# 1nc – round 5

## offcase

### 1nc – court ptx

#### Conservative justices will uphold Roe V Wade to appear bi-partisan, but the aff forces them to reverse course

Cohen & Lithwick 21 – [David S. Cohen - associate professor at the Drexel University School of Law, Dahlia Lithwick – courts and law writer at Slate, July 28th 2021, “Roe v. Wade Is Now in the Hands of the Three Trump Justices”, <https://slate.com/news-and-politics/2021/07/mississippi-roe-challenge-barrett-kavanaugh-gorsuch.html>, eph]

One of the most interesting fissures that has opened up within the conservative legal movement in recent years has been between mainstream conservative lawyers and the growing performance artist faction of the lawyers for the Trump base. Soon, the conservative justices themselves will have to pick which side of the battle they are on: With the filing last week of a brief that explicitly asks the Supreme Court to overturn Roe v. Wade, the state of Mississippi is forcing the court’s three newest Trump-appointed justices to choose between institutional stability and law that channels right-wing internet memes. Examples of the latter abound in the past year. Rudy Giuliani has seen his license to practice law temporarily suspended—twice!—as a result of his star turns as all-purpose lawyer for crazy stuff. Last December, 17 Republican attorneys general signed a brief supporting a suit filed by Texas Attorney General Ken Paxton seeking to set aside the 2020 election based on false claims of “unconstitutional irregularities.” The chief law enforcement officers of those 17 states actually asked the Supreme Court to throw out every vote in the four consequential states in which Joe Biden had prevailed—Georgia, Michigan, Pennsylvania, and Wisconsin—and then have each state’s legislature declare Donald Trump the winner. Another exhibit might be the various lawsuits filed by Trump’s “Kraken” lawyers Lin Wood and Sidney Powell, who currently face the prospect of legal sanctions for their work advancing his bogus claims of a stolen election. Fitch’s brief represents an astoundingly maximalist theory of ignoring precedent, claiming that “the stare decisis case for overruling Roe and Casey is overwhelming.” Calling Roe v. Wade “egregiously wrong” (five times!), the brief asks the court to simply overturn every abortion rights decision made over the course of half a century. The casual trolling is indeed epic. Justice Ruth Bader Ginsburg, who dedicated her life to protecting women’s reproductive rights, is invoked to support the proposition that Roe and Casey “have inflicted significant damage” upon the country. The brief blames Roe for creating a national culture war that was in fact produced almost singlehandedly by Pat Buchanan, Phyllis Schlafly, and Nixon strategist Kevin Phillips. It contends that Roe and Casey and their progeny are not really precedent because they were fractured opinions. It argues that “abortion jurisprudence has harmed the Nation.” The brief even cites one of us (Lithwick) to support its claim that abortion is so contentious that it must be returned to the states to decide, without interference from the federal government. Trolly. Just over one year ago, the Supreme Court struck down a Louisiana law that would have reduced the number of clinics in the state to one, and five years ago, the court struck down a Texas law that would have cut the number of clinics in the state by three-quarters. In neither of those cases did the state attorneys general, both outspoken, politically motivated, anti-abortion conservatives, urge the court to use the lawsuit to overturn Roe. So what changed? Several things. For one, the Mississippi law at issue in this case is one of a new breed of extreme anti-abortion laws that have swept the nation in the past two years. Despite the fact that fetal viability is currently set at between 23 and 24 weeks, states have been banning abortion at 15 weeks (Mississippi, in this case), 12 weeks (Arkansas), 8 weeks (Missouri), 6 weeks (Ohio, Georgia, and seven others), and at conception (Alabama, Louisiana, Utah). In other words, these new laws are rooted not in state solicitude for public health, but in a desire to end legal abortion. Dobbs is the first case to arrive at the Supreme Court addressing these direct attacks on Roe. Beyond that, the most essential change here is that Trump struck Republican gold during his presidency and was able to appoint three new Justices to the court. All three—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—were established conservative jurists at the time they were elevated to the court, but by being appointed by Trump, and sometimes with some discomfort, their reputations and careers became reoriented as Trump loyalists. Since Trump stated that one of his chief goals in his court appointments was to appoint justices who would overturn Roe, Fitch received the precise message a loyal Trump soldier was sent loud and clear—send these justices a Trump-inspired brief that will appeal to the Trump moment. And that she did. What she may have missed is how hard the three Trump justices have labored to show the country that they are not partisans, not shoddy hacks, and not the brazen political actors their party promised. Just as the last term showed that, in some areas, minimalism and moderation were to be the lodestars of, at minimum, Barrett and Kavanaugh, Fitch served up a giant partisan fireworks display that would benefit her own image and career more than the Trump justices’. But perhaps that was the intended purpose. Her Trump-stylized arguments certainly garnered immense attention for Fitch last week. Whether it further inclined the Supreme Court to grant the relief she sought is a much harder question. So far on the court, the Trump three have been reliable conservative votes, but they have not completely walked the party line. Gorsuch wrote the pivotal decision in 2020 giving LGBTQ people equal rights in the workplace; Kavanaugh is now the court’s median justice and cited something akin to the public perception of critical race theory in his opinion supporting college athletes against the NCAA; and Barrett stopped short of overturning a precedent about religious liberty that has been in conservative crosshairs for decades. These three are conservatives, there’s no two ways about it. But, are they bomb-thrower justices, like Samuel Alito and Clarence Thomas? Or are they justices prone to taking less visible, headline-eluding smaller steps to accomplish larger conservative goals while still paying some respect to half a century of precedent? That’s the choice before them now that Mississippi has so clearly thrown down the gauntlet. Abortion rights activists who seek to see Roe ended outright celebrated the in-your-face-ness of the AG’s filing. Several argued that there was no other avenue for Mississippi and applauded the candor of a brief that no longer covered itself in fabrications about the real goals of the anti-choice movement. But, there is at least some reason to doubt that there are five, let alone four, or even three votes, at the high court for an in-your-face reversal of Roe just weeks before the 2022 midterm elections. It will be up to the Trump justices to decide just how much they side with the church of Trump, instead of the institution of the Supreme Court.

#### Judicial interpretation of market regulation & anti-trust is split along political lines – the aff’s regulation makes them look too liberal.

Ventoruzzo 15 – [Marco Ventoruzzo - Full Professor of Business Law at Bocconi University in Milan and Full Professor of Law at Penn State Law School, 2015, “Do Conservative Justices Favor Wall Street: Ideology and the Supreme Court's Securities Regulation Decisions”, <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1277&context=fac_works>, eph]

Probably the best evidence that political ideology can play a role in the area of securities regulation is the set of rules concerning the composition of the Securities and Exchange Commission (SEC). Section 4(a) of the 1934 Exchange Act sets forth that the SEC should be composed of five members appointed by the President with the "advice and consent" of the Senate, but also requires that "[n]ot more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as may be practicable."8 ° The statutory call for a bipartisan SEC indicates that regulation and enforcement activities concerning the financial markets can be subject to diverging philosophies along political lines.8 1 It is obviously impossible here to fully discuss the general economic tenets of conservative and liberal policies with respect to the regulation of financial markets. General intuition, noted above, is that ''conservative" views of economic policy emphasize the efficacy of markets over government intervention and regulation, while for liberals the position is reversed. The consequence is that conservatives tend toward deregulation based on the conviction that market failures rarely justify protections for perceived weaker parties in a private transaction. Liberals, on the other hand, are more skeptical about the virtues of free markets and believe that regulation should curb the possible inefficient and inequitable outcomes of laissez-faire market operation.8 2 In short, the former tend to be more "pro-business," the latter more "pro-investor." 83 An illustration of this possible political divide is the legislative history of the so-called Private Securities Litigation Reform Act of 1995.84 In the 1990s, there was a growing concern that frivolous securities lawsuits could arise as attorney-driven class actions, in particular invoking section 10(b) and Rule lOb-5 of the Exchange Act, forcing defendants to settle in light of the potential costs of discovery.8 5 Congress created this piece of legislation to curb such a phenomenon through different measures like raising the pleading standards.86 In order to survive a motion to dismiss, a plaintiff had to plead false statements "with particularity," and that pleading had to create a "strong inference" of scienter, one of the elements of a Rule lOb-5 cause of action; in addition, the court granted a "stay of discovery" before the decision on the motion to dismiss. 87 Congress enacted the bill into law over a veto by President Bill Clinton.88 Numerous Democratic representatives voted in favor of the law,89 but the diverging views of President Clinton and Congress evoke the traditional dividing line between liberals and conservatives in this area. This Section briefly addresses the room for policy consideration- politics-in the enforcement of the securities laws. The intent is not to offer a comprehensive account of the degree of freedom that courts have in the interpretation of all the provisions of the securities laws, but more simply to give a flavor of the possible different interpretations of the relevant statutes that a particular set of beliefs concerning the proper scope of the regulation might influence. To begin, note that the U.S. securities laws enacted in the 1930s were among the first modem regulations of the financial industry, and they have served as a model for several foreign jurisdictions.90 These laws, however, apply to one of the most dynamic and innovative industries. Inevitably, enforcing the existing rules to the ever-evolving factual circumstances that characterize this sector leaves wiggle room for different policy considerations. A good starting point is the scope of the securities laws. The definition of "security" that triggers the obligation to register and disclose information, as well as the availability of specific private causes of action designed to protect investors, is broad but also vague. For example, consider the notion of what constitutes an "investment contract" set forth in section 2 of the Securities Act (and section 3 of the Exchange Act) that the Supreme Court had to define on various occasions. 91 Another crucial area concerns the availability of private causes of action to plaintiff-investors allegedly harmed by false, misleading, or incomplete statements in the purchase or sale of securities and the burden of proof that they must satisfy to prevail.92 Furthermore, in several cases, the remedies granted to plaintiffs are based on private causes of action implied by the courts and not explicitly regulated by the legislature, most notably section 10(b) and Rule lOb-5 of the Exchange Act. In these instances, significant interpretative latitude exists. Consider, for example, problems such as the need to prove reliance vis-h-vis the fraud-on-the- market theory, the scienter requirement, or the extension of liability to aiders and abettors.93 The extension of the insider-trading prohibition, a rule largely created by courts, is another area in which different ideological perspectives might affect the decision-making process.94 Conservatives and liberals also often have divergent views about the powers of the government (i.e., the SEC) to enforce the law, particularly the securities laws. For example, some interesting cases in this respect deal with the burden of proof that the SEC must satisfy to establish a violation of the securities laws.95 Rulings on takeover regulation also might indicate different policy preferences of the Justices. These cases, however, show the difficulty of properly coding certain decisions as pro-business or pro-investor, a problem that more generally affects the analysis undertaken later in this Article.96 On one hand, it is possible to argue that takeovers, and more specifically hostile tender offers, favor investors by allowing them to sell their shares at a premium over market prices. On the other hand, some tender offers may not be value-maximizing, and in this case to allow the target corporation, as well as its controlling shareholders and managers, to resist an inadequate or coercive offer could be in the best interest of shareholders. In any case, the proper role of the market for corporate control and how to create a level playing field for bidders and targets in the takeover context are also areas where there is room for competing policy considerations. 97 In addition, litigation concerning the constitutionality of state antitakeover statutes is instructive as to the position of the Supreme Court on issues relating to the relative powers of the federal government and the states in regulating commerce, an area that implicates the politically charged question of the role of the federal government.9" The legislature resolved some of the controversies mentioned above, and the Court unanimously finds this, easy solution. Even assuming that ideological preference might be embedded in their decision-making, judges and, to a lesser but not unsubstantial extent, Supreme Court Justices face several constraints while speaking from the bench: Sometimes statutes and regulations are fairly straightforward and do not leave room for policy considerations; Lower judges might desire not to be reversed on appeal; 99 Fear of "government retaliation" might play a role (in the sense, for example, that striking down a statute might lead the legislature to introduce other measures that the Justice opposes); And public opinion might unconsciously influence them. There are, however, several "hard cases" where the solution does not seem to appear in either the Constitution or in statutory or case law. These hard cases leave room for the different policy approaches of the decision maker, as also indicated by the practice of dissenting opinions. This Article proposes that by examining a significant number of cases, it is possible to detect economic policies preferred by the Justices. In short, there are problems in the area of securities regulation in which ideology can play a role, considering the indeterminacy of the applicable laws.

#### Fetal tissue research solves diseases & upholding roe is key

Boonstra 16 – [Heather D. Boonstra - Vice President for Public Policy at the Guttmacher Institute, February 9th 2016, “Fetal Tissue Research: A Weapon and a Casualty in the War Against Abortion”, [https://www.guttmacher.org/gpr/2016/fetal-tissue-research-weapon-and-casualty-war-against-abortion#](https://www.guttmacher.org/gpr/2016/fetal-tissue-research-weapon-and-casualty-war-against-abortion), eph]

Fetal Tissue Research: A Weapon and a Casualty in the War Against Abortion

The debate over using human fetal tissue in medical research came roaring back on the national policy agenda last summer when a group of antiabortion activists began releasing deceptively edited videos about Planned Parenthood’s handling of fetal tissue donations for this purpose. Fetal tissue research dates back to the 1930s, and has led to major advances in human health, including the virtual elimination of such childhood scourges as polio, measles and rubella in the United States. 1,2 Today, fetal tissue is being used in the development of vaccines against Ebola and HIV, the study of human development, and efforts to treat and cure conditions and diseases that afflict millions of Americans.

To ensure it meets the highest ethical standards, fetal tissue research has been subject to stringent laws and regulations for decades. Abortion foes are now accusing health care providers and researchers of violating these laws and ethical standards, in hopes of undermining the right to abortion and ending fetal tissue research. These attacks not only threaten sexual and reproductive health and rights, but also pose a threat to the large numbers of people who could benefit from fetal tissue research, given the wide range of conditions that such research might ameliorate. Any impediment to ongoing scientific inquiry in the field caused by the current controversy would have substantial consequences.

IMPORTANCE OF FETAL TISSUE RESEARCH

Unlike embryonic stem cell research, which uses cells from days-old embryos created through in vitro fertilization, fetal tissue research uses tissue derived from induced abortion of pregnancies at or after the ninth week. 1,3 (Fetal tissue obtained from a miscarriage is often not suitable for research purposes because of concerns about potential chromosomal abnormalities that led to the miscarriage. 3) Researchers most often acquire fetal tissue from a tissue bank or, sometimes, directly from a hospital or abortion clinic. 4

Because it is not as developed as adult tissue and is able to adapt to new environments, fetal tissue is critical to the study of a wide variety of diseases and medical conditions, according to the American Society for Cell Biology. 1 Researchers use fetal tissue—and cell cultures derived from such tissue, which can be maintained in a laboratory environment for decades—to study fundamental biological processes and fetal development. According to the U.S. Department of Health and Human Services, fetal tissue continues to be an important resource for researchers studying degenerative eye disease, human development disorders such as Down syndrome, and early brain development (relevant to understanding the causes of autism and schizophrenia). 2

Fetal tissue has also been used to develop vaccines that have saved and improved the lives of billions of people worldwide. 1,2,5 The 1954 Nobel Prize in Medicine was awarded for work using cell cultures originating from fetal tissue that led to the development of the polio vaccine. Vaccines for diseases such as measles, mumps, rubella, chickenpox, whooping cough, tetanus, hepatitis A and rabies were also created using fetal cell cultures, and researchers are now using fetal cells to develop vaccines against other diseases, including Ebola, HIV and dengue fever.

In addition, researchers use fetal tissue in transplantation research. Fetal tissue has several unique properties that make it particularly suitable for transplantation. Not only do fetal cells grow at a much faster rate than adult cells, they also elicit less of an immune response, which lowers the risk of tissue rejection. 6 Clinical trials transplanting fetal cells are currently underway for people with spinal cord injury, stroke and ALS (Lou Gehrig’s disease), and may soon begin for those with Alzheimer’s disease, Parkinson’s disease and multiple sclerosis. 1

The National Institutes of Health (NIH) has been supporting research using fetal tissue since the 1950s, and in FY 2014, NIH provided roughly $76 million for this work. 3 According to an analysis of NIH research grants published in Nature, NIH funded 164 projects using fetal tissue in 2014, most often for research on infectious diseases, eye function and disease, and developmental biology (see chart). 7,8

Many of the nation’s leading academic medical centers are involved in fetal tissue research. 7,9,10 Researchers at the University of North Carolina at Chapel Hill are using cell cultures derived from fetal tissue for their work on hepatitis B and C—specifically, on how the viruses evade the human immune system and cause chronic liver diseases. At the University of Wisconsin-Madison, fetal cell cultures are used to study heart disease, including sudden cardiac arrest. At Stanford University, fetal tissue has been used to study Huntington’s disease, juvenile diabetes, autism and schizophrenia. And scientists at Colorado State University are conducting HIV research using fetal tissue.

FEDERAL LAW AND REGULATION

Soon after the U.S. Supreme Court’s Roe v. Wade decision in 1973 legalizing abortion nationwide, antiabortion leaders in Congress seized on fetal tissue research as a weapon in the war against abortion. Fetal tissue research was perhaps an inevitable target: It provided an aura of legitimacy to abortion itself and, at the same time, could be easily exploited to show how abortion “dehumanizes” the fetus. 11 Accordingly, antiabortion activists employed graphic visuals to shock members of Congress, try to personify the fetus, and demonize abortion providers and the procedure itself.

This first incarnation of the controversy coincided with public revelations about the infamous Tuskegee syphilis study—a study that enrolled black men living in Alabama to investigate the long-term effects of syphilis. In 1973, an ad hoc advisory panel convened by the Department of Health, Education and Welfare (now the Department of Health and Human Services) concluded that, in retrospect, the study was “scientifically unsound” and “ethically unjustified.”12 In response to the Tuskegee revelations, Congress felt pressure to create protections for human research subjects, and by 1974, Congress passed the National Research Act. The law created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research to develop guidelines on the ethical principles that apply to research on all human subjects, as well as on particular principles that apply to research involving fetuses and using fetal tissue. The commission’s report on research on the fetus, issued in 1975, led to the creation of regulations during the Ford administration that set out the rules of the road for federally funded fetal tissue research. The regulations—which are still in effect—specify that “no inducements, monetary or otherwise, will be offered to terminate a pregnancy.” They also provide that “individuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.” Fetal tissue research receded as a political issue until the late 1980s, when a group of NIH scientists sought approval from the Reagan administration for a proposed project involving the transplantation of fetal tissue. After deliberating on the request, the administration appointed an advisory panel—which included a chair and several members who were well-known opponents of abortion rights—to examine the ethical, legal and scientific questions raised by this type of research. In 1988, the panel issued its report and, despite its mixed composition, it concluded that “in light of the fact that abortion is legal and that the research in question is intended to achieve significant medical goals…the use of such tissue [for research] is acceptable public policy.”13 Key recommendations of the panel were later codified into law with the passage of the NIH Revitalization Act of 1993. The legislation won broad bipartisan support in Congress, including from several prominent senators with solid antiabortion records. Among them were Sens. Robert Dole (R-KS), a longtime advocate for people with disabilities, and Strom Thurmond (R-SC), who had a daughter with juvenile diabetes. 14,15 The NIH Revitalization Act of 1993 added several provisions to the existing regulations governing fetal tissue research. One such provision prohibits anyone from accepting payment for human fetal tissue other than “reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.” Thus, although individuals may be compensated for any costs they incur in the acquisition, receipt or transfer of fetal tissue, they are prohibited from making a profit from these activities, regardless of whether the project is federally funded or not. The law also imposes additional requirements when the donated tissue is used in federally funded research involving the transplantation of fetal tissue for therapeutic purposes. Among these are provisions for informed consent and prohibiting physicians and researchers from altering the timing or method used to terminate the pregnancy solely for the purposes of obtaining the tissue. Although all of these requirements technically apply only to federally funded transplantation research, as a practical matter, they set the standard for all research using fetal tissue. For example, the policies and procedures for fetal tissue donation issued by Planned Parenthood Federation of America and by the National Abortion Federation incorporate the substance of these federal requirements. 16,17 STATE POLICIES At the state level, fetal tissue donation is regulated by the Uniform Anatomical Gift Act (UAGA), versions of which are in effect in every state. 13,18 According to an analysis by the Guttmacher Institute, 38 states and the District of Columbia have UAGA laws that explicitly treat fetal tissue the same way as other human tissue, permitting it to be donated by the woman for research, therapy or education. The remaining 12 states have laws that are silent, neither allowing nor disallowing the donation of fetal tissue (see map). UAGA also prohibits profiting from the sale or purchase of anatomical gifts for transplantation or therapy. Fetal tissue donation and research are also regulated in some states by specific statutes. Often, these statutes incorporate many of the same standards set by federal law and regulations. For example, 12 states prohibit making a profit from the donation or transfer of fetal tissue for research purposes, and eight states require the woman’s consent for research.

Five states have laws that ban research using fetal tissue obtained from abortions throughout pregnancy. (Four other states also ban research using postabortion fetal tissue, but these laws have been struck down by the courts.) One of these states with a ban in effect, Indiana, also has a law that requires the disposal of postabortion fetal tissue in an established cemetery or by cremation, presumably precluding any possibility of donation for research.

POLITICAL FIRESTORM

The current furor over the use of fetal tissue in research ignited last summer, after the release of heavily edited videos purporting to capture undercover sting operations targeted at Planned Parenthood. The series of videos—released in close cooperation with members of Congress who want to ban abortion19—show an antiabortion activist posing as a representative of what turned out to be a sham biomedical research company, in frank discussions with various Planned Parenthood officials about tissue donation policies and reimbursement.

The fallout from the videos has been swift, severe and wide-ranging. The stated targets are Planned Parenthood, abortion providers and the legitimacy of abortion. The videos also threaten to undermine fetal tissue research itself, however, by sowing confusion, and by using graphic descriptions and images to turn the public against this research.

The primary goal of this current campaign has been to portray Planned Parenthood as callous and its providers as possibly criminal. Antiabortion policymakers have accused Planned Parenthood of violating several provisions of the NIH Revitalization Act of 1993, such as profiting from the sale of fetal tissue and altering the abortion procedure solely for the purpose of obtaining tissue. Opponents of abortion have also accused providers of using a procedure that violates the so-called “partial birth” abortion ban. As an instigator of the videos, David Daleiden explained in an interview with Politico, “For me, the goal was to document and illustrate for the public really, really clearly how Planned Parenthood harvests and sells the body parts of the babies that they abort.”20

Antiabortion elected officials ran with this narrative and immediately called for investigations of the organization. In October 2015, congressional leaders formed a special committee to carry out an official inquiry into Planned Parenthood—bringing the total number of investigations into Planned Parenthood in the House and Senate to five since the first video was released. In January 2016, the House’s first substantive piece of business was yet another attempt to cut off funding for Planned Parenthood, one of several such efforts recently to scale back abortion rights and women’s health care. Also, officials in 11 states have concluded investigations into claims that Planned Parenthood profited from fetal tissue donation, and each one of these investigations has cleared the organization of wrongdoing. 21

Nonetheless, the grandstanding has continued unabated. Antiabortion leaders, lawmakers and all the Republican presidential candidates have used the opportunity to demonize abortion and paint a ghoulish picture of organ harvesting, all in an effort to gin up public disgust and attract public support for themselves and against abortion and Planned Parenthood. Indeed, the videos and the hype around them appear to have provoked at least four arson attacks on Planned Parenthood clinics since July 2015 and set the stage for yet another extreme act of violence in Colorado Springs over Thanksgiving weekend. 10 It was there that Robert Lewis Dear Jr. allegedly killed three people and injured nine others at a Planned Parenthood health center. During his arrest, Dear shouted “no more baby parts,” suggesting that the constant barrage of inflammatory rhetoric around the fetal tissue issue over the prior months played a role in triggering his actions. 22

HIGH STAKES

Beyond the attacks on Planned Parenthood, however, the use of fetal tissue in research also is under direct attack. Since July, bills have been introduced in Congress and in several states that would make it more difficult to donate tissue or use fetal tissue in research. Other bills would ban fetal tissue research outright. This trend is almost certain to continue through 2016 as the issue is sure to be exploited in state and federal elections.

