# 1AC

## 1AC

### Plan

#### Plan: The United States federal government should substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

### 1AC---Innovation ADV

#### Advantage 1 is Innovation:

#### Current standard setting organization and FRAND enforcement is failing now

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I. Standard Setting and the Competitive Process

The fundamental economics in the information technology sector, driven by network effects, implies that there is enormous value associated with establishing compatibility standards. Popular standards include the mobile broadband standards used in cell phones, which are established by the 3rd Generation Partnership Project (3GPP), and the Wi-Fi technology for wireless local area networks, which is enabled by the 802.11 standard established by the Institute of Electrical and Electronics Engineers (IEEE).4

There are many SSOs, and their rules and procedures differ considerably. In addition to IEEE, leading SSOs include the International Organization for Standardization (ISO), the International Telecommunication Union (ITU), the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF), and the World Wide Web Consortium (W3C).5 SSOs generally establish standards by holding a series of committee meetings among industry participants. These meetings culminate in a vote on a technical specification that describes what features or attributes a product must have in order to comply with the standard. Most SSOs are open to all industry participants and seek to operate on a consensus basis, applying certain voting rules. SSOs do not normally engage in patent licensing, nor do they specify how patent royalties will be divided up among patent holders. They leave that to their members, which in some cases form patent pools to address these issues.6

SSOs adopt specific policies relating to intellectual property rights (IPRs).7 These IPR policies are generally intended to enable the SEP holders to obtain reasonable royalties for licensing their patents, while prohibiting them from charging excessive royalties after other industry participants have committed to the standard. At that point, firms committed to implementing the standard— which we call “implementers”—would find it very costly to avoid using the patented technology. For this purpose, most SSOs require SEP owners to license their SEPs on FRAND terms.8

FRAND policies are especially necessary because negotiations between SEP holders and implementers generally take place only after the implementers have used and infringed the technologies claimed by the SEPs. Standards involving information and communications technology can involve hundreds or even thousands of SEPs, many with uncertain boundaries for infringement. In addition, a time lag exists between patent application and patent issuance. For these and other reasons, it is impractical for implementers to enter into negotiations for patent licenses with all SEP owners prior to the establishment of a standard and to their implementation of it.9

The fact that patent negotiations generally do not take place until after implementers have used and infringed the technologies has several critical implications. First, at the time of negotiation, implementers are locked into the standard and the technologies claimed by the SEPs—that is, the cost to switch to an alternative technology or standard at that point—ex post—is much greater than it was ex ante, before the patented technology was first included in the standard. Ex post, the patent holder is no longer competing to have its technology included in the standard, nor is it competing to have implementers of the standard use its technology. Instead, because the patent holder owns an asset that is essential to the standard, implementers have no choice but to use the patented technology.

If the standard is commercially successful, implementers are willing to pay a much larger royalty for use of the patented technology than they would have paid ex ante, when the SEP holder faced competition from other technologies. In these circumstances, the SEP holder can be said to have obtained monopoly power in the market in which the patented technology is licensed for use in implementing the standard.10

Second, because of lock-in and the implementer’s ongoing infringement, the potential for litigation looms large in licensing negotiations. In effect, the parties are negotiating about how to settle an infringement suit, and that negotiation is heavily influenced by their predictions as to what the court will do if they cannot agree. This situation is not unique to SEPs; it arises frequently when firms are faced with patent infringement claims for products they have independently developed or technologies they have inadvertently infringed. Patent law addresses such instances by specifying that patent holders are entitled to “reasonable royalties,” defined as the royalties that the parties would have negotiated prior to the infringement and thus prior to lock-in.11 Those hypothetical ex ante royalties reflect the market value of the patent license. Notwithstanding the law’s embrace of this principle, however, as a practical matter, patent holders are generally able to recover more than the ex ante value of the patent when litigation occurs after the implementers are locked in. Further, negotiations in the shadow of litigation after lock-in tend to result in royalties in excess of the ex ante or market value of the patented technology.12

Third, the shadow of litigation is particularly problematic in the communications and technology sector, in which products typically include hundreds or thousands of patented technologies. A court-ordered injunction involving such products would deprive the implementer of not only the value of the technology covered by the patent-in-suit, but also the value of the entire product.13 Implementers that are forced to bear the risk of an injunction are thus induced to agree to royalties greater than those that would be appropriate if only the value of the patented technology were at stake. Those royalties systematically provide SEP holders with excessive compensation in comparison with the benchmark of ex ante royalties.

These implications of lock-in and ex post dealings are well-understood: they represent an example of the general concept of lock-in and opportunism developed by Oliver Williamson.14 The Federal Circuit has also recognized the market distortions caused by the inclusion of patented technologies in public standards and the resulting danger of patent holdup involving SEPs.15

For these and other reasons, the SEP holder has ex post monopoly power that, if left unchecked, would enable it to obtain royalties far in excess of the royalties that it could earn in a competitive market.16 To address this common problem and limit ex post opportunism by SEP holders, SSOs typically require participants that own SEPs to make certain FRAND commitments. In particular, by requiring a commitment to license on “fair and reasonable” terms, the FRAND requirement aims to prevent, or at least reduce, the extent of monopoly pricing by SEP holders. And by requiring a commitment to license on “nondiscriminatory” terms, the FRAND requirement can prevent SEP holders from extracting monopoly premiums by selective licensing or, more important, migrating their monopoly power from the FRAND-regulated market to unregulated standard-implementing product markets by licensing to only one or a few implementers or licensing to selected implementers on discriminatorily favorable terms.

#### Holdup is accentuated by FTC v Qualcomm

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

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

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

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

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

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

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

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

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

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

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

#### Patent holdup is real and necessitates intervention, even if it can’t be systemically proven.

Contreras 19, \*Jorge Contreras, Professor, University of Utah S.J. Quinney College of Law; (2019, “MUCH ADO ABOUT HOLD-UP”, <https://www.illinoislawreview.org/wp-content/uploads/2019/08/Contreras.pdf>)

B. Protective Measures May Already Be Working to Reduce Hold-Up

Another important factor that should be considered regarding the purported lack of empirical evidence of systemic hold-up is the effect that existing policy measures have already had in reducing hold-up. As noted above, the threat of patent hold-up was a primary motivating factor for many SDOs to adopt policies requiring the disclosure and licensing of SEPs. These policies have been in place for decades. In the United States, the first such policy was adopted in 1959 by the American Standards Association (the predecessor to today’s American National Standards Institute (ANSI).102 Today, every one of the more than 200 ANSI-accredited developers of American National Standards must adhere to ANSI’s essential requirements, including the adoption of such a licensing policy for SEPs. Similar policies have existed in European and international standards organizations since at least the 1980s.103 These policies, which were developed by SDOs in large part to reduce the likelihood of hold-up within standard-setting systems, have had several decades to work, and it is likely that the lack of observed hold-up in some studies can be attributed to the successful operation of these policies.

Similarly, antitrust and competition enforcement agencies in the U.S. and Europe have been aware of the potential for hold-up connected with standardization for many years. Accordingly, they have brought enforcement actions when it has been alleged that hold-up behavior has resulted in a violation of the antitrust laws. High-profile enforcement actions against patent holders such as Rambus, 104 Google 105 and Qualcomm106 send powerful deterrent signals to the market and warn others not to engage in similar behavior lest they, too, become the subject of agency enforcement. Like SDO policies, it is likely that the general market awareness of agency interest in standard-setting and hold-up has, to a degree, limited the amount of hold-up that is actually attempted in the marketplace, thereby limiting the direct evidence of hold-up as a systemic problem.

But do the deterrent effects of SDO and agency efforts to reduce hold-up signify that hold-up is not a problem? Certainly not. To reach such a conclusion would be perverse: akin to claiming that burglary is not a problem in a neighborhood that experiences reduced burglary rates after it has implemented an active neighborhood watch program and enhanced policing.

C. Indicia of Healthy Markets do not Prove the Absence of Anticompetitive Conduct

As noted above, one of the principal arguments advanced by commentators seeking to refute the “hold-up theory” is that markets for telecommunications products, namely smart phones, are robust – evidenced by increasing product functionality, decreasing consumer prices and rapid innovation -- and that this degree of robustness indicates that hold-up cannot be a problem in these markets.107 If hold-up were a problem in these markets, they reason, we would see product stagnation, stable (but high) prices, and a lack of competition – features associated with classic examples of hold-up in markets for products such as natural resources and agricultural goods.108

But this argument relies on a false syllogism: hold-up results in market dysfunction; if a market functions well, then it cannot be subject to hold-up. The weaknesses in this argument are multifold. First, hold-up may exist in individual instances without sufficient weight to affect overall market characteristics, particularly in a large global market such as mobile telecommunications. Thus hold-up may exist, even in a market that outwardly appears to be functioning well. Second, there is no valid counterfactual to use to compare the health and robustness of the market for mobile telecommunications products.109 Other consumer electronics devices, such as televisions and DVD players, do not compare well with mobile telecommunications devices, which have taken on a unique character in the modern networked economy. Thus, observing the strength of the market fails to answer the critical questions “compared to what?” and how much stronger the market might be (through more product diversity, functionality, price reduction) without hold-up?

A simple historical illustration is useful in this context. During the decade leading up to the enactment of the Sherman Antitrust Act of 1890, several major U.S. commodity markets (e.g., steel, salt, petroleum, coal, sugar, lead, and others) came under intense scrutiny for a variety of allegedly anticompetitive industrial arrangements. One might have argued that these markets, had they been subject to the sorts of anticompetitive collusion that the Sherman Act sought to address, should have seen reductions of output and increases in price. Yet, between 1880 and 1890, U.S. output of salt, petroleum, steel, and coal all increased significantly, and prices of steel, sugar and lead all dropped significantly.110 Do these positive market indicia demonstrate that the subject markets were not subject to anticompetitive collusion, and that the Sherman Act was not necessary? Certainly, investigations of these industries revealed significant cartel behavior. I would suggest that few commentators today would argue that the coal, steel, sugar and other major industrial producers of the late nineteenth century were innocent of collusive and anticompetitive conduct, or that the Sherman Act was not a necessary and beneficial measure for the U.S. economy.111 Yet, had we relied solely on the positive characteristics exhibited by these markets as proof that anticompetitive conduct did not exist, then perhaps the Sherman Act never would have been enacted.

By the same token, the fact that global markets for standardized products such as computers and smart phones appear to be thriving does not itself refute the possibility of hold-up nor the existence of anticompetitive conduct in these markets. Nor does it allow regulators and policy makers to drop their guard or cease to monitor these important industries.

#### The plan requires SSO’s to administer reasonable action to prohibit ex post opportunism---that solves

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

3. Application of the Basic Legal Principles

The antitrust principle is straightforward: industry-wide collaboration through SSOs to establish procompetitive standards is permitted only if it is no more restrictive of competition than reasonably necessary to enable creation of the standards. When standard setting predictably creates technology monopolies that, if unrestrained, will enable anticompetitive ex post opportunism that would otherwise not occur, an SSO that does not take effective measures to prevent or minimize such ex post opportunism engages in conduct that is more restrictive of competition than necessary. In that case, the SSO and, in appropriate cases, its members, may well violate Section 1 of the Sherman Act.

Under this principle, SSO procedures and FRAND rules should be evaluated based on whether they lead to reasonable SEP royalties, using the competitive ex ante licensing standard discussed above, which has been adopted by the courts in patent law. Put differently, FRAND rules should be evaluated based on their ability to prevent SEP holders from obtaining more than the ex ante value of their technology from implementers.

This limitation would not prevent a SEP holder from proﬁting, perhaps greatly, from participating in the SSO and having its patented technology included in the standard. The SEP holder continues to be rewarded for its technology because the inclusion of its technology in the standard can still greatly increase the volume of licensing opportunities available to the SEP holder.

Whether a particular set of FRAND rules are sufficiently effective in preventing ex post opportunism will depend on the particular circumstances. The procedural unfolding of the case will also depend upon the circumstances. As a general matter, the case would probably be structured as an ordinary Rule of Reason case.82

First, the plaintiff would have to demonstrate harm to competition as a result of the collaboration of the SSO’s members, many of which compete with one another. In this case, the harm to competition would stem from the ability of the SEP holder to exercise monopoly power by obtaining royalties in excess of the competitive, ex ante level. The decision to include patented technologies in the standard would be the allegedly unlawful agreement. Notably, the court need not determine what a FRAND royalty is; it would suffice to determine that market power has been created or exercised, and that existing SSO rules and policies were not adequate to prevent the competitive harm. The defendant, which could be the SSO or perhaps one or more SSO members, would win at this point if the plaintiff failed to show harm to competition. If might fail if the standard faces substantial competition and the court concludes that the SEP holder therefore does not have market power or if the SSO’s rules and policies are found to be effective in preventing ex post opportunism, even if the plaintiff or even the court thinks that other rules and policies would be preferable.

Second, if the plaintiff makes the requisite showing of harm to competition, the defendant(s) would then have to show some procompetitive justiﬁcation— in this case, the beneﬁts of the standard. These two initial steps should be straightforward.

Third, if as is likely the defendant is able to show a procompetitive justiﬁcation, the plaintiff would have to show that the SSO could have used available, reasonable alternatives to realize the efficiency beneﬁts with less or none of the competitive harms. The plaintiff might identify reasonable alternatives that would have led to a different standard, based on including unpatented technology in the standard or perhaps involving fewer SEPs or fewer owners of SEPs, which would be less subject to patent holdup. More likely, the plaintiff could suggest alternative SSO rules that would not change the standard, but would reduce the likelihood or extent of ex post opportunism. For example, the plaintiff might suggest more rigorous FRAND-type rules, such as rules that set forth more precise principles on which FRAND royalties are to be determined and the circumstances under which SEP holders might seek injunctions.

Fourth, the burden would then shift to the defendant(s) to show that the beneﬁts of the standard could not have been realized if the SSO had adopted any of the proffered alternatives or that those alternatives were unrealistic.83 The plaintiff would be entitled to judgment if the court concludes that those beneﬁts could have been realized with less competitive harm if the SSO had adopted the standard with different IPR rules or policies.

Our overall sense, based on experience and the empirical literature, is that the extant FRAND rules are generally useful, but tend to be inadequate because they are imprecise and leave unresolved such critical issues as (a) the meaning of a reasonable royalty, even conceptually; (b) the meaning of “non-discriminatory;” (c) to whom licenses must be offered; and (d) under what circumstances may a SEP holder obtain an injunction.84 These imprecise FRAND commitments are therefore not sufficient to adequately prevent ex post opportunism. The recent revisions to IEEE’s FRAND policy represent a signiﬁcant step in the right direction, but even this advance leaves important questions unanswered.85 If FRAND rules are inadequate in these ways, litigation involving extant FRAND rules would likely be resolved only at the ﬁnal, fourth step. The defendant would be able to demonstrate the beneﬁts created by the standard; the plaintiff would be able to demonstrate the creation of market power and that other reasonable and practical rules or policies would ameliorate the problem. The case would thus turn on whether the defendant is able to demonstrate that signiﬁcant beneﬁts associated with standardization could not have been realized if the SSO had adopted those other rules or policies.

The court would have available a variety of possible remedies if the plaintiff prevails. Implementers that paid supracompetitive royalties or were unlawfully excluded in whole or in part from product markets as a result of the inadequate FRAND policies would be entitled to damages and, in some cases, to treble damages.86 If the unlawful SSO conduct is regarded as the collective action of the SSO and its members, which is likely to be the case in most instances, SSO members would be jointly and severally liable for the damages. Forward-looking injunctive relief aimed at restoring competition would need to be fashioned to the requirements of the individual case. For example, a court could order the SSO to adopt a new rule or policy proposed by the plaintiff. If the court is reluctant to take on that governance role, it might give the SSO a period of time—maybe ninety days—to develop a rule, subject to the court’s ultimate approval, which would adequately ameliorate the competitive problem created by the SSO. Alternatively or in addition, the court might order the parties to attempt to negotiate a rule or policy on which they can agree. And, depending on the circumstances, the court might order SEP holders, including at least those that were defendants in the case, to comply with the new SSO rules and policies.

#### Don’t trust neg authors---Qualcomm funded their papers.

McLaughlin 21, Bloomberg, (David, March 12th, 2021, “One Tech-Funded University Helped Shape FTC’s Hands-Off Approach”, <https://www.bloomberg.com/news/articles/2021-03-12/how-george-mason-university-shaped-ftc-s-hands-off-approach-to-tech>)

* Alden Abbott, Jonathan Barnett are both fellows at George Mason University’s Center for Intellectual Property and Innovation Policy (funded by Qualcomm)
* Joshua Wright is a former FTC commissioner who taught at the institute and lobbied for Qualcomm

The [Tech Transparency Project](https://www.techtransparencyproject.org/) (TTP), a watchdog group in Washington, details in a new report an unusually close relationship between the law school at Virginia’s George Mason University and the Federal Trade Commission. By helping shape the workforce of the FTC, the group claims, the school infused it with a laissez-faire philosophy favorable to the school’s tech donors.

[The report](https://www.techtransparencyproject.org/articles/big-techs-backdoor-ftc) throws a harsh light on the FTC’s hands-off approach to tech companies over the past decade. As the agency prepares to argue the lawsuit against [Facebook Inc.](https://www.bloomberg.com/quote/FB:US) that it filed late last year, seeking to break up the social media giant, it must contend with an inconvenient fact: It approved Facebook’s acquisitions of Instagram in 2012 and WhatsApp in 2014—the very mergers it now seeks to undo. The FTC’s consent to those deals is cited by critics as evidence of a permissive attitude that allowed tech companies to grow into leviathans.

One explanation for its lenience, the TTP report charges, is that the industry used a corner of academia to capture the agency. According to the report, which was published on March 12, Silicon Valley donated substantial sums to George Mason’s Antonin Scalia Law School, which built a pipeline of professors and graduates who went to work at the FTC. Dozens of people went from the school to the regulator—commissioners, bureau heads, attorney-advisers, legal interns—during the Obama and Trump administrations.

Under President Trump alone, professors and graduates of Scalia Law, and heads of affiliated programs at George Mason, served as the FTC chair, general counsel, policy planning head, and leaders of its three main divisions: the bureaus of competition, consumer protection, and economics.

Katie Paul, who heads the TTP, says an investigation is needed into “whether George Mason University has effectively become Big Tech’s back door into the FTC, giving the companies an undisclosed way to sway its decision-making and hobble enforcement action.”

Revolving Door

Large tech companies have donated to two programs affiliated with Scalia Law, the Global Antitrust Institute and the Law & Economics Center. From January 2018 to the end of last year, [Google](https://www.bloomberg.com/quote/GOOGL:US) donated $900,000, [Amazon.com Inc.](https://www.bloomberg.com/quote/AMZN:US) contributed $925,000, and Facebook Inc. gave $675,000, according to documents obtained by Bloomberg Businessweek through a public records request. Google, Amazon, and Facebook declined to comment on their donations.

The law school says the ties between its faculty and the FTC aren’t unusual. Alison Price, a senior associate dean, says it’s common for professors to work for federal agencies and then return to their teaching jobs. “Since Scalia Law has special expertise and a relatively large faculty in antitrust, it’s logical that our faculty is called to serve with frequency,” she says. “But faculty don’t set policy; administrations do.”

The Tech Transparency Project is part of a larger watchdog group, [Campaign for Accountability](https://campaignforaccountability.org/). The TTP website cites several philanthropists as donors, including George Soros’s Open Society Foundations. Oracle Corp. had been a donor to a TTP predecessor group that focused mostly on Google, but the TTP says it no longer accepts corporate funding.

Both George Mason programs, which host conferences and offer training for judges and antitrust enforcers, promote the consumer-welfare standard articulated by Robert Bork, the late federal judge and Yale Law School professor. That standard, the guidepost for regulators and courts since the 1980s, looks to price increases as a gauge of competitive harm. It is blamed by some antitrust experts for handcuffing enforcers when it comes to policing tech companies.

The tech companies’ donations are drawing scrutiny. At a hearing on Feb. 25, New York Democratic Representative Mondaire Jones called Abbott “Tad” Lipsky, a former FTC official now at the [Global Antitrust Institute](https://gai.gmu.edu/), “a wolf in sheep’s clothing.” As he testified against proposals to give the antitrust laws more teeth, Lipsky drew Jones’s scorn. Programs such as the GAI “have worked to teach judges and regulators to let their guard down as corporate funders like yours came to dominate our economy,” Jones said. Lipsky responded that his antitrust views predated “any of these digital technology companies.”

A key figure in the law school-to-regulator pipeline is Lipsky’s boss, Joshua Wright, an FTC commissioner from 2013 to 2015. He now teaches antitrust law at George Mason while also running the GAI.

