# 1AC — Off a Perc

### 1AC---Economy ADV

#### 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.

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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.

#### Patent holdup is accentuated by the Ninth Circuit’s recent decision in *FTC v. Qualcomm* that permits ICT firms to engage in innovation-stifling conduct with antitrust impunity.

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Standards can enhance competition and consumer choice, but they also massively inflate the value of patents deemed essential to the standard, and give their owners the power to sue companies that implement the standard for money damages or injunctions to block them from using their SEPs. When standards cover critical features like wireless connectivity, SEP owners wield a huge amount of “hold-up” power because their patents allow them to effectively block access to the standard altogether. That lets them charge unduly large tolls to anyone who wants to implement the standard.

To minimize that risk, standard-setting organizations typically require companies that want their patented technology incorporated into a standard to promise in advance to license their SEPs to others on fair, reasonable, and non-discriminatory (FRAND) terms. But that promise strikes at a key tension between antitrust and patent law: patent owners have no obligation to let anyone use technology their patent covers, but to get those technologies incorporated into standards, patent owners usually have to promise that they will give permission to anyone who wants to implement the standard as long as they pay a reasonable license fee.

Qualcomm is one of the most important and dominant companies in the history of wireless communication standards. It is a multinational conglomerate that has owned patents on every major wireless communication standard since its first CDMA patent in 1985, and it participates in the standard-setting organizations that define those standards. Qualcomm is somewhat unique in that it not only licenses SEPs, but also supplies the modem chips used by a wide range of devices. These include chips that implement wireless communication standards, which lie at the heart of every mobile computing device.

Although Qualcomm promised to license its SEPs (including patents essential to CDMA, 3G, 4G, and 5G) on FRAND terms, its conduct has to many looked unfair, unreasonable, and highly discriminatory. In particular, Qualcomm has drawn scrutiny for bundling tens of thousands of patents together—including many that are not standard-essential—and offering portfolio-only licenses no matter what licensees actually want or need; refusing to sell modem chips to anyone without a SEP license and threatening to withhold chips from companies trying to negotiate different license terms; refusing to license anyone other than original-equipment manufacturers (OEMs); and insisting on royalties calculated as a percentage of the sale price of a handset sold to end users for hundreds of dollars, despite the minimal contribution of any particular patent to the retail value.

In 2017, the U.S. Federal Trade Commission [sued](https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used) Qualcomm for violating both sections of the Sherman Antitrust Act by engaging in a number of anticompetitive SEP licensing practices. In May 2019, the U.S. District Court for the Northern District of California agreed with the FTC, identifying numerous instances of Qualcomm’s unlawful, anticompetitive conduct in a comprehensive [233-page opinion](https://www.eff.org/document/ftc-v-qualcomm-district-court-opinion). We were pleased to see the FTC take action and the district court credit the overwhelming evidence that Qualcomm’s conduct is corrosive to market-based competition and threatens to cement Qualcomm’s dominance for years to come.

But this month, a panel of judges from the Court of Appeals for the Ninth Circuit unanimously [overturned](https://www.eff.org/document/ninth-circuit-opinion-ftc-v-qualcomm) the district court’s decision, reasoning that Qualcomm’s conduct was “hypercompetitive” but not “anticompetitive,” and therefore not a violation of antitrust law. To reach that result, the Ninth Circuit made the patent grant more powerful and antitrust law weaker than ever.

According to the Ninth Circuit, patent owners don’t have a duty to let anyone use what their patent covers, and therefore Qualcomm had no duty to license its SEPs to anyone. But that framing requires ignoring the promises Qualcomm made to license its SEPs on reasonable and non-discriminatory terms—promises that courts in this country and around the world have consistently enforced. It also means ignoring antitrust principles like the essential facilities doctrine, which limits the ability of a monopolist with hold-up power over an essential facility (like a port) to shut out rivals. Instead, the Ninth Circuit held rather simplistically that a duty to deal could arise only if the monopolist had provided access, and then reversed its policy.

But even when Qualcomm restricted its licensing policies in critical ways, the Ninth Circuit found reasons to approve those restrictions. For example, Qualcomm stopped licensing its patents to chip manufacturers and started licensing them only to OEMs. This had a major benefit: it let Qualcomm charge a much higher royalty rate based on the high retail price of the end user devices, like smartphones and tablets, that OEMs make and sell. If Qualcomm had continued to license to chip suppliers, its patents would be “exhausted” once the chips were sold to OEMs, extinguishing Qualcomm’s right to assert its patents and control how the chips were used.

Patent exhaustion is a century-old doctrine that protects the rights of consumers to use things they buy without getting the patent owner’s permission again and again. Patent exhaustion is important because it prevents price-gouging, but also because it protects space for innovation by letting people use things they buy freely, including to build innovations of their own. The doctrine thus helps patent law serve its underlying goal—promoting economic growth and innovation. In other words, the doctrine of exhaustion is baked into the patent grant; it is not optional. Nevertheless, the Ninth Circuit wholeheartedly approved of Qualcomm’s efforts to avoid exhaustion—even when that meant cutting off access to previous licensees (chip-makers) in ways that let Qualcomm charge far more in licensing fees than its SEPs could possibly have contributed to the retail value of the final product.

It makes no sense that Qualcomm could contract around a fundamental principle like patent exhaustion, but at the same time did not assume any antitrust duty to deal under these circumstances. Worse, it’s harmful for the economy, innovation, and consumers. Unfortunately, the kind of harm that antitrust law recognizes is limited to harm affecting “competition” or the “competitive process.” Antitrust law, at least as the Ninth Circuit interprets it, doesn’t do nearly enough to address the harm downstream consumers experience when they pay inflated prices for high-tech devices, and miss out on innovation that might have developed from fair, reasonable, and non-discriminatory licensing practices.

We hope the FTC sticks to its guns and asks the Ninth Circuit to go en banc and reconsider this decision. Otherwise, antitrust law will become an even weaker weapon against innovation-stifling conduct in technology markets.

#### 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 incentivizes rent-seeking and undermines 5G innovation.

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.

#### A trusted and credible system for ICT innovation is critical to rapid tech diffusion and economic growth---absent FRAND, the system will collapse.

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It is easy to take a pessimistic view about whether the system will break. If the current trend continues, the system is likely to break at some point for the simple reason that companies will not trust it anymore. The series of legal disputes witnessed over the past years – sometimes referred to as the “smartphone patent wars” – has been fodder for a pessimistic reading of “the two tales of SEPs”. While it is common in the business world that disputes over patents and licenses are settled in courts, various SEP disputes have revealed problematic aspects of the SEP market that are different from those disputes that follow the normal stream of business and contracts. Often, the SEP disputes are less concerned about the rights and boundaries of patents, and more about antitrust limits to market behavior: they concern market abusive practices and restrictions to competition as much as they are about intellectual property.

If the SEP system actually does break at some point, the consequences would be felt throughout the economy. SEPs have been a critical part of the ICT revolution. SEPs have allowed for the fast rates of innovation diffusion that the world has witnessed over the past quarter of a century. All the computer and Internet related products and services that people are now dependent upon for their private and professional lives are intricate webs of intellectual property. As many as 250,000 patents can be used to claim ownership of some technical specification or design element in a single smartphone (NYT 2012). A laptop, suggests one calculation, implements more than 250 interoperability standards (Biddle et al. 2010), and the number of SEP holders for 3G and 4G standards grew from 2 in 1994 to 130 in 2013 while the number of SEPs rose from fewer than 150 in 1994 to more than 150,000 in 2013 (Galetovic and Gupta 2016). The standardization-body ETSI has registered more than 150,000 declarations of SEPs from companies, and ETSI is just one of many bodies in the world of ICT standardization. For the 3G standard, the same body has about 24,000 patents that have been declared essential. Now, with the economy yet again on the threshold of big technological change, a trusted and credible system for creators and users of technology to standardize proprietary technology would be a boon for innovation, interoperability and – ultimately – the consumers.

And there are reasons for optimism. Although many of the problems in the SEP regimes need to be addressed, the numbers above indicate that the SEP system is in fact attractive to patent holders and SEP implementers. It is easy to see why: neither holders nor implementers are presented with alternative options that on the face of it would be far more profitable for them. In other words, there simply would not be as many patents declared as essential if both creators and users of technology believed the SEP system worked to their disadvantage or was grossly unfair. While the reality for some companies may be that legal disputes and unpredictability prompt them to find other ways than SEPs to get access to key technologies for their products, it remains the case that most stakeholders have strong economic incentives to maintain a balanced SEP system that is trusted.

First, standard essential patents are an asset for creators of technology because, by becoming essential to a standard, their volumes of sales for technologies that users value rise significantly. As many holders want to raise more revenues for their SEPs and – ideally – have the freedom to contract with buyers on their terms, they can expand their customer base when they agree to sell patented technology in accordance with a set of rules that are designed to prevent SEP holders exploiting the weakness of a customer that has grown dependent on having access to their technology.

Second, SEPs are hugely beneficial also to those that buy the licenses – the implementers or users. Through the SEP system, they can access technologies that are interoperable and work with different products and functionalities – and they can do it under conditions that, if history is a guide, in most cases give them stable and predictable terms of contract. As a consequence, both creators and users can focus on their competitive advantages and profit on the economies of scale and specialization. Downstream firms do not need to develop their own upstream technology and upstream firms do not need to package their technologies in end-customer products in order to make their products valuable.

Third, standard-setting organisations (SSOs) also have a big stake in an SEP system that works well – and, like creators and users of technology, they would stand to lose significantly if the SEP system were to collapse.

Lastly, the biggest beneficiaries are individual consumers – those who buy the end products using FRAND-conditioned SEPs. The advent of SEPs and the rules represented by FRAND have enabled a development of fast technology creation and contributed to the rapid diffusion in ICT goods and ICT-based services. The SEP system has also allowed for new competition, both between existing technologies and brands, and from new ones that have stepped into the market with the ambition to disrupt it, again to the benefit of the consumer. It is difficult to imagine that the ICT and digital development would have been as fast as it has been if SEPs had not been a central feature of the market.

The changing fortunes of companies operating in the cellular and smartphone market would not have been possible if there had not been an SEP system that supported competition. Now that the world economy is on the doorstep of new innovations that are dependent on a great number of input technologies – e.g. the Internet-of-Things, transport connectivity and intelligent vehicles – it is crucially important for the consumer that a balanced and functioning SEP system is maintained and that actors in the system converge towards it – which would ultimately meet their economic interests.

#### ICT innovation is key to post-COVID economic recovery and long-term growth.

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Introduction

As the global economy has entered recession in 2020, triggered by the COVID-19 pandemic, the human casualties, and economic damage are perceived to be very large. Even as the health crisis will gradually become manageable, the impact on economic growth can be long-lasting and the recovery path can take several years. In particular, growth drivers such as the pace of job creation, income generation and investment may take several years to get back to pre-crisis trends. Initially the productivity of those growth drivers may be of less concern as the mantra of ‘we’ll do what it takes to avoid worse’ is predominant in this phase of the crisis.

However, once the recovery gets underway the productive use of resources is key to sustained growth. While we do not ignore the short-term challenges of the economic recovery, our primary focus in this paper is on the productivity puzzle from a long-term perspective. Productivity is driven by technological change and innovation which, in turn, depends on investment in human and physical capital as well as in other ‘missing capitals’ often referred to as intangible assets. Indeed, those investments create a positive feedback effect, as the productivity it generates also helps to make more efficient usage of scarce resources in the future. When properly measured and valued, productivity also provides a critical yardstick to realise a fairer distribution of the gains from economic growth to those who bring the resources to bear. It thereby creates the incentives for people to produce and business to invest helping to drive economic growth and raise living standards.

Unfortunately, in the aftermath of the global financial crisis of 2008/2009, many economies around the world, especially advanced economies, have failed to recharge the economy by powering productivity as the key source of growth in the long term. Indeed the latest update of The Conference Board Total Economy Database (July 2020) points at significant weakening in labor productivity growth in Europe up to 2019 (figure 1a–c). While the United States experienced somewhat faster productivity growth from 2017 to 2019 than the Euro Area and the United Kingdom, it still has not recovered to the rates of productivity growth from before the global financial crisis either.

The slowdown in productivity growth over the past 15 years has been well documented. There are multiple causes including an exhaustion of catch-up potential in emerging markets impacting economies along entire global value chains, and the drag from the global financial crisis because of low demand and weak investment, too low interest rates causing misallocations an overreliance on cheap labor, and failing fiscal policies (Bauer et al., 2020; Cette et al., 2016; Crafts, 2018; Dieppe, 2020; Fernald et al., 2017; Syverson, 2016).1 Technical measurement issues regarding inputs and outputs may have played a role as well.

In our earlier work we have stressed the importance of time lags in the adoption of new technologies, and in particular the complexity in generating productivity growth from the latest round of new digital technologies since the early 2010s, including the move toward mobile, ubiquitous access to broadband, the rise of cloud storage and advances in artificial intelligence (AI) and robotics (van Ark, 2016a, 2016b; van Ark and O’Mahony, 2016; van Ark et al., 2016).

While the first priority for economic recovery from the COVID-19 crisis is to restore jobs, it is important that any employment-intensive growth path does go together with a productivity revival. In this paper, we argue that it is possible to avoid another productivity slowdown. Underneath the aggregate figures, there is evidence pointing toward a possible tipping point at which many advanced economies may expect to see more widespread impacts from the adoption and absorption of digital technology on productivity and GDP growth.

In Section 2 we review the latest literature on the productivity impacts of general purpose technologies (GPTs), including the notion of time lapses through which digital technologies result in faster productivity growth. We also look at patterns by which innovation and productivity effects GPTs emerge across industries and disperse across the economy. We explain why the New Digital Economy (NDE) is especially characterised by long lag effects.

In Section 3 we provide an empirical analysis of productivity growth by industry data to observe whether we can detect a distinct pattern across groups of industries pointing to a structural improvement in recent years. We use a taxonomy on digital intensity by industry which was recently developed by the Organisation for Economic Co-operation and Development (OECD) (Calvino et al., 2018), showing that the most digital-intensive industries have experienced a relatively strong performance in terms of labor productivity growth since 2007 and especially since 2013.

In Section 4 of the paper, we discuss the connection between labor and skills in the digital economy, which we believe provides the key to a productivity revival. We developed a new metric on innovation competencies by occupation on the basis of data from the O\*Net database on occupation-specific descriptors in the United States (Hao et al., 2018). When applied to the United Kingdom, we find that innovation competencies point at stronger productivity effects by industry.

In Section 5 we focus on how productivity has been behaving in the short-term during the COVID-19 recession. In particular, we address the potential trade-offs between traditional pro-cyclical recovery effects and scarring effects the recession leaves, especially on the labor market. We argue that increased adoption and usage of digital technologies during the COVID-19 crisis may create a positive productivity effect. In the final section, Section 6, we will review our hypothesis that a productivity revival could be imminent in the light of the recovery from the COVID-19 crisis. In order not to miss this opportunity again, as happened a decade ago, we argue that a coordinated effort from business and policy is needed, and has to be delivered in such a way that the gains from productivity will be more widespread and such that those who provide the resources for growth are incentivised to deliver them in an efficient way.

2. The productivity paradox of the New Digital Economy

It is well known that General Purpose Technologies (GPTs), defined as new methods of producing and inventing new goods and services which are important enough to have a long-term aggregate impact on the economy, can take a significant amount of time to translate to faster productivity growth at the aggregate level of the economy. This is inherent to the three critical characteristics of a GPT as identified by Bresnahan and Trajtenberg (1995).2

1. Pervasiveness –The GPT should spread to most sectors.

2. Improvement –The GPT should get better over time and, hence, should keep lowering the costs of its users.

3. Innovation spawning –The GPT should make it easier to invent and produce new products or processes.

Historical analysis has focussed on productivity trends in previous technology phases (Bakker et al., 2019; Crafts, 2004). Recent literature has shown that the information and communication technology (ICT) revolution of the past 50 years can be characterised as a GPT and doesn’t pale with previous GPTs such as steam technology, electricity and the combustion engine. For example, Hempell (2005) concludes that ‘investment in information and communication technologies (ICT) are closely linked to complementary innovations and are most productive in firms with experience from earlier innovations’. In a more recent analysis of the evolution of the Internet, Simcoe (2015) argues that the modularity of the internet has prevented a fall in return to investments in innovation by ‘facilitating low-cost adaptation of a shared general-purpose technology to the demands of heterogeneous applications’. In a review of the data, Liao et al. (2016) conclude that:

‘...ICT investment does contribute to productivity but not in the usual manner –we find a positive (but lagged) ICT effect on technological progress. We argue that for a positive ICT role on growth to actually take place, a period of negative relationship between productivity and ICT investment together with ICT-using sectors’ capacity to learn from the embodied new technology was crucial. In addition, it took a learning period with appropriate complementary co-inventions for the new ICT-capital to become effective and its gains to be realised. Our findings provide solid, further empirical evidence to support ICT as a general purpose technology’.

