# 2AC

## ADV---Cyber

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

## ADV---Innovation

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

### 2AC---AT: No 5G Race

### IL---Innovation

#### The Qualcomm decision has cooling effect on 5G innovation.

Breed et al. 20, \*Logan M. Breed, antitrust partner in the Washington office of Hogan Lovells; \*Edith Ramirez, former Chairwoman of the Federal Trade Commission; \*Suparna S. Reddy, Associate at Hogan Lovells based in Washington; \*Labeat Rrahmani, an Associate at Hogan Lovells; (August 19th, 2020, “Ninth Circuit rules in favor of Qualcomm, distancing antitrust law from FRAND disputes”, https://www.engage.hoganlovells.com/knowledgeservices/news/ninth-circuit-rules-in-favor-of-qualcomm-distancing-antitrust-law-from-frand-disputes)

The practical effects of the Ninth Circuit’s decision are already emerging: other holders of significant wireless SEP portfolios such as [Nokia](https://www.nokia.com/about-us/news/releases/2020/03/24/nokia-announces-over-3000-5g-patent-declarations/) and [Ericsson](https://www.ericsson.com/en/blog/2019/10/5g-patent-leadership) have already begun to use more aggressive patent strategies related to 5G devices. The decision could also have repercussions beyond the technology sector. Companies litigating against the FTC, including in the pharmaceutical sector, have quickly [availed](https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/vyera-claims-qualcomm-reversal-supports-defence-against-ftc) themselves of the ruling to defend themselves. The ruling may also have a cooling effect on innovation if companies are less inclined to participate in standard-setting processes due to limited repercussions for companies that maneuver around their FRAND obligations. If the panel decision stands, it could have far reaching consequences.

### 2AC---Link Turn---Overclaiming

#### Ex ante valuations streamline innovation by weeding out the nonessentials and rewarding truly essential patents.

Arsego 15, \*David Arsego, J.D., Brooklyn Law School, May 2016, Certificate in Intellectual Property Law, B.S. in Mechanical Engineering, Villanova University, May 2010, works at Fay Kaplun & Marcin; (“The Problem with FRAND: How the Licensing Commitments of Standard-Setting Organizations Result in the Misvaluing of Patents”, <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1416&context=bjil>)

A common theme in current FRAND litigation is inflated claims for damages and desired royalty rates. Judge Holderman in In re Innovatio IP Ventures reduced IP Ventures’ award to a few percentage points of its original claim. He justified this action by stressing the importance of the patent to the standard at issue and ruled that patents of lesser importance are not entitled to as high of rates as patents of greater importance. This proposed valuation framework intends to assess that very same importance, ex ante and prior to any negotiations or litigation. The intent is for contracting parties to have an initial understanding of the patent value prior to negotiations. In the same way that Judge Holderman’s judgement turned on the classification of the at-issue patents as “of moderate to moderate-high importance to the standard”, an opinion from ETSI that assesses this same importance would give negotiation parties a relatively clear picture of the importance of their patents. D. The Effects of Such Valuation The intended effect of this mandatory patent valuation is not to solve every patent-licensing disagreement that parties will have. It is merely a proposed tool that will help companies come to an agreement more efficiently. Both parties will be aware if one party has a portfolio full of patents with little importance and will not waste time debating the value. Similarly, if two parties are in litigation regarding whether or not a royalty rate is FRAND, the judge will not have to perform an independent analysis of the patent’s importance herself, but can instead rely on ETSI’s determination. The effect of this reliance, and the initial determination of essentiality, will be far reaching. Duplicitous patent holders that may claim essentiality for meritless patents will now be barred from asserting SEP rights.246 Important innovators with valuable patents will be more justly rewarded for their innovation, not only by having an “important” label on their SEPs, but by no longer competing for royalties with patents that are deemed to be nonessential.

### 2AC---!---Taiwan

## AT: CP---Common Law

### 2AC---Permutations

#### 2---do the cp

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

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

#### No regulatory regime exists for SSO patent holdup---the counterplan doesn’t exist!

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>)

B. IMPLIED PREEMPTION DOCTRINE DOES NOT APPLY TO PATENT HOLDUP Even accepting the idea of implied preemption in the face of substantial regulatory regimes, the case for preempting the antitrust laws in the SSO-patent holdup context has not been made. Put simply, there is no regulatory oversight in the case of SSO-patent holdup. Although the Patent and Trade-mark Office (PTO) regulates patents in the sense of deciding what patents to issue, there is no connection between that role and the patent holdup issue. Indeed, almost every dispute involving a patent—whether patent abuse, infringement, or licensing quarrels—is ordinarily resolved through some form of private litigation or dispute resolution.79 It is of course true that there is a specialized patent court (the Federal Circuit), and that certain doctrines (laches, equitable estoppel, and misuse) have been developed to address “opportunistic behavior” by patentees. But this simply means that there is an independent body of patent law that certain private parties may enforce. The government does not actively police the behavior of patent holders in the way the SEC enforces the securities laws or the states enforce their laws in the state-action context.80 Although the PTO imposes certain duties upon patent applicants,81 it lacks the authority to impose any such similar duties upon patentees participating in a standard-setting process. SSOs impose their own disclosure obligations without any interference or oversight by the PTO. In sum, we think it is a stretch to argue that a competing regulatory scheme governs all of patent law. Many patent law defenses, such as those recognized under 35 U.S.C. § 282, are borrowed from the common law.

## AT: CP---States

### 2AC---Permutations

### 2AC---Conditionality---Short

### 2AC---Preemption

#### The Ninth Circuit imposed court-order limitations on antitrust law to preserve its balance with patent law.

Martino et al. 20, \*[Matthew M. Martino](https://www.skadden.com/professionals/m/martino-matthew-m) [Tara L. Reinhart](https://www.skadden.com/professionals/r/reinhart-tara-l) [Steven C. Sunshine](https://www.skadden.com/professionals/s/sunshine-steven-c) [Julia K. York](https://www.skadden.com/professionals/y/york-julia-k), works with clients at Skadden, Arps, Slate, Meagher & Flom LLP; (August 14th, 2020, “Ninth Circuit Strikes Down Sweeping Injunction Against Qualcomm and Reins In Expansive Interpretation of Sherman Act”, https://www.skadden.com/insights/publications/2020/08/ninth-circuit-strikes-down-sweeping-injunction)

In its highly anticipated decision, the Ninth Circuit panel unanimously rejected the lower court’s reasoning, vacating the judgment and reversing the worldwide injunction against Qualcomm. The panel concluded that the district court had erroneously imposed the antitrust duty to deal on Qualcomm, had impermissibly looked outside the relevant antitrust market in order to infer an anticompetitive act and had relied on outdated evidence of agreements that were terminated before the suit was filed to justify a broad, forward-looking global injunction. The Ninth Circuit further rejected the argument that a SEP holder’s violation of FRAND commitments could independently create antitrust liability, instead pointing to patent and contract law as sources for potential remedies. The decision reflects a considered effort to rei

n in the district court’s expansive interpretation of general antitrust principles and their specific application to SEP holders, as well as recognition that the antitrust laws aim to preserve companies’ incentives to innovate and compete. Recognizing that while “[a]nticompetitive behavior is illegal under federal antitrust law[,]” the panel was adamant that “[h]ypercompetitive behavior is not.”[7](https://www.skadden.com/insights/publications/2020/08/ninth-circuit-strikes-down-sweeping-injunction" \l "ftn7)

Rejection of District Court’s Expansive Interpretation of Antitrust Laws

The Ninth Circuit decision contains several notable conclusions regarding the scope of Section 2 of the Sherman Act and what constitutes cognizable antitrust harm.

#### State efforts to impose greater antitrust liability than established by federal courts will be preempted to protect that balance.

Samp 14, \*Richard A. Samp is the chief counsel for Washington Legal Foundation (WLF), a non-profit, public interest law firm in Washington, D.C. WLF filed an amicus brief in support of Love Terminal Partners. (2014, “The Role of State Antitrust Law in the Aftermath of Actavis”, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1062&context=mjlst)

V. ACTAVIS’S PREEMPTIVE EFFECT Application of state antitrust law to reverse payment settlements is not merely a hypothetical possibility. There are a fair number of pending lawsuits that challenge reverse payment settlements on state-law grounds. The California Supreme Court has agreed to review one such suit.74 In seeking affirmance of the appeals court’s dismissal of the suit, the defendants argue inter alia that the suit is preempted by federal law.75 As noted above, there is precedent for a finding that state antitrust law is preempted to the extent that it conflicts with the policy underlying a federal statute.76 Moreover, in the context of patent law, federal courts have not hesitated to preempt state laws that the courts deem to stand as an obstacle to accomplishing Congress’s objectives (i.e., encouraging efforts to develop new and useful products).77 To the extent that any portions of Actavis’s holding can be deemed to reflect the Court’s perception of Congress’s new-product-development objectives, a state law is preempted if it is inconsistent with that holding and seeks to impose a greater degree of antitrust liability on the parties to a reverse payment settlement. Actavis’s treatment of settlements involving a compromise entry date appears to meet that description. Actavis held that federal antitrust liability could not arise from a settlement in which the generic manufacturer agrees not compete for a number of years and in return is rewarded with an exclusive license to market its product several years in advance of the patent’s expiration date.78 Accordingly, states are not permitted to impose antitrust liability under similar circumstances because doing so would upset the balance that, according to Actavis, Congress sought to achieve between antitrust and patent law. Other issues left open by Actavis are likely to be answered in the years ahead. For example, the Supreme Court did not specify whether noncash benefits received by a generic manufacturer in connection with a patent settlement can ever serve as the basis for federal antitrust liability. If the Supreme Court eventually answers that question by stating: “No, federal antitrust law will not examine settlement benefits other than cash that flow to the infringing party,” then it is likely that state antitrust law would be required to conform to that rule. The potential grounds for such a ruling (a desire both to promote settlement of patent disputes and to uphold reliance interests in existing patents) are based largely on values embedded in federal patent law. There is little reason to believe, however, that the Court would prevent application of state antitrust law to patent settlement agreements where state law is fully consistent with federal antitrust law. Even in areas subject to extensive federal regulation, the Supreme Court has upheld the authority of states to engage in parallel regulation that is not inconsistent with the federal regulation.79 Unless the Court were to determine, as in Connell,80 that states could not be trusted to properly accommodate the objectives of the federal statute at issue (here, federal patent law), there is no reason to conclude that Congress would not have wanted states to be permitted to police the same sorts of anticompetitive conduct that is policed by federal antitrust law. Moreover, states are likely free to impose greater penalties on the proscribed conduct than is available under federal law. As the Court explained in California v. ARC America Corp., state antitrust law is not required to adhere to the same set of sanctions imposed by federal antitrust law.81 It seems reasonably clear, however, that Actavis prohibits states from adopting the procedural devices rejected by the U.S. Supreme Court—either a per se condemnation of reverse payment settlements or a presumption of illegality accompanied by “quick look” review. The Supreme Court rejected those approaches because it determined that in many cases there might well be pro-competitive economic justifications for reverse payment settlements and that presuming their illegality could result in the suppression of economically useful conduct.82 State antitrust laws that adopted the FTC’s proposed presumption of illegality would be subject to similar criticism, and thus would likely be impliedly preempted as inconsistent with the careful balance between antitrust and patent law established by Actavis. CONCLUSION Because Actavis left so many questions unanswered regarding the application of federal antitrust law to patent settlement agreements, the extent to which federal law preempts the application of state antitrust law to such agreements remains similarly unsettled. One can be reasonably confident that if private plaintiffs become dissatisfied with the results of pending litigation under federal antitrust law, they will turn with increasing frequency to state antitrust law as an alternative remedy. Even if state law ends up doing no more than “parallel” federal antitrust law, defendants are likely to incur substantial litigation costs fending off such state claims in the years to come.