Wright wielded outsize influence at the agency, pushing through a 2015 policy statement in an attempt to rein in the agency’s enforcement power. After he left he improperly lobbied the agency on behalf of Qualcomm Inc., one of the law school’s largest donors, according to a report by the FTC inspector general that was obtained by TTP and verified by Bloomberg Businessweek. His name was redacted in the report, but Wright confirmed it was about him. He says he did nothing wrong.

The New York Times last year [reported that tech companies bankrolled the work of the GAI](https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html) and that Wright had worked with corporate donors to fend off critics. The extent of the revolving door between the FTC and the law school, and Wright’s alleged violation of ethics laws, haven’t been previously reported.

Many companies support higher education, and many universities send professors and graduates to Washington. But George Mason is unique in cultivating a specific regulator, says Jeff Hauser, executive director of the [Revolving Door Project](https://therevolvingdoorproject.org/), which tracks government officials’ corporate ties.

“In terms of feeding directly into a government agency, I’m not aware of any equivalent at the SEC or the EPA or anything else,” he says, referring to the Securities and Exchange Commission and the Environmental Protection Agency.

A public university in the northern Virginia suburbs of Washington, George Mason is home to the free-market think tank the [Mercatus Center](https://www.mercatus.org/" \t "_blank" \o "Mercatus Center website). It is a leader in the study of applying economic analysis to the law, emphasizing that markets work best when government regulates less. The university became known as a haven for conservatives at the end of the Reagan administration in 1988. Even Bork taught there after stepping down from the bench in 1988.

The George Mason conduit was steady and robust, according to the TTP, which details dozens of examples of people moving between the FTC and the law school over the past decade. One is James Cooper, who directs an economics and privacy program at the Law & Economics Center. He simultaneously taught at the school and served as a deputy director for the FTC’s Bureau of Consumer Protection.

Cooper was among the academics who urged House lawmakers last year to reject proposals to break up tech companies and make merger approvals more difficult. George Mason’s Wright, Lipsky, and John Yun, a professor at the law school who was an economist at the FTC, joined the filing. Cooper didn’t respond to a request for comment, and Yun declined to comment.

But Wright, the former FTC commissioner, perhaps best embodies the ties linking the FTC to the law school and its donors. After leaving the agency in 2015, Wright simultaneously taught at George Mason, ran the GAI, and worked for the Wilson Sonsini Goodrich & Rosati law firm, where he represented Qualcomm.

The FTC sued Qualcomm in January 2017 in a monopoly case that was developed while Wright was an FTC commissioner. Wright tried to broker a settlement about four months after the case was brought. He met Lipsky, then the acting director of the FTC’s competition bureau, for lunch at a steakhouse in Washington and tried to set up an additional meeting with agency officials, according to the inspector general’s report.

In doing so, Wright violated an ethics law that bans officials for life from lobbying on issues they worked on “personally and substantially,” according to the inspector general. Those findings were referred to the Department of Justice’s public integrity section. The Justice Department, which decided not to prosecute, declined to comment.

Lipsky resigned two months after his lunch with Wright, who then hired him at the GAI. Lipsky didn’t respond to a request for comment.

“I never made any appearance at the FTC involving its enforcement action against Qualcomm or discussed the merits of the case with any FTC official,” says Wright, who declined to elaborate on the specifics of the investigation. “I immediately complied when the FTC ethics office informed me that I should not make any appearance based upon a single preliminary vote I had cast years before the case was filed.”

Qualcomm contributed almost $5.8 million to the George Mason law school programs from 2016 through 2020. Less than two months before Wright met with the FTC to try to settle the Qualcomm case, the company gave $525,000 to the GAI. The company didn’t respond to requests for comment.

Tech companies that donate to George Mason collaborate with the school’s professors on projects, according to emails obtained through a public records request.

#### Don’t trust Big Tech-funded academic papers---they’re not credible.

Mullins and Nicas 17, \*Brody Mullins is an investigative reporter in the Washington D.C. bureau of The Wall Street Journal where he covers business, lobbying and campaign finance; \*Jack Nicas covers Google and other companies owned by Alphabet Inc. He is based in The Wall Street Journal's San Francisco bureau; (July 14th, 2017, “Paying Professors: Inside Google’s Academic Influence Campaign”, https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286)

Ms. Feldman and other critics of the funding say even disclosing money received from a company that has benefited from the research can give the appearance of a conflict of interest and undermine academic credibility.

“Yeah, the money is good but it does get in the way of objective academic research,” said Daniel Crane, a University of Michigan law professor. He said he turned down Google’s offers to fund his research that opposed antitrust regulation of internet search engines. “If I am reading an academic paper, and they disclose an interest with a party with an interest in the outcome,” he said, “you take [the research] with a grain of salt.”

Paying for favorable academic research has long been a tool of influence by U.S. corporations in food, drug and oil industries. Scandals involving conflicts of interest in medical research have spurred many medical schools, scientific researchers and journals to require disclosure of corporate funding and to prohibit corporate sponsors from meddling with findings.

The tech industry now includes the world’s top five companies by market value: [Apple](https://www.wsj.com/market-data/quotes/AAPL) Inc., Google parent [Alphabet](https://www.wsj.com/market-data/quotes/GOOG) Inc., [Microsoft](https://www.wsj.com/market-data/quotes/MSFT) Corp. , [Amazon.com](https://www.wsj.com/market-data/quotes/AMZN) Inc. and [Facebook](https://www.wsj.com/market-data/quotes/FB) Inc.

Several of the companies also are active in funding academic research. Microsoft has paid Harvard business professor Ben Edelman, the author of papers saying Google abuses its market dominance. Chip maker [Qualcomm](https://www.wsj.com/market-data/quotes/QCOM) Inc. funded papers supporting its side of a fight against Google over patents. And telecommunication giants [Verizon Communications](https://www.wsj.com/market-data/quotes/VZ) Inc. and [AT&T](https://www.wsj.com/market-data/quotes/T) Inc. have funded various papers against Google. The companies either declined to comment or didn’t respond to requests for comment.

#### Big Tech bankrolls academic papers---compromises academic integrity in a manner identical to Big Tobacco.

Auslender 20, (June 10th, 2020, “This research was sponsored by Amazon: How ‘Big Tech’ is compromising academic integrity”, https://www.calcalistech.com/ctech/articles/0,7340,L-3854970,00.html)

Research with questionable backing

The entry of corporate money into controversial research fields has always raised concerns. In the 1950s and 1960s, it was the big tobacco companies that poured billions into universities and research centers to produce academic studies into why smoking or second-hand smoke was not a health concern, or that there was no link between smoking and various diseases.

In the 80s and 90s, the same model was adopted by the energy companies, who used it to build the foundations of global warming and climate change denial. The huge amounts of capital the companies poured into the research bodies enabled them to shape the science in such a way as to produce as many studies as possible that emphasized the lack of certainty regarding climate change and help make the argument that man-made global warming was nothing but a theory. In between, there were always the food companies who tried to bridle science to downplay the risks of sugar consumption or the dangers of processed food by sponsoring studies that confused consumers and regulators alike.

In retrospect, it is clear that the money invested by tobacco and energy companies in academic studies served them to help manipulate the public and the regulators put in place to defend it in order to ensure huge profits while ignoring the dangers to people’s health, human lives and the future of the planet. The lessons learned from the previous decades are apparent in the academic institutions’ readiness to accept more money from such companies. When Philip-Morris announced in 2018 that it was launching a research fund that will hand out a billion dollars over 15 years, a long line of researchers, scientists, and doctors spoke out against accepting funding from a company whose products kill millions of people a year. It’s a good start, but it’s only the beginning. There are now several organizations dedicated to tracking the secret donations of tobacco and oil companies to research centers and NGOs.

Small sums, a huge impact

In recent years technology giants have joined the ranks of organizations that infuse the scientific community, and even some in the non-profit and watchdog sector, with small, but well-targeted sums. At first glance, it is difficult to point out the benefit they seek from cutting the checks, but chances are it’s there just waiting to be cashed. There are many examples and Amazon is only the most recent. Last July, IBM announced it was granting Notre Dame $20 million to establish an ethics lab and last year it was exposed that Oxford University received 17 million GBP from Google, in part to fund research into the ethics of AI and the public responsibility of tech companies. Facebook, in turn, launched a giant campaign to fund 60 research projects across 30 institutions to examine the impact of social media on democracy and at the same time donated $7.5 million for the establishment of a computer science ethics center in Munich. Earlier this week [a study](https://www.wired.com/story/top-ai-researchers-financial-backing-big-tech/) by a researcher at the University of Toronto revealed that more than half of the faculties dealing with AI at four leading universities receive funding from large tech companies, including Alphabet, Amazon, Facebook, Microsoft, Apple, Nvidia, Intel, IBM, Huawei, Samsung, Uber, Alibaba, Element AI, and Elon Musk’s OpenAI. Moreover, not all donations are transparent. Last July, the [New York Times revealed](https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html?auth=linked-google) that the Global Antitrust Institute, a part of the Antonin Scalia Law School at George Mason University in Fairfax, Va., which often host regulators and judges from all over the world at its functions, has received over the years donations from Google ($500,000), Amazon ($225,000) and Qualcomm ($2.9 million). Those sums may be small compared to the huge amounts available to the tech giants, but for research institutes and universities they are substantial, especially compared to the government grants they compete fiercely over. In such a way, with minimal but precise contributions, the tech giants purchase access and influence over the shaping of the collective knowledge surrounding such critical subjects as competition, ethical technologies, and long-term social and political impact.

Researchers wake up!

Even though the tech giants are buying influence over social issues that are of critical importance, their relationships with research bodies are nearly free of critique, mostly due to the fact that there are no set rules to protect scientific integrity in such situations. There is no question that technology companies should take part in the discussion over the shaping of the regulatory environment and the ethical frameworks within which they develop new technology and one can’t ignore the two-way flow of people from companies to independent research institutes throughout their careers or completely negate its reciprocal impact. But these bodies, both the tech giants and the research centers, must conduct the dialog in a transparent space, uncorrupted by the money various stakeholders have spread around.

Big Oil and Big Tobacco and now Big Tech too all operate within the limitations of the law, and the money they pour in is all permitted. But when the research bodies are seduced into taking their money, they cast a shadow on the already elusive concept of scientific integrity. No matter how much academic freedom the donors promise, when money is involved there is always a way to pressure the researchers into serving financial interests.

#### Weakened antitrust enforcement emboldens firms to follow Qualcomm’s lead

Hovenkamp 20, \*Herbert J. Hovenkamp is James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School of the University of Pennsylvania; (2020, “FRAND and Antitrust”, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3095&context=faculty_scholarship>)

While the FRAND process has been highly productive, it is also fragile. Firms are tempted to make commitments at the beginning when the incentive to join is large, but renege on them later when they can profit by doing so. At least in this particular case, private FRAND enforcement had not worked very well. Qualcomm had been able to violate FRAND commitments in order to exclude rivals and obtain higher royalties than FRAND would permit, largely with impunity. Other firms will very likely follow Qualcomm’s lead. If that happens the FRAND system will fall apart, doing irreparable injury to the modern wireless telecommunications network or, at the very least, diminishing the leadership role of the United States in preserving effective network competition.

While governments can be heavily involved in standard set-ting,9 the implementation of technical standards in information technologies is largely the work of private actors. Government involvement is limited mainly to enforcement of contract, intellectual property, or antitrust law. As private actors, those involved in standard setting or compliance are fully subject to the federal antitrust laws.

This Article addresses one question: when is an SSO participant’s violation of a FRAND commitment an antitrust violation, and if it is, of what kind and what are the implications for remedies? It warns against two extremes. One is thinking that any violation of a FRAND commitment is an antitrust violation as well. In the first instance FRAND obligations are contractual, and most breaches of contract do not violate any antitrust law. The other extreme is thinking that, because a FRAND violation is a breach of contract, it cannot also be an antitrust violation. The question of an antitrust violation does not de-pend on whether the conduct breached a particular agreement but rather on whether it caused competitive harm. This can happen because the conduct restrained trade under section 1 of the Sherman Act, was unreasonably exclusionary under section 2 of the Sherman Act, or amounted to an anticompetitive condition or understanding as defined by section 3 of the Clay-ton Act.10 The end goal is to identify practices that harm com-petition, thereby injuring consumers.

The Ninth Circuit’s Qualcomm decision will make antitrust violations in the context of FRAND licensing much more difficult to prove, even in cases where anticompetitive behavior and consumer harm seem clear.11 Indeed, in this case the court itself acknowledged the harm to consumers but appeared to think that they were not entitled to protection.12 If this decision stands, FRAND obligations will to a larger extent have to be settled through private litigation and the federal antitrust enforcement agencies will have a diminished role. Anticompetitive behavior by one firm that is not effectively disciplined will lead others to do the same thing.

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

Bauer et al. 17, \*Matthias Bauer is Senior Economist at ECIPE; \*Fredrik Erixon is a Swedish economist and writer. He has been the Director of the European Centre for International Political Economy (ECIPE) ever since its start in 2006; (October 2017, “Standard Essential Patents and the Quest for Faster Diffusion of Technology”, https://ecipe.org/publications/standard-essential-patents/)

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

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

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

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

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

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

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

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

#### Holdup threatens the entire IOT economy.

Morton 16, \*Fiona M. Scott Morton is an American economist, currently the Theodore Nierenberg Professor at Yale School of Management; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (2016, “Patent Assertions: Are We Any Closer to Aligning Reward to Contribution?”, https://www.journals.uchicago.edu/doi/full/10.1086/684987#\_i22)

G. Summary

However, our overall conclusions regarding SEPs are more mixed. Policy and legal changes that have reduced the ability of SEP owners to engage in patent holdup appear to have stalled out, especially as regards reform of the IPR rules at SSOs other than the IEEE. If so, this could have important effects on innovation and efficiency. For example, the “Internet of Things” is a new and growing area where royalty stacking and patent holdup appear to be very real dangers. Devices of all sorts, from thermostats to railroad cars to refrigerators, are being given connectivity using standards developed by SSOs. The price of those chips, and whether the IP contained in them costs $5 or $0.50 or $0.005, will determine the nature of new applications and the rate of adoption.

Failure to prevent patent holdup relating to tomorrow’s information technology and communications standards is likely to cause significant social welfare loss in the years ahead. If new and more effective private solutions relating to standard setting do not emerge to promote innovation and protect consumers, antitrust enforcement is one of the only remaining remedies that seems feasible.

V. Conclusions

Over the past five years, the rewards provided to patent owners in the United States have become more closely matched with the value of the technology they contribute. When rewards and contributions are aligned, economic efficiency is promoted because investments into developing new technologies are commensurate with benefits. These changes have come from legislation, the federal courts, and policy statements and enforcement actions by regulators of various types. However, at this juncture, we see a substantial gap persisting between the ability of some patent owners to monetize their patents and the contributions provided by the technology underlying those patents. With the “Internet of Things” poised to create economic growth, this is a problem worthy of further research and policy attention.

#### Emergence of smart cities depends on IoT applications of 5G interoperability standards---absent FRAND, excessive royalties will undermine sustainable development.

Schwartz 18, \*Matt Schwartz, Privacy Fellowship Coordinator at ACT, App Association; (March 2nd, 2018, “It’s Smart to be FRANDly: How the FRAND Commitment Will Determine the Future of Smart Cities”, https://actonline.org/2018/03/02/its-smart-to-be-frandly-how-the-frand-commitment-will-determine-the-future-of-smart-cities/)

In December, we [outlined](https://actonline.org/2017/12/18/smart-cities-connecting-your-community-through-technology/%5d) the emergence of Smart Cities – cities that harness technological innovations like internet of things (IoT) devices and data analytics to improve essential infrastructure in growing urban centers. The technological foundation of Smart Cities aims to improve public safety, better allocate resources, and meet the needs of citizens more quickly.

A central element to Smart Cities is the comprehensive network of sensors and devices implemented within buildings, roads, traffic signs, and parking meters that allows them to interact with public, and potentially private-owned, infrastructure. These sensors will “speak” to one another, communicating information about energy usage, traffic density, or other elements of city management that have traditionally either been analyzed separately or not tracked at all. The potential of Smart Cities allows data to flow from previously disconnected branches of the city and be processed in real-time, unlocking previously unknown insights.

The powerful interoperability of Smart Cities will rely heavily on standardized technologies developed in organizations like the IEEE, which is responsible for standardizing the wi-fi technology we use every day. Standardized technologies often include standard-essential patents (SEPs), which, like their name suggests, are patents declared essential to an industry standard by a standards-setting organization. In simple terms, one cannot implement the standardized technology without using the patent.

Like regular patents, the users of SEPs must pay royalties or licensing fees to the patent owner before they may use it. For example, if a manufacturing company wants to make an IoT device interoperable with a 5G network, the manufacturer must pay a licensing fee to the owner of the SEP that is essential to the 5G standard. SEPs play a vital role in the new innovations we enjoy and have come to expect, and because of the value of these patents, SEP holders have the ability to demand high license fees from those who wish to implement the standard. To offset this competition issue, many SEP holders voluntarily agree to license their SEPs to any willing licensee under fair, reasonable, and non-discriminatory (FRAND) terms.

While wi-fi and LTE are standards that will be vital to Smart City deployment, countless new standardized technologies are being developed that will be integral to any fully-operational Smart City. With reasonable access to SEPs, assured by the FRAND commitment, innovators can enjoy the legal and business certainty they need to compete. While the meaning of the FRAND commitment continues to be refined – as evidenced by the development of SEP best practices recently launched by the App Association in Europe – its foundations are well-established.

But what happens when SEP holders do not abide by the FRAND licensing commitment, or simply refuse to license at all? Sadly, small and medium-sized companies would be forced to accept untenable licensing terms, but more realistically, they would be priced out of using the standard altogether. As a result, it would impose a barrier to innovation that would result in fewer products offered to consumers or cities eager to implement IoT technologies. For example, many hope the rise of autonomous vehicles will be seamlessly integrated into the Smart City network. But how beneficial would it be if only some autonomous vehicle brands are able to license the technology needed to communicate with traffic lights, simply because of the market power of a chipmaker? The FRAND commitment is an important backstop to that unfortunate possibility.

It is vital for SEP holders to honor FRAND licensing terms, if not for small and medium-sized innovators, then for the sustainability of future Smart Cities. FRAND creates a platform for innovation, providing a floor on which companies can stand, innovate, and compete. If the foundation of the FRAND commitment is reneged, American innovators pay a steep price – not only do they lose a key component of product development and market entry, but they are also left with years of expensive negotiations and litigation if they choose to challenge the licensing practice. What’s more, the confidence developed in the open standards development system is shaken, and Smart Cities have fewer choices in IoT solutions for their future.

To achieve the promise of Smart Cities, a balanced standards ecosystem is essential. We must allow small and medium-sized developers to leverage industry standards for innovation and prevent cost-prohibitive royalty structures and negotiating practices that are detrimental to competition, while also ensuring that SEP owners can protect their intellectual property and be fairly compensated for its use. The FRAND commitment continues to be the best framework to achieve this balance, and adherence to its principles will determine the future and success of Smart Cities.

#### Climate change is anthropogenic and causes extinction---5G-enabled smart cities are critical for mitigation and adaptation.

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Currently, the entire planet is at risk due to continual climate change [1–3]. The recorded increase in average temperature across the world in the past hundred years, and the associated changes attributed to this, are known as global warming. Many scientists are convinced by the published evidence that this change is anthropogenic and resulted from the elevated emission levels of global greenhouse gases (GHGs) [4,5]. Gases such as water vapor, carbon dioxide, methane, nitrous oxide, and ozone are responsible for the absorption and emission of thermal radiation. These changes in the relative quantities of the GHGs induce a proportional change in the amount of preserved solar energy. Presently, the accepted indicator for global warming is the sustained rise in the mean temperature worldwide. This definition is designed to account for the fact that there may be some localized exceptions to this rise. For example, there may be cooling experienced in a region while the global temperature may increase altogether, hence the need for average temperature. A key concern with the GHGs trapping of more heat in the atmosphere is that it affects both climate and short scale weather patterns. Consequently, it results in greater numbers of adverse weather events such as storms, heat waves, cold snaps, droughts, and fires [6]. Climate-related risks to health, livelihoods, food security, water supply, human safety, and economic growth are projected to increase with global warming of 1.5 ◦C [7] and further increase further at 2 ◦C, as shown in Figure 1. In addition, the risks to global aggregated economic growth due to the climate change impacts are projected to be lower at 1.5 ◦C than at 2 ◦C by the end of this century.

