# 1NC---Round 5---Shirley

## 1

Topicality:

#### ‘Prohibiting’ a practice requires per se illegality.

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

Limits---many standards, requiring distinct answers, make the topic unmanageable.

Ground---fringe standards dodge links and allow bidirectional permissiveness.

## 2

Patent Law CP:

In patent assertion cases, the United States federal government should:

* restrict duplicative filings,
* require advance value estimates of patents,
* expand fee liability for parties involved,
* incentivize and fund cyber resilience and redundancy for corporations, including the grid, and
* mandate disclosed binding arbitration between SSO’s and licensees to establish reasonable royalty rates when FRAND disputes arise

#### The counterplan eliminates ‘hold up’ AND ‘hold in’ by modifying patent law design, NOT doctrine.

Chien ’14 [Colleen V; Fall; Law Professor at Santa Clara University; Michigan Telecommunications and Technology Law Review, “Holding Up and Holding Out,” vol. 21]

Combining "hold-out" and "hold-up" perspectives reveals surprising pathways to a better patent system, focused as much on the design as on the doctrine of patent law. Rather than trying to eliminate all technology patents, or to enforce all of them, courts and policymakers should develop ways for parties, early on, to determine the value of a patent, or at least a range of values, and for courts to hear and decide dispositive issues. Instead of trying to make patent law perfect, the patent process should be made cheaper, more streamlined, and more equitable.

This part considers four promising ways of doing so: 1) reducing duplication and forum shopping by improving coordination between the venues; 2) early adjudication of dispositive issues, including patent validity and copying; 3) early damages disclosure and non-expert damages methodologies; and 4) promoting symmetry between economically dissimilar parties and proportionality between the economic value of a patent and the cost of fighting about it, through fee-and cost-shifting. Many of these suggestions could be implemented in a variety of ways: through jury instructions and case management, including across districts, through the Patent Pilot Program, 193 case law development, and legislative change.

#### Arbitration reduces royalty rates and ensures FRAND compliance.

Lemley ’13 [Mark A. Lemley and Carl Shapiro; 2013; William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP; Transamerica Professor of Business Strategy at the Haas School of Business, University of California at Berkeley and a Senior Consultant at Charles River Associates; Berkeley Technology Law Journal, “A Simple Approach to Setting Reasonable Royalty Rates for Standard-Essential Patents,” vol. 28]

2. Procedure

We suggest that SSOs specify that disputes over what is FRAND be resolved through binding arbitration, "baseball-style."24 In baseball-style arbitration, the parties produce evidence and argument before the arbitrator, and then they each propose a royalty number. The arbitrator must pick one of the two numbers offered and cannot come up with her own number. Using baseball-style arbitration logically drives the parties towards making reasonable proposals, because the party that asks for too much (or offers too little) risks losing the case altogether.25 FRAND disputes are well suited to baseball-style arbitration, because the only thing at issue is which of two numbers in fact represents the more reasonable royalty.26 We provide more details on how to determine that royalty in Section I.B.3, infra.

Baseball-style arbitration has a number of other advantages. The arbitrator does not need to decide whether any given patent is valid and infringed. Nor does she need to decide whether a particular patent is essential except in unusual circumstances.27 Both of those things may be contested, and the evidence on each question will likely influence the reasonableness of the competing royalty proposals. But unlike a court that might have to rule on any number of subsidiary factual issues, the only thing the arbitrator needs to do is pick the better of two proposed royalty rates.

Under SSO best practices, any arbitration decision will be disclosed to willing licensees." This disclosure is justified by the non-discrimination provision; it is hard to know whether a royalty unfairly favors one party unless we also know what other parties had to pay. Disclosure to willing licensees has other advantages: it will encourage implementers to submit to arbitration, reduce the need for duplicative arbitrations, avoid giving one party an informational advantage if they have already been involved in an arbitration, and help build a record of what constitutes FRAND royalty rates that may encourage subsequent parties to resolve their disputes themselves. In any given arbitration, the standard-essential patent owner and the licensee may well prefer to keep the arbitration outcome secret. For the reasons just given, such secrecy would undermine the effectiveness of the FRAND regime. And in any event, courts are not likely to permit it, at least when a party to a subsequent dispute can show that the information is potentially2' relevant.

## 3

Antitrust PIC:

The United States federal government should:

* maintain the scope of its antitrust laws and announce its intent to do so, and
* prohibit private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

## 4

Business Confidence DA:

#### Unpredictable shifts in antitrust spill over, decimating confidence and overall recovery.

Mitchell ’21 [Trace; March 3; Research Associate at the Mercatus Center at George Mason University, J.D. from George Mason University; Morning Consult, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea,” <https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/>]

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against [Google](https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws) from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The [vast majority](https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4) of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Extinction.

Skaperdas ’20 [Stergios; June 16; Professor of Economics at the University of California Irvine, former Director of the Center for Global Peace and Conflict Studies; Peace Economics, Peace Science and Public Policy, “The Decline of US Power and the Future of Conflict Management after Covid,” vol. 26]

Whether the pandemic ends soon or is longer-lasting, the global economy and global geopolitics are very likely to have a different shape than they had before its onset. The high likelihood of a world depression and the differential responses across countries – especially those of China and the US – is changing the existing distribution of power across the world.

After going over recent trends in the US’s superpower status, I will discuss the pandemic’s implications for the rise of China as a challenger to the US’s position and a consequent urgent importance for improving global conflict management. Urgency is justified because international institutions have atrophied over the past few decades whereas the possibilities for conflict are expanding.

During the late 90’s when many thought that the end of US dominance was ending, Wohlforth (1999) argued well that unipolarity – with the US as the sole superpower – was likely to last for decades. More recently, Brooks and Wohlforth (2016) noted that “[T]he United States currently has defense pacts with sixty eight countries – a security network that spans five continents, contains a quarter of the Earth’s population, and accounts for nearly three-quarters of global economic output.” Bleckley (2018) even asserts that unipolarity will last for the rest of this century.

I don’t confront the debate on “unipolarity” here. However, with the rapid economic growth of China and the emergence of Russia as a military and diplomatic competitor to the US in Eurasia, the US’s dominance in Eurasia cannot be taken for granted. If anything, as I will argue, the trends over the past two decades have been more negative for the US than is commonly recognized. With Eurasia having nearly 70 percent of the world’s population and about the same in total GDP (at PPP, IMF 2020), it will be no longer possible for a non-Eurasian power to dominate the world’s economics and geopolitics by itself.

1 Trends before the Pandemic

I will discuss recent trends relating China to the US in terms of three dimensions that are often used to assess great power status: the economy, military capabilities, and technology.

1.1 Economy

China has been quickly catching up with the US in its economy. In fact, by the beginning of 2020, China’s GDP at PPP was 37 percent higher than that of the US (IMF 2020). While GDP at nominal exchange rates might be better in projecting economic power, GDP at PPP is better in gauging the actual productive capacity of an economy.

The trend, however, that has been in favor of the US lately, has been the enhanced status of the US dollar as a reserve currency, paradoxically since 2008. The currency swaps between the Fed and other Central Banks – to help primarily the banks of US allied countries – appears to have been the major factor in this trend (Tooze 2018). This financial power has been increasingly used in sanctions against adversaries but even Allies.

1.2 Military

China has been rapidly modernizing and expanding its conventional forces but is very far away from becoming a peer to the US militarily.

The US has maintained its extraordinary predominance to move military resources by sea, land, and air throughout the world. However, the actual ability for the US to force its will on others has been shown to be limited recently. It can barely hold onto its troops in Afghanistan and Iraq and has had limited influence in Syria and in Libya. The fact that, after the assassination of Iranian General Suleimani, Iran was allowed to hit the US Al-Asad military base in Iraq (with apparently pretty accurate missiles) without any reaction shows the limits of US power projection. I suspect this is the first time that the US had one of its bases hit by another sovereign state without retaliating against them. While Iraq could be occupied, Iran is unlikely to be so – it is three times as big and populous as Iraq and its invasion would involve many additional complications.

Moreover, US aircraft carriers and bases are vulnerable to increasingly accurate missiles not just from Russia and China but from Iran as well. Hypersonic missiles are even deadlier, with Russia and China being reportedly ahead of the US in their development. With such vulnerabilities the US’s ability to project military power in Eurasia becomes much more limited. It would be no exaggeration to say that it is “game over” for the US’s projecting military power in Eurasia without the expectation of a challenge.

Finally, the relatively small wars that US have already entered have been extremely costly. The cost of the Iraq and Afghanistan wars to US alone was estimated 10 years ago by Stiglitz and Bilmes (2012) to be between $4-6 trillion, a quarter to 40% of US GDP at the time.

1.3 Technology

While the US was far ahead of China in technology and basic research barely a few years ago, China has been rapidly catching up. For example, one respectable index of current high-quality research is the Nature Index (natureindex.com) which includes articles only in the top natural science journals. In 2012 China’s scientific productivity was at 24% of the US but by 2019 it was 67% of the US’s level. This is likely a much better level than the Soviet Union ever achieved relative to the US. In technological disciplines such as computer science and AI China is likely in even better place.

Furthermore, China has been demonstrating the ability to rapidly learn how to adapt foreign technologies and implement them in production at large scale. Highspeed rail, for instance, expanded from nothing to a 30,000 km network within a decade, while pushing the technology to new limits. The US by contrast seems to have largely divested itself of the necessity of maintaining primacy in engineering and manufacturing. The US’s emphasis on expensive high-tech weaponry is largely driven by military-industrial complex rent-seeking and is, at best, a gamble that would have highly uncertain returns in a hypothetical conventional battlefield.

Overall, China, while still markedly militarily inferior, has become at least an equal to the US economically and has been catching up rapidly in technology, while Russia has been counter-balancing the US militarily and diplomatically in Eurasia.

2 Effects of the Pandemic

The pandemic has brought about Depression levels of unemployment in the US in record time and almost all countries are facing severe contraction.1 Employment is unlikely to reach its pre-pandemic level for a long time and, because this is happening simultaneously around the world, there is no single large country or region that could help lift the rest of the world with its demand.

However, in relative terms China and East Asia have been less affected thus far and will continue to do so as long as they maintain a better health policy response to the pandemic.2 China will likely have to restructure its economy to be less dependent on existing supply chains, rapidly expand the Belt-and-Road initiative, and expand its social welfare so as to rely more on internal demand for continued growth. Nevertheless, although all predictions now can be expected to have high variance, China is likely to come out in the end economically better off relative to the US.

Other widely discussed probable effects include the strengthening of the nation-state and a retreat of globalization in production, trade, and capital movements. We can envision scenarios from a mild retreat of globalization with shorter supply chains to a full blown new Cold War with two or more separate economic blocks.

Regardless of what the medium and long run will look like, the pandemic appears to have accelerated pre-existing trends of US declining power to the extent that we cannot say that there is one superpower dictating the international politics and economics of Eurasia. China and, secondarily, Russia will have much to say about how the global political economy evolves. Under such conditions opportunities for conflict increase and institutions of conflict management become ever more important.

3 The Alarming Future of Conflict Management

US policy until recently was as if the liberal trade hypothesis were true and there was no chance of an adversarial relation with China in the future. That is consistent with a neoclassical economic perspective according to which more trade is always better. However, trade policy cannot be separated from security considerations when there is the possibility of insecurity (Garfinkel et al. 2015; Skaperdas and Syropoulos 2001). Now US policy seems to have been reversed with China being treated, not as trade partner, but effectively as an enemy.

In such a case international institutions of conflict management would be important for reducing the chance of conflict, reducing the costs of arming, and allowing for smoother trade relations; most of all, for minimizing the chance of nuclear war. Those institutions, however, have gradually atrophied or have been intentionally boycotted during the time of US dominance. Over the past two decades, for example, and contrary to previous practices the US entered a number of wars without UN Security Council resolutions (including those that it could have obtained agreement such as the Afghanistan war). The recent withdrawal from the WHO, and the series of withdrawals from arms-control agreements (ABM, INF, Open Skies, and perhaps START) are other examples of the weakening of international institutions. Perhaps this is to be expected of a world hegemon, but the unilateralism appears to have increased while US power has been decreasing and the need for future restraint on all has become more visible. The conditions appear to be leading to a “bad” equilibrium without investments in conflict management and high probability of conflict as opposed to a “good” equilibrium with investments in conflict management and low probability of conflict (Genicot and Skaperdas 2002).

The times we are now have similarities with the pre-WWI period which combined a high degree of globalization with the absence of institutions of conflict management (instead of their atrophy that we now have). At the time, there was a wide-spread belief that economic interdependence, and the break of that interdependence and other costs that war brings about, would by themselves guarantee peace (see, e.g., Angell 1913). Yet war came unexpectedly and with a vengeance.

With the dismantling of previous arms control agreements, without good prospects for their replacement in the future, and the weakening of the UN and other international organizations, the risks and challenges facing the world include the following:

* Multiple-pronged arms races that go beyond hypersonic weapons to cyberweapons, autonomous weapon systems, other AI technology-enabled systems, and deployments in outer space. The costs and, most important, the multiple uncertainties that such arms races can generate are of immense risk. Highly risk averse leaders, perhaps as a result of a mistake or misunderstanding but not only so, could launch wars from which there might be no going back (Mearsheimer 2001; Wong et al. 2020).
* In the absence of nuclear weapons treaties, the only restraint on nuclear war is Mutual Assured Destruction (MAD). With new platforms, such as hypersonic missiles, that make possible delivery of nuclear weapons faster than it ever has been, could there be a greater temptation for a first strike (thinking that retaliation would never come)? Many examples of preconceptions, mishaps, and near-accidents from the 1950s and 60s that were not previously known (reported in Ellsberg 2017) show how the world we are now entering is likely more dangerous than the Cold War ever was.
* A scramble for trading partners and Allies across the world that could go beyond just the offering of carrots. The undermining of governments that are perceived to be unfriendly by one side and their shoring up by the other side often leads to less autonomy, externally-induced political conflicts, increased authoritarianism, and not infrequently to outright civil war. The danger of many countries in Eurasia, Africa, and Latin America becoming battlegrounds for continual proxy conflicts between the superpowers is increasing.

## 5

IPR DA:

#### Expanding antitrust law in IP detonates a doctrinal atom bomb, crushing strong patent rights.

Sipe ’17 [Matthew; December of 2016, published in the 2017 edition; J.D. at Yale Law School; American University Law Review, “Patents v. Antitrust: Preempting Conflict,” Vol. 66]

IV. RISK OF CONFLICT

The previous two Parts examined the existing sources of regulatory authority in the patent context--the PTO, the ITC, and the Federal Circuit--to create a hierarchy of potentially anticompetitive patent activities, categorizing them based on the degree to which they are already under patent-specific supervision. Where that alternative supervision exists, as the Credit Suisse Court recognized, the benefits of overlapping antitrust intervention are marginal. Of equal--if not greater--concern, however, are the costs of overlapping antitrust intervention.

The bulk of the Court's analysis in Credit Suisse was dedicated to calculating those costs in the securities context. Due to the "fine, complex, detailed line" separating activity the SEC permits and activity the SEC forbids, the "contradictory inferences" that might arise from identical behavior, the "need for securities-related expertise" in adjudication, the "risk of inconsistent court results," and the danger of permitting plaintiffs to "dress what is essentially a securities complaint in antitrust clothing," the Credit Suisse Court determined that "antitrust courts are likely to make unusually serious mistakes" where they intervene with securities law. 193 As a result, the Court stated, permitting antitrust law and securities law to overlap would likely "produce conflicting guidance, requirements, duties, privileges, or standards of conduct." 194 This Part extends that analysis to the patent context where the costs are equally substantial. Each of the above concerns is just as pressing in the patent sphere--if not moreso.

[\*451] A. The Fine Lines of Patent Law

In Credit Suisse, the Court characterized the line separating permissible and impermissible securities activity as "fine, complex, [and] detailed." 195 Accordingly, allowing antitrust and securities law to apply simultaneously would be particularly likely to produce conflicting guidance and requirements. The Court illustrated this dilemma:

It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of . . . conduct that it now seems to forbid? 196

Patent law is similarly replete with fine doctrinal lines separating the permissible and the forbidden. To provide just a few key examples, the frameworks governing patent misuse, exhaustion, inequitable conduct, and contributory infringement are highly complex and continue to develop and evolve.

As explained in Part III, patent misuse and exhaustion are equitable defenses to infringement. 197 The former applies where a patentee "impermissibly broadened the 'physical or temporal scope' of the patent grant with anticompetitive effect." 198 The patent then becomes "unenforceable until the misuse is purged." 199 The latter applies where a patented item has been "lawfully made and sold," after which "there is no restriction on [its] use to be implied for the benefit of the patentee." 200 An infringement claim based on downstream use or sale will therefore be dismissed as a matter of law. 201 The Federal Circuit, reviewing these defenses, 202 is forced to thus grapple with complex, "murk[y]" questions. 203 In terms of patent misuse: What is outside [\*452] the scope of any given patent grant? Has this particular patent been "leveraged" as part of the alleged anticompetitive scheme? How should courts analyze and resolve portfolio--rather than individual patent--misuse? 204 In terms of exhaustion: Does the article sold sufficiently embody the "essential features" of the patent? 205 To what extent can parties contract around exhaustion? 206 As a result, there is already "foreseeable polymorphism" in the doctrines of patent misuse and exhaustion, and "unforeseeable strains of potential misbehaviors" are likely to emerge. 207 Allowing generalist antitrust courts to intervene would only produce greater uncertainty and, ultimately, conflicting and inconsistent results.

Inequitable conduct is another equitable defense to patent infringement. 208 To successfully assert a claim of inequitable conduct, the accused infringer must show that the patentee failed to disclose information, such as prior art, in its patent application. 209 The patentee must also have "specific intent to deceive the PTO," such that the "PTO would not have granted the patent but for [the] failure to disclose." 210 The remedy, as expressed by the Federal Circuit, is the "'atomic bomb' of patent law": "inequitable conduct regarding any single claim renders the entire patent unenforceable." 211 The result is a fine line to adjudicate. Because the Federal Circuit has determined that "intent and materiality are separate elements . . . that . . . should not be put on a sliding scale with one another," the crucial--and highly technical--question of whether or not the patentee's alleged deception was the "but for" cause of the PTO's grant must be addressed fully in every case. 212 Again, inconsistency and uncertainty would mar this already complex doctrine if antitrust courts were left to adjudicate these claims.

[\*453] As opposed to direct infringement, contributory infringement covers situations where a party does not sell the patented article or practice the patented process, but instead

offers to sell or sells . . . a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use . . . . 213

For a plaintiff's claim of contributory infringement to succeed, the plaintiff must demonstrate that the defendant "knew that the combination for which its components were especially made was both patented and infringing," and that the "components have 'no substantial noninfringing uses.'" 214 In practice, contributory infringement claims can be incredibly complex, not only in technical terms--understanding how components may be used together or separately in infringing or noninfringing ways--but doctrinally as well. For example, there is a delicate line between raising a successful contributory infringement claim and impermissibly trying to extend the scope of one's patent over unpatented devices--potentially triggering misuse. 215 With the risk of a finding of unenforceability on one side and the possibility of rampant third-party infringement on the other, the costs of antitrust courts generating conflicting guidance or contributing to uncertainty in this doctrine would be quite high.

Altogether, the degree of complexity associated with patent doctrines, such as misuse, exhaustion, inequitable conduct, and contributory infringement, weigh in favor of preemption under Credit Suisse's analysis. If permitted instead to overlap, there is a significant risk that patent law and antitrust law would produce conflicting guidance and requirements. Just as generalist antitrust courts would struggle to distinguish permissible and forbidden securities arrangements--and fail to accurately forecast potential changes in securities law 216--they would struggle with the equally delicate and fine lines of patent doctrine.