## AT: CP---Regulation

### 2AC---Permutations

### 2AC---Links

### 2AC---AT: CP

#### These concerns aren’t generic---their evidence concedes this link OR the counterplan links to the tradeoff DA.

Kristelia A. 1NC Garcia 16, Associate Professor, University of Colorado Law School, “Facilitating Competition by Remedial Regulation,” Berkeley Technology Law Journal, Vol. 31:1, 2016, pages 183-258.

3. Challenges The suggestion to implement additional regulation, remedial or otherwise, in an already highly regulated environment such as music licensing, is not made lightly. As a general matter, regulation begets regulatory gaming, or “private behavior that harnesses procompetitive or neutral regulations and uses them for exclusionary purposes.”258 In their seminal article on this topic, Professors Dogan and Lemley suggest that while regulatory gaming cannot generally be avoided ex ante, it may be checked by continued antitrust oversight of regulated markets.259 While not a wholesale fix, the fact that the DOJ and the FTC would continue to have jurisdiction over the music publishing companies should assuage gaming concerns here.

Another concern is the fact that remedial regulation would shift some of the antitrust oversight from the auspices of the Sherman Act to that of the Copyright Act; or, from Title 15 to Title 17. This opens competition policy up to the potentially negative influences of lobbying. Copyright— with its concentrated market power and disparate interests—is particularly susceptible to the influence of lobbyists.

### 2AC---Deficit Frontline

#### Regulation remedies fail

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>)

III. CONCLUSION

Patent holdup where a patentee has deceived an SSO in order to secure a position in the standard is, at its core, an antitrust problem. In this context, patent holders harm consumers by exploiting the competition-reducing aspects of standard setting to their own private advantage. In addition to being the body of law directed toward anticompetitive conduct, antitrust provides numerous practical advantages, including the possibility of governmental enforcement, and appropriately broad standing.

Remedying the patent holdup problem exclusively through non-antitrust legal remedies would be perverse. Indeed, it would be a bit like remedying patent infringement through the doctrine of common law conversion. In some instances, it might work, but there certainly would be under-enforcement.

To be sure, there are instances where deceptive conduct by the patentee does not harm competition and, in those instances, there is no antitrust claim. Often there will be patent remedies in that situation, or contract or even tort remedies. The legal regimes can and do coexist peacefully.

Those who argue that the marginal benefit of antitrust remedies do not out-weigh the cost of antitrust litigation both understate the benefits (broad standing and ready remedies where appropriate) and overstate the costs (the potential, however unknown, of “false positives,” i.e., condemning behavior that is not anticompetitive). In addition to being overstated, the false positives concern is also misplaced in this context. Unlike an antitrust attack on price cutting or a securities offering, the risk of a false positive here is not the over-deterrence of desired behavior, but rather that over-deterrence of deceptive and opportunistic behavior. Fretting about that form of over-deterrence seems itself to be a misallocation of resources. And preventing that form of over-deterrence by reliance on the competitive outcomes under legal regimes not designed to protect competition strikes us as unwise.

#### Regulatory capture wrecks solvency

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

The problem with agencies is much greater than just their questionable mandate to promote competition, however. Agencies are famously subject to “capture” by the industries they are supposed to regulate.55 That capture can take many different forms. Sometimes regulators or legislators are captured in the most venal sense – they are bribed or otherwise given personal benefits in exchange for voting a particular way. This seems to have been the case in Omni Outdoor Advertising, for example. Regulators who accept bribes (or politicians who accept campaign contributions in exchange for a particular vote) are not acting in the public interest but in their private interest, a private interest that necessarily aligns with the industry participant doing the bribing. Even a regulator who would never accept bribes may still seek to maximize, not the public interest, but his own power or the power and interests of his agency, a fact that industry can often use to its advantage. Capture need not be so brazen, however. Even honest regulators and legislators can be captured through the mechanism of public choice theory.56 A legislator that tries to maximize her constituents’ expressed preferences may still end up supporting legislation that benefits private firms at the expense of the public interest, because the private firms will frequently have a concentrated interest – and therefore show up to lobby on a particular issue – while the public is hard to organize even around issues that may affect a great many of them diffusely. Regulators are subject to the same effect. A notice and comment rulemaking is likely to produce more comments from people with a concentrated interest in the outcome, and fewer comments from those with a more diffuse interest. Thus, regulators who try in good faith to determine what the public thinks of a particular regulation may still end up with a skewed view of the pros and cons. This may be particularly likely with competition issues. While the public as a whole has a strong interest in unfettered competition, any individual member of the public is unlikely to be affected much by a particular regulatory decision. And particularly where the industry as a whole colludes to seek regulatory intervention that benefits them, as in Ticor Title, there are unlikely to be competitors who can stand as proxy for the interests of the public. Finally, even legislators and regulators aware of the existence of public choice problems and determined to do the right thing are still susceptible to forms of what we might call “soft” capture. Acquiring accurate information about market conditions is often very difficult, for example. Companies with a vested interest in the outcome can hire lobbyists that provide information helpful to their side, and a regulator who cannot get information except from those lobbyists may have little choice but to accept that information as true. Even if there are competing sources of information, interested parties can and do hire as lobbyists former employees, colleagues, or friends of the regulator, and it is natural human instinct to trust those people more than strangers. And regulators tend to come from the industries they regulate, which may mean that they start out seeing things from the industry’s perspective. Judges, by contrast, are much less subject either to having their purpose diverted or to capture. While some have tried to argue that judges face some of the same interest group constraints as legislators and administrative agencies,57 the fact is that antitrust courts are trying to achieve the goal of economic efficiency, they are doing it in industries in which they have no direct financial interest, they cannot act to benefit their “agency” in rendering a decision, and the structure of the litigation process helps ensure to the extent possible that both sides are presented in a relatively balanced way. Courts aren’t perfect, of course. But all advantages are comparative, and the fact that antitrust courts are trying to promote competition rather than to achieve some other end (whether legislated or self-motivated) provides a powerful counterweight to the industry expertise of administrative agencies. It is important to keep in mind, as Areeda and Hovenkamp summarize, that “it often turn[s] out that the principal beneficiaries of industry regulation were the regulated firms themselves, which were shielded from competition and guaranteed profit margins.”58 Courts should not assume that regulation will lead to competition merely because regulators know more than courts about the industries they regulate.

#### FTC enforcement is key

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

I. The Relative Efficiency of Antitrust and Regulation The growing antitrust deference to regulation is cause for concern. Both antitrust and regulation are economic responses to market failures.46 Implemented correctly, both are designed to serve the ends of economic efficiency.47 It is therefore reasonable to judge the relative efficacy of antitrust and regulation by economic criteria. And judged by those criteria, virtually all economists would agree that antitrust-overseen market competition is superior to industry regulation. In particular, none of the arguments the Court has offered as a reason to prefer regulation to antitrust withstand scrutiny. Relative expertise. It is true, as the Court emphasized in Trinko and Credit Suisse, that antitrust courts are generalist courts, while regulatory agencies tend to specialize in a particular industry and its problems. That specialization should, all other things being equal, mean that expert regulators will do a better job than judges or juries of reaching the right result. But other things are far from being equal. Antitrust courts have two significant advantages over regulatory agencies when it comes to promoting competition. First, antitrust courts are trying to promote economic efficiency, while regulators often aren’t. For decades, efficiency has served as the sole criterion on which to judge antitrust rules. And courts have had over a century in which to hone those rules to achieve that end. Without question, courts have made mistakes in the past. But there is a strong consensus among antitrust scholars that the wave of cases in the last 30 years has largely moved antitrust in the right direction, eliminating any significant risk that antitrust enforcement will do more harm than good.48 Scholars may fight over whether a Chicago School or a post-Chicago School approach will achieve the right result in specific cases,49 but for the most part they are tinkering at the margins: the law and the scholarship have converged with respect to both the proper goals of antitrust and the general rules that will achieve those goals. Regulation, by contrast, is frequently not even intended to achieve economic efficiency through competition. Occasionally that is because of a legislative judgment that competition is impossible, though the number of industries thought to be natural monopolies for which markets won’t work has shrunk dramatically in the past four decades.50 Industry regulation that excludes entry in order to promote a natural monopoly, as telephone regulation did before 1984, is not likely to achieve a competitive outcome. More often, the goals of the legislators who establish regulatory agencies, or the goals of the regulators who run those agencies, are to achieve something other than competition. Indeed, many regulations are aimed precisely at eliminating competition, as was the government- sponsored raisin cartel in Parker v. Brown51 or any of its modern descendent crop-support programs administered by the Department of Agriculture. It should be obvious that regulations intended to reduce competition will not promote it. But even if the regulation is not directly inimical to competition, competition is frequently irrelevant to, or at best a minor consideration in, a regulator’s agenda. Regulators may care about the safety and efficacy of a drug, for example, and only incidentally about whether there is competition in the sale of that drug. They may seek to reduce traffic deaths or air pollution by mandating technology, regardless of the effect that mandate has on the price manufacturers can charge or the number of products they sell. These are laudable goals, to be sure, but they are not competition-related goals. An agency tasked with achieving these goals is likely to ignore threats to competition from the industry it regulates so long as those threats do not compromise its core mission. Thus, the state and local governments that enacted the privately-drafted National Fire Protection Code at issue in Allied Tube into law were interested in stopping fires; doubtless they thought little if at all about the competitive effects of the code, even though it turned out that the code was drafted by interested private parties with the purpose of impeding competition rather than promoting fire safety.52 Even those agencies whose mission expressly involves consideration of competition issues will not necessarily make it their first among potentially conflicting priorities. The SEC, for example, which as Justice Breyer pointed out is dedicated to improving market information and expressly considers competition among other issues in setting regulation,53 is first and foremost an investor-protection and information-disclosure agency, not an agency that investigates and weeds out cartels or other anticompetitive practices. It is unlikely to devote much in the way of time or resources to such issues, because even if it is tasked to consider such issues they do not reflect the agency’s primary purpose. Similarly, even an agency like the Federal Communications Commission that is directly focused on competitive conditions in a particular market may naturally pay attention primarily to that market, and give less if any attention to the effect its rules might have on competition in adjacent markets or competition from unanticipated new businesses. This arguably explains the FCC’s willingness to largely ignore the effects of its decisions on the Internet, for example: it is telecommunications, not the Internet, that the FCC is tasked to regulate. Agencies that view competition as secondary, or view it through the lens of a particular industry’s characteristics and interests, are less likely to create and enforce rules that optimally encourage competition.54 At a bare minimum, therefore, the industry-specific expertise of an agency must be balanced against the competition-specific expertise of the specialist antitrust agencies: the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division.