#### Growth solves nuclear war.

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What Is To Be Done?

The first marching order is to dodge any kind of perpetual war of the sort that George Orwell outlined in  “1984,” which engulfed the three super states of Eastasia, Eurasia, and Oceania, and made possible the totalitarian Big Brother regime. A long-running Cold War-type confrontation would almost certainly take another form than the one that ran from 1945 until the downfall of the Soviet Union.

What prescriptions can be offered in the face of the escalating competition among the three global powers? First, by staying militarily and economically strong, the United States will have the resources to deter its peers’ hawkish behavior that might otherwise trigger a major conflict. Judging by the history of the Cold War, the coming strategic chess match with Russia and China will prove tense and demanding—since all the countries boast nuclear arms and long-range ballistic missiles. Next, the United States should widen and sustain willing coalitions of partners, something at which America excels, and at which China and Russia fail conspicuously.

There can be little room for error in fraught crises among nuclear-weaponized and hostile powers. Short- and long-term standoffs are likely, as they were during the Cold War. Thus, the playbook, in part, involves a waiting game in which each power looks to its rivals to suffer grievous internal problems which could entail a collapse, as happened to the Soviet Union.

Some Chinese and Russian experts predict grave domestic problems for each other. They also entertain similar thoughts about the United States, which they view as terminally decadent and catastrophically polarized over politics, ethnicity, and the future direction of the country. So, the brewing three-way struggle also involves a systemic contest, which will test the competitors’ economic and political institutions.

At this juncture, the world is entering a standoff among the three great and several not-so-great powers. Averting war, while defending our interests, will prove a challenge, calling for deft policy, political endurance, and economic growth, as well as sufficient military force to keep at bay aggressive states or prevail over them if ever a war breaks out.

#### Economic growth is responsible for drastic improvements in global living standards, and is the only path for future improvements.

Cowen 18, \*Tyler Cowen is a Holbert L. Harris Professor at George Mason University and Director of the Mercatus Center; (October 16th, 2018, “Stubborn Attachments: A vision for a society of free, prosperous, and responsible individuals”, <https://www.goodreads.com/en/book/show/31283667-stubborn-attachments>)

How good is growth, anyway ?

The history of economic growth indicates that, with some qualifications, growth alleviates misery, improves happiness and opportunity, and lengthens lives. Wealthier societies have better living standards, better medicines, and offer greater personal autonomy, greater fulfillment, and more sources of fun. While measured wealth does not exactly correspond to Wealth Plus, these two concepts have come pretty close to one another in the past, especially across the range of outcomes we have observed (as opposed to hypothetical thought experiments and counterfactuals).

We often forget how overwhelmingly positive the effects of economic growth have been. Economist Russ Roberts reports that he frequently polls journalists about how much economic growth there has been since the year 1900. According to Russ, the typical response is that the standard of living has gone up by around fifty percent. In reality, the U.S. standard of living has increased by a factor of five to seven, estimated conservatively, and possibly much more, depending on how we measure prices and the values of outputs over time, a highly inexact science.

The data show just how much living standards have gone up. In 1900, for instance, almost half of all U.S. households (forty-nine percent) had more than one occupant per room and almost one quarter (twenty-three percent) had over 3.5 persons per sleeping room. Slightly less than one quarter (twenty-four percent) of all U.S. households had running water, eighteen percent had refrigerators, and twelve percent had gas or electric lighting. Today, the figures for all of these stand at ninety-nine percent or higher. Back then, only five percent of households had telephones, and none of them had radio or TV. The high school graduation rate was only about six percent, and most jobs were physically arduous and had high rates of disability or even death. In the mid-nineteenth century, a typical worker might have put in somewhere between 2,800 and 3,300 hours of work a year; that estimate is now closer to 1,400 to 2,000 hours a year. 6

Until recently, polio, tuberculosis, and typhoid were common ailments, even among the rich. U.S. presidents George Washington, James Monroe, Andrew Jackson, Abraham Lincoln, Ulysses S. Grant, and James A. Garfield all caught malaria during their lives. Antibiotics and vaccines have existed for only a tiny fraction of human history, and it is no coincidence that they emerged in the wealthiest time period humanity has ever seen. There is also a strong and consistent relationship between wealth and rates of infant mortality; small children do best when they are born into wealthier countries, and that is because wealth supplies the resources to take better care of them.

As recently as the end of the nineteenth century, life expectancy in Western Europe was roughly forty years of age, and food took up fifty to seventy-five percent of a typical family budget. The typical diet in eighteenth-century France had about the same energy value as that of Rwanda in 1965, the most malnourished nation for that year. One effect of this deprivation was that most people simply did not have much energy for life.

In earlier time periods, most individuals performed hard physical labor, and a college or university education—or even a high school education—was a luxury. Leisure time has risen with economic growth. In 1880, about four-fifths of individuals’ discretionary time was spent working, according to economist Robert Fogel. Today we spend about fifty-nine percent of our time doing what we like, and that may rise to seventy-five percent by 2040. 8

The splendors of the modern world are not just frivolous baubles; they are important sources of human comfort and well-being. Imagine that a time traveler from the eighteenth century were to pay a visit to Bill Gates today. He would find televisions, automobiles, refrigerators, central heating, antibiotics, plentiful food, flush toilets, cell phones, personal computers, and affordable air travel, among other remarkable benefits. The most impressive features of Gates’s life, seen from the point of view of a person from the eighteenth century, are those shared by most citizens of wealthy countries today. My smartphone is as good as his. The very existence of an advanced civilization—the product of cumulative economic growth—confers immense benefits to ordinary citizens, including their ability to educate and entertain themselves and choose one life path over another. For further arguments along these lines, I recommend Steven Pinker’s recent book, Enlightenment Now: The Case for Reason, Science, Humanism, and Progress . 9

The economic growth of the wealthier countries benefits the very poor as well, though sometimes with considerable lags. The distribution of wealth changes over time, and not all growth trickles down, but as an overall historical average, the bottom quintile of an economy shares in growth. 10 You can see this by comparing the bottom quintile in, say, the United States to the bottom quintile in India or Mexico.

The richer economy can also do more to elevate the living standards of immigrants. Poor people who move to rich countries usually receive higher incomes and have better living conditions, and their children do better still. The richer the receiving country, the more new immigrants tend to benefit. Central American immigrants to the United States do better than Central American immigrants to Mexico or Nepalese immigrants to India. Immigrants also send remittances back home at a rate that far exceeds governmental foreign aid. Actual upward mobility in the United States far exceeds what the usual numbers indicate, because published statistics on upward mobility do not typically include a comparison with pre-immigration outcomes.

But the chain of benefits does not stop there. Migrants will often return to their home countries, bringing new skills and new business connections. Both India and Israel have developed vibrant technology and software scenes precisely because of their close ties with the start-up scene of the United States. English-language universities in English-speaking countries have trained many thousands of Asian students in science and engineering, again leading to new businesses and, eventually, higher economic growth in their home countries.

New medicines and technologies developed in wealthy nations also make their way to the rest of the world, as illustrated most conspicuously by the rapid spread of the cell phone and now the smartphone. One study predicts that if the leading twenty-one industrial countries were to boost their R&D by half a percentage point of GDP, U.S. output alone would grow by fifteen percent. But it doesn’t end there: output in Canada and Italy would grow by about twenty-five percent, and the output of all industrial nations would increase by 17.5 percent, on average. In the less economically developed countries, output would increase by about 10.6 percent on average. 11

Although these historical processes have often embodied unfairness and long lags of decades or more, economic growth has nonetheless brought wealth to the poor and elevated their status. The Greek city-states and the Roman Empire benefited from maritime trade across the Mediterranean; those regions in turn spread growth-enhancing institutions around Europe, Northern Africa, and the Middle East. The commercial revolution of the late Middle Ages and Renaissance reopened many of the trade routes of antiquity, and eventually human beings started to climb out of the Malthusian trap of very low per capita incomes at subsistence. The wealth of the West helped to enable the export miracles of the East Asian economies. Today, most poor countries seek greater access to wealthier Western and Asian markets, and flourish if they can achieve it. 12

For all the recent increases in inequality within individual nations, global inequality has declined over the last few decades, in large part because of growth in China and India. And the growth in these emerging nations was largely driven by earlier growth in the West and in East Asia. China, for instance, engaged in “catch-up” growth by adopting Western technologies and exporting to the wealthier nations. China has gone from being a quite poor nation to a “middle-income” nation with a sizable middle and upper class.

Although recent media coverage has focused almost exclusively on within-nation magnitudes, recent world history has been an extraordinarily egalitarian time. It is above all else a story about how global economic growth helps the poor. There has been a squeezing of the middle class in the wealthier nations, in part because of increasing global competition. Still, we have seen economic growth, aggregate wealth, and global income equality all rising together over the last twenty-five years. Many citizens in East Asia, South Asia, and Latin America have seen significant gains in their standard of living, and much of this has been a trickle-down effect from the earlier growth of the wealthier countries. Much of Africa is now following suit, bolstered in part by China’s demand for raw materials, and also by the spread of modern technologies such as affordable cell phones. 13

Sometimes extended periods of growth do not confer full or fair benefits to the poor or lower classes, for instance during the early phase of the British Industrial Revolution in the late eighteenth century. Still, the historical record suggests that it was better for Britain to push ahead with economic growth, as this eventually drove the greatest boost in living standards the world has ever seen. To be sure, there were probably better policies which, had they been adopted, would have distributed the benefits of growth more widely (e.g., fewer wars and Poor Law reform and free trade for the British). But even taking misguided policies into account, Britain fared better by pursuing economic growth rather than turning its back on the idea, even though significant real wage gains for the working class often did not arrive until the 1840s.

Nobel Laureate Amartya Sen has promoted the idea of “capabilities” as, if not quite a substitute for economic growth, then an alternative focus. Sen points out that our positive opportunities in life often matter more than the amount of cash in our bank accounts. He also notes that some parts of the world, such as the state of Kerala in India, have relatively good health and education indicators, even though their per capita incomes are relatively low.

Sen’s points are well taken, but they do not put a fundamental dent in the relevance of wealth, or, as I am calling it here, Wealth Plus. The significant benefits accrued from capabilities, such as health benefits, are accounted for in Wealth Plus, even if they are not properly represented in current GDP measures. In other words, Kerala is wealthier than some limited statistical measures imply. Wealth and good social outcomes are still strongly correlated on average, and this correlation is stronger over longer time horizons. For instance, if Kerala does not grow much in more narrow economic terms, it is unlikely to look so impressive in its social indicators fifty or one hundred years from now. Even today, Kerala manages as well as it does in large part because so many Keralans take jobs in wealthier countries, especially in the Gulf States, and send money back home. And compared to other Indian states, Kerala has an above-average measure of wealth, as well as above-average consumption expenditures, both of which are accounted for in traditional statistics. 14

The truth is that economic growth is the only permanent path out of squalor. Economic growth is how the Western world climbed out of the poverty of the year 1000 A.D. or 5000 B.C. It is how much of East Asia became remarkably prosperous. And it is how our living standards will improve in the future. Just as the present appears remarkable from the vantage point of the past, the future, at least provided growth continues, will offer comparable advances, including, perhaps, greater life expectancies, cures for debilitating diseases, and cognitive enhancements. Billions of people will have much better and longer lives. Many features of modern life might someday seem as backward as we now regard the large number of women in earlier centuries who died in childbirth for lack of proper care.

I myself have written of the great stagnation, a slowdown in growth which overtook the Western world starting in about 1973. It would be a failure of imagination, however, to believe that human progress has run its course. The more plausible view is that progress is unevenly bunched, we have been in a slow period as of late, various new developments are percolating, and we should do our best to help them along. Whether we like it or not, economic growth and technological progress do not always arrive at a steady pace.

World history offers various precedents for the idea of a “great transformation” leading to enormous increases in the quality and quantity of human lives. Our ancestors did not foresee the evolution of humans, the agricultural revolution, the “urban revolution” (Sumeria and Mesopotamia, circa 4000 B.C.), or the Industrial Revolution. For that matter, the East Asian revolution in economic growth was not widely anticipated. Each development development dramatically changed the human condition over time, and eventually very much for the better. The history of economic growth, to some extent, is the history of working out the consequences of such unforeseen transformations. It is unlikely that we have seen the last of such revolutions, at least provided that civilization manages to stay afloat.

Looking into the more distant future makes the question of the economic growth rate all the more important. For instance, a two percent rate of economic growth, as opposed to a one percent rate, makes only a small difference across the time horizon of a single year. But as time passes, the higher growth rate eventually brings about a very large boost to well-being. To make this concrete, here’s an experiment: redo U.S. history, but assume the country’s economy had grown one percentage point less each year between 1870 and 1990. In that scenario, the United States of 1990 would be no richer than the Mexico of 1990. 15

It is also worth pondering some comparisons with higher rates of economic growth, of the sort we often see in emerging economies. At a growth rate of ten percent per annum, as has been common in China, real per capita income doubles about once every seven years. At a much lower growth rate of one percent, such an improvement takes about sixty-nine years.

Robert E. Lucas, Nobel Laureate in Economics, put the point succinctly: “The consequences for human welfare involved in questions like these are staggering: once one starts to think about [exponential growth], it is hard to think about anything else.” 16

Even if you don’t regard material wealth as central to human well-being, economic growth brings many other values, including, for instance, much greater access to the arts and education. Economic growth also gives individuals greater autonomy and minimizes the chance that their destiny will be determined by the time and place in which they were born. It remains true that many individuals are born poor or are born into families that do not much respect formal education or are born far away from cities. Still, ask yourself a simple question: has there ever been a time in human history when so many individuals had such a good chance of becoming world-class scientists ?

Individuals today are more able to shape their futures, choose their friends, communicate with the outside world, and weave together diverse cultural strands when building out their personal narratives. Benjamin M. Friedman, in his brilliant The Moral Consequences of Economic Growth , shows just how many of the virtues of the modern world depend on higher and indeed growing levels of wealth. 17

The bottom line is this: the more rapidly growing economy will, at some point, bring about much higher levels of human well-being—and other plural values—on a consistent basis. If some set of choices or policies gives us a higher rate of economic growth, those same choices or policies are akin to a Crusonia plant.

#### Innovation diffusion solves uneven global development and contributes to drastic increases in global productivity.

Eugster et al. 19, \*[Johannes Eugster](https://voxeu.org/user/270976), Economist, IMF; [Giang Ho](https://voxeu.org/user/223188), Economist in the European Department, IMF; [Florence Jaumotte](https://voxeu.org/user/222643), Deputy Division Chief, Research Department, IMF; [Roberto Piazza](https://voxeu.org/user/270975), Economist, IMF; (June 12th, 2019, “Technology diffusion and global living standards”, https://voxeu.org/article/technology-diffusion-and-global-living-standards)

The innovation landscape is changing

A striking development in recent years has been the rise of South Korea and China as innovators, whether measured by patenting or R&D spending. China’s R&D spending is now second only to that of the US (Figure 1). South Korea and China are today among the top five most innovative countries in a number of sectors, either based on the stock of R&D or the stock of international patents. Their rise has been particularly pronounced in the electrical and optical equipment sector and, for South Korea, also in machinery and equipment.

Notably, innovation between economies at the technology frontier (G5) has been diverging from other economies. Since the early 2000s, there has been a pronounced slowdown in the growth of patenting – and to a lesser extent R&D – in the G5. This mirrors the well-documented slowdown in labour productivity and total factor productivity. Growth in innovation and productivity held up better in emerging market economies and, to a lesser extent, in other advanced economies (Figure 2).

Diverging dynamics could reflect changes in the way innovation diffuses from the frontier to other regions. The dramatic increases in international trade and capital flows, and the progress in information and communications technologies, have made it easier for countries, especially emerging market economies, to access the international stock of knowledge. Much recent research highlights the importance of trade and foreign direct investment for technology diffusion (e.g. Keller 2004, 2011).

In recent papers (Eugster et al. 2018, IMF 2018), we take a new look at the process of international technology diffusion and its evolution as globalisation has progressed since the mid-1990s. We ask three main questions:

Have knowledge flows become more globalised?

