# 1AC

### 1AC---Innovation Advantage

#### Advantage 1 is Innovation:

#### Standards-Setting Organizations are industry members who jointly establish standards for IT defined by the adoption of standard-essential patents, which are licensed to companies on Fair, Reasonable, and Non-Discriminatory terms. Current standards promote price gouging, FRAND enforcement is critical.

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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.

#### Patent holdup is accentuated by the Ninth Circuit’s recent decision in *FTC v. Qualcomm* that permits ICT firms to engage in innovation-stifling conduct with antitrust impunity.

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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.

#### Weakened antitrust enforcement emboldens firms to follow Qualcomm’s lead, which collapses FRAND integrity.

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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.

#### Absence of domestic 5G competition cedes leadership in technical standards to China.

Duan 19, \*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; (February 5th, 2019, “Why China Is Winning the 5G War”, https://nationalinterest.org/feature/why-china-winning-5g-war-43347)

There is little doubt today that American superiority in the next generation of mobile communications, commonly called 5G, is a matter of extraordinary national concern. There is also little doubt that China is a strong competitor, already having outspent the United States by [$24 billion](https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5g-deployment-imperative.pdf#page=3) and planning [$411 billion](https://www.scmp.com/tech/china-tech/article/2098948/china-plans-28-trillion-yuan-capital-expenditure-create-worlds) in 5G investment over the next decade. The Chinese government has also laid out multiple national plans for establishing the country as a leader in mobile technology, and the Chinese firm Huawei is poised to be the [top smartphone manufacturer](https://www.cnbc.com/2018/11/16/huawei-aims-to-overtake-samsung-as-no-1-smartphone-player-by-2020.html) by 2020.

And what are United States companies doing about this? Bickering over patents.

For years, the leading American supplier of advanced mobile communications chips has been the San Diego-based Qualcomm. The company has been an innovator of mobile technology, but it has also been a remarkable innovator of convoluted legal strategies. As an ongoing Federal Trade Commission [lawsuit alleges](https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used), Qualcomm has used its dominant position as a chip supplier and its extensive patent holdings to weave an intricate web of patent licensing across the mobile industry. The effect of that complex licensing scheme, the FTC claims, has been to force competitor chipmakers out of the market and to extract concessions and high patent royalties from smartphone and mobile-device makers.

Qualcomm today faces only one major U.S. competitor—Intel, whose chips Apple recently [started using](https://www.cultofmac.com/484250/intel-reaping-rewards-apples-scrap-qualcomm/) instead of Qualcomm’s. Not surprisingly, Qualcomm has leveraged its patents to force a retaliatory investigation against Apple, the effect of which could be, as an administrative judge [recently determined](http://www.fosspatents.com/2018/10/itc-judge-didnt-buy-testimony-for-which.html), to boot Intel out of the mobile-chip market and leave Qualcomm as a monopoly.

It is hard to imagine that this infighting among Apple, Intel and Qualcomm is getting the United States very far in 5G, and it is harder to imagine that Qualcomm’s desired outcome would do so, either. The best path, instead, is the obvious one: allowing competition and expanding the number of firms working on 5G.

Competition encourages companies to out-innovate each other in order to grab market share. Of particular importance to 5G, competition leads to [better cybersecurity](https://morningconsult.com/opinions/in-the-race-to-5g-monopoly-considered-harmful/) in products, making them less vulnerable to hacking or misuse.

Competition is especially crucial when it comes to the technical standards that define how 5G works. These standards are the work of 3GPP, an international consortium of technology companies in the field. Chinese players such as Huawei and ZTE are major participants in 3GPP. Ensuring that 3GPP’s standards reflect American values requires having as many American companies at the negotiating table as possible—which is harder to achieve when those companies are trying to sue each other out of business.

Certainly patents themselves, as rewards for new inventions, are a driver of innovation in areas such as 5G. The problem, though, is not the existence of a patent system but the ever-expanding power of the patent laws, which encourage companies to pour dollars into complex patent licensing and assertion schemes—as companies like Qualcomm have done—rather than to perform the hard work of building new technologies. When innovation in patent strategy is more profitable than actual innovation, we lose the race to 5G and other technologies.

But don’t take my word for it. [Multiple members of Congress](https://www.patentprogress.org/2019/01/11/congress-weighs-in-on-qualcomm-and-apple-at-the-itc/), from both sides of the aisle, have denounced the use of patents to kick companies like Intel out of 5G development, predicting that such actions would “dampen the quality, innovation, competitive pricing, and in this case the preservation of a strong U.S. presence in the development of 5G and thus the national security of the United States.”

Or look to what China itself is doing. The Chinese government is handing out rewards left and right to encourage technology research and development. Indeed, it grants subsidies and financial benefits (ranging from the [ordinary](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818503) to the [imperfect](https://funginstitute.berkeley.edu/wp-content/uploads/2013/12/patent_subsidy_Zhen.pdf) to the [bizarre](https://www.scmp.com/news/china/article/1681850/how-get-out-jail-early-china-buy-inventors-idea-and-patent-it)) to encourage its citizens to file for patents. But while China specifically encourages filing for patents, it does little to encourage using them: Patent infringement awards in court are peanuts—often only [five figures](https://scholarship.law.berkeley.edu/btlj/vol33/iss2/2/)—and most Chinese patent owners drop their patents [within five years](https://www.bloomberg.com/news/articles/2018-09-26/china-claims-more-patents-than-any-country-most-are-worthless) of getting them. The message in China is clear: You will be rewarded for innovating, but not for quibbling over patents.

The United States should take the same tack if it wants to match China in 5G. Ever-stronger patent rights encourage counterproductive disputes that are a drag on industry, a drag on research and development, and ultimately a drag on domestic competitiveness on the global stage. If America wants to lead in 5G, then it must clear the path for strong competition among leading American technology companies.

#### Standards leadership allows China to export digital authoritarianism.

Drew et al. 21, \*Dr Alexi Drew, Research Associate, The Policy Institute, King’s College London; (May 7th, 2021, “The Critical Geopolitics of Standards Setting”, https://www.transatlantic-dialogue-on-china.rusi.org/article/the-critical-geopolitics-of-standards-setting)

However, this previously ‘western’ domain is challenged by a Chinese bloc of private industry actors with centrally directed, strategic motivations for their efforts who have managed to leverage the flaws of this system for political and economic advantage.  The market-driven self-regulation model of technical standards has proven itself unsustainable given the geopolitical power achievable through the control of these standards. The marketised approach is easily abusable by a technologically developed nation-state with geopolitical intentions firmly in mind.

Obscurity Through Complexity

Technical standards have the immediate appearance of being both apolitical and ethically neutral. This seems to set them apart from the debate over standards of state behaviour in [cyber space concerning espionage and actions below the threshold of armed conflict](https://www.cfr.org/blog/unexpectedly-all-un-countries-agreed-cybersecurity-report-so-what). Yet, technological standards are unequivocally connected to normative practices of international behaviour and ethics. The extremely complex nature of the standards under consideration in bodies such as the International Organization for Standardization, the International Electrotechnical Commission (IEC), the International Telecommunications Union (ITU), and the Third Generation Partnership Project (3GPP) obscures the very tangible real-world impact that the standards they set have. The 3GPP is responsible for standards setting for mobile telecommunications. It covers everything from 5G through to autonomous vehicles and the Internet of Things. These are the bodies defining how the modern world is constructed.

On the one hand they appear quite benign, responsible for such banalities as the use of Universal Serial Bus (USB) connectors versus proprietary standards. This hardly seems a matter of national security importance. But the same process is responsible for what ultimately shape the basic operating parameters of facial recognition technology in closed circuit television systems, the level of centralised state control at the technical foundations of the internet, and the protections of personally identifiable data. These generate profound implications for international policy and ethics.

Internal Competition vs Strategic Direction

Technical standards setting processes have, historically, been dominated by private sector actors who have had both the capacity to develop a particular technology to the point of holding a significant market share, and the ability to use that market share to advocate for the standardisation of the technology in line with their own production. The market led approach has continued to be the prevailing model by which American companies have globalised the technical standards behind US dominated technological innovation. This privatised form of self-regulation for technology companies is only partially influenced by the approach taken within the EU where [some licensing of standards are controlled by state or EU led institutions.](https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2019/ui-brief-no.-2-2019.pdf)

In contrast to this approach the Chinese model has involved a high level of state-oriented direction, oversight, and direct engagement on the creation and signing off technical standards. Efforts to harmonise and centralise technical standards domestically have become increasingly internationalised as the CCP takes this centralised, strategic approach to technical standards setting bodies such as the ITU, 3GPP, and IEC. Technical standards have also become an increasingly central component of the Digital Silk Road with the openly expressed goal of increasing uptake of Chinese technical standards in partner countries.

The implications of this clash between a system of technical standardisation that is driven by the market versus one driven by an authoritarian government subsidised model are a direct challenge to the development of free, open, and ethical technology. Standardisation mechanisms have become political, or rather there has been a gradual realisation of the political power to be gained from the control of technical standards. While the PRC might have come to this awareness first, the US and Europe have since had a rude awakening about the missed opportunity. The privatised model of technical standards setting favoured by European and US markets relies upon the dynamics of financial competition to regulate behaviour. This is in stark contrast to the statist Chinese model.

#### Causes global backsliding.

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The risk that technology will usher in a wave of authoritarianism is all the more concerning because our own empirical research has indicated that beyond buttressing autocracies, digital tools are associated with an increased risk of democratic backsliding in fragile democracies. New technologies are particularly dangerous for weak democracies because many of these digital tools are dual use: technology can enhance government efficiency and provide the capacity to address challenges such as crime and terrorism, but no matter the intentions with which governments initially acquire such technology, they can also use these tools to muzzle and restrict the activities of their opponents.

#### Democracy solves a litany of existential threats.

Diamond 19, Professor of Political Science and Sociology at Stanford University, Senior Fellow at the Hoover Institution, Senior Fellow at the Freeman Spogli Institute for International Studies, PhD in Sociology from Stanford University, (Dr. Larry, Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition, and American Complacency, p. 199-202)

The most obvious response to the ill winds blowing from the world’s autocracies is to help the winds of freedom blowing in the other direction. The democracies of the West cannot save themselves if they do not stand with democrats around the world. This is truer now than ever, for several reasons. We live in a globalized world, one in which models, trends, and ideas cascade across borders. Any wind of change may gather quickly and blow with gale force. People everywhere form ideas about how to govern—or simply about which forms of government and sources of power may be irresistible—based on what they see happening elsewhere. We are now immersed in a fierce global contest of ideas, information, and norms. In the digital age, that contest is moving at lightning speed, shaping how people think about their political systems and the way the world runs. As doubts about and threats to democracy are mounting in the West, this is not a contest that the democracies can afford to lose. Globalization, with its flows of trade and information, raises the stakes for us in another way. Authoritarian and badly governed regimes increasingly pose a direct threat to popular sovereignty and the rule of law in our own democracies. Covert flows of money and influence are subverting and corrupting our democratic processes and institutions. They will not stop just because Americans and others pretend that we have no stake in the future of freedom in the world. If we want to defend the core principles of self-government, transparency, and accountability in our own democracies, we have no choice but to promote them globally. It is not enough to say that dictatorship is bad and that democracy, however flawed, is still better. Popular enthusiasm for a lesser evil cannot be sustained indefinitely. People need the inspiration of a positive vision. Democracy must demonstrate that it is a just and fair political system that advances humane values and the common good. To make our republics more perfect, established democracies must not only adopt reforms to more fully include and empower their own citizens. They must also support people, groups, and institutions struggling to achieve democratic values elsewhere. The best way to counter Russian rage and Chinese ambition is to show that Moscow and Beijing are on the wrong side of history; that people everywhere yearn to be free; and that they can make freedom work to achieve a more just, sustainable, and prosperous society. In our networked age, both idealism and the harder imperatives of global power and security argue for more democracy, not less. For one thing, if we do not worry about the quality of governance in lower-income countries, we will face more and more troubled and failing states. Famine and genocide are the curse of authoritarian states, not democratic ones. Outright state collapse is the ultimate, bitter fruit of tyranny. When countries like Syria, Libya, and Afghanistan descend into civil war; when poor states in Africa cannot generate jobs and improve their citizens’ lives due to rule by corrupt and callous strongmen; when Central American societies are held hostage by brutal gangs and kleptocratic rulers, people flee—and wash up on the shores of the democracies. Europe and the United States cannot withstand the rising pressures of immigration unless they work to support better, more stable and accountable government in troubled countries. The world has simply grown too small, too flat, and too fast to wall off rotten states and pretend they are on some other planet. Hard security interests are at stake. As even the Trump administration’s 2017 National Security Strategy makes clear, the main threats to U.S. national security all stem from authoritarianism, whether in the form of tyrannies from Russia and China to Iran and North Korea or in the guise of antidemocratic terrorist movements such as ISIS.1 By supporting the development of democracy around the world, we can deny these authoritarian adversaries the geopolitical running room they seek. Just as Russia, China, and Iran are trying to undermine democracies to bend other countries to their will, so too can we contain these autocrats’ ambitions by helping other countries build effective, resilient democracies that can withstand the dictators’ malevolence. Of course, democratically elected governments with open societies will not support the American line on every issue. But no free society wants to mortgage its future to another country. The American national interest would best be secured by a pluralistic world of free countries—one in which autocrats can no longer use corruption and coercion to gobble up resources, alliances, and territory. If you look back over our history to see who has posed a threat to the United States and our allies, it has always been authoritarian regimes and empires. As political scientists have long noted, no two democracies have ever gone to war with each other—ever. It is not the democracies of the world that are supporting international terrorism, proliferating weapons of mass destruction, or threatening the territory of their neighbors.

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

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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.

#### 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>)

III. CAN WE PLEASE STOP SEARCHING FOR SYSTEMIC HOLD-UP?

It is not the purpose of this article to critique the data or methodologies used by researchers who claim that there is no evidence of systemic hold-up. Though questions remain, the data presented in the cited studies finding no empirical evidence of systemic hold-up present plausible descriptions of current markets for products such as smart phones and other connected technology devices. Instead, this critique is directed at the core assumption that runs through each of these studies: that a lack of evidence of systemic hold-up means that hold-up does not represent a threat that justifies policy intervention. In this Part, I argue that, notwithstanding the findings of these studies, patent hold-up in standardized product markets may indeed be a threat that merits preventative policy measures, but that those measures should be directed toward the prevention of well-understood and actionable forms of anticompetitive conduct rather than the economic phenomenon of hold-up.

A. The Absence of Systemic Hold-Up Does Not Mean that Hold-Up Does Not Occur

In a 2017 article, Galetovic and Haber utilize an extended analogy drawn from the field of Mayan archeology to make the point that scholars sometimes ignore the facts in front of them in order to cling to pre-formed (and empirically unsupported) beliefs.92 In this analogical tradition, I will use a hypothetical from public health epidemiology to illustrate a related point. Let us consider the often fatal and highly contagious viral infection Ebola. U.S. public health officials, aware of the dangerous effects of Ebola, might propose the implementation of prophylactic measures to prevent the spread of Ebola in the United States. Such measures might include early detection systems at U.S. hospitals, a network of Ebola experts ready to investigate suspected cases, and potential vaccines for particularly vulnerable populations. All of these measures, of course, would come at a cost. Those opposing the incurrence of this cost might argue that such measures are unjustified because there is no empirical evidence that Ebola is a problem in the U.S. After all, there are no documented outbreaks of the disease, and the only reported cases have been sporadic and linked to other factors (such as health workers returning from abroad). In fact, both lifespan and overall health in the United States have been improving steadily over the past several decades. Most declines in population health can be traced to causes such as tobacco use, poor dietary choices, lack of exercise and the like, but not to Ebola. Thus, because there is no evidence that Ebola outbreaks have occurred in the United States nor any linkage between decreased health and Ebola, and because the overall health of the United States population continues to improve, there is no justification for preventative measures to stop Ebola outbreaks in the United States.

This reasoning is, of course, fallacious and, in the case of a disease like Ebola, dangerously so. In the field of public health, prophylactic measures are often taken before a health risk affects a significant portion of the population. This is the reason for prophylactic measures in the first place. In the field of public health, it is widely recognized that risks arising from any number of environmental and pathogenic sources can be assessed based on laboratory analysis and test cases, without population-level epidemiological data. In fact, once population level data for such outbreaks is available, it is often too late: an epidemic has broken out and millions are at risk. Luckily, it is doubtful that public health officials would apply the fallacious reasoning outlined above to important public health decisions.

