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#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97, Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### ‘Prohibition’ must ban all instances of anticompetitive behavior

James Lane Buckley 91, Judge on the United States Court of Appeals for the District of Columbia Court, BA and JD from Yale University, Former Undersecretary for Security Assistance at the State Department, Former United States Senator from New York, “Hazardous Waste Treatment Council v. Reilly”, United States Court of Appeals for the District of Columbia Circuit, 938 F.2d 1390, 1395-1396, 1991 U.S. App. LEXIS 16095, 7/26/1991, Lexis

Petitioners claim that the EPA considers a state law to "act as a prohibition" under the regulation only when it bans all treatment, storage, and disposal within a State, and they point to the ALJ's statement, based on his reading of the preamble to the regulations, 45 Fed. Reg. at 33,395, that the EPA "appears to have construed the phrase 'act as a prohibition' in [paragraph (b)] as equivalent to an outright ban or refusal to accept hazardous waste for treatment, storage, or disposal." ALJ Decision at 112. Petitioners contend that the regulation must embrace any law that would even indirectly, as in the instant case, prohibit any treatment facility; otherwise, a State could accomplish a total ban one facility at a time. Senate Bill 114, they charge, epitomizes the "NIMBY" syndrome: In response to the needs of the nation for treatment of hazardous waste, North Carolina has simply said, "Not in my backyard." By refusing to respond, petitioners urge, the EPA ignores its duty to monitor state programs.

Although, at oral argument, government counsel [\*\*13] attempted to defend the "ban on all treatment" position that petitioners ascribe to the EPA, that is not the basis on which the agency concluded that Senate Bill 114 did not act as a prohibition within the meaning of section 271.4(b). In explaining why the second condition of paragraph (b) had not been met, the Regional Administrator emphasized that of the 485 riparian miles available in North Carolina for a facility of the kind proposed by GSX, 333 remained available under the Act, and noted that a smaller plant could be built at the Laurinburg site. Final Decision at 2. We therefore construe the EPA's decision to mean that a state law "acts as a prohibition" on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State, and nothing more.

[\*1396] Such a construction is reasonable and merits deference. The language of paragraph (b), which uses the word "prohibit[]" rather than "impede[]" or "restrict[]" as in the case of paragraph (a), suggests that the former allows States greater latitude in regulating particular treatment facilities before a prohibition is found to exist. This is consistent with the preamble's expression of [\*\*14] a desire to encourage the development of state programs by avoiding the establishment of "very tight standards." See 45 Fed. Reg. at 33,385. Second, defining prohibition in terms of the ban of a particular technology falls well within the language of paragraph (b). Finally, we see nothing inconsistent between this construction and the language of the underlying statute, 42 U.S.C. § 6926(b), which merely asserts that a state program may not be authorized if "such program is not consistent with the Federal and State programs applicable in other States." This language allows the agency enormous latitude in structuring its own implementing regulations and in interpreting them.

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#### Topical affs must increase prohibitions on the entire economy:

#### 1---By identifies an agent

Lexico, ND (“BY English Definition and Meaning” https://www.lexico.com/en/definition/by)

PREPOSITION

1 Identifying the agent performing an action.

#### 2---“The” before a noun means whole

Webster’s 5 (Merriam Webster’s Online Dictionary, [http://www.m-w.com/cgi-bin/dictionary](about:blank))

The

4 -- used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole <the elite>

#### 3---“Private Sector” means all

Senate Manual 11 (Senate Document No. 112-1)//babcii

The term ``private sector'' means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.112 S. Doc. 1

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#### “Antitrust laws” and “Prohibitions” can’t be courts

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the **prohibitions** of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

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#### The United States federal government ought to, deploying the technique utilized in Great Northern Railway Company v. Sunburst Oil and Refining Company:

#### decline to rule that conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards should be a prohibited practice on the basis that such a decision would undermine judicial deference to reliance interest

#### announce that existing precedent in this area is no longer reliable and that relevant parties should be on notice that the reliance interests that caused it to be upheld in this case will not apply to future challenges

#### not deny certiorari in challenges on the issue

#### CP solves and avoids - sunbursting avoids the downfalls of an unpredictable decision but causes legal change

Faure 14 – Michael Faure, Professor of International and Comparative Environmental Law at Maastricht University and Professor of Comparative Private Law and Economics at the Rotterdam Institute of Law and Economics (RILE), Erasmus School of Law, Morag Goodwin, Associate Professor in European and International Law, Tilburg Law School, and Franziska Weber, Junior Professor for Civil Law & Law and Economics at the Institute of Law and Economics, University of Hamburg, “THE REGULATOR'S DILEMMA: CAUGHT BETWEEN THE NEED FOR FLEXIBILITY & THE DEMANDS OF FORESEEABILITY. REASSESSING THE LEX CERTA PRINCIPLE”, Albany Law Journal of Science and Technology, 24 Alb. L.J. Sci. & Tech. 283, Lexis

Prospective overruling is a judicial technique in which a [\*349] previous precedent or authority is overruled without the new ruling having retrospective effect. n386 It thus represents a departure from the fundamental notion that judicial decisions that develop or change the law necessarily have retroactive effect. n387 It is, or has been, used by a court wishing to overturn or amend bad law, but is wary of the consequences of the retrospective application of their finding. Such consequences may include the inherent unfairness that would result to an individual who had relied on the existing law in good faith n388 or because of reasons of practicality, where the decision would have sweeping consequences for the operation of the judicial system. n389 Although appearing similar, prospective overruling differs from obiter dicta in two significant ways. Firstly, while judges can use obiter dicta to declare certain rules to be bad law or to comment on the likely direction of necessary legal reform, such comments do not entail that the decision in the case before them will be inconsistent with a future case. n390 Secondly, obiter dictum, while possibly highly influential, does not benefit from stare decisis and therefore is not binding. n391

There are a number of different ways in which a court can use prospective overruling. n392 Firstly, a court can announce a new rule or standards that will apply only to future cases, i.e., not to the case before it in the instant dispute. The old rule would also govern any cases that arose from action taken prior to the [\*350] announcement of the new rule but determined after it. n393 This has been called "pure" prospective overruling. n394 A second approach would be to announce a new rule that is only applicable to future cases that arise after the announcement but, as an exception, to apply it to the instant case. n395 A third alternative is to apply the new rule not only to the case at hand but to all other cases already pending at the time of announcement. This third approach excludes those cases in which the action that motivated them predates the announcement but where proceedings had not already been commenced at the moment of declaration of the new rule. n396 Finally, a fourth possibility would be for a court to announce a new rule not having retroactive effect but to suspend the entry into force of that new rule until a future date. n397 This technique is used to allow those actors likely to be affected by the change to adapt their behavior accordingly and to give the legislature the opportunity to enact a different rule should they so wish. n398 Traynor termed this form of prospective overruling "prospective-prospective overruling." n399 In this version of prospective overruling, the new rule does not apply to the case in which it is announced, or to any other cause of action that arises before the delayed entry into force of the new rule. n400 The Court of Justice of the European Union, for example, has accepted the need to place temporal limitations on its rulings in the interests of justice, although it has declared that it does so only in exceptional circumstances. n401 A variation on this form of [\*351] prospective overruling has been suggested by Advocate General Jacobs, whereby both the retrospective and prospective effect of a ruling of the Court of Justice of the European Union could be subject to a temporal limitation; in that case until the Member State concerned has had a reasonable opportunity to consider the introduction of amending legislation. n402

In addition to the European Union, a number of jurisdictions have used or accepted the possibility, if only in principle, of prospective overruling in exceptional circumstances, including the United States, n403 India, n404 New Zealand, n405 Canada, n406 the United Kingdom n407 and Germany. n408 The European Court of Human Rights has been understood to issue prospective rulings, n409 although there is some doubt as to whether its "dynamic" approach to convention interpretation is properly classified as such; n410 however, it certainly accepts such rulings in domestic courts as compatible with the rule of law. n411 At its apogee in the United States, the United States Supreme Court ruled in the case of Linkletter v. Walker, that in both criminal and civil cases, "the accepted rule today is that in appropriate cases the Court may in the interests of justice make the rule prospective." n412 However, since the 1970s, the use of retrospective overruling in the United States has been in retreat. While it remains unclear as to whether the use of "pure" prospective overruling (where the new rule does not apply to the case at hand) has been abandoned in civil cases, n413 the Supreme Court [\*352] has overturned its earlier enthusiasm and now prohibits prospective overruling in criminal cases n414 and the use of selective prospective overruling (i.e., "non-pure") in civil cases. n415 Yet, despite the discrediting of prospective overruling as a technique in the US more than twenty years ago, it continues to attract the interest of senior common law judges. n416 In a 2005 case, In re Spectrum Plus, the House of Lords found that it was theoretically possible to overrule a judgment with prospective effect only; n417 and in 2007, two members of the New Zealand Supreme Court accepted the same possibility. n418

3. The Pros and Cons of Prospective Overruling

Given that the heyday of prospective overruling has, until recently, been behind us, what reasons are there for being suspicious of the technique? There are, it seems, two main reasons for rejecting prospective overruling in its entirety. The first has been articulated by the Australian High Court in its emphatic refusal to countenance the use of prospective overruling and concerns an understanding of the nature of judicial interpretation. In the case of Ha v. New South Wales, the Court ruled that, "it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law." n419 In this reading, where a court determines that the rule they are required to apply is bad law, i.e., that the "real law" is actually now a different standard, it is simply untenable to continue to apply the wrong standard, even where it results in a manifest injustice to one of the parties before it. n420 The notion that prospective overruling is "a perversion of judicial power" gains further credence from the commonly accepted understanding that the role of the judiciary is to interpret the law in light of the case before it, where the primary function of the courts is to [\*353] adjudicate between parties; going beyond the particular case by making a general statement about the law is seen by some as "blatantly legislative." n421 While the legislature looks forward, the proper direction of the courts' attention is backwards, applying the existing law to situations that have already happened. This view was echoed by the United States Supreme Court in Griffith v. Kentucky, in which it ruled, concurring with earlier minority opinions by Justice Harlan, that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." n422

The second reason for critics to reject prospective overruling concerns the impact upon individuals of arbitrariness to which prospective overruling gives rise. In Griffiths v. Kentucky, the United States Supreme Court stated quite simply that "selective application of new rules violates the principle of treating similarly situated defendants the same." n423 Once a rule or practice has been declared bad law or unconstitutional, it violates the central notion of equality before the law if the new rule is applied to benefit one individual but not another. n424 These concerns can be somewhat alleviated by applying the new rule to all cases stemming from action arising at or after the time of the cause of action of the case in which the new rule is announced, i.e., by limiting the normal retrospective effect of rulings only marginally, but to do so would be to reduce considerably the possible benefits of prospective overruling. n425 In effect, those parties who had relied in good faith on the previous standard in such actions would be held to a new, stricter standard and thus their legitimate expectation of and right to legal certainty would [\*354] be compromised. n426