What was the role of foreign knowledge flows in boosting domestic innovation and, more generally, productivity, especially in emerging market economies?

What was the impact of increased international competition – resulting for example from China opening up to global trade – on innovation and cross-border technology diffusion?

To answer these questions, we exploit the rich global patent dataset (PATSTAT), maintained by the European Patent Office, in addition to measures of R&D and productivity. Our methodology builds on the work of Peri (2005) and Coe and others (2009), but extends it by introducing the industry dimension, widening the geographical scope of the analysis to include emerging market economies, and focusing on the most recent decades (1995-2014).

More globalised knowledge flows

PATSTAT allows us to trace knowledge flows using cross-patent citations, that is, the extent to which countries cite patents from other innovators as prior knowledge in their own patent applications. A first look at the data (Figure 3) suggests knowledge flows have increased significantly over the last two decades, and China and South Korea (depicted in Figure 3 as 'other Asia') have become substantially more integrated in global citations, both as citing and as cited innovators.

Figure 3 The evolution of cross-patent citations within, and across, regions between 1995 and 2014

But we need to look beyond raw citation counts. To measure the intensity of knowledge diffusion, we follow Peri (2005) and estimate the predicted frequency at which a given country-sector cites innovations of the technology leaders (taken to be the G5) – relative to the presumed 'frictionless' frequency of citation within the technology leader. This is based on a model in which cross-patent citations between country-sector pairs are a time-varying function of geographical distance between the two, technological distance, whether the countries share a common language or have historic colonial ties, and a large number of fixed effects which control for the stock of innovations and institutional changes in the propensities to patent and cite.

Using this measure confirms that the share of technology leaders’ knowledge that diffuses to emerging market economies has increased steadily and significantly over time – and this finding is robust to excluding China from the 'recipient' economies (Figure 4). In contrast, the diffusion of knowledge from the G5 to (non-G5) advanced economies has remained flat or even moderated somewhat – albeit from a higher level – since the global financial crisis.1

Figure 4 Estimated intensity of knowledge diffusion

Capitalising on knowledge flows

Next, we ask whether foreign knowledge flows impacted the innovation capacity and productivity of recipient countries. Our findings suggest that they do, and increasingly so. We estimate the impact of knowledge flows from technology leaders (G5) – measured by their R&D stock interacted with the estimated intensity of knowledge diffusion presented above – on patenting, and on labour and total factor productivity of other countries.2

We find that both emerging market and other advanced economies have been able to capitalise on knowledge flows from the G5 to increase domestic innovation (measured by patenting) – with foreign knowledge playing a relatively larger role than domestic R&D in emerging market economies. These results also apply to productivity, suggesting that knowledge from the G5 has contributed to boosting income levels in other countries.

The impact on productivity is economically meaningful, especially for emerging market economies. For instance, between 2004 and 2014, knowledge flows from the technology leaders may have generated, for an average country-sector, about 0.7 percentage point of labour productivity growth per year (Figure 5). This amounts to about 40% of the observed average sectoral productivity growth in this period.

Figure 5 Contribution of foreign knowledge to labour productivity growth in emerging market economies (annual % growth across country sectors)

The impact of foreign knowledge flows on domestic technological progress has increased significantly over time. This is especially true for disembodied measures of technological progress such as innovation and total factor productivity (but not for labour productivity).

Growing competition from emerging market economies

We also examine the effect of growing international competition on foreign knowledge flows.

The degree of product market competition is a key theoretical determinant of innovation activity. Its intensity has changed over time, shaped in part by the reduction in trade barriers with globalisation. We construct two measures of international competitive pressures that are reasonably exogenous to developments in specific country-sectors:

The evolution of import penetration from China in US industries. We use this measure to instrument import penetration in 'recipient' advanced economies.

Indices of industry concentration at the global level. These exclude China from our sample because, as the largest non-G5 country, it could introduce significant reverse causality between domestic innovation and our global concentration measure. We find that, consistently across both measures, greater international competitive pressure has increased both the level of sectoral innovation and its sensitivity to foreign knowledge flows.

Although, theoretically, competition has ambiguous effects on innovation, our results point to a positive empirical relation internationally. A small but growing number of papers has tried to empirically address this question. Autor et al. (2016) find that increasing competition from China has lowered innovation in US industries, while Bloom et al. (2016) find the opposite for European firms. Our results capture the conclusions of Bloom et al. (2016), as many European countries are included in our sample of countries. However, they cannot be directly compared to Autor et al. (2016), because we consider the US only as a source of knowledge flows, and not as a sample country.

Conclusions

Globalisation has intensified the international diffusion of technology, which is crucial to share growth potential across countries and boost global growth. The positive impact has been particularly large for emerging market economies, helping increase productivity for them, and supporting income convergence. Our results also suggest that the growing competition from emerging market economies may lead to more innovation, even in advanced economies.

#### 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---Solvency

#### Plan: The United States federal government 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.

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)

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.

#### The exponential expected value of economic growth to future well-being makes securing it a moral imperative.

Cowen 18, \*Tyler Cowen is a Holbert L. Harris Professor at George Mason University and Director of the Mercatus Center; (October 16th, 2018, “Stubborn Attachments: A vision for a society of free, prosperous, and responsible individuals”, https://www.goodreads.com/en/book/show/31283667-stubborn-attachments)

So often we are tempted to put pleasure first and postpone our chores and our pains. The present is so real and vivid, and the future seems so distant and abstract. Many people cannot fully grasp that when the future comes, it will be as real as the present is right now.

I am struck by how people respond when they are given a choice between the immediate present, the future, and the more distant future. Very often they are biased toward the immediate present. For instance, a person might realize that a benefit in two years’ time is about the same in value as that same benefit in three years’ time. That’s a rational posture. That same person, however, may prefer a dollar today to three dollars three weeks from now. 1 But when the comparison is between ten years from now and twenty years from now, people exhibit much more patience, and many people would even say that a benefit ten years from now is about as valuable as the same benefit twenty years from now.

In other words, individual time preference usually focuses on the immediate vs. the only somewhat distant. If we can get over our initial impatience for receiving a reward now, our intellect is very often capable of seeing that we should care about the more distant future as much as we should care about the less distant future. For the most part, we’re actually fairly rational about time, except for this fixation on the “now” moment and the “very soon/right away” horizon.

We are programmed for the now moment for reasons which are inapplicable to most of our public policy choices and obsolete as a fundamental tool of moral reasoning. Human beings evolved under brutal hunter-gatherer conditions; they had good reason to pay special attention to the now moment. If you didn’t get the “now” right, there might not be a tomorrow. If you let a piece of meat sit, it would spoil or be seized by your neighbor or consumed by marauding animals overnight. It wasn’t like sitting on T-Bills in your Fidelity account. So we may have an innate biological preference for the “now,” but we will do better if we can get past it, if we can tap into the part of ourselves that recognizes that a benefit in twenty years’ time is about as valuable as that same benefit in thirty years’ time.

If you are the kind of person who is inclined to seize the current benefit, you will do best if you can find a way to link these immediate rewards to a superior payoff in the future. Young people, uneducated people, and those with lower IQs and problems with cognition or self-control find it hardest to make this connection. Those same people are also more likely to have problems with obesity, gambling, impulse control, and even violence. These correlations don’t philosophically prove that their impatient choices are incorrect (maybe the gamblers are the wise ones and the rest of us are fools for missing out on their risky delights), but they do lend support to the idea that these individuals are making a mistake. They are failing to imagine the future and its import. Further evidence suggests that children who are more impatient have more trouble in school and are more likely to encounter disciplinary action. 2

Very often the choice between the present and the future takes place at the social level. Many social policies influence whether benefits and costs come sooner or later, and if we are to make a choice, we need to decide how impatient we are going to be. I worry about the logical implications of impatience, if we were to apply such impatience to a longer time horizon. Together with Derek Parfit, I once wrote: 3

Why should costs and benefits receive less weight, simply because they are further in the future? When the future comes, these benefits and costs will be no less real. Imagine finding out that you, having just reached your twenty-first birthday, must soon die of cancer because one evening Cleopatra wanted an extra helping of dessert. How could this be justified ?

Economists and other social scientists often speak of a “discount rate.” A discount rate tells us how to compare future benefits to current benefits (or costs) when we make decisions. When the discount rate is high, we are counting future costs and benefits for less. Let’s speak in terms of pleasure (or pain) as a magnitude that corresponds, however roughly, to a real number scale. A five percent discount rate, defined annually, means that 100 units worth of pleasure today is equal to 105 units worth of pleasure a year from now. A ten percent discount rate would set this equality at 110 units worth of pleasure a year from now, and so on.

A discount rate of zero means that a future benefit (or cost) counts for as much as a comparable benefit in the present. A person with a zero discount rate would not see any point in putting off going to the dentist. There’s no reason not to get it over with.

If there’s one thing we’ve learned, it’s that discount rates matter. In your personal life it affects how hard you work, how much you drink and gamble, and what kind of education you get. At the social level, the discount rate pertains to questions of how hard we should be fighting climate change and how much we should invest in preserving biodiversity. If we dismiss the importance of the distant future, action will not seem imperative. But if we pay heed to the distant future, we will see these as major concerns.

Discounting also matters for how hell-bent we are on pursuing a higher rate of economic growth. A higher growth rate means that the future, at some point in time, will be much richer than it would be otherwise, and, as I argued earlier, it also means that human beings will be much better off. How compelled should we feel to bring about this wealthier state of affairs ? If you only care about today, you won’t be as motivated to act in favor of higher sustainable growth.

Most of us are altruistic, especially toward our own children and grandchildren. But this form of partial altruism does not make us care much about other people’s grandkids. When people vote or otherwise make choices that affect future generations as a whole, they often behave quite selfishly. Political time horizons tend to be very short, often extending no further than the next election or the next media cycle. Voters are keen to receive more government spending now and postpone the required taxes to the more distant future. Few governments do everything they can to promote economic growth for the more distant future. The bottom line is that caring about the future is not something that happens automatically, even if you dearly love, or will dearly love, your grandchildren. When it comes to the discount rate for social decisions, we need to choose wisely.

For certain decisions, such as whether or not to cut down a tree, market forces induce even selfish people to think about the more distant future. If you leave the tree standing, it might be worth more money. If you own a Rembrandt painting, you’ll probably keep it in decent shape, even if you’re a selfish, uncultured bastard who doesn’t care about the artistic patrimony of the Dutch. These kinds of examples, however, apply only when there are well-defined property rights to specific assets. The motivations behind these behaviors won’t spur us to preserve the environment or maximize the rate of sustainable economic growth. Once again, the proper depth of concern for the more distant future does not come to us automatically, at least not in a wide variety of cases.

Expressed differently, when it comes to non-tradable and storable assets, markets do not reflect the preferences of currently unborn individuals. The branch of economics known as welfare economics holds up perfect markets as a normative ideal, yet future generations cannot contract in today’s markets. If we were to imagine future generations engaging in such contracting, current decisions might run more in their favor. Circa 2018, the future people of 2068 can’t express their preferences across a lot of the choices we are making today, such as how rapidly to boost future wealth or how much to mitigate the risk of serious catastrophes. 4

Let’s now consider some basic choices about how to value the distant future. Again, think of a decision-maker weighing present and future interests, in this case human lives. The way discounting works, if we discount the future by five percent, a person’s death today is worth about thirty-nine billion deaths five hundred years from now. Alternatively, at that same discount rate, one death two hundred years from now is equal in value to 131.5 deaths three hundred years from now. Upon reflection, few people, putting aside their selfish interest in the current time period, would share these conclusions as a basis for ethical decision-making. 5

Or consider the comparison prospectively. Under any positive discount rate, no matter how low, one life today could be worth more than one million lives in the future. It could even be worth the entire subsequent survival of the human race, if we use a long enough time horizon for the comparison. At the very least, we should be skeptical that positive discount rates apply to every choice before us. Sometimes we should be less impatient and pay the future greater heed.

Even if you think that individual impatience is sometimes justified, impatience will not justify the positive discounting of well-being across generations. Time preference may mean that an individual prefers to have a good steak dinner sooner rather than later. Even if this is rational—after all, you’re getting hungrier by the minute—this kind of time preference doesn’t apply across longer time frames, including future generations. Our still-unborn great-great-grandchildren will not receive benefits for some time. But in the meantime they are not sitting around, waiting impatiently with rumbling stomachs. It cannot be argued that their forthcoming slice of time is worth less simply because they must wait for it. Similarly, it cannot be argued that Medieval peasants benefited from having been born before us and thus having eaten their bread sooner. When we consider long periods of time and count the years before individuals are born, we need to discard impatience as a factor of relevance because it just doesn’t apply. Time preference therefore does not justify the significant discounting of the distant future, even if it justifies Tom’s wanting to have his steak dinner sooner rather than later. 6

Another way of thinking about why a high time discount rate is wrong involves a somewhat unusual—some would say kooky—thought experiment. Einstein’s theory of relativity suggests that there is no one factual answer to the question, “What time is it ? ” Any measurement of time (when is “now” ? ) is relative to the perspective of an observer, and to the velocity of that observer relative to the speed of light. In other words, if you are traveling very fast, you are moving into the future at an especially rapid rate. Yet it seems odd, to say the least, to discount the well-being of people as their velocity increases. If, for instance, we sent off a spacecraft at nearly the velocity of light, the astronauts would return to Earth, hardly aged, many millions of years hence. Should we pay less attention to the safety of our spacecraft, and thus to the welfare of our astronauts, the faster those vehicles go ? Should we—as a result of positive discounting—not give them enough fuel to make a safe landing ? And if you decline to condemn these brave astronauts to death, how are they different from other residents of the distant future ?

Instead of letting our speedy astronauts die, we can think of the universe as a block of four-dimensional space-time. We would not discount human well-being for temporal distance per se any more than we would discount well-being for spatial location per se . In moral terms, maybe time really is an illusion, as Buddha suggested thousands of years ago.

That said, discounting for risk is justified in a way that discounting for the pure passage of time is not. If a future benefit is uncertain, we should discount that benefit accordingly because it may not arrive. But such a practice does not dent a deep concern for the distant future. It is precisely because we discount for risk that we seek to protect our future against great tragedies, thereby making that future less risky. If we boost the long-term sustainable growth rate, for instance, we are indeed making the future less risky. Rather than ignoring risk, a future-oriented perspective takes long-term risk into account and attempts to lower it. The factor of risk might encourage you to spend your money now, otherwise someone might steal it. But it won’t discourage us from caring a lot about long-term sustainable growth.

Before moving on, let’s consider the relevance of the numerical comparisons presented above of events which lie one hundred, two hundred, or even five hundred years into the future. It might seem that nothing we do today can affect the world that far out, most of all when it comes to policy issues. Yet the most recent evidence suggests that good (or bad) political and economic decisions, and the general existence of prosperity, have persistent effects that stretch for centuries into the future. Colonial policies from the sixteenth and seventeenth centuries have persistent effects on prosperity today, and there is even research suggesting that the prosperity of a region well before the birth of Christ holds predictive power for the prosperity of those regions today. 7

For whatever reason, good institutions and a history of prosperity tend to have enduring effects. Wealth can fund and enable better government, and that in turn gives rise to further wealth and better institutions. Institutional memories of economic success and good governance can persist for long periods of time. Cultural practices such as business savvy or an interest in external markets can last for centuries.

England, which led the Industrial Revolution, had positive institutional features stretching far back in its history, such as relatively free labor markets in Medieval times and the carving out of a coherent national unit with a language, an army, and a parliament. The practices of the empire then carried some of these institutions across the oceans, such as when the British settled much of North America and the Antipodes (though not every region benefited from the brighter side of British rule). It’s no accident that many of the original territories of the Roman Empire remain some of the world’s wealthiest and most successful nations. China was also a relatively wealthy nation in earlier times, and that prosperity is reemerging today. For centuries, Chinese entrepreneurs around the world have shown special commercial savvy; this again has something to do with history.

Of course, the persistence of prosperity does not apply in every case. Much of the Arab world is currently well below its historic relative standing; Baghdad might have been one of the best and most interesting cities to live in about a thousand years ago, but today it is struggling. Still, if we think in terms of averages, we see plenty of evidence that history can matter over very long time spans. Therefore, any act which strengthens good institutions today has, in expected value terms, a causal stretch running centuries into the future. Once again, this means that our choice of discount rate is of critical importance.