Meanwhile, the videos appear to have had a chilling effect on science. According to Theresa Naluai-Cecchini, a scientist at the Birth Defects Research Laboratory at the University of Washington (a federally funded entity that has served as a source of donated fetal tissue to researchers nationwide for more than 50 years), tissue donations have dropped dramatically since July 2015. 10 Naluai-Cecchini told Mother Jones that if this trend continues, research that may save lives would take considerably longer.

Some scientists involved in fetal tissue research have been afraid to speak out. 7 They have seen how abortion providers have been targeted, and now they too fear for their personal safety. Others have spoken out strongly to defend the importance of their work, pointing out that tissue that would otherwise be discarded has played a vital role in lifesaving medical advances and holds great promise for new breakthroughs. In an October 2015 open letter to Congress, 41 scientists called for the end to political interference with science and research: “Fetal tissue research has already saved and improved the lives of countless people. [We] cannot allow political agendas to undermine our nation’s legacy of leadership in medical and scientific innovation.”23 In another action, the Association of American Medical Colleges released a statement on January 6, 2016 signed by 59 academic medical centers, scientific societies and allied groups—from the University of Alabama School of Medicine to Duke University School of Medicine, from the University of Wisconsin-Madison to Tulane University School of Medicine. 24 The statement expresses “grave concerns” about the numerous legislative proposals now in play in Congress and in many states, and it calls on lawmakers to reject any proposals that restrict access to fetal tissue for research.

Ironically, in the wake of all the heightened focus on fetal tissue donation, Planned Parenthood officials report they have seen an uptick in the number of women obtaining abortion who request that the fetal tissue be donated to research. The role that Planned Parenthood plays in providing postabortion tissue to researchers, however, is small: Just 1% of the approximately 700 health centers that are part of the Planned Parenthood network are equipped for fetal tissue donation. And in another response to the disinformation campaign and to try to quell some of the controversy, Planned Parenthood announced in October 2015 that its clinics will no longer seek reimbursement for their costs related to fetal tissue donation, even though the practice is perfectly legal and commonplace.

Bioethicist R. Alta Charo has argued that enabling the use of fetal tissue to advance scientific research for the benefit of humankind must be seen as something of a moral imperative. “Virtually every person in this country has benefited from research using fetal tissue,” she wrote in the New England Journal of Medicine. “Every child who’s been spared the risks and misery of chickenpox, rubella, or polio can thank the Nobel Prize recipients and other scientists who used such tissue in research yielding the vaccines that protect us….Any discussion of the ethics of fetal tissue research must begin with its unimpeachable claim to have saved the lives and health of millions of people.”25

As the full impact of the current firestorm surrounding fetal tissue research is still unfolding, it remains to be seen how much this research will continue be used as a weapon against abortion or become a serious target itself—or both. To be sure, the current controversy threatens not just access to safe and legal abortion and the providers who care for the women who seek this essential health service. It also threatens the millions of people globally who could benefit from fetal tissue research—and that includes nearly all of us, whatever our views on abortion rights may be.

#### New pandemics are coming and cause extinction – preventative measures solve

Diamandis 21 (Eleftherios P. Diamandis, Division Head of Clinical Biochemistry at Mount Sinai Hospital and Biochemist-in-Chief at the University Health Network and is Professor & Head, Clinical Biochemistry, Department of Laboratory Medicine and Pathobiology, University of Toronto, Ontario, Canada, April 14th 2021, “The Mother of All Battles: Viruses vs. Humans. Can Humans Avoid Extinction in 50-100 Years?” modified to fix author typo [“could result n” 🡪 “could result in” <https://www.preprints.org/manuscript/202104.0397/v1>) MULCH

The recent SARS-CoV-2 pandemic, which is causing COVID 19 disease, has taught us unexpected lessons about the dangers of human extinction through highly contagious and lethal diseases. As the COVID 19 pandemic is now being controlled by various isolation measures, therapeutics and vaccines, it became clear that our current lifestyle and societal functions may not be sustainable in the long term. We now have to start thinking and planning on how to face the next dangerous pandemic, not just overcoming the one that is upon us now. Is there any evidence that even worse pandemics could strike us in the near future and threaten the existence of the human race? The answer **is** unequivocally yes. It is not necessary to get infected by viruses of bats, pangolins and other exotic animals that live in remote forests in order to be in danger. Creditable scientific evidence indicates that the human gut microbiota harbor billions of viruses which are capable of affecting the function of vital human organs such as the immune system, lung, brain, liver, kidney, heart etc. It is possible that the development of pathogenic variants in the gut can lead to contagious viruses which can cause pandemics, leading to destruction of vital organs, causing death or various debilitating diseases such as blindness, respiratory, liver, heart and kidney failures. These diseases could result [in] the complete shutdown of our civilization and probably the extinction of human race. In this essay, I will first provide a few independent pieces of scientific facts and then combine this information to come up with some (but certainly not all) hypothetical scenarios that could cause human race misery, even extinction. I hope that these scary scenarios will trigger preventative measures that could reverse or delay the projected adverse outcomes.

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#### Prohibitions must forbid --- Governing standards are distinct

Chanell 90 --- William Chanell, Associate Justice, California Court of Appeals, “CITY OF REDWOOD CITY v. DALTON CONSTRUCTION COMPANY”, Dec 1990, https://caselaw.findlaw.com/ca-court-of-appeal/1769184.html

We agree with the trial court's conclusion. By its plain language, section 35704 exempts certain contractors from the application of an ordinance [221 Cal. App. 3d 1573] adopted pursuant to section 35701. Section 35701 permits cities to prohibit the use of city streets by heavy trucks. (See § 35701, subd. (a).) However, the portion of the city's hauling ordinance at issue in this case does not prohibit street use; it regulates users by requiring them to obtain a permit and pay a fee in order to lawfully drive their heavy trucks over city streets. (See Redwood City Code, §§ 20.62-20.74.) To determine the legislative intent behind a statute, courts look first to the words of the statute themselves. In so doing, we must give effect to the statute according to the usual, ordinary import of its language. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230 [110 Cal. Rptr. 144, 514 P.2d 1224].)

To construe section 35704, which specifically creates an exemption from prohibition of use, to exempt the regulation of that use would violate these cardinal rules of statutory construction. [2] The distinction between a regulation and a prohibition is well understood in municipal law. (See San Diego T. Assn. v. East San Diego (1921) 186 Cal. 252, 254 [200 P. 393, 17 A.L.R. 513].) The term "prohibit" means "[t]o forbid by law; to prevent;-not synonymous with 'regulate.' " (Black's Law Dict. (5th ed. 1979) p. 1091, col. 1.) The term "regulate" means "to adjust by rule, method, or established mode; to direct by rule or restriction; to subject something to governing principles of law. It does not include a power to suppress or prohibit [citation]." (In re McCoy (1909) 10 Cal. App. 116, 137 [101 P. 419].) [1b] Therefore, we are satisfied that section 35704 was not intended to apply to ordinances regulating street use, but only to those prohibiting such use.

**Business practices are ongoing conduct of many market participants**

**Macintosh 97** --- Kerry Lynn Macintosh, Associate Professor of Law, Santa Clara University School of Law, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, [Vol. 38:1465 1997], https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1691&context=wmlr

**\*\*Footnote 5\*\***

5. In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2).

**Only per se rules bans a PRACTICE --- rule of reason regulate anticompetitive effects for individual acts**

**Stucke 09** --- Maurice E. Stucke, Associate Professor, University of Tennessee College of Law, “Does the Rule of Reason Violate the Rule of Law?”, University of California, Davis [Vol. 42:1375 2009], https://lawreview.law.ucdavis.edu/issues/42/5/articles/42-5\_Stucke.pdf

But who has created this predicament? The Supreme Court. Over the past ninety years, the Court has supplied the Sherman Antitrust Act’s legal standards. In determining the legality of restraints of trade, the Supreme Court generally employs either a per se or rule-of-reason standard.10 Under the Court’s per se illegal rule, certain restraints of trade are deemed illegal without consideration of any defenses. These restraints are so likely to harm competition and to lack significant procompetitive benefits that, in the Court’s estimation, “they do not warrant the time and expense required for particularized inquiry into their effects.”11 Under the per se rule, once a plaintiff proves an agreement among competitors to engage in the prohibited conduct, the plaintiff wins.12 But the Court evaluates all other restraints under the rule of reason. This standard involves a **flexible** factual **inquiry** into a restraint’s overall competitive effect and “the facts **peculiar to the business**, the history of the restraint, and the reasons why it was imposed.”13 The rule of reason also “**varies in focus and detail** depending on the nature of the agreement and market circumstances.”14 “Under this rule the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”15 Despite its label, the rule of reason is not a **directive defined ex ante (such as a speeding limit).**16 Instead, the term embraces antitrust’s most **vague and open-ended principles**, making prospective compliance with its requirements exceedingly difficult.

**Vote neg for GROUND and LIMITS --- Other standards dodge topic uniqueness and links and they can pick something that’s broader but more permissive --- creating a bidirectional topic. Standard prolif makes the topic unmanageable**

**1nc – section 5**

***Next off – Section 5:***

**Text:**

The FTC should issue clear enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA includes private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards. The FTC should release a policy statement and data sets that reflects this and enforce accordingly.

**The cplan solves. It also competes – the FTC interprets current authority, instead of creating new prohibitions.**

**Kahn ‘21**

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

**Section 5** of the **F**ederal **T**rade **C**ommission **A**ct **prohibits** “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s **congressionally mandated duty** to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the **F**ederal **T**rade **C**ommission **A**ct to reach beyond the Sherman Act and to provide an alternative institutional framework for **enforcing** the **antitrust** laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 **These concerns spurred the passage of the FTC A**ct, which created an administrative body that could police unlawful business practices with **greater expertise** and **democratic accountability** than courts provided.15

**At the heart of the statute was Section 5,** which declares “unfair methods of competition” **unlawful**.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides **no private right of action**, shielding violators from **private lawsuits** and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to **leave it to the Commission** to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the **various unlawful practices**, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the **agency’s Section 5 authority**, holding that **the statute**, **by its plain text**, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

### 1nc – ftc independence

***Next off is FTC independence:***

**FTC independence in the US key to *global norms* that support agency independence. Vital for *free trade* and *GLO*.**

* United States’ FTC practices are modeled *by several nations* – including South Korea – and *will continue to be modeled* by nations that are still amid transitions towards industrialization;
* Global attentiveness to the United States’ FTC practices *remains ongoing* and - “*to this day*” - are a *central obstacle* to aspired free trade norms;
* The root of the loss of the global public’s confidence in free trade stems from the success of zero-sum strategies. *The root of that* is an interpretation of the FTCA that permits politicized intervention;
* Ambiguity in the United States’ FTCA permit the Act to be exercised *EITHER with a great deal of agency discretion* – *OR* alternatively, *with the perceived influence of external political branches*;
* Current US FTC practices lean away agency independence – and that’s *a central obstacle* to international agencies countering the growth of protectionist mercantilist norms
* More broadly, this hampers *general support for internationalism/GLO*

**Nam ‘18**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – No text omitted – but the Table of Contents – which comes after the Abstract - was not included – modified for language that may offend - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

ABSTRACT:

The Federal Trade Commission Act of 1914 (“**FTC A**ct”), **a model** for **many other countries** that set up their **own** competition agencies, combines the **control** afforded by presidential appointment and removal powers over FTC commissioners with an **exceedingly discretionary** mandate. This Article contends that the FTC Act’s outmoded openness to **strong presidential direction**, **where adapted abroad**, has helped detract from **antitrust regulator independence.** Even advanced players in the liberal international economic order **such as South Korea** have made use of the United States’ original blueprint for unitary **executive-stamped** **antitrust** enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

Strong executive direction **in antitrust enforcement** is particularly suited to capitalist economies helmed by administrations with mercantilist policies, **given their belief that the state and big business must coop**erate in the face of zero-sum international competition. South Korean President Lee MyungBak’s term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces **preventing global convergence** in antitrust enforcement, and of their **roots.**

We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. —President Woodrow Wilson, September 1916

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let’s take just a half step forward to move beyond the pace of change in the global economy. —South Korean President Lee Myung-bak, March 2008

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions. —Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further nonantitrust goals. —The U.S. Department of Justice and the Federal Trade Commission, April 1995

INTRODUCTION

The International Competition Network’s founding in October 2001, with the aim of “formulat[ing] proposals for procedural and substantive convergence” among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that “consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else,” many countries (turned) ~~looked~~ to the U.S. **as a role model** while developing their **competition** regimes.6 It is ironic, **then,** that **to this day** a **central obstacle** to the aspired international “culture of competition” **can be found in none other than the influence of the U.S.’s own FTC A**ct.7

American **antitrust** priorities around the time of the legislation’s passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that **would reemerge abroad** in **many** later-developing countries.

The deepening global retreat from **internationalism** ***and*** free market principles in the present day, with the specter of **trade wars looming**, is exacerbated by nationalist competition regimes that **are derivative of a U.S. model** predating the modern world economy. Domestic critics of open markets often overlook the U.S.’s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8

**Globally, independence of antitrust agencies will prove key – checks spiraling economic nationalisms that’ll crush liberal peace.**

**Nam ‘18**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,152 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades.153 However, a **creeping** loss of public confidence in open markets—**coupled with** the obstacles to coherent global antitrust enforcement that bear the FTC Act’s influence, **as illustrated in this Article**—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of **protectionist** silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even **perennial norms** and conventions of **the U.S. competition regime** which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that **carried over abroad** to empower strong executives are likewise playing a paper tiger role domestically of late.155

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality and the concurrent **liberal peace**156 **often taken for granted**. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country’s companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for “our country, right or wrong” protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act’s **formative influence** is not above scrutiny or reproach. **Still-elusive** realization of the liberal economic international order’s intended form will **require** an expanded constellation of **independent competition regulators** empowered to enforce antitrust laws consistently.

**Global free trade reversals will cause *multiple existential impacts*.**

* Arctic conflict
* Space conflict;
* Global nuclear prolif;
* Structural wars;
* Climate;
* Geo-engineering;

**Langan-Riekhof ‘21**

et al; Maria Langan-Riekhof is the Lead Author and is the new Director of the Strategic Futures Group at the National Intelligence Council, leading the Intelligence Community’s assessment of global dynamics and charged with producing the quadrennial Global Trends product for the incoming or returning administration. She has spent more than 27 years in the intelligence community as both a senior analyst and manager, serving at the CIA and on the NIC. She brings a background in Middle East studies and has spent more than half her career analyzing regional dynamics. Her leadership roles include: Chief of the CIA’s Red Cell, founder and director of the CIA’s Strategic Insight Department, and research director for the Middle East. She was one of the DNI’s Exceptional Analysts in 2008-09 and the Agency’s fellow at the Brookings Institution in 2016-17. She is a member of the Senior Analytic Service and the Senior Intelligence Service and hold degrees from the University of Chicago and the University of Denver - National Intelligence Council - Global Trends 2040 – Form the section: “Scenario Four – Separate Silos” - MARCH 2021 - #E&F - https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

With the trade **and financial** connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to **develop nuclear weapons**, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like **the Arctic** and **space**. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, **conflicts became endemic**, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address **climate changes**, little was done to slow greenhouse gas emissions, and some states experimented with **geoengineering with disastrous consequences**.

*Note to students*: this ev appears to advance a cemented future – but it is an ebook report by the National Intelligence Council outlining possible futures \*if\* certain premises were to take place. Perhaps this is best explained by an except from the opening of this report: “Welcome to the 7th edition of the National Intelligence Council’s Global Trends report. Published every four years since 1997, Global Trends assesses the key trends and uncertainties that will shape the strategic environment for the United States during the next two decades. Global Trends is designed to provide an analytic framework for policymakers early in each administration as they craft national security strategy and navigate an uncertain future. The goal is not to offer a specific prediction of the world in 2040; instead, our intent is to help policymakers and citizens see (aware of) what may lie beyond the horizon and prepare for an array of possible futures”.

### 1nc – estados

#### Text: The 50 states and relevant territories should

#### engage in multistate antitrust action and enforcement over private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards

* **initiate quo warranto proceedings as a tool of last resort against any corporation found to be engaging in anticompetitive petitioning**

#### States solve best---multistate organizations, expanded jurisdiction, and can “fill the gap”

Rauch 20 Daniel E. Rauch J.D. Yale Law School. (2020 ). ARTICLE: SHERMAN'S MISSING "SUPPLEMENT": PROSECUTORIAL CAPACITY, AGENCY INCENTIVES, AND THE FALSE DAWN OF ANTITRUST FEDERALISM. *Cleveland State Law Review*, 68, 172. <https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn:contentItem:5YDM-6NS1-FCK4-G4MV-00000-00&context=1516831>. {DK}

In 2020, as in 1890, states attorneys general have much to offer antitrust enforcement. Illegal anticompetitive conduct is often concentrated locally, rather than nationally, making state-level enforcement especially appropriate. 202Link to the text of the noteMany states have antitrust statutes (or bodies of state law) that allow for prosecutions that the federal laws do not. 203Link to the text of the noteState governments often will have better knowledge of local economic conditions than distant agencies in Washington, making them natural choices for [\*210] antitrust enforcement. 204Link to the text of the noteAnd if the federal government fails to enforce the antitrust laws, state attorneys general often have the ability and political incentives "step up" to "fill the void." 205Link to the text of the note

Yet, if the early failure of antitrust federalism holds a single lesson, it is that even such compelling political, historical, and economic imperatives are, without more, insufficient to spur state antitrust action. Unless state prosecutors have the capacity and incentives to take on the antitrust challenge, they will not act.

What does this mean for today's state antitrust enforcers? On one hand, the years since 1890 have seen several innovations that substantially mitigate the problem of prosecutorial capacity. Multistate organizations like the National Association of Attorneys General (NAAG) have allowed for coordination and information sharing between attorneys general on antitrust matters, thus reducing the costs and burden of such cases. 206Link to the text of the noteLikewise, the rise of multistate antitrust suits brought jointly by dozens of states allows for cost-and-capacity-sharing. 207Link to the text of the noteChanges in federal law, like the Hart-Scott-Rodino Act of 1976, created an economic incentive for states to pursue antitrust cases by codifying the ability of state attorneys general to sue as parens patriae and by offering states treble damages when they prevail (a strong economic incentive if ever there was one). 208Link to the text of the note

Going further, the federal government has sometimes expressly subsidized state antitrust efforts, as with the supplemental funding offered in the Crime Control Act of 1976. 209Link to the text of the noteAnd in some states, the capacity of the attorney general's office has increased to levels inconceivable at the turn of the century: New York's Attorney General, for instance, supervises over 1,800 employees, 210Link to the text of the notewhile California employs a staggering [\*211] 4,500. 211Link to the text of the notePerhaps because of these shifts, it is unsurprising that in recent times at least some state attorneys general have heeded the call to enforce state and federal antitrust laws, from local investigations of healthcare consolidation 212Link to the text of the noteto multistate actions against Silicon Valley behemoths like Apple and Amazon. 213Link to the text of the note

**1nc – vagueness**

**Vagueness –**

**The plan’s generic wording is manipulated in implementation – wrecks solvency**

**Baer 20** [Bill Baer former visiting fellow in governance studies at The Brookings Institution and assistant attorney general of the Antitrust Division and as the acting associate attorney general of the U.S. Department of Justice, 11-19-2020 <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true>]

Meaningful antitrust reform should be a priority of the next administration and the 117th U.S. Congress. The challenge of drafting legislation is substantial. On the one hand, the legislation must be written for a judiciary that is both increasingly hostile to antitrust claims in general and increasingly textualist in its statutory interpretation. On the other hand, in the context of the antitrust laws, courts have often “abandoned statutory textualism” to interpret the laws “in favor of big business,”15 explains Daniel Crane, the Fredrick Paul Furth Sr. professor of law at the University of Michigan Law School. If given discretion to interpret new legislation, the current judiciary is likely to fall back on the same **skepticism** of antitrust enforcement that it has advanced over the past 40 years.

Despite those concerns, legislation remains the best option to revitalizing antitrust enforcement. In drafting legislation, Congress can learn from the past. One case in point: The legislative history of the Celler-Kefauver bill, not its text, reveals the bill’s intent, which courts increasingly ignore.16 Congress can reduce that risk by **being explicit** in the text when vacating or rejecting existing precedent and when identifying relevant factors, such as the importance of protecting both actual and potential competition. Congress should identify in statute the elements sufficient to establish an antitrust violation **as precisely as possible**.

**Voting issue---**

**Aff conditionality destroys ground. 2AC clarifications dodge DA links and counterplan competition.**

### 1nc – adv cp

#### The United States federal government should adopt a zero trust default defense against cyberattacks

#### Solves the case

Reiber and Glenn 21 --- Jonathan Reiber is Senior Director for Cybersecurity Strategy and Policy at AttackIQ, Matt Glenn is Senior Vice President for Product at Illumio. In this role, Matt is responsible for Illumio’s product lines and product strategy, The U.S. Government Needs to Overhaul Cybersecurity. Here’s How.”, Friday, April 9, 2021, https://www.lawfareblog.com/us-government-needs-overhaul-cybersecurity-heres-how

After the 2015 hack of the U.S. Office of Personnel Management, the SolarWinds breach, and—just weeks after SolarWinds—the latest Microsoft breach, it is by now clear that the U.S. federal government is woefully unprepared in matters of cybersecurity. Following the SolarWinds intrusion, White House leaders have called for a comprehensive cybersecurity overhaul to better protect U.S. critical infrastructure and data, and the Biden administration plans to release a new executive order to this end.

What should this reinvestment in cybersecurity look like? Although the United States is the home of many top cybersecurity companies, the U.S. government is behind where it should be both in technology modernization and in mindset. Best-in-class cyberdefense technologies have been available on the market for years, yet the U.S. government has failed to adopt them, opting instead to treat cybersecurity like a counterintelligence problem and focusing most of its resources on detection. Yet the government’s massive perimeter detection technology, Einstein, failed to detect the SolarWinds intrusion—which lays bare the inadequacy of this approach.

The sophisticated nature of the SolarWinds supply chain attack shows that adversaries with the time, personnel, imagination, and resources to pursue novel methods of intrusion will succeed. It is not a question of if but when an intruder will break past the gates.

For this reason, it is time for a different model for cybersecurity. U.S. military bases have layers of walls, guards, badge readers, and authentication measures to control access. The United States needs the same mindset for its cybersecurity.

Agencies need to adopt an “assume breach” mindset and invest in the security controls required to stop intruders’ internal movements. To “assume breach” in cyberspace means to invest in a comprehensive defense-in-depth strategy to stop intruders from moving freely throughout a network once they’ve broken past the perimeter. What’s more, the government needs to continuously test its security controls to ensure they work.

This cannot all happen at once. For the first phase in the U.S. government’s cybersecurity modernization, the goal should be both clear and aggressive: achieve a continuously validated zero trust architecture for the government’s most critical high-value assets. A continuously validated architecture “tests” the zero trust claims that an agency is asserting. For instance, the U.S. armed services conduct penetration testing of their bases to ensure that security directives are followed. In a zero trust network, zero trust security controls need to be similarly tested to ensure that a system that should not be able to access another system cannot do so.

To understand why this approach is required, it helps to start with the state of federal cybersecurity capabilities today. Despite decades of investment in cybersecurity personnel and capabilities, today the congressionally run Government Accountability Office (GAO) says U.S. federal cybersecurity capabilities have regressed from prior years—and federal cybersecurity is currently in the GAO’s category of government programs at high risk of failure. Under the “assume breach” mindset, the GAO’s reasoning is clear. There are no internal walls to prevent breaches from spreading.

Today, the Department of Homeland Security Cybersecurity and Infrastructure Security Agency (CISA) designs, develops, deploys, and sustains a suite of programs called the National Cybersecurity Protection System (NCPS) to help secure federal civilian executive branch information and networks. Capabilities within the NCPS include intrusion detection, analytics, information sharing, and intrusion prevention capabilities. The system’s most significant investment is Einstein, which provides a federal early warning system and improved situational awareness of intrusions, and seeks to identify and prevent malicious cyberspace capabilities. The Department of Homeland Security also maintains continuous diagnostic capabilities to analyze intrusions, and a federal high-value asset program design to identify the government’s most important aspects.

Taken together, all of these capabilities failed to detect the SolarWinds intrusion. None of these capabilities delivers on the “assume breach” mindset or the high walls required to stop intruders from moving laterally.

