# 1AC

Same as round 1

# 2AC

### Case

#### Actors have the means and motivations to strike critical infrastructure.

Wintch 21, \*Timothy M. Wintch, an active-duty Major in the United States Air Force. He is currently a graduate student at the Oettinger School of Science & Technology Intelligence, National Intelligence University, in Bethesda, Maryland. Mr. Wintch has over 11 years of experience in command-and-control operations as an Air Battle Manager. He holds a Bachelor of Arts in Politics from the University of California, Santa Cruz, and a Master of Arts in Military Studies from American Military University. (April 20th, 2021, “PERSPECTIVE: Cyber and Physical Threats to the U.S. Power Grid and Keeping the Lights on”, https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/)

Among critical infrastructure sectors in the U.S., energy is perhaps the most crucial of the 16 sectors defined by the Department of Homeland Security. This sector is so vital because it provides the energy necessary to run every other critical infrastructure sector. However, the U.S. power grid, the backbone of the energy sector, is built upon an aging skeleton that is becoming increasingly vulnerable every day. Whether from terrorists or nation-states like Russia and China, the power grid is susceptible to not just physical attacks, but also to cyber intrusion as well. However, much of this threat can be mitigated if the U.S. takes the appropriate steps to safeguard the power grid and avoid a potential catastrophe in the future.

Since Sept. 11, 2001, terrorism on U.S. soil has been at the forefront of American consciousness. Critical infrastructure provides an appealing target because of the disproportionally large impact even a small attack can have on the sectors. In particular, the power grid represents a particularly lucrative target, both in terms of the ease of access and the large impact it can make. The National Research Council stated that the U.S. power grid is “vulnerable to intelligent multi-site attacks by knowledgeable attackers intent on causing maximum physical damage to key components on a wide geographical scale.”[[1]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn1) Additionally, the physical security of transmission and distribution systems is difficult due to the dispersed nature of these key components, which in turn is advantageous to attackers as it reduces the likelihood of their capture.[[2]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn2) From 2002-2012, approximately 2,500 physical attacks occurred against transmission lines and towers worldwide and approximately 500 attacks against transformer substations.[[3]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn3) Terrorists have the motivation to attack the U.S. power grid but the very nature of the grid makes it highly vulnerable. The power grid is not only at risk from physical attacks, but also nation-state cyberattacks.

One nation that has shown both the capability and intent to use attacks against critical energy infrastructure is Russia, as demonstrated in their 2015 annexation of Crimea from Ukraine. A Russian cyber threat group known as Sandworm, which used its BlackEnergy malware, attacked Ukrainian computer systems that provide remote control of the Ukraine power grid.[[4]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn4) This attack, and another in 2016, each left the capital Kiev without power, prompting cyber experts to raise concern about the same malware already existing in NATO and the U.S. power grids.[[5]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn5) In any conflict between Russia and NATO, not only would similar cyberattacks pose a threat, but so would potential physical attacks severing fuel oil and natural gas lines to Western Europe. Russia has both the capability and intent to attack critical infrastructure, particularly power grids, during future conflicts in their “hybrid warfare” approach.

Another nation that has the capability to attack critical energy infrastructure is China, representing a threat to not just the U.S. energy infrastructure but also that of our allies whose support would be vital in a major conflict. A recent NATO report highlighted this threat from China’s Belt and Road Initiative, stating that “[China’s] foreign direct investment in strategic sectors [such as energy generation and distribution] …raises questions about whether access and control over such infrastructure can be maintained, particularly in crisis when it would be required to support the military.”[[6]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn6) Like Russia, China has been active with cyber intrusions in U.S. energy infrastructure. The Mission Support Center at Idaho National Laboratory characterized these as attacks as “multiple intrusions into US ICS/SCADA [Industrial Control Systems/Supervisory Control and Data Acquisition] and smart grid tools [that] may be aimed more at intellectual property theft and gathering intelligence to bolster their own infrastructure, but it is likely that they are also using these intrusions to develop capabilities to attack the [bulk electric system], as well.”[[7]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn7) China, therefore, has both the capability and intent to conduct cyber intrusions and attacks for myriad reasons.

Another arm of this threat is the reliance the U.S. energy industry has on imports from China, especially transformers. In early 2020, federal officials seized a transformer in the port of Houston that had been imported by the Jiangsu Huapeng Transformer Company before sending it to Sandia National Laboratory in Albuquerque. Sandia is contracted by the U.S. Department of Energy for mitigating national security threats.[[8]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn8) The Wall Street Journal reported that “Mike Howard, chief executive of the Electric Power Research Institute, a utility-funded technical organization, said that the diversion of a huge, expensive transformer is so unusual – in his experience, unprecedented – that it suggests officials had significant security concerns.”[[9]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn9) Previously destined for the Washington Area Power Administration’s Ault, Colo., substation, the transformer is believed to have been seized due to “backdoor” exploitable hardware emplaced by the Chinese prior to shipment.[[10]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn10) Shortly after these events, President Trump issued Executive Order 13920, “[Securing the United States Bulk-Power System](https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-securing-united-states-bulk-power-system/),” essentially limiting the import of Chinese-built critical energy infrastructure components due to concerns about cybersecurity.[[11]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn11) Interestingly, Jiangsu Huapeng “boasted that it supported 10 percent of New York City’s electricity load.”[[12]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn12)

Franklin Kramer, the former Assistant Secretary of Defense for International Security Affairs, testified before a U.S. House of Representatives Energy and Commerce subcommittee during an energy and power hearing in 2011 and said that a “highly-coordinated and structured cyber, physical, or blended attack on the bulk power system, however, could result in long-term (irreparable) damage to key system components in multiple simultaneous or near-simultaneous strikes.” He added that “an outage could result with the potential to affect a wide geographic area and cause large population centers to lose power for extended periods.”[[13]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn13) Even the inclusion of features such as smart grids to the overall grid structure poses new vulnerabilities through their connectivity. Kramer stated that “such connectivity means that the distribution system could be a key vector for a national security attack on the grid.”[[14]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn14)

## T

### 2AC – T Prohibit

#### Prohibitions can have exemptions – prefer contextual evidence

DOJ and FTC 17 [US Department of Justice and Federal Trade Commission, “ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION”. https://www.ftc.gov/system/files/documents/public\_statements/1049863/international\_guidelines\_2017.pdf]

The Sherman Antitrust Act (“Sherman Act”) sets forth general antitrust prohibitions.11 Section 1 of the Sherman Act outlaws contracts, combinations, and conspiracies that unreasonably restrain “trade or commerce among the several States, or with foreign nations.”12 Section 2 outlaws monopolization, attempts to monopolize, and conspiracies to monopolize “any part of the trade or commerce among the several States, or with foreign nations.”13 Section 6a, added by the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), clarifies the Sherman Act’s application to conduct involving only non-import foreign commerce.1

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

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

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

#### Changing liability expands the scope of antitrust law – means we meet the floor

Richman 84 [DC, Yale Law School J.D. 1984. “Antitrust Standing, Antitrust Injury, and the Per Se Standard”. https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6883&context=ylj]

