# 1AC

### 1AC---Innovation

#### Advantage 1 is Innovation:

#### Standards-Setting Organizations (SSO’s) are industry members who jointly establish standards for information tech defined by the adoption of standard-essential patents (SEP’s), which are licensed to companies who wish to implement the tech in their product, called implementers, on Fair, Reasonable, and Non-Discriminatory (FRAND) terms. Current standards promote price gouging, FRAND enforcement is critical.

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)

I. Standard Setting and the Competitive Process The fundamental economics in the information technology sector, driven by network effects, implies that there is enormous value associated with establishing compatibility standards. Popular standards include the mobile broadband standards used in cell phones, which are established by the 3rd Generation Partnership Project (3GPP), and the Wi-Fi technology for wireless local area networks, which is enabled by the 802.11 standard established by the Institute of Electrical and Electronics Engineers (IEEE).4 There are many SSOs, and their rules and procedures differ considerably. In addition to IEEE, leading SSOs include the International Organization for Standardization (ISO), the International Telecommunication Union (ITU), the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF), and the World Wide Web Consortium (W3C).5 SSOs generally establish standards by holding a series of committee meetings among industry participants. These meetings culminate in a vote on a technical specification that describes what features or attributes a product must have in order to comply with the standard. Most SSOs are open to all industry participants and seek to operate on a consensus basis, applying certain voting rules. SSOs do not normally engage in patent licensing, nor do they specify how patent royalties will be divided up among patent holders. They leave that to their members, which in some cases form patent pools to address these issues.6 SSOs adopt specific policies relating to intellectual property rights (IPRs).7 These IPR policies are generally intended to enable the SEP holders to obtain reasonable royalties for licensing their patents, while prohibiting them from charging excessive royalties after other industry participants have committed to the standard. At that point, firms committed to implementing the standard— which we call “implementers”—would find it very costly to avoid using the patented technology. For this purpose, most SSOs require SEP owners to license their SEPs on FRAND terms.8 FRAND policies are especially necessary because negotiations between SEP holders and implementers generally take place only after the implementers have used and infringed the technologies claimed by the SEPs. Standards involving information and communications technology can involve hundreds or even thousands of SEPs, many with uncertain boundaries for infringement. In addition, a time lag exists between patent application and patent issuance. For these and other reasons, it is impractical for implementers to enter into negotiations for patent licenses with all SEP owners prior to the establishment of a standard and to their implementation of it.9 The fact that patent negotiations generally do not take place until after implementers have used and infringed the technologies has several critical implications. First, at the time of negotiation, implementers are locked into the standard and the technologies claimed by the SEPs—that is, the cost to switch to an alternative technology or standard at that point—ex post—is much greater than it was ex ante, before the patented technology was first included in the standard. Ex post, the patent holder is no longer competing to have its technology included in the standard, nor is it competing to have implementers of the standard use its technology. Instead, because the patent holder owns an asset that is essential to the standard, implementers have no choice but to use the patented technology. If the standard is commercially successful, implementers are willing to pay a much larger royalty for use of the patented technology than they would have paid ex ante, when the SEP holder faced competition from other technologies. In these circumstances, the SEP holder can be said to have obtained monopoly power in the market in which the patented technology is licensed for use in implementing the standard.10 Second, because of lock-in and the implementer’s ongoing infringement, the potential for litigation looms large in licensing negotiations. In effect, the parties are negotiating about how to settle an infringement suit, and that negotiation is heavily influenced by their predictions as to what the court will do if they cannot agree. This situation is not unique to SEPs; it arises frequently when firms are faced with patent infringement claims for products they have independently developed or technologies they have inadvertently infringed. Patent law addresses such instances by specifying that patent holders are entitled to “reasonable royalties,” defined as the royalties that the parties would have negotiated prior to the infringement and thus prior to lock-in.11 Those hypothetical ex ante royalties reflect the market value of the patent license. Notwithstanding the law’s embrace of this principle, however, as a practical matter, patent holders are generally able to recover more than the ex ante value of the patent when litigation occurs after the implementers are locked in. Further, negotiations in the shadow of litigation after lock-in tend to result in royalties in excess of the ex ante or market value of the patented technology.12 Third, the shadow of litigation is particularly problematic in the communications and technology sector, in which products typically include hundreds or thousands of patented technologies. A court-ordered injunction involving such products would deprive the implementer of not only the value of the technology covered by the patent-in-suit, but also the value of the entire product.13 Implementers that are forced to bear the risk of an injunction are thus induced to agree to royalties greater than those that would be appropriate if only the value of the patented technology were at stake. Those royalties systematically provide SEP holders with excessive compensation in comparison with the benchmark of ex ante royalties. These implications of lock-in and ex post dealings are well-understood: they represent an example of the general concept of lock-in and opportunism developed by Oliver Williamson.14 The Federal Circuit has also recognized the market distortions caused by the inclusion of patented technologies in public standards and the resulting danger of patent holdup involving SEPs.15 For these and other reasons, the SEP holder has ex post monopoly power that, if left unchecked, would enable it to obtain royalties far in excess of the royalties that it could earn in a competitive market.16 To address this common problem and limit ex post opportunism by SEP holders, SSOs typically require participants that own SEPs to make certain FRAND commitments. In particular, by requiring a commitment to license on “fair and reasonable” terms, the FRAND requirement aims to prevent, or at least reduce, the extent of monopoly pricing by SEP holders. And by requiring a commitment to license on “nondiscriminatory” terms, the FRAND requirement can prevent SEP holders from extracting monopoly premiums by selective licensing or, more important, migrating their monopoly power from the FRAND-regulated market to unregulated standard-implementing product markets by licensing to only one or a few implementers or licensing to selected implementers on discriminatorily favorable terms.