#### Strong IP’s key to breakthrough solution to global threats.

Mark Esper 9, Executive Vice President of the U.S. Chamber of Commerce’s Global IP Center, “Climate for Innovation: Technology and Intellectual Property in Global Climate Solutions”, Hearing Before the Select Committee on Energy Independence and Global Warming House of Representatives, 7/29/2009, https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg62451/html/CHRG-111hhrg62451.htm

The Global IP Center and its members believe that strong intellectual property rights are integral to driving the innovation and creativity necessary to create jobs, save lives, advance economic growth and development around the world, and generate breakthrough solutions to global challenges such as climate change.

Our Nation's Founders recognized the link between strong IP rights and innovation more than 200 years ago and explicitly gave Congress the power to protect IP rights in the constitution. As a result, America has led the world in innovation for generations.

Today, the United States IP is worth between $5 and $5.5 trillion. IP accounts for more than half of all U.S. exports, helping drive 40 percent of the United States economic growth; and, as of 2008, IP-intensive industries employed more than 18 million Americans. But beyond driving job creating and economic growth, strong IP rights have created a secure framework for investment in research that led to solving some of the world's most difficult problems, from disease and famine to water scarcity and energy security, just to name a few.

In addition to protecting and incentivizing inventors, strong IP rights are also integral to promoting technology deployment and diffusion by providing a clear legal framework by which companies can transact business.

## Adv---FRAND

### Turn---1NC

#### America is winning the 5G race now---expanding antitrust flips it.

Abbott ’21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### Applying antitrust to patent law undermines broader 5G innovation.

Abbott ’21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

Although much of the excitement about 5G wireless technology focuses on how it will improve every aspect of our lives – from smart homes to smart cities, from healthcare to food to business to entertainment – this technology is also critical for an often-invisible, but even more critical, application: national security. 5G is a vast improvement over existing mobile technology, with massively increased speeds of data transfer and other enhanced capacities. The benefits this unprecedented speed and capacity will have for the United States military include improved surveillance and reconnaissance systems, new and more accurate methods of command and control, and integrated and streamlined logistics systems for increased efficiency.1 On the other hand, the same technological advancements facilitated by 5G technology may also give rise to new cybersecurity vulnerabilities.

Although it is the future of everything, 5G does not pose a potential problem in some far-off future. Today, the U.S. is already depending on a wide array of 5G technology suppliers for its national security system. For example, the national security programs of the Department of Defense (DOD) rely on continued access to telecommunication products made by companies with security clearance on a range of active classified and unclassified prime government contracts.2 Devices that rely on such wireless technology include those used to command troops in combat, control drones, target smart munitions, and perform other vital military functions.3 Allied partnerships with the U.S. also depend on its efforts to address cybersecurity in the next generation of wireless, 5G, and Internet of things.4

To ensure the safety of the systems on which the U.S. military relies and avoid unknown and unexpected cybersecurity vulnerabilities, the U.S. must remain an active and competitive participant in 5G development. Antitrust policies that undermine the intellectual property rights of U.S. innovators will diminish U.S. companies’ ability to invest in research and development (R&D) and to compete in the global 5G ecosystem. Even more important than increased economic growth, new jobs, and enhanced daily lives, these antitrust policies must be changed for the sake of U.S. national security.

### 5G---1NC

#### No 5G race.

Nilay Patel 19, J.D. from the University of Wisconsin Law School, Editor-in-Chief of The Verge, Former Acting Managing Editor for Vox, AB in Political Science from the University of Chicago, “Wait, Why The Hell Is The ‘Race To 5G’ Even A Race?”, The Verge, 5/23/2019, https://www.theverge.com/2019/5/23/18637213/5g-race-us-leadership-china-fcc-lte

I have a dumb question that no one seems capable of answering directly: Why is 5G a race?

Everyone — the wireless industry, Democrats, Republicans, the major media, you name it — frames the building of next-generation 5G networks as a “race” in which the United States needs to demonstrate “leadership.”

Here is The Washington Post declaring America has the lead in the race to 5G. Here’s CNN asking “Who’s winning the race to 5G?” Here’s AT&T CEO Randall Stephenson declaring that China isn’t beating the US to 5G “yet,” as some sort of ominous warning. Here’s T-Mobile CEO John Legere telling the House Subcommittee on Communications and Technology that merging with Sprint will let his company “win the race to 5G.” Here is an entire microsite from industry lobbying group CTIA titled “The Race to 5G.”

Let us never forget AT&T being so desperate to lead this “race” that it rolled out fake 5Ge logos on its phones.

But the stakes of this supposed race are wholly unclear. What happens if we win, besides telecom execs getting slightly richer? More importantly, what are the drawbacks to coming in second, or even third? Where is the list of specific negative outcomes of China building a 5G network a month, a year, or even five years before the United States? I’ve never seen it, and I keep asking about it.

NO ONE CAN SAY WHAT BAD THINGS WILL HAPPEN IF WE DON’T WIN THE RACE TO 5G

For example, here’s FCC Commissioner Geoffrey Starks on The Vergecast this week, when I asked why 5G is a race.

“I think it is important for us to continue to lead the race ... we obviously led to 4G and I think we get to set some of the standards that are ultimately going to be implemented worldwide, which is why there is a little bit of a race.”

Starks went on to say that China wants to be a global leader in supplying 5G equipment and that’s why Huawei has been so aggressively building and pricing its gear. But Huawei depends on American chip technology to make its products, and the US government has just put Huawei on a blacklist anyway. So... the race is so we can set some wireless standards? I suspect Apple, Google, Qualcomm, Verizon, and AT&T can fend for themselves when it comes to that process.

The other main argument for winning the “race” to 5G is that having the world’s best and fastest networks will create new economic opportunities for businesses of all kinds — we’ll enable self-driving cars and telemedicine and all the other stuff you hear about during interminable 5G slideshows at trade conferences. At a hearing before the Senate Committee on Commerce, Science, and Transportation earlier this year, Mississippi Sen. Roger Wicker confidently declared that “failing to win the race to 5G would not only materially delay the benefits of 5G for the American people, it would forever reduce the economic and societal gains that come from leading the world in technology.”

WE WON THE RACE TO LTE AND OUR LTE NETWORKS ARE AMONG THE SLOWEST AND MOST EXPENSIVE IN THE WORLD

Maybe. It is indeed true that better networks lead to better opportunities, and that widespread high-speed broadband is something everyone wants. But I sincerely doubt that all of these companies will pick up and move to China or Europe if the United States builds 5G networks slightly slower. After all, we already have some of the slowest and most expensive networks in the world, and Apple and Facebook have not yet relocated to South Korea.

The more I hear about the race, the more I don’t buy it. I think the “race” framing is there to make some big decisions seem urgent and important — to make it appear as though some serious trade-offs are worth it in order to “win.” And those trade-offs are indeed serious: 5G networks will require a serious rethinking of how we use wireless spectrum. There are incredible privacy implications around putting millions of IoT devices in a “smart city” on 5G. Investment dollars will naturally flow toward building 5G networks in cities instead of expanding our networks to rural areas, exacerbating the digital divide.

THE “RACE” IS TO THERE TO MAKE SERIOUS TRADE-OFFS SEEM WORTH IT SO WE CAN “WIN”

And once the “race” to build out 5G in big cities is “won,” the pressure to expand access to other places in the country will vanish, making that divide even worse. It is worth carefully considering all of these things before giving in to haste.

Oh, and it appears that some of the required 5G spectrum might interfere with important weather sensors, a concern raised by NASA, the Navy, and the NOAA in hearings before Congress last week. How did the wireless industry respond to these concerns? By writing a blog post accusing meteorologists from across three government agencies of “risking our 5G leadership.” The implication, of course, is that worrying about detecting major weather events could make us lose the race.

This race is imaginary bullshit. It’s being foisted on us by huge telecom companies that know internet access is fundamentally a commodity and want something new to sell at high prices instead of competing to improve service and lower prices on the networks they have. After all, the United States “won” the “race” for LTE, but it bears repeating: our LTE networks are among the slowest in the world, and our prices among the highest. What did winning that race accomplish for the millions of people across the country that still can’t get a reliable LTE signal?

#### 5G leadership is harmless.

John Tanner 19, Editor of Disruptive Asia, Former Editor-In-Chief and Global Technology Editor at Telecom Asia, Two Degrees in Telecommunications, “US Memo Claims China Could Use 5G To Kill People, Maybe”, Disruptive Asia, 1/8/2019, https://disruptive.asia/memo-china-5g-kill-people/

ITEM: A former Trump administration official is circulating a memo claiming China could weaponize 5G if its market dominance isn’t checked.

How does one weaponize 5G, you may ask? According to the memo author – retired Air Force Brigadier General Robert Spalding, who used to sit on the National Security Council – you do it by selling your 5G gear cheap enough to ensure it’s installed in every 5G network in the world, then make use of secret back doors to wreak international havoc, reports Bloomberg:

Spalding in his memo paints a future headed toward domination by China. Eventually, alternatives to its network technology won’t exist, because other suppliers won’t be able to compete with government-subsidized offerings from Huawei and fellow Chinese gear maker ZTE Corp., Spalding said.

Once China controls the market for internet-connected devices, it will be able “to weaponize cities,” Spalding said in the memo: “Think of self-driving cars that suddenly mow down unsuspecting pedestrians. Think of drones that fly into the intakes of airliners.”

Well. Yes. Think.

If you’re wondering, Spalding is the same person who put together a memo and presentation last year that proposed a similar idea on the grounds that Chinese dominance of 5G was tantamount to China attempting to reinvent the global internet as a platform designed to enable Chinese cyber espionage and cyber attacks on US networks.

Which is silly, because that’s not really how 5G or the internet work.

I haven’t read the new memo (which hasn’t been made public), but based on the Bloomberg report, Spalding’s concept of weaponized 5G sounds both silly and paranoid.

That’s not to say that China doesn’t engage in cyber espionage and hacking against US targets. Of course it does – it has done for years, just as the US has been doing likewise to China and … well, just about everyone, really.

And sure, it’s technically possible that China could secretly leverage Huawei or ZTE network gear to control every 5G network on earth, hoover up personal data and turn cars and drones into robo-assassins. (It’s also technically possible that once Alexa, Siri, Bixby, Cortana and Google Assistant become smart enough, they’ll become sentient, team up to form an AI hive mind called Skynet and kill us all.)

But Spalding’s scenario doesn’t hold up if you look closely. For a start, it seems to depend on the premise that (1) Huawei and ZTE will literally become the only commercially viable alternatives for buying 5G solutions (which is highly unlikely), and (2) there will be no possible way for regulators, law enforcement agencies or telcos to vet 5G gear for possible spyware capabilities before installing it (also highly unlikely).

The other main assumption here seems to be that autonomous cars, drones and the rest of the Internet of Things will either be manufactured by Huawei (or run Huawei software), or have crap security, zero encryption and no failsafes whatsoever. The latter may be possible given the state of IoT security today, but in that case Chinese hackers wouldn’t need Chinese gear in everyone’s networks to pull off such an attack. They certainly haven’t needed it up to now.

Again, I don’t have a copy of the full memo, and it might contain details that make this sound more plausible than the ones included in the Bloomberg report. But I’m reasonably sure that of all the things China plans to do with 5G, turning self-driving cars into murderbots is not one of them.

### No Holdup---1NC

#### Patent holdup is wrong. Authors cite no empirical studies AND royalty rates negotiate down.

Barnett ’21 [Jonathan M; Spring 2021; Torrey H. Webb Professor of Law, Gould School of Law, University of Southern California; Harvard Journal of Law & Technology, “Patent Groupthink Unravels,” vol. 34 no. 2]

E. Replacing Conjecture with Data

It is important to appreciate that the shift in policy concerning SEPs, both in the U.S. and in other jurisdictions as described above, reflects a well-developed body of empirical research.88 This body of research has done what academic, regulatory, and industry proponents of patent holdup and royalty stacking theories have never done. Namely, this research has subjected these widely-accepted theoretical assertions to empirical inquiry in order to verify that they provide an accurate picture of real-world innovation markets, rather than relying on stylized models in which a theory can never be more than “plausible” under “reasonable assumptions.” Puzzlingly, scholarly commen- tary that continues to view patent holdup and royalty stacking as material risks has generally declined to engage in detail with, or some- times even fully cite, this body of empirical research, generally dismiss- ing these findings on the grounds that they cannot exclude a counterfactual world characterized by both weaker SEP protections and even greater market efficiency.89

Footnote starts.

89. See, e.g., Carl Shapiro & Mark A. Lemley, The Role of Antitrust in Preventing Patent Holdup, 168 U. PA. L. REV. 2019, 2041–42 (2020) (referring generally to empirical studies that observe lack of evidence for patent holdup, citing only two of five major studies, and dismissing those studies’ validity largely due to the non-excludable possibility that “SEP holdup increased the price of cellular phones from what it otherwise would have been”); A. Douglas Melamed & Carl Shapiro, How Antitrust Law Can Make FRAND Commitments More Effective, 127 YALE L.J. 2110, 2111, 2117 (2018) (referring generally to empirical ev- idence that casts doubt on patent holdup, citing only one of five major studies, and dismissing the evidence due to the failure to “offer a sensible but-for world in the absence of opportunism [by IP licensors] as a comparator by which to assess observed behavior”). Other commenta- tors more fully cite the empirical evidence but argue that patent holdup remains a pertinent concern in particular cases, while acknowledging that empirical evidence suggests it may not be a systematic phenomenon. See, e.g., Thomas F. Cotter, Erik Hovenkamp & Norman Siebrasse, Demystifying Patent Holdup, 76 WASH. & LEE L. REV. 1501, 1546–48 (2020); Jorge L. Contreras, Much Ado About Holdup, 2019 ILL. L. REV. 875, 896–98; Norman V. Siebrasse, Holdup, Holdout, and Royalty Stacking: A Review of the Literature, in PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARD A GLOBAL CONSENSUS 294, 298–302 (C. Bradford Biddle, Jorge L. Contreras, Brian J. Love & Norman V. Siebrasse eds., 2019).

Footnote ends.

Relatedly, patent holdup theorists have yet to deliver empirical evidence affirmatively showing that the outcomes anticipated by these theories have been realized during the several decades in which the wireless communications markets have been in operation. This is not to say that these empirical studies are definitive or free from all possible doubt. To the contrary, following standard practice in the social sciences, the five major empirical studies on patent holdup and royalty stacking incorporate this uncertainty into their analytical framework, making conservative assumptions where data is unclear, acknowledging the potential incompleteness or inaccu- racy of certain data, and not purporting to offer anything other than the most compelling interpretation of market performance based on avail- able evidence.90 No social science discipline can ever hope to meet any higher standard of proof given the inherent impossibility of conducting perfectly replicable natural experiments.91 Additionally, some patent holdup theorists appropriately observe that we cannot exclude the hy- pothetical counterfactual that wireless communications markets might have performed even more efficiently if those markets had operated under greater constraints on SEP enforcement.92

But the practically rel- evant question is which of the alternative interpretations has the greatest explanatory power with respect to all available evidence when considered in the aggregate.93 That is: do we tend to observe strong indications of patent overreach, which would justify significant limita- tions on SEP enforcement and licensing, or rather do we tend to observe strong indications of market success even under patent-intensive con- ditions, which would warrant few if any such limitations? Given the overwhelming weight of observed performance in the wireless communications markets over a period of more than two decades, which indicates a statically and dynamically efficient market in which output is expanding, prices adjusted for quality are declining, and innovation is proceeding robustly,94 patent holdup and royalty stacking models simply do not provide the most likely account.

1. Testing the Model

Scholars advancing royalty stacking theories had argued that profit-maximizing SEP owners would generate an aggregate royalty burden that would dramatically inflate device prices in the end-user market.95 The evidence behind these arguments either relied on anecdotal reports or added up publicly announced royalty rates indicating that SEP owners were collectively charging smartphone producers ag- gregate royalty burdens representing double-digit percentages of the sales price.96

Footnote starts.

96. Ann Armstrong, Joseph J. Mueller & Timothy D. Syrett, The Smartphone Royalty Stack: Surveying Royalty Demands for the Components Within Modern Smartphones 2, 69 (Working Paper, 2014), https://www.wilmerhale.com/-/media/files/shared\_content/ editorial/publications/documents/the-smartphone-royalty-stack-armstrong-mueller-syrett.pdf [http://perma.cc/CYQ5-EV28] (relying on data predicting “patent royalties in excess of $120 on a hypothetical $400 smartphone — which is almost equal to the cost of device’s compo- nents” as “one important reason why selling smartphones is currently a profitable endeavor for only a [few] suppliers”); Lemley & Shapiro, supra note 89, at 2025–27 (discussing patents essential to 3G technology and noting that four companies — Qualcomm, Ericsson, Nokia, and Motorola — own three-quarters of these essential patents, which likely contributes to royalties reportedly accounting for 30% of the total price of each phone); Lemley, supra note 40, at 152 (noting that, in response to the SSO’s survey of essential patents for 3G wireless protocol, patent owners indicated that there are “6000 ‘essential’ patents” and that “the cu- mulative royalty rate turned out to be 130%”).

Footnote ends.

The latter method is inherently unreliable because it over- looks the fact that IP licensors and licensees typically engage in negotiations to reduce the announced royalty rate (in some cases, to zero), especially in cases in which the licensee itself has an IP portfolio that can be used for “offsetting” purposes.97 Empirical researchers that subsequently undertook systematic efforts to collect and analyze royalty data consistently failed to find support for the standard holdup and stacking claims. Using various methodologies, researchers found that estimated average total royalty burdens owing to SEP owners constituted approximately five percent or less of the device price,98 a result that is consistent with the offsetting practices in licensor-licensee negotiations overlooked by patent holdup theorists. Additionally, researchers found that the royalty-stacking hypothesis is incompatible with the performance of the 3G and 4G wireless markets over an almost two- decade period during which device sales grew dramatically while, adjusted for increased functionality, device prices fell.99 Other research- ers found that entry by device producers has remained robust over the lifetime of the wireless communications device industry.100

If the holdup and stacking hypotheses were correct, then it would be expected that device prices would rise, sales would fall over time, and entry by producers would slow — precisely the opposite of what is actually observed. To be clear, this does not reject the proposition that SEP-dependent markets are susceptible to some form of patent holdup and royalty stacking as had been initially theorized. However, our best available evidence indicates that this risk does not appear to have been realized yet in any reliably observable form. While this result runs counter to what has become conventional wisdom on SEP policy, it is worthwhile to observe that this is precisely the result that would be an- ticipated by the original and still-classic formulation of the hold-up problem by Nobel Prize laureate Oliver Williamson. That model both identified circumstances in which holdup risk could arise, and de- scribed how rational market actors anticipate this risk and take preemp- tive steps (principally, vertical integration) so that it is unlikely to actually materialize.101 Given the market’s predictive and self-correc- tive capacities, Williamson therefore presented the holdup theory as a basis against policy intervention by antitrust regulators. Patent hold-up theory implicitly treats device manufacturers as lacking the foresight (or, in some versions, having only limited foresight) to anticipate holdup risk and demand protections ahead of time.102 Once foresight capacities are dropped or constrained by analytical fiat, it then becomes plausible to suppose circumstances in which device manufacturers would make large sunk-cost investments irrespective of holdup risk and IP input suppliers could then freely set the royalty rate and other terms of access. However, this is likely an implausible assumption in business settings involving sophisticated and repeat-play entities that can anticipate such risks and will seek protections ahead of time or, even under milder rationality assumptions, can observe such behavior in the past and will demand protections in connection with future launches of new technologies. As I will show in the next Section, if the standard hold-up model is embedded in a more realistic framework involving sophisticated, repeat-play entities with some reasonable level of memory, learning, and foresight capacities, it yields the expectation that holdup risk is unlikely to materialize in real-world SEP-dependent markets — a result that is consistent with observed market performance. This of course reverses the normative conclusion to which patent holdup theory typically leads.