#### Regulations don’t deter misconduct

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

Our goal in this paper is not to persuade the reader that these particular examples of regulatory gaming violate the antitrust laws (though we think they do) or that other examples, such as regulatory price squeezes, do not violate the antitrust laws. Rather, our point is that whether or not particular acts of regulatory gaming harm competition is and should be an antitrust question, not merely one that involves interpreting statutes or agency regulations. Regulatory agencies and even Congress cannot prevent gaming ex ante. Experience with the pharmaceutical industry suggests that if Congress acts to squelch one form of gaming, companies will find other ways to game the system. And even if Congress or the regulating body can surgically fix a particular type of exclusionary behavior, such an ex post response (unlike the threat of antitrust treble damages) does nothing to compensate for past harm or to deter future gaming behavior. Some level of antitrust enforcement – with appropriate deference to firm decisions about product design and affirmative regulatory decisions that affect market conditions – provides a necessary check on behavior, such as product hopping, that has no purpose but to exclude competition.

### 2AC---AT: Patent Law

#### Patent & contract law fails

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>)

One final point about patent remedies concerns standing: it is not just the type of harm that matters to antitrust, but whether anyone has a remedy to address it. Antitrust fills the gap left open by patent law by providing a remedy to those “outsiders”—consumers, competitors and others—who lack standing to seek relief under the patent laws. Consider Qualcomm: The use of equitable estoppel there was only available as a defense asserted by the alleged infringer. The elements of the defense discussed above, moreover, require that the infringer either be involved in the SSO process or have a specific basis for claiming that it was affirmatively misled by the patentee. No consumer injured by the wrongful acquisition of monopoly power in this context would meet these criteria, nor would other firms that have been excluded from the market due to the deception at issue. There is no government enforcement agency to protect such plaintiffs, because patent law has no proviszion for government enforcement intended to protect consumers from harm to competition.

In sum, the limitations of patent law would exclude many of the categories of potential plaintiffs suffering antitrust injury as a result of standard-setting abuse. We conclude that equitable estoppel is unequal to the task of policing monopolization through fraudulent conduct in the standard-setting process.

#### 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 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.

## AT: DA---Politics

### 2AC---AT: UQ

#### Won’t pass---Manchin & Sinema

Editorial Board 9-30, Wall Street Journal Editorial Board. (Editorial Board, 9-30-2021, “Joe Manchin’s Intervention,” WSJ, <https://www.wsj.com/articles/joe-manchins-intervention-democrats-spending-bill-senate-house-nancy-pelosi-chuck-schumer-11633039990>)

House Democrats scrambled all day and failed Thursday to come up with the votes to pass the Senate infrastructure bill. But the bigger news this week is West Virginia Sen. Joe Manchin’s declaration of what he won’t accept in the separate $3.5 trillion tax-and-spending bill. Think of this as an intervention to save the Democratic Party, and the country, from the left. Progressives are furious with Mr. Manchin, and with Arizona Sen. Kyrsten Sinema, for refusing to go along with the Bernie Sanders entitlement dreamscape. As an act of retribution, they’ve threatened to scuttle the $1 trillion infrastructure bill that the two Democrats negotiated with Republicans. Mr. Sanders wants the House to defeat the infrastructure bill, a Biden priority, and Speaker Nancy Pelosi had to delay going to the floor again Thursday because she lacked the votes to pass it. Unless it passes, the moderate liberals who support the infrastructure bill will know they’re riding in the back of the party bus. Not so Mr. Manchin, who has the leverage in a 50-50 Senate to ride in the front, maybe even to drive the bus. They can’t afford to lose his vote, yet the left and the White House have behaved as if somehow the West Virginian would roll over in the end. Mr. Manchin has been sending signals for months that his support has limits. First he refused to break the Senate filibuster. Then he said he couldn’t support $3.5 trillion because it’s inflationary and the economy no longer needs the help. Then in our pages he called for a “strategic pause” on the spending bill to debate specific policies. He might as well have been Ted Cruz for all that Democratic leaders paid attention. Then, in statements and remarks Wednesday and Thursday, Mr. Manchin laid down markers that Democrats can no longer ignore. He won’t support more than $1.5 trillion in new spending. He says “social programs must be targeted to those in need, not expanded beyond what is fiscally possible.” He’s willing to raise some taxes, but nothing like what’s in the $2.1 trillion House Ways and Means bill. “What I have made clear to the President and Democratic leaders,” Mr. Manchin said in a statement, “is that spending trillions more on new and expanded government programs, when we can’t even pay for the essential social programs, like Social Security and Medicare, is the definition of fiscal insanity.” He’s right. Democrats may be angry, but as the days go by they may recognize that Mr. Manchin is doing them a favor. With President Biden abdicating to the left, the West Virginian is providing a reality check on progressive excess. Inflation is already a political problem for Democrats, and another spending blowout would further associate the party with rising prices and falling real wages. The economy may have enough post-Covid momentum to absorb the tax increases, but they will slow growth over time. The overriding problem for Democrats is that they are trying to pass a Bernie Sanders agenda with a Joe Biden mandate. Mr. Biden won because he ran against Donald Trump’s chaotic leadership and promised to end the pandemic. Even then he lacked coattails as Democrats lost seats in the House and won the Senate only because Mr. Trump demoralized GOP voters in two Georgia races. Mr. Biden ran explicitly against Mr. Sanders’s socialism in the primaries. As the nominee he felt obliged to endorse a “unity” agenda with Mr. Sanders. But that should have gone by the wayside with the small majorities in Congress. For reasons that are hard to understand, Mr. Biden came to believe he was FDR and could pass the Sanders agenda as his own. He has no mandate for the vast expansions of government he is proposing, and if Democrats somehow manage to pass even half of it, they’ll be crushed in 2022. This is the political message if you read between the lines of Mr. Manchin’s warnings. As he put it on Thursday, progressive Democrats can campaign in 2022 on what they don’t pass this year in Congress. Then they might have a mandate for what they’re trying to jam through now without enough public support. Unlike Mr. Manchin, we think even $1.5 trillion more in spending is far too much after Congress has spent $5.4 trillion in the last year. More than the amount of new spending, and even more than the tax increases, the real danger is from the many new entitlements demanded by the left. Even if they start small, they will always grow. And even if they are phased out to fit a 10-year budget window, they will never be repealed. These entitlements are the largest stakes as Democrats try to pass whatever they can without a voter mandate. They would corrode the federal fisc and entrench government from cradle-to-grave. Meantime, Mr. Manchin is trying to save Democrats from themselves.

#### PC is thrashed

Lim 9-30-2021 (Naomi, “Biden's decision to go big on coronavirus spending undermines reconciliation negotiations,” Yahoo News, <https://news.yahoo.com/bidens-decision-big-coronavirus-spending-110000972.html>)

\*language modified in brackets

President Joe Biden's decision to outspend former President Barack Obama with his $1.9 trillion coronavirus package may backfire as Democrats squabble over his $3.5 trillion social welfare and environment proposal amid a looming federal government shutdown and debt ceiling crisis.

As inflation lingers and new data suggest mass pandemic-induced evictions never materialized, Biden may have exhausted his political capital with centrist Democrats by muscling an excessive COVID-19 relief measure through Congress — ~~crippling~~ [undermining] his broader legislative agenda and the health of the U.S. economy in the process. On Wednesday evening, Sen. Joe Manchin, a West Virginia Democrat and key vote on the package, trashed the spending bill as "fiscal insanity."

There is evidence that Biden's so-called "American Rescue Plan," which dwarfed Obama's $800 billion stimulus framework in 2009, was "too big," according to Scott Lincicome, a senior fellow at the libertarian-leaning Cato Institute.

"The emergency wasn't nearly the size it was when this bill was first proposed," he told the Washington Examiner. "Nothing changed in terms of the top line spending between December and March, and that's an issue because a lot changed on the ground."

"Instead of taking a small bite in March, the Democratic majorities saw an opportunity to get the ball rolling on a lot of nonpandemic related priorities," he continued. "For example, the child tax credit."

That has economic consequences, according to Lincicome. While August's annual inflation rate of 5.3% can be partly attributed to supply chain constraints, economists who initially insisted higher prices would be "transitory" and last between "two, three months" now look "pretty silly," Lincicome said.

"2020 hindsight is, obviously, perfect," he added. "But I do think that, even in February and March, there were signs that $1.9 trillion was just way, way too big and that it was Democratic majorities in both chambers getting a little greedy. You know, reap what you sow. So, I think they're facing some of the repercussions."

