# 1AC

### 1AC---Innovation

#### Advantage 1 is Innovation:

#### Standards-Setting Organizations (SSO’s) are industry members who jointly establish standards for information tech defined by the adoption of standard-essential patents (SEP’s), which are licensed to companies who wish to implement the tech in their product, called implementers, on Fair, Reasonable, and Non-Discriminatory (FRAND) terms. Current standards promote price gouging, FRAND enforcement is critical.

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

I. Standard Setting and the Competitive Process The fundamental economics in the information technology sector, driven by network effects, implies that there is enormous value associated with establishing compatibility standards. Popular standards include the mobile broadband standards used in cell phones, which are established by the 3rd Generation Partnership Project (3GPP), and the Wi-Fi technology for wireless local area networks, which is enabled by the 802.11 standard established by the Institute of Electrical and Electronics Engineers (IEEE).4 There are many SSOs, and their rules and procedures differ considerably. In addition to IEEE, leading SSOs include the International Organization for Standardization (ISO), the International Telecommunication Union (ITU), the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF), and the World Wide Web Consortium (W3C).5 SSOs generally establish standards by holding a series of committee meetings among industry participants. These meetings culminate in a vote on a technical specification that describes what features or attributes a product must have in order to comply with the standard. Most SSOs are open to all industry participants and seek to operate on a consensus basis, applying certain voting rules. SSOs do not normally engage in patent licensing, nor do they specify how patent royalties will be divided up among patent holders. They leave that to their members, which in some cases form patent pools to address these issues.6 SSOs adopt specific policies relating to intellectual property rights (IPRs).7 These IPR policies are generally intended to enable the SEP holders to obtain reasonable royalties for licensing their patents, while prohibiting them from charging excessive royalties after other industry participants have committed to the standard. At that point, firms committed to implementing the standard— which we call “implementers”—would find it very costly to avoid using the patented technology. For this purpose, most SSOs require SEP owners to license their SEPs on FRAND terms.8 FRAND policies are especially necessary because negotiations between SEP holders and implementers generally take place only after the implementers have used and infringed the technologies claimed by the SEPs. Standards involving information and communications technology can involve hundreds or even thousands of SEPs, many with uncertain boundaries for infringement. In addition, a time lag exists between patent application and patent issuance. For these and other reasons, it is impractical for implementers to enter into negotiations for patent licenses with all SEP owners prior to the establishment of a standard and to their implementation of it.9 The fact that patent negotiations generally do not take place until after implementers have used and infringed the technologies has several critical implications. First, at the time of negotiation, implementers are locked into the standard and the technologies claimed by the SEPs—that is, the cost to switch to an alternative technology or standard at that point—ex post—is much greater than it was ex ante, before the patented technology was first included in the standard. Ex post, the patent holder is no longer competing to have its technology included in the standard, nor is it competing to have implementers of the standard use its technology. Instead, because the patent holder owns an asset that is essential to the standard, implementers have no choice but to use the patented technology. If the standard is commercially successful, implementers are willing to pay a much larger royalty for use of the patented technology than they would have paid ex ante, when the SEP holder faced competition from other technologies. In these circumstances, the SEP holder can be said to have obtained monopoly power in the market in which the patented technology is licensed for use in implementing the standard.10 Second, because of lock-in and the implementer’s ongoing infringement, the potential for litigation looms large in licensing negotiations. In effect, the parties are negotiating about how to settle an infringement suit, and that negotiation is heavily influenced by their predictions as to what the court will do if they cannot agree. This situation is not unique to SEPs; it arises frequently when firms are faced with patent infringement claims for products they have independently developed or technologies they have inadvertently infringed. Patent law addresses such instances by specifying that patent holders are entitled to “reasonable royalties,” defined as the royalties that the parties would have negotiated prior to the infringement and thus prior to lock-in.11 Those hypothetical ex ante royalties reflect the market value of the patent license. Notwithstanding the law’s embrace of this principle, however, as a practical matter, patent holders are generally able to recover more than the ex ante value of the patent when litigation occurs after the implementers are locked in. Further, negotiations in the shadow of litigation after lock-in tend to result in royalties in excess of the ex ante or market value of the patented technology.12 Third, the shadow of litigation is particularly problematic in the communications and technology sector, in which products typically include hundreds or thousands of patented technologies. A court-ordered injunction involving such products would deprive the implementer of not only the value of the technology covered by the patent-in-suit, but also the value of the entire product.13 Implementers that are forced to bear the risk of an injunction are thus induced to agree to royalties greater than those that would be appropriate if only the value of the patented technology were at stake. Those royalties systematically provide SEP holders with excessive compensation in comparison with the benchmark of ex ante royalties. These implications of lock-in and ex post dealings are well-understood: they represent an example of the general concept of lock-in and opportunism developed by Oliver Williamson.14 The Federal Circuit has also recognized the market distortions caused by the inclusion of patented technologies in public standards and the resulting danger of patent holdup involving SEPs.15 For these and other reasons, the SEP holder has ex post monopoly power that, if left unchecked, would enable it to obtain royalties far in excess of the royalties that it could earn in a competitive market.16 To address this common problem and limit ex post opportunism by SEP holders, SSOs typically require participants that own SEPs to make certain FRAND commitments. In particular, by requiring a commitment to license on “fair and reasonable” terms, the FRAND requirement aims to prevent, or at least reduce, the extent of monopoly pricing by SEP holders. And by requiring a commitment to license on “nondiscriminatory” terms, the FRAND requirement can prevent SEP holders from extracting monopoly premiums by selective licensing or, more important, migrating their monopoly power from the FRAND-regulated market to unregulated standard-implementing product markets by licensing to only one or a few implementers or licensing to selected implementers on discriminatorily favorable terms.

#### Weakened antitrust enforcement emboldens firms to follow Qualcomm’s lead, which collapses FRAND integrity.

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While the FRAND process has been highly productive, it is also fragile. Firms are tempted to make commitments at the beginning when the incentive to join is large, but renege on them later when they can profit by doing so. At least in this particular case, private FRAND enforcement had not worked very well. Qualcomm had been able to violate FRAND commitments in order to exclude rivals and obtain higher royalties than FRAND would permit, largely with impunity. Other firms will very likely follow Qualcomm’s lead. If that happens the FRAND system will fall apart, doing irreparable injury to the modern wireless telecommunications network or, at the very least, diminishing the leadership role of the United States in preserving effective network competition. While governments can be heavily involved in standard set-ting,9 the implementation of technical standards in information technologies is largely the work of private actors. Government involvement is limited mainly to enforcement of contract, intellectual property, or antitrust law. As private actors, those involved in standard setting or compliance are fully subject to the federal antitrust laws. This Article addresses one question: when is an SSO participant’s violation of a FRAND commitment an antitrust violation, and if it is, of what kind and what are the implications for remedies? It warns against two extremes. One is thinking that any violation of a FRAND commitment is an antitrust violation as well. In the first instance FRAND obligations are contractual, and most breaches of contract do not violate any antitrust law. The other extreme is thinking that, because a FRAND violation is a breach of contract, it cannot also be an antitrust violation. The question of an antitrust violation does not de-pend on whether the conduct breached a particular agreement but rather on whether it caused competitive harm. This can happen because the conduct restrained trade under section 1 of the Sherman Act, was unreasonably exclusionary under section 2 of the Sherman Act, or amounted to an anticompetitive condition or understanding as defined by section 3 of the Clay-ton Act.10 The end goal is to identify practices that harm com-petition, thereby injuring consumers. The Ninth Circuit’s Qualcomm decision will make antitrust violations in the context of FRAND licensing much more difficult to prove, even in cases where anticompetitive behavior and consumer harm seem clear.11 Indeed, in this case the court itself acknowledged the harm to consumers but appeared to think that they were not entitled to protection.12 If this decision stands, FRAND obligations will to a larger extent have to be settled through private litigation and the federal antitrust enforcement agencies will have a diminished role. Anticompetitive behavior by one firm that is not effectively disciplined will lead others to do the same thing.

#### Monopoly pricing and selective licensing undermines 5G innovation---FRAND enforcement is key.

Actonline 20, the App Association represents more than 5,000 app companies and information technology firms across the mobile economy; (August 26th, 2020, “Save Our Standards: The Ninth Circuit Court of Appeals Reverses Decision in FTC v. Qualcomm”, <https://actonline.org/2020/08/26/save-our-standards-the-ninth-circuit-court-of-appeals-reverses-decision-in-ftc-v-qualcomm/>)

* Ability edited

Moreover, the FRAND agreement is a critical tool used by standard setting organizations to ensure the process enhances competition and does not run afoul of antitrust laws. Generally, a collaboration between competitors to choose market winners or set prices raises significant questions for competition regulators. Royalty free and FRAND licensing requirements were created by standards bodies to avoid potential antitrust scrutiny by limiting the market power and the potential for abuse by those involved in developing a standard. This is why the American National Standards Institute (ANSI) will not accredit any standards developing organization (SDO) that does not require standard-essential patent holders to provide licensing terms at least as favorable as FRAND. The most important beneficiary of open interoperability standards and FRAND licensing requirements are the entrepreneurs and small businesses that have long fueled America’s innovation engine. They don’t have giant patent portfolios, market power, or the resources to hire legions of lawyers and spend years battling SEP abusers in civil court. Without some level of certainty about their ability to obtain licenses—let alone what they may cost—entrepreneurs will have trouble justifying the pursuit of any innovation that uses a standard and will certainly struggle to raise money from investors for such innovation. And Qualcomm’s vague and toothless promise simply “not to sue” smaller companies and component makers is no substitute for a license. The adoption of 5G technology is expected to open unprecedented opportunities for innovation and economic growth as we move toward a world where everything from cars to tractors to buildings will connect to wireless networks. At every stage of the information technology revolution, America has been the undisputed leader because of the unparalleled entrepreneurial innovation ecosystem that we have built. If 5G SEP holders are able to arbitrarily refuse licenses to smaller firms, it would ~~cripple~~ undermine America’s innovation ecosystem at the start of the next big wave of innovation. As economic tensions continue to rise with China, Chinese-based companies could use their 5G SEPs as international economic weapons to thwart U.S. competitors. The 5G standard is supposed to be a platform for competition, innovation, and entrepreneurship, but if the Ninth Circuit decision is allowed to stand, it will become a chokepoint for snuffing out competitors and demanding monopoly rents. Open standards and FRAND licensing commitments are fundamental to competition in the modern economy, and the idea that they aren’t a subject for antitrust enforcement is patently absurd.

#### The absence of domestic 5G competition cedes leadership in technical standards to China.

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There is little doubt today that American superiority in the next generation of mobile communications, commonly called 5G, is a matter of extraordinary national concern. There is also little doubt that China is a strong competitor, already having outspent the United States by [$24 billion](https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5g-deployment-imperative.pdf#page=3) and planning [$411 billion](https://www.scmp.com/tech/china-tech/article/2098948/china-plans-28-trillion-yuan-capital-expenditure-create-worlds) in 5G investment over the next decade. The Chinese government has also laid out multiple national plans for establishing the country as a leader in mobile technology, and the Chinese firm Huawei is poised to be the [top smartphone manufacturer](https://www.cnbc.com/2018/11/16/huawei-aims-to-overtake-samsung-as-no-1-smartphone-player-by-2020.html) by 2020. And what are United States companies doing about this? Bickering over patents. For years, the leading American supplier of advanced mobile communications chips has been the San Diego-based Qualcomm. The company has been an innovator of mobile technology, but it has also been a remarkable innovator of convoluted legal strategies. As an ongoing Federal Trade Commission [lawsuit alleges](https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used), Qualcomm has used its dominant position as a chip supplier and its extensive patent holdings to weave an intricate web of patent licensing across the mobile industry. The effect of that complex licensing scheme, the FTC claims, has been to force competitor chipmakers out of the market and to extract concessions and high patent royalties from smartphone and mobile-device makers. Qualcomm today faces only one major U.S. competitor—Intel, whose chips Apple recently [started using](https://www.cultofmac.com/484250/intel-reaping-rewards-apples-scrap-qualcomm/) instead of Qualcomm’s. Not surprisingly, Qualcomm has leveraged its patents to force a retaliatory investigation against Apple, the effect of which could be, as an administrative judge [recently determined](http://www.fosspatents.com/2018/10/itc-judge-didnt-buy-testimony-for-which.html), to boot Intel out of the mobile-chip market and leave Qualcomm as a monopoly. It is hard to imagine that this infighting among Apple, Intel and Qualcomm is getting the United States very far in 5G, and it is harder to imagine that Qualcomm’s desired outcome would do so, either. The best path, instead, is the obvious one: allowing competition and expanding the number of firms working on 5G. Competition encourages companies to out-innovate each other in order to grab market share. Of particular importance to 5G, competition leads to [better cybersecurity](https://morningconsult.com/opinions/in-the-race-to-5g-monopoly-considered-harmful/) in products, making them less vulnerable to hacking or misuse. Competition is especially crucial when it comes to the technical standards that define how 5G works. These standards are the work of 3GPP, an international consortium of technology companies in the field. Chinese players such as Huawei and ZTE are major participants in 3GPP. Ensuring that 3GPP’s standards reflect American values requires having as many American companies at the negotiating table as possible—which is harder to achieve when those companies are trying to sue each other out of business. Certainly patents themselves, as rewards for new inventions, are a driver of innovation in areas such as 5G. The problem, though, is not the existence of a patent system but the ever-expanding power of the patent laws, which encourage companies to pour dollars into complex patent licensing and assertion schemes—as companies like Qualcomm have done—rather than to perform the hard work of building new technologies. When innovation in patent strategy is more profitable than actual innovation, we lose the race to 5G and other technologies. But don’t take my word for it. [Multiple members of Congress](https://www.patentprogress.org/2019/01/11/congress-weighs-in-on-qualcomm-and-apple-at-the-itc/), from both sides of the aisle, have denounced the use of patents to kick companies like Intel out of 5G development, predicting that such actions would “dampen the quality, innovation, competitive pricing, and in this case the preservation of a strong U.S. presence in the development of 5G and thus the national security of the United States.” Or look to what China itself is doing. The Chinese government is handing out rewards left and right to encourage technology research and development. Indeed, it grants subsidies and financial benefits (ranging from the [ordinary](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818503) to the [imperfect](https://funginstitute.berkeley.edu/wp-content/uploads/2013/12/patent_subsidy_Zhen.pdf) to the [bizarre](https://www.scmp.com/news/china/article/1681850/how-get-out-jail-early-china-buy-inventors-idea-and-patent-it)) to encourage its citizens to file for patents. But while China specifically encourages filing for patents, it does little to encourage using them: Patent infringement awards in court are peanuts—often only [five figures](https://scholarship.law.berkeley.edu/btlj/vol33/iss2/2/)—and most Chinese patent owners drop their patents [within five years](https://www.bloomberg.com/news/articles/2018-09-26/china-claims-more-patents-than-any-country-most-are-worthless) of getting them. The message in China is clear: You will be rewarded for innovating, but not for quibbling over patents. The United States should take the same tack if it wants to match China in 5G. Ever-stronger patent rights encourage counterproductive disputes that are a drag on industry, a drag on research and development, and ultimately a drag on domestic competitiveness on the global stage. If America wants to lead in 5G, then it must clear the path for strong competition among leading American technology companies.

#### China’s standard-setting leadership enables them export 5G infrastructure globally.

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The information and biotechnology revolutions have changed our world and will heavily inform the future of society. Whoever controls these technologies controls the future, and whoever controls their standardization controls the technologies. China understands this well. For two decades, it has been working to take over international standardization rulemaking bodies to serve the goals advanced in “[Made in China 2025](https://www.pbs.org/wgbh/frontline/article/made-in-china-2025-the-industrial-plan-that-china-doesnt-want-anyone-talking-about/)” — that is, to dominate world manufacturing and then transition to become the center of the world’s technological innovation. The dangers to the United States are already present, and in forms that are not obvious. These include, first, [direct-to-consumer genetic testing](https://medlineplus.gov/genetics/understanding/dtcgenetictesting/directtoconsumer/). China may be using such testing to gain genetic information that permits the identification and tracking of Americans, including U.S. military and intelligence community personnel or their relatives. Second, health monitoring apps are able to provide geolocation data to Chinese entities, which means to the Chinese Communist Party (CCP) and its security services. This provides location data that is valuable on its own and might be compared with data from other sources to reveal key information about Americans. Third, the CCP, in cooperation with Chinese industrial entities on international bodies, are developing and setting international standards for emerging technologies. China’s influence has grown over the past two decades, and Beijing now possesses leadership roles in standards-drafting technical committees, which means it could shape outcomes to its benefit. China has formulated a four-step strategy to seek dominance in this area: plan, track, participate and take over. Beijing has boasted that it completed the first three steps and is on the last, which is to “[develop indigenous standards](https://saiscsr.org/2019/10/29/setting-a-new-standard-implications-of-chinas-emerging-standardization-strategy/) and to lead international standardization.” This means China may be replacing international standards with its own standards, in order to control technologies and the market. In 2017, China revised its [standardization law](https://share.ansi.org/Shared%20Documents/News%20and%20Publications/Links%20Within%20Stories/China%20Standardization%20Law_English%20translation_SESEC_5.17.2017.pdf), almost 30 years after its adoption in 1989. It also set up the [Standardization Administration of China](http://www.sac.gov.cn/sacen/) to implement its strategy in the early 2000s. China’s standardization strategy also has been incorporated into the [Belt and Road Initiative](https://www.beltroad-initiative.com/belt-and-road/) so that, as countries are weaved into this network, they adopt China’s standards. Beijing essentially has had the three primary standard-setting international organizations — the [International Organization for Standardization](https://www.iso.org/home.html) (ISO), the [International Telecommunication Union](https://www.itu.int/en/ITU-T/about/Pages/development.aspx) (ITU) and the [International Electrotechnical Commission](https://www.iec.ch/homepage) (IEC) — under its influence. Two Chinese government officials currently serve as president of ITU and IEC, and placed China’s proxy as the [head of the ISO](https://www.oxebridge.com/emma/latest-iso-president-has-ties-to-china-too/) after the organization was led by a Chinese official for many years. Meanwhile, Beijing has taken leadership or other influential positions in the [International Accreditation Forum](https://www.iaf.nu/) (IAF), [United Nations Industrial Development Organization](https://www.unido.org/) (UNIDO), [International Civil Aviation Organization](https://www.icao.int/Pages/default.aspx) (ICAO), [American Society for Quality](https://asq.org/) (ASQ) and perhaps others. China’s strategy to determine the world’s standards appears to be working. In 2019 alone, China submitted [830 standards proposals to the ITU](https://www.ft.com/content/858d81bd-c42c-404d-b30d-0be32a097f1c). According to [Zhang Xiaogang](https://www.chinadaily.com.cn/m/qingdao/2017-06/23/content_29862586.htm), former president of the ISO, China planned to initiate 395 international standards by 2020 but, in actuality, [it set 495](https://www.sohu.com/a/412713490_362042#:~:text=%E5%A4%AE%E5%B9%BF%E7%BD%91%E5%8C%97%E4%BA%AC8,%E5%87%BA%E6%9C%80%E5%A4%A7%E8%B4%A1%E7%8C%AE%E7%9A%84%E5%9B%BD%E5%AE%B6%E3%80%82). Zhang claims that “China has made the greatest contribution in the field of international standardization in the past five years.” Indeed, China has dominated 5G standard-setting, for example, in the [3rd Generation Partnership Project](https://www.3gpp.org/) (3GPP), an organization to develop mobile broadband standards, and 90 percent of standard proposals in the 5G super uplink field is done by China Telecom. Unfortunately, Western countries fail to see the importance of China’s strategic move. Zhang states, “Whoever leads in standard-setting will be the leader of the technology and the controller of the market.” China’s dominance in 5G standards-setting enables it to avoid the West’s sanctions against its tech giants such as Huawei, continue to expand globally, and to dominate the market. This could be a paramount communication-security problem for the U.S. Of particular importance is China’s standardization strategy — as identified in “[China Standards 2035](https://www.cfr.org/blog/china-standards-2035-and-plan-world-domination-dont-believe-chinas-hype)” — on international bodies engaged in developing and setting standards for select emerging technologies. These include advanced communication technologies and cloud computing and cloud services. The United States and its allies must ensure that international standards for emerging technologies are not being designed to promote the interests of China. If China is successful, it would lead to the exclusion of other participants; China would be the architect, builder and maintainer of the 21st century’s information technology infrastructure.

#### Standards leadership allows China to export digital authoritarianism.

Drew et al. 21, \*Dr Alexi Drew, Research Associate, The Policy Institute, King’s College London; (May 7th, 2021, “The Critical Geopolitics of Standards Setting”, https://www.transatlantic-dialogue-on-china.rusi.org/article/the-critical-geopolitics-of-standards-setting)

However, this previously ‘western’ domain is challenged by a Chinese bloc of private industry actors with centrally directed, strategic motivations for their efforts who have managed to leverage the flaws of this system for political and economic advantage. The market-driven self-regulation model of technical standards has proven itself unsustainable given the geopolitical power achievable through the control of these standards. The marketised approach is easily abusable by a technologically developed nation-state with geopolitical intentions firmly in mind. Obscurity Through Complexity Technical standards have the immediate appearance of being both apolitical and ethically neutral. This seems to set them apart from the debate over standards of state behaviour in [cyber space concerning espionage and actions below the threshold of armed conflict](https://www.cfr.org/blog/unexpectedly-all-un-countries-agreed-cybersecurity-report-so-what). Yet, technological standards are unequivocally connected to normative practices of international behaviour and ethics. The extremely complex nature of the standards under consideration in bodies such as the International Organization for Standardization, the International Electrotechnical Commission (IEC), the International Telecommunications Union (ITU), and the Third Generation Partnership Project (3GPP) obscures the very tangible real-world impact that the standards they set have. The 3GPP is responsible for standards setting for mobile telecommunications. It covers everything from 5G through to autonomous vehicles and the Internet of Things. These are the bodies defining how the modern world is constructed. On the one hand they appear quite benign, responsible for such banalities as the use of Universal Serial Bus (USB) connectors versus proprietary standards. This hardly seems a matter of national security importance. But the same process is responsible for what ultimately shape the basic operating parameters of facial recognition technology in closed circuit television systems, the level of centralised state control at the technical foundations of the internet, and the protections of personally identifiable data. These generate profound implications for international policy and ethics. Internal Competition vs Strategic Direction Technical standards setting processes have, historically, been dominated by private sector actors who have had both the capacity to develop a particular technology to the point of holding a significant market share, and the ability to use that market share to advocate for the standardisation of the technology in line with their own production. The market led approach has continued to be the prevailing model by which American companies have globalised the technical standards behind US dominated technological innovation. This privatised form of self-regulation for technology companies is only partially influenced by the approach taken within the EU where [some licensing of standards are controlled by state or EU led institutions.](https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2019/ui-brief-no.-2-2019.pdf) In contrast to this approach the Chinese model has involved a high level of state-oriented direction, oversight, and direct engagement on the creation and signing off technical standards. Efforts to harmonise and centralise technical standards domestically have become increasingly internationalised as the CCP takes this centralised, strategic approach to technical standards setting bodies such as the ITU, 3GPP, and IEC. Technical standards have also become an increasingly central component of the Digital Silk Road with the openly expressed goal of increasing uptake of Chinese technical standards in partner countries. The implications of this clash between a system of technical standardisation that is driven by the market versus one driven by an authoritarian government subsidised model are a direct challenge to the development of free, open, and ethical technology. Standardisation mechanisms have become political, or rather there has been a gradual realisation of the political power to be gained from the control of technical standards. While the PRC might have come to this awareness first, the US and Europe have since had a rude awakening about the missed opportunity. The privatised model of technical standards setting favoured by European and US markets relies upon the dynamics of financial competition to regulate behaviour. This is in stark contrast to the statist Chinese model.

#### That compromises U.S. military superiority.

Borghard et al. 19, \*Erica D. Borghard is an Assistant Professor at the Army Cyber Institute at West Point. Shawn W. \*Lonergan is a U.S. Army Reserve officer assigned to 75th Innovation Command and a Research Scholar at the Army Cyber Institute. (April 25th, 2019, “The Overlooked Military Implications of the 5G Debate”, https://www.cfr.org/blog/overlooked-military-implications-5g-debate)

There are economic implications for which entities can secure the [greatest global market share](https://www.reuters.com/brandfeatures/venture-capital/article?id=61837) of 5G technology. Technological innovation drives economic growth, job creation, and global economic influence. Huawei may have a long-term market advantage over U.S and Western telecoms because the former has been able to offer 5G products at [far cheaper](https://www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.html) rates than the latter. Furthermore, there are also concerns that Chinese-built 5G technology is likely to [contain backdoors](https://www.wired.com/story/huawei-case-signals-new-us-china-cold-war-tech/) that could be used to enable [Chinese economic or national security espionage](https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html). It is unlikely that Beijing would actively monitor all of the content of the data that comes across Huawei owned or operated infrastructure (although it may collect and analyze metadata). However, it is conceivable that Huawei would get a proverbial “tap on the shoulder” from Beijing to share pertinent information in specific instances. This may include individually targeting senior corporate executives, which is enabled by the millimeter wave frequency that 5G networks employ. The military applications of 5G technology have vital strategic and battlefield implications for the U.S. Historically, the U.S. military has reaped enormous advantages from employing cutting edge technology on the battlefield. 5G technology holds similar innovative potential. Perhaps most obviously, the next generation of telecommunications infrastructure will have a direct impact on improving military communications. However, it will also produce cascading effects on the development of other kinds of military technologies, such as robotics and artificial intelligence. For instance, artificial intelligence and machine learning capabilities, such as those used in the Department of Defense’s [Project Maven](https://dod.defense.gov/News/Article/Article/1254719/project-maven-to-deploy-computer-algorithms-to-war-zone-by-years-end/), could be greatly enhanced when leveraging the data processing speeds made possible through 5G infrastructure. As an [era of great power competition](https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf) emerges between the United States and China, the United States has a compelling strategic interest in being at the forefront of these new technologies. The United States and its allies must also consider the tactical and operational implications on the battlefield of conducting conventional or counterinsurgency operations in an area with Chinese owned or operated 5G infrastructure. This concern stems from the nature of the relationship between Huawei, an [ostensibly private company](https://www.itnews.com.au/news/analysis-who-really-owns-huawei-175946), and the Chinese Communist Party (CCP). While Huawei’s founder and CEO, Ren Zhengfei proclaimed in a February 2019 interview on [CBS This Morning](https://www.cbsnews.com/news/ren-zhengfei-huawei-ceo-says-we-will-never-provide-chinese-government-with-any-information/) that the company never has and never would provide information to the Chinese government, many experts are [skeptical](https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html). Under China’s [2017 National Intelligence Law](https://www.reuters.com/article/us-china-security-lawmaking-idUSKBN19I1FW), the CCP has the authority to monitor and investigate domestic and international companies as well as direct organizations to assist with government espionage efforts. As such, it is conceivable that Huawei will be required to hand over its data to the Chinese government for collection and analysis. Due to this reality, the United States must consider and be prepared to conduct overseas contingency or counterterrorism operations in areas where Chinese telecommunications infrastructure is widely proliferated, thus restricting the United States’ ability to rely on indigenous telecoms. As [noted](https://www.africom.mil/media-room/transcript/31604/gen-joseph-votel-gen-thomas-waldhauser-and-acting-asd-for-international-security-affairs-kathryn) by US AFRICOM Commander General Thomas Waldhauser, this has already become an issue in Africa where Chinese telecommunications companies are poised to dominate. The integrity of U.S. military communications systems that rely on 5G networks could be undermined at key phases of an operation. For example, if the United States is conducting a military operation in an area of interest to China, it is plausible that the Chinese government could leverage Huawei to intercept or even deny military communications. Furthermore, Chinese telecom infrastructure dominance in a theater of operations may limit the U.S. military’s ability to conduct precision targeting that leverages signals intelligence collection on 5G telecommunications networks. The strategic and battlefield implications of who owns and operates 5G infrastructure around the world underscores the national security importance of 5G. The U.S. government and its allies should more systematically assess both the opportunities and risks associated with conducting future military operations in environments that rely on Chinese technology. To date, the U.S. government has devoted significant energy to persuading its allies and partners to follow the United States in prohibiting Chinese telecoms, particularly Huawei, from building and/or operating 5G infrastructure. However, its diplomatic approach has been met with varying degrees of success. While some countries such as [Australia](https://www.ft.com/content/e90c3800-aad3-11e8-94bd-cba20d67390c) and [Japan](https://www.reuters.com/article/us-usa-china-huawei-japan/japans-top-three-telcos-to-exclude-huawei-zte-network-equipment-kyodo-idUSKBN1O90JW) have fallen in line with the U.S. stance on Huawei, many others have not. The European Commission’s recent 5G [recommendations](https://www.cyberscoop.com/5g-eu-huawei-cybersecurity-recommendations/) for member states dismissed a ban on Chinese telecoms. British intelligence has reportedly maintained that the security risks associated with Huawei can be [sufficiently managed](https://www.ft.com/content/619f9df4-32c2-11e9-bd3a-8b2a211d90d5), and New Zealand, after [initially bandwagoning](https://www.nytimes.com/2018/11/28/business/huawei-new-zealand-papua-new-guinea.html) with the United States in December 2018, abruptly [reversed course](https://www.bloomberg.com/news/articles/2019-02-18/new-zealand-says-china-s-huawei-hasn-t-been-ruled-out-of-5g-role) in February 2019. This is concerning for the United States because New Zealand and the UK are members of the Five Eyes intelligence-sharing alliance. Many allies have refused an outright ban of Huawei because of the company’s ability to offer 5G products at far cheaper rates than Western telecoms. It is clear that U.S. diplomatic efforts are not working. The reality is that the bottom line is largely driving decision-making. Therefore, rather than take a purely negative approach, the United States should consider using positive inducements to make its 5G products more appealing. While the United States should not strive to mirror China’s top-down approach to innovation, it should work with allies to use market incentives to make U.S.- and Western-developed 5G infrastructure and products more competitive. Furthermore, the U.S. military needs to anticipate that its use of native telecommunications infrastructure in a future operating environment may be compromised, limited, or denied. The U.S. military will inevitably need greater bandwidth on the tactical edge and this should be an imperative that drives investment in research and development to address this challenge. Technological innovation was at the crux of the United States’ comparative military and economic advantage in the twentieth century. In this contemporary great power competition, U.S. failure to innovate at the scientific and technological frontier will have direct (and deleterious) effects for the United States on the distribution of power in the international system over the long term.