What, then, are the benefits? In particular, would other, less dramatic, techniques do the same job without encountering the hostility that prospective overruling can inspire? Obiter dicta could be used, for example, to indicate a likely direction of legal reform without actually introducing a new rule. n427 However, it is in large part the binding nature of a prospective decision that makes it such a useful technique in balancing flexibility and foreseeability. n428 While obiter dicta could be used in a similar way, although such statements lack the ability to bind future courts, they reduce the foreseeability of parties the same way incentives for operators to adapt their behavior are reduced. Operators may instead play a waiting game in which they fail to carry out adaptations in the hope that a different court will continue to apply the existing standard. Prospective overruling, we suggest, cannot be replaced by the less controversial tool of obiter dictum. Moreover, obiter dictum would obviously only provide a solution in those legal systems where it exists, which is not the case for many civil law systems. n429

The first main benefit of prospective overruling follows from the assertion that it is a perversion of judicial power to uphold a law that is understood to be unsound. n430 Courts are rightly reluctant to overturn a precedent, even where they are convinced of the unsoundness of the rule in question, where the harm caused by retrospective change is greater than the supposed benefits. n431 Thus, Justice Traynor suggested, in his classic article on the topic, that the main benefit of the technique of prospective overruling is that it enables courts to "change[] bad law without upsetting the ... expectations of those who [have] relied upon it." n432 For Traynor, prospective overruling, in direct contrast to its critics, is a necessary tool for the proper administration of justice. n433 Allowing bad law to stand simply to overturn a [\*355] precedent would entail unacceptable and unreasonable hardship for one of the parties concerned is an equally perverse understanding of the judicial role. n434

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#### The aff is sua sponte – it makes a decision in absence of arguments presented before the court – that crushes court legitimacy

Milani & Smith 02 (Adam and Michael, both are Assistant Professors, Mercer University School of Law, “Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts,” 69 Tenn. L. Rev. 245, Winter, lexis)

The heart of the American legal system is the adversary process in which trained advocates present the parties’ facts and arguments to neutral decision makers. The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his own in an inquisitorial system.3 The adversary process is also said to “promote[] litigant and societal acceptance of decisions rendered by the courts”4 because a party who “is intimately involved in the adjudicatory process and feels that he has [they have] been given a fair opportunity to present his case . . . is likely to accept the results whether favorable or not.”5 Indeed, the Joint Conference on Responsibility of the American Bar Association and the Association of American Law Schools stated that “[i]n a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate.”6 Accordingly, most lawyers probably never think about the possibility that a court will decide a case on an issue that the court itself raises and which was neither briefed nor argued by the parties. But we all know it happens. We even have a name for such a decision: [is] sua sponte. Translated from its original Latin, “sua sponte” means “on his or its own motion.”7 In the legal setting, sua sponte describes a decision or action undertaken by a court on its own motion8 as opposed to an action or decision done in response to a party’s request or argument. As such, the concept of “sua sponte” is an important exception to two basic [the] principles of our adversary system of adjudication: (1) that the parties will control the litigation, and (2) that the decision maker will be neutral and passive.9 One of the clearest manifestations of these principles is that the parties themselves, not the decision maker, determine what issues will be adjudicated. In the context of judicial decision making, a court deviates from its traditional “passive” role in the adjudicatory process when it raises an issue not identified by the parties but which it deems relevant to the legal controversy before it. Nonetheless, raising issues sua sponte is not an uncommon practice.10 In fact, legal scholars have identified several kinds of issues that are commonly raised by courts on their own. First, both trial and appellate courts often raise jurisdictional issues such as standing, subject matter jurisdiction, and mootness sua sponte.1

#### That corrodes rule of law via abdicating judicial legitimacy.

Donaldson ’17 [Michael J; Partner at Burnet, Duckworth & Palmer, LLP, Master of Laws from Columbia; 2017; “Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals”; http://www.bdplaw.com/publications/justice-in-full-is-time-well-spent-why-the-supreme-court-should-ban-sua-sponte-dismissals/; Quinnipiac Law Review, Vol 36; accessed 9/15/21; TV]

There is a lot wrong with sua sponte dismissals. They are inconsistent with the adversary system, and change the judge's role from referee to contestant.85 They can undermine respect for the legal system. And they increase the likelihood of errors, leading to unnecessary appeals and a waste of judicial resources." But most importantly, they lack the very due process the courts are supposed to safeguard. A. Failure to Provide Due Process Sua sponte decisions are inconsistent with due process.89 Period. There is no other way to look at it. 90 Not only does a plaintiff surprised by a sua sponte dismissal not receive "due" process, she receives no process at all.91 She has no idea her lawsuit is in jeopardy of being dismissed, no idea what the reasons for that dismissal might be, and no opportunity to respond. 92 This is the case whether the court's dismissal decision is right or wrong. 93 As Allan Vestal puts it: When [issues are] considered sua sponte both parties are taken completely by surprise and the court decides the matter on grounds not urged by either. Neither has had any opportunity to consider the matter, and both are now bound by res judicata grounded on considerations which represent not well reasoned positions for the litigants, but rather only the fortuitous decision of a 94 wayward court. The reference to res judicata here is important. As Milani and Smith point out, the res judicata doctrine requires a party or its privy to be a participant in the former proceeding before the court can bind him to the consequences of that proceeding because, according to the Supreme Court, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."95 If this is the standard applied to former proceedings, how can it not apply to proceedings currently before the court? Lon Fuller once wrote of sua sponte decisionmaking: [I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant ... the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.9 6 The situation is even harder to defend when there is no hearing at all. 9 B. Undermining Respect for the Legal System The perception that the courts are regularly failing to provide due process cannot do anything but undermine respect for the legal system.9 8 Sir Robert Megarry, in the speech quoted at the beginning of this article,99 underlined the importance of sending the unsuccessful litigant away feeling as though he has had a fair hearing.' Justice Harlan was obviously cognizant of this problem in his dissent in Mapp, when he warned that the Court's sua sponte decision in that case was "not likely to promote respect ... for the court's adjudicatory process."o This is not a farfetched concern. Offenkrantz and Lichter note that in the Second Circuit's high-profile decision to "[sua sponte remove] Judge Shira Scheindlin from further proceedings in two stop-and-frisk cases," an order which left the Judge "completely blindsided," "newspapers were reporting that appellate courts had carte blanche to raise and decide important issues in a case without ever seeking the input of any of the parties to it."' 0 2 Megarry tells a story of a client of his who had a fatal flaw in his case, but insisted on going ahead anyway.10 3 Instead of seizing on the fatal flaw at the outset, the trial judge heard the case all the way through.1 0 4 The client won on his two collateral points, but, as expected, lost on the key issue. o Megarry tells the story of what happened next: The course taken by the judge must have prolonged the hearing by an hour or two. But the effect on the defeated tenant was striking. True, he had lost the last point and the case as a whole; but he had been victorious on the other two points. All that nonsense about the agent's lack of authority and the letter not having been received in time had been blown away by the judge. It was a pity about the wording of the letter, of course; but he had seen his case being put in full, and none of his grievances had been left unheard or unresolved. This is as it should be. Courts must not, as Megarry puts it, give in to "the temptation of brevity."'0 o Their very legitimacy hangs in the balance. A loss of respect for the courts marks the beginning of the unraveling of the rule of law. This is simply too high of a price to pay for efficiency.

#### Extinction.

Davis and Morse ’18 [Christina and Julia; September 19; Professor of Government at Harvard University; Professor of Political Science at the University of California at Santa Barbara; International Studies Quarterly, “Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice,” vol. 62]

Trade, Conflict, and Adjudication

We argue that countries turn to international adjudication to protect trade flows under conditions of strong economic interdependence. This argument is built on two key assumptions. First, states believe that an international dispute over territory, fishing rights, or another salient issue could harm trade. Second, states view international adjudication as an effective way to end the dispute. Given the risk of harm to economic relations and the potential for courts to contribute to conflict resolution, states with high trade value vested in a relationship will be more willing to undertake costly litigation. This section elaborates on the general conditions of our theory and then explains why the ICJ is a good venue for testing the relationship between economic interdependence and international adjudication. The Adverse Impact of Conflict on Trade The premise that conflict disrupts trade is central to the theory of commercial peace. Russett and Oneal (2001) draw on the work of philosopher Immanuel Kant to argue that interdependence deters conflict by raising its costs. According to this reasoning, war interrupts trade while peace promotes stable commerce, leading states to calculate that the gains of peace are significant compared to the costs of war.4 Other perspectives focus on the informational role of interdependence to lower uncertainty between states (Reed 2003). Gartzke, Li, and Boehmer (2001) contend economic interdependence allows states to signal their resolve through their willingness to bear the economic costs of confrontation.5 A host of empirical studies supports the idea that conflict reduces trade (Keshk, Reuveny, and Pollins 2004; Long 2008). Several potential channels connect trade and conflict, including direct damage to infrastructure and transportation resulting from actual conflict, sanctions policies, and informal discrimination by governments or private actors. Glick and Taylor (2010) find that the effect of war on trade is significant and persistent. At a lower level, political tensions may also suppress trade (Pollins 1989; Fuchs and Klann 2013). Consumer boycotts and financial market reactions in some cases have led to adverse market impact (Fisman, Hamao, and Wang 2014; Heilmann 2016; Pandya 2016). Simmons (2005) finds that territorial disputes have a sizable negative impact on trade even in the absence of militarized action. Others suggest states anticipate the potential adverse impact of conflict on trade, and therefore trade less to begin with if they think that war is likely. In such a scenario, the marginal economic costs of war should be insufficient to change a state's calculation for going to war (Morrow 1999; Barbieri 2002). Gowa and Hicks (2017) contend that trade is largely diverted through third-party channels, which compensate for having less direct trade with the adversary. We assume that leaders and business constituencies on average believe that conflict damages trade relations. Political conflict could lead governments to adopt sanctions against an adversary or to restrict financial flows. Violence likely disrupts trading routes and slows the movement of goods. The potential for adverse financial market reactions and consumer response adds further unpredictability about the risk of spillover from political disagreement into economic harm. Substitution through third parties could alleviate the harm, but this would still increase trade costs. The expected harm to trade motivates states to pursue the resolution of disputes. Adjudication as a Conflict Resolution Mechanism When states want to resolve an interstate dispute, why would they choose adjudication rather than negotiations, economic sanctions, or militarized action? In some cases, the decision follows an episode of military conflict as part of an effort to normalize relations. In other disputes, countries may turn to a legal venue to prevent a problem from ever reaching the stage that could produce serious political tensions or threats of force. The literature offers three broad types of explanations for why states pursue adjudication: legitimacy, informational benefits, and domestic obstacles to settlement. At the systemic level, international norms support peaceful conflict resolution. Some contend that rule of law has come to shape the identities of states, forming norms about appropriate action in both the domestic and international spheres (Finnemore and Sikkink (1998, 902). When international law has been established through fair procedures and offers coherent principles, it forms a legitimate source of authority in international affairs that generates an independent “compliance pull” on state behavior (Franck 1990, 65). International courts combine both legitimacy and authority as they help states solve specific disputes about how to interpret international law; the growing role for international courts in international affairs represents an important trend (Alter 2014; Alter, Helfer, and Madsen 2016). Integration with national courts has reinforced states’ use of the European Court of Justice (ECJ), which stands out for its expansive caseload and impact on state behavior (Alter 1998). The ICJ has achieved a relatively strong record of compliance with rulings (Schulte 2004; Llamzon 2007; Mitchell and Hensel 2007; Johns 2012). Legal settlement can help states coordinate policies through the provision of information. Compared to bilateral negotiations or nonbinding third-party arbitration, adjudication conveys a government's willingness to reach an agreement (Helfer and Slaughter 2005; Gent and Shannon 2010). Having taken the public step to initiate legal action, a government would appear inconsistent and incur a reputational penalty if it also took unilateral measures such as sanctions or military actions before the legal process had reached a conclusion. This shapes the diplomatic context because participants know that the matter will neither escalate into violence nor disappear through neglect. A court ruling offers a focal point amidst uncertainty about how to interpret the terms of an agreement (Ginsburg and McAdams 2004; Huth, Croco, and Appel 2011). As the record-keeper of past actions, courts support systems of tit-for-tat and reputational enforcement (Milgrom, North, and Weingast 1990; Carrubba 2005; Mitchell and Hensel 2007). In these informational theories of courts, states may comply with court rulings in the absence of coercive measures or the threat of sanctions because the reputational costs of noncompliance are too high. Rather than simply interpret law, courts coordinate expectations about enforcement. Johns (2012) models the circumstances whereby mobilization of third-party actions in support of a court ruling generates endogenous enforcement that can affect outcomes. In this way, multilateral enforcement makes an international court different from the pressure available in bilateral negotiations. International courts also offer a way for states to frame settlements to appeal to domestic audiences (Fang 2008). Simmons notes that even when the same deal could be reached in negotiations or through a court decision, a negotiated settlement could be viewed as a sign of weakness while legal resolution would be a positive signal for future cooperation (Simmons 2002, 834). This dynamic occurs because “domestic groups will find it more attractive to make concessions to a disinterested institution than to a political adversary” (Simmons 2002, 834). In research on several prominent ICJ cases, Fischer (1982, 271) emphasizes the court has helped governments to save face. Consequently, those governments unable to reach agreements over domestic opposition may find it easier to do so with the involvement of a third-party ruling. Allee and Huth (2006a) show that governments with higher levels of domestic political constraints are more likely to choose adjudication over negotiation for settling territorial disputes. Domestic political constraints also increase the probability of filing complaints at the WTO (Davis 2012). The mobilization of domestic groups plays a critical role in litigation patterns at the ECJ (Alter and Vargas 2000).a