Steven Kamin, a senior fellow with the conservative-leaning American Enterprise Institute, conceded the $1.9 trillion package was "a trifle generous, particularly in the stimulus checks." But he downplayed links between that measure and the negotiations over the $3.5 trillion reconciliation, government funding, and debt ceiling bills.

Liberal House Democrats threaten to sink the Senate-cleared $1.2 trillion bipartisan infrastructure deal if their centrist colleagues do not support the $3.5 trillion Democrats-only social welfare and climate proposal. Additionally, the fiscal year ends after Sept. 30, and Treasury Secretary Janet Yellen projects her department will run out of money to pay the country's debts by Oct. 18 unless the borrowing limit is increased.

"The way I see it is, it's sort of a perfect storm, where everything, unfortunately, is coming together at once," Kamin said. "And it would be my guess that if basically the grandstanding of both the centrists and the progressives on this led to neither bill being passed, I think it would be like, 'Adios Democrats.'"

The stock market reverberated this week after Federal Reserve Chairman Jerome Powell told the Senate Banking Committee that "elevated" inflation would remain "in coming months." Additionally, unemployment is at 5.2% and 5.6 million fewer people are working than before the pandemic, despite estimates of 10.5 million job openings.

### 2AC---NL---Courts

#### The plan is court action, which doesn’t link:

#### 1---it doesn’t require Biden to invest PC for passage.

#### 2---court action flies under the radar.

Lohier 16 - judge on the United States Court of Appeals for the Second Circuit and formerly an Assistant United States Attorney for the Southern District of New York (Raymond, “THE COURT OF APPEALS AS THE MIDDLE CHILD,” *Fordham Law Review*, Lexis)

In the meantime, almost all of the work of our circuit courts is off the congressional radar. Circuit opinions, with or without the intercession of the Supreme Court, so rarely prompt a ripple in Congress that it becomes memorable when they do. The few ripples more often arise in cases involving issues of national security. A recent example was our decision in ACLU v. Clapper,25 which stirred a vigorous debate in Congress in 2015 when we held that the text of section 215 of the USA PATRIOT Act did not plainly authorize the systematic bulk collection of domestic phone records by the National Security Agency.26 Even more recently, Senator Orrin Hatch of Utah cited our court’s decision in Microsoft Corp. v. United States,27 in which we held that the Electronic Communications Privacy Act (ECPA) did not authorize the government to obtain electronic communications stored outside the United States.28 Senator Hatch and other members of Congress pointed to both the majority opinion and a concurring opinion in that case to ask the Department of Justice to work with Congress on fixing the ECPA.29 On extremely rare occasions, specific congressional involvement arises in the context of a discrete case, as when individual Senators or Representatives seek to influence how we decide important legal issues, such as the indefinite detention provisions of the National Defense Authorization Act for Fiscal Year 2012, by submitting amicus briefs pressing their points of view.30 There also are continuing efforts to get Congress’s attention on broader issues of statutory language. Fairly recently, for example, the Judicial Conference of the United States sought to revitalize and readvertise an excellent project to promote communications between federal courts of appeals and Congress.31 Under the project, “courts of appeals identify opinions that point out possible technical problems in statutes [such as ambiguities and gaps] and send those opinions to Congress for its information and whatever action it wishes to take.”32 Yet, for whatever reason, only three opinions were submitted to Congress under this project in 2015 and only fifty-two altogether have been submitted since 2007.33 Of course, other ways to solicit legislative attention exist short of using this formal mechanism. An opinion that cries for congressional action or decries congressional inaction is one example. But, as I explain later, that opinion is apt to be ignored by Congress if it comes from a circuit court, rather than even a lone dissenter on the Supreme Court.

### 2AC---Afghanistan Thumper

#### PC low---delta and Afghanistan

AFP 9-7-2021 (“Biden to unveil new 'six-pronged' plan on how to stop delta variant,” <https://www.i24news.tv/en/news/coronavirus/1631027956-biden-to-unveil-new-six-pronged-plan-on-how-to-stop-delta-variant>)

Biden, who took office in January, won praise for his administration's concerted effort to get the coronavirus pandemic under control. Mass vaccination campaigns quickly got off the ground, boosting the Democrat's image as a competent crisis manager. However, the combination of the aggressive Delta variant and large, mostly Republican-dominated swaths of the country where vaccinations continue to lag, has fueled a stunning resurgence of the disease. Despite the role played by Republican leaders in refusing to impose mask mandates in hard-hit areas, Biden is taking much of the blame. Also damaged politically by the traumatic exit from Afghanistan, the 78-year-old Democrat has seen his political capital plummet in the last few weeks.

### 2AC---Conversation Changer

#### The plan changes the conversation by pivoting to domestic issues---that builds PC lost on Afghanistan

Gift 9-7-2021, Associate Professor of Political Science at UCL, where he is director of the Centre on US Politics (CUSP). (Thomas, “Biden’s mishandled Afghanistan withdrawal is unlikely to have a large effect on the 2022 midterms,” <https://blogs.lse.ac.uk/usappblog/2021/09/07/bidens-mishandled-afghanistan-withdrawal-is-unlikely-to-have-a-large-effect-on-the-2022-midterms/>)

The last few weeks have been an undeniable jolt to the White House. Biden’s approval ratings have dipped into negative territory. Republicans are using the devastating images out of Kabul to paint a portrait of an unreliable commander-in-chief. Even Democratic allies have questioned how Biden’s recent moves square with a leader who promised to be a steady hand and to restore American trust abroad. Afghanistan was Biden’s first true foreign policy test, and his execution failed. Politically, however, whether this proves to be a temporary blip for Biden—or the start of a protracted loss of political capital—will depend on how effectively the administration can change the conversation. The White House communications office is clearly trying to pivot back to domestic issues. But even here, there’s no safe harbor given continued depressing news on COVID-19, worse-than-expected August job numbers, mounting concerns about inflation, and so on. To the extent that presidents are granted even a modicum of a honeymoon period anymore, we’re well past that with Biden.

### 2AC---NL---Compartmentalized

#### Lawmakers compartmentalize.

Pergram 18 (Chad Pergram, Congressional reporter. “Amid Kavanaugh cacophony, Congress forges bipartisan agreements on key issues”. October 13, 2018. <https://www.foxnews.com/politics/amid-kavanaugh-cacophony-congress-forges-bipartisan-agreements-on-key-issues>)

Step back from the Kavanaugh cacophony. Examine what lawmakers from both parties in both chambers accomplished in September and early October, with virtually zero fanfare. Amid the turmoil, Congress approved the first revamp of national aviation policy in years. The Senate approved the final version of the legislation 93-6. This came after a staggering six extensions due to bickering and disagreement. Then, Congress approved a sweeping, bipartisan measure to combat opioid abuse. The House okayed the package 393-8. The Senate adopted the measure 98-1. And, there was no government shutdown. The House and Senate came to terms on two bipartisan bills which funded five of the 12 annual spending bills which operate the government. The sides agreed to latch an additional measure to one of the spending plans to fund the remaining seven areas of federal spending through December 7. President Trump briefly threatened to force a government shutdown if lawmakers didn’t include money for his border wall in the plan. But the President ultimately punted that battle until December. Democrats praised Republicans for keeping conservative “poison pill” riders out of the appropriations bills. That decision drew Democratic support for the measures. The Senate approved a bipartisan water and infrastructure package. McConnell hailed the bipartisanship which descended upon the Senate – even as the senators fought over Kavanaugh. Nearly in the same breath, McConnell derided boisterous, anti-Kavanaugh protesters outside the Capitol as a “mob.” McConnell insisted this week he needed the Senate to clear a slate of 15 conservative judges to lower courts before he could cut senators loose for the midterm elections. McConnell and Schumer appeared at loggerheads. McConnell’s goal was clear: extract the confirmation of these nominees – or tether to Washington vulnerable Democratic senators from battleground states to keep them off the campaign trail. Schumer knew McConnell would ultimately prevail on the nominees after the midterms. So the New York Democrat accepted McConnell’s ransom, permitting the Senate vote on a slate of nominees on Thursday night. Schumer also extracted a concession from McConnell: send senators home until November 13th. One may wonder how lawmakers can find themselves in an imbroglio over a major issue like Kavanaugh – yet forge major bipartisan accords on other. Frankly, that’s just politics. Politics always elicits strange bedfellows. Successful lawmakers know they should compartmentalize their disputes. The enemy today may be your best ally tomorrow.

### 2AC---Doesn’t Solve Warming

#### Stimulus solve warming---huge investment in climate technology.

#### Budget reconciliation is insufficient to solve warming

Karlsson 7-27-2021, Program Manager for the Climate and Economic Transformation program at the Roosevelt Institute, (Kristin and Rhiana Gunn-Wright, “Climate’s Filibuster Problem: Why Transformation Requires More Than Reconciliation,” *Roosevelt Institute*, <https://rooseveltinstitute.org/2021/07/27/climates-filibuster-problem-why-transformation-requires-more-than-reconciliation/>)

The climate crisis poses an existential threat to the planet, humanity, and the economy—but to pass the climate policy we need, we must abolish the filibuster. Meeting the emission reductions and climate justice goals set forth by the Biden-Harris administration and the Paris Agreement mandate requires substantial federal spending—largely financed by deficit spending. It also requires creating and funding new programs and agencies dedicated to the climate crisis and implementing cross-cutting equity, labor, and environmental justice standards, like Justice40, to ensure that the new green economy reduces, rather than deepens, inequality. Legislation of this scale and scope is guaranteed to face a filibuster. As a workaround, progressives are attempting to pass a pared-down climate agenda through budget reconciliation. But the budget reconciliation process is the wrong tool to deliver the large-scale, structured interventions we need to adequately address the climate crisis, especially when it comes to equity and environmental justice. Budget reconciliation is a process designed to make adjustments to the congressional budget, with strict guardrails in place that limit the impact to the federal deficit, ensure that provisions only pass if their intended purpose is a budgetary impact, and prohibit the creation of new programs with clear, qualitative goals in mind. These limitations will block adequate climate legislation. We cannot pass needed, transformational climate investments through budget reconciliation.