Curiously, however, this “Ebola fallacy” has taken root in the debate over patent hold-up. As discussed above, the purported lack of empirical evidence of system-wide patent hold-up is used as a justification for abandoning or forestalling policy interventions aimed at reducing the risk of hold-up. Because hold-up has not been detected at a systemic level, so the argument goes, it must not be a problem. Therefore, measures designed to prevent hold-up from occurring must be the result of gratuitous or over-zealous policy making. The logical fallacies in this argument should be apparent.

In fact, there are numerous examples of anticompetitive conduct by individual firms in markets that are not otherwise overrun by anticompetitive behavior. For example, in 2009, the Federal Trade Commission brought an action against pharmaceutical manufacturer Solvay and a group of generic drug manufacturers for violating Section 5 of the FTC Act by entering into an arrangement whereby the generic manufacturers agreed not to challenge Solvay’s patent on its AndroGel product and not to market their generic versions of AndroGel, in exchange for a significant payment by Solvay to each of the generic manufacturers (a so-called “pay for delay” scheme).94 The Supreme Court held in 2013 that such conduct was actionable and reversed the Eleventh Circuit’s dismissal of the FTC’s claim.95 Yet even in 2009, the year in which the FTC brought its action, of the 68 agreements settling patent disputes filed by pharmaceutical manufacturers with the FTC,96 the FTC estimated that only 19 of these (28%) were potential pay for delay agreements; and by 2014, the year after the Actavis decision, only 21 out of 160 such agreements (13%) were deemed by the FTC likely to represent illegal pay for delay schemes.97 Thus, while pharmaceutical industry patent settlements have attracted significant attention as potentially anticompetitive arrangements, most such settlements do not merit investigation by the FTC.98

An even more telling example is found in the area of mergers and acquisitions. During fiscal year 2016, a total of 1,832 merger and acquisition transactions were reported to the FTC and DOJ under the Hart-Scott-Rodino Antitrust Improvements Act.99 Of these, the FTC challenged only twenty-two (1.2%). 100 Thus, while some anticompetitive mergers may exist, the vast majority are not anticompetitive.101 But the absence of market-wide anticompetitive conduct in the area of mergers and acquisitions hardly excuses the handful of transactions that do present antitrust risks, nor does it suggest that mergers should not be subject to governmental monitoring and, when merited, enforcement.

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.

### 1AC---Cyber Advantage

#### Advantage 2 is Cybersecurity:

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

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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.

#### Only maximizing redundancy and diversity prevents devastating attacks from single vulnerabilities.

Rajiv Shah 20, President of the Rockefeller Foundation. Former administrator of the United States Agency for International Development, graduate of the University of Michigan and the University of Pennsylvania, 2020, “Ensuring a trusted 5G ecosystem of vendors and technology,” https://www.aspi.org.au/report/ensuring-trusted-5g-ecosystem-vendors-and-technology

Why is cybersecurity seen as so critical for 5G networks? Because 5G isn’t just the next natural stage in the evolution of wireless networks. 5G is about more than movie downloads. The likely applications and use cases will become critical to the functioning of governments, companies and society, including cyber-physical and safety-critical systems that will rely on the network. Not only do we need to be concerned about the confidentiality of data and users on the network, but we also need to consider the impacts of an attacker potentially compromising the availability and integrity of the systems, including the risks of the attacker being able to take down the whole network at once.

Australian and many other governments have already identified telecommunications networks as critical national infrastructure that’s essential to the effective functioning of society and therefore requiring additional regulation and attention, and it’s easy to understand why.12 In Australia in recent months, we’ve seen the chaos caused by outages of electronic payment (EFTPOS) systems for a few hours, making it impossible for people to buy basic items because they’re unused to carrying cash.13

Now imagine the impact of a smart city suddenly losing all traffic sensor data and the ability to control traffic lights. An attacker could cause major accidents by maliciously changing the data being sent to traffic lights. In fact, given some of the potential applications enabled by 5G, it could be possible to cause major disruption by more subtle changes. If applications such as remote driving of vehicles rely on ultra-low latency, what would happen if an attacker introduced a small delay to some or all network traffic?

The increasing importance of the network, combined with the increased risk that a cyber breach will cause major real-world consequences, means that the cybersecurity of 5G networks must be a critical consideration, planned and accounted for from the outset. Risk management approaches should also consider the more sensitive functions that are used by national security and law enforcement authorities, such as compliance with legislation on telecommunications interception and data retention, which may create additional security risks.

Building an understanding of 5G security requires integrating security and the 5G network architecture. Both suffer from a major skills gap in Australia14 and globally,15 so we would expect a major shortage of professionals with a detailed understanding of both, exacerbated by the fact that 5G architectures are complex and still evolving.

One example is the debates about the separation of the ‘core’ and ‘edge’ components of a 5G network. Can they be effectively segregated so that a threat in the edge can’t affect the core? Australian authorities say they can’t be effectively segregated, whereas UK authorities appear to be suggesting they can. Without getting involved in the details of the debate here, it’s likely that the true answer is that it depends on architectural choices and complex overall system-level interactions. Concepts such as network slicing will make this even more complex. End users are given effective control and exclusive use of an end-to-end slice of the network, and attention will need to be paid to the security safeguards required to minimise the risk of them escaping their own virtual slice and getting access to other parts of the network.

Vendor trust and security

The issue of vendor trust and security has been prominent in discussions about 5G security. Australia and the US have announced decisions to bar certain vendors, the UK has been formulating a compromise approach,16 (although this seems to be still evolving) and active debates in Europe are seemingly close to reaching a conclusion.

The risks from using a particular vendor can be many and varied. Much commentary on the subject talks about hardware ‘backdoors’ being inserted by a vendor at the factory,17 but that’s probably not the biggest issue. In fact, it’s probably an unhealthy focus that can drive the debate onto specific component manufacturers, when the bigger risks probably come higher up the technology stack.

A much more worrying vendor risk occurs when carriers are critically dependent on vendors for maintaining the quality of service and so give the vendors access to the live network for support and maintenance. The nature of 5G networks as ‘software defined everything’ also means that there are security risks throughout the network that can be hidden in the complexity of software—vulnerabilities that are deliberately introduced by the vendor, or that come from genuine errors and oversights.

Different vendors have different approaches to and cultures of security. The extent to which they use approaches such as secure software development, system integrity validation and third-party supplier checks can be a useful guide, as well as their approach to the reporting and patching of security issues.

However, the control and ownership of vendors, in particular those from nation-states in which companies may be subject to extrajudicial direction, has, to date, been the main criterion used to measure vendor risk.18 This should be broadened to consider all sources of risk. As well as foreign ownership and control, vendor threats can come from insiders, such as rogue employees, even in a vendor from a trusted country, and also depend on the quality of the security culture and secure-by-design approaches used by a vendor. This leads to a spectrum of vendor risk levels that can be used to guide appropriate treatments.

We can sensibly decide to exclude very high risk vendors, but since no vendor will be zero-risk, other mitigation measures will be needed in addition. While, given the criticality of 5G networks, we should impose a high standard of cybersecurity control and risk management across the network even for the lowest risk vendors, additional measures may be needed for intermediate levels. It’s important that carriers understand these requirements and can factor the different security costs into their procurement decisions (so potentially avoiding the incentive to simply choose the cheapest supplier who isn’t excluded due to being very high risk).

Independent testing of vendor equipment may be of some use to assess and mitigate risk (see, for example the Huawei testing facility set up and used by the UK over the past few years), but it’s not just a matter of testing the product from the factory. For any software components, each new release will require retesting, and in a 5G world the software becomes the most critical layer. The public reports from the UK testing facility19 show a series of damning findings and a lack of any assurance that identified flaws are resolved effectively. This means that, at best, this approach can be only a small part of a broader strategy.

In some cases, architectural approaches can be used to mitigate the risk. For example, end-to-end encryption could be used to mitigate the risk that particular network equipment could have unnecessary access to user details and data on the network. However, if we look at the risk of an adversary seeking to completely disable a network, the vendor risk is much greater, as ultimately the end-to-end network works only if every component in the chain is working—RAN, core access and routing.

This means it isn’t just a matter of assessing and using a vendor with an acceptable level of risk. Any farmer will tell you to avoid monoculture—growing just one crop means that one disease can wipe you out overnight. Similarly, if a network is dependent on a single vendor and a vulnerability is found, the vendor becomes untrusted for some reason or the company collapses, the equipment will be almost impossible to replace, and entire networks can become at risk overnight.

Therefore, as well as vendor trust, we need to ensure vendor diversity and redundancy in design.

Operators need to have confidence that multiple vendors’ equipment can interoperate, and ideally have multiple vendors’ systems in service for each major function. This will provide resilience and options to reduce dependence on a particular vendor if circumstances change. In a given carrier’s network, there should be at least two vendors for each key equipment type, and across the market there should be four or more viable suppliers considered acceptable to use. These are bare minimums from a competition policy and resilience perspective; from a long-term resilience point of view, there should be as many vendors as possible, subject to ensuring that each has critical mass and is commercially sustainable in the long term.

#### 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/" \l "_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/" \l "_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/" \l "_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/" \l "_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/" \l "_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.

#### Cracking down on anticompetitive patent licensing reintroduces competition—solves cybersecurity

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IV. LESSONS AND POLICY DIRECTIONS

The above discussion shows that patent protection can have mixed effects on national security: On the one hand, patents can encourage innovation that ensures domestic technological leadership and produces useful security-protective technologies; on the other hand, patents can stifle innovation-producing and cybersecurity-enhancing competition and can stymie the government’s own ability to achieve national security goals. To navigate the complex effects of patent policy on national security, policymakers may consider the following recommendations as guideposts.

A. Anticompetitive Patent Licensing

An area of particular concern should be the use of patents and patent licensing strategies to diminish competition or put up roadblocks to new entrants. Policymakers should certainly not support these abuses of the patent system, and indeed should take steps to prevent them.

In the mobile communications space, patent licensing already plays an outsized role. There are reportedly between 250,000 and 314,000 patents on the smartphone alone, and litigation over cell phone technologies has lasted decades by now. Patents will thus inevitably have an impact on technologies like 5G or the Internet of Things, so the question is what that impact will be.

Patents are supposed to encourage innovation, but research finds that patents alone will not do so; competition is another requirement. A 2015 study considered the impact of competition policy and patent strength on innovation among European firms, measured in terms of research and development spending.183 Initially, the study compared firms in countries with strong patent laws against those in countries with weaker patent laws, and found that patent protection has “no effect on R&D intensity,” a conclusion consistent with multiple other studies.184 However, the study found that when a major competition reform went into effect, strong-patent countries enjoyed a boost in innovation greater than that experienced in weak-patent countries.185 In other words, strong patent protection is complementary to strong competition; the former does not promote innovation without the latter. The practical import of this research is that patent protection is beneficial up to a point, but to the extent that patents—or, more commonly, legal strategies involving patents—overreach to suppress competition, that overreach should be cause for concern.

Yet today, strategic patent behavior contrary to competition is prevalent. The Federal Trade Commission’s ongoing lawsuit against mobile phone chip manufacturer Qualcomm, for example, challenges Qualcomm’s practice of refusing to sell chips to any phone manufacturer who does not first pay a hefty sum for patent licenses—even if the manufacturer does not actually have need for all those licenses.186 To the extent that Qualcomm’s “no license, no chips” practice is in fact anticompetitive—that is what the courts overseeing the case will decide—monopolization of that market could substantially harm cybersecurity for the reasons noted above.187 The company’s about-50% market share in the advanced mobile chip market 188 means that there is a virtual monoculture of Qualcomm chips already, and there are ongoing concerns about security vulnerabilities in those chips.189 It is thus puzzling that some have opposed the FTC litigation on the grounds that it is making the United States “less competitive in the global 5G arms race.”190 As one scholar explains, this rhetoric “smacks of ‘national champion’ thinking” and ultimately fails to ensure that “national security warnings are being balanced against competitive imperatives.”191

With respect to emerging information technologies, policymakers should be concerned that a leading firm could undertake similar patent licensing strategies to control the market. Indeed, the district court in the Qualcomm litigation found that Nokia and Ericsson already “have imitated Qualcomm’s practice” because it is “more lucrative.”192

### 1AC---Plan

#### Plan: The United States federal judiciary 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---Solvency

#### Solvency:

#### The plan strengthens FRAND effectiveness while enabling SEP holders to capture appropriate royalties---strikes the best competition-innovation balance.

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 pre- vent 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.

#### Threatening antitrust liability lures SSO’s into adopting best practices.

Lemley & Shapiro 13, \*Mark Lemley is the William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business, University of California at Berkeley and a Senior Consultant at Charles River Associates; (2013, “A SIMPLE APPROACH TO SETTING REASONABLE ROYALTIES FOR STANDARD-ESSENTIAL PATENTS”, (https://faculty.haas.berkeley.edu/shapiro/frand.pdf)

Under our approach, many of these issues should become moot, since the patentee cannot obtain an injunction (or transfer the patent to someone who can) against a willing licensee, and since competitors are not involved in jointly setting the reasonable royalty rate. If SSOs set clear, reasonable rules following the best practices we recommend, and parties follow those rules, there should be little or no need for antitrust to intervene. Indeed, even the risk of non-disclosure of a patent is lessened, since the patentee has committed to license its essential patents whether or not it discloses them. For the most part, the rules we have described are self-executing, meaning that even if a party tries to break the rules set by the SSO there still may be no need for antitrust to intervene. Thus, we suggest that parties who abide by these procedures—patentees, implementers, and the SSOs themselves—should be immune from antitrust liability for activities that merely follow those rules.107 They have entered into an arrangement that is on balance good for competition, one that allows patentees to receive reasonable royalties but prevents holdup and reduces the risk of monopolization by trickery.

The fact that antitrust remains a last resort available when SSOs don’t follow best practices may have two practical benefits, however. First, under our approach the promise of avoiding the risk of antitrust liability will be a powerful incentive for both SSOs and patent owners to adopt the best practices we propose. Second, the risk of antitrust liability may be relevant when an individual patentee wants to adopt best practices but the SSO governing the standard has not yet done so. We propose that a patentee that unilaterally commits to the FRAND procedures we describe here should be immune from antitrust liability for following these procedures.108 A patentee’s unilateral binding commitment to arbitration could be enforced whether or not it was elicited by an SSO. Thus, just as the prospect of antitrust immunity might lure SSOs to adopt best practices, it might also lure patentees to implement those practices even if the SSO has not done so. Given the large number of standard-essential patents based on preexisting standards,109 and given that SSOs tend to update their IP rules rather slowly,110 this is not a small matter.

#### Only antitrust enforcement creates a consumer-action feature that counterbalances SSO’s conspiratorial incentives---private action fails.

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>)

2. Why Antitrust Enforcement Is Necessary

Some SSO members have an interest in ensuring that the SSO takes steps to minimize the potential harms from the SEP holders’ monopoly power, and this undoubtedly explains in part why most SSOs have adopted FRAND policies or similar requirements. But, as shown in the economic model in the Appendix,73 SSOs cannot in general be counted on to adopt effective FRAND policies. The bases for this conclusion, which is central to our argument for the applicability of Section 1 to SSO FRAND rules, can be summarized as follows.74

First, the SSO members collectively have an interest in permitting SEP holders to charge supracompetitive royalties that elevate the downstream price of compliant devices to the monopoly level. Doing so will enable the members in aggregate to collect increased revenues from consumers, and thus to generate increased profits that in theory could be shared by all the members. In other words, supracompetitive royalties can enrich industry participants as a group at the expense of final consumers. This fact alone should serve as a clear and strong signal regarding the dangers of counting on SSOs to implement effective FRAND policies: if the SSO members negotiate efficiently, the outcome will be just as bad for consumers as if the members agreed to fix downstream prices.75 The fundamental problem is that final consumers are not at the table when the SSO rules are negotiated.

Second, SSO members that own SEPs but earn little or no profits as implementers have a powerful self-interest in being able to exercise the ex post monopoly power associated with their SEPs. Because SSO policies are usually determined by a consensus process, these members will likely be able to block the adoption of fully effective FRAND policies. Moreover, these SSO members often have the greatest interest in SSO patent policies. Since much of their income may be attributable to patent licensing, they can be expected to devote substantial resources to block the adoption of FRAND policies that effectively prevent patent holdup.