Some courts and commentators treated Brunswick as irrelevant to standing doctrine. Because the standing of the Brunswick plaintiffs had never been challenged, these readers concluded that only a trial on the merits could determine whether a plaintiff has suffered an "antitrust injury."69 They failed to realize that the Brunswick plaintiffs' allegations of predatory pricing had made a grant of standing quite proper. If the plaintiffs had, at the outset, attributed their losses solely to the continued existence of their competitors instead of alleging a disruption of the market, their lack of "antitrust injury" and of standing would have been clear from the start. Whether a plaintiff's claim is defeated at the standing stage or the damages stage may thus be merely a matter of when his theory of causation becomes clear.7 Some lower courts used Brunswick solely to reinforce their own diverse approaches to standing.71 Indeed, the Second and Seventh Circuits were quite correct in using Brunswick to confirm their tests' results. As the Second circuit's decision in Fields Productions illustrates, 7 the only difference between the Second Circuit's test and Brunswick's approach lay in their analytical progressions. The circuit's analysis looked to the particular per se rule invoked and then determined whether that rule presumed any disruption of the plaintiff's market. The analysis implicit in Brunswick focuses first on the plaintiff's market and then on whether the plaintiff, through either a per se claim or rule of reason allegations, can indicate some effect upon that market. 7

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After Brunswick, therefore, the Ninth Circuit's refusal to abandon the doctrine that permitted standing to the kind of plaintiff barred by Fields Productions was unjustified. By continuing to consider intent and foreseeability in its analysis of standing in per se claims, the Ninth Circuit expanded the scope of section 4 beyond that allowed by Brunswick." In Ostrofe v. H.S. Crocker Co.,7 5 for example, a former sales manager alleged that his employer had forced his resignation to prevent him from interfering in a conspiracy to fix prices. Even though the plaintiff clearly had failed to indicate any disruption of competition in his own market-the labor market-the Ninth Circuit found him to have standing under section 4. It reasoned that the "[d]ischarge of those who refuse to participate [in a price fixing conspiracy] is essential to success of the scheme"' and concluded that the plaintiff had suffered a direct injury.

## CP

## States

### 2AC – States CP

#### Standard setting is global and SSOs are outside of US jurisdiction

Kasdan 19 [Abraham and Michael. Partners in IP Law @ Wiggins and Dana LLP. “Recent Developments In The Licensing Of Standards Essential Patents”. 8/30/19. https://www.natlawreview.com/article/recent-developments-licensing-standards-essential-patents-0]

Technologies that operate across many different devices and geographical regions are all around us. As one example, today's mobile telephones can connect to 3G/4G/LTE and WiFi networks and communicate with other devices virtually anywhere in the world. This is made possible because all of these devices comply with highly specific technical standards that are promulgated by national and/or international standards setting organizations (SSOs), made up of companies involved in developing and building these global technologies.

When aspects of technical standards are protected by patents, the patent owners are generally obligated by the pertinent SSO to offer licenses to their patented technology under "fair, reasonable and non-discriminatory" (FRAND) terms, as the quid pro quo for having their patented technology included in the standard. The purpose behind the FRAND requirement is to prevent patent owners from gaining an unfair advantage over companies who must make devices that practice the standard in order to participate in the market; and are therefore necessarily “locked in” to standard-compliant designs.

Over the past several years, the licensing and litigation landscape involving standard essential patents (SEPs) and FRAND has become a matter of intense focus. Numerous technology industries, as well as courts around the world have begun to grapple with key issues such as “How do you determine what a FRAND licensing rate should be?” and whether a licensor’s offer is FRAND or not. This article summarizes several recent developments in the transnational licensing of SEP portfolios.

The Overall Landscape

Not surprisingly, most of the recent licensing disputes over SEPs involve the worldwide telecommunications industry. A host of multinational companies have been involved in developing the 2G, 3G, 4G and soon-to-be-commercialized 5G standards (aspects of which are also described by a bewildering array of acronyms, such as "LTE" and "LTE Advanced" ) These standards specify the technical features included in mobile phones and their networks.

The European Telecommunications Standards Institute (ETSI) is an SSO charged with developing worldwide standards for these technologies. Early on, SSOs recognized that the incorporation of patented technology into a standard could give the patent holder significant leverage when negotiating licenses. SSOs therefore required the patent holder to agree to make its SEPs available on FRAND licensing terms. However, ETSI, like other SSOs, does not provide guidance on how to structure licensing terms that meet the FRAND requirement. Indeed, doing so or setting price or royalty rates among entities in a given industry may raise antitrust issues. This leaves it to others to work out the specifics of how SEP owners can comply with the FRAND requirement.

#### State international regulation gets preempted, kills foreign investment and triggers massive economic uncertainty

O’Rourke 10 [Ken, Senior Partner @ O'Melveny & Myers LLP. “United States: The FTAIA In State Court: A Defense Perspective”. 3/3/10. https://www.mondaq.com/unitedstates/trade-regulation-practices/95030/the-ftaia-in-state-court-a-defense-perspective]

A threshold question is whether these limitations similarly restrict the extraterritorial application of state antitrust laws. Defendants will argue that the state antitrust laws cannot permissibly extend to reach conduct or give rise to damages that Congress has placed beyond the reach of federal antitrust law under the FTAIA.

The defendants' argument goes like this. First, under the Supremacy Clause of the U.S. Constitution,4 federal law preempts state law even in the absence of an express preemption provision when, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."5

Second, the FTAIA's legislative history establishes that Congress had multiple objectives when enacting the statute. One objective was to ensure that the risk of Sherman Act liability did not prevent American exporters and other firms doing business abroad from entering into advantageous "business arrangements (such as joint selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."6

Another objective was to eliminate "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction."7

Congress sought to adopt a "clear benchmark ... for businessmen, attorneys and judges as well as [U.S.] trading partners"8 with the "ultimate purpose" of "promot[ing] certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions."9

A third objective was to promote international comity by acknowledging and respecting the prerogatives of other nations to establish and apply their own standards for regulating and remediating alleged restraints of trade in their own markets.10

Congress believed that respecting such foreign sovereign regulatory prerogatives would ultimately best serve U.S. interests by "encourage[ing] our trading partners to take more effective steps to protect competition in their markets."11

Applying state antitrust laws to regulate foreign trade or commerce excluded from federal antitrust jurisdiction by the FTAIA arguably would frustrate every one of these objectives.

American exporters and other businesses engaged in foreign trade or commerce could have no confidence that restraints exempted from federal antitrust attack would not be subject to alternative antitrust attack under the laws of one or more U.S. states. Businesses, therefore, would be deterred from entering into arrangements that Congress intended to enable.

Likewise, ambiguity in the "standard to be employed" for assessing the extraterritorial application of "American antitrust law" would not only persist, but would be multiplied fifty times.

And the imposition of as many as 50 states' antitrust laws on foreign trade or commerce clearly would negate the federal objectives of international comity and respect for foreign regulation of foreign markets.

At every level then, the application of state antitrust laws to foreign trade or commerce exempted by the FTAIA from federal antitrust regulation would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FTAIA.12

Plaintiffs likely will counter these preemption arguments by pointing out that there is a presumption against preemption and that Congress did not expressly overrule any state antitrust law when enacting the FTAIA.

True, Congress did not address the reach of state antitrust laws, one way or the other, when it enacted the FTAIA. However, the Sherman Act has always extended to "commerce with foreign nations,"13 and was subject to a large body of pre-FTAIA case law addressing the limitations on its extraterritorial reach.14

By contrast, state antitrust laws such as California's Cartwright Act do not expressly reference foreign commerce and have no comparable history of being applied to it.

Congress, therefore, had no cause to be concerned that states would attempt to apply state antitrust laws to foreign trade or commerce exempted from federal regulation by the FTAIA.

Even if there had been such a concern, Congress would have been amply justified in anticipating that the doctrine of implied obstacle preemption — well established when the FTAIA was enacted in 198215 — would resolve any conflict.16

Take California as a specific example. There is a "strong presumption" against preemption, particularly in fields that have been the subject of California's "historic police powers."17 Antitrust plaintiffs would argue that California's "historic police powers" include the authority to regulate competition in California.