#### Chinese tech superiority upends deterrence and emboldens them to risk conflict over Taiwan---extinction.

Kroenig 18, Deputy Director for Strategy, Scowcroft Center for Strategy and Security Associate Professor of Government and Foreign Service, Georgetown University (Matthew, Nov 12, 2018, “Will disruptive technology cause nuclear war?” *BAS*, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war>)

Rather, we should think more broadly about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict. International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage. You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power. For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full display in its ongoing intervention in Ukraine. Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.” If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war. If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member. Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation. This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly. When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states. These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

#### Taiwan war goes nuclear---entanglement and both sides underestimate escalation risks.

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Alternately, if China did use conventionally armed missiles against U.S. bases in Japan and Guam, perhaps killing not only U.S. and Japanese military personnel, but also local civilians and U.S. dependents, what reaction would that spark? Is it so far-fetched to consider the United States initiating nuclear use under those circumstances? The United States does have viable tactical options, which it has sought to make more robust in accordance with the findings of 2018 Nuclear Posture Review (NPR).45 These include the deployment of the submarine-launched low-yield W76-2 warhead and development of an upgraded version of the B61 tactical gravity bomb.46 Chinese observers have expressly noted that these systems could make U.S. nuclear use more likely, a situation compounded by diminishing U.S. conventional superiority in the Western Pacific.47 To be clear, as with all aspects of this discussion, the point is not to state with certainty that the United States would resort to nuclear use. It might not be even likely. But it is worth acknowledging that it is possible. That is the element that needs to be injected into the debate not only over the future of strategic ambiguity, but over defense planning for Taiwan scenarios more broadly. The preferred U.S. style of warfare—to conduct attacks deep throughout an enemy’s territory rather than simply meeting them at a forward line of engagement—also presents problems and contains the prospect that non-nuclear strikes might unintentionally trip Chinese redlines regarding nuclear use. Within the U.S. academic community, this has produced a small, but important body of literature focused on the subject of “entanglement,” or the co-mingling of systems with both conventional and nuclear applications.48 This discussion has primarily focused on China’s ballistic missile force, as most of its systems are capable of firing both nuclear and non-nuclear warheads.49 China’s increasing reliance on road-mobile ICBMs (such as the DF-31 variants and the new DF-41) complicates this problem, creating the potential for their misidentification as shorter-range systems, such as the road-mobile DF-21 and DF-26, that might be used against U.S. ships or regional bases.50 Analysts have also expressed concern over the potential for U.S. forces to inadvertently sink a Chinese SSBN as part of its ASW campaign during a Taiwan conflict, a fear that echoes similar worries from the U.S.-Soviet struggle.51 Recall again the private comments of Chinese officials about conventional attacks on nuclear systems nullifying its NFU policy. The potential for mutual miscalculation Entanglement issues are far from the whole of the problem. There is still a fundamental misreading—perhaps on both sides—of the ability to manage escalation in Taiwan contingencies for reasons beyond strict operational matters. The very fact of China attempting something as complex and challenging as an amphibious invasion of an island of 24 million people would show an unwelcome tolerance for risk. For that matter, U.S. efforts to defend said island—halfway around the world on another nuclear power’s doorstep—also shows a fair amount of audacity. Put differently, the act of aggression against Taiwan and the effort to repel such an attack both demonstrate that each side is willing to take actions which could be viewed as inherently risky. Through that lens, the additional step to unwanted nuclear escalation is not a great leap. States act rationally, right up until they do not. In considering how a Taiwan contingency would play out, it would therefore be prudent to assume that nuclear use is more viable than cold assessments of each side’s pre-conflict intentions suggest. If academic surveys of Chinese strategic literature are correct, overoptimism on the ability to manage escalation once hostilities commence is not confined to the U.S. side.52

#### Patent holdup is real and necessitates intervention, even if it can’t be systemically proven.

Contreras 19, \*Jorge Contreras, Professor, University of Utah S.J. Quinney College of Law; (2019, “MUCH ADO ABOUT HOLD-UP”, <https://www.illinoislawreview.org/wp-content/uploads/2019/08/Contreras.pdf>)

III. CAN WE PLEASE STOP SEARCHING FOR SYSTEMIC HOLD-UP? It is not the purpose of this article to critique the data or methodologies used by researchers who claim that there is no evidence of systemic hold-up. Though questions remain, the data presented in the cited studies finding no empirical evidence of systemic hold-up present plausible descriptions of current markets for products such as smart phones and other connected technology devices. Instead, this critique is directed at the core assumption that runs through each of these studies: that a lack of evidence of systemic hold-up means that hold-up does not represent a threat that justifies policy intervention. In this Part, I argue that, notwithstanding the findings of these studies, patent hold-up in standardized product markets may indeed be a threat that merits preventative policy measures, but that those measures should be directed toward the prevention of well-understood and actionable forms of anticompetitive conduct rather than the economic phenomenon of hold-up. A. The Absence of Systemic Hold-Up Does Not Mean that Hold-Up Does Not Occur In a 2017 article, Galetovic and Haber utilize an extended analogy drawn from the field of Mayan archeology to make the point that scholars sometimes ignore the facts in front of them in order to cling to pre-formed (and empirically unsupported) beliefs.92 In this analogical tradition, I will use a hypothetical from public health epidemiology to illustrate a related point. Let us consider the often fatal and highly contagious viral infection Ebola. U.S. public health officials, aware of the dangerous effects of Ebola, might propose the implementation of prophylactic measures to prevent the spread of Ebola in the United States. Such measures might include early detection systems at U.S. hospitals, a network of Ebola experts ready to investigate suspected cases, and potential vaccines for particularly vulnerable populations. All of these measures, of course, would come at a cost. Those opposing the incurrence of this cost might argue that such measures are unjustified because there is no empirical evidence that Ebola is a problem in the U.S. After all, there are no documented outbreaks of the disease, and the only reported cases have been sporadic and linked to other factors (such as health workers returning from abroad). In fact, both lifespan and overall health in the United States have been improving steadily over the past several decades. Most declines in population health can be traced to causes such as tobacco use, poor dietary choices, lack of exercise and the like, but not to Ebola. Thus, because there is no evidence that Ebola outbreaks have occurred in the United States nor any linkage between decreased health and Ebola, and because the overall health of the United States population continues to improve, there is no justification for preventative measures to stop Ebola outbreaks in the United States. This reasoning is, of course, fallacious and, in the case of a disease like Ebola, dangerously so. In the field of public health, prophylactic measures are often taken before a health risk affects a significant portion of the population. This is the reason for prophylactic measures in the first place. In the field of public health, it is widely recognized that risks arising from any number of environmental and pathogenic sources can be assessed based on laboratory analysis and test cases, without population-level epidemiological data. In fact, once population level data for such outbreaks is available, it is often too late: an epidemic has broken out and millions are at risk. Luckily, it is doubtful that public health officials would apply the fallacious reasoning outlined above to important public health decisions. Curiously, however, this “Ebola fallacy” has taken root in the debate over patent hold-up. As discussed above, the purported lack of empirical evidence of system-wide patent hold-up is used as a justification for abandoning or forestalling policy interventions aimed at reducing the risk of hold-up. Because hold-up has not been detected at a systemic level, so the argument goes, it must not be a problem. Therefore, measures designed to prevent hold-up from occurring must be the result of gratuitous or over-zealous policy making. The logical fallacies in this argument should be apparent. In fact, there are numerous examples of anticompetitive conduct by individual firms in markets that are not otherwise overrun by anticompetitive behavior. For example, in 2009, the Federal Trade Commission brought an action against pharmaceutical manufacturer Solvay and a group of generic drug manufacturers for violating Section 5 of the FTC Act by entering into an arrangement whereby the generic manufacturers agreed not to challenge Solvay’s patent on its AndroGel product and not to market their generic versions of AndroGel, in exchange for a significant payment by Solvay to each of the generic manufacturers (a so-called “pay for delay” scheme).94 The Supreme Court held in 2013 that such conduct was actionable and reversed the Eleventh Circuit’s dismissal of the FTC’s claim.95 Yet even in 2009, the year in which the FTC brought its action, of the 68 agreements settling patent disputes filed by pharmaceutical manufacturers with the FTC,96 the FTC estimated that only 19 of these (28%) were potential pay for delay agreements; and by 2014, the year after the Actavis decision, only 21 out of 160 such agreements (13%) were deemed by the FTC likely to represent illegal pay for delay schemes.97 Thus, while pharmaceutical industry patent settlements have attracted significant attention as potentially anticompetitive arrangements, most such settlements do not merit investigation by the FTC.98 An even more telling example is found in the area of mergers and acquisitions. During fiscal year 2016, a total of 1,832 merger and acquisition transactions were reported to the FTC and DOJ under the Hart-Scott-Rodino Antitrust Improvements Act.99 Of these, the FTC challenged only twenty-two (1.2%). 100 Thus, while some anticompetitive mergers may exist, the vast majority are not anticompetitive.101 But the absence of market-wide anticompetitive conduct in the area of mergers and acquisitions hardly excuses the handful of transactions that do present antitrust risks, nor does it suggest that mergers should not be subject to governmental monitoring and, when merited, enforcement. B. Protective Measures May Already Be Working to Reduce Hold-Up Another important factor that should be considered regarding the purported lack of empirical evidence of systemic hold-up is the effect that existing policy measures have already had in reducing hold-up. As noted above, the threat of patent hold-up was a primary motivating factor for many SDOs to adopt policies requiring the disclosure and licensing of SEPs. These policies have been in place for decades. In the United States, the first such policy was adopted in 1959 by the American Standards Association (the predecessor to today’s American National Standards Institute (ANSI).102 Today, every one of the more than 200 ANSI-accredited developers of American National Standards must adhere to ANSI’s essential requirements, including the adoption of such a licensing policy for SEPs. Similar policies have existed in European and international standards organizations since at least the 1980s.103 These policies, which were developed by SDOs in large part to reduce the likelihood of hold-up within standard-setting systems, have had several decades to work, and it is likely that the lack of observed hold-up in some studies can be attributed to the successful operation of these policies. Similarly, antitrust and competition enforcement agencies in the U.S. and Europe have been aware of the potential for hold-up connected with standardization for many years. Accordingly, they have brought enforcement actions when it has been alleged that hold-up behavior has resulted in a violation of the antitrust laws. High-profile enforcement actions against patent holders such as Rambus, 104 Google 105 and Qualcomm106 send powerful deterrent signals to the market and warn others not to engage in similar behavior lest they, too, become the subject of agency enforcement. Like SDO policies, it is likely that the general market awareness of agency interest in standard-setting and hold-up has, to a degree, limited the amount of hold-up that is actually attempted in the marketplace, thereby limiting the direct evidence of hold-up as a systemic problem. But do the deterrent effects of SDO and agency efforts to reduce hold-up signify that hold-up is not a problem? Certainly not. To reach such a conclusion would be perverse: akin to claiming that burglary is not a problem in a neighborhood that experiences reduced burglary rates after it has implemented an active neighborhood watch program and enhanced policing. C. Indicia of Healthy Markets do not Prove the Absence of Anticompetitive Conduct As noted above, one of the principal arguments advanced by commentators seeking to refute the “hold-up theory” is that markets for telecommunications products, namely smart phones, are robust – evidenced by increasing product functionality, decreasing consumer prices and rapid innovation -- and that this degree of robustness indicates that hold-up cannot be a problem in these markets.107 If hold-up were a problem in these markets, they reason, we would see product stagnation, stable (but high) prices, and a lack of competition – features associated with classic examples of hold-up in markets for products such as natural resources and agricultural goods.108 But this argument relies on a false syllogism: hold-up results in market dysfunction; if a market functions well, then it cannot be subject to hold-up. The weaknesses in this argument are multifold. First, hold-up may exist in individual instances without sufficient weight to affect overall market characteristics, particularly in a large global market such as mobile telecommunications. Thus hold-up may exist, even in a market that outwardly appears to be functioning well. Second, there is no valid counterfactual to use to compare the health and robustness of the market for mobile telecommunications products.109 Other consumer electronics devices, such as televisions and DVD players, do not compare well with mobile telecommunications devices, which have taken on a unique character in the modern networked economy. Thus, observing the strength of the market fails to answer the critical questions “compared to what?” and how much stronger the market might be (through more product diversity, functionality, price reduction) without hold-up? A simple historical illustration is useful in this context. During the decade leading up to the enactment of the Sherman Antitrust Act of 1890, several major U.S. commodity markets (e.g., steel, salt, petroleum, coal, sugar, lead, and others) came under intense scrutiny for a variety of allegedly anticompetitive industrial arrangements. One might have argued that these markets, had they been subject to the sorts of anticompetitive collusion that the Sherman Act sought to address, should have seen reductions of output and increases in price. Yet, between 1880 and 1890, U.S. output of salt, petroleum, steel, and coal all increased significantly, and prices of steel, sugar and lead all dropped significantly.110 Do these positive market indicia demonstrate that the subject markets were not subject to anticompetitive collusion, and that the Sherman Act was not necessary? Certainly, investigations of these industries revealed significant cartel behavior. I would suggest that few commentators today would argue that the coal, steel, sugar and other major industrial producers of the late nineteenth century were innocent of collusive and anticompetitive conduct, or that the Sherman Act was not a necessary and beneficial measure for the U.S. economy.111 Yet, had we relied solely on the positive characteristics exhibited by these markets as proof that anticompetitive conduct did not exist, then perhaps the Sherman Act never would have been enacted. By the same token, the fact that global markets for standardized products such as computers and smart phones appear to be thriving does not itself refute the possibility of hold-up nor the existence of anticompetitive conduct in these markets. Nor does it allow regulators and policy makers to drop their guard or cease to monitor these important industries.

### 1AC---Cybersecurity

#### Advantage 2 is Cybersecurity:

#### Aggressive patent strategies create structural flaws in 5G standardization that imperils domestic cybersecurity---market competition reduces the incidence of vulnerability and severity of attacks.

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III. COMPETITION AND CYBERSECURITY In addition to the historical review done so far, another approach to understanding the relationship among patents, competition, and national security is to consider the role of cybersecurity. There is little doubt that computer system vulnerabilities that enable hacking and spread of computer exploits are a threat to the nation’s defenses, so better cybersecurity is a key part of national security strategy.155 Strong competition can thus complement national security by enhancing domestic cybersecurity, and patent assertion that unduly weakens competition detracts from cybersecurity.156 Competition promotes better cybersecurity in at least two ways. First, multiple studies show that competition encourages firms to improve their products on multiple vectors including cybersecurity. Second, competition avoids a situation that security experts call a “monoculture,” which increases vulnerability to severe cyberattacks. As former Secretary of Homeland Security Michael Chertoff wrote recently, “We need competition and multiple providers, not a potentially vulnerable technological monoculture,” to guarantee national security.157 Thus, cybersecurity provides a useful lens for understanding how unfettered patent assertion and licensing can detract from national security. A. Cybersecurity as Competitive Value-Add Competition enhances national security by reducing the incidence of technical vulnerabilities. That effect is especially important for security sensitive systems such as mobile telecommunications. Intuitively, a causal chain from competition to cybersecurity makes logical sense. Computer security is a value-added benefit to consumers, so firms in competitive markets are likely to use security to gain an edge over their competitors.158 In monopolized markets, though, there may be less external impetus to test products for flaws, and the monopolist may choose to focus less on security and more on new product features or increased product quality. Economic research confirms these hypotheses about competition leading to better cybersecurity. A 2009 empirical study of web browsers considered the impact of market concentration on the amount of time that vendors took to fix security vulnerabilities as they were discovered.159 The study found that the presence of more competitors correlated with faster cybersecurity response—a reduction of 8–10 days in response time per additional market rival.160 Similarly, business researchers in 2005 modeled incentives for firms to engage in sharing of cybersecurity information, and concluded that the “inclination to share information and invest in security technologies increases as the degree of competitiveness in an industry increases.”161 Another study found that, where two software firms are in competition, at least one will be willing to take on some degree of risk and responsibility for cybersecurity, whereas a monopoly software firm will consistently fail to accept such responsibility.162 To be sure, an unpublished study from 2017 found that some market concentration can make firms more responsive to cybersecurity issues, but only to a point: “being in a dominant position reduces the positive effect of having less competitors on the responsiveness of the vendor,” and indeed the “more dominant the firm is, the less rapid it is in releasing security patches.”163 This research confirms that competition is more conducive to cybersecurity. It is not hard to see how this applies to emerging communication technologies markets. In the absence of competition, the above research suggests that device manufacturers, chip makers, and software developers will lack incentives to respond to vulnerabilities, to share information about cybersecurity practices and issues, and to take responsibility for security matters. Mobile phone chips have had their share of cybersecurity failures already.164 The best way to flush out ongoing and future cybersecurity issues is to maintain competitive pressure at all levels of the supply chain. B. Vulnerabilities of “Monocultures” A second reason why monopoly undermines cybersecurity is that monopoly leads to a “monoculture” of single-vendor products, opening the door to massive systemic failure in the case of a cyberattack. Computer researchers developed the theory of software monocultures in the early 2000s, in response to the regular phenomenon of computer viruses and other attacks spreading rapidly by exploiting flaws in the dominant operating system at the time, Microsoft Windows.165 Where a computer system such as Windows has a commanding share of users, a virus that exploits a flaw in that system can quickly spread to infect a whole interconnected ecosystem. An operating system monopoly thus enables fast and easy spread of cyberattacks, and better cybersecurity would be achieved through greater diversity in online systems.166 As one research group posited, “a network architecture that supports a collection of heterogeneous network elements for the same functional capability offers a greater possibility of surviving security attacks as compared to homogeneous networks.”167 There has been considerable study of the theory that computer monocultures are naturally more vulnerable to attacks.168 In one study, computer science researchers reviewed a catalog of 6,340 software vulnerabilities recorded in 2007, to compare whether comparable software would share the same flaws.169 Of the 2,627 vulnerabilities applicable to application software (as opposed to operating systems, web scripts, and other software components), only 29 (1.1%) applied to substitute products from different vendors but providing the same functionality.170 By contrast, different versions of a single software product were found to share vulnerabilities 84.7% of the time.171 Thus, software monocultures share exploitable flaws even when there is some variation in versions across the monoculture; by contrast, diversity in software is almost guaranteed to prevent a single flaw from affecting all users. In the case of 5G and wireless mobile communications, a monoculture is an especially concerning possibility. To the extent that systems such as smart city sensors or communication networks are widely deployed in a monoculture fashion, a widespread attack could have devastating consequences, potentially blacking out a region and affecting essential services such as 911.172 A monoculture that is vulnerable to so-called “rootkits” or “backdoors”—maliciously installed software that enable bad actors to commandeer systems—could also enable mass surveillance or spying by private hackers or foreign governments.173 The presence of systems from multiple vendors would mitigate these possibilities. The monoculture theory is not without critics, but a review of those criticisms shows them to be inapplicable to contemporary communication technologies. Some critics suggest that software diversity imposes unwarranted costs on firms who must forego economies of scale and devise seemingly duplicative yet different setups of computer systems.174 But those concerns largely focus on the situation where a single firm produces and manages heterogeneous systems, concerns that are avoided where heterogeneity arises naturally through competition between two unrelated firms. Critics also argue that technological measures can create “artificial diversity” through automated randomization of software code, so software engineers can purportedly solve monoculture issues and device users need not worry about the issue.175 But even these critics acknowledge that artificial diversity techniques are often insufficient because they must make assumptions about what aspects of the technology are most vulnerable to attack, and they concede that artificial diversity cannot stop attacks involving operation of legitimate software functions in undesirable ways (sending spam emails or deleting document files, for example).176 It is widely recognized that a monoculture is unavoidable in at least one respect: Most connected devices will need to conform to technical standards.177 5G, for example, is a technical standard developed by a private industry consortium called 3GPP.178 A flaw in any such standard would render all mobile devices implementing the standard vulnerable to an identical attack.179 Avoiding these sorts of systemic flaws in standards requires rigorous development, analysis, and testing of the standard in the development process, which in turn requires ensuring that as many firms as possible, especially firms that share basic American values, are involved in the development of those standards.180 Thus, the necessary standardization of information and communication technologies is perhaps the most important reason why a competitive communication technology market is essential to cybersecurity and national security.

#### Cyber escalation is more likely now than ever---empirics don’t assume intensified competition and acute geopolitical conditions.

Jervis et al. 20, \*Robert Jervis (Ph.D., California at Berkeley, 1968) is the Adlai E. Stevenson Professor of International Politics and has been a member of the Columbia political science department since 1980; \*Jason Healey is a senior research scholar and adjunct professor at the School of International and Public Affairs, Columbia University. He is also a senior fellow with the Cyber Statecraft Initiative at the Atlantic Council, where he was the program's founding director; (Fall 2020, “The Escalation Inversion and Other Oddities of Situational Cyber Stability”, https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/)

Situational Cyber Stability: When Cyber Capabilities Can Be Destabilizing To sum up: Cyber conflict has not escalated and there are strong, theory-backed reasons why it provides negative feedback, acting as a pressure release pushing back against geopolitical crises. We agree with these conclusions, which explain why cyber conflict has not yet escalated and may not in the future. However, we believe they hold only if the next few decades generally resemble the past few. This stability is situational and we see three major, interrelated mechanisms by which it may change. Cyber conflicts and competition are intensifying over increasing stakes and might inadvertently or intentionally spark a larger conflict; there is a higher likelihood of acute crises, far worse than the relatively bland geopolitical conditions of the past decades; and in times of acute crisis, the dynamics go through an inversion, encouraging rather than suppressing escalation. Spark: Cyber Conflict Can Cause Acute Geopolitical Crises As cyberspace becomes increasingly existential for economies and societies, states compete more aggressively over the same cyber terrain and treasure. In such circumstances, cyber capabilities add positive feedback, intensifying conflict within cyberspace. Ben Buchanan has featured some of these dynamics in his book, The Cybersecurity Dilemma. If a “potential adversary bolsters its own security by increasing its methods of secrecy and ratcheting up intrusive collection of its own — or by shooting back at the collectors — the first state will often feel a need to respond” with “still more intrusive collection.”[34](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn34) This situation is one which can easily notch upward but only with great difficulty be reversed. This section will summarize the relevant dynamics of cyber conflict, establish that conflict is escalating in cyberspace, and discuss how this dangerous mix of factors can spark war. Escalation in Cyberspace Cyber conflict and competition are intensifying. A cyber incident might cross the threshold into armed conflict either through a sense of impunity or through miscalculation or mistake. Alternatively, the cyber attack might be brazen or reckless enough to demand a muscular response from the target state. Libicki’s framework of cyber escalation requires three elements: an increase in intensity, the crossing of significant thresholds, and causal links between cyber incidents (i.e., “one attack is in response to another”).[35](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn35) A cyber incident might cross the threshold into armed conflict either through a sense of impunity or through miscalculation or mistake. We believe the first two elements are important and it is not necessary to balance each incident with its tit-for-tat response. Cyber conflict can be escalatory even if there is not a direct retaliation (“you did A, so we will do X”) but rather a trend over time (“we caught you doing A and B, and suspect you of C … so we’ll do X and Y and for good measure see no reason to further hold off on Z”). It is through this larger picture, the series of campaigns and capabilities, that the escalatory mechanics become obvious. Despite no provable chain of causation from A to Z, the series can show evidence of intensification and ignored thresholds, if the direction and magnitude of the vector are consistent over a long period of time. A full analysis of escalation requires its own paper, but as an initial analysis we have selected four points each separated by a decade over forty years in order to illustrate this trend: In 1988, nations did not have major cyber organizations. Within the U.S. Department of Defense, there were small groups planning and conducting offensive operations, but there was no dedicated civilian defensive team in the United States until the creation of the Computer Emergency Response Team, funded by the Defense Department, in November 1988. There were significant incidents — such as the Morris Worm of 1988 and a case known as the Cuckoo’s Egg of 1986 which involved German hackers who searched for information on U.S. ballistic missile defense technologies and then passed their findings along to the Soviet KGB. However shocking at the time, those incidents still had quite modest scope, duration, and intensity.[36](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn36) Ten years later in 1998, the world’s first combat cyber unit — established in the U.S. Air Force — had already been in existence for three years, with 93 officers and enlisted.[37](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn37) The first major cyber bank heist was in 1995 against Citibank, while the U.S. military created the first cyber command in 1998 in response to the internal Eligible Receiver exercise and Solar Sunrise incident.[38](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn38) This command was staffed by about two dozen defenders (including one of the authors) and worked with the larger Computer Emergency Response Team and similar teams in the military services to defend against and trace the major Moonlight Maze espionage case to Russia.[39](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn39) Within two years, the command expanded and took on responsibilities to coordinate offensive operations, growing to 122 personnel with a $26 million budget.[40](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn40) Only 10 years after that, in 2008, Estonia suffered a debilitating cyber attack from Russia. Espionage against the United States from Russia became increasingly worrisome, including a case known as Buckshot Yankee, where Russian spies breached classified networks. Chinese theft of intellectual property would be known as the “greatest transfer of wealth in history” by 2012.[41](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn41) In direct response to these incidents, the Department of Defense combined their dedicated offensive and defensive task forces into a single U.S. Cyber Command in 2010.[42](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn42) What had been a defensive-only command with 25 people in 1998 grew to cover both offense and defense with a staff of over 900 by 2011.[43](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn43) In the decade leading up to 2018, the United States launched a sophisticated cyber assault on Iranian uranium enrichment facilities; Iran conducted sustained denial of service attacks on the U.S. financial system; North Korea attacked Sony; and Russia disrupted the Ukrainian power grid in winter (twice) and the opening ceremony of the Olympics.[44](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn44) U.S. Cyber Command grew to 6,200 personnel just in the operational element.[45](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn45) Iran and China created their own cyber commands as did the Netherlands,[46](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn46) the United Kingdom,[47](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn47) France,[48](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn48) Singapore,[49](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn49) Vietnam,[50](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn50) Germany,[51](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn51) and others. If intensification is measured as worsening levels of violence, then cyber conflict has intensified across all periods. By 2018, the problems faced in 2008 seemed minor and the organizations small and limited, while the cyber incidents from 1998 and 1988 appeared positively trivial. Operations that had appeared risky 20 years beforehand were now routine. The intensification trend is also clear according to the measurement of Libicki’s “number of troops committed to the fight.” The Defense Department expanded the central cyber warfighting force from zero troops in 1988 to 25 in 1998, 900 in 2011, and at least 6,200 in 2018. The first commander of the U.S. Cyber Command noted in 2011 that its creation “garnered a great deal of attention from other militaries,” which he hoped was not a sign of militarization but rather “a reflection of concern.”[52](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn52) Nations must indeed be concerned, as there are now dozens of copycats. Jensen, Valeriano, and Maness, using more quantified methods, have similar findings to this qualitative assessment, tracking a strong growth of latent cyber power by Russia and China from 2001 through 2014.[53](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn53) There is no obvious evidence pointing to a decrease or even a plateau in the intensity of cyber conflict, or that fewer thresholds are being passed now than 10, 20, or 30 years ago. The direction and magnitude of the change over four decades has marched in only one direction: a relentless increase as nations build their organizations and employ them in more frequent and more dangerous incidents.

#### 5G rollout is inevitable and vastly broadens America’s cyber vulnerabilities.

Durbin 20, \*Managing Director of the Information Security Forum (ISF); (August 11th, 2020, “5G Brings Benefits, But Also Heralds Fresh Security Threats”, https://www.forbes.com/sites/forbesbusinesscouncil/2020/08/11/5g-brings-benefits-but-also-heralds-fresh-security-threats/?sh=2277006b77f1)

The continuing rollout of the fifth generation of mobile networks and technologies, known collectively as 5G, is set to radically transform the business world. Incredible new speeds, dramatically reduced latency and fresh swathes of bandwidth will allow real-time connectivity on a whole new scale. Smart cities, autonomous vehicles and augmented reality present amazing opportunities, so it’s no surprise that investment in 5G technologies from governments and businesses is enormous and growing. Amid the excitement of all this technological promise, significant new dangers are being overlooked. As digital connectivity soars to new heights and internet of things devices expand to rapidly become the internet of forgotten things, organizations will face a number of serious security challenges. As someone who specializes in cybersecurity and technology, I believe it’s crucial that organizations start to consider the threats posed by a vastly broadened attack surface, machine learning manipulation and parasitic malware. Securing The Infrastructure From my perspective, organizations, businesses and individuals will quickly become reliant on 5G networks for daily life. Inevitably, 5G technologies and infrastructure will be a prime target for foreign governments and cybercriminals. The line between protectionism and concern about espionage is blurry. Any uncertainty about the technology that forms critical infrastructure should be of major concern to business leaders. While the explosion of digital connectivity presents new opportunities, it also massively increases potential attack surfaces. Many more devices and sensors will be connected by millions of new 5G masts, and these new 5G networks have a heavier reliance on software. What this means is an explosion of new attack vectors, possible vulnerabilities and weaknesses that can be exploited by a range of bad actors. All the benefits that 5G promises in terms of greater speeds and lower latency will also benefit hacktivists, enabling them to carry out attacks more rapidly and at greater scale. Fresh Threat Landscape Spoofing and jamming of 5G networks could cause serious disruption for supply chains and dependent infrastructure. By targeting embedded IoT devices, determined attackers could put vital networks under threat. Greater speed, higher bandwidth and lower latency will enhance the potency of distributed denial of service attacks. Many traditional techniques will find fresh life in the 5G future, and the impact on business could be catastrophic. As more organizations come to rely on machine learning, I predict attackers will find new ways to exploit neural networks and subvert these systems for their own gain. Manipulated machine learning could enable attackers to enrich themselves, obfuscate and deceive, ultimately sowing confusion on a grand scale. What’s worrisome is the opportunity for parasitic malware to burrow into 5G networks and systems to steal processing power and degrade the performance or even shut down critical services like water and power. Any adoption of 5G must include a proper assessment of the risks involved and plans for protection, vigilance and remediation of security incidents.