We can also see the importance of faith to the overall argument. To fully grasp the import of doing the right thing, and the importance of creating wealth and strengthening institutions, we must look very deeply into the distant future. As I have argued at length, this is a conclusion suggested by reason. But in the real world of actual human motivations, the application of abstract reason across such long time horizons is both rare and unhelpful when it comes to getting people to do the right thing. The actual attitudes required to induce an acceptance of such long time horizons are, in psychological terms, much closer to a kind of faith. We cannot see these very distant expected gains, but we must believe in them nonetheless, and we must hold those beliefs near and dear to our hearts. In this sense, we should strongly reject the modern secular tendency to claim that a good politics can or should be devoid of faith.

There are, of course, many bad forms of faith in politics, and we should not encourage political (or other) beliefs in willful disregard of reason. But we cannot kick away faith itself as a motivational tool, as politics is of necessity built on some kind of faith. The lack—and, indeed, the sometimes conscious rejection—of the notion of faith, as is common in secular rationalism, is one of the most troubling features of the contemporary world. It has brought us some very real gains in terms of personal freedom, but it also threatens to diminish our ability to make the very best choices.

#### Economic data restricts biases, promotes critical thinking, and prevents flawed decision-making errors---rejecting economists plagues public discourse with innumeracy that results in worse outcomes.

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Thus, when economists preach the virtues of globalization, market solutions or cost-benefit analysis, they sound to critics on the left like corporate shills lacking any moral anchor. To critics on the right, they sound like globalist elites who despise patriotism.

Yet it is precisely their love of numbers that makes economists invaluable. By stripping the emotions from pressing problems, economists can often illuminate the most practical ways to tackle them—but only if ordinary people and their representatives are prepared to listen.

Economics emerged in the 1700s as an offshoot of moral philosophy. Known then as political economy, its pioneering practitioners—such as David Hume and Adam Smith —believed that liberating individual self-interest, rather than following religious or political authority, maximized society’s well-being.

Smith made this case most memorably in “The Wealth of Nations” (1776), in which he famously invoked the benevolent “invisible hand” of the free market. But for today’s economists, David Ricardo’s “The Principles of Political Economy and Taxation,” published in 1817, was even more of a breakthrough.

Most people aren’t surprised if a doctor, who could be a better caregiver to her children than a nanny, chooses instead to spend that time seeing patients and pays a nanny out of what she earns. Thanks to Ricardo, economists know that the same principle applies to countries. The average American worker can probably make more tires than a foreign worker, but his edge at producing grain is even greater—and thus the U.S. should export grain and import tires. This theory, known as “comparative advantage,” is both counterintuitive and powerful.

Ricardo went further, extolling the pacifying power of free trade: It “binds together, by one common tie of interest and intercourse, the universal society of nations throughout the civilized world,” he wrote. Most economists still agree that globalization fosters political stability and cooperation.

Non-economists have always found this emphasis on material interests and motives somewhat distasteful. In 1790, Edmund Burke, who was friends with Hume and Smith, wrote in “Reflections on the Revolution in France,” “The age of chivalry is gone. That of sophisters, economists, and calculators has succeeded; and the glory of Europe is extinguished forever.”

The influence of economists truly blossomed in the 20th century. The Great Depression gave birth to macroeconomics, the study of how consumption, investment, income and interest rates interact in the aggregate.

In search of better tools to manage the economy, the federal government commissioned economists in the 1930s to calculate gross national product. Convinced that the economy could no longer be left to its own devices, Congress passed the Employment Act in 1946, which established, among other things, a Council of Economic Advisers to provide the president with the necessary expert guidance.

The next year, Paul Samuelson’s seminal book, “Foundations of Economic Analysis,” used mathematics to formalize the key axioms of economics. He touched off a revolution that equipped economists with ever more powerful methods for explaining and analyzing economic behavior. They increasingly adopted the trappings of the physical sciences, hoping to achieve a similar degree of objective truth and predictive power.

Math did clarify economic thinking, but it didn’t improve its forecasting accuracy, which remains dreadful. Virtually no economists predicted the financial crisis of 2007-08 and the recession that followed. Nor has economics rid itself of bias. Economists who advise presidents and prime ministers routinely shape their analyses to validate particular political views.

In recent decades, the stature of economists has taken a beating from two critiques in particular. The first, popular especially on the left, argues that economists are slaves to the assumption that individuals act rationally and in their own best interests. These critics point to psychological and experimental evidence that shows how often people violate the axioms of Econ 101: Our spending and investment habits are often driven by emotions, rules of thumb, ignorance and shortsightedness. The financial crisis seemed to be the ultimate proof, as highly paid bankers and traders, armed with state-of-the-art economic techniques, took on so much risk that they nearly destroyed the global financial system.

Economists consider national borders and sovereignty annoying obstacles to the free flow of goods, capital and people.

The second critique originates from populist, nativist and nationalist movements in the world’s more prosperous countries. Economists consider national borders and sovereignty annoying obstacles to the free flow of goods, capital and people. The new movements of the right see them as essential preconditions for national identity and cohesion. Many Britons voted for Brexit because control over immigration and their laws mattered more to them than the pecuniary advantages of the European common market.

These trends have fed a broader mistrust of experts and elites. During last year’s election campaign, Mike Pence, Mr. Trump’s vice-presidential running mate, dismissed statistical evidence of the U.S. economy’s health by saying, “People in Fort Wayne, Indiana, know different.” In the months after Mr. Trump’s victory, his team wondered whether it should even appoint a chairman of the Council of Economic Advisers. (The administration eventually nominated Kevin Hassett, a highly regarded economist from the conservative American Enterprise Institute.)

In Greece, economists aren’t simply mistrusted; they’re prosecuted. During the 2000s, Eurostat, the EU’s statistical arm, had repeatedly questioned the accuracy and political independence of Greek statistics. Soaring deficits in 2009 triggered a crisis and forced Greece to seek a bailout in 2010. Mr. Georgiou, a Greek native who received his Ph.D. from the University of Michigan and spent 21 years at the International Monetary Fund, took over Greece’s statistical agency that August. Officials had already shown previous debt and deficit figures to be understated. He revised them further upward and earned for his agency a clean bill of health from Eurostat.

Politicians of the left and right accused him of inflating Greece’s debts to justify its creditors’ demands for austerity. Prosecutors charged him with making false statements and improperly disseminating statistics without his board’s approval. Courts acquitted him, but the second set of charges was reinstated, resulting in this month’s conviction. Mr. Georgiou, who now lives in a suburb of Washington, D.C., plans to ask Greece’s supreme court for a retrial.

Mr. Georgiou says that his real offense, in the politicians’ eyes, was breaking from the past practice of “resisting” and “negotiating” with outsiders, such as the EU, over what official Greek data would show. The politicians needed a scapegoat to preserve their own “political narratives,” he says. He calls the implications of his case “terrifying” for other professionals responsible for economic statistics.

Economists bear some blame for the public and political backlash. Their disagreement with populist policies has often colored their predictions. British economists, including Mr. Carney, thought that Brexit would unleash so much uncertainty that markets and the economy would tank. American economists foresaw similar swoons if Mr. Trump became president. Both were wrong, at least thus far: Economies in both countries have chugged along, and stock markets in particular have soared. There may be long-term costs, of course, but those may be hard to detect.

Economists didn’t predict the financial crisis, but they did help to arrest it.

But such misjudgments don’t justify the charges leveled at economists. Take, for example, their inability to predict financial meltdowns. Crises almost by definition are unpredictable. In a recent essay, Ricardo Reis, an economist at the London School of Economics, argues that failing to foretell a financial crash is no more an indictment of economics than failing to predict when a patient will die is an indictment of medicine. Economists didn’t predict the financial crisis, Prof. Reis notes, but they did help to arrest it by applying theory and experience: “The economy did not die, and a Great Depression was avoided, in no small part due to the advances of economics over many decades.”

Another caricature of economists is that they try to emulate physicists, fetishizing elegant, abstract mathematical models disconnected from economic reality. Paul Romer, the chief economist at the World Bank, derisively calls this approach “mathiness.” The critique is certainly fair in some corners of academia, but it is increasingly untrue of the profession as a whole.

In 1963, roughly half the papers published in the top three American economics journals were theoretical, according to a tally by Daniel Hamermesh, now at Royal Holloway, University of London. By 2011, that figure had shrunk to 28%; the remainder were empirical papers based on public data, on data gathered by the authors or on experiments. Economic debates these days are won not by the best theory but by the best data: Statistics are more important than calculus. Economists are far more obsessed with measurement than with math. When public discourse is plagued by innumeracy, this capacity to count is no small thing.

Economists are also instinctively skeptical of simple explanations. They are trained to look for equilibrium, which is another way of saying, “When you change one thing, how do other things respond? Where do things settle once all interactions have occurred?”

Advocates for a higher minimum wage extol the benefits to workers. Economists ask: Will it change employers’ demand for workers who earn the minimum wage? Or what they pay workers who earn just above the minimum? Or the prices they charge, or how much market share they lose to companies that don’t face the higher minimum or how much they invest in automation? Does it reduce turnover and thus make workers more productive?

Advocates of tariffs on imported steel focus on the benefit to domestic steelmakers and their workers. But economists ask: What happens to steel-consuming companies that now face higher prices, as well as to their workers and customers? Does penalizing imports boost the dollar and hurt U.S. exports?

The more data economists collect, the better they can map such complex interactions. Seemingly simple questions seldom have simple answers. A higher minimum wage helps workers in some circumstances but hurts them in others. Tariffs help some workers but hurt many others. Global warming will do some economic harm, but not enough to justify banning fossil fuels.

Sometimes, this attachment to numbers conveys a false precision. Critics say that the Congressional Budget Office overestimated how many people would get insurance under Obamacare and must therefore be overestimating how many will lose it if the law were to be replaced. But the CBO always warned that its estimates were highly uncertain; what no economists doubted, including those working in Mr. Trump’s administration, is that the number would be large. Economists could confidently predict that price controls would lead to shortages in Venezuela, though not how severe they would be.

Non-economists see all this as hopeless equivocation, but it is actually the way that evidence drives science. Economists still have their ideological leanings, but data has helped to restrict these biases. Surveys of top academic economists by the University of Chicago show considerable agreement, even among liberals and conservatives.

For example, the scholars almost all agree that fiscal stimulus reduced unemployment after the last recession and that trade with China benefits Americans by providing them with cheap goods. A study by Gordon Dahl and Roger Gordon of the University of California, San Diego, found that disagreement among economists was greatest where the empirical research was most sparse, as with the issue of whether natural-gas fracking helps U.S. exports.

Though economics remains an imperfect science, it has come a long way in 200 years. Its greatest challenge today isn’t the quality of the analysis it supplies, but whether there is still sufficient demand for it.

#### Alternatives to economic rationality have no explanatory power and only make economics more insidious.

Beabout 8, \*Gregory R. Beabout is an adjunct fellow of the Center for Economic Personalism and Associate Professor of Philosophy at Saint Louis University; (“Challenges to Using the Principle of Subsidiarity for Environmental Policy”; 5 U. St. Thomas L.J. 210 (2008))

Economics offers many insights into how the world around us works, much more than would be possible to summarize even in a full-length law review article with many footnotes.5 From among those many insights, I have selected three "propositions" that demonstrate the fundamental points that economics is necessary, but not sufficient, to address environmental issues and that economics is necessary, but not sufficient, to reconcile the obligations of faith toward the poor and the need to protect the environment. By "propositions" I mean fundamental truths about human behavior and the natural world that we ignore at our peril, truths as basic as the laws of gravity or humanity's susceptibility to sin. We can write statutes or regulations that ignore these-and Congress, legislatures, and regulators the world over frequently do-but such measures risk the same fatal results as bridges built without accounting for gravity. These propositions I will offer are economic "theory," but they are theory in the sense that the laws of gravity are a theory and are founded upon economic insights spanning hundreds of years of careful analyses, testing of hypotheses, and rigorous debates. That does not mean all economists agree on all policy implications or that every prediction by an economist comes true. It does mean that the core principles of the discipline are not mere matters of opinion and that economics is not a "point of view" to be accorded equal weight with folk tales or political preferences. All theories of how the world works are not equal -some work better than others and the ones that work deserve greater weight in policy debates than the ones that do not. Economics' great strength is that it is a concise and powerful theory that explains the world remarkably well. Those who ignore its insights are doomed to fail. Science fiction author Robert Heinlein coined the phrase "TANSTAAFL" as a shorthand way of saying "There Ain't No Such Thing As A Free Lunch" in his classic 1966 science fiction novel The Moon is a Harsh Mistress, in which he described a revolution by residents of lunar colonies against oppressive governments on Earth in 2076.6 Heinlein had the revolutionaries emblazon TANSTAAFL on their flag and wove the principle through the free lunar society he imagined-a place where even air cost people money. "No free lunch" means that everything costs something. Everything. No exceptions. At a minimum, if I spend my time doing one activity, I cannot spend that time doing something else. Economists refer to the idea that resources devoted to one activity are unavailable for other activities as "opportunity cost." If we do X, we cannot use those resources to do Y. The failure to recognize that there is an opportunity cost to committing resources to any given use can have disastrous consequences because when we do not recognize that our actions have costs we cannot intelligently consider our alternatives. And if we cannot assess the costs and benefits of our alternatives, we cannot make reasoned choices among them.7 In short, tradeoffs matter, and we need to pay attention to them.

#### Consequentialism best informs ethical decision-making. Deontological rubrics divert political responsibility for atrocity.

Zanotti 17, \*Laura Zanotti, Associate Professor Department of Political Science, Virginia Tech, (January 13th, 2017, “Reorienting IR: Ontological Entanglement, Agency, and Ethics,” International Studies Review)

Furthermore, if we accept Barad’s position that we are “of the world” and not above the world, theorizing looks more like a practice endowed with performative political effects than a quest for the discovery of the “true nature” of what exists. Therefore, intellectual undertakings are a form of political agency and come with great responsibility. Such responsibility requires the need for exercising prudence in making truth statements about what is universally good or naturally inevitable. Assumptions about linearity of causal relations, universal laws of history, or ontological properties of entities yield two problematic effects. On the one hand, they may stifle political imagination; on the other hand, they could encourage actions based upon abstract prescriptions rather than upon careful diagnosis of the forces that obtain in the situation at hand. In an entangled world, there are no externalities. Arguments that divert responsibility by basing political choices upon abstract principles or aspirations and, as a result, that treat what happens on the ground as “unintended consequences” or “collateral damage,” are ethically thin and politically dangerous.

In fact, unintended consequences may well be the result of irresponsible political decision-making that does not include a competent assessment of the practical configurations that constitute the context of action and the means necessary to achieve stated goals. Such attitudes, Amoureux and Steele (2014) have suggested, have led to disastrous initiatives, such as the Bush administration’s invasion of Iraq. Likewise, Kennedy (2006) has shown that the bland rhetoric of jus in bello that provides standardized criteria regarding the number of acceptable civilian casualties (conveniently called collateral damage) produces the effect of diverting responsibility from those who conduct war while assuaging their consciences concerning the injuries and deaths their choices are inflicting. Kennedy (2004) has also shown that as a result of the preference for universal normativity, the human rights profession (which he calls “the invisible college”) is more concerned with protecting abstract norms than with acting politically so as to devise viable solutions to specific problems.

Universal norms and bureaucratic routines play a major role in prescribing and justifying UN peacekeeping interventions. As Jean Marie Guehe ́nno argued more than a decade ago, strategies of international intervention based upon assumptions of causal linearity and invariance may amount to hubris. Norms and rules can also offer grounds for appeasement. The massacres that occurred in Rwanda and Srebrenica in the 1990s provide examples of how, by uncritically following institutionalized rules, United Nations peacekeepers permitted atrocities. UN employees are not cold-blooded monsters or extremely callous individuals. They follow norms and rules, key examples of which include the principle of “impartiality,” Security Council mandates, and “rules of engagement.” By doing so, however, they have often fallen short of considering the possible consequences of decisions in specific situations. The United Nations’ failure to take action to prevent the Rwanda and Srebrenica genocide testifies to the fact that following universal norms (i.e., the imperative to preserve impartiality) and bureaucratic reasoning (i.e., the rules of engagement prescribing not to intervene to disarm any party of the conflict) set the stage for avoiding a careful assessment of what was at stake on the eve of the massacres. These ways of reasoning also appeased consciences for not making decisions accountable to the people in danger (Zanotti 2014).

# 2AC

## T

#### We meet — the plan bans all anticompetivie business practices it is more restrictive of competition than reasonably necessary to enable creation of information technology standards

#### We meet---the plan still increases prohibitions on anticompetitive conduct, the rule of reason is simply a test that decides whether certain conduct actually violates said prohibition.