On the other hand, the U.S. Supreme Court has consistently held that the power of states to regulate commercial activity outside their borders is necessarily circumscribed.18 That principle applies a fortiori when states attempt to regulate foreign trade or commerce.19

Even in cases involving traditional regulation of conduct within state borders, the California Supreme Court has declined to apply a presumption against preemption where the regulation in question also implicates foreign affairs.20

When the area of regulation encompasses not only foreign trade and commerce but also international relations — that is to say, areas in which federal rather than state interests traditionally predominate — the case for preemption is even stronger.21

Extending the foreign extraterritorial reach of state antitrust laws beyond the limits of the Sherman Act would infringe not only the Supremacy Clause but several additional constitutional provisions establishing federal primacy in the areas of foreign trade, foreign commerce and international relations.22

This allocation of power is intended to ensure that only one entity — the federal government — represents American interests in foreign trade and commerce and foreign affairs.23

In recognition of these principles, courts have repeatedly invalidated state laws that undermine, or threaten to undermine, federal policies and prerogatives in the areas of foreign trade and commerce or foreign affairs.24

These decisions support a conclusion that states cannot constitutionally apply state antitrust laws such as the Cartwright Act to remediate alleged harm from restraints of trade in foreign markets having no direct, substantial and foreseeable anti-competitive effects on trade or commerce in the United States (as would be required for federal antitrust jurisdiction under the FTAIA).

There are policy reasons for this result as well. Claims arising from international cartel conduct or overseas monopolistic behavior arguably seek to apply state antitrust law to decide the legality of foreign conduct (e.g., communications between English and Japanese manufacturers about industry standards, or discussions between Chinese and Korean buyers, or joint ventures in Singapore investing in South America) regardless of whether such conduct was legal when and where it occurred.

Such claims threaten much more than an "incidental or indirect effect" on foreign trade and the internal affairs of foreign countries exercising their sovereign rights to regulate their own markets.25

To assert a state's antitrust law as an all-encompassing international antitrust statute available to police alleged restraints of trade in every country would contravene the federal policy, reflected in the FTAIA, of promoting international comity in this area.26

And allowing one state to apply its antitrust laws to foreign transactions paves the way for every other state to apply its antitrust statutes beyond the limits of the FTAIA.27

Exposure to a thicket of state antitrust regimes would drive foreign companies to avoid doing business that even tangentially affects U.S. commerce.

Finally, such an outcome would conflict with the reported decisions considering this specific issue. One federal court, in In re Intel Corp. Microprocessor Antitrust Litig. ("Intel II"),28 held that California Cartwright Act claims are "limited by the reach of their applicable federal counterparts."29

Intel II analyzed the question as follows:

"Plaintiffs have ... not demonstrated that their state law claims should be applied beyond the boundaries set by the FTAIA ... As the Supreme Court has recognized, '[f]oreign commerce is pre-eminently a matter of national concern,' and therefore, it is important for the Federal Government to speak with a single, unified voice.

"Here, Congress has spoken under the FTAIA with the 'direct, substantial and reasonably foreseeable effects' test, and the Court is persuaded that Congress' intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not."30

The only published California appellate decision on the issue, Amarel v. Connell, similarly holds that the Cartwright Act should not be construed to allow prosecution of extraterritorial antitrust claims that the FTAIA would not.31

The Amarel court observed that "[t]he legislative history of [the FTAIA] discloses it was intended to establish a uniform standard, in the face of conflicting judicial formulations, of the domestic effects necessary to trigger the jurisdiction of American antitrust laws,"32 and that "the proper approach to a preemption analysis is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'"33

The court concluded that the plaintiffs' state law antitrust claims were "not preempted" because, as pleaded, the claims did not seek to apply state antitrust laws in a manner inconsistent with the FTAIA.

Rather, they sought damages for anti-competitive practices "alleged to have had an adverse effect on the relevant markets in this state ..."34

According to the court:

"So long as the anticompetitive conduct in question has a direct, substantial and reasonably foreseeable effect within the state, prosecution of the conduct under state law is not precluded."35

In sum, there are strong reasons for a state court evaluating a state law antitrust claim involving foreign trade or commerce to limit the reach of that state law co-extensively with the reach of the Sherman Act as defined by the FTAIA.

To do otherwise contravenes constitutional clauses, rules of statutory construction and federal policies.

## Substantially PIC

## FTC CP

### 2AC – FTC

#### Specifically antitrust is locked out of royalty hikes, refusals to deal, and FRAND breaches

Hedge 20 [Justin Hedge, Partner @ Arnold & Porter. Jonathan Gleklen. “Ninth Circuit Reversal of FTC's Qualcomm Win Highlights the Limits of Antitrust Enforcement in Standard Essential Patent Licensing”. 8/18/20. https://www.arnoldporter.com/en/perspectives/publications/2020/08/9th-circuit-reversal-of-ftc-qualcomm-win]

Earning monopoly profits on patents is **not an antitrust violation**. The Ninth Circuit characterized Qualcomm as engaged in profit-maximizing, "hypercompetitive behavior" and held that just because Qualcomm had "sharp elbows," that did not mean it had acted anticompetitively. The decision is a reminder that high prices or **high royalty rates** alone—and even rates at a monopoly price—cannot form the basis for an **antitrust claim** against a monopolist.

Patent holders can design royalty systems to avoid patent exhaustion and choose where in the supply chain to extract their royalties. The FTC's central contention was that the royalty charged by Qualcomm to OEMs acted as a surcharge on sales by Qualcomm's competitors and allowed Qualcomm to charge lower prices for its own chips. The Ninth Circuit, however, made clear that nothing in the antitrust laws prohibited Qualcomm from **choosing where in the supply chain** it wanted to license and there was no evidence that Qualcomm's chip prices were so low as to be considered predatory. The court characterized the FTC's arguments as a type of "margin squeeze" theory that was rejected by the Supreme Court in linkLine. Even if SSOs clearly draft their patent policies to require IP owners to license component makers, a breach of that commitment does not raise antitrust concerns where component makers pay no royalties and there is no price squeeze.

Aspen Skiing applications remain limited. Antitrust liability for **unilateral refusals to deal remains disfavored**. The Ninth Circuit's decision does not even cite its decision in ITS v. Kodak, in which the court held that a refusal to license patents can be the basis for antitrust liability where the justification for the refusal to deal is "pretextual." Instead, antitrust liability attaches to a unilateral refusal to deal only if there was a prior course of dealing, the refusal involves a "profit sacrifice" and lacks any procompetitive justification, and a remedy would be administrable as shown by the fact that the defendant is currently selling to others.

Breach of a FRAND commitment does not constitute an antitrust violation unless there is foreclosure (and maybe not even then). Because Qualcomm's licensing policies led to its competitors being licensed royalty-free and OEMs paying the same royalty regardless of where they bought their chips—and because there was no price squeeze—even if Qualcomm breached its FRAND obligations that breach did not foreclose competitors.

Volume discounts that are contingent on exclusivity risk antitrust claims if foreclosure can be established. The Ninth Circuit did take issue with the structure of Qualcomm's supply contracts to Apple given Qualcomm's monopoly power. While it found the specific claims here failed because the facts did not establish the requisite foreclosure and the agreements had already been terminated, companies with high market shares considering similar provisions should proceed cautiously and engage in a careful assessment of market conditions before enforcing those provisions.