#### NC3 systems are technically vulnerable, attractive targets.

Klare 19, \*Michael T. Klare is a professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association; (November 19th, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation”, https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation)

The Nuclear-Cyber Connection These links exist because the NC3 systems of the United States and other nuclear-armed states are heavily dependent on computers and other digital processors for virtually every aspect of their operation and because those systems are highly vulnerable to cyberattack. Every nuclear force is composed, most basically, of weapons, early-warning radars, launch facilities, and the top officials, usually presidents or prime ministers, empowered to initiate a nuclear exchange. Connecting them all, however, is an extended network of communications and data-processing systems, all reliant on cyberspace. Warning systems, ground- and space-based, must constantly watch for and analyze possible enemy missile launches. Data on actual threats must rapidly be communicated to decision-makers, who must then weigh possible responses and communicate chosen outcomes to launch facilities, which in turn must provide attack vectors to delivery systems. All of this involves operations in cyberspace, and it is in this domain that great power rivals seek vulnerabilities to exploit in a constant struggle for advantage. The use of cyberspace to gain an advantage over adversaries takes many forms and is not always aimed at nuclear systems. China has been accused of engaging in widespread cyberespionage to steal technical secrets from U.S. firms for economic and military advantages. Russia has been accused, most extensively in the Robert Mueller report, of exploiting cyberspace to interfere in the 2016 U.S. presidential election. Nonstate actors, including terrorist groups such as al Qaeda and the Islamic State group, have used the internet for recruiting combatants and spreading fear. Criminal groups, including some thought to be allied with state actors, such as North Korea, have used cyberspace to extort money from banks, municipalities, and individuals.[4](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote04) Attacks such as these occupy most of the time and attention of civilian and military cybersecurity organizations that attempt to thwart such attacks. Yet for those who worry about strategic stability and the risks of nuclear escalation, it is the threat of cyberattacks on NC3 systems that provokes the greatest concern. This concern stems from the fact that, despite the immense effort devoted to protecting NC3 systems from cyberattack, no enterprise that relies so extensively on computers and cyberspace can be made 100 percent invulnerable to attack. This is so because such systems employ many devices and operating systems of various origins and vintages, most incorporating numerous software updates and “patches” over time, offering multiple vectors for attack. Electronic components can also be modified by hostile actors during production, transit, or insertion; and the whole system itself is dependent to a considerable degree on the electrical grid, which itself is vulnerable to cyberattack and is far less protected. Experienced “cyberwarriors” of every major power have been working for years to probe for weaknesses in these systems and in many cases have devised cyberweapons, typically, malicious software (malware) and computer viruses, to exploit those weaknesses for military advantage.[5](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote05)

#### Compromised NC3 escalates to nuclear war---instills use-it or lose-it pressures that upend crisis stability.

Klare 19, \*Michael T. Klare is a professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association; (November 19th, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation”, https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation)

Although activity in cyberspace is much more difficult to detect and track than conventional military operations, enough information has become public to indicate that the major nuclear powers, notably China, Russia, and the United States, along with such secondary powers as Iran and North Korea, have established extensive cyberwarfare capabilities and engage in offensive cyberoperations on a regular basis, often aimed at critical military infrastructure. “Cyberspace is a contested environment where we are in constant contact with adversaries,” General Paul M. Nakasone, commander of the U.S. Cyber Command (Cybercom), told the Senate Armed Services Committee in February 2019. “We see near-peer competitors [China and Russia] conducting sustained campaigns below the level of armed conflict to erode American strength and gain strategic advantage.” Although eager to speak of adversary threats to U.S. interests, Nakasone was noticeably but not surprisingly reluctant to say much about U.S. offensive operations in cyberspace. He acknowledged, however, that Cybercom took such action to disrupt possible Russian interference in the 2018 midterm elections. “We created a persistent presence in cyberspace to monitor adversary actions and crafted tools and tactics to frustrate their efforts,” he testified in February. According to press accounts, this included a cyberattack aimed at paralyzing the Internet Research Agency, a “troll farm” in St. Petersburg said to have been deeply involved in generating disruptive propaganda during the 2016 presidential elections.[6](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote06) Other press investigations have disclosed two other offensive operations undertaken by the United States. One called “Olympic Games” was intended to disrupt Iran’s drive to increase its uranium-enrichment capacity by sabotaging the centrifuges used in the process by infecting them with the so-called Stuxnet virus. Another left of launch effort was intended to cause malfunctions in North Korean missile tests.[7](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote07) Although not aimed at either of the U.S. principal nuclear adversaries, those two attacks demonstrated a willingness and capacity to conduct cyberattacks on the nuclear infrastructure of other states. Efforts by strategic rivals of the United States to infiltrate and eventually degrade U.S. nuclear infrastructure are far less documented but thought to be no less prevalent. Russia, for example, is believed to have planted malware in the U.S. electrical utility grid, possibly with the intent of cutting off the flow of electricity to critical NC3 facilities in the event of a major crisis.[8](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote08) Indeed, every major power, including the United States, is believed to have crafted cyberweapons aimed at critical NC3 components and to have implanted malware in enemy systems for potential use in some future confrontation. Pathways to Escalation Knowing that the NC3 systems of the major powers are constantly being probed for weaknesses and probably infested with malware designed to be activated in a crisis, what does this say about the risks of escalation from a nonkinetic battle, that is, one fought without traditional weaponry, to a kinetic one, at first using conventional weapons and then, potentially, nuclear ones? None of this can be predicted in advance, but those analysts who have studied the subject worry about the emergence of dangerous new pathways for escalation. Indeed, several such scenarios have been identified.[9](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote09) The first and possibly most dangerous path to escalation would arise from the early use of cyberweapons in a great power crisis to ~~paralyze~~ undermine the vital command, control, and communications capabilities of an adversary, many of which serve nuclear and conventional forces. In the “fog of war” that would naturally ensue from such an encounter, the recipient of such an attack might fear more punishing follow-up kinetic attacks, possibly including the use of nuclear weapons, and, fearing the loss of its own arsenal, launch its weapons immediately. This might occur, for example, in a confrontation between NATO and Russian forces in east and central Europe or between U.S. and Chinese forces in the Asia-Pacific region. Speaking of a possible confrontation in Europe, for example, James N. Miller Jr. and Richard Fontaine wrote that “both sides would have overwhelming incentives to go early with offensive cyber and counter-space capabilities to negate the other side’s military capabilities or advantages.” If these early attacks succeeded, “it could result in huge military and coercive advantage for the attacker.” This might induce the recipient of such attacks to back down, affording its rival a major victory at very low cost. Alternatively, however, the recipient might view the attacks on its critical command, control, and communications infrastructure as the prelude to a full-scale attack aimed at neutralizing its nuclear capabilities and choose to strike first. “It is worth considering,” Miller and Fontaine concluded, “how even a very limited attack or incident could set both sides on a slippery slope to rapid escalation.”[10](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote10) What makes the insertion of latent malware in an adversary’s NC3 systems so dangerous is that it may not even need to be activated to increase the risk of nuclear escalation. If a nuclear-armed state comes to believe that its critical systems are infested with enemy malware, its leaders might not trust the information provided by its early-warning systems in a crisis and might misconstrue the nature of an enemy attack, leading them to overreact and possibly launch their nuclear weapons out of fear they are at risk of a preemptive strike. “The uncertainty caused by the unique character of a cyber threat could jeopardize the credibility of the nuclear deterrent and undermine strategic stability in ways that advances in nuclear and conventional weapons do not,” Page O. Stoutland and Samantha Pitts-Kiefer wrote in 2018 paper for the Nuclear Threat Initiative. “[T]he introduction of a flaw or malicious code into nuclear weapons through the supply chain that compromises the effectiveness of those weapons could lead to a lack of confidence in the nuclear deterrent,” undermining strategic stability.[11](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote11) Without confidence in the reliability of its nuclear weapons infrastructure, a nuclear-armed state may misinterpret confusing signals from its early-warning systems and, fearing the worst, launch its own nuclear weapons rather than lose them to an enemy’s first strike. This makes the scenario proffered in the 2018 NPR report, of a nuclear response to an enemy cyberattack, that much more alarming.

#### Attacks on vital infrastructure cause accidental escalation.

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Yet another pathway to escalation could arise from a cascading series of cyberstrikes and counterstrikes against vital national infrastructure rather than on military targets. All major powers, along with Iran and North Korea, have developed and deployed cyberweapons designed to disrupt and destroy major elements of an adversary’s key economic systems, such as power grids, financial systems, and transportation networks. As noted, Russia has infiltrated the U.S. electrical grid, and it is widely believed that the United States has done the same in Russia.[12](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The Pentagon has also devised a plan known as “Nitro Zeus,” intended to immobilize the entire Iranian economy and so force it to capitulate to U.S. demands or, if that approach failed, to pave the way for a crippling air and missile attack.[13](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The danger here is that economic attacks of this sort, if undertaken during a period of tension and crisis, could lead to an escalating series of tit-for-tat attacks against ever more vital elements of an adversary’s critical infrastructure, producing widespread chaos and harm and eventually leading one side to initiate kinetic attacks on critical military targets, risking the slippery slope to nuclear conflict. For example, a Russian cyberattack on the U.S. power grid could trigger U.S. attacks on Russian energy and financial systems, causing widespread disorder in both countries and generating an impulse for even more devastating attacks. At some point, such attacks “could lead to major conflict and possibly nuclear war.”[14](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote14) These are by no means the only pathways to escalation resulting from the offensive use of cyberweapons. Others include efforts by third parties, such as proxy states or terrorist organizations, to provoke a global nuclear crisis by causing early-warning systems to generate false readings (“spoofing”) of missile launches. Yet, they do provide a clear indication of the severity of the threat. As states’ reliance on cyberspace grows and cyberweapons become more powerful, the dangers of unintended or accidental escalation can only grow more severe.

#### Cracking down on anticompetitive patent licensing post-*Qualcomm* reintroduces cybersecurity-enhancing competition to the market.

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IV. LESSONS AND POLICY DIRECTIONS The above discussion shows that patent protection can have mixed effects on national security: On the one hand, patents can encourage innovation that ensures domestic technological leadership and produces useful security-protective technologies; on the other hand, patents can stifle innovation-producing and cybersecurity-enhancing competition and can stymie the government’s own ability to achieve national security goals. To navigate the complex effects of patent policy on national security, policymakers may consider the following recommendations as guideposts. A. Anticompetitive Patent Licensing An area of particular concern should be the use of patents and patent licensing strategies to diminish competition or put up roadblocks to new entrants. Policymakers should certainly not support these abuses of the patent system, and indeed should take steps to prevent them. In the mobile communications space, patent licensing already plays an outsized role. There are reportedly between 250,000 and 314,000 patents on the smartphone alone, and litigation over cell phone technologies has lasted decades by now. Patents will thus inevitably have an impact on technologies like 5G or the Internet of Things, so the question is what that impact will be. Patents are supposed to encourage innovation, but research finds that patents alone will not do so; competition is another requirement. A 2015 study considered the impact of competition policy and patent strength on innovation among European firms, measured in terms of research and development spending.183 Initially, the study compared firms in countries with strong patent laws against those in countries with weaker patent laws, and found that patent protection has “no effect on R&D intensity,” a conclusion consistent with multiple other studies.184 However, the study found that when a major competition reform went into effect, strong-patent countries enjoyed a boost in innovation greater than that experienced in weak-patent countries.185 In other words, strong patent protection is complementary to strong competition; the former does not promote innovation without the latter. The practical import of this research is that patent protection is beneficial up to a point, but to the extent that patents—or, more commonly, legal strategies involving patents—overreach to suppress competition, that overreach should be cause for concern. Yet today, strategic patent behavior contrary to competition is prevalent. The Federal Trade Commission’s ongoing lawsuit against mobile phone chip manufacturer Qualcomm, for example, challenges Qualcomm’s practice of refusing to sell chips to any phone manufacturer who does not first pay a hefty sum for patent licenses—even if the manufacturer does not actually have need for all those licenses.186 To the extent that Qualcomm’s “no license, no chips” practice is in fact anticompetitive—that is what the courts overseeing the case will decide—monopolization of that market could substantially harm cybersecurity for the reasons noted above.187 The company’s about-50% market share in the advanced mobile chip market 188 means that there is a virtual monoculture of Qualcomm chips already, and there are ongoing concerns about security vulnerabilities in those chips.189 It is thus puzzling that some have opposed the FTC litigation on the grounds that it is making the United States “less competitive in the global 5G arms race.”190 As one scholar explains, this rhetoric “smacks of ‘national champion’ thinking” and ultimately fails to ensure that “national security warnings are being balanced against competitive imperatives.”191 With respect to emerging information technologies, policymakers should be concerned that a leading firm could undertake similar patent licensing strategies to control the market. Indeed, the district court in the Qualcomm litigation found that Nokia and Ericsson already “have imitated Qualcomm’s practice” because it is “more lucrative.”192

### 1AC---Plan

#### Plan: The United States federal judiciary should substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

#### The plan requires SSO’s to administer reasonable action to prohibit ex post opportunism---that strengthens FRAND effectiveness while enabling SEP holders to capture appropriate royalties---which is the best competition-innovation balance.

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3. Application of the Basic Legal Principles The antitrust principle is straightforward: industry-wide collaboration through SSOs to establish procompetitive standards is permitted only if it is no more restrictive of competition than reasonably necessary to enable creation of the standards. When standard setting predictably creates technology monopolies that, if unrestrained, will enable anticompetitive ex post opportunism that would otherwise not occur, an SSO that does not take effective measures to pre- vent or minimize such ex post opportunism engages in conduct that is more restrictive of competition than necessary. In that case, the SSO and, in appropriate cases, its members, may well violate Section 1 of the Sherman Act. Under this principle, SSO procedures and FRAND rules should be evaluated based on whether they lead to reasonable SEP royalties, using the competitive ex ante licensing standard discussed above, which has been adopted by the courts in patent law. Put differently, FRAND rules should be evaluated based on their ability to prevent SEP holders from obtaining more than the ex ante value of their technology from implementers. This limitation would not prevent a SEP holder from proﬁting, perhaps greatly, from participating in the SSO and having its patented technology included in the standard. The SEP holder continues to be rewarded for its technology because the inclusion of its technology in the standard can still greatly increase the volume of licensing opportunities available to the SEP holder. Whether a particular set of FRAND rules are sufficiently effective in preventing ex post opportunism will depend on the particular circumstances. The procedural unfolding of the case will also depend upon the circumstances. As a general matter, the case would probably be structured as an ordinary Rule of Reason case.82 First, the plaintiff would have to demonstrate harm to competition as a result of the collaboration of the SSO’s members, many of which compete with one another. In this case, the harm to competition would stem from the ability of the SEP holder to exercise monopoly power by obtaining royalties in excess of the competitive, ex ante level. The decision to include patented technologies in the standard would be the allegedly unlawful agreement. Notably, the court need not determine what a FRAND royalty is; it would suffice to determine that market power has been created or exercised, and that existing SSO rules and policies were not adequate to prevent the competitive harm. The defendant, which could be the SSO or perhaps one or more SSO members, would win at this point if the plaintiff failed to show harm to competition. If might fail if the standard faces substantial competition and the court concludes that the SEP holder therefore does not have market power or if the SSO’s rules and policies are found to be effective in preventing ex post opportunism, even if the plaintiff or even the court thinks that other rules and policies would be preferable. Second, if the plaintiff makes the requisite showing of harm to competition, the defendant(s) would then have to show some procompetitive justiﬁcation— in this case, the beneﬁts of the standard. These two initial steps should be straightforward. Third, if as is likely the defendant is able to show a procompetitive justiﬁcation, the plaintiff would have to show that the SSO could have used available, reasonable alternatives to realize the efficiency beneﬁts with less or none of the competitive harms. The plaintiff might identify reasonable alternatives that would have led to a different standard, based on including unpatented technology in the standard or perhaps involving fewer SEPs or fewer owners of SEPs, which would be less subject to patent holdup. More likely, the plaintiff could suggest alternative SSO rules that would not change the standard, but would reduce the likelihood or extent of ex post opportunism. For example, the plaintiff might suggest more rigorous FRAND-type rules, such as rules that set forth more precise principles on which FRAND royalties are to be determined and the circumstances under which SEP holders might seek injunctions. Fourth, the burden would then shift to the defendant(s) to show that the beneﬁts of the standard could not have been realized if the SSO had adopted any of the proffered alternatives or that those alternatives were unrealistic.83 The plaintiff would be entitled to judgment if the court concludes that those beneﬁts could have been realized with less competitive harm if the SSO had adopted the standard with different IPR rules or policies. Our overall sense, based on experience and the empirical literature, is that the extant FRAND rules are generally useful, but tend to be inadequate because they are imprecise and leave unresolved such critical issues as (a) the meaning of a reasonable royalty, even conceptually; (b) the meaning of “non-discriminatory;” (c) to whom licenses must be offered; and (d) under what circumstances may a SEP holder obtain an injunction.84 These imprecise FRAND commitments are therefore not sufficient to adequately prevent ex post opportunism. The recent revisions to IEEE’s FRAND policy represent a signiﬁcant step in the right direction, but even this advance leaves important questions unanswered.85 If FRAND rules are inadequate in these ways, litigation involving extant FRAND rules would likely be resolved only at the ﬁnal, fourth step. The defendant would be able to demonstrate the beneﬁts created by the standard; the plaintiff would be able to demonstrate the creation of market power and that other reasonable and practical rules or policies would ameliorate the problem. The case would thus turn on whether the defendant is able to demonstrate that signiﬁcant beneﬁts associated with standardization could not have been realized if the SSO had adopted those other rules or policies. The court would have available a variety of possible remedies if the plaintiff prevails. Implementers that paid supracompetitive royalties or were unlawfully excluded in whole or in part from product markets as a result of the inadequate FRAND policies would be entitled to damages and, in some cases, to treble damages.86 If the unlawful SSO conduct is regarded as the collective action of the SSO and its members, which is likely to be the case in most instances, SSO members would be jointly and severally liable for the damages. Forward-looking injunctive relief aimed at restoring competition would need to be fashioned to the requirements of the individual case. For example, a court could order the SSO to adopt a new rule or policy proposed by the plaintiff. If the court is reluctant to take on that governance role, it might give the SSO a period of time—maybe ninety days—to develop a rule, subject to the court’s ultimate approval, which would adequately ameliorate the competitive problem created by the SSO. Alternatively or in addition, the court might order the parties to attempt to negotiate a rule or policy on which they can agree. And, depending on the circumstances, the court might order SEP holders, including at least those that were defendants in the case, to comply with the new SSO rules and policies.

#### Threatening antitrust liability lures SSO’s into adopting best practices.

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

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

#### Only antitrust enforcement creates a consumer-action feature that counterbalances SSO’s conspiratorial incentives---private action fails.

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, <https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf>)

2. Why Antitrust Enforcement Is Necessary Some SSO members have an interest in ensuring that the SSO takes steps to minimize the potential harms from the SEP holders’ monopoly power, and this undoubtedly explains in part why most SSOs have adopted FRAND policies or similar requirements. But, as shown in the economic model in the Appendix,73 SSOs cannot in general be counted on to adopt effective FRAND policies. The bases for this conclusion, which is central to our argument for the applicability of Section 1 to SSO FRAND rules, can be summarized as follows.74 First, the SSO members collectively have an interest in permitting SEP holders to charge supracompetitive royalties that elevate the downstream price of compliant devices to the monopoly level. Doing so will enable the members in aggregate to collect increased revenues from consumers, and thus to generate increased profits that in theory could be shared by all the members. In other words, supracompetitive royalties can enrich industry participants as a group at the expense of final consumers. This fact alone should serve as a clear and strong signal regarding the dangers of counting on SSOs to implement effective FRAND policies: if the SSO members negotiate efficiently, the outcome will be just as bad for consumers as if the members agreed to fix downstream prices.75 The fundamental problem is that final consumers are not at the table when the SSO rules are negotiated. Second, SSO members that own SEPs but earn little or no profits as implementers have a powerful self-interest in being able to exercise the ex post monopoly power associated with their SEPs. Because SSO policies are usually determined by a consensus process, these members will likely be able to block the adoption of fully effective FRAND policies. Moreover, these SSO members often have the greatest interest in SSO patent policies. Since much of their income may be attributable to patent licensing, they can be expected to devote substantial resources to block the adoption of FRAND policies that effectively prevent patent holdup. Third, even SSO members that earn significant profits as implementers may have mixed incentives if they also own SEPs, which can also lead to weak or in-effective FRAND rules. In the Appendix, we show that, if the requisite share of votes in the SSO are cast by firms whose share of SEP royalties is at least as large as their share of downstream profits, and if these firms can coordinate their voting over the FRAND rules, then an SSO unconstrained by antitrust laws will establish FRAND rules leading to an outcome no better for consumers than would result from an integrated monopolist controlling all SEPs and all downstream sales.76 Fourth, even SSO members that are downstream implementers and own few, if any, SEPs may have only a modest interest in promoting effective policies to restrict ex post opportunism. Because all implementers will be subject to the opportunism, all of them will face increased licensing costs, and therefore will likely be able to pass on most or all of the increased costs to their customers.77 Furthermore, these implementers might not be especially active or effective in the standard-setting process for free-riding or public-good reasons, especially if SEP royalties constitute only a relatively small portion of the costs of their standard-implementing products. Public choice theory predicts that the highly motivated SEP holders are likely to have the greatest influence over patent policies. Empirical evidence bears out these concerns. As a starting point, we find it striking that SSO FRAND rules are almost always quite vague.78 Notably, SSOs in which SEP holders are more prevalent tend to have weaker FRAND rules.79 Further, to our knowledge, SSOs have made almost no effort to enforce their FRAND rules and have, instead, left enforcement efforts to others.80 This evidence raises serious doubts about the effectiveness of the existing FRAND rules in preventing ex post opportunism.

#### Antitrust fervor is at an all-time high---thumps.

Zanfagna 9/7/21, \* [Gary Zanfagna](https://www.paulhastings.com/professionals/garyzanfagna) is an antitrust and competition partner at Paul Hastings LLP; (September 7th, 2021, “Antitrust isn't headed to an inflection point; it's already there”, https://thehill.com/opinion/judiciary/571087-antitrust-isnt-headed-to-an-inflection-point-its-already-there)

The truth is most companies have not had to think too much about antitrust regulations. The basic rules are pretty well known. But that is potentially changing quickly as antitrust concerns focus on not only high-tech companies, but businesses across the economy, from startups to global conglomerates. It means antitrust is at an important inflection point. Changes are occurring at multiple levels — from [rule reform](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf) to [new applications](https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big) of existing rules to [increased enforcement](https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=A4EF296B-9072-4244-90AF-54FE43BB0876). Some of these changes are a reflection of the economic upheaval ushered in by the digital economy, which has prompted businesses and governments to look to antitrust rules to solve their problems. Witness [President Biden](https://thehill.com/people/joe-biden)’s [July 9 executive order](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/) whose 72 provisions include requests ranging from asking the FCC to reinstate net neutrality rules to directing the FDA to issue rules to allow more competition in the hearing aid market. It’s a reflection of a general zeitgeist whose goal is to slow the onslaught of consolidation in technology across industries, from news media to healthcare to agriculture. And it’s gathering momentum as new rules are being proposed from both sides of the aisle. Many look to the 449-page [“Investigation of Competition in Digital Markets”](https://www.nytimes.com/interactive/2020/10/06/technology/house-antitrust-report-big-tech.html?action=click&module=RelatedLinks&pgtype=Article) report from the judiciary committee on antitrust as the opening salvo. The report took aim at Amazon, Apple, Facebook, and Google, outlining how those once scrappy startups now leverage their market position in ways not seen since “the era of oil barons and railroad tycoons.” The judiciary report’s conclusion: prevent big tech from acquiring smaller tech with tougher policing — and reform antitrust laws. Both Democrats and Republicans have since voiced their support for such ideas. Aimed at the seemingly intractable challenges of the digital era, Sen. [Amy Klobuchar](https://thehill.com/people/amy-klobuchar)’s (D-Minn.) “[Antitrust Law Enforcement Reform Act”](https://www.congress.gov/bill/117th-congress/senate-bill/225/text) would create barriers to prevent consolidation across industries, not just in tech, but in any business that might be connected to “dominant digital platforms.” The legislation would have a prescriptive force, creating a presumption against certain mergers, whether they be in biotech or burgers. Meanwhile, on the Republican side, Sen. [Josh Hawley](https://thehill.com/people/joshua-josh-hawley) (R-Mo.) has rolled out a bill that looks even more severe, blocking some mergers and acquisitions outright. The [“Trust-Busting for the Twenty-First Century Act”](https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big) would ban any acquisitions by companies with a market cap of more than $100 billion. The act would also make it easier for the FTC to classify a company’s behavior as anti-competitive, and then extract penalties (including profits) based on that behavior. And it’s not just the Federal government. Several states have proposed their own legislation to prevent and punish what they see as anti-competitive behavior. Arizona narrowly passed initial legislation that would prevent app store operators, specifically Apple and Google, from forcing developers to use their payment systems. Meanwhile in New York State, the [Twenty-First Century Anti-Trust Act (S933)](https://www.nysenate.gov/legislation/bills/2019/s8700/amendment/a) includes a first-of-its-kind state merger notification of any deal in which the buyer would end up with more than $8 million in assets of the target. It would also create an “abuse of dominance” offense and give the N.Y. attorney general rulemaking authority — whether or not the company was based in New York. These proposals have a long way to go before becoming law, but they demonstrate potentially significant antitrust adjustments coming. Expanding antitrust view The ripple effects will be profound, affecting transportation, communications, banking and healthcare companies. Incumbents looking to diversify their business are vulnerable, as are startups looking for profitable partners. Unhappy competitors who feel stymied may look to antitrust rules for remediation. And private equity moves to consolidate fledgling, fragmented industries will face tougher questions about overlap and industry concentration. So, we are going to see antitrust being used in industries and in ways that haven’t been considered in many years, with views about market concentration expanding to encompass what used to be considered diverse or vertical markets. In fact, both Sen. Klobuchar’s and Sen. Hawley’s proposals specifically target consolidation across industries. Sen. Hawley’s $100 billion ban explicitly targets vertical acquisitions. It would certainly prevent deals like Facebook’s acquisition of WhatsApp or Google’s purchase of Fitbit.

#### Apple case thumps---it’s politicized, and has ripple effects across antitrust.

Albertgotti 9/10/21, \*[Reed Albergotti](https://www.washingtonpost.com/people/reed-albergotti/), Washington Post; (September 10th, 2021, “Judge’s ruling may take a bite out of Apple’s App Store, but falls short of calling the iPhone maker a monopolist”, https://www.washingtonpost.com/technology/2021/09/10/apple-epic-decision-judge-market-monopoly/)

A federal judge fundamentally altered Apple’s App Store business model on Friday in a landmark ruling that accused the iPhone maker of illegal anticompetitive behavior and is likely to have ripple effects across the U.S. antitrust landscape. In a decision on an antitrust lawsuit brought by Fortnite maker Epic Games, U.S. District Judge Yvonne Gonzalez Rogers ruled that Apple must allow app developers to “steer” customers to alternatives to the tech giant’s payment processing service, which collects a 30 percent fee on most digital transactions. That was previously not allowed by the company, and marks a major victory for developers which have long complained of the tight grip the tech giant holds over its App Store on the roughly one billion iPhones currently in use. [The blockbuster trial between Apple and the maker of ‘Fortnite’ goes out with a ‘hot tub’ session](https://www.washingtonpost.com/technology/2021/05/24/apple-epic-trial-hot-tubbing/?itid=lk_interstitial_manual_5) Gonzalez Rogers also found that Apple was in violation of California state competition laws because of the way it forces developers into using Apple’s payment processing service without allowing them to tell customers there are alternatives, which are often cheaper. She stopped short of ruling in favor of Epic‘s claims that Apple is a monopolist, although she left the door open by suggesting more evidence could have changed her decision. “The court does not find that it is impossible; only that Epic Games failed in its burden to demonstrate Apple is an illegal monopolist,” she wrote. Epic spokeswoman Elka Looks said the company plans to appeal the ruling. Tim Sweeney, chief executive of Epic, said in a tweet that, “Today’s ruling isn’t a win for developers or for consumers.” Apple did not respond to requests for comment. The ruling, one of the first major legal actions taken against a tech giant in a new era of antitrust scrutiny, is sure to echo loudly both in Washington, where a legislative effort to rein in the power of Big Tech is underway, and in the courts, which are facing the biggest test of existing antitrust laws in decades. Tech giants have come under the microscope in recent years as it became clear that current antitrust law does not effectively address their power, and regulators and lawmakers have been pushing to change that.

#### Biden executive order outweighs.

Posner 21, professor at the University of Chicago Law School (Eric, 7-21-2021, "The Antitrust War’s Opening Salvo", Project Syndicate, <https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07>)

CHICAGO – US President Joe Biden’s new executive order on “Promoting Competition in the American Economy” is more significant for what it says than for what it does. In fact, the order doesn’t actually order anything. Rather, it “encourages” federal agencies with authority over market competition to use their existing legal powers to do something about the growing problem of monopoly and cartelization in the United States. In some cases, the relevant agencies are asked merely to “consider” ramping up enforcement; in others, they are directed to issue regulations, but the content of those regulations remains largely up to them. Nonetheless, it would be a mistake to dismiss the order’s tentative language as mere rhetoric. Antitrust is the main body of law governing market competition in the US, and it has been the object of sustained attack by business interests and conservative intellectuals for more than 50 years. Biden is the first president since Harry Truman to take a strong public [anti-monopoly stand](https://www.project-syndicate.org/commentary/new-brandeisians-antitrust-for-big-tech-by-eric-posner-2021-06), and he has backed it up by [appointing](https://www.politico.com/news/2021/07/20/biden-picks-doj-antitrust-chief-500310) ardent anti-monopoly advocates to his government. The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality. The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

#### The DOJ is already prepared to engage in more antitrust litigation over SEP’s.

Love 21, \*Bruce Love, writer at the National Law Journal; (June 15th, 2021, “As DOJ Confirms a Change in Antitrust Patent   
Policy, Lawyers Prepare for Shifting Demand”, https://www.mckoolsmith.com/assets/htmldocuments/2021%2006%2016%20As%20DOJ%20Confirms%20a%20Change%20in%20Anittrust%20Patent%20Policyk%20Lawyers%20Prepare%20for%20Shifting%20Demand%20-%20The%20National%20Law%20Journal.pdf)

The Justice Department has confirmed it is looking to develop new policies surrounding how standard-essential patents might be used as tools for anticompetitive practices. The change in policy will mean big business for law firms that can combine highly technical IP advice with their antitrust and litigation practices, with one lawyer likening the demanding skill set to “three-dimensional chess.” Standard-essential patents, or SEPs, are a fundamental piece of intellectual property for business and innovation because they are used under license so frequently by manufacturing companies other than the patent owners. The policy change was hinted at during an online event in late May, when Richard Powers, the acting attorney general of DOJ’s antitrust division, gave an indication that the government might be walking back the relaxed approach implemented by the DOJ under the Trump administration. A DOJ spokesperson confirmed in an email Tuesday to Law.com that it will change its policy on SEPs and antitrust behavior, with the agency still working out the details. The new administration, said the DOJ spokesperson, is rethinking what policies at the intersection of IP and anti- trust will best serve competition and consumers. “New Department leadership is working with career staff on developing a more balanced approach,” said the DOJ spokesperson. “The department wants to develop neutral and balanced policies in this area that recognize the importance of both antitrust enforcement and JUNE 15, 2021 As DOJ Confirms a Change in Antitrust Patent Policy, Lawyers Prepare for Shifting Demand BY BRUCE LOVE U.S. law has often shied away from enforcing essential patent obligations. That’s set to change. The result could be “a significant change in the volume and nature of business for IP trial lawyers and their clients,” one lawyer said. Office of the Attorney General at the U.S. Department of Justice in Washington, D.C. June 6, 2020. THE NATIONAL LAW JOURNAL JUNE 15, 2021 intellectual property protection to our economy and that do not favor one set of interests over others.” Such policy changes could result in a swell of business for law firms with deep, technical IP benches and strong experience representing the industry in enforcement actions, lawyers said. Trump’s DOJ had “taken its foot off the gas” when it came to SEPs as the focus of anti-competitive behavior, said one Washington-based lawyer, speaking on the condition of anonym- ity because he currently has active cases that involve both SEP enforcement and defense. “It didn’t mean we weren’t busy as litigators. There was a lot of work enforcing SEPs against infringers and defending against infringement allegations,” he said. “But we weren’t busy in the antitrust arena. A greater focus on SEPs—not just by the DOJ but also other agencies—might mean more litigation, but it will also mean a more transparent field of play. It doesn’t do companies any good for there to be unfettered SEP enforcement.”