Fishman 19, \*Todd Fishman, [Allen & Overy LLP](https://www.jdsupra.com/profile/Allen_Overy_docs/); (January 31st, 2019, “The Rule of Reason as a Bar to Criminal Antitrust Enforcement”, https://www.jdsupra.com/legalnews/the-rule-of-reason-as-a-bar-to-criminal-87406/)

Antitrust law’s rule of reason was born of technical necessity. By its terms, §1 of the Sherman Act prohibits “[e] very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” 15 U.S.C. §1. Despite the expansive language of the statutory prohibition, the Supreme Court has held that §1 prohibits only agreements that unreasonably restrain trade. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58-60 (1911). With the rule of reason, antitrust courts assumed a prudential role in administering the scope of antitrust violations, applying a factual inquiry weighing legitimate justifications for a restraint against any anticompetitive effects. Under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 49 (1977).

#### Counter-interpretation---rule of reason is a prohibition

Light 19, Sarah E. Light Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania., The Law of the Corporation as Environmental Law, 71 Stan. L. Rev. 137, 2019, Lexis/Nexis

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive. As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition. The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199 Associations of firms have adopted numerous mechanisms of private environmental governance to address the management of common pool resources like fisheries, forests, and the global climate. 200 Examples include the Sustainable Apparel Coalition's Higg Index 201 and the American Chemistry Council's Responsible Care program. 202 But private industry standards raise special antitrust concerns. An agreement among competitors with respect to product or process specifications may exclude competitors who fail to meet such standards, raising the specter that such industry collaborations really constitute output limitations or efforts to limit competition. 203 While the U.S. Supreme Court has scrutinized private standard-setting associations carefully, 204 it has noted that if associations "promulgate … standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition … , those private standards can have significant procompetitive advantages." 205 In the absence of price fixing or a boycott, a rule of reason analysis generally applies to product standard setting by private associations. 206 The uncertain outcome [\*179] inherent in the application of antitrust law in this context could therefore serve as a potential disincentive to the adoption of private industry standards. 207 The challenge of course is that some form of explicit sanctions on noncompliant industry members may be necessary for private industry standards to be effective. In the context of private reputational mechanisms like the New York Diamond Dealers Club, 208 Barak Richman has pointed out that the Club's use of reputational sanctions and voluntary refusals to deal with actors who flout industry norms, while welfare enhancing, could nonetheless amount to violations of antitrust law. 209 This echoes the concern raised by Andrew King and Michael Lenox in their extensive empirical analysis of the Responsible Care program created by the Chemical Manufacturers Association (now the American Chemistry Council). 210 King and Lenox concluded that the absence of explicit sanctions on members who failed to meet the standards set by the program left the program vulnerable to "opportunism." 211 While they suggested that industry associations could look to third parties to enforce the rules, 212 an alternative way to facilitate the long-term environmental benefits of stronger sanctions would be to interpret antitrust law in conformity with the environmental priority principle presented below. 213 [\*180] In some instances, the conflict between the values of promoting competition and conserving environmental resources can be stark. 214 Jonathan Adler, for example, has identified this conflict in the context of fisheries - a tragedy of the commons situation in which some form of collective action is required to avoid overfishing. 215 He cites as an example Manaka v. Monterey Sardine Industries, Inc., in which a fisherman was excluded from a local fishing cooperative. 216 The fisherman sued the cooperative under the Sherman Act, and the court found an antitrust violation in his exclusion. 217 While the fishing cooperative's policies were no doubt exclusionary, Adler contends that they also promoted conservation by restricting catch. 218 The fishery collapsed by the 1950s, a collapse Adler hypothesizes might have been "inevitable" but that perhaps might not have occurred in the absence of the antitrust suit. 219 While a court performing a rule of reason analysis must consider whether a restraint on trade suppresses or destroys competition, Adler points out that courts may also "consider offsetting efficiencies from otherwise anticompetitive arrangements." 220 It is not clear, however, that the courts have consistently taken these factors into account. 221 Among other potential remedies, Adler argues that to resolve this tension between antitrust law, on the one hand, and private collective action to conserve environmental resources, on the other, courts should more actively consider the "ancillary conservation benefits of otherwise anticompetitive conduct." 222 Recognizing the long-term health of a fishery would be consistent with antitrust law's purpose of ensuring viable markets exist in the future, and consistent with the environmental priority principle introduced below. 223

#### Prohibit can mean ‘severely hinder’---doesn’t necessitate a ban.

Washington Court of Appeals 19 (KORSMO-judge. Opinion in State v. Kimball, No. 35441-5-III (Wash. Ct. App. Apr. 2, 2019). Google scholar caselaw. Date accessed 7/13/21).

His argument runs counter to the meaning of the word "prohibit." It means "1. To forbid by law. 2. To prevent, preclude, or severely hinder." BLACK'S LAW DICTIONARY 1405 (10th ed. 2014). As "severely hinder" suggests, a "prohibition" need not be an all or nothing proposition.

#### No limits nor ground loss:

#### 1---there are tons of link cards for innovation and politics that say *any* antitrustchange can trigger.

#### 2---functional limits solve---‘substantially increase’ and ‘expand scope’ mandate large shifts from the status quo.

#### Reasonability---competing interpretations cause a race to the bottom and substance crowd-out.

## Gender K

#### No alternative to the law/legal system---other ideas bring more inequality and abuse

Jerold S. Auerbach 83, Professor of History at Wellesley, “Justice Without Law?”, 1983, p. 144-146

As cynicism about the legal system increases, so does enthusiasm for alternative dispute-settlement institutions. The search for alternatives accelerates, as Richard Abel has suggested, "when some fairly powerful interest is threatened by an increase in the number or magnitude of legal rights.\*'6 Alternatives are designed to provide a safety valve, to siphon discontent from courts. With the danger of political confrontation reduced, the ruling power of legal institutions is preserved, and the stability of the social system reinforced. Not incidentally, alternatives prevent the use of courts for redistributive purposes in the interest of equality, by consigning the rights of disadvantaged citizens to institutions with minimal power to enforce or protect them. It is, therefore, necessary to beware of the seductive appeal of alternative institutions. They may deflect energy from political organization by groups of people with common grievances; or discourage effective litigation strategies that could provide substantial benefits. They may, in the end, create a two-track justice system that dispenses informal "justice" to poor people with "small" claims and "minor" disputes, who cannot afford legal services, and who are denied access to courts. (Bar associations do not recommend that corporate law firms divert their clients to mediation, or that business deductions for legal expenses—a gigantic government subsidy for litigation—be eliminated.) Justice according to law will be reserved for the affluent, hardly a novel development in American history but one that needs little encouragement from the spread of alternative dispute-settlement institutions.¶ It is social context and political choice that determine whether courts, or alternative institutions, can render justice more or less accessible—and to whom. Both can be discretionary, arbitrary, domineering—and unjust. Law can symbolize justice, or conceal repression. It can reduce exploitation, or facilitate it. It can prohibit the abuse of power, or disguise abuse in procedural forms. It can promote equality, or sustain inequality. Despite the resiliency and power of law, it seems unable to eradicate the tension between legality and justice: even in a society of (legal) equals, some still remain more equal than others. But diversion from the legal system is likely to accentuate that inequality. Without legal power the imbalance between aggrieved individuals and corporations, or government agencies, cannot be redressed. In American society, as Laura Nader has observed, "disputing without the force of law ... [is| doomed to fail."7 Instructive examples document the deleterious effect of coerced informality (even if others demonstrate the creative possibilities of indigenous experimentation). Freed slaves after the Civil War and factory workers at the turn of the century, like inner-city poor people now, have all been assigned places in informal proceedings that offer substantially weaker safeguards than law can provide. Legal institutions may not provide equal justice under law, but in a society ruled by law it is their responsibility.¶ It is chimerical to believe that mediation or arbitration can now accomplish what law seems powerless to achieve. The American deification of individual rights requires an accessible legal system for their protection. Understandably, diminished faith in its capacities will encourage the yearning for alternatives. But the rhetoric of "community" and "justice" should not be permitted to conceal the deterioration of community life and the unraveling of substantive notions of justice that has accompanied its demise. There is every reason why the values that historically are associated with informal justice should remain compelling: especially the preference for trust, harmony, and reciprocity within a communal setting. These are not, however, the values that American society encourages or sustains; in their absence there is no effective alternative to legal institutions.¶ The quest for community may indeed be "timeless and universal."8 In this century, however, the communitarian search for justice without law has deteriorated beyond recognition into a stunted off-shoot of the legal system. The historical progression is clear: from community justice without formal legal institutions to the rule of law, all too often without justice. But injustice without law is an even worse possibility, which misguided enthusiasm for alternative dispute settlement now seems likely to encourage. Our legal culture too accurately expresses the individualistic and materialistic values that most Americans deeply cherish to inspire optimism about the imminent restoration of communitarian purpose. For law to be less conspicuous Americans would have to moderate their expansive freedom to compete, to acquire, and to possess, while simultaneously elevating shared responsibilities above individual rights. That is an unlikely prospect unless Americans become, in effect, un-American. Until then, the pursuit of justice without law does incalculable harm to the prospect of equal justice.

#### Opposition to the state and lawfails

**DeBoer 16**, Ph.D. from Purdue University, (Fredrik Deboer, March 15th, 2016, “c’mon, guys,” http://fredrikdeboer.com/2016/03/15/cmon-guys/)

I could be wrong about the short-term dangers, and the stakes are incredibly high. But in the end we’re left with the same old question: what tactics will actually work to secure a better world?

In a sharp, sober piece about the meaning of left-wing political violence in the 1970s, Tim Barker writes “If you can’t acknowledge radical violence, radicals are reduced to mere victims of repression, rather than political actors who made definite tactical choices under given political circumstances.” The problem, as Barker goes on to imply, is those tactical choices: in today’s America they will essentially never break on the side of armed opposition against the state. The government knows everything about you, I’m sorry to say, your movements and your associations and the books you read and the things you buy and what you’re saying to the people you communicate with. That’s simply on the level of information before we even get to the state’s incredible capacity to inflict violence.

Look, the world has changed. The relative military capacity of regular people compared to establishment governments has changed, especially in fully developed, technology-enabled countries like the United States. The Czar had his armies, yes, but the Czar’s armies depended on manpower above and beyond everything else. The fighting was still mostly different groups of people with rifles shooting at each other. If tomorrow you could rally as many people as the Bolsheviks had at their revolutionary peak, you’re still left in a world of F-15s, drones, and cluster bombs. And that’s to say nothing of the fact that establishment governments in the developed world can rely on the numbing agents of capitalist luxuries and the American dream to damper revolutionary enthusiasm even among the many millions who have been marginalized and impoverished. This just isn’t 1950s Cuba, guys. It’s just not. In a very real way, modern technology effectively lowers the odds of armed political revolution in a country like the United States to zero, and so much the worse for us.

This isn’t fatalism. It doesn’t mean there’s no hope. It means that there is little alternative to organization, to changing minds through committed political action and using the available nonviolent means to create change: a concert of grassroots organizing, labor tactics, and partisan politics. Those things aren’t exactly likely to work, either, but they’re a hell of a lot more plausible than us dweebs taking the Pentagon. Bernie Sanders isn’t really a socialist, but he’s a social democrat that moves the conversation to the left, and if people are dedicated and committed to organizing, the local, state, and national candidates he inspires will move it further to the left still. You got any better suggestions?

#### Attempting to transition away from capitalism causes fascism.

Büchs and Koch, 19, Milena Büchs, Sustainability Research Institute, School of Earth and Environment, University of Leeds, Leeds, LS2 9JT, UK, Max Koch, Faculty of Social Sciences, Socialhögskolan, Lund University, Box 23, 22100 Lund, Sweden, “Challenges for the degrowth transition: The debate about wellbeing”, <https://www.sciencedirect.com/science/article/pii/S0016328718300715>

3.2. Implications of rapidly transforming social systems The social practices lens is also useful for thinking about possible wellbeing implications of rapid social change more generally, and a transition away from a growth-based economy specifically. While the concept of social practices inherently implies the possibility of change (with its focus on agency and creativity), it equally strongly highlights the structural aspects of practices which provide stability and orientation. During times of rapid social transitions, social norms and ‘mental infrastructures’ often lag behind, creating disorientation, social conflict, and negative impacts on wellbeing ([Büchs & Koch, 2017: ch. 6](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0060)). Stability of structural dimensions of social practices offers orientation and some extent of predictability of how oneself and other people are likely to act in the future, providing a framework within which flexibility and change are possible. This orienting function of structural dimensions of practices is likely to be an important condition for people to form reasonably stable identities and relationships – key ingredients for wellbeing. Examples from classical and contemporary [sociological and psychological research](https://www.sciencedirect.com/topics/social-sciences/sociological-research) suggest that different speeds of changing social structures can establish misalignments and disruptions of social practices which can, in turn, negatively influence health and other wellbeing outcomes. For instance, in his classical study, Durkheim presents suicide at least partly as an outcome of a failure of cultural resources to provide meaning and orientation in the context of other, more rapid social changes ([Durkheim, 2006](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0125); [Vega & Rumbaut, 1991: 375](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0455)). This idea also links to Bourdieu’s concept of the “hysteresis effect”. Here, Bourdieu emphasises that, especially during phases of social transition, people’s habitus and “objective” social circumstances can become disjointed: as a result of [hysteresis](https://www.sciencedirect.com/topics/social-sciences/hysteresis), dispositions can be “out of line with the field and with the ‘collective expectations’ which are constitutive of its normality. This is the case, in particular, when a field undergoes a major crisis and its regularities (even its rules) are profoundly changed” ([Bourdieu, 2000: 160](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0040)). This can contribute to a deterioration of people’s wellbeing as it makes them feel “out of place” or let them be perceived that way, “plung[ing] them deeper into failure” ([Bourdieu, 2000: 161](https://www.sciencedirect.com/science/article/pii/S0016328718300715#bib0040)) because they cannot make use of new opportunities or are mistreated or socially excluded by others. Empirical research which partly builds on the idea of hysteresis has shown that wide-ranging organisational change can have a range of negative effects on people’s health and mortality ([Ferrie et al., 1998](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0150); [McDonough & Polzer, 2012](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0315)). One study found that across 174 countries, several measures of wellbeing and social performance, including life satisfaction, health, safety and trust, voice and accountability, were highest in periods of economic stability, but lower in times of GDP growth or contraction ([O’Neill, 2015](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0355)); and other studies concluded that life expectancy can be negatively affected by both rapid economic growth and contraction ([Notzon et al., 1998](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0345); [Szreter, 1999](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0445)). Several scholars have recently highlighted the potential for social conflict inherent in (rapid) social change. For instance, Maja [Göpel (2016: 49)](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0185) remarks: “Unsurprisingly, the navigation or transition phase in shifting paradigms as well as governance solutions is marked by chaos, politicization, unease and power-ridden struggles”. Wolfgang Streeck has issued similar warnings ([Streeck et al., 2016: 169](https://www.sciencedirect.com/science/article/pii/S0016328718300715" \l "bib0435)). It is not difficult to see how such scenarios bear the potential of undermining some of the fundamental conditions that are necessary for the satisfaction of basic needs as discussed above, and hence the danger of generating substantial wellbeing losses for current and near-future generations. In the current context, it is very difficult to imagine that we might be able to observe a rapid and radical cultural change in which people adopt identities and related lifestyles that value intrinsically motivated activities over pursuing satisfaction and status through careers and consumption. Even more worryingly, political events in Europe, the United States and elsewhere since the ‘Great Crash’ of 2008 indicate that times of negative or stagnant growth can provide a breeding ground for populist, nationalistic and anti-democratic movements. Economic insecurity, a perceived threat of established identities through migrants, and deep mistrust against ‘elite’ politicians are amongst the main explanations for previously unimaginable events such as the [Brexit](https://www.sciencedirect.com/topics/social-sciences/brexit) vote, Trump presidency, and recent electoral successes for far right-wing parties in a range of European countries.