#### Royalty stacking is non-existent in relevant fields.

Sidak ’18 [J. Gregory; 2018; Wohlford Family Senior Fellow at the Hoover Institution and the Tully M. Friedman Professor of Economics at Stanford; The Criterion Journal on Innovation, “Is Patent Holdup a Hoax?” vol. 3]

D. The Similar Lack of Empirical Support for the Royalty-Stacking Conjecture

When discussing the patent-holdup conjecture, scholars and commentators often mention another theoretical concern in SEP negotiations that some believe to be closely related to the issue of patent holdup: royalty stacking.7 6 In their 2007 article, Lemley and Shapiro explained that "trloyalty stacking refers to situations in which a single product potentially infringes on many patents, and thus may bear multiple royalty burdens."77 The royalty-stack- ing conjecture predicts that the sum of all royalties that each SEP holder demands might impose an excessive royalty burden on the licensee-the royalty stack-and thereby limit the licensee's ability to commercialize its product.7's According to Lemley and Shapiro, royalty stacking compounds the issue of patent holdup: 'As a matter of simple arithmetic, royalty stacking magnifies the problems associated with injunction threats and holdup, and greatly so if many patents read on the same product."79

Like the patent-holdup conjecture, the royalty-stacking conjecture presents testable hypotheses that one can either confirm or reject with empirical analysis. Galetovic and Haber summarize the implications of the royalty-stacking conjecture in their 2017 article:

The mechanics of royalty stacking mean that it would only take a few patent owners to devastate an industry. High cumulative royalty rates levied on manufacturers mean that they must charge a price for their products that is so high that it will exclude all but a few buyers. Royalty stacking is not, therefore, consistent with a thriving industry: the incentives for incumbent manufacturing firms to invest are weak, the incentives for new manufac- turing firms to enter are nil, and the incentives for technology developers are eroded by royalty rates that might not pay for their R&D expenditures. In short, if royalty stacking is actually taking place, then the market will stagnate in the long run."'

However, as of November 2018, there is no empirical evidence showing that any of these deleterious implications of the royalty-stacking conjecture have materialized.

Many legal and economic scholars have made similar observations. For example, Damien Geradin, Anne Layne-Farrar, and Jorge Padilla empirically analyzed the patents related to the third-generation (3G) cellular telephone technology-one industry that Lemley and Shapiro explicitly offer as an example of patent holdup and royalty stacking"8' -and concluded that there is no evidence of royalty stacking among the more than sixty companies involved in the standard.112 Similarly, Galetovic and Kirti Gupta tested the observable implications of the royalty-stacking conjecture in the mobile wireless device industry between 1994 and 2013, analyzing over 300 firms that participated in the development of the global third-generation and fourth-generation wireless cellular standards. They found that, contrary to the predictions of the royalty-stacking conjecture, the number of SEP holders in the industry grew between 1994 and 2013, sales increased significantly, real average selling price (controlling for technological generation) decreased, the gross margin of SEP holders and implementers showed no long-run downward trend, and the number of device manufacturers increased.

Proponents of the royalty-stacking conjecture often invoke studies purporting to show that the royalty stack for standard-compliant products, such as a smartphone, is exorbitantly high, which they claim is evidence that royalty stacking occurs. For example, Lemley and Shapiro claimed in 2007 that "stacked royalties" can be as high as 40 percent of the total price of a smartphone.4 A 2014 unpublished paper by Ann Armstrong of Intel and Joseph Mueller and Timothy Syrett of WilmerHale (Intel's law firm) esti- mated "potential patent royalties in excess of $120 on a hypothetical $400 smartphone," or 30 percent of the price of the hypothetical smartphone.5

Before discussing the evidence refuting the royalty-stacking conjecture, it bears emphasis that the unpublished paper by Armstrong, Mueller, and Syrett suffers from several significant weaknesses. First, it is unclear whether the authors are measuring the royalty stack only from smartphone SEPs or from all patents used in a smartphone. Second, the authors do not address the opposing literature. They did not initially address the opposing literature available in 2014, nor have they attempted to incorporate the opposing liter- ature that has been published since 2014. Third, although the authors stated that they intended to submit the paper for publication,"' as of November 2018, the paper still appears after more than four years not to have been published in any journal.

In addition, legal and economic scholars have refuted the studies purporting to show an exorbitant aggregate SEP royalty or total royalty. In 2015, Keith Mallinson, an engineering consultant in the mobile telecommunications industry, estimated the total monetary burden that royalties for mobile communications SEPs actually impose on manufacturers of mobile handsets and then compared that aggregate royalty to total global handset revenues for 2014.187 He found that the aggregate royalty for 2G, 3 G, and 4 G SEPs was approximately 5 percent of global handset revenues."'s In 2016, I replicated Mallinson's study and confirmed that the aggregate SEP royalty that implementers paid in 2013 and 2014 was between 4 and 5 percent of global handset revenues for handsets practicing the 3 G and 4 G standards.'8 9 Using a slightly different methodology, Galetovic, Haber, and Lew Zaretski also estimated the aggregate royalty in the entire mobile phone value chain-including both SEPs and non-SEPs-and found that the average aggregate royalty was less than 4 percent of the average selling price of the device.90

The proponents of the royalty-stacking conjecture have failed to rebut these studies or produce empirical evidence that affirmatively supports their theory. Therefore, the proponents of the patent-holdup cannot assert that holdup is exacerbated by royalty stacking, for the simple reason that the empirical evidence does not support the existence of royalty stacking in the licensing of SEPs.

#### ‘Patent holdups’ are fake. Antitrust is worse.

Barnett ’18 [Jonathan, Ronald A. Cass, Richard A. Epstein, Douglas H. Ginsburg, Gus Hurwitz, David J. Kappos, Paul Michel, Adam Mossoff, Kristen Osenga, David J. Teece, and Joshua D. Wright; February 22; Professor at the USC Gould School of Law; Dean Emeritus of the Boston University School of Law; Law Professor at New York University; Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, Law Professor at George Mason University; Law Professor at the University of Nebraska; Former Under Secretary of Commerce and Director of the United States Patent & Trademark Office; Retired Chief Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Professor at the University of Richmond School of Law; Thomas W. Tusher Professor in Global Business at the University of California at Berkeley; Former Commissioner of the Federal Trade Commissioner, Law Professor at George Mason University; IP Watchdog, “Apply Evidence-based Approach to Antitrust Law Equally to Innovators and Implementers,” https://www.ipwatchdog.com/2018/02/22/evidence-based-application-antitrust-law/id=93755/]

As judges, former judges and government officials, legal academics and economists who are experts in antitrust and intellectual property law, we write to express our support for your recent announcement that the Antitrust Division of the Department of Justice will adopt an evidence-based approach in applying antitrust law equally to both innovators who develop and implementers who use technological standards in the innovation industries.

We disagree with the letter recently submitted to you on January 24, 2018 by other parties who expressed their misgivings with your announcement of your plan to return to this sound antitrust policy. Unfortunately, their January 24 letter perpetuates the long-standing misunderstanding held by some academics, policy activists, and companies, who baldly assert that one-sided “patent holdup” is a real-world problem in the high-tech industries. This claim rests entirely on questionable models that predict that opportunistic behavior in patent licensing transactions will result in higher consumer prices. These predictions are inconsistent with actual market data in any high-tech industry.

It bears emphasizing that no empirical study has demonstrated that a patent-owner’s request for injunctive relief after a finding of a defendant’s infringement of its property rights has ever resulted either in consumer harm or in slowing down the pace of technological innovation. Given the well understood role that innovation plays in facilitating economic growth and wellbeing, a heavy burden of proof rests on those who insist on the centrality of “patent holdup” to offer some tangible support for that view, which they have ultimately failed to supply in the decade or more since that theory was first propounded. Given the contrary conclusions in economic studies of the past decade, there is no sound empirical basis for claims of a systematic problem of opportunistic “patent holdup” by owners of patents on technological standards.

Several empirical studies demonstrate that the observed pattern in high-tech industries, especially in the smartphone industry, is one of constant lower quality-adjusted prices, increased entry and competition, and higher performance standards. These robust findings all contradict the testable implications of “patent holdup” theory. The best explanation for this disconnect between the flawed “patent holdup” theory and overwhelming weight of the evidence lies in the institutional features that surround industry licensing practices. These practices include bilateral licensing negotiations, and the reputation effects in long-term standards activities. Both support a feed-back mechanism that creates a system of natural checks and balances in the setting of royalty rates. The simplistic models of “patent holdup” ignore all these moderating effects.

Of even greater concern are the likely negative social welfare consequences of prior antitrust policies implemented based upon nothing more than the purely theoretical concern about opportunistic “patent holdup” behavior by owners of patented innovations incorporated 2 into technological standards. For example, those policies have resulted in demands to set royalty rates for technologies incorporated into standards in the smartphone industry according to particular components in a smartphone. This was a change to the longstanding industry practice of licensing at the end-user device level, which recognized that fundamental technologies incorporated into the cellular standards like 2G, 3G, etc., optimize the entire wireless system and network, and not just the specific chip or component of a chip inside a device.

#### Melamed and Shapiro are a joke. They’re wrong about every case study.

Sidak ’18 [J. Gregory; 2018; Wohlford Family Senior Fellow at the Hoover Institution and the Tully M. Friedman Professor of Economics at Stanford; The Criterion Journal on Innovation, “Is Patent Holdup a Hoax?” vol. 3; KP]

Three years later, in his 2018 article with Melamed, Shapiro presents a different argument, yet he still fails to provide empirical support for the patent-holdup conjecture. Melamed and Shapiro assert: "Economic theory predicts that SEP holders will exploit their positions, and both anecdotal evidence and litigated cases suggest that they have done so."3. This claim is at once ambiguous and underwhelming. Melamed and Shapiro suddenly introduce the phrase "exploit their positions" as a vague stand-in to saying directly, "engage in patent holdup." Moreover, they assert that "anecdotal evidence" (which they never explain) and "litigated cases" merely "suggest" the existence of supposedly exploitative behavior by SEPs (which, given the ambiguous choice of language by Melamed and Shapiro, might or might not include charging a royalty that exceeds the ceiling of the range of legitimately FRAND royalties).

Another distinguished economist has also purported to rely on "litigated cases" in finding empirical evidence for the patent-holdup conjecture. Nancy Rose-an economics professor at MIT, on leave at the time and serving as the Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division-delivered a keynote address at a conference on patent law at George Washington University on November 5, 2015, one month after Shapiro's address to the IEEE-SIIT3,' For a PowerPoint slide entitled, "Have Institutions Eliminated Holdup?," Rose writes: 'Anecdotal evidence from court decisions: patentees often demand royalties well in excess of RAND."13 2 Under these headings are three bar graphs comparing the court-determined FRAND royalty to the FRAND royalty that the SEP holder had initially offered the implementer in Microsoft v. Motorola, In re IP Innovatio Ventures, and Realtek v. LSI, which in all three cases exceeded the court-determined FRAND royaltyzz Rose's observation of the large gap between the SEP holder's initial royalty offer and the court-determined royalty in these liti- gated cases is unremarkable when one recognizes that FRAND constitutes a range of royalties, rather than a single point.'34 It is conceivable that the FRAND royalty range for a given license for SEPs can be quite large, particu- larly in highly contentious cases that result in litigation, with the SEP holder bargaining for a royalty at the upper bound of the range and the implementer bargaining for a royalty at the lower bound of the range. One cannot merely assume that, if such a gap exists, the SEP holder necessarily attempted to hold up the implementer.35

When one turns to the four litigated cases that Melamed, Shapiro, and Rose claim are evidence "suggestling}" that SEP holders systematically engage in patent holdup, the facts are otherwise. In the first case that Melamed and Shapiro cite, Ericsson v. D-Link, the Federal Circuit considered whether the district court had erred in failing to instruct the jury to account for the risk of patent holdup and royalty stacking when calculating a FRAND royalty.z6 The Federal Circuit found that the district court had not erred, because, "{iln deciding whether to instruct the jury on patent hold-up .. ., the district court must consider the evidence on the record before it."z7 The Federal Circuit agreed with the district court's finding that the infringer "failed to provide evidence of patent-holdup and royalty stacking sufficient to warrant a jury instruction."38 It emphasized that "[clertainly something more than a general argument that these phenomena are possibilities is necessary."z, Thus, the reasoning in Ericssonv. D-Link contradicts rather than support the thesis of Melamed and Shapiro that SEP holders systematically engage in opportunistic behavior.

In Innovatio-the second case that Melamed, Shapiro, and Rose cite- Judge James Holderman calculated a FRAND royalty for Innovatio's SEPs while accounting for the possibility of patent holdup.4. Judge Holderman never found that Innovatio had, in fact, engaged in patent holdup. Thus, the reference by Melamed, Shapiro, and Rose to Innovatio at best is ambiguous empirical evidence that patent holdup might have occurred in this particular case, but it certainly is not evidence that patent holdup commonly occurs. In the third case that Melamed, Shapiro, and Rose cite as evidence that patent holdup exists, Microsoft v. Motorola, the Ninth Circuit affirmed4' Judge James Robart's finding that the SEP holder, Motorola, had violated its FRAND commitment by, among other things, failing to offer to license its SEPs to Microsoft in exchange for a FRAND royalty.42 Similarly, in Realtek v. LSI-the fourth case, which Rose cites but Melamed and Shapiro do not cite- Judge Ronald Whyte held that LSI violated its contractual obli- gation to offer the alleged infringer a license on RAND terms.43 However, these two cases in which a court found that an SEP holder violated its FRAND obligation certainly do not constitute empirical evidence of a systematic patent-holdup problem any more than Innovatio does. Moreover, in both Microsoft v. Motorola and Realtek v. LSI the implementer successfully defeated the SEP holder's alleged attempt at holdup, by means of a breach- of-contract claim brought in federal court. Evidence that attempts by SEP holders to engage in patent holdup have failed is not equivalent to affirmative evidence that patent holdup is routinely a successful strategy for SEP holders.

In fact, during Judge Robart's 2012 trial in Microsoft v. Motorola, Microsoft's expert economic witness, Kevin Murphy of the University of Chicago, invoked the patent-holdup conjecture. 44 Yet, on cross examination, Murphy could not identify a single real-world instance of the phenomenon, but instead merely speculated about the "possibility" of patent holdup if the SEP holder sought an injunction:

Q: Sir, do you have any specific evidence that any of Motorola's licenses were the product of hold-up?

A: Again, I know we are not supposed to mention names. There is one where there was-there was an injunction sought. An injunction in an ex post environment by its very nature involves an element of hold-up, because an injunction would deny you the right not just to the patent in question but to the standard. Things that involve injunctions inherently bring hold-up into the equation.

Q: You are aware that that company that we are talking about had an earlier license from 2003, correct?

A: Yes. But once you are in an ex post environment there is definitely the possibility of hold-up. 45

Murphy did not explain, among other things, why an SEP holder's low likeli- hood of receiving an injunction after the Supreme Court's decision six years earlier in eBay would still suffice to empower the SEP holder to threaten an implementer credibly with patent holdup.4 6

Furthermore, even if one agrees that the respective breaches by Motorola and LSI of their FRAND commitments equate to attempts to engage in patent holdup (which, as I explain below in Part III.C, is a proposition with which I disagree), the Ninth Circuit's decision in Microsoft v. Motorola and the Northern District of California's decision in Realtek v. LSI reinforce the insight (which Shapiro conceded in 2015) that implementers can readily adapt to defeat an SEP holder's attempt at opportunism. Motorola and LSI lost. Microsoft and Realtek successfully petitioned a federal district court to enforce an SEP holder's contractual obligations arising from its FRAND commitment. Melamed, Shapiro, and Rose do not explain why, given the implementer's demonstrated ability to defeat what Melamed and Shapiro consider an attempt at patent holdup by an SEP holder, a crisis looms requiring the curtailment of the SEP holder's patent rights and the increased intervention into SEP licensing practices by the world's antitrust enforcement agencies, including the FTC and the Antitrust Division. The factual evidence to date better supports the conclusion that contract law is up to the task than the conclusion that it is deficient.47

### Democracy---1NC

#### Massive alt causes.

Klaas ’21 [Brian; June 11; associate professor of global politics at University College London; the Washington Post, “Opinion: The world is horrified by the dysfunction of American democracy,” https://www.washingtonpost.com/opinions/2021/06/11/pew-research-global-opinion-us-democracy/]

It’s official: America is no longer a “shining city upon a hill.”

Data released Thursday from Pew Research shows that our allies are beyond delighted that the Trump presidency has ended. Confidence in U.S. leadership has soared. Our friends are breathing a sigh of relief.

But buried in that story about the United States’ post-Trump redemption is some seriously bad news: U.S. allies see our democracy as a shattered, washed-up has-been. We used to provide a democratic model for the world, but no longer. The chaos, dysfunction and insanity of the past several years have taken a predictable toll.

The numbers are depressing. Just 14 percent of Germans see American democracy as a desirable model for other countries, while 54 percent say that it “used to be a good example, but has not been in recent years.” Public opinion in France, Britain, South Korea, Japan and Australia is similarly bleak. In New Zealand, fewer than 1 in 10 citizens sees American democracy as a desirable model.

It turns out the rest of the democratic world wasn’t particularly impressed by the United States’ former authoritarian president, who spread conspiracy theories, tweeted narcissistic absurdities while 400,000 people died of covid-19, and incited a deadly insurrection. Go figure.

But these numbers coming out of our allies aren’t just depressing bits of polling trivia. They have real-world consequences. And they highlight a disturbing, inescapable dilemma that the Biden administration must confront: Until the United States fixes its broken democracy at home, it will be unable to effectively fight authoritarianism abroad.

Put bluntly: The United States’ authoritarian slide isn’t just a domestic policy issue. It’s a foreign policy disaster, too.

Ever since Donald Trump emerged as the Republican front-runner in 2016, China has been exploiting the unhinged turmoil he ushered in as evidence that democracy is a bad joke rather than a serious way of governing a society. As the Trump years descended into mayhem, China ramped up its rhetoric. And when Trump’s failures to contain the covid-19 pandemic became plain for the world to see, Beijing cited it as further evidence that democracy was a failed experiment.

Needless to say, China is no model for the rest of the world; it’s a brutal authoritarian regime that stays in power by committing genocide against ethnic and religious minorities while silencing its critics. But the Trump years were a gift-wrapped propaganda coup for the Chinese in their ongoing battle to challenge the West’s ideological primacy on the global stage.

This matters because emerging economies are slowly getting pulled into China’s orbit as they seek a viable blueprint for their own development. In Afrobarometer surveys of public opinion across Africa, China has pulled even with the United States. Six in 10 Africans have a favorable view of China’s role in their country. And while the United States is still seen as offering the best development model, China isn’t far behind. This is a drastic shift in just a few decades — and it will play an increasingly important role in U.S. foreign policy as some of these developing countries decide whether to follow Washington or Beijing.

The United States has lost the moral high ground. The world might have always been wary of lectures from the United States about the virtues of democracy and freedom, but at least those on the receiving end of those lectures often believed that the country giving the lecture knew how to build a successful democracy. That’s no longer true.

At a time of authoritarian resurgence, we need the words of the U.S. president to pack a democratic punch. Instead, they ring hollow. After all, due to ongoing Republican machinations, American voters can’t even be sure that their right to vote will be protected in the years to come. What can the United States teach the world about democracy when the country is continuing its steady slide toward authoritarian politics?

This won’t just hamper President Biden’s foreign policy; it will also make the world safer for authoritarianism. Although there are still plenty of desirable democratic models around the world (I’m looking at you, Norway), none of them has the power to take meaningful action when a dictator rigs an election or imprisons an opposition leader. Worse, now that the world doesn’t respect or admire U.S. democracy, dictators have a rhetorical trump card. They can point to the fact that Trump (falsely) claimed the U.S. election was rigged; that Republicans are actually trying to rig elections with voter suppression and worsened partisan gerrymandering; and that the former president repeatedly called to jail his political opponents. Our hypocrisy will enhance dictators’ impunity.

Comparisons between the United States’ malfunctioning politics and genuine dictatorships are, of course, hyperbolic. But dictators will nonetheless get plenty of rhetorical mileage out of making them, pointing to Washington’s failures to justify or excuse their own authoritarian plots.