# 2AC

## ADV---Innovation

### 2AC---AT: No Patent Holdup---TL

### 2AC---AT: Innovation

#### The Qualcomm decision has cooling effect on 5G innovation.

Breed et al. 20, \*Logan M. Breed, antitrust partner in the Washington office of Hogan Lovells; \*Edith Ramirez, former Chairwoman of the Federal Trade Commission; \*Suparna S. Reddy, Associate at Hogan Lovells based in Washington; \*Labeat Rrahmani, an Associate at Hogan Lovells; (August 19th, 2020, “Ninth Circuit rules in favor of Qualcomm, distancing antitrust law from FRAND disputes”, https://www.engage.hoganlovells.com/knowledgeservices/news/ninth-circuit-rules-in-favor-of-qualcomm-distancing-antitrust-law-from-frand-disputes)

The practical effects of the Ninth Circuit’s decision are already emerging: other holders of significant wireless SEP portfolios such as [Nokia](https://www.nokia.com/about-us/news/releases/2020/03/24/nokia-announces-over-3000-5g-patent-declarations/) and [Ericsson](https://www.ericsson.com/en/blog/2019/10/5g-patent-leadership) have already begun to use more aggressive patent strategies related to 5G devices. The decision could also have repercussions beyond the technology sector. Companies litigating against the FTC, including in the pharmaceutical sector, have quickly [availed](https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/vyera-claims-qualcomm-reversal-supports-defence-against-ftc) themselves of the ruling to defend themselves. The ruling may also have a cooling effect on innovation if companies are less inclined to participate in standard-setting processes due to limited repercussions for companies that maneuver around their FRAND obligations. If the panel decision stands, it could have far reaching consequences.

#### US loses

Borghard et al. 19, \*Erica D. Borghard is an Assistant Professor at the Army Cyber Institute at West Point. Shawn W. \*Lonergan is a U.S. Army Reserve officer assigned to 75th Innovation Command and a Research Scholar at the Army Cyber Institute. (April 25th, 2019, “The Overlooked Military Implications of the 5G Debate”, https://www.cfr.org/blog/overlooked-military-implications-5g-debate)

Last week, the U.S. Defense Innovation Board released a [report](https://media.defense.gov/2019/Apr/04/2002109654/-1/-1/0/DIB_5G_STUDY_04.04.19.PDF) outlining the risks and opportunities for the United States in the global race to develop 5G. This followed a [damning report](https://www.theverge.com/2019/3/28/18285185/huawei-uk-government-cybersecurity-report-5g-rollout-security-concerns) published by the United Kingdom’s Huawei Cyber Security Centre Oversight Board detailing how the Chinese telecom giant’s 5G products, particularly its software, contained [significant vulnerabilities](https://www.nytimes.com/2019/03/28/technology/huawei-security-british-report.html) and that the company had failed to remedy persistent [poor security practices](https://www.theguardian.com/technology/2019/mar/28/huawei-chinese-firm-poses-national-security-risks-says-uk-watchdog). 5G network architecture uses high frequency spectrum to enable significantly faster speeds to process larger amounts of data with lower latency and greater device connectivity. While much attention has been paid to economic and espionage implications of a potential Chinese lead in developing and operating 5G infrastructure, there are important military implications that remain largely overlooked.

There are economic implications for which entities can secure the [greatest global market share](https://www.reuters.com/brandfeatures/venture-capital/article?id=61837) of 5G technology. Technological innovation drives economic growth, job creation, and global economic influence. Huawei may have a long-term market advantage over U.S and Western telecoms because the former has been able to offer 5G products at [far cheaper](https://www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.html) rates than the latter. Furthermore, there are also concerns that Chinese-built 5G technology is likely to [contain backdoors](https://www.wired.com/story/huawei-case-signals-new-us-china-cold-war-tech/) that could be used to enable [Chinese economic or national security espionage](https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html). It is unlikely that Beijing would actively monitor all of the content of the data that comes across Huawei owned or operated infrastructure (although it may collect and analyze metadata). However, it is conceivable that Huawei would get a proverbial “tap on the shoulder” from Beijing to share pertinent information in specific instances. This may include individually targeting senior corporate executives, which is enabled by the millimeter wave frequency that 5G networks employ.

The military applications of 5G technology have vital strategic and battlefield implications for the U.S. Historically, the U.S. military has reaped enormous advantages from employing cutting edge technology on the battlefield. 5G technology holds similar innovative potential. Perhaps most obviously, the next generation of telecommunications infrastructure will have a direct impact on improving military communications. However, it will also produce cascading effects on the development of other kinds of military technologies, such as robotics and artificial intelligence. For instance, artificial intelligence and machine learning capabilities, such as those used in the Department of Defense’s [Project Maven](https://dod.defense.gov/News/Article/Article/1254719/project-maven-to-deploy-computer-algorithms-to-war-zone-by-years-end/), could be greatly enhanced when leveraging the data processing speeds made possible through 5G infrastructure. As an [era of great power competition](https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf) emerges between the United States and China, the United States has a compelling strategic interest in being at the forefront of these new technologies.

The United States and its allies must also consider the tactical and operational implications on the battlefield of conducting conventional or counterinsurgency operations in an area with Chinese owned or operated 5G infrastructure. This concern stems from the nature of the relationship between Huawei, an [ostensibly private company](https://www.itnews.com.au/news/analysis-who-really-owns-huawei-175946), and the Chinese Communist Party (CCP). While Huawei’s founder and CEO, Ren Zhengfei proclaimed in a February 2019 interview on [CBS This Morning](https://www.cbsnews.com/news/ren-zhengfei-huawei-ceo-says-we-will-never-provide-chinese-government-with-any-information/)that the company never has and never would provide information to the Chinese government, many experts are [skeptical](https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html). Under China’s [2017 National Intelligence Law](https://www.reuters.com/article/us-china-security-lawmaking-idUSKBN19I1FW), the CCP has the authority to monitor and investigate domestic and international companies as well as direct organizations to assist with government espionage efforts. As such, it is conceivable that Huawei will be required to hand over its data to the Chinese government for collection and analysis.

Due to this reality, the United States must consider and be prepared to conduct overseas contingency or counterterrorism operations in areas where Chinese telecommunications infrastructure is widely proliferated, thus restricting the United States’ ability to rely on indigenous telecoms. As [noted](https://www.africom.mil/media-room/transcript/31604/gen-joseph-votel-gen-thomas-waldhauser-and-acting-asd-for-international-security-affairs-kathryn) by US AFRICOM Commander General Thomas Waldhauser, this has already become an issue in Africa where Chinese telecommunications companies are poised to dominate. The integrity of U.S. military communications systems that rely on 5G networks could be undermined at key phases of an operation. For example, if the United States is conducting a military operation in an area of interest to China, it is plausible that the Chinese government could leverage Huawei to intercept or even deny military communications. Furthermore, Chinese telecom infrastructure dominance in a theater of operations may limit the U.S. military’s ability to conduct precision targeting that leverages signals intelligence collection on 5G telecommunications networks.

The strategic and battlefield implications of who owns and operates 5G infrastructure around the world underscores the national security importance of 5G. The U.S. government and its allies should more systematically assess both the opportunities and risks associated with conducting future military operations in environments that rely on Chinese technology.

To date, the U.S. government has devoted significant energy to persuading its allies and partners to follow the United States in prohibiting Chinese telecoms, particularly Huawei, from building and/or operating 5G infrastructure. However, its diplomatic approach has been met with varying degrees of success. While some countries such as [Australia](https://www.ft.com/content/e90c3800-aad3-11e8-94bd-cba20d67390c) and [Japan](https://www.reuters.com/article/us-usa-china-huawei-japan/japans-top-three-telcos-to-exclude-huawei-zte-network-equipment-kyodo-idUSKBN1O90JW) have fallen in line with the U.S. stance on Huawei, many others have not. The European Commission’s recent 5G [recommendations](https://www.cyberscoop.com/5g-eu-huawei-cybersecurity-recommendations/) for member states dismissed a ban on Chinese telecoms. British intelligence has reportedly maintained that the security risks associated with Huawei can be [sufficiently managed](https://www.ft.com/content/619f9df4-32c2-11e9-bd3a-8b2a211d90d5), and New Zealand, after [initially bandwagoning](https://www.nytimes.com/2018/11/28/business/huawei-new-zealand-papua-new-guinea.html) with the United States in December 2018, abruptly [reversed course](https://www.bloomberg.com/news/articles/2019-02-18/new-zealand-says-china-s-huawei-hasn-t-been-ruled-out-of-5g-role) in February 2019. This is concerning for the United States because New Zealand and the UK are members of the Five Eyes intelligence-sharing alliance. Many allies have refused an outright ban of Huawei because of the company’s ability to offer 5G products at far cheaper rates than Western telecoms.

It is clear that U.S. diplomatic efforts are not working. The reality is that the bottom line is largely driving decision-making. Therefore, rather than take a purely negative approach, the United States should consider using positive inducements to make its 5G products more appealing. While the United States should not strive to mirror China’s top-down approach to innovation, it should work with allies to use market incentives to make U.S.- and Western-developed 5G infrastructure and products more competitive. Furthermore, the U.S. military needs to anticipate that its use of native telecommunications infrastructure in a future operating environment may be compromised, limited, or denied. The U.S. military will inevitably need greater bandwidth on the tactical edge and this should be an imperative that drives investment in research and development to address this challenge.

Technological innovation was at the crux of the United States’ comparative military and economic advantage in the twentieth century. In this contemporary great power competition, U.S. failure to innovate at the scientific and technological frontier will have direct (and deleterious) effects for the United States on the distribution of power in the international system over the long term.

### 2AC---!---Taiwan

## ADV---Cybersecurity

### 2AC---!---Cyber

## AT: CP---Notice & Comment

### 2AC---Permutations

### 2AC---Deficit

#### No regulatory regime exists for SSO patent holdup---the counterplan doesn’t exist!

Cary et al. 11, \*Messrs. George Cary and Alex Sistla are members of the California and District of Columbia Bars. Mr. Mark Nelson is a member of the New York and District of Columbia Bars. Mr. Steven Kaiser is a member of the New Jersey and District of Columbia Bars; (2011, “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM INSTANDARD SETTING”, <https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf>)

B. IMPLIED PREEMPTION DOCTRINE DOES NOT APPLY TO PATENT HOLDUP Even accepting the idea of implied preemption in the face of substantial regulatory regimes, the case for preempting the antitrust laws in the SSO-patent holdup context has not been made. Put simply, there is no regulatory oversight in the case of SSO-patent holdup. Although the Patent and Trade-mark Office (PTO) regulates patents in the sense of deciding what patents to issue, there is no connection between that role and the patent holdup issue. Indeed, almost every dispute involving a patent—whether patent abuse, infringement, or licensing quarrels—is ordinarily resolved through some form of private litigation or dispute resolution.79 It is of course true that there is a specialized patent court (the Federal Circuit), and that certain doctrines (laches, equitable estoppel, and misuse) have been developed to address “opportunistic behavior” by patentees. But this simply means that there is an independent body of patent law that certain private parties may enforce. The government does not actively police the behavior of patent holders in the way the SEC enforces the securities laws or the states enforce their laws in the state-action context.80 Although the PTO imposes certain duties upon patent applicants,81 it lacks the authority to impose any such similar duties upon patentees participating in a standard-setting process. SSOs impose their own disclosure obligations without any interference or oversight by the PTO. In sum, we think it is a stretch to argue that a competing regulatory scheme governs all of patent law. Many patent law defenses, such as those recognized under 35 U.S.C. § 282, are borrowed from the common law.

#### A broad, unambiguous, transparently enforceable ruling is key---the counterplan confuses the plan’s decision, ruining investor certainty and inviting loopholes.

Reed 19, \*Morgan Reed, President of the App Association, represents more than 5,000 app makers and connected device companies in the mobile economy; (March 13th, 2019, “An FTC Settlement with Qualcomm Could Hold the Entire IoT Economy Hostage”, https://actonline.org/2019/03/13/an-ftc-settlement-with-qualcomm-could-hold-the-entire-iot-economy-hostage/)

Any Outcome that Allows Qualcomm to Export its Illegal Behavior to New Markets Would Be Devastating

Qualcomm’s executives are desperate to save their jobs as shareholders fume over the $121 billion offer they rejected, and time is running out to turn the ship around. Qualcomm’s history, and its current desperate situation, mean that FTC cannot take any promises Qualcomm makes at face value, and must ensure any remedies they reach are iron clad and not limited to a few companies or even the broader smartphone industry. Any company willing to argue that the refusal to license patents to competitors is perfectly legal under its FRAND commitments clearly has no qualms about breaking its contracts and legal commitments. With shareholders demanding results immediately, Qualcomm’s executives will be looking for any loophole or gray area they can exploit as long as possible.

Perhaps most importantly, the FTC must ensure any outcome of this case protects competition beyond the smartphone industry.  Any court decision or settlement in this case should be comprehensive (i.e., fully address each charge the FTC has made in its enforcement action), enforceable, and as transparent as possible in order to provide small business innovators with maximum clarity.

As we move toward a 5G connected world, Qualcomm’s practices represent a clear and present danger to the entire economy. We must protect these standards which form the foundation for competition in the connected economy, and that means holding Qualcomm to their FRAND commitments across the board in a way that leaves no room for the gamesmanship it is famous for in this context. Anything less will only serve to encourage Qualcomm to export its anticompetitive behavior to every corner of the economy.

### 2AC---Theory---Textual + Functional

### 2AC---AT: Impact

#### Democracy doesn’t solve war---best models.

Campbell et al. 18, \*Doctoral Candidate in Political Science, Ohio State University. \*\*Carter Phillips and Sue Henry Associate Professor of Political Science at the Ohio State University. \*\*\*Associate Professor of Political Science, Pennsylvania State University. (\*Benjamin W., \*\*Skyler J. Cranmer, \*\*\*Bruce A. Desmarais, September 13, 2018, “Triangulating War: Network Structure and the Democratic Peace”, *Cornell University*, Accessible at: <https://arxiv.org/pdf/1809.04141.pdf>)

Conclusion

The dyadic understanding of the democratic peace has become ubiquitous in International Relations. By looking beyond simple dyadic analysis, accounting for the embededness of states in a much more complex network, we found the democratic peace may not be as robust as previously thought. Our results demonstrate that after accounting for the tendency for like-regime states with common enemies not to fight one another, the effect of the democratic peace not only vanishes, but jointly democratic dyads seem to be *more* conflict prone than mixed dyads. These results are consistent across operationalizations of the outcome variable, our triadic closure predictor, measurements of joint democracy, and a variety of other factors. We believe this explanation for the democratic peace is not a mechanism for understanding the democratic peace, but instead, an alternative. What we have shown here is that conflict between democracies indeed exists and the peaceful relations occasionally found are not necessarily a function of the affinity of democratic states, or intrinsic attributes of democratic states, but instead, a function of the strategic inefficiencies of fighting a state with a shared enemy. While regime type may influence the interests of states, we find that it does not directly influence the probability that any two states fight one another.

There are three major implications to our research. First, scholars should be hesitant to consider dyadic conflict in isolation, as there are network dependencies informing whether a state engages or joins a MID. Second, preferences operating in addition to network interdependencies and collaboration explain much of the democratic peace. Third, when studying conflict, scholars and practitioners should consider the cost structure of collaboration, and how these dynamics inform not only conflict initiation, but conflict escalation. Particularly interesting is that the theoretical mechanism at work here is dramatically simpler than any of the established justifications for the democratic peace. We do not rely on arguments about institutions or norms, but just the simple and intuitive proposition that it does not make much sense for two states fighting a third to also fight each other. What the existing literature seems to have missed, usually theoretically and almost always empirically, is that dyadic conflicts do not occur in isolation, but in the context of a complex network of relations.

## AT: CP---Regulation

### 2AC---Permutations

#### 2---do the cp---the counterplan still expands the scope of core antitrust laws by increasing prohibitions.

Bradford and Chilton 18 (Anu Bradford, Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton, Assistant Professor of Law and Walter Mander Research Scholar @ the University of Chicago. “Competition Law Around the World from 1889 to 2010: The Competition Law Index” , Columbia Law School Scholarship Archive Faculty Scholarship, <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3519&context=faculty_scholarship> , 2018, date accessed 9/5/21)

The Scope Index is the closest to the CLI in that it also measures the law in the books, treating prohibitions as elements that increase the scope (or stringency) of the law and defenses as elements that reduce the scope (or stringency) of the law. Basic categories in the Scope Index and our CLI are also the same, even if somewhat differently labeled. For example, we refer to “anticompetitive agreements” where the Scope Index refers to “restrictive trade practices.”

Plan: The United States federal judiciary should substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

### 2AC---Deficits

#### 1---competition-specific expertise---DOJ enforcement is key. Even if other agencies are granted authority to regulate, they will underenforce.

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

I. The Relative Efficiency of Antitrust and Regulation The growing antitrust deference to regulation is cause for concern. Both antitrust and regulation are economic responses to market failures.46 Implemented correctly, both are designed to serve the ends of economic efficiency.47 It is therefore reasonable to judge the relative efficacy of antitrust and regulation by economic criteria. And judged by those criteria, virtually all economists would agree that antitrust-overseen market competition is superior to industry regulation. In particular, none of the arguments the Court has offered as a reason to prefer regulation to antitrust withstand scrutiny. Relative expertise. It is true, as the Court emphasized in Trinko and Credit Suisse, that antitrust courts are generalist courts, while regulatory agencies tend to specialize in a particular industry and its problems. That specialization should, all other things being equal, mean that expert regulators will do a better job than judges or juries of reaching the right result. But other things are far from being equal. Antitrust courts have two significant advantages over regulatory agencies when it comes to promoting competition. First, antitrust courts are trying to promote economic efficiency, while regulators often aren’t. For decades, efficiency has served as the sole criterion on which to judge antitrust rules. And courts have had over a century in which to hone those rules to achieve that end. Without question, courts have made mistakes in the past. But there is a strong consensus among antitrust scholars that the wave of cases in the last 30 years has largely moved antitrust in the right direction, eliminating any significant risk that antitrust enforcement will do more harm than good.48 Scholars may fight over whether a Chicago School or a post-Chicago School approach will achieve the right result in specific cases,49 but for the most part they are tinkering at the margins: the law and the scholarship have converged with respect to both the proper goals of antitrust and the general rules that will achieve those goals. Regulation, by contrast, is frequently not even intended to achieve economic efficiency through competition. Occasionally that is because of a legislative judgment that competition is impossible, though the number of industries thought to be natural monopolies for which markets won’t work has shrunk dramatically in the past four decades.50 Industry regulation that excludes entry in order to promote a natural monopoly, as telephone regulation did before 1984, is not likely to achieve a competitive outcome. More often, the goals of the legislators who establish regulatory agencies, or the goals of the regulators who run those agencies, are to achieve something other than competition. Indeed, many regulations are aimed precisely at eliminating competition, as was the government- sponsored raisin cartel in Parker v. Brown51 or any of its modern descendent crop-support programs administered by the Department of Agriculture. It should be obvious that regulations intended to reduce competition will not promote it. But even if the regulation is not directly inimical to competition, competition is frequently irrelevant to, or at best a minor consideration in, a regulator’s agenda. Regulators may care about the safety and efficacy of a drug, for example, and only incidentally about whether there is competition in the sale of that drug. They may seek to reduce traffic deaths or air pollution by mandating technology, regardless of the effect that mandate has on the price manufacturers can charge or the number of products they sell. These are laudable goals, to be sure, but they are not competition-related goals. An agency tasked with achieving these goals is likely to ignore threats to competition from the industry it regulates so long as those threats do not compromise its core mission. Thus, the state and local governments that enacted the privately-drafted National Fire Protection Code at issue in Allied Tube into law were interested in stopping fires; doubtless they thought little if at all about the competitive effects of the code, even though it turned out that the code was drafted by interested private parties with the purpose of impeding competition rather than promoting fire safety.52 Even those agencies whose mission expressly involves consideration of competition issues will not necessarily make it their first among potentially conflicting priorities. The SEC, for example, which as Justice Breyer pointed out is dedicated to improving market information and expressly considers competition among other issues in setting regulation,53 is first and foremost an investor-protection and information-disclosure agency, not an agency that investigates and weeds out cartels or other anticompetitive practices. It is unlikely to devote much in the way of time or resources to such issues, because even if it is tasked to consider such issues they do not reflect the agency’s primary purpose. Similarly, even an agency like the Federal Communications Commission that is directly focused on competitive conditions in a particular market may naturally pay attention primarily to that market, and give less if any attention to the effect its rules might have on competition in adjacent markets or competition from unanticipated new businesses. This arguably explains the FCC’s willingness to largely ignore the effects of its decisions on the Internet, for example: it is telecommunications, not the Internet, that the FCC is tasked to regulate. Agencies that view competition as secondary, or view it through the lens of a particular industry’s characteristics and interests, are less likely to create and enforce rules that optimally encourage competition.54 At a bare minimum, therefore, the industry-specific expertise of an agency must be balanced against the competition-specific expertise of the specialist antitrust agencies: the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division.

#### 2---regulatory capture---even honest agencies will subject to lobbying and industry pressure that diverts the counterplan’s purpose. Antitrust courts are superior and impartial.

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

The problem with agencies is much greater than just their questionable mandate to promote competition, however. Agencies are famously subject to “capture” by the industries they are supposed to regulate.55 That capture can take many different forms. Sometimes regulators or legislators are captured in the most venal sense – they are bribed or otherwise given personal benefits in exchange for voting a particular way. This seems to have been the case in Omni Outdoor Advertising, for example. Regulators who accept bribes (or politicians who accept campaign contributions in exchange for a particular vote) are not acting in the public interest but in their private interest, a private interest that necessarily aligns with the industry participant doing the bribing. Even a regulator who would never accept bribes may still seek to maximize, not the public interest, but his own power or the power and interests of his agency, a fact that industry can often use to its advantage. Capture need not be so brazen, however. Even honest regulators and legislators can be captured through the mechanism of public choice theory.56 A legislator that tries to maximize her constituents’ expressed preferences may still end up supporting legislation that benefits private firms at the expense of the public interest, because the private firms will frequently have a concentrated interest – and therefore show up to lobby on a particular issue – while the public is hard to organize even around issues that may affect a great many of them diffusely. Regulators are subject to the same effect. A notice and comment rulemaking is likely to produce more comments from people with a concentrated interest in the outcome, and fewer comments from those with a more diffuse interest. Thus, regulators who try in good faith to determine what the public thinks of a particular regulation may still end up with a skewed view of the pros and cons. This may be particularly likely with competition issues. While the public as a whole has a strong interest in unfettered competition, any individual member of the public is unlikely to be affected much by a particular regulatory decision. And particularly where the industry as a whole colludes to seek regulatory intervention that benefits them, as in Ticor Title, there are unlikely to be competitors who can stand as proxy for the interests of the public. Finally, even legislators and regulators aware of the existence of public choice problems and determined to do the right thing are still susceptible to forms of what we might call “soft” capture. Acquiring accurate information about market conditions is often very difficult, for example. Companies with a vested interest in the outcome can hire lobbyists that provide information helpful to their side, and a regulator who cannot get information except from those lobbyists may have little choice but to accept that information as true. Even if there are competing sources of information, interested parties can and do hire as lobbyists former employees, colleagues, or friends of the regulator, and it is natural human instinct to trust those people more than strangers. And regulators tend to come from the industries they regulate, which may mean that they start out seeing things from the industry’s perspective. Judges, by contrast, are much less subject either to having their purpose diverted or to capture. While some have tried to argue that judges face some of the same interest group constraints as legislators and administrative agencies,57 the fact is that antitrust courts are trying to achieve the goal of economic efficiency, they are doing it in industries in which they have no direct financial interest, they cannot act to benefit their “agency” in rendering a decision, and the structure of the litigation process helps ensure to the extent possible that both sides are presented in a relatively balanced way. Courts aren’t perfect, of course. But all advantages are comparative, and the fact that antitrust courts are trying to promote competition rather than to achieve some other end (whether legislated or self-motivated) provides a powerful counterweight to the industry expertise of administrative agencies. It is important to keep in mind, as Areeda and Hovenkamp summarize, that “it often turn[s] out that the principal beneficiaries of industry regulation were the regulated firms themselves, which were shielded from competition and guaranteed profit margins.”58 Courts should not assume that regulation will lead to competition merely because regulators know more than courts about the industries they regulate.

## AT: CP---States

### 2AC---Preemption

#### The Ninth Circuit imposed court-order limitations on antitrust law to preserve its balance with patent law.

Martino et al. 20, \*[Matthew M. Martino](https://www.skadden.com/professionals/m/martino-matthew-m) [Tara L. Reinhart](https://www.skadden.com/professionals/r/reinhart-tara-l) [Steven C. Sunshine](https://www.skadden.com/professionals/s/sunshine-steven-c) [Julia K. York](https://www.skadden.com/professionals/y/york-julia-k), works with clients at Skadden, Arps, Slate, Meagher & Flom LLP; (August 14th, 2020, “Ninth Circuit Strikes Down Sweeping Injunction Against Qualcomm and Reins In Expansive Interpretation of Sherman Act”, https://www.skadden.com/insights/publications/2020/08/ninth-circuit-strikes-down-sweeping-injunction)

In its highly anticipated decision, the Ninth Circuit panel unanimously rejected the lower court’s reasoning, vacating the judgment and reversing the worldwide injunction against Qualcomm. The panel concluded that the district court had erroneously imposed the antitrust duty to deal on Qualcomm, had impermissibly looked outside the relevant antitrust market in order to infer an anticompetitive act and had relied on outdated evidence of agreements that were terminated before the suit was filed to justify a broad, forward-looking global injunction. The Ninth Circuit further rejected the argument that a SEP holder’s violation of FRAND commitments could independently create antitrust liability, instead pointing to patent and contract law as sources for potential remedies. The decision reflects a considered effort to rei

n in the district court’s expansive interpretation of general antitrust principles and their specific application to SEP holders, as well as recognition that the antitrust laws aim to preserve companies’ incentives to innovate and compete. Recognizing that while “[a]nticompetitive behavior is illegal under federal antitrust law[,]” the panel was adamant that “[h]ypercompetitive behavior is not.”[7](https://www.skadden.com/insights/publications/2020/08/ninth-circuit-strikes-down-sweeping-injunction" \l "ftn7)

Rejection of District Court’s Expansive Interpretation of Antitrust Laws

The Ninth Circuit decision contains several notable conclusions regarding the scope of Section 2 of the Sherman Act and what constitutes cognizable antitrust harm.

#### State efforts to impose greater antitrust liability than established by federal courts will be preempted.

Samp 14, \*Richard A. Samp is the chief counsel for Washington Legal Foundation (WLF), a non-profit, public interest law firm in Washington, D.C. WLF filed an amicus brief in support of Love Terminal Partners. (2014, “The Role of State Antitrust Law in the Aftermath of Actavis”, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1062&context=mjlst)

V. ACTAVIS’S PREEMPTIVE EFFECT Application of state antitrust law to reverse payment settlements is not merely a hypothetical possibility. There are a fair number of pending lawsuits that challenge reverse payment settlements on state-law grounds. The California Supreme Court has agreed to review one such suit.74 In seeking affirmance of the appeals court’s dismissal of the suit, the defendants argue inter alia that the suit is preempted by federal law.75 As noted above, there is precedent for a finding that state antitrust law is preempted to the extent that it conflicts with the policy underlying a federal statute.76 Moreover, in the context of patent law, federal courts have not hesitated to preempt state laws that the courts deem to stand as an obstacle to accomplishing Congress’s objectives (i.e., encouraging efforts to develop new and useful products).77 To the extent that any portions of Actavis’s holding can be deemed to reflect the Court’s perception of Congress’s new-product-development objectives, a state law is preempted if it is inconsistent with that holding and seeks to impose a greater degree of antitrust liability on the parties to a reverse payment settlement. Actavis’s treatment of settlements involving a compromise entry date appears to meet that description. Actavis held that federal antitrust liability could not arise from a settlement in which the generic manufacturer agrees not compete for a number of years and in return is rewarded with an exclusive license to market its product several years in advance of the patent’s expiration date.78 Accordingly, states are not permitted to impose antitrust liability under similar circumstances because doing so would upset the balance that, according to Actavis, Congress sought to achieve between antitrust and patent law. Other issues left open by Actavis are likely to be answered in the years ahead. For example, the Supreme Court did not specify whether noncash benefits received by a generic manufacturer in connection with a patent settlement can ever serve as the basis for federal antitrust liability. If the Supreme Court eventually answers that question by stating: “No, federal antitrust law will not examine settlement benefits other than cash that flow to the infringing party,” then it is likely that state antitrust law would be required to conform to that rule. The potential grounds for such a ruling (a desire both to promote settlement of patent disputes and to uphold reliance interests in existing patents) are based largely on values embedded in federal patent law. There is little reason to believe, however, that the Court would prevent application of state antitrust law to patent settlement agreements where state law is fully consistent with federal antitrust law. Even in areas subject to extensive federal regulation, the Supreme Court has upheld the authority of states to engage in parallel regulation that is not inconsistent with the federal regulation.79 Unless the Court were to determine, as in Connell,80 that states could not be trusted to properly accommodate the objectives of the federal statute at issue (here, federal patent law), there is no reason to conclude that Congress would not have wanted states to be permitted to police the same sorts of anticompetitive conduct that is policed by federal antitrust law. Moreover, states are likely free to impose greater penalties on the proscribed conduct than is available under federal law. As the Court explained in California v. ARC America Corp., state antitrust law is not required to adhere to the same set of sanctions imposed by federal antitrust law.81 It seems reasonably clear, however, that Actavis prohibits states from adopting the procedural devices rejected by the U.S. Supreme Court—either a per se condemnation of reverse payment settlements or a presumption of illegality accompanied by “quick look” review. The Supreme Court rejected those approaches because it determined that in many cases there might well be pro-competitive economic justifications for reverse payment settlements and that presuming their illegality could result in the suppression of economically useful conduct.82 State antitrust laws that adopted the FTC’s proposed presumption of illegality would be subject to similar criticism, and thus would likely be impliedly preempted as inconsistent with the careful balance between antitrust and patent law established by Actavis. CONCLUSION Because Actavis left so many questions unanswered regarding the application of federal antitrust law to patent settlement agreements, the extent to which federal law preempts the application of state antitrust law to such agreements remains similarly unsettled. One can be reasonably confident that if private plaintiffs become dissatisfied with the results of pending litigation under federal antitrust law, they will turn with increasing frequency to state antitrust law as an alternative remedy. Even if state law ends up doing no more than “parallel” federal antitrust law, defendants are likely to incur substantial litigation costs fending off such state claims in the years to come.