### OFF

#### The United States federal government should remove antitrust scrutiny on companies colluding against patent holders for information technology standards

#### The CP solves the aff without antitrust --- Collusion allows negotiation in concert that resolves anti-competitive practices --- The plans inclusion decks innovation

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

While courts and agencies have found that **antitrust is ill-equipped to identify anticompetitive patent practices**, the clearer antitrust offense may thus occur when licensees combine to negotiate against rightsholders. As a result, patent owners may enforce the antitrust laws to solidify their limited monopoly even though antitrust is meant to condemn monopolies. In light of this, the next Part explores the costs imposed by strategic patenting. It concludes with a simple, yet effective, proposal promising to foster innovation and harmonize the antitrust and patent laws.

III. THE NON-ANTITRUST SOLUTION

**The best remedy against abuses of patent rights is less antitrust**. This Part suggests that some firms have used the patent system to exclude competition rather than to protect original innovation. But we caution against enhancing antitrust enforcement as many policymakers and scholars have sought to do.187 **Using historical and economic analyses, we assert that firms should be able to collude against a monopolist or rightsholder, effectively balancing another’s market power.** **This would harmonize the patent and antitrust laws**, resolve the judicial split about bilateral monopolies, reduce litigation, and promote efficiency.

A. The Puzzle

The issue of whether antitrust should discipline rightsholders raises questions about the patent system’s efficacy. Federal **agencies, courts, and scholars have cautioned against involving antitrust within patent disputes** on the belief that **it would stymy innovation**.188 The theory is that the patent system must grant the right to exclude competition unfettered by antitrust review.189 This position, however, presumes that the exploitation of patent rights promotes R&D. But if patent abuses achieve the opposite result in predictable instances, then the deadweight loss may not warrant the per se insulation of patent rights sought by the DOJ and others. We ask, first, should the patent system go unaltered, or is enough competition and innovation impaired to demand a remedy? If the latter is true, then the issue is whether antitrust enforcement offers the best solution. We advocate for less antitrust. Based on economic theory, as well as support from the labor market and the Sherman Act’s legislative history, **allowing firms to combine against rightsholders and monopolists would help to discipline abusive practices and provide clear rules without costly litigation**. Helping to support our claim, we investigated whether patent owners do seek to impede competition and R&D without contributing innovation. It seems that as firms build large arsenals of low-value **patents**, rivals tend to reduce R&D and exit the market. That said, we also assert that **antitrust is the wrong remedy**. Further, we insist that **permitting firms to collude against a monopolist would redress ironic uses of antitrust law.** As discussed earlier, a patent owner may currently enforce the antitrust laws to charge monopoly prices as well as suppress competition and innovation.190 While patentees must be able to exercise exclusive rights, we think that they should rely on patent and contract remedies rather than antitrust enforcement. By taking antitrust out of patent law, it would provide holders with the proper scope of exclusive rights to foster innovation (**as well as preserve the incentives to innovate conferred in patent**, which Part IV explains in greater detail).

### OFF

#### Bill passes --- election losses have put dems in DEFCON-2

Brodey, 11-12 (Sam Brodey is the congressional reporter for The Daily Beast. He previously was the Washington correspondent for MinnPost and a fellow at Mother Jones, “Election Setbacks Embolden Dems to Go YOLO on Biden Agenda”, Daily Beast, 11-12-21, https://www.thedailybeast.com/election-setbacks-embolden-dems-to-go-yolo-on-joe-biden-agenda)//babcii

Three days later, Democrats finally picked up some momentum toward enacting their agenda. On Friday night, the House [sent a $1.2 trillion infrastructure bill to Biden’s desk](https://www.thedailybeast.com/democrats-hand-joe-biden-his-long-awaited-infrastructure-win) after a lengthy impasse, and the chamber teed up consideration of a sweeping $1.75 trillion social spending package, titled the Build Back Better Act.

But Democrats’ Election Night calamity—and the mounting signs that keeping their congressional majorities in 2022 will be a miracle—haven’t shaken their resolve to muscle through a bill that Republicans can’t wait to campaign against.

If anything, Democrats are feeling even more urgency to pass their social spending bill through Congress, even if some lawmakers are grappling with the very real prospect that, in this political environment, a yes vote could cost them their seats.

During a Tuesday appearance on [the New York Times podcast The Daily,](https://www.nytimes.com/2021/11/09/podcasts/the-daily/abigail-spanberger-democrats-infrastructure-bill.html) Rep. Abigail Spanberger (D-VA), a top GOP target, joked, “There will be so many attacks based on this bill, I could write some of them myself.”

Spanberger didn’t discount the possibility that the Build Back Better Act, [if poorly sold](https://www.thedailybeast.com/the-new-challenge-for-democrats-sucking-up-a-dollar2-trillion-cut-while-smiling), could send Democrats like her packing. But she expressed confidence that Democrats can sell it—even if they’ve collectively failed to do that so far—and plenty of her colleagues feel the same way.

“We’ve lost control of the narrative,” said Rep. Gerry Connolly (D-VA), who argued that the election results in his home state amounted to a “clear warning” for Democrats and a need to go to “DEFCON-2.”

But Connolly told The Daily Beast that the party shouldn’t get “overly wrapped up” in today’s bad polling numbers, even if he allowed that it is a “low point” for them so far.

“We have an opportunity, if we’re smart, if we stop our own internal squabbling and unify, if we get sharp and disciplined about messaging… we can tout the good news we are bringing, and will bring, to every corner of the country,” he told The Daily Beast.

The political headwinds of recent weeks seem to have Democrats thinking about the political impact of their marquee bills in a different light. Rep. Jake Auchincloss (D-MA) summed up the consensus among many Democrats by explaining the belief that voters will make up their minds in 2022 over two key questions: whether COVID is behind us, and whether a strong economy is ahead.

If voters are unconvinced that Biden has made headway on those two fronts, many in the party believe it won’t matter whether the Build Back Better Act is a hit or a flop; Democrats will lose their majorities regardless.

“If COVID is significantly behind us, and if the economy continues to post job gains at a level of hundreds of thousands per month, Democrats will have something visible to run on,” said former Rep. Steve Israel (D-NY), who chaired the party’s official House campaign arm from 2011 to 2015.

“If those conditions don’t exist,” Israel said, “passing all the legislation in the world is not necessarily going to translate into votes in competitive districts.”

A senior House Democratic aide, speaking anonymously to candidly describe sentiment among lawmakers, put it more bluntly.

“The White House is going to have to get their act together,” the aide said. “Congress cannot bail the president out here. He’s going to have to grab the wheel of the ship and steer us to victory, otherwise, we’re going to have historic losses.”

Many believe those losses would be even worse if congressional Democrats do not deliver Biden a major win, in the form of the Build Back Better Act. That legislation would fulfill a series of longstanding campaign promises at a moment when [historically Democratic voters seem to be questioning](https://www.washingtonpost.com/politics/biden-falling-poll-numbers-georgia/2021/10/10/3606c99e-2002-11ec-8200-5e3fd4c49f5e_story.html) why they keep showing up to support the party.

#### Biden punch gets the bill through and prevents future cuts – PC and Time are key

Barrón-López, 11-11 (Laura Barrón-López, White House Correspondent for POLITICO, previously led 2018 coverage of Democrats for the Washington, “Dems to White House: The only prescription is more Biden”, POLITICO, 11-11-21, <https://www.politico.com/news/2021/11/11/dems-white-house-biden-520946>)//babcii

After months of deference to Congress, President Joe Biden moved more assertively last week to shepherd half his domestic agenda into law. With the other half still in limbo, Democrats want some of that Biden punch again.

Outside groups fear that congressional Democrats could come up short on Biden’s social spending package. They are concerned that moderates in the House may end up buckling if the budget scores on the bill come back worse than anticipated. And there is residual anxiety that one of the two wavering Senate Democrats — Joe Manchin of West Virginia and Kyrsten Sinema of Arizona — could vote “no” over concerns about inflation and long-term debt.

**The clearest solution to avoiding this, they argue, is more Biden.**

“All eyes are on the president, all expectations are on the president,” said Lorella Praeli, co-president of the progressive Community Change Action. “We are playing our role. We are mobilizing. We're reminding people everyday what this is about.”

Praeli added that **Biden must ensure there aren’t future cuts to the package**, which dropped from $3.5 trillion to $1.75 trillion to accommodate centrist Democrats in the House and Senate. “This is what he campaigned on. Only the president can deliver it in the end.”

Until last week, Biden’s [involvement in negotiations](https://www.politico.com/news/2021/11/05/democrats-plea-biden-more-assertive-519672) had been more deferential than managerial. That befuddled lawmakers, who were waiting for him to draw red lines about which priorities he wants in and out of the deal or to even demand votes. To date, Biden has publicly refrained from drawing a red line around including paid leave in the final version of the legislation, leaving the leadership in the House at odds with centrists in the Senate.