Adopting a zero trust strategy will change how the government views its networks for the better. In the case of SolarWinds, the intruder read and stole credentials, and then used those stolen credentials to leverage and travel through unrestricted communications paths between servers—systems that had never tried to communicate with other servers before, and never should have been able to do so. There were no walls between these servers, and that gave the advantage to the intruder. The attacker stole the keys to the kingdom and moved with no restrictions throughout federal agencies.

How would zero trust have prevented this from happening? Zero trust hinges on a policy of “default deny,” meaning that connections between assets are by default not allowed. There is no reason for, say, a low-value server in the Department of the Treasury used for managing human resources issues for department staff abroad to have a direct connection to a high-value server in the United States that hosts the secretary of the treasury’s emails. A zero trust strategy defines acceptable behaviors between assets, including applications and the servers on which they reside, and anything that is not acceptable is denied. This default deny policy essentially forms a wall that prevents servers from establishing unauthorized connections. It requires a human to intervene to alter the policy. In zero trust, servers cannot even present credentials to one another unless they were explicitly allowed to connect with one another.

This is what it means to “assume breach” and prevent breaches from spreading. Zero trust defends against credential theft, another tactic in the MITRE ATT&CK framework that enables an intruder’s lateral movement within a data center. (MITRE ATT&CK is a publicly available knowledge base of adversary tactics, techniques and procedures.) In the case of zero trust, even if the secretary of the treasury was targeted and fell victim to malware, the default deny posture would stop any abnormal communications from her computer, limiting the spread of the breach.

The good news is that zero trust is gaining traction in Washington. In a memo to the federal government just a few weeks ago, the National Security Agency (NSA) recommended that federal civilian agencies explore the zero trust model and focus on “assume breach.” The NSA strongly recommends that a zero trust security model be considered for critical U.S. government networks, including national security systems, which are used for intelligence operations; Department of Defense networks; and defense industrial base systems, which are used for research and development, manufacturing, and design of military weapons. Following the NSA’s memo, CISA endorsed the memo to agencies for their review and included zero trust in draft discussion documents.

The Biden administration has an opportunity to drive the adoption of zero trust capabilities for high-value assets. The executive order reportedly includes a clause for software vendors to notify their federal government customers when the company experiences a cybersecurity breach. While prompt breach disclosure is vital for supply chain attacks like SolarWinds, the fact is that the SolarWinds intrusion could have been slowed if the government had adopted zero trust in advance. The Biden administration should require that departments and agencies explain to the White House that they have identified their high-value assets, and report how they plan to achieve a validated zero trust architecture within 60 days of the executive order.

Based on our combined experience holding executive roles in cybersecurity companies and a senior cybersecurity role in the U.S. Defense Department, we believe the U.S. government can transform its cybersecurity by adopting the following layered components into its security stack. The same strategy can apply to any organization that seeks to defend its own high-value assets.

A new, validated zero trust architecture should include the following aspects in the security stack:

An endpoint monitoring system (commonly known as endpoint detection and response, or next-generation anti-virus) that is always on and can provide a centralized analytic view to block malware. An endpoint is an end device: a desktop, laptop, smartphone, tablet, server or “Internet of Things” device. In the case of the SolarWinds breach, endpoint monitoring tools reported repeated false positives of SolarWinds software before the breach. SolarWinds recommended turning off these monitoring systems, which is part of what allowed the breach to occur.

A security segmentation capability to stop attacks from moving between endpoints and within the broader infrastructure. Such platforms build walls where there were no walls. This includes mapping out all communications between applications, containers, clouds, data centers, and networks and allowing only trusted communications to happen around high-value assets.

A next-generation firewall to monitor and filter network traffic between large environments (zones) and agencies.

An automated testing platform aligned to the MITRE ATT&CK framework and robust cyber threat intelligence to validate the organization’s overall security program effectiveness. This platform should be testing security programs and security controls continuously, at scale, and in a production environment, and should emulate real-world adversary behaviors.

These investments need to be considered holistically. If one endpoint is compromised, it should not be able to affect other laptops. If one application is compromised, it should not impact other applications. If a large zone is compromised, a security control should prevent the breach from compromising other aspects of the organization and spreading outside the organization. This strategy looks at the federal information technology infrastructure and creates compartments around endpoints, applications, and networks in the same way compartments are built within military bases and vessels.

Yet none of these investments should be trusted to work as intended without being continuously exercised. To upgrade President Reagan’s old aphorism for the cyber age, don’t trust any of your connections, and verify all of your defenses.

Security controls are composed of people, processes and technologies. Failing to test such controls is equivalent to the military not putting its forces through regular, consistent training exercises. Absent continuous testing, leaders lack data-driven visibility into their security program’s overall performance. Untested organizations without metrics exist in a state of poor readiness, likely to fail when an adversary attacks because they have neglected to focus on and prepare for the most critical threats.

Today, the U.S. federal government has limited visibility into its cybersecurity. This is a dangerous state of affairs: In the absence of visibility, the security team lacks control, and if the security team lacks control, the adversary wins. The goal therefore should be to maintain a validated zero trust architecture where security teams have comprehensive, data-driven control over their security and can test their organizations on a moment’s notice to ensure effectiveness. Security teams should use scenarios aligned to the MITRE ATT&CK framework and sector-specific threat intelligence to prepare for known threat behaviors.

With performance data generated from automated testing, security leaders can adjust failing programs, identify gaps and areas of investment, and then measure their program effectiveness in a continuous fashion. The net result of this approach is a validated zero trust environment in which all of the security controls work as intended. This is what visibility really means. To prepare for future breaches, security leaders can use performance data to report with confidence to their leadership teams, Congress and the public about the true effectiveness of their cybersecurity programs.

Today the U.S. federal government faces a range of challenges to its cybersecurity and information technology, to include sprawling networks, legacy systems, and, most importantly, diligent and capable nation-state adversaries. There is a reason why large organizations design strategies to address complex challenges: You cannot solve every problem all at one time. The only path is to prioritize what matters most.

The Biden administration can make meaningful progress in its first year by delivering a validated zero trust architecture for the missions and assets that matter most—not only investing in the defense capabilities required, but also ensuring that the security controls in place will work as intended when the adversary inevitably breaks through. It would be a signal achievement to go from the SolarWinds breach to a validated zero trust architecture. The government should set this as an aggressive but achievable strategic goal.

## frand

### 1NC --- FRAND Strong

#### No Injunctions and FRAND licensing inevitable because of REPUTATION and RETALITORY concerns --- ZERO evidence of hold-ups and uniqueness is a neg crush

SIDAK 16 --- J. GREGORY SIDAK, Chairman, Criterion Economics, L.L.C., Washington, D.C, expert economic witness in disputes over FRAND royalties for standard-essential patents, “The Antitrust Division's Devaluation of Standard-Essential Patents”, 2015-16, https://www.law.georgetown.edu/georgetown-law-journal/glj-online/104-online/the-antitrust-divisions-devaluation-of-standard-essential-patents/

Ms. Hesse assumes, incorrectly, that the theoretical and empirical underpinnings of the patent-holdup and royalty-stacking conjectures are robust, and her letter's analysis relies on an outdated account of those conjectures. Referencing an article from 2007 by lawyer Mark Lemley of Stanford and economist Carl Shapiro of Berkeley that introduced the patent-holdup and royalty-stacking conjectures, Ms. Hesse states that "[t]he economic bargaining model underlying claims of hold up has been studied extensively and applied to the standard-setting context." 45 Ms. Hesse neglects to say that the Lemley-Shapiro article was funded by companies that were the major proponents of the IEEE's 2015 bylaw amendments Apple, Cisco, Intel, and Microsoft46 -and she ignores the many articles, which first started to appear in 2007, that have refuted the Lemley-Shapiro model on both theoretical and empirical grounds. 47 For the same reason, the 2007 report of the Department of Justice and the Federal Trade Commission that Ms. Hesse cites is also unreliable evidence in 2015 of the plausibility of the patent-holdup conjecture. 48 By early 2015, more than two dozen economists and lawyers had disproved or disputed the numerous assumptions and predictions of the patent-holdup and royalty-stacking conjectures. 4 9 Ms. Hesse's letter ignores all of that scholarship. 50 Her letter even ignores concessions made by the leading proponents of the patent-holdup and royalty- stacking conjectures concerning the unavailability of injunctions to SEP holders and the infrequency with which licensor opportunism actually occurs. In 2014, Carl Shapiro and Fiona Scott-Morton, who previously served as chief economists at the Antitrust Division, said that "the risk of injunctions appears to be quite low" and that "[m]any holders of SEPs do license at FRAND rates, perhaps due to concerns about reputation or retaliatory conduct by others." 51 Some scholars are skeptical of whether patent holdup and royalty stacking have ever occurred in the implementation of a standard. In 2013, Commissioner Joshua Wright of the Federal Trade Commission (FTC) emphasized that, "[d]espite the amount of attention patent hold-up has drawn from policymakers and academics, there have been relatively few instances of litigated patent hold-up among the thousands of standards adopted. 52 In 2014, Alexander Galetovic, Stephen Haber, and Ross Levin found that, "over long periods[,] SEP industries tend to show better performance than most other industries," and that innovation appears to grow fastest in SEP industries. 53 In 2015, Galetovic, Haber, and Levin also empirically refuted the classic hypothesis of the patent-holdup conjecture-that "hold-up will harm downstream consumers in the form of slower price declines and slower improvements in product quality and variety"-by showing that the quality-adjusted prices for products in SEP industries decline faster than quality-adjusted prices for products in non-SEP industries. 54 All of these empirical and theoretical challenges to the patent-holdup and royalty-stacking conjectures are conspicuously absent from Ms. Hesse's letter. Instead, she warns parties not to say that patent holdup and royalty stacking are nonexistent problems. 55

### 1NC --- Qualcom Didn’t Violate FRAND

#### Qualcomm is neg uniqueness --- competitors were asking them to give up TOO MUCH --- would have stifled innovation

Osenga 19 --- Kristen Osenga, Professor, teaches at the University of Richmond School of Law and writes in the areas of intellectual property, patent law, law and language, and legislation and regulation, “Analyzing Judge Koh’s Errors in FTC v. Qualcomm: Highlights From Three Amicus Briefs”, Sept 16th 2019, https://www.ipwatchdog.com/2019/09/16/analyzing-judge-kohs-errors-ftc-v-qualcomm-highlights-three-amicus-briefs/id=113426/

On August 30, a number of amicus briefs were filed in the FTC v. Qualcomm appeal in the U.S. Court of Appeals for the Ninth Circuit. The appeal stems from a May 2019 order finding Qualcomm liable for anticompetitive behavior and issuing “sweeping” injunctive relief. Following Judge Koh’s ruling, her opinion has been called “disastrous,” an “utter failure,” and “based on scant evidence,” and further been accused of “mangling” antitrust law. The Ninth Circuit, in granting a partial stay of the injunction, noted there were “serious questions on the merits” of Judge Koh’s decision.

Three of the amicus briefs in particular point out the errors in Judge Koh’s opinions that have given rise to these “serious questions.” Retired Federal Circuit Chief Judge Paul Michel filed an amicus brief focusing primarily on patent law issues, including the smallest salable patent-practicing unit (SSPPU) concept and reasonable royalty calculation. The International Center for Law & Economics (ICLE) and Scholars of Law and Economics filed an amicus brief arguing that Judge Koh’s decision “is disconnected from the underlying economics of the case” and will cause serious harm to antitrust law. Finally, a number of Antitrust and Patent Law Professors, Economists, and Scholars filed an amicus brief highlighting how antitrust overreach, as they allege is present here, will harm innovation and arguing that the district court failed to engage in the level of real-world economic analysis as is required by this case.

Brief of Judge Michel

Judge Michel first argues that the SSPPU concept was improperly applied by the district court. He explains that the concept of SSPPU first appeared in 2009 when then-Federal Circuit Judge Rader was sitting as a district court judge overseeing a jury deciding a patent infringement case. Although the Federal Circuit has clarified that SSPPU is simply an “evidentiary principle,” useful when a jury is requested to choose a royalty base, the district court in the FTC v. Qualcomm case—in a bench trial—instead acted as though SSPPU was mandated. Additionally, Judge Michel points out that SSPPU is not appropriate when attempting to value a large, diverse patent portfolio, nor is SSPPU relevant to cases involving standard essential patents (SEPs) under FRAND commitments. Both of these circumstances are present in the FTC v. Qualcomm case.

Judge Michel also argues that, in addition to inappropriately applying the concept of SSPPU, the district court made other errors with respect to calculating a “reasonable royalty.” Specifically, Judge Koh repeated refers to Qualcomm’s royalty rates as “unreasonably high” without any reference to the law governing reasonable royalties in a patent case. There is extensive Federal Circuit, as well as Supreme Court, case law that notes that an established royalty rate is the best measure of a reasonable royalty rate—yet the district court did not once consider established royalty rates in this case.

In addition to pointing out these errors, Judge Michel expresses concern for the effect the district court’s opinion will have on patent law, antitrust law, and innovation going forward. He notes that contract law and patent law are better avenues to resolve FRAND disputes; bringing this case in antitrust, particularly in the controversial manner in which it was brought, is likely to create bad precedent and have negative impacts on innovation policy. Judge Michel then rounds out his brief explaining the importance of reliable and effective patent rights for advancing both innovation and competition.

Brief of ICLE and Scholars of Law and Economics

The International Center for Law & Economics’ (ICLE’s) primary concern is to ensure that Judge Koh’s decision does not stand because it undermines the purposes and goals of antitrust law. As ICLE states, “this case is a prime – and potentially disastrous – example of how the unwarranted reliance on inadequate inferences of anticompetitive effect lead to judicial outcomes utterly at odds with Supreme Court precedent.” ICLE points to two main errors in the district court’s decision: first, the court impermissibly inferred anticompetitive harm by reasoning that Qualcomm had a duty to deal with its rivals, and second, that the court erred in relying on these inferences, rather than the economic evidence. Through these two errors, ICLE claims that Judge Koh has extended antitrust beyond clear boundaries set by the Supreme Court, with significant harm going forward.

First, the ICLE brief argues that, by inferring anticompetitive effects, the district court impermissibly analyzed this case under a per se standard. She reached this inference by erroneously imposing on Qualcomm a duty to help its competitors. For example, Judge Koh made no finding of the competitive harm associated with Qualcomm’s decision to license to OEMs rather than its rivals; she just assumed that terminating a profitable scheme in which a company deals with its rivals must demonstrated anticompetitive intent, from which she then inferred anticompetitive effect. The problem is that, in deciding to license to OEMs, Qualcomm was actually choosing to terminate one profitable course in favor of a more profitable course. The record is replete with facts that support this as an exercise of good business judgment and not an action taken with anticompetitive intent. Even were there evidence to support an intent to harm rivals, intent alone is “not particularly probative of underlying economic realities of the sort that almost all antitrust laws are intended to punish and deter,” notes ICLE, quoting the Supreme Court’s opinion in Verizon Communications v. Law Offices of Trinko.

Second, the ICLE brief argues that the district court relied on a theory of foreclosure focused on rivals, rather than focused properly on competition. Judge Koh’s naked assertion that Qualcomm was “~~hobbling~~” [undermining] its rivals fails to understand that some exclusion is pro-competitive, such as when a company wins business away from a competitor based on its merits. Her only basis for inferring that Qualcomm foreclosed its rivals are internal business statements, documents that are notable for business rhetoric and are not sufficient evidence of significance of foreclosure. Additional evidence that the district court relied on in inferring harm have numerous possible explanations, including pro-competitive explanations, and yet Judge Koh failed to consider these alternate possibilities.

For a more in-depth look at ICLE’s brief, see this post from some of the brief’s signatories on the Truth on the Market blog.

Brief of Antitrust and Patent Law Professors, Economists and Scholars

Finally, the brief filed by Professors, Economists and Scholars focuses on the district court’s choice to apply the antiquated per se type approach, rather than the modern rule of reason approach, when assessing the conduct in this case. Because this case involves intellectual property licensing by a single firm, the rule of reason is the appropriate analysis because per se rules would result in false positives that would actually harm, not encourage, innovation and competition.

The Professors, Economists and Scholars liken this case to the epic failure of the DOJ’s case against IBM in the late 1960s-1980s. In that case, after pursuing IBM for 13 years, the DOJ finally dismissed its complaint as lacking merit. In the IBM case, the government failed to recognize the efficiencies in the company’s business arrangement and misunderstood IBM’s market power in the relevant market. The DOJ learned a lesson from the IBM case and has intervened in this case, taking a contrary position to its competition enforcement counterpart, the FTC, making similar arguments about ignoring key evidence and misunderstanding industry and institutional details. This brief also points to another older case, Digidyne Corp. v. Data General Corp., from the mid-1980s, where the Ninth Circuit erroneously assumed, without analysis, market power based on a company’s intellectual property. The errors of these past cases, which are almost humorously wrong when looking backwards, are exactly the type of mistakes Judge Koh has brought into the current decision in FTC v. Qualcomm.

The Professors, Economists and Scholars brief then explains how the district court failed to engage in a fact-based economic analysis and thus engaged in what has been deemed “per se condemnation under the rule of reason.” The FTC’s case was built nearly entirely on a theoretical model, from which the district court determined that Qualcomm’s licenses were “unreasonably high,” without even determining what a “reasonable royalty” would have been. Judge Koh adopted the FTC’s argument wholesale and backfilled her opinion by citing press releases and other non-relevant, non-timely, and non-analogous data to support the notion of “unreasonably high.” Additionally, the district court made no findings about the quality of Qualcomm’s contributions to the standards technology, pointing instead to quantity of patents, a basically irrelevant data point. This information was available; in a separate trial, Apple Computer, a witness for the FTC, acknowledged that Qualcomm’s patent portfolio was “the strongest patent portfolio” in the industry.

If the district court had been doing a legitimate rule of reason analysis, it would have received economic data about the smart phone market, including the prices, products, and services available to consumers, as evidence of the effects of Qualcomm’s licensing rates. However, Judge Koh clearly took a short cut, because the evidence from the smart phone market is that prices have declined, and functionality has increased. Empirical evidence also demonstrates that there is continuous entry by new firms, another sign of competition. This is relevant economic evidence because it contradicts Judge Koh’s allegations of Qualcomm’s unreasonably high royalty surcharge, which, if true, would have increased production costs, increased prices, decreased entry of new competitors, and decreased rates of innovation, but Judge Koh never addresses or explains how or why the market data contradicts her “findings.” Because the district court simply assumed the rates were “unreasonably high,” it had to also rely on testimony of self-interested witnesses, rather than rigorous data, to accept that Qualcomm’s competitors were somehow harmed. Furthermore, there is no nexus between the alleged negative impacts and Qualcomm’s rates. Regardless of how the district court characterized its analysis, this case was clearly decided via a per se approach and is as wrong now as the IBM case from the past.

There is hope the Ninth Circuit will reverse this case, given the fairly basic errors that Qualcomm’s brief and at least these three amicus briefs highlight. Not only is it important for the case at bar, but more so to ensure that antitrust and patent law principles are developed and maintained in ways that continue to promote both competition and innovation.

### 1NC --- Link Turn

#### Turn --- Plan stifles innovation;

#### a) Innovator chilling effect

Osenga 18 --- Kristen Osenga, Professor, teaches at the University of Richmond School of Law and writes in the areas of intellectual property, patent law, law and language, and legislation and regulation,, “Ignorance Over Innovation: Why Misunderstanding Standard Setting Organizations Will Hinder Technological Progress”, 2018, https://scholarship.richmond.edu/law-faculty-publications/1502/

On January 17, 2017, the Federal Trade Commission (FTC) sued Qualcomm Inc. in federal district court, alleging antitrust violations in the company's licensing of semiconductor chips used in cell phones and more.2 The suit alleges, in part, that Qualcomm refuses to license its patents that cover innovations incorporated in technology standards (standard-essential patents, or SEPs), in contradiction of the company's promise to license this intellectual property on fair, reasonable, and nondiscriminatory (FRAND) terms.' According to the FTC, Qualcomm's behavior reduces competitors' ability to participate in the market, raises prices paid by consumers for products incorporating the standardized technology, and at bottom, impedes innovation.!

While there is plenty to criticize about the FTC's action,' the lawsuit is evidence of a much larger and more fundamental problem. The FTC's allegations are not based on sound economic analysis nor are they supported by evidentiary findings.6 This is not due to haste or poor practices by the FTC; it is instead indicative of the FTC's ignorance. Put plainly, the FTC does not understand technology standards and the organizations that develop them. And the FTC is not alone in this lack of knowledge. Many courts and commentators have also demonstrated clear misunderstandings of standard setting organizations (SSOs). Unfortunately, this is not harmless error or mere academic diversion. Important legal, business, and policy decisions are being made based on these misunderstandings. These decisions have the potential to negatively impact the future of technology standards and, ultimately, innovation itself.

To understand why decisions that affect standards have a far-reaching impact on innovation, it is important to grasp the role that these standards play in today's society. As just one example, consider the remarkable level of interconnectivity and interoperability we rely on and enjoy. Using a wide variety of devices and a few simple clicks, we can be instantly connected to any other person or organization or piece of information, anywhere in the world, through any number of networks. The innovations and infrastructure that created today's connected reality did not occur by accident. Rather, the success of things we take for granted-the Internet, Wi-Fi, 3G and 4G (and soon 5G) networks, and the myriad devices with which we access these-is in large part due to technological standards. Particularly in the field of information and communications technology, although certainly not limited to this field, standards improve how we do business and enhance everyday experiences. Standards are prevalent in many and diverse other fields, including aeronautics, health and life sciences, renewable energy, and manufacturing.' In fact, standards-facilitated technologies have become so ubiquitous across all areas that most of us cannot imagine life without them.8

Despite our reliance on and enjoyment of these important innovations, rarely do we talk about technology standards that make them possible. Worse still, if standards are discussed, it is generally in conjunction with accusations of negative behaviors by the firms that contribute the technological innovations that become part of a standard.' For example, owners of patents incorporated in standards are sometimes accused of using patents to seek excessively high royalties from companies wanting to manufacture and sell products implementing the standard.io Others, like Qualcomm, are accused of unfair dealing when licensing patents covering standardized technology." Although there is little to no evidence supporting the existence, extent, or effects of this alleged bad behavior,12 the assertions alone have been sufficient to compel reaction against firms that participate in standard setting activities.13 For example, courts have denied injunctive relief to firms who own patents, found to be infringed, simply because the technology covered by those patents is part of a standard.14 Commentators and policy makers have urged both courts and standard setting organizations to adopt policies that weaken the patent rights of firms that participate in standard setting." And unfortunately, standard setting organizations are heeding this call. In 2015, the Institute of Electrical and Electronics Engineers (IEEE), a major standard setting organization, became the first to adopt many of these suggested policies.16

Even accepting at face-value the assertions that some firms participating in standard setting activities behave badly and that this behavior has negative impacts, the fact that courts and commentators are trying to fix the problem without understanding SSOs is akin to renovating a house without checking for load-bearing walls. Standard setting is a complex, time-intensive, collaborative process that carries both significant risks and benefits for participating firms. 17 And yet, the so-called "reforms" being implemented and proposed drastically reduce the benefits to the innovative firms contributing foundational technology to standards, seemingly without any acknowledgement of the accompanying remaining risks and without analyzing the effects on the standard setting ecosystem as a whole. By failing to consider the risks while eviscerating the benefits, courts and commentators are implementing changes to law and policy that will serve to discourage participation by innovative firms in standard setting activities. Decreased participation in SSOs may then lead to fewer technologies submitted for incorporation into standards and, perhaps, less incentives to develop innovative technologies in the first instance. As fewer firms participate in standard setting, the quality of the technology incorporated into standards may wane, leading to suboptimal standards and less adoption of the standards by the marketplace. This, in turn, destroys a key value of standardsproviding interconnectivity and interoperability. At the end of the day, disincentivizing participation in standard setting activities will hinder innovation.

#### b) Implementer hold-outs --- This outweighs and assumes their vague plan text

Delrahim 17 --- Makan Delrahim, Assistant Attorney General, Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference, Friday, November 10, 2017, https://weblaw.usc.edu/resources/downloads/faculty/centers/ctlb/reforming-patent-form-conference.pdf?121120153141

Too often lost in the debate over the hold-up problem is recognition of a more serious risk: the hold-out problem. Standard setting typically occurs against the backdrop of negotiations between innovators, who develop technologies through private investment and own IP rights, and implementers, who hope to market and use the technology through a license and pay the IP holder a royalty. The hold-out problem arises when implementers threaten to under-invest in the implementation of a standard, or threaten not to take a license at all, until their royalty demands are met.