#### negative does not unsettle any academic spaces rather it simply codes wins and losses – there’s no explanation of what the praxis of the alternative looks like which means even if the theory is good, it is not able to subvert the material institutions that code and enable gendered violence either in the debate space or in the world – academics theories have very little influence on public politics

Gunnell 9 (John G., Ph.D. in political science, is a Professor in Political Science and Political Theory at UCDavis UNISA, "Speaking politically: politics and the academic intellectual in the United States", April 7, 2009)

POLITICAL THEORY AS A METAPRACTICE We often fail to recognise how much contemporary political theory bears the genetic imprint of its nineteenth-century origins**. Political science and political theory in the United States originated as a surrogate for religion and moral philosophy, but what scholars have failed to figure out is exactly how this academic community can have** practical significance**.** Michael Walzer, for example, has advanced the idea of the theorist as a `connected critic' who, while seeking necessary `critical distance', enters the `mainstream' and pursues criticism as `interpretation' and `opposition' and seeks to mediate between `specialists and commoners' or `elite and mass' (1987; 1988). Walzer acknowledges the conflict between the claim of philosophy to `objective truths' and the authority of the political community but, as with so many conceptual solutions, he fails to situate this image. None of Walzer's many historical examples, from the Hebrew prophets to Michel Foucault, touch directly upon the circumstances of contemporary institutionalised academic metapractices. **Charles Lindblom has grappled intensively with the problem of whether social science can provide `usable knowledge' (Cohen and Lindblom 1979) and how social scientific inquiry can contribute to social change (1990), with what might be called the problem of relating knowing about to knowing how, but in the end, the issue seems to come down to the place and role of the university in contemporary society**. Russell Jacoby has argued that the American university has come to function as a sort of `brain drain' which has attracted but also absorbed and neutralised the potential public intellectual, particularly on the Left (1988). This is a provocative claim, but it is based on a romanticised image of the [14] existence and impact of public intellectuals in American political life. Thomas Bender, for example, has more carefully explored the impact of the modern university on the participation of academics in public life (1993). Those attracted to the university seldom really had a stomach for political life and dirty hands. Jacoby's more recent analysis, in The Chronicle of Higher Education, probably hits close to the mark. He suggests that the university is at once politicised and apolitical (1996). **Academicians take positions on a variety of political and moral issues but in a universe and** language that is quite disconnected from practical politics**. In the academy there is a kind of virtual politics represented in discussions of feminism, liberalism, citizen identity and the like, but this seldom reaches the political world.** Allan Bloom's claim, and lament, that Leftist ideology has taken over the university assumes that the university (1988) is a staging zone for political education, but this would be difficult to sustain empirically. **And despite abstractly voiced concerns about, and attestations to, political relevance, most scholarly activity is generated and propelled by academic concerns and professionalism. A dominant theme in many humanistic fields such as literary criticism is that they are, in one way or another, a form of political action or that they can exercise significant influence on public life (Lentrecchia 1983; Norris 1985). Most of these claims are advanced by individuals who fancy themselves radical and oppositional thinkers. At the same time conservatives, such as Bloom, Roger Kimball (1990), Dinesh D'Sousa (1991), Martin Anderson (1992) and Lynne Cheney (1995), protest the influence of these individuals in the American academy and warn of their corrosive impact on public life and morals. What these commentators have in common, however, is the belief that what takes place in the university really has consequences, but specifying, or determining, the exact nature of these consequences is another matter**. Claims, such as those of Isaac and myself, about the alienation of political theory from politics as well as arguments, such as Jacoby's, about the apolitical character of the academy are countered in a number of ways. **One response is to point to what is sometimes called the `cross-over' phenomenon, that is, instances of academics entering political life or politicians moving to the academy, but this fails to take account of what the metapractical dream has been all about, that is, to have authority over practice without joining it.** And it has other difficulties attached to it. **While `crossover' may seem intuitively significant** - cases like those of Woodrow Wilson, Henry Kissinger, Hubert Humphrey in one direction, and those of Jimmy Carter and similar instances in the other direction **-- these are exceptions that do not prove the rule. What these classic cases**, as well as instances of Straussians joining the Reagan and Bush administration or the influence of communitarian liberals and academic advocates of strong democracy in the Clinton White House**, tell us about the general relationship between political theory and politics is that for the most part these realms are actually quite disparate.** They represent more choices between vocations than articulation. We [15] note these incidents because they are so unusual, not because they represent the manner in which political theorists are characteristically involved in politics. **And even though we might wish to think that these are examples of theory leading practice, they probably are closer to instances of practice using theory.** Another line of argument is based on the `trickle-down' hypothesis that the university can and does play, through education and other processes of cultural diffusion, a major role in shaping the public consciousness. Some also subscribe to the view that there are many individual theorists who are actually talking about politics and confronting pressing political problems, both by dealing with the philosophical dimension of these issues and by speaking to and for various concrete and sometimes marginalised constituencies. And there is the further claim that many do not simply give at the office but take their work home and through their individual efforts carry it into the relevant communities. While these are interesting theses, they remain largely at the level of professional folklore. To the extent that they can be demonstrated, they may indicate something about a few individuals but do not tell us very much about the general structural relationship between political theory and politics. **Although it would be interesting to know if and to what extent and in what manner academic discourse does reverberate in the world of social practices, claims about such influence remain largely matters of faith, rhetoric and metapractical fantasy.** There is, however, a more significant point. In instances as diverse as nineteenth-century social science, various images of political science as a policy analysis, critical theory, and Wolin's account of political theory as a vocation, the vision involved transcending the vagaries and unpredictability of individual action and establishing a professional cadre as an institutional social force that would carry authority and inform practice on a systematic basis. What received short-shrift in Isaac's analysis, however, was a consideration of whether political theory actually had anything to say about the events of 1989. I happened to be in Berlin, at an academic conference dealing with the historical origins of modern social science, the day that the `wall' came down. It was a profoundly moving event and, as usual, theorists were in awe at being so proximate to actual politics. What was most striking, however, was the general lack of any sense of the imminence of the event and the inability to provide more that the most mundane explanation of its occurrence.

#### Subjectivities do not totalizingly cause violence

Nancy **Fraser 95**, New School political and social science professor, “False Antitheses: A Response to Seyla Benhabib and Judith Butler”, Feminist Contentions: A Philosophical Exchange, pg 68

This brings me to the second set of claims implicit in Butler's poststructuralist account of subjectivity—normative, as opposed to onto- logical , claims. Such claims arise, first, in relation to the social practices through which subjects are constituted. Here Butler follows Foucault in claiming that practices of subiectivation are also practices of subjection. Like him, she insists that subjects are constituted through exclusion; some people are authorized to speak authorita- tively because others are silenced. Thus, in Butler's view, the consti- tution of a class of authorized subiects entails "the creation of a domain of deauthorized subjects, pre-subjects, figures of abjection, populations erased from view." ¶ But is it really the case that no one can become the subject of speech without others' being silenced? Are there no counterexamples? Where such exclusions do exist, are they all bad? Are they all equally bad? Can we distinguish legitimate from illegitimate exclusions, better from worse practices Of subiectivation? Is subject-authorization inher- ently a zero-sum game? Or does it only become one in oppressive societies? Can we overcome or at least ameliorate the asymmetries in current practices Of subjectivation? Can we construct practices, insti- tutions, and forms of life in which the empowerment Of some does not entail the disempowerment Of others? If not, what is the point Of feminist struggle? ¶ Butler offers no help in thinking about these issues. Nor can she, I submit, so long as she fails to integrate critical-theoretical considera- tions into her poststructuralist Foucauldian framework. That frame- work, I have argued elsewhere, is structurally incapable of providing satlsfactory answers to the normative questions it unfailingly solicits.13 It needs modification and supplementation, therefore, in order to be fully adequate to the feminist project. In addition to her claims about the social practices of subiectiva- tion, Butler also makes normative claims about the relative merits of different theories of subjectivity. She claims that some such theories are "politically insidious," whereas others are progressive or emanci- patory. On the insidious side is the view of subjectivity as possessing an ontologically intact reflexivity that is not an effect of cultural processes of subjectivation. This view, according to Butler, is a "ruse of power" and an "instrument Of cultural imperialism." ¶ Is it really? There is no denying that foundationalist theories of subjectivity have often functioned as instruments of cultural imperial- ism. But is that due to conceptual necessity or historical contingency? In fact, there are cases where such theories have had emancipatory effects—witness the French Revolution and the appropriation Of its foundationalist view of subjectivity by the Haitian "Black Jacobin, Toussaint de I 'Ouverture.14 These examples show that it is not possi- ble to deduce a single, univocal political valence from a theory of subjectivity. Such theories, too, are bits of cultural discourse whose meanings are subject to "resignification. ¶ How, then, should we resolve the Benhabib-Butler dispute over "the death of man"? I conclude that Butler is right in maintaining that a culturally constructed subject can also be a critical subject, but that the terms in which she formulates the point give rise to difficul- ties. Specifically, "resignification" is not an adequate substitute for "critique, since it surrenders the normative moment. Likewise, the view that subiectivation necessarily entails subjection precludes nor- mative distinctions between better and worse subjectivating practices. ¶ Finally, the view that foundationalist theories of subjectivity are in- herently oppressive is historically disconfirmed, and it is conceptually incompatible with a contextualist theory of meaning. The upshot, then, is that feminists need to develop an alternative conceptualiza- tion of the subject, one that integrates Butler's poststructuralist emphasis on construction with Benhabib's critical-theoretical stress on critique.

#### Our impact outweighs and the alt fails.

Hudson 15— professor of International Relations and Director of the Centre for Africa Studies at the University of the Free State, Bloemfontein, South Africa, (Heidi, “(Re)framing the Relationship between Discourse and Materiality in Feminist Security Studies and Feminist IPE,” pg 413-419, Politics & Gender; Cambridge Vol. 11, Iss. 2, June 2015; EG)

Critical Perspectives on Gender and Politics¶ While feminists usually try to ground the meanings that they study, theorizing the mundane or the everyday may very well represent a detour--or even a dead end--if bread-and-butter issues related to the security and economic well-being of ordinary women and men [people] are ignored. What value does feminist theorizing (even if it draws from women's lived experiences) have in war-affected contexts where meeting immediate needs is paramount? At what point does the theorizing of the body under such circumstances become a means to satisfying intellectual fetishes? Theorizing the everyday is messy because it has to contend with the immediate social setting in which popular culture is inseparable from the economic materiality of the conditions of oppression.¶ In response to this dilemma, my aim is to argue for a productive rather than a reductive relationship between Feminist Security Studies (FSS) and Feminist (International) Political Economy (FPE), achieved through a reframed relationship between discursive subjectivity and a structure-centred materiality. I argue for a more systematic feminist analysis that reunites FPE and cultural FSS critiques. This analytical synthesis is based on an understanding of the co-constituted agency of discourse and materiality underpinned by a postcolonial-feminist attention to the politics of space.¶ After the Cold War, security became a catch-all concept for critical variants of IR, but instead of working against disciplinary fragmentation, "security has settled into each new camp in particularistic ways" (Sylvester 2013, 618). For FSS the main concern is to underscore the conceptual necessity of gender to understanding security. Although scholars have also emphasized the theoretical and methodological diversity of FSS, I contend that there is an implicit hierarchy of sorts when it comes to which critical tradition matters more theoretically or epistemologically--with a subtle but distinct privileging of the discursive as evidenced by the influential contributions of, among others, Judith Butler (1993), Karin Fierke (2013a), Lene Hansen (2006), and Laura Shepherd (2008). FSS thus tends to focus on the gendered, discursive construction of forms of violence with less attention paid to materialities of economic insecurity. In contrast, FPE tends to avoid the security frame and its discursive implications and concentrates more on gender as a social relation of inequality and the gendered effects of capitalism or economic globalization.¶ Poststructuralist scholarship in FSS insists that the discursive is not privileged over the material and that objects in the material world and human subjects both take their forms and agencies relationally, as they are embedded within particular locations. Similarly, gendered and embodied security is theorized to be the outcome of relational processes--performed in, by, and through those relations. Theory thus makes practice (Foucault 1972). Yet, thinking about our bodies as cultural constructs, produced as objects in security discourse, has a high level of abstraction. Before we can analyze discourse about bodies, shouldn't we first make the bodies from "other worlds," rooted in everyday struggles of human insecurity, feature in IR? How is attention to contextualized discourses of individuals or groups without considering their basic needs different from what liberal feminists are doing, namely treating those whose security is at stake as abstract, silent, rights-bearing individuals with no culture? Moreover, for all this talk about interactions between language and matter (as if they were equal), "language" remains the star of the show, as evidenced in Karin Fierke's claim that "embodied security is ... fundamentally bound up in the interaction between humans and their material environment, both of which are constituted in and through language" (Fierke 2013b, 16). Theoretically, materiality should gain agency through the fact that it cannot ontologically be separated from discursive forces but in practice discourses treat material practices (bodies) as effects (objects) rather than causes (subjects), and consequently maintain agency (Wilcox 2012). A subtle hierarchy is therefore imposed. Reversing the starting point of the inquiry may succeed in troubling dualistic thinking but does not transcend it. We may have thrown the baby out with the bathwater when we privileged the effects of cultural constructions of gender difference at the expense of the material effects of bodies, economic justice, and security (see Fraser 2013).¶ There are clearly limits to discursive analysis, especially when it comes to connecting physical insecurity and the materiality of insecurity linked to structures. We must therefore look to the so-called "new materialisms" on posthumanist agency (Connolly 2013), material feminisms (Hughes 2013), and Feminist IPE. Feminist IPE as a diverse body of scholarship studies structures, social practices, and the meanings of the global political economy (Griffin 2010; Peterson 2007). The emphasis falls on specifically gendered bodies while also foregrounding differences that are based upon material and structural inequalities as well as intersectional relations of disadvantage (e.g., gender, institutionalized racism, or ethnicity). In this regard, FPE may find itself closer than FSS to a radical definition of human security as everyday life experiences embedded in global structures of inclusion and exclusion and can keep FSS honest by guiding it back to a concern with everyday (economic) insecurities.¶ While FPE reminds us to consider the global picture of inequality, a systematic feminist political economy theory of security/conflict/violence is yet to emerge. That said, revisiting the material conditions that influence the socioeconomic production of gender as a relation of inequality is a potentially agency-inducing factor that could complement (together with attention to new materialisms) the discursive analytics of FSS, as will be shown in the discussion that follows on sexual and gender-based violence (SGBV) in the Democratic Republic of Congo (DRC).¶ FSS research has highlighted the harmful discursive misrepresentations that characterize international attention on rape as a tool of war in the DRC (e.g., Baaz and Stern 2013). However, feminist poststructuralism on its own is not a suitable lens to understand the hybridity of how women in the DRC adapt SGBV discourses to fit in with local cultural practices and to fulfil particular sociomaterial needs within their specific context. One needs a postcolonial feminism for that. To keep the international community interested and maintain the status that funding brings, women's organizations in the eastern DRC tend to emphasize the brutal and extensive nature of SGBV. The outcome is not straightforward--women's victimhood is reinforced--but at the same time, it could mean that so-called "victims" fight back, negotiating the "global patriarchal bargain" from below, simultaneously engaging with discourse and the material aspects of socioeconomic justice and empowerment (Jean-Bouchard 2013).¶ This case also underlines the necessity to consider a broad range of materialities (i.e., not only those that are discursively produced, but also "conventional" political economy materialities during and after war). During war, rape as a form of gendered accumulation by dispossession was used in Mozambique and Rwanda to strip women of their productive and reproductive labor power, as well as their possessions and access to land and livestock. Postwar, Baaz and Stern (2013) found that Congolese men rape due to a complex mix of cultural and political economy perceptions about masculinity, women as property, and a sense of entitlement to sex as compensation for their loss of status as providers. Borrowing Claudia Card's (2003) term "social death" to describe the cultural shame as a consequence of rape, I argue that the loss of social vitality is not just a loss of identity and meaning for one's existence, but also a deeply material loss of political, economic, and social relations. Both FSS and Feminist IPE should therefore pay more attention to the political economy of social relations and inequalities of the everyday.