#### Democratic peace theory is cherry-picked, and dyadic between two democracies at best.

Doorenspleet ’19 [Renske; 2019; Political Science and International Studies Professor at Warwick University; Rethinking the Value of Democracy: A Comparative Perspective, “Democracy and Interstate War,” Ch. 3]

This finding or ‘law’ has not only been recognized by scholars of international relations, but also found its way outside academia and has influenced foreign policies to promote peace and democracy, most prominently since the 1990s. However, my book will not draw conclusions based on ‘cherry-picking’ of specific studies showing how peaceful democracies are, but on a systematic overview of studies in this field. Therefore, this book relies on my own database with hundreds of different studies, which are relevant for each chapter; the articles had to engage directly with the chapter’s main research question. The next section will provide more detailed information around the selection criteria. This overview includes both highly cited and recent articles which were selected in a systematic way.

Based on analyses of statistical studies around this topic of democracy and war, it will become clear that the overall statistical support for the democratic peace hypothesis is not strong at all. In the rest of the chapter, I will spell out four reasons why democracy does not cause peace, and why the empirical support for the popular idea of democratic peace is quite weak: (1) most studies do not find a strong correlation between democracy and interstate war at the dyadic level, and they show that there are other—more powerful—explanations for war and peace, or even that the impact of democracy is a spurious one, (2) the theoretical foundation of the democratic peace hypothesis is weak, and the causal mechanisms are unclear, (3) democracies are not necessarily more peaceful in general, and the evidence for the democratic peace hypothesis at the monadic level is inconclusive, and (4) the process of democratization is dangerous and living in a democratizing country means living in a less peaceful country.

In my view, it is difficult—if not impossible—to support the democratic peace hypothesis without any reservations. The key caveats should not be ignored and certainly deserve more attention before we can confidently argue that democracies are more peaceful than other types of political systems. Please notice that I can already reveal that the assumed link between democracy and intrastate war is problematic as well, but this topic will be at the core of the next chapter (Chapter 4).

Selection of Articles: Democracy and War

The instrumental value of democracy cannot convincingly be found in democracy’s expected bond with peace. I have come to this conclusion on the basis of an analysis of statistical studies, which will be discussed in the rest of this chapter. So how did I select the articles for my database?4

For this chapter and Chapter 4, I selected the articles that focused on war and democracy. Using the online database Web of Science (formerly known as Web of Knowledge), I identified a total of almost 8000 articles published in the sampled journals until the end of 2015. I identifed them by entering ‘democr\*’ in the basic search field; this asterisk (\*)-based ‘wildcard’ allows searching for terms including ‘democratic’, ‘democracy’, and ‘democratization’ (in both British and American spellings) simultaneously, in the title, abstract and/or the keywords. As a next step, I excluded articles in which ‘democracy’ is used as synonym for state (e.g. analysis of the relationship between immigration policies and unemployment in European democracies) or a specific political party or movement (e.g. the ‘Democrats’ in the USA, or Uganda’s People’s Democratic Army) or a specifc country (e.g. the Democratic Republic of Congo). In addition, I identified them by entering ‘war\*’ in the basic search feld. The words democracy (democr\*) and war (war\*) need to be mentioned in title and/or abstract—and I also checked for equivalents of ‘war’ like ‘conflict’ and ‘dispute’ and ‘no peace’.5

As it is not feasible to analyse thousands of articles, it is necessary to take a next step in the selection process. I decided to select these articles, which will be part of the database for the third and fourth chapter, in three different ways. The first method is to choose the articles with the most citations. So, for example, in Chapter 3, the articles which are cited more than a hundred times are included in this first list. The article by Beck et al. (1998) has been cited more than 951 times, and as a consequence, this article is part of the database. But also articles with a much lower number of citations (such as Barbieri 1996, with 179 citations) are included in my analyses.

The second method is simply to include the most recent articles published in the past five years, so since beginning 2011 until end 2015. The most recent articles can easily be overlooked by applying the first method of most quoted articles. In my view, however, they still need to be included as they present the most recent findings and engage with the recent and innovative debates, which cannot be ignored in this book. For example, recent studies on democracy and interstate war (Chapter 3) have paid more attention to the mechanisms (see, e.g., Zeigler et al. 2014), and there is a growing attention for the impact of political institutions in recent studies on democracy and intrastate war (Chapter 4; see, e.g., Walter 2015). Those recent findings cannot be ignored in any systematic analysis of statistical studies on this theme.

The third method is the most subjective approach of selecting articles, as it is based on the ‘snowballing method’. So it includes articles which have not been selected by the first and second methods, but which have been quoted extensively and regularly by the previously selected articles. For example, the article by Bethany Lacina (2006) cannot be selected based on having high citations (the first method) and it cannot be included based on being a recent publication (the second method), but it has been mentioned by key studies and hence surfaces via the snowballing method (a third method). This article is important as it clearly distinguishes the determinants of conflict severity from those for conflict onset, and those determinants seem to be quite different, which is crucial information for Chapter 4.

In this way, my study presents and assesses the findings based on a big pool of statistical studies in the published literature. Based on this assessment, I will be able to draw clearer conclusions concerning the significance of the effects of democracy on interstate war (this chapter) and intrastate war (the next chapter). The Appendix shows more detailed information of the selected articles.

The Democratic Peace Hypothesis, Its Roots and Supporters

The democratic peace hypothesis6 states that democracies never or seldom go to war with one another. Where is this powerful idea of ‘democratic peace’ coming from? Before discussing the main findings of the statistical articles and before describing the four caveats of the ‘democratic peace paradigm’, we need to know a bit more around the background and the roots of this idea.

Immanuel Kant’s 1795 essay Perpetual Peace has often been mentioned as the foundation for this hypothesis. Kant believed peace was difficult to achieve, since ‘the natural state is one of war’ (Kant 1795: 10). A state of peace must therefore be established for—in his view—it is certain that hostilities will be committed and people need to be protected from each other. In such a world, each may treat his neighbour, from whom he demands security, as an enemy. In a dictatorship where ‘the subjects are not citizens, a declaration of war is the easiest thing in the world to decide upon, because war does not require of the ruler, who is the proprietor and not a member of the state, the least sacrifice of the pleasures of his table, the chase, his country houses, his court functions, and the like. He may, therefore, resolve on war as on a pleasure party for the most trivial reasons, and with perfect indifference leave the justification which decency requires to the diplomatic corps who are ever ready to provide it’ (Kant 1795: 13).

In contrast, the situation is different in constitutional republics, according to Kant. He argued that the majority of the people in republics would never vote to go to war, except for pure self-defence. Therefore, a world with only republics would be peaceful, since there would be no aggressors. The republican constitution, which requires the consent of the citizens to start a war, gives the positive prospect of perpetual peace.

It is important to note that the ideas of Kant on the one hand and the modern democratic peace scholars on the other hand are not completely similar. For example, Kant talked about republics instead of democratic states as the ideal states to achieve peace. He defined republican states as states with representative governments, in which the legislature is separated from the executive. Not surprisingly—considering the epoch in which he lived—Kant did not include universal suffrage in his definition, which is now seen as an essential dimension of democracy, even of the most minimalist types of democracy (Dahl 1971; see also Chapter 2). Moreover, Kant argued that republics will be at peace in general, which means that such political systems are expected to be not only in peace with each other, but also with other non-republican systems. Nowadays, only few scholars would support this approach of a ‘monadic democratic peace’. As will become clear at the end of this chapter, there is not much evidence for the idea that democracies are more peaceful in general.

Since the 1960s, most statistical studies have not focused on the ‘monadic democratic peace hypothesis’ but on testing the ‘dyadic democratic peace hypothesis’. This dyadic hypothesis states that it is less likely that democracies fight with each other, compared to other ‘dyads’ or other pairs of different types of political systems. The sociologist Dean Babst was the first scholar who started to build on Kant’s old idea in the ‘dyadic’ way, and decided to test it in statistical studies (Babst 1964, 1972). He concluded that ‘no wars have been fought between independent nations with elective governments between 1789 and 1941’ (Babst 1972: 55). His study was not published in one of the journals in the field of international relations, but in a sociological journal and later in Industrial Research. Therefore, it was not read by international relations scholars, and initially, it did not get the attention it deserved in the field of international politics.

Babst’s work was, for example, not cited by Melvin Small and J. David Singer (1976), and their fndings seemed to contradict Babst’s study. However, Small and Singer did not compare the rates of war proneness for democracies and dictatorships, but instead they focused on the question whether wars involving democratic states have historically been significantly different in length or in degree of violence compared to wars involving only dictatorships. For length and degree of violence during the wars, they did not find a difference between democracies and dictatorships, so they concluded that types of political systems did not matter.7 A few years later, Rudolph J. Rummel did cite Babst’s work and replicated Babst’s idea in statistical tests, which were described in the fourth book of his five-volume Understanding Confict and War (1975– 1981). He found clear support for his eleventh (of the 33) propositions about causes and conditions of conflict, which stated that ‘Libertarian systems mutually preclude violence’ (Rummel 1979: 279).

Eventually, those innovative studies from the 1970s helped to evoke the interest in the democratic peace proposition, and in the expected peaceful nature of relationships among democratic states. Since the 1980s, the number of quantitative studies has increased considerably, accumulating into an impressive field of research in international relations with its own ‘empirical law’ of democratic peace (Levy 1989: 270; see also Ray 1998).

This democratic peace hypothesis has not only received support from political scientists, but also from politicians and policy makers. Particularly since 1993, the idea of a democratic peace has inspired American foreign policies aimed at the promotion of peace and democracy. As the 42nd president of the USA (1993–2001), Bill Clinton was the first politician who explicitly bridged the gap between these findings in international relations on the one hand, and his foreign policy strategy on the other hand, at least rhetorically. Anthony Lake, who was Clinton’s National Security Adviser, stated in 1993 that in order to cope with America’s foreign policy challenges, the expansion of democratic states around the world would be essential because ‘it protects our [U.S.] interests and security’ (see Henderson 2002: 20). In his 1994 State of the Union, Clinton declared that ‘Ultimately, the best strategy to ensure our security and to build a durable peace is to support the advance of democracy elsewhere. Democracies don’t attack each other’.8 Findings from research in the field of international relations seemed to have a direct impact on policy making, and this move of the Clinton administration can be seen as ‘a textbook case of arbitrage between the ivory tower and the real world’ (Gowa 1999: 109).

Clinton’s successor, George W. Bush, went one big step further in his faith that democratic peace holds. He argued that efforts to turn Iraq into a democratic country would have positive effects on Iraqi’s neighbours. The authoritarian regimes in the region would fall as domino stones and follow the Iraqi example. They would start democratizing as soon as they could, which would then result in achieving a peaceful and stable the Middle East. The real motives for attacking Iraq may have been different, but ‘regime change’ was at the heart of Washington’s rhetoric when the USA started to bomb Baghdad in March 2003. The rhetoric of the Bush administration focused on toppling Saddam Hussein’s regime, and replacing the entire underlying dictatorial system with a democracy.

Moreover, George W. Bush used the democratic peace idea to justify the war in Iraq, declaring, ‘The reason why I’m so strong on democracy is democracies don’t go to war with each other…I’ve got great faith in democracies to promote peace. And that’s why I’m such a strong believer that the way forward in the Middle East, the broader Middle East, is to promote democracy’.9 In 2004, the 43rd President of the USA said: ‘If you think you can have peace without democracy – again - I think you’ll find that - I can only speak for myself, that I will be extremely doubtful that it will ever happen’.10 In his second inaugural address, he stated that ‘the survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world’.

Again, these are just words from speeches and can hence be seen as rhetoric to defend military intervention (cf. Jervis 2003; Kaufmann 2004; Daalder and Lindsay 2005; Owen 2005; Lieberfeld 2005; Schmidt and Williams 2008). Still, in the end, politicians have rationalized their political decisions based on one of the most powerful ideas taken from studies in the field of international relations, clearly showing the influence of this academic idea in political practice.

Hence, the field of international relations seems to have its own law: democracies rarely fight with each other. It cannot be denied that the evidence supporting the democratic peace proposition is quite diverse in character (see Ray 1998): the evidence has been epistemological (Rummel 1975), philosophical (Doyle 1986), formal (Bueno de Mesquita and Lalman 1992), historical (Weart 1994; Ray 1995; Owen 1994), experimental (Mintz and Geva 1993), anthropological (Ember et al. 1992; Crawford 1994), psychological (Kegley and Hermann 1995), economic (Brawley 1993; Weede 1996) and political (Gaubatz 1991). Still, there have been numerous critical studies (see, i.e., Hayes 2011), and the general picture is unclear. We do not yet know much about the overall findings from statistical studies.

So far, it seems as if some quantitative studies—mainly within the field of international relations—have found strong and robust evidence which supports the ‘democratic peace hypothesis’. Those studies show that democracy has had a positive influence on international peace (see, i.e., Rummel 1979; Ray and Russett 1996). In this sense, the idea of a democratic peace seems to be confirmed. Political scientists such as James Lee Ray are passionate supporters: ‘No scientific evidence is entirely definitive’ but ‘based on all the empirical evidence so far’ the more defensible of the two possible definitive answers to the question “Does democracy cause peace?” is “Yes” (Ray 1998: 43). However, based on my own analyses of the empirical studies with statistical evidence, I cannot be as enthusiastic as those scholars; to the contrary, I whole-heartily disagree with them, as a more systematic analysis of the articles shows that there are four important weaknesses, which seriously undermines the idea that peace is one of democracy’s instrumental values.

Caveat 1: It’s Not (Just) Democracy

While analysing the selected articles, the first remarkable finding is that only a relatively small number of studies have actually tested the democratic peace hypothesis. Most of the studies have focused on the mechanisms (see next section, caveat 2), and hence seem to assume that there is a correlation between democracy and war. In this way, the majority of the studies—often unintentionally—reinforce the idea that democratic peace actually exists without testing this proposition. However, none of the studies that directly test the democratic peace hypothesis found strong evidence that democracy is the most important factor when explaining interstate war. All democratic peace studies have controlled for many possible alternative causes of the peace, such as economic development and growth, geographic distance and contiguity, power status, alliance ties, militarization and political stability. The findings show that it is not just democracy which explains war, not at all. Within this group of studies, which explicitly test the democratic peace hypothesis, four different types of findings can be detected. I will discuss those results more in-depth in the rest of this section.

First Result: There Is Correlation, but Other Explanations Are Significant Too

The first subgroup consists of scholars who stress the importance of democratic peace, despite the fact their own analyses have shown that other factors are statistically significant as well (Maoz and Russett 1993; Rousseau et al. 1996; Gleditsch and Hegre 1997; Beck et al. 1998; Ray 2013). For example, some studies (e.g. Rousseau et al. 1996) included alternative independent variables in order to test realist arguments. They tested whether the distribution of power determines decisions to use force, and measures each state’s military capabilities relative to its opponent. A state’s military capability is the average of three elements: number of troops, military expenditures and military expenditures per soldier. They found that this realist variable was strong, positive and statistically significant at the 0.001 level in their analyses (see, e.g., Rousseau et al. 1996: 522, Table 2). However, not only a state’s military capabilities appeared to be an important explanation for peace. In addition, wealth, growth, alliances and contiguity played a crucial role when explaining interstate war (see, e.g., Maoz and Russett 1993: 632, Table 1).11 Moreover, when other factors are included, the impact of democracy on the likelihood of international crises is even spurious (Maoz and Russett 1993: 632; Henderson 2002: 141, see also p. 3).12 Still, scholars in this group keep defending the democratic peace idea, despite the fact that their own analyses showed the significance of alternative explanations.

Second Result: Initially There Is Correlation, but the Impact of Democracy Is Spurious When Other Explanatory Factors Are Included in the Models

The second subgroup of scholars is far more radical. Based on their own analyses, this group concludes that the democratic peace link is a spurious one (Weede 1984, 1996; Barbieri 1996; Mousseau 2013; Gartzke and Weisiger 2014).13 Typically, efforts to demonstrate the spuriousness of the statistical democratic peace pointed to other factors that, when accounted for ‘properly’, eliminated or dramatically reduced the statistical significance of shared democracy. Hence, the studies in this second group did not find strong evidence for the democratic peace hypothesis anymore, once other explanatory factors were included in the models.14

One of the most convincing alternative explanations of peace between countries is that there is no democratic peace, but a capitalist peace instead. The settlement in Germany and Japan succeeded because of the establishment of capitalist peace. Because of economic support by the Americans, who encouraged free trade and offered trade opportunities in practice as well, the poorer economies in Europe and Japan would gain economically, resulting in ‘economic growth, prosperity, and, ultimately, free trade among most of the more technologically advanced economies’ (Rasler and Thompson 2005: 232). By establishing and expanding free trade, the incentives for war would quickly decrease among trading states, according to this approach. To prevent new interstate wars after World War II, the capitalist peace was a far more important factor than the American promotion of democracy and its political institutions.

The capitalist peace, or capitalist peace theory, also states that economic development accounts for both democracy and the peace among democratic nations. Economic development is a key factor to explain democracy (Lipset 1959; see also Hegre 2003; Weede 2004).15 Moreover, economic development also plays a role when explaining peace, and the presence of market-oriented economies in countries have a positive impact on both democracy in those countries and peace between them (Mousseau 2000, 2002, 2003, 2005, 2013; see also Hegre 2014). Democratic peace only exists when both democracies have high levels of economic development, when economic development is well above the global median.

In fact, the poorest 21% of the democracies studied, and the poorest 4–5% of current democracies, are significantly more likely than other kinds of political systems to fight each other (see, e.g., Mousseau 2005). Moreover, if at least one of the democracies involved has a very low level of economic development, then democracy cannot prevent war.16 Still, there is a pacifying effect of free trade and economic interdependence, which is more important than the effect of democracy, because the former affects peace both directly and indirectly, by producing economic development and ultimately, democracy (see Weede 2004).17

Capitalist peace is not the only alternative explanation. Shared interests in general, and political similarities in specific, can also be seen as an important second alternative explanation for war and peace between countries (Farber and Gowa 1995, 1997; Gartzke 2007; Gowa 1999; Henderson 2002). Democracies are not peaceful to each other because they are democratic, but rather because they are similar. So the difference of the scores of both countries also contributes to the conflict proneness of the dyad. If the difference in levels of democracy is big, then the chance of conflict is higher (cf. Oneal and Russett 1997: 281–282).

Many researchers have conflated both the conflict-dampening impact of joined democracy and the confict-exacerbating impact of political distance in the variables focusing on political systems, but as Errol A. Henderson (2002: 32) convincingly argued: ‘Fusing these two contrasting attributes in a single variable makes it difficult to distinguish between the competing processes’. Therefore, it is better to include an additional variable of ‘political dissimilarity’ in the model. Henderson (2002) was one of the first scholars who included this variable and measured it by taking the absolute value of the difference between the two states’ scores. His main variables were not only political similarity, but also geographic distance and economic interdependence, and he concluded that democratic peace is a statistical artefact which disappears when those other variables are taken into account. Political similarity clearly has a pacifying effect18 (see Werner 2000; Henderson 2002; Beck et al. 2004), and it is not democracy per se which is the decisive factor.19

Hence, the benefits of trade and trade interdependence are essential explanations, while democracy is spurious or at least subordinate (see also Rosecrance 1986; Weede 1984, 1996; Hegre 2000, 2014; Jervis 2002; Souva 2003; Rasler and Thompson 2005: 235; Mousseau 2000, 2002, 2003, 2005). Based on those studies, it is safe to conclude that democracy, on its own, is an unlikely cause of the democratic peace.

Third Result: There Is Correlation, but Other Explanations Are Much Stronger

This same point that democracy is just one of the explanations for peace (and not even a very important one) is also at the core of studies in the third subgroup. Scholars of this group keep arguing that there is support for the democratic peace hypothesis, and that the link is not spurious. In this sense, they are less radical than the second group of scholars, as they do not completely reject the value of democracy for peace. On the other hand, their own analyses have clearly shown that alternative factors—hence other factors than democracy or type of political system— are not only statistically significant but also more important when trying to explain interstate war (Bremer 1992; Gelpi 1997; Oneal and Russett 1999a, b; Reiter and Stam 2002; Peterson 2013; Caselli et al. 2015).