Carbon dioxide has the most substantial effect on global warming [8]. Although it was once assumed to have an ~100 year lifespan in the atmosphere, careful studies revealed that the situation is far worse, with three-quarters of the gas expected to remain for a time in the region of up to ~1000 years, with the remainder lasting for an indefinite period of time [9]. It was indicated that the present impacts of humanity on the atmosphere can certainly cause a long term problem [10]. Carbon dioxide is released when oil, coal, and other fossil fuels are burnt for the energy we use to power our homes, cars, and smartphones. By lessening its usage, we can curb our own contribution to climate change while saving money. The first challenge is eliminating the burning of coal, oil, and, eventually, natural gas. Oil is the lubricant of the global economy as it is hidden inside such ubiquitous items as plastic and corn, fundamental to the transportation of both consumers and goods. Coal is the substrate, supplying roughly half of the electricity worldwide, a percentage that is likely to grow according to the International Energy Agency (IEA). In fact, buildings contribute up to 43% of all the greenhouse gas emissions worldwide [11], even though investing in thicker insulation and other cost-effective as well as temperature-regulating strategies can save money in the long run. Investment in new infrastructures, or radical upgradation of the existing highways and transmission lines, may help to reduce greenhouse gas emissions, yielding economic growth in the developing countries.

Nations across the globe have kept very high targets to reducing their GHG discharges [12,13]. In order to meet these goals, considerable reductions in city energy usage is required. At a global scale, urban communities represent over half (55%) of the population, which is predicted to reach 68% by the middle of this century [14]. Urban areas claim ownership of the highest levels of energy use, gas emission, and also the largest local economy. As such, it is crucial for urban areas to reduce their consumption and utilize renewable sources wherever available to reduce their gas discharge levels. Smart cities often utilize digital sensors to measure and transmit data about the levels of GHGs in the city at that moment, as a means of tackling them [15]. The efficacy of such a system is thus reliant on the network used to collate and analyze the data collected as an extant network. The mobile telecommunications networks offer a convenient solution to this desire, as their pre-existence has the clear benefit of reducing costs compared to the design and implementation of a novel system. It is recognized that smart cities will certainly act as the key players meeting these ambitious targets [16,17]. In this study, we focused primarily on the potential applications of 5G network technology to control climate change in Singapore. In addition, a clear overview of the sustainability benefits of introducing 5G technology compatible smart cities, buildings, and farms in all aspects of urbanization is provided. Herein, the main purpose is to tackle the negative outcomes associated with anthropogenic climate change, with a particular focus on the contributions that are best made by the telecoms network operators.

Climate change is one of the most challenging problems that humanity has ever faced. Presently, hundreds of millions of lives, innumerable species, entire ecosystems, health, economy, and the future habitability of this planet are at risk. Fortunately, climate change is solvable, we just need to wisely exploit the existing technologies and sciences. Climate change mitigation is a pressing international need in which many management actions are required. The development of 5G technology has been largely driven by smart mobile devices and advanced communication technologies. It may thus serve as a technical enabler for a whole new range of business opportunities, energy, and facilities management, together with industrial applications. Moreover, it may enable different devices to work together seamlessly. Definitely, the 5G cellular network technology is expected to revolutionize the global industries with profound effects on the savings of energy, waste generation and recycling, and water resources management, thus reducing the climate change impacts.

#### Smart Cities are key to the 1.5 degree threshold.

Dasgupta 18, \*Aniruddha (Ani) Dasgupta is President and CEO of World Resources Institute; (October 31st, 2018, “IPCC 1.5° Report: We Need to Build and Live Differently in Cities”, https://www.wri.org/insights/ipcc-15deg-report-we-need-build-and-live-differently-cities)

Amid the barrage of news about climate-related natural disasters and climate change summits, it's important to recognize real inflection points—when there is truly cause to sit up and take note. The [IPCC Special Report on Global Warming of 1.5ºC](http://www.ipcc.ch/report/sr15/), released last month, is a genuine wake up call.

We are already at 1º Celsius warming beyond pre-industrial averages. Limiting global warming to 1.5° Celsius (2.7° Fahrenheit)—beyond which scientists expect more significant damage to global ecosystems—requires "rapid and far-reaching transitions" in energy systems, land use, industry and urban infrastructure, [concludes the special report](http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf).

In short, we need to live and build differently.

Those of us focused on cities know this is true. The trajectory for major trends needs to change significantly in urban areas to reach the targets agreed to by the world's governments in the Paris Agreement, Sustainable Development Goals and New Urban Agenda. We need not just nudges and tweaks, but transformation on a massive scale, starting now.

The IPCC special report, a synthesis of the latest climate research collected by 91 authors, reinforces this message comprehensively. From reducing emissions to expanding economic opportunities for all, cities are key to a sustainable future.

Building Differently

Big changes to the built environment are needed to stay under 1.5°. We must build smarter and retrofit faster. Emissions from buildings must be reduced 80-90 percent by mid-century, and all new construction must be "fossil-free and near-zero energy" in just two years.

These changes need to happen everywhere. In the developed world, we need to see optimization and decarbonization of existing services. In the developing world, we need to provide new services—including roads, water, sanitation and electricity—to the underserved, and cities need to build these services differently from those of the past. New solutions need to be adopted quickly since the infrastructure being constructed today will last decades. This is a challenge, but also a significant opportunity to reshape cities—some [75 percent](http://thecityfix.com/blog/financing-transition-sustainable-cities-introducing-thecityfix-labs-india-christopher-moon-miklaucic-kate-owens-jaya-dhindaw/) of the infrastructure expected to be in place by 2050 has yet to be built.

Reaching the 1.5° target will require a 40 percent reduction in final energy use in transportation by mid-century, according to the report. Individual choices [can make a dent here](https://www.citylab.com/transportation/2018/10/un-climate-report-transportation-choices/572494/), but better urban planning can go even further. The authors note that "effective urban planning can reduce GHG emissions from urban transport between 20 percent and 50 percent."

Cities Under Siege

At 2º of warming by 2040, more than 70 percent of coastlines will see sea level rise greater than 0.2 meters (8 inches). Among the places hardest hit by flooding will be dense urban areas, including at least 136 "megacities" (defined as "port cities with a population greater than one million in 2005"). That doesn't include new cities that will enter this category due to population growth in the next few decades.

Heat is already a major concern for many cities, and the report notes that the challenge will be much greater if nothing is done. "At 1.5°C, twice as many megacities (such as Lagos, Nigeria and Shanghai, China) could become heat-stressed, exposing more than 350 million more people to deadly heat by 2050 under midrange population growth."

At 2º, without changes to the built environment like cooler roofs and greener urban design, cities like [Karachi](http://www.ndma.gov.pk/files/heatwave.pdf) and [Kolkata](https://www.cnn.com/2015/06/01/asia/india-heat-wave-deaths/index.html) can expect deadly heatwaves like the ones in 2015 that killed thousands.

Living Differently

It's not just the physical changes of a warming world that are alarming; it's the social and economic implications. Climate change is a "poverty-multiplier that makes poor people poorer and increases the poverty head count," the report says.

"Unmitigated warming could reshape the global economy later in the century by reducing average global incomes and widening global income inequality," it says. "Most severe impacts are projected for urban areas and some rural regions in sub-Saharan Africa and Southeast Asia."

Cities are especially vulnerable to these trends in part because the number of people living in "[informal](https://www.wri.org/wri-citiesforall/publication/towards-more-equal-city-including-the-excluded)" settlements—areas often beyond the scope of basic services and municipal assistance—is expected to triple to 3 billion by 2050. The risk for cities already [struggling with the effects of inequality](http://thecityfix.com/blog/winner-take-all-richard-floridas-new-urban-crisis-part-of-growing-global-focus-on-unequal-cities-ani-dasgupta/) is that reaching these populations becomes even more difficult, not only putting millions of people at risk of destitution and literal drowning but dragging down [urban and national economies writ large](http://thecityfix.com/blog/big-picture-small-cities-urban-development-needs-national-governments-leah-lazer/).

A much larger emphasis on governance, [equity](https://www.wri.org/wri-citiesforall/cities-all) and "broad participation" will need to be considered to reduce urban risks. Even well-intentioned adaptation efforts [can backfire](https://www.newsecuritybeat.org/2014/07/dont-forget-governance-risk-tunnel-vision-pursuing-resilience-asias-cities/) if they end up further marginalizing or displacing poor citizens.

Our World Resources Report, "[Towards a More Equal City](https://www.wri.org/wri-citiesforall/cities-all)," suggests ways to build cities for all by outlining [equity challenges sector by sector](https://www.wri.org/wri-citiesforall/working-papers) as well as exploring [practical approaches](https://www.wri.org/wri-citiesforall/case-studies) that are already working in cities around the world.

Cities for All

The IPCC report is a call for transformation on a massive scale—not just in energy or climate policy but how we live and build generally. Though it's easy to focus on the potential costs of such a change, the benefits could be significant, too.

The authors note urban "green economies" are emerging [from the informal sector](https://www.wri.org/wri-citiesforall/publication/towards-more-equal-city-including-the-excluded), helping to [meet demand for clean water](https://www.sciencedirect.com/science/article/pii/S0197397515002325), for example, and [improve recycling](https://www.wri.org/wri-citiesforall/publication/pune-civil-society-coalitions-policy-contradictions-and-unsteady). And cities in Africa and Asia have the potential to leapfrog traditional ways of generating electricity, bringing cleaner energy to more citizens and improving adaptive capacity at the same time (here, the report cites[WRI's own work on powering cities in the global south](https://www.wri.org/publication/towards-more-equal-city-powering-cities-global-south)).

Estimates of the net value of low-carbon investments in cities are as high as [$16.6 trillion by 2050](https://newclimateeconomy.report/workingpapers/wp-content/uploads/sites/5/2018/06/CUT2018_CCCEP_final_rev060718.pdf), according to the Coalition for Urban Transitions.

The furious pace of urbanization gives us an opportunity to make rapid changes. A window for transformation is opening, and it's up to us to seize it. Cities are the best chance we have to get this right.

#### Reducing urban emissions is critical.

Casini 17, \*Marco Casini, Eng. PhD, Professor of Architecture Technology and Environmental Certification of Buildings - Department of Planning, Design and Architecture Technology, Sapienza University of Rome; (2017, “Green Technology for Smart Cities”, https://iopscience.iop.org/article/10.1088/1755-1315/83/1/012014/pdf)

Global population increase, progressive decrease of energy sources and their consequent higher cost, climate change and air pollution are some of the main problems that the cities of the future will have to cope with to survive, transforming into Smart Cities and focusing on Green Building and Smart Mobility.

Because of the low energy efficiency of buildings and transportation systems, the cities of today are responsible, on average, for 70% of greenhouse gases emissions and over 60% of energy consumed worldwide [1].

The global increase of carbon dioxide emissions, whose values, equal to over 32 Gigatonnes per year in 2016, exceeded over 50% of those in 1990, caused the increase of CO2 concentration levels in the atmosphere, by now stably higher than 400 parts per million (which has not been occurring for 300 millions of years) [2].

2016 was also the hottest year ever recorded in NOAA's 137-year series, since measurements began in 1880. Remarkably, this is the third consecutive year a new global annual temperature record has been set [3]. The average global temperature across land and ocean surface areas for 2016 was 0.94°C (1.69°F) above the 20th century average of 13.9°C (57.0°F), surpassing the previous record warmth of 2015 by 0.04°C (0.07°F). This marks the 40th consecutive year (since 1977) that the annual temperature has been above the 20th century average. To date, all 16 years of the 21st century rank among the seventeen warmest on record (1998 is currently the eighth warmest). 2017 lends itself to being a record year too. In fact, the global land and ocean surface temperature during January-April 2017 was 0.95°C (1.71°F) above the 20th century average of 12.6°C (54.8°F). This was the second highest such period since records began in 1880, behind 2016 by 0.19°C (0.34°F) and ahead of 2015 by 0.10°C (0.18°F).

The issues of acoustic pollution and air quality typical of urban centres go in addition to the climate changes. In the EU, buildings alone are responsible for 40% of the final energy use, 36% of CO2 emissions and above 40% of Particulate Matter emissions (PM10 and PM2.5). Current mobility systems based on fossil fuel, besides being responsible for above 25% of polluting emissions, are unsuitable to the needs of urban areas, making movements difficult especially during rush hours, with journey speeds around 7-8 km/h (the same speeds recorded in 1700) [4].

Every year worldwide 12.6 million people die because of environmental pollution, equal to one fourth of the total deaths. Air, water and soil pollution, chemical exposure, climate changes and ultraviolet radiation contribute to the increasing of over 100 illnesses and health damages [5].

Atmospheric pollution is the fourth risk factor for deaths on a global level, and undoubtedly the main environmental risk factor for lungs and heart diseases: over 5.5 million people die every year all over the world because of air pollution, more than Finland, Slovacchia and Sicily inhabitants. Italy hits the record of dead from smog with 59,500 premature deceases from PM2.5, 3,300 from Ozone and 21,600 from NOx only in 2012 [6].

These issues are going to increase with the progressive decrease of resources, the consequent increase of energy cost and the population development that is estimated to reach 9 billions of individuals in 2050 (from current 7.4 billions) of which over two thirds will live in the urban centres. These will produce the 80% of global GDP and will consume the 75% of global resources, contributing to create a model of urban-centric development.

The economic resources that the worldwide cities have addressed to adaptation measures to climate changes like protective barriers against inondations, more resilient infrastructures and better draining systems (around the 0.22% of GDP for the developed countries compared to the 0,15% for the cities of developing countries) are already relevant.

Looking at this scenario, cities have to be ready and capable of handling enormous social and environmental mutations, becoming the fulcrum of the fight against global warming and catalyzing investments and policies oriented to sustainability and efficiency in a Smart vision.

### 1AC---Cybersecurity ADV

#### Advantage 2 is Cybersecurity:

#### Aggressive patent strategies create structural flaws in 5G standardization that imperils domestic cybersecurity---market competition reduces the incidence of vulnerability and severity of attacks.

Duan 20, \*Charles Duan is a senior fellow and associate director of tech & innovation policy at the R Street Institute, where he focuses his research on intellectual property issues; (2020, “OF MONOPOLIES AND MONOCULTURES: THE INTERSECTION OF PATENTS AND NATIONAL SECURITY”, Santa Clara High Technology Law Journal, 36(4), 369-405. Retrieved from <https://www2.lib.ku.edu/login?url=https://www.proquest.com/scholarly-journals/monopolies-monocultures-intersection-patents/docview/2442966690/se-2?accountid=14556>)

III. COMPETITION AND CYBERSECURITY

In addition to the historical review done so far, another approach to understanding the relationship among patents, competition, and national security is to consider the role of cybersecurity. There is little doubt that computer system vulnerabilities that enable hacking and spread of computer exploits are a threat to the nation’s defenses, so better cybersecurity is a key part of national security strategy.155

Strong competition can thus complement national security by enhancing domestic cybersecurity, and patent assertion that unduly weakens competition detracts from cybersecurity.156 Competition promotes better cybersecurity in at least two ways. First, multiple studies show that competition encourages firms to improve their products on multiple vectors including cybersecurity. Second, competition avoids a situation that security experts call a “monoculture,” which increases vulnerability to severe cyberattacks. As former Secretary of Homeland Security Michael Chertoff wrote recently, “We need competition and multiple providers, not a potentially vulnerable technological monoculture,” to guarantee national security.157 Thus, cybersecurity provides a useful lens for understanding how unfettered patent assertion and licensing can detract from national security.

A. Cybersecurity as Competitive Value-Add

Competition enhances national security by reducing the incidence of technical vulnerabilities. That effect is especially important for security sensitive systems such as mobile telecommunications.

Intuitively, a causal chain from competition to cybersecurity makes logical sense. Computer security is a value-added benefit to consumers, so firms in competitive markets are likely to use security to gain an edge over their competitors.158 In monopolized markets, though, there may be less external impetus to test products for flaws, and the monopolist may choose to focus less on security and more on new product features or increased product quality.

Economic research confirms these hypotheses about competition leading to better cybersecurity. A 2009 empirical study of web browsers considered the impact of market concentration on the amount of time that vendors took to fix security vulnerabilities as they were discovered.159 The study found that the presence of more competitors correlated with faster cybersecurity response—a reduction of 8–10 days in response time per additional market rival.160 Similarly, business researchers in 2005 modeled incentives for firms to engage in sharing of cybersecurity information, and concluded that the “inclination to share information and invest in security technologies increases as the degree of competitiveness in an industry increases.”161 Another study found that, where two software firms are in competition, at least one will be willing to take on some degree of risk and responsibility for cybersecurity, whereas a monopoly software firm will consistently fail to accept such responsibility.162 To be sure, an unpublished study from 2017 found that some market concentration can make firms more responsive to cybersecurity issues, but only to a point: “being in a dominant position reduces the positive effect of having less competitors on the responsiveness of the vendor,” and indeed the “more dominant the firm is, the less rapid it is in releasing security patches.”163 This research confirms that competition is more conducive to cybersecurity.

It is not hard to see how this applies to emerging communication technologies markets. In the absence of competition, the above research suggests that device manufacturers, chip makers, and software developers will lack incentives to respond to vulnerabilities, to share information about cybersecurity practices and issues, and to take responsibility for security matters. Mobile phone chips have had their share of cybersecurity failures already.164 The best way to flush out ongoing and future cybersecurity issues is to maintain competitive pressure at all levels of the supply chain.

B. Vulnerabilities of “Monocultures”

A second reason why monopoly undermines cybersecurity is that monopoly leads to a “monoculture” of single-vendor products, opening the door to massive systemic failure in the case of a cyberattack. Computer researchers developed the theory of software monocultures in the early 2000s, in response to the regular phenomenon of computer viruses and other attacks spreading rapidly by exploiting flaws in the dominant operating system at the time, Microsoft Windows.165 Where a computer system such as Windows has a commanding share of users, a virus that exploits a flaw in that system can quickly spread to infect a whole interconnected ecosystem. An operating system monopoly thus enables fast and easy spread of cyberattacks, and better cybersecurity would be achieved through greater diversity in online systems.166 As one research group posited, “a network architecture that supports a collection of heterogeneous network elements for the same functional capability offers a greater possibility of surviving security attacks as compared to homogeneous networks.”167

There has been considerable study of the theory that computer monocultures are naturally more vulnerable to attacks.168 In one study, computer science researchers reviewed a catalog of 6,340 software vulnerabilities recorded in 2007, to compare whether comparable software would share the same flaws.169 Of the 2,627 vulnerabilities applicable to application software (as opposed to operating systems, web scripts, and other software components), only 29 (1.1%) applied to substitute products from different vendors but providing the same functionality.170 By contrast, different versions of a single software product were found to share vulnerabilities 84.7% of the time.171 Thus, software monocultures share exploitable flaws even when there is some variation in versions across the monoculture; by contrast, diversity in software is almost guaranteed to prevent a single flaw from affecting all users.

In the case of 5G and wireless mobile communications, a monoculture is an especially concerning possibility. To the extent that systems such as smart city sensors or communication networks are widely deployed in a monoculture fashion, a widespread attack could have devastating consequences, potentially blacking out a region and affecting essential services such as 911.172 A monoculture that is vulnerable to so-called “rootkits” or “backdoors”—maliciously installed software that enable bad actors to commandeer systems—could also enable mass surveillance or spying by private hackers or foreign governments.173 The presence of systems from multiple vendors would mitigate these possibilities.

#### The economy is inevitably reliant on 5G---BUT rollout will vastly broaden America’s cyber vulnerabilities.

Durbin 20, \*Managing Director of the Information Security Forum (ISF); (August 11th, 2020, “5G Brings Benefits, But Also Heralds Fresh Security Threats”, https://www.forbes.com/sites/forbesbusinesscouncil/2020/08/11/5g-brings-benefits-but-also-heralds-fresh-security-threats/?sh=2277006b77f1)

The continuing rollout of the fifth generation of mobile networks and technologies, known collectively as 5G, is set to radically transform the business world. Incredible new speeds, dramatically reduced latency and fresh swathes of bandwidth will allow real-time connectivity on a whole new scale. Smart cities, autonomous vehicles and augmented reality present amazing opportunities, so it’s no surprise that investment in 5G technologies from governments and businesses is enormous and growing.

Amid the excitement of all this technological promise, significant new dangers are being overlooked.

As digital connectivity soars to new heights and internet of things devices expand to rapidly become the internet of forgotten things, organizations will face a number of serious security challenges. As someone who specializes in cybersecurity and technology, I believe it’s crucial that organizations start to consider the threats posed by a vastly broadened attack surface, machine learning manipulation and parasitic malware.

Securing The Infrastructure

From my perspective, organizations, businesses and individuals will quickly become reliant on 5G networks for daily life. Inevitably, 5G technologies and infrastructure will be a prime target for foreign governments and cybercriminals. The line between protectionism and concern about espionage is blurry. Any uncertainty about the technology that forms critical infrastructure should be of major concern to business leaders.

While the explosion of digital connectivity presents new opportunities, it also massively increases potential attack surfaces. Many more devices and sensors will be connected by millions of new 5G masts, and these new 5G networks have a heavier reliance on software. What this means is an explosion of new attack vectors, possible vulnerabilities and weaknesses that can be exploited by a range of bad actors.