But **Biden did ramp up his involvement** in the negotiations last week. And Democrats viewed that as key to getting an agreement in the House on their infrastructure bill, as well as on a rule to move forward with their social spending package, which funds universal pre-K, expands Medicare access, cuts taxes for families with children 18 years old and under, and combats climate change.

Now they want more. Expectations are high for Biden to keep the House to its promise of a vote on that social spending plan the week of Nov. 15. “They basically made a promise,” said Rahna Epting, executive director of the progressive advocacy group MoveOn. “And Biden was able to get enough progressives to vote for the bipartisan infrastructure bill, on that promise. We are expecting Biden and the Democratic Caucus will make good on their word and pass the Build Back Better Act no later than Nov 15th as stated.”

White House officials contend that **Biden and his team remain in close touch** with the Hill, and their legislative affairs staff continues to push the social spending bill toward a vote. The White House said it is communicating regularly with a range of lawmakers including Manchin, but did not answer when asked whether Biden has spoken to the West Virginia senator or other moderates in recent days.

“**There has been no kind of slowdown** when it comes to our Hill outreach,” a White House official said.

The growing demands for Biden to stay heavily involved reflect a fear in the party that the window to act on the agenda is quickly closing, especially as concerns mount about lingering inflation and the midterms near. If the House meets its deadline next week and passes the social spending bill, some Democrats want Biden to issue a deadline for the Senate to act. Others noted that the end-of-year legislative calendar is short and brutal.

The “dynamic has totally changed,” said a Democratic strategist. “The president secured this agreement with the five holdouts for House passage of BBB next week and it’s on him to enforce it.”

A top climate operative echoed that assessment telling POLITICO that Biden “will have failed” on tackling climate change if the second piece of the agenda doesn’t pass.

But the operative also expressed a newfound fear that Biden’s current effort to sell the benefits of the infrastructure bill could distract or complicate Democrats’ attempt to keep public interested in the social spending plan.

"They need to sell [physical infrastructure] but also act like it's not enough," said the activist.

"How are they also creating the urgency for BBB to get done, for it to stay on the timeline of getting it done by Thanksgiving? It's a balancing act.”

Matt Bennett, co-founder of the moderate group Third Way, agreed that the dynamics were “tricky” in trying to sell one just-passed bill as historic while simultaneously making the case that another ambitious bill is needed. Biden will travel to New Hampshire and Michigan next week to highlight the money the infrastructure bill will direct toward new roads, bridges and transit projects across the country.

“This moment that we're in is hard,” said Bennett. “It will be much, much easier when both bills are completed. There is a very profound political imperative for Democrats to get this finished, to end the infighting and sausage-making and shift to creating a narrative about what Democrats have just done for Americans because they've been utterly unable to do that.”

A number of groups plan to amp up pressure next week as Congress returns. House Speaker Nancy Pelosi and the White House have repeated their desire to have a vote on the social spending plan by the end of next week. The Service Employees International Union will descend on Capitol Hill with some 500 union members, said Mary Kay Henry, the union’s president.

“We are escalating phone calls, text messages,” said Henry. “We're bringing members into Washington next Tuesday, we have the president's back, to get Congress to act quickly and get the full back package.”

Democratic outside groups have spent more than $150 million on TV and digital ads promoting the president’s social spending plan, known as “Build Back Better.” The League of Conservation Voters and Climate Power launched [new digital ads](https://lcv.org/wp-content/uploads/2021/11/TakeAction-Case-1.png) calling on the [five moderates](https://lcv.org/wp-content/uploads/2021/11/TakeAction-Murphy.png) who reached an agreement with the White House and House leadership last week to follow through on their commitment to pass the second piece of Biden’s economic agenda “next week.”

**The longer it takes to pass** the social spending plan, **the harder it becomes to keep the party unified**, Democrats warn, especially amid up-and-down economic news. A new report Wednesday revealed inflation hit 6.2 percent in October, its highest point in 31 years, contributing to high gas, car and food prices. It forced Biden to quickly issue a statement addressing the issue and ever-so-slightly shift his messaging, arguing that passage of the social spending plan would combat inflation.

“Inflation hurts Americans’ pocketbooks, and reversing this trend is a top priority for me,” Biden said in a statement. “It is important that Congress pass my Build Back Better plan, which is fully paid for and does not add to the debt, and will get more Americans working by reducing the cost of child care and elder care, and help directly lower costs for American families.”

#### Antitrust reform decks PC and trades off with infra

Carstensen, 21 (Peter C. Carstensen, the Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, February 2021, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en)

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### The bill solves soft power

**Bergmann , 21** (Max Bergmann , Max Bergmann is a senior fellow at the Center for American Progress. Carolyn Kenney is a senior policy analyst for National Security and International Policy at the Center., 6-30-2021, accessed on 8-27-2021, Center for American Progress, "Climate Will Test Whether America Is Truly ‘Back’ - Center for American Progress", https://www.americanprogress.org/issues/security/news/2021/06/30/501175/climate-will-test-whether-america-truly-back/)//Babcii

In the end, President Biden’s efforts to restore U.S. leadership on the global stage will ultimately be determined by what actions the United States takes domestically on climate, rather than by what is expressed in an international communique. While U.S. officials are confident they can meet short-term climate targets through executive branch regulation, the world does not trust such an approach after witnessing during the Trump administration how easy it is for these to be undone. Therefore, for America to truly be back globally, it needs to first pass robust climate legislation that commits the United States to taking climate action. The Europeans and the rest of the world are thus paying close attention to the climate provisions in the infrastructure bill. The outcome of this bill and whether it includes the climate provisions—to bolster electric vehicles, modernize the energy grid, and protect and restore nature-based infrastructure—will determine whether America can reclaim the mantle of global leadership. The passage of such a transformative package would suddenly make the United States a leader on climate. It would allow the United States to work with Europe in creating the decarbonized economy of the future. It would also enable the United States to press China for more action, not only diplomatically but also in the arena of global public opinion. For too long the United States has been a climate pariah, allowing China to position itself as a responsible and productive actor when it comes to the issue. Strong U.S. action would suddenly turn the tables and allow the United States to ramp up global pressure on China, which is now the world’s largest emitter, producing more carbon than all developed countries combined. For this to happen, however, the climate provisions President Biden outlined in his initial infrastructure proposal need to make it through the legislative process. Whether they are included in the ultimate infrastructure and budget package that makes it through Congress will be critical not only for saving the planet but for preserving American global leadership.

#### Soft power solves extinction

Joseph S. Nye 20. Harvard University Distinguished Service Professor, Emeritus. "COVID-19’s Painful Lesson About Strategy and Power". War on the Rocks. 3-26-2020. https://warontherocks.com/2020/03/covid-19s-painful-lesson-about-strategy-and-power/

In 2017, President Donald Trump announced a new National Security Strategy that focused on great-power competition with China and Russia. While the plans also note the role of alliances and cooperation, the implementation has not. Today, COVID-19 shows that the strategy is inadequate. Competition and an “America First” approach is not enough to protect the United States. Close cooperation with both allies and adversaries is also essential for American security.

Under the influence of the information revolution and globalization, world politics is changing dramatically. Even if the United States prevails in the traditional great-power competition, it cannot protect its security acting alone. COVID-19 is not the only example. Global financial stability is vital to U.S. prosperity, but Americans need the cooperation of others to ensure it. And while trade wars have set back economic globalization, there is no stopping the environmental globalization represented by pandemics and climate change. In a world where borders are becoming more porous to everything from drugs to infectious diseases to cyber terrorism, the United States must use its soft power of attraction to develop networks and institutions that address these new threats. For example, this administration proposed halving the U.S. contribution to the World Health Organization’s budget — now we need it more than ever.

A successful national security strategy should start with the fact that “America First” means America has to lead efforts at cooperation. A classic problem with public goods (like clean air, which all can share and from which none can be excluded) is that if the largest consumer does not take the lead, others will free-ride and the public goods will not be produced. As the technology expert Richard Danzig summarizes the problem:

Twenty-first century technologies are global not just in their distribution, but also in their consequences. Pathogens, AI systems, computer viruses, and radiation that others may accidentally release could become as much our problem as theirs. Agreed reporting systems, shared controls, common contingency plans, norms and treaties must be pursued as a means of moderating our numerous mutual risks.

Tariffs and border walls cannot solve these problems. While American leadership is essential because of the country’s global influence, success will require the cooperation of others.

On transnational issues like COVID-19 and climate change, power becomes a positive-sum game. It is not enough to think of American power over others. We must also think in terms of power to accomplish joint goals, which involves power with others. On many transnational issues, empowering others helps us to accomplish our own goals. The United States benefits if China improves its energy efficiency and emits less carbon dioxide, or improves its public health systems. In this world, institutional networks and connectedness are an important source of information and of national power, and the most connected states are the most powerful. Washington has some sixty treaty allies while China has few. Unfortunately, as Mira Rapp-Hooper recently argued, the United States is squandering that power resource.

In the past, the openness of the United States enhanced its capacity to build networks, maintain institutions, and sustain alliances. But will that openness and willingness to engage with the rest of the world prove sustainable in the current populist mood of American domestic politics? Even if the United States possesses more hard military and economic power than any other country, it may fail to convert those resources into effective influence on the global scene. Between the two world wars, America did not and the result was disastrous.

## Case

### Advantage 1

#### Anticompetitive impacts of holding multiple SEPs are limited and don’t undermine innovation --- Bargaining is sufficient

Spulber ’20 [Daniel; Elinor Hobbs Distinguished Professor of International Business, and Professor of Strategy, Strategy Department, Kellogg School of Management, Northwestern University, and Professor of Law (Courtesy), Pritzker School of Law, Northwestern University, Articles And Essay: Licensing Standard Essential Patents With Frand Commitments: Preparing For 5g Mobile Telecommunications, 18 Colo. Tech. L.J. 79, 81]

E. FRAND and the "Complements Problem"

Performance and interoperability are central to technology standards. Combining multiple technologies both within and among innovative products drives the need for interoperability. Multiple patented inventions provide complementary components in innovative products and production processes. The combination of complementary components often results in complex systems that generate benefits greater than can be achieved by separate groups of components. 272

SSOs do not intend for FRAND policies to address the "complements problem." The "complements problem" refers to the challenge of allocating the joint benefits of complementary inventions to the owners of those inventions. 273This problem is best solved by decentralized bilateral bargaining among patent holders and [\*138] implementers. 274SSOs rely on bargaining in the marketplace to address the allocation of the benefits of invention and innovation. I have demonstrated elsewhere that bilateral negotiation of patent license agreements guarantees that total royalties and royalties per unit of output are lower than those of a patent pool. 275

There are a number of public policy concerns associated with the "complements problem" including "royalty stacking," "patent thickets," and the "Tragedy of the Anti-Commons". 276These closely-related theoretical concepts suggest that with complementary patented inventions, total royalties will be "excessive" due to lack of coordination among licensors. 277These policy concerns are all based on an application of the classic complementary monopolies model of Antoine Cournot. 278

Cournot's theoretical analysis shows that monopolists supplying complementary inputs to competitive downstream producers will choose prices whose total is greater than what a monopolist would charge for a bundle of those inputs. 279This inefficiency is known as the "Cournot Effect". The "Cournot Effect" is a type of "free-rider problem," where each input monopolist chooses its price without taking into account the effect of its price on the demand for all of the complementary inputs. 280Because inputs are complements, an increase in the price of one input lowers demand for all of the inputs. The theoretical "Cournot Effect" is the result of assuming that complementary monopolists offer take-it-or-leave-it prices to producers. 281

Patent policy concerns based on the "complements problem" are misguided. In the patent context, patent holders negotiate patent license agreements with implementers. In contrast to take-it-or-leave-it price offers, negotiation eliminates the distortions associated with the "Cournot Effect". Negotiation results in lower total [\*139] royalties in comparison with a monopoly patent pool that offers licenses for the bundle of complementary inventions. 282

SSO FRAND policies predate by many decades any patent policy concerns related to the "complements problem". As with the "patent holdup" problem, SSO FRAND policies do not address these supposed problems either. SSO FRAND policies do not mention any phenomena resembling these theoretical concepts, and there is little evidence that these closely-related problems have ever been observed. 283The significant pace of technological change and widespread diffusion of advances in ICT provide substantial evidence that these problems do not occur.