## AT: DA---FTC

### 2AC---AT: UQ

#### Bill won’t pass the senate---the GOP hates it

Kelley Drye & Warren 7/21 (Kelley Drye & Warren LLP. “With Partisan Tensions Running High, House Passes Legislation to Strengthen FTC’s 13(b) Enforcement Authority” , <https://www.jdsupra.com/legalnews/with-partisan-tensions-running-high-9497117/> , July 21, 2021, date accessed 9/18/21)

On July 20, the U.S. House of Representatives passed H.R. 2668, the Consumer Protection and Recovery Act, to clarify the Federal Trade Commission’s enforcement authority under Section 13(b) of the FTC Act. H.R. 2668, authored by Representative Tony Cárdenas (D-CA), would explicitly authorize the FTC to seek permanent injunctions and other equitable relief, including restitution and disgorgement, to redress perceived consumer injury. The bill was passed by a vote of 221-205, with two Republicans joining all Democrats in support. In a joint statement issued after the vote, House Energy and Commerce Committee Chair Frank Pallone (D-NJ) and Consumer Protection and Commerce Subcommittee Chair Jan Schakowsky (D-IL) said: “The Consumer Protection and Recovery Act will restore the FTC’s ability to force scammers that have broken the law to repay those who have been harmed or defrauded.” Chairs Pallone and Schakowsky moved quickly to usher the bill through their committee and the House just three months after the Supreme Court ruled in AMG Capital Management, LLC v. FTC that the Federal Trade Commission did not have the authority to pursue monetary penalties under Section 13(b). Facing increasing legal uncertainty in the months leading up to the AMG decision, bipartisan FTC Commissioners had urged Congress to clarify the agency’s enforcement authority – and bipartisan Members of Congress expressed support, citing a shared desire to protect consumers and hold fraudsters accountable. Those bipartisan sentiments, however, did not translate to bipartisan legislative text. As we’ve written previously, House Energy and Commerce Committee Republicans have voiced process concerns, accusing Democrats of rushing the legislation through the House. Republicans have also stressed the need for statutory “guardrails” to ensure due process and protect legitimate businesses. Throughout the legislative process, for instance, Republicans have sought to amend the legislation to reduce the 10-year statute of limitations and to more narrowly tailor the language to target outright fraudulent acts. Republicans have also expressed concerns about retroactivity, questioning the legality of allowing the FTC to go after prior conduct with the expanded authorities included in H.R. 2668. Ahead of the vote, Consumer Protection and Commerce Subcommittee Ranking Member Gus Bilirakis (R-FL) said, “…this bill before us will provide the FTC with new authorities that far outpace the need supported by a consensus of the FTC Commissioners.” He went on to say that the expanded authority granted to the agency in the legislation “signals a return to the broad overreach we saw with the FTC in previous decades – a situation so bad that a Democratic Congress crippled the FTC’s funding and stripped it of its authority at that time.” Additionally, House Republicans argue that any 13(b) fix should be part of a broader package of FTC reforms and should move in concert with legislation establishing a national privacy framework – an issue itself full of partisan landmines. H.R. 2668 now heads to the Senate, where bipartisan Members of the Commerce Committee have expressed interest in a legislative fix – and where Democrats don’t have the luxury of disregarding Republican opposition. Perhaps in a nod to that reality, ahead of the bill’s passage, Representative Cárdenas said on the floor, “It’s unfortunate that we weren’t able to negotiate more into this bill and make it bipartisan, but there will be other opportunities as we are a two-chamber legislature, and I’m sure the Senate has some ideas about how to make this bill better. And we’re all open to that opportunity.”

### 2AC---AT: Link

### 2AC---Link Turn

#### Turn---the prospect of antitrust intervention deters violations---that’s Melamed and Shapiro---no enforcement necessary.

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.

### 2AC---Thumper

#### FTC focus on healthcare and big tech thumps.

Levine 8-25-2021, master’s degree from the Columbia University Graduate School of Journalism and a bachelor of arts in English from the University of Pennsylvania. She is also an alumna of the Fellowships at Auschwitz for the Study of Professional Ethics, a program in Germany and Poland that explores the ethics of reporting on politics, war and genocide (Alexandra, “How Biden's tech trustbuster could change health care,” *Politico*, <https://www.politico.com/newsletters/future-pulse/2021/08/25/how-bidens-tech-trustbuster-could-change-health-care-797333>)

Lina Khan’s Federal Trade Commission has its eyes on health care. The agency known for efforts to rein in Big Tech companies like Facebook and Amazon is also enmeshed in high-stakes health care and health tech battles that extend well beyond Silicon Valley. Case in point: The FTC trial that kicked off yesterday examining monopoly concerns in the market for cancer screening technology. (More on that below.) That closely watched antitrust case — involving the giant Illumina and startup Grail — predates Khan’s confirmation as FTC chair. But it underscores how health issues are looming over the agenda, particularly heading into the pandemic's second year. The way health care companies and consumer health apps handle sensitive data “is an area that I'm sure [Khan’s] very, very interested in,” said Jessica Rich, former director of the FTC’s consumer protection bureau, adding that the Biden administration's FTC will also be closely scrutinizing hospital mergers. “I expect her and the commission to take a very bold approach to what constitutes harm for both,” Rich said. “I expect her to pay close attention to algorithms and potential discrimination in health care, both denials and pricing issues which the FTC's laws can address.” The FTC’s jurisdiction touches nearly the entire health economy. While its competition bureau looks at health care mergers like the Illumina-Grail deal, its consumer protection side is focused on health privacy and data security issues, as well as fighting bogus medical claims on everything from weight loss to Covid cures. When Congress passed the Covid-19 Consumer Protection Act last year, the agency was granted new authority to police Covid scams. Although Khan hasn't spoken publicly about her health care agenda, she's likely to take issue with health apps and companies whose business models maximize, incentivize and monetize data collection. Of particular concern is how firms disclose what they’re doing with consumers’ data — and whether it may still be deceptive or unfair.

### 2AC---Terror

#### Huge alt causes to terror financing (KU BLUE)

Michael 1NC Tierney 18 [KU BLUE], George & Mary Hylton Professor of International Relations; Director Global Research Institute (GRI), “#TerroristFinancing: An Examination of Terrorism Financing via the Internet,” International Journal of Cyber Warfare and Terrorism, vol. 8, no. 1, 01/2018, pp. 1–11

2. TERRORIST FINANCING AND THE INTERNET

As mentioned, terrorists’ use of the internet has become a major concern for security officials across the world in recent years. Like many other users, terrorists have found that the internet is an invaluable tool to share information quickly, in order to disseminate ideas and link up with likeminded individuals (Jacobson, 2010; Okolie-Osemene & Okoh, 2015). In this manner, terrorists use the internet for a variety of purposes, including recruitment, propaganda, and financing. As scholars have also noted, the internet is an attractive option for extremists due to the security and anonymity it provides (Jacobson, 2010). Yet while there have been a growing number of studies completed on the ways in which terrorist organizations use the internet to recruit and indoctrinate others, there has been relatively little focus on the methods by which terrorists finance themselves through online activities. Some researchers have attempted to fill gaps in this area by broadly studying internet aspects of terrorism financing. However, research on this particular aspect of terrorism financing still appears to be lacking, with little focus on new methods of terrorist financing via the internet or a marrying of strategies to combat online financing trends available to practitioners in the field.

For instance, Sean Paul Ashley (2012) assessed the mobile banking phenomenon, which is prevalent in regions such as the Middle East and Africa, and provides extremists with the ability to easily connect to the internet and remit funds around the world. The decentralization of this kind of banking, due to the fact that brick-and-mortar facilities are not needed to conduct transactions, has allowed terrorist financiersto more efficiently move funds while avoiding detection from authorities. Other researchers,such as MichaelJacobson (2010), have studied the waysin which terrorists engage in cyber-crime to raise and move funds. For example, Jacobson (2010) found that online credit card fraud was a fairly major source of terrorist financing. By stealing a victim’s private credit information, terrorists are able to co-opt needed funds and provide support to themselves or their counterparts. Yet as James Okolie-Osemene and Rosemary Ifeanyi Okoh (2015) note, the internet is mostly used to augment and assist activities which occur in the physical world. In this way, it would appear that the internet is far more useful as a means to move funds globally in support of terrorism, rather than simply as a method to raise funds.

[Their card ends]

Many have argued that terrorists can use a variety of means to launder money and move funds as needed. The Council of Europe (2013) stated that while online gambling does not seem to be a major venue for terrorist financing activity, there are risks associated with these online businesses. Terrorist financiers have the opportunity to develop their own online gambling sites, registered in one jurisdiction with servers in another to hinder law enforcement investigations. They can then launder funds through the site, by co-mingling legitimate funds with illegitimate funds meant for terrorist financing (Council of Europe, 2013). Financiers are also able to set up multiple accounts, or use smurfs to move money on an ongoing basis (Council of Europe, 2013). Furthermore, terrorists funding their operations through proceeds of crime may be able to register an account, place money into the system, and then withdraw the funds aslegitimate gambling winningsto obfuscate the ultimate source and purpose of the funds (Council of Europe, 2013).

Online payment systems have also come under scrutiny for their heightened potential to assist in the financing of terrorism (Duhaime, 2015). A case in the United States from 2015 highlighted the point, when members of the Islamic State attempted to send funds into the US via PayPal, likely to finance an attack (Ellis, 2015). E-banking platforms have been discussed previously, but it is worth noting that these services are growing in popularity, and therefore present an increased risk related to terrorism moving into the future.

There have also been allegations that online gaming sites, such as SecondLife, can be effectively used by terrorist sympathizers to move money across the international system via crypto-currency exchanges (Brill & Keene, 2014). Crypto-currencies are heavily encrypted online wealth transfers, which are independent of a central regulatory authority and are thought to be “self-regulated.” Players have the option to exchange fiat currency for in-game crypto-currency, generally meant for in-game purchases. However, terrorist financiers can use this option to exchange fundsto the game’s currency and transfer the fundsto another player (i.e., another terrorist, who needsthe fundsto conduct attacks or other terrorist related activities). The recipient can then exchange the crypto-currency back into fiat money, for use in the real world (Brill & Keene, 2014). Perhaps the most concerning part of this kind of financial transaction is that crypto-currencies are generally very difficult to trace. Therefore, it becomes even more difficult to stop the transaction, or to bring the parties to justice.