Third, even SSO members that earn significant profits as implementers may have mixed incentives if they also own SEPs, which can also lead to weak or in-effective FRAND rules. In the Appendix, we show that, if the requisite share of votes in the SSO are cast by firms whose share of SEP royalties is at least as large as their share of downstream profits, and if these firms can coordinate their voting over the FRAND rules, then an SSO unconstrained by antitrust laws will establish FRAND rules leading to an outcome no better for consumers than would result from an integrated monopolist controlling all SEPs and all downstream sales.76

Fourth, even SSO members that are downstream implementers and own few, if any, SEPs may have only a modest interest in promoting effective policies to restrict ex post opportunism. Because all implementers will be subject to the opportunism, all of them will face increased licensing costs, and therefore will likely be able to pass on most or all of the increased costs to their customers.77 Furthermore, these implementers might not be especially active or effective in the standard-setting process for free-riding or public-good reasons, especially if SEP royalties constitute only a relatively small portion of the costs of their standard-implementing products. Public choice theory predicts that the highly motivated SEP holders are likely to have the greatest influence over patent policies.

Empirical evidence bears out these concerns. As a starting point, we find it striking that SSO FRAND rules are almost always quite vague.78 Notably, SSOs in which SEP holders are more prevalent tend to have weaker FRAND rules.79 Further, to our knowledge, SSOs have made almost no effort to enforce their FRAND rules and have, instead, left enforcement efforts to others.80 This evidence raises serious doubts about the effectiveness of the existing FRAND rules in preventing ex post opportunism.

# 2AC

## Ad1

### 2AC---IL---Innovation

#### The monopolization of essential 5g technology destroys innovation— Qualcomm is refusing to share their technical knowledge and taxing new innovations which destroys the market--that’s Moss and Schwartz.

### 2AC---LD---Innovation Incentives

#### The link is wrong:

#### 1---FRAND is voluntary---SEP holders knowingly develop technology and commit to license on fair terms.

#### 2---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.

#### 3---under-compensation is empirically denied.

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)

Furthermore, a considerable amount of standardization activity has been coming from groups that prohibit the participating companies or individuals from collecting SEP royalties—so-called “RF-RAND” (royalty-free RAND)435 and “RAND-Zero” (RAND with zero royalties) groups or groups that rely on promises not to assert essential-patent claims436—as well as from SSOs that permit RAND licensing but whose members in practice collect royalties on few, if any, standards.437 The availability of these important, royalty-free technology sources is a factor in evaluating the threatened “disincentivization” and massive resistance against the policies reflected in the IEEE 2015 Patent Policy update.

Finally, the disincentivization argument is pure ipse dixit, for no analysis of comparative rates of return on alternative investment opportunities is offered. Nor is any empirical support provided.438 The rhetoric of “Incentivize me or I’ll defect” is completely unsupported and therefore not credible.

### 2AC---LD---Qualcomm Specific

#### Turn---competition sharpens Qualcomm’s incentives to innovate, and royalties aren’t key.

Kattan 19, \*Joseph Kattan is a partner in Gibson, Dunn & Crutcher’s Washington, DC office.  His practice focuses on antitrust litigation, counseling, and enforcement agency matters; (February 7th, 2019, “The Qualcomm Case and U.S. National Security”, http://actonline.org/wp-content/uploads/The-Qualcomm-Case-and-National-Security\_Final.pdf)

Qualcomm goes further and claims that an FTC victory will undermine its incentive to invest in 5G technology and cede the next generation of wireless telecommunications technology to Huawei. According to Qualcomm, requiring it to comply with U.S. antitrust laws will result in a national security calamity. One of its serial defenders goes so far as to say that the FTC case poses an “existential harm” to Qualcomm and that an FTC victory would bring about “a monumental calamity for the U.S. economy (consumers and businesses) and national security.”26 The evidence that he offers in support of these claims? None, which is understandable given that Qualcomm has plenty of incentive to invest in 5G technology and will continue to have that incentive if the FTC prevails. Let’s examine the evidence.

In 2018, Qualcomm’s modem chip business earned $3 billion in pre-tax profits on sales of $17.3 billion. The modem chip business achieved this enviable level of profitability even though Qualcomm directs its massive licensing royalty revenues and income to a separate licensing subsidiary. In other words, any effect of the FTC case on Qualcomm’s royalties will not bear on the company’s modem chip business. And Qualcomm expects its chip business to become even more profitable as 5G technology takes hold. Qualcomm’s CEO, Steve Mollenkopf, recently told securities analysts that 5G “represent[s] a significant opportunity for Qualcomm to expand revenue and earnings.”27 Its president, Cristiano Amon, said that “we expect 5G to be a significant expansion, even on existing units, both in revenue and earnings for QCT [Qualcomm’s modem chip business].”28 As is now well known, 5G is expected to transform a host of industries beyond the mobile phone market to create a myriad of new always-connected products and services. These new business opportunities will justify a high level of investment in 5G regardless of what happens in the FTC case.

Given the opportunity for profit expansion in what is already a highly profitable modem chip business, it is implausible that Qualcomm will scale back investments in 5G technology if it is required to play by the same rules as all other companies and stop forcing customers to take licenses to extinguished patents. Qualcomm’s modem chip business alone will generate sufficient profits to maintain the incentive to invest in R&D even if Qualcomm earns zero licensing revenues

, and no one is contemplating a world in which Qualcomm’s licensing business will go away. In the past three fiscal years, this business has averaged over $5 billion per year in pre-tax profits.29

One need look no further than at the other leading U.S. 5G innovator to see the specious nature of Qualcomm’s claims. Intel has invested in 5G for a number of years even though it earns no royalty revenues whatsoever and its modem chip sales have been, and are expected to remain, a small fraction of Qualcomm’s. Intel has achieved a number of firsts in the 5G race, including the first 5G interoperable device, the first live 5G public network, the first global 5G modem, and the first 5G mm-wave call.

Rather than impairing Qualcomm’s incentives to innovate, having to compete on the merits will sharpen them. Indeed, it was competition from Intel that led to the adoption of the most innovative aspect of 5G technology. Over Qualcomm’s objections, Intel successfully promoted the adoption of millimeter-wave technology in 5G. Millimeter-wave technology is what makes 5G revolutionary. It is this technology that is bringing about the phenomenal speeds and low latency of 5G communications that will proliferate 5G technology beyond the mobile phone space. We would not be enjoying the benefits of this technology had Qualcomm had its way, either when it tried to expel Intel from the market or when it fought to exclude millimeter wave technology from the 5G standards.

The notion that Qualcomm needs to rake in 25% of all intellectual property royalties on all of the products on the planet to justify investing in 5G or even merely to survive, as its more overwrought advocates allege, is self-evidently absurd. It is no wonder then that its claims of threats to the national security of the United States, or even merely to Qualcomm’s own incentives to invest in R&D, are not accompanied by any relevant financial facts or analysis. Similarly, the claim that Qualcomm is all that stands between U.S. leadership and Chinese domination in 5G is equally bereft of factual support.

### 2AC---!---Democracy

#### Backsliding creates a confluence of escalatory factors---state collapse, civil war, WMD terrorism---that’s Diamond.

#### Anticompetitive patent licensing cedes technical leadership to China---that allows them to shape global parameters for facial recognition, totalitarian internet governance, and data intrusions---causes global backsliding---that’s Drew and Kendall-Taylor.

### 2AC---!---Warming

#### Warming causes extinction---adverse weather, drought, famine, and heat stroke threaten planetary habitability---that’s Huseien. 5G smart cities solve via emissions monitoring and revolutionizing efficiency

## Ad2

### 2AC---!---Cyber

#### Cyber conflict goes nuclear---critical infrastructure causes tit-for-tat escalation, and ill-established redlines and use-it-or-lose-it mentality pressures advisors to assume the worst---that’s Klare.

### 2AC---AT: No Patent Holdup---Prodict

#### Patent holdup is overwhelmingly empirically supported---prefer thousands of peer-reviewed 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.

#### Their ev comes is funded by SEP holders with vested interests in falsely debasing the patent holdup theory.

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)

Patent holdup has proven one of the most controversial topics in innovation policy, in part because companies with a vested interest in denying its existence have spent tens of millions of dollars trying to debunk it. Notwithstanding a barrage of political and academic attacks, both the general theory of holdup and its practical application in patent law remain valid and pose significant concerns for patent policy. Patent and antitrust law have made significant strides in the past fifteen years in limiting the problem of patent holdup. But those advances are currently under threat from the Antitrust Division of the Department of Justice, which has reversed prior policies and broken with the Federal Trade Commission to downplay the significance of patent holdup while undermining private efforts to prevent it. Ironically, the effect of the Antitrust Division’s actions is to create a greater role for antitrust law in stopping patent holdup. We offer some suggestions for moving in the right direction.

### 2AC---Solvency---Cybersecurity

#### Plan reintroduces cybersecurity competition to the market---that’s key:

#### 1---monopolies irresponsibly divest from product security because market position is secured.

#### 2---multiple providers enables heterogenous network development that is insulated from catastrophic attacks---that’s Duan.

## T

### 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.

#### 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.

#### Prefer our interp:

#### Overlimiting---rule of reason is core topic controversy---their interp kills the wealth of solvency advocates forwarding substantial changes in the form of standards.

#### Aff ground--- the rule of reason counterplan is OP— solves all affs with clear net benefits—that disincentivizes case neg writing and rigs the game

#### No limits nor ground loss:

#### 1---there are tons of link cards for innovation and politics that say *any* antitrustchange can trigger.

#### 2---functional limits solve---‘substantially increase’ and ‘expand scope’ mandate large shifts from the status quo.

#### Reasonability---competing interpretations cause a race to the bottom and substance crowd-out.

## St

## Section 5 CP

### 2AC---AT: Section 5 CP

#### Perm do both.

#### Perm do the plan and counterplan over different antitrust. Insert a text.

The Federal Trade Commission should determine that “unfair methods of competition” pursuant to Section 5 of the FTC Act prohibits anticompetitive business practices that restrict competition in Information Technology.

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

#### Must compete via text and function---otherwise, negs win every debate on word PICs and are incentivized to go for process nonsense that undermines clash

#### Perm do the CP---it expands the FTC act which is a core antitrust law.

#### 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.

#### Rulemaking fails---notice and comment delays and corrupts decision making.

Harold Feld 21, Senior Vice President for Public Knowledge, one of the nation’s premier consumer advocacy organizations working at the intersection of copyright, telecommunications and the Internet, 6/23/2021, “Fake Comments Cause Real Harm: How the Public Comment Process Was Corrupted,” https://promarket.org/2021/06/23/fake-public-comment-process-corrupted-net-neutrality/

At the end of April, the [Administrative Conference of the United States](https://www.acus.gov/) (ACUS) started a proceeding on how federal agencies should deal with “[mass, computer-generated, and fraudulent comments](https://www.acus.gov/research-projects/mass-computer-generated-and-fraudulent-comments).” Shortly thereafter, the NY Attorney General’s Office (NY AG) [released the results](https://ag.ny.gov/sites/default/files/oag-fakecommentsreport.pdf) of its comprehensive three-year investigation into perhaps the most extensive case of fraudulent comments in US regulatory history—the filing of more than 8.5 million fraudulent comments during President Donald [Trump’s Federal Communications Commission’s (FCC) proceeding](https://apnews.com/article/net-neutrality-north-america-us-news-ap-top-news-ajit-pai-e1eabbdf1525477dbaacf1a482b57ed4) to repeal network neutrality in 2017. But while both the ACUS [preliminary report](https://www.acus.gov/report/mass-computer-generated-and-fraudulent-comments-draft-report-4221) and the NY AG report discuss the same phenomena, the two could not be further apart in terms of perspective. Whereas the NY AG report sees special interests hiring companies to generate fraudulent comments using stolen identities as corrupting the regulatory process and an assault on democracy, the ACUS report regards this as a mere nuisance to the expert agency—no different really from when actual citizens file “mass comments.”

ACUS is an independent federal agency that issues reports “to [recommend improvements to administrative process and procedure](https://www.acus.gov/administrative-conference-united-states-acus).” These recommendations carry considerable weight with administrative agencies, Congress, and the courts. If the ACUS proceeding recommends treating fraudulent comments as a mere inconvenience for agencies, rather than a serious issue that requires significant penalties for violators, this will have significant impact on how Congress and the courts approach the issue. If ACUS recommends treating mass comments and computer-generated comments by human beings as imposing significant costs to agencies while providing little value, one of the most important mechanisms of public participation in the modern administrative state will be minimized and trivialized—to the great detriment of our rulemaking institutions and their perceived legitimacy.

Unfortunately, reading the ACUS report and [recommendations](https://www.acus.gov/sites/default/files/documents/Managing%2520Mass%252C%2520Computer-Generated%252C%2520and%2520Malattributed%2520Comments%2520-%2520For%2520Plenary%2520%252806-02-2021%2529.pdf) (as well as [this article](http://cardozolawreview.com/wp-content/uploads/2021/01/42.1.1.Herz_.pdf) by one of the Committee members, cited approvingly throughout the ACUS report), the real problem has nothing to do with democracy or anything so fundamental. The *real* concern is what a terrible waste of agency resources it is to consider “non-technical” and “non-substantive” comments. The ACUS report (and [most recent](https://www.acus.gov/sites/default/files/documents/Managing%2520Mass%252C%2520Computer-Generated%252C%2520and%2520Malattributed%2520Comments%2520-%2520For%2520Plenary%2520%252806-02-2021%2529.pdf) draft recommendation) goes so far as to rename fraudulent comments as “malattributed,” deeming “fraud” as far too dramatic for something that (in the opinion of the authors) matters little in the grand scheme of things. According to the ACUS committee report, expert agencies are not swayed by these tiresome expressions of individual preference—whether properly attributed or not. It is the sort of report and recommendation one could imagine as a parody of technocratic elitism, were the authors not so clearly earnest in their thesis and dismissive of concerns such as legitimacy and the impact on democratic institutions.

“MASS COMMENTS PROVIDE AN IMPORTANT ELEMENT OF REAL DATA ABOUT HOW PEOPLE AND SMALL BUSINESSES PERCEIVE THE LIKELY IMPACTS OF AGENCY POLICY CHOICES, AND THE OVERALL POPULARITY OF THESE CHOICES.”

The NY AG report provides some empirical evidence that directly refute the ACUS assumptions and conclusions. The NY AG report also provides much more useful recommendations. I will briefly run through some of the more significant arguments by ACUS, contrasting these with the evidence from the NY AG report that comments from actual human beings (even when simply submitting a computer-generated statement of support or opposition) have genuine value whereas “malattributed” comments cause real harm and undermine the institutions of self-governance.

ACUS Asks: What’s the Harm in Fraudulent Comments?

ACUS examines the impact of mass comments and fraudulent comments from the perspective of professional staff at expert agencies such as the FCC and the Environmental Protection Administration. As a consequence of this perspective, the ACUS report’s authors conclude that mass comments of any sort—whether submitted by actual people or by a few companies using stolen identities—don’t really influence the outcome of proceedings that much. The ACUS authors reach this conclusion primarily by surveying agency staff and relying on the “expert” qualification of the agency. While the ACUS report does cite literature discussing things such as the legitimacy conferred by popular participation, the expert committee of scholars and representatives from expert agencies express their skepticism of the concept: “If comments contain information that agencies may not or do not consider—including expressions of preference—it is not clear that the process will ultimately enhance perceptions of procedural fairness.” The authors also suggest that producing “high quality, effective government decision making” is another source of legitimacy. Excluding mass and computer-generated comments in addition to “malattributed” comments might therefore *increase* legitimacy by improving the agency’s decision-making processes.

Concluding that mass comments of any variety have virtually no real impact on the regulatory process makes it simple for ACUS to group comments written by real people that simply express a basic idea (“mass comments”), comments generated by computer when individuals visit a website and click a button (“computer-generated comments”), and comments submitted using stolen identities (“fraudulent comments” or “malattributed comments”) as all belonging together in the same category. The objective of reform, therefore, becomes how to prevent any comments in any of these categories from perturbing the meditations of the expert agencies or otherwise draining agency resources. Why bother to distinguish between genuine comments and fraudulent comments if neither sets of comments play any legitimate role in determining the outcome?

Indeed, the ACUS report expresses such confidence in the conclusion that these comments have no impact that the report questions whether any of the federal statutes criminalizing fraudulent, or even simply false, statements really apply when someone forges someone else’s name and files this document in an agency proceeding. As the ACUS report explains, the false or fraudulent statements must be material to a government proceeding, and since these comments don’t really have any effect on outcomes, the ACUS report concludes they do not qualify as “material” under the relevant federal statutes.