All the benefits that 5G promises in terms of greater speeds and lower latency will also benefit hacktivists, enabling them to carry out attacks more rapidly and at greater scale.

Fresh Threat Landscape

Spoofing and jamming of 5G networks could cause serious disruption for supply chains and dependent infrastructure. By targeting embedded IoT devices, determined attackers could put vital networks under threat. Greater speed, higher bandwidth and lower latency will enhance the potency of distributed denial of service attacks. Many traditional techniques will find fresh life in the 5G future, and the impact on business could be catastrophic.

As more organizations come to rely on machine learning, I predict attackers will find new ways to exploit neural networks and subvert these systems for their own gain. Manipulated machine learning could enable attackers to enrich themselves, obfuscate and deceive, ultimately sowing confusion on a grand scale. What’s worrisome is the opportunity for parasitic malware to burrow into 5G networks and systems to steal processing power and degrade the performance or even shut down critical services like water and power.

Any adoption of 5G must include a proper assessment of the risks involved and plans for protection, vigilance and remediation of security incidents.

#### Insecure technical standards cause inevitable systemic grid collapse---extinction.

DeNardis 21, \*Dr. Laura DeNardis, PhD in Science and Technology Studies from Virginia Tech, Dean of the School of Communication at American University, and Gordon M. Goldstein, Adjunct Senior Fellow at the Council on Foreign Relations, (March 1st, 2021, “The Real Lesson of the Texas Power Debacle”, Lawfare, 3/1/2021, https://www.lawfareblog.com/real-lesson-texas-power-debacle)

The infrastructure was essential, ubiquitous and providing basic functionality for everything in daily life from water to heat and transportation. And in an instant it was gone, plunging tens of thousands of residents into a life-threatening crisis. This is, of course, the narrative of the recent debacle in Texas, where a winter storm overwhelmed the state’s electrical grid and brought the state to a near-total blackout. But it should also be interpreted as a preemptive warning of what Americans will face from the next generation of the internet and the new realm of cybersecurity risk it will dramatically amplify.

Both forms of infrastructure—a state-run electrical grid and the 5G and “internet of things” future to which we are rapidly hurtling—share three attributes. First, their construction reflects a lack of imagination about the danger that can quickly coalesce when seemingly remote threat scenarios become real. Second, compounding a lack of analytic imagination is an absence of preparedness. Third, for both the Texas electrical grid and the emerging internet, public policy protections are either meager or completely absent.

In planning for the resilience of its electrical grid, public officials in Texas discounted the potentially devastating disruption that could occur from unpredictable events—whether related to climate change or just a once-a-century anomaly. They also eschewed precautions other states take seriously by allowing for the interconnection of electrical grid supply chains across their borders, ostensibly because of their ideological rejection of federal regulatory oversight governing such arrangements.

As the United States builds out a new national 5G cyber-physical communications network through private service providers, Americans similarly discount the risks—myriad in their diversity and severity—that are orders of magnitude more significant than what Texas confronted recently. More physical things than people are already connected. The super empowered internet of tomorrow, known among some in the field as the “internet of everything,” will exceed by tens of billions of devices the number of connections between individuals simply communicating via social media or digital screens.

This confronts policymakers with an imminent threat: A cyber outage is no longer about losing digital communications but about losing basic societal functioning and even human life. The failure of imagination is to think of the SolarWinds attack on U.S. federal agencies and tech companies as a worst-case scenario. The failure of imagination is to think of cybersecurity through a content-centric lens rather than as possible attacks on the material world. The emergence of internet-connected cardiac devices, digitally dependent cars, and internet-connected agriculture systems portend the stakes of a cyberattack to health care, economic and social functioning, and food security.

The United States should be prepared for, and certainly not be caught by surprise by, such cyberattacks. Yet, the internet of everything is notoriously insecure. Internet-connected physical objects are not necessarily upgradeable. Nor do they come with adequate default security and encryption. The 5G infrastructure that helps connect digital objects has been at the center of debates over Chinese espionage. Industrial cyber-physical systems are based on technical standards that have not been collaboratively vetted for security and interoperability. One of the most infamous cyberattacks—the so-called Mirai botnet that took down major media sites and corporations—hijacked these insecure objects in homes to carry out the assault. The United States is not yet prepared.

Finally, in the race to conceive and deploy effective public policy responses, the U.S. government as a whole is hardly more anticipatory or synthesized in its response to potential calamity than the state of Texas. The focus of U.S. cyber policy remains on information policy issues such as disinformation, manipulation and violent speech rather than securing the digital world that now powers our material day-to-day lives. The Biden administration confronts an enormous challenge in crafting a comprehensive strategy to the cybersecurity risks foreshadowed by the ruinous experience in Texas and its management of vital infrastructure. While the digital world has leapt from two-dimensional to three-dimensional space, cyber policy has not at all jumped from 2D to 3D.

This failure of imagination, preparedness and policy protection must not be America’s cyber future; the stakes are far too high and the costs are far too great. The Texas disaster is a potent illustration of what has always been true: Our digital society and economy are extremely vulnerable and grow more porous and subject to penetration day by day. As digital sensors and cyber control systems become further embedded in physical infrastructure like energy systems, agriculture and transportation, there is no longer a separation between security of the “real” world and security of the online world. They are entangled and increasingly enmeshed—and policy has yet to catch up to either envisioning or mitigating the looming threats the U.S. confronts.

If the energy grid cannot weather a winter storm, how can it be expected to withstand a major cyberattack? What other vital forms of national infrastructure—ranging from water, bridges, highways and roads, and ultimately our day-to-day financial system—are comparably at risk? As Texas dramatizes, it is neither hyperbolic nor exaggerated to assert that our survival could now depend on securing the inevitable cyber-physical future that is accelerating with stunning rapidity.

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

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

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

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

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

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

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

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

#### Those attacks cause accidental nuclear escalation.

Klare 19, \*Michael T. Klare is a professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association; (November 19th, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation”, https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation)

Yet another pathway to escalation could arise from a cascading series of cyberstrikes and counterstrikes against vital national infrastructure rather than on military targets. All major powers, along with Iran and North Korea, have developed and deployed cyberweapons designed to disrupt and destroy major elements of an adversary’s key economic systems, such as power grids, financial systems, and transportation networks. As noted, Russia has infiltrated the U.S. electrical grid, and it is widely believed that the United States has done the same in Russia.[12](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The Pentagon has also devised a plan known as “Nitro Zeus,” intended to immobilize the entire Iranian economy and so force it to capitulate to U.S. demands or, if that approach failed, to pave the way for a crippling air and missile attack.[13](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12)

The danger here is that economic attacks of this sort, if undertaken during a period of tension and crisis, could lead to an escalating series of tit-for-tat attacks against ever more vital elements of an adversary’s critical infrastructure, producing widespread chaos and harm and eventually leading one side to initiate kinetic attacks on critical military targets, risking the slippery slope to nuclear conflict. For example, a Russian cyberattack on the U.S. power grid could trigger U.S. attacks on Russian energy and financial systems, causing widespread disorder in both countries and generating an impulse for even more devastating attacks. At some point, such attacks “could lead to major conflict and possibly nuclear war.”[14](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote14)

These are by no means the only pathways to escalation resulting from the offensive use of cyberweapons. Others include efforts by third parties, such as proxy states or terrorist organizations, to provoke a global nuclear crisis by causing early-warning systems to generate false readings (“spoofing”) of missile launches. Yet, they do provide a clear indication of the severity of the threat. As states’ reliance on cyberspace grows and cyberweapons become more powerful, the dangers of unintended or accidental escalation can only grow more severe.

#### Cyber-compromised NC3 causes nuclear war.

Klare 19, \*Michael T. Klare is a professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association; (November 19th, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation”, <https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation>)

The Nuclear-Cyber Connection

These links exist because the NC3 systems of the United States and other nuclear-armed states are heavily dependent on computers and other digital processors for virtually every aspect of their operation and because those systems are highly vulnerable to cyberattack. Every nuclear force is composed, most basically, of weapons, early-warning radars, launch facilities, and the top officials, usually presidents or prime ministers, empowered to initiate a nuclear exchange. Connecting them all, however, is an extended network of communications and data-processing systems, all reliant on cyberspace. Warning systems, ground- and space-based, must constantly watch for and analyze possible enemy missile launches. Data on actual threats must rapidly be communicated to decision-makers, who must then weigh possible responses and communicate chosen outcomes to launch facilities, which in turn must provide attack vectors to delivery systems. All of this involves operations in cyberspace, and it is in this domain that great power rivals seek vulnerabilities to exploit in a constant struggle for advantage.

The use of cyberspace to gain an advantage over adversaries takes many forms and is not always aimed at nuclear systems. China has been accused of engaging in widespread cyberespionage to steal technical secrets from U.S. firms for economic and military advantages. Russia has been accused, most extensively in the Robert Mueller report, of exploiting cyberspace to interfere in the 2016 U.S. presidential election. Nonstate actors, including terrorist groups such as al Qaeda and the Islamic State group, have used the internet for recruiting combatants and spreading fear. Criminal groups, including some thought to be allied with state actors, such as North Korea, have used cyberspace to extort money from banks, municipalities, and individuals.[4](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote04) Attacks such as these occupy most of the time and attention of civilian and military cybersecurity organizations that attempt to thwart such attacks. Yet for those who worry about strategic stability and the risks of nuclear escalation, it is the threat of cyberattacks on NC3 systems that provokes the greatest concern.

This concern stems from the fact that, despite the immense effort devoted to protecting NC3 systems from cyberattack, no enterprise that relies so extensively on computers and cyberspace can be made 100 percent invulnerable to attack. This is so because such systems employ many devices and operating systems of various origins and vintages, most incorporating numerous software updates and “patches” over time, offering multiple vectors for attack. Electronic components can also be modified by hostile actors during production, transit, or insertion; and the whole system itself is dependent to a considerable degree on the electrical grid, which itself is vulnerable to cyberattack and is far less protected. Experienced “cyberwarriors” of every major power have been working for years to probe for weaknesses in these systems and in many cases have devised cyberweapons, typically, malicious software (malware) and computer viruses, to exploit those weaknesses for military advantage.[5](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote05)

Although activity in cyberspace is much more difficult to detect and track than conventional military operations, enough information has become public to indicate that the major nuclear powers, notably China, Russia, and the United States, along with such secondary powers as Iran and North Korea, have established extensive cyberwarfare capabilities and engage in offensive cyberoperations on a regular basis, often aimed at critical military infrastructure. “Cyberspace is a contested environment where we are in constant contact with adversaries,” General Paul M. Nakasone, commander of the U.S. Cyber Command (Cybercom), told the Senate Armed Services Committee in February 2019. “We see near-peer competitors [China and Russia] conducting sustained campaigns below the level of armed conflict to erode American strength and gain strategic advantage.”

Although eager to speak of adversary threats to U.S. interests, Nakasone was noticeably but not surprisingly reluctant to say much about U.S. offensive operations in cyberspace. He acknowledged, however, that Cybercom took such action to disrupt possible Russian interference in the 2018 midterm elections. “We created a persistent presence in cyberspace to monitor adversary actions and crafted tools and tactics to frustrate their efforts,” he testified in February. According to press accounts, this included a cyberattack aimed at paralyzing the Internet Research Agency, a “troll farm” in St. Petersburg said to have been deeply involved in generating disruptive propaganda during the 2016 presidential elections.[6](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote06)

Other press investigations have disclosed two other offensive operations undertaken by the United States. One called “Olympic Games” was intended to disrupt Iran’s drive to increase its uranium-enrichment capacity by sabotaging the centrifuges used in the process by infecting them with the so-called Stuxnet virus. Another left of launch effort was intended to cause malfunctions in North Korean missile tests.[7](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote07) Although not aimed at either of the U.S. principal nuclear adversaries, those two attacks demonstrated a willingness and capacity to conduct cyberattacks on the nuclear infrastructure of other states.

Efforts by strategic rivals of the United States to infiltrate and eventually degrade U.S. nuclear infrastructure are far less documented but thought to be no less prevalent. Russia, for example, is believed to have planted malware in the U.S. electrical utility grid, possibly with the intent of cutting off the flow of electricity to critical NC3 facilities in the event of a major crisis.[8](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote08) Indeed, every major power, including the United States, is believed to have crafted cyberweapons aimed at critical NC3 components and to have implanted malware in enemy systems for potential use in some future confrontation.

Pathways to Escalation

Knowing that the NC3 systems of the major powers are constantly being probed for weaknesses and probably infested with malware designed to be activated in a crisis, what does this say about the risks of escalation from a nonkinetic battle, that is, one fought without traditional weaponry, to a kinetic one, at first using conventional weapons and then, potentially, nuclear ones? None of this can be predicted in advance, but those analysts who have studied the subject worry about the emergence of dangerous new pathways for escalation. Indeed, several such scenarios have been identified.[9](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote09)

The first and possibly most dangerous path to escalation would arise from the early use of cyberweapons in a great power crisis to ~~paralyze~~ undermine the vital command, control, and communications capabilities of an adversary, many of which serve nuclear and conventional forces. In the “fog of war” that would naturally ensue from such an encounter, the recipient of such an attack might fear more punishing follow-up kinetic attacks, possibly including the use of nuclear weapons, and, fearing the loss of its own arsenal, launch its weapons immediately. This might occur, for example, in a confrontation between NATO and Russian forces in east and central Europe or between U.S. and Chinese forces in the Asia-Pacific region.

Speaking of a possible confrontation in Europe, for example, James N. Miller Jr. and Richard Fontaine wrote that “both sides would have overwhelming incentives to go early with offensive cyber and counter-space capabilities to negate the other side’s military capabilities or advantages.” If these early attacks succeeded, “it could result in huge military and coercive advantage for the attacker.” This might induce the recipient of such attacks to back down, affording its rival a major victory at very low cost. Alternatively, however, the recipient might view the attacks on its critical command, control, and communications infrastructure as the prelude to a full-scale attack aimed at neutralizing its nuclear capabilities and choose to strike first. “It is worth considering,” Miller and Fontaine concluded, “how even a very limited attack or incident could set both sides on a slippery slope to rapid escalation.”[10](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote10)

What makes the insertion of latent malware in an adversary’s NC3 systems so dangerous is that it may not even need to be activated to increase the risk of nuclear escalation. If a nuclear-armed state comes to believe that its critical systems are infested with enemy malware, its leaders might not trust the information provided by its early-warning systems in a crisis and might misconstrue the nature of an enemy attack, leading them to overreact and possibly launch their nuclear weapons out of fear they are at risk of a preemptive strike.

“The uncertainty caused by the unique character of a cyber threat could jeopardize the credibility of the nuclear deterrent and undermine strategic stability in ways that advances in nuclear and conventional weapons do not,” Page O. Stoutland and Samantha Pitts-Kiefer wrote in 2018 paper for the Nuclear Threat Initiative. “[T]he introduction of a flaw or malicious code into nuclear weapons through the supply chain that compromises the effectiveness of those weapons could lead to a lack of confidence in the nuclear deterrent,” undermining strategic stability.[11](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote11) Without confidence in the reliability of its nuclear weapons infrastructure, a nuclear-armed state may misinterpret confusing signals from its early-warning systems and, fearing the worst, launch its own nuclear weapons rather than lose them to an enemy’s first strike. This makes the scenario proffered in the 2018 NPR report, of a nuclear response to an enemy cyberattack, that much more alarming.

# 2AC

## ADV---Innovation

### 2AC---AT: Innovation DA---TL

#### *Every single* neg innovation claim is false---overdeterrence and “false positives” are wrong, FRAND-ly rates sufficiently motivate innovation, and holdup outweighs.

Leslie 20, \*Christopher R. Leslie, Chancellor’s Professor of Law, University of California Irvine School of Law; (2020,“The DOJ’s Defense of Deception:   
Antitrust Law’s Role in Protecting the Standard-Setting Process”, https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/25382/1\_Leslie\_FNL.pdf?sequence=1&isAllowed=y)

1. Innovation

In his speeches, Delrahim tries to create the specter of antitrust liability destroying innovation incentives if FRAND violations are treated as anticompetitive conduct.152 In particular, Delrahim argues that, even in the presence of FRAND commitments, courts should grant injunctions against alleged infringers in order to “optimize[] the incentive[s] to innovate for the benefit of the public.”153 At times, he asserts that allowing owners of FRAND-encumbered SEPs to enjoin manufacturers from making products is necessary to reward inventors.154 This is counterintuitive. Allowing patentholders to evade their contractual commitments made to SSOs does not “reward[] successful inventors,” as Delrahim argues.155 Rather, it distorts the competitive process through which the standard was initially adopted, which was based on the patentholders’ representations that they would charge FRAND royalties.156 Moreover, there is nothing in patent law that suggests—let alone mandates—that patentholders should be able to maximize their profits by any means they choose.157

Delrahim repeatedly describes FRAND violators as “innovators” and suggests that this characterization alone warrants antitrust immunity, lest liability deter or discourage inventors from inventing.158 But this is a red herring, a distraction. If a patentholder monopolizes a market solely through its innovation, and nothing else, the monopoly is legal. But no one is suggesting that monopolization through innovation should trigger antitrust liability. Rather, it is a patentholder’s deception and/or breach of relied-upon commitments that leads to antitrust scrutiny, because neither of these bad acts represents competition on the merits.159 Delrahim asserts that acquiring market power “as a result of a patent holder’s so-called ‘deception’ about its licensing obligations . . . is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act.”160 Delrahim never really explains why monopolization-through-deception is not conduct that violates Section 2. Instead, he expresses concern that patentholders may be liable for treble damages.161 But treble damages are easy to avoid: if the monopolist patentholder does not engage in deception and honors its FRAND commitments, then it will not be on the hook for any damages. In a similar vein, Delrahim notes that “the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of ‘false positives’ or condemnations of lawful pro-competitive conduct.”162 Invoking that concern, Delrahim asserts that holding innovators liable for their misconduct could deter innovation.163 That is absurd. Liability for misconduct deters misconduct. It does not deter any lawful behavior that is not the basis for liability in the first place. Delrahim offers no explanation for why holding patentees liable for breaking their FRAND commitments after having deceived an SSO into incorporating their patented invention into a standard would be likely to produce “false positives” against patentholders who have not engaged in such behavior.164

Delrahim consistently fails to appreciate how easy it is for an SEP owner to avoid antitrust liability: license the patent on FRAND terms. If there is a dispute about what constitutes a FRAND royalty, the patentholder can go to court and get a ruling on the FRAND rate, instead of suing for an injunction and threatening to drive a manufacturer from the market. Seeking and following judicial guidance on the FRAND rate immunizes the SEP owner against both antitrust liability and a breach of contract lawsuit. Some of Delrahim’s innovation arguments read like a defense of patent holdup writ large. For example, he asserts, “An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.”165 Taken at face value, this approach would eliminate antitrust liability for any patentholders’ anticompetitive conduct (tying, sham litigation, etc.) because such liability would reduce the maximum possible return they could earn on their patent.166 Delrahim’s statement ignores the fact that the patentholder acquired its monopoly power by legally promising not “to seek the greatest rewards possible for [its] invention[].”167

Furthermore, Delrahim is wrong to assert that antitrust liability for willful misconduct weakens incentives for innovation. The patentee is receiving just compensation under the FRAND regime.168 By bargaining to have its patent included in the industry standard, the SEP owner is locking in a steady stream of profits. Delrahim provides no evidence that these FRAND royalties are insufficient to reward and encourage innovation. And, in any event, the patentholder chose to pursue FRAND royalties rather than maintaining its patent outside the standard and retaining the right to set its own royalty rate for its patented technology. To make his innovation-based arguments, Delrahim describes a binary world in which firms are either innovators or implementers, and the “dueling interests of innovators and implementers always are in tension.”169 If this were a tug-of-war match, Delrahim would be loudly rooting for the innovators. Delrahim does not merely champion innovators; he affirmatively disparages implementers and the work of standard-setting organizations, which he accuses of having been “given too little scrutiny when they have acted as a forum to slow down, rather than to facilitate, the adoption of disruptive innovations.”170

The development of advanced technological goods, however, is not a zero-sum game in which one team wins and the other team loses. Delrahim’s description of the relationship between innovators and implementers is deeply flawed because no clear line separates these groups. In response to his first deception-forgiving speech, a group of leaders in the high-tech industry wrote to Delrahim, “We are not mere implementers of standards. Rather, we contribute technologies to standards and drive research, development, investment and innovation throughout the value chain.”171 Signatories to the letter included Apple, Audi, Cisco Systems, Dell, Hewlett Packard, Intel, Microsoft, and Samsung—all major players in the innovation game. In short, Delrahim is wrong to suggest that implementers are not innovators and that recognizing their legal rights would somehow hurt innovation.172

Moreover, Delrahim ignores an entire class of (undisputed) innovators—those inventors who own patented technology that was not included in the adopted standard. Unchosen standards are often rife with innovations. When a patent owner engages in deception to secure a particular standard, the innovators who own patents that would have been SEPs for an alternative standard that was not selected due to another patentee’s deceptive conduct suffer a loss of revenue that could constitute a form of antitrust injury.