I view the collective hold-out problem as a more serious impediment to innovation. Here is why: most importantly, the hold-up and hold-out problems are not symmetric. What do I mean by that? It is important to recognize that innovators make an investment before they know whether that investment will ever pay off. If the implementers hold out, the innovator has no recourse, even if the innovation is successful. In contrast, the implementer has some buffer against the risk of hold-up because at least some of its investments occur after royalty rates for new technology could have been determined. Because this asymmetry exists, under-investment by the innovator should be of greater concern than under-investment by the implementer.

More to the point, many of the proposed “solutions” to the hold-up problem are often anathema to the policies underlying the intellectual property system envisioned by our forefathers. These patent policies are constitutionally enshrined in Article 1, Section 8, which gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.” These “exclusive rights” importantly and necessarily include the power to exclude. The misapplication of the antitrust laws to punish the legitimate exercise of these rights seems to undermine these policies when they require a patent holder to sacrifice these rights.

My priority as Assistant Attorney General is to help foster debate toward a more symmetric balance between the seemingly dueling policy concerns between intellectual property and antitrust law. Unfortunately, in recent years, competition policy has focused too heavily on the so-called unilateral hold-up problem, often ignoring what fuels dynamic innovation and efficiency. New inventions do not appear out of the ether, and excessive use of the antitrust laws rather than other remedies can overlook and undermine the magnitude of investment and risk inventors undertake for the chance at being included in a standard. Every incremental shift in bargaining leverage toward implementers of new technologies acting in concert can undermine incentives to innovate. I therefore view policy proposals with a one-sided focus on the hold-up issue with great skepticism because they can pose a serious threat to the innovative process.

### 1NC --- IoT Warming

#### IoT for smart cities inevitable

King 21 --- Diana King - Founder, Impact UA, “IoT and Blockchain: The Future of Smart Cities”, Jun 8th 2021, https://www.iotforall.com/iot-and-blockchain-the-future-of-smart-cities

The first smart cities are already being created, and soon, every one of us can be called smart citizens. Our lives will change, and a mass of new advantages will emerge: fluid and efficient operations of public transportation and competently distributed traffic, low crime rates, process automation, service quality improvement, and much more.

Blockchain for the Privacy of Data Collection

Existing smart city concepts include within themselves a variety of equipment with sensors for collecting data. This could be driverless transportation, drones for the delivery of goods, city cameras for monitoring, automated stoplights, and any other equipment for that matter. This makes the collection of personal data an inevitable fact, which is why it is necessary to prevent this data from being accessed by unwanted third parties.

Blockchain opens up the opportunity for additional income, secure contracts, the interaction between machines and other services for citizens of smart cities.

The collection and storage of personal data create a risk for the personal lives of every human being. Developers of solutions for smart cities must provide a transparency policy for the exchange, confidentiality, and security of data for end-users.

This is exactly why blockchain technology opens up the possibility for all participants of such a process to collect and exchange their data with a high level of reliability and security without the involvement of a sole centralized administrator or intermediaries.

Smart Cities Win With Blockchain

There exist many solutions that utilize blockchain technology for cities of the future. For example, smart contracts. These agreements can be executed autonomously if pre-established conditions between several parties (for example, a human and machine or a machine with other smart systems) are met. Blockchain does the job of storing smart contracts due to its security and technological immutability.

The decentralized storage of data requires a distributed cloud storage system. Blockchain technology can be used to create a secure and encrypted cloud analog, ensuring accountability and transparency.

Solutions for logistics and the management of finances with the utilization of blockchain technology at a city level can increase efficiency and guarantee transparency by eliminating unnecessary verification steps.

In smart cities, all devices connected to an Internet-of-Things network can receive and relay data and execute commands. Therefore, providing remote monitoring and adaptive management functionality. Thanks to the use of blockchain, data from city sensors can be converted into tradable tokens. Imagine a scenario wherein a parking lot sensor generates information on whether or not it is occupied. The operator of an available parking spot search service in a smart city purchases this data. Such solutions can fuel the private business of investing in sensors and recouping investments to install sensors.

These are not the only avenues for the application of blockchain technology in smart cities. This technology allows for a combination of various Internet-of-Things and robotics services and eliminates the possibility of security violations, and guarantees an uninterrupted transaction flow.

Existing Smart City Blockchain Projects

Developers of solutions for smart cities frequently collide with ethical questions, difficulties in integrating technologies, legal limitations. This is why such technologies are developing at a rather slow pace. Despite this, a few interesting projects are occupied with the integration of blockchain for the use of IoT.

Two of them occupy fairly strong positions in the market: IOTA and Robonomics. Both were founded over 5 years ago; they operate actively and transparently and create blockchain solution integrations for various sectors of smart cities.

Both platforms are open source and allow engineers to propose their own development improvements and create new projects based on the platforms. The primary difference lies in conceptual approaches.

IOTA has existed since 2015 and develops solutions following the ‘Internet for Everything’ model, which assumes the ability to exchange valuables and data between humans and machines. At the start of its work, the company declared itself to the world quite loudly and occupied a leading position in the market. However, just a year following its launch, their wallet fell victim to a major hack. Amongst other subsequent errors, security breaches led to the loss of activity on IOTA in 2020. Before the hack, it was one of the largest five digital currencies. At the time, its market capitalization was slightly above 13 billion dollars. Recently, the IOTA team announced the project’s rebirth. It is currently unknown how it will develop further and if it is protected from future hacker attacks.

Robonomics is a decentralized platform with open source code for IoT. The team is working on developing an ‘Economy of Robots’ concept, where robots and other automated systems become full-fledged agents in the real sector of the economy. Smart devices can independently make decisions about their maintenance, pay for electricity, receive funds for their work, and much more. In addition to this, Robonomics is creating ecological projects for monitoring air quality conditions with the help of sensors and water pollution levels using drones. They also created a green finance market. Robonomics engineers have been developing their cases since 2016 using the Ethereum blockchain. In 2018, they integrated their solutions within the Polkadot ecosystem.

Polkadot protects the project from hacker attacks, those from which IOTA suffered in its time since it operates on the shared security principle. This means that all external systems connected to the Polkadot Relay Chain using renting a parachain slot – receive economic security provided by independent validators.

Other projects worth paying attention to were established during an active time of interest towards the blockchain industry in 2017: IoTex, IoTChain, and Hedera. They offer a new generation of services to ensure the security and privacy of smart device data.

Certain projects create solutions using protocols built on their own architectures, but this opens up vulnerability to cyberattacks. Others use popular public blockchains, such as Ethereum and Polkadot. Amongst existing solutions in the market, these networks can support the connection of a large number of smart devices and guarantee their continuous operations with low fees for users.

Fourth Industrial Revolution

We have reached the fourth industrial revolution; technology is gradually becoming a necessary component of our lives. The creation of smart cities is inevitable. Thus it is necessary to develop solutions for them that are secure from the point of view of transparency and user confidentiality. Blockchain technology can assist in this matter and will allow solving many ethical problems.

### 1nc – warming

#### No warming impact

Lehr 19 – Jay Lehr, Ph.D. in Groundwater Hydrology from the University of Arizona, and Tom Harris, Executive Director of the International Climate Science Coalition, “Global Warming Myth Debunked: Humans Have Minimal Impact on Atmosphere’s Carbon Dioxide and Climate”, Western Journal, 2-14, <https://www.westernjournal.com/global-warming-myth-debunked-humans-minimal-impact-atmospheres-carbon-dioxide-climate/> [language modified]

Global warming activists argue carbon-dioxide emissions are destroying the planet, but the climate impacts of carbon dioxide are minimal, at worst. Activists would also have you believe fossil-fuel emissions have driven carbon-dioxide concentrations to their highest levels in history. The Obama-era Environmental Protection Agency went so far as to classify carbon dioxide as a toxic pollutant, and it established a radical goal of closing all of America’s coal-fired power plants.

Claims of unprecedented carbon-dioxide levels ignore most of Earth’s 4.6-billion-year history. Relative to Earth’s entire record, carbon-dioxide levels are at historically low levels; they only appear high when compared to the dangerously low levels of carbon dioxide that occurred in Earth’s very recent history. The geologic record reveals carbon dioxide has almost always been in Earths’ atmosphere in much greater concentrations than it is today. For example, 600 million years ago, when history’s greatest birth of new animal species occurred, atmospheric carbon-dioxide concentrations exceeded 6,500 parts per million (ppm) — an amount that’s 17 times greater than it is today.

Atmospheric carbon dioxide is currently only 410 parts per million. That means only 0.04 percent of our atmosphere is carbon dioxide (compared to 0.03 percent one century ago). Only one molecule in 2,500 is carbon dioxide. Such levels certainly do not pose a health risk, as carbon-dioxide levels in our naval submarines, which stay submerged for months at a time, contain an average carbon-dioxide concentration of 5,000 ppm.

The geologic record is important because it reveals relationships between carbon-dioxide levels, climate, and life on Earth. Over billions of years, the geologic record shows there is no long-term correlation between atmospheric carbon-dioxide levels and Earth’s climate. There are periods in Earth’s history when carbon dioxide concentrations were many times higher than they are today, yet temperatures were identical to, or even colder than, modern times. The claim that fossil-fuel emissions control atmospheric carbon-dioxide concentrations is also invalid, as atmospheric concentrations have gone up and down in the geological record, even without human influence.

The absurdity of climate alarmism claims gets even stranger when you consider there are 7.5 billion people on our planet who, together, exhale 2.7 billion tons of carbon dioxide each year, which is almost 10 percent of total fossil-fuel emissions every year. However, we are but a single species. Combined, people and all domesticated animals contribute 10 billion tons.

Further, 9 percent of carbon-dioxide emissions from all living things arise not from animals, but from anaerobic bacteria and fungi. These organisms metabolize dead plant and animal matter in soil via decay processes that recycle carbon dioxide back into the atmosphere. The grand total produced by all living things is estimated to be 440 billion tons per year, or 13 times the amount of carbon dioxide currently being produced by fossil-fuel emissions. Fossil-fuel emissions are less than 10 percent of biological emissions. Are you laughing yet?

Every apocalyptic pronouncement you hear or read is [totally wrong] ~~nothing short of insanity~~. Their primary goal is not to save plants, humans, or animals, but rather to use climate “dangers” as a justification for centralizing power in the hands of a select few.

### 1nc – econ

#### No econ impact – overwhelming data.

Clary ’15 (Christopher; 4/25/15; Ph.D. in political science from the Massachusetts Institute of Technology, M.A. in National Security Affairs, Postdoctoral fellow, Watson Institute for International Studies, Brown University; MIT Political Science Department Research Paper, “Economic Stress and International Cooperation: Evidence from International Rivalries,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2597712)

Do economic downturns generate pressure for diversionary conflict? Or might downturns **encourage austerity and economizing behavior** in foreign policy? This paper provides **new evidence** that economic stress is associated with **conciliatory policies** between strategic rivals. For states that view each other as military threats, the biggest step possible toward bilateral cooperation is to terminate the rivalry by taking political steps to manage the competition. Drawing on **data from 109 distinct rival dyads since 1950**, 67 of which terminated, the evidence suggests rivalries were approximately **twice as likely to terminate** during economic downturns than they were during periods of economic normalcy. This is true controlling for all of the main alternative explanations for peaceful relations between foes (democratic status, nuclear weapons possession, capability imbalance, common enemies, and international systemic changes), as well as many other possible confounding variables. This research questions existing theories claiming that economic downturns are associated with diversionary war, and instead argues that in certain circumstances peace may **result from economic troubles**. I define a rivalry as the perception by national elites of two states that the other state possesses conflicting interests and presents a military threat of sufficient severity that future military conflict is likely. Rivalry termination is the transition from a state of rivalry to one where conflicts of interest are not viewed as being so severe as to provoke interstate conflict and/or where a mutual recognition of the imbalance in military capabilities makes conflict-causing bargaining failures unlikely. In other words, rivalries terminate when the elites assess that the risks of military conflict between rivals has been reduced dramatically. This definition draws on a growing **quantitative literature** most closely associated with the research programs of William Thompson, J. Joseph Hewitt, and James P. Klein, Gary Goertz, and Paul F. Diehl.1 My definition conforms to that of William Thompson. In work with Karen Rasler, they define rivalries as situations in which “[b]oth actors view each other as a significant politicalmilitary threat and, therefore, an enemy.”2 In other work, Thompson writing with Michael Colaresi, explains further: The presumption is that decisionmakers explicitly identify who they think are their foreign enemies. They orient their military preparations and foreign policies toward meeting their threats. They assure their constituents that they will not let their adversaries take advantage. Usually, these activities are done in public. Hence, we should be able to follow the explicit cues in decisionmaker utterances and writings, as well as in the descriptive political histories written about the foreign policies of specific countries.3 Drawing from available records and histories, Thompson and David Dreyer have generated a universe of strategic rivalries from **1494 to 2010** that serves as the basis for this project’s empirical analysis.4 This project measures rivalry termination as occurring on the last year that Thompson and Dreyer record the existence of a rivalry. Economic crises lead to conciliatory behavior through five primary channels. (1) Economic crises lead to **austerity pressures**, which in turn incent leaders to search for ways to **cut defense expenditures**. (2) Economic crises also encourage strategic reassessment, so that leaders can argue to their peers and their publics that defense spending can be arrested without endangering the state. This can lead to **threat deflation**, where elites attempt to **downplay** **the seriousness** of the threat posed by a former rival. (3) If a state faces multiple threats, economic crises provoke elites to **consider threat prioritization**, a process that is postponed during periods of economic normalcy. (4) Economic crises increase the political and economic benefit from **international economic cooperation**. Leaders **seek foreign aid**, **enhanced trade**, and **increased investment** from abroad during periods of economic trouble. This search is made easier if tensions are reduced with historic rivals. (5) Finally, during crises, elites are more prone to select leaders who are perceived as **capable of resolving economic difficulties**, permitting the emergence of leaders who hold heterodox foreign policy views. Collectively, these mechanisms make it **much more likely** that a leader will prefer conciliatory policies compared to during periods of economic normalcy. This section reviews this **causal logic** in greater detail, while also providing **historical examples** that these mechanisms recur in practice. Economic Crisis Leads to **Austerity** Economic crises generate pressure for austerity. Government revenues are a function of national economic production, so that when production diminishes through recession, revenues available for expenditure also diminish. Planning almost **invariably assumes growth** rather than contraction, so the deviation in available revenues compared to the planned expenditure can be sizable. When growth slowdowns are prolonged, the cumulative departure from planning targets can grow even further, even if no single quarter meets the technical definition of recession. Pressures for austerity are **felt** most **acutely** in governments that face difficulty borrowing to finance deficit expenditures. This is **especially the case** when this borrowing relies on international sources of credit. Even for states that can borrow, however, intellectual attachment to balanced budgets as a means to restore confidence—a belief in what is sometimes called “expansionary austerity”—generates **incentives to curtail expenditure**. These incentives to cut occur precisely when populations are experiencing economic hardship, making reductions especially painful that target poverty alleviation, welfare programs, or economic subsidies. As a result, mass and elite constituents strongly resist such cuts. Welfare programs and other forms of public spending may be especially susceptible to a policy “ratchet effect,” where people are **very reluctant** to forego benefits once they have become accustomed to their availability.6 As Paul Pierson has argued, “The politics [of welfare state] retrenchment is typically treacherous, because it imposes **tangible losses** on concentrated groups of voters in return for diffuse and uncertain gains.”7

## cyber

### 1nc – stem

#### Diversity in cyber firms now

Businesswire 9/20 --- “Cyber Security Assessment Market - Global Growth, Trends, and Forecasts 2021-2026 - ResearchAndMarkets.com”, Sept 20th 2021, https://www.yahoo.com/now/cyber-security-assessment-market-global-124900815.html

The rapidly rising cases of cyber-attacks coupled with the need to adhere to stringent compliances and the increased adoption of Internet of Things (IoT) across multiple end-user industries and mobility trends are forcing the organizations across the globe, irrespective of their size to adopt security assessment solutions in order to protect and assess critical business infrastructure.

The Security Assessment Market is highly competitive owing to the presence of multiple vendors in the market providing services to domestic as well as international markets. The market appears to be moderately concentrated with the major players adopting strategies such as product innovation, strategic partnerships, among others in order to stay competitive in the market.

Some of the major players in the market are IBM Corporation, Kaspersky Lab, FireEye, Inc, among others.

Key Market Trends

BFSI Segment is Expected to Witness Significant Growth

With the rapid rise in banking and online transaction, the risk for fraud and potential exposure of personal information is rising significantly. Mobile and e-banking channels are being increasingly used every day to transfer and perform transactions, which opens doors to cyber criminals trying to compromise a user's account to extract money.

Data breaches have led to an exponential rise in the costs and loss of valuable customer information. According to the Data Breach Investigations Report, which was released by Verizon in 2019, 88 percent of all cyber incidents in the financial services and insurance sector were done with financial motivation. Cyber attackers in pursuit of the easiest path possible to financial gain attack the financial services industry

Moreover, the BFSI sector is experiencing an increase in cloud workloads, where a significant amount of data is moved to the cloud. Furthermore, the rising integration of the third party, such as mobile wallets, coupled with complex security infrastructure where many vendors are deployed around the ecosystem, is creating a significant security challenge in the sector.

With the aim to secure their IT processes and systems, secure customer critical data, and comply with government regulations, both private and public banking institutes are focusing on implementing the latest technology and adopting robust solutions to prevent cyberattacks. Additionally, with greater customer expectation, growing technological capabilities, and regulatory requirements, banking institutions are pushed to adopt a proactive approach to security.

North America is Expected to Hold a Significant Market Share

The North American region is anticipated to hold a significant market share. This is primarily owing to the significant presence of major security assessment service providers in the market that are offering multiple services to multiple businesses in the region across multiple end-user industries.

#### New grid tech solves resilience vs cyber

TULLY 21 --- SHAWN TULLY , “A new technology being used in Chicago could protect cities from blackouts and cyberattacks”, Fortune, Aug 31st 2021, https://fortune.com/2021/08/31/chicago-reg-resilient-electric-grid-system-preventing-blackouts-cyberattacks/

A new partnership between a pioneer in superconductor technology and the Chicago utility has hatched a new solution for keeping the heat pumping and factories chugging if anything were to knock out parts of the city’s grid. American Superconductor (AMSC), a Nasdaq-listed innovator in energy technology, is deploying its Resilient Electric Grid (REG) system at two substations operated by ComEd, the utility serving over 4 million homes and businesses in Chicago and northern Illinois. If this first installation performs as the city expects, Chicago could expand the technology to link many more of the nodes that distribute electricity directly to homes and businesses. “We’re planning this stage with the next stage of connecting multiple substations in mind,” says Terence Donnelly, president and COO of ComEd. Put simply, REG is a backup system that for the first time connects substations so that if a downtown facility is damaged by severe weather or a massive hack, a nearby station it’s linked to sends power to the offices and apartment buildings that would otherwise suffer a blackout.

The REG technology offers a second big advantage. It could create a fully integrated network where when one substation needs extra power, others that harbor additional capacity can fill the gap. Hence, utilities would no longer need to build each individual station so that it holds tons of excess capacity for times when AC units or heaters are running at full tilt, or when part of its equipment fails. “REG changes the whole geography of the grid,” says Daniel McGahn, AMSC’s chief executive. “The more you network the grid, the less excess capacity you need. The utilities no longer have to keep building new substations to meet higher usage, they can tap the ‘trapped’ capacity from the substations already there.”

The way the grid operates now, its nodes can’t back each other up in times of trouble

To grasp the potential impact of the REG system, it’s important to understand why the design of today’s grids prevents them from sharing electricity. The grid resembles the hub and spokes of a bicycle wheel. Huge power plants that run on natural gas, nuclear, wind, and solar—mostly located far from the cities they serve—send electricity via “long-haul” transmission lines to substations in urban neighborhoods. ComEd has several hundred substations in the city of Chicago alone. Some get their power from a single plant, others from a blend of, say, renewables and natural gas from multiple facilities.

The substations are equipped with transformers that collect all that high-voltage electricity, and step down the voltages to a level that’s safe for homes and stores. The stations’ circuit breakers cut off the power flowing from the big plants if too much voltage is arriving. By the way, you seldom see or recognize a substation while walking around a city. They’re often installed in a brownstone that just looks like a residence, or sheltered in the basements of apartment buildings. That’s a sketch of the transmission and distribution system as it stands today.

The spokes are the lines that run directly from the substations to the homes, apartment buildings, and businesses in their service areas. But the hubs or nodes in the system, the substations, aren’t connected to each other. Their function is strictly distribution, sending the electricity from power plants to their customers. They don’t form a network at all. They can’t back each other up by having substation A that has excess capacity channel electricity to substation B when B is short on power or has shut down during a heat wave, a cyber hack, or an equipment failure.

Because today’s substations operate as islands or silos, each one needs to be designed with far more capacity than it uses most of the time. The reason is twofold. First, the stations must contain transformers and other gear big enough to meet times of peak demand, such as 100-degree days when everyone’s running the AC to keep cool. Second, some of the equipment at a substation will occasionally malfunction. So they need even more backup so that the gear that remains working can compensate for the parts most likely to break down. “All told, most substations have built-in redundancy of 100%,” says McGahn, meaning they’re designed and constructed to generate twice as much juice as their customers consume on a typical day.

Obviously, connecting substations would be a great solution. Today, in case of a cyberattack on one substation, the other stations loaded with excess capacity can’t send their power to light and heat the homes suffering the blackout. Nor can a substation in the suburbs that has extra capacity on a hot day dispatch it to a maxed-out station in a city center.

But the stations couldn’t link up for two reasons. First, the traditional copper cables used to move power were too bulky to fit into the rights-of-way for the much smaller conduits running from the stations to homes and buildings. Second, if and when a substation sends power to another substation, that power starts in a big surge. That surge is powerful enough to knock out the transformers in the station receiving the electricity. Worse, if several substations are connected, the rush can cause a domino effect that disables a whole series of stations. The supposed solution would turn into a disaster on the scale of a cyber hack. That cascading effect is how many blackouts in the past have occurred.

How the new REG technology would harden and expand the grid

AMSC’s superconductor technology miniaturizes power transmission. Its Amperium wire is made from a copper oxide compound that, for the same weight, enables it to carry 200 times the voltage of the regular copper wire that’s the traditional foundation for transmission. When electricity travels one mile over copper cable, as much as one-third of the power is lost during that trip. By contrast, electricity can cover any distance over superconductor wire and suffer no electrical loss.

The U.S. Navy deploys the AMSC's Amperium superconductors to protect its ships from mines. The technology is calibrated to mask the magnetic field spread by the vessels so they don’t trigger the underwater explosives. But utilities were still reluctant to deploy superconductors for joining substations. They acknowledged that superconductors solved the space problem: They can fit inside six-inch–diameter conduits and pipes that run well within the rights-of-way going from the substations to customers. The rights-of-way for each substation overlap with those of other stations, making it possible to extend the wires from one substation to another in the next neighborhood, or even 50 miles away.

The obstacle: The superconductor technology hadn’t solved the “overcurrent” problem that could cause rolling blackouts. But AMSC’s Amperium was the breakthrough. It combined the ability to carry huge amounts of power over a small wire with an outer layer called a “super-resistor” that tames the surges, and also protects against lightning strikes that could cause cascading outages.

What the Chicago project could mean for cybersecurity and more

As McGahn puts it, the REG technology provides an extension cord between the now-vulnerable nodes in the nation’s urban power grids. If substations are linked, power from those still functioning would automatically flow to the customers of the station that’s attacked or hit by extreme weather. In addition, utilities will be getting far more of their power from renewable sources in the future, and that power shuts off when the wind’s not blowing or even when the sun goes behind a cloud. Grids will need a lot more backup capacity to compensate for that intermittent energy. Linking substations would provide that support without needing to continue the current strategy of building still more substations to ensure sufficient backup.