#### No deference and courts strike down CP

McGinnis 21 John O. McGinnis is the George C. Dix Professor in Constitutional Law at Northwestern University, August 26, 2021, Abandoning the Consumer Welfare Standard, https://lawliberty.org/abandoning-the-consumer-welfare-standard/

The Prospects The Executive Order, however ill-conceived the specifics are, will do the most damage if it changes antitrust law fundamentally. And here the Biden administration happily faces problems. We have had forty years of bipartisan competition policy focused generally on consumer welfare. The President does not have a political eraser to wipe that away. One possibility is for the Biden administration to persuade Congress to enact major changes in antitrust law. The House Judiciary Committee has passed a few bills that would make is harder for tech companies to merge with other companies. But these measures are not yet going anywhere on the House floor, and it will be difficult, if not impossible, to get any substantial changes in antitrust law through the evenly divided Senate. Thus, the administration has pinned its strategy on transformation through administrative fiat. To that end, it appointed Lina Khan, a 32-year-old associate law professor to become Chairman of the FTC. Khan may be the single most radical appointment in the Biden administration. She opposed Amazon’s acquisition of Whole Foods, although Amazon and Whole Foods together constitute a very small part of the grocery market, and no other company in the history of the United States has been more innovative than Amazon. Khan has begun by voting along with her Democratic colleagues on the commission to revoke a policy of the FTC supported by both Democratic and Republican administrations that essentially defined “unfair method of competition” by reference to methods that undermined consumer welfare. The idea no doubt is to write a regulation that would provide a more open-ended approach, perhaps taking into account other values like democracy and decentralization, even if these are at the expense of consumer welfare. But it is not at all clear Khan can succeed. On such a central question as the definition of competition, courts may not give her agency much deference now that the Roberts Court appears to have stopped applying Chevron—the quintessential modern case for agency deference—to major questions raised by a statute. The meaning of competition is obviously the major question for competition law, and courts are likely to determine that for themselves, influenced by decades of their own consumer welfare jurisprudence.

#### We’ll insert blue to prove the aspirational note of their evidence

**Zeisler 14** --- J.D. Candidate 2014, Columbia Law School; B.S., B.A. 2012, University of British Columbia.

Royce, 2014, HEVRON DEFERENCE AND THE FTC: HOW AND WHY THE FTC SHOULD USE CHEVRON TO IMPROVE ANTITRUST ENFORCEMENT, Columbia Law Review.

As a final example, this Note examines pay-for-delay liability. 162 The history of this problem can be summarized briefly. For over a decade, the FTC has cracked down on pay-for-delay settlements. 163 During this time, appellate courts consistently rejected the FTC's theory of liability because of the statutory presumptions inherent to patent law and the Hatch-Waxman Act.164 Eventually, the FTC succeeded in creating a circuit split, giving rise to the Actavis decision, where the Court held that a settlement "can sometimes violate the antitrust laws."16 5 From the perspective of this Note, what makes pay-for-delay important is that it provides a retrospective lesson-the FTC could not have forced this change earlier by taking advantage of Chevron deference-as well as a prospective opportunity- the FTC has a unique occasion to promulgate notice-and-comment rules.

Turning first to the retrospective lesson, understanding the logic of these courts' holdings leads to the conclusion that the FTC could not have used notice-and-comment rulemaking or Chevron deference to hasten this change. The FTC's rulemaking grant does not permit direct regulation of patents, nor does it empower interpretations of the HatchWaxman Act. 167 Circuits that have ruled against pay-fordelay settlements would also find that the FTC lacked authority to promulgate such regulations. In a sense, there is an inverse Chenery principle at work. In Chenery, the Supreme Court explained that the SEC's mandate included the ability to proceed either through litigation or adjudication.168 In the pay-for-delay context, the FTC can proceed with neither rulemaking nor litigation. Once a court determines that a substantive legal issue falls outside of an agency's mandate through litigation, rulemaking is also likely to be found inappropriate. As a larger jurisprudential insight, this reveals a powerful method that courts can use to check the FTC. If a court can justify a presumption on broader regulatory grounds, and not merely antitrust law, then the FTC lacks authority to regulate this conduct.

Moving to the post-Actavis antitrust regime, the FTC is now in a different situation. In Actavis, the Court created a new sphere of antitrust liability and left "to the lower courts the structuring of the present rule-of-reason antitrust litigation. 1 69 Faced with this new precedent, the FTC has three reasons to begin exercising its rulemaking authority. First, the FTC correctly identified reverse settlements as potentially anti-competitive while lower courts remained skeptical. The FTC's characterization of this conduct will carry a certain rhetorical force that can be leveraged toward more assertive regulation. Second, and building on the first point, the FTC's institutional advantages and capabilities to form presumptions in this regulatory arena are at their height. Indeed, as Professor Hemphill argues, the FTC's ability to aggregate data gives it the unique ability to form the presumptions required for understanding the pay-for-delay regulatory structure. 170 Third, FTC regulation can provide crucial guidance to businesses. In creating, but not defining, the scope of liability, the Court has created considerable uncertainty around settlements. 171 Concededly, while FTC regulation cannot shield a corporation from liability under the Sherman Act, it can provide initial guidance for conduct likely to lead to liability in this unsettled area.

#### 5—No bio impact

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The bioterror WMD myth. Those who have overemphasized the bioterrorism threat typically portray it as an imminent concern, with emphasis placed on high-consequence, mass-casualty attacks, performed with weapons of mass destruction (WMD). This is a myth with two dimensions.¶ The first involves the identities of terrorists and what their intentions are. The assumption is that terrorists would seek to produce mass-casualty weapons and pursue capabilities on the scale of 20th century, state-level bioweapons programs. Most leading biological disarmament and non-proliferation experts believe that the risk of a small-scale bioterrorism attack is very real and present. But they consider the risk of sophisticated large-scale bioterrorism attacks to be quite small. This judgment is backed up by historical evidence. The three confirmed attempts to use biological agents against humans in terrorist attacks in the past were small-scale, low-casualty events aimed at causing panic and disruption rather than excessive death tolls. ¶ The second dimension involves capabilities and the level of skills and resources available to terrorists. The implicit assumption is that producing a pathogenic organism equates to producing a weapon of mass destruction. It does not. Considerable knowledge and resources are necessary for the processes of scaling up, storage, and dissemination. These processes present significant technical and logistical barriers.¶ Even if a biological weapon were disseminated successfully, the outcome of an attack would be affected by factors like the health of the people who are exposed and the speed and manner with which public health authorities and medical professionals detect and respond to the resulting outbreak. A prompt response with effective medical countermeasures, such as antibodies and vaccination, can significantly blunt the impact of an attack.

## FTC DA

### 2AC

#### COVID thumps healthcare

Blumenthal et al. 20, President of the Commonwealth Fund, a national philanthropy engaged in independent research on health and social policy; Elizabeth Fowler, Former Executive Vice President for Programs at the Commonwealth Fund; Melinda Abrams, Executive vice president for programs at the Commonwealth Fund; Sara R. Collins, Vice President for health care coverage and access at The Commonwealth Fund, “Covid-19 — Implications for the Health Care System”, The New England Journal of Medicine, 10/8/20, https://www.nejm.org/doi/full/10.1056/nejmsb2021088

INSURANCE COVERAGE

The pandemic has significantly undermined health insurance coverage in the United States. A sudden surge in unemployment — exceeding 20 million workers1 — has caused many Americans to lose employer-sponsored insurance. A recent Commonwealth Fund survey showed that 40% of respondents or their spouse or partner who lost a job or were furloughed had insurance through the job that was lost.2 Although many will continue to get employer coverage or become eligible for Medicaid or marketplace plans, a substantial number will probably become uninsured.3,4 Even workers who keep their jobs may find their coverage dropped or curtailed as financially strained employers cut costs. These developments will add to the 31 million persons who were uninsured and the more than 40 million estimated to be underinsured before the pandemic struck.5,6

This new crisis of coverage has at least two causes. The first is our continued reliance on employer-sponsored insurance to cover approximately half of Americans against the cost of illness. The second is failure to vigorously implement current law. By design, the Affordable Care Act (ACA) helps persons who lose employer-sponsored insurance by making subsidies available for the purchase of individual insurance in the ACA marketplaces, by expanding Medicaid eligibility, and by requiring that private insurance cover preexisting conditions and a basic package of benefits. However, although states with their own marketplaces have alerted the recently unemployed to their potential eligibility for subsidized plans,7 the federal government has not engaged in a parallel effort. It has neither educated the newly unemployed about their immediate eligibility outside of open enrollment periods for subsidized insurance in the federally run ACA marketplaces nor opened special enrollment periods for those wishing to enroll even if they did not previously have coverage. Furthermore, 14 states have chosen not to expand Medicaid.