#### Patent holdups’ are a lie. Antitrust policies are a greater threat --- prefer bargaining

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

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

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

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

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

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

#### Antitrust is a wrecking ball for innovation --- Spurs overdeterrence and uncertainty

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

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

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

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

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

#### Econ decline doesn’t cause war

Dr. Stephen M. Walt 20, Robert and Renée Belfer Professor of International Relations at Harvard University, PhD in International Relations (with Distinction) from Stanford University, MA in Political Science from the University of California, Berkeley, “Will a Global Depression Trigger Another World War?”, Foreign Policy, 5/13/2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).” Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself. The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success. Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then. The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

#### Warming doesn’t trigger extinction

* peer-reviewed journal shows IPCC exaggeration
* history proves resilience
* no extinction- warming under Paris goals
* rock breaking strategy could offset warming

IBD 18 [Investors Business Daily, Citing Study from Peer reviewed journal by Lewis and Curry, “Here's One Global Warming Study Nobody Wants You To See”, 4/25/18, https://www.investors.com/politics/editorials/global-warming-computer-models-co2-emissions/]

Settled Science: A **new study published in a peer-reviewed journal finds** that **climate models exaggerate** the global warming from CO2 emissions by as much as 45%. If these findings hold true, it's huge news. No wonder the mainstream press is ignoring it. In the study, authors Nic Lewis and Judith Curry looked at actual temperature records and compared them with climate change computer models. What they found is that the planet has shown itself to be far less sensitive to increases in CO2 than the climate models say. As a result, they say, the planet will warm less than the models predict, even if we continue pumping CO2 into the atmosphere. As Lewis explains: "Our results imply that, for any future emissions scenario, future warming is likely to be **substantially lower** than the central computer **model-simulated** level projected by the (United Nations **I**ntergovernmental **P**anel on **C**limate **C**hange), and highly unlikely to exceed that level. How much lower? Lewis and Curry say that their findings show temperature increases will be 30%-45% lower than the climate models say. If they are right, then there's **little to worry about**, even if we don't drastically reduce CO2 emissions. The planet will warm from human activity, but not nearly enough to cause the sort of end-of-the-world calamities we keep hearing about. In fact, the resulting warming would be **below the target** set at the Paris agreement. This would be tremendously good news. The fact that the Lewis and Curry study appears in the peer-reviewed American Meteorological Society's Journal of Climate lends credibility to their findings. This is the same journal, after all, that recently published widely covered studies saying the Sahara has been growing and the **climate boundary** in central U.S. **has shifted 140 miles to the east** because of global warming. The Lewis and Curry findings come after another study, published in the prestigious journal Nature, that found the **long-held view that a doubling of CO2 would boost global temperatures** as much as 4.5 degrees Celsius **was wrong.** The most temperatures would likely climb is 3.4 degrees. It also follows a study published in Science, which found that rocks contain vast amounts of nitrogen that plants could use to grow and absorb more CO2, potentially offsetting at least some of the effects of CO2 emissions and reducing future temperature increases.

### Advantage 2

#### No cyber impact

Lewis 20—(senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies). Lewis, James. 2020. “Dismissing Cyber Catastrophe.” Center for Strategic & International Studies. August 17, 2020. https://www.csis.org/analysis/dismissing-cyber-catastrophe.

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack. To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation. The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability. One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

#### No nuclear hacks

Green, MA, 2 (Joshua, Editor, Washington Monthly, “The Myth of Cyberterrorism”, November, http://www.washingtonmonthly.com/features/2001/0211.green.html)

When ordinary people imagine cyberterrorism, they tend to think along Hollywood plot lines, doomsday scenarios in which terrorists hijack nuclear weapons, airliners, or military computers from halfway around the world. Given the colorful history of federal boondoggles--billion-dollar weapons systems that misfire, $600 toilet seats--that's an understandable concern. But, with few exceptions, it's not one that applies to preparedness for a cyberattack. "The government is miles ahead of the private sector when it comes to cybersecurity," says Michael Cheek, director of intelligence for iDefense, a Virginia-based computer security company with government and private-sector clients. "Particularly the most sensitive military systems." Serious effort and plain good fortune have combined to bring this about. Take nuclear weapons. The biggest fallacy about their vulnerability, promoted in action thrillers like WarGames, is that they're designed for remote operation. "[The movie] is premised on the assumption that there's a modem bank hanging on the side of the computer that controls the missiles," says Martin Libicki, a defense analyst at the RAND Corporation. "I assure you, there isn't." Rather, nuclear weapons and other sensitive military systems enjoy the most basic form of Internet security: they're "air-gapped," meaning that they're not physically connected to the Internet and are therefore inaccessible to outside hackers. (Nuclear weapons also contain "permissive action links," mechanisms to prevent weapons from being armed without inputting codes carried by the president.) A retired military official was somewhat indignant at the mere suggestion: "As a general principle, we've been looking at this thing for 20 years. What cave have you been living in if you haven't considered this [threat]?" When it comes to cyberthreats, the Defense Department has been particularly vigilant to protect key systems by isolating them from the Net and even from the Pentagon's internal network. All new software must be submitted to the National Security Agency for security testing. "Terrorists could not gain control of our spacecraft, nuclear weapons, or any other type of high-consequence asset," says Air Force Chief Information Officer John Gilligan. For more than a year, Pentagon CIO John Stenbit has enforced a moratorium on new wireless networks, which are often easy to hack into, as well as common wireless devices such as PDAs, BlackBerrys, and even wireless or infrared copiers and faxes.

# 2NC

## 2NC --- CP --- Collusion

### 2NC --- S --- (SEP)

#### 1. Economic theory and studies prove that collusion solves *better* than the affs condemnation of the patentee --- Balanced market power will force an equilibrium at or below a FRAND price

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

**Economic theory supports the contention that allowing a cartel to collude against a monopolist is superior to condemning** the cartel. Consider a two-party bargaining system with the patentee on one side and a cartel of licensees on the other, opposing it. **If the rightsholder wants to license its patent, it must deal with the cartel,** and if the cartel wants to secure a license, it must deal with the patentee.220 Restated in economic terms, a bilateral monopoly exists with a monopolist selling licenses on one side and a cartel of buyers (a monopsony) on the other.221 This landscape allows, as we show, the cartel to balance the rightsholder’s negotiating power without turning the tables, giving the licensees the power to exploit monopsony pricing.222 **This should, at the macro level, allow patent markets to enhance efficiency**. All **the innovative incentives conferred by a patent should also remain intact**, as we explain later in Part IV.

In the typical monopoly or monopsony, the dominant actor can extract supracompetitive benefits due to its market power.223 Absent a bilateral monopoly, a monopolist controls the supply function such that it will operate at the point on a demand curve that maximizes profits.224 Likewise, **a monopsonist usually controls the demand curve** and can select a preferred location on the supply curve at which to buy.225 These **benefits break down in a bilateral monopoly** because **there are no markets to establish supply and demand curves** on which the monopolist and monopsonist can operate.226 The **deal must occur at some point** below the monopoly price and above monopsony pricing, meaning that neither party can render the inefficiencies of market power.227

This two-party system does, however, create the risk of a stalemate where an agreement cannot be reached.228 Yet, unlike a traditional bilateral monopoly involving physical goods, the patent regime enjoys several ways of encouraging a deal. **In FRAND situations**, the **patentee is contractually obligated to license** on fair and reasonable terms at the risk of facing liability for breach of contract.229 A would-belicensee could also **coerce negotiations by threatening to attempt to invalidate the patent** via inter partes review.230 Potential negative outcomes associated with these actions **would thus break a stalemate.**

Nevertheless, a bilateral monopoly offers the second-best scenario for consumers: better than when a monopolist controls the market but worse than the best-case scenario—vigorous competition.231 **Since the two parties may negotiate between themselves, this should maximize the surplus split between the parties**.232 Moreover, the expected supply curve from a patentee—especially in regulated situations like essential patents— **is expected to account for hyper-marginal returns to recoup research costs and fund future endeavors**.233 Accordingly, formation of a monopsony **among potential licensees should not harm aggregate welfare** while creating a method to discipline patentees who engage in holdup behaviors. Similar evidence exists in Sherman Act’s legislative history which is essential to modern enforcement.

#### 2. The CP creates bargaining in concert

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

A. Colluding Against the Garden Variety Monopolist Our approach could as easily work against the garden variety monopolist as with rightsholders. Commentators and lawmakers have grown increasingly anxious about the market power accrued by Big Tech, the telecommunications giants, and other monopolists.266 Concerns involve how companies, like Amazon, wield market power over the firms selling on their platforms. 267 The problem is that small firms operating through Amazon **lack the ability to bargain in concert with** Amazon and similar **monopolists**, **given the illegality of collusion**. While not the overarching focus of this Article, our proposal could likewise apply to monopolists acting without patent rights. It would, in fact, help to resolve complaints about the growth of “natural” or legal **monopolists** such as Facebook and Google, which allegedly diminish consumer welfare without offending the antitrust laws.268 In fact, underlying the e-book case between Apple and Amazon were allegations that Amazon had priced e-books below the market rate in an act of predatory pricing; as such, commentators asserted that the publishers were right to collude against Amazon’s **abuse of market power**.269 We are sympathetic to this argument, as it would be **optimal for rivals to solve this problem via private ordering—rather than litigation**— **and to effectively estop monopolists from using the antitrust law to preserve their market power**. To this end, **instead of increasing antitrust enforcement, a more efficient remedy would entail permitting smaller firms to bargain in concert against such monopolists**.

#### That successfully deters hold-up behavior without harming patent owners

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

CONCLUSION As described herein, **the patent system has the capacity to encourage innovation by affording a specific set of exclusionary rights**. However, certain firms undertake strategies that create power extending beyond the scope of their patent rights, which can damage competition. In response, some **market participants attempt to remedy this harm by collectively bargaining to even the playing field**. These behaviors have been alleged to violate the antitrust laws. We argue that application of antitrust laws in this instance is a policy error.