Fraudulent Comments Hurt the Rulemaking Process, Harm Those Whose Identities Are Stolen, and Erode Trust in Institutions of Governance.

The NY AG report provides a much-needed empirical and philosophical rebuttal to the ACUS report. First and foremost, mass comments work in a variety of ways. Experts at agencies no doubt genuinely believe mass comments make no difference, just as doctors [genuinely believe](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563313/#:~:text=We%252520found%25252C%252520as%252520have%252520others,that%252520accepting%252520samples%252520is%252520ethical.) that being showered with [money and gifts](https://www.statnews.com/2020/12/04/drug-companies-payments-gifts-affect-physician-prescribing/) from [drug companies](https://www.npr.org/sections/health-shots/2016/03/17/470679452/drug-company-payments-mirror-doctors-brand-name-prescribing) has no impact on how they write prescriptions. But even accepting this self-assessment, agency professionals that choose to ignore mass comments rather than genuinely engage with them ignore important raw data that a dedicated expert agency staff would take the time to analyze. Mass comments provide an important element of real data about how people and small businesses perceive the likely impacts of agency policy choices, and the overall popularity of these choices. While this may not be determinative, it is not something that can be casually ignored.

Yes, technology has made it much easier for individuals to generate such comments, but individuals are also bombarded with many more distractions and invitations to comment than they can plausibly address. If millions of individuals decide that *this specific* policy is worthy of their attention, that is real information. Bad actors deliberately polluting this process are no more harmless than studies relying on falsified data. But either way, the statement of agency expert staff that they simply ignore mass comments is more a confession of dereliction of duty prompted by arrogance than a meritorious commitment to meritocracy.

“FRAUDULENT COMMENTS MAKE AN ACCURATE ASSESSMENT OF THE REACTION TO NEW POLICIES MUCH HARDER, THUS DISTORTING PUBLIC DEBATE AND COMPROMISING POLITICAL ACCOUNTABILITY AND OVERSIGHT BY ELECTED OFFICIALS.”

More importantly, expert analysis is simply one element of rulemaking. Our system of representative democracy requires democratic accountability at some level—even in rulemaking. This occurs via appointment of political appointees and through Congress, which can disapprove an agency rulemaking through the Congressional Review Act or through legislation. Unlike agency experts, political appointees and members of Congress generally do care about the popularity of specific proposals. Experts and academics may consider this a feature that undermines reasoned, evidence-based decision-making, but it is crucial to the structure of our representative form of government. Mass comments can also bring an issue to the attention of the press, and if genuine comments overwhelmingly support one position over another this will frame the debate.

This is why, according to the NY AG investigation, several of the largest internet service providers (ISPs) were willing to spend over $8 million to flood the record with comments supporting repeal of net neutrality to provide “cover” for the FCC, and why the companies hired to produce these comments went to such pains to make them appear real by stealing the identities of real people. This real passion is also why states such as California have passed their own net neutrality legislation. Even if regulators don’t make decisions by counting comments, they should at least understand the likely consequences of their actions. Fraudulent comments make an accurate assessment of the reaction to new policies much harder, thus distorting public debate and compromising political accountability and oversight by elected officials.

Conversely, turning a blind eye to the corruption of the public comment process—or worse, lumping together genuine mass comments with fraudulent comments—corrupts the rulemaking process. This, in turn, undermines faith in the legitimacy of the rulemaking process, which in turn undermines the legitimacy of the rule of law. Few things can make citizens feel more disconnected from their own government than having the rulemaking institutions of that government treat citizen participation as no better than a fraud. In a time when we are seeing the violent fruits of cultivating alienation, cynicism, and helplessness on the part of the public, the ACUS report is at best tone deaf and at worst a confirmation that “government bureaucrats” are wholly captured by the special interests they are supposed to regulate. As the NY AG report noted: “When the regulatory process is corrupted, citizens may view the system as rigged or broken, which undermines their faith in the proper working of government.”

Finally, the NY AG report documents the feelings of anger and violation from real people when they discover that special interests have stolen their identities to further their corporate agenda. The NY AG report contains a sample of responses from people who found out their names were used for fake comments supporting net neutrality repeal. “I’m sick to my stomach knowing that somebody stole my identity and used it to push a viewpoint that I do not hold.” “I find it extremely sick and disrespectful to be using my deceased dad to try to make an unpopular decision look the opposite.” “This is terrifying. Who knows what else has been said falsely under my name?” “We feel robbed of our rights.” The impact on real people requires lawmakers to take the problem of fraudulent comments seriously rather than simply treat them as a nuisance.

No one can doubt that our complicated world requires complex and nuanced policies. Agencies must routinely balance potential harms against potential benefits. Doing so requires expertise in a wide range of subjects ranging from biological sciences, complex system analysis and economics. But the need for expertise does not make mass comments irrelevant. To the contrary, mass comments provide real data on important and highly relevant matters such as public perception. They can shine a spotlight on potential impacts on specific communities—especially those communities that lack regular representation in the regulatory process. When special interests flood regulatory proceedings with fraudulent comments, it is more than a mere inconvenience and drain on agency resources. Not only does it corrupt the broader policy process, it undermines faith in the institutions of government. As the NY AG report shows, fraudulent comments create real harms. ACUS needs to recognize this.

#### Counterplan collapses innovation.

Maureen K. Ohlhausen 21, American lawyer who is a former Commissioner of the Federal Trade Commission, JD from George Mason University, 8/12/2021, “Pushing the Limits? A Primer on FTC Competition Rulemaking,” https://www.uschamber.com/sites/default/files/ftc\_rulemaking\_white\_paper\_aug12.pdf

A. Legislative Rulemaking on Competition Issues Runs Contrary to the Purpose of Antitrust Law

The core of U.S. antitrust law is based on broadly drafted statutes that, at least for violations outside the criminal conspiracy context, leave determinations of likely anticompetitive effects, procompetitive justifications, and ultimate liability up to fact-finders charged with highly detailed, case-specific determinations. Indeed, it is inherent in the “rule of reason” – the default legal framework for any antitrust claim not falling within the “red zone” of per se prohibited conduct – that the inquiry is deeply rooted in the history, effects, and context of each particular industry and practice being challenged. Although no fact-finder is infallible, this requirement for highly fact- bound analysis helps to ensure that each case’s outcome has a high likelihood of preserving or increasing consumer welfare. As detailed above, the FTC’s administrative process is in some ways the pinnacle of this model, combining the concept of detailed case-specific factual inquiry with administrative law judges focused entirely on competition and consumer protection issues. On appeal, an ALJ’s determinations are evaluated first by another panel of typically seasoned, well- advised antitrust experts – the Commission itself – and the final determinations of the Commission are entitled to significant deference should they be challenged in the Courts of Appeal.

Legislative rulemaking would replace this quintessential fact-based process with one-size- fits-all bright-line rules. Competition rules would function as per se-like prohibitions, but based on notice-and-comment procedures rather than the broad and longstanding legal and economic consensus usually required for per se condemnation under the Sherman Act. Past experience with similar regulatory regimes should give reason for pause here: the Interstate Commerce Commission, for example, failed to efficiently regulate the railroad industry before being abolished with bipartisan consensus in 1996, by some estimates costing consumers as much as several billion 17 (in today’s dollars) per year in lost competitive benefits.74 As FTC Commissioner Christine Wilson observes, regulatory rules “frequently stifle innovation, raise prices, and lower output and quality without producing concomitant health, safety, and other benefits for consumers.”75 By sacrificing the precision of case-by-case adjudication, rulemaking advocates are also losing one of the best tools we have to account for “market dynamics, new sources of competition, and consumer preferences.”76

## Congress CP

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

#### Permutation do the counterplan.

#### Permutation do both shields or the counterplan links to the net benefit. Courts can point to the counterplan as justification for the aff.

Durling 17, \*James Durling, a member of the Yale Law School J.D. Class of 2018; (May 1st, 2017, “May Congress Abrogate Stare Decisis by Statute?”, https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute)

As suggested in the Introduction,[66](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref66) there may be very good reasons to treat statutory stare decisis differently from constitutional stare decisis.[67](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref67) For example, in the statutory context Congress already has the power to overrule Supreme Court decisions by amending the statute in question[68](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref68)—a power it does not have in the constitutional context. But perhaps more importantly, Congress may also have the power to prescribe rules of statutory interpretation for courts [69](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute#_ftnref69)—a power it probably does not have over constitutional interpretation.[70](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref70) Congress has enacted interpretive rules in Chapter 1 of the U.S. Code, also known as the Dictionary Act, where it prescribes “Rules of Construction.”[71](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref71) Although most of these rules of interpretation might be more accurately described as definitions,[72](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref72) some involve more methodological rules of grammar.[73](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref73) In addition, Congress has codified a few other interpretive rules in scattered sections of the U.S. Code.[74](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref74) Perhaps these interpretive rules themselves violate separation of powers, but such a ruling would certainly conflict with current understandings of Congress’s power over statutory interpretation.[75](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref75) This Essay does not provide an independent defense of interpretive rules; it merely notes that current practice views them as compatible with the judicial power.[76](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref76)

If Congress may overrule decisions interpreting statutes and if it may prescribe rules of statutory interpretation, Congress would also appear to have the power to prescribe a rule of interpretation requiring courts to ignore a past Supreme Court decision. Similar to Paulsen’s approach, this is not to say that courts could not look to the reasoning of prior Supreme Court cases as persuasive authority, but they could not follow the “super-strong presumption” of stare decisis famously invoked in past cases.[77](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref77) Put another way, courts would interpret federal statutes as courts in civil law jurisdictions do.[78](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref78)

In addition, beyond limiting the Court from citing the narrow interpretive holding of a case, Congress might also prevent it from citing its opinions as precedent for the use of interpretive canons, a phenomenon some have called “methodological stare decisis.”[79](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref79) The most famous example of methodological stare decisis is Chevron, which is both a statutory precedent about the meaning of “stationary source” in the Clean Air Act[80](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref80) and a methodological precedent regarding judicial deference toward agency interpretations of statutes.[81](https://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute" \l "_ftnref81) If Congress banned the Court from citing Chevron, then it would eliminate both the narrow holding and the broader canon—at least as binding precedent.

#### Courts circumvent---particularly on antitrust.

Newman 19, University of Miami School of Law professor and a former attorney with the U.S. Department of Justice Antitrust Division. (John, 4-5-2019, "What Democratic Contenders Are Missing in the Race to Revive Antitrust", *Atlantic*, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/)

But the federal courts represent a massive stumbling block for any progressive antitrust movement. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions. But no matter its content, enforcing a law requires persuading a judge. When it comes to U.S. antitrust laws, federal judges—not Congress, and not regulatory agencies—are the ultimate arbiters. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files all its cases in federal courts. And although the Federal Trade Commission (the other) can decide cases internally, the inevitable appeals eventually end up in court as well. No matter how strongly worded a law may be, ideologically driven judges can usually find a way around enforcing it. The cyclical history of U.S. antitrust law is proof that judges wield nearly limitless institutional power in this area. Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to chip away at its effectiveness. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades. But starting in the late 1970s, conservative judges began to erode the Clayton Act. Today, megamergers among competitors such as Bayer and Monsanto barely raise eyebrows. So-called vertical mergers, which combine suppliers and their customers, are now all but immune from antitrust enforcement—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up. Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been eviscerated. By the 2000s, the ideas of the conservative Chicago School had become mainstream in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a receptive audience in the federal judiciary. Among insiders, Robinson-Patman is now known as “zombie law.” It remains on the books, but regulators no longer bother trying to enforce it. If Democrats want to change antitrust law, they will first and foremost need to change the judges who apply it. Yet none of the 2020 contenders championing antitrust reform have even mentioned the possibility of appointing progressive antitrust thinkers to the bench. Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power. Recognizing the high stakes, the Republican Party has gone to great lengths to appoint conservative antitrust experts to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing. And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017. Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench. Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the central role judges play in our political system. There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. Real antitrust reform will require more than regulatory and legislative tweaks; it will require the right judges.

#### Statutory changes fail. Courts won’t listen and will continue to apply the Ninth Circuit’s precedent.

Widiss 20, Deborah A. Widiss is Professor of Law, Associate Dean for Research and Faculty Affairs, and Ira C. Batman Faculty Fellow at the Indiana University Maurer School of Law; (Spring 2020, “Communication Breakdown: How Courts Do — and Don’t — Respond to Statutory Overrides”, https://judicature.duke.edu/articles/how-courts-do-and-dont-respond-to-statutory-overrides/)

Courts and Congress are, at times, engaged in a kind of ongoing “conversation” about statutory law. Congress has exclusive power to enact statutes — but when statutory language is unclear, or doesn’t explicitly resolve a factual question that arises under a statute, courts must resolve the issue through statutory interpretation. Congress then may choose to “override”1 judicial interpretations with which it disagrees (so long as the judicial decision is not constitutional in nature) by amending the law at issue or enacting a new law. The power to enact such overrides is core to maintaining democratic accountability for policy. Enactment of an override, however, is not the end of the story. As new cases arise, courts must assess how the new statutory language has changed the prior legal landscape. And so the exchange continues.

Earlier commentators, including many well-respected judges, have offered thoughtful suggestions for facilitating communication from courts to Congress about problems in statutes that Congress might want to address.2 My research explores the opposite question. How effective is communication from Congress back to courts? The answer is: Not very.3 Even when Congress enacts overrides, courts frequently continue to follow the prior judicial precedent.

This is likely due more to information failure than willful disregard of controlling law. Nonetheless, a key aspect of the separation of powers is broken.

My research shows that when the Supreme Court overrules a prior decision, lower courts quickly decrease their reliance on the old precedent and begin to apply the new rule. By contrast, when Congress enacts an override, citation patterns to the prior precedent change very little. Even a decade later, many overridden precedents, or what I have called “shadow precedents,” are still routinely cited as controlling precedent.

This surprising finding may be partially explained by the coding protocols used by leading legal research services. When assessing the viability of precedent, both Westlaw and Lexis consider primarily judicial signals rather than legislative signals; accordingly, it can take several years before a decision is “flagged” as having been affected by later legislation. Even when aware of an override, legal actors sometimes fail to follow the new statutory standard. Luckily, this problem is easy to address. Courts need to start their research with the statutory language itself, rather than a judicial gloss on the statutory language. Sometimes there are difficult interpretive questions regarding the scope of an override, but often it’s just a matter of carefully considering whether the operative language supersedes any aspect of a prior interpretation. By taking this straightforward approach, courts can help ensure that overrides can play their expected role in our tripartite system of government.

Courts Often Rely on Overridden Precedents

Congressional overrides are typically described as the legislative equivalent of a judicial overruling. My study with Professor Brian Broughman was the first to empirically test this characterization. We constructed a database of Supreme Court decisions that had been overruled by later Supreme Court decisions; Supreme Court decisions that had been overridden by later statutory amendments; and a “control” group of Supreme Court decisions that were similar (in terms of subject matter, year of decision, and other factors) to the overruled and overridden decisions but that had not been repudiated by subsequent judicial or legislative actions.4 We then used Lexis’s Shepard’s service to assess how often each Supreme Court case in our database was cited by other courts, generally looking at a 15-year window that spanned from five years prior to the superseding “event” — either overruling or overriding — to ten years after it.5 Although citation counts are admittedly a somewhat blunt measure, they are frequently used in legal and political science studies as a rough gauge of the ongoing precedential weight of a prior decision. By collecting citation data from several years before the superseding event, we were able to establish a “baseline” citation pattern, which we could then compare to citation levels after the overruling or the override. We hypothesized that citation patterns could be expected to change in two different ways: “positive” or “neutral” citations would be expected to decline, and “negative” citations, such as an indication that the prior decision had been fully or partially overruled or superseded, would be expected to increase. To capture both of these effects, we developed a measure we called “net citations,” which we defined as the number of positive or neutral citations to a decision, minus the number of warning or other negative citations.6 We then compared the average number of net citations a case received each year after the event to the average number of net citations the case received before the event; this ratio measures how much effect the overruling or override had on citation levels.

Our findings were striking. As shown in Figure 1, after a judicial overruling, net citations to the prior decision drop rapidly when compared to the pre-event baseline. The citation patterns for cases in our “overridden” category, by contrast, are very similar to those of our control group. Overall levels of citations drop, but in a gradual fashion that is typical of the natural “depreciation” that decisions generally experience over time.7

Even ten years after an override is enacted, most overridden precedents are still widely cited as controlling precedent.