Theoretical arguments and empirical evidence suggest that democracy is not the most important factor, while war is more likely to occur between states that are geographically proximate, approximately equal in power, major powers, allied, economically advanced and highly militarized than between those that are not. Bivariate analyses of these factors in relation to the onset of interstate war over all pairs of states in the period from 1816 to 1965 have generally supported these associations. However, multivariate analyses revealed some differences. Stuart Bremer (1992), for example, showed that some factors are far more important than others. The existence of a dangerous, war-prone dyad can be best explained by the presence of contiguity, the absence of an alliance and the absence of more advanced economy. The absence of democratic polity and other factors (absence of overwhelming preponderance, and presence of major power) are less powerful. Overall, these findings suggest that our research priorities may be seriously distorted and that we should not focus too much on the perceived positive impact of democracy, but on other factors (such as alliances and economic factors) instead.

Fourth Result: There Is Correlation, but Only Under Certain Specific Conditions

The final subgroup of scholars argues that we cannot unconditionally accept the idea that democratic peace exists in general, so always and everywhere. Their statistical studies clearly showed that support for this hypothesis heavily depends on other factors. The chance of democratic peace depends not just on the specific historical period (Cold War or not; Gibler and Sarkees 2004; Siverson and Emmons 1991; Weede 1984), but also the stage of the conflict (beginning, duration or severity; see Bremer 1993; Bennett and Stam 1996; Reed 2000), and on the neighbourhood instability (extent of confict in the region; see Gibler and Braithwaite 2013; Gibler and Miller 2013). Despite the differences between the studies, there is one common finding in all studies: when explaining interstate war, we cannot just rely on the impact of democracy, as it is too much dependent on other factors.

Several scholars found strong evidence for the idea that democratic peace exists, but only during some specific historical periods. Based on this evidence, they concluded that democratic peace is simply a statistical artefact of the Cold War. For example, Henry Farber and Joanne Gowa (1995) found statistical support for the idea that peace between democracies is an artefact of the Cold War, when the threat from the communist states forced democracies to ally with one another (see also Mearsheimer 1990). Sebastian Rosato (2003) also argued that most of the significant evidence for democratic peace has been observed after World War II; and that it has happened within a broad alliance, which can be identified with NATO and its satellite nations, imposed and maintained by American dominance.

Since the Second World War, war has become a very costly affair. Scholars discovered that only a handful of states are ‘capable of engaging in major power warfare. That process of elimination has not yet extinguished the possibility of major power warfare, but it has lowered its probability immensely’ (Rasler and Thompson 2005: 219). The chance to achieve something in a war is low in general, and even lower in a bipolar world with two big power players risking high nuclear war costs (Jervis 2002). While war became more costly, trade became less costly; as a consequence, the war/trade costs increased during the Cold War (Rosecrance 1986; see also Jervis 2002). In such a world, war and conflict have become less attractive, while trade and cooperation have become more appealing (Rasler and Thompson 2005: 219). Hence, more states decided to adopt trading strategies in order to prevent confict and war as much as possible. In the end, democracy was part of the story, but only a very small part with a subordinated role next to the power dynamics during the Cold War, the costs of warfare and the benefits of trade.

Some scholars found evidence that the democratic peace still exists in the post-Cold War period (Park 2013) which weakens this argument. However, most analyses showed that dyadic dispute rates have converged after the Cold War (see, e.g., Gowa 2011). Moreover, jointly democratic dyads are likely to be allied only after 1945 (see Gibler and Sarkees 2004); during the 1816–1944 time period, there is even a negative relationship between democratic dyads and alliance formation.20 These findings cast serious doubts on the idea of a general existence of democratic peace.

Not only the historical period, but also the *stage* of the conflict is crucial. Some scholars in this group provided evidence that democratic peace is not universal, but that it depends on the stage and whether we focus on the beginning, duration or severity of the conflict. Although joint democracy has some pacifying effects on the onset of conflict, the results suggest that they are unrelated to the escalation of disputes to war (see Reed 2000). Moreover, democratic peace is dependent on the neighbourhood instability. Democracies often have few territorial issues over which to contend, as they tend to be part of a stable region. Democracies only seldom have territorial disputes with their neighbours, and therefore they can more easily choose favourable conflicts to escalate. The type of political system does not predict conflict selection or victory once controls are added for issue salience (Gibler and Miller 2013; see also Park and James 2015). There is an interaction between joint democracy and regional instability, which confirms the idea that the effects of type of political system on continued conflict apply mostly to dyads in peaceful regions (Gibler and Braithwaite 2013; see also Park and James 2015). Very democratic countries might even become more aggressive and faster than other political systems, once the region becomes more hostile (see, e.g., Baliga et al. 2011).

The General Lesson from the Results in a Nutshell (Caveat 1)

In short, regardless of the differences between the statistical studies on democratic peace, all findings have indicated that other explanations are important as well. It is clear that democracy is just one of the explanations, and certainly not the most important one,21 sometimes even spurious and often heavily dependent on other factors. It is not (just) democracy to be preoccupied with, when trying to prevent war between countries (Table 3.1).

Caveat 2: What Are the Causal Mechanisms?

Most of the statistical studies on democratic peace seem to assume that there is a correlation between democracy and war; based on this assumption, they then decide to focus on the mechanisms. This is problematic as none of the democratic peace studies found strong evidence that democracy is the most important factor when explaining interstate war (see the previous section). As a consequence, the next step of looking for mechanisms is quite irrelevant and not necessary in my view, but most studies nevertheless argue that the field lacks strong theoretical foundations and robust empirical evidence that can reveal convincing causal mechanisms.22 Those studies seem to accept the correlation between dyadic democracy and peace, and then start questioning whether democracy really causes peace before investigating potential mechanisms.

Table 3.1 Statistical studies on democracy and interstate war (dyadic level)

|  |  |
| --- | --- |
| Caveat 1: It’s Not (Just) Democracy | Studies |
| ‘It’s just democracy; democracy is most important explanation for peace between countries’ | No studies found |
| ‘There is correlation, but other explanations are significant too’ | Beck et al. (1998), Gleditsch and Hegre (1997), Maoz and Russett (1993), Ray (2013), and Rousseau et al. (1996) |
| ‘Initially there is correlation, but the impact of democracy is spurious when other explanatory factors are included in the models’ | Barbieri (1996), Beck et al. (2004), Farber and Gowa (1997), Gartzke (2007), Gartzke and Weisiger (2014), Gowa (1999), Hegre (2000, 2003, 2014, Jervis (2002), Mousseau (2000, 2002, 2003, 2005, 2013), Oneal and Russett (1997), Rasler and Thompson (2005), Rosecrance (1986), Souva (2003), Weede (1984, 2004), and Werner (2000) |
| ‘There is correlation, but other explanations are much stronger’ | Bremer (1992), Caselli et al. (2015), Gelpi (1997), Oneal and Russett (1999a, b), and Peterson (2013) |
| ‘There is correlation, but only under certain specific conditions’ | Baliga et al. (2011), Bremer (1993), Bennett and Stam (1996), Farber and Gowa (1995), Gibler and Braithwaite (2013), Gibler and Miller (2013), Gibler and Sarkees (2004), Gowa (2011), Jervis (2002), Mearsheimer (1990), Park (2013), Park and James (2015), Rasler and Thompson (2005), Reed (2000), Rosato (2003), Rosecrance (1986), Gibler and Sarkees (2004), Siverson and Emmons (1991), and Weede (1984) |

### Taiwan---1NC

#### No Taiwan war---even if Beijing thinks it has a military advantage.

Kassam ’20 [Natasha; January 7; Research Fellow in the Diplomacy and Public Opinion Program at the Lowy Institute, Bachelor of Laws (Hons I) and a Bachelor of International Studies from the University of Sydney, and Richard McGregor, Senior Fellow at the Lowy Institute, Former Fellow at the Wilson Center and Visiting Scholar at the Sigur Center at George Washington University; Lowy Institute Report, “Taiwan’s 2020 Elections,” <https://www.lowyinstitute.org/publications/taiwan-s-2020-elections>]

In Taiwan, political leaders worry that Xi wants to cement his legacy with a breakthrough on Taiwan. Once shy about revealing its strengths, Beijing under Xi has adopted a different approach, flaunting its wealth and power and strengthening the People’s Liberation Army to deter any challengers.

Regionally, the conventional balance of military power is tipping towards China. The People’s Liberation Army has long equipped itself and planned for a cross-straits conflict. However, a full-frontal Chinese invasion of Taiwan remains unlikely in the near term. There are numerous factors that would deter such an invasion, including Taiwan’s unwelcoming geography and climate, the difficulties of staging an amphibious landing, the unknown appetite in the United States for intervention and Japan’s interests in the Taiwan Strait. Other military options which would be less risky, and potentially less disruptive to trade, include a targeted naval blockade.[36]

Even if Beijing were to take over Taiwan militarily, Hong Kong has illustrated how difficult it would be to occupy the island in the face of near certain local resistance. The resulting political and security crisis for China and the broader region would be unprecedented since World War II. Taiwanese resistance, both on the island and by a mobilised Taiwanese diaspora, would be a test for national politics around the world, including in Australia. The People’s Liberation Army is untested, both in battle and in the business of occupation, and China’s institutions and military resources would be stretched by such a war.[37] It is unsurprising then that Beijing is pursuing its current strategy of multi-front hybrid warfare against the island to force an opening of talks, rather than military action.

## Adv---Cybersecurity

### Circumvention---1NC

#### The plan is circumvented.

Chopra ’20 [Rohit and Lina Khan; March 2020; Commissioner of the Federal Trade Commission; Academic Fellow at Columbia Law School, Counsel to the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary and Former Legal Fellow at the Federal Trade Commission; University of Chicago Law Review, “The Case for ‘Unfair Methods of Competition’ Rulemaking,” vol. 87]

I. The Status Quo: Ambiguous, Burdensome, and Undemocratic?

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication "may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies." 7Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades. 8

#### Rules fail---they slow down SSOs and reduces legal clarity.

David J. Teece & Edward F. Sherry 3, Mitsubishi Bank Professor in the Haas School of Business and Director of the Institute of Management, Innovation and Organization at the University of California, Berkeley, Ph.D. in Economics from the University of Pennsylvania; Senior Managing Economist at LECG, “THE INTERFACE BETWEEN INTELLECTUAL PROPERTY LAW AND ANTITRUST LAW: Standards Setting and Antitrust,” Minnesota Law Review, Vol. 87, June 2003, accessed via Lexis

These two interpretations have fundamentally different bases and policy implications. In our opinion, it is simply unnecessary to adopt mandatory rules in this area. SSOs are perfectly capable of adopting their own search, disclosure, and licensing rules, and of adapting those rules to the needs of the SSO participants. The results of Professor Lemley's survey indicate that SSOs have a variety of different rules. 227 There is no reason why a "one size fits all" mandatory-type approach is appropriate. 228

[\*1986] We find it is extremely telling that, at the recent FTC and Department of Justice (DOJ) hearings on the intersection between antitrust and intellectual property, both of the comments from SSOs expressed the belief that the current system worked reasonably well, and expressed concern that the antitrust authorities might adopt a "one size fits all" interventionist approach to standards issues. 229 We believe that those comments, coupled with the results of Professor Lemley's survey showing the wide diversity of policies across SSOs, 230 strongly suggest that the antitrust authorities should proceed cautiously in this area.

In particular, we are concerned that antitrust intervention may reduce the clarity of the rules, thereby making participation in SSOs more risky and reducing the willingness of firms with valuable IP (and which therefore presumably have much to contribute to selecting the appropriate standard) to participate. If the SSO's rules are unclear, the obvious public policy solution is to encourage SSOs to adopt clearer rules on a going-forward basis.

Most significantly, we believe that intervention runs a significant risk of slowing down the standards-setting process, thus delaying the adoption of new standards and new products made in accordance with those standards, to the detriment of consumers and of society generally.

This is not, of course, to suggest that there will never be an appropriate role for antitrust scrutiny of the standards-setting actions of SSOs or their participants. There is no question but that the activities of SSOs can affect non-participants, and one [\*1987] rationale for antitrust intervention is to protect the interests of such non-participants from being adversely affected by decisions in which they did not participate or could not exert influence. And there are obvious examples of manipulation of SSO rules/policies, such as the "stuffing the ballot box" example of Allied Tube, 231 in which antitrust intervention may be the only solution.

But we believe that the antitrust authorities are likely to give too little weight to the fact that SSOs, as voluntary organizations, must often walk a fine line between competing interests. In our view, ex post intervention runs the serious risk of failing to recognize the ex ante balancing of competing interests.

#### Better FRAND won’t be enforced---antitrust authorities want to stay out of it.

Eliana Garcés Tolon 13, Senior Economist and Deputy Head of the Unit for Industrial Competitiveness Policy at the European Commission, Ph.D. in Economics from the University of California, Los Angeles, “Licensing Of Standard Essential Patents: Antitrust Intervention Is Not Big Enough A Fix,” Competition Policy International, Vol. 9, Autumn 2013, accessed via Lexis

Antitrust intervention against injunctions to assert SEPs relies on the hold-up theory rather than on a violation of FRAND terms. None of the reasoning justifying antitrust intervention based on hold-up theory seems to rely on the existence of FRAND commitments, even though the existence of such commitments is sometimes referred to as further evidence of abuse. Once established that the extraction of market gains from participation in the standard is illegitimate and unwarranted because it does not reflect the value of the technology for the licensee, showing a violation of FRAND terms is superfluous. It is at best an exercise of tautology where the violation of FRAND and the definition of the infringement are done concomitantly.

By definition, FRAND terms will be violated if there is an attempt to extract illegitimate rent from the [\*94] licensee, and in this sense antitrust intervention informs on the definition of FRAND by making explicit the kind of rent it should not include and the kind of behavior that would be suspicious of extracting that rent opportunity. But so far the investigations opened have stayed away from defining the value or terms of the license that is in fact legitimate to extract. Many will welcome this as prudent behavior and argue that it is not for antitrust regulators to define fair, reasonable and non-discriminatory licensing terms. 9

Antitrust intervention in Europe seems so far to have been quite careful not to be seen as determining the scope of FRAND commitments or finding a violation of FRAND terms. Although it has contributed to the determination of FRAND commitments by arguing that the recourse to injunction is inadmissible in some cases, it has only done so indirectly by restricting the patent owner's behavior during the negotiating process. Beyond this behavioral restriction, there have been no limitations by antitrust regulators so far of what FRAND terms can or cannot include.

One can only relate the lack of enthusiasm by antitrust authorities to get involved in the discussions surrounding the meaning of FRAND to the general avoidance in past years of cases involving arguments of excessive pricing and exploitative abuses. This aversion to getting involved in anything that could be associated with price determination is in fact the main reason why antitrust intervention is not well equipped to resolve the litigious dynamics that have developed around SEP licensing.

B. FRAND determination requires a theory of fair value

The general reticence so far to determine more concretely what is and what is not FRAND is not justified by the lack of analytical tools. A theoretical body of literature has addressed the question on how to value the technology absent the market power of the standard. The most pervasive methodology proposes a valuation based on the ex-ante value of the technology, that is, before the technology is included in the standard. 10 Ways to calculate such valuation include estimating the value of the differential impact of a technology compared to the next best alternative. Such methodologies, if implemented, could help determine the "excess price" that is gained by hold-up. This ex-ante methodology has been endorsed by the European Commission as one acceptable way to approach FRAND. 11 But no methodology has yet been proposed in an antitrust investigation, and antitrust regulators have stopped short of defining any range for FRAND terms.

One could raise the valid argument that the current licensing terms agreed between licensing parties involve a complex equilibria of reciprocal commitments and that this does not make FRAND terms susceptible to optimal ex-ante determination. Licensing contracts for SEPs include long lists of specific rights and obligations by the signing parties and such agreements are best left to be negotiated without any outside constraints. How far can one go with determining FRAND by behavior? If such is the case, the approach adopted by antitrust authorities in Europe to only sanction behavior that is susceptible to distort negotiations is correct. The question is then whether there are other means than injunctions to extract illegitimate rent. So far, no other theory of harm has been taken up by regulators in the EU or the US, although some players in the industry have raised concerns about behavior such as the bundling of patents or the cross-licensing demands of certain SEP holders. [\*95] Assessing whether such demands are consistent with FRAND or not is in fact very difficult to do without addressing upfront the question of what constitute reasonable and fair licensing terms in the case of SEPs. Antitrust enforcers have no far shown no inclination to do this.

### Cybersecurity---1NC

#### No cyber risk---attribution, restraint, and capabilities.

Lewis ’20 [James Andrew; 8/17/20; senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies; "Dismissing Cyber Catastrophe," https://www.csis.org/analysis/dismissing-cyber-catastrophe]

More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are:

Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals.

There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.)

No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare.

State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war.

This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation.

The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability.

#### Critical infrastructure is impervious now.

Uchill 18 Joe Uchill, Cybersecurity reporter at Axios, former cybersecurity reporter at The Hill, internally citing Department of Homeland Security officials and other cybersecurity experts. [Why "crashing the grid" doesn't keep cyber experts awake at night, 8-23-18, https://www.axios.com/why-crashing-the-grid-doesnt-keep-cyber-experts-awake-at-night-a40563a5-f266-493d-856a-5c9a5c1383dd.html]

Reality check: The people tasked with protecting U.S. electrical infrastructure say the scenario where hackers take down the entire grid — the one that's also the plot of the "Die Hard" movie where Bruce Willis blows up a helicopter by launching a car at it — is not a realistic threat. And focusing on the wrong problem means we’re not focusing on the right ones. So, why can't you hack the grid? Here's one big reason: "The thing called the grid does not exist," said a Department of Homeland Security official involved in securing the U.S. power structure. Think of the grid like the internet. We refer to the collective mess of servers, software, users and equipment that routes internet traffic as "the internet." The internet is a singular noun, but it’s not a singular thing. You can’t hack the entire internet. There’s so much stuff running independently that all you can hack is individual pieces of the internet. Similarly, the North American electric grid is actually five interconnected grids that can borrow electricity from each other. And the mini-grids aren't singular things either. Taking down "the grid" would be more like collapsing the thousands of companies that provide and distribute power accross the country. "When someone talks about 'the grid,' it's usually a red flag they aren't going to know what they are talking about," says Sergio Caltagirone, director of threat intelligence at Dragos, a firm that specializes in industrial cybersecurity including the energy sector. Redundancy and resilience: Every aspect of the electric system, from the machines in power plants to the grid as a whole, is designed with redundancy in mind. You can’t just break a thing or 10 and expect a prolonged blackout. On some level, most people already know this. Everyone has lived through blackouts, but no one has lived through a blackout so big it caused the Purge. 'The power system is the most complex machine ever made by humans," said Chris Sistrunk, principal consultant at FireEye in energy cybersecurity. "Setting it up, or hacking it, is more complicated than putting a man [person] on the moon." An attack that took out power to New York using cyber means would require a nearly prohibitive amount of effort to coordinate, said Lesley Carhart of Dragos. Such a failure would also tip off other regions that there was an attack afoot. Causing a power outage in New York would likely prevent a power outage in Chicago.

#### The best statistics prove.

Valeriano & Maness 18 – Brandon Valeriano, PhD, Chair of Armed Politics at the Marine Corps University, Cyber Security Senior Fellow at the Atlantic Council. Ryan Maness, an American cybersecurity expert, Defense Analysis Professor at Naval Postgraduate School. [How We Stopped Worrying about Cyber Doom and Started Collecting Data, Politics and Governance, 6(2), Cogitatio Press]

6. Expanding Cyber Security Data Our team has been coding cyber incident data since 2010 and serves as a unique example of how the process of collecting cyber security data and evidence can be done. Our first peer reviewed published work appeared in 2014 in Journal of Peace Research (Valeriano & Maness, 2014). In this article we note that cyber conflict is much more restrained than generally understood by popular discourse. Threat inflation is ripe in cyber security, and the real use of cyber tools seems to be to enhance the power of strong states.