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

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While the FRAND process has been highly productive, it is also fragile. Firms are tempted to make commitments at the beginning when the incentive to join is large, but renege on them later when they can profit by doing so. At least in this particular case, private FRAND enforcement had not worked very well. Qualcomm had been able to violate FRAND commitments in order to exclude rivals and obtain higher royalties than FRAND would permit, largely with impunity. Other firms will very likely follow Qualcomm’s lead. If that happens the FRAND system will fall apart, doing irreparable injury to the modern wireless telecommunications network or, at the very least, diminishing the leadership role of the United States in preserving effective network competition. While governments can be heavily involved in standard set-ting,9 the implementation of technical standards in information technologies is largely the work of private actors. Government involvement is limited mainly to enforcement of contract, intellectual property, or antitrust law. As private actors, those involved in standard setting or compliance are fully subject to the federal antitrust laws. This Article addresses one question: when is an SSO participant’s violation of a FRAND commitment an antitrust violation, and if it is, of what kind and what are the implications for remedies? It warns against two extremes. One is thinking that any violation of a FRAND commitment is an antitrust violation as well. In the first instance FRAND obligations are contractual, and most breaches of contract do not violate any antitrust law. The other extreme is thinking that, because a FRAND violation is a breach of contract, it cannot also be an antitrust violation. The question of an antitrust violation does not de-pend on whether the conduct breached a particular agreement but rather on whether it caused competitive harm. This can happen because the conduct restrained trade under section 1 of the Sherman Act, was unreasonably exclusionary under section 2 of the Sherman Act, or amounted to an anticompetitive condition or understanding as defined by section 3 of the Clay-ton Act.10 The end goal is to identify practices that harm com-petition, thereby injuring consumers. The Ninth Circuit’s Qualcomm decision will make antitrust violations in the context of FRAND licensing much more difficult to prove, even in cases where anticompetitive behavior and consumer harm seem clear.11 Indeed, in this case the court itself acknowledged the harm to consumers but appeared to think that they were not entitled to protection.12 If this decision stands, FRAND obligations will to a larger extent have to be settled through private litigation and the federal antitrust enforcement agencies will have a diminished role. Anticompetitive behavior by one firm that is not effectively disciplined will lead others to do the same thing.

#### Monopoly pricing and selective licensing undermines 5G innovation---FRAND enforcement is key.

Actonline 20, the App Association represents more than 5,000 app companies and information technology firms across the mobile economy; (August 26th, 2020, “Save Our Standards: The Ninth Circuit Court of Appeals Reverses Decision in FTC v. Qualcomm”, <https://actonline.org/2020/08/26/save-our-standards-the-ninth-circuit-court-of-appeals-reverses-decision-in-ftc-v-qualcomm/>)