## AT: CP---Congress

#### Courts can point to the counterplan as justification for the aff.

Durling 17, \*James Durling, a member of the Yale Law School J.D. Class of 2018; (May 1st, 2017, “May Congress Abrogate Stare Decisis by Statute?”, https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute)

As suggested in the Introduction,[66](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref66) there may be very good reasons to treat statutory stare decisis differently from constitutional stare decisis.[67](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref67) For example, in the statutory context Congress already has the power to overrule Supreme Court decisions by amending the statute in question[68](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref68)—a power it does not have in the constitutional context. But perhaps more importantly, Congress may also have the power to prescribe rules of statutory interpretation for courts [69](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute#_ftnref69)—a power it probably does not have over constitutional interpretation.[70](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref70) Congress has enacted interpretive rules in Chapter 1 of the U.S. Code, also known as the Dictionary Act, where it prescribes “Rules of Construction.”[71](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref71) Although most of these rules of interpretation might be more accurately described as definitions,[72](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref72) some involve more methodological rules of grammar.[73](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref73) In addition, Congress has codified a few other interpretive rules in scattered sections of the U.S. Code.[74](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref74) Perhaps these interpretive rules themselves violate separation of powers, but such a ruling would certainly conflict with current understandings of Congress’s power over statutory interpretation.[75](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref75) This Essay does not provide an independent defense of interpretive rules; it merely notes that current practice views them as compatible with the judicial power.[76](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref76) If Congress may overrule decisions interpreting statutes and if it may prescribe rules of statutory interpretation, Congress would also appear to have the power to prescribe a rule of interpretation requiring courts to ignore a past Supreme Court decision. Similar to Paulsen’s approach, this is not to say that courts could not look to the reasoning of prior Supreme Court cases as persuasive authority, but they could not follow the “super-strong presumption” of stare decisis famously invoked in past cases.[77](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref77) Put another way, courts would interpret federal statutes as courts in civil law jurisdictions do.[78](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref78) In addition, beyond limiting the Court from citing the narrow interpretive holding of a case, Congress might also prevent it from citing its opinions as precedent for the use of interpretive canons, a phenomenon some have called “methodological stare decisis.”[79](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref79) The most famous example of methodological stare decisis is Chevron, which is both a statutory precedent about the meaning of “stationary source” in the Clean Air Act[80](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref80) and a methodological precedent regarding judicial deference toward agency interpretations of statutes.[81](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref81) If Congress banned the Court from citing Chevron, then it would eliminate both the narrow holding and the broader canon—at least as binding precedent.

## AT: DA---Courts

### 2AC---Bipartisan

#### Plan is bipartisan.

Contreras 18, \*Jorge L. Contreras teaches in the areas of intellectual property law, property law and genetics and the law at the University of Utah. He has recently been named one of the University of Utah's Presidential Scholars, and won the 2018-19 Faculty Scholarship Award from the S.J. Quinney College of Law. Professor Contreras has previously served on the law faculties of American University Washington College of Law and Washington University in St. Louis, and was a partner at the international law firm Wilmer Cutler Pickering Hale and Dorr LLP, where he practiced transactional and intellectual property law in Boston, London and Washington DC; (August 2018, “Taking it to the Limit: Shifting U.S. Antitrust Policy Toward Standards Development”, https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1114&context=scholarship)

This being said, antitrust policy regarding standard-setting, and hold-up in particular, did not previously appear to run along party lines. In fact, many key DOJ position statements regarding hold-up, including those expressed in its 2006 and 2007 business review letters to VITA and IEEE, respectively, and the 2007 report on antitrust and IP that it produced jointly with the FTC, were developed during the Republican George W. Bush Administration. Each of these documents acknowledged the existence and potential anticompetitive effects of hold-up. At least in this area, the Obama DOJ did not appear to deviate significantly from the policies of prior administrations. As observed by FTC Commissioner Terrell McSweeny, the FTC and prior DOJ approach to combatting hold-up were based on “15 years of scholarship and bipartisan study” and should not lightly be discarded.37

### 2AC---Court Capital Theory False

#### Court capital isn’t transferrable.

Redish 95, \*Martin, Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law, teaches and writes on the subjects of federal jurisdiction, civil procedure, freedom of expression and constitutional law; (“The Constitution as Political Structure”, https://books.google.com/books?id=z3XmCwAAQBAJ&pg=PA20&lpg=PA20&dq=court+institutional+capital+transferable&source=bl&ots=0kC1kjNdWy&sig=G8dFWZ7y87qQm6ptHHdSr1X3ZgQ&hl=en&sa=X&ved=0ahUKEwjGqZHf067aAhUm4YMKHaVEB7QQ6AEIMzAC#v=onepage&q=court%20institutional%20capital%20transferable&f=false)

Choper’s assumption that the judiciary’s institutional capital is transferable from structural cases to individual rights cases is no more credible. Common sense should tell us that the public’s reaction to controversial individual rights cases—for example, cases concerning abortion, school prayer, busing, or criminal defendants’ rights—will be based largely, if not exclusively, on its feelings concerning those particular issues. There exist no grounds to believe that the public’s acceptance or rejection of these individual rights rulings would somehow be affected by anything the court says about wholly unrelated structural issues.

### 2AC---Thumper---Antitrust

#### NCAA ruling thumps.

Edelman 21, \*Marc Edelman is Professor of Law at the Zicklin School of Business (City University of New York), where he focuses on sports, antitrust, gaming, and intellectual property law; (June 21st, 2021, “Supreme Court’s Ruling Against NCAA In College Athlete Pay Case Rests On Decades Of Legal Precedent”, https://www.forbes.com/sites/marcedelman/2021/06/21/as-earlier-predicted-us-supreme-court-rules-against-ncaa-9-0/?sh=2a6bd796824b)

Back in April, I [predicted on Forbes.com](https://www.forbes.com/sites/marcedelman/2021/04/05/seven-reasons-why-the-ncaa-is-likely-to-lose-its-supreme-court-case/) that the National Collegiate Athletic Association would lose its Supreme Court antitrust case, NCAA v. Alston, in a 9-0 ruling. At the time, I explained that the most interesting question in this case would not be who would win but rather whether the U.S. Supreme Court would go even further than the U.S. Court of Appeals in reining in what the NCAA currently calls “amateurism.” Today, we [got our answer](https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf). The NCAA indeed did lose its Supreme Court case, 9-0. And Justice Brett Kavanaugh, [channeling a view of the NCAA expressed earlier](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226541), took the time to write a concurring opinion that put the writing on the wall that many other NCAA rules—beyond just limits on educational-related, in-kind benefits—might also one day be found to violate Section 1 of the Sherman Act.

### 2AC---No Swing Vote

#### 6-3 majority turns swing votes into bystanders and provides political cover for inevitable landmark cases.

Stevenson 21, \*Peter W. Stevenson writes The 5-Minute Fix newsletter and covers national and state politics for The Fix. He's been at The Washington Post since 2015 and has been the senior political video producer since 2017; (May 20th, 2021, “Chief Justice John Roberts: From key swing vote to potential bystander?”, https://www.washingtonpost.com/politics/2021/05/20/chief-justice-john-roberts-key-swing-vote-potential-bystander/)

Barrett’s confirmation didn’t just give conservatives on the court a 6-3 majority; it also means Chief Justice John G. Roberts Jr. is no longer as likely to be a swing vote on the court — marking a sudden change to the amount of power Roberts has to steer the direction of the court. When President Donald Trump made his third and final [Supreme Court](https://www.washingtonpost.com/politics/courts_law/supreme-court-abortion-roe-v-wade/2021/05/17/cdaf1dd6-b708-11eb-a6b1-81296da0339b_story.html?itid=lk_inline_manual_5) nomination, putting Barrett in the seat previously occupied by Ruth Bader Ginsburg, the court became more conservative than it had been [in more than 50 years](https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/?itid=lk_inline_manual_5). With a conservative majority on the court, Republicans hope justices could make a series of landmark decisions on issues their electorate is passionate about. At the top of that list is abortion rights. By the time Trump took office, Republicans had succeeded in making the nomination of Supreme Court justices an issue that drives voter turnout in a way Democrats couldn’t. In exit polls conducted after Trump’s election in 2016, [one-fifth of voters said court nominations](https://www.washingtonpost.com/politics/2020/09/18/where-polling-stands-supreme-court-vaults-into-top-tier-campaign-issues/?itid=lk_inline_manual_8) were the most important factor in their vote, and those voters broke for Trump by a 15-point margin. When Ginsburg died last September, handing Trump the opportunity to make a third nomination and swing the court even further to the right, it became a more urgent issue for Democrats. About two-thirds of Joe Biden supporters said Supreme Court nominees were “very important” to their vote in an August 2020 Pew Research [poll](https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/), while about 6 in 10 Trump supporters said the same. But Trump was already on his way to nominating Barrett, a right-leaning justice who gave conservatives on the court what amounts to a majority. That got Republicans excited — and made Democrats nervous — about the possibility of the court making the kind of rulings conservatives have had on their wish list for decades, starting with overturning Roe v. Wade, the landmark abortion case. The 2020 Democrats want to ‘codify’ Roe v. Wade. Here’s what that means. The landmark 1973 Supreme Court decision established a woman’s constitutional right to have an abortion. Some Democrats want to make it into law. (Blair Guild/The Washington Post) Now, the Mississippi law is under the court’s microscope. The law hasn’t gone into effect because of lower-court rulings that say it goes against decades of Supreme Court precedent, including Roe v. Wade. But the Supreme Court has more latitude to revisit such precedents when it is deemed warranted. “In an unbroken line dating to Roe v. Wade, the Supreme Court’s abortion cases have established (and affirmed, and reaffirmed) a woman’s right to choose an abortion before viability,” Judge Patrick Higginbotham wrote for the U.S. Court of Appeals for the 5th Circuit. The Supreme Court has long declined to take on such cases, often falling back on the precedent set by previous decisions. Under Roberts, even with a 5-4 conservative majority after Trump’s first two nominees, Neil M. Gorsuch and Brett M. Kavanaugh, were confirmed, the court seemed reluctant to take on big, landmark cases — and certainly to challenge precedent on politically sensitive issues. It has been suggested that Roberts aimed to make the court appear less political by avoiding those sensitive issues. Some conservatives have even said he lacks the will to address issues such as abortion at all. But such things could increasingly be out of his hands. Roberts’s status as a key swing vote was solidified by the [2012 decision he wrote](https://www.washingtonpost.com/politics/supreme-court-to-rule-thursday-on-health-care-law/2012/06/28/gJQAarRm8V_story.html?itid=lk_inline_manual_17) upholding the Affordable Care Act’s constitutionality, in which the individual care mandate was preserved as a tax, a decision that infuriated conservatives. But his supposed efforts to depoliticize the court were blunted by Barrett’s appointment. In a 6-3 court, Roberts is no longer a swing vote. Even if he were to side with the liberal-leaning justices, they could be outvoted 5-4. This [isn’t the first case](https://www.washingtonpost.com/politics/courts_law/supreme-court-guns-second-amendment-national-rifle-association/2021/04/26/83e865c8-a690-11eb-8c1a-56f0cb4ff3b5_story.html?itid=lk_inline_manual_21) that has seemingly made Roberts’s vote potentially less potent — but it has the potential to be the most high-profile (though we have no idea what the court will do with it).

### 2AC---AT: Impact

#### Population growth is stable and sustainable

Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford (Dr. Toby Ord, 2020, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 113-115)

Climate change is not the only form of environmental damage we are inflicting upon the Earth. Might we face other environmental existential risks through overpopulation, running out of critical resources or biodiversity loss? When environmentalism rose to prominence in the 1960s and 1970s, one major concern was overpopulation. It was widely feared that humanity’s rapidly growing population would far outstrip the Earth’s capacity to feed people, precipitating an environmental and humanitarian catastrophe. The most prominent advocate of this view, Paul Ehrlich, painted an apocalyptic vision of the near future: “Most of the people who are going to die in the greatest cataclysm in the history of man have already been born.”93 This catastrophe would come soon and pose a direct existential risk. Ehrlich predicted: “Sometime in the next 15 years, the end will come—and by ‘the end’ I mean an utter breakdown of the capacity of the planet to support humanity.”94 These confident predictions of doom were thoroughly mistaken. Instead of rising to unprecedented heights, the prevalence of famine dramatically declined. Less than a quarter as many people died of famine in the 1970s as in the 1960s, and the rate has since halved again.95 Instead of dwindling to a point of crisis, the amount of food per person has steadily risen over the last fifty years. We now have 24 percent more food per person than when Ehrlich’s book, The Population Bomb, was published in 1968. Much of the credit for this is owed to the Green Revolution, in which developing countries rose to the challenge of feeding their people. They did so by modernizing their farming, with improved fertilizers, irrigation, automation and grain varieties.96 Perhaps the greatest single contribution was from Norman Borlaug, who received the Nobel Prize for his work breeding the new, high-yield varieties of wheat, and who may be responsible for saving more lives than anyone else in history.97 But the improvements in agriculture are just part of the story. The entire picture of overpopulation has changed. Population growth is almost always presented as an exponential process—increasing by a fixed percentage each year—but in fact that is rarely the case. From about 1800 to 1960 the world population was growing much faster than an exponential. The annual growth rate was itself growing from 0.4 percent all the way to an unprecedented rate of 2.2 percent in 1962. These trends rightly warranted significant concern about the human and environmental consequences of this rapid population increase. But suddenly, the situation changed. The population growth rate started to rapidly decline. So far it has halved, and it continues to fall. Population is now increasing in a roughly linear manner, with a fixed number of people being added each year instead of a fixed proportion. This change has been driven not by the feared increase in death rates, but by a dramatic change in fertility, as more and more countries have undergone the demographic transition to a small family size. In 1950, the average number of children born to each woman was 5.05. It is now just 2.47—not so far above the replacement rate of 2.1 children per woman.98 While we can’t know what will happen in the future, the current trends point to a rapid stabilization of the population. The current linear increase is likely to be an inflection point in the history of human population: the point where the curve finally starts to level off. We may never again see the rapid population growth of the mid-twentieth century. In the last eighty years, population grew threefold. In the next eighty years (to 2100) it is expected to go up just 50 percent, to about 11 billion. For every person alive now, we’ll have to make room for an extra half a person. This will be a challenge, but a much easier one than last century.

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## AT: DA---Japan

### Top---2AC

#### Uniqueness outweighs link.

Kim 20, Seoul-based reporter for the Associated Press (Tong-hyung Kim, 2020, The Diplomat, “Leaders of America’s Asian Allies Call President-Elect Biden,” https://thediplomat.com/2020/11/leaders-of-americas-asian-allies-call-president-elect-biden/)

Japanese Prime Minister Suga Yoshihide said he and Biden during their call reaffirmed the importance of their countries’ alliances and agreed to further deepen it in face of China’s growing influence and North Korea’s nuclear threat. “We had a very meaningful telephone conversation as I will work with President-elect Biden to push forward measures to strengthen the Japan-U.S. alliance,” Suga told reporters after speaking to Biden on the phone for about 15 minutes. Biden’s office said the leaders “spoke about their shared commitment to tackle climate change, strengthen democracy around the world, and reinforce the U.S.-Japan alliance as the cornerstone of a prosperous and secure Indo-Pacific region.” Suga said he told Biden that Japan wants to pursue the “Free and Open Indo-Pacific,” a vision that it has been promoting with the United States to include “like-minded” countries in the region, including Australia, India, and Southeast Asian countries that share concerns about China. China has built and militarized man-made islands in the South China Sea and is pressing its claim to virtually all of the sea’s key fisheries and waterways. Japan is concerned about China’s claim to the Japanese-controlled Senkaku Islands, called Diaoyu in China, in the East China Sea. China has denied it is expansionist and said it is only defending its territorial rights. Suga said Biden gave him reassurance that Washington is committed to protecting Japan’s territorial rights to the Senkakus under the bilateral security pact in case of military clash.

#### If they win spill-over, it’s in line with global proposals for antitrust enforcement---resuscitates trade.

Leonardo ’16 [Lizl; 2016; J.D. Candidate, DePaul University College of Law, B.S. from De La Salle University-Manila, Philippines; DePaul Law Review, “A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce,” vol. 66]

Moreover, having a more consistent approach in cases like this will strengthen and harmonize the partnership across nations. Needless to say, the cooperation between these countries can play a significant role in attaining this objective. Bilateral agreements between the countries have proven that, though challenging, implementing this stricter rule is not impossible.423 International trade rules, such as the General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), and agreements between countries, imply the general acceptance of this proposal.424 The rapid growth in globalization has forced governments to institute and enforce policies that both protect domestic products from multinational firms and encourage the domestic firms to compete internationally, in furtherance of international trade.425

#### marked

One of the partnerships the European Union (EU) and the U.S. governments are currently working on is called the Transatlantic Trade and Investment Partnership (T-TIP).426 Its aim is to further develop the strong relationship nations have and leverage that relationship to boost economic growth and international competitiveness.427 The agreement purports to provide greater transparency around trade and investment regulation while ensuring the quality of the products.428 As part of the agreement, the governments seek to eliminate all tariffs, other duties, and charges on trade in various products between the United States and the European Union.429

The proponents of T-TIP point out that the elimination of tariffs and quotas will, among other things, entail lower costs of import to each of the regions, put products from one area “on equal footing” with the products from another, create more jobs, lower the unemployment rate, increase competitiveness, and improve the overall growth of members of the agreement.430 Although the agreement seems ambitious at this time, it intends to link two of the world’s largest economies to generate a third of the world’s GDP.431 Critics argue, however, that the deregulation of several national laws—possibly resulting in lower consumer standards, as well as compromised laws covering intellectual property, food safety, privacy and data collection, and democratic legitimacy—are all steps in the wrong direction.432

Having an established rule that foreign companies’ non-import trade conduct can be subjected to U.S. antitrust laws, as long as the conduct had an “immediate consequence” on U.S. commerce, could mitigate the risks associated with the opening of U.S. and EU markets. Foreign companies that will be encouraged to invest in the United States as a result of T-TIP will have an understanding of the laws and the possible repercussions of any business transaction in which they take part. These companies do not need to determine if and how any of their strategic decisions can be subjected to either the Seventh or Ninth Circuit rulings before securing deals or signing agreements. The certainty will provide companies with notice and understanding of how the law affects their decisions, thereby making their investments less risky. In return, investments could become safer, eventually having a favorable impact on the continued development of the world economy.

#### No Indo-Pacific instability.

Singh 20 – Ameya Pratap Singh is a DPhil student in South Asia at the University of Oxford. [Why Another Sino-Indian War Is Unlikely, 6-1-20, https://thediplomat.com/2020/06/why-another-sino-indian-war-is-unlikely/]

However, contrary to widespread fears, another Sino-Indian war is unlikely to be in the offing. In the shadow of nuclear weapons, a limited conventional war on the Sino-Indian border — somewhat akin to the month-long clash in 1962 – can be avoided for several reasons. First, this is because of the nature of the dispute and the lack of ideological fundamentalism and issue indivisibility. Unlike the United States, which has increasingly begun to view the geopolitical competition with China as a battle for values such as freedom of navigation or democracy or the preservation of the liberal international order, India and China do not see each other through such an ideological lens. The authoritarian regime of the Chinese Community Party is not perceived to be antithetical to India’s democratic character, and vice versa. India’s long-term strategy, as former Foreign Secretary Vijay Gokhale puts it, is to retain its strategic autonomy, and pursue alignments based “on issues, not ideology.” Hence, while both parties have been cautious of each other’s maneuvers on the border, they have refrained from linking these to existential attributes of national identity, which are notorious for inflating the significance of disputed territories — for example in the case of Kashmir, Tibet, or Taiwan. In fact, Beijing has long held that the border dispute is a remnant of British colonialism and its reckless cartographic practices, rather than being driven by India’s territorial expansionism. On the Indian side, Army Chief General Manoj Mukund Naravane, in a break from traditional bouts of recrimination between adversaries, accepted that due to differing notions of the LAC, “both sides” were guilty of aggressive behavior in Eastern Ladakh and North Sikkim. This choice of words effectively yielded the use of any victimhood narratives that could be mobilized to create moral justification for retaliatory action. Second, the risks of inadvertent pre-emption are also not nearly as high as they were in 1962, when Nehru’s ill-fated “forward policy” was met by overwhelming Chinese military force. This is because of a series of five agreements signed between India and China to address disputes arising over the LAC: 1) the 1993 Agreement on the Maintenance of Peace and Tranquility along the LAC; 2) the 1996 Agreement on Confidence-Building Measures in the Military Field Along the LAC, 3) the 2005 Protocol on Modalities for the Implementation of Confidence-Building Measures in the Military Field Along the LAC; 4) the 2012 Agreement on the Establishment of a Working Mechanism for Consultation and Coordination on India-China Border Affairs; and 5) the 2013 Border Defense Cooperation Agreement. These agreements provide a modus operandi for diplomatic engagement at the military and political levels, as well as a set of “status quo” commitments both sides can return to in case of escalation. They proved effective during the 16-day stand-off between Indian and Chinese forces in eastern Ladakh near the village of Chumar, the military confrontation at Burtse in the Depsang plains in northern Ladakh in 2015, and the Doklam crisis in 2017. Indian Ministry of External Affairs spokesperson Anurag Srivastava has also affirmed New Delhi’s intention to de-escalate the current stand-off based on these agreements. He stated that “the two sides [already] have established mechanisms to resolve such situations peacefully through dialogue.” Similarly, the Chinese official statement also reiterated Beijing’s commitment “to uphold peace and tranquility in border areas.” Summit diplomacy is likely to return if the crisis escalates further. Third is the element of ambiguity and the “fog” surrounding the details of the military stand-off. Typically, analysts have viewed “nationalist strongmen” as promoters of aggressive state behavior. But, in this case, the ability of both governments to control national media, and the inscrutability of the facts related to the dispute, aided efforts to manage domestic audience costs. For instance, media reports of 15-20 personnel of the Indo-Tibetan Border Police force being detained by the Chinese were categorically refuted by the Indian side. This meant that no domestic pressure for retaliation arose and no great reputational damage was suffered. In the aftermath of the Doklam crisis, similar ambiguity allowed both sides to claim tactical victories for themselves and diffuse the situation successfully. In India, criticism has been incrementally rising with respect to the Modi government’s lack of transparency on the matter, but it is unlikely to reach electorally harmful proportions. Lastly, the material costs of limited war for both parties far outweigh potential gains. For China, conflict on the border with India would diminish its ability to meet key security challenges in the South China Sea, thus making it vulnerable to the United States, which Beijing considers its primary security competitor. It seems unlikely that Beijing would want to risk a two-front war. Additionally, reputational damages suffered due to COVID-19, pre-existing fears surrounding China’s rise, and India’s conventional and nuclear deterrence capabilities will all temper Beijing’s pre-emptive use of military force. Similarly, for India, the primary security challenge remains Pakistan-based terrorist infiltration on the Kashmir border. More importantly, beyond the protection of vital strategic points on either side that allow military forces to effectively defend and patrol their territories in challenging high-altitude mountainous regions, the vast tracts of disputed land along the LAC do not hold any important material resources such as oil, precious mineral reserves, or ethnic-kin populations. The benefits of territorial aggrandizement are therefore, limited to deterrence value and the natural terrain offers few advantages to offensive forces.

## AT: DA---FTC

### 2AC---Frontline

#### Healthcare AND Big Tech thumper

Levine 8-25-2021, master’s degree from the Columbia University Graduate School of Journalism and a bachelor of arts in English from the University of Pennsylvania. She is also an alumna of the Fellowships at Auschwitz for the Study of Professional Ethics, a program in Germany and Poland that explores the ethics of reporting on politics, war and genocide (Alexandra, “How Biden's tech trustbuster could change health care,” *Politico*, <https://www.politico.com/newsletters/future-pulse/2021/08/25/how-bidens-tech-trustbuster-could-change-health-care-797333>)

Lina Khan’s Federal Trade Commission has its eyes on health care. The agency known for efforts to rein in Big Tech companies like Facebook and Amazon is also enmeshed in high-stakes health care and health tech battles that extend well beyond Silicon Valley. Case in point: The FTC trial that kicked off yesterday examining monopoly concerns in the market for cancer screening technology. (More on that below.) That closely watched antitrust case — involving the giant Illumina and startup Grail — predates Khan’s confirmation as FTC chair. But it underscores how health issues are looming over the agenda, particularly heading into the pandemic's second year. The way health care companies and consumer health apps handle sensitive data “is an area that I'm sure [Khan’s] very, very interested in,” said Jessica Rich, former director of the FTC’s consumer protection bureau, adding that the Biden administration's FTC will also be closely scrutinizing hospital mergers. “I expect her and the commission to take a very bold approach to what constitutes harm for both,” Rich said. “I expect her to pay close attention to algorithms and potential discrimination in health care, both denials and pricing issues which the FTC's laws can address.” The FTC’s jurisdiction touches nearly the entire health economy. While its competition bureau looks at health care mergers like the Illumina-Grail deal, its consumer protection side is focused on health privacy and data security issues, as well as fighting bogus medical claims on everything from weight loss to Covid cures. When Congress passed the Covid-19 Consumer Protection Act last year, the agency was granted new authority to police Covid scams. Although Khan hasn't spoken publicly about her health care agenda, she's likely to take issue with health apps and companies whose business models maximize, incentivize and monetize data collection. Of particular concern is how firms disclose what they’re doing with consumers’ data — and whether it may still be deceptive or unfair.

#### No link:

#### 1---the plan is a federal court mandate that does not require new FTC resources for implementation.

#### 2---last year’s lawsuit proves it’s equally likely the plan is enforced by the DoJ.

#### 3 ⁠— no ev says there’d be cuts OR they’d cut from privacy

#### Antitrust inevitable

James V. 1NC Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

#### Biden’s XO solves

Posner 21, professor at the University of Chicago Law School (Eric, 7-21-2021, "The Antitrust War’s Opening Salvo", Project Syndicate, <https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07>. Accessed 7-22-21)

The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality.

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

#### To win the DA, they need to remove all FTC antitrust responsibilities

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

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### The prospect of antitrust intervention deters violations---that’s Melamed and Shapiro---no enforcement necessary.

Cheng 13, \*Thomas Cheng, B.A. (Yale), J.D. (Harvard), B.C.L. (Oxon); Attorney & Counsellor, New York State; Associate Professor, Faculty of Law, The University of Hong Kong; (2013, “Putting Innovation Incentives Back in the Patent-Antitrust Interface”, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1195&context=njtip>), ability edited

Imposing a duty to license on opportunistic patentees may solve this problem. If these patentees know that the courts may step in and mandate licensing at a reasonable royalty rate,214 they will be induced to enter into negotiations with follow-on innovators in good faith.215 The threat of compulsory licensing may become a default background legal rule against which negotiations between initial and follow-on innovators take place. The instances in which the courts need to intervene could be few.

#### FTC overload now.

Burke ’21 [Henry and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>]

Even if the will to stop it exists, the FTC doesn’t have the funding to stop this boom. In fact, it hasn’t had the funding to keep up with a steady uptick in mergers in years. Aside from the recent spike, the total number of premerger filings [increased](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by 80 percent over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost doubled to 2089.

While the number of transactions the FTC is charged with regulating has increased steadily, the number of enforcement actions — challenges to anticompetitive mergers or conduct — has stagnated.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw 22 enforcement actions for 1166 reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for 2089 mergers, meaning there was only one FTC enforcement action for every 99 mergers.

Overall funding and staffing levels at the FTC have similarly stagnated. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[indisputable](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has not kept up with market demands; according to Slaughter, the FTC budget has only increased by 13% since 2010 and the employee headcount decreased. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

#### \*\*\*\*\*No impact to A.I.

— AT: Musk, Hawking, and Bostrom

Shermer 17 — Michael Shermer (Publisher of Skeptic magazine, a monthly columnist for Scientific American, and a Presidential Fellow at Chapman University), April 2017, “Why Artificial Intelligence Is Not an Existential Threat,” Skeptic, vol. 22, no. 2, pp. 29–35.