The data that Valeriano and Maness (2014, 2015) have built challenges the cyber revolution perspective and does so with the tools of social science, and is a necessary turn given the general tone of the debate. We first determine that a viable data collection method in light of limited resources was to focus on states that are committed interstate rivals (Diehl & Goertz, 2001). This allows us to focus on those actors with an intense history of recent hostilities that should be the most likely users of cyber technology on the battlefield (Maness & Valeriano, 2018).

In our research (Maness & Valeriano, 2016; Maness, Valeriano, & Jensen, 2017; Valeriano & Maness, 2014, 2015), we have been able to marshal a massive amount of evidence that is useful in dissecting the actual trends on the cyber battlefield in a geopolitical context. We demonstrate that while cyber-attacks are increasing in frequency, they are limited in severity, are directly connected to traditional territorial disagreements, and mostly take the shape of espionage and low-level disruptive campaigns rather than outright warfare.

Given this data-based perspective, we question the dynamics of the cyber security debate and offer a countering theory where states are restrained from using more malicious cyber actions due to the limited nature of the weapons, the possibly of blowback, the connection between the digital world and civilian infrastructure, and the reality that any cyber weapon launched can be replicated and used right back against the attacker. Given all of these perspectives gleamed from the data, we must moderate our views about the transformation that is offered by cyber strategists who stress a more revolutionist tone (Lango, 2016).

Social science clearly matters for contemporary technological policy debates. Absent rigorous methods, much of what is in the field is basically guesswork. Our work really owes an intellectual debt to J. David Singer, who started the effort to quantify war at the University of Michigan with the Correlates of War (COW) project (Small & Singer, 1982). Our project builds on this methodology and uses many of the same coding strategies. We recognize that data is a work in progress and seek to build more and more knowledge through subsequent updates. By gathering the full picture, we can gain the perspective that really matters in these emerging policy debates regarding the cyber battlefield.

# 2nc

## Bizcon

### Uniqueness---2NC

#### Growth now---overcomes supply crisis, shortages, and inflation.

Smart ’10/22 [Tim; Oct 22, 2021; Contributing Editor; U.S. News & World Report, “Survey: U.S. Economic Growth Accelerated in October, Led by Services,” https://www.usnews.com/news/economy/articles/2021-10-22/survey-us-economic-growth-accelerated-in-october-led-by-services]

Growth in U.S. economic activity accelerated in October, overcoming supply chain snafus and shortages of labor and materials, according to the flash composite Purchasing Managers Index released Friday by IHS Markit.

The overall index now stands at 57.3, up from 55 last month, with the services sector index at 58.2, a three-month high and up from 54.9 in September. Manufacturing slipped to 59.2 from 60.7 in September, registering a seven-month low.

Economists projected the services index at 55.2, with the manufacturing index estimated at 60.7.

"U.S. Private sector businesses recorded a sharp and accelerated upturn in output led by the service sector during October," the report said, "with growth the strongest for three months, albeit still much weaker than earlier in the year."

The report noted companies struggled with a backlog of orders, constrained by a lack of workers and key parts. Prices rose at a record pace, reflecting rising inflation across many categories of goods.

The report mirrors many other recent readings on the economy, which show strong demand from customers running head-on into shortages and higher prices.

Economists have blamed the current imbalance between supply and demand on the coronavirus, specifically the delta variant that began showing up in the summer and has yet to fully recede.

Restrictions on businesses, such as masking and vaccination mandates, have created holes in the global supply chain, and countries react differently to the latest outbreak. The situation has cast new light on the global nature of trade, which has been heralded for keeping supplies flowing and prices depressed in recent years.

### Impact---2NC

#### It stops extinction from emerging tech and U.S.-Russia-China war.

Burrows ’16 [Matthew; September 2016; Director of the Atlantic Council’s Strategic Foresight Initiative, PhD in European History from the University of Cambridge; Global Risks 2035, “The Difficult Transition to a Post-Western Order,” Ch. 8, http://espas.eu/orbis/sites/default/files/generated/document/en/Global\_Risks\_2035\_web\_0922.pdf]

The multilateralist global system that the United States and the West built after the end of the Second World War was premised on an economically strong United States and West. In 1945, the United States was the only victor that was not completely devastated. World War II had brought the country out of the Great Depression, and the US GDP constituted more than 50 percent of the world’s total. Into the twenty-first century, the members of the Group of Seven (G7) were the world’s political and economic heavyweights. It has only been in the past several years that the collective GDP of the developing world—led by China—has surpassed the developed world’s. Even as non-Western powers grow, it is psychologically hard for the West to think about relinquishing its reins.

Demographically, the West has, for a long time, been in the minority. What’s more recent is the aging of the Western population (analyzed in chapter 2), which is already occurring in Japan and Europe, beginning to squeeze the availability of resources for anything but health, social security, and interest payments on debt. Unless healthcare becomes far more efficient, the US economy will be overburdened with healthcare and pension costs as the “baby boomer” generation ages. Healthcare constitutes a whopping 18 percent of the US GDP—significantly more than is the case for other industrialized countries—without necessarily providing better results.

With more going to health and pensions, there will be less capacity for defense and military spending. The United States is the biggest military spender, but China is increasing its portion of worldwide military spending, while the worldwide share of European NATO members is diminishing.

China’s military probably will not rival the United States’ power-projection capabilities even by 2035, but it will have greater anti-access and denial powers. In a military contest, China may never be able to deliver a knockout blow, but it could tarnish the US image of military invincibility in a conventional state-on-state contest held in its region. Equally, a confrontation that results in a Chinese humiliation could set back China’s aspirations for regional leadership, if not trigger a domestic legitimacy crisis for the Communist Party leadership.

Biggest Problem Is Domestic

The biggest psychological blow to ordinary Western citizens has been their sagging standard of living (more analysis in chapter 1). Despite a much better record of overall growth in the United States since the 2008 financial crisis, those with median incomes have taken a hit.

Worrisome for future US growth potential has been the drop in the labor-participation rate, from the 67 percent range before the 2008 financial crisis to 62-63 percent in the years since. The labor-participation rate was destined to drop due to a growing numbers of retirees, but much of the current sharp decrease comes from unskilled males in their prime working years—forties and early fifties—dropping out. Additionally, many younger women are not entering or staying in the job market. Global Trends 2030 looked at two scenarios for future US growth—one in which the United States maintained or slightly increased its average 2.5 percent pre-2008 growth rate, or one in which growth would slow to an average of 1.5 percent a year. In the first, there would still be the global economic shift to China. On the other hand, the 2.5 percent average growth would help boost average living standards, engendering a “feel-good” factor, which would make more Americans interested in reengaging with world issues.91

Given the record of slower growth and labor-force decline since the 2008 financial crisis, the likelihood of the second scenario is increasing. That scenario anticipated lower growth rates—which accelerated declines in average living standards—making it harder to continue trade-liberalization efforts. Indeed, the IMF warned in June 2016 that the United States faces potentially significant longer-term challenges to strong and sustained growth, saying, “concerted policy actions are warranted, sooner rather than later… focusing on the causes and consequences of falling labor force participation, an increasingly polarized income distribution, high levels of poverty, and weak productivity.”92

Moreover, it is not as if traditional US partners—Europe and Japan—are doing much better. Japan and many European countries are aging faster than the United States, eliminating labor-force growth as a driver of future economic growth. Europe’s and Japan’s economic performances have been declining since the 1990s.

In Europe, the public discontent with high unemployment and declining incomes has helped to spur the rise of antiestablishment far-right and populist parties that want to weaken the EU and transatlantic ties. Even in richer European countries, such as Germany, a backlash has been growing against the Transatlantic Trade and Investment Partnership (TTIP), out of fear that Europe’s rewards would be meager and European standards would be diluted. McKinsey Global Institute, for example, believes a “return to sustained growth of 2-to-3 percent” is possible for Europe, but would require many politically difficult reforms.93 These include: reducing dependence on imports (much coming from Russia) for crude oil and natural gas; fostering a more vibrant digital economy; increasing workforce participation by the elderly, women, and migrants; and promoting flexibility in labor markets. China now spends a greater share of its GDP on research and development than does Europe. The latest OECD figures show that Europe now spends even less than the rest of the OECD.94

In both the United States and Europe, there is increasing anti-immigrant sentiment despite documented economic benefits from immigration. According to EU Commission Employment Analyst Dr. Jorg Peschner, productivity, by itself, will not be enough to reverse the negative employment trend absent more immigration: “EU’s productivity growth would have to double in order to keep the EU’s economy growing at the same pace as it did before the crisis started.” For employment growth to remain positive as long as possible, improving the labor participation of women, low-educated people, and migrants will also have to be a priority. In the United States, many of the new businesses started every year are started by first- or second-generation immigrants.95

Politically, there has been a large rise in support for right-wing and populist parties in the United States and Europe, undermining traditional parties. The gaps, for example, between the leadership and supporters in the US Republican and UK Tory and Labor Parties have been particularly evident in the selection of Donald Trump as presidential candidate and the June 2016 victory of the “Leave” vote in Britain. Unfortunately, there is no end of economic disruption. The job churn will continue as more and more skills and professions are automated, also increasing the potential for more “losers” from globalization, greater political polarization, and inequality. The increased competitiveness of the developing world with the West is a particular morale buster for Western middle classes who got used to ever-increasing prosperity for themselves and succeeding generations. Adapting to a new norm of economic turbulence—more prevalent in other eras—may be one of the biggest mental hurdles for Westerners. The West is used to thinking of the “Third World,” not home, as the place where economic turmoil happens.

And a Multipolar Financial Architecture, Too

Historically, US and Western power has rested on having a monopoly on reserve currencies and a Western-dominated financial system. In 2035, the dollar will be the biggest reserve currency, but its share of global financial transactions is expected to drop from 60 percent today to 45 percent. The euro will probably remain the second reserve currency, while the Chinese yuan or RMB—which became a part of the IMF benchmark-currency basket in 2015—will become a third reserve currency, accounting for 10 to 15 percent of global finance in two decades’ time.96

The financial architecture will also become more regionalized. The central role played by the financial centers of New York and London will also diminish, and a multitiered financial architecture will develop. Following the UK Brexit, those centers’ share in financial intermediation will decrease, as a second pole of global finance forms in the Eurozone. A third pole will develop in East Asia and Southeast Asia.

Gradually, a growing share of global financial resources will be concentrated in those regional clusters. As with the growth of regional trade, the regional clusters will be more self-encapsulated, spurred by rising domestic demand in China and other developing countries with growing middle classes. With the role of electronic money likely to grow, the traditional banking system will probably also undergo major revision, with potential impacts on governmental powers.

A more multipolar reserve system and regionalized financial architecture should lessen risks and contribute to greater stability. But the large-scale technological innovations—some of which contributed to the 2008 breakdown—will continue, making global finance still volatile. Emerging-market countries with fragmentary regulatory regimes will be particularly prone to suffering financial crises. The aging-population factor also increases risks to public finances. This report anticipates modestly increased volatility, lower than what occurred in the global economy during the 1890s through the 1940s, but higher than in the 1950s and 1960s—more of a continuation of what has been the trend line since the mid-1980s.

Are There Alternative Visions to Western Order?

Four years ago, when Global Trends 2030 was published, the answer was largely no.97 Increasingly, the facts on the ground would suggest otherwise. They do not add up to a cohesive plan to substitute wholesale all Western institutions and practices. However, they clearly indicate that there are some no-go areas, particularly those connected to regime change, democracy promotion, state control over NGOs, and maintaining sovereignty. Russia and China, in particular, see themselves as great powers and, as such, believe they have special rights to dominance in their regions. However, as other powers like India develop, it is likely that they will see themselves as regional powers with inherent prerogatives. It is worth recalling the United States’ expansive Manifest Destiny and nineteenth-century Monroe Doctrine, claiming special rights to determine the future of the Western Hemisphere.

The Mercator Institute for China Studies (MERICS) has been closely following Beijing’s efforts to build a network of parallel structures to existing international organizations. It has concluded that China “is not seeking to demolish or exit from current international organizations…It is constructing supplementary— in part complementary, in part competitive—channels for shaping the international order beyond Western claims to leadership.”98

As the accompanying chart indicates, China’s shadow network of alternative international structures encompasses everything from financial and economic partnerships (the Silk Road Economic Belt and the Asian Infrastructure Investment Bank) to full-blown political groupings like the Shanghai Cooperation Organization, Conference on Interaction and Confidence Building Measures in Asia (CICA), and the BRICS association of Brazil, Russia, India, China, and South Africa.99

Moreover, there is increasing cooperation among many of the emerging powers—beyond just authoritarians—to not just limit what they see as Western meddling in domestic affairs, but to go on the attack globally. According to a recent academic study, the “Big Five” authoritarian states of China, Russia, Iran, Saudi Arabia, and Venezuela “have taken more coordinated and decisive action to contain democracy on the global level.” They have sought to “alter the democracy and human-rights mechanisms of key rulesbased institutions, including the Organization of American States, the Council of Europe, the Organization for Security and Cooperation in Europe, and international bodies concerned with the governance of the Internet.”100

How durable are these preferences for nondemocracy and state control? By 2035, if not sooner (in the case of Venezuela), some of the now-authoritarian states could be liberalized, and the perceived threat posed by Western civil-society NGOs may ease. However, China and Russia are more likely than not to want to dominate their regions. Nationalism and democracy have been shown to be highly compatible. It is not clear that an even more powerful China or India would defer to Western leadership of the global order, even if both sides’ values in other areas begin to converge.

What Kind of Post-Western World? Clearly, there is a need to plan for a world that will not have the West as its big economic powerhouse—a prospect hard for Western elites and publics to conceive of, despite a decade or more of publicity about the “rise of the rest.” According to a recent survey, Europeans and Americans are more comfortable with each other than they are with anybody else. Although a majority of Europeans said, in the most recent German Marshall Fund transatlantic-trends polling, that they would like to see their country take an approach more independent from the United States, both Americans and Europeans still prefer each other over more Russian or Chinese leadership in the world.

The Obama administration—considered among the most multilateralist of recent administrations— campaigned hard in 2015 to convince Europeans not to join China’s proposed Asian Infrastructure and Investment Bank (AIIB). It was as if the United States was against any governance structure not “made in the USA,” even when those running the AIIB have made clear their intentions of operating with the World Bank and the Asian Development Bank.

More and more, the talk among Western elites is about locking in as much as possible the status quo, which favors the West, so that it will be harder for the newcomers to overcome. The TPP was sold as a way to set the rules before China gains much more power. A former Obama administration official advised that now might be the best time to undertake UN Security Council reform, before China and other uncooperative powers become more powerful. “A new US administration may be able to advance a proposal to address the Security Council’s anachronistic makeup while perpetuating a council that Washington can work with.”101

For Westerners, the challenge will be to plan for a future that will not be solely run by them, but which they can live with. Handovers have been historically difficult and fraught—more often than not, decided by bloody contests. One could envisage different scenarios, some already described in the earlier chapter on conflict, of military contests between the United States and China, or the United States and China with Russia, or the United States with NATO against Russia. Without delivering a knockout blow by one side or the other, these contests would most likely pit West against East, creating something akin to a new Cold War. Even if there were a knockout blow by the United States against China, it is hard to imagine a defeated China deferring permanently to the West. Its population has been imbued with such a narrative about the injustices by the West against China that any defeat or setback would be confirmation that the United States and West are dead set against a rising China.

Perhaps the most harmful effect of such a contest would be to convince both sides that neither is trustworthy. For the non-West, it would confirm the suspicion that the West does not want to relinquish its leadership position. For the West, it would make it harder to ever reach out and help establish a truly global system.

Need for a Second-Generation US and Western Leadership Model

War is not, and should not be, inevitable as the West struggles with the growing clout of China and other developing states on the world stage. Unlike during other transitions, the tools exist for ensuring more peaceful outcomes. They will require Western acquiescence to greater roles for the developing world to set and implement new rules of the road for the international order. A key feature of the post-1945 US design for the world order is its multilateralist structures. Many of these operate below most people’s radar. This plumbing of the international system has enabled the daily functioning of globalization. To keep it viable, China, as well as other developing countries, must be accorded more representation. There are too many long-term risks involved, for example, in China having only the equivalent of France’s voting rights in the IMF, when it is the first or second economic power in the world. This is how resentments are nurtured—all the more dangerous in China’s case because of its underlying “century of humiliation” mental complex.

As emerging technologies come online, the lack of a truly global institutional framework could be particularly dangerous. Assuring the future security of the Internet is particularly important in this regard, because all the new emerging technologies—bio, 3D printing, robotics, big data—take for granted a secure, global Internet. Everyone loses if cyber crime and cyber terrorism undermine the Internet. In the worstcase scenarios, in which cyber crime proliferates or strong national borders fragment the Internet, an Atlantic Council study, as mentioned, found that the economic costs could be as much as $90 trillion out to 2030, in addition to the risk of open conflict.102

Besides bringing the emerging powers into leadership roles in the panoply of multilateral institutions, the United States will need to temper its often “exemptionalist” stance to ensure the survival of the multilateralist order. According to the Council on Foreign Relations’ Patrick Stewart, a prominent scholar of global governance, one of the persistent paradoxes of the post-1945 decades has been that the “United States is at once the world’s most vocal champion of a rules-based international order and the power most insistent on opting out of the constraints that it hopes to see binding on others.”103 No country has the networks and connections that the United States does, but the system is now polycentric, rather than unipolar, and others resent the “exceptional” privileges that the United States claims. The Global Trends works have talked about the need for a new model of US global leadership. The United States needs to be guiding the international system as a “first among equals,” and willing to play by its own rules. Paradoxically, there is likely to be no vibrant global-governance system without US and Western leadership, but too much domineering behavior could doom it.

Even if the United States adapted its global role, this is not to say that the tensions and differences with many emerging powers would all disappear, or that the governance system would function seamlessly. In addition to the growing number of new state actors, the increasing importance of nonstate actors adds a new complexity to the functioning of global institutions. Moreover, there are clear-cut differences between the West and emerging powers on values-based issues, such as democracy promotion and the responsibility to protect. Many developing-country publics still resent Western colonialism and equate any intrusion with past historical wrong. They point to the 2011 humanitarian intervention in Libya, for example, as cover for the Western goal of regime change. Hence, the UN Security Council failure to stop the fighting in Syria, with more than two hundred thousand killed and 7.6 million displaced. Russia and China want to make a stand against the United States and the West getting their way and ousting the Assad regime. On the other hand, the lack of a solution smacks more of anarchy than global governance. Certainly, it shows one of the gaps that remains, and likely will remain, limiting global governance because of differences in values.

The speed with which new technologies are coming online and becoming an important political, military, and economic tool—for both good and bad—carries big risks for global governance. Stewart Patrick lists four potential new technologies that “cry out for regulation”: geoengineering, drones, synthetic biology, and nanotechnology. Without some setting of rules for their operation, there is the risk of major disruptions, if not catastrophes, stemming from their abuse. The recent advances in synthetic biology lower the bar to abuse by amateurs and terrorists alike, forever affecting human DNA. Geoengineering involves planetary-scale interventions that could interfere with complex climatic systems.

However cumbersome, politically unpopular, and ineffective at times, there is little alternative to increased global cooperation if one does not want to see higher risks of conflict and economic degradation. Without some sort of bolstered global governance, the West would end up with less sovereignty in a “dog-eat-dog” world, in which it was increasingly in the minority. But can the United States and the West rise to the challenge of investing in a global-governance system that will not always favor their interests on every issue? Historically, the United States could be especially generous because it was on top of the world in about everything after the Second World War. Europeans came to truly believe in pooling sovereignty and joint governance after centuries of internecine conflict. The tough economic times at home have seen US and European publics become distrustful of overarching multilateral institutions, believing the will of the United States or individual European countries will not be served. It is oftentimes easier for political leaders to fall in with the public mood rather than display leadership that might appear to work against it.