The most famous crypto-currency, bitcoin, has presented a major challenge to governments and traditional banking institutions alike (Brill & Keene, 2014). Like the online gaming sites, individuals simply need to set up a ‘Wallet’ provided by a bitcoin dealer, in order to exchange fiat currency. Bitcoins can then be moved and transferred across the internet and similarly withdrawn back into fiat as required (Brill & Keene, 2014). An added risk associated with this activity however is the fact that bitcoins are the official currency of the dark web (The Economist, 2016). Using the dark web, terrorists can use bitcoins to purchase weapons as well as other goods and services to carry out their operations. On the other side, terrorist organizations relying drugs and weapons trading can raise funds from the sale of goods. They can then also withdraw the funds as fiat to be used as needed. Given that bitcoins are unregulated by any government, there will likely need to be further assessment of the ways in which this kind of activity can be monitored and if needed, stopped, by counter-terrorism officials.

With particular relation to social media, terrorists have also become adept at using crowd funding sites to quickly raise funds in support of their operations (FATF, 2015). Similar to other charitable endeavoursfronted by terrorist groups, crowd funding efforts can be set up to disguise the true nature of the campaign. For instance, terrorists can develop online charity sites which appear to be related to actual humanitarian causes. They can then promote these “charitable causes” via other social media platforms, in order to attract supporters and increase revenues via sympathizers. In this way, terrorist sympathizers can collect fundsfrom both witting and unwitting donors, to increase their wealth (FATF, 2015). The front also makes it more difficult for law enforcement to reveal the actual purpose of the campaign, which allows the individuals involved to avoid prosecution. Websites developed for the purpose of financially supporting terrorism can also be easily shut down and re-opened under a new name, making counter-terrorism efforts in this field even more difficult (Greenberg, 2015).

### 2AC---Turn

#### If tradeoff does happen, it’s in AI

Cohen 21, does Attorney Analysis at Reuters. James Denvil, Filippo Rason, and Stevie Degroff. (Bret, 7-8-2021, “FTC authority to regulate artificial intelligence,” Reuters, https://www.reuters.com/legal/legalindustry/ftc-authority-regulate-artificial-intelligence-2021-07-08/)

July 8, 2021 - The FTC has long exercised its authority to regulate private sector uses of personal information and algorithms that impact consumers. That authority stems from Section 5 of the FTC Act (Section 5), the Fair Credit Reporting Act (FCRA) and Equal Credit Opportunity Act (ECOA). Section 5 prohibits unfair or deceptive acts or practices in or affecting commerce. An act or practice is considered deceptive if there is a statement, omission or other practice that is likely to mislead a consumer acting reasonably under the circumstances, causing harm to the consumer. An act or practice is considered unfair if it is likely to cause consumers substantial harm not outweighed by benefits to consumers, or to create competition circumstances where consumers cannot reasonably avoid the harm. The FTC's most recent guidance offers examples of how AI deployments could be deemed deceptive (e.g., if organizations overpromise regarding AI performance or fairness) or unfair (e.g., if algorithms impact certain racial or ethnic groups unfairly). FCRA regulates consumer reporting agencies and the use of consumer reports. The FTC's AI guidance and enforcement actions make clear that the FTC considers certain algorithmic or AI-based collection and use of data subject to the FCRA. For example, if an organization purchases a report or score about a consumer from a background check company that was generated using AI tools, and uses that score or report to deny the consumer housing, that organization must provide an adverse action notice to the consumer as required by the FCRA. The FTC has also noted that organizations that supply data which may be used for AI-based insurance, credit, employment or similar eligibility decisions may have FCRA obligations as "information furnishers." The ECOA prohibits discrimination in access to credit based on protected characteristics such as race, color, sex, religion, age and marital status. The FTC notes in both its 2020 and 2021 guidance that if, for example, a company used an algorithm that, either directly or through disparate impact, discriminated against a protected class with respect to credit decisions, the FTC could challenge that practice under the ECOA. The FTC's updated guidance provides insight into the expectations for organizations using AI.

#### AI antitrust is bad, causes conflict

Foster 20, graduate student at Oxford University and a former visiting researcher at the Center for Security and Emerging Technology. (Dakota, 6-02-2020, “Antitrust investigations have deep implications for AI and national security,” Brookings, https://www.brookings.edu/techstream/antitrust-investigations-have-deep-implications-for-ai-and-national-security/)

In late March, Attorney General William Barr announced that “decision time” was looming for America’s leading tech firms. By early summer, Barr expects the Department of Justice to reach preliminary conclusions about possible antitrust violations by Silicon Valley’s largest companies. The DOJ’s investigation is just one of several probes scrutinizing potential abuses by Facebook, Google, Amazon, Apple, and Microsoft. While concerns over consumer protections, anti-competitive practices, and industry concentration have fueled these antitrust investigations, their results will almost certainly have national-security ramifications. Secretary of Defense Mark Esper has argued that artificial intelligence is likely to shape the future of warfare, and the national-security community has largely backed that conclusion. The most recent National Defense Strategy, released in 2018, highlights AI’s importance, noting that the Pentagon will seek to harness “rapid application[s] of commercial breakthroughs…to gain competitive military advantages.” With defense officials arguing that U.S. military superiority may hinge on artificial intelligence capabilities, antitrust action aimed at America’s largest tech companies—and leading AI innovators—could affect the United States’ technological edge. But the effects of such action are highly uncertain. Will a less concentrated tech sector comprised of slightly smaller firms fuel innovation and create openings for a new generation of tech companies? Or will reductions to scale significantly hurt leading tech firms’ ability to leverage the traditional building blocks of AI innovation—like computing power and data—into breakthroughs? The answers to these questions aren’t clear cut but offer a way to begin thinking about how antitrust enforcement could impact artificial intelligence innovation and national security more broadly. Unlike some earlier national-security technologies, the commercial sector plays an outsize role in AI development. As a result, government access to both AI products and innovation hinges, in large part, on industry. While academia, private research labs, and AI start-ups offer important contributions to AI development, major American technology companies have traditionally led the field. Last year, Microsoft, Facebook, Amazon, Google, and Apple ranked among the ten largest recipients of U.S. artificial intelligence and machine learning (ML) patents. Changes to the composition of America’s tech sector might boost net AI innovation. From 2013-2018, 90 percent of successful Silicon Valley AI start-ups were purchased by leading tech companies. This is a potentially worrisome trend for AI innovation. After all, incumbent firms and emerging companies can have very different incentives. Entrenched tech giants may be more focused on maintaining market share than disrupting markets altogether. As Big Tech increasingly moves to acquire AI start-ups, individual firm dynamics also shift. Instead of “building for scale,” start-ups begin to “build for sale,” adopting a mentality that may be ill-suited for moonshot innovations. Would a company like DeepMind (now owned by Google parent-company Alphabet), for example, have developed AlphaGo—the ground-breaking computer program that became the first to beat a human player in Go—if the firm’s primary goal was to be acquired by a bigger player? Antitrust action could shift these incentives and spur competition, potentially opening the door for new AI innovations—and for a new wave of AI companies. With their smaller statures, some of these firms might focus on more niche AI applications, including defense-related products, as start-ups like Anduril and ShieldAI have done. Today’s tech giants have every financial incentive to cater to foreign markets and the average consumer, not to the U.S. federal government. Indeed, with its global user-base, it is hard to imagine Google tailoring its AI innovation decisions to U.S. defense needs. The same may not hold within an AI ecosystem where some companies built, for example, in the mold of Palantir (a data-analytics company with clear national-security applications) consider government their primary customer and subsequently concentrate on its demands. National-security agencies, from the Pentagon to the U.S. intelligence community, could stand to benefit from more targeted innovation—and from an industrial base better attuned to their needs. As Christian Brose points out, only a fraction of the U.S.’s billion-dollar tech “unicorns” have operated in the defense sector, leaving the U.S. military “shockingly behind the commercial world in many critical technologies.” As Silicon Valley’s largest companies consolidate AI talent and novel ideas through acquisitions, these companies gain an ever-larger say in the future of AI. This consolidation, which antitrust action could disrupt, may not favor innovation. But breaking up major tech firms also has potential pitfalls for AI innovation. With scale comes resources, and AI innovation is resource-intensive, requiring large quantities of data, diverse datastores, and vast computing power—known as “compute” in industry jargon. American tech giants’ huge revenues uniquely equip them to fund costly AI research. Google’s DeepMind, arguably the world’s leading AI-research organization, is billions of dollars in debt and lost over $500 million in 2018 alone. Google’s fortress-like balance sheet can easily absorb the costs associated with such cutting-edge research, but smaller firms likely cannot. The economics of compute offer a concrete example of this dynamic. The rapidly increasing volume of compute required for deep learning research, coupled with compute’s prohibitively expensive prices, creates significant barriers to entry and innovation for smaller AI firms. As Microsoft co-founder Paul Allen noted in 2019, the “exponentially higher” costs of compute may leave the U.S. with only “a handful of places where you can be on the cutting edge.” Even the most well-funded independent AI organizations rely on Big Tech’s compute resources. OpenAI’s billion-dollar compute partnership with Microsoft, reached after OpenAI spent millions renting compute from leading tech firms, offers one example. Changes to firms’ scale also may impact their access to data, another key resource required for AI innovation. Studies have linked the performance of deep learning models to the quantity of data fed into them. At present, tech giants have access to unprecedented volumes of data about their users. Google, for example, can harness data from Google Search, Maps, YouTube, Gmail, and other sources. If antitrust enforcement leads to divestment or broader break-ups, access to data may diminish, lessening innovation. Would reduced access to large, internal datastores hurt U.S. tech companies’ ability to innovate relative to China, whose biggest firms have largely evaded antitrust action? Big Tech executives, including Mark Zuckerberg, have argued that antitrust action could hinder U.S. competitiveness. Data access is a growing point of concern along these lines. The U.S. National Security Commission on AI has reportedly discussed the possibility of data pooling among allied countries to “offset” any data advantage held by China. However, it remains unclear just how central big data will be to the future of AI innovation (promising ML techniques like few-shot learning are not data intensive) and how well big companies can utilize their large datasets in the first place. National security and antitrust are rarely part of the same conversation. The realities of today’s AI ecosystem should challenge that dynamic. American AI innovation is concentrated in the private sector—particularly within its largest, most dominant firms. As these firms face antitrust scrutiny, policymakers and lawmakers alike need to consider the AI ecosystem that they will have a hand in creating. They will need to contemplate its competitiveness, its innovativeness, its responsiveness to defense and national-security needs, and its accessibility to government. Will its companies have the resources to access and acquire key inputs for AI innovation like compute and data? Will the sector’s composition encourage competition at every level? Or will it stifle new growth and engage in anti-innovative practices? American leadership in AI—a key national security technology—may hinge on an AI ecosystem shaped by antitrust action. It will be imperative that innovation considerations play a role in forging it.