DEEP FINANCIAL LOSSES FOR PROVIDERS

For the first time since the Great Depression, ~~crippling~~ [devastating] financial losses threaten the viability of substantial numbers of hospitals and office practices, especially those that were already financially vulnerable, including rural and safety-net providers and primary care practices.8 The immediate cause of this unprecedented financial crisis is substantial, unexpected changes in demand for health services. On the one hand, a novel infectious illness has increased demand for specialized acute care that has overtaxed some hospitals and imposed unexpected costs on many more. On the other hand, precipitous declines in demand for routine services have reduced providers’ revenue. Office-based practices had reductions of 60% in visit volumes in the first months of the crisis, and, by their own estimates, hospitals will lose an estimated $323.1 billion in 2020.9,10 Employment in the health care system is down by more than 1 million jobs through May.1

Providers’ vulnerability to these demand fluctuations raises a fundamental question about the way we currently pay for health care in the United States. Providers operate as businesses that charge for services in a predominantly fee-for-service marketplace. When the market for well-paid services collapses, so do health care providers.

This system has a number of adverse effects in normal times. It creates incentives to raise prices and push up volumes, shortages of poorly compensated services such as primary care and behavioral health, and an undersupply of services in less financially attractive poor and rural communities. But in the extreme circumstances of a pandemic, a new question arises: is health care an essential national resource that warrants secure financing beyond what the current fee-for-service system offers?

SUBSTANTIAL RACIAL AND ETHNIC DISPARITIES IN THE HEALTH CARE SYSTEM

Black persons constitute 13% of the U.S. population but account for 20% of Covid-19 cases and more than 22% of Covid-19 deaths, as of July 22, 2020. Hispanic persons, at 18% of the population, account for almost 33% of new cases nationwide.11 Nearly 20% of U.S. counties are disproportionately Black, and these counties have accounted for more than half of Covid-19 cases and almost 60% of Covid-19 deaths nationally.12

These racial and ethnic disparities constitute a new crisis compounding the long-standing failure of our health system to care adequately for persons of color. The causes start with a system that disproportionately fails to insure persons of color for the cost of illness, a problem reduced but not eliminated by the ACA.13 Lack of coverage causes less access to care, which results in a higher prevalence of and less-well-controlled chronic illness among persons of color. These illnesses leave them more vulnerable to the ravages of Covid-19.14

Another cause is that persons of color are more affected by nonmedical threats to health, including food and housing insecurity. They also tend to have jobs that are riskier during pandemics, such as providing care at home and long-term care facilities.15 Once ill, persons of color are more likely to get care in safety-net facilities overwhelmed by surges in demand for acute care.

Disparities in access and health outcomes are entrenched features of the U.S. health care system.16 They reflect a history of racism and discrimination that permeates society generally.

A CRISIS IN PUBLIC HEALTH

The United States has 4% of the world’s population but, as of July 16, approximately 26% of its Covid-19 cases and 24% of its Covid-19 deaths.17 These startling figures reflect a deep crisis in our public health system.

Put simply, that system failed to quickly identify and control the spread of the novel coronavirus. The United States did not make testing widely available early in the pandemic, was late to impose physical-distancing guidelines, and has still not implemented either as widely as needed.18 National guidance on managing the pandemic has been inconsistent and delayed. Many states have now abandoned stringent physical-distancing guidelines without careful attention to public health measures needed to prevent resurgence.

Although inadequate leadership and excessive partisanship have played a role in these shortcomings, other factors are also in play. Public health is a quintessentially governmental function, undertaken collectively for the public good at the national, state, and local levels. In part because of many Americans’ distrust of government, public health functions have historically been underresourced.19 The trained personnel who are needed for contact tracing — a traditional public health function long applied to such age-old afflictions as tuberculosis and sexually transmitted disease — are now scarce. Tellingly, there is no national public health information system — electronic or otherwise — that enables authorities to identify regional variation in the demand for, and supply of, resources critical to managing Covid-19. Without such information, authorities have no way to direct vital resources from areas of surplus to areas of undersupply. It is no exaggeration to say that the United States currently lacks a functioning national system for responding to pandemics.

#### Turn—the aff resolves FTC-DOJ turf wars over SEPs—the aff harmonizes enforcement. The aff’s certain enforcement encourages more resources down the line and frees wasted resources.

McGinnis and Sun, 21 – John O. McGinnis, Professor at Northwestern University and Linda Sun, Associate at Wilmer Pickering Hale & Dorr LLP and J.D. 2020 at Northwestern Pritzker School of Law, Winter, “Unifying Antitrust Enforcement for the Digital Age,” *78 Wash. & Lee L. Rev. 305*, p. Nexis

1. Standard-Essential Patents: A Case Study in Incoherence

Turf battles aside, the FTC and the DOJ have promoted directly opposing policies regarding the application of antitrust law to technology.138 The contentious disagreement on the important issue of standard-essential patents shows the divergent treatment and uncertainty already generated by dual enforcement. The FTC believes violation of a SEP licensing agreement is potentially an antitrust violation.139 Standard-setting organizations often require patent holders to license SEPs for free or on fair, reasonable, and non-discriminatory (FRAND) terms.140 The FTC argues that a violation of these licensing terms can violate antitrust laws by enabling a patent holder to “parlay the standardization of its technology into a monopoly in standard-compliant products.”141 The DOJ disagrees, because it believes “it is not the duty or the proper role of antitrust law to referee what unilateral behavior is reasonable for patent holders in this context.”142 The DOJ argues that patent holders enjoy a government-granted monopoly over the item under patent.143 Thus, a violation of a SEP licensing agreement may raise an issue of contract law or other common law right, but not antitrust.144

SEPs are vital to technological innovation and economic growth, with billions of dollars at stake.145 To understand the importance of SEPs to technology, one must first understand the importance of a standard. A standard is a uniform practice around which a technology develops.146 For example, a standard could describe a specific design of a charging port. Once the standard is set, multiple devices, from cell phones to speakers, can be designed to work with that standard charging port. Standards enable uniformity and operability across manufacturers, devices, or platforms.147 We interact with and depend on countless technology standards such as USB, Bluetooth, HTML, and 3G in our everyday life. Their importance cannot be overstated: they provide the foundation for the development and implementation of technology.148

Despite their benefits, standards also present a dilemma: they are most beneficial when there is widespread adoption.149 But most entities, from companies to countries, want to have their own individual designs become standard so as to gain a competitive advantage.150 Thus, there must be some process that encourages collaboration and consensus even among competitors.151