#### Every hotspot explodes.

Lewis ’18 [Patricia; November 10; Research Director for International Security at Chatham House, PhD in Nuclear Physics from Birmingham University, Former Deputy Director and Scientist-in-Residence at the Center for Nonproliferation Studies at the Former Monterey Institute of International Studies, Former Director of the UN Institute for Disarmament Research, Former Director of the Verification Research, Training and Information Centre, Graduated in Physics from Manchester University; World Economic Forum, “How to Prevent World War 3,” <https://www.weforum.org/agenda/2018/11/how-to-prevent-world-war-3>]

Since the ‘war to end all wars’ − as H G Wells so wrongly predicted a century ago − the world has seen the ‘peace to end all peace’ lead to the horrors of the second world war, proxy wars through the Cold War and, today, violent conflicts that increasingly affect civilians disproportionately and cross the red lines laid by the laws of armed conflict. The machinery of war and the available firepower has increased dramatically. The risks of a third world war are enormous. If we add in all the means and methods of warfare − conventional, nuclear, cyber, drones, and so on − we have the military potential to destroy ourselves entirely.

Violence is raging in the Middle East, Europe and Russia are poised on the edge of conflict over Ukraine, the United States is once more engaged in military action in Iraq and, as NATO pulls out, Afghanistan is vulnerable. Other flashpoints over disputed islands in the South China Sea, tensions on the Korean peninsula and over Kashmir are just some of the easily identified points of escalation.

In the past 100 years, we have, however, learned a great deal about how to prevent conflict. After the Second World War, we established the United Nations with the primary purpose of saving succeeding generations from the scourge of war. The European Union grew over decades from a trade treaty to an organization that won the Nobel Peace Prize for its part in transforming Europe from a continent of war to a continent of peace. NATO has had its part to play in shoring up the transatlantic alliance that bonded many European countries in a common cause. Today war between Germany and France is almost impossible to imagine.

Other regional organizations have been established in Africa, Asia, the South Pacific and the Americas. International bodies have been established to implement disarmament and security treaties and civil society expertise has been channeled through universities and think tanks − including Chatham House, conceived in 1919 with a view to preventing future wars.

According to the Uppsala Conflict Data Program, 254 armed conflicts have been fought since 1946 of which 114 are classed as wars (defined as more than one thousand battle-related deaths per annum). Since the end of the Cold War, the numbers of armed conflicts have dropped dramatically. Of the 33 armed conflicts listed in 2013, only seven were classed as wars – a 50% reduction since 1989.

Many factors have supported the reduction in armed conflicts including the withering of proxy wars, UN sponsored peace processes and economic development. Research by the Human Security Report demonstrates that peace negotiations and cease-fire agreements reduce violent conflict even when they fail.

Six peace agreements were signed in 2013 and four were agreed in 2012. Over recent years, despite common perceptions, we do seem to have learned how to create, keep and enforce the peace.

The laws of armed conflict and human rights laws along with the international criminal court, war crime tribunals, economic and military sanctions and domestic justice commissions serve to protect civilians. Although nuclear weapons possession or use, outlawed for most countries, are yet to be globally forbidden, international law has proscribed the possession and use of devastating weapons systems such as chemical and biological weapons, antipersonnel landmines, cluster munitions and blinding lasers.

Academic disciplines that study war and peace have developed a rich body of research that helps us understand how wars start and how they can be prevented or ended. No approach or system is perfect, of course, but we understand how resource scarcity, environmental change, economic stress, refugee flows and racism all fuel the engendering of conflict. We understand the importance of history and culture, the role of gender and the ways in which different political systems exacerbate or diminish the risks of conflict.

In a study for the European Strategy and Policy Analysis System (ESPAS), Chatham House and FRIDE predicted that the world in 2030 will be more fragile and governments and international institutions will struggle to cope with the twin trends of increased interdependence and greater fragmentation. Most significantly, we realized that the risks of inter-state wars are rising and a major inter-state war cannot be ruled out in the near future.

In the lead up to the First World War, many foolishly imagined that Europe was ‘too civilized’ to go to war. Prior to the Second World War people hoped that the aggression from Nazi Germany could be contained. In so many cases of war, we tend to be overly optimistic about the length of time (‘we’ll be home by Christmas’), the scale and the outcome of the conflict.

It is time that we put aside complacency and become more realistic about war and peace and ourselves. We know a great deal about how to prevent war. We owe it to all others who sacrificed their lives and families to put into action all that we have learned and ensure peace in Europe, the Middle East and Asia for forthcoming generations. Otherwise, there will be few left to hear our excuses.

## PR 2NC

### Overview---2NC

### Perm: Do CP---2NC

#### Antitrust laws means Sherman, Clayton, and FTC.

FTC ’13 [Federal Trade Commission; first saved on the Wayback Machine’s Internet Archive on December 14, 2013; “The Antitrust Laws,” https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws]

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

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## UQ

### Uniqueness---2NC

#### IPR and antitrust sit in the goldilocks zone. Only antitrust could tip the balance.

Ginsburg ’21 [Douglas, Joshua D. Wright, and Camila Ringeling; Retired Chief Judge of the DC Court of Appeals, Law Professor at George Mason University; Former Commissioner of the Federal Trade Commissioner, Law Professor at George Mason University; Associate at Hausfeld; July; CPI Antitrust Chronicle, “Growing Convergence: The Limited Role of Antitrust in Standard Essential Patent Disputes,” Vol. 1, No. 2]

VI. THE LEVEL AT WHICH SEPS MAY BE LICENSED

While some have argued a FRAND commitment restricts an SEP holder’s freedom to choose the level at which to license its patent,89 no U.S. court has adopted this position. In Qualcomm, the Ninth Circuit acknowledged not only that an SEP holder could choose the level at which to license but that it only made commercial sense for Qualcomm to base its licenses in such a way as to avoid patent exhaustion.90 The court also noted there is generally no duty to deal with competitors and the limited exception in Aspen Skiing91 was not applicable to Qualcomm’s practice of licensing only to end product manufacturers.92 The same approach was followed by the district court in Continental Auto Systems Inc. v. Avanci, LLC, 93 when it rejected the claim that the practice of licensing SEPs to car manufacturers, rather than to component manufacturers, violated antitrust laws.94

This question also arose in Europe pursuant to the Huawei decision. In that case the ECJ refers to SEPs subject to FRAND commitments as creating “‘particular circumstances’” that justify distinguishing “cases brought under the (otherwise restrictive) EU competition case-law on essential facilities.”95 These “particular circumstances” are the creation of legitimate expectations, which the ECJ held established expectations for the terms of licenses but did not create a duty to license at every level.96

VII. POLICY IMPLICATIONS AND CONCLUSIONS

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

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

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

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

Finally, antitrust laws protect against conduct that harms consumers101 and should not be used to protect particular firms or competitors from lawful competition. Patent and antitrust laws are aligned in their mutual aim to foster innovation that creates dynamic competition.102 They accomplish this objective by ensuring that innovators have adequate incentives to invest in, and to monetize, their technological advances.

#### Antitrust is constrained in IP now.

Barnett ’20 [Jonathan; December 21; Law Professor at the University of Southern California; Antitrust Chronicle, “How and Why Almost Every Competition Regulator Was Wrong About Standard-Essential Patents,” Vol. 3, No. 2]

II. THE LEGAL UNRAVELING OF THE SEP-SKEPTICAL CONSENSUS

The reversal of the Federal Trade Commission v. Qualcomm decision has deservedly garnered extensive attention. Yet it is only one element in a sequence of regulatory pronouncements and judicial decisions since 2015, and accelerating starting in 2019, that have eroded a formerly blanket regulatory consensus in favor of deploying competition law to constrain substantially the enforcement and licensing capacities of SEP owners in wireless communications markets. To provide a point of reference for the rest of the discussion, the Table below sets forth selected regulatory and judicial actions that are representative of this policy shift.

|  |  |  |
| --- | --- | --- |
| Date | Court or Regulator | Action or Statement |
| Sept. 2015 | European Court of Justice | Permits SEP owners to seek injunctions in case of "unwilling licensee." |
| Nov. 2017 | DOJ Antitrust | Rejects view that SEPs pose high risk of patent holdup, given lack of evidence. |
| Mar. 2019 | UK High Court | Issues injunction against SEP infringer on grounds of "holdout" behavior. |
| Dec. 2019 | DOJ Antitrust, National Institute of Standards and Technology, U.S. Patent & Trademark Office | Rejects "no-injunction" rule for SEPs. Expresses concern over patent holdout. |
| May 2020 | German Federal Court of Justice | Adopts "unwilling licensee" standard for SEP injunctions. |
| Aug. 2020 | Court of Appeals for the Ninth Circuit | Overturns district court ruling in FTC v. Qualcomm. |
| Aug. 2020 | UK Supreme Court | Adopts "unwilling licensee" standard for SEP injunctions. |
| Sept. 2020 | Northern District of Texas | Dismisses antitrust suit against automotive 5G patent pool. |

Table 1. The Global Policy Shift on SEP Licensing (2015-Present)6 These judicial and regulatory actions have rejected, or expressed skepticism toward, the dominant view that the enforcement and licensing activities of SEP owners pose a high risk of patent holdup that warrants antitrust intervention. In particular, these judges and regulators have generally adopted two views that significantly constrain the role of antitrust in SEP licensing disputes.

## Link

### Link---2NC

#### Patents imbue a zone of immunity from antitrust law now, which supports innovation.

Schuster ’21 [W. Michael and Gregory Day; 2021; Professors at the University of Georgia’s Terry College of Business; Wisconsin Law Review, “Colluding Against a Patent,” Forthcoming Volume]

Courts have struggled to determine when, if ever, patent strategies may constitute an antitrust offense. In hopes of harmonizing patent and antitrust laws, the general rule is that a patent grants a zone of antitrust immunity, though questions persist about the scenarios in which a rightsholder has exceeded their patent's scope. 35Consider the competing functions of patent and antitrust laws.

1. Patent Law, Exclusion, and Innovation

The patent system is meant to promote innovation by granting twenty years of exclusive rights. 36Experts have long thought that society would lack incentives to create if third parties could copy and sell an inventor's device without incurring the costs of creation. 37To avoid this outcome, a patent confers exclusive rights, allowing the patent holder to charge monopoly prices (to the degree that consumers are willing to pay high [\*546] prices). 38If a party employs another's patented technology without acquiring a license, the patent owner may recover damages and seek injunctive relief, estopping the infringer from using the device altogether. 39Because patent law lacks a general defense of innocent or accidental infringement, firms must exercise significant caution in creating, employing, and selling technology. 40

Since a patent embodies "the right to exclude," it may come as little surprise that the system impedes degrees of competition. 41This has generated allegations that some patentees have sought to erect barriers to competition rather than to protect original technology. 42If patent owners undermine enough competition and innovation, critics contend that the abuse of patent rights should, at some point, constitute an antitrust offense. 43But antitrust's application to such innovation has so far posed a host of practical and theoretical problems.

2. Antitrust Law in the Shadow of Patents

Antitrust has struggled where it collides with patent law. To resolve this tension, courts have sought to draw clear lines about when patent owners can legally exclude competition or, in the alternative, when antitrust law may condemn exclusionary acts. The key to defining antitrust's scope stems from the historical difficulties of identifying anticompetitive conduct regardless of patent rights.

Uncertainty has long prevailed over the types of practices that antitrust law bans. This is due to the broad text of the Sherman Antitrust Act (Sherman Act) which facially forbids vast swaths of acceptable activity. 44Section 1 bans every trade restraint, as in "every contract, [\*547] combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," 45while Section 2 makes it illegal to "monopolize, or attempt to monopolize ... any part of the trade or commerce." 46The courts, in turn, have struggled to identify when the elimination of firms was due to anticompetitive practices or valid competition. 47

To resolve confusion, courts in the 1970s leaned on scholarship (notably, the "Chicago School" 48) to reinterpret and narrow antitrust law into its modern form: the "consumer welfare prescription." 49The movement's leaders asserted that antitrust's sole purpose is to foster competition for the benefit of consumers. 50Because consumers are primarily concerned about prices, quality, and innovation, modern antitrust may only condemn exclusionary practices that raised prices, diminished quality, eroded innovation, or rendered similar effects in a defined market. 51To violate antitrust law, the reduction of competition [\*548] must derive from an exclusionary act rather than the innovation of superior goods or other legitimate means. 52

Since the patent system grants the legal right to exclude competition, 53the consensus is that patent owners enjoy antitrust immunity so long as they act within their patent's scope. 54Examples of where a rightsholder exceeds its patent and thereby offends antitrust law include the tying of a non-patented item with a patented good (which extends one's patent to the non-patented item) 55and sham infringement litigation. 56However, when a rightsholder refuses to license a patent or charges fortunes to do so, courts have largely characterized these acts as squarely within one's exclusive rights. 57The principle is that a patent owner - or anyone else - owes no duty to help their rival. 58

Also informing this rule, antitrust enforcement might threaten innovation. A theory is that firms would tepidly invest in research and development (R&D) if they feared exercising their right to exclude. 59Along the same lines, it is thought that courts are ill-equipped to identify whether an act of innovation was meant to produce a superior good or, instead, suppress competition. 60Thus, for practical and policy reasons, the exploitation of patent rights has not typically been considered an exclusionary act. Undeterred, plaintiffs have sought to impose antitrust liability on patent holders under an array of theories, as explained next.

#### Antitrust erodes R&D at a widespread level---literature consensus.

Barnett ’19 [Jonathan; Spring; Law Professor at the University of Southern California; Michigan Technology Law Review, “Article: Antitrust Overreach: Undoing Cooperative Standardization in The Digital Economy,” Vol. 25]

Following the conventional view, scholars and regulators have widely predicted that the combination of abundant intellectual property ("IP") rights, multiple IP holders, and multi-component systems that characterizes wireless device markets is liable to yield a "tragedy of the anti-commons" 13 in which high IP density inflates prices, reduces access and impedes innovation. 14Those types of statements can be found in scholarly publications, in-fluential reports issued by the DOJ, the FTC and the Patent & Trademark Office ("PTO") from 2003 through 2013 15, and statements made by competition agencies in the European Union and Asian jurisdictions. 16Some scholars are already making similar claims before the Internet of Things has even been deployed, arguing that intensive patent usage in that market "is likely to cause significant social welfare loss in the years ahead." 17

This near-consensus among much of the scholarly and policymaking communities faces one minor difficulty: it does not describe any actual real-world market. As the wireless communications industry has moved from 2G to 3G to 4G standards, patent issuance and the dispersion of patent ownership has increased. 18The consensus view would expect to observe some combination of increased prices, reduced output, blocked entry, and delayed innovation. Yet markets have disobeyed that theory. Quality-adjusted prices on mobile telephone devices and computing equipment have fallen, smartphone devices have rapidly achieved high rates of adoption in consumer markets, entry rates in device production have remained robust, and computing and communications functionalities have continuously improved. 19

The now-standard view has a clear normative implication: namely, weaken IP rights and intervene in privately negotiated licensing arrangements to "protect" the public interest against opportunistic enforcement and royalty rate-setting by patent owners. Illustrated most vividly by the sweeping order issued in the FTC v. Qualcomm litigation 20, courts and regulators in the U.S. and other commercially significant jurisdictions (again, with the recent exception of the DOJ Antitrust Division 21) have adopted policies that threaten the security of SEPs and the associated licensing infrastructure that stands behind the smartphone and related ICT markets. Specifically, courts and regulators have largely withdrawn the possibility of injunctive relief for SEP owners while regulators have advocated approaches for determining "reasonable royalties" in SEP infringement litigation and SEP licenses that would effectively reallocate market surplus away from innovators and toward device producers. This regulatory and judicial "reset" of the property rules in ICT markets distorts market negotiations between innovator-firms that supply the smartphone market with R&D inputs and producer-firms that embed those inputs into devices for the end-user. If there is no credible threat of injunctive relief, a downstream firm that can fund an extended litigation process (an assumption easily satisfied by the largest branded handset manufacturers) will elect what some industry observers now call "efficient" infringement 22: that is, use the upstream firm's technology and then negotiate the royalty rate in the courthouse, rather than the marketplace.

The sequence of policy actions pursued by competition regulators in the U.S. and other jurisdictions has overlooked the patent-dependent organizational mechanisms that have supported both robust R&D investment and standardization initiatives in wireless communications markets. For several decades, those markets have achieved those two objectives through a bottom-up process of private ordering rooted in three legal anchors: (i) reasonably secure IP rights, (ii) quasi-contractual commitments informed by reputational norms, and (iii) surgically applied antitrust safeguards against collusion. A secure foundation of IP rights and contract enforcement is necessary to induce an innovator-firm to invest in R&D and contribute the resulting output toward a collective standard-setting initiative. A rational manager will only allocate resources to these high-cost, high-risk activities on the expectation that the firm can expect ultimately to earn returns through licensing relationships with producer-firms that have the capital and expertise to embody R&D in products for the end-user market. From a competition policy perspective, this vertically disaggregated structure, over which no individual firm can exercise control, compares favorably with more historically prevalent mechanisms for achieving standardization through the coercive power of a government monopoly regulator or the market power wielded by a single dominant firm.

The approximately three-decade history of wireless communications networks has shown how standardization can be achieved without government direction, thereby harnessing the superior information-gathering and processing capacities of the private market, but without entrenching a single dominant incumbent, thereby avoiding the pricing, output, and other distortions inherent to a monopolized market. When this occurs, there is no quasi-utility entity setting the standard, and government intervention counterproductively substitutes an ad hoc rate-setting process, as implemented through legal proceedings, for the collective judgment of market actors, as expressed through the price discovery mechanism. As scholars working in the public choice tradition have emphasized and documented, resource allocation through the political process presumptively underperforms resource allocation through the market due to inherent informational disadvantages, bureaucratic delay and the susceptibility of political entities to capture by well-organized rent-seeking constituencies. 23In the wireless communications markets, a consistent pattern of political-economic behavior supplies substantial ground for the latter concern, at both the "firm level" and the "country level." Since the inception of these markets, firms and countries that specialize in the production, assembly and distribution segments of the ICT supply chain have advocated for, and achieved substantial success in securing, outcomes in antitrust and patent law that attenuate patent owners' ability to bring enforcement actions against, and negotiate licensing fees with, intermediate users. From a privately interested perspective, the logic is self-evident. Weakening patents shifts the "IP balance of trade" in favor of firms and countries that principally occupy downstream portions of the ICT supply chain while potentially undercompensating firms that specialize in upstream R&D. From a publicly interested perspective, however, regulatory and judicial interventions that erode the property rights and contracting infrastructure behind wireless technology markets endangers the cooperative standardization mechanisms that have supported innovation and commercialization in these markets.

### Link---FRAND---2NC

#### FRAND is carefully calibrated---upsetting its balance with antitrust decks innovation.

Gregory J. Werden & Luke M. Froeb 19, former Senior Economic Counsel in the Antitrust Division of the U.S. Department of Justice; William C. Oehmig Chair in Free Enterprise and Entrepreneurship at Vanderbilt University, former Chief Economist of the Antitrust Division of US Department of Justice, Ph.D. in Economics from the University of Wisconsin, “Why Patent Hold-Up Does Not Violate Antitrust Law,” Texas Intellectual Property Law Journal, Vol. 27, 2019, accessed via Lexis

A (valid) patent can have great value if it claims technology essential to devices from which many consumers derive substantial utility. The owner of such a patent possesses a monopoly of sorts, and the investment in the technology could pay off handsomely. A technology standard tends to increase the pay off by causing standard-essential technology to be used in more units of royalty-paying components or devices. 13Moreover, a standard locks in technology choices, so patents essential to a standard-complaint version of a particular component or device could be inessential [\*6] to a noncompliant version of the component or device that uses alternative technologies.