# 1AR

## Cyber

### Impact ⁠— 1AR

## Innovation

### Impact ⁠— 1AR

### Uniqueness ⁠— 1AR

**SEP-specific ev!**

**Clark 9-8** (Robert Clark is a tech journalist and contributing editor for light reading incorporated 9-8-2021 Light Reading, "China's 5G is a domestic affair | Light Reading", https://www.lightreading.com/asia/chinas-5g-is-domestic-affair/d/d-id/771959)

Statistically speaking, China rules 5G: It has 70% of the basestations, 80% of the subscribers and holds the most 5G-related patents. Operators have deployed 993,000 basestations, covering all 300 prefecture-level cities and a third of all rural townships, according to Ministry of Industry and Information Technology (MIIT) figures. Some 460 handsets have been licensed for network access, 392 million customers have signed up for 5G service and more than 150 million 5G phones shipped in the first seven months of the year. Chinese IP also accounts for 38% of the 5G standard-essential patents, more than any other country, the MIIT says. If you attended the World 5G Convention in Beijing last week this blizzard of China 5G stats would be familiar to you.

### AT: No Hold-Up ⁠— 1AR

#### Here’s ev for the long-waited speeding metaphor ⁠— their argument is akin to saying speed limits don’t matter because high ways are safe

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

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

#### 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.

#### Even if we concede that all neg studies are 100% accurate---they don’t disprove anything!

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

B. Addressing the Patent Holdup Skeptics

Several arguments have been advanced in support of imposing less stringent or no restraints on SEP holders. These arguments are deeply flawed, both empirically and theoretically. First, some who oppose rigorous enforcement of effective FRAND commitments rely on studies that purport to show that concerns about ex post opportunism leading to excessive royalties are unfounded.20 However, those studies lack proper controls and therefore do not show what they purport to show— namely, that aggregate royalty costs have not hindered innovation or commercialization. The basic shortcoming of these studies is that they do not offer a sensible but-for world in the absence of opportunism as a comparator by which to assess observed behavior. For example, noting that cell phone technology has advanced rapidly in recent years does not prove a lack of costly opportunism by the owners of SEPs for the thousands of technologies included in cell phones.21

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

#### AND

Carrier 21, \*Michael A. Carrier, Distinguished Professor, Rutgers Law School; Intellectual Property Fellow, Innovators Network Foundation; (“Rescuing Antitrust’s Role in Patent Holdup”, <https://www.pennlawreview.com/2021/02/05/rescuing-antitrusts-role-in-patent-holdup/>)

Academic Debate

Stepping back to the biggest picture, the final point involves the nature of academic debate. Shapiro and Lemley have written a thoughtful and persuasive article that situates patent holdup in the literature of transaction cost economics. They have shown the weaknesses, and radical nature, of Delrahim’s approach. And they have made a compelling claim for antitrust’s role in the standard-setting context.

But what if all of that is not enough?

What if the only thing that matters in enforcement today is the existence of unsupported assertions and scholarship on Delrahim’s side? And what if much of this output is the result of—as [Mark Lemley and Timothy Simcoe](https://scholarship.law.cornell.edu/clr/vol104/iss3/2/) put it—[Qualcomm’s](https://perma.cc/2ET3-CDAK) “[extraordinary](https://perma.cc/UQW4-BUH6)” funding [that](https://www.sciencedirect.com/science/article/abs/pii/S0308596118302404) [includes](https://perma.cc/R2DS-A38L) “[the](https://perma.cc/SPH9-SCLG) [creation](https://www.sciencedirect.com/science/article/pii/S0308596117302240#!) [of](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275968) [entire](https://onlinelibrary.wiley.com/doi/abs/10.1111/jems.12046) [centers](https://www.researchgate.net/publication/287622403_Increments_and_incentives_The_dynamic_innovation_implications_of_licensing_patents_under_an_incremental_value_rule) [and] [scholarly](https://perma.cc/D4JT-7427) [papers](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417216)?”

## CP ⁠— States

### Perm ⁠— 1AR

#### Shields ⁠— it’s cooperative federalism AND deflects blame, so Biden doesn’t have to use PC

Philip J. 2NC Weiser 20, Colorado Attorney General. Hatfield Professor of Law, University of Colorado. "The Enduring Promise of Antitrust" https://coag.gov/app/uploads/2020/04/Antitrust-Speech-Loyola-U.-Chicago-footnotes.pdf

During the 1970s, Congress began to develop a range of “cooperative federalism” regulatory programs. Under such programs, Congress authorizes state enforcement of federal law, allowing the federal government to set a floor for enforcement, but giving states additional authority to tailor standards as well as pick up any slack in enforcement (and it is critical to note that, given constrained federal resources, that slack may be the product of workload). By instituting such a model, Congress adopted a hedging strategy—ensuring a base level of uniformity while allowing for appropriate experimentation.

The environmental laws provide the classic example of cooperative federalism in action, with the Clean Air Act being a clear case in point.3 Under the Clean Air Act’s model, the EPA authorizes state agencies to address air pollution using a variety of tools, provided that they ensure a basic level of air quality. Where state agencies decide to go above the level specified by the EPA, they are permitted to do so.4 Following this precedent, both telecommunications regulation and health care policy later adopted a cooperative federalism architecture, blending state and federal authority and calling on state agencies to develop and enforce federal regulatory standards.

Antitrust law operates in a functionally similar manner. In 1976, in adopting the Hart Scott Rodino Antitrust Improvements Act, Congress embraced the ability of State AGs to enforce federal antitrust law on behalf of their States, using what is called “parens patriae” authority.5 The theory of this delegation of authority, like other cooperative federalism programs, is two-fold: (1) states may be better positioned to know of competitive issues in their jurisdictions; and (2) states may have a greater willingness to take action and have the ability to collect damages on behalf of their citizens, thereby further advancing the goals of antitrust law. As the Supreme Court put it, the role of states in antitrust enforcement “was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.”6

One of the questions inherent in a cooperative federalism framework is whether the federal government has the authority to prevent states from going further than the federal government where, in their view, local conditions warrant. In the environmental arena, the EPA has the authority to ensure a minimum level of enforcement, but not to prevent states from taking additional action. In the antirust arena, the situation is similar: the federal government can take action to ensure a basic level of enforcement, but it does not have the power to prevent states from going further, under federal or state law, to stop anti-competitive conduct.7

For an example of parallel federal and state action, consider the Microsoft case.8 In that case, the federal government ultimately decided—after a remand on the remedies issue by the D.C. Circuit Court of Appeals—on a regulatory remedy and declined to pursue structural relief. A number of states who were part of this litigation took a different view and proceeded to challenge the absence of divestiture. As this case was litigated and ultimately decided, the D.C. Circuit made clear that the States have the requisite authority to pursue a different view from the federal government if they choose to do so.

The opposite approach—empowering the federal government to bar states from antitrust enforcement whenever it so chooses—would undermine the architecture of cooperative federalism and hurt consumers in states where State AGs pick up the slack in federal enforcement by bringing additional resources to bear and by applying their local expertise. Consider, for example, the case of a recent merger in Colorado Springs between DaVita’s clinical network and UnitedHealth Group’s Medicare Advantage insurance product. 10 In this case, UnitedHealth consummated this merger after its market share declined from around 75% to around 50%, owing to the emergence of a disruptive entrant, Humana. Humana emerged as a rival after building its relationship with DaVita’s clinics, which referred patients to it. In the wake of the merger, however, Humana faced the prospect of losing access to a critical resource.

The Federal Trade Commission reviewed the UnitedHealth/DaVita merger and declined to take action in the Colorado Springs market. In Colorado, however, we were concerned about the prospect of UnitedHealth using control over DaVita’s clinics to re-establish its dominant position in the Medicare Advantage market, leading to higher prices, less choice, and lower quality offerings to patients. By taking action in this case, separate and apart from the FTC, we were able to protect Colorado consumers. And rather than protest our action, the FTC respected our authority. Indeed, two Commissioners wrote separately to highlight the valuable role State AGs play in enforcing antitrust law.11

### Deficit ⁠— 1AR

#### Counterplan is uncertain to Qualcomm, links to loophole deficits on Regulation

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>)

Finally, Kobayashi and Wright argue that “jurisdictional competition in state contract and tort law is more likely to generate efficient rules and institutions than antitrust.”145 That argument, it seems to us, vastly overstates the degree to which there is “jurisdictional competition.” We are also skeptical that such competition among jurisdictions can be expected to lead to better results. Indeed, by its nature, such competition would lead to inconsistent results, which would simply inject uncertainty and doubt into the standard-setting process, which is surely not welfare enhancing. This inconsistency is exacerbated where the law of foreign jurisdictions also comes into play, as is likely where global standards are at issue.

## DA ⁠— FTC

### DA---Uniqueness

#### Only 1 card that says Republicans aren’t coming to an agreement! Other cards don’t assume Lina Khan which is what our ev is about.