#### AND, gender can’t explain violence at the state level because of the fluid nature of gender categories

Darryl **Harvis 2k**, professor of government and IR – University of Sydney, “Feminist revisions of international relations,” International Relations and the Challenge of Postmodernism, p. 162-3

Critical research agendas of this type, however, are not found easily in International Relations. Critics of feminist perspectives run the risk of denouncement as either a misogynist malcontent or an androcentric keeper of the gate. At work in much of this discourse is an unstated political correctness, where the historical marginalization of women bestows intellectual autonomy, excluding those outside the identity group from legitimate participation in its discourse. Only feminist women can do real, legitimate, feminist theory since, in the mantra of identity politics, discourse must emanate from a positional (personal) ontology. Those sensitive or sympathetic to the identity politics of particular groups are, of course, welcome to lend support and encouragement, but only on terms delineated by the groups themselves. In this way, they enjoy an uncontested sovereign hegemony oyer their own self-identification, insuring the group discourse is self constituted and that its parameters, operative methodology, ,uu\ standards of argument, appraisal, and evidentiary provisions are self defined. Thus, for example, when Sylvester calls lor a "home.steading" does so "by [a] repetitive feminist insistence that we be included on our terms" (my emphasis). Rather than an invitation to engage in dialogue, this is an ultimatum that a sovereign intellectual space be provided and insulated from critics who question the merits of identity-based political discourse. Instead, Sylvester calls upon International Relations to "share space, respect, and trust in a re-formed endeavor," but one otherwise proscribed as committed to demonstrating not only "that the secure homes constructed by IR's many debaters are chimerical," but, as a consequence, to ending International Relations and remaking it along lines grounded in feminist postmodernism.93 Such stipulative provisions might be likened to a form of negotiated sovereign territoriality where, as part of the settlement for the historically aggrieved, border incursions are to be allowed but may not be met with resistance or reciprocity. Demands for entry to the discipline are thus predicated on conditions that insure two sets of rules, cocooning postmodern feminist spaces from systematic analyses while "respecting" this discourse as it hastens about the project of deconstructing International Relations as a "male space." Sylvester's impassioned plea for tolerance and "emphatic cooperation" is thus confined to like-minded individuals, those who do not challenge feminist epistemologies but accept them as a necessary means of reinventing the discipline as a discourse between postmodern identities—the most important of which is gender.94 Intolerance or misogyny thus become the ironic epithets attached to those who question the wisdom of this reinvention or the merits of the return of identity in international theory.'"' Most strategic of all, however, demands for entry to the discipline and calls for intellectual spaces betray a self-imposed, politically motivated marginality. After all, where are such calls issued from other than the discipline and the intellectual—and well established—spaces of feminist International Relations? Much like the strategies employed by male dissidents, then, feminist postmodernists too deflect as illegitimate any criticism that derives from skeptics whose vantage points are labeled privileged. And privilege is variously interpreted historically, especially along lines of race, color, and sex where the denotations white and male, to name but two, serve as generational mediums to assess the injustices of past histories. White males, for example, become generic signifiers for historical oppression, indicating an ontologicallv privileged group by which the historical experiences of the "other" can then be reclaimed in the context of their related oppression, exploitation, AND exclusion. Legitimacy, in this context, can then be claimed in terms of one's group identity and the extent to which the history of that particular group has been “silenced.” In this same way, self-identification or “self-situation” establishes one’s credentials, allowing admittance to the group and legitimating the “authoritative” vantage point from which one speaks and writes. Thus, for example, Jan Jindy Pettman includes among the introductory pages to her most recent book, *Worlding Women*, a section titled “A (personal) politics of location,” in which her identity as a woman, a feminist, and an academic, makes apparent her particular (marginal) identities and group loyalties.96 Similarly, Christine Sylvester, in the introduction to her book, insists, “It is important to provide a context for one’s work in the often-denied politics of the personal.” Accordingly, self-declaration revelas to the reader that she is a feminist, went to a Catholic girls school where she was schooled to “develop your brains and confess something called “sins” to always male forever priests,” and that these provide some pieces to her dynamic objectivity.97 Like territorial markers, self-identification permits entry to intellectual spaces whose sovereign authority is “policed” as much by marginal subjectivies as hey allege of the oppressors who “police” the discourse of realism, or who are said to walk the corridors of the discipline insuring the replication of patriarchy, hierarchical agendas, and “malestream” theory. If Sylvester’s version of feminist postmodernism is projected as tolerant, perspectivist, and encompassing of a multiplicity of approaches, in reality it is as selective, exclusionary, and dismissive of alternative perspectives as mainstream approaches are accused of being. Skillful theoretical moves of this nature underscore the adroitness of postmodern feminist theory at emasculating many of its logical inconsistencies. In arguing for a feminist postmodernism, for example, Sylvester employs a double theoretical move that, on the one hand, invokes a kind of epistemological deconstructive anarchy cum relativism in an attempt to decenter or make insecure fixed research gazes, identities, and concepts (men, women, security, and nation-state), while on the other hand turning to the lived experiences of women as if ontologically given and assuming their experiences to be authentic, real, substantive, and authoritative interpretations of the realities of international relations. Women at the peace camps of Greenham Common or in the cooperatives of Harare, represent, for Sylvester, the real coal face of international politics, their experiences and strategies the real politics of “relations international.” But why should we take the experiences of these women to be ontologically superior or more insightful than the experiences of other women or other men? As Sylvester admits elsewhere, “Experience … is at once always already an interpretation and in need of interpretation.” Why, then are experience-based modes of knowledge more insightful than knowledges derived through other modes of inquiry?98 Such espistemologies are surely crudely positivistic in their singular reliance on osmotic perception of the facts as they impact upon the personal. If, as Sylvester writes, “sceptical inlining draws on substantive everydayness as a time and site of knowledge, much as does everyday feminist theorizing,” and if, as she further notes, “it understands experience…as mobile, indeterminate, hyphenated, [and] homeless,” why should this knowledge be valued as anything other than fleeting subjective perceptions of multiple environmental stimuli whose meaning is beyond explanation other than as a personal narrative?99 Is this what Sylvester means when she calls for a re-visioning and a repainting of the “canvases of IR,” that we dissipate knowledge into an infinitesimal number of disparate sites, all equally valid, and let loose with a mélange of visceral perceptions; stories of how each of us perceive we experience international politics? If this is the case, then Sylvester’s version of feminist postmodernity does not advance our understanding of international politics, leaving untheorized and unexplained the causes of international relations. Personal narratives do not constitute theoretical discourse, nor indeed an explanation of the systemic factors that procure international events, process, or the actions of certain actors. We might also extend a contextualist lens to analyze Sylvester’s formulations, much as she insists her epistemogical approach does. Sylvester, for example, is adamant that we can not really know who “women” are, since to do so would be to invoke an essentialist concept, concealing the diversity inherent in this category. “Women” don’t really exist in Sylvester’s estimation since there are black women, white women, Hispanic, disabled, lesbin, poor, rich, middle class, and illiterate women, to name but a few. The point, for Sylvester, is that to speak of “women” is to do violence to the diversity encapsulated in this category and, in its own way, to silence those women who remain unnamed. Well and good. Yet this same analytical respect for diversity seems lost with men. Politics and international relations become the “places of men.” But which men? All men? Or just white men, or rich, educated, elite, upper class, hetero-sexual men? To speak of political places as the places of men ignores the fact that most men, in fact the overwhelming majority of men, are not in these political places at all, are not decision makers, elite, affluent, or powerful. Much as with Sylvester’s categories, there are poor, lower class, illiterate, gay, black, and white men, many of whom suffer the vestiges of hunger, poverty, despair, and disenfranchisement just as much as women. So why invoke the category “men” in such essentialist and ubiquitous ways while cognizant only of the diversity of in the category “women.” These are double standards, not erudite theoretical formulations, betraying, dare one say, sexism toward men by invoking male gender generalizations and crude caricatures. Problems of this nature, however, are really manifestations of a deeper, underlying ailment endemic to discourses derived from identity politics. At base, the most elemental question for identity discourse, as Zalewski and Enloe note, is “Who am I?”100 The personal becomes the political, evolving a discourse where self-identification, but also one’s identification by others, presupposes multiple identities that are fleeting, overlapping, and changing at any particular moment in time or place. “We have multiple identities,” argues V. Spike Peterson, “e.g., Canadian, homemaker, Jewish, Hispanic, socialist.”101 And these identities are variously depicted as transient, polymorphic, interactive, discursive, and never fixed. As Richard Brown notes, “Identity is given neither institutionally nor biologically. It evolves as one orders continuities on one’s conception of oneself.”102 Yet, if we accept this, the analytical utility of identity politics seems problematic at best. Which identity, for example, do we choose from the many that any one subject might display affinity for? Are we to assume that all identities are of equal importance or that some are more important than others? How do we know which of these identities might be transient and less consequential to one’s sense of self and, in turn, politically significant to understanding international politics? Why, for example, should we place gender identity ontologically prior to class, sexual orientation, ethnic origin, ideological perspective, or national identity?103 As Zalewski and Enloe ask, “Why do we consider states to be a major referent? Why not men? Or women?”104 But by the same token, why not dogs, shipping magnates, movie stars, or trade regimes? Why is gender more constitutive of global politics than, say, class, or an identity as a cancer survivor, laborer, or social worker? Most of all, why is gender essentialized in feminist discourse, reified into the most preeminent of all identities as the primary lens through which international relations must be viewed? Perhaps, for example, people understand difference in the context of identities outside of gender. As Jane Martin notes, “How do we know that difference…does not turn on being fat or religious or in an abusive relationship?”105 The point, perhaps flippantly made, is that identity is such a nebulous concept, its meaning so obtuse and so inherently subjective, that it is near **meaningless** as a conduit for understanding global politics if only because it can mean anything to anybody.

#### BUT, the alt detracts from that process by overfocusing on the discursive constitution of masculine ontologies

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ACADEMIC INJUSTICE DISCOURSE Just law can coexist with unjust practice and both are parts of “empirical law” or what Bendey called “the process of government.” Empirical law is constantly changing and some theorists are optimistic that verbal discourse has the ability to make written law more just, even though the same unjust practices recur or new ones emerge. These theorists, some of whom are or may aspire to become public intellectuals, hope that someday public political discourse on behalf of those who are treated unjustly will have the power to interrupt a cycle of just written law accompanied by continued unjust practice. That is, the “right” discourse perennially holds the promise of changing the beliefs, values, and goals of everyone in the public auditorium, so that the same kind of unjust practices do not perpetually chase the same kinds of just laws.11 This search for “magic words” is futile for academics who are professionally confined to dry and abstract prose. Our verbiage does not have the power to move the multitudes who do not read or listen to it anyway. But even when multitudes are inspired and emotionally stirred by great orators, action that follows is unlikely to result in lasting change, without the support of powerful interests. After the 1960s, academics began a robust practice of liberatory discourse about injustice that seems to grow more impassioned and intense each year. The quest for demographic diversity among students and faculty in higher education has weathered judicial defeat of explicit affirmative action policies, but only partly for the sake of justice. There are pragmatic prizes if the academy can justify itself by producing a racially integrated leadership and managerial class for business, politics, and the military. Top leaders throughout society realize that they need such racial diversity for broad consumption, voter support, and boots on the ground, and the expression of that need is evident in amicus curiae briefs submitted to the US Supreme Court as it has been torturously dismantling affirmative action, piece by piece, since Bakke in 1978.12 Academic political discourse has been deeper than polemics and debate, exactly because of its disciplined intellectual origins in different fields of study (i.e., discipline imposed by distinct “disciplines”). But it has been swimming upstream against a more rarefied and older academic tradition, particularly among many philosophers and their gate keepers outside of the profession. Even Hannah Arendt (see chapter 2) spoke approvingly of the life of the mind as cut off from real political activity that occurred in the realm of “opinion.” In her 1970 interview with Adelbert Reif, Arendt addressed the phenomenon of college-stu-dent protestors, noting that they had brought social change through optimistic belief in their ability to make a better world, while at the same time discovering joy in civic participation. Arendt credited such protests with the success of the civil rights movement and progress toward ending the Vietnam War.13 As discussed in chapter 4, it is doubtful that Arendt was correct that student protests caused the success of the civil rights movement. A historical analysis of the end to the Vietnam War is beyond the present scope, but what we already know about empirical Bentleyan analyses would warrant skepticism about Arendt’s causal thesis there as well. In the same interview, Arendt warned that demonstrations by student activists could be self-defeating in democratic Euro-American contexts, because in attacking their universities, they were attacking the very entities that made their protests possible, American universities, especially large state schools that were the sites of the protests Arendt had in mind, have perforce developed very different financial structures since 1970. These schools have become increasingly dependent on private corporate and philanthropic funding, with state government funds now a much reduced part of their budget. While this structural change is not generally viewed as an incursion on academic freedom, it has been coincident with a very flat era of student protest and activism. Still, Arendt's notion of the "life of the mind” remains useful if we consider that the progressive/change-seeking output of professional academics since 1970 has been professionally accepted in the institutions that employ its participants. Also, much of today’s liberatory academic discourse can be viewed as the legacy of earlier student protest, furthering a tradition that may have been founded when some of the 1960s student radicals became professors. This indicates that the connection between academic radicals and the hands that feed them is not as simple as Arendt thought. In the United States, everything now points to both the existence of real academic freedom and its real ineffectiveness. Progressive academic writers ply a craft of formal speech that deals with contemporary injustice through complex theoretical frameworks, with requisite scholarly apparatuses and without translation into more simple views of the world; there is often also a lack of translation from one discipline to another or between subdisciplines in the same field. The audience is other academics and students. Neither specialization nor the limited and partly captive audience should be viewed as problematic because that is the nature of academic work, given broad social divisions of labor. But there is a problem with the delusional nature of so much of this work. The delusion consists of a naive view of the power of academic speech to directly change reality. The rhetorical mode of address used by academics writing cultural criticism, political philosophy, social philosophy, or what is now called social-political philosophy (which combines the other subfield approaches), often proceeds as though its authors are making grand entries in a planetary cabala, where words have the immediate power to become their intended referents. Those who do not write and speak cabalistically may subscribe to the Trickle-Down Good Ideas Theory that can be traced from Plato to John Stuart Mill to John Rawls. Subscription to that theory is immediately self-flattering, but it lacks reliable empirical support.16 Although, after the US civil rights movement, there has been an uncanny coincidence of race-blind formal racial equality with the hegemony in political philosophy of Rawls’s requirement that those who plan fundamental social institutions do so in ignorance of their own societal environments. As we saw in chapter 1, Rawls was quite explicit about this: I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong.17 Both race-blind racial equality and Rawlsian ideals are compatible with race-based real inequality. There are, of course, counter-examples, such as Katherine MacKinnon’s work on sexual harassment in the workplace as expressed in current law and institutional policy.18 Nevertheless even very good academic political discourse about justice and injustice cannot be relied upon to attract implementation or application in real life. This may be because there has not been sufficient time for the development of training programs for a new profession of “bridgers,” who could translate good ideas in the academy for those who govern and make policy. An internal problem for such translators would be to decide where to anchor their bridges in fields—every humanistic field—where experts disagree. However, the current tradition of progressive academic writing and speech is less than half a century old and if and when such translators emerge, they will develop their own professional criteria for choosing among contending experts. Public media, as a democratic analogue to disagreement within academic discourse, supports the idea that expressing and airing views in day-to-day practices or special “national conversations” also have immediate practical results. It is not evident how there could be such results, when opposing views and opinions are treated with the same respect and have equal access to the same mass auditorium that lacks rules for evidence or valid argument. As with academic discourse, there is no structured connection to official decision processes. The only reliable result of participation in such unbinding referenda is that those who participate are able to express themselves and get attention that may benefit them in the marketplace of their related endeavors. Public expression also serves to, represent and create collective atmospheres of belief, attitude, and opinion. These atmospheres are implicitly known by a majority of people in the culture, even though such knowledge is difficult to validate. Ambiguities cannot be resolved by recourse to public opinion polls, because understanding the results of those polls requires creative interpretive skills that draw on what is already known about relevant atmospheres. For example, suppose that more blacks than whites believe that white privilege is real and that O.J. Simpson was innocent, or that more whites than blacks believe that white American police officers are not, in general, racially biased. Are the views of whites evidence of racial bias or racial oblivion? Are the views of blacks evidence of racial preference or paranoia? Moreover, such polls almost always have a large racial overlap of opinion: If 29 percent of blacks compared to 71 percent of whites believe X, then 71 percent of blacks and 29 percent of whites do not believe X. Does this mean that the percentages of each group that does not contribute to the discrepancy in belief recorded in the polls are in some degree of agreement? Experiments in social psychology could be designed to answer such questions and others like them, but it is important to decide beforehand why the data is important and what it does and does not indicate. For instance, testing the claim that white privilege is a reality of contemporary life requires some prior definition of what is meant by “white privilege,” which can range from injustice to social courtesies. In a widely discussed 2013 experiment conducted in Queensland, Australia, economists Redzo Mujcic and Paul Frijters found that the majority of free bus rides, based on conductor generosity, were dispensed to whites, with blacks least likely to receive this courtesy, compared to all other racial groups among commuters. Journalist Britni Danielle, writing for a general audience on Yahoo News, touted this study as evidence that “white privilege is real,” without distinguishing between an amenity such as a free bus ride and recognition of one’s rights by not being subject to arbitrary stops and frisks by police officers.19 Conservatives reading Mujcic and Frijter’s study might say that the bus driver may have been acting rationally based on past experience with unruly black passengers. From a progressive perspective, more specifics would need to be introduced to defend the claim that this study revealed white privilege, such as controls for the apparent social class and gender of passengers, as well as the preexisting racial climate among bus commuters in Queensland, as well as the broader racial atmosphere throughout Australia in 2013. The 2015 Academy Awards What is racial atmosphere and climate? A US example that is also global could help clarify these vague ideas, provided that it is understood beforehand that in this context, as in most public references to "race," ‘racial” means “pertaining to racism.” From beginning to end, the 2015 Academy Awards ceremony hit racist notes that slid by unchecked, because it was an occasion of celebration. Neil Patrick Harris, the host, began with what might have been a critical remark about the lack of racial diversity among audience members and award winners: “Tonight we honor Hollywood’s best and whitest, sorry, bright est.” For those who were uncomfortable with the lack of robust racial diversity among audience members and award winners, his remark might have validated their unease. But those who would have been uncomfortable with more racial diversity may have been heard “best and whitest” as support for their social values. (The discourse of white privilege as a critique of contemporary anti-nonwhite racism is, as indicated, that kind of double-edged sword.) Midway through the ceremony, Patricia Arquette called for people of color and members of the lesbian, bisexual, gay, and transgender (LBGT) community to support legislation for equal pay for women and to commit themselves to supporting women, thereby overlooking the women who were either or both people of color and members of the LGВТ community. This kind of oversight may perhaps be excused by Arquette’s ignorance of what academics have been for decades analyzing as “intersectionality.” But Sean Penn’s remark at the grand finale awarding for Best Picture to Alejandro Gonzalez Inarritu, the Mexican director of Birdman, was simply, explicitly, racist: "Who gave this son of a bitch a green card?” Inarritu later brushed off the insult by saying he found it "hilarious,” because “Sean and I have that kind of brutal relationship. I think it was very funny.”20 Inarritu attempt at a “save” for Penn does not address the impact of Penn’s insult on other Mexicans and Mexican Americans, including those without green cards who struggle to remain employed in the face of anti-immigrant prejudice and discrimination. (That such a moment of maximum recognition was brought so low by a racist crack is not unusual in US culture, where the nastiest forms of racist insult are often let loose on people of color who have succeeded.) As a spectacle watched by almost thirty-four million, the 2015 Oscars, despite ratings lower than recent years, was a global public event.21 Symbolically, it has no peer for the display of beauty, talent, and artistic creativity. Its subtext inevitably has implications about current American race relations, which influence their future. The racial implications of the Oscars replays in millions of minds at countless other public celebrations and entertainment venues, as well as in private interactions (for a year at least). Such spectacles are forms of public discourse and what they represent or fail to represent about US racial demographics and the attitude of the dominant white group creates or augments a specific racial climate that in 2015 is part of a more general racial atmosphere of ambiguity and indeterminacy. At the 2015 Academy Awards, for many critical observers, the issue or subject pertaining to race (insofar as it is understood that subjects of race are subjects of racism), was recognition.22 The beauty, talent, and artistic creativity of people of color was not fully recognized. Some people of color did get awards and some audience members were people of color, so recognition, along with diversity, was not completely absent. But there appeared to be insufficient racial diversity for audience and award winners to be considered racially integrated. And that appearance was symbolic. However, the symbolic meaning is ambiguous: Were there people of color who were deserving of awards but did not get them because they were people of color? Is race a factor in who I becomes a member of the Academy of Motion Picture Arts and Sciences? In the future, will the racial makeup of award winners become more or less representative of their proportions in the motion picture industry? If the proportion of people of color in the motion picture industry is not proportional to their presence in the population at large, why is that? The answers to these questions are undetermined in the symbolic spectacle of the 2015 Academy Awards. The observer does not know if recognition of the achievements of people of color in the movie industry will improve, stay the same, or get worse, and she does not know how to find out. The racial (i.e., in regards to racism) climate of the Academy Awards is cloudy, subject to many different interpretations, some of them conflicting. It is an epistemologically unstable racial climate, because people of color do not know what the weather is in that climate, as a basis for prediction, and neither do they know how to find out. The shared judgment throughout the American atmosphere of race in the early twenty-first century is that racism is morally bad. This judgment is a general principle that leaves the nature of racism undefined throughout the atmosphere and most of the climates and subclimates of race. The overriding shared judgment is a bitter and ineffective refuge for nonwhites, because it does not protect them from either First Amendment-protected racist expressions or actions that turn out to be indirectly racist. Energetic self-aware racist whites can try to evade the judgment that they are racist through coded language for racial difference, and the use of intermediate activities and traits as subjects of direct action. That is, something other than race, which nonetheless does a good job of picking out members of a specific racial group, can be used instead of the race of that group to maintain prejudice and legitimize discrimination. The term “racial climate” has a history of meaning “micro-aggressions” based on race, small cuts, insults, and slights that can have a cumulative effect of individual harm.24 In using the term “racial atmosphere,” reference may be made to other issues of harm to people of color, such as ignorance of black history and contemporary racism or discrimination in career advancement.25 The implication of these meanings is that the micro-aggressions add up to what is perceived as a general predisposition of white people to treat people of color in unjust ways. But, at this time, ideas of racial atmosphere and climate also work as metaphors for what is unknown about race relations and attitudes; they capture the vagueness and unpredictability of racial prejudice and discrimination that occur in a society where nonwhites remain disadvantaged, even though there is formal equality. This “vague weather” aspect of atmosphere and climate is an epistemological condition of indecision that may or may not constitute a lasting crisis, although some syndromes of political injustice should be viewed as crises. A crisis is a period of indecision and uncertainty that requires a resolution before life can go on. Will blacks and other people of color achieve more equality with whites, or is the United States—and with it the world, because US racism is exported with business practices, tour-ism, and entertainment products—on the brink of a new era of explicitlу direct oppression of people of color? Are most white Americans, whose race-neutral economic and social activities have racist effects on nonwhites, genuinely ignorant of how the system in which they operate works, or are they secretly but knowingly hearts-and-minds not clear that this indeterminate aspect of present racial atmosphere and climates must be resolved now. We do not know if life can go on if it is not resolved or what it means for life to go on, or not. We do not even know if the putative crisis can be resolved at this time, because there is as yet no systematic and sustained, impassioned, liberatory dis- course for our condition of ambiguity, a time with a black president and police killing with impunity of unarmed black youth, a time of voting rights for everyone but new restrictions and requirements that disproportionately affect African Americans.26 Except for what academics write and say and how important they think their discourse is (among themselves), American discourse of racial liberation is at a standstill. And insofar as academic discourse is uttered and received in a closed system, with a semicaptive audience and no reliable means for it to affect the real world, that standstill remains at the disposal of history, where history is understood to be the unpredictable result of contingent events. However, if academic oppositional political discourse can be related to a longer historical trend, a more coherent and optimistic picture might emerge. Cornel West's ideas about the American black prophetic tradition appears to be a relation to such a trend.