Not only is Delrahim’s innovation analysis incorrect, it is counterproductive to its stated goals. The industry letter in response to Delrahim’s first speech explained that the Trump appointee’s approach would “instead threaten US industry and consumer interests, harm US innovation, and interfere with parties’ right to contract.”173 The Department of Justice used to recognize this, noting in its prior joint statement with the PTO that “F/RAND commitments may also contribute to increased follow-on innovation by allowing nondiscriminatory access to networks both to new entrants and to established market participants to introduce new generations of network-operable devices.”174 Patent holdup harms innovation by discouraging firms from participating in SSOs because “[w]here the danger of abuse undermines the collaborative process by threatening to extract supracompetitive prices from competitors, industry members are less likely to participate in SSOs in the future and, as a result, consumers are less likely to benefit from these organizations.”175 Douglas Melamed and Carl Shapiro have explained that “supracompetitive pricing by SEP holders increases the cost of follow-on inventions that build on or improve the technologies claimed by the SEPs. This cost acts as a tax on follow-on innovation, reducing such innovations and impairing the very process of invention that the patent laws are intended to promote.”176 Moreover, because Delrahim looks at the issue only through the eyes of the SEP owner that seeks to evade its FRAND obligation, he overlooks the fact that by delaying the implementation of the standard, the holdout who commits holdup hurts all the other innovators who have SEPs.177 Ultimately, because SSOs facilitate and reward innovation and because patent holdup can chill industry members from participating in the standard-setting process, the failure to deter and remedy patent holdup harms innovation.178 Former FTC Commissioner Terrell McSweeny explained that “[b]y protecting the integrity of the standard-setting process itself, sound antitrust enforcement actually strengthens market opportunities for new technologies, thus improving the incentive for valuable innovation.”179 Thus, while Delrahim is right to praise innovation, he is wrong to argue that permitting deception and FRAND violations is the correct way to encourage innovation.

### AT: Link---Reverse Hold-up

#### Reverse hold-up is wrong---FRAND enjoys excessive participation despite being voluntary, and it’s not a winning strategy.

Kattan et al. 14, \*Joseph Kattan and Chris Wood are partners in the Antitrust and Trade Regulation practice of Gibson, Dunn & Crutcher LLP; (2014, “Standard-Essential Patents and the Problem of Hold-Up”, <http://awa2014.concurrences.com/IMG/pdf/standard_essential_patent_kattan-wood.pdf>)

Just as significantly, this critique ignores the options that are available to patent holders at the time of the hypothetical ex ante negotiation. They have the full ability to refrain from making a FRAND commitment and avoid the constraints that it imposes should their patents find a commercial use.69 But companies make FRAND commitments despite the constraints that these commitments impose because doing so enables them to influence the selection of technologies that standards incorporate and thereby gain a valuable guarantee that every standard implementer will need to license their patents. To take the Wi-Fi standard as an example, the Wi-Fi Alliance estimates that 1.1 billion Wi-Fi 802.11 devices were sold worldwide in 2011, and this number is expected to double by 2015.70 To give a sense of the impact of such a guaranteed market of licensees, a royalty of just one tenth of a cent on a billion devices will generate $1 million in revenues annually. It appears that the critics’ position is that SEP holders should be entitled to both the guarantee of a large market of locked-in standard implementers and a royalty rate reflecting the inability of locked-in implementers to switch to alternative technologies that existed prior to adoption of the standard. The view that royalty rates should be defined by the ex post actions of implementers, rather than with reference to the ex ante bargain entered into by the SEP holder, essentially amounts to a justification of post-contractual opportunism.

Moreover, the “reverse hold-up” argument implies that SEP holders are being systematically undercompensated by FRAND royalties. If that were the case, one would expect to see the withdrawal of significant technology developers from participation in cooperative standard- setting. The voluntary nature of the FRAND commitment means that patent holders may dynamically evaluate the benefits and disadvantages of participating in standard-setting to maximize their overall return on their IP portfolio. At least to date, however, there is no evidence of such withdrawal.

Finally, the assumption that potential licensees will view infringement as a cost-free strategy seems not well-founded. A hold-out strategy by implementers would be imprudent because the standard implementer ultimately would both have to pay a reasonable royalty and incur the high costs of patent litigation if the SEP is proven to be valid and infringed (and outside the United States it would have to pay the winning plaintiff’s legal fees and costs as well).

## ADV---Cybersecurity

### 2AC---Monoculture Deficit

#### Relying exclusively on a single 5G standard creator concentrates vulnerability---creates widespread cyber risk.

Chertoff 19, \*Michael Chertoff served as secretary of homeland security, 2005-09 and is the author of “Exploding Data: Reclaiming Our Cyber Security in the Digital Age.” He is executive chairman of the Chertoff Group, whose clients include technology companies involved in the original complaint and that have filed amicus briefs in the case; (November 24th, 2019, “Qualcomm’s Monopoly Imperils National Security: The U.S. shouldn’t rely on one company for vital technologies like wireless silicon microchips”, https://www.wsj.com/articles/qualcomms-monopoly-imperils-national-security-11574634436)

But then, on appeal, the Energy and Defense departments entered the fray on Qualcomm’s side. They argued to the appellate court that Qualcomm, as the last remaining American mobile-chip manufacturer, needed to be protected from competition so that it could remain economically viable and retain the ability to provide the military with vital chip components. To put it colloquially, the government thinks Qualcomm is too important to fail.

That viewpoint is not only unwise, it’s inconsistent with history and inimical to national security. Being dependent on a single source for critical components puts the U.S. in peril. Having only one provider gives rise to a technological version of “monoculture risk.” That’s when farmers plant only one variety of a crop—such as the Gros Michel banana—which diminishes genetic diversity and increases vulnerability to disease. Banana wilt devastated Gros Michel yields in the 1950s, and similar diseases could wipe out other monoculture crops today.

A monoculture technology system likewise poses substantial risks. If there is some critical flaw in the single system on which the U.S. is dependent, its failure would be catastrophic. These technical vulnerabilities are especially risky in security-sensitive industries such as telecommunications. American reliance on a single chip provider creates an inviting target for adversaries, who would need to find and exploit only one vulnerability to execute a destructive cyberattack.

The U.S. has long struggled to maintain at least two providers of most critical military systems. The government subsidizes two builders of submarines. It purchases military aircraft from more than one source. It also relies on open standards in technology to foster many suppliers, allowing companies to compete in the open market while offering products that have similar capabilities and are interoperable. No strategic analyst could ever imagine voluntarily relying on only one supplier of arms or materiel.

In the Pentagon’s view, maintaining the company’s economic health is also essential because it is a critical player in the competition with China to develop 5G technology. To be sure, it’s important to support the viability of U.S. firms that can compete with China on 5G, but this hardly justifies the risks of a monoculture in the defense-industrial base.

Further, the argument mistakenly links two national-security issues in an artificial way. Qualcomm doesn’t need protection in the wireless chipset market to strengthen its competitive edge in the 5G race. To the contrary, it has every incentive to develop leading 5G technologies even in the absence of protection in the chip market.

In the technology race against China, the U.S. should prefer to let competition drive innovation rather than support exclusive national champions. Apart from the economic inefficiency, a single-source national champion creates an unacceptable risk to American security—artificially concentrating vulnerability in a single point. The government’s argument in support of Qualcomm isn’t prudent, and if courts accept it, the result would be a self-inflicted wound to U.S. national interests. We need competition and multiple providers, not a potentially vulnerable technological monoculture.

#### Only market competition creates resilience.

Duan 18, \*Charles Duan is a senior fellow and associate director of tech & innovation policy at the R Street Institute, where he focuses his research on intellectual property issues; (December 4th, 2018, “In the Race to 5G, Monopoly Considered Harmful”, https://morningconsult.com/opinions/in-the-race-to-5g-monopoly-considered-harmful/)

To see how a solid monopoly over 5G baseband processors creates cybersecurity issues, recall another technology monopoly: operating systems in the early 2000s. In a famous [series](https://www.schneier.com/essays/archives/2003/09/cyberinsecurity_the.html) of [papers](http://static.usenix.org/legacy/publications/login/2005-12/openpdfs/geer.pdf) (including one titled “[Monopoly Considered Harmful](https://ieeexplore.ieee.org/document/1253563)”), security consultant Dan Geer and his co-authors explained that a “monoculture” of Microsoft Windows created a systemic cybersecurity problem rising to the level of a national security risk. With every computer running Windows and thus subject to the same security vulnerabilities, viruses and attacks could spread quickly across networks, what Geer called a “cascade failure,” rapidly taking down businesses, infrastructure and government. As with [agricultural monoculture s](https://www.britannica.com/event/Great-Famine-Irish-history)wiped out by a single pest, Geer’s proposed solution was greater diversity: Multiple operating systems, each with different vulnerabilities, would be more resilient to cascade failure.

As mobile devices [have overtaken](https://techcrunch.com/2016/11/01/mobile-internet-use-passes-desktop-for-the-first-time-study-finds/) desktop computers, the Microsoft monoculture is being replaced with a Qualcomm monoculture that could have equally bad effects for cybersecurity. Baseband processors are notoriously vulnerable because they run [proprietary software](https://www.extremetech.com/computing/170874-the-secret-second-operating-system-that-could-make-every-mobile-phone-insecure) and are [difficult to study](http://www.osnews.com/story/27416/The_second_operating_system_hiding_in_every_mobile_phone). Researchers who do study them report numerous [potential insecurities](https://www.usenix.org/system/files/conference/woot12/woot12-final24.pdf) to be exploited. Consider that the [IMSI catcher](https://arstechnica.com/information-technology/2015/10/low-cost-imsi-catcher-for-4glte-networks-track-phones-precise-locations/), the device favored by [law enforcement](https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them) to capture cellphone calls, functions essentially by exploiting a flaw in the baseband processor communication protocols. The ability of governments to conduct mass surveillance because of baseband processor insecurity is a classic example of a cascade failure exploited.

A competitive market between Intel and Qualcomm would be categorically better for cybersecurity, both by avoiding monoculture and also because competition would lead to better products. Qualcomm and Intel would hire security firms to poke holes in each other’s products and would improve their own products to beat out their competitor. And the two companies would likely participate in developing 5G standards; their competing interests would push the standards in better, more secure directions.

## T---Per Se

### 2AC---AT: T---Prohibit = Per Se---TL

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

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

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

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

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

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

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

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

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

#### **Anticompetitive practices are strategies that have anticompetitive effects.**

Wells 16, Executive Notes Editor, Washington University Global Studies Law Review, J.D., Washington University in St. Louis. (Todd Wells, “Exploring the Space for Antitrust Law in the Race for Space Exploration,” Washington University Global Studies Law Review, Vol. 15, 2016, LexisNexis)

Antitrust law attempts to fight anti-competitive actions. "Anticompetitive practices refer to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality." The Organization for Economic Cooperation and Development, Glossary of Statistical Terms, Anticompetitive Practices http://stats.oecd.org.proxy.library.georgetown.edu/glossary/detail.asp?ID=3145. Obviously, with such a broad definition of anticompetitive practices, many types of actions can fall under the regulation of anticompetitive law. This can cover forms of collusion, price fixing, bid rigging, bid suppression, complementary bidding, bid rotation, subcontracting, and market divisions. Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For, U.S. Dep't of Justice, http://www.justice.gov/atr/ public/guidelines/211578.htm. An even broader approach would put patents under antitrust law. "All of these developments, in Congress and the Courts, are in the spirit of harmonizing patent and antitrust law, generally in the direction of subsuming patent law under antitrust law. From the perspective of providing clarity and certainty for those who are the targets of patent and antitrust suits, harmonization has much appeal." Robin Feldman, Patent and Antitrust: Differing Shades of Meaning,13 Va. J.L. & Tech. 1, 7 (2008).

#### B---the ‘per se’ distinction is meaningless---rules always devolve into standards.

Crane 7 Daniel A. Crane is Assistant Professor, Benjamin N. Cardozo School of Law, Yeshiva University, Rules Versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007), https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss1/3

Before proceeding much further, it is worth pausing to consider the possibility that a world of antitrust rules would be illusory because, in practice, rules always fade into standards. Take H.L.A. Hart's observation that "[n]atural languages like English are... irreducibly open-textured" when specifying "general classifying terms,' ' 0 0 or Wittgenstein's point that the problem with rules is that they do not tell you when they should be applied.' 0 ' Because language is irreducibly open-textured and indeterminate and because rules lack internal mechanisms to specify when they should be applied, even when the law is formally framed as a rule, it requires penumbral rules, canons of interpretation, and other secondary decisional criteria which end up swallowing the apparent simplicity of the rule. 10 2 Specifying the governing law as a simple, bright-line rule may merely conceal the fact that important balancing of social interests, weighing of probabilities, and choosing between competing ends and means lurk in the shadow of the rule. Declaring a legal rule thus appears misleading or even dishonest because it hides the social preferences that animate the decision-maker's conclusion. Under one interpretation, antitrust law provides the perfect illustration for Hart and Wittgenstein's point. In this view, there never have been such things as case-determinative antitrust rules-only standards clad in rule-bound rhetoric. The current march toward standards, then, is not so much a change in liability determinants as a dissipation of the mystery surrounding antitrust's concealed methodology. In a moment, I will dispute this possibility and argue that the specification of antitrust law as rule or standard has very important practical consequences. But first, it is worth acknowledging the extent to which Hart and Wittgenstein's observation rings true in antitrust. A case in point is antitrust law's long-standing per se prohibition against "price fixing." As any antitrust practitioner will recognize, price fixing appears in quotation marks because application of the per se rule depends not on the fact that competitors have literally fixed prices but that the challenged conduct falls within the antitrust category known as "price fixing." The judicial decision often thought to have established the per se rule against price-fixing did not involve price fixing either literally or figuratively but rather a gentleman's agreement by dominant oil producers to buy up distressed oil from small refineries and thereby stabilize the wholesale market. 1 03 The defendants never came close to agreeing on price. Nonetheless, the Supreme Court held that any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" amounts to "price fixing" in the relevant legal sense, whether or not the defendants have actually done the act that a lay person might suppose "price fixing" to be-fixing a price. 1 On the other hand, the Supreme Court has described an act of apparent price fixing by competitors-an agreement on prices for blanket licensing of musical repertoires-as something other than "price fixing" and hence subject to the rule of reason. 0 5 In BMI v. CBS, the Supreme Court rejected textual "literalism" and held that application of the per se rule against price fixing is not as "simplistic" as "determining whether two or more potential competitors have literally 'fixed' a 'price.'" 06 Rather, "[a] s generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable."' 0 7 Application of the per se rule turns not on whether the conduct amounts literally to price fixing but on whether the "particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue."" 8 This flexibility in the per se rule invites endless pages of briefing on whether the conduct at issue should be properly characterized as "price fixing" because it unjustifiably tampers with the market mechanism for determining prices or as something else because it can be justified by efficiencies, a standard-favoring way of doing law.'0 9 Hence, Hart explains that rules inevitably dissolve into standards and Wittgentsein explains that rules do not tell us when to apply them.

## T---Vagueness

### 2AC---AT: T---Core Antitrust Laws---TL

#### The plan increases the scope of the Sherman Act.

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

Antitrust enforcement aimed only at SEP holders is not sufficient to prevent or remedy ex post opportunism. First, as described in Part I, that kind of enforcement must be implemented separately for each patent holder, and for many standards, there are hundreds or even thousands of SEP holders. Second, some of the most common kinds of opportunism are arguably beyond the reach of antitrust claims against SEP holders. 61 Moreover, enforcement aimed at SEP holders is not directed at the basic problem: the failure of the SSOs to take adequate steps to prevent the ex post opportunism that the SSOs’ conduct enabled. There is, therefore, another important role for Section 1 of the Sherman Act to help guard against ex post opportunism by SEP holders—one that the courts have not yet had occasion to recognize. This role is soundly based on well-established Supreme Court precedent regarding the application of Section 1 to activities by SSOs and their members.

## CP---ATL PIC

### 2AC---AT: Regulation CP---TL

#### Perm do both---concurrent enforcement by both antitrust and regulatory agencies solves the tradeoff link.

Varney et al. 20, \*Christine A Varney, Julie A North and Margaret Segall D’Amico are partners, and Molly M Jamison is an associate, at Cravath, Swaine & Moore LLP; (October 22nd, 2020, “Antitrust Remedies in Highly Regulated Industries”, https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-059)

Balancing remedies with regulation

As discussed above, there is a wide range of approaches for merger review between antitrust authorities and specialised regulatory agencies. Given the range of different approaches, it is difficult to make generalisations across either agencies or industries. What is clear is that there are certain strengths and weaknesses to a dual merger review and remedy approach. On the one hand, the dual review system has been criticised for its purported inefficiency and added costs of concurrent reviews by two agencies.[[84]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-007) On the other hand, others have touted the importance of consistent antitrust review[[85]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-006) and the avoidance of agency capture that a dual review system can accomplish. So how should antitrust authorities approach mergers in highly regulated industries? Should Congress do away with dual review and grant exclusive merger review jurisdiction to the DOJ or FTC? Or should the regulatory agencies be responsible for merger review and remedies in their areas of expertise? A review of past practices suggests that there is not a single right answer to these questions. However, in the current landscape there are considerations that could mediate some concerns about inefficiency and cost.

First, coordination between the relevant antitrust authority and regulatory agency can facilitate consistent outcomes and ensure that the appropriate remedies are ordered. The most common critique of having both antitrust and regulatory review of mergers is inefficiency. Having two federal agencies both expend time and resources reviewing mergers and imposing remedies is expensive for both taxpayers and the merging entities, and extends the time required to review transactions. Conflicting decisions – where one agency may approve a transaction while the other challenges it – also add to the risk of inefficiency. Better coordination and cooperation can mediate these concerns to an extent.[[86]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-005) As the American Antitrust Institute identified, increased cooperation should be a ‘high priority’, particularly in industries transitioning from regulated to a more competitive free market.[[87]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-004)

Second, antitrust authorities should continue to use regulatory agencies’ strengths to the fullest extent possible to construct appropriate remedies. Regulatory agencies have expert knowledge of the industry and often have access to far more information on the market than the DOJ or FTC would be able to gather on their own. The DOJ and FTC have to rely on receiving information from parties, competitors and customers in the market. Such information is often limited in scope and time period. By contrast, regulatory agencies, such as the FCC and Federal Reserve, have access to information on the market spanning decades and are better able to access necessary information that can save antitrust authorities time and cost. Moreover, regulatory agencies already have the ability to monitor and oversee industry actors. Reliance on the regulatory agencies’ ability to monitor could resolve the frequent concerns about imposing conduct remedies and the use of long-term consent decrees.[[88]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-003) The ability to impose effective conduct remedies may reduce the DOJ and FTC’s reliance on the one-time fix of a structural remedy and open the possibility of more tailored remedies.[[89]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-002)

#### Permutation do the counterplan---the counterplan still expands the scope of core antitrust laws by increasing prohibitions.

Bradford and Chilton 18 (Anu Bradford, Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton, Assistant Professor of Law and Walter Mander Research Scholar @ the University of Chicago. “Competition Law Around the World from 1889 to 2010: The Competition Law Index” , Columbia Law School Scholarship Archive Faculty Scholarship, <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3519&context=faculty_scholarship> , 2018, date accessed 9/5/21)

The Scope Index is the closest to the CLI in that it also measures the law in the books, treating prohibitions as elements that increase the scope (or stringency) of the law and defenses as elements that reduce the scope (or stringency) of the law. Basic categories in the Scope Index and our CLI are also the same, even if somewhat differently labeled. For example, we refer to “anticompetitive agreements” where the Scope Index refers to “restrictive trade practices.”

#### Extraterritoriality deficit---SSO’s are multinational private ventures with representatives from a litany of different countries---specifically, the 3GPP connects global standards bodies in the development of 5G.

Coopersmith 21, \*Jonathan Coopersmith is a Professor at Texas A&M University, where he teaches the history of technology; (March 31st, 2021, “[Let’s Thwart This Terrible Idea for Standards Setting”, https://spectrum.ieee.org/lets-thwart-this-terrible-idea-for-standards-setting)](Let’s%20Thwart%20This%20Terrible%20Idea%20for%20Standards%20Setting)

Technical standards hold the global economy together. They specify the characteristics or performance requirements of countless aspects of your world, and you’re completely oblivious to most of them. The code that converts your finger’s pressure on a keyboard key into a symbol on your computer screen? That’s the [ISO/IEC 646](https://www.iso.org/standard/4777.html) family of standards.  And that television in your media room? It was transported across the sea in a shipping container, whose [corners interlocked](https://backspace00.wordpress.com/tag/iso-14961/) with those of adjacent containers in accordance with ISO standard 1496. You get the idea. Non-governmental technical committees, thousands of which are active at any time, create most of these standards. Their members are typically engineers and other experts representing the companies, universities, and other entities worldwide that are the main producers or purchasers of the object or the process being standardized. Most of the technical committees also have experts who explicitly represent the larger public interest. These are often engineers who volunteer their time and pay their own expenses.