Such collaboration is facilitated by a standards development organization (SDO) or standard setting organization (SSO), which creates, revises, and coordinates technical standards.152 Standards development organizations have rules and criteria to prevent a single interest from dominating the definition of a standard.153 Their rules govern how they approach patented technologies.154 For example, an SDO may require that only unpatented technologies can be adopted as standard. Thus, in deciding what charging port will be the industry standard, the SDO would reject any charging ports that were patented. While this is, in a sense, a procompetitive solution—no entity would have a monopoly over the standard technology that was decided upon—it is largely unrealistic in today’s world where most useful and current inventions are patented. Adopting an unpatented technology that is outdated as standard defeats the purpose of a standard, which is to facilitate the development and adoption of innovative technology.155

As a result, SDOs must contend with standard-essential patents (SEPs), patents that are necessary for the implementation of a standardized technology.156 SDOs typically require that if a proposed standard is encumbered by patents, those patents must be licensed on “fair, reasonable, and non-discriminatory” (FRAND) terms to those seeking to utilize the technology.157 This requirement is thought to facilitate the adoption of the standard in the industry while providing fair terms to all parties involved.158 Because standards are critical to almost everything that touches technology, standard-essential patents are as well. When a patent is essential to a standard, there is no way to comply with the standard without infringing or licensing the patent.159 A dispute over a single SEP can prevent a company from making its product compatible with the internet, computers, or mobile devices.160 For example, a typical cellphone charging port has SEPs that cover every part of its design, from the electronic circuitry to communication protocols. Methods that enable a mobile phone to stay connected to a 4G/LTE network are covered by a multitude of SEPs that are essential to the 4G/LTE standard.161 Qualcomm owns SEPs essential to widely adopted cellular communication standards such as CDMA and LTE.162

A competition problem arises when, despite any agreement made at the time a standard was chosen, SEPs are later not licensed at fair, reasonable, and non-discriminatory terms. When the owner of a SEP bars a competitor from utilizing a SEP and therefore a standard technology, this decision deals a huge blow to the competitor. The FTC believes that when a SEP-owner violates an agreement to license the SEP on fair, reasonable, and non-discriminatory terms, this is an anticompetitive action in violation of antitrust laws.163 In FTC v. Qualcomm,164 the FTC pursued action against Qualcomm under Section 5 of the FTC Act for refusing to license its SEPs to competitors.165

In contrast, the DOJ has taken the stance that SEP owners refusing to license on FRAND terms is not an anticompetitive antitrust violation.166 It is simply a patent owner exercising his or her earned right to exclude competitors. As dictated under patent law doctrine, a patent owner has the right to prevent anyone from utilizing his or her patented technology.167 Going forward, it is uncertain whether the government will pursue antitrust enforcement actions related to the licensing of SEPs.168

This disagreement between the DOJ and the FTC rippled out to cause concern in the legislative branch. Because of the DOJ’s disagreement with the FTC, Senators wrote to the DOJ urging the agency to clarify its policy and provide guidance to stakeholders.169 The uncertainty created by this bifurcated approach creates dissatisfaction in Congress and so undermines support for these agencies among those who control their funding.170

The disagreement between the DOJ and FTC has international implications as well. Divergence in treatment of FRAND agreements among countries already causes difficulties for companies operating under different national standards in the global economy.171 These international challenges are further exacerbated by the different policies of the two domestic antitrust enforcement agencies of the United States, still the most important commercial nation in the world.172 Companies are subject to potentially conflicting standards depending not only on the national identity of the enforcement agency but also on the identity of the agency with the United States. International harmonization becomes more difficult if the United States has internal disagreements. Therefore, the case of SEPs shows how dual enforcement has created uncertainty in the industry, in Congress, and internationally.

B. Dual Enforcement Causes Inefficiencies and Inconsistent Outcomes

Technology did not create, but only exacerbates long-standing problems of dual antitrust enforcement. In this subpart we briefly offer more general arguments against joint enforcement by the FTC and Antitrust Division. It wastes resources, and even in non-technological areas, it creates uncertainty. 173 Both waste and uncertainty are compounded by turf wars, as exemplified by conflicts over mergers. 174

Moreover, Congress never intended for a system of full dual enforcement. 175 Thus, eliminating it would not undermine a fully deliberated scheme. Single enforcement would additionally bring the United States in conformity with industrialized nations worldwide, which generally have a single antitrust enforcer. 176 Finally, we respond to the argument that single agency enforcement would not improve matters much because private actors can enforce antitrust. 177 Private enforcers are subject to heavy restrictions and do not have the same ability to direct antitrust policy as the agencies do.

## M&A DA

### 2AC

#### Applying antitrust to FRAND doesn’t deter innovation since investments happen before rate changes

Cary 11 [George Cary, Mark Nelson, Steven Kaiser, Alex Sistla. Cary and Sistla are members of the California and District of Columbia Bars. Mr. Nelson is a member of the New York and District of Columbia Bars. Mr. Kaiser is a member of the New Jersey and District of Columbia Bars. “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM IN STANDARD SETTING”. Antitrust Law Journal No 3. (2011). https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf]

Finally, measuring FRAND based on the ex ante value of a technology is unlikely to have any negative impact on incentives to innovate. Geradin’s hypothesized discovery of incremental ex post value was unanticipated, by definition, and would generally come to light only after investments in innovation were made. Under these circumstances, we doubt that the inability to capture such windfall gains later would deter a company from investing in innovation. Indeed, the existing practice of many essential patent holders to negotiate royalty rates early on, and in many cases before a standard is adopted, belies the concern about inadequate incentives to innovate. If firms believed it was important to be able to capture unanticipated future benefits of a technology, they would not so readily enter into long-term licensing agreements that locked them into established royalty rates. Indeed, in our experience firms typically consider the trade-off between the FRAND rate at which they license their technology (even assuming this rate is lower than some hypothetical ex post rate) and the additional sales volume they are likely to achieve by having their technology incorporated into a standard. Moreover, our experience with industry practice suggests that royalty rates for a particular technology do not increase, and often decrease, over time, suggesting that the concern that ex ante royalties will be too low is more theoretical than real.

#### Link ev is about expanding M&A – not the aff

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(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

## K

### 2AC

#### Competition is the determinant for innovation – thumps other internals

Slimane 15 [Melouki Slimane, Political sciences Department ,Faculty of Law ,University of M’sila,Algeria. “Relationship between innovation and leadership.” 2015. https://www.sciencedirect.com/science/article/pii/S1877042815031766/pdf?md5=38f8d716e7d805a09d96f0171aa3d033&pid=1-s2.0-S1877042815031766-main.pdf]

Today, we need innovators more than any time before. Every organization and business is feeling the impact of globalization, migration, technological and knowledge revolutions, and climate change issues. Innovation will bring added value and widen the employment base. Innovation is imperative if the quality of life in these trying circumstances is to improve. Innovation will make the world a better place for the younger generation.[1] Ken Michaels Assumes New Leadership Role at Macmillan Science and Education;2005;p 13

Studies have confirmed that all businesses want to be more innovative. One survey identified that almost 90 per cent of businesses believe that innovation is a priority for them. The importance of innovation is increasing, and increasing significantly .[2] Phil Holberton. Speaking of Leadership , Vol. 3, No. 3Taking Charge American journal 2001. In the current day economic scenario, innovativeness has become a major factor in influencing strategic planning. It has been acknowledged that innovation leads to wealth creation. Even though efficiency is essential for business success, in the long run, it cannot sustain business growth.