Degree of Overruling or Override. We recognize that an override may supersede some, but not all, of the analysis in a prior decision, meaning other aspects of the decision remain controlling. The same, of course, is true for a judicial overruling. To assess whether this affected our results, the cases were assigned a “depth” measure that evaluated how completely the overruling Supreme Court decision or overriding legislation rejected the prior opinion,8 as well as an “explicitness” measure that evaluated how explicit the Court or Congress was about its disapproval of the prior opinion. We found that for both sets of cases, greater “depth” was associated with a larger decline in citations; however, at each level of “depth,” citations to overruled cases declined more dramatically than citations to the overridden cases. The same was true for “explicitness.” Thus, our findings are not the result of comparing deep and explicit overrulings to shallow and non-explicit overrides. Rather, even when we control for these factors, we find that judicial overrulings have considerably more effect on future citations than legislative overrides.

As an additional robustness check, for a randomly selected subset of cases in both groups, we hand-coded individual headnotes to distinguish between headnotes identifying portions of the prior decision that had been superseded and those that had not. Since Lexis’s Shepard’s service tracks citations to each headnote in a case, this allowed us to assess in a more fine-grained manner which propositions within each case were being referenced when later decisions cited to the earlier precedents. For both groups of cases, we found a notable decline in net citations to the headnotes associated with specific propositions within the cases that had been superseded, but again this decrease was much more pronounced for the overruled cases than the overridden cases. Additionally, we assessed the extent to which ideological preferences might explain ongoing citation of overridden precedents, but our data did not suggest a judge’s ideology was the driving factor.9

Prospectivity. Because a judicial overruling is a reinterpretation of existing law, it typically takes effect immediately; the Court’s new interpretation will apply to all pending disputes, including those arising out of events that pre-dated the new opinion. By contrast, statutory overrides are typically prospective; the old (now superseded) judicial standard will govern the resolution of a dispute arising out of events that pre-date the effective date of the statutory amendment, even if the decision in the case is issued after the effective date of the amendment. For this reason, we would expect to see a judicial overruling have a more immediate effect on net citation levels than a statutory override. To address this issue, our analysis excluded citation counts from the year of the superseding event and the first two years after the superseding event, as this is the window when we expect the difference between retroactive judicial overrulings and prospective statutory overrides to be most salient. We modified these parameters to exclude greater and fewer years, but our general results held, suggesting that the differences we observe are not driven by the prospective nature of overrides.10

Since this study relies on citation counts, rather than a close reading of the context for each citation, we cannot definitively assert that any particular citation of an overridden case was in error. Below, I provide specific examples, drawn from my work on overrides in the employment discrimination context, of both “proper” and “improper” citations to overridden cases. The big picture conclusion is clear, however. If overrides were having the effect that they are intended to have, it is reasonable to assume that there would be sizeable decline in citations to legislatively overridden precedents, just as there is a sizeable decline in citations to judicially overruled precedents. Instead, on average, citation patterns to the overridden cases are almost indistinguishable from those to the comparison control group of cases that have been neither overridden nor overruled. This suggests that often courts fail to hear — or to heed — Congress’s side of the dialogue.

## CP—Contract

### 2AC---AT: Contract Law CP---TL

#### Permutation do the counterplan.

#### Permutation do both---solves by using antitrust as a backstop.

#### The counterplan doesn’t solve:

#### A---consumer-action deficit. Patent infringers have attenuated incentives to cough up high royalties because SSO’s can profit in aggregate by passing costs onto consumers---that’s Melamed and Shapiro. That means widening the plaintiff pool beyond implementers is key---which the counterplan CANNOT do.

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>)

2. Contract Law

The argument that antitrust should step aside because contract law “out-perform[s] antitrust when it comes to the successful identification and regulation of ex post opportunism associated with patent hold-up”127 fails for much the same reasons. A contract can only be enforced by its parties and by other to whom the parties clearly and explicitly intended to give enforcement rights.128 The victims of anticompetitive patent holdup, however, are also consumers and potential competitors who may not have been part of the SSO. Moreover, contracts can be modified and third parties generally have no enforcement rights as to the original contract. In implementing an industry-wide standard, the parties to the contract may actually prefer high royalty levels that hurt consumers. For example, if participants in the standard-setting process, who agreed collectively to support one technology over all others, mutually agree to license on FRAND terms but then, after the standard is adopted, each independently chooses to increase its royalty significantly, no party to the FRAND “contract” may have incentive to bring a breach of contract action, while implementers of the standard and users of standard-compliant products ultimately pay the bill. Antitrust should be available in such circumstances as a remedy for the parties harmed by the anticompetitive agreement.

#### SSO interests do not align with consumers. Contract law is an insufficient proxy for securing competition.

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

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

#### B---targeting deficit---faulting the entire SSO is key to curtail monopolization---targeting individual SEP holders fails.

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.

#### C---deterrence deficit---only antitrust law creates a legitimate cost to misconduct---that’s 1AC Melamed and Shaprio---whereas the loss of a private lawsuit wouldn’t change SEP holder’s calculus.

Tsilikas 17, \*Haris Tsilikas is an IP and Antitrust Consultant, a Doctoral Candidate and Visiting Research Fellow at the Max Planck Institute for Innovation and Competition, Munich; (2017, Antitrust Enforcement and Standard Essential Patents: Moving beyond the FRAND Commitment”, https://www.jstor.org/stable/pdf/j.ctv941t01.9.pdf?refreqid=excelsior%3A92dc720d1ebc7088811b40032a60f575)

Antitrust could play a meaningful role.165 The most important contribution of antitrust enforcement against abuses of SEPs is its deterrent effect.166 Although patent law reforms or contractual binding of subsequent SEPs-holders to FRAND licensing would provide to victims of hold-up useful defences in court, they do not sufficiently deter abusive assertion of SEPs in the first place. For instance, the contractual binding to FRAND could raise counterclaims of breach of contract or/and contractual performance; however, the opportunistic SEP-holder will, in case it loses on such grounds, be left no worse than with a licence on FRAND terms. In the end, a patent hold-up is indeed precluded, but contractual constraints can do little to prevent opportunistic assertion of SEPs in the first place. The victims still suffer the costs of uncertain and resource-draining litigation; most importantly, the reliability of the standards-setting process might still be at risk.

Antitrust enforcement on the other hand, in imposing tortfeasors positive monetary losses in the form of fines, alters the profit-cost calculus of opportunistic behaviour in the first place; opportunistic assertion of SEPs will come at a cost. Of course, a too-heavy-handed approach could have a chilling effect on legitimate patent assertions against implementers that are reluctant to pay FRAND royalties, thus leading to false positives. Antitrust enforcement should carefully examine the specificities of each case, such as the particular PAE conduct, the relationship between PAEs and practicing entities, the structure of downstream markets.167 More importantly, an economically informed antitrust analysis focusing on the actual and potential anticompetitive effects of opportunistic SEPs assertion should prohibit behaviour that is truly harmful to consumers. Safeguarding the inclusive and efficient character of the standards-setting process is a competition law problem. Informed antitrust analysis could provide adequate responses to opportunistic PAE behaviour and privateering.

#### D---contract deficit---FRAND commitments aren’t considered contracts, so they can’t be enforced.

Contreras 14, \*Jorge L. Contreras teaches in the areas of intellectual property law, property law and genetics and the law at the University of Utah. He has recently been named one of the University of Utah's Presidential Scholars, and won the 2018-19 Faculty Scholarship Award from the S.J. Quinney College of Law. Professor Contreras has previously served on the law faculties of American University Washington College of Law and Washington University in St. Louis, and was a partner at the international law firm Wilmer Cutler Pickering Hale and Dorr LLP, where he practiced transactional and intellectual property law in Boston, London and Washington DC; (September 14th, 2014, “Why FRAND Commitments are Not (usually) Contracts”, https://patentlyo.com/patent/2014/09/commitments-usually-contracts.html)

Nevertheless, as I discuss in [a forthcoming article](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309023), common law contract is a poor fit for the enforcement of most FRAND commitments, and relying too heavily on it is likely to have unwelcome results.  Contract law fails as a general-purpose FRAND enforcement theory on several grounds.  First, the simplified offer-acceptance-consideration model laid out above does not reflect the actual manner in which most FRAND commitments are made.  Most of these commitments are not set forth in an agreement between the patent holder and the SDO.  Rather, they are contained in SDO policies, bylaws and other types of statements.  In addition, many of these policies (including those adopted by leading SDOs such as IEEE) do not actually require the patent holder to commit to license its patents on FRAND terms, but only to disclose to the SDO the terms on which it will, or on which it intends to, license its essential patents.  Moreover, FRAND commitments are typically a sentence or two in length, and fail to set forth any of the relevant details

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of the promised license agreement, whether they be royalty rates, grant-back requirements, terms on which the license may be suspended or terminated, and the like.  As such, whatever “contract” is formed is likely void for want of detail, a mere “agreement to agree”.  Finally, the attempt to extend third party beneficiary rights to every product vendor in the world, whether or not it competed in the relevant business, or even existed, when the promise was made, stretches this venerable doctrine beyond any sensible boundaries.  As a result, except perhaps in a few cases in which standards are developed by small groups of firms that have actual contractual arrangements amongst themselves, common law contract is a poor choice as a general enforcement mechanism for FRAND commitments.

At least one Administrative Law Judge at the International Trade Commission has recently come to the same conclusion in the ITC’s case against Interdigital (337-TA-868, June 18, 2014), expressly ruling that the FRAND policy adopted by the European telecom SDO ETSI “is not a contract”, and merely “contains rules to guide the parties in their interactions with the organization, other members and third parties.”  I couldn’t agree more.

## Incentives CP

### 2AC---AT: Federal Assistance CP---TL

#### Permutation do both.

#### Permutation do the counterplan.

#### The counterplan doesn’t solve advantage 1:

#### 1---monopoly pricing:

#### A---lower product output and taxes on follow-on innovation negate the benefits of federal assistance.

#### B---patent overclaiming means assistance would be wasted on suboptimal inventions---that’s Melamed and Shapiro.

#### 2---licensing discrimination---absent FRAND, the best 5G technologies will be driven out of the market through refusals to license---that’s Actonline.

#### And, doesn’t solve advantage 2---market competition is key to cybersecurity---motivates responsible investment and diversifies suppliers---that’s Duan. Forcing all new IP to be public is the worst of all worlds that links way harder to innovation

### 2AC---AT: Public R&D

#### Public R&D causes crowd-out and impedes private investment.

Marino et al. 16, \*Marianna Marino and Stephane Lhuillery, ICN Business School, Department of Strategy and Entrepreneurship; \*Pierpaolo Parrotta and [Davide Sala](https://www.sciencedirect.com/science/article/pii/S0048733316300555#!), Aarhus University, Tuborg Research Centre for Globalization and Firms; (June 17th, 2016, “Additionality or crowding-out? An overall evaluation of public R&D subsidy on private R&D expenditure”, https://www.sciencedirect.com/science/article/pii/S0048733316300555)

6. Discussion and conclusions

This paper is an overall evaluation of the public subsidies to R&D, which proposes an assessment of this policy in absence or combination with the R&D tax credit, an equally important policy instrument used to stimulate private R&D investments. Using a dataset of French companies that covers the period 1993–2009, we perform both inter-group and intra-group assessment of the outcome of this policy. The former analysis is directed to investigate a differentiated impact of R&D grants across differently funded firms, and is presented alongside utilization of the categorical matching method. The latter analysis investigates the implications of the current modulation of public intervention for similarly funded firms. Implemented by means of a continuous treatment evaluation method, the intra-group assessment allows us to investigate the likelihood of crowding-in and crowding-out effects within each tercile along the distribution of the public R&D support grant. Both methods are coupled with the DID approach to account for unobserved heterogeneity and results strengthened by a rich dataset featuring comprehensive information on the pre-treatment variables. In addition, exploiting the exogenous variation due to the sharp change in R&D tax [credit policy](https://www.sciencedirect.com/topics/economics-econometrics-and-finance/credit-policy) that occurred in 2004, we compare [treatment effects](https://www.sciencedirect.com/topics/economics-econometrics-and-finance/causality-analysis) on growth of R&D private expenditure between before- and after-reform periods, and therefore we identify the effects of such a policy change introduced by the government.

Our results show that substitution between private and public funds may occur, especially for medium-high levels of public subsidies, and under the regime of R&D tax credit. Recipients of larger doses appear not to outperform or to perform worse than recipients of lower doses or non-recipient firms

. Crowding-out seems stronger and more significant in the after-reform period as reported in both the propensity score and exact matching analysis performed by year. In addition, we find evidence of more extensive negative effects for firms employing fewer than 100 employees or operating in low R&D intensive industries. When analyzing the intra-tercile distribution of public funds under R&D tax credit regime, we highlight a considerable reduction in the growth of private R&D expenditure among medium-high subsidy recipients, whereas additionality effects are found for a few top beneficiary companies (above EUR 10 million). In the sample of fully supported recipients, it seems to emerge – on average – that firms receiving subsidies between EUR 145 thousand and 1.8 million exhibit significant lower private contribution with respect to their counterfactual units. Subsidy-only recipients instead show significant substitution of private with public R&D resources for subsidy doses between EUR 20–55 thousand. Interestingly, when dividing the sample in before- and after-reform periods, we find that crowding-out effects seem to persist solely for recipients of subsidies under tax credit incentives after the 2004 reform.

Overall, our findings appear to suggest a substantial re-design of both the modulation and targeting of the public R&D subsidy policy, especially under R&D tax credit regime. Indeed, the substitution effects emerging from the inter-tercile and funded versus unfunded comparisons would motivate a better targeting of the recipient firms, especially among [small and medium size firms](https://www.sciencedirect.com/topics/economics-econometrics-and-finance/sme) and in low R&D intense industries. Concerning the modulation of the public R&D subsidy provision, it appears opportune to move resources from medium-high to top beneficiary recipients to boost the growth of private R&D expenditure and rise the private contribution to R&D in the economy. Furthermore, the distinction between fully funded from subsidy-only recipient firms underlines the importance of accounting for “hidden treatments” that may otherwise affect the policy evaluation and favor misleading implications. In addition, the 2004 reform of R&D tax credit appears to have lowered the effectiveness of public R&D funding. Although this result shed some lights on the effects of the 2004 reform, it also asks for further research to investigate the opportune mix of such R&D policy tools. Finally, it is worth underlining that a potential limitation of our study is due to the fact that we do not observe companies with fewer than 20 employees in the manufacturing industries, a significant proportion of the French firm population.

This overall assessment indicates that an ex-post evaluation of the targets of an R&D policy is desirable, if not necessary in a time of downturns or economic stagnation. In fact, if R&D funding is seen as a valid policy instrument to support companies hit hard by a crisis and facing financial restrictions, it is inevitable that public resources should not be re-directed away from risky and promising research projects toward companies that would likely perform equally well without this funding.

#### Public R&D investment isn’t enough and can’t compensate for a lack of private industry competitiveness.

Clark 21, \*Laurie Clark is a senior reporter at Tech Monitor. Before this, she held reporting positions at NS Tech, Wired UK and IDG. She holds an undergraduate degree in psychology from UCL and a masters in media and journalism from the University of Glasgow; (June 10th, 2021, “Massive US tech bill needs to aim for more than countering China”, https://techmonitor.ai/policy/massive-us-tech-bill-needs-aim-more-than-countering-china)

One of the meatiest industrial policy bills in US history, the Innovation and Competition Act (ICA) would commit around $250bn in funding for scientific research, earmarking $52bn to shore up the US’s domestic semiconductor industry, and $120bn for investment in technologies such as AI and quantum computing, as well as overseeing an overhaul of the National Science Foundation (NSF). “The ICA will dramatically increase R&D for basic and applied research in the US,” says Sarah Bauerle Danzman, assistant professor of International Studies at Indiana University Bloomington, pointing out that at present, R&D spending in the US is [about .5% of GDP](https://www.aei.org/economics/us-federal-research-spending-is-at-a-60-year-low-should-we-be-concerned/) with the private sector contributing around 70% of that. “If passed, this bill will increase federal R&D spending by about 30% over the next five years.” How will the Innovation and Competition Act impact chip supply? Although the US is the world leader in semiconductor technologies, most of its manufacturing is outsourced to fabrication plants in Asia. A global chip shortage has highlighted the weakness in its supply chains, and China’s plans to [bolster its own domestic production](https://techmonitor.ai/silicon/silicon-cold-war-china-tech-self-sufficiency) abilities have increased calls for the US to bring chip manufacturing back within its borders. While the signposted federal funding was [applauded](https://www.semiconductors.org/senate-passage-of-usica-marks-major-step-toward-enacting-needed-semiconductor-investments/) by the Semiconductor Industry Association – which noted that the share of global semiconductor manufacturing capacity in the US has decreased from 37% in 1990 to 12% today – some remain sceptical that it will be sufficient. “Even a couple of hundred billion US dollars is not enough to bring about a rapid turnaround of the situation as the US sees it,” says Jonathan Liebenau, associate professor in Technology Management at the London School of Economics. “Semiconductor fabrication plants are hugely expensive and the rest of the supply chain that China built up over the past 30 plus years cannot simply be bought off-the-shelf.” He points out that the US doesn’t have the state-owned enterprises or the complex private-public business ecosystem that China does. “We can ramp up spending on research but under current legal, and treaty, conditions we cannot pick national technology champions anymore, we cannot boost chosen tech companies against their direct competitors, even foreign ones.” The US still narrowly leads in AI, but there are forecasts that China could soon take the edge. China itself has set the goal of becoming the world leader in AI [by 2030](https://multimedia.scmp.com/news/china/article/2166148/china-2025-artificial-intelligence/index.html). In quantum computing, an area considered to have important national security implications, China is said to be [slightly ahead](https://asia.nikkei.com/Spotlight/Datawatch/China-emerges-as-quantum-tech-leader-while-Biden-vows-to-catch-up) of the US. It has funnelled money into the sector, [spending $10bn](https://www.bloomberg.com/news/articles/2018-04-08/forget-the-trade-war-china-wants-to-win-the-computing-arms-race) on setting up the world’s largest quantum research facility.