Standard-setting organizations (SSOs) and networks of SSOs organize these technical committees. The largest such network is the [International Organization for Standardization](https://www.iso.org/home.html) (ISO, founded in 1946) and its partner, the [International Electrotechnical Commission](https://www.iec.ch/homepage) (IEC, founded in London in 1906). Their members are national-level standard-setting bodies that exist in almost every country. Those bodies, in turn, have members from engineering societies (including the [IEEE](https://www.ieee.org/)), from trade associations in different industries, and from such other organizations as testing laboratories, companies, non-profits, and government agencies.  In parallel with all of this conventional standards activity, at any given moment there are hundreds of corporate consortia creating anticipatory standards in new fields in which technologies are not yet stabilized.

The 1906 London meeting establishing the IEC adopted a brilliant precept. It mandated that national delegations to the new international body should represent not governments but private or non-profit standards bodies. These delegations would consist of people representing manufacturers, purchasers, and independent engineers charged with representing the larger public interest. An exception was made for countries where the electrotechnical industry was so new that no private organization existed. During the Soviet era, the IEC and ISO allowed a second exception for countries with centrally planned economies.

Over the past century, an ecology of technical committees, institutions, and their international community of engineers has grown and evolved stupendously but has nevertheless remained a largely private, non-governmental endeavor. The participating organizations typically cooperate with governments and include representatives of government organizations (often in their role as major purchasers), but they are in no way appendages of a national government.  Of course, the evolution of the standards ecosystem reflects the spread and development of technologies. Outside the ISO/IEC network, global organizations produce standards for the internet (IETF, the [Internet Engineering Task Force](https://www.ietf.org/) -1986), the web (W3C, the [World Wide Web Consortium](https://www.w3.org/) – 1994), and mobile broadband standards ([3rd Generation Partnership Project](https://www.3gpp.org/), 3GPP – 1998).  The 3GPP is an association of the Chinese, European, Indian, Japanese, Korean, and U.S. telecommunications-industry associations.

## CP---Section 5

### 2AC---Strike-Down Deficit

#### Counterplan is struck down on non-delegation grounds.

Helgi Walker 21, partner in Gibson, Dunn & Crutcher's Washington, D.C. office, JD from the University of Virginia, 7/9/2021, “President Signs Executive Order Directing Agencies to Address Wide Range of Businesses’ Competitive Practices, Including Non-Compete Agreements,” https://www.gibsondunn.com/president-signs-executive-order-directing-agencies-to-address-wide-range-of-businesses-competitive-practices-including-non-compete-agreements/

Expansive rulemaking could also expose the FTC to legal challenges under the constitutional “nondelegation doctrine,” which limits the extent to which Congress may delegate lawmaking power to administrative agencies.  Although the nondelegation doctrine has seldom been invoked by the Supreme Court since the New Deal Era, in 2019 five Supreme Court justices expressed interest in reviving the doctrine.[[7]](https://www.gibsondunn.com/president-signs-executive-order-directing-agencies-to-address-wide-range-of-businesses-competitive-practices-including-non-compete-agreements/#_ftn6)  Those five justices constitute a majority of the current Supreme Court.  The FTC Act, which delegates to the FTC the authority to regulate “unfair” behavior, may be susceptible to a challenge on the grounds that Congress must provide concrete guidance to cabin the FTC’s exercise of its delegated power.

## DA---Bedoya

### 2AC---Bedoya

#### The highlighting of their uniqueness ev is a joke—The article says that there are areas of antitrust enforcement where Garland blocks enforcement that he disagrees with

Moran 1-6-22 (Max Moran, Research Director of the Personnel Team at the Revolving Door Project, studied International Relations and Journalism at Brandeis University, “Merrick Garland Is Undermining the Biden Antitrust Strategy,” The American Prospect, 1-6-2022, https://prospect.org/justice/merrick-garland-is-undermining-biden-antitrust-strategy/)

The Biden administration is threatening new anti-monopoly enforcement actions against the Big Four meatpacking companies, in part to counter inflation at the grocery store and in part to address decades of exploitation of small farmers. On Monday, the president dispatched Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to hear grievances from small ranchers, while the White House builds a new web portal to gather complaints. While the White House’s proposals for funding small meat processors to increase competition are rather unsatisfying, the enforcement piece could have a real impact. Revolving Door Project.jpg This initiative has caused the usual grumbling from neoliberal economists, and the usual corrections to the usual grumbling. But no one has yet explained how Biden plans to actually follow through on his threat—a problem for which Garland is partly to blame. As The Information’s Josh Sisco reported on Tuesday, there are currently just two deputies trying to manage the entire DOJ Antitrust Division (ATR) alongside Assistant Attorney General Jonathan Kanter, who was confirmed only two months ago. ATR typically has at least 12 deputies and top advisers in the “front office” who oversee about 700 career staffers. And that was under past administrations, which didn’t have nearly as ambitious an antitrust agenda as Biden’s. Reversing four decades of Borkian antitrust sloth requires a cohesive and energetic senior leadership team. Meanwhile, the Federal Trade Commission, the executive branch’s other main antitrust enforcer, remains in a 2-2 partisan deadlock, as Senate Republicans blockade Biden nominee Alvaro Bedoya from being confirmed as a commissioner. He has a path to 51 Senate votes, but arcane (and unnecessary) procedural hurdles have slowed the process to a crawl, hindering the other avenue to antitrust action. Biden can only do so much to move Bedoya’s nomination. But in theory, nothing prevents him from hiring whomever Kanter personally trusts to help execute their shared agenda. The deputies at ATR are not Senate-confirmed positions. So what’s causing the chaos? The problem isn’t procedural; it’s political. In addition to diversity concerns, Sisco reports that “ideological divisions” about anti-monopoly enforcement within the Biden administration are causing fights over any potential selection for the ATR deputies. These divisions should be familiar to anyone who followed the initial fight over antitrust nominees during the Biden transition last year. While Biden himself seems sold on the benefits of a strong anti-monopoly agenda, Garland testified last year that he sees no problem with hiring big corporations’ preferred defense attorneys to oversee their former firms and clients. Garland and other anonymous voices floated a slew of names to run ATR throughout last year—anyone but Kanter, whom progressives favored. While Garland lost that initial fight, he seems content to starve Kanter of resources as a work-around, even if it means sabotaging his own president’s agenda. Garland, after all, appears to consider it core to his job to throttle the better parts of the Biden administration for the sake of an imagined apolitical comity. He rushed to the Trump administration’s defense over the objections of the White House many times over the last year, and continues to undermine environmental action wherever he can. It’s perfectly in keeping with his priorities to undermine antitrust enforcement too. The corporate revolvers and pro-monopoly hacks Garland boosted also haven’t gone anywhere. Again according to Sisco, Sonia Pfaffenroth is now in the mix for one of those coveted jobs in the ATR “front office.” Pfaffenroth revolved from Arnold & Porter into the Obama ATR and back over the last two decades. In private practice, she’s defended pharmaceutical firms, fossil fuel companies, and mining companies from class actions, price-fixing cases, and of course antitrust lawsuits. One should look to Pfaffenroth’s record from her past stint at ATR to get a sense of what a second go-around might look like. Under the Obama administration, Pfaffenroth blessed tie-ups between Virgin America and Alaska Airlines, as well as US Airways and American Airlines. Today, just four mega-airlines control 80 percent of U.S. air traffic. Pfaffenroth even approved the $107 billion merger between Anheuser-Busch InBev and SABMiller, allowing 30 percent of the world’s beer market volume and 60 percent of the world’s beer market profits at the time to be controlled by one firm. Today, AB InBev has essentially hacked the multitiered regulatory system that kept the alcohol market competitive for decades. In some cases, AB InBev’s distributors only allow craft brewers to distribute their drinks to retailers if they keep overall production low. This bottlenecking, alongside the pandemic, has been devastating for craft brewers. Pfaffenroth’s record at ATR reveals someone whose poor judgment has harmed major American industries. But her judgment is reflective of the failed antitrust status quo, and in antitrust and everything else, Garland sees maintaining the status quo as inherently salutary. Where you or I might see bad calls, Garland likely sees jurisprudence executed according to a well-worn book. Whether the book is right or wrong is immaterial, in his eyes. To state the obvious, Biden ought to reject Pfaffenroth and empower Kanter with deputies ready to throw that book aside, or else his antitrust agenda on meatpacking and everything else will get tossed on the growing pile of broken promises that are cratering his approval ratings. Doing so, however, will require standing up to Garland. Thus far, Biden has appeared reluctant to do so, for fear of threatening the attorney general’s independence. There’s a kernel of truth here, after the Justice Department was turned into the president’s personal law firm under Trump. But there is a big difference between deploying the DOJ’s resources to help friends and target enemies and ensuring the DOJ has the staff and leadership necessary to execute its policy agenda. One is a blatant abuse of power, the other a clear presidential prerogative.

#### There is no internal link to agriculture enforcement—That is an area where Garland and the USDA are already committed and already enforcing—Bedoya is not key to ag enforcement

Schweller 1/4/22, Assistant News Editor for Whistleblower Network News., (Geoff 1/4/21, and USDA Commit to Protecting Agricultural Antitrust Whistleblowers, <https://whistleblowersblog.org/government-whistleblowers/doj-and-usda-commit-to-protecting-agricultural-antitrust-whistleblowers/>)

On January 3, Attorney General Merrick B. Garland and Secretary of Agriculture Tom Vilsack spoke at a White House event focused on competition in agriculture. Garland and Vilsack expressed the shared commitment of the Department of Justice (DOJ) and Department of Agriculture (USDA) in “effectively enforcing federal competition laws that protect farmers, ranchers, and other agricultural producers and growers from unfair and anticompetitive practices,” according to a DOJ press release. Furthermore, Garland and Vilsack voiced support for strong whistleblower protections as a key element in policing unfair and anticompetitive practices in agriculture. In connection with the event, the DOJ and USDA released a statement of principles and commitments. One of the principles highlights the agencies’ shared commitment to protecting whistleblowers. It reads: “The agencies will jointly develop within 30 days a centralized, accessible process for farmers, ranchers, and other producers and growers to submit complaints about potential violations of the antitrust laws and the Packers and Stockyards Act. The agencies will protect the confidentiality of the complainants, if they so request, to the fullest extent possible under the law and also commit to supporting the strongest possible whistleblower protections.”

#### FTC is irrelevant—It is the USDA that is key to ag enforcement

Farm News Media 1/4/21, (USDA, DOJ launch joint effort to enforce ag antitrust laws, <https://www.michiganfarmnews.com/usda-doj-launch-joint-effort-to-enforce-ag-antitrust-laws>)

USDA and the Department of Justice (DOJ) are outlining their joint commitment to enforcing federal antitrust laws that protect farmers, including the Packers and Stockyards Act. The update came during a White House meeting Monday, where President Biden outlined $1 billion in new federal spending to increase production capacity for independent meat processors — a move aimed at chipping away at the large companies that dominate the American meat market. Four large meat packing companies control 85% of the beef market, while in poultry the top four processing firms control 54% of the market and the top four pork processors control about 70%. Ag Secretary Tom Vilsack and U.S. Attorney General Merrick Garland said their departments are already working together to support enforcement of federal competition laws pertaining to agriculture and released a list of shared commitments between USDA and DOJ. The agencies will jointly develop a centralized process for farmers to submit complaints about potential violations of antitrust laws and the Packers and Stockyards Act. USDA and DOJ say the confidentiality of the complainants will be protected “to the fullest extent possible under the law” and commit to supporting relevant whistleblower protections. USDA and DOJ say they will work together on information sharing to create a process to efficiently address a complaint and USDA will refer potential violations of the Packers and Stockyards Act to DOJ. The agencies say they will also work together to identify areas where Congress can help modernize that process.

#### There is no link—The Khan nomination proves there is a strong bipartisan consensus for increasing antitrust enforcement

Stoler 21, Research Director for the American Economic Liberties Project. (Matt, 6/16/21. Research Director for the American Economic Liberties Project, https://mattstoller.substack.com/p/the-antitrust-revolution-has-found)

The earth-shattering news in the antitrust world is that yesterday, Lina Khan became the Chair of the Federal Trade Commission, one of the two agencies that enforces antitrust law. In this issue, I’m going to explain who she is, why she got both Republican and Democratic votes for her confirmation in the Senate, and how her selection to this position indicates a potential revolutionary shift in politics. The TLDR version is that something just happened to make Wall Street analysts on CNBC very nervous. From Journalist to Lawyer to Leader On Monday, the Senate voted overwhelmingly to put progressive antitrust scholar Lina Khan on the Federal Trade Commission. A few hours after her final vote yesterday, Senator Amy Klobuchar leaked the news that the White House would designate her as Chair. Khan is something rare in progressive politics, someone with academic credentials and mastery over a dense technical subject, but also connected with a broad-based populist social movement that crosses partisan lines. I can’t tell you how many people I’ve spoken to in business, Republicans as well as Democrats, who talk in reverential tones about Khan. It’s not just that she is an important thinker, it’s that she \*understands\* what they are going through, the coercive power they are up against. And that’s because she got her start understanding the economy not in a classroom or at a law firm, but as a business journalist, listening to business people and workers facing monopolists. As such, Khan covered all sorts of industries. In 2013, for instance, she wrote a Halloween-themed story in Time Magazine titled “Why So Little Candy Variety? Blame the Chocolate Oligopoly.” In that piece, she traced consolidation in the candy market, showing the industry is controlled by just three firms, Hershey’s, Mars, and Nestle. These firms offer kickbacks to retailers known as ‘slotting fees,’ which block the ability of independent candy makers to sell their wares. To write the story, Khan talked to small candy makers, like Dave Wagers of the Idaho Candy Company, who told her what it is like to try to get a product on shelves. Such a story is common, and Khan examined concentrated power across the economy, writing about airlines, banks and commodity trading, meatpackers, seeds and chemicals, and business formation in general. Then she went to law school. While a student, Khan used her experience as a journalist to help craft a legal argument on the roots of Amazon’s power, which she traced to the transformation of antitrust enforcement. Her analysis, titled Amazon’s Antitrust Paradox, put her at the center of a worldwide debate over concentration and monopoly power. Khan then went the FTC as an advisor to Commissioner Rohit Chopra, before going to work for the Antitrust Subcommittee last year. She served as the lead researcher of big tech in the subcommittee’s groundbreaking investigation which reoriented tech policy globally. In other words, Khan has shown herself a capable storyteller, a creative lawyer, and a practical and hard-nosed policymaker, and one who doesn’t orient her thinking around traditional partisan political calculations. That said, Joe Biden took a risk in appointing her to the FTC, because neither monopolists nor the antitrust establishment are happy to see their main intellectual foil placed in a position of authority. And during her nomination hearing, Khan didn’t play any political games. She didn’t try to hide anything or moderate her views. When asked, she noted “potential criminal activity” by big tech firms, in an allusion to possible price-fixing by Google and Facebook in ad markets. And yet, Biden’s gamble paid off. The right-wing took the choice of Khan in good faith, and at a moment of deep partisan bitterness over virtually every issue under the sun, 22 Republicans chose to oppose big tech, cross the aisle and vote to confirm her to run the agency tasked with enforcing fair trade rules in America. To call this appointment remarkable understates the point. That Khan is on the commission, with Republican votes, is surprising enough, but for her to be Chair is downright shocking. It’s too soon to know what Khan is going to do in her new role, but her appointment is already sending shock waves in the enforcement community globally. Antitrust policy is run by a small yet international community of lawyers and economists who know each other. In every country, some of them are cheering this move, while others are horrified. But they all know it matters, because as goes the U.S. on antitrust, so goes Europe. And Khan, if she is able, will take competition policy in a very different direction. There are hurdles, as the FTC does require a 3-2 vote for most major actions, so it’s not like Khan can bring cases on her own authority. Still, this is a big deal. And it wasn’t just antitrust enforcers and monopolists who realized the import of this pick. Wall Street and the Crisis of Legitimacy Over the past two days, Khan’s nomination has been discussed several times on CNBC, with analysts looking at which stocks to buy or sell due to her appointment. While the general sentiment among analysts is alarm, CNBC star Jim Cramer, in a later segment, argued not to worry. Breaking up big tech, he said, would help boost investor returns because big tech firms are worth far more in pieces. While it’s true that researchers are finding that stronger antitrust laws are good for stock prices (which is something I noted in 2019), the far more important point is that Wall Street is having this debate about the Federal Trade Commission at all. It’s been a generation since the FTC was taken seriously as a meaningful player in the organization of our economy and markets. Every so often some official will make noise about a tougher stance on competition, citing Senator John Sherman or Teddy Roosevelt in a fancy speech, only to back down. Getting sanctioned by enforcers is increasingly a joke. As Commissioner Rohit Chopra noted, “it's become a right of passage for Silicon Valley companies to get an FTC consent decree." This crisis of legitimacy is longstanding, but it became evident antitrust enforcement was irrelevant in 2013, when the FTC, even though it had good evidence of monopolization by Google, dropped its antitrust claims against the search giant, and then kept secret how much evidence it had. The flaccid nature of these enforcement choices was further emphasized when Facebook was fined $5 billion by the FTC over its Cambridge Analytica scandal. It sounds like a lot of money, but upon the announcement of the fine, the firm’s stock price jumped up by tens of billions of dollars. As if a regulator couldn’t get any more deferential to power, the FTC didn’t even make the announcement of the fine. Facebook did, on an earning’s call no less. In other words, Khan is stepping into a leadership role at a demoralized and insular institution, with a culture of timidity. That can’t last for much longer. Khan’s reputation is such that many are looking to Biden’s appointment of her, and her confirmation with Republican votes, as a signal that politicians want to end the era of concentrated economic power. Either Khan fixes the FTC, or in ten years the FTC will probably not exist in its current form. The FTC’s New Deal Resurrection This moment isn’t the first time the FTC has been nearly left for dead as a handmaiden of monopoly, and then resurrected. In fact, a similar scenario occurred at another moment of extreme monopolization, a few decades after the FTC’s birth. The origins of the FTC go back to the birth of corporate America, at the turn of the century, when J.P. Morgan had engineered a merger wave to create many of the giants we know, like General Electric and U.S. Steel. In response, Teddy Roosevelt created the Bureau of Corporations in the early 1900s to help lead investigations into these firms. Woodrow Wilson turned this agency into a full commission with regulatory authority in 1914, with the goal of breaking up corporate giants and regulating the resulting competitive markets. But the FTC, though it had some successes, didn’t quite work. World War One got in the way, and then the FTC was neutered by courts and captured by monopolists in the 1920s. By the early 1930s, populists, most of whom had been aligned with Wilson, had had enough. Many came to despise the FTC, because far from a commission to address monopolization and create fair trade practices, it had turned into a vehicle for legalizing monopolies. When I was researching my book, I found an amazing letter in the archives from anti-monopolist Congressman Wright Patman, who later was a strong supporter of the FTC, illustrating the depth of this anger. Patman, in writing to a fellow Texas anti-monopolist, proudly noted that he “succeeded in eliminating $300,000 from” the FTC budget, and expressed hope that soon “we will finally abolish that useless Commission altogether.” New Dealer populists like Patman didn’t end up eliminating the FTC. Instead, they resurrected it with new leadership and funding, until it became the guardian of small business in America. From the 1930s until the 1960s, the FTC brought suits against chain stores to stop the kind of predatory pricing and discriminatory behavior that Amazon-style chains like A&P had routinely used to destroy independent retailers. The populist economic strategy worked. After an initial collapse of independent retailers in the early 1930s, their numbers recovered and America became a mix of chain and independent stores, as well as small, medium, and large manufacturers, a high-wage high-growth economy. That period lasted until the 1970s, when naive consumer advocates trained by Ralph Nader took over the FTC. Reared in a period when politicians had been wholly friendly to consumer rights, these activists largely saw the FTC as a consumer-only focused commission. In doing so, they unwittingly killed the political support base of the agency, which had been rural and southern small businesses. In the 1980s, Reagan, pointing to these failures, restructured the agency. His FTC Chairman James Miller began getting rid of populist lawyers, and stocked it instead with neoliberal economists. Clinton, Bush, and Obama continued down the path Reagan laid out, even as Walmart and other chain stores gobbled up the economy. By the time the FTC gave up on the Google monopolization case in 2013, the failure, though dramatic and far-reaching, was more a ratification of the collapse of anti-monopoly rules than anything else. So the failure is great, and the monopoly crisis is now urgent. The question, therefore, is what Khan’s appointment means, not just for antitrust or competition policy, but politics more broadly. Where Is King Manchin of the Senate? If you talk to most progressives or Democrats who watch MSNBC or CNN, the most significant domestic policy storyline is whether Senator Joe Manchin of West Virginia will validate their legislation on voting rights, spending, or the filibuster. They perceive a narrow partisan path for wielding power, and failing that, despair. What is fascinating about the nomination and confirmation of Khan is that it suggests a different political roadmap, not just for Democrats but for Republicans as well. Both parties are confused and trying to figure out what they think, with scuffles within parties as much as between them, mirroring the disputes within the commercial world. Political operatives, pollsters, politicians, and lawyers in both parties are not comfortable with this new populist language and policy and how to wield it. On the right, libertarians and corporatist lawyers are the only ones with the substantive chops to operate in this dense and complex area. On the left, there’s a cultural dislike of commerce. Some Democratic activists often imagine, wrongly, that business questions are wonky, niche, and not relevant to ordinary people. Thinking about monopoly power isn’t really even politics to them, or if it is, using terms like ‘markets,’ and ‘competition’ signifies conservative political beliefs. Nonetheless, it’s evident there is interest on the right and left in addressing concentrated private power through revamped competition policy enforcement. What is increasingly clear is that there is consensus that something must be done, and that there is opportunity here to steal this issue from the other party. Both the Democrats and Republicans are trying to outflank each other on who is stronger on antitrust. In many ways, competition policy is very similar to trade, where Donald Trump stole the traditional Democratic issue and made it his own, accurately pointing out that Democrats like Bill Clinton and Barack Obama pursued policies incentivizing offshoring to China instead of protecting American jobs. Rather than oppose Trump on trade, populist Democrats quietly worked with Trump to reorient American policy. Trump’s trade chief, Robert Lighthizer, was the only cabinet member respected by Democrats, and was able to bring nearly every Democrat on board for a rewrite of NAFTA. Biden is trying to steal this issue back; Katherine Tai, who is Biden’s pick for trade, has continued Lighthizer’s agenda, with some modifications (like challenging pharma’s vaccine monopoly). Unlike many social questions, in other words, antitrust and related issues like trade cross party lines and are areas of consensus. That doesn’t make them unimportant, even though they aren’t often reported on CNN. Competition policy is a massively consequential area, and not just in the tech platform area, which is the centerpiece of current debates. Pretty much every part of the economy is full of concentrated power, whether pharmacy benefits managers, search engines, meatpackers, or candy monopolists.