Experts have identified many types of innovation such as ‘Product Innovation’ that entails the introduction of a new product or a service that is new or considerably improved, ‘Process Innovation’ comprising the implementation of a new or a significantly enhanced production or delivery method, ‘Supply Chain Innovation’ in which innovations transform the sourcing of input products from the market and the delivery of output products to customers and ‘Marketing Innovation’ which results in the evolution of new methods of marketing with enhancements in product design or packaging, its promotion or pricing, among others. [3]-Ogbonna, E. and Harris, L. (2000), Leadership style, organizational culture and performance: Empirical evidence from UK companies, International Journal of Human Resources Management, pp.766-788.

Most often planned and measured combination of ideas, objects and people leads to innovation resulting in new business ideas and technological revolutions. In order to be termed valuable innovations, new products and services need to be strong enough to progress through rigorous commercialization processes and into the marketplace. Many organizations are adopting measures to strengthen their ability to innovate. Such companies are creating a dependable operating system for innovation, an important indicator of corporate sustainability. [4]- Cenzo, D, “Human resources management”, Engel work, New Jersey, 1996.p146.

Research has indicated that competition combined with strong demand is a major driver of innovation. Intensity of competition is the determinant of innovation and productivity. Innovation, besides 220 Melouki Slimane / Procedia - Social and Behavioral Sciences 181 ( 2015 ) 218 – 227 products and services, also includes new processes, new business systems and new methods of management, which have a significant impact on productivity and growth.

#### Neolib is resilient – global resistance proves

Igor Guardiancich 17, Assistant Professor in the Department of Political Science and Public Management of the University of Southern Denmark, 3/3/2017, “Absorb, Coopt and Recast: Global Neoliberalism’s Resilience through Local Translation”, http://www.euvisions.eu/neoliberalisms-resilience-translation/

One powerful message permeating the book, and which gives a forceful explanation to Colin Crouch’s punchy title is that: “rather than a mass-produced, slightly shrunk, and off-the-rack ideological suit, neoliberalism is a bespoke outfit made from a dynamic fabric that absorbs local color” (5). Even under a full-out attack against some of its basic assumptions, such as the one unleashed in the immediate wake of the global financial crisis, neoliberalism proved resilient beyond its many architects’ wildest dreams. Its capacity to absorb, coopt and recast selected ideas of oppositional social forces has been the most valuable asset guaranteeing its survival. Again, the comparison of the responses to the crisis in Spain and Romania show such adaptability in full.¶ The socialist government of José Luis Rodríguez Zapatero tried to salvage the social-democratic legacies of the Spanish economy by engineering a Keynesian rescue package. Only later, when the disaster of the cajas became apparent and the emergency intensified, did conservative PM Mariano Rajoy embrace more deregulation in the labour market (inspired by the Hartz IV reform) and extensive cuts in the public sector under the strong external pressure of the European Central Bank and of international financial markets.¶ In Romania, local policymakers further radicalized in the aftermath of the Lehman Brothers’ crisis, thereby outbidding the IMF on austerity and structural reforms. Instead of shielding lower-income groups, the opposite strategy of upward redistribution was chosen. By heroically withstanding the external attempts at moderation, the Romanian economy retained an unenviable mix of libertarian achievements (flat-tax rates), experimental neoliberalism (privatized pensions) and mainstream neoliberal orthodoxy (sound finance, labour market deregulation, social policy targeting, privatization of all public companies). Pure laissez-faire ideas such as the replacement of the welfare state by a voluntary, private, Christian charity system were not unheard of.¶ Hence, through an insightful analysis of the ideational underpinnings of its local interpretations, this book shows us that, despite the challenges, neoliberalism is alive and kicking. Ban guides us through half a century of policymaking in Spain and Romania, and embeds his analysis within the related nuances of contemporary liberal economic thought. The research is a valuable addition to a growing literature on the origin of current ideational frames and comfortably sits alongside contemporary classics, such as Mark Blyth’s Austerity: The History of a Dangerous Idea.

#### Capitalism is sustainable and humanity’s only hope against catastrophic climate change

Shi-Ling Hsu 21, D'Alemberte Professor of Law at the Florida State University College of Law, Sept 2021, Capitalism and the Environment, Cambridge University Press, p. 50-52

* 1. CHOOSING CAPITALISM TO SAVE THE ENVIRONMENT: LARGE-SCALE DEPLOYMENT Finally, a third reason that capitalism is suited to the job of environmental restoration and protection is its ability to undertake and complete projects at very large scales. In keeping with a major thesis of this book, construction at very large scales should give us a little pause, because of the propensity of capital to metastasize into a source of political resistance to change. But some global problems, especially climate change, may require very large-scale enterprises. For example, because greenhouse gas emissions may already have passed a threshold for catastrophic climate change, technology is almost certainly needed to chemically capture carbon dioxide from ambient air. But carbon dioxide is only about 0.15% of ambient air by molecular weight, and a tremendous amount of ambient air must be processed just to capture a small amount of carbon dioxide. This technology has often been referred to as "direct air capture," or "carbon removal." Given that inherent limitation, direct air capture technology must be deployed at vast scales in order to make any appreciable difference in greenhouse gas concentrations. There is certainly no guarantee that direct air capture will be a silver bullet. But if it is to be an effectual item on a menu of survival techniques, it will more assuredly be accomplished under the incentives of a capitalist economy. Capitalism might also help with the looming crisis of climate change by helping to ensure the supply of vital life staples such as food, water, and other basic needs in future shortages caused by climate-change. In a climate-changed future, there is the distinct possibility that supplies of vital life staples may run short, possibly for long periods of time. Droughts are projected to last longer, with water supplies and growing conditions increasingly precarious. Capitalist enterprise could, first of all, provide the impetus to finally reform a dizzying multitude of price distortions that plague water supply and agriculture worldwide. Second, capitalist enterprise can undertake scale production of some emergent technologies that might alleviate shortages. Desalination technology can convert salty seawater into drinkable freshwater.54 A number of environmental and economic issues need to be solved to deploy these technologies at large scales, but in a crisis, solutions will be more likely to present themselves. A technology that is already being adopted to produce food is the modernized version of old-fashioned greenhouses. The tiny country of the Netherlands, with its 17 million people crowded onto 13,000 square miles, is the second largest food exporter in the world,55 exporting fully three-quarters that of the United States in 2017.56 The secret to Dutch agriculture is its climate-controlled, low-energy green-houses that project solar panel-powered artificial sunlight around the clock. Dutch greenhouses produce lettuce at ten times the yield57 and tomatoes at fifteen times the yield outdoors in the United States58 while using less than one-thirteenth the amount of water,59 very little in the way of synthetic pesticides and, of course, very little fertilizer given its advanced composting techniques. Sustained shortages in a climate-changed future might require that a capitalist take hold of greenhouse growing and expand production
  2. to feed the masses that might otherwise revolt. 2.9 CHOOSE CAPITALISM Clearly, the job in front of humankind is enormous, complex, and many-faceted. The best hope is to be able to identify certain human impacts that are clearly harmful to the global environment, and to disincentivize them. Getting back to notions of institutions in capitalism, what is crucial is aligning the right incentives with profit-making activity. What capitalism does so well — beyond human comprehension — is coordinate activity and send broad signals about scarcity. Information about a wide variety of environmental phenomena is extremely difficult to collect and process. If a set of environmental taxes can help establish a network of environ-mental prices, then an unfathomably large and complex machinery will have been set in motion in the right direction. Also, because of the need for new scientific solutions to this daunting list of problems, new science and technology is desperately needed. Capitalism is tried and true in terms of producing innovation. Again drawing upon the study of institutions, it is not so much that individuals need a profit-motive in order to tinker, but the prospect of profit-making has to be present in order for institutions, including corporations, to devote resources, attention, and energy towards the development of solutions to environmental problems. Corporations can and should demonstrate social responsibility by attempting to mitigate their impacts on the global environment, but a much more conscious push for new knowledge, new techniques, and new solutions are needed. Finally, the scale of needed change is profound. Huge networks of infrastructure centered upon a fossil fuel-centered economy must somehow be replaced or adapted to new ways of generating, transmitting, consuming, and storing energy. A global system of feeding seven billion humans (and counting), unsustainable on its face, must be morphed into something else that can fill that huge role. About a billion and a half cars and trucks in the world must, over time, be swapped out for vehicles that must be dramatically different. This is a daunting to-do list, but look a bit more carefully among the gloomy news. Elon Musk, a freewheeling, pot-smoking entrepreneur shows signs of breaking into not one, but two industries dominated by behemoths with political power. Thanks to California emissions standards, automobile manufacturers have developed cars that emit a fraction of what they did less than a generation ago. Hybrid electric vehicles have thoroughly penetrated an American market that powerful American politicians had tried to cordon off for American manufacturers only. At least two companies have developed meat substitutes that are now widely judged to be indistinguishable from meat, and have established product outposts in the ancient power centers of fast food, McDonald's and Burger King. The tiny country of the Netherlands, about half the size of West Virginia, exports almost as much food as the United States, able to ship fresh produce all the way to Africa. At bottom, all of these accomplishments and thousands more are and were capitalist in nature. While they collectively repre-sent a trifle of what still needs to be accomplished, they were also undertaken without the correct incentives in place, and thus also represent the tremendous promise of capitalism.