## Antitrust DA

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

#### Antitrust fervor is at an all-time high---thumps.

Zanfagna 9/7/21, \* [Gary Zanfagna](https://www.paulhastings.com/professionals/garyzanfagna) is an antitrust and competition partner at Paul Hastings LLP; (September 7th, 2021, “Antitrust isn't headed to an inflection point; it's already there”, https://thehill.com/opinion/judiciary/571087-antitrust-isnt-headed-to-an-inflection-point-its-already-there)

The truth is most companies have not had to think too much about antitrust regulations. The basic rules are pretty well known. But that is potentially changing quickly as antitrust concerns focus on not only high-tech companies, but businesses across the economy, from startups to global conglomerates.

It means antitrust is at an important inflection point. Changes are occurring at multiple levels — from [rule reform](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf) to [new applications](https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big) of existing rules to [increased enforcement](https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=A4EF296B-9072-4244-90AF-54FE43BB0876). Some of these changes are a reflection of the economic upheaval ushered in by the digital economy, which has prompted businesses and governments to look to antitrust rules to solve their problems. Witness [President Biden](https://thehill.com/people/joe-biden)’s [July 9 executive order](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/) whose 72 provisions include requests ranging from asking the FCC to reinstate net neutrality rules to directing the FDA to issue rules to allow more competition in the hearing aid market.

It’s a reflection of a general zeitgeist whose goal is to slow the onslaught of consolidation in technology across industries, from news media to healthcare to agriculture. And it’s gathering momentum as new rules are being proposed from both sides of the aisle.

Many look to the 449-page [“Investigation of Competition in Digital Markets”](https://www.nytimes.com/interactive/2020/10/06/technology/house-antitrust-report-big-tech.html?action=click&module=RelatedLinks&pgtype=Article) report from the judiciary committee on antitrust as the opening salvo. The report took aim at Amazon, Apple, Facebook, and Google, outlining how those once scrappy startups now leverage their market position in ways not seen since “the era of oil barons and railroad tycoons.” The judiciary report’s conclusion: prevent big tech from acquiring smaller tech with tougher policing — and reform antitrust laws.

Both Democrats and Republicans have since voiced their support for such ideas.

Aimed at the seemingly intractable challenges of the digital era, Sen. [Amy Klobuchar](https://thehill.com/people/amy-klobuchar)’s (D-Minn.) “[Antitrust Law Enforcement Reform Act”](https://www.congress.gov/bill/117th-congress/senate-bill/225/text) would create barriers to prevent consolidation across industries, not just in tech, but in any business that might be connected to “dominant digital platforms.” The legislation would have a prescriptive force, creating a presumption against certain mergers, whether they be in biotech or burgers.

Meanwhile, on the Republican side, Sen. [Josh Hawley](https://thehill.com/people/joshua-josh-hawley) (R-Mo.) has rolled out a bill that looks even more severe, blocking some mergers and acquisitions outright. The [“Trust-Busting for the Twenty-First Century Act”](https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big) would ban any acquisitions by companies with a market cap of more than $100 billion. The act would also make it easier for the FTC to classify a company’s behavior as anti-competitive, and then extract penalties (including profits) based on that behavior.

And it’s not just the Federal government. Several states have proposed their own legislation to prevent and punish what they see as anti-competitive behavior. Arizona narrowly passed initial legislation that would prevent app store operators, specifically Apple and Google, from forcing developers to use their payment systems.

Meanwhile in New York State, the [Twenty-First Century Anti-Trust Act (S933)](https://www.nysenate.gov/legislation/bills/2019/s8700/amendment/a) includes a first-of-its-kind state merger notification of any deal in which the buyer would end up with more than $8 million in assets of the target. It would also create an “abuse of dominance” offense and give the N.Y. attorney general rulemaking authority — whether or not the company was based in New York.

These proposals have a long way to go before becoming law, but they demonstrate potentially significant antitrust adjustments coming.

Expanding antitrust view

The ripple effects will be profound, affecting transportation, communications, banking and healthcare companies. Incumbents looking to diversify their business are vulnerable, as are startups looking for profitable partners. Unhappy competitors who feel stymied may look to antitrust rules for remediation. And private equity moves to consolidate fledgling, fragmented industries will face tougher questions about overlap and industry concentration.

So, we are going to see antitrust being used in industries and in ways that haven’t been considered in many years, with views about market concentration expanding to encompass what used to be considered diverse or vertical markets. In fact, both Sen. Klobuchar’s and Sen. Hawley’s proposals specifically target consolidation across industries. Sen. Hawley’s $100 billion ban explicitly targets vertical acquisitions. It would certainly prevent deals like Facebook’s acquisition of WhatsApp or Google’s purchase of Fitbit.

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

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

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

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

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

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

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

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

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

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

Apple did not respond to requests for comment.

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

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

#### Biden executive order outweighs.

Posner 21, professor at the University of Chicago Law School (Eric, 7-21-2021, "The Antitrust War’s Opening Salvo", Project Syndicate, <https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07>)

CHICAGO – US President Joe Biden’s new executive order on “Promoting Competition in the American Economy” is more significant for what it says than for what it does. In fact, the order doesn’t actually order anything. Rather, it “encourages” federal agencies with authority over market competition to use their existing legal powers to do something about the growing problem of monopoly and cartelization in the United States. In some cases, the relevant agencies are asked merely to “consider” ramping up enforcement; in others, they are directed to issue regulations, but the content of those regulations remains largely up to them.

Nonetheless, it would be a mistake to dismiss the order’s tentative language as mere rhetoric. Antitrust is the main body of law governing market competition in the US, and it has been the object of sustained attack by business interests and conservative intellectuals for more than 50 years. Biden is the first president since Harry Truman to take a strong public [anti-monopoly stand](https://www.project-syndicate.org/commentary/new-brandeisians-antitrust-for-big-tech-by-eric-posner-2021-06), and he has backed it up by [appointing](https://www.politico.com/news/2021/07/20/biden-picks-doj-antitrust-chief-500310) ardent anti-monopoly advocates to his government.

The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality.

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

### 2AC--- L/T

#### Non-unique and link turn---post *Qualcomm*, the FTC will devote more resources to litigation against SEP holders.

Angela Morris 9/17, litigation reporter at American Lawyer Media, reports on cases pending in the federal circuit, 9/17/2021, “The FTC creates a potential new US headache for SEP owners,” https://www.iam-media.com/frandseps/the-ftc-creates-potential-new-us-headache-sep-owners

SEP owners that may already be wary of potential Biden Administration regulatory changes now have a new threat to keep them up at night.

Over the summer the Federal Trade Commission [announced an expanded view](https://www.jdsupra.com/legalnews/the-ftc-expands-section-5-enforcement-7020931/) of its standalone enforcement authority to curb anti-competitive misconduct; and [now the agency has made it clear](https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas) that priority targets include “abuse of intellectual property” and “monopolistic practices”.

The agency’s description of the “anticompetitive and deceptive conduct” it seeks to curtail in the technology sector most likely will encompass alleged misconduct by standards essential patent (SEP) owners and their commitments to licensing on FRAND terms, according to IP and antitrust attorney [Tim Syrett](https://www.wilmerhale.com/en/people/timothy-syrett).

“The FTC has previously conducted two investigations where it found that SEP holders seeking injunctions against licensees was anti-competitive and presented a threat to innovation,” Syrett, who is a partner in Wilmer Hale in Washington DC, explains via email. “That may be an area where the FTC wants to continue to devote resources and is certainly an area where there can be harm to competition because of the hold-up power of SEPs.”

Wilmer Hale has represented Apple in high-profile disputes with Samsung, Nokia and Qualcomm, as well as other Big Tech companies in litigations that concern the intersection of patents and anti-trust.

Syrett adds that investment-backed patent assertion entities and patent aggregation organisations may also have reason to fear ITC investigations.

“Investment-backed patent assertion entities can obscure information about who actually owns or has an interest in patents that can harm both licensing and litigation,” says Syrett. “Further, we have seen a concerning rise of patent assertions where the incentives of investors to obtain outsized returns from patents trump any reasonable valuation of the patents’ worth, which can harm competition in the licensing of patents.”

Many in US patent circles may disagree with Syrett's claims about hold-up and PAEs, but the concern will be that they  represent opinion inside the FTC.

The commission has indicated that it will investigate potential abuses of IP rights that create anti-competitive and deceptive conduct, identifying the pharmaceutical, technology and gasoline refining industries by name. Another stated FTC aim is to target alleged abuses of market power that stop entrepreneurs from competing with Big Tech.

These two resolutions were among a group of eight that a divided commission passed this month on a 3-2 vote, as the agency seeks to handle increased workload from high merger filings. Both resolutions, effective for 10 years, direct the agency to use its compulsory processes to obtain documents and testimony through either demands or subpoenas to investigate allegations that would be a violation of Section 5 of the FTC Act.

Section 5 prohibits business conduct that amounts to an unfair method of competition that impacts commerce. Historically, that has meant a violation of federal antitrust laws like the Sherman Antitrust Act or the Clayton Act. However, over the summer, the FTC issued an expanded interpretation of its Section 5 authority that opened room for the agency to use its standalone authority to bring Section 5 enforcements.

The “abuse of intellectual property” resolution would allow FTC staff quickly to conduct investigations into IP rights as a source of anti-competitive and deceptive conduct in the pharmaceutical, technology and gasoline refining industries, said the commission statement that announced the resolutions on 14 September.

[According to the resolution](https://www.ftc.gov/system/files/attachments/press-releases/ftc-streamlines-consumer-protection-competition-investigations-eight-key-enforcement-areas-enable/omnibus_resolutions_p859900.pdf), the agency plans to investigate people, partners or corporations that engage in “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative or exclusionary acts or practices”. The FTC will determine what action to take or remedy to grant, including injunctive or monetary relief that is in the public interest.

Another resolution on “monopolistic practices” addresses bipartisan concerns about market power abuses by tech companies and other large businesses, said the statement. It added that the resolution allows FTC staff to expeditiously investigate dominant players’ abuses that stop other businesses and entrepreneurs from competing – especially in digital markets.

The vote on the resolutions split the commission, with [chair Lina Khan](https://www.ftc.gov/system/files/documents/public_statements/1596260/p859900omnibuslmkrksconcur.pdf) and commissioners [Rohit Chopra](https://www.ftc.gov/system/files/documents/public_statements/1596280/p859900rcomnibusstmtomnibusmilitary.pdf) and Rebecca Kelly Slaughter in favour, and commissioners [Noah Joshua Phillips and Christine S Wilson](https://www.ftc.gov/public-statements/2021/09/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson) opposed.

Syrett says he can’t predict if the agency’s announcement is a prelude to more *FTC v Qualcomm* style investigations, but he does view it as another signal that the Biden Administration takes a different approach to SEP and FRAND issues compared with its predecessor. It goes hand-in-glove with [the president’s executive order in July](https://www.iam-media.com/frandseps/white-house-executive-order-seps-frand-europe) telling the attorney general and secretary of commerce to reconsider a 2019 statement that downplayed the risk of SEPs.

“The prior administration took a decidedly pro-patent holder view when it came to considering harm to competition from SEPs,” says Syrett. “The Biden Administration has shown that it’s willing to return to the consensus view that’s existed across multiple administrations, both Republican and Democratic, that SEPs pose a significant risk of holdup that can harm competition, innovation and consumers.”

#### AND 2) The plan deters violations so no cases have to be filed---that’s Melamed and Shapiro and…

Cheng 13, \*Thomas Cheng, B.A. (Yale), J.D. (Harvard), B.C.L. (Oxon); Attorney & Counsellor, New York State; Associate Professor, Faculty of Law, The University of Hong Kong; (2013, “Putting Innovation Incentives Back in the Patent-Antitrust Interface”, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1195&context=njtip>), ability edited

Imposing a duty to license on opportunistic patentees may solve this problem. If these patentees know that the courts may step in and mandate licensing at a reasonable royalty rate,214 they will be induced to enter into negotiations with follow-on innovators in good faith.215 The threat of compulsory licensing may become a default background legal rule against which negotiations between initial and follow-on innovators take place. The instances in which the courts need to intervene could be few.

## COURT DA

### 2AC---AT: Court DA

#### Roe is as good as dead.

[Mark](https://slate.com/author/mark-joseph-stern) Stern 9/2. Professor of Social Policy and History at the University of Pennsylvania. 9/2/2021. “The Supreme Court Overturned Roe v. Wade in the Most Cowardly Manner Imaginable.” https://slate.com/news-and-politics/2021/09/supreme-court-overturn-roe-wade-texas.html

At midnight on Wednesday, in an unsigned 5–4 [decision](https://www.supremecourt.gov/opinions/20pdf/21a24_8759.pdf), the Supreme Court effectively overturned *Roe v. Wade*. The five most conservative Republican-appointed justices refused to block Texas’ abortion ban, which allows anyone to sue any individual who “aids or abets” an abortion after six weeks, which is when the vast majority of operations occur. There is no exception for rape or incest. The decision renders almost all abortions in Texas illegal for the first time since 1973. Although the majority did not say these words exactly, the upshot of Wednesday’s decision is undeniable: The Supreme Court has abandoned the constitutional right to abortion. *Roe*is no longer good law.

Texas’ ban, known as SB 8, constitutes [a uniquely insidious workaround](https://slate.com/news-and-politics/2021/05/texas-abortion-ban-lawsuit-liability.html) to *Roe*. It outlaws abortion after six weeks but does not call on state officials to enforce its restrictions.  
Instead, as Justice Sonia Sotomayor wrote in dissent, the law “deputized the State’s citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors’ medical procedures.” Random strangers can sue any “abettor” to an abortion anywhere in Texas and collect a minimum of $10,000, plus attorneys’ fees. The act’s language is incredibly broad, encompassing any friend, family member, clergy member, or counselor who facilitates the abortion in any way. Every employee of an abortion clinic, from front desk staff to doctors, is liable as well. And when an individual successfully sues an abortion provider, the court must permanently shut it down.