The Chicago project links just two substations. For McGahn and ComEd the ideal solution is joining many or even all the nodes in one giant network that operates in a kind of buddy system. McGahn wants to create a “super-grid” that allows for more renewables without adding lots of backup capacity, and hence at a much lower cost than would be required under the current system. His vision would make our grids much safer, and enable the grid to channel electricity where it’s needed, when it’s needed, in exactly the amounts it’s needed, with far less need for excess capacity.

It’s a big vision for an old, and some would say stodgy, industry. But it would unite aging infrastructure with new technology to make America’s most vulnerable pressure points, where terrorists and hackers are now taking aim, far more secure.

### No Cyber War --- 1NC

#### No cyber war or retaliation

Rodet 18 --- Jasmine Rodet, Master’s Degree in Cyber Security, Strategy, and Diplomacy from the University of New South Wales, Cyber Security Program Manager at Fortescue Metals Group, “The Threat of Cyber War is Exaggerated”, 11/11/2018, linkedin.com/pulse/threat-cyber-war-exaggerated-jasmine-rodet/

For the regular person on the street, the term ‘cyber war’ is more likely to bring to mind the 1983 movie “WarGames” and the doomsday articles that appear regularly in the media about the ‘cyber battlefield’ and an impending World War III. This essay argues that the threat of cyber war is exaggerated and although it can, by definition, be stated that we are already in a state of cyber war, the impact on states is negligible compared to conventional war domains.

The argument is presented in 3 steps. The first step is to define cyber war and cyber weapons, referencing scholars and experts in the area of conventional war and the cyber domain. The second step is to explore who has been exaggerating the threat of cyber war and what their motivations might be. The third is to explore the evidence and quantify the probability and impact that cyberwar has had on states to date.

‘Cyber war’ is a term often used interchangeably in media with cyber-crime, cyber-attacks, cyber-conflict and cyber-incidents, creating confusion amongst the public and scholars alike. Clausewitz (1989, 75), in his book, On War, defines war as ‘an act of force to compel the enemy to do our will’. Rid (2012, 7) on the other interprets Clausewitz use of ‘force’ as meaning ‘violent’ force. According to Rid, if an act is not potentially violent, it is not an act of war. However, Stone (2013, 107) describes ‘cyber war’ as a politically motivated act of force, not necessarily lethal and not necessarily attributable. The definition by Powers and Jablonski states more simply that cyber war is the utilisation of digital networks for geopolitical purposes (Nocetti 2016, 464). Neither of the latter two definitions requires violence to qualify as cyber war. Under these definitions, the Stuxnet cyber-incident in 2010 and the Estonia incident in 2007 would constitute an act of cyber war, and as such we could say that nations have been at cyber war in the past and are likely to continue to engage in cyber war in years to come.

For this essay, I will use Stones definition to argue that even though states may engage in cyber war, the concept of cyber war is exaggerated. It seems that cyber war is deliberately exaggerated in the media and by politicians for financial and political gains. There are countless examples in the media and in politics of the exaggeration of the threat of cyber war and the language used plays a big factor in creating a sense of fear in the community.

The Four Corners report, Hacked, is a classic example where the reporter, Andrew Fowler describes the current situation in Australia as ‘… a secret war where the body count is climbing every day’ (Fowler 2013). The documentary reveals nothing violent or lethal about cyber incidents. The documentary is actually about hackers working from locations overseas, having targeted key Federal Government departments and major corporations in Australia.

In another example, NATO may be interpreted as exaggerating the threat of Cyber War when they invited Charlie Millar to present at their Conference for Cyber Conflict at the NATO Cooperative Cyber Defence Centre of Excellence in 2017. Millar is an independent security evaluator, and his presentation was titled ‘Kim Jong-il and me: How to build a cyber army to attack the US’. He later presented similar content at Def Con 2018. His presentation described the steps he would take to mount a cyber war, including the types of people he would engage, how much he would pay them, what his strategy would be and how much it would cost in total.

Who stands to gain from the exaggeration and hype? Logically, one group would be those that gain financially from the sale of cyber protective services and software. According to Valerino, 57% of technical experts surveyed said that we are currently in a cyber arms race and 43% said that the worst-case scenarios are inevitable (Valeriano and Ryan 2015). Translate this into sales and Gartner projects worldwide security spending will reach $96 Billion in 2018, up 8 Percent from 2017 and to top $113 billion by 2020 (Gartner 2017).

Additionally, there may be political motivations to exaggerate the threat of cyber war. Cyberspace is not well understood by the general public and fear is natural. In the US’s cyber security debate, observers have noted there is a tendency for policymakers, military leaders, and media, among others, to use frightening ‘cyber-doom scenarios’ when making a case for action on cyber security (Dunn 2008, 2).

There is some evidence to suggest that more recently in the political arena; we may be maturing in our understanding of the real threat of cyber war. The Tallinn Manual, an academic, non-binding study on how international law applies to cyber conflicts and cyber warfare, was written at the invitation of the Tallinn-based NATO Cooperative Cyber Defence Centre of Excellence. It was first published in 2013 with the title ‘The Tallinn Manual on the International Law of Cyber War’. In 2017, it was re-released with the revised title ‘Tallinn Manual 2.0 on the International Law of Cyber Operations’. The change in title from ‘war’ to ‘operations’ signifies a more moderate use of language from NATO and is an acknowledgement that cyber incidents generally fall below the threshold at which International Law would declare them to be a formal act of war. Experience over the 4 short years from 2013 to 2017 has demonstrated that cyber incidents tend to have a low-level impact on the target state. As the book’s authors put it ‘the focus of the original Manual was on the most severe cyber operations, those that violate the prohibition of the use of force in international relations, entitle states to exercise the right of self-defence, and/or occur during armed conflict’ while the new version ‘adds a legal analysis of the more common cyber incidents that states encounter on a day-to-day basis and that fall below the thresholds of the use of force or armed conflict’ (Leetaru 2017).

To get a better sense if cyber war is exaggerated, we must also consider the probability of cyber war in the future. The probability of cyber war should be weighed up against the probability of conventional war. Where tensions are already high, for example, between North Korea and the US or Russia and Estonia, I would argue that cyber war is more likely than conventional war. This is due to factors including; cyber warfare is less costly than conventional warfare, states are less rational in their decision space in the cyber realm, states find cyber attribution very difficult to achieve so attacks can be undertaken covertly and cyber war is considered ‘a challenge’ and central to the hackers’ ethos (Junio 2013, 128). Further, Sanger describes in his book, The Perfect Weapon, cyber weapons (such as cyber vandalism, Distributed Denial of Service (DDOS), intrusions and advanced persistent threat (APT)) as the ‘perfect weapons’ for the following reasons;

They are cheap: When compared to Nuclear weapons, there are only a handful of nations globally that can afford the technology to create a nuclear weapon.

They are easily accessible: Unlike a Nuclear bomb that requires uranium, a highly protected metal, in the production process, a cyber weapon can be created with minimal investment and highly available IT infrastructure.

They can be dialled-up or dialled-down relatively easily. A ballistic missile, the force of the explosion cannot be adjusted as easily as a DDOS attack. A DDOS attack can be adjusted to last an hour, a few days or a few weeks.

They have a huge range in how they are used: Sabotage as with Stuxnet, Espionage as with the Chinese industrial spying on the US, North Korea’s infiltration of Sony, the Iranians attack on Las Vegas Sands Corp. casino operators.

The significant factor is that cyber weapons can and are being used every day for discrete, low-level cyber conflicts to undermine and disrupt rivals, but historically it has not progressed to open conflict, nor has it warranted a military response (Sanger 2018). Additionally, massive cyber operations would necessarily impact the civilian population and violate the immunity of non-combatants. The conditions of war dictate that this is “taboo” and to date, rival states have shown restraint in their use of cyber weapons for this reason (Valeriano and Ryan 2015). It appears that the threat that cyber weapons represent to national security is overstated and the threat of cyber war is overstated.

The US and likely other highly networked nations appear reticent about using cyber weapons for significant cyber conflict given their vulnerabilities. Ironically, NSA programs such as PRISM have made the US more of a target given the sheer volume of sensitive information stored in one place. Regardless of US defences, there is no way to make this information completely secure from intrusion, and as such, the very act of storing the information makes them more vulnerable.

Rid (2012) is among some academics who argue that cyber war has never and will likely never eventuate. The benefits of being on this side of the debate mean that public funding can be allocated away from offensive cyber security initiatives to other, potentially more important initiatives, such as public health and housing. The government is constantly under pressure to prioritise public spending and it is imperative that they have realistic, accurate projections regarding the risk of cyber war, the probability and the impact, to allow them to focus spending on the most important areas.

### No NC3 Hacking --- 1NC

**No NC3 hacking.**

**Futter ’16** [Andrew; 2016; International Politics Professor at the University of Leicester; “War Games Redux? Cyberthreats, US–Russian Strategic Stability, and New Challenges for Nuclear Security and Arms Control,” European Security 25(2), p. 171-172]

It is of course **highly unlikely** that either the **US**A or Russia has plans – or perhaps more importantly, the desire – to fully undermine the other’s nuclear **c**ommand and **c**ontrol systems as a precursor to some type of disarming first strike, but the perception that nuclear forces and associated systems could be vulnerable or compromised is persuasive. Or as Hayes (2015) puts it, “The risks of cyber disablement entering into our nuclear forces are real”. While the growing possibility of “cyber disablement” should **not** be **overstated** (notions of a “cyber-**Pearl Harbor**” (Panetta 2012) or “cyber 9–11” (Charles 2013) have **done little** to help understand the nature of the challenge), cyberthreats are nevertheless an increasingly important component of the contemporary US–Russia strategic context. This is particularly the case when they are combined with other emerging military-technical developments and programmes. The net result, especially given the current downturn in US–Russian strategic relations, and the way cyber is exacerbating the impact of other problematic strategic dynamics, is that is seems highly unlikely that either the USA or Russia will make the requisite moves to de-alert nuclear forces that the new cyber challenges appear to necessitate, or for that matter to (re)embrace the “deep nuclear cuts” agenda any time soon.

Assessing the options for arms control and enhancing mutual security

Given the new challenges presented by cyber to both US and Russian nuclear forces and to US–Russia strategic stability, it is important to consider what might be done to help mitigate and guard against these threats, and thereby help minimise the risks of unintentional launches, miscalculation, and accidents, and perhaps create the conditions for greater stability, de-alerting, and further nuclear cuts. While there is unlikely to be a panacea or “magic bullet” that will reduce the risk of cyberattacks on US and Russian nuclear forces to zero – be they designed to launch nuclear weapons or compromise the systems that support them – there are a number of options that might be considered and pursued in order to address these different types of threats and vulnerabilities. None, of these however, will be easy.

The most obvious and immediate priority for both the USA and Russia is working (potentially together) to harden and better protect nuclear systems against possible cyberattack, intrusion, or cyber-induced accidents. In fact, in October 2013 it was announced that Russian nuclear command and control networks would be protected against cyber incursion and attacks by “special units” of the Strategic Missile Forces (Russia Today 2014). Other measures will include better network defences and firewalls, more sophisticated cryptographic codes, upgraded and better protected communications systems (including cables), extra redundancy, and better training and screening for the practitioners that operate these systems (see Ullman 2015). However, and while comprehensive reviews are underway to assess the vulnerabilities of current US and Russian nuclear systems to cyberattacks, it may well be that US and Russian C2 infrastructure becomes more vulnerable to cyber as it is modernised and old analogue systems are replaced with increasingly hi-tech digital platforms. As a result, and while **nuclear** weapons and **c**ommand and **c**ontrol infrastructure are likely to be the **best protected** of **all** computer systems, and **“air gapped”**14 from the wider Internet – this does not mean they are invulnerable or will continue to be secure in the future, particularly as systems are modernised or become more complex (Fritz 2009). Or as Peggy Morse, ICBM systems director at Boeing, put it, “while its old it’s very secure” (quoted in Reed 2012).

**It's false – totally disconnected from the internet.**

**Caylor ’16** [Matt; 2-1-16; Command and Staff College; “The Cyber Threat to Nuclear Deterrence,” War on the Rocks, <http://warontherocks.com/2016/02/the-cyber-threat-to-nuclear-deterrence/>]

The perception that cyber threats will ultimately undermine the relevance or effectiveness of nuclear deterrence is **flawed** in at least three keys areas. First among these is the perception that nuclear weapons or their command and control systems are similar to a heavily defended corporate network. The **critical error** in this analogy is that there is an expectation of IP-based availability that simply **does not exist** in the case of American nuclear weapons — **they are not online**. Even with **physical access**, the proprietary nature of their control system design and redundancy of the National Command and Control System (NCCS) makes the possibility of successfully implementing an exploit against either a weapon or communications system **incredibly remote**. Also, whereas the cyber domain is characterized by significant levels of risk due to a combination of bias toward **automated safeguards** and the liability of single human failures, nuclear weapon safety and surety are predicated on **balanced elements** of **stringent human interaction** and **control**. From **two-person integrity** in physical inspections and loading, to the **rigorous mechanisms** and **authority** required for weapons release, human beings serve as a **multi-factor safeguard** while retaining the ultimate role to protect the integrity of nuclear deterrence against cyber threats.

To a large degree, the potential vulnerabilities caused by wireless communications and physical intrusions into areas holding nuclear material are already mitigated via secure communications that are not linked to the outside and multiple layers of physical security systems. While there has been a great deal of publicity surrounding the Y-12 break-in of 2012, the truth is that the three people involved never got near any nuclear material or technology.

Without state-level resourcing in the billions of dollars, the technical sophistication required to pursue a Stuxnet-like attack against nuclear weapons is most likely beyond the capability of **even the most gifted group of hackers**. For all intents, this **excludes terrorist organizations** and **cyber criminals** from the field of threats and restricts it to those nations that already possess nuclear weapons. Nuclear-weapon states, however, have the full-spectrum cyber threat capability referenced in the Defense Science Board report and would most likely be influenced by an understanding of the elements of classic nuclear deterrence strategy. In the case of first strike, no cyber weapon could be expected to perform at a rate higher than any conventional anti-nuclear capability (i.e., not 100 percent effective). Therefore, an adversary’s nuclear threat would be **perceived to endure**, thereby **negating** and **dissuading** the effort to use and employ a cyber weapon against an adversary’s nuclear force. Additionally, just as missile defense systems have been historically controversial due to perceived destabilizing effects, it is reasonable to conclude that these nuclear-weapon states would view the attempt to deploy a cyber capability against their nuclear stockpiles from a similar perspective.

Finally, the very existence of nuclear weapons is often enough to **alter the risk analysis** of an adversary. With virtually no chance of remote or unauthorized detonation (which would be the desired results of a sabotage event), the most probable cyber threat to any nuclear stockpile is that of espionage. Attempted cyber intrusions at the U.S. National Nuclear Security Agency (NNSA) and its efforts to bolster cybersecurity initiatives provide clear evidence that this is already underway. However, theft of design information or even more robust intelligence on the location of stored nuclear weapons **cannot eliminate the potential destruction** that even a handful of nuclear weapons can bring to an adversary. Knowledge alone, particularly the imperfect knowledge that cyber espionage is likely to offer, is **incapable of drastically altering an adversary’s risk calculus**. In fact, **quite the opposite is true.** An adversary with greater understanding of the nuclear capabilities of a rival is forced to consider courses of action to **prevent escalation**, potentially **increasing the credibility** of a state’s nuclear deterrence.

Despite the growing sophistication in cyber capabilities and the willingness to use them for espionage or in concert with kinetic attack, the strategic value of nuclear weapons has not been diminished. The **insulated architecture** combined with a **robust and redundant command-and-control system** makes the existence of any viable cyber threat of exploitation **extremely low**. With the list of capable adversaries limited by both funding and motivation, it is **highly unlikely** that any nation will **possess**, or even **attempt to develop**, a cyber weapon **sufficient to undermine the credibility of nuclear weapons**. In both psychological and physical terms, the threat of the megabyte will never possess the ability to overshadow the destructive force of the megaton. Although the employment of cyberspace for military effect has brought new challenges to the international community, the role of nuclear weapons and their associated deterrence against open and unconstrained global aggression are as relevant now as they were in the Cold War.

**Section 5**

**2NC OV**

**The cp solves the entire case---the cp fiats the FTC issues clear enforcement guidance of section 5 which goes entirely through the FTC and solves both advantages without increasing prohibitions or expanding the scope** - **their generic enforcement deficits and competition threats don’t apply – guidance is a distinct process that differs from just enforcing the plan - that’s Kahn who is literally the chair of the FTC**

**View it through sufficiency---they lack any specific deficits and any deficit has to outweigh the risk of the net benefit**

**CP solves the case --- FTC enforcement of SEPs through the current scope of antitrust prevents abuse --- they’ll win in other circuits**

**Clippinger 21** --- Lucy S. Clippinger, associate at Baker & Miller PLLC. Her practice is focused on litigating complex cases in federal courts in the areas of antitrust, “CONCEDING THE BATTLE, BUT STILL WAGING THE WAR: FTC WILL CONTINUE TO TARGET PATENT LICENSING PRACTICES”, Baker & Miller LLC, April 22nd 2021, https://bakerandmiller.com/conceding-the-battle-but-still-waging-the-war-ftc-will-continue-to-target-patent-licensing-practices/

It may be tempting to draw conclusions from the Federal Trade Commission’s (FTC’s) recent decision to abandon its antitrust case against Qualcomm, but companies should not construe that decision as an indication that the FTC will **cease pursuing similar cases**. Once President Biden’s anticipated nominees to the FTC are seated, the FTC may be **even more** likely to challenge similar conduct, despite the Ninth Circuit Court of Appeal’s undisturbed ruling in Qualcomm’s favor. Therefore, companies should view the FTC’s failure to appeal that decision to the Supreme Court as a practical decision intended to limit that ruling’s applicability to the Ninth Circuit, rather than an indication that similar licensing practices can be adopted without fear of scrutiny by US competition authorities.

Qualcomm’s patent licensing practices **designed to avoid patent exhaustion**

The FTC’s challenge in Qualcomm focused on the intersection of antitrust and patent licensing law. Qualcomm, an innovator in the cellular technology space, holds various patents for technology that is integral to cellular systems currently in use. Some of Qualcomm’s patents are standard-essential patents (SEPs) in the cellular space, meaning that use of the patented technology is required to meet certain standards promulgated by international standard-setting organizations. Prior to incorporating a particular patent into a standard (thereby making the patent an SEP), standard-setting organizations require patent owners such as Qualcomm to agree to license SEPs to other industry participants on fair, reasonable and non-discriminatory (FRAND) terms. This is intended to eliminate the risk that the patent owner will selectively prevent other market participants from implementing the relevant standard.

In addition to holding a valuable patent portfolio, Qualcomm has possessed monopoly power in two modem chip markets (code-division multiple access (CDMA) and long-term evolution (LTE)) during portions of the past decade and has charged monopoly prices during those times (a practice which is not generally illegal under US law). Rather than licensing its patent portfolios to competitor chip makers, Qualcomm licenses **exclusively** to original equipment manufacturers (OEMs), avoiding the risk of patent exhaustion (i.e., Qualcomm’s patent rights in the technology being extinguished at the time the chip containing the technology is sold by the chip seller to the OEM). Qualcomm then collects a royalty rate set as a percentage of the OEM’s end product sales price and does so regardless of whether the chip used in the product was purchased from Qualcomm, as the product necessarily uses Qualcomm’s patented technology to comply with the relevant standards. Qualcomm itself **does not manufacture end products**, so it **does not compete directly** with the OEMs that it licenses and to which it sells chips.

While Qualcomm licenses OEMs, it refuses to license competing chip manufacturers and instead has a policy of **not enforcing its patent rights** against chip manufacturers. Qualcomm enters into agreements with manufacturers in which it permits manufacturers to sell chips only to OEMs that hold licenses from Qualcomm for the patented technology. To enforce this practice, Qualcomm has a ‘no chips, no license’ policy, under which Qualcomm will not sell its own chips to OEMs unless those OEMs have licenses for Qualcomm’s patented technology. This is another tactic to avoid patent exhaustion, as the OEM’s agreements to the license mean that they cannot assert that Qualcomm’s patent rights were exhausted when Qualcomm sold the chip to the OEM, depriving Qualcomm of its royalty rate on the end product.

Rival chip manufacturers and OEMs alike have complained that these practices are anti-competitive. Chip manufacturers assert that Qualcomm’s refusal to license them:

has limited their ability to attract OEM customers;

has limited entry and growth of competitors; and

fails to comply with Qualcomm’s commitment to license on FRAND terms.

OEMs such as Apple have complained that these practices amount to anti-competitive conduct designed to cement Qualcomm’s monopolies in the CDMA and LTE chip market and that they make it impossible for OEMs to source less expensive chips from other sources. In addition, consumers have filed an indirect purchaser antitrust class action against Qualcomm claiming that the same licensing practices have injured cell phone purchasers; an appeal of the decision granting class certification in that case is currently pending before the Ninth Circuit Court of Appeals.

FTC’s suit challenging Qualcomm’s licensing practices

In 2017 the FTC filed suit against Qualcomm, claiming that Qualcomm’s practices harmed competition in violation of the Sherman Act and the FTC Act. Following a bench trial, a California district court judge held that the licensing practices constituted unlawful restraints of trade and unlawful exclusionary conduct. The judge entered an order enjoining Qualcomm from engaging in these business practices. Qualcomm appealed the judge’s ruling to the Ninth Circuit Court of Appeals.

In August 2020 a three-judge panel of Ninth Circuit judges reversed the district court’s ruling and vacated the injunction. The panel concluded that the district court had focused on injury to OEMs, which were outside the relevant market of CDMA and LTE chip sales because they were buyers of such chips – not sellers. According to the panel, the district court should have focused on injury to Qualcomm’s rival chip manufacturers (i.e., the direct competitors in the markets for sales of CDMA and LTE chips). The panel suggested that by focusing on injury to chip buyers instead of chip sellers, the district court’s decision mischaracterized hypercompetitive conduct intended to extract lucrative profits from OEMs as anti-competitive conduct. This **specific conclusion** has created some confusion among antitrust commentators and may serve as a method of **distinguishing the Qualcomm decision going forward**, as harm to customers in the relevant market – in this case OEMs – is generally considered to be a **classic example of antitrust injury.**

When analyzing the licensing practices’ impact on rival chip manufacturers, the panel emphasized that Qualcomm’s situation did not fall within **the narrow circumstances** that create an antitrust duty to deal with a particular rival because:

Qualcomm’s licensing practices were economically rational and highly lucrative – in other words, Qualcomm was not foregoing short-term profits for long-term gains; and

Qualcomm did not single out specific rivals in its refusal to offer licenses, but rather refused to license chip manufacturers across the board, applying its OEM-licenses-only policy on an equal basis.

The panel also found that Qualcomm’s breach of its agreements with standards-setting organizations, even if proven, was insufficient to prove a violation of the Sherman Act’s anti-monopoly provisions. The panel expressed concern with using antitrust law to punish what were essentially breach of contract and patent law claims, particularly when such punishment might reduce incentives for companies to cooperate with standard-setting organizations.

The basic message of the Ninth Circuit’s decision was that the issues raised by the FTC could be addressed through contract and patent law. In other words, the core of the FTC’s claim was that Qualcomm had violated its FRAND licensing obligations by failing to license its chip competitors: that action can be addressed through contract law. At the same time, whether the royalties charged by Qualcomm were unreasonably high is a question that should be addressed through traditional patent law principles – not antitrust law.

FTC’s abandonment of the case and conclusions that should not be drawn

The FTC responded to the panel’s decision by filing a petition requesting that all judges sitting on the Ninth Circuit Court of Appeals rehear the appeal in Qualcomm, which was denied. However, rather than filing a petition for certiorari to request that the Supreme Court hear the case, the FTC announced at the end of March 2021 that it would not seek Supreme Court review. In an accompanying statement, the FTC’s Acting Chair Rebecca Kelly Slaughter emphasized that that the FTC’s decision was not based on a belief that the Ninth Circuit panel’s conclusions were correct. The statement explained that Slaughter believed that the district court’s decision was correct and that:

[n]ow more than ever, the FTC and other law enforcement agencies need to boldly enforce the antitrust laws to guard against abusive behavior by dominant firms, including in high-technology markets and those that involve intellectual property.