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### CP

#### Without change to current federal law, the USSC will overturn any application of antitrust

Gottlieb 20 [Clearly Gottlieb, Globally Renowned Law Firm, “Our Analysis of the Ninth Circuit Panel Decision Reversing FTC v. Qualcomm”. https://www.clearygottlieb.com/-/media/files/alert-memos-2020/20200827-our-analysis-of-the-ninth-circuit-panel-decision-reversing-ft-pdf.pdf]

We may therefore see further movement away from the use of antitrust to resolve SEP licensing in the near future, even though, due to differences in the underlying regimes, we do not expect it to directly influence pending proceedings elsewhere, for instance in the Korean Supreme Court (Qualcomm v KFTC). 69

Future Appeals

The FTC may request rehearing en banc. The Ninth Circuit typically rehears cases en banc as a panel consisting of the chief judge and ten other randomly selected judges from the circuit. The overall composition of the Ninth Circuit is more likely to be favorable to the FTC than were the panels that heard Qualcomm’s motion to stay the District Court judgment and the merits.

Up to this point in the appeal, the FTC’s staff lawyers had been litigating this case without further direction from the Commission itself, because the FTC was deadlocked 2-2.70 However, since May, Chairman Joe Simons is no longer recused, because the recusal resulted not from his personal involvement but that of his previous firm, and sufficient time had passed.71 As a result, it is highly likely that the full Commission will make the ultimate decision about the appeal.72

Apart from the direct issues in the case, the FTC may want to seek a rehearing in order to clean up some of the opinion’s statements about general antitrust principles: for example, the elements of the panel’s opinion regarding what counts as “harm to competition” versus customers or competitors, or the conflation of standards under Section 1 and Section 2 of the Sherman Act.

On the other hand, because of these types of issues, the FTC may believe that the opinion’s reasoning is sufficiently vulnerable that it may not be followed by other Courts of Appeals. And it may fear that if it were to prevail in an en banc rehearing, Qualcomm might successfully petition for US Supreme Court review. Given the Supreme Court’s views as expressed in other recent antitrust decisions, such as Amex, the FTC may view that as a losing proposition that would end the argument permanently.

The FTC could of course also theoretically directly seek certiorari from the US Supreme Court itself, in lieu of first asking for a rehearing en banc. We view that outcome as even more unlikely for the same reasons—that the FTC will want to contain the damage and reserve the right to fight another day.

#### Solvency is terrible – requires adjudicating cases which means the courts deficits still apply

Hoofnagle, Hartzog, and Solove 19 – Chris Jay Hoofnagle is an American professor at the University of California, Berkeley who teaches information privacy law, computer crime law, regulation of online privacy, internet law, and seminars on new technology. Woodrow Hartzog is Professor of Law and Computer Science at Northeastern University. Daniel J. Solove is a professor of law at the George Washington University Law School.

Chris Hoofnagle, Woodrow Hartzog and Daniel Solove, August 8 2019, “The FTC can rise to the privacy challenge, but not without help from Congress,” Brookings, https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/

The FTC also could achieve greater deterrence by leveraging an obscure power known as “non-respondent liability.” In cases where the FTC has a fully-adjudicated matter concerning some business practice, the agency can use that precedent to issue civil penalties to others engaging in the same activity. The power is limited to instances of actual knowledge of a closely-matching precedent by the new defendant, butthis can be established by sending that company notice of its wrongdoing and the relevant previous order. If we think about recent privacy wrongs—poor data security, selling data despite promising not to, and so on—many are widespread, recurring practices. If the FTC were willing to adjudicate just one case involving information “sale,” changing users’ settings, or even storing passwords in plain text, hundreds of companies could inherit exposure to civil penalty liability though this mechanism.

### DA

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

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

A federal judge fundamentally altered Apple’s App Store business model on Friday in a landmark ruling that accused the iPhone maker of illegal anticompetitive behavior and is likely to have ripple effects across the U.S. antitrust landscape.

In a decision on an antitrust lawsuit brought by Fortnite maker Epic Games, U.S. District Judge Yvonne Gonzalez Rogers ruled that Apple must allow app developers to “steer” customers to alternatives to the tech giant’s payment processing service, which collects a 30 percent fee on most digital transactions. That was previously not allowed by the company, and marks a major victory for developers which have long complained of the tight grip the tech giant holds over its App Store on the roughly one billion iPhones currently in use.

[The blockbuster trial between Apple and the maker of ‘Fortnite’ goes out with a ‘hot tub’ session](https://www.washingtonpost.com/technology/2021/05/24/apple-epic-trial-hot-tubbing/?itid=lk_interstitial_manual_5)

Gonzalez Rogers also found that Apple was in violation of California state competition laws because of the way it forces developers into using Apple’s payment processing service without allowing them to tell customers there are alternatives, which are often cheaper.

She stopped short of ruling in favor of Epic‘s claims that Apple is a monopolist, although she left the door open by suggesting more evidence could have changed her decision.

“The court does not find that it is impossible; only that Epic Games failed in its burden to demonstrate Apple is an illegal monopolist,” she wrote.

Epic spokeswoman Elka Looks said the company plans to appeal the ruling. Tim Sweeney, chief executive of Epic, said in a tweet that, “Today’s ruling isn’t a win for developers or for consumers.”

Apple did not respond to requests for comment.

The ruling, one of the first major legal actions taken against a tech giant in a new era of antitrust scrutiny, is sure to echo loudly both in Washington, where a legislative effort to rein in the power of Big Tech is underway, and in the courts, which are facing the biggest test of existing antitrust laws in decades. Tech giants have come under the microscope in recent years as it became clear that current antitrust law does not effectively address their power, and regulators and lawmakers have been pushing to change that.

### T

#### “Prohibitions” means restrictions on practices.

Emerson 90 – Assistant Professor of Business Law and Legal Studies, Graduate School of Business, University of Florida

Robert W. Emerson, “Franchising and the Collective Rights of Franchisees,” Vanderbilt Law Review & En Banc, Vol. 43, October 1990, LexisNexis

\*P The term "prohibitions" includes restrictions on practices. For explanations and examples of prohibitions or restrictions, see supra notes 27-28 and accompanying text.

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

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

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