#### No modelling

David S. Law & Mila Versteeg, 2012 [Professor of Law and Professor of Political Science at Washington University in St. Louis; Associate professor of law and director of the Human Rights Program at the University of Virginia School of Law. Most of her research deals with the origins, evolution, and effectiveness of provisions in the world's constitutions, “THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION” PDF] KD-NCP

The appeal of American constitutionalism as a model for other countries appears to be waning in more ways than one. Scholarly attention has thus far focused on global judicial practice: There is a growing sense, backed by more than purely anecdotal observation, that foreign courts cite the constitutional jurisprudence of the U.S. Supreme Court less frequently than before.247 But the behavior of those who draft and revise actual constitutions exhibits a similar pattern. Our empirical analysis shows that the content of the U.S. Constitution is becoming increasingly atypical by global standards. Over the last three decades, other countries have become less likely to model the rights-related provisions of their own constitutions upon those found in the U.S. Constitution. Meanwhile, global adoption of key structural features of the Constitution, such as federalism, presidentialism, and a decentralized model of judicial review, is at best stable and at worst declining. In sum, rather than leading the way for global constitutionalism, the U.S. Constitution appears instead to be losing its appeal as a model for constitutional drafters elsewhere. The idea of adopting a constitution may still trace its inspiration to the United States, but the manner in which constitutions are written increasingly does not. If the U.S. Constitution is indeed losing popularity as a model for other countries, what—or who—is to blame? At this point, one can only speculate as to the actual causes of this decline, but five possible hypotheses suggest themselves: (1) the advent of a superior or more attractive competitor; (2) a general decline in American hegemony; (3) judicial parochialism; (4) constitutional obsolescence; and (5) a creed of American exceptionalism. With respect to the first hypothesis, there is little indication that the U.S. Constitution has been displaced by any specific competitor. Instead, the notion that a particular constitution can serve as a dominant model for other countries may itself be obsolete. There is an increasingly clear and broad consensus on the types of rights that a constitution should include, to the point that one can articulate the content of a generic bill of rights with considerable precision.248 Yet it is difficult to pinpoint a specific constitution—or regional or international human rights instrument—that is clearly the driving force behind this emerging paradigm. We find only limited evidence that global constitutionalism is following the lead of either newer national constitutions that are often cited as influential, such as those of Canada and South Africa, or leading international and regional human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Although Canada in particular does appear to exercise a quantifiable degree of constitutional influence or leadership, that influence is not uniform and global, but more likely reflects the emergence and evolution of a shared practice of constitutionalism among common law countries.249 Our findings suggest, instead, that the development of global constitutionalism is a polycentric and multipolar process that is not dominated by any particular country.250 The result might be likened to a global language of constitutional rights, but one that has been collectively forged rather than modeled upon a specific constitution. Another possibility is that America’s capacity for constitutional leadership is at least partly a function of American “soft power”

more generally.251 It is reasonable to suspect that the overall influence and appeal of the United States and its institutions have a powerful spillover effect into the constitutional arena. The popularity of American culture, the prestige of American universities, and the efficacy of American diplomacy can all be expected to affect the appeal of American constitutionalism, and vice versa. All are elements of an overall American brand, and the strength of that brand helps to determine the strength of each of its elements. Thus, any erosion of the American brand may also diminish the appeal of the Constitution for reasons that have little or nothing to do with the Constitution itself. Likewise, a decline in American constitutional influence of the type documented in this Article is potentially indicative of a broader decline i

n American soft power. There are also factors specific to American constitutionalism that may be reducing its appeal to foreign audiences. Critics suggest that the Supreme Court has undermined the global appeal of its own jurisprudence by failing to acknowledge the relevant intellectual contributions of foreign courts on questions of common concern252 and by pursuing interpretive approaches that lack acceptance elsewhere.253 On this view, the Court may bear some responsibility for the declining influence of not only its own jurisprudence, but also the actual U.S. Constitution: One might argue that the Court’s approach to constitutional issues has undermined the appeal of American constitutionalism more generally, to the point that other countries have become unwilling to look either to American constitutional jurisprudence or to the U.S. Constitution itself for inspiration.254 It is equally plausible, however, that responsibility for the declining appeal of American constitutionalism lies with the idiosyncrasies of the Constitution itself rather than the proclivities of the Supreme Court. As the oldest formal constitution still in force and one of the most rarely amended constitutions in the world,255 the U.S. Constitution contains relatively few of the rights that have become popular in recent decades.256 At the same time, some of the provisions that it does contain may appear increasingly problematic, unnecessary, or even undesirable with the benefit of two hundred years of hindsight.257 It should therefore come as little surprise if the U.S. Constitution strikes those in other countries—or, indeed, members of the U.S. Supreme Court258—as out of date and out of line with global practice.259 Moreover, even if the Court were committed to interpreting the Constitution in tune with global approaches, it would still lack the power to update the actual text of the document. Indeed, efforts by the Court to update the Constitution via interpretation may actually reduce the likelihood of formal amendment by rendering such amendment unnecessary as a practical matter.260 As a result, there is only so much that the U.S. Supreme Court can do to make the U.S. Constitution an attractive formal template for other countries. The obsolescence of the Constitution, in turn, may undermine the appeal of American constitutional jurisprudence. Foreign courts have little reason to follow the Supreme Court’s lead on constitutional issues if the Supreme Court is saddled with the interpretation of an unusual and obsolete constitution.261 No amount of ingenuity or solicitude for foreign law on the part of the Court can entirely divert attention from the fact that the Constitution itself is an increasingly atypical document. One way to put a more positive spin on the U.S. Constitution’s status as a global outlier is to emphasize its role in articulating and defining what is unique about American national identity. Many scholars have opined that formal constitutions serve an expressive function as statements of national identity.262 This view finds little support in our own empirical findings, which suggest instead that constitutions tend to contain relatively standardized packages of rights.263 Nevertheless, to the extent that constitutions do serve such a function, the distinctiveness of the U.S. Constitution may reflect the uniqueness of America’s national identity. In this vein, various scholars have argued that the U.S. Constitution lies at the very heart of an “American creed of exceptionalism,” which combines a belief that the United States occupies a unique position in the world with a commitment to the qualities that set the United States apart from other countries.264 From this perspective, the Supreme Court’s reluctance to make use of foreign and international law in constitutional cases amounts not to parochialism, but rather to respect for the exceptional character of the nation and its constitution.265 Unfortunately, it is clear that the reasons for the declining influence of American constitutionalism cannot be reduced to anything as simple or attractive as a longstanding American creed of exceptionalism. Historically, American exceptionalism has not prevented other countries from following the example set by American constitutionalism. The global turn away from the American model is a relatively recent development that postdates the Cold War. If the U.S. Constitution does in fact capture something profoundly unique about the United States, it has surely been doing so for longer than the last thirty years. A complete explanation of the declining influence of American constitutionalism in other countries must instead be sought in more recent history, such as the wave of constitution making that followed the end of the Cold War.266 During this period, America’s newfound position as lone superpower might have been expected to create opportunities for the spread of American constitutionalism. But this did not come to pass. Once global constitutionalism is understood as the product of a polycentric evolutionary process, it is not difficult to see why the U.S. Constitution is playing an increasingly peripheral role in that process. No evolutionary process favors a species that is frozen in time. At least some of the responsibility for the declining global appeal of American constitutionalism lies not with the Supreme Court, or with a broader penchant for exceptionalism, but rather with the static character of the Constitution itself. If the United States were to revise the Bill of Rights today—with the benefit of over two centuries of experience, and in a manner that addresses contemporary challenges while remaining faithful to the nation’s best traditions—there is no guarantee that other countries would follow its lead. But the world would surely pay close attention.

### 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.

### 2AC---Thumper---Court Capital

#### 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.

#### Population growth is stable and sustainable

Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford (Dr. Toby Ord, 2020, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 113-115)

Climate change is not the only form of environmental damage we are inflicting upon the Earth. Might we face other environmental existential risks through overpopulation, running out of critical resources or biodiversity loss? When environmentalism rose to prominence in the 1960s and 1970s, one major concern was overpopulation. It was widely feared that humanity’s rapidly growing population would far outstrip the Earth’s capacity to feed people, precipitating an environmental and humanitarian catastrophe. The most prominent advocate of this view, Paul Ehrlich, painted an apocalyptic vision of the near future: “Most of the people who are going to die in the greatest cataclysm in the history of man have already been born.”93 This catastrophe would come soon and pose a direct existential risk. Ehrlich predicted: “Sometime in the next 15 years, the end will come—and by ‘the end’ I mean an utter breakdown of the capacity of the planet to support humanity.”94 These confident predictions of doom were thoroughly mistaken. Instead of rising to unprecedented heights, the prevalence of famine dramatically declined. Less than a quarter as many people died of famine in the 1970s as in the 1960s, and the rate has since halved again.95 Instead of dwindling to a point of crisis, the amount of food per person has steadily risen over the last fifty years. We now have 24 percent more food per person than when Ehrlich’s book, The Population Bomb, was published in 1968. Much of the credit for this is owed to the Green Revolution, in which developing countries rose to the challenge of feeding their people. They did so by modernizing their farming, with improved fertilizers, irrigation, automation and grain varieties.96 Perhaps the greatest single contribution was from Norman Borlaug, who received the Nobel Prize for his work breeding the new, high-yield varieties of wheat, and who may be responsible for saving more lives than anyone else in history.97 But the improvements in agriculture are just part of the story. The entire picture of overpopulation has changed. Population growth is almost always presented as an exponential process—increasing by a fixed percentage each year—but in fact that is rarely the case. From about 1800 to 1960 the world population was growing much faster than an exponential. The annual growth rate was itself growing from 0.4 percent all the way to an unprecedented rate of 2.2 percent in 1962. These trends rightly warranted significant concern about the human and environmental consequences of this rapid population increase. But suddenly, the situation changed. The population growth rate started to rapidly decline. So far it has halved, and it continues to fall. Population is now increasing in a roughly linear manner, with a fixed number of people being added each year instead of a fixed proportion. This change has been driven not by the feared increase in death rates, but by a dramatic change in fertility, as more and more countries have undergone the demographic transition to a small family size. In 1950, the average number of children born to each woman was 5.05. It is now just 2.47—not so far above the replacement rate of 2.1 children per woman.98 While we can’t know what will happen in the future, the current trends point to a rapid stabilization of the population. The current linear increase is likely to be an inflection point in the history of human population: the point where the curve finally starts to level off. We may never again see the rapid population growth of the mid-twentieth century. In the last eighty years, population grew threefold. In the next eighty years (to 2100) it is expected to go up just 50 percent, to about 11 billion. For every person alive now, we’ll have to make room for an extra half a person. This will be a challenge, but a much easier one than last century.

Chart, line chart

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#### 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---No Swing Vote

#### 6-3 majority turns swing votes into bystanders and provides political cover for inevitable landmark cases.

Stevenson 21, \*Peter W. Stevenson writes The 5-Minute Fix newsletter and covers national and state politics for The Fix. He's been at The Washington Post since 2015 and has been the senior political video producer since 2017; (May 20th, 2021, “Chief Justice John Roberts: From key swing vote to potential bystander?”, https://www.washingtonpost.com/politics/2021/05/20/chief-justice-john-roberts-key-swing-vote-potential-bystander/)

Barrett’s confirmation didn’t just give conservatives on the court a 6-3 majority; it also means Chief Justice John G. Roberts Jr. is no longer as likely to be a swing vote on the court — marking a sudden change to the amount of power Roberts has to steer the direction of the court.

When President Donald Trump made his third and final [Supreme Court](https://www.washingtonpost.com/politics/courts_law/supreme-court-abortion-roe-v-wade/2021/05/17/cdaf1dd6-b708-11eb-a6b1-81296da0339b_story.html?itid=lk_inline_manual_5) nomination, putting Barrett in the seat previously occupied by Ruth Bader Ginsburg, the court became more conservative than it had been [in more than 50 years](https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/?itid=lk_inline_manual_5). With a conservative majority on the court, Republicans hope justices could make a series of landmark decisions on issues their electorate is passionate about. At the top of that list is abortion rights.

By the time Trump took office, Republicans had succeeded in making the nomination of Supreme Court justices an issue that drives voter turnout in a way Democrats couldn’t. In exit polls conducted after Trump’s election in 2016, [one-fifth of voters said court nominations](https://www.washingtonpost.com/politics/2020/09/18/where-polling-stands-supreme-court-vaults-into-top-tier-campaign-issues/?itid=lk_inline_manual_8) were the most important factor in their vote, and those voters broke for Trump by a 15-point margin.

When Ginsburg died last September, handing Trump the opportunity to make a third nomination and swing the court even further to the right, it became a more urgent issue for Democrats. About two-thirds of Joe Biden supporters said Supreme Court nominees were “very important” to their vote in an August 2020 Pew Research [poll](https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/), while about 6 in 10 Trump supporters said the same.

But Trump was already on his way to nominating Barrett, a right-leaning justice who gave conservatives on the court what amounts to a majority. That got Republicans excited — and made Democrats nervous — about the possibility of the court making the kind of rulings conservatives have had on their wish list for decades, starting with overturning Roe v. Wade, the landmark abortion case.

The 2020 Democrats want to ‘codify’ Roe v. Wade. Here’s what that means.

The landmark 1973 Supreme Court decision established a woman’s constitutional right to have an abortion. Some Democrats want to make it into law. (Blair Guild/The Washington Post)

Now, the Mississippi law is under the court’s microscope. The law hasn’t gone into effect because of lower-court rulings that say it goes against decades of Supreme Court precedent, including Roe v. Wade. But the Supreme Court has more latitude to revisit such precedents when it is deemed warranted.

“In an unbroken line dating to Roe v. Wade, the Supreme Court’s abortion cases have established (and affirmed, and reaffirmed) a woman’s right to choose an abortion before viability,” Judge Patrick Higginbotham wrote for the U.S. Court of Appeals for the 5th Circuit.

The Supreme Court has long declined to take on such cases, often falling back on the precedent set by previous decisions. Under Roberts, even with a 5-4 conservative majority after Trump’s first two nominees, Neil M. Gorsuch and Brett M. Kavanaugh, were confirmed, the court seemed reluctant to take on big, landmark cases — and certainly to challenge precedent on politically sensitive issues. It has been suggested that Roberts aimed to make the court appear less political by avoiding those sensitive issues. Some conservatives have even said he lacks the will to address issues such as abortion at all. But such things could increasingly be out of his hands.

Roberts’s status as a key swing vote was solidified by the [2012 decision he wrote](https://www.washingtonpost.com/politics/supreme-court-to-rule-thursday-on-health-care-law/2012/06/28/gJQAarRm8V_story.html?itid=lk_inline_manual_17) upholding the Affordable Care Act’s constitutionality, in which the individual care mandate was preserved as a tax, a decision that infuriated conservatives.

But his supposed efforts to depoliticize the court were blunted by Barrett’s appointment. In a 6-3 court, Roberts is no longer a swing vote. Even if he were to side with the liberal-leaning justices, they could be outvoted 5-4.

This [isn’t the first case](https://www.washingtonpost.com/politics/courts_law/supreme-court-guns-second-amendment-national-rifle-association/2021/04/26/83e865c8-a690-11eb-8c1a-56f0cb4ff3b5_story.html?itid=lk_inline_manual_21) that has seemingly made Roberts’s vote potentially less potent — but it has the potential to be the most high-profile (though we have no idea what the court will do with it).

# 1AR

### 1AR---Link Turn---Overclaiming

#### Ex post, patentees are motivated to overclaim patents---creating a thicket of nonessential patents that overburden implementers.

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

#### Majority of the time, SEP’s are not necessary for standard implementation.

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)

Unfortunately, SDOs have not defined the limits on FRAND terms. Furthermore, they do not have uniform disclosure requirements or uniform definitions of “essential.” Studies show that many patents declared essential to common standards are not technically nor economically necessary to implement the standard.[17](javascript:void(0))

### 1AR---LD---Innovation Incentives

#### Ex post royalties are not necessary to motivate innovation.

Bosworth et al. 17, \*D. Scott Bosworth is a Principal Economist at Nathan Associates; \*Russell W. Mangum is Executive Vice President at the American Antitrust Institute and Associate Professor of Economics in the School of Business and Economics at Concordia University Irvine; \* Eric Matolo is the Vice President of Cirque Analytics; (October 28th, 2017, “FRAND Commitments and Royalties for Standard Essential Patents”, https://link.springer.com/chapter/10.1007/978-981-10-6011-3\_2#Sec10)

The common justification for intellectual property law is that inventions must be properly protected to allow inventors to be rewarded for inventions, thereby stimulating innovation. However, promoting inventions and innovation does not justify, nor does it require, rewarding patent owners beyond the value of the technology the intellectual property is meant to protect. Allowing patent holders to extract the value of the network effect created from a standard rewards the patentees based on value beyond the patented technology. Without FRAND terms the network effects value will flow to SEP holders. Proper FRAND terms that keep SEP holders from extracting the value of network effects can still leave the efficient level of return for innovators—that based on the technology itself. In other words, extracting the value of network effects by SEP holders is not necessary to appropriately motivate innovation. Any value of the standardization resulting from collaborative efforts during the SSO process may ultimately be available in the public domain.