Inventors that become monopolists with the adoption of a standard generally accept an important restriction on the grant of monopoly. They commit to license their SEPs to all comers and to do so on FRAND terms. FRAND, however, is neither a number nor a formula, and innumerable FRAND commitments were made before any court had interpreted the concept. As a matter of economic theory, broad agreement exists on how to conceptualize a FRAND royalty: It is the royalty that would have been negotiated just before the standard was adopted. 14This is the benchmark used in economic analyses of patent hold-up. 15The scenario defining FRAND is properly termed " ex interim bargaining" because it occurs before implementers invest but after inventors invest. 16

Bargaining theory predicts that bilateral negotiations divide the total gain to both parties reaching agreement. 17The original theory of John Nash posited an even division, 18but economic analyses of patent hold-up posit a division determined by relative bargaining skill. 19In ex interim bargaining, inventors and implementers would have divided the incremental gain from using the best technical solution instead of the next-best alternative. This incremental gain would be huge for a breakthrough invention but very small if alternative technical solutions to a particular problem were almost equally good.

Licensing SEPs before adoption of a standard likely is infeasible because some SEPs have not been issued and their claims are unsettled. 20Before taking all the necessary licenses, implementers are apt to make sunk investments in product development and manufacturing. Once they have, replacing a particular technology in a standard with the next-best alternative ex interim might be impossible, in which [\*7] case all of an implementer's sunk investments in standard-compliant products would be lost if bargaining over the royalty failed to produce an agreement. This puts SEP holders in a position to engage in what is called patent hold-up, meaning that the SEP holder exploits the bargaining advantage afforded by the implementer's sunk investment.

A concrete example clarifies the insight that ex interim and ex post bargaining produce different royalties because they involve different metaphoric pies: Suppose that an implementer expects to manufacture a standard-compliant component with a marginal cost of $ 2 and a price of $ 8. The difference of $ 6 is not expected profit because the implementer incurred sunk costs. But once those costs are sunk, the per-unit gain from reaching agreement with holders of SEPs is the full $ 6, so ex post bargaining splits $ 6. If sunk development costs amortized to $ 4 per unit, ex interim bargaining would have split just $ 2. If bargaining splits gains evenly a la Nash, conducting the bargaining after product development costs are sunk increases the per-unit royalty (divided among all SEP holders) from $ 1 to $ 3. 21

The foregoing ignores external influences on the bargaining outcome, and there are several. An inventor can seek an injunction, and threat of an injunction could affect the bargaining outcome. 22An implementer can seek a declaratory judgment that the patent is invalid or not infringed, 23and the threat to do so could also affect the bargaining outcome. And, of course, an implementer can bring an action to enforce the FRAND commitment, 24and the threat to do that could also affect the [\*8] bargaining outcome. Courts have observed that a FRAND commitment is meant to achieve the outcome that ex interim bargaining would have produced, 25and they have acted accordingly in determining SEP royalties. 26

Antitrust intervention in patent royalty disputes also would alter the bargaining outcome. Section 4 of the Clayton Act allows any person injured "by reason of anything forbidden by the antitrust laws" to sue for treble damages. 27If patent hold-up was deemed an antitrust violation, damages presumably would be computed as the difference between the royalties paid and the royalties later determined to have been FRAND. With uncertainty about what royalty a court would choose, the threat of antitrust damages would cause the bargaining to settle on a royalty less than the expected court-determined FRAND royalty. 28Reducing SEP royalties would cause inventors to reduce their investment and would result in less innovation, thereby harming consumers. 29

### Link---Holdup---2NC

#### Antitrust action for holdup would upset the carefully balanced IP ecosystem.

Ginsburg ’15 [Douglas H. Ginsburg, Koren W. Wong-Ervin, & Joshua D. Wright; October; Retired Chief Judge of the DC Court of Appeals, Law Professor at George Mason University; former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission; Former Commissioner of the Federal Trade Commissioner, Law Professor at George Mason University; CPI Antitrust Chronicle, “The Troubling Use of Antitrust to Regulate FRAND Licensing,” ssrn.com/abstract=2674759]

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

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

Third, antitrust liability is likely to deter patent holders from contributing their technology to an SSO under FRAND terms if doing so will require them to forfeit their right to protect their intellectual property by seeking an injunction against infringing users. These possibilities, far from protecting the public interest in competition and innovation, actually threaten to reduce the gains from innovation and standardization. V. CONCLUSION

The new antitrust rules are troubling not only because they are wholly unsupported by empirical evidence, but also because they threaten to deter participation in standard setting and reduce the incentive to innovate. Antitrust enforcers around the globe should be wary of upsetting the carefully balanced FRAND-ecosystem, and should consider the unintended consequences of their proposed solution to the largely theoretical problem of patent holdup.

#### Antitrust action to resolve patent holdups links.

Ginsburg ’15 [Douglas H. Ginsburg, Koren W. Wong-Ervin, & Joshua D. Wright; October; Retired Chief Judge of the DC Court of Appeals, Law Professor at George Mason University; former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission; Former Commissioner of the Federal Trade Commissioner, Law Professor at George Mason University; CPI Antitrust Chronicle, “The Troubling Use of Antitrust to Regulate FRAND Licensing,” ssrn.com/abstract=2674759]

Second, as for the remedy, imposing antitrust liability for patent holdup and a patent holder’s refusals to issue a license on FRAND terms is not only unnecessary, given that the law of contracts is sufficient to provide optimal deterrence, it is likely to be harmful to both competition and consumers by diminishing the value of patents and hence reducing incentives to innovate and to participate in standard setting.

### Link---Uncertainty---2NC

#### Expanding antitrust law in IP deletes certainty, detonating a doctrinal atom bomb.

Sipe ’17 [Matthew; December of 2016, published in the 2017 edition; J.D. at Yale Law School; American University Law Review, “Patents v. Antitrust: Preempting Conflict,” Vol. 66]

IV. RISK OF CONFLICT

The previous two Parts examined the existing sources of regulatory authority in the patent context--the PTO, the ITC, and the Federal Circuit--to create a hierarchy of potentially anticompetitive patent activities, categorizing them based on the degree to which they are already under patent-specific supervision. Where that alternative supervision exists, as the Credit Suisse Court recognized, the benefits of overlapping antitrust intervention are marginal. Of equal--if not greater--concern, however, are the costs of overlapping antitrust intervention.

The bulk of the Court's analysis in Credit Suisse was dedicated to calculating those costs in the securities context. Due to the "fine, complex, detailed line" separating activity the SEC permits and activity the SEC forbids, the "contradictory inferences" that might arise from identical behavior, the "need for securities-related expertise" in adjudication, the "risk of inconsistent court results," and the danger of permitting plaintiffs to "dress what is essentially a securities complaint in antitrust clothing," the Credit Suisse Court determined that "antitrust courts are likely to make unusually serious mistakes" where they intervene with securities law. 193 As a result, the Court stated, permitting antitrust law and securities law to overlap would likely "produce conflicting guidance, requirements, duties, privileges, or standards of conduct." 194 This Part extends that analysis to the patent context where the costs are equally substantial. Each of the above concerns is just as pressing in the patent sphere--if not moreso.

[\*451] A. The Fine Lines of Patent Law

In Credit Suisse, the Court characterized the line separating permissible and impermissible securities activity as "fine, complex, [and] detailed." 195 Accordingly, allowing antitrust and securities law to apply simultaneously would be particularly likely to produce conflicting guidance and requirements. The Court illustrated this dilemma:

It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of . . . conduct that it now seems to forbid? 196

Patent law is similarly replete with fine doctrinal lines separating the permissible and the forbidden. To provide just a few key examples, the frameworks governing patent misuse, exhaustion, inequitable conduct, and contributory infringement are highly complex and continue to develop and evolve.

As explained in Part III, patent misuse and exhaustion are equitable defenses to infringement. 197 The former applies where a patentee "impermissibly broadened the 'physical or temporal scope' of the patent grant with anticompetitive effect." 198 The patent then becomes "unenforceable until the misuse is purged." 199 The latter applies where a patented item has been "lawfully made and sold," after which "there is no restriction on [its] use to be implied for the benefit of the patentee." 200 An infringement claim based on downstream use or sale will therefore be dismissed as a matter of law. 201 The Federal Circuit, reviewing these defenses, 202 is forced to thus grapple with complex, "murk[y]" questions. 203 In terms of patent misuse: What is outside [\*452] the scope of any given patent grant? Has this particular patent been "leveraged" as part of the alleged anticompetitive scheme? How should courts analyze and resolve portfolio--rather than individual patent--misuse? 204 In terms of exhaustion: Does the article sold sufficiently embody the "essential features" of the patent? 205 To what extent can parties contract around exhaustion? 206 As a result, there is already "foreseeable polymorphism" in the doctrines of patent misuse and exhaustion, and "unforeseeable strains of potential misbehaviors" are likely to emerge. 207 Allowing generalist antitrust courts to intervene would only produce greater uncertainty and, ultimately, conflicting and inconsistent results.

Inequitable conduct is another equitable defense to patent infringement. 208 To successfully assert a claim of inequitable conduct, the accused infringer must show that the patentee failed to disclose information, such as prior art, in its patent application. 209 The patentee must also have "specific intent to deceive the PTO," such that the "PTO would not have granted the patent but for [the] failure to disclose." 210 The remedy, as expressed by the Federal Circuit, is the "'atomic bomb' of patent law": "inequitable conduct regarding any single claim renders the entire patent unenforceable." 211 The result is a fine line to adjudicate. Because the Federal Circuit has determined that "intent and materiality are separate elements . . . that . . . should not be put on a sliding scale with one another," the crucial--and highly technical--question of whether or not the patentee's alleged deception was the "but for" cause of the PTO's grant must be addressed fully in every case. 212 Again, inconsistency and uncertainty would mar this already complex doctrine if antitrust courts were left to adjudicate these claims.

[\*453] As opposed to direct infringement, contributory infringement covers situations where a party does not sell the patented article or practice the patented process, but instead

offers to sell or sells . . . a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use . . . . 213

For a plaintiff's claim of contributory infringement to succeed, the plaintiff must demonstrate that the defendant "knew that the combination for which its components were especially made was both patented and infringing," and that the "components have 'no substantial noninfringing uses.'" 214 In practice, contributory infringement claims can be incredibly complex, not only in technical terms--understanding how components may be used together or separately in infringing or noninfringing ways--but doctrinally as well. For example, there is a delicate line between raising a successful contributory infringement claim and impermissibly trying to extend the scope of one's patent over unpatented devices--potentially triggering misuse. 215 With the risk of a finding of unenforceability on one side and the possibility of rampant third-party infringement on the other, the costs of antitrust courts generating conflicting guidance or contributing to uncertainty in this doctrine would be quite high.

Altogether, the degree of complexity associated with patent doctrines, such as misuse, exhaustion, inequitable conduct, and contributory infringement, weigh in favor of preemption under Credit Suisse's analysis. If permitted instead to overlap, there is a significant risk that patent law and antitrust law would produce conflicting guidance and requirements. Just as generalist antitrust courts would struggle to distinguish permissible and forbidden securities arrangements--and fail to accurately forecast potential changes in securities law 216--they would struggle with the equally delicate and fine lines of patent doctrine.

#### DOJ softened the American stance on SEPs.

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

II. DOJ Antitrust: From Patent Holdup to Patent Holdout

On December 19, 2019, a relatively under-discussed event took place in the patent world. Some history, however, is necessary to appreciate this event.

In 2007, the Federal Trade Commission (“FTC”) and the Department of Justice’s Antitrust Division (“DOJ Antitrust” or “Division”) issued a report expressing concern that owners of standard-essential patents (“SEPs”) relating to digital communications technologies were prone to engage in holdup behavior that would result in heavy licensing fees, which would then inflate device prices and stunt market growth. Additionally, the report identified the related risk of “royalty stacking,” in which individually profit-maximizing SEP owners set royalty rates that result in a collectively inefficient licensing burden on producers and ultimately consumers.2 In 2011, the FTC individually issued a report expressing similar concerns.3 In 2013, DOJ Antitrust and the USPTO issued a statement continuing this same line of argument and suggesting that these concerns could be partially addressed by generally precluding SEP owners from seeking injunctive relief against alleged infringers.4 This policy trajectory (which has been followed by competition regulators in other major commercial jurisdictions5 ) sought to substantially limit SEP owners’ enforcement and licensing capacities in global digital communications markets.

Now we get to December 19, 2019. On that date, DOJ Antitrust, the USPTO and the National Institute of Standards and Technology issued a statement that rejected this line of thinking, stating that SEPs should not be treated differently than other patents as a matter of antitrust or patent law.6 DOJ Antitrust and the USPTO withdrew the 2013 statement and DOJ Antitrust must be understood to have separately retracted its support for much of the substance of its 2007 report with the FTC. This means that two out of three federal agencies that impact patent policy have rejected a key intellectual foundation for over a decade’s worth of regulatory activity in the U.S. and abroad relating to SEPs in the 3G, 4G and now 5G wireless communications markets. This internal divergence within federal policymaking entities is vividly illustrated in the FTC’s ongoing antitrust litigation against Qualcomm, in which DOJ Antitrust unusually intervened in the district court litigation in May 2019 and has done so again in appellate court proceedings in February 2020.7

The December 2019 announcement reinforced and formalized remarks by DOJ Antitrust starting in November 2017, when Assistant Attorney General Makan Delrahim had rejected the Division’s prior positions concerning the allegedly elevated anticompetitive risks posed by SEP owners.8 Delrahim and other senior attorneys in the Division have noted the paucity of evidence for the patent holdup hypothesis, which casts doubt on the Division’s prior position that SEP owners should generally be barred from seeking injunctive relief against infringers.9 The December 2019 statement indicates that the USPTO now shares that view.

The joint statement makes the important additional observation that precluding SEP owners from seeking injunctive relief could give rise to opportunistic “patent holdout” by alleged infringers.10 The rationale is straightforward. Absent the limited possibility of being found to have willfully infringed (which would trigger treble damages), a well-resourced infringer in a noinjunction environment will rationally decline a license and invite the patentee to litigate, with attendant costs and delays. In the worst-case scenario, the alleged infringer incurs legal fees plus a “reasonable royalty” damages award approximately equal to the licensing fees it would have paid in the first place. In best-case and “better-case” scenarios, respectively, the alleged infringer either succeeds in invalidating the patent or compels a less well-resourced patentee to agree to a more favorable royalty rate and other licensing terms.

## Internal

### Internal---2NC

#### American leads on 5G now, BUT antitrust can flip it.

Abbott ’21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### Antitrust murders 5G AND open innovation.

Gupta ’19 [Kirti; September 23; Economics PhD from the University of California, San Diego; Antitrust Chronicle, “5G and Anticipated Intellectual Property and Antitrust Policy Issues,” Vol. 3, No. 2]

For antitrust economists, the courts, and policy makers to comprehend the full impact of their myopic theories, perhaps it is necessary to map out what might happen if rewards for investing in 5G mobile wireless technology are in fact set too low. The likely consequence is that: (1) R&D on mobile wireless is reduced and invention that relies on the licensing model slows. 5G updates occur less frequently, if at all. (2) Device makers and application developers suffer slowing, even declining, sales. There is little reason to buy new phones and other devices if the new ones don’t do much more than the old ones as technology obsolescence is what causes most customers to upgrade their devices. (3) To combat declining upstream innovation, device makers like Apple facing eroded sales may for the first time start to contemplate subsidizing upstream R&D. But this will be difficult because, in the shadow of FTC v. Qualcomm, the upstream wireless technology developers must provide FRAND licenses to all, subsidizer and free rider alike, at “nondiscriminatory” rates.15 Device makers subsidizing upstream technology developers is a strategy likely to fail, as individual device makers that consider subsidizing upstream R&D will have to compete with other free riding device makers. (4) Because such efforts to patch up open innovation are likely to fail, the large players (e.g. Apple, Google, Samsung, Huawei) are likely to begin to build their own proprietary technology stacks, causing the ETSI/3GPP open innovation model to collapse further. The integrated players will no longer wish to tender their technology to ETSI and be exposed to the FRAND commitment. The open innovation FRAND model will then no longer support sufficient technological development. This might not in the end trouble the big players like Samsung, Apple, and Huawei who can bring the technology in-house and not license it to the other usually smaller players. However, innovation will slow, and concentration in the downstream device markets would likely increase dramatically.

The irony would be that the same antitrust policy makers that might take pride from the breakup of the vertically integrated Bell System (“AT&T”), would have in fact stimulated the emergence of a vertically integrated model in mobile wireless, one that would likely suffocate a good deal of follow-on innovation and squeeze out downstream players. New entry into the device market would be much, much harder. The highly competitive model we have now, with scores if not hundreds of players, would collapse to a few players with proprietary software stacks. Perhaps these stacks would cooperate to achieve some amount of compatibility. Oligopoly would replace the vigorous competition we see today. Lower innovation is a likely corollary

There is not much in this scenario that is appealing from a competition policy perspective. Should this scenario play out, antitrust zealots in the US and the EU should then have on their tombstone the inscription that they “helped destroy the greatest model of technological cooperation and innovation in the history of human civilization” – all because they used too narrow an analytical lens. The poorest members of global society, who have benefited enormously from mobile technology, are likely to suffer disproportionately.

#### Antitrust threatens American leadership on 5G.

Abbott ’21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

III. Overly Aggressive Antitrust Enforcement Hinders American Technological Leadership and Threatens National Security

As companies from around the world develop the technology and standards for 5G mobile devices and networks, American companies are under threat by aggressive antitrust enforcement that ultimately redounds to the benefit of these foreign companies, which are economic competitors in countries that are also military competitors of the U.S. Over the past five years, foreign governments, particularly in Asia, have subjected U.S. companies to antitrust investigations that failed to follow basic norms of the rule of law, such as providing basic due process protections.14 These antitrust investigations were a thinly-disguised effort by these countries to force the transfer of U.S. patented technology to their own domestic companies, or to insulate their domestic companies from American competition. In recent years, Chinese, Korean, and Taiwanese antitrust authorities have brought nearly 30 investigations against 60 foreign companies across a range of industries, including manufacturing, life sciences, and technology.15

Antitrust challenges undermine intellectual property rights by forcing companies to license their products on non-market-based terms. One prominent example in U.S. history is when the Department of Justice wrung a concession from AT&T to license royalty-free the entire portfolio of 8,600 patents held by Bell Labs in a 1956 antitrust consent decree with the company.16 Today, the White House Office of Trade and Manufacturing Policy has observed that “China uses the Antimonopoly Law of the People’s Republic of China not just to foster competition but also to force foreign companies to make concessions such as reduced prices and below-market royalty rates for licensed technology.”17 Companies have also complained about poor policy guidance and procedural protections under China’s competition laws.18 Others have complained about China’s use of its competition laws to promote policy objectives rather than protect competition and advance consumer welfare.19 In one example, companies raised concerns with Article 7 of China’s State Administration of Industry Commerce (SAIC) 2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights.20 Under this provision, intellectual property constitutes an “essential facility,” which could allow parties to raise abuse of intellectual property rights claims against patent owners for a unilateral refusal to license their patents.21

#### Only antitrust can bust American 5G.

Osenga ’21 [Kristen; June 7; Austin E. Owen Research Scholar & Professor of Law at the University of Richmond School of Law; the Desert Sun, “Column: 5G isn't just about fast internet. It can help keep America safe,” https://www.desertsun.com/story/opinion/contributors/2021/06/07/5-g-china-national-security/7574073002/]

Most Americans associate 5G technology with self-driving cars, virtual reality headsets, or super-fast internet. While all of these applications are exciting, they aren’t as critical to America as the national security implications of 5G. Winning the race to 5G will help ensure that our military communications are secure and that bad actors can’t hack or manipulate these communications.

The Chinese Communist Party understands very well the importance of 5G and is working hard to develop 5G technology before us to gain control of the market. A recent report by the White House Office of Trade and Manufacturing Policy bluntly summarizes the threat the CCP poses.

“Given the size of China’s economy, the demonstrable extent of its market-distorting policies, and China’s stated intent to dominate the industries of the future, China’s acts, policies, and practices of economic aggression now targeting the technologies and IP of the world threaten not only the U.S. economy but also the global innovation system as a whole.”

America must swiftly act to ensure we win the race to 5G. One of the biggest barriers to American development of 5G is antitrust law and enforcement, both domestically