**Collective negotiations have the capacity to undercut abusive behaviors** that may be undertaken by mass patent aggregators or **those who ignore their FRAND obligations**. And as shown through our analysis, anticompetitive behaviors such as aggregation of huge numbers of patents can undercut the incentive to spend money on research, incentivize the filing of relatively lower value patents, and increase market concentration. With this in mind, we argue that antitrust should not be used to stifle **collective negotiation** where the opposing party enjoys monopoly power. Moreover, we address the implications of our proposal, showing that while it **discourages anticompetitive behaviors**, it should **not harm patent owners** who behave in good faith.

#### 3. Information sharing encourage FRAND terms AND makes litigation easier if the patentee doesn’t accede

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

The **impact** will be, however, **significant where the patentee engages in a holdup behavior** by offering a license at obviously non-FRAND terms (i.e., a rate higher than fair). In this instance, the patentee has no interest in litigation, as a court will simply force it to license its patents at a fair and reasonable price, plus it will still have to pay litigation costs. The patentee’s goal in a holdup instance is to encourage some licensees to agree to the **elevated** non-FRAND **rate**. A rational, individual licensee will do so where the aggregate additional licensing cost (the difference between a FRAND rate and the holdup rate offered) is less than the cost of litigation. In some instances, this may be a reasonable choice by the single licensee, **as the cost of litigation can be substantial.**

This **situation changes**, however, **where licensees work in concert**. In that instance, they will jointly agree not to accept the **holdup** rate, which discourages the patentee from demanding this elevated sum, with the goal of inducing it to offer FRAND terms. Should this **change not occur, the decision for licensees to litigate becomes more palatable in the cartel situation**. Given the **shared** litigation **interests** within the group (e.g., proving that the offered license rate is unreasonable and unfair or that the patent is invalid), **substantial efficiencies are created by sharing the costs of these undertakings**.284 This, in turn, encourages litigation by the licensees to the exclusion of accepting a holdup cost license from the patentee. That is the **exact opposite of what the patentee hopes for**, thus encouraging the patentee to offer licenses at **a FRAND rate**.

More, to the extent that the licensee cartel shares information about licensing **offers from the patentee** (explicitly or implicitly, by leaving the cartel), **this benefits the cartel**. The parties recognize that the patentee must license on non-discriminatory terms, such that it must afford all licensees the same offer as it gave to one.285 If another party left the cartel, it is likely they received better terms than the holdup rate, **which encourages the cartel to demand these improved terms** for itself.286

#### 4. Basic economic calculation proves --- Moving closer to a FRAND deal is in the patentee’s self interest

* ΔP \* units > PL\_Cost --- (Change in price multiplied by units is greater than private litigation costs)
* %\_FRAND \* ΔP \* units > PL\_Cost --- (Percent chance jury will uphold offer multiplied by change in price multiplied by units is greater than private litigation costs)

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

Given the primary importance of whether the patent owner offered a FRAND license, we assess the situation under our rule for both when a FRAND offer was made and when one was not. **When a FRAND offer has been made**, the only question for the patentee is whether to **accede to lower demands** from a cadre of colluding licensees **or sue for infringement**. If an essential patent owner concedes to the demands of the colluding licensees, it loses the difference between its FRAND offer and the collusion **price** (ΔP) **times** the aggregate number of **units** of the technology created by the licensees (units).281 **If it chooses to go to court, it loses** the **cost of** bringing an infringement **lawsuit** (PL\_Cost).282 Thus, we expect litigation where the patentee made a FRAND offer, and the licensees responded with a collusion price counteroffer if:

(1) ΔP \* units > PL\_Cost

However, the **patentee must consider whether a jury will determine it did make a FRAND offer**. We call this likelihood “%\_FRAND.” **If the jury determines that the patentee failed** to make a FRAND-compliant offer, **it may adopt the licensees’ collusion rate** (or some other reasonable rate) as the measure of damages and future license rate. The benefit of going to court for the patentee must be adjusted to include the threshold that a jury must find its offer to be fair and reasonable if it is to collect the additional license income associated with not acceding to the collusion rates.

(2) %\_FRAND \* ΔP \* units > PL\_Cost

Based on this relationship,283 our proposal will have largely offsetting consequences where the patentee has lived up to its obligation to make a reasonable license offer. A patentee has an incentive to **increase** the **likelihood** that a **jury might find their offer fair and reasonable (and thus, increase the value of the left side of Equation 2),** but this decreases ΔP as the difference between the collusion price and demanded license price converge. Further, as these prices converge, more licensees are likely to defect and accept a license. This in turn decreases the aggregate number of units being litigated and decreases the cost of litigation for the patentee (PL\_Cost). Except in very specific examples, our proposal should have negligible impact.

#### 5. No risk of overdeterrence --- FRAND offers cause defections from the cartel AND are easily litigated in favor of the patentee --- That encourages FRAND dealing

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

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**Based on this relationship**,283 our proposal will have largely offsetting consequences where the patentee has lived up to its **obligation** to make a **reasonable license offer**. A patentee has an incentive to increase the likelihood that a jury might find their offer fair and reasonable (and thus, increase the value of the left side of Equation 2), but this decreases ΔP as the difference between the collusion price and demanded license price converge. Further, **as these prices converge, more licensees are likely to defect and accept a license**. This in turn decreases the aggregate number of units being litigated and decreases the cost of litigation for the patentee (PL\_Cost). Except in very specific examples, our **proposal should have negligible impact**.

### 2NC --- AT: L2NB (innovation)

#### The CP leaves the patent itself completely untouched

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

In important part, **fears should also be assuaged that patent rights may erode**. The proposed defense would leave all parts of the patent monopoly **intact**, as patent holders **can still charge** monopoly **rates as well as prevent other parties from using their tech**nology.212 While patentees may assert that antitrust should condemn groups who (threaten to) infringe as a bargaining ploy,213 such an argument is unpersuasive since patentees may still initiate infringement lawsuits. Further, this defense would not empower a cartel of, for instance, big box stores to collude in hopes of depressing the price of a patented television—the proposal instead pertains only to the licensing, use, and implementation of the underlying technology in the television. Therefore, stripping rightsholders of antitrust remedies would leave untouched the right and ability to charge monopoly prices, exclude competition, and all other **benefits of exclusive rights** (as the following review of economic research indicates). It **would only remove antitrust from the quiver of tools**. We indeed find no reason why antitrust law provides a better mechanism to protect patent rights than patent law.

### 2NC --- AT: Consumer Deficit

#### Speegle assumes individual company litigation! --- The CP solves by creating collaborative litigation

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

Even assuming that SSO members are willing and able to engage in litigation with a firm attempting patent holdup, consumer welfare takes a backseat to the members' financial considerations.3 8 Because the incentives of the SSO members do not align with those of consumers, enforcement actions by firms in the private sector cannot be relied on to adequately protect consumers. 39 This **concept is illustrated by** a practice known as **injunction threats**, in which a **patent holder threatens** to bring an **injunction against a manufacturer** for violating its patent unless the manufacturer pays a substantial royalty.4 ° While the patent holder's threat may have questionable legal footing, the manufacturer will often pay the royalty instead of engaging in extended **litigation**.4 This happens for several reasons. **First**, the manufacturer has a disincentive to engage a patent holder in litigation because the **manufacturer will bear the cost of the litigation**, the result of which could benefit competitors. 42 Companies will tend to pay the royalty and wait for another company to challenge the practice. 43 Second, the **costs** associated with challenging injunction threats may be substantial." On top of ordinary litigation costs, if the manufacturer has already begun making and distributing goods based on the patented technology, a potential preliminary injunction could have a devastating effect on its business.4 5 While engaging a patent holder in litigation may collaterally benefit consumers in that increased royalties are not passed through to the price of the ultimate product, this benefit does not tip the scales in favor of manufacturers pursuing such a path.' Thus, reliance on litigation by SSO members or other third parties will not provide a complete solution to patent holdup, as these parties serve as poor proxies for consumers.

## T --- Courts

### 2NC --- O/V

#### 4. AND Resolved implies a legislative instrument

LA House 5 (Lousiana House of Representatives, <http://house.louisiana.gov/house-glossary.htm>)

Resolution A legislative instrument that generally is used for making declarations, stating policies, and making decisions where some other form is not required. A bill includes the constitutionally required enacting clause; a resolution uses the term "resolved". Not subject to a time limit for introduction nor to governor's veto. ( Const. Art. III, §17(B) and House  Rules 8.11 , 13.1 , 6.8 , and 7.4)

# 1NR

## 2NC --- Advantage 1

### 2NC --- ! --- Bio-med

#### Biotech innovation and industry are high because of COVID.

Brennan 20 (Paul, 9-23-2020, "Therapeutics Innovation in the Era of a Pandemic", *Grit Daily News*, https://gritdaily.com/therapeutics-innovation-in-the-era-of-a-pandemic/)

Pharma and biotech companies have demonstrated a rapid and powerful response to the COVID-19 pandemic with biopharmaceutical innovators leading the charge in the fight. A rush of investor money is placing bets on biotech companies with the best odds of making it to the vaccine finish line. What’s the impact on biotech companies researching for cure pathways for other serious diseases, such as cancer, multiple sclerosis, Alzheimer’s disease, and more? When the pandemic abates, with vaccines and optimal care treatments in place, other diseases will still be robbing lives and diminishing people’s quality of life. How bumpy is the road for biotech companies working on breakthroughs for non-COVID-19 diseases? Here’s what biotech companies are wrestling with during this challenging time: Access to Capital Global biotech ventures raised $18.8 billion in 2019, which was up from $17 billion in 2018, according to BioCentury’s BCIQ database. While there’s been a fear of a slowdown in venture financing, according to BioCentury, that fear has been largely unfounded as “fund-raising in 1Q20 is on par with previous quarters, with $5.71 billion raised, compared with the quarterly average of $5.93 billion in 2019, from 160 financings, compared with an average of 162 financings per quarter last year. While we can estimate that significant capital is being raised for pandemic-related ventures, biotech companies outside of this spectrum are also being funded. However, it must be very difficult for companies that are trying to raise their first round. Connecting with investors over a Zoom call works well if you are already acquainted, but for first-time introductions the ‘virtual’ dynamic makes it very difficult to build trust and relationships. Trials and Tribulations of Clinical Trials According to BioPharmaDive, since March 2020, nearly 100 companies and 240 trials have experienced disruptions. As such, the COVID-19 pandemic threatens to set back non-COVID-19 clinical trial research several years which could result in stalled progress on experimental medicines for other diseases. Phase I studies of a new drug generally involve healthy people and look to find the highest dose of the new treatment that can be given safely without causing severe side effects. Currently, several companies initiating their a Phase 1 non-pandemic related trials in the U.S. are being delayed as the clinics and supporting hospitals that conduct Phase 1 trials are prioritizing treating patients with COVID-19. Fortunately, there are some promising alternatives. Companies engaged in Phase 1 trials are starting to get creative and looking into other countries not as afflicted by the pandemic, such as Canada and Australia. The pandemic highlights the advantage for study decentralization in the face of a crisis. Phase 2 studies focus test treatments that have been found to be safe in Phase I but now need a larger group of human subjects to assess efficacy and side effects. As Phase 2 trials are coordinated with hospitals and medical centers, many of which are focused on pandemic-related treatments, there have been major delays for biotech companies in this phase of study. The hardest hit category of therapeutics is for non-urgent therapies, but that are still important for quality of life and long-term health. In the current environment, patients are just not visiting hospitals for elective and preventative treatments, and as such the access to these patients for clinical trials is limited. Discovery Stage Companies are Also Affected Not all biotech companies have progressed their research to clinical trials, and for these companies most of their research is conducted in labs. For the first couple of months after the lockdown, most lab work was put on hold while the companies or their vendors learned how to manage their social distancing protocols. Whilst many labs are now back to work, many are not yet working to full capacity, and in some cases non-COVID-19 researchers are having a difficult time getting access to their studies when the labs share space with pandemic researchers. Biotech is Ready for Its Close-up As people around the world are turning to biotechnology and pharmaceutical companies for solutions for the COVID-19 pandemic, there is renewed respect for the sector. If an effective vaccine becomes available, “the perception of the pharmaceutical and life sciences industry is positioned to shift dramatically from near the bottom of favorability polls currently to much higher. This will impact policymaking, industry communications, and beyond,” reads the State of Possible 2025 Report from MassBio. COVID-19 is demonstrating the importance of the biotechnology sector to society, as even anti-vaccine protestors are humbled by the advent of an earth-shaking pandemic. A respect for the production of life-saving technologies will translate to our world being more prepared for future new diseases with a renewed focus on cure pathways for uncured diseases. As countries move toward normalcy, many emerging biotech companies who have not pivoted to focus on the pandemic, are weathering the storm with therapeutic innovations on the horizon. For those of us lucky enough to work in biotech, our work is far more than just a job. We are working on solutions to help humankind live longer and healthier.