Slaughter also expressed ongoing concern regarding “anticompetitive or unfair behavior in the context of standard setting” and noted that the FTC would continue to monitor such behavior.

Based on this statement, companies would be **ill-advised** to view the FTC’s decision to abandon its appeal as a sign that licensing practices similar to those used by Qualcomm will no longer be targeted by government competition agencies or private parties. This view is bolstered by Biden’s recent announcement of Lina Khan, a law professor known for her skepticism of large corporations exercising market power, as a nominee for FTC commissioner. It is anticipated that Biden will nominate an additional Democrat commissioner after Rohit Chopra, an acting commissioner whose term has expired, is confirmed as the leader of another government agency. With three democrats seated on the five-member commission, it is likely that the majority of commissioners will share Slaughter’s view that the Ninth Circuit was mistaken in its view that Qualcomm’s conduct was hypercompetitive, not anti-competitive.

Rather than seeing the FTC’s abandonment of its appeal as a concession of the weakness of its claims, companies should view the move from the perspective of the FTC. Had the Supreme Court heard Qualcomm and agreed with the Ninth Circuit panel, the FTC’s ability to pursue administrative actions or federal court cases against companies using similar licensing practices may have been significantly impaired. By abandoning its appeal, the FTC **protected itself** from that risk; it is now free to pursue administrative actions and cases regarding similar licensing practices **in the majority of the United States**, including the District of Columbia, and is limited from pursuing them **only in the Ninth Circuit** (which covers the West Coast of the United States). However, for administrative FTC adjudications relating to similar licensing practices, companies that reside or transact business in the Ninth Circuit will have a clear incentive to file any appeals in that jurisdiction.

In light of the Ninth Circuit panel’s decision being **limited in geographic reach**, Slaughter’s statement and the anticipated future makeup of the FTC, companies should anticipate **increased pursuit of cases similar to Qualcomm, rather than diminished interest**. Accordingly, companies considering adopting licensing practices similar to those used by Qualcomm, and particularly companies that arguably have market power in the same or a related market, **should carefully consider the risks** of becoming an enforcement target; it seems likely that the FTC’s choice in Qualcomm was merely a concession of a lost battle, all while the FTC continues to pursue its long-term strategy of **winning the war.**

**FTC can and will win SEP cases throughout the country**

**BULUSU 21** --- SIRI BULUSU, “FTC to Come Back Stronger After Dropping Qualcomm Litigation”, Bloomberg Law, April 2nd 2021, https://news.bloomberglaw.com/antitrust/ftc-to-come-back-stronger-after-dropping-qualcomm-litigation

The Federal Trade Commission’s decision to drop its antitrust case against Qualcomm Inc. is part of a **broader strategy** to **regroup** and **build more favorable case law** rather than a retreat from this type of litigation, attorneys say.

Appealing the case to the U.S. Supreme Court now could end the FTC’s ability to target companies with similar business models if the justices rule against the agency.

But leaving in place last summer’s ruling from the U.S. Court of Appeals for the Ninth Circuit means the commission is free to pursue cases **similar to Qualcomm in other areas of the country.**

“From a legal standpoint, the decision in Ninth Circuit will be binding on the FTC with regards to what goes on out West, **but that won’t be binding** when it comes to, say, the Fifth Circuit which covers Texas and some other places,” said David Long, a patent attorney and managing partner at Essential Patent LLC.

“So there’s a chance they thought, well let’s see if we can get some more victories in some other circuits,” he said.

And an upcoming shift in the independent agency’s political makeup likely means increased scrutiny of companies using similar patent licensing models.

**2NC v PDB**

**Plan and perm include *non-FTC actors*.**

**Involvement of external actors *that are political appointees* creates *perceptions* of external influence. That erodes the signal of FTC independence.**

* The article outlines a difference between political appointees subject to *at-will* removal by POTUS (serve at the pleasure of the President – i.e. Solicitor General, AG, DOJ, etc) **VIS-A-VIS** *for-cause* agency Committee members. FTC Commissioners – an example in the article - operate on 7 year terms, spanning Administrations, and can solely be removed for-cause.

**Kovacic ‘15**

et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

On March 16, 1915, the Federal Trade Commission (“**FTC**”) opened for business and began what has proven to be a **uniquely compelling experiment** in economic regulation. The FTC was the first law enforcement agency to be designed “from the keel up” as a competition agency. One vital consideration in forming the new institution was to define its relationship **to the political process**. Among other features in the original FTC Act, Congress provided that the agency’s commissioners would have fixed, seven-year terms and that a commissioner could be removed during his or her term only **for cause**.

Through these and other design choices, Congress created what would come to be known **as the world’s first “independent” competition agency**. The **FTC**’s degree of **insulation from** direct **political control** supplied **an influential model** **of institutional design** and contributed to **the acceptance of a norm**, evident in modern commentary about competition law, that **public** enforcement agencies **should be politically independent**. This Essay examines the relationship of competition agencies to the political process. We use the experience of the FTC to address three major issues. First, what does it mean to say that a competition agency is “independent”? Second, how much insulation from political control can a competition agency achieve in practice? Third, how is the pursuit of political independence properly reconciled with demands that a competition agency be accountable for its decisions—an important determinant of legitimacy—and with the need to engage with elected officials to be effective in performing functions such as advocacy?

In addressing these questions, we seek to develop themes we have addressed in earlier work involving the establishment and operations of the FTC. We approach the topic in the spirit of Professor Herbert Hovenkamp, whose work shows how historical research can improve our understanding of a competition system. Professor Hovenkamp’s scholarship has deeply influenced our approach to this field, and we are honored to participate in a symposium that celebrates his extraordinary contributions to competition law and policy.

II. The Relationship of the Competition Agency to the Political Process: Design Tradeoffs

The suggestion that competition agencies **be independent** reflects a desire to enable enforcement officials to make decisions **without** destructive **intervention** by elected officials or by **political appointees who head other** government **departments**. One method of providing the desired independence from these forms of interference is for the law to state that competition agency leaders can be removed by elected officials only for good cause. Political intervention undermines sound policy making when it causes the agency to bend the application of competition law to serve special interests at the expense of the larger society’s well being. As discussed below, because antitrust-relevant behavior (e.g., a merger) can involve large commercial stakes and affect the economic fortunes of individual firms and communities, the decisions of a competition agency can attract close scrutiny by heads of state, legislators, and cabinet officials.

The need for independence arguably varies according to the function that the competition agency is performing. In carrying out some functions, particularly certain law enforcement functions, the agency requires **greater insulation from political pressure**. For other functions, broader involvement by elected officials in setting the agency’s agenda and determining its choice of projects may be appropriate.

The **utmost degree of independence** is warranted when a competition agency **functions as an adjudicative decisionmaker**. Congress gave the FTC authority to use **administrative** adjudication to **develop norms** of business conduct. After the agency initiates a formal prosecution and functions as a trade court, the legitimacy of its decisions **requires** the **highest degree of assurance** that sound technical analysis, **not political intervention**, determined the outcome.

**2NC – Textual and Functional competition**

We meet it – the cp is clearly textually competitive and is functionally competitive because it uses precludes private action which the aff utilizes

**2NC v PDCP**

**We compete on four phrases:**

* **“Law v. Reg”** – (POGO ev – below - CP expands and enforcement Agency’s Regs/Rules – not external “Law”)
* **“increase prohibitions”** (selectively under-enforced v. more enforcement)
* **“expand scope”** (“agency interp” vs. “a larger legal scope than presently exists on paper”)
* **“core laws”** (FTCA vs Sherman and Clayton)

**First, Aff severs *“Law”***

* We aren’t prohibiting or expanding anything (below);
* But *if we were*, it’s NOT an expansion of the LAW:

**P.O.G.O. ‘15**

Project On Government Oversight *- Internally quoting Chief Justice Roberts’ Majority Opinion in US Supreme Court’s 7-2 decision in Department of Homeland Security v. MacLean* (2015) - which dealt largely with statutory interpretation. The Project On Government Oversight (POGO). POGO’s investigators are experts in working with whistleblowers and other sources inside the government who come forward with information that we then verify using the Freedom of Information Act, interviews, and other fact-finding strategies. We publish these findings and release them to the media, Members of Congress and their constituents, executive branch agencies and offices, public interest groups, and our supporters. In addition to quoting the Majority Opinion from the Chief Justice, this article was authored by POGO’s Phillip Shaverdian – who is currently a Judicial Law Clerk within the U.S. District Court System and, at the time of the writing, was an intern within and correspondent on behalf of the Project On Government Oversight - “Agency Rules and Regulations Are Not Laws” - FEBRUARY 10, 2015 - #E&F – modified for language that may offend - https://www.pogo.org/analysis/2015/02/agency-rules-and-regulations-are-not-laws/

Agency Rules and Regulations **Are Not Laws**

In January, in one of the most riveting cases of the current session, the Supreme Court ruled **7-2** in favor of Transportation Security Administration (TSA) whistleblower Robert MacLean, holding that **agency rules and reg**ulation**s** **do not equate** to **laws**. **Chief Justice John Roberts wrote the majority opinion for the Court.** And now that we’ve had time to celebrate the victory for MacLean, it’s time to turn our focus to what Department of Homeland Security v. MacLean may mean for whistleblowers in general.

Current federal whistleblower protection law—the Whistleblower Protection Act (**WPA**)—protects individuals against backlash from employers for disclosing information about “any violation of any **law,** **rule** or regulation” or “a substantial and specific danger to public health or safety” by a federal agency. However, in the same statute there exists an exception for disclosures that are “specifically **prohibited** by ***law***.”

The question the Court sought to answer was whether MacLean’s disclosures were “specifically **prohibited** by ***law***.”

The Homeland Security Act of 2002 states that the **TSA’s** “Under Secretary shall prescribe **reg**ulation**s** prohibiting the disclosure of information obtained or developed in carrying out security” if they decide that the disclosure of that information would “be detrimental to the security of transportation.” The resultant **reg**ulation**s** thus **prohibit** the disclosure of “sensitive security information” (**SSI**) without the proper authorization. Among the various types of information that could be designated SSI is “information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.”

The government argued that **MacLean’s** disclosures were “specifically prohibited by law” and that the WPA did not offer protection **for two reasons: 1)** the disclosure was prohibited by specific TSA **regulations** on SSI; **and** **2)** the **H**omeland **S**ecurity **A**ct authorizes the TSA to promulgate the **regulations**.

The Court addressed and subsequently **rejected both arguments**, affirming the judgment in favor of MacLean by the U.S. Court of Appeals for the Federal Circuit.

The Court **rejected the** government’s **argument** that a disclosure that is prohibited **by regulation** **is** also “specifically prohibited **by law,”** as prescribed by federal whistleblower statute.

The Court elaborates that **in the WPA** Congress repeatedly used the phrase “law, rule, or regulation,” but did not use the same phrase in the statutory language at question in this case. Instead, Congress used the word “law” alone, suggesting that it meant to exclude rules and regulations from the specific stipulation. Congress’s omission of “rule, or regulation” **must be** ~~viewed~~ (**considered**) as **deliberate** because of the use of “law” and “law, rule, or regulation” in the same sentence, as well as the frequent use of the latter phrase throughout the statute. These “two aspects of the whistleblower statute make Congress’s choice to use the narrower word “law” seem quite deliberate,” opined the Court.

After creating an exception for disclosures “specifically prohibited by law,” the WPA also creates a second exception for information “specifically required by Executive order to be kept secret.” The second exception is limited to actions taken by the President, and thus suggests that the first exception and the use of “law” is limited to actions by Congress.

The Court also reasons that “If **‘law’** included **agency rules and reg**ulation**s**, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that ‘specifically prohibited’ whistleblowing.” Instead, “Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.” **The Court concluded** that “it is unlikely that Congress meant to include rules and regulations within the word ‘law’” and that **the specificity of the phrase** “specifically **prohibited by law**” was meant to deliberately **exclude rules and reg**ulation**s**.

* **Second is *“Increase prohibition*”;**

**The underlying conduct’s *already prohibited* – albeit in vague terms which beg questions of enforcement and interpretation. That’s Khan – we’re re-including for clarity, but 1NC read all this:**

**NOTE**: All highlighted portions (green and blue) of this card were read in the 1NC. The 1NC card made solvency and competition claims – and, to offer context, we’ve used blue highlighting to outline the parts of the ev that augment our perm/competition claims.

**Kahn ‘21**

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

**Section 5** of the **F**ederal **T**rade **C**ommission **A**ct **prohibits** “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s **congressionally mandated duty** to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the **F**ederal **T**rade **C**ommission **A**ct to reach beyond the Sherman Act and to provide an alternative institutional framework for **enforcing** the **antitrust** laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 **These concerns spurred the passage of the FTC A**ct, which created an administrative body that could police unlawful business practices with **greater expertise** and **democratic accountability** than courts provided.15

**At the heart of the statute was Section 5,** which declares “unfair methods of competition” **unlawful**.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides **no private right of action**, shielding violators from **private lawsuits** and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to **leave it to the Commission** to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the **various unlawful practices**, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the **agency’s Section 5 authority**, holding that **the statute**, **by its plain text**, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

**The CP has an agency alter its enforcement discretion related to an existing statutory prohibition. That’s not an increase in prohibitions.**

**Kusserow ‘91**

R.P. Kusserow, Inspector General, Department of Health and Human Services - 42 Code of Federal Regulations - Part 1001, RIN 0991-AA49 – “Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions” - Monday, July 29, 1991 (56 FR 35952) - AGENCY: Office of Inspector General (OIG), HHS. ACTION: Final rule - #E&F - https://oig.hhs.gov/fraud/docs/safeharborregulations/072991.htm

Response: This regulation covers many categories of business arrangements, providing standards to be met within each safe harbor provision. If a person participates in an arrangement that fully complies with a given provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of that provision.

**This regulation does not expand the scope of activities that the statute prohibits**. The **statute itself** describes **the scope of illegal activities**. The legality of a **particular** business arrangement must be determined by comparing the **particular facts** to the proscriptions of **the statute.**

The failure to comply with a safe harbor can mean **one of three things**. **First,** as we stated in the preamble to the proposed rule, it may mean that **the arrangement does not fall within the ambit of the statute**. In other words, the arrangement is not intended to induce the referral of business reimbursable under Medicare or Medicaid; so there is no reason to comply with the safe harbor standards, and no risk of prosecution.

**Second,** **at the other end of the spectrum**, **the arrangement could be a clear statutory violation** and also not qualify for safe harbor protection. In that case, assuming the arrangement is obviously abusive, prosecution would be very likely.

**Third,** the arrangement may violate the statute in a less serious manner, although not be in compliance with a safe harbor provision. Here there is no way to predict the degree of risk. Rather, the degree of the risk depends on an evaluation of the many factors which are part of **the decision-making process** regarding case selection for investigation and prosecution. Certainly, in many (**but not** necessarily **all**) instances, prosecutorial discretion would be exercised not to pursue cases where the participants appear to have acted in a genuine good-faith attempt to comply with the terms of a safe harbor, but for reasons beyond their control are not in compliance with the terms of that safe harbor. In other instances, there may not even be an applicable safe harbor, but the arrangement may appear innocuous. But in other instances, we will want to take appropriate action.

We do not believe the Medicare and Medicaid programs would be properly served if we assured protection in all instances of "substantial compliance," "technical violations," or "de minimis" payments. **Unfortunately**, these are vague concepts, **subject to differing interpretations.** In this regulation, we have attempted to provide bright lines, to the extent possible, for safe harbors in order to provide clarity and predictability as to what conduct is immune from government action. Our endorsement of the concepts mentioned above would only serve to blur these lines and produce litigation as to what "substantial," "technical" and "de minimis" really mean. The OIG therefore declines to adopt these concepts.

**Third they sever “expand scope”.**

**Agencies can *lean on interpretive discretion to reverse selective under-enforcement*. That’s distinct from *expanding legal scope on paper*.**

**Theoretically, Section 5 could already challenge the practice outlined by the Aff.**

**Federal Register: Rules and Regulations - ‘9**

Federal Trade Commission - *16 Code of Federal Regulations*- 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; *Final Rule* - “Rules and Regulations” - Federal Register - Vol. 74, No. 198 - Thursday, October 15, 2009 - #E&F - https://www.ftc.gov/sites/default/files/documents/federal\_register\_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf

b. Examples 7-9 – New Media Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.91 Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission’s **prior commitment** to address word of mouth marketing issues on a case-by-case basis.92 Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the growth of these (and other) new media.93 Two commenters said that industry self-regulation is sufficient.94

The Commission’s inclusion of examples using these new media is not inconsistent with the staff’s 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of ‘‘buzz marketing’’ were appropriate.95 All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides **do not expand the scope** of liability **under Section 5**; they simply provide guidance as to how the Commission intends **to apply** governing **law** **to** various **facts**. **In other words**, the Commission ***could*** challenge the dissemination **of deceptive representations made via these media** **regardless of whether the Guides contain these examples**; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.96

**Those cards access the Precision and Context warrants.**

**They’re from the formal Code of Federal Regs, use topic phrases, and get at whether agency interps “prohibits” or “expands scope”.**

**Fourth they sever “core laws”**

**Core laws are Sherman and Clayton**

**Felsenfeld 93** – Carl Felsenfeld Professor of Law, Fordham University School of Law. “The Bank Holding Company Act: Has It Lived Its Life?,” *Villanova Law Review*, Vol. 38, January 1993, https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2821&context=vlr

It is well established that, despite the "extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition,"480 the United States' core antitrust statutes (the Sherman and Clayton Acts) apply to banks.481 There is respectable opinion that "existing antitrust laws are fully adequate to guard against anticompetitive mergers or acquisitions, or other anticompetitive activity, in the banking industry."482 A proposal to remove the BHCA, however, is not a suggestion that only the Sherman and Clayton Acts would impose antitrust limitations on banks. The other bank laws and regulations would continue in effect.483

Whether the antitrust laws are sufficient to curb bank abuse that is otherwise dealt with by the BHCA has been disputed. One relatively early opinion suggested that illicit bank behavior is "almost impossible to detect and prove in a court of law" and, consequently, explicit legislation, like the BHCA, which foreclosed banks from other fields was desirable. 484 In contrast, a former Deputy Assistant Attorney General for Antitrust later opined that bank antitrust problems within the BHCA sphere are simply traditional antitrust issues that can be dealt with by those laws.485 He was countered by a then current Attorney General for Antitrust who believed the BHCA was essential to keep banks separate from commerce.486 Because these last two views were expressed in 1969 and 1970, one must assess current antitrust laws to analyze what view is valid today.487

There is a high degree of flexibility in the antitrust laws. One of the functions of the antitrust laws is to adapt their application to the particular industry under consideration and to the particular markets within which the industry operates.488 The general approach of the antitrust laws towards a merger or consolidation of the sort that currently requires preapproval under the BHCA is to accept the industry in its existing form as the norm and then to establish the effects of the merger or acquisition in terms of its effects on that norm. The net effect is the antitrust laws' disposition in favor of the existing structure.

The Justice Department has the power under existing law to challenge banking mergers and acquisitions for violation of the antitrust laws even when the Fed has first found the BHCA's antitrust tests satisfied.489 For example, in December 1990, the Justice Department challenged the acquisition of First Interstate of Hawaii, Inc. by First Hawaiian, Inc. under the BHCA even though the Fed had approved the transaction. The suit was settled by the agreement of the parties to a divestiture plan proposed by the Justice Department.490 In July 1991, the Justice Department challenged an acquisition by Fleet/Norstar of assets from the FDIC after the transaction was approved by the Fed under the Bank Merger Act.491 As these two cases show, the Justice Department has sufficient regulatory authority to police the antitrust aspects of bank acquisitions effectively without the BHCA statutory protections.

2. Federal Trade Commission Act

Secondary to the core antitrust laws, and of more potential than experiential significance in regulating bank holding company behavior in the absence of the BHCA, is the Federal Trade Commission Act (FTC Act). \492 In its broad scope the FTC Act is inapplicable to banks. 493 The FTC, however, may require banks to produce documentary evidence required during agency investigations. 494 The FTC Act's basic function is the prevention of precisely the type of activity that banks and their nonbank affiliates were accused of in the initial drafting of and amendments to the BHCA 495 - the perpetration of "unfair methods of competition." 496

**Aff severance a voter – Plan’s the locus, we’re reactive, so it’s worse for them. No clash or in-round education. Independently proves they are not topical!**

**It is a zero-sum game – so consider whether it’s *worse* if Cplan were – instead – a topical Aff. Their thread NECESSARILY mean “Agency interp Affs” are topical - which Ends EDUCATION about “prohibit vs. agency interpretation”, wishes away the topic, and lets aff’s be squo interps of laws - perms cannot include non-topical characterizations of the aff**

**A2: Treble Damages**

**FTC can issue civil damages under Penalty Offense Authority**

**Gordon ‘21**

et al; Len Gordon, chair of Venable’s Advertising and Marketing Group, is a skilled litigator who leverages his significant experience working for the Federal Trade Commission (FTC) to help protect his clients’ interests and guide their business activity. Len regularly represents companies and individuals in investigations and litigation with the FTC – From: “The Regulatory Road Ahead: Payments Law Virtual Bootcamp” - June 8, 2021 – This specific section was written January 19, 2021 and reconsolidated into a broader doc - #E&F - https://www.venable.com/-/media/files/events/2021/06/the-regulatory-road-ahead.pdf?la=en&hash=7DA62C06072C24DB3A3C8A743AEE41FCC12E3410

Finally, the FTC could utilize a somewhat unused avenue for obtaining redress—the **Penalty Offense Authority**, which we’ve previously discussed here. This Authority authorizes the FTC to seek civil penalties (**directly not through the DOJ**) against a defendant in federal court where (1) the FTC has obtained a litigated cease and desist order against another party through an administrative proceeding p**ursuant to Section 5**(b) **of the FTC A**ct**;** (2) the cease and desist order identifies a specific practice as unfair or deceptive; and (3) a party on notice of the order (i.e., someone with actual knowledge that the practice is unfair or deceptive) then engages in that same violating conduct after the order is final.

**2NC – A2: Rollback**

**2NC---AT: Rollback---Guidance**

**Rollback doesn’t assume our specific mechanism:**

**1. Section 5---it’s widely viewed by previous Court decisions as legitimate for the Commission to determine---that’s Khan**

**2. Policy statements---even if guidance is traditionally rolled back, courts have determined that the precise specification of conduct is binding---that’s Seidenfeld.**

**3. Links to them---their evidence is reasons why the courts won’t adhere to Section 5 standards---if they do use FTC rulemaking, then it links to them.**

**4. Empirics---courts will characterize them as interpretative and won’t overturn them.**

**Seidenfeld ‘11**

Mark Seidenfeld – Patricia A. Dore Professor of Administrative Law, Florida State University College of Law. “Substituting Substantive for Procedural Review of Guidance Documents” - 90 TEX. L. REV. 331 (2011) -#E&F – continues to footnote #97 - https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1004&context=articles

2. **Interpretive Rules**.—The picture is slightly clearer for purported **interpretive rules**, although the distinction between interpretive and legislative rules is still far from pellucid.**97** Again, the focus is on whether the rule “carries the force and effect of law,”98 but the emphasis for evaluating an interpretive rule is whether the binding obligation is created by the rule rather than reflecting a preexisting obligation imposed by the statute or regulation the rule purports to interpret.99 Operationally, this inquiry looks at the relation between the rule and the text it interprets.100 For example, courts have stated that a rule is interpretive if it spells out a duty “fairly encompassed” within the regulation that the interpretation purports to construe.101 The basis for this test is that a rule that is fairly encompassed does not create an independent legal obligation, but rather merely clarifies one that already exists. Similarly, courts have held that a rule that is inconsistent with, or amends, a legislative rule cannot be interpretive, because such a rule would impose new rights or obligations.102 This standard, however, still leaves difficult line-drawing choices for determining whether the connection between an announced interpretation and the text being interpreted is sufficiently close to characterize the announcement as an interpretive rule. In fact, courts often deviate from the strictures of the doctrine they have created by holding that interpretations that are clearly not encompassed in the language being interpreted were, nonetheless, interpretive rules.103

**97.** Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Courts will often characterize **guidance doc**ument**s** that are **not** clarifications of language nonetheless as interpretive, and then **uphold them** even though they are sufficiently definitive that a court almost certainly would reverse them were they characterized as policy statements. See John F. Manning, Nonlegislative Rules, 72 GEO. WASH. L. REV. 893, 926–27 (2004) (evaluating the D.C. Circuit’s method of identifying “procedurally invalid nonlegislative rules” and observing that “the resulting inquiry has an air of arbitrariness to it”).