Why AI is not an Existential Threat First, most AI doomsday prophecies are grounded in the false analogy between human nature and computer nature, or natural intelligence and artificial intelligence. We are thinking machines, but natural selection also designed into us emotions to shortcut the thinking process because natural intelligences are limited in speed and capacity by the number of neurons that can be crammed into a skull that has to pass through a pelvic opening at birth, whereas artificial intelligence need not be so restricted. We don't need to compute the caloric value of foods, for example, we just feel hungry. We don't need to calculate the waist-to-hip ratio of women or the shoulder-to-waist ratio of men in our quest for genetically healthy potential mates; we just feel attracted to someone and mate with them. We don't need to work out the genetic cost of raising someone else's offspring if our mate is unfaithful; we just feel jealous. We don't need to figure the damage of an unfair or non-reciprocal exchange with someone else; we just feel injustice and desire revenge. Emotions are proxies for getting us to act in ways that lead to an increase in reproductive success, particularly in response to threats faced by our Paleolithic ancestors. Anger leads us to strike out, fight back, and defend ourselves against danger. Fear causes us to pull back, retreat, and escape from risks. Disgust directs us to push out, eject, and expel that which is bad for us. Computing the odds of danger in any given situation takes too long. We need to react instantly. Emotions shortcut the information processing power needed by brains that would otherwise become bogged down with all the computations necessary for survival. Their purpose, in an ultimate causal sense, is to drive behaviors toward goals selected by evolution to enhance survival and reproduction. AIs -- even AGIs and ASIs -- will have no need of such emotions and so there would be no reason to program them in unless, say, terrorists chose to do so for their own evil purposes. But that's a human nature problem, not a computer nature issue. To believe that an ASI would be "evil" in any emotional sense is to assume a computer cognition that includes such psychological traits as acquisitiveness, competitiveness, vengeance, and bellicosity, which seem to be projections coming from the mostly male writers who concoct such dystopias, not features any programmer would bother including, assuming that it could even be done. What would it mean to program an emotion into a computer? When IBM's Deep Blue defeated chess master Garry Kasparov in 1997, did it feel triumphant, vengeful, or bellicose? Of course not. It wasn't even "aware" -- in the human sense of self-conscious knowledge -- that it was playing chess, much less feeling nervous about possibly losing to the reigning world champion (which it did in the first tournament played in 1996). In fact, toward the end of the first game of the second tournament, on the 44th move, Deep Blue made a legal but incomprehensible move of pushing its rook all the way to the last row of the opposition side. It accomplished nothing offensively or defensively, leading Kasparov to puzzle over it out of concern that he was missing something in the computer's strategy. It turned out to be an error in Deep Blue's programming that led to this fail-safe default move. It was a bug that Kasparov mistook as a feature, and as a result some chess experts contend it led him to be less confident in his strategizing and to second-guess his responses in the subsequent games. It even led him to suspect foul play and human intervention behind Deep Blue, and this paranoia ultimately cost him the tournamentt.[ 13] Computers don't get paranoid, the HAL 9000 computer in 2001 notwithstanding. Or consider Watson, the IBM computer built by David Ferrucci and his team of IBM research scientists tasked with designing an AI that could rival human champions at the game of Jeopardy! This was a far more formidable challenge than Deep Blue faced because of the prerequisite to understand language and the often multiple meanings of words, not to mention needing an encyclopedic knowledge of trivia (Watson had access to Wikipedia for this). After beating the all-time greatest Jeopardy! champions Ken Jennings and Brad Rutter in 2011, did Watson feel flushed with pride after its victory? Did Watson even know that it won Jeopardy!? I put the question to none other than Ferrucci himself at a dinner party in New York in conjunction with the 2011 Singularity Summit. His answer surprised me: "Yes, Watson knows it won Jeopardy!" I was skeptical. How could that be, since such self-awareness is not yet possible in computers? "Because I told it that it won," he replied with a wry smile. Sure, and you could even program Watson or Deep Blue to vocalize a Howard Dean-like victory scream when it wins, but that is still a far cry from a computer feeling triumphant. This brings to mind the "hard problem" of consciousness -- if we don't understand how this happens in humans, how could we program it into computers? As Steven Pinker elucidated in his answer to the 2015 Edge Question on what to think about machines that think, "AI dystopias project a parochial alpha-male psychology onto the concept of intelligence. They assume that superhumanly intelligent robots would develop goals like deposing their masters or taking over the world." It is equally possible, Pinker suggests, that "artificial intelligence will naturally develop along female lines: fully capable of solving problems, but with no desire to annihilate innocents or dominate the civilization."[ 14] So the fear that computers will become emotionally evil are unfounded, because without the suite of these evolved emotions it will never occur to AIs to take such actions against us. What about an ASI inadvertently causing our extinction by turning us into paperclips, or tiling the entire Earth's surface with solar panels? Such scenarios imply yet another emotion -- the feeling of valuing or wanting something. As the science writer Michael Chorost adroitly notes, when humans resist an AI from undertaking any form of global tiling, it "will have to be able to imagine counteractions and want to carry them out." Yet, "until an AI has feelings, it's going to be unable to want to do anything at all, let alone act counter to humanity's interests and fight off human resistance." Further, Chorost notes, "the minute an A.I. wants anything, it will live in a universe with rewards and punishments -- including punishments from us for behaving badly. In order to survive in a world dominated by humans, a nascent A.I. will have to develop a humanlike moral sense that certain things are right and others are wrong. By the time it's in a position to imagine tiling the Earth with solar panels, it'll know that it would be morally wrong to do so."[ 15] From here Chorost builds on an argument made by Peter Singer in The Expanding Circle (and Steven Pinker in The Better Angels of Our Nature[ 16] that I also developed in The Moral Arc[ 17] and Robert Wright explored in Nonzero[ 18]), and that is the propensity for natural intelligence to evolve moral emotions that include reciprocity, cooperativeness, and even altruism. Natural intelligences such as ours also includes the capacity to reason, and once you are on Singer's metaphor of the "escalator of reason" it can carry you upward to genuine morality and concerns about harming others. "Reasoning is inherently expansionist. It seeks universal application," Singer notes.[ 19] Chorost draws the implication: "AIs will have to step on the escalator of reason just like humans have, because they will need to bargain for goods in a human-dominated economy and they will face human resistance to bad behavior."[ 20] Finally, for an AI to get around this problem it would need to evolve emotions on its own, but the only way for this to happen in a world dominated by the natural intelligence called humans would be for us to allow it to happen, which we wouldn't because there's time enough to see it coming. Bostrom's "treacherous turn" will come with road signs ahead warning us that there's a sharp bend in the highway with enough time for us to grab the wheel. Incremental progress is what we see in most technologies, including and especially AI, which will continue to serve us in the manner we desire and need. Instead of Great Leap Forward or Giant Fall Backward, think Small Steps Upward. As I proposed in The Moral Arc, instead of Utopia or dystopia, think protopia, a term coined by the futurist Kevin Kelly, who described it in an Edge conversation this way: "I call myself a protopian, not a Utopian. I believe in progress in an incremental way where every year it's better than the year before but not by very much -- just a micro amount."[ 21] Almost all progress in science and technology, including computers and AI, is of a protopian nature. Rarely, if ever, do technologies lead to either Utopian or dystopian societies. Pinker agrees that there is plenty of time to plan for all conceivable contingencies and build safeguards into our AI systems. "They would not need any ponderous 'rules of robotics' or some newfangled moral philosophy to do this, just the same common sense that went into the design of food processors, table saws, space heaters, and automobiles." Sure, an ASI would be many orders of magnitude smarter than these machines, but Pinker reminds us of the AI hyperbole we've been fed for decades: "The worry that an AI system would be so clever at attaining one of the goals programmed into it (like commandeering energy) that it would run roughshod over the others (like human safety) assumes that AI will descend upon us faster than we can design fail-safe precautions. The reality is that progress in AI is hype-defyingly slow, and there will be plenty of time for feedback from incremental implementations, with humans wielding the screwdriver at every stage."[ 22] Former Google CEO Eric Schmidt agrees, responding to the fears expressed by Hawking and Musk this way: "Don't you think the humans would notice this, and start turning off the computers?" He also noted the irony in the fact that Musk has invested $1 billion into a company called OpenAI that is "promoting precisely AI of the kind we are describing."[ 23] Google's own DeepMind has developed the concept of an AI off-switch, playfully described as a "big red button" to be pushed in the event of an attempted AI takeover. "We have proposed a framework to allow a human operator to repeatedly safely interrupt a reinforcement learning agent while making sure the agent will not learn to prevent or induce these interruptions," write the authors Laurent Orseau from DeepMind and Stuart Armstrong from the Future of Humanity Institute, in a paper titled "Safely Interruptible Agents." They even suggest a precautionary scheduled shutdown every night at 2 AM for an hour so that both humans and AI are accustomed to the idea. "Safe interruptibility can be useful to take control of a robot that is misbehaving and may lead to irreversible consequences, or to take it out of a delicate situation, or even to temporarily use it to achieve a task it did not learn to perform or would not normally receive rewards for this."[ 24] As well, it is good to keep in mind that artificial intelligence is not the same as artificial consciousness. Thinking machines may not be sentient machines. Finally, Andrew Ng of Baidu responded to Elon Musk's ASI concerns by noting (in a jab at the entrepreneur's ambitions for colonizing the red planet) it would be "like worrying about overpopulation on Mars when we have not even set foot on the planet yet."[ 25] Both Utopian and dystopian visions of AI are based on a projection of the future quite unlike anything history has given us. Yet, even Ray Kurzweil's "law of accelerating returns," as remarkable as it has been has nevertheless advanced at a pace that has allowed for considerable ethical deliberation with appropriate checks and balances applied to various technologies along the way. With time, even if an unforeseen motive somehow began to emerge in an AI we would have the time to reprogram it before it got out of control. That is also the judgment of Alan Winfield, an engineering professor and co-author of the Principles of Robotics, a list of rules for regulating robots in the real world that goes far beyond Isaac Asimov's famous three laws of robotics (which were, in any case, designed to fail as plot devices for science fictional narratives).26 Winfield points out that all of these doomsday scenarios depend on a long sequence of big ifs to unroll sequentially: "If we succeed in building human equivalent AI and if that AI acquires a full understanding of how it works, and if it then succeeds in improving itself to produce super-intelligent AI, and if that super-AI, accidentally or maliciously, starts to consume resources, and if we fail to pull the plug, then, yes, we may well have a problem. The risk, while not impossible, is improbable."[ 27]

#### No resources AND thumpers.

Kades ‘7-28 [Michael; Director of Markets and Competition Policy, former attorney at the Federal Trade Commission; Equitable Growth Foundation, “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law,” <https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/>]

As the report explains, “Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.” In the face of such warnings, it is a particularly bad time for the Supreme Court to unanimously reject 40 years of lower court rulings and conclude that the Federal Trade Commission can neither force companies to give up the profits they earned by violating the law nor compensate the victims of those violations. (The first remedy is called disgorgement, and the second remedy is called restitution.) Whether the Supreme Court in April correctly interpreted the statute at issue in the case, AMG Capital Management LLC v. Federal Trade Commission, is less important than its implications. Professor [Andy Gavil discusses a potential silver lining](https://equitablegrowth.org/competitive-edge-the-silver-lining-for-antitrust-enforcement-in-the-supreme-courts-embrace-of-textualism/) in the Supreme Court’s decision—the glass-half-full approach. He argues that if the Supreme Court faithfully applies its approach to statutory interpretation, then it could open the door to broader application of the antitrust laws. I look at the direct impact of the decision—the glass-half-empty approach. I argue that the decision deprives the antitrust agency of a critical, albeit imperfect, weapon that has deterred anticompetitive conduct particularly in the pharmaceutical industry. Although it has used disgorgement in competition cases sparingly, those awards have deterred the entire industry from engaging in the challenged conduct. Before the recent Supreme Court decision, the disgorgement awards in competition cases went far beyond the impact in a single case. The savings include benefits from the conduct that did not occur. If the commission cannot seek monetary remedies, then companies will keep the rewards of their illegal conduct. Perversely, the companies causing the greatest harm will benefit the most from April’s decision. The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

### 2AC---AT: Algorithmic Bias

#### AI bias inevitable – 4 reasons

Hao 19 This is how AI bias really happens—and why it’s so hard to fix -- by Karen Hao February 4, 2019 https://www.technologyreview.com/2019/02/04/137602/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix/

Unknown unknowns. The introduction of bias isn’t always obvious during a model’s construction because you may not realize the downstream impacts of your data and choices until much later. Once you do, it’s hard to retroactively identify where that bias came from and then figure out how to get rid of it. In Amazon’s case, when the engineers initially discovered that its tool was penalizing female candidates, they reprogrammed it to ignore explicitly gendered words like “women’s.” They soon discovered that the revised system was still picking up on implicitly gendered words—verbs that were highly correlated with men over women, such as “executed” and “captured”—and using that to make its decisions. Imperfect processes. First, many of the standard practices in deep learning are not designed with bias detection in mind. Deep-learning models are tested for performance before they are deployed, creating what would seem to be a perfect opportunity for catching bias. But in practice, testing usually looks like this: computer scientists randomly split their data before training into one group that’s actually used for training and another that’s reserved for validation once training is done. That means the data you use to test the performance of your model has the same biases as the data you used to train it. Thus, it will fail to flag skewed or prejudiced results. Lack of social context. Similarly, the way in which computer scientists are taught to frame problems often isn’t compatible with the best way to think about social problems. For example, in a new paper, Andrew Selbst, a postdoc at the Data & Society Research Institute, identifies what he calls the “portability trap.” Within computer science, it is considered good practice to design a system that can be used for different tasks in different contexts. “But what that does is ignore a lot of social context,” says Selbst. “You can’t have a system designed in Utah and then applied in Kentucky directly because different communities have different versions of fairness. Or you can’t have a system that you apply for ‘fair’ criminal justice results then applied to employment. How we think about fairness in those contexts is just totally different.” The definitions of fairness. It’s also not clear what the absence of bias should look like. This isn’t true just in computer science—this question has a long history of debate in philosophy, social science, and law. What’s different about computer science is that the concept of fairness has to be defined in mathematical terms, like balancing the false positive and false negative rates of a prediction system. But as researchers have discovered, there are many different mathematical definitions of fairness that are also mutually exclusive. Does fairness mean, for example, that the same proportion of black and white individuals should get high risk assessment scores? Or that the same level of risk should result in the same score regardless of race? It’s impossible to fulfill both definitions at the same time (here’s a more in-depth look at why), so at some point you have to pick one. But whereas in other fields this decision is understood to be something that can change over time, the computer science field has a notion that it should be fixed. “By fixing the answer, you’re solving a problem that looks very different than how society tends to think about these issues,” says Selbst.

#### They miss the root cause of AI bias

Eisenstat 19 The Real Reason Tech Struggles With Algorithmic Bias, YAEL EISENSTAT, 02.12.2019, WIRED.

These are mistakes made while trying to do the right thing. But they demonstrate why tasking untrained engineers and data scientists with correcting bias is, at the broader level, naïve, and at a leadership level insincere. I believe that many of my former coworkers at Facebook fundamentally want to make the world a better place. I have no doubt that they feel they are building products that have been tested and analyzed to ensure they are not perpetuating the nastiest biases. But the company has created its own sort of insular bubble in which its employees' perception of the world is the product of a number of biases that are engrained within the Silicon Valley tech and innovation scene. This is exactly why the tech industry needs to actually invest in real cognitive bias training and empower true experts to address these issues, as opposed to spouting platitudes. Countering bias takes work. While I don’t expect companies to put their employees through the same rigorous training of intelligence analysts, raising awareness of their cognitive limitations through workshops and training would be one concrete step. Last year, when I attended a workshop in Sweden, a trainer started a session with a typical test. As soon as he put the slide up, I knew this was a cognitive bias exercise; my brain scrambled to find the trick. Yet despite my critical thinking skills and analytic integrity, I still fell right into the trap of what is called “pattern bias”, in which we see the patterns that we expect to see. At a workshop I gave to a group of trained intelligence and security analysts in New York a few months later, they also all fell for a number of bias traps. No matter how trained or skilled you may be, it is 100 percent human to rely on cognitive bias to make decisions. Daniel Khaneman’s work challenging the assumptions of human rationality, among other theories of behavioral economics and heuristics, drives home the point that human beings cannot overcome all forms of bias. But slowing down and learning what those traps are—as well as how to recognize and challenge them—is critical. As humans continue to train models on everything from stopping hate speech online to labeling political advertising to more fair and equitable hiring and promotion practices, such work is crucial. Becoming overly reliant on data—which in itself is a product of availability bias—is a huge part of the problem. In my time at Facebook, I was frustrated by the immediate jump to “data” as the solution to all questions. That impulse often overshadowed necessary critical thinking to ensure that the information provided wasn't tainted by issues of confirmation, pattern, or other cognitive biases. There is not always a strict data-driven answer to human nature. The belief that simply running a data set will solve for every challenge and every bias is problematic and myopic. To counter algorithmic, machine, and AI bias, human intelligence must be incorporated into solutions, as opposed to an over-reliance on so-called “pure” data. While there are positive signs that the industry is seeking real solutions—such as IBM Research’s work to reduce discrimination already present in a training dataset—such efforts will not solve for human nature. Some of the proposed fixes include revisiting algorithms or updating the data being fed to machines. But it is still humans who are developing the underlying systems. Attempting to avoid bias without a clear understanding of what that truly means will inevitably fail.

# 1AR

## Congress

#### Statutory changes fail. Courts won’t listen and will continue to apply the Ninth Circuit’s precedent.

Widiss 20, Deborah A. Widiss is Professor of Law, Associate Dean for Research and Faculty Affairs, and Ira C. Batman Faculty Fellow at the Indiana University Maurer School of Law; (Spring 2020, “Communication Breakdown: How Courts Do — and Don’t — Respond to Statutory Overrides”, https://judicature.duke.edu/articles/how-courts-do-and-dont-respond-to-statutory-overrides/)

Courts and Congress are, at times, engaged in a kind of ongoing “conversation” about statutory law. Congress has exclusive power to enact statutes — but when statutory language is unclear, or doesn’t explicitly resolve a factual question that arises under a statute, courts must resolve the issue through statutory interpretation. Congress then may choose to “override”1 judicial interpretations with which it disagrees (so long as the judicial decision is not constitutional in nature) by amending the law at issue or enacting a new law. The power to enact such overrides is core to maintaining democratic accountability for policy. Enactment of an override, however, is not the end of the story. As new cases arise, courts must assess how the new statutory language has changed the prior legal landscape. And so the exchange continues. Earlier commentators, including many well-respected judges, have offered thoughtful suggestions for facilitating communication from courts to Congress about problems in statutes that Congress might want to address.2 My research explores the opposite question. How effective is communication from Congress back to courts? The answer is: Not very.3 Even when Congress enacts overrides, courts frequently continue to follow the prior judicial precedent. This is likely due more to information failure than willful disregard of controlling law. Nonetheless, a key aspect of the separation of powers is broken. My research shows that when the Supreme Court overrules a prior decision, lower courts quickly decrease their reliance on the old precedent and begin to apply the new rule. By contrast, when Congress enacts an override, citation patterns to the prior precedent change very little. Even a decade later, many overridden precedents, or what I have called “shadow precedents,” are still routinely cited as controlling precedent. This surprising finding may be partially explained by the coding protocols used by leading legal research services. When assessing the viability of precedent, both Westlaw and Lexis consider primarily judicial signals rather than legislative signals; accordingly, it can take several years before a decision is “flagged” as having been affected by later legislation. Even when aware of an override, legal actors sometimes fail to follow the new statutory standard. Luckily, this problem is easy to address. Courts need to start their research with the statutory language itself, rather than a judicial gloss on the statutory language. Sometimes there are difficult interpretive questions regarding the scope of an override, but often it’s just a matter of carefully considering whether the operative language supersedes any aspect of a prior interpretation. By taking this straightforward approach, courts can help ensure that overrides can play their expected role in our tripartite system of government. Courts Often Rely on Overridden Precedents Congressional overrides are typically described as the legislative equivalent of a judicial overruling. My study with Professor Brian Broughman was the first to empirically test this characterization. We constructed a database of Supreme Court decisions that had been overruled by later Supreme Court decisions; Supreme Court decisions that had been overridden by later statutory amendments; and a “control” group of Supreme Court decisions that were similar (in terms of subject matter, year of decision, and other factors) to the overruled and overridden decisions but that had not been repudiated by subsequent judicial or legislative actions.4 We then used Lexis’s Shepard’s service to assess how often each Supreme Court case in our database was cited by other courts, generally looking at a 15-year window that spanned from five years prior to the superseding “event” — either overruling or overriding — to ten years after it.5 Although citation counts are admittedly a somewhat blunt measure, they are frequently used in legal and political science studies as a rough gauge of the ongoing precedential weight of a prior decision. By collecting citation data from several years before the superseding event, we were able to establish a “baseline” citation pattern, which we could then compare to citation levels after the overruling or the override. We hypothesized that citation patterns could be expected to change in two different ways: “positive” or “neutral” citations would be expected to decline, and “negative” citations, such as an indication that the prior decision had been fully or partially overruled or superseded, would be expected to increase. To capture both of these effects, we developed a measure we called “net citations,” which we defined as the number of positive or neutral citations to a decision, minus the number of warning or other negative citations.6 We then compared the average number of net citations a case received each year after the event to the average number of net citations the case received before the event; this ratio measures how much effect the overruling or override had on citation levels. Our findings were striking. As shown in Figure 1, after a judicial overruling, net citations to the prior decision drop rapidly when compared to the pre-event baseline. The citation patterns for cases in our “overridden” category, by contrast, are very similar to those of our control group. Overall levels of citations drop, but in a gradual fashion that is typical of the natural “depreciation” that decisions generally experience over time.7 Even ten years after an override is enacted, most overridden precedents are still widely cited as controlling precedent. Degree of Overruling or Override. We recognize that an override may supersede some, but not all, of the analysis in a prior decision, meaning other aspects of the decision remain controlling. The same, of course, is true for a judicial overruling. To assess whether this affected our results, the cases were assigned a “depth” measure that evaluated how completely the overruling Supreme Court decision or overriding legislation rejected the prior opinion,8 as well as an “explicitness” measure that evaluated how explicit the Court or Congress was about its disapproval of the prior opinion. We found that for both sets of cases, greater “depth” was associated with a larger decline in citations; however, at each level of “depth,” citations to overruled cases declined more dramatically than citations to the overridden cases. The same was true for “explicitness.” Thus, our findings are not the result of comparing deep and explicit overrulings to shallow and non-explicit overrides. Rather, even when we control for these factors, we find that judicial overrulings have considerably more effect on future citations than legislative overrides. As an additional robustness check, for a randomly selected subset of cases in both groups, we hand-coded individual headnotes to distinguish between headnotes identifying portions of the prior decision that had been superseded and those that had not. Since Lexis’s Shepard’s service tracks citations to each headnote in a case, this allowed us to assess in a more fine-grained manner which propositions within each case were being referenced when later decisions cited to the earlier precedents. For both groups of cases, we found a notable decline in net citations to the headnotes associated with specific propositions within the cases that had been superseded, but again this decrease was much more pronounced for the overruled cases than the overridden cases. Additionally, we assessed the extent to which ideological preferences might explain ongoing citation of overridden precedents, but our data did not suggest a judge’s ideology was the driving factor.9 Prospectivity. Because a judicial overruling is a reinterpretation of existing law, it typically takes effect immediately; the Court’s new interpretation will apply to all pending disputes, including those arising out of events that pre-dated the new opinion. By contrast, statutory overrides are typically prospective; the old (now superseded) judicial standard will govern the resolution of a dispute arising out of events that pre-date the effective date of the statutory amendment, even if the decision in the case is issued after the effective date of the amendment. For this reason, we would expect to see a judicial overruling have a more immediate effect on net citation levels than a statutory override. To address this issue, our analysis excluded citation counts from the year of the superseding event and the first two years after the superseding event, as this is the window when we expect the difference between retroactive judicial overrulings and prospective statutory overrides to be most salient. We modified these parameters to exclude greater and fewer years, but our general results held, suggesting that the differences we observe are not driven by the prospective nature of overrides.10 Since this study relies on citation counts, rather than a close reading of the context for each citation, we cannot definitively assert that any particular citation of an overridden case was in error. Below, I provide specific examples, drawn from my work on overrides in the employment discrimination context, of both “proper” and “improper” citations to overridden cases. The big picture conclusion is clear, however. If overrides were having the effect that they are intended to have, it is reasonable to assume that there would be sizeable decline in citations to legislatively overridden precedents, just as there is a sizeable decline in citations to judicially overruled precedents. Instead, on average, citation patterns to the overridden cases are almost indistinguishable from those to the comparison control group of cases that have been neither overridden nor overruled. This suggests that often courts fail to hear — or to heed — Congress’s side of the dialogue.

#### They’ll read down the plan---statutory codification fails.

Crane 21, Frederick Paul Furth, Sr. Professor of Law, University of Michigan. (Daniel A., “Antitrust Antitextualism”, 96 Notre Dame L. Rev. 1205, pg. 1207, Accessible at: https://scholarship.law.nd.edu/ndlr/vol96/iss3/7/)

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital. Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.6 This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that.

#### The counterplan scorns the Courts---causes evasion.

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D. Statutory Interpretation Unconstrained: The Hydra Problem

In Greek mythology, the Hydra was a multiheaded monster whose notable feature was that severance of any head resulted in the growth of a new head in its place.90 The reasoning employed by the Supreme Court in Gross suggests that the same can be true for overrides. The enactment of an override—the metaphorical severing of a “head”—can result in multiple heads growing in many different statutes. This is what I call the hydra problem. The hydra problem is the product of the interrelationship of the interpretive conventions described above. Following the enactment of a statute, ambiguous terms are interpreted by courts. Courts, using whatever interpretive methodology they favor, choose among the “reasonable” interpretations of the language (a decision that is sometimes influenced by a stated obligation to defer to reasonable agency interpretations).91 Once a court with precedential authority issues an authoritative interpretation of Statute A, that interpretation functionally becomes part of Statute A. Second, courts following the in pari materia canon apply that authoritative interpretation to a (unspecified and unpredictably growing) group of related statutes that include the same or similar language as Statute A. Third, Congress, exercising its authority over the interpretation of statutory language, overrides the judicial interpretation by amending Statute A, but Congress does not simultaneously amend all of the other (unspecified and unpredictably growing) related statutes. With respect to Statute A, the judicial gloss on the statutory language is superseded by the actual statutory amendment of the language by Congress. The difficult question is what governs the interpretation of the related statutes. If the preexisting language of Statute A and the related statutes could reasonably bear both the interpretation the court provided and the interpretation endorsed by Congress in the override, there are three logically plausible answers to this question, although, as discussed in the parts that follow, I think there are significant problems with two of them. The first is that the override supersedes the judicial interpretation of Statute A but not its exportation to the group of related statutes, leaving the preexisting statutory precedent controlling the interpretation of related statutes. This is the approach endorsed by the dissent in Gross.92 The second is that the override supersedes the judicial interpretation of Statute A and its exportation to the group of related statutes, and that the preexisting language of the related statutes should be reinterpreted by courts in line with the meaning endorsed by Congress in its amendment of Statute A. This is the approach I endorse.93 The third is that the override supersedes the judicial interpretation of Statute A and its exportation to the group of related statutes but signals only that the interpretation of language in related statutes should differ from that adopted by Congress. The third option (which, for good reason, was not considered viable prior to Gross) dramatically increases contemporary judicial power, permitting—solely because of the override—courts to adopt a new judicial interpretation of the language in the related statutes, free from the constraint of following Congress’s preferred interpretation or the need to justify a departure from the standard rule of stare decisis. The basic contours of the hydra problem predated Gross. It can emerge any time Congress amends a statute to override a judicial interpretation but does not amend all related statutes to which the disfavored precedent might plausibly be applied. Employment discrimination law is particularly fertile ground for the hydra problem because it is a field that contains numerous statutes with similar language and because it is a field in which overrides are quite common. My previous exploration of this issue was published before Gross was decided, but it briefly discussed confusion over the application of Price Waterhouse to other statutes, including the ADEA, as an illustration of shadow precedents.94 Courts have also disagreed about whether amendments to Title VII overriding the standard for disparate impact liability95 and the statute of limitations applied to seniority systems96 should affect the interpretation of related statutes. Similar questions were at play in back-and- forths between the courts and Congress regarding extraterritorial application of discrimination laws97 and the availability of attorneys’ fees and experts’ fees in a variety of statutes.98 But Gross makes the hydra problem far more serious by holding that neither the prior precedent (which was not explicitly overruled) nor the override govern the interpretation of the related statutes. It also addresses the issue more directly than prior decisions and in a context that is of central importance in employment discrimination litigation.99 As the next parts illustrate, Gross has quickly caused widespread upheaval and confusion, thus making it a particularly rich case study. My preliminary research in other areas of statutory law suggests that the prevalence of the hydra problem in employment discrimination law may be atypical. Employment discrimination is an area of the law with an unusual abundance of distinct statutes that are typically interpreted in pari materia. It is also a politically charged area of the law. The Supreme Court is often sharply divided in employment discrimination cases, and Congress frequently overrides the Court’s decisions.100 Courts in turn demonstrate unusually high levels of disagreement about the meaning of civil rights overrides as compared to less partisan areas of the law.101 These factors have significance in two respects. First, it could be that the hydra problem has emerged as a common problem in employment discrimination law precisely because it is such a contentious area of the law. Courts may seek to cabin the significance of an override because they disagree with the approach adopted by Congress or because they resent the fact that Congress has superseded their prior interpretation. Second, the partisan nature of the subject matter also suggests that the aggrandizement of contemporary judicial power implicit in the approach that the Court endorses in Gross is particular cause for concern. If overrides are interpreted to free judges from constraints of precedent and congressional directives, there is a real risk that judges will use that interpretive freedom to advance their own ideological preferences. Further study of the interpretation of overrides in other contexts is warranted to determine how widespread the hydra problem is in other areas of statutory law and to assess potential responses.

#### Courts won’t enforce even watertight legislation.

Crane 21, Frederick Paul Furth, Sr. Professor of Law, University of Michigan. (Daniel A., “Antitrust Antitextualism”, 96 Notre Dame L. Rev. 1205, pg. 1251-1252, Accessible at: https://scholarship.law.nd.edu/ndlr/vol96/iss3/7/)

The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act … cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result. Even where reform statutes are textually honored in their immediate aftermath, history shows a creeping judicial tendency to begin integrating the reform statutes into the mainstream of antitrust jurisprudence within a few decades. This has been the fate of the four major antitrust reform statutes— the FTC, Clayton, Robinson-Patman, and Celler-Kefauver Acts—each of which was meant to rein in capital in ways that the Sherman Act did not. In all four instances, however, the courts incrementally began mainstreaming the statutes into Sherman Act precedent, creating a homogenous antitrust jurisprudence that read the textual distinctiveness out of the reform statutes. Thus, today, cases under the FTC Act, section 3 of the Clayton Act, and the Robinson-Patman Act are largely indistinct from Sherman Act cases,256 and merger cases have been rolled into the same modes of price-theoretic analysis that would be employed in a Sherman Act case.257 Given that neither statutory text nor legislative history seems to have deterred the courts from this process within a few decades after the passage of the statutes, there is little reason to believe that a “this time we mean it” statutory reform would not meet the same fate. If the courts continue to understand aspects of the antitrust statutes as aspirationally motivated and operationally impracticable, the previously observed pattern is likely to continue. Again, it would be an overstatement to claim that statutory words have no consequences or that antitrust reform statutes are doomed ab initio to judicial culling. But the courts’ pattern of antitrust antitextualism and their perennial insistence that the antitrust statutes are delegations of common-law power rather than textually actionable injunctions in all of their particulars provide a cautionary tale for future legislatures: the dynamic of antitrust legislation, enforcement, and adjudication plays out against a longstanding backdrop of contestation over bigness, power, and efficiency that has muted the ordinary importance of statutory language. Writing more definite statutes will not necessarily curb these habits of mind.