#### The plans meddling with antitrust in patents disrupts the bio-med industry

**Dabney, 13** (James Dabney, Jan-23-2013, accessed on 10-29-2021, Chamberlitigation, "BRIEF FOR AGILENT TECHNOLOGIES, INC., ILLUMINA, INC., LIFE TECHNOLOGIES CORP., PROMEGA CORP., QIAGEN N.V., AND ROCHE MOLECULAR SYSTEMS, INC. AS. AMICI CURIAE IN SUPPORT OF RESPONDENTS,", https://www.chamberlitigation.com/sites/default/files/scotus/files/Agilent%20Technologies%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

The biotechnology and research tools industry (the “Industry”) is diverse, embracing public and private, non-profit and for-profit, and academic. and corporate institutions. The Industry **spends billions of dollars each year developing technologies** that support both research and development activities and diverse commercial and industrial activities. Commercial biotechnology products provide new sources of energy, more accurate techniques for identifying criminals or exonerating the innocent, improved food safety testing. and faster and more discriminating **methods for diagnosing, detecting, and treating diseases including cancer and infections**.

Amici rely heavily on 35 U.S.C. § 271(d) and the principles of divisibility and party autonomy that the statute implements. For example, amici frequently sell research tools to persons engaged in university research. Such sales are typically made on “research use only” conditions that exclude industrial or commercial activities. By retaining use and sale rights that university **researchers have no need to buy or pay for, research tool companies** are able to make patented research products available to biomedical re-searchers at prices that are tailored to the needs and economics of the persons engaged in research, and hence are more affordable than would be the case if researchers had to pay for manufacturing, commercial diagnostic, or other non-research use rights.

Divisibility of patent rights and party autonomy in contracting are also important to the federal government’s ability to maximize its **return on investment in biomedical research** and to carry out the purposes of the Bayl-Dole Act, 35 USC. §§ 200-212. By ‘**keeping prices lower for products** sold for re- search use only, conditional sale and license transactions allow more research to occur for every dollar of federal research funds that are granted. And where federal funding results in the United States owning patents, the Patent Act authorizes agencies to grant nonexclusive, exclusive, or partially exclusive lit censes under federally owned inventions, royalty-free or for royalties or other consideration,” and “on such terme and conditions aa the granting agency considers appropriate.” 35 U-S.C. §§ 207(a), 20008).

Divisibility of patent rights and party autonomy in contracting are also critical to the biotechnology technology transfer system that has developed over past decades. This technology transfer system gives members of the Industry, including teaching and research universities, flexibility to work with multiple parties in different fields, or at different levels or places within the same field, to put patented technology to its highest and best use with the best partner. This is particularly relevant where the patented technology has many uses but no single licensee could use, develop, or commercialize a technology for all possible uses and benefits.

Uses of biomedical technologies are often subject to restrictions in patent license agreements that limit licensees to uses in specific fields and allow other licensees the right to use in other fields. Patent right divisibility and party autonomy in contracting **help licensees navigate this often complex field of patent rights use restrictions.** When a licensee develops and sells a new product that comprises amici’s patented technology, conditional sale and license terms provide a mechanism that enables the licensee to comply with field of use and other restrictions in its contracts for the sale of products embodying amicis patented inventions. Without the ability to make selective waivers of **patent rights**, **the biomedical technology transfer system would be severely disrupted and thousands upon thousands of existing licenses would be undermined**. Divisibility of patent rights and party autonomy in contracting **are also critical to the commercialization of patents** disclosing readily replicable technologies. Many research tools are replicable, such as **cell lines and DNA vectors**. If a patentee could not retain certain **use and resale rights** when selling products embodying novel replicable technologies, a customer could buy a product once and then easily replicate and resell it an indefinite number of times, in either identical or modified form. **This would severely disrupt the network of limited use patent licenses for the technology, force higher prices, and deprive the Industry of incentives for developing and selling replicable research tools.**

#### Bio-med research is key to outpace China --- China bio-med lead causes extinction --- It outweighs nuclear war

Moore ’20 [Scott; November 8; director of the Penn Global China Program at the University of Pennsylvania.; Foreign Policy, “China’s Biotech Boom Could Transform Lives—or Destroy Them,” <https://foreignpolicy.com/2019/11/08/cloning-crispr-he-jiankui-china-biotech-boom-could-transform-lives-destroy-them/>]

When James Clapper, the U.S. director of national intelligence at the time, appeared before Congress in early January 2016 for an annual briefing of threats to the United States, he didn’t lack for material. Just a few weeks earlier, North Korea had tested a nuclear device, and Russia had begun deploying cruise missiles that appeared to violate a crucial arms-control agreement. But to the surprise of many experts, Clapper devoted a good chunk of his time to describing a much more exotic threat: biomedical research. Specifically, [Clapper warned](https://thebulletin.org/2016/04/how-genetic-editing-became-a-national-security-threat/), “Research in genome editing conducted by countries with different regulatory or ethical standards than those of Western countries probably increases the risk of the creation of potentially harmful biological agents or products.” Clapper’s statement didn’t explicitly mention China—but it didn’t need to. As his testimony went on to make clear, while in the 20th century the United States and Soviet Union held the keys to preventing planetary catastrophe, in the 21st the principal players are the United States and China. And while in a previous age keeping Pandora’s box closed meant preventing nuclear war, today it’s about preventing biotech dangers. In just the past few years, the development of inexpensive gene-editing techniques has democratized biomedical research, producing a biotech bonanza in places such as China and creating a whole new category of security threats in the process, from the use of genetic information to persecute dissidents and minority groups to the development of sophisticated bioweapons. When it comes to the United States, China, and technology, artificial intelligence tends to grab most of the attention. But policymakers need to come to grips with the even bigger threat of biotechnology—and soon. Fortunately, though, shared concerns about China’s role in biotechnology also provide a rare chance for meaningful and productive engagement in shaping the rules of a new world. China’s starring role in preventing the 21st century’s biotech perils stems from its skyrocketing investment in biomedical research. Historically, Western countries, and especially the United States, have been the epicenter of research in the life sciences. The United States alone accounted for some [45 percent](https://itif.org/publications/2018/03/26/how-ensure-americas-life-sciences-sector-remains-globally-competitive) of biotech and medical patents filed in the 14-year period ending in 2013. But now, thanks to heavy state-backed investment, China is catching up. Economic plans instituted in 2015 call for the biotechnology sector to account for more than 4 percent of China’s total GDP by 2020, and [estimates suggest](https://www.nature.com/articles/d41586-018-00542-3) that as of 2018, central, provincial, and local governments had already invested over $100 billion in the life sciences. Chinese venture capital and private equity investment in the life sciences, meanwhile, totaled some $45 billion just from 2015 to 2017. China has also invested considerable effort in competing with countries like the United States for biotech talent. Of some [7,000 researchers recruited](http://www.nature.com/articles/d41586-018-00542-3) under the Thousand Talents Plan since 2008, more than 1,400 specialized in the life sciences. A leading American geneticist, Harris Lewin, has [warned](https://www.wired.com/story/wildebeest-okapi-giraffe-ibex-come-peruse-their-genomes/) that the United States is “starting to fall behind … the Chinese, who have always been good collaborators, [are] now taking the lead.” For the United States and other Western countries, China’s growing role in biomedical research is raising plenty of concern. Several Chinese researchers have shown a willingness to ignore ethical and regulatory constraints on genetic research. In 2018, He Jiankui became a poster child for scientific irresponsibility when he announced he had edited the genes of two twins in utero without following basic safety protocols. He [reportedly dismissed](https://dev.biologists.org/content/146/3/dev175778) them as guidelines, not laws. Yet the reaction at home was not what He had hoped for. His research had been made possible by the relatively lax standards of Chinese universities, even as he had kept the true nature of it secret from many involved – while discussing it with a [small group](https://www.nytimes.com/2019/04/16/health/stanford-gene-editing-babies.html) of Western bioethicists and scientists, who stressed their disapproval. It’s not uncommon in China to break the rules and be lauded for the results anyway, whatever the field. For He, though, the vast international attention that came after the story broke cost him his career and possibly [his freedom](https://www.nytimes.com/2019/01/21/world/asia/china-gene-editing-babies-he-jiankui.html?module=inline). Chinese media rushed to stress [official disapproval](https://www.sciencemag.org/news/2019/08/untold-story-circle-trust-behind-world-s-first-gene-edited-babies) of the experiments. Even the [overt purpose](https://www.statnews.com/2019/04/15/jiankui-embryo-editing-ccr5/) of the editing – to ensure that the babies, born to HIV+ mothers, enjoyed protection against the virus – turned out to be scientifically weak. As China’s biotech sector grows, so too do fears that Chinese researchers like He will be more willing to push the limits of both science and ethics than those in the United States. Earlier this year, Chinese researchers recorded another mind-bending milestone when they [implanted](https://www.technologyreview.com/s/613277/chinese-scientists-have-put-human-brain-genes-in-monkeysand-yes-they-may-be-smarter/) human genes linked to intelligence into monkey embryos—and then said that the monkeys performed better on memory tests. The dominance of the party-state in China raises serious concerns around biotechnology, especially because it carries increasingly ethnonationalist tone. When in 2018 Chinese researchers created the world’s first primate clones, for example, they dubbed them Zhong Zhong and Hua Hua, from the term zhonghua meaning “The Chinese Nation”—an oddly jingoistic moniker for a pair of monkeys. Chinese government policies often blur the line between eugenics and education, lumped together as improving the “quality” (suzhi) of the population, which received another stamp of official [endorsement](https://twitter.com/globaltimesnews/status/1191681436635451392) following the recent Fourth Plenum. These programs are carried out through the country’s huge so-called family planning bureaucracy—originally established to enforce the one-child policy. Moreover, Beijing is increasingly extending its formidable social control apparatus into the realm of genetics. While there are considerable restrictions on private firms sharing biomedical data, largely because of an ugly history of [popular discrimination](https://www.theatlantic.com/china/archive/2013/12/chinas-struggle-with-hepatitis-b-discrimination/281994/) against hepatitis carriers, the government has no such restrictions. A [New York Times report](https://www.nytimes.com/2019/02/21/business/china-xinjiang-uighur-dna-thermo-fisher.html) earlier this year suggested, for example, that Chinese authorities had assembled a vast trove of genetic data on Chinese citizens without their consent, with the Uighur minority group having been specifically targeted. Beijing’s brand of bio-nationalism also directly threatens the United States. U.S. officials have been [warning](https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html) universities and research institutions that the biotech sector is a focal point for Chinese industrial espionage activities in the United States. And this past August, a senior Defense Department official warned Congress that China’s growing role in pharmaceutical manufacturing could allow it to disrupt deliveries of critical battlefield medicines, or potentially even [alter them to harm](https://www.washingtonpost.com/opinions/we-rely-on-china-for-pharmaceutical-drugs-thats-a-security-threat/2019/09/10/5f35e1ce-d3ec-11e9-9343-40db57cf6abd_story.html) U.S. forces. Yet the biggest risks posed by biotech, for China, the United States, and other countries, pertain to nonstate actors. A critical feature of modern biotech, in contrast to technology like nuclear weapons, is that it’s cheap and easy to develop. A technique known as CRISPR, which the Chinese researcher He used in his illicit gene-editing work, makes it practical for just about anyone to manipulate the genomes of just about any organism they can lay their hands on. CRISPR makes it much simpler to skirt ethical restrictions and terrifyingly straightforward for terrorist groups to develop fearsome biological weapons. Researchers have already [shown](https://doi.org/10.1371/journal.pone.0188453) it’s possible to reconstruct the smallpox virus, which was eradicated in the real world in the 1970s, for as little as $200,000 using DNA fragments you can order online. If a terrorist or rogue state were to successfully do so, virtually no one alive would have any resistance to the virus—and most stockpiles of the vaccine were destroyed long ago. There is an organization, the [International Gene Synthesis Consortium](https://genesynthesisconsortium.org/), that tries to screen suspicious orders for DNA fragments that might be used to build such bioweapons. And while most of the world’s major DNA synthesis firms belong to the consortium, membership is completely voluntary, and there’s also a [thriving and entirely unregulated](https://www.wired.com/story/synthetic-biology-vaccines-viruses-horsepox/) black market—much of it based in China. All of this means that biosecurity standards in places like China matter more than ever. After all, if a major bioweapon were to be unleashed, it’s unlikely that any major, globally integrated country could escape unharmed. Fortunately, there are growing signs China is open to better regulation of its biotech sector. In February, the Chinese government announced that “[high risk](https://www.statnews.com/2019/02/27/china-unveils-new-rules-on-biotech-after-gene-editing-scandal/)” biomedical research would be overseen by the State Council, China’s equivalent of the cabinet—a sign of the concern with which Beijing views incidents like the He Jiankui CRISPR scandal. In a further sign of this concern, in August, the Chinese Communist Party announced the creation of a [new committee](http://www.nature.com/articles/d41586-019-02362-5) to advise top leaders on research ethics.