**One – SCOTUS is a firewall.**

**1NC Khan says The Court’s repeatedly affirmed the FTC’s Section 5 authority.**

**And, their args don’t assume the 1NC distinctions in our CP Text.** **Our planks about *policy statements* and *data sets* mean CP avoids politics and rollback.**

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

**Kovacic ‘15**

et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

A. Greater Specification of Authority

One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

B. More Transparency, Including Reliance on Policy Statements and Guidelines

Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful **barrier** to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of **complete data sets** that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation.

Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, **the Commission strengthened external perceptions** (within the business community and **within Congress**) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban **u**nfair **m**ethods of **c**ompetition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, **the FTC**’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use **section 5** of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. **By issuing a policy statement before** commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely **increase confidence** within industry and **within Congress** that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

**Prefer SCOTUS *precedent* AND *empirics dipped from when the Court’s ideology was most aligned with the Chicago School*.**

**Dagen ‘10**

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

The FTC enforces Section 5, which makes unlawful “unfair methods of competition.”118 **In FTC v. Sperry** & Hutchinson Co., the Supreme Court held that Section 5 “empower[s] the Commission **to define** and **proscribe** an unfair competitive practice, **even though the practice does not infringe either the letter or the spirit of the antitrust laws**.”119 Many believe that the interpretation of Section 5 as broader than the Sherman Act is a remnant of a bygone era. But **even during the Chicago School era**, the Supreme Court reaffirmed its understanding that Section 2 and Section 5 differed. **For example, in Copperweld Corp**. v. Independence Tube Corp., while attempting to limit the reach of the Sherman Act, the Reagan antitrust team, led by Assistant Attorney General William Baxter, and FTC Chairman James Miller, submitted an amicus brief highlighting that “[t]he courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act.”120 The Court thereafter explained that single firm conduct was governed not only by Section 2 but also by Section 5.121 In 1986, the Court more specifically and directly referenced the “spirit” of Section 5, stating that Section 5 “encompass[es] not only practices that violate the **Sherman** Act and **other antitrust laws**, . . . but also practices **that the Commission determines are against public policy for other reasons.”**122

**We have issue specific ev – courts uphold**

**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)

Despite the procompetitive benefits generally associated with standard setting by SSOs, such activities do not fall into a safe harbor insulated from the antitrust laws. To the contrary, the Supreme Court and the lower courts have **repeatedly held** that both SSOs and their members can violate Section 1 of the Sherman Act. For example, in Allied Tube & Conduit Corp. v. Indian Head, Inc., the Supreme Court held that a group of manufacturers violated Section 1 when they manipulated the standard selection process in order to exclude a competing technology from the standard.65 And in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., the Court found that a scheme by a member company and an officer of the SSO to cause a competitor’s product to be wrongfully deemed noncompliant with the standard violated both Sections 1 and 2 of the Sherman Act.66

**And – post-dating distinction**

**Aff Rollback args don’t assume the FTC’s recent recission of 2015 guidance *OR* our Cplan plank that sets a clear interpretation.**

**Salop ‘21**

et al; Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center “A New Section 5 Policy Statement Can Help the FTC Defend Competition” – Public Knowledge – July 19th - #E&F - https://publicknowledge.medium.com/a-new-section-5-policy-statement-can-help-the-ftc-defend-competition-a76451eacb39

We generally agree with the **F**ederal **T**rade **C**ommission’s decision to rescind its 2015 Section 5 Policy Statement. Just as the Department of Justice and Federal Trade Commission Merger Guidelines are regularly updated on the basis of agency experience, legal and economic developments, so should this type of policy statement. Rescinding the old statement is particularly relevant in light of the growing recognition of the hurdles preventing effective antitrust enforcement.

Calls for reform have not come solely from Neo-Brandeisian commentators (including both FTC Chair, Lina Khan, and Tim Wu, now a member of the National Economic Council). The need for reform and a varied set of proposals has also been expressed by economics-oriented commentators, including this group of former Justice Department enforcers, Jonathan Baker and Herbert Hovenkamp, among others. Chair Khan in her statement suggested that the Commission would next consider replacing the Policy Statement with a new statement explaining **how they plan to use Section 5** to increase competition. We think this would **be a valuable way to** show parties and courts what is coming. This article provides several suggestions that would be useful to consider and possibly include in the revised Section 5 Policy Statement. It should not be taken as an exhaustive list; there certainly may be other approaches to a revised statement that could also be effective.

A revised Policy Statement should make it clear that Section 5 is not identical to the Sherman and Clayton Act and that conduct can be challenged as an **unfair** method of **competition** under Section 5 even if it would not violate these other antitrust laws. In fact, even the original 2015 Policy Statement explicitly made this point. But the distinction between Section 5 and these other statutes is often ignored or suppressed by commentators who object to more vigorous antitrust enforcement by the FTC. Eventually, the FTC’s cases and rules under Section 5 will likely face the scrutiny of the courts. At that time, it may be **particularly helpful** to have **a clear** Policy **Statement of how the FTC is** **interpreting** Section 5. This can help maximize the impact the FTC can have, while assuaging concerns of detractors who say there is no limiting principle.

**Our *Guidance distinction* means no rollback**

* Agencies can issue *“Guidance”* (and enforce) – or they can create *“Rulemaking”* – both have legal force, but the latter tends to encounter more judicial review/resistance.

**Raso ‘10**

CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

**5. Judicial Challenge**

Agencies concerned that the courts will invalidate their policy decisions will be motivated to use **guidance documents** more frequently relative to **legislative rules.** Guidance documents are advantageous because **they are less likely to be challenged**. **Even if challenged**, agencies have a reasonable **probability of winning** on **ripeness** or finality grounds.

**Rollback assumes Core Antitrust *at present* – it’s less likely precisely because the Aff *expands beyond* current core understandings.**

**Dagen ‘10**

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

In Part III, I provide a more comprehensive analysis of Section 5. I begin with a general discussion of the breadth of Section 5 and then address the concern that using Section 5 to fill in gaps in the antitrust laws will cause mayhem. Although some maintain that the FTC should not use Section 5 because three different appellate courts chastised the FTC in the 1980s for trying to expand the antitrust laws, those defeats involved core competition practices that the courts protect the most. **As** the **conduct moves** away **from** either **the core** or the essential, authority under both the Sherman Act and **the FTC A**ct is broader.

**FTC Independence DA**

**2NC – OV**

**The internal net benefit is *perception of FTC independence*.**

**The CPlan *boosts it* because the FTC’s the lone actor. Plan and perm *don’t solve* - they involve *non-FTC actors*.**

**Our Nam cards are shockingly strong. The global community models FTC independence levels. External actors might be good or bad domestically, but – overseas - they greenlight involvement of political appointees. That boosts mercantilist postures and crushes global free trade.**

**Free trade turns case – it checks ongoing global wars which structurally complicate the Aff advantages AND detract resources for Aff enforcement.**

**Our ev lists six extinction warrants – we’ll deepen the terminals:**

**( ) geoengineering overcompensates – fails and causes extinction.**

**Baum ‘13**

Et al; Dr. Seth Baum is an American researcher involved in the field of risk research. He is the executive director of the Global Catastrophic Risk Institute (GCRI), a think tank focused on existential risk. He is also affiliated with the Blue Marble Space Institute of Science and the Columbia University Center for Research on Environmental Decisions. He holds a PhD in Geography and authored his dissertation on climate change policy: “Double catastrophe: intermittent stratospheric geoengineering induced by societal collapse” - Source: Environment Systems & Decisions - vol.33, no.1 pp. 168-180 - #E&F – available via: https://pubag.nal.usda.gov/catalog/122717

Perceived failure to reduce greenhouse gas emissions has prompted interest in avoiding the harms of climate change via geoengineering, that is, **the intentional manipulation of Earth system processes**. Perhaps the most promising geoengineering technique is **stratospheric aerosol injection** (**SAI**), which reflects incoming solar radiation, thereby lowering surface temperatures. This paper analyzes a scenario in which SAI brings great harm on its own. The scenario is based on the issue of SAI intermittency, in which aerosol injection is halted, sending temperatures rapidly back toward where they would have been without SAI. The rapid temperature increase could be quite damaging, which in turn creates a strong incentive to avoid intermittency. In the scenario, a catastrophic societal collapse eliminates society’s ability to continue SAI, **despite the incentive**. The collapse could be caused by a pandemic, nuclear war, or other global catastrophe. The ensuing intermittency hits a population that is already vulnerable from the initial collapse, making for a **double catastrophe**. While the outcomes of the double catastrophe are difficult to predict, **plausible** worst-case scenarios include **human extinction.** The decision to implement SAI is found to depend on whether global catastrophe is more likely from double catastrophe or from climate change alone. The SAI double catastrophe scenario also strengthens arguments for greenhouse gas emissions reductions and against SAI, as well as for building communities that could be self-sufficient during global catastrophes. Finally, the paper demonstrates the value of integrative, systems-based global catastrophic risk analysis.

**( ) *Prolif* and *climate* each independently cause extinction**

* Climate change is true and real bad
* Prolif = probable scenario for extinction bc of *miscalc*, *user error*, or *unauthorized use*.

**Thakur ‘15**

Ramesh Thakur, Director of the Centre for Nuclear Non-Proliferation and Disarmament in the Crawford School of Public Policy, The Australian National University. 2015. “Nuclear Weapons and International Security.” Routledge

The world faces two **existential threats:** **climate** change and **nuclear Armageddon**. Those who reject the first are derided as denialists; those dismissive of the second are praised as realists. Nuclear weapons may or may not have kept the peace among various groups of rival states; they could be **catastrophic** for the world if **ever used by both sides in a war between nuclear-armed rivals**; and the prospects for their use have **grown** since the end of the Cold War. Even a **limited regional** nuclear war in which India and Pakistan used 50 Hiroshima-size (15kt) bombs each could lead to a **famine** that kills up to a **billion people.** 1 Having learnt to live with nuclear weapons for 70 years (1945–2015), we have become desensitized to the gravity and immediacy of the threat. The **tyranny of complacency** could yet exact a **fearful price with nuclear Armageddon**. The nuclear peace has held so far owing as much to good **luck** as sound stewardship. Deterrence stability depends on rational **decision**-maker**s** being always in office on all sides: a **dubious** and **not very**. **reassuring precondition** It depends equally critically on there being no **rogue launch**, **human error** or system **malfunction**: an impossibly high bar. For nuclear peace to hold, deterrence and fail-safe **mech**anism**s** must work **every single time**. For nuclear Armageddon, deterrence or fail-safe mechanisms need to break down **only once**. This is not a comforting equation. It also explains why, unlike most situations where risk can be mitigated after disaster strikes, with nuclear weapons all risks must be mitigated before any disaster. 2 As more states acquire nuclear weapons, the risks **multiply exponentially** with the requirements for rationality in **all decision-makers**; robust **c**ommand-**and**-**c**ontrol systems in **all states**; **100 percent reliable fail-safe mechanisms** and procedures against accidental and unauthorized launch of nuclear weapons; and **totally unbreachable security** measures against terrorists acquiring nuclear weapons by being able to penetrate one or more of the growing nuclear facilities or access some of the wider spread of nuclear material and technology.

**( ) Arctic war means extinction**

* outweighs on probability and magnitude – war exits the region, goes nuclear, and can be instigated by miscalc.

**Chrisinger ‘20**

Internally quoting Niklas Granholm – who is Deputy Director of Studies at FOI, the Swedish Defence Research Agency, Division for Defence Analysis. Mr Granholm currently heads a study project on behalf of the Swedish Foreign Ministry studying the strategic developments in the Arctic. He was seconded to the Swedish Ministry of Defence in 2007 and during 2006 was a Visiting Fellow to RUSI. He has been an Associate Fellow of the Institute since 2007. Between 1999-2006, he headed the project for international peace support and crisis management operations on behalf of the Swedish Ministry of Defence. From 1997-99 he was seconded to the Swedish Ministry for Foreign Affairs, Division for European Security Policy. David Chrisinger is a Logan Nonfiction Fellow and a contributing writer to The New York Times Magazine and The War Horse, an award-winning nonprofit newsroom educating the public on military service, war, and its impact. Prior to this, David worked at the U.S. Government Accountability Office as a Strategic Planning and Foresight Analyst. For nearly nine years, he taught public policy writing, consulted with researchers on the design and execution of governmental audits and evaluations, facilitated message development exercises, and wrote and edited reports and testimonies for the U.S. Congress. For six years, he also taught public policy writing at Johns Hopkins University. “It Would Be a Mistake to Underestimate Russia”: The New Cold War That’s Emerging in the Arctic” – The War Horse – Nov 19th - #E&F - https://thewarhorse.org/military-arctic-new-cold-war-with-russia-and-climate-change/

One of the greatest risks, **according to Niklas Granholm**, is that the Arctic region will undergo a “Balkanization” like what occurred in Eastern Europe after the fall of the Soviet Union. Granholm is the deputy director of studies at the Swedish Defence Research Agency, and he points to the Faroe Islands calling for self-rule from Denmark, Scotland clamoring for independence from the United Kingdom after Brexit, and the resurgence of troubles in Northern Ireland as indicators that more fragmentation and political division in the Arctic could lead to less cooperation or even hostility. Paired with the great-power competition among the United States, Russia, and China, any **Balkanization of the region** would, in Granholm’s words, be a “double whammy” and could make the Arctic much more combustible.

“Whatever **happens in the Arctic** **won’t stay there**,” he said. “It **will escalate.”**

Is this the beginning of a new Cold War?

The new Norwegian radar system undermines Russia’s ability to launch a retaliatory nuclear strike from its submarine fleet in the Arctic, New York Times reported, and that bothers Russia, according to Lt. Col. Tormod Heier, a faculty adviser at the Norwegian Defense University College. Because it upsets the strategic nuclear balance between the United States and Russia, the new radar system establishes a blow to Russia’s last indisputable claim to great-power status.

“There is a new Cold War,” Heier told the Times, adding that the risk of nuclear war was **much higher now** than in the old Cold War “because Russia is so much **weaker,** and because of that much **more dangerous and unpredictable**.”

In recognition of the threats posed by a new Cold War, the Pentagon released an updated National Defense Strategy in January 2018. While the document makes no specific mention of the Arctic, it recognizes the threats posed by great-power competition (especially as it relates to America’s eroding competitive edge) and clarifies that potential conflict with Russia and China had supplanted terrorism **as the biggest threat** to American national security.

To achieve this end state, the United States must confront three risks that, if they materialized, would stand in the way. First, bad actors could use the Arctic as a staging ground for an attack on the U.S. homeland. Second, states like Russia and China could challenge the rules-based international order in the Arctic in ways that could lead to conflict. Third, but not least, tensions, competition, and conflict in other parts of the world could spill over into the Arctic.

Three months later, the U.S. Coast Guard released its own strategy for the Arctic, which called for funding to upgrade ships, aircraft, and unmanned systems operating in the region. Admiral Karl Schultz, the Coast Guard’s commandant, told the Washington Post that the goal should be to return the Arctic to a “peaceful place where we work to cross international lines here with partner nations that share interests in a transparent fashion.” Projecting sovereignty, he continued, will help expedite that return.

But all these plans have failed to persuade decision makers to establish new organizational structures designed to address changes in the Arctic wrought by climate change and the rush to exploit the region’s natural resources. The plans do not include any substantive plans to guide the construction of infrastructure needed in the region, nor do they detail how resources will need to be reallocated to mitigate risks and help the United States reach its desired end state. They provide a vision for the future, but they do not provide a road map on how to get there.

**Russia won’t back down**

In late August 2019, a Russian submarine emerged from the icy waters near the North Pole and fired a Sineva-type intercontinental ballistic missile capable of carrying a nuclear warhead. That same day, another Russian submarine in the Arctic Circle launched a Bulava-type intercontinental ballistic missile from beneath the surface of the Barents Sea. One missile hit a remote corner of Russia’s Pacific coast, and the other landed on the Kanin Peninsula. Twelve years after Russia planted its flag on the seabed below the North Pole, this demonstration of its military capabilities in the Arctic can be seen as its latest attempt to assert its sovereignty in the region. Against a broader backdrop of distrust and diminished communication across the U.S.-Russia divide, there exists a risk that relatively minor miscalculations **or misinterpretations** could escalate into broader conflict.

**( ) Space conflict causes extinction**

* creates “use it or lose it” pressures bc an attack on a satellite creates communication and (subsequently) warfighting vulnerabilities;
* outweighs on probability

**Marshall ‘21**

Timothy John Marshall is a British journalist, author and broadcaster, specialising in foreign affairs and international diplomacy. He is a guest commentator on world events for the BBC. Marshall's blog, 'Foreign Matters', was short-listed for the Orwell Prize 2010.[8] In 2004 he was a finalist in the Royal Television Society's News Event category for his Iraq War coverage. He won finalist certificates in 2007, for a report on the Mujahideen, and in 2004 for his documentary 'The Desert Kingdom' which featured exclusive access to Crown Prince Abdullah and his palaces. “War in space is a growing threat – with hypersonic missiles and lasers to shoot down satellites” - This is an edited excerpt from the book: The Power of Geography: Ten Maps That Reveal the Future of Our World by Tim Marshall - April 20, 2021 - #E&F – modified for language that may offend - https://inews.co.uk/news/long-reads/space-war-lasers-missiles-satellites-conflict-tim-marshall-963439

**Without binding treaties**, low Earth orbit is a **probable battlefield** for military weapons aimed firstly at rivals within the belt, and then below it.

Russia and China have made organisational changes in their military, as have the Americans with the formation of the US Space Force in 2019. There are concerns that this activity violates the Outer Space Treaty, but it only states that weapons of mass destruction such as nuclear missiles should not be placed “in orbit or on celestial bodies or [stationed] in outer space in any other manner”. There’s nothing in international law to prevent the stationing of laser-armed satellites. And every page of history suggests that if one country does it, so will another, and then another. This is why the US Department of Defence has a mantra: “Space is a war-fighting domain.”

Britain’s space force

The UK Space Command was officially formed on 1 April, staffed from the Royal Navy (RN), British Army and Royal Air Force (RAF), the Civil Service and key members of the commercial sector. Its commander is a former Harrier jump jet pilot, Air Vice-Marshal Paul Godfrey.

The defence think-tank Rusi said after the British announcement that “questions remain as to what a space command means in practice, particularly for a medium-sized space power with few sovereign assets”. It added that “major decisions shaping the future of the UK’s military space capabilities and activities are likely to be taken this year”.

The head of the RAF, Air Chief Marshal Sir Mike Wigston, warned in November that Russia and China were developing anti-satellite weaponry and that the UK must be prepared.

“A future conflict may not start in space, but I am in no doubt it will transition very quickly to space, and it may even be won or lost in space, so we have to be ready and, if necessary, defend our critical national interests.”

In the previous century the possibility of nuclear war threatened to destroy **our** way of life; now the **weaponisation of space** ~~looks~~ (seems) as if it will pose a similar danger.

At the inauguration of Space Force, the then US President Donald Trump said: “American superiority in space is absolutely vital… The Space Force will help us deter aggression and control the ultimate high ground.”

The Chinese and Russians view space in the same way. We saw an early attempt to gain this advantage with the American Strategic Defence Initiative in the 80s, trying to develop a missile-defence system that could protect the US from nuclear attack. One of the options it investigated was space-based weaponry, earning it the name “Star Wars”.

Now the development of hypersonic missiles, which can fly at more than 20 times the speed of sound, is also focusing attention on this area. Unlike conventional intercontinental ballistic missiles, hypersonic missiles do not fly in an arc and can change direction and altitude. Therefore, at launch the potentially targeted country cannot work out where they are heading and co-ordinate their defences. Hitting a missile with a missile is hard enough; hypersonic missiles make it much more difficult.

Governments are examining the possibility of positioning anti-hypersonic laser systems in space to fire downwards. But machines capable of firing on the laser systems would then be developed, and then defensive systems for them – a space arms race.

The situation will only become more complicated as we continue to turn science fiction into reality. An example of that came in July 2020. Russia’s Kosmos 2542 military satellite had been “stalking” an American satellite, USA 245, at times coming within 150km of it, a distance regarded as close. It then released a mini satellite from within it – Kosmos 2543. The US military calls these “Russian dolls”. This “baby” Kosmos also shadowed the American spacecraft before manoeuvring towards a third Russian satellite. It then appeared to fire a projectile travelling at more than 400mph.

The Kremlin says it was simply inspecting the condition of its satellites, but the British and Americans both believe it was a weapons test. The US also shadows foreign satellites and is researching its own space weapons, but it was furious about what it believes was a breach of conventional behaviour. Such protocols and understandings are not codified in ratified law. But the threat to satellites is one that all countries must take seriously.

**Dangers in orbit**

Satellites are vital for modern warfare. All advanced countries rely on satellites for intelligence and surveillance. If a series of military satellites were hit, the high command would immediately worry that this was a precursor to being attacked on the ground. Early-warning systems of a nuclear launch might go down, triggering a decision on whether **to launch first.** Even if a conflict remained non-nuclear, the other side would have the advantage of precision-targeting its enemy and moving its own forces without being “seen”, while its opponent’s ability to send encrypted communications would also be limited.

**This is all a very real threat.** Already Russia, China, the US, India and Israel have developed “satellite-killer” systems. Techniques are being invented to shoot down satellites with lasers, to “dazzle” them so they cannot communicate, to spray them with chemicals, and even to ram them. And with no laws about who can be where, how close they can be and what activity is allowed, there is the growing danger of an exercise, or even faulty navigating, being mistaken for an impending attack.

**2NC – Error rates turns case**

**Turns case---**

**1. Exclusive FTC avoids false positives *AND* false negatives.**

**Salop ‘13**

Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center - “Guiding Section 5: Comments on the Commissioners” -Scholarship @ Georgetown Law - #E&F - https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2284&context=facpub

Commissioner Wright apparently is most concerned with over-deterrence from the FTC’s administrative process, where the FTC acts **as prosecutor and judge** and **is not subject to the constraints from an independent court** deciding motions to dismiss and summary judgment.25 **However,** there also are forces tipping in the other direction. First, the FTC is **an expert body** with **significant economics resources available**, resources that presumably can be used to **avoid false negatives** ***and* overdeterrence**.26 Second, the Commission’s bipartisan nature and the use of majority rule also have provided significant constraints over most of its history. Finally, if this is the main concern, his remedy proposal instead might be that the FTC be forced to all litigate its complaints in District Court.27

**False Negatives snowball and fiat cannot solve---turns solvency.**

**Kades ’18**

Michael Kades - Director, Markets and Competition Policy - Washington Center for Equitable Growth - Comments of the Washington Center for Equitable Growth. Michael worked as Antitrust Counsel for Sen. Amy Klobuchar (D-MN), the ranking member on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, where he led efforts to reform antitrust laws. Previously, he spent 20 years investigating and litigating some of the most significant antitrust actions as an attorney at the Federal Trade Commission. Topic 1: The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, since the Pitofsky Hearings - August 20, 2018 - #E&F - <https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0051-155290.pdf>

A False negative occurs when a rule incorrectly allows an anticompetitive practice; for example, if a judicial rule allows mergers that substantially reduce competition, generating higher prices and deadweight loss. The rule is under-inclusive. An antitrust rule that generates too many false negatives—**that fails to catch illegal behavior**—**will encourage anticompetitive activity.** The cost is **not** simply the defendant in a specific case avoiding liability— **firms will engage in more anticompetitive conduct because it is profitable**.