### 1AR---LD---Patent Holdout

#### 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.

#### Patent holdout is nonsensical---the patentee could simply say “no” and sue for infringement.

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>)

In any event, patent infringement actions remain available in the event of infringement. Under the holdout theory, implementers supposedly band together and force a patentee (through the process of SEP choice) to agree to sub-market royalties in exchange for selection of its patents. The patentee, having no alternative, agrees. But a patentee who chooses not to participate has a damage action for patent infringement against implementers who use its invention without a li-cense.245 Further, this would likely be an action for willful infringement, leading to the possibility of multiple damages.246 To be sure, in winner take all patent races losers may go un- compensated, but that occurs only if implementers do not in-fringe their patents.247

#### Patent holdout theory conflates holdout with legitimate concerns about patent validity.

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>)

The theory of holding out may be called upon to explain a refusal by implementers to pay royalties to a particular patentee, or else to pay too low a royalty. Given the costs of patent infringement when it is found, a far more likely explanation is serious doubts about patent infringement or validity.251 Patents in information technology markets—including standard-essential patents in networked industries involving electronics and telecommunications—are rife with these problems. In fact, patent infringement plaintiffs lose most of their cases, including those involving SEPs. Refusing to accept and pay for a license on an untested patent is not an abuse of the system. Rather, it is simply recognition of the fact there is a good chance that the patent that is being asserted is either invalid or not infringed.252

#### This link is imagined.

Hovenkamp 21, \*Herbert Hovenkamp, James G. Dinan University Professor, Penn Law and the Wharton School, University of Pennsylvania. He is a Fellow of the American Academy of Arts and Sciences, and in 2008 won the Justice Department’s John Sherman Award for lifetime contributions to antitrust law. (September 8th, 2021, “The DOJ’s “New Madison” Doctrine Disregards Both the Economics and the Law of Innovation”, https://promarket.org/2021/09/08/doj-madison-doctrine-antitrust-innovation/)

The New Madison doctrine clearly cannot be justified as incentivizing innovation in new technologies. Quite the contrary. It is justifiable only if compelled by the Constitution or the relevant statutes. On the innovation point, the doctrine imagines a process in which standard setting organizations “hold out,” compelling patentees to commit their patents to universal licensing requirements if they want to have them adopted. Faced with this threat the patentees have no choice but to commit to licensing their patents at oppressively low royalties.

But patent law does not work that way, and the holdout problem is completely imagined. To the contrary, patentees egregiously over declare their patents as standard essential, and for a good reason: once patents are declared they become more valuable. By default, they will be included in the licensing package governing that technology. For this reason, holders of standard essential patents must accept independent royalty determinations, usually by either arbitration or a federal court, that assess the value of the patent prior to its incorporation into a standard. This procedure applies a simple law and economics principle that the New Madison doctrine ignores: when multiple inventors are competing for a standard, one way to ensure competitive outcomes is to make them [bid up front to be the provider](https://www.journals.uchicago.edu/doi/abs/10.1086/466643). As for the holdout threat, if a group of manufacturers employ a technology without paying, they will be guilty of patent infringement and their damages will be based on the patent’s current value.

### 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---Ev Indict

#### Don’t trust neg evidence---in all likelihood it’s funded by Qualcomm.

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)

Beyond the obvious and fatal flaws in this empirical work,71 the whole line of inquiry is of limited relevance for the purpose of measuring the social costs of holdup or designing institutions to limit patent holdup, because it only looks for instances of actual patent holdup. As explained above, these instances are very difficult to detect and are only the tip of the iceberg in terms of the social costs of patent holdup.72 So far as we can tell, the vast majority of these papers have been funded by Qualcomm and other patent holders seeking to weaken the institutions designed to control patent holdup, increase their leverage in licensing negotiations, and thus increase their ability to monetize their patents.73

#### Qualcomm devotes millions each year globally to funding studies disproving patent holdup.

Perma.cc 18, (September 16th, 2018, “U.S. telecom firm boosts research funds at Tilburg university”, https://perma.cc/3H9B-VTPT)

TILBURG, the Netherlands - Research center TILEC, the Tilburg Law and Economics Center, has received almost $.€300,000 from American telecom company Qualcomm. The money, which can be spent without restriction, was obtained by Damien Geradin, professor in competition law and legal advisor of the company.

The Qualcomm donation was earmarked for the Faculty of Law, but will be used for research fields in law and economics, the disciplines of TILEC. Earlier, Qualcomm informally stated that it expected to donate a similar amount next year. The total donation can amount to one million dollars.

TILEC emphasized that there are no conditions attached to the gift, the money can be spent freely, and Geradin is free to do his own research. TILEC says that they want to keep their independence.

Each year, the U.S. company donates one percent of its turnover to philanthropic aims, including academic education and research. Qualcomm also sponsors a technological institute at UC Berkeley. The idea that such a donation could be 'tainted because it is commercial' is without foundation, states TILEC. The Faculty of Law will also continue to have sponsored chairs, such as the AFM Chair and Anton Philips Chair, provided that its ”independence remains assured."

## Contract

### 1AR---Consumer Action Deficit

#### Only consumer-action feature that counterbalances SSO’s conspiratorial incentives---private action fails.

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>)

2. Why Antitrust Enforcement Is Necessary

Some SSO members have an interest in ensuring that the SSO takes steps to minimize the potential harms from the SEP holders’ monopoly power, and this undoubtedly explains in part why most SSOs have adopted FRAND policies or similar requirements. But, as shown in the economic model in the Appendix,73 SSOs cannot in general be counted on to adopt effective FRAND policies. The bases for this conclusion, which is central to our argument for the applicability of Section 1 to SSO FRAND rules, can be summarized as follows.74

First, the SSO members collectively have an interest in permitting SEP holders to charge supracompetitive royalties that elevate the downstream price of compliant devices to the monopoly level. Doing so will enable the members in aggregate to collect increased revenues from consumers, and thus to generate increased profits that in theory could be shared by all the members. In other words, supracompetitive royalties can enrich industry participants as a group at the expense of final consumers. This fact alone should serve as a clear and strong signal regarding the dangers of counting on SSOs to implement effective FRAND policies: if the SSO members negotiate efficiently, the outcome will be just as bad for consumers as if the members agreed to fix downstream prices.75 The fundamental problem is that final consumers are not at the table when the SSO rules are negotiated.

Second, SSO members that own SEPs but earn little or no profits as implementers have a powerful self-interest in being able to exercise the ex post monopoly power associated with their SEPs. Because SSO policies are usually determined by a consensus process, these members will likely be able to block the adoption of fully effective FRAND policies. Moreover, these SSO members often have the greatest interest in SSO patent policies. Since much of their income may be attributable to patent licensing, they can be expected to devote substantial resources to block the adoption of FRAND policies that effectively prevent patent holdup.

Third, even SSO members that earn significant profits as implementers may have mixed incentives if they also own SEPs, which can also lead to weak or in-effective FRAND rules. In the Appendix, we show that, if the requisite share of votes in the SSO are cast by firms whose share of SEP royalties is at least as large as their share of downstream profits, and if these firms can coordinate their voting over the FRAND rules, then an SSO unconstrained by antitrust laws will establish FRAND rules leading to an outcome no better for consumers than would result from an integrated monopolist controlling all SEPs and all downstream sales.76

Fourth, even SSO members that are downstream implementers and own few, if any, SEPs may have only a modest interest in promoting effective policies to restrict ex post opportunism. Because all implementers will be subject to the opportunism, all of them will face increased licensing costs, and therefore will likely be able to pass on most or all of the increased costs to their customers.77 Furthermore, these implementers might not be especially active or effective in the standard-setting process for free-riding or public-good reasons, especially if SEP royalties constitute only a relatively small portion of the costs of their standard-implementing products. Public choice theory predicts that the highly motivated SEP holders are likely to have the greatest influence over patent policies.

Empirical evidence bears out these concerns. As a starting point, we find it striking that SSO FRAND rules are almost always quite vague.78 Notably, SSOs in which SEP holders are more prevalent tend to have weaker FRAND rules.79 Further, to our knowledge, SSOs have made almost no effort to enforce their FRAND rules and have, instead, left enforcement efforts to others.80 This evidence raises serious doubts about the effectiveness of the existing FRAND rules in preventing ex post opportunism.

#### SSO members and licensees don’t have sufficient incentives to litigate---making consumer standing critical.

Cary et al. 08, \*George Cary is a partner in the Washington office of Cleary Gottlieb Steen & Hamilton LLP. He is a former Deputy Director of the Federal Trade Commission's Bureau of Competition and 1976 graduate of the Boalt Hall School of Law at the University of California-Berkeley. \*Larry Work-Dembowski is an associate in the Washington office of Cleary Gottlieb Steen & Hamilton LLP and a 2002 graduate of the Georgetown University Law Center. \*Paul Hayes is an associate in the Washington office of Cleary Gottlieb Steen & Hamilton LLP and a 2001 graduate of the New York University School of Law; (“Antitrust Implications of Abuse of Standard-Setting”, 15 GEO. Mason L. REV. 1241 (2008))

Redress of deceptive FRAND commitments should not be limited to theories of contract and tort law. Advocates of such a limitation ignore that antitrust law properly applies where there is misconduct resulting in anti-competitive effects and where a party has acquired monopoly power as a result of that misconduct.'" It is for this reason that courts have tradition- ally applied antitrust law to attempts to exclude competition through deceptive conduct both within and outside of the standard-setting context.'45 If there are anticompetitive effects flowing from misconduct, the public should have recourse under the antitrust laws, even if it does not have standing to pursue a contract or tort claim. This is particularly true because participants in the standard-setting process who most likely would have contract or tort claims may not have sufficient incentives to vindicate the public interest in preserving the benefits of competition, particularly when their own technology has also been incorporated in the standard.

CONCLUSION

Antitrust law has an important role to play in governing both collusive and unilateral misconduct in the standard-setting process. Such misconduct can cause extensive harm to consumer welfare by undermining the reliability and viability of standard-setting, raising the costs of goods, and slowing innovation. Given the degree and extent of the potential harm, the consequences for such misconduct should be severe, including the award of treble damages to injured parties and the loss of the right to enforce the IPRs at issue. Courts and federal agencies addressing standard-setting abuses have recognized this fact in a long string of antitrust cases that have sought to punish patent holders for misappropriating the monopoly power created by the standard-setting process.'" As the need for standardization increases with each new generation of technological advances, applying antitrust law to address such misconduct is crucial to protecting consumer welfare and fostering innovation.

#### Contract law fails---fails to consider competition, limits pool of plaintiffs, and can’t obtain treble damages.

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>)

A firm’s violation of its FRAND commitment is very likely a breach of contract, as several decisions have held.54 The FRAND contract is incomplete, in the sense that not every term is specified in detail. But participants are subject to a contractual duty to bargain in good faith, with some terms being filled in by courts or other tribunals as necessary. The breach of contract question does not depend on whether the conduct reduced market output or excluded a rival unreasonably. It certainly does not depend on the existence of any party’s market power. Remedies are ordinarily contract damages or an injunction. Nonparties to the contract will typically be able to obtain relief only to the extent that they are third-party beneficiaries. However, the courts have had little difficulty concluding that participating members of the SSO are third-party beneficiaries of FRAND commitments.55 In all events, challengers will not be able to obtain antitrust law’s treble damages unless they can prove an antitrust violation.

Whether a firm’s breach of a FRAND commitment also violates the antitrust laws depends on whether the conduct in question causes competitive harm of a sort that the antitrust laws recognize.56 In the case of section 1 of the Sherman Act57 this requires a showing of a relevant agreement that is likely to reduce market output. If the conduct is reasonably ancillary to other arguably procompetitive activity, the court must also assess market power and anticompetitive effects. In the case of section 2 of the Sherman Act or section 3 of the Clayton Act, which reach mainly tying and exclusive dealing, it will require a showing of market power plus conduct that is unreasonably exclusionary.

The antitrust harm results, not from the breach of the FRAND obligation per se. Rather, it results from the creation of monopoly and higher prices for consumers. The Ninth Circuit got this issue precisely wrong, holding that the district court incorrectly focused on downstream harm to buyers when it should have looked at harm to rivals.58 That confuses contract or tort law with antitrust law.

### 1AR---Deterrence

Detterence deficit---counterplan does not contain treble damages which are key to deterrence---single damages do not create a cost to bad conduct because they only make the holder pay back what they took---only antitrust creates a legitimate cost to misconduct---Shapiro

#### The scope of remedies afforded under contract law is too narrow.

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>)

In any event, FRAND obligations reach much more broadly than do antitrust obligations. For example, a refusal to license a FRAND patent to a qualified licensee unless that person also purchases the IP owner’s hardware would very likely violate a FRAND commitment “per se,” as a simple breach of contract. Breach of the agreement would be unlawful without any showing of higher prices, market power, a minimum foreclosure amount, or another anticompetitive effect such as raising a rival’s costs.

In the case of a FRAND violation alone, the remedy could be a nonantitrust penalty for breach of contract, as well as a mandatory or prohibitory injunction.105 Absent a finding of an antitrust violation, however, it would not be amenable to anti-trust’s treble damages.106 Nor would a simple breach of a FRAND obligation be governed by the provisions that govern private equity relief from antitrust violations.107 It would also not be governed by the very broad provision that gives the Attorney General the authority to obtain an injunction against an ongoing antitrust violation without making the usual showing that equitable principles favored the requested relief.108 That provision does not contain the limitation that appears in most statutory authorizations for an injunction that empowers the court to grant them “in accordance with the principles of equity.”109

#### Treble damages good---that was above.

## DA

### ! Calc

Our internal to cyber is much bigger

### AT: New Impact

#### 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.

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

#### Calling bullshit on this DA---they do not have a piece of link evidence that connects the plan to banks. Banks do not give a shit about the aff, it’s explicitly about tellecommunition.

#### Antitrust fervor is at an all-time high---that’s Zanfangaa from 9/7---tons of rule reforms, new enforcement, bills in both chambers, state legislation that expands enforcement.

#### NCAA ruling thumps---that’s Edelman---it held the NCAA liable of a Sherman act violation on a 9-0, their link is generic so the thumper zeroes it.

**Lots of thumpers KANSAS**

**1NC Nylen 21** – covers antitrust and investigations for Politico Pro

Leah Nylen, "Bank mergers come into Democrats’ antitrust crosshairs," Politico, 4-19-2021, <https://www.politico.com/news/2021/04/19/progressives-biden-bank-merger-threat-483183>

The last time the Justice Department challenged a bank merger was in 1985, around the time that compact discs and New Coke debuted.

In the 36 years since, the U.S. has shed roughly 10,000 banks — some from bank failures, but most through acquisitions that regulators and antitrust prosecutors at the Justice Department have blessed. Critics say that has led to higher fees for consumers, reduced access to banking services and increased concerns about risk to the financial system.

Now, as Democrats in Congress push for an antitrust overhaul to restrain corporate power in tech, health care and agriculture, progressive lawmakers and economists also want the Biden administration to crack down on mergers in the banking sector. It’s setting up a clash with the industry, which has been lobbying for even easier merger scrutiny.

The issue is taking on greater urgency as some of the country’s biggest regional banks — PNC of Pittsburgh, Huntington Bank of Columbus, Ohio and M&T Bank of Buffalo, New York — pursue major deals.

“Bank regulators are playing with matches while wrecking the fire department,” said Senate Banking Chair Sherrod Brown (D-Ohio). “The Wall Street megabanks are so large and powerful that banks across the country feel pressured to get bigger and riskier. These mergers are a symptom of a bigger problem — deregulation has left us with Wall Street banks that are too big and that take too many risks.”

The campaign is threatening to drag big banks into a high-stakes antitrust debate even as they warn they need help from Washington to compete with financial technology upstarts. It comes as progressives play an increasingly influential role in Biden’s economic policy.

“Regulators have served as a rubber stamp for bank mergers for too long,” said Rep. Chuy García (D-Ill.), who with Sen. Elizabeth Warren (D-Mass.) has proposed legislation to overhaul how bank deals are considered. “These mergers have negative consequences for our communities. They mean more Wells Fargos and fewer local bank branches.”

The regional bank mergers at issue accelerated after moderate Democrats joined forces with Republicans in 2018 to ease lending regulations that Congress enacted after the 2008 global financial crisis.

Wall Street analysts are now predicting a merger wave, particularly after SunTrust’s easy combination with BB&T in 2019 to form Truist, the nation’s sixth-largest commercial bank.

The deal boom was delayed by the pandemic. But an increasing number of regional lenders are now planning mergers to better position themselves against the biggest banks, like JPMorgan Chase and Bank of America, whose assets in the trillions of dollars will continue to dwarf the smaller competitors even after they consolidate.

The expected M&A rush may run into antitrust headwinds as top congressional Democrats turn their sights to industries like banking where many players are already considered “too big.”