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#### Every empirical study finds that SEP innovation is booming AND prices are low

Sidak ’18 [Gregory; 2018; Chairman of Criterion Economics, Formerly Ronald Coase Professor of Law and Economics at Tilburg University, Formerly Visiting Professor of Law at Georgetown University, Formerly Senior Lecturer at the Yale School of Management at Yale University, Formerly Deputy General Counsel to the Federal Communications Commission, Founding Editor of the Journal of Competition Law & Economics; Criterion Journal on Innovation, “Is Patent Holdup a Hoax?” Volum 3, https://www.criterioneconomics.com/sidak-is-patent-holdup-a-hoax.html]

Furthermore, economists who have empirically tested the predictions of the patent-holdup conjecture have found that their findings contradict those predictions.109 For example, the proponents of the patent-holdup conjecture predict that holdup in SEP licensing would result in “higher prices, less product choice and less investment [in innovation].”110 However, in 2017, Alexander Galetovic and Stephen Haber found that, contrary to those predictions, between 1994 and 2013, products incorporating SEPs exhibited higher rates of innovation than did products that did not rely on SEPs.111 They measured the rate of innovation by analyzing the relative rates of change in quality-adjusted prices and found that the rates of innovation for products that rely on SEPs significantly exceeded the economy-wide average.112 In addition, Galetovic and Haber found that “there was rapid entry of new firms [,] . . . so much so that industrial concentration, measured with the number of devices sold, actually fell in this industry over time.”113 Therefore, their empirical results contradict the predictions that patent holdup will result in higher quality-adjusted prices, fewer products, or less innovation.

As of November 2018, proponents of the patent-holdup conjecture have failed to reconcile their theory with the empirical evidence refuting it. Although Shapiro and other proponents purport to have responded to the empirical criticism of the patent-holdup conjecture, in fact they have ignored the vast majority of those substantive criticisms and have failed to explain why empirical evidence contradicts the predictions of the patent-holdup conjecture. For example, in response to John Golden’s thoughtful criticisms published in 2007,114 Lemley and Shapiro failed to provide any rigorous empirical analysis proving their claim that patent holders are overcompensated; instead, they simply asserted: “In our article, we offered several theoretical reasons to believe that judicial determinations of reasonable royalties might systematically overcompensate patent owners where multicomponent products are at issue.”115 Similarly, the attempts by Shapiro and other proponents to address the lack of affirmative empirical evidence supporting the patent holdup conjecture, as well as their attempts to defend that conjecture in the face of contradictory empirical evidence, have been superficial, ineffective, and unpersuasive. In October 2015, for example, Shapiro said in response to my criticisms of the patent-holdup conjecture that I was ignoring the large body of empirical research supporting the general theory of holdup—which is to say, authentically Williamsonian holdup.116 That statement is incorrect. By October 2015, I had already published many substantive criticisms of the patent-holdup conjecture that Shapiro simply ignored.117

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#### It’ll squeeze out market players by raising barrier to entry

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

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

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

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

#### 1. Immunity --- There’s a precedent of patents being immune to antitrust --- that’s key to innovation.

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

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

1. Patent Law, Exclusion, and Innovation

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

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

2. Antitrust Law in the Shadow of Patents

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

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

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

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

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

#### 2. Suits --- Antitrust suits are uniquely time consuming and expensive --- That drains R&D efforts

Osenga '21 [Kristen; 6/7/21; Professor of Law at the University of Richmond School of Law; J.D. from the University of Illinois College of Law, Visiting Professor at Emory University School of Law and at William & Mary School of Law; "Opinion: We Must Win the Race to 5G," https://prescottenews.com/index.php/2021/06/07/opinion-we-must-win-the-race-to-5g/]

America must swiftly act to ensure we win the race to 5G. One of the biggest barriers to American development of 5G is antitrust law and enforcement, both domestically and internationally. A combination of domestic rulings and efforts by foreign governments have left many of our most innovative companies dangerously exposed. We need to respond to these anti-competitive measures to ensure American companies are competing on a level playing field.

Aggressive antitrust enforcement by both foreign and domestic forces threatens innovation by forcing American companies to engage in expensive litigation. The lawsuits often result in these companies being unable to exercise their legally granted intellectual property rights. Qualcomm – one of the most active companies in the 5G space – is embroiled in a years-long legal battle that jeopardizes its business model and could force it to sell its groundbreaking wireless chips at a steep discount. The problems American technology companies face overseas are even more extensive, as foreign governments like China prioritize technological supremacy over the rule of law.

China’s government and courts regularly disregard due process guidelines. American companies often face pressure to settle out of court because they know the process is rigged. In some instances, American companies weren’t allowed to view all the evidence against them or retain appropriate legal counsel. Without legal baselines, American companies are powerless to resist theft and wrongdoing by the CCP.

Another example of these manipulative legal maneuvers against U.S. companies by China occurred when the American company InterDigitial filed a suit in India alleging that Xiaomi, a Chinese tech giant, was infringing its patents. The Chinese Wuhan Intermediate Court stepped in and demanded InterDigital drop its case and not sue Xiaomi in any jurisdiction or face a hefty fine. Clearly, the CCP was putting its hand on the scales of justice to protect a domestic company.

Research by the Office of the United States Representative has found the laws that China chooses to enforce are often overly broad and essentially allow Chinese companies to seize intellectual property if American companies won’t hand it over at a steep discount.

These actions, in the U.S. and especially in China, can have devastating impacts on America’s role in 5G development. Historically, American companies have been the forerunners of innovation, and America has reaped the benefits. This process may not occur with 5G because only a handful of American companies, like Qualcomm, are heavily investing in 5G. These companies may be forced out of the market by expensive litigation costs or the outright theft of their products.

#### 3. Competence --- Antitrust courts are inept --- That chills innovation

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

IV. RISK OF CONFLICT

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

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

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

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

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

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

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

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

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

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

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

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

#### 4. Consensus --- Overwhelming consensus is that antitrust nukes innovation in patents

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

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

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

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

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

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

### 2NC --- AT --- Holdups

#### No patent holdup or royalty stacking.

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

A. Replacing Conjecture with Data

It is important to appreciate that the shift in SEP antitrust policy is firmly grounded in a recent but already well-developed body of empirical research. This point deserves some emphasis, because litigators, regulators, and, more surprisingly, scholarly commentators who continue to rely on patent holdup theories often do not seem to take this evidence into account. That research has done what academic, regulatory and industry proponents of patent holdup and royalty stacking theories have never done, namely, subject these theoretical assertions to empirical inquiry to verify that they provide an accurate picture of real-world innovation markets, rather than relying on stylized models in which a theory can never be more than “plausible” under “reasonable assumptions.”

In this case, it turns out that the old joke about the economist’s magical can opener is brutally true.11

Scholars who had advanced these theories had argued that profit-maximizing SEP owners would generate an aggregate royalty burden that would dramatically inflate device prices in the end-user market.12 In some cases, these arguments referred to anecdotal reports, or simply added up publicly announced royalty rates, that SEP owners were collectively charging smartphone producers aggregate royalty burdens representing double-digit percentages of the sales price.13 Empirical researchers that have made systematic efforts to collect and analyze royalty data have failed to find support for these claims. Using various methodologies, researchers have found that estimated total royalty burdens are in the single to mid-digits as a percentage of the device price.14 Additionally, researchers have found that the royalty-stacking hypothesis is incompatible with the performance of the 3G and 4G wireless markets over an almost two-decade period during which device sales grew dramatically while, adjusted for increased functionality, device prices fell.15 In light of this discrepancy between theories of market failure and evidence of market success, the U.S. taxpayer might reasonably ask why the antitrust agencies elected to dedicate scarce investigation and enforcement resources to a well-functioning market in the first place.