**t**

**Block --- A2: RoR Prohibits**

**Only Per Se PROHIBITS --- RoR “Limits”**

**Loevinger 61** --- Honorable Lee Loevinger- Assistant Attorney General in charge of the Antitrust Division. “THE RULE OF REASON IN ANTITRUST LAW” , *Section of Antitrust Law* , 1961, Vol. 19, PROCEEDINGS AT THE ANNUAL MEETING, ST. LOUIS, MISSOURI, AUGUST 7 THROUGH 11, 1961 (1961), pp. 245-251, https://www.justice.gov/atr/speech/file/1237731/download

Running through the history of antitrust law are two contrapuntal themes: A **prohibition** of restraint of trade **and a principle** lately called the "**rule of reason**" which **limits the prohibition**. The legal rule against restraint of trade began in the 15th century in cases holding that a contract by which a man agreed not to practice his trade or profession was illegal.1 However, in the course of development of the common law, it became established that agreements which were ancillary to the sale or transfer of a trade or business and which were limited so as to impose a restriction no greater than reasonably necessary to protect the purchaser's interest.2

Thus, when the Sherman Act incorporated the common-law principles on this subject into federal statutory law 3 by adopting the concept of restraint of trade, it presumably imported both the principle that restrictions on competition are illegal and also the principle that in some circumstances a showing of reasonableness will legalize restrictions on competition. Nevertheless, when the question was first presented to the United States Supreme Court under the Sherman Act, it was clearly held (despite later disavowals4 ) that the justification of reasonableness was not available as a defense to a combination which had the effect of restraining trade.' Indeed, it was intimated that the question of reasonableness was not open to the courts in these actions at common law.6 However, when the Court reviewed this matter in Standard Oil Co. v. United States,7 it said in fairly explicit terms both that the Sherman Act prohibited only contracts or acts which unreasonably restrained competition and that the standard of reasonableness had been applied to all restraints of trade at the common law. The Court's assertion is somewhat weakened by the fact that it construed the rule of reason not as applying a standard for judging the character or consequences of the challenged conduct, but as a technique involving the application of human intelligence, or reason, to the problem of making a judgment about whether the conduct does restrain trade.'

**Innovation**

**Ext #1 --- FRAND Strong**

**The overall health of FRAND and SSOs is high---the industry is succeeding and litigation rates are incredibly low**

Daniel F. **Spulber 20**, Elinor Hobbs Distinguished Professor of International Business, and Professor of Strategy, Strategy Department, Kellogg School of Management, Northwestern University, and Professor of Law (Courtesy), Pritzker School of Law, Northwestern University, Articles And Essay: Licensing Standard Essential Patents With FRAND Commitments: Preparing For 5G Mobile Telecommunications, 18 Colo. Tech. L.J. 79, 81, Edited for Readability

A. FRAND and Negotiation of Patent License Contracts

**Patent** license agreements are the **best indicators** of **FRAND** commitments in both generic and specific ways. First, **SEP** license agreements are **routine and commonplace** and such contracts have **existed** for more than half a century. 185The population of patent license contracts provides a picture of common practice across many types of contracts over time. The many SEP license agreements illustrate contractual norms and standard contractual provisions including royalties. Such standard practice satisfies the generic legal definition of what is "reasonable". Black's Law Dictionary defines "reasonable" as "fair, proper, or moderate under the circumstances." 186Common practice in contracting also recalls the legal standard in tort of a "reasonable person" as "a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests." 187

Second, **standard practice** in SEP license agreements characterizes the meaning of FRAND in a **specific sense** because **licensors** have made FRAND commitments before **entering into those contracts.** Indeed, the parties are fully **informed** about the content of IP **policies** of the relevant **SSOs** and the **implementer** is well informed **about the patent holder's** SEP **declarations** and FRAND **commitments**. By forming SEP contracts in light of the FRAND commitments, the provisions of those contracts including royalties implicitly define what is meant by "fair", "reasonable", and "non-discriminatory".

SEP license **agreements** in the market reflect the **judgments**, experience, **capabilities**, knowledge, and **business relationships** of a **large number** of SEP **holders** and **implementers**. These agreements are **"fair"** and **"reasonable"** because **they take place in a competitive** market **environment**: the SEP holder and the implementer have jointly chosen the provisions of the agreement. The parties also voluntarily choose what bargaining procedures they will use to arrive at the provisions of the patent license agreement. Royalties and other **provisions** of a **patent license** agreement provide the **best indicators** of what is "fair" and "reasonable".

SEP license agreements define negotiated FRAND commitments because they are made by willing SEP holders and willing [\*118] implementers. Patent license agreements in general, whether or not they are FRAND, reflect a meeting of the minds of the licensor and the licensee. In contrast to patent disputes involving infringement, there is no need for a court to imagine a hypothetical negotiation or to construct a contract. There is no need for third parties to infer the expectations of the parties, their business plans, or their costs and benefits.

Negotiation of patent license agreements accurately reflects the information that the parties have at the time. Negotiation of SEP licenses depends on the subjective perspectives of the parties making agreement. The parties may also negotiate contingent contracts that adjust to events that occur after the contract is negotiated, subject to the transaction costs of contingent contracting. 188SSOs do not provide details or specific guidance for FRAND commitments because SEP holders and implementers are best informed about their commercial interests and the potential benefits of their patent license agreements.

SEP license agreements characterize FRAND commitments because the parties are fully informed about the relevant technology standards. These technology standards are extensive, detailed, and publicly available. The parties may have participated in the technical committees and decision making of the SSO. The parties also are fully informed about the patents because SSOs require public declaration of SEPs and detailed Letters of Assurance (LOAs) that specify the asserted patent claims. Technology standards often reference SEPs, which provides additional information to potential licensees. The parties involved in SEP license negotiations will tend to be informed because they are likely to be companies that are knowledgeable in the industry. Patent license agreements typically involve specialized patent attorneys. Companies involved in SEP license negotiations are likely to be well informed because they may have recurring business transactions and long-term business relationships.

Patent license agreements, including SEP license agreements, are intrinsically "fair" and "reasonable" because they are contracts. As with other types of contract, patent license agreements involve offer, acceptance, and consideration. Patent license agreements protect the reasonable expectations of the parties, although there are varying interpretations of what are reasonable expectations. 189These agreements generally are formal written contracts and the [\*119] terms tend to be tailored for the specific licensor and licensee rather than containing highly standardized provisions. Patent license agreements have all other properties of contractual agreements and benefit from the framework and protections of contract law.

In a patent license negotiation, as in any other contract negotiation, self-interest implies that the parties seek to maximize their joint benefits. This means that, apart from negotiation over how to divide the gains from trade, both parties have incentives to maximize the total gains from trade. Economic analysis consistently predicts that parties to a negotiation seek agreements that are Pareto Optimal, that is, there is no agreement that would improve the benefits of one party without reducing the benefits of the other party. 190Ronald Coase emphasizes the efficiency of bilateral bargaining when transaction costs are low. 191This suggests that the provisions of patent license agreements, including royalties, will be those that maximize the joint benefits of the parties.

A patent license agreement is a form of what I termed an "Intellectual Contract". 192Patent license agreements take into account the special characteristics of intangible assets, 193and because a patent license agreement is a contract, negotiations take place within the context of contract law. This means that all of the protections and mechanisms of contract law are in the background, including defenses against mistake and misrepresentation. Patent license agreements are commercial contracts with formal written provisions, and typically, the provisions are not standardized but vary with the type of technology and the characteristics of the parties involved. 194

The combination of **SSO** IP **policies**, market negotiation of **patent licenses**, and legal **enforcement** of IP rights has been **generally successful**. An important **indication of this success** is that **patent disputes** are relatively **rare**. 195Ron **Katznelson** finds that **patent lawsuits** were less than **one third of one percent** of U.S. **patents** in [\*120] **force** during the period 1923-2013. 196The **litigation rate** for SEPs is **also very low**: patent lawsuits were about **one half of one percent** of U.S. **SEPs** at ETSI, which has the highest **concentration** of SEPs. 197This **suggests that the litigation** rate would be **considerably lower** when comparing the **number of patent lawsuits** to the **number of patent license** agreements.

The **large number** of **SEPs** declared to **SSOs** provides an **important indication** of the importance of negotiated **FRAND** commitments. Pohlmann and Blind find about 200,000 declared SEPs. 198Stitzing et al. examine a subsample of the 79,257 declared SEPs for ETSI standards. 199Pohlmann considers declared granted and active SEPs for cellular telecommunications standards: 25,064 for Long Term Evolution (LTE), 19,069 for Universal Mobile Telecommunications Service (UMTS), and 6,293 for Global System for Mobile Communications (GSM). 200Pohlmann also finds declared granted and active SEPs for related standards: 2,780 for video coding technologies such as Advanced Video Coding (AVC), 1,704 for broadcasting standards such as Digital Video Broadcasting (DVB), and 1,537 for wireless technology standards such as WiFi. 201Bekkers et al. consider a dozen SSOs and find about 4,910 SEP disclosures. 202

**Declaration** of SEPs may exceed the **number of patents** that are **necessary to implement** the **standard**. 203This occurs because companies may have incentives to over-declare SEPs. 204SSOs require declaration of SEPs for patents to be included in standards. Even with over-declaration, however, SEP holders remain bound by [\*121] FRAND commitments so that SEP licenses reflect FRAND commitments.

The **implementation** of technology **standards** provides **additional evidence** of the success of SSO **FRAND** commitments, private license negotiation, and legal **enforcement** of IP rights. For example, Biddle et al. point to 251 **[two hundred fifty-one]** standards in a **laptop computer** and find that about **three quarters** of the 197 standards they evaluated were covered by **FRAND**. 205The many products that conform to **standards established** by SSOs, such as **smartphones** and other **electronic devices**, further indicates that there are **many underlying** SEP license agreements. There is widespread conformity to **technology standards** by suppliers of parts, components, and **software**, suggesting the **existence** of many SEP licensing **agreements**. For example, it is projected that in **several years**, there will be almost 5 billion devices with one or more **USB-C** ports. 206AT&T licenses SEPs for **MPEG-4** standards subject to **FRAND** commitments. These SEPs are licensed to 25 companies that offer "mobile handsets, game consoles, digital cameras, set-top boxes, broadcast equipment, video teleconferencing equipment and software." 207

There are a **number of indications** that the number of **SEP** license agreements is **significant**. 208The 200,000 **[two hundred thousand]** declared SEPs suggest that **there** are many license **agreements**. Companies have been **licensing** SEPs for over half a century, as noted previously. The [\*122] many **companies** that are members of SSOs further suggest that **there are a significant** number of **potential licensees**.

**Comparison** of negotiated licenses with **licensing by patent pools** provides a useful **indication of the extent** of SEP **license agreements**. This is because the number of negotiated SEP **licenses** is many **times** greater than license agreements offered by **patent pools**. It is estimated that there are **nine times** as many SEPs licensed through negotiation as those licensed through patent pools. 209Patent pools have entered into many SEP license agreements with implementers. For example, MPEG LA's MPEG-2 Patent Portfolio License "has helped produce the most widely employed standard in consumer electronics history." 210The MPEG-2 license lists 891 licensees and affiliates although not all may produce licensed products. 211

**Ext #1 --- FRAND Strong --- Holdups / Stacking Backline**

**Patent holds up and royalty stacking doesn’t happen and even if it did it doesn’t reduce innovation**

**Mossoff 18** --- Adam Mossoff et al, Professor of Law Antonin Scalia Law School, George Mason University, “Will Overzealous Regulators Make Your Smartphone Stupid?”, Regulatory Transparency Project, December 10, 2018, https://regproject.org/paper/will-overzealous-regulators-make-smartphone-stupid/

In recent years, antitrust regulators have been taking a closer look at SDOs and innovative companies that participate in SDOs based on one-sided, unbalanced theories that these companies are engaging in “bad” behavior, made possible by the standardization of technology. The most common of these theories that regulators have relied on are called “patent hold up” and “royalty stacking.” Although regulators use these theories to justify intervention in the free market, **there is scant evidence that either patent hold up or royalty stacking are systemic problems**, and **no evidence** that, even if these practices do exist, **they present real and substantial harm to innovation or to consumers**.

Patent hold up is the idea that the owner of a patent covering technology incorporated in a standard could “hold up” anyone seeking to implement the standard by demanding inordinately high royalty rates (what economists would call “supra-competitive rates”). In other words, the incorporation of the patented technology into the standard would enable the owner of the “standard-essential patent” (SEP) to use the standard itself as leverage in demanding an unreasonable licensing fee from the manufacturers (and consumers) who must use the standard if they wish to sell and buy products incorporating it, such as the 4G communication standard in smartphones. For some odd reason, although the theory is borrowed from the classic “hold up” theory from the economic analysis of contracts, for a long time there was no mention of how this could be a two-sided problem; that is, implementers of technological standards could refuse to pay the reasonable compensation after using the patented technology by simply making smartphones or other products given the knowledge of the technology that is available to all via the patent and the SDO’s publications of the standard—a problem that is referred to as “hold out.”14

The first problem with the “patent hold up” theory is that it fails to consider the property rights that are secured by a patent. Just as a real property owner could conceivably stop anyone from using his property by telling a trespasser to “get off of my land,” a patent owner has the same right to tell an infringer to stop using the technology secured by its patent. The inclusion of a patented technology into a standard does alter these circumstances; for the success of the standard and to reap the benefits of network effects, **it is important to ensure that every company** that wishes to use the standard **has access to the standard.** SDOs require participating companies to agree to license any SEPs on a FRAND basis, ensuring equal treatment of all users of the standard in paying a reasonable fee to use the patented technology. At the same time, SDOs recognize that the patent owner is entitled to receive adequate compensation in the form of licensing fees for recovering their risky R&D costs. **Maintaining a balance between the incentives of implementers and innovators is critical for SDOs,** as their success depends upon being able to attract both types of companies as voluntary members for developing common standards.

Royalty stacking is a related theory that suggests that to license all of the necessary patents to practice a standard (or otherwise manufacture a product having multiple components covered by multiple patents from many patent owners), the patent owners will demand license fees that cumulatively will greatly diminish or even outpace the profit the manufacturer can obtain from sale of the product. Essentially, the required royalty fees stack up, causing the manufacturer to either raise the price of the product to cover the fees, or stop making the product altogether. Oftentimes, the royalty stacking theory is also laced with notions that it is the patent owners, engaging in “patent hold up”, to charge excessive fees, that cause royalty stacking; however, even without portraying the patent owners as villains, the theory still has a certain logic to it. In reality, though, the royalty stacking theory simply **doesn’t hold true.** If royalty stacking were an actual problem, we would not be enjoying any sort of high-tech goods today—because many of these products include multiple patented technologies from multiple patent owners. And yet, we have cars, computers, smart appliances, and smartphones, all of which are products in industries that are based on thousands of products and services secured by patents; and ours is, arguably, the most vibrant and dynamic high-tech industry in the world.15

Based on these two **purely theoretical concerns**, the FTC has pushed heavily for regulatory restrictions on patent licensing rights in the SDO context. For example, some regulators have demanded that patent owners relinquish their rights to seek injunctions against infringers of their patents, and they have actively inserted themselves into the details of licensing negotiations. Both of these aspects of a functioning free market and growing innovation economy—the legal right to stop someone who is found liable for violating one’s property rights and private-party contract negotiations between sophisticated commercial companies—are activities that have functioned well for many decades under the Patent Act and with courts as enforcers, without any additional meddling from the government. Not only is the FTC stepping in to “fix” something that is not broken, it is doing so without any evidence of consumer harm or impediments to innovation. **In fact, the exact opposite has been observed**—the patent-intensive smart phone industry has experienced the **largest quality-adjusted price drops**, new products and services, and market expansion compared to other non-patent-intensive industries.16 **Competition and innovation are both flourishing in this industry without the government’s regulatory “assistance.”**

**Ext #1 --- FRAND Strong --- A2: Patent Thickets**

**Turn --- Thickets good**

**Brougher 21** --- Joanna T and Andrew Kingsbury; March 24; the founder and principal at BioPharma Law Group PLLC; student at Cornell Law School; Law360, “7th Circ. Should Find Patent Thickets Aren't Anti-Competitive, https://www.law360.com/articles/1367923/7th-circ-should-find-patent-thickets-aren-t-anti-competitive]

Furthermore, the risk of entering the market without AbbVie's authorization could force those biosimilar manufacturers to pay high damages. Thus, opponents of AbbVie's practice argue that Humira's patent thicket creates a **monopoly** outside the scope of patent law's original intent because new competitors cannot provide the market with new and innovative drug iterations.

However, a finding against AbbVie in this regard is **misguided**. First, the patent system grants inventors the right to **protect their inventions** in a variety of ways. While Humira represents an exceptional case of patent stacking, the **underlying principle** can apply across **all industries** and **all technologies**.

Suppose you invented a new battery that revolutionized the electric automobile industry, and you receive a patent for this invention. Suppose further that, during the process of your research, you also determine how to apply your invention to marine travel as well as aviation.

Under the current U.S. patent system, the patent owner is **not restricted** in only seeking patent protection for one use. Rather, the inventor can seek and receive **patent protection** for any **additional innovative uses**, which can include, in the case of drugs, new indications, new dosage amounts, new formulations, and so on.

Not only does the patent system permit a patent owner to seek multiple patents to cover its invention, doing so actually **promotes innovation**. Because the system allows for protecting **additional uses or variations** of an idea, the system **incentivizes** patent owners to undertake the risks and expenses associated with continued **r**esearch and **d**evelopment.

These continued efforts can result in discoveries such as safer dosage forms, more effective derivatives, new indications, and so on. Without the incentive to undertake this **additional research**, many potential **groundbreaking and beneficial discoveries** could remain **undiscovered**.

Finally, the process of conducting **additional research** and patenting those discoveries does not come without a **high cost**. Not only does the research and development of these additional uses require a significant amount of investment, but so does the process of patenting and obtaining these patents.

This is only to say that the additional years of market exclusivity that AbbVie acquired for Humira did not come for free. It required a dedicated team who were willing to fund additional projects and also pursue patent protection for any discoveries that came from those projects.

Patent stacking is not without its limitations. The new discoveries must still satisfy the patentability requirements — subject matter, usefulness, novelty, nonobviousness and written description. Additionally, the discoveries must be supported by at least some data. And, it goes without saying, there should be no fraud or misrepresentation in that data.

The process of stacking patents is a **lawful practice** that **comports** with antitrust principles. It is not a process that stifles innovation but rather one that offers inventors comprehensive protection over their intellectual property by covering different innovative features of the invention. So long as this process remains in place, inventors should utilize the process to take advantage of the fullest extent of patent law's protection.

**Ext #3a --- Chilling Effect**

**Changing the rules AFTER the sunk cost of innovation guarantees companies don’t participate in SSOs --- turns every advantage**

**Mossoff 18** --- Adam Mossoff et al, Professor of Law Antonin Scalia Law School, George Mason University, “Will Overzealous Regulators Make Your Smartphone Stupid?”, Regulatory Transparency Project, December 10, 2018, https://regproject.org/paper/will-overzealous-regulators-make-smartphone-stupid/

Worse still, the government is not content to simply meddle in the private negotiations between a patent owner and a manufacturer, or in the civil lawsuits between a patent owner and an infringer. Antitrust regulators have also used the theoretical problems of “patent hold up” and “royalty stacking” to actively influence SDOs to alter their own patent policies. For example, the IEEE, an organization that oversees thousands of standards in hundreds of technologies, recently revised its patent policy. The policy, among other things, takes away the right of a patent owner who participates in its development of technological standards to seek an injunction against anyone who is infringing its SEP, turning the FRAND commitment into a compulsory license—making these patents less valuable than patents in other industries.

The problem with these changes by SDOs is that this is a **dangerous short-term game** being played by users of technological standards, because they are changing the rules of the game **after the sunk cost R&D investments** have been made by the innovators. In the long run, such policy revisions make it **less appealing** for a company to invest in developing **new, innovative technology** and to participate in SDO activities. If companies decline to participate in SDOs because of these policy revisions, **there will be fewer tech**nologies **contributed to the SDO** for consideration and less robust participation by these companies’ engineers. Having the best ideas and the smartest people at the table when a standard is being developed is a key strength of standardization, and this will **disappear** if **innovative companies** begin to eschew participating in SDOs.17 At the end of the day, if participation in an SDO is unattractive to innovative companies due to the SDOs patent policies, **innovation will suffer**. As companies refocus their innovative efforts towards proprietary technologies instead of creating common standards. This will hurt competition and consumers, the very people antitrust regulators are supposed to be protecting.

The problems with the “patent hold up” and “royalty stacking” theories are biased without taking into account other factors that drive the functioning of a market, such as long-term incentives of technology developers and licensors to make the industry successful and maximize demand for their technology, thus keeping any price increases under check. **There is no evidence to support these theories**, and the harms alleged by these theories are simply **not borne out**. Proving that these harms are not real is as easy as asking you to take your smart phone out of your pocket or your purse. And yet, despite this very tangible evidence that the high-tech world is functioning well in the presence of SSOs and standardized technologies, the antitrust regulators are pushing forward on thin air. Separately, the potential of hold out, which enables technology users to reduce the price of the technology, or stop paying for it altogether, may become a rational strategy when injunctions are hard to obtain and restricted to even seek.

**Ext #3 --- New Link --- Error Rates**

**New link --- Plan is prone to erroneous enforcement that chills innovation and investment across all economic sectors.**

**Manne 20** --- Geoffrey A. Manne, president and founder of the International Center for Law and Economics, “Error Costs in Digital Markets,” November 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3733662

**Legal decision-making** and **enforcement under uncertainty** are always **difficult** and always potentially **costly**. The **risk of error** is **always present** given the **limits of knowledge**, but it is **magnified** by the **precedential nature** of judicial decisions: an **erroneous outcome** affects not only the **parties** to a **particular case**, but also **all subsequent economic actors** operating **in “the shadow of the law**.”2 The **inherent uncertainty** in judicial decision-making is further **exacerbated** in the **antitrust context** where liability turns on the **difficult-to-discern economic effects** of challenged conduct. And this difficulty is still further magnified when **antitrust decisions** are made in **innovative**, **fastmoving**, **poorly-understood**, or **novel** market settings—attributes that aptly describe today’s **digital economy**.

Rational decision-makers will undertake enforcement and adjudication decisions with an eye toward maximizing social welfare (or, at the very least, ensuring that nominal benefits outweigh costs).3 But “[i]n many contexts, we simply **do not know** what the **consequences** of our choices will be. Smart people can make guesses based on the best science, data, and models, but they **cannot eliminate the uncertainty**.”4 Because uncertainty is pervasive, we have developed certain heuristics to help mitigate both the direct and indirect costs of decision-making under uncertainty, in order to increase the likelihood of reaching enforcement and judicial decisions that are on net beneficial for society. One of these is the error-cost framework.

In simple terms, the objective of the error-cost framework is to ensure that regulatory rules, enforcement decisions, and judicial outcomes minimize the expected cost of (1) erroneous condemnation and deterrence of beneficial conduct (“false positives,” or “Type I errors”); (2) erroneous allowance and under-deterrence of harmful conduct (“false negatives,” or “Type II errors”); and (3) the costs of administering the system (including the cost of making and enforcing rules and judicial decisions, the costs of obtaining and evaluating information and evidence relevant to decision-making, and the costs of compliance).

In the antitrust context, a further premise of the error-cost approach is commonly (although not uncontroversially5 ) identified: the assumption that, all else equal, Type I errors are relatively **more costly** than Type II errors. “Mistaken inferences and the resulting **false condemnations** ‘are **especially costly**, because they **chill** the **very conduct** the antitrust laws are **designed to protect**.’”6 Thus the error-cost approach in antitrust typically takes on a more **normative objective**: a **heightened concern** with **avoiding** the **over-deterrence** of **procompetitive activity** through the **erroneous condemnation** of **beneficial conduct** in **precedent-setting judicial decisions**. Various aspects of antitrust doctrine—ranging from antitrust pleading standards to the market definition exercise to the assignment of evidentiary burdens—have evolved in significant part to **constrain** the **discretion of judges** (and thus to limit the incentives of antitrust enforcers) to condemn uncertain, unfamiliar, or nonstandard conduct, **lest “uncertain” be erroneously identified as “anticompetitive.”**

The concern with avoiding Type I errors is even more significant in the enforcement of antitrust in the digital economy because the “twin **problems** of likelihood and **costs of erroneous antitrust enforcement** are **magnified** in the face of **innovation**.”7 Because **erroneous interventions against innovation** and the **business models** used to deploy it **threaten to deter subsequent innovation** and the deployment of innovation in **novel settings,** both the **likelihood** and **social cost** of **false positives** are **increased** in digital and other innovative markets. Thus the avoidance of error costs in these markets also raises the related question of the proper implementation of dynamic analysis in antitrust.8