#### Republicans are irrelevant—Dems can push the nomination through—They have to have a link that says Manchin is not bothered by current aggressive antitrust agenda and would only be bothered by the plan.

Kelly 1/10/22, is a policy reporter for The Verge . (Makena, The FCC’s still in a stalemate a year into Biden’s presidency

And pressure is mounting to get nominations confirmed, https://www.theverge.com/22876628/fcc-biden-ftc-gigi-sohn-alvaro-bedoya-rosenworcel-net-neutrality Biden renominated Sohn and Bedoya on January 4th, setting the nominations up for further consideration by the Senate Commerce Committee. According to Politico on Monday, the committee plans to vote on nominees on January 24th, and the markup may include Sohn and Bedoya, but the final agenda has not been released as of publication. “THERE’S NO TIME TO WASTE” “There’s no time to waste and so much to get done at the FCC: ensuring the billions being invested in broadband actually reach those who need it most, restoring Net Neutrality and Title II, reckoning with media regulators’ history on race and repairing the damage of the Trump years,” Craig Aaron, Free Press Action co-CEO, said in a Monday statement. As FCC and FTC nominations saw some movement in the Senate last year, Republicans like Sen. Lindsey Graham and The Wall Street Journal editorial board argued that Sohn was a telecom policy extremist. “Gigi Sohn is a complete political ideologue who has disdain for conservatives. She would be a complete nightmare for the country when it comes to regulating the public airwaves,” Graham said in a tweet thread last November. “I will do everything in my power to convince colleagues on both sides of the aisle to reject this extreme nominee.” So long as every Senate Democrat, including Sen. Joe Manchin (D-WV), votes in favor of both Sohn and Bedoya, no Republican support would be necessary to confirm them.

## DA---Court

### 2AC Thumpers

#### Tons of thumpers

Gorod 9-9 [Brianne Gorod is chief counsel for the Constitutional Accountability Center. 9-9-2021https://newrepublic.com/article/163519/roe-wade-supreme-court-fall-term]

The new Supreme Court term is about to begin, and it promises to be a blockbuster. With cases involving abortion and guns already on the docket, and the possibility that an affirmative action case may be added as well, this term will present the court’s new six-member conservative supermajority with the opportunity to usher in major shifts in the law. What the justices do with those opportunities will be a test of their commitment to precedent and, for many of them, their self-professed commitment to originalism.

Perhaps the biggest issue on the court’s docket this term will be abortion. A little over a year ago, in a case called June Medical Services LLC v. Russo, the Supreme Court gave abortion rights advocates a win when it held unconstitutional a Louisiana law that required physicians who perform abortions to have admitting privileges at a nearby hospital. In his opinion concurring in the ruling, with which he joined the court’s (then) four liberal members, Chief Justice John Roberts extolled the importance of precedent, observing that “for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly.” Because the Louisiana law was identical to a Texas law the court had previously struck down, the chief justice voted to strike down the Louisiana law.

But with the replacement of Justice Ruth Bader Ginsburg by Justice Amy Coney Barrett, the chief justice’s vote will not be dispositive when the court hears Dobbs v. Jackson Women’s Health Organization this term. In Dobbs, the court will be considering a challenge to the constitutionality of a Mississippi law that, with limited exceptions, bans abortions after the fifteenth week of pregnancy. The lower courts rightly concluded that this pre-viability ban on abortion was unconstitutional under the Supreme Court’s precedents, and Mississippi now asks the court to overrule those precedents.

According to Monica Simpson, executive director of SisterSong, a Southern-based, national reproductive justice organization that works to improve policies that affect the reproductive lives of women of color, “If the Supreme Court decides to overturn ... precedent under Roe v. Wade, the consequences will be devastating for communities like mine in Georgia, where we are currently fighting against a six-week abortion ban in court.” As she further explained, “The right to access abortion care is a crucial aspect of bodily autonomy, which is too often denied to Black people and others from marginalized backgrounds.”

This case is a huge test for the court and its newest justices, all three of whom—Barrett, Brett Kavanaugh, and Neil Gorsuch—professed a commitment to precedent at their confirmation hearings. Repeatedly, the Supreme Court has been asked to overrule Roe, and repeatedly it has reaffirmed that decision. But in an ominous sign, the court, over the dissents of Chief Justice John Roberts and Justices Breyer, Sotomayor, and Kagan, recently refused an emergency request to block Texas’s six-week abortion ban from going into effect, thus functionally gutting Roe. In doing so, the court not only undermined the right to abortion, but also its own legitimacy. If the new conservative supermajority does, in fact, vote in Dobbs to fully jettison Roe and the other long-standing precedents that recognize a constitutional right to access abortion simply because they were not, in the views of those justices, “decided correctly,” it will deliver an even more significant blow not only to the right to abortion, but also to the legitimacy of the court.

It should also deliver a blow to the claims by many members of the court that they follow the text and history of the Constitution, wherever it leads. When the Reconstruction framers drafted the Fourteenth Amendment, they chose sweeping language to protect the full panoply of fundamental rights for all, and they viewed both personal liberty and control over one’s body as among those fundamental rights. The Fourteenth Amendment thus guarantees the right to access abortion, and the court’s originalists should recognize that.

Dobbs is not the only blockbuster case on the court’s docket. In New York State Rifle & Pistol Association Inc. v. Bruen, the court will be considering whether New York’s denial of two individuals’ applications for concealed-carry licenses for self-defense violates the Second Amendment. In 2008, in a case called District of Columbia v. Heller, the Supreme Court held that the Second Amendment protects an individual right to own guns for self-defense, but also made clear that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”

In the years since Heller, it has fallen to the lower courts to determine what gun regulations are constitutional, with very little guidance from the Supreme Court. The Second Circuit Court of Appeals concluded that the New York law was constitutional, explaining that because “our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, ... [the law] passes constitutional muster if it is substantially related to the achievement of an important governmental interest.” The circuit court went on to conclude that “New York has substantial, indeed compelling, governmental interests in public safety and crime prevention,” and the law is “substantially related” to those interests. When the Supreme Court decides Bruen, how it rules may ultimately be as important as what it rules, because the guidance it provides about how courts should decide the constitutionality of gun regulations could have ramifications that extend far beyond the New York law at issue in the case.

As if these two huge cases were not enough, the court may add another big issue to the docket before the term ends: affirmative action. And as in the abortion case, the court is being asked to overrule a long-standing precedent: Grutter v. Bollinger, the 2003 case that held that universities may consider race as a factor in admissions. In Students for Fair Admissions Inc. v. President & Fellows of Harvard College, an organization called Students for Fair Admissions sued Harvard under a federal law that prohibits entities that accept federal funds from discriminating on the basis of, among other factors, race. The lower courts rejected the challenge, concluding that Harvard’s “limited use of race in its admissions process in order to achieve diversity ... is consistent with the requirements of Supreme Court precedent.” The group challenging Harvard’s admissions policy has asked the court to hear the case, and the court has called for the views of the solicitor general.

Here, as in Dobbs, both constitutional text and history, as well as the court’s own precedent, require the same result—upholding the lower court decision. After all, at the same time the framers of the Fourteenth Amendment drafted that amendment, they also enacted a long list of race-conscious legislation designed to guarantee equality of opportunity for all persons regardless of race. The Supreme Court’s repeated rulings upholding universities’ use of race as one factor in admissions decisions are entirely consistent with that history. In other words, if the court ultimately decides to take up this case, it—no less than Dobbs—will be a real test of the justices’ commitment to the text and history of the Constitution, as well as to the court’s own precedent.

While those three cases are likely to dominate headlines about the court this term, they’re hardly the only important ones on the docket. The court will also be deciding, among many other matters, whether individuals can challenge conduct that has a disparate impact on the basis of disability, whether an important federal civil rights law allows plaintiffs to recover damages for emotional distress, and whether it is constitutional for a state to provide students with funding for private schools but prohibit them from attending schools that provide religious instruction.

#### Antitrust is under the radar

Baum and Devins 10 – Lawrence Baum is a professor emeritus in the Department of Political Science at Ohio State University; his primary research focus is judges’ behavior in decision making. Neal Devins is Sandra Day O’Connor Professor of Law and Professor of Government at William and Mary Law School.

Lawrence Baum and Neal Devins, “Why the Supreme Court Cares About Elites, Not the American People,” *The Georgetown Law Journal*, vol. 98, 2010, pp. 1549-1550, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs.

It is worth underlining the point that a great deal of the Court’s work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court’s legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.170 More telling, the Rehnquist Court’s federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,171 thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or any other Supreme Court invalidations of federal statutes.173

#### Court is unpredictable and a multitude of cases thump.

Solomon 21, \*Aron Solomon, the senior digital strategist for NextLevel.com and an adjunct professor at the Desautels Faculty of Management at McGill University in Montreal; (July 26th, 2021, “Coming Supreme Court term could prove historic”, https://www.theday.com/article/20210726/OP03/210729694)

The most important and high-profile case the U.S. Supreme Court will hear in the upcoming 2021-2022 term that begins in October revisits Roe v. Wade. There’s no way to overstate how important Dobbs v. Jackson Women’s Health Organization is, as this case has the potential to fundamentally rewrite the law of the land regarding abortion.

Aside from Dobbs, which I examine in more detail here, there are several other key cases to watch.

In CVS Pharmacy, Inc. v. Doe, HIV-AIDS patients are suing CVS pharmacies that provide them with HIV medication. The issue here is that CVS refuses to sell their medication at their locations within the community, forcing patients to acquire their medication only via mail-order or through specialized CVS locations. The court will decide whether CVS is violating the disability portions of the Affordable Care Act.

In Gallardo v. Marstiller, a 13-year-old living in Florida in 2008 was hit by a truck. After Florida’s Medicaid program paid over $862,000 for her care, they came after the family for $300,000 of the settlement they had won. The Court needs to determine whether under Medicaid law states are allowed to seek reimbursement from legal settlements.

Aside from cases the court has already agreed to hear, given that it is still early, they are expected to agree to hear more. One case that was decided at the state court level recently that might be interesting for the Supreme Court regards Washington state’s limited license to practice law.

Its technical name is the Limited License Legal Technician and the Washington Supreme Court decided in 2020 to “sunset” the program, which allowed non-lawyers to perform some legal tasks. While the program officially ends on the last day of July, there has been word on the legal street of at least one strong upcoming challenge to ending the program. Why the court might be interested in the right case dealing with the LLLT is because ending the program tightens the legal profession’s hold on having only lawyers perform legal tasks in an environment that is re-examining fundamental industry questions, such as who is allowed to own a law firm.

There is one other case that isn’t yet a case but could very well become one fast. The Texas special legislative session legislature this month will deal with several important issues, one of which is antiabortion legislation. What makes the legislation unique, and may make it perfect for review from the highest court in the land, is how bizarre its enforcement mechanism is.

The Texas law is one of approximately 100 new restrictive abortion laws coming in across the country. What makes the Texas law unique is the fact that this heartbeat law won’t be enforced by the state but can be enforced by anyone.

That’s right, anyone.

If you’re picturing roving bands of anti-abortion activists visiting clinics and providers to stop any abortions that violate Texas’ heartbeat law (or any abortion at all) you’re probably on the right track. While this issue is far too early at the moment for Supreme Court review, one could imagine that with the right plaintiff and set of facts as to how the heartbeat bill in Texas is enforced, this could move reasonably quickly up the courts.

Adriana Gonzalez, a civil rights lawyer, points out that any abortion law that essentially invites activists to enforce it has the potential for disaster; “While each one of these state abortion ‘heartbeat laws’ poses its own difficulties, any heartbeat law where the state allows and actually encourages the general public to enforce it is an invitation to violence.“

A final thing to watch between now and October is what Justice Stephen Breyer is going to do. There is a general expectation that he plans to soon resign, and the fact that he has yet to make his decision is concerning to a lot of people who fall ideologically at or to the left of center. The longer Breyer waits to announce his retirement, the lower the percentage chance that President Joe Biden will be able to nominate a replacement who is ideologically aligned.

With a court that has been remarkably unpredictable to date, yet does indeed have a 6-3 conservative majority, any risk of losing one of those three liberal seats is a danger no liberal president or jurist should take lightly.

### 2AC---Court Capital Theory False

#### Court capital isn’t transferrable.

Redish 95, \*Martin, Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law, teaches and writes on the subjects of federal jurisdiction, civil procedure, freedom of expression and constitutional law; (“The Constitution as Political Structure”, https://books.google.com/books?id=z3XmCwAAQBAJ&pg=PA20&lpg=PA20&dq=court+institutional+capital+transferable&source=bl&ots=0kC1kjNdWy&sig=G8dFWZ7y87qQm6ptHHdSr1X3ZgQ&hl=en&sa=X&ved=0ahUKEwjGqZHf067aAhUm4YMKHaVEB7QQ6AEIMzAC#v=onepage&q=court%20institutional%20capital%20transferable&f=false)

Choper’s assumption that the judiciary’s institutional capital is transferable from structural cases to individual rights cases is no more credible. Common sense should tell us that the public’s reaction to controversial individual rights cases—for example, cases concerning abortion, school prayer, busing, or criminal defendants’ rights—will be based largely, if not exclusively, on its feelings concerning those particular issues. There exist no grounds to believe that the public’s acceptance or rejection of these individual rights rulings would somehow be affected by anything the court says about wholly unrelated structural issues.

### 2AC---Thumper---Antitrust

#### NCAA ruling thumps.

Edelman 21, \*Marc Edelman is Professor of Law at the Zicklin School of Business (City University of New York), where he focuses on sports, antitrust, gaming, and intellectual property law; (June 21st, 2021, “Supreme Court’s Ruling Against NCAA In College Athlete Pay Case Rests On Decades Of Legal Precedent”, https://www.forbes.com/sites/marcedelman/2021/06/21/as-earlier-predicted-us-supreme-court-rules-against-ncaa-9-0/?sh=2a6bd796824b)

Back in April, I [predicted on Forbes.com](https://www.forbes.com/sites/marcedelman/2021/04/05/seven-reasons-why-the-ncaa-is-likely-to-lose-its-supreme-court-case/) that the National Collegiate Athletic Association would lose its Supreme Court antitrust case, NCAA v. Alston, in a 9-0 ruling. At the time, I explained that the most interesting question in this case would not be who would win but rather whether the U.S. Supreme Court would go even further than the U.S. Court of Appeals in reining in what the NCAA currently calls “amateurism.”

Today, we [got our answer](https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf). The NCAA indeed did lose its Supreme Court case, 9-0. And Justice Brett Kavanaugh, [channeling a view of the NCAA expressed earlier](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226541), took the time to write a concurring opinion that put the writing on the wall that many other NCAA rules—beyond just limits on educational-related, in-kind benefits—might also one day be found to violate Section 1 of the Sherman Act.

# 1AR

## DA

### 1AR---Impact

#### Their 1NC ev says it’s Vilsack and Garland, and then separately talks about the FTC.

Moran 1-6-22 (Max Moran, Research Director of the Personnel Team at the Revolving Door Project, studied International Relations and Journalism at Brandeis University, “Merrick Garland Is Undermining the Biden Antitrust Strategy,” The American Prospect, 1-6-2022, https://prospect.org/justice/merrick-garland-is-undermining-biden-antitrust-strategy/)

The Biden administration is threatening new anti-monopoly enforcement actions against the Big Four meatpacking companies, in part to counter inflation at the grocery store and in part to address decades of exploitation of small farmers. On Monday, the president dispatched Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to hear grievances from small ranchers, while the White House builds a new web portal to gather complaints. While the White House’s proposals for funding small meat processors to increase competition are rather unsatisfying, the enforcement piece could have a real impact.

This initiative has caused the usual grumbling from neoliberal economists, and the usual corrections to the usual grumbling. But no one has yet explained how Biden plans to actually follow through on his threat—a problem for which Garland is partly to blame.

As The Information’s Josh Sisco reported on Tuesday, there are currently just two deputies trying to manage the entire DOJ Antitrust Division (ATR) alongside Assistant Attorney General Jonathan Kanter, who was confirmed only two months ago. ATR typically has at least 12 deputies and top advisers in the “front office” who oversee about 700 career staffers. And that was under past administrations, which didn’t have nearly as ambitious an antitrust agenda as Biden’s. Reversing four decades of Borkian antitrust sloth requires a cohesive and energetic senior leadership team.

Meanwhile, the Federal Trade Commission, the executive branch’s other main antitrust enforcer, remains in a 2-2 partisan deadlock, as Senate Republicans blockade Biden nominee Alvaro Bedoya from being confirmed as a commissioner. He has a path to 51 Senate votes, but arcane (and unnecessary) procedural hurdles have slowed the process to a crawl, hindering the other avenue to antitrust action.

Biden can only do so much to move Bedoya’s nomination. But in theory, nothing prevents him from hiring whomever Kanter personally trusts to help execute their shared agenda. The deputies at ATR are not Senate-confirmed positions. So what’s causing the chaos?

The problem isn’t procedural; it’s political. In addition to diversity concerns, Sisco reports that “ideological divisions” about anti-monopoly enforcement within the Biden administration are causing fights over any potential selection for the ATR deputies.

These divisions should be familiar to anyone who followed the initial fight over antitrust nominees during the Biden transition last year. While Biden himself seems sold on the benefits of a strong anti-monopoly agenda, Garland testified last year that he sees no problem with hiring big corporations’ preferred defense attorneys to oversee their former firms and clients. Garland and other anonymous voices floated a slew of names to run ATR throughout last year—anyone but Kanter, whom progressives favored.

While Garland lost that initial fight, he seems content to starve Kanter of resources as a work-around, even if it means sabotaging his own president’s agenda. Garland, after all, appears to consider it core to his job to throttle the better parts of the Biden administration for the sake of an imagined apolitical comity. He rushed to the Trump administration’s defense over the objections of the White House many times over the last year, and continues to undermine environmental action wherever he can. It’s perfectly in keeping with his priorities to undermine antitrust enforcement too.

The corporate revolvers and pro-monopoly hacks Garland boosted also haven’t gone anywhere. Again according to Sisco, Sonia Pfaffenroth is now in the mix for one of those coveted jobs in the ATR “front office.” Pfaffenroth revolved from Arnold & Porter into the Obama ATR and back over the last two decades. In private practice, she’s defended pharmaceutical firms, fossil fuel companies, and mining companies from class actions, price-fixing cases, and of course antitrust lawsuits.