Kate Linebaugh & Ryan Tracy 21 [KU BLUE], Linebaugh is the co-host of The Journal; Tracy is a Reporter at The Wall Street Journal, “Biden's New FTC Chair Squares Off With Big Tech,” WSJ, 7-30-2021, https://www.wsj.com/podcasts/the-journal/biden-new-ftc-chair-squares-off-with-big-tech/b3aae132-15f2-499f-ab40-51758758ad34

Kate Linebaugh: Now that Kahn is in a powerful position and has shown she's willing to rewrite the rules, the forces against her are piling up, including two of the biggest companies in the world. That's after the break. When Khan took over leadership of the FTC, Amazon publicly challenged her objectivity, citing her past statements and writings. Ryan Tracy: The FTC has an active antitrust investigation of Amazon, and Amazon has preemptively asked for Lina Khan to be recused from that investigation and any action the agency might take as a result. Kate Linebaugh: Two weeks later, Facebook, which is being sued by the FTC over antitrust, came out with a similar argument. Ryan Tracy: In Facebook's view, she should be an impartial observer of these facts. She's brought on to this job, but she has access to the evidence that the agency has. And then she makes a judgment, keeping the public interest in mind and upholding her oath to the Constitution and all these things that public officials are supposed to do. If she's already formed her view, then how can she do that? That's Facebook's argument. Kate Linebaugh: The FTC's case against Facebook predates Kahn, but it gets right at the heart of her philosophy. It doesn't look at prices for consumers. Instead, it focuses on how Facebook's acquisitions of companies like WhatsApp and Instagram stifled competition and hurt consumers. Ryan Tracy: What the FTC says is we may not have challenged these mergers back when they happened, but when you look at the whole picture, we think Facebook wasn't making these mergers for good business reasons. We think they were trying to keep competitors out and to create a monopoly for themselves. Kate Linebaugh: Big high visibility cases like these are important, but they aren't Kahn's only priority. Ryan Tracy: She's got a lot of other things that she wants to do. She wants to write rules that aim to boost competition and target unfair business practices in sectors across the economy. Kate Linebaugh: Kahn's plans for the agency were the focus of this week's House hearing, and lawmakers came with a laundry list of what they wanted the FTC to enforce. Everything from online fraud and ransomware to protections for veterans and older adults. Kahn had her own message for lawmakers. Ryan Tracy: Congress, please give us more money. And if you want us to do all these things well, we're going to need more resources. Kate Linebaugh: But Republicans voiced their displeasure over Kahn's early steps that they say indicate she's consolidating power. Here's Republican Congresswoman Cathy Rogers. Audio: I continue to hear that the FTC needs additional funding, staff authorities, but if decisions are being made behind the scenes unilaterally, really makes it hard to justify such requests. Kate Linebaugh: Despite some critique, Ryan says that Kahn held her own in the hearing. Ryan Tracy: I once had someone who had testified before Congress tell me that really what you're trying to do is not lose when you're under pressure, and I think she didn't make any errors or have any blow-up moment. It was a fairly even-keeled hearing from her. To the extent she got pushback, it was really on this issue of how she's running the agency, what the agency's internal process and policies and procedures have been under her leadership. A lot of that is coming from Republicans on the Commission being frustrated that she's, in their view, cutting her out of the process. She responded to that by saying she was open to thinking about how to do things differently. That seemed to satisfy lawmakers, at least for now. Kate Linebaugh: Why does it matter if Congress is happy with her or not? Ryan Tracy: Look, in terms of conducting her daily business, she's already got this job. Congress doesn't have any direct say about that. On the other hand, she does have things she needs from Congress, and if she wants to get those things, she's got to have support from Democrats and probably also from Republicans, at least on some of them. Because some of that legislation will have to be bipartisan to get through. Kate Linebaugh: After the hearing, Kahn held a press conference. She stayed on message and didn't ruffle feathers, but there was one notable thing. She had a book with her, a book about a century-old action by the FTC. Ryan Tracy: She said it had a fairly boring title, like Federal Trade Commission Report on Meatpacking Industry. Basically as she described it, it was the Commission's investigation into this industry and how it worked and how different companies might've had power over different segments of the supply chain and that sort of thing. She also noted with a laugh that the FTC had tried to take action on that industry and that Congress ended up thinking the agency had gone too far in limiting its jurisdiction with respect to that industry. Which I thought was kind of an interesting comment, given that in a lot of people's view, she may try to herself push the bounds of the FTC's legal authority.

### AT: Terror ⁠— 1AR

#### No nukes ⁠— building/maintain uranium is impossible AND it’s well-guarded. Dropped that terrorists use methods with proven track-records ⁠— that’s [Ward].

#### Doesn’t assume COVID

Davis 20, president of Insight Threat Intelligence, an international consultant on counterterrorism and intelligence, a former senior strategic analyst with the Canadian Security Intelligence Service. (Jessica, 4/28/20, "Terrorism During a Pandemic: Assessing the Threat and Balancing the Hype", *Just Security*, https://www.justsecurity.org/69895/terrorism-during-a-pandemic-assessing-the-threat-and-balancing-the-hype/)

The COVID-19 pandemic also creates mitigating conditions for the terrorist threat in much of the world. Around the globe, people are implementing physical distancing measures and, therefore, removing a significant terrorist target: crowds. Physical distancing measures make tactics such as vehicle rammings, stabbings, and bombings far less effective. Without the crowds that usually allow these relatively simple attacks to generate casualties, terrorists may determine that their plans are best perpetrated once physical distancing measures are no longer in place. While it may be convenient to think of terrorists as relatively omnipotent, my work in counter-terrorism has demonstrated that this is far from the case. Terrorists, like everybody else, can and do get sick, as do their family and friends, creating a burden on care. At the same time, the economic devastation caused by the virus has likely left many would-be terrorists without a source of income. They may be struggling with daily subsistence, meaning devoting additional resources (both in time and money) to attack planning and weapons/component procurements may take a back seat to more immediate needs. The intense media focus on COVID-19 may also dissuade some would-be terrorists from engaging in attacks during the pandemic. Most terrorists seek recognition for their attacks, with the ultimate goal of sowing fear in a population. This is difficult to do if no one is paying attention to you. A recent attack in France demonstrates how little media attention some attacks are generating. Even for a COVID-19 attack (involving an infected individual), this tactic also does not guarantee media attention. The reality is that anyone we come into contact with could be a virus carrier – determining responsibility would be difficult and far from instantaneous, minimizing one of terrorism’s objectives: instilling fear. This fear would also likely be mitigated by the current environment, which is one where fear is already pervasive due to the global pandemic.

#### Our defense assumes acquisition

<<fear of backlash from supporters, internal division, and international retaliation>>

McIntosh & Storey 18 (Christopher McIntosh is visiting assistant professor of political studies at Bard College, Ph.D. in 2013 from The University of Chicago, specializing in international relations and has an M.A. in Security Studies from Georgetown & Ian Storey is a fellow at the Hannah Arendt Center for Politics and Humanities at Bard College, Ph.D. in Political Science from the University of Chicago; Between Acquisition and Use: Assessing the Likelihood of Nuclear Terrorism, *International Studies Quarterly*, 19 April 2018, sqx087, https://doi.org/10.1093/isq/sqx087)

Our approach offers a point of departure for strategically assessing the options, likely responses, and potential outcomes that could arise from the different paths available to a nuclear-armed non-state group. Too often analysts treat the decision by such groups to use nuclear weapons as if it occurs in a vacuum. In practice, terrorist groups face many short-term and long-term considerations. They are influenced by factors both external and internal to their organization. These include the potential for backlash among supporters, internal factionalization over nuclear strategy and doctrine, and an overwhelming response by the target state and the international community. Moreover, we suggest a way to bring the recursivity of strategic choice into the account of terrorist organizational decision-making. These organizations must consider the long-term effects of a nuclear attack. An attack occurs in the context of an ongoing campaign by a well-established organization. Opportunity costs exist because escalating to nuclear attack forecloses future options. As well, conducting an attack may not only preclude other strategies, but the continued existence of the group itself. This changes the game significantly. In most cases, a nuclear attack must present not just an effective option for the moment, but the only strategic option worth pursuing going forward. Once we take these considerations into account, the detonation of a nuclear weapon generally appears the least strategically advantageous option for non-state groups. Indeed, the factors presented here are analytically independent, adaptable, and scalable to particular threat contexts. We can therefore use our framework to study the opportunities and constraints faced by specific future groups. It should therefore assist in the process of planning responses to potential nuclear acquisition by terrorist groups. Successive governments have now identified nuclear terrorism as a critical concern in the formulation of security policy. This line of thinking systematically underspecifies, or simply misunderstands, key considerations that terrorist organizations take into account. These include the group's organizational survival, opportunity costs, and the conflation of victory with the end of hostilities. Each factor presents strong disincentives to immediate nuclear attack. A nuclear-armed terrorist group is exceedingly dangerous, but for different reasons than normally assumed. The options available to the group that fall short of detonation or attack remain considerable, albeit less spectacular and immediate. Just as scholars like Bunn et al. (2015) are careful to do, political actors and analysts should resist uncritically deploying the term “nuclear terrorism” in an umbrella fashion. This point goes beyond even the attempts at disaggregating “use” presented here. The threat of an attack involving an improvised nuclear device is vastly different than that of a “dirty bomb,” and both have little in common with the threat posed by an attack on a nuclear facility. Each deserves separate consideration when formulating policy, even if measures taken to address these concerns, such as controlling nuclear leakage, ultimately overlap. If any of the acquisition or threat scenarios we explore come to fruition, then potential target states will need strategies that potentially employ positive, as well as negative, incentives to lessen the attractiveness of nuclear attack. As we argue, a crisis involving a nuclear-armed terrorist group will be a negotiation—regardless of what the target state chooses to label it. Far from demonstrating weakness, employing threats while dangling the possibility of political concessions can widen internal divisions, heightening the overall organizational costs of escalating violence (Toros 2008; Cronin 2009). Finally, efforts designed to improve intelligence capabilities both prior to and post-attack remain vital. Signature analysis as a forensic measure has shown promise as a way of identifying the origin of nuclear material—in some cases it can identify whether or not it was provided by a state (Kristo and Tumey 2013). These efforts would be improved with a more widespread international commitment via the IAEA to placing signature markers in weapons and weaponizable material (Korbatov et al. 2015, 70; Findlay 2014, 6). Ultimately, when it comes to the threat of a nuclear attack by a terrorist, presumption should lie squarely on the side of skepticism rather than inevitability. While some terrorist organizations have some incentives for nuclear acquisition, paradoxically and thankfully, the most strategic uses of a nuclear weapon fall well short of actual nuclear attack. From a scholarly perspective, as well as a political one, we need to start to think through how states would act in a world with nuclear-armed non-state actors. In doing so, we should avoid assumptions that fit neither with known nuclear strategy nor the empirical behavior of non-state organizations. Like most clichés, the post–Cold War trope that the threat of attack is higher now than it was during the US-USSR arms race (Litwak 2016) obscures much more than it reveals.