#### Gender is not the root cause of violence or ontological and cant explain the case -- violence is constructed by many axes of oppression

Olena Hankivsky 12, Professor in the School of Public Policy, Simon Fraser University, June 2012, Women’s health, men’s health, and gender and health: Implications of intersectionality, Social Science & Medicine, http://www.sciencedirect.com.turing.library.northwestern.edu/science/article/pii/S0277953612000408

Using an intersectionality framework, researchers have noted the explanatory limitations of single axis designs centered on sex and gender. Cole (2009) has warned that analyses that focus on gender are problematic because they often “implicitly assume a host of other social statuses that usually go unnamed in American culture: middle-class standing, heterosexuality, able-bodiedness and White race” (p. 173). Others have explicated similar limitations. For example, studies in the field of violence (Bent-Goodley, 2007; Craig-Taylor, 2008; Crenshaw, 1995; Nixon & Humphreys, 2010; Sandelowski, Barroso, & Voils, 2009) show that violence against women is not only a matter of gendered power relationships but is co-constructed with racial and class stratification, heterosexism, ageism, and other systems of oppression, some of which may be more salient within such interactions. Research on cardiovascular disease (CVD) (Brister, Hamdulay, Verma, Maganti, & Buchanan, 2007; King, LeBlanc, Carr, & Quan, 2007; King, LeBlanc, Sanguins, & Mather, 2006) shows that focussing on sex and gender often obscures the fact that CVD is disproportionately experienced by racial ethnic and low-income groups whose lives are shaped by intersecting processes of differentiation along the lines of age, sex, ethnic group affiliation, socioeconomic class, and geography. Finally, HIV/AIDS research (Dworkin, 2005; Elford, Anderson, Bukutu, & Ibrahim, 2006; Jackson & Reimer, 2008; Meyer, Costenbader, Zule, Otiashvili, & Kirtadze, 2010; Young & Meyer, 2005) demonstrates that gender and sexuality cannot be separated from other axes including race, class, age, religious affiliation, and immigration status and the structural economic, political, and social processes that shape them. For example, in her analysis of surveillance categories for HIV, Dworkin (2005) argues that pushing beyond a singular sex/gender system to explore the simultaneity of race, class, and shifting gender relations is vital to the future of the HIV epidemic and in particular, for making visible bisexual and lesbian transmission risks. Emerging research thus demonstrates that there are many groups which “do not necessarily identify gender oppression as the primary frame through which they understand their lives” (Nixon & Humphreys, 2010, p. 150). In Canada, as in many other jurisdictions, this is especially apparent with growing immigrant populations whose health is primarily affected by dislocation, isolation, loss of identity, culture, and meaningful employment and Aboriginal/Indigenous populations whose health and well-being is largely determined by unresolved colonial injustices and ongoing experiences of racism and poverty (Alfred, 2005; Waldrum, Herring, & Young, 2006).¶ Further, the emphasis on gender (and sex) often leads to a focus on differences between women and men. This helps to explain why so much data continues to be collected, organized, and presented solely around sex and gender differences even when similarities between women and men are demonstrated (e.g. Hyde, 2005; Petersen, 2009), differences among women and among men are often as significant if not more than between women and men (Crawshaw & Smith, 2009; Varcoe, Hankivsky, & Morrow, 2007), and men are sometimes subordinate to some women and some women exercise power over some men (Pease, 2006). Nevertheless, numerous reviews of sex based and gender differences continue to be produced (Gochfeld, 2010; Read & Gorman, 2010). Moreover, even in some frameworks that seek to include considerations of both sex and gender, as in the sex and gender based analysis (SGBA) tool developed in Canada (e.g. Clow et al., 2009), proposed guides construct lines of interrogation that prioritize examinations of similarities and differences between women and men. As Clow et al. (2009) state, “SGBA reminds us to ask questions about similarities and differences among women and men, such as: Do women and men have the same susceptibility to lung disease from smoking? Are women at the same risk as men of contracting HIV/AIDS through heterosexual intercourse? Are the symptoms of heart disease the same in women and men?.” (p. 1). Within this type of construct, differences that are shaped and formed by factors outside of sex and gender are treated as secondary in importance, if at all.

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#### State is not monolithically masculine---assimilation can work the other way around.

Angelika Striedinger 17, PhD Candidate at the University of Vienna School of Economics and Business, with a focus on institutional theory of organizations and gender equality, International Feminist Journal of Politics, How organizational research can avoid the pitfalls of a co-optation perspective: analyzing gender equality work in Austrian universities with organizational institutionalism, Vol 19(2), 2017, http://www.tandfonline.com/doi/pdf/10.1080/14616742.2016.1189672?needAccess=true

In a second example of gender equality work, gender equality offices organized trainings aimed at reducing bias in personnel evaluation procedures. These trainings were part of the universities’ leadership development programs and they were explicitly framed as a way to increase the quality of personnel selection, rather than as a means to overcome inequality. The terms “gender,” “diversity” or “equality” were not even in the title of these trainings and did not feature prominently in their description; instead, the workshops were portrayed as part of the quality assurance agenda of the university. By applying the concept of co-optation, we could criticize this rhetorical framing as contributing to the marginalization of gender equality as an aim in itself, making the legitimacy of gender equality activities dependent on whether they contribute to other aims such as quality assurance and optimizing human resources (see Lind 2003; Barry, Chandler, and Berg 2007; Wetterer 2009).¶ These interpretations certainly help us develop a critical perspective on how feminist concepts and goals travel into organizational procedures, taking on new meanings and implications. However, they run the risk of simply inversing such accounts when they replace a story of gender equality success with a story of gender equality failure, thereby overlooking the complexity of efforts aimed at changing organizations and, consequently, societies.¶ As a first step toward a more differentiated picture, we need to understand that organizations, in our case universities, are not monolithic blocks governed by a homogenous market logic of how to make the most efficient use of the available human resources. To this end, a helpful concept provided by organizational institutionalism is institutional complexity (Greenwood et al. 2011), meaning that organizations are confronted with different prescriptions from multiple institutional logics and that these logics exist simultaneously in one and the same organizational context, even when they are partly contradictory. In Austrian academia, our research in the context of the GENIA project led us to identify four rationalities which shape how universities approach gender equality work (Striedinger et al. 2014, 18–19). Universities simultaneously offer different and overlapping justifications for their gender equality activities by arguing that: (1) in the spirit of “academic professionalism,” gender bias should be eliminated in order to come closer to the aim of objective and neutral evaluation and discovery; (2) following the logic of the “socially responsible university,” tackling the underrepresentation of women in academia is a moral obligation and a legally defined duty; (3) within the logic of the “entrepreneurial university,” gender equality work contributes to improving the image of the university and to the use of its human resources; and (4) according to the logic of the “managerial university,” gender equality regulations align academic decision making with managerially defined goals and increase the transparency of organizational procedures. As we can see, the concept of institutional complexity led us to a more fine-grained understanding of organizational rationalities toward gender equality.¶ Second, organizational contexts are not only places where multiple logics compete and coexist, but institutional logics can themselves be subject to transformation. This happens, for example, when a new logic is “translated” into an existing institutional field. This concept “refers to the notion that ideas change when they travel from one context to another” (Boxenbaum and Strandgaard Pedersen 2009, 185). In this process, “blending” (Thornton, Ocasio, and Lounsbury 2012, 162) means that dimensions of different logics are combined, resulting in new vocabularies and practices; “assimilation” (164) means that dimensions of one logic are incorporated into another logic and end up further supporting and justifying this logic. What is described here as assimilation is very similar to the concept of co-optation; however, an institutional logics perspective suggests that assimilation could also work the other way around. For example, elements of managerialism can be assimilated into (used for) purposes of gender equality work (for a similar suggestion based on frame analysis see Ferguson 2005, 33). Furthermore, the idea of blending indicates the possibility of a more equal merging of different logics.¶ Third, institutional work (Lawrence, Suddaby, and Leca 2009) can consist in efforts to translate, blend or assimilate institutional logics. Through strategy development, such as a “small wins approach” or a strategic use of different “language styles” (Meyerson and Scully 1995, 594–598), gender equality agents can make use of the institutional complexity of their organizational contexts and turn “an institutional wrinkle into a signifi- cant tear in the institutional fabric” (Reay, Golden-Biddle, and Germann 2006). Furthermore, even when the commitment of the organizational leadership to gender equality mainly serves as lip service to increase the legitimacy of the organization vis- à-vis demands for social justice and equality (see Meyer and Rowan 1977), gender equality agents can build on these rhetorical commitments (Hofbauer et al. 2015) and, through their implementation work, retranslate them toward more holistic interpretations of gender equality.¶ Returning to our two examples of gender equality activities in Austrian universities introduced above, we can apply these concepts to paint a more dynamic and finegrained picture of gender equality work than if we solely relied on the notion of co-optation. When it comes to the issue of reconciliation of work and family responsibilities, one gender equality agent working in the university structure explained: We can see that there is a lot of political will from the ministry and from the rectors to push this issue. And of course we’re not particularly delighted with how they frame this, just as a way to make it easier, to make it possible that women can be good mothers and good workers too. But then again, and I also talked about this with other gender equality officers from other universities: we try to reinterpret this more towards gender equality in care responsibilities, and we use it as an opportunity to question gender stereotypes. (Gender equality officer, university B)¶ As this statement shows, the transformation of feminist demands does not end with the “selective incorporation and partial recuperation” (Fraser 2009, 99) of these demands by other policy priorities. The politically prioritized University and Family audit program may have little in common with a feminist agenda of transforming gender relations, since it does not problematize the societal issue of the unequal distribution of care responsibilities between women and men. However, in the course of translating the political and organizational commitment to the reconciliation of work and family responsibilities into concrete gender equality activities and regulations, gender equality agents can reshape the character of this issue toward problematizing gender relations.