One should look to Pfaffenroth’s record from her past stint at ATR to get a sense of what a second go-around might look like. Under the Obama administration, Pfaffenroth blessed tie-ups between Virgin America and Alaska Airlines, as well as US Airways and American Airlines. Today, just four mega-airlines control 80 percent of U.S. air traffic.

Pfaffenroth even approved the $107 billion merger between Anheuser-Busch InBev and SABMiller, allowing 30 percent of the world’s beer market volume and 60 percent of the world’s beer market profits at the time to be controlled by one firm. Today, AB InBev has essentially hacked the multitiered regulatory system that kept the alcohol market competitive for decades. In some cases, AB InBev’s distributors only allow craft brewers to distribute their drinks to retailers if they keep overall production low. This bottlenecking, alongside the pandemic, has been devastating for craft brewers.

Pfaffenroth’s record at ATR reveals someone whose poor judgment has harmed major American industries. But her judgment is reflective of the failed antitrust status quo, and in antitrust and everything else, Garland sees maintaining the status quo as inherently salutary. Where you or I might see bad calls, Garland likely sees jurisprudence executed according to a well-worn book. Whether the book is right or wrong is immaterial, in his eyes.

To state the obvious, Biden ought to reject Pfaffenroth and empower Kanter with deputies ready to throw that book aside, or else his antitrust agenda on meatpacking and everything else will get tossed on the growing pile of broken promises that are cratering his approval ratings. Doing so, however, will require standing up to Garland.

Thus far, Biden has appeared reluctant to do so, for fear of threatening the attorney general’s independence. There’s a kernel of truth here, after the Justice Department was turned into the president’s personal law firm under Trump. But there is a big difference between deploying the DOJ’s resources to help friends and target enemies and ensuring the DOJ has the staff and leadership necessary to execute its policy agenda. One is a blatant abuse of power, the other a clear presidential prerogative.

It’s an awkward situation for a president, but Biden must recognize that achieving his goals—especially the ones that improve working people’s economic fortunes—does far more for the health of the nation than sticking to a failed principle for its own sake. The president badly needs to remember that the buck stops not at Main Justice, but the Oval Office. Biden can demonstrate his commitment to fulfilling his promises and vision by empowering those of his appointees who are showing the necessary courage.

#### The only 1NR card that the FTC solves ag says 3 agencies are key.

Kelloway 21 [KU=yellow] (Claire Kelloway, senior reporter and researcher with the Open Markets Institute, primary writer of FoodAndPower.net, former sustainability fellow with Bon Appetit Management Company, BA political science, concentration in political economy and sustainable development, Carleton College, “How Biden can rein in the Big Meat monopoly,” Vox, 2-24-2021, https://www.vox.com/future-perfect/22298043/meat-antitrust-biden-vilsack)

So what can the government actually do to rein in Big Meat?

Well, the good news is there are already laws on the books to address Big Meat’s manipulation and merger mania. The bad news is we just haven’t been enforcing them. A good first step would be to appoint bold, creative, and progressive enforcers to lead critical antitrust agencies at the DOJ, the FTC, and, of course, the Department of Agriculture.

[MSU’s card ends]

But if the Biden administration wants to get serious about taking on Big Meat, it needs to go further.

It can start by issuing stronger rules under the Packers and Stockyards Act — a 1921 law that is supposed to protect farmers against unfair and deceptive business practices. Biden’s USDA could pass rules that actually give contract farmers the opportunity to seek justice when jerked around by meatpackers, and cut loopholes for corporations that justify farmer mistreatment as a “reasonable business decision.”

#### Even if they get Senate swing votes, there’s no floor time.

Hendel 1-3 (John Hendel is a POLITICO tech reporter, “2022 kicks off with tech nomination do-overs,” 1-3-2022, <https://www.politico.com/newsletters/morning-tech/2022/01/03/2022-kicks-off-with-tech-nomination-do-overs-799632>, DOA: 1-22-2022) //Snowball

Bedoya for FTC: Bedoya, a longtime privacy advocate who, like Sohn, faces GOP complaints over past partisan tweets, faces bigger procedural hurdles than Davidson and is unlikely to win the same amount of bipartisan support.

The committee deadlocked along partisan lines when it voted on him in December, with every Republican siding against. He could still advance to the floor with unified Democratic support, but Democrats would need to find the time for three roll call votes. (In addition to cloture and confirmation votes, Bedoya would need one simply to discharge him from the Senate Commerce Committee — and that adds up to a lot of floor time.)

## Adv 1

### 1AR---AT: Frand Strong

#### Collapsing

Hovenkamp 20, \*Herbert J. Hovenkamp is James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School of the University of Pennsylvania; (2020, “FRAND and Antitrust”, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3095&context=faculty_scholarship>)

CONCLUSION

Oversight of FRAND obligations is one area where it is critical for the courts to keep an eye on longer run concerns for innovation. FRAND has evolved into a highly successful but nevertheless vulnerable mechanism for facilitating joint innovation and product development. Indeed, for networked technologies such as cellular phones it is difficult to see how coordinated development by numerous competitive firms could be achieved without the significant coordination and technology sharing that FRAND enables. That system will be undermined, however, if one firm is able to renege on its voluntarily entered obligations, because others will then do the same. The regime of collaborative innovation that FRAND contemplates would very likely fall apart, and at great harm to competition and economic welfare. The Ninth Circuit’s 2020 Qualcomm decision indicates that this fear is more than fanciful. Unless corrected, Congress may have to intervene in order to protect a system that has been an important driver of innovation and economic growth.

### 1AR---LD---Qualcomm Specific

#### The plan in no way diminishes Qualcomm’s incentives to innovate.

Durkin-Rixley 20, \*Ashley Durkin-Rixley is Director of Communications at ACT, (January 30th, 2020, “Qualcomm Wants You to Think the FTC’s Antitrust Case is About Patents; It’s Not”, https://actonline.org/2020/01/30/qualcomm-wants-you-to-think-the-ftcs-antitrust-case-is-about-patents-its-not/)

The amicus from the 40 legal and economic scholars demonstrates “the policy concerns that drove the Supreme Court’s reluctance to hold refusals to deal unlawful do not apply here.” They argue requiring Qualcomm to honor its voluntary FRAND commitments does not trigger the previously identified policy concerns because:

The “free-rider” problem is not an issue with SEPs. “Industry standards like those at issue here are intended to be available to all firms—competitors and non-competitors alike—to spur widespread adoption of, and facilitate competition in the development and sale of products implementing, the standards.”

Courts will not be in the role of “central planner.” “A court need only order licensing on FRAND terms, leaving Qualcomm and its competitors to negotiate rates in the shadow of the law.”

There is no undue risk of collusion. “The parties need only discuss the royalty. Unlike Aspen Skiing . . . the resulting interactions here would not require joint marketing or sale of consumer-facing products…nor would they require coordination regarding the introduction of a new competitor-facing service…or any discussion of output levels or chipset design.”

It will not compromise Qualcomm’s incentives to innovate. Qualcomm “will continue to earn royalties and chipset profits in return for its investments in developing patented technology…Condemning a refusal to deal in this context merely holds Qualcomm to a bargain that it willingly struck in exchange for SSOs’ adoption of its technology into industry standards, and in no way diminishes its right to obtain a reasonable royalty for others’ use of its SEPs.”

### 1AR---AT: No Patent Holdup---Not Systemic

#### Their argument is akin to saying speed limits don’t matter because high ways are safe.

Gilbert 20, \*Richard J. Gilbert is an [American Economist](https://en.wikipedia.org/w/index.php?title=American_Economist&action=edit&redlink=1), professor at [UC Berkeley](https://en.wikipedia.org/wiki/University_of_California,_Berkeley) from 1976 to 2000, and founder of [LECG](https://en.wikipedia.org/wiki/LECG_Corporation) Corp. ([Law and Economics Consulting Group](https://en.wikipedia.org/wiki/LECG_Corporation)). Richard ('Rich') Gilbert served as Deputy Assistant General in the [Antitrust Division](https://en.wikipedia.org/wiki/United_States_Department_of_Justice_Antitrust_Division) of the [U.S. Department of Justice](https://en.wikipedia.org/wiki/United_States_Department_of_Justice) in the White House from 1993 to 1995. He led the development of Joint Department of [Justice and Federal Trade Commission](https://en.wikipedia.org/w/index.php?title=Justice_and_Federal_Trade_Commission&action=edit&redlink=1) [Antitrust](https://en.wikipedia.org/wiki/Competition_law) Guidelines for the Licensing of [Intellectual Property](https://en.wikipedia.org/wiki/Intellectual_property) and is currently [Emeritus Professor](https://en.wikipedia.org/wiki/Emeritus_Professor) of Economics at the [University of California at Berkeley](https://en.wikipedia.org/wiki/University_of_California,_Berkeley); (2020, “Innovation Matters: Competition Policy for the High-Technology Economy”, https://mitpress.mit.edu/books/innovation-matters)

Conduct that enables a patent owner to evade FRAND commitments should not be lawful. High royalties harm consumers and can impede innovation for technologies for which a patent license is necessary. Some have argued that patent holdup is no more than an academic curiosity because innovation and competition for smartphones and other devices have thrived, despite the fact that these devices implement standards covered by hundreds of SEPs.[26](javascript:void(0)) But this argument is flawed. It does not recognize that prices for smartphones and other devices would likely be much higher if the antitrust authorities and the courts stopped policing FRAND licensing obligations.[27](javascript:void(0)) The fact that it is reasonably safe to drive on highways in the US does not mean that speed limits are unnecessary. FRAND limitations are speed limits on the information superhighway.

#### They can win everything and lose

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

B. Addressing the Patent Holdup Skeptics

Several arguments have been advanced in support of imposing less stringent or no restraints on SEP holders. These arguments are deeply flawed, both empirically and theoretically.

First, some who oppose rigorous enforcement of effective FRAND commitments rely on studies that purport to show that concerns about ex post opportunism leading to excessive royalties are unfounded.20 However, those studies lack proper controls and therefore do not show what they purport to show— namely, that aggregate royalty costs have not hindered innovation or commercialization. The basic shortcoming of these studies is that they do not offer a sensible but-for world in the absence of opportunism as a comparator by which to assess observed behavior. For example, noting that cell phone technology has advanced rapidly in recent years does not prove a lack of costly opportunism by the owners of SEPs for the thousands of technologies included in cell phones.21

Nor do the studies even purport to show that individual holders of asserted patents are not excessively compensated, or rebut the hypothesis that the prospect of such excessive compensation has created perverse incentives for over-patenting and other welfare-reducing strategies.

#### Thousands of studies

Shapiro & Lemley 20, \*Carl Shapiro is the Transamerica Professor of Business Strategy Emeritus at the Haas School of Business, University of California at Berkeley; \*Lemley is the William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP; (2020, “THE ROLE OF ANTITRUST IN PREVENTING PATENT HOLDUP”, https://faculty.haas.berkeley.edu/shapiro/patentholdup.pdf)

D. Empirical Support for the General Theory of Holdup

An impressive body of empirical work supports the general theory of holdup described above. Literally hundreds of papers have been published in peer-reviewed journals developing and testing the general theory of holdup. As Robert Gibbons, one of the editors of the Handbook of Organizational Economics, stated in his article on transaction cost economics, “the huge body of TCE literature is overwhelmingly empirical.”28

One extensive line of research uses transaction cost economics to explain the scope and incidence of vertical integration.29 Put differently, these papers use transaction cost economics to explain the “make vs. buy” decisions of firms. A closely related line of research uses transaction cost economics to explain how firms structure their contractual relationships. Shelanski and Klein provide an early survey of this literature.30 As they conclude, “Studies that examine the make-or-buy decision and the structure of long-term contracts, in particular, overwhelmingly confirm transaction cost economic predictions.”31 Masten assembles some of the best early empirical articles on vertical integration and vertical contracting.32 Whinston notes that “TCE predicts that any increase in quasi-rents will increase the likelihood of vertical integration (a finding that is so far consistent with nearly all of the existing empirical literature).”33 Macher and Richtman reviewed “over 3,500 abstracts from which [they] obtained approximately 900 articles that empirically test some aspect of TCE theory.”34 After recognizing considerable variability in the quality of the empirical work that they surveyed, they concluded, “[e]ven so, the volume of our findings lend considerable support overall for the main predictions of TCE.”35

In addition, there is an enormous amount of anecdotal evidence based on long-term contracts between sophisticated parties in situations where substantial specific investments are involved and the parties come to rely on each other. It is safe to say that anyone who has seen a good number of such contracts will confirm that they normally contain provisions by which one party obtains price and performance protections to limit opportunism by the other party.

### 1AR- Overclaiming

#### Overclaiming outweighs the signal

Hovenkamp 20, \*Herbert J. Hovenkamp is James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School of the University of Pennsylvania; (2020, “FRAND and Antitrust”, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3095&context=faculty_scholarship>)

Having a patent declared standard essential can increase its value considerably, mainly because the promise of a license at a reasonable rate steers developmental decision making in favor of that particular technology. When a firm makes a commitment to develop its products under a particular standard, it wants assurance that it will have a durable right to operate under that standard at reasonable royalty rates. This process naturally leads to the creation of considerable path dependence in standards. It encourages firms to develop their own technology in ways that ensure interoperability but that can be costly to reverse after the fact.30

This phenomenon of increased value for SEPs also motivates patent owning firms to “over-claim”—that is, to assert that patents are standard essential when subsequent litigation or evaluation determines that they are not. While FRAND agreements require participants to declare relevant patents thought to be essential, the rate of actual declaration far exceeds any rational boundary. As many as one-third to more than half of declared SEPs are very likely not essential to the standard for which they were declared,31 and allegations about the practice of over-declaring are currently being litigated as potential antitrust violations.32 In fact, overall infringement rates for SEP patents are not materially different from those for non-SEP patents.33 A declaration of non-infringement means that, although the patent might be valid, it does not in fact read on the defendant’s particular device or process. In effect, the patent is not a part of the defendant’s technology, and thus cannot be essential. The problem is exacerbated by the fact that, for the most part, SSOs have no process up front for reviewing or questioning individual participants’ declarations that a patent they are offering is in fact both valid and standard essential.34

Ex ante, a patent may offer one of many alternative technological paths to a certain goal. However, ex post, after a standard has been adopted and others have developed their technologies in reliance, the range of acceptable alternatives can decrease dramatically. As a result, the patent whose path is adopted becomes much more valuable.35 In that case, a firm’s ability to evade the FRAND obligation by charging selectively higher royalties to some licensees or conditioning licenses on the purchase of other technology can be extremely lucrative for the patentee but costly to implementers of the standard and disruptive of the SSO’s developmental goals.36 In its Qualcomm decision noted above, the Ninth Circuit did not indicate any awareness of these motivations or their potential for harm.37

### 1AR---AT: False Positives

#### No ‘false positives’---courts are experienced and ex ante valuations force disclosure which mitigates deception.

Cary et al. 11, \*Messrs. George Cary and Alex Sistla are members of the California and District of Columbia Bars. Mr. Mark Nelson is a member of the New York and District of Columbia Bars. Mr. Steven Kaiser is a member of the New Jersey and District of Columbia Bars; (2011, “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM INSTANDARD SETTING”, <https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf>)

While we recognize that, when a court is asked to determine a FRAND royalty, one form of “false positive” is that the court could require a patent owner to license its technology at less than a FRAND rate (if it incorrectly finds that the patent owner failed to offer a license on FRAND terms), we believe this risk is limited. Courts are routinely asked to calculate royalty rates in a variety of disputes. They are also routinely asked to calculate the “but for” world competitive price in assessing damages in most antitrust litigation. There is no reason to believe that evaluating such rates in the context of a FRAND commitment would be any more difficult.84 We also note that patent owners can (and do) mitigate their risk in this regard if, prior to the adoption of a standard, they provide transparency into the rates that they consider FRAND. With such ex ante disclosures, patent owners can reduce the risk of being accused of deception, which is generally at the core of antitrust claims arising out of abuses of the standard-setting process.

### 1AR- AT: Profitability

#### ex ante valuation preserves profit due to mass licensing volume---that’s Melamed and Shapiro and…

Stern 18, \*Richard H. Stern, Professorial Lecturer in Law, The George Washington University Law School. A Washington, D.C. patent and antitrust attorney, Stern was Chief of the Patent Section of the US Justice Department’s Antitrust Division during the Nixon and Ford Administrations; (2018, “Who Should Own the Benefits of Standardization and the Value It Creates?”, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1439&context=mjlst)

D. INCENTIVIZE ME OR I’LL DEFECT

A highly theoretical argument is often made by SEP owner spokesmen—that lessened compensation to SEP owners will “disincentivize” them from creating technology and contributing it to standardization, stagnating further standardization. For example:

If the SEP holder cannot capture any of the value from standardization that its technology creates for the standard, it will have a dampened incentive to continue contributing its best technologies to SSOs. In the long run, the quality of technologies contributed to a future standard—and the expected value of that new standard—would decrease. The SEP holder’s decision to contribute its technologies to a standard depends on the compensation that an SEP holder expects to obtain from such a contribution, compared with the SEP holder’s alternative option to monetize its invention outside the standard. . . . If the SEP holder expects not to be compensated fully for its contributions, it will not commit its most valuable technologies to the standard.431

But the amount of dampening of incentive (assuming that we do not already have enough or more than enough incentive for smartphones) may well be outweighed in impact by the prospect of nonetheless gaining first-user and head-start advantage from incorporation of one’s technology into a standard, and the opportunity to increase one’s equipment sales (anointed with the imprimatur of the standard),432 even if one cannot also obtain monopoly profits as well, from SEP royalties. In a sense, those advantages are a form of “the compensation that an SEP holder expects to obtain” from such a SEP contribution, but the commentator fails to take those significant incentives into consideration.433 Moreover, the supposed “SEP holder’s alternative option to monetize its invention outside the standard” may be a figment of the SEP holder spokesman’s imagination.434 If an alternative technology becomes standard, the only opportunity to monetize the withheld invention may be to incorporate the technology into unsaleable non-standard products. Defection may be a poor business strategy.

### 1AR- Hold out

#### Individual and collective patent hold-out is factually unsupported.

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

Fourth, others who oppose effective measures to prevent ex post opportunism argue that so-called “patent hold-out” by implementers—the unwillingness of some implementers to bargain in good faith for patent licenses—is a more serious problem.27 We know of no factual support for this argument. Moreover, if the implementers are infringing valid patents, they are required by the patent statute to pay at least a reasonable royalty and may be liable for treble damages.28 The issue, therefore, is not whether the implementer would prefer not to pay for a license, but rather whether there is a need for special rules in patent infringement cases—unavailable in other settings—to deal with alleged debtors that would rather litigate than settle on the terms offered to them.

In a recent speech, the Assistant Attorney General for Antitrust, Makan Delrahim, made a different argument about what he calls “collective hold-out.”29 Delrahim seems to have in mind implementers acting “together within a standard-setting organization” in order “to impose anticompetitive licensing terms” before the standard is established.30 This concern should provide no basis to permit SSOs to refrain from enforcing effective FRAND commitments adopting and, much less to stop them from doing so.

In the first place, we know of no instance in which the feared “collective holdout” has happened in the context of modern communications and information industries, and Delrahim cites none. Moreover, SSOs are a form of industry and competitor collaboration, and the creation and promotion of standards is usually procompetitive and efficiency-enhancing. These procompetitive activities and rules of SSOs—including FRAND requirements—cannot therefore be condemned as naked, cartel-like behavior. Instead, they should be assessed for antitrust purposes under the Rule of Reason.31

This does not mean that FRAND requirements can never violate the antitrust laws. FRAND requirements are intended to ameliorate the problem of ex post monopoly power created by the collective action of the SSO. They should do so by, inter alia, constraining monopoly pricing so that ex post royalties will be closer to the competitive ex ante price. As long as FRAND requirements do not entail the use of market power to force patent holders to accept royalties at lower levels, they should not be regarded as an unlawful exercise of collective buyer power. To our knowledge, no SSO has required patent holders to accept less than the ex ante price; and the kind of effective FRAND commitments we advocate, and believe the law requires, would not require that patent holders do so.

Delrahim suggests that any effort by an SSO to enact meaningful FRAND commitments is problematic because “[e]very incremental shift in bargaining leverage toward implementers of new technologies acting in concert can undermine incentives to innovate.”32 But excessive royalties undermine incentives for follow-on innovation and can have adverse economic consequences as well. The patent laws are intended to limit, not maximize, the royalties to which patent holders are entitled.33 Delrahim’s approach is inconsistent with both sound economic analysis and the policies animating patent law. FRAND commitments that reduce excessive royalties further the policies of both the antitrust laws and the patent laws.