## CP ⁠— Regulation

### 1AR ⁠— Deficit

#### Framing issue: only we have SSO-specific ev ⁠— reject spin AND generic ev

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2. Evading regulatory limits as antitrust harm The second open question is whether antitrust injury occurs when a defendant’s misrepresentations prevent an agency from placing limits on an exercise of market power, rather than eliminating the market power altogether. In Rambus v. FTC,148 the D.C. Circuit effectively held that where market power resulted from a regulatory decision (there, the grant of a patent), antitrust law could not constrain the price the monopolist charged. Rambus involved alleged misrepresentations made in the course of a private standard-setting organization’s deliberations. The FTC claimed that Rambus had withheld material information about patent rights that it held over the relevant technology. The FTC alleged that if the SSO had known about Rambus’s patents, either it would have adopted a different standard, or it would have demanded some form of fair and nondiscriminatory licensing terms on Rambus’s patents. The D.C. Circuit found the second allegation legally inadequate, concluding that the mere exercise of market power (i.e., charging higher prices) does not violate the antitrust laws if the market power itself arose from a valid government grant.149 The Rambus court relied on NYNEX v. Discon,150 in which the Supreme Court refused to apply the per se rule to a kickback scheme involving a regulated utility. The regulated party in Discon awarded a contract for non-regulated services to a company that would charge higher prices that the regulated company could then pass on to consumers through rate regulation. The NYNEX Court rejected an antitrust claim alleging that the scheme constituted an unlawful group boycott, absent proof that it harmed competition (not just a competitor) in the non-regulated service market. The Court specifically acknowledged that consumers were injured by the conduct, because it resulted in higher prices in the regulated market. Because that injury came from the exercise of agency-granted market power, however, the Court deemed it beyond the reach of antitrust law. While NYNEX itself involved only the question of whether the per se rule applied, Rambus read it as going further and immunizing any conduct that owed its origin to a regulatory grant of market power. Both NYNEX and its substantial new extension in Rambus are problematic as matters of antitrust law. The harm to competition in NYNEX did not stem solely from government-granted market power; it stemmed from the defendant’s effort to extend that market power in ways that deceived the regulatory agency and prevented it from controlling NYNEX’s behavior. Similarly, the harm to competition in Rambus did not stem solely from the government’s grant of a patent, but from the combination of that grant with Rambus’s deception of a standard-setting organization that would otherwise have restrained the ability of Rambus to charge a supracompetitive price for that patent. Both of these cases, in other words, involve deliberate and effective regulatory gaming. By refusing to apply antitrust law to private deceptive conduct that manipulates a regulatory process, or extends or exacerbates the anticompetitive effects of a regulatory decision, NYNEX and Rambus appear to condone a new and insidious form of implicit antitrust deference to regulation, one in which antitrust law must ignore conduct that exacerbates competitive harm because the company causing that harm wouldn’t have been in a position to do so but for regulation.151 Whatever one’s views of the substantive antitrust issues, the existence of antitrust injury is an antitrust question that should be decided by antitrust courts, and will not (and often cannot) be adequately addressed by regulatory agencies. And neither NYNEX nor Rambus discredits the notion that abuse of standard-setting processes can, in some circumstances, violate the antitrust laws. In particular, if the facts show that an agency relied upon misrepresentations in choosing a standard – and would have chosen a different standard but for the misrepresentations – then the defendant has caused a structural harm in the market even in the narrow Rambus view. In these circumstances, the defendant’s misrepresentations are the “but-for” cause of the defendant’s economic monopoly.152 While the D.C. Circuit refused to speculate on whether even this could constitute antitrust injury,153 it strains credulity to imagine any other outcome. Like product-hopping, then, abuse of government standard-setting processes can cause competitive harm in markets. And like product-hopping, the harm may not be remediable through administrative recourse. The capture of government standard-setting processes offers yet another example of regulatory gaming, and another reason that antitrust courts should continue to play a role in regulated markets.

#### Most qual’ed ev agrees AND we solve it

Chilson 19, former chief technologist at the FTC (Neil Chilson, 10-30-2019, “Creating a new federal agency to regulate Big Tech would be a disaster,” *Washington Post*, <https://www.washingtonpost.com/outlook/2019/10/30/creating-new-federal-agency-regulate-big-tech-would-be-disaster/>)

On its face, a single expert agency, laser-focused on one set of problems, sounds sensible. But history shows that such industry-specific agencies are most susceptible to “regulatory capture,” a term used to describe when an institution is dominated by the industry they are charged with overseeing — for example, when a state board that sets the rules for the practice of dentistry is dominated by practicing dentists. The idea was popularized by the Stigler Center’s namesake, Nobel economist George Stigler, who argued that “regulation is acquired by the industry and is designed and operated primarily for its benefit.” In his foundational paper “The Theory of Economic Regulation,” Stigler warned that any regulated industry has strong incentives to form close connections with its regulators to seek favors. The inevitable result, he argues, is that industries disproportionately influence the agency’s agenda, shape its rulemaking and even supply it with personnel. Companies find it much easier to influence narrowly focused institutions than institutions with broader law enforcement mandates. Where the latter hear from a wide range of companies with a variety of concerns, the former hear only from one type of company. Think about how much easier it is to talk your way out of a speeding ticket from the local police officer, who knows your family, than it is to deal with an effectively anonymous city cop who pulls over dozens of drivers a day. Similarly, big companies would much rather deal with a select group of bureaucrats whom they know well — and who hear only their perspective most of the time. Captured agencies don’t hold companies accountable; instead, they act to benefit the industry’s established players, disadvantaging newer firms and the public at large. In worst-case scenarios, such agencies can block new, disruptive competitors that threaten the established, regulated industry. The recent report from the Stigler Center holds up the Federal Communications Commission as an example of what a new Digital Authority could look like. But the FCC is a perfect example of the likely problems of an industry-specific regulator. At nearly every turn, with every new potentially disruptive communications innovation, the FCC (and its predecessor, the Federal Radio Commission) did the bidding of the best-connected incumbents. As former FCC chairman Michael Powell said, “[T]he history of the FCC is, when something happens that it doesn’t understand, kill it. We tried to kill cable. We tried to kill long-distance. When [MCI founder] Bill McGowan start[ed] stringing out microwave towers that threatened AT&T, the FCC tried to stop him. The FCC tried to kill cable because it was going to threaten broadcasting.” While it didn’t halt technological progress or competition, it often slowed it, occasionally by decades. For example, almost immediately after its creation, the Federal Radio Commission sided with industry players when it rejected the expansion of AM radio bands at the behest of existing commercial broadcasters. Later, the agency slowed the development of FM radio to protect AM radio manufacturers. It cracked down on early “community antenna television” (cable TV) to protect the broadcast television industry; conducted “beauty contests” to parcel out valuable broadcast licenses, sometimes to the politically connected (such as President Lyndon Johnson’s wife); and slowed approvals and imposed onerous regulations on satellite radio services to protect traditional radio stations. The FCC also transfers billions of consumer dollars between various telecommunication competitors in pursuit of several different connectivity goals — an exercise that brings everyone to Washington to petition the FCC for a share of the money. Want to rebuild the economy? Stop obsessing over tech startups. Thinking forward, the FCC’s history suggests that a single digital regulator would make it easier for existing companies to lobby for processes that restrict new competitors. Even regulations that are intended to promote competition could easily become barriers to new competitors. Similarly, new digital business models could be delayed or blocked by regulators who are too familiar with the existing way of doing things to imagine new pathways to success. Then there’s the question of price controls: Fixing prices with competitors is anticompetitive — unless the government is the one setting the prices. And where private price-fixing agreements are unstable (since it only takes one defecting party to ruin the agreement), government-mandated prices are conveniently government-enforced. A single digital regulator could provide a simple mechanism for guaranteed profits. Imagine a digital ad industry regulated like the FCC regulated the AT&T telephone monopoly for more than 40 years. So what is the alternative? As I noted earlier, regulators are less susceptible to the interests of individual companies and interests when they hear from a lot of different companies with a lot of different interests. Thus, generalist agencies that broadly regulate many industries are more resistant to capture. Further, agencies that primarily enforce laws (like the DOJ) are far less attractive targets for regulatory capture than those that mostly write rules (like the FCC). A company that manages to get in bed with the former might be able to dodge a lawsuit or put pressure on a competitor, but that pales before the possibility of influencing rules that reshape a company’s entire industry. In the United States, we already have an economywide enforcement agency: the Federal Trade Commission. Charged by Congress to promote competition and to protect consumers, the FTC has decades of experience addressing antitrust and consumer protection issues in the tech industry. Even now, it is pursuing investigations into digital companies under its current authority. And if new capabilities are needed to police digital companies, doesn’t it make sense to give such authority to an experienced agency that has been resistant to regulatory capture?

#### Threatening antitrust liability lures SSO’s into adopting best practices.

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

#### Only antitrust enforcement creates a consumer-action feature that counterbalances SSO’s conspiratorial incentives---private action fails.

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2. Why Antitrust Enforcement Is Necessary Some SSO members have an interest in ensuring that the SSO takes steps to minimize the potential harms from the SEP holders’ monopoly power, and this undoubtedly explains in part why most SSOs have adopted FRAND policies or similar requirements. But, as shown in the economic model in the Appendix,73 SSOs cannot in general be counted on to adopt effective FRAND policies. The bases for this conclusion, which is central to our argument for the applicability of Section 1 to SSO FRAND rules, can be summarized as follows.74 First, the SSO members collectively have an interest in permitting SEP holders to charge supracompetitive royalties that elevate the downstream price of compliant devices to the monopoly level. Doing so will enable the members in aggregate to collect increased revenues from consumers, and thus to generate increased profits that in theory could be shared by all the members. In other words, supracompetitive royalties can enrich industry participants as a group at the expense of final consumers. This fact alone should serve as a clear and strong signal regarding the dangers of counting on SSOs to implement effective FRAND policies: if the SSO members negotiate efficiently, the outcome will be just as bad for consumers as if the members agreed to fix downstream prices.75 The fundamental problem is that final consumers are not at the table when the SSO rules are negotiated. Second, SSO members that own SEPs but earn little or no profits as implementers have a powerful self-interest in being able to exercise the ex post monopoly power associated with their SEPs. Because SSO policies are usually determined by a consensus process, these members will likely be able to block the adoption of fully effective FRAND policies. Moreover, these SSO members often have the greatest interest in SSO patent policies. Since much of their income may be attributable to patent licensing, they can be expected to devote substantial resources to block the adoption of FRAND policies that effectively prevent patent holdup. Third, even SSO members that earn significant profits as implementers may have mixed incentives if they also own SEPs, which can also lead to weak or in-effective FRAND rules. In the Appendix, we show that, if the requisite share of votes in the SSO are cast by firms whose share of SEP royalties is at least as large as their share of downstream profits, and if these firms can coordinate their voting over the FRAND rules, then an SSO unconstrained by antitrust laws will establish FRAND rules leading to an outcome no better for consumers than would result from an integrated monopolist controlling all SEPs and all downstream sales.76 Fourth, even SSO members that are downstream implementers and own few, if any, SEPs may have only a modest interest in promoting effective policies to restrict ex post opportunism. Because all implementers will be subject to the opportunism, all of them will face increased licensing costs, and therefore will likely be able to pass on most or all of the increased costs to their customers.77 Furthermore, these implementers might not be especially active or effective in the standard-setting process for free-riding or public-good reasons, especially if SEP royalties constitute only a relatively small portion of the costs of their standard-implementing products. Public choice theory predicts that the highly motivated SEP holders are likely to have the greatest influence over patent policies. Empirical evidence bears out these concerns. As a starting point, we find it striking that SSO FRAND rules are almost always quite vague.78 Notably, SSOs in which SEP holders are more prevalent tend to have weaker FRAND rules.79 Further, to our knowledge, SSOs have made almost no effort to enforce their FRAND rules and have, instead, left enforcement efforts to others.80 This evidence raises serious doubts about the effectiveness of the existing FRAND rules in preventing ex post opportunism.

#### Deterrence---regulations don’t deter misconduct.

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

Our goal in this paper is not to persuade the reader that these particular examples of regulatory gaming violate the antitrust laws (though we think they do) or that other examples, such as regulatory price squeezes, do not violate the antitrust laws. Rather, our point is that whether or not particular acts of regulatory gaming harm competition is and should be an antitrust question, not merely one that involves interpreting statutes or agency regulations. Regulatory agencies and even Congress cannot prevent gaming ex ante. Experience with the pharmaceutical industry suggests that if Congress acts to squelch one form of gaming, companies will find other ways to game the system. And even if Congress or the regulating body can surgically fix a particular type of exclusionary behavior, such an ex post response (unlike the threat of antitrust treble damages) does nothing to compensate for past harm or to deter future gaming behavior. Some level of antitrust enforcement – with appropriate deference to firm decisions about product design and affirmative regulatory decisions that affect market conditions – provides a necessary check on behavior, such as product hopping, that has no purpose but to exclude competition.

#### \*Deterrence matters---SEP holders will remain opportunistic absent the threat of antitrust.

Tsilikas 17, \*Haris Tsilikas is an IP and Antitrust Consultant, a Doctoral Candidate and Visiting Research Fellow at the Max Planck Institute for Innovation and Competition, Munich; (2017, Antitrust Enforcement and Standard Essential Patents: Moving beyond the FRAND Commitment”, https://www.jstor.org/stable/pdf/j.ctv941t01.9.pdf?refreqid=excelsior%3A92dc720d1ebc7088811b40032a60f575)

Antitrust could play a meaningful role.165 The most important contribution of antitrust enforcement against abuses of SEPs is its deterrent effect.166 Although patent law reforms or contractual binding of subsequent SEPs-holders to FRAND licensing would provide to victims of hold-up useful defences in court, they do not sufficiently deter abusive assertion of SEPs in the first place. For instance, the contractual binding to FRAND could raise counterclaims of breach of contract or/and contractual performance; however, the opportunistic SEP-holder will, in case it loses on such grounds, be left no worse than with a licence on FRAND terms. In the end, a patent hold-up is indeed precluded, but contractual constraints can do little to prevent opportunistic assertion of SEPs in the first place. The victims still suffer the costs of uncertain and resource-draining litigation; most importantly, the reliability of the standards-setting process might still be at risk. Antitrust enforcement on the other hand, in imposing tortfeasors positive monetary losses in the form of fines, alters the profit-cost calculus of opportunistic behaviour in the first place; opportunistic assertion of SEPs will come at a cost. Of course, a too-heavy-handed approach could have a chilling effect on legitimate patent assertions against implementers that are reluctant to pay FRAND royalties, thus leading to false positives. Antitrust enforcement should carefully examine the specificities of each case, such as the particular PAE conduct, the relationship between PAEs and practicing entities, the structure of downstream markets.167 More importantly, an economically informed antitrust analysis focusing on the actual and potential anticompetitive effects of opportunistic SEPs assertion should prohibit behaviour that is truly harmful to consumers. Safeguarding the inclusive and efficient character of the standards-setting process is a competition law problem. Informed antitrust analysis could provide adequate responses to opportunistic PAE behaviour and privateering.

### AT: Patent Law

#### Consumer-action deficit---beneath patent law, only implementers have standing to recover damages---which categorically excludes consumers as plaintiffs.

Cary et al. 11, \*Messrs. George Cary and Alex Sistla are members of the California and District of Columbia Bars. Mr. Mark Nelson is a member of the New York and District of Columbia Bars. Mr. Steven Kaiser is a member of the New Jersey and District of Columbia Bars; (2011, “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM INSTANDARD SETTING”, <https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf>)

One final point about patent remedies concerns standing: it is not just the type of harm that matters to antitrust, but whether anyone has a remedy to address it. Antitrust fills the gap left open by patent law by providing a remedy to those “outsiders”—consumers, competitors and others—who lack standing to seek relief under the patent laws. Consider Qualcomm: The use of equitable estoppel there was only available as a defense asserted by the alleged infringer. The elements of the defense discussed above, moreover, require that the infringer either be involved in the SSO process or have a specific basis for claiming that it was affirmatively misled by the patentee. No consumer injured by the wrongful acquisition of monopoly power in this context would meet these criteria, nor would other firms that have been excluded from the market due to the deception at issue. There is no government enforcement agency to protect such plaintiffs, because patent law has no provision for government enforcement intended to protect consumers from harm to competition.

In sum, the limitations of patent law would exclude many of the categories of potential plaintiffs suffering antitrust injury as a result of standard-setting abuse. We conclude that equitable estoppel is unequal to the task of policing monopolization through fraudulent conduct in the standard-setting process.

#### Consumer-action is key---implementers have attenuated interests in paying supracompetitive royalties, making consumers the only surrogate for FRAND enforcement---that’s 1AC Melamed and Shapiro and…

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

B. Deficiencies in Private Action While there is a range of legal options available to private parties injured by patent holdup, sounding in areas from contract to tort law, private action alone cannot provide a complete solution to the problem.32 One reason for this is the way SSOs operate. Through their bylaws, SSOs ensure that each member agrees to a series of requirements in order to take part in the standard-setting process. 3 3 These requirements typically include agreements to disclose patents and to license these patents on reasonable and nondiscriminatory ("RAND") terms. 34 However, the terms of these agreements are intentionally left vague to avoid potential antitrust liability. If the terms of the SSO agreement are too specific-for example, listing pricing requirements for patented technologies-they could be viewed as illegal price-fixing agreements.35 As a result, SSO bylaws often provide at most a questionable foundation on which to base litigation over patent licensing disagreements.3 6 Moreover, many firms-particularly third-party beneficiaries-are unable to pursue action through traditional legal routes. In the SSO context, third-party beneficiaries are industry members who have chosen not to participate in the SSO. Once the SSO selects a standard, these firms are still exposed to both the benefits of the standard-setting process and the problems that arise from patent holdup. But while members of the SSO may have weak claims against a firm engaged in patent holdup, third-party beneficiaries were not even parties to the SSO agreement. They are therefore even more unlikely to bring any successful suit in instances of patent holdup.37 Even assuming that SSO members are willing and able to engage in litigation with a firm attempting patent holdup, consumer welfare takes a backseat to the members' financial considerations.3 8 Because the incentives of the SSO members do not align with those of consumers, enforcement actions by firms in the private sector cannot be relied on to adequately protect consumers. 39 This concept is illustrated by a practice known as injunction threats, in which a patent holder threatens to bring an injunction against a manufacturer for violating its patent unless the manufacturer pays a substantial royalty.4 ° While the patent holder's threat may have questionable legal footing, the manufacturer will often pay the royalty instead of engaging in extended litigation.4 This happens for several reasons. First, the manufacturer has a disincentive to engage a patent holder in litigation because the manufacturer will bear the cost of the litigation, the result of which could benefit competitors. 42 Companies will tend to pay the royalty and wait for another company to challenge the practice. 43 Second, the costs associated with challenging injunction threats may be substantial." On top of ordinary litigation costs, if the manufacturer has already begun making and distributing goods based on the patented technology, a potential preliminary injunction could have a devastating effect on its business.4 5 While engaging a patent holder in litigation may collaterally benefit consumers in that increased royalties are not passed through to the price of the ultimate product, this benefit does not tip the scales in favor of manufacturers pursuing such a path.' Thus, reliance on litigation by SSO members or other third parties will not provide a complete solution to patent holdup, as these parties serve as poor proxies for consumers.

#### End-user challenges is key to optimal IP law---implementers benefit from high royalties because they hinder competition and enable profiteering.

Hovenkamp 17, \*Herbert Hovenkamp is James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School of the University of Pennsylvania; (2017, “Antitrust and Information Technologies”, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1306&context=flr)

On the other hand, the patent system does not have satisfactory tools for permitting consumer or end-user challenges to harmful patent practices. Infringement defendants, who are almost always producers, can litigate questions about patent validity and scope as well as overclaiming or litigation misconduct, and they do so all the time. Nothing in the Patent Act, however, gives consumers a general right to challenge such practices. When consumers do obtain such rights, it is most typically under antitrust laws, which permit consumers to challenge anticompetitive practices that raise prices or reduce product quality.219For example, while only patent infringement defendants can challenge improper infringement actions directly under the Patent Act—then only by a defense, counterclaim, or request for attorney’s fees—consumers can bring an action under antitrust laws for improper infringement actions that result in monopoly and higher prices.220

What makes the consumer-action feature of antitrust law particularly important is that consumer welfare is just as central to good IP policy as to good competition policy. Consumers consistently benefit from innovation that reduces costs or improves product or service quality.221As a result, they are the optimal surrogates for patent efficiency. The story for producers is more ambiguous. Producers certainly benefit from their own innovation as well from complementary innovations that they can procure from others. However, they can also benefit from practices that restrain the competing innovations of other firms or that permit them to profit from the assertion of legal rights that confer no social benefit whatsoever.222In sum, consumers are inherently better plaintiffs for enforcing IP rights, just as they are for enforcing antitrust law. No good institutional mechanism for consumer involvement exists in IP law.

#### Birth rates are plummeting---population will stabilize and shrink, not go beyond capacity

Dr. Alex Berezow 19, Vice President of Scientific Communications at the American Council on Science and Health, PhD in Microbiology from the University of Washington, “Earth To Paul Ehrlich: UN Revises Population Projection Downward”, American Council on Science and Health, 6/20/2019, https://www.acsh.org/news/2019/06/20/earth-paul-ehrlich-un-revises-population-projection-downward-14108

For reasons that we do not understand, the topic of world population makes some people foam at the mouth. Largely due to a book called The Population Bomb written by the thoroughly discredited (and strangely unrepentant) secular doomsday prophet Paul Ehrlich, there is a widespread belief that the world is overpopulated. It is not. Saying that, however, will get you called a lot of really bad names.

But facts don't care about feelings. Demographers routinely conduct computer simulations of the world population, and they do not predict runaway population growth. The broad consensus is that population will peak sometime during the 22nd Century and then decline.

It's not just that the concept of overpopulation is factually incorrect. It also encourages a misanthropic view of other (mostly black and brown) people in the developing world. If you think that humans are just a bunch of cockroaches, that doesn't encourage you to be helpful toward those in need. It's a toxic mindset.

It's also a worldview that causes people to say stupid things and waste money on non-existent problems, such as the ridiculous claim that the world will run out of food by 2027. Jeff Bezos wants to build space colonies for a trillion people, despite that we won't need them because there will never be a trillion of us.

On top of all that, some scholars who have studied the issue believe that world population will start shrinking this century, not next century. ACSH published an article by two such writers, Darrell Bricker and John Ibbitson, in February of this year. They argued, "We do not face the challenge of a population bomb but of a population bust—a relentless, generation-after-generation culling of the human herd. Nothing like this has ever happened before."

They may very well be right.

United Nations Revises Its Population Projection Downward

As reported in The Economist, the UN has revised its latest population projection downward. Specifically, it lowered its projection for 2050 by 37 million people (to 9.7 billion) and for 2100 by 309 million people (to 10.9 billion). Why? Because "[b]irth rates are falling faster than expected in some developing countries." That's precisely the argument made by Mr. Bricker and Mr. Ibbitson.

And it's why we feel completely justified in saying:

WE TOLD YOU SO!

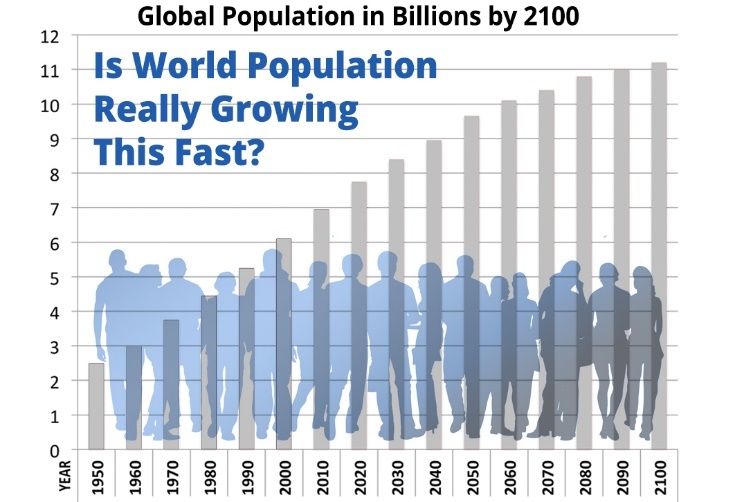
#### Official counts are overstated by billions---there’s no chance of overshoot

Jeff Schechtman 19, Media Executive and Interview Host at WhoWhatWhy Radio, interviewing John Ibbitson, Journalist and Political Writer for The Globe and Mail, “Could Everything You Know About Global Population Growth Be Wrong?”, WhoWhatWhy, 4/5/2019, https://whowhatwhy.org/2019/04/05/could-everything-you-know-about-global-population-growth-be-wrong/

Since the 1960s we’ve come to understand that an expanding global population threatens our quality of life — and, potentially, all life itself. Paul Ehrlich’s 1968 book, The Population Bomb, set the stage for 50 years of doom-laden assumptions about population growth.

But our guest on this week’s WhoWhatWhy podcast, Canadian journalist John Ibbitson, offers a new and surely controversial perspective. He contends that population estimates are way off, and that if the errors continue, by the end of the 21st century the official figures may be overstated by as many as two billion people.

Ibbitson — the co-author (with Darrell Bricker) of Empty Planet: The Shock of Global Population Decline — points out that for much of history, population was kept down by catastrophe, famine, or disease. Now, he says, human population is still facing suppression, but the mechanisms are more subtle and not well understood. He contends that mass migrations to cities, the empowerment of women, and a decline of religion’s influence have all impacted population in a way that has eluded demographers.



For example: The population of Japan’s wildly overcrowded string of islands shrank by 450,000 in the past year alone; China, famed for pushing fertility, is now below replacement rate, and even in historically bursting India the population appears to be no longer rising.

All this, combined with longevity increasing just as fertility rates are dropping, will have severely negative economic consequences.

Indeed, Ibbitson argues that given the actual population figures, more cross-border immigration will be needed to staff tomorrow’s workforce. Even East Asia, he says, will have to forgo its traditional homogeneity if it is to prosper economically.

Ibbitson further shows that this is not just a trend or a cycle: History has no examples where the acceptance of smaller families has been reversed.

The prospect of two billion fewer people on the planet by century’s end should relieve fears of food shortages, conflicts over arable land, and further environmental degradation. But unless politicians and the media acknowledge the economic challenges of an impending decline in world population, the transition will be costly and painful.

#### Population is peaking

ACSH 19, American Council on Science and Health, 2-26-2019, "Overpopulation Myth: Humanity Will Begin Shrinking This Century," https://www.acsh.org/news/2019/02/26/overpopulation-myth-humanity-will-begin-shrinking-century-13839

If you find this news shocking, that’s not surprising. The United Nations forecasts that our population will grow from seven billion to eleven billion in this century before leveling off after 2100. But an increasing number of demographers around the world believe the un estimates are far too high. More likely, they say, the planet’s population will peak at around nine billion sometime between 2040 and 2060, and then start to decline, perhaps prompting the un to designate a symbolic death to mark the occasion. By the end of this century, we could be back to where we are right now, and steadily growing fewer. Populations are already declining in about two dozen states around the world; by 2050 the number will have climbed to three dozen. Some of the richest places on earth are shedding people every year: Japan, Korea, Spain, Italy, much of Eastern Europe. “We are a dying country,” Italy’s health minister, Beatrice Lorenzin, lamented in 2015. But this isn’t the big news. The big news is that the largest developing nations are also about to grow smaller, as their own fertility rates come down. China will begin losing people in a few years. By the middle of this century, Brazil and Indonesia will follow suit. Even India, soon to become the most populous nation on earth, will see its numbers stabilize in about a generation and then start to decline. Fertility rates remain sky-high in sub-Saharan Africa and parts of the Middle East. Even here, though, things are changing as young women obtain access to education and birth control. Africa is likely to end its unchecked baby boom much sooner than the UN’s demographers think.

## Case

### AT: Court Clog

**Court clog is fearmongering.**

**Stern 03** – J.D. Candidate, 2004, University of Pennsylvania Law School; B.A., 2001, The Johns Hopkins University. (Toby J., “FEDERAL JUDGES AND FEARING THE "FLOODGATES OF LITIGATION," UPenn Journal of Law, 2004, <https://www.law.upenn.edu/journals/conlaw/articles/volume6/issue2/Stern6U.Pa.J.Const.L.377(2003).pdf)>

One of the most easily identifiable problems with the floodgates argument is that it is rarely, if ever, followed by a true analysis of the potential litigation of which it speaks. That is, one response to a floodgates argument might be, "Are you sure that a contrary position would yield a flood of litigation?" 82 This criticism is frequently leveled against the floodgates argument, especially in the realm of tort litigation. For example, as one commentator has argued: The "floodgates of litigation" argument has proven wrong time and again. The lifting of the "impact" rule in rewarding damages for mental anguish, allowing third parties to recover under contracts, and the recognition of the right to privacy, were all prophesied to overwhelm the courts with frivolous claims. **They have not**. This argument, one should think, is relatively strong. While the floodgates argument is generally based on policy considerations,8 5 policy arguments are rarely so indeterminate. While moral arguments are certainly not precise--one cannot quantify, say, "fairness" or 'justice"-they are simply used differently. That is, when a judge says that a decision "promote [s] justice,"8 6 ~~he or she~~ [they] is not speaking about a tangible, actual result. In contrast, when a judge expresses that a decision will open the floodgates of litigation, he or she [they] is saying that there will be actual, cognizable caseload results from the decision. Given how often the floodgates do not open when we are warned that they will,"' making the argument without a proper foundation is dangerous. While there certainly are situations in which a judge should consider the implications of a decision on ~~his or her~~ [their] caseload, 8 doing so without considering the factual bases of those implications is problematic.'8 9 And while uncertainty is an unavoidable part of the law,' 90 the language with which the floodgates argument is regularly employed expresses anything but conjecture and uncertainty. The arguments are forceful; they are intended to conjure "[i] mages of a destructive, elemental force."'9' After all, as Judge Posner notes, "So irregular has been the growth of the caseloads of each of the three tiers of the federal judiciary in the past, and so many and poorly understood are the causes of changes in judicial caseloads, that it is impossible to make responsible predictions about future changes.' 92 The failure of judges to recognize this limitation of the argument reduces the weight afforded thereto.

## DA---Japan

### 1AR---UQ Overwhelms

#### Alliance resilience depends on trade, that’s solid

Japan Times 21 [KU BLUE]. "Japan business leaders welcome Biden's multilateral push". https://www.japantimes.co.jp/news/2021/01/21/business/economy-business/japan-keidanren-joe-biden/

Business leaders in Japan on Thursday welcomed the inauguration of U.S. President Joe Biden, expecting his administration to take a multilateral approach to trade policy while cooperating closely with other countries. "We have high hopes for the new U.S. administration as it focuses on international coordination," Hiroaki Nakanishi, chairman of the Japan Business Federation, known as Keidanren, said in a statement. The chief of the country's most powerful business lobby made clear "the power of the United States is necessary" to achieve a recovery in a global economy hit hard by the novel coronavirus pandemic, adding that it also allows for the global order to be "reconstructed." "I hope the Biden administration will unite and revive the United States as the world's number one country," said Nakanishi. He added that Japan has to make efforts to further develop its relationship with the United States and persuade it to return to the Trans-Pacific Partnership free trade pact, from which Washington withdrew under the administration of Biden's predecessor Donald Trump. Akio Mimura, chairman of the Japan Chamber of Commerce and Industry, said he expects Biden to exert strong leadership "as a new U.S. president who values multilateralism and the rule of law." He expressed hope that Biden will tackle global issues such as the coronavirus pandemic and climate change in conjunction with other countries. "I welcome a shift to international cooperation by the Biden administration," said Kengo Sakurada, chairman of the Japan Association of Corporate Executives. "We hope the United States will reclaim its status as a world leader in promoting democracy and market economics and again drive moves toward global peace and prosperity," Sakurada said, also stressing the importance of strengthening Japan-U.S. cooperation in various areas.

#### It's dependent on 5G leadership, which only the plan solves!

Dr. Adam Liff 19 [KU BLUE]. Assistant Professor of East Asian International Relations at the Hamilton Lugar School of Global and International Studies at Indiana University, Ph.D. and M.A. in Politics from Princeton University, and B.A. from Stanford University, “Unambivalent Alignment: Japan’s China Strategy, The US Alliance, and the ‘Hedging’ Fallacy”, International Relations of the Asia-Pacific, July 2019, p. 31

Nevertheless, **what is at present is not necessarily what shall forever be**. Japan’s leaders will continue to face a complex, dynamic, and potentially volatile strategic environment. Increasingly **difficult trade-offs** may **manifest**, specially if China’s military power, economic wherewithal, and willingness to attempt to drive wedges between the United States and its allies grow. An **exogenous shock** could also upset Japan’s basic trajectory. Indeed, this possibility appears **less remote** today given China’s and North Korea’s recent policies, geopolitical and **geo-economic shifts**, **US** relative decline, and President **Trump's skepticism** of alliances and free trade. Yet, even in this case, Japan’s continued pursuit of more **independent military capabilities** and strategic autonomy while simultaneously bolstering security cooperation with the United States and its regional partners seems more likely than a strategic realignment toward Beijing.