* Ability edited

Moreover, the FRAND agreement is a critical tool used by standard setting organizations to ensure the process enhances competition and does not run afoul of antitrust laws. Generally, a collaboration between competitors to choose market winners or set prices raises significant questions for competition regulators. Royalty free and FRAND licensing requirements were created by standards bodies to avoid potential antitrust scrutiny by limiting the market power and the potential for abuse by those involved in developing a standard. This is why the American National Standards Institute (ANSI) will not accredit any standards developing organization (SDO) that does not require standard-essential patent holders to provide licensing terms at least as favorable as FRAND. The most important beneficiary of open interoperability standards and FRAND licensing requirements are the entrepreneurs and small businesses that have long fueled America’s innovation engine. They don’t have giant patent portfolios, market power, or the resources to hire legions of lawyers and spend years battling SEP abusers in civil court. Without some level of certainty about their ability to obtain licenses—let alone what they may cost—entrepreneurs will have trouble justifying the pursuit of any innovation that uses a standard and will certainly struggle to raise money from investors for such innovation. And Qualcomm’s vague and toothless promise simply “not to sue” smaller companies and component makers is no substitute for a license. The adoption of 5G technology is expected to open unprecedented opportunities for innovation and economic growth as we move toward a world where everything from cars to tractors to buildings will connect to wireless networks. At every stage of the information technology revolution, America has been the undisputed leader because of the unparalleled entrepreneurial innovation ecosystem that we have built. If 5G SEP holders are able to arbitrarily refuse licenses to smaller firms, it would ~~cripple~~ undermine America’s innovation ecosystem at the start of the next big wave of innovation. As economic tensions continue to rise with China, Chinese-based companies could use their 5G SEPs as international economic weapons to thwart U.S. competitors. The 5G standard is supposed to be a platform for competition, innovation, and entrepreneurship, but if the Ninth Circuit decision is allowed to stand, it will become a chokepoint for snuffing out competitors and demanding monopoly rents. Open standards and FRAND licensing commitments are fundamental to competition in the modern economy, and the idea that they aren’t a subject for antitrust enforcement is patently absurd.

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

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There is little doubt today that American superiority in the next generation of mobile communications, commonly called 5G, is a matter of extraordinary national concern. There is also little doubt that China is a strong competitor, already having outspent the United States by [$24 billion](https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5g-deployment-imperative.pdf#page=3) and planning [$411 billion](https://www.scmp.com/tech/china-tech/article/2098948/china-plans-28-trillion-yuan-capital-expenditure-create-worlds) in 5G investment over the next decade. The Chinese government has also laid out multiple national plans for establishing the country as a leader in mobile technology, and the Chinese firm Huawei is poised to be the [top smartphone manufacturer](https://www.cnbc.com/2018/11/16/huawei-aims-to-overtake-samsung-as-no-1-smartphone-player-by-2020.html) by 2020. And what are United States companies doing about this? Bickering over patents. For years, the leading American supplier of advanced mobile communications chips has been the San Diego-based Qualcomm. The company has been an innovator of mobile technology, but it has also been a remarkable innovator of convoluted legal strategies. As an ongoing Federal Trade Commission [lawsuit alleges](https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used), Qualcomm has used its dominant position as a chip supplier and its extensive patent holdings to weave an intricate web of patent licensing across the mobile industry. The effect of that complex licensing scheme, the FTC claims, has been to force competitor chipmakers out of the market and to extract concessions and high patent royalties from smartphone and mobile-device makers. Qualcomm today faces only one major U.S. competitor—Intel, whose chips Apple recently [started using](https://www.cultofmac.com/484250/intel-reaping-rewards-apples-scrap-qualcomm/) instead of Qualcomm’s. Not surprisingly, Qualcomm has leveraged its patents to force a retaliatory investigation against Apple, the effect of which could be, as an administrative judge [recently determined](http://www.fosspatents.com/2018/10/itc-judge-didnt-buy-testimony-for-which.html), to boot Intel out of the mobile-chip market and leave Qualcomm as a monopoly. It is hard to imagine that this infighting among Apple, Intel and Qualcomm is getting the United States very far in 5G, and it is harder to imagine that Qualcomm’s desired outcome would do so, either. The best path, instead, is the obvious one: allowing competition and expanding the number of firms working on 5G. Competition encourages companies to out-innovate each other in order to grab market share. Of particular importance to 5G, competition leads to [better cybersecurity](https://morningconsult.com/opinions/in-the-race-to-5g-monopoly-considered-harmful/) in products, making them less vulnerable to hacking or misuse. Competition is especially crucial when it comes to the technical standards that define how 5G works. These standards are the work of 3GPP, an international consortium of technology companies in the field. Chinese players such as Huawei and ZTE are major participants in 3GPP. Ensuring that 3GPP’s standards reflect American values requires having as many American companies at the negotiating table as possible—which is harder to achieve when those companies are trying to sue each other out of business. Certainly patents themselves, as rewards for new inventions, are a driver of innovation in areas such as 5G. The problem, though, is not the existence of a patent system but the ever-expanding power of the patent laws, which encourage companies to pour dollars into complex patent licensing and assertion schemes—as companies like Qualcomm have done—rather than to perform the hard work of building new technologies. When innovation in patent strategy is more profitable than actual innovation, we lose the race to 5G and other technologies. But don’t take my word for it. [Multiple members of Congress](https://www.patentprogress.org/2019/01/11/congress-weighs-in-on-qualcomm-and-apple-at-the-itc/), from both sides of the aisle, have denounced the use of patents to kick companies like Intel out of 5G development, predicting that such actions would “dampen the quality, innovation, competitive pricing, and in this case the preservation of a strong U.S. presence in the development of 5G and thus the national security of the United States.” Or look to what China itself is doing. The Chinese government is handing out rewards left and right to encourage technology research and development. Indeed, it grants subsidies and financial benefits (ranging from the [ordinary](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818503) to the [imperfect](https://funginstitute.berkeley.edu/wp-content/uploads/2013/12/patent_subsidy_Zhen.pdf) to the [bizarre](https://www.scmp.com/news/china/article/1681850/how-get-out-jail-early-china-buy-inventors-idea-and-patent-it)) to encourage its citizens to file for patents. But while China specifically encourages filing for patents, it does little to encourage using them: Patent infringement awards in court are peanuts—often only [five figures](https://scholarship.law.berkeley.edu/btlj/vol33/iss2/2/)—and most Chinese patent owners drop their patents [within five years](https://www.bloomberg.com/news/articles/2018-09-26/china-claims-more-patents-than-any-country-most-are-worthless) of getting them. The message in China is clear: You will be rewarded for innovating, but not for quibbling over patents. The United States should take the same tack if it wants to match China in 5G. Ever-stronger patent rights encourage counterproductive disputes that are a drag on industry, a drag on research and development, and ultimately a drag on domestic competitiveness on the global stage. If America wants to lead in 5G, then it must clear the path for strong competition among leading American technology companies.