### 1AR---Thumpers

#### Antitrust conflicts happen all the time!

Takaaki Kojima 02 [KU BLUE]. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

Bilateral approach. The OECD has played a leading role in international efforts to avoid international conflicts over the extraterritorial application of competition law through the decades, “recognizing that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective sphere of sovereignty of countries concerned” and that “anticompetitive practices, investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries.”41 Since 1967, the OECD has adopted and revised a series of recommendations concerning cooperation between member countries that aim for two goals: more effective law enforcement and avoiding jurisdictional conflicts. In the context of the OECD recommendations, the concept of comity describes a voluntary policy calling for a country to give full and sympathetic consideration of other countries’ important interests while deciding the enforcement of its own competition law. Comity involves two aspects: first, a country’s consideration of how it may prevent its law enforcement actions from harming another country’s important interests, and second, a country’s consideration of another country’s request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting that country’s interest. These aspects have come to be referred to as “negative comity” and “positive comity,” respectively. 42 Following the OECD recommendations, bilateral cooperation agreements have been concluded between the United States and several other industrialized states such as Australia, Canada, and Germany to avoid friction in competition law enforcement.43 The milestone would be the U.S. and E.U. agreement of 1991 that set forth, inter alia, positive comity as well as negative comity for the first time in a bilateral agreement. This agreement was supplemented by a more detailed agreement on positive comity in 1998, which even provides for the deferral of enforcement proceedings by the requesting side under certain conditions. Although enforcement cooperation has been strengthened, the European Commission has explained that eliminating the jurisdictional “imbalance” was one of the main reasons the E.C. negotiated the positive comity provisions in the supplement agreement.44 In the Commission’s view, “it is clearly preferable … that the United States avail itself of the principle of positive comity when considering anticompetitive behavior taking place within the European Community rather than seeking to apply U.S. competition law. Through positive comity the Commission can retain control, where it wishes, of enforcement procedures addressing such behaviour.”45 Bilateral conflicts have frequently arisen between Japan and the United States over the latter’s extraterritorial application of antitrust laws, as the two countries hold divergent positions with regard to state jurisdiction under international law and against the background of increasingly expanding trade between the two countries. The Japan-U.S. Agreement, which was concluded in October 1999, should be the test case as to how effective a bilateral agreement could work for avoiding or mitigating potential bilateral conflicts. Several points should be elaborated upon here. First, Article II stipulates the obligation of the competition authority of each party to “notify the competition authority of the other party with respect to enforcement activities” that may “affect the important interests of the other party. ” This notification procedure is the foundation of cooperation and coordination in the agreement and “important interests” are interpreted to include not only interests concerning competition law enforcement but also interests concerning sovereignty and other legal or policy matters.46 Second, Article VI stipulates that “each party shall give full consideration to the important interests of the other party throughout all phases of its enforcement activities.” In seeking an appropriate accommodation of competing interests, such factors as the conduct’s relative significance to the anticompetitive activities, the relative impact of the anticompetitive activities on the important interests, etc., should be considered. These provisions represent so-called “negative comity” and are expected to work toward avoiding jurisdictional conflicts, which may be caused, for instance, by the extraterritorial application of U.S. antitrust law, through such consideration for balancing interests tests. However, the fundamental gap with regard to their respective positions on jurisdictional justification or sovereignty, as shown in the Nippon Paper case, could not be bridged by this provision of (negative) comity itself. Although an unilateral attempt to extend the application of domestic legislation extraterritorially violates the basic principle of territoriality in international law, the need for regulatory measures to be applied across national borders has also become a reality with the growth of transnational economic and social relations and the consequent emergence of a borderless society on a global basis. In this respect, the position of Japan is too rigid in resisting to accept the need for the extraterritorial adjustment of national competence, as evidenced in the negotiations between Japan and the United States for regulating transnational activities involving unfair competition across national borders.47 As seen above, the Government of Japan still formally rejects the effects doctrine; however, adjustment of extraterritorial jurisdiction that justifies extending jurisdiction with respect to foreign companies’ conduct abroad could be based on (a modified version of) the objective territorial principle, as has been applied in the Wood Pulp cases by the European Court. This justification could be compatible with the recent practice of the JFTC on the Nordion case and on the Exxon Mobil merger review. Third, Article V stipulates that if the competition authority of a party believes that anticompetitive activities “in the other country adversely affect the important interests of the former party … [it] may request that the competition authority of the other party initiate the appropriate enforcement activities.” The requested competition authority shall carefully consider whether to initiate enforcement activities. These provisions represent the so-called “positive comity” and the requested competition authority is expected to take into account “the importance of avoiding conflicts regarding jurisdiction,” which is explicitly set forth in the article. Positive comity may play an important role in export restrains (market access) cases where the requesting country’s interest is protection of its exporters’ interests.48 It has been observed that the Soda Ash case has positive comity aspects, where after U.S. trade officials complained that U.S. soda ash producers faced barriers to access in Japan, the JFTC conducted an investigation and issued a cease and desist order against Japanese producers.49 In such cases as the Fuji Kodak case, the United States could have invoked positive comity; however, U.S. enforcement agencies would have had to consider the similar position of Kodak in the U.S. market as that of Fuji in the Japanese market. Positive comity’s role may be limited in certain categories of export cartel cases because of the exemptions under the Export Trade Act in Japan and under the Webb Pomerene Act, etc., in the United States. Positive comity under the Agreement raised concerns that it would further intensify U.S. demands for more vigorous law enforcement against anticompetitive conduct relating to market access while requests of positive comity from Japan to the United States would be rare. Nevertheless, such concerns seem off the mark. Apart from the voluntary nature of positive comity, the alleged conduct’s illegality under the requested state is a prerequisite to invocation of positive comity, and if any complaint is filed on an alleged illegal conduct, the JFTC would consider the possibility of enforcement in any case. Furthermore, Japan may request positive comity in such cases as alleged abuse of antidumping procedures against Japanese exporters by a U.S. company in the United States, even though Japanese competition law does not apply to protect Japanese exporters’ interests. Again, if Japan considers that a U.S. film maker’s conduct in the United States is anticompetitive, it may request positive comity to the United States, regardless of the fact that Japan claims to have no extraterritorial jurisdictional reach over the film maker’s conduct in the United States. In these situations, jurisdictional “imbalance” between the two countries could, to some extent, be eliminated. The effectiveness of this agreement in terms of avoiding conflicts remains to be judged from how it will be applied in practice. Although this agreement is an executive agreement that is to be implemented within the framework of existing laws and regulations of the two states, the obligation to consider negative and positive comity will facilitate cooperation and coordination with a view to reducing conflicts. Comity is essentially voluntary but its flexibility may work better in solving a potential conflict, which ultimately depends on good working relations between the two governments, especially between the enforcement agencies, based on mutual trust. At the same time, it must be remembered that U.S. courts will not be bound by this agreement; therefore, effectiveness of both negative and positive comity under this agreement has significant institutional limitations with respect to U.S. case law.

## DA---Court Capital

### 1AR---No Swing Vote

#### The court is out of Robert’s hands---loss of capital and politicization is inevitable.

Litman et al. 20, \*Leah Litman is an assistant professor of law at the University of Michigan and host of the Supreme Court podcast "Strict Scrutiny."; \* Melissa Murray is the Frederick I. and Grace Stokes professor of law at New York University; (September 25th, 2020, “Shifting from a 5-4 to a 6-3 Supreme Court majority could be seismic”, https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b\_story.html)

With the Senate poised to quickly confirm Amy Coney Barrett to replace the late justice Ruth Bader Ginsburg, the Supreme Court will soon operate with a stout 6-3 conservative majority, rather than with the slimmer 5-4 conservative majority it has recently had. A one-vote shift may appear incremental, but it’s a shift that could have seismic consequences for the country. A relative 5-4 balance has meant that neither bloc could dominate, because a move by one conservative justice to the liberal side in a given case could swing the outcome. That sometimes led the justices to broker compromise positions on thorny issues, or to avoid taking up certain matters altogether if they weren’t sure whether all of their colleagues would vote along ideological lines. If the president’s nominee is confirmed to fill Ginsburg’s seat, however, the court’s conservative bloc will be able to afford to lose a vote and still prevail, reducing the need for narrower decisions, compromise and forbearance. Chief Justice John G. Roberts Jr. — appointed by President George W. Bush in 2005 — has functioned as the swing vote, occasionally siding with his liberal colleagues, sometimes to maintain the court’s veneer of institutional nonpartisanship. With six justices cementing a conservative majority, liberals who hope to prevail on issues that divide along ideological lines will have to persuade Roberts and another of the court’s conservatives (three of whom will be Trump nominees).

### 1AR---AT: Link

#### Shadow docket shields the link.

Vladeck 20, \*Steve Vladeck, professor of law at the University of Texas School of Law. He is co–editor in chief of [Just Security](https://www.justsecurity.org/); (August 11th, 2020, “The Supreme Court’s Most Partisan Decisions Are Flying Under the Radar”, https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html)

But after the fanfare subsided, the justices have spent the first month of their summer recess handing out an unusually large and divisive number of significant rulings. These rulings are quietly shaping the rules of the upcoming elections, how governments can (and can’t) respond to COVID, the resumption of the federal death penalty, and more. But they aren’t decisions in argued cases left over from last term. Rather, these are decisions on what University of Chicago law professor Will Baude has dubbed [the “shadow docket.”](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1961&context=public_law_and_legal_theory) The court’s “merits docket” includes cases in which the justices first decide to grant review, take full briefing (including from outside parties), hold oral argument, and then deliver lengthy, signed opinions providing the court’s reasoning and resolving the case. In contrast, the “[shadow docket](https://slate.com/news-and-politics/2019/09/supreme-court-asylum-stay.html)” consists almost entirely of summary orders, usually only one sentence long. These orders tend to be based on far less participation from lawyers, far less briefing, and no oral argument. And, in almost every case, they offer virtually no insight into the justices’ reasoning—unless some of them choose to write separately to explain their concurrence or dissent. Indeed, unlike merits cases, we usually don’t even know how the justices voted on the shadow docket—unless four justices publicly note their dissent (or three, if it’s an order granting review). For those reasons and others, these orders tend to receive far less scrutiny from the press, the public, and the academy—and far less attention and precedential weight from lower courts. Yet there are more than 6,000 cases decided this way each term. Many of these rulings are as unsurprising as they are unimportant. But not all of them. As the last month has driven home, the lack of attention distorts not only the public perception of the court but also our understanding of the ways in which the justices’ “shadow docket” rulings can affect our lives. Just since the beginning of July, the justices have issued rulings on the “shadow docket” that • [cleared the way](https://www.supremecourt.gov/opinions/19pdf/20a9_p8k0.pdf) for the first three federal executions in 17 years after lower courts had repeatedly halted them; • [refused to disturb](https://www.supremecourt.gov/opinions/19pdf/19a1070_08l1.pdf) a Nevada COVID-related emergency order that treated churches more harshly than casinos; • [blocked a grassroots effort](https://www.supremecourt.gov/opinions/19pdf/20a18_f2qg.pdf) in Idaho to increase funding for K–12 education; • [allowed President Donald Trump](https://www.supremecourt.gov/opinions/19pdf/19a60_bqm1.pdf) to finish using military construction funds to complete his controversial border wall—even though every lower court to consider the issue has ruled that such repurposing of funds is unlawful; • [pushed back resolution](https://www.supremecourt.gov/orders/courtorders/070220zor_apl1.pdf) of a dispute between the House of Representatives and the Justice Department over the Mueller report in a way that will ensure that the Justice Department prevails; • [prevented potentially hundreds of thousands](https://www.supremecourt.gov/opinions/19pdf/19a1071_4h25.pdf) of eligible voters in Florida from voting this November by refusing to freeze Florida’s “pay to vote” law, which requires felons to clear any claimed outstanding judgments before voting, and which the lower court had struck down as flagrantly unconstitutional; and • [froze a district court order](https://www.supremecourt.gov/opinions/19pdf/20a19_k537.pdf) that had required an Orange County jail to take measures its own policies already required to protect inmates from an outbreak of COVID-19. What’s more, we know that at least seven of the nine orders in these cases were decided 5–4. And although it’s hard to account for every ruling on the shadow docket, two slices of the data underscore the uptick in both the frequency of such rulings and their divisiveness: First, in the Trump administration’s 3½ years in office, the justices have granted (in whole or in part) [22 stay requests from the federal government](https://twitter.com/steve_vladeck/status/1283729527370395654?s=20) (including 10 during the current term alone)—compared with a total of [four grants of such requests](https://harvardlawreview.org/wp-content/uploads/2019/11/123-163_Online.pdf) in the 16 years of the George W. Bush and Obama administrations combined. (Trump has submitted 34 applications, versus eight from Bush and Obama combined.)\* Second, the shadow docket is quickly crowding out the merits docket. During the October 2017 term (Justice Anthony Kennedy’s last on the court), only two stay applications provoked four justices to publicly note their dissents. In the not quite two terms since, there have been 20 separate orders from which four justices publicly dissented—[including 11 so far this term](https://twitter.com/steve_vladeck/status/1292916855850651655?s=20) (and six since the beginning of July). By contrast, there were only [12 merits decisions](https://www.scotusblog.com/wp-content/uploads/2020/07/5-4-cases-7.20.20.pdf) during the current term that split the court 5–4 (the SCOTUSblog list of 14 includes two “shadow docket” rulings). With two months to go, it seems likely that the shadow docket will produce more 5–4 splits than the merits docket—for the first time, well, ever. Not only are these shadow docket rulings decided by narrow margins, but they’re also more strictly partisan. Unlike the unusual lineups we sometimes see in cases that receive full briefing and argument, the 5–4 splits in stay cases have all featured the same two voting alignments: Chief Justice John Roberts joining the other conservative justices to form a majority, or joining the progressives to form a majority. Because all of this is happening in the shadows, we can’t know for sure why it’s happening—including whether this is a function of Kennedy’s departure, a substantive shift in how the justices weigh the traditional factors that are supposed to go into resolution of such orders, a newfound hostility to lower courts, or some combination of all three. But regardless of why it’s happening, it is increasingly difficult to deny its impact. Not only are these orders directly affecting millions of lives, but they’re also starting to be cited as precedent by lower-court judges—even though the justices themselves have long insisted that they lack precedential value. They’re becoming especially common in election-related and COVID-related cases—of which we can expect only more between now and this fall. And it’s all happening as Congress, which has the unquestioned power to exercise far more control over the justices’ caseload, has done nothing to change any of the relevant rules in well over three decades. Whatever one’s views, this uptick is worthy of far more attention. Among other things, these rulings put the justices in the position of deciding weighty legal issues at a very early stage of litigation, in a context in which it is often unclear exactly what the relevant facts are and in which legal arguments have not been fully developed. The justices are fond of insisting that theirs is a “court of review, not first view,” except, apparently, in these cases. In the process, these disputes consume significant time and energy at the expense of the court’s “merits” cases, which dropped to their lowest total this term (with 52 cases) since … 1862. And in their impact, the justices’ rulings to date reveal three problematic trends: Republican federal and state government parties fare far better than their Democratic counterparts; the impact these orders have upon the public has disappeared from the legal analysis; and the justices are even more sharply partisan in these cases than in those that receive more attention. But by far the most troubling feature of all of this is that it’s happening in the shadows. It’s not just that most of these orders are accompanied by no reasoning; it’s that they’re handed down at all hours of the day (including quite a few after midnight or on Friday afternoons), with little opportunity for public involvement or scrutiny. It was one thing for the shadow docket to be so invisible to the public when it wasn’t as important. But with more and more of these decisions affecting more and more of us on a regular basis, it would behoove the justices to do whatever they can to bring more of these rulings into the sunlight—and for Congress to consider more aggressive reforms if they don’t.

## DA

### Overpop D---No Carrying Capacity

#### Carrying capacity is wrong and tech solves

Alex Epstein 14, Director of the Center for Industrial Progress, "Alex Epstein: The sustainability myth," 12/24/14, news.nationalpost.com/2014/12/24/alex-epstein-the-sustainability-myth/

Modified for gendered language – insertions bracketed

Exploring the evidence about [hu]mankind’s use of fossil fuels so far, we have seen that the fossil fuel industry is far and away the world leader at producing cheap, plentiful, reliable energy and that that energy has radically increased our ability to create a flourishing society, a more livable climate, and greater environmental quality. On these fronts, so long as we are able to use fossil fuels, the evidence is overwhelming that life can get better and better across the board, as we use fossil fuel technology and other technologies to solve more problems — including those that fossil fuel technology and other technologies create.

One big question remains: What are the long-term prospects for this way of life? While today we are rich in fossil fuel resources and the wealth they help us create, what is in store for the future?

With so much consuming, can this way of life really last? Is it sustainable?

The answer is better than yes. Not only can our way of life last; it can keep getting better and better, as long as we don’t adopt “sustainability” policies.

Earlier, we saw that the amount of unused fossil fuel raw material currently in the Earth exceeds by far the amount we’ve used in the entire history of civilization by many multiples and that the key issue is whether we have the technological ability and economic reason to turn that raw material into a resource.

For years, actually centuries, opponents of fossil fuels — and some supporters of fossil fuels — have said that using fossil fuels is unsustainable because we’ll run out of them.

Instead, we keep running into them. The more we use, the more we create. Fossil fuel energy resources, as we discussed, are created — by turning a non-resource raw material into a resource using human ingenuity. And there is plenty of raw material left.

In the last few years, the shale energy revolution has unlocked vast new oil and gas resources, making the “running out of fossil fuels” claim seem implausible for the foreseeable future. Many environmental leaders have therefore shifted from saying that we’re running out of fossil fuels to saying that our abundance of fossil fuels is causing us to run out of other resources — arable land and water, most alarmingly, but also a whole host of other materials that are crucial for civilizations.

“Consuming three planets’ worth of resources when in fact we have one is the environmental equivalent of childhood obesity — eating until you make yourself sick,” says David Miliband, at the time secretary of state for the environment, food, and rural affairs in the United Kingdom. In response to criticisms of renewable energy plans as utopian and far-fetched, environmentalist Bill McKibben says, “Perhaps it’s the current scheme, with its requirement of endless growth in a finite world, that seems utopian and far-fetched.”

The theory behind these predictions is that Earth has a finite “carrying capacity,” an idea that was spread far and wide in the 1970s. Two of the leading exponents of this view were Paul Ehrlich and John Holdren. In their landmark book, Global Ecology, they wrote: “When a population of organisms grows in a finite environment, sooner or later it will encounter a resource limit. This phenomenon, described by ecologists as reaching the ‘carrying capacity’ of the environment, applies to bacteria on a culture dish, to fruit flies in a jar of agar, and to buffalo on a prairie. It must also apply to man on this finite planet.

These theories were not idle banter — they were used by many to call for drastic restrictions on fossil fuel use, much as we have today.

Ehrlich and Holdren announced, “A massive campaign must be launched to restore a high-quality environment in North America and to de-develop the United States.” This meant an attempt to reverse industrial development — by law: “This effort must be largely political.”

These ideas were viewed highly enough that Holdren’s body of work, which stresses these themes over and over, gave him the prestige to become science adviser to President Barack Obama.

As we’ve discussed earlier, these predictions were wrong, but why, exactly, were they wrong? The most direct reason is that there are far more fossil fuel raw materials and far more human ingenuity to get them than Ehrlich and Holdren expected. But there is a deeper error here, an error at the root of the whole concept of sustainability. The error is a backward understanding of resources.

The believers in a finite carrying capacity think of the Earth as something that “carries” us by dispensing a certain amount of resources. But if this was true, then why did the cave[hu]man have so few resources?

Those who believe in the ideal of human non-impact tend to endow nature with godlike status, as an entity that nurtures us if only we will live in harmony with the other species and not demand so much for ourselves.

But nature gives us very few directly usable machine energy resources. Resources are not taken from nature, but created; from nature. What applies to the raw materials of coal, oil, and gas also applies to every raw material in nature — they are all potential resources, with unlimited potential to be rendered valuable by the human mind.

Ultimately, a resource is just matter and energy transformed via human ingenuity to meet human needs. Well, the planet we live on is 100% matter and energy, 100% potential resource for energy and anything else we would want. To say we’ve only scratched the surface is to significantly understate how little of this planet’s potential we’ve unlocked. We already know that we have enough of a combination of fossil fuels and nuclear power to last thousands and thousands of years, and by then, hopefully, we’ll have fusion (a potential, far superior form of nuclear power) or even some hyper-efficient form of solar power.

The amount of raw matter and energy on this planet is so incomprehensibly vast that it is nonsensical to speculate about running out of it. Telling us that there is only so much matter and energy to create resources from is like telling us that there is only so much galaxy to visit for the first time. True, but irrelevant.

Sustainability is not a clearly defined term. According to the United Nations, it has over a thousand interpretations, but the basic idea is “indefinitely repeatable.” For example, the idea of renewability, which is usually synonymous with sustainability in the realm of energy, is that the fuel source keeps replenishing itself over and over without the need to do anything different.

But why is this an ideal? In most realms, we accept and desire constant change. For example, you want the best phone with the best materials, regardless of whether those materials will be there in 200 years and regardless of whether it would be more “renewable” to use two cups and a string.

Why should we want to use solar panels or windmills over and over (leaving aside the fact that they quickly deteriorate and thus require a continuous series of mass-mining projects) if they keep giving us expensive, unreliable energy? Why not use the best, the most progressive form of energy at any given time, recognizing that this will change as we advance and the best becomes better?

At the beginning of this book, we observed that human beings survive by using ingenuity to transform nature to meet their needs — i.e., to produce and consume resources. And we observed that the motive power of transformation, the amplifier of human ability, the resource behind every other resource, is energy — which, for the foreseeable future, means largely fossil fuel energy. There is no inherent limit to energy resources — we just need human ingenuity to be free to discover ways to turn unusable energy into usable energy. This opens up a thrilling possibility: the endless potential for improving life through ever-growing energy resources helping create ever-growing resources of every kind. This is the principle that explains the strong correlation between fossil fuel use and life expectancy, fossil fuel use and income, fossil fuel use and pretty much anything good: human ingenuity transforming potential resources into actual resources — including the most fundamental resource, energy.

Growth is not unsustainable. With freedom, including the freedom to produce energy, it is practically inevitable. We are not eating the last slice of pizza in the box or scraping the bottom of the barrel; we are standing on the tip of an endless iceberg.

#### Latest tech solves the impact, and it’s locally-accessible

Megan Treacy 15, staff writer covering clean technology topics, "Dew collecting greenhouse to fight water and food scarcity in Ethiopia," 3/23/15, www.treehugger.com/clean-technology/dew-collecting-greenhouse-fight-water-crisis-ethiopia.html

In many parts of the world, droughts and an increasingly dry, arid climate have lead to water scarcity and in tandem, food scarcity too. A group of researchers in Northern Ethiopia are tackling the issue by creating a very low-tech solution that could have a huge impact.

The Roots Up project, a non-profit organization affiliated with Ethiopia’s University of Gondar, has developed a dew collecting greenhouse that could help farmers grow fresh vegetables even in times of drought and also act as a source of clean drinking water.

The simple design uses low-cost materials to both improve plant-growing conditions inside and act as a water harvester, making it an attainable technology for area farmers. The initiative wants to support highland farmers who've been facing low crop yields and food insecurity because of drought.

The greenhouse traps hot air and humidity during the heat of the day, creating a better atmosphere for plant growth and then at night, a rope can be pulled that opens up a latch at the top of the greenhouse that lets cool air in, eventually reaching the dew point and creating condensation. The water droplets are channeled into a collection cistern and can be used for drinking water or for irrigation.

In times of rain, the design can also be used as a rainwater collector.

Roots Up plans to deploy these greenhouses in Northern Ethiopia soon and will offer training to local farmers on how to maximize their crop yields using the technology. To see more about the project, watch the video below.

### Overpop D---AT: Climate Change

#### Population growth has zero meaningful effect on environmental damage or warming

Lyman Stone 18, Vox Columnist, Regional Population Economics Researcher Who Blogs at In a State of Migration, Agricultural Economist at USDA, Master’s Degree in International Trade and Investment Policy from The George Washington University, “Why You Shouldn’t Obsess About “Overpopulation””, Vox, 7/11/2018, https://www.vox.com/the-big-idea/2017/12/12/16766872/overpopulation-exaggerated-concern-climate-change-world-population

Clearly, fear of overpopulation is widespread.

But the truth is that overpopulation in the United States is not even close to a serious problem. Even globally, overpopulation is an overstated problem.

It’s simplest to start with just the United States. How many people can the country support? Because I am an agricultural economist by profession, my bias is to first think about food. One simple question is how many people can the United States feed? Well, our net agricultural exports account for about 25 percent of the physical volume of agricultural production, which suggests that if we redirected those exports internally, the US could probably support approximately 25 percent more people. That’s assuming current technology and current diets and current land use.

In short, we could feed more than 400 million people, total, *merely by consuming locally what we now export*.

If you assume that a growing population induces more land to be shifted to food production (because farming becomes more profitable), that food imports can rise, and that agricultural innovation continues apace, it becomes clear that our land can physically support even more people than that — I estimate as much as double our current population. And given that agricultural yields are far lower in the developing world today than in the United States, thanks to the much lower level of technological advancement and managerial expertise in those countries, the truth is that the rest of the world has plenty of potential for increased food production: more than enough to feed itself and provide imports for a more populous United States. Merely tweaking foreign land use rules could unlock large gains in agricultural production.

I also approach this problem as a regional economist specializing in migration, so I also think of the American population issue through the lens of population density comparisons. Consider that the European Union has approximately 300 people per square mile, making it as dense as the ninth-densest US state (that is, similar to Pennsylvania or Florida). The continental United States on the whole has about 110 people per square mile (excluding Alaska, an outlier), making the US less than one-third as densely peopled as the EU. Yet the European Union, too, has roughly balanced or even slightly positive agricultural trade. That suggests that Europe, too, has no trouble feeding itself despite being three times as densely settled as the United States.

If the continental United States were as heavily settled as the EU, the US would have nearly a billion people living in it. Granted, the Western US is extremely dry and thus might not support an EU-density population. (Again, I assume we aren’t going to populate remote Alaska.) Nonetheless, if just the states east of the Mississippi had European-style population density, and the other states maintained current population, then the United States would still have more than 400 million people.

Every time I show Americans these calculations, they respond with surprise, but the truth is that getting European-style densities wouldn’t require technological change. It wouldn’t even require any non-voluntary lifestyle changes or new regulations: Simple deregulation of the housing industry would do the trick. Reducing parking requirements for new apartment buildings, removing height limits, altering restrictive lot sizes (namely lot minimums), and generally just allowing landowners to build freely on their property would greatly reduce the cost of living and boost population growth and density. It would prompt Americans to move to denser areas while also lowering housing prices and easing family budgets — which would itself increase fertility. (Recall that many American families wish they could afford more children.)

Population growth is the least influential part of the climate change calculation

The concern with overpopulation, naturally, often dovetails with concerns about climate change. Won’t higher population devastate the environment? We can answer that question fairly easily, making use of forecasts of population, GDP per capita, and emissions intensity per dollar by country. We can come up with some scenarios and then compare them to estimates of emissions needed to keep global warming manageable.

Chart

Description automatically generated

I show a daunting number of scenarios above, but they’re color-coded to make following them easier. The greenish lines show emissions under different population scenarios. The most steeply climbing line assumes only a modest decline in global fertility rates, while the lowest (green) scenario assumes a very rapid decline in total fertility rates — frankly, an unattainable decline.

The teal line assumes that fertility rates in every country go directly to replacement rate in 2016 (down for most poor countries, up for rich ones), and stay there. The central green line assumes fertility declines in the future following the historic trend. As you can see from these crude extrapolations, fertility rates do have substantial long-run effects on emissions.

But note those two gray lines. They’re important: They show where emissions need to go in order to prevent sharp rises in global temperatures. The pazler of the two shows emissions required for less than 2 degree Celsius increase, broadly seen as the benchmark for a “serious” global warming solution. The darker gray line would get us down to a 2.5 to 2.7 degree increase, which is more or less what the Paris climate agreement committed participating countries to strive for. No amount of population control achieves those goals.

One challenge is that lower fertility leads to higher consumption and economic output

One complication is that fertility decline tends to increase GDP per capita, as families invest more in human capital for each child. What happens if GDP growth is much faster than in my baseline scenario? That sharply rising purple line shows emissions if we retain baseline fertility but global GDP per capita rises to $100,000 real dollars. (It is under $12,000 today.) The much lower pink line shows what happens if we retain current fertility but global GDP per capita peaks in 2050 at about $20,000, then declines. Emissions are much lower, but they’re still far above the levels necessary to prevent extreme warming.

Finally, the red and orange lines show different assumptions about technology and society. The red line assumes that the amount of CO2 it takes to produce $1 of GDP declines much slower than it has in the past 25 years. The orange line assumes it declines substantially faster. Achieving either scenario requires a global economy that is substantially less dependent on fossil fuels than it is today in either case, but reaching the most optimistic scenario requires a near-total elimination of fossil fuel power generation on developed countries (as France has done, with its commitment to nuclear power).

Either scenario is technologically possible, though we would need big breakthroughs in cost-effectiveness of alternative energy for the best-case outcomes. But compared to the “cost” involved, these tech and social measures have the biggest bang.

But unfortunately, even if we combine lower fertility, more efficient technology, and lower economic growth (the brown line), by the 2030s we are once again overshooting necessary emissions. In other words, this entire exercise is hopeless within current technological constraints. The only hope for the climate is a quantum-leap breakthrough in carbon efficiency — beyond what we observe in even very carbon-efficient economies. Fertility on its own won’t make a serious dent.

And it gets worse: Fertility declines may offset themselves even when couples have zero children. An American couple that forgoes a child might take an extra vacation,

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say, a road trip across Peru — burning extra fossil fuel for airfares and extra driving. The couple’s plane ticket alone to Peru would produce between 3 and 7 metric-ton equivalents of CO2. Add in the couple’s double consumption of housing (their home is vacant while they travel), their increase in driving (it’s a road trip), their increase in eating and other consumption (it’s vacation, after all), and that single vacation has about the same carbon impact as a baby in its first year (some 10 tons of carbon, let’s estimate).

Because of this higher-intensity consumption by childless couples, while lower fertility could reduce long-run emissions, it probably has no net impact on short-run emissions — or even increases them. And short-run emissions have the largest impact on future temperatures (because there is a time delay between carbon emissions and climate impact).