#### China’s standard-setting leadership enables them export 5G infrastructure globally.

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The information and biotechnology revolutions have changed our world and will heavily inform the future of society. Whoever controls these technologies controls the future, and whoever controls their standardization controls the technologies. China understands this well. For two decades, it has been working to take over international standardization rulemaking bodies to serve the goals advanced in “[Made in China 2025](https://www.pbs.org/wgbh/frontline/article/made-in-china-2025-the-industrial-plan-that-china-doesnt-want-anyone-talking-about/)” — that is, to dominate world manufacturing and then transition to become the center of the world’s technological innovation. The dangers to the United States are already present, and in forms that are not obvious. These include, first, [direct-to-consumer genetic testing](https://medlineplus.gov/genetics/understanding/dtcgenetictesting/directtoconsumer/). China may be using such testing to gain genetic information that permits the identification and tracking of Americans, including U.S. military and intelligence community personnel or their relatives. Second, health monitoring apps are able to provide geolocation data to Chinese entities, which means to the Chinese Communist Party (CCP) and its security services. This provides location data that is valuable on its own and might be compared with data from other sources to reveal key information about Americans. Third, the CCP, in cooperation with Chinese industrial entities on international bodies, are developing and setting international standards for emerging technologies. China’s influence has grown over the past two decades, and Beijing now possesses leadership roles in standards-drafting technical committees, which means it could shape outcomes to its benefit. China has formulated a four-step strategy to seek dominance in this area: plan, track, participate and take over. Beijing has boasted that it completed the first three steps and is on the last, which is to “[develop indigenous standards](https://saiscsr.org/2019/10/29/setting-a-new-standard-implications-of-chinas-emerging-standardization-strategy/) and to lead international standardization.” This means China may be replacing international standards with its own standards, in order to control technologies and the market. In 2017, China revised its [standardization law](https://share.ansi.org/Shared%20Documents/News%20and%20Publications/Links%20Within%20Stories/China%20Standardization%20Law_English%20translation_SESEC_5.17.2017.pdf), almost 30 years after its adoption in 1989. It also set up the [Standardization Administration of China](http://www.sac.gov.cn/sacen/) to implement its strategy in the early 2000s. China’s standardization strategy also has been incorporated into the [Belt and Road Initiative](https://www.beltroad-initiative.com/belt-and-road/) so that, as countries are weaved into this network, they adopt China’s standards. Beijing essentially has had the three primary standard-setting international organizations — the [International Organization for Standardization](https://www.iso.org/home.html) (ISO), the [International Telecommunication Union](https://www.itu.int/en/ITU-T/about/Pages/development.aspx) (ITU) and the [International Electrotechnical Commission](https://www.iec.ch/homepage) (IEC) — under its influence. Two Chinese government officials currently serve as president of ITU and IEC, and placed China’s proxy as the [head of the ISO](https://www.oxebridge.com/emma/latest-iso-president-has-ties-to-china-too/) after the organization was led by a Chinese official for many years. Meanwhile, Beijing has taken leadership or other influential positions in the [International Accreditation Forum](https://www.iaf.nu/) (IAF), [United Nations Industrial Development Organization](https://www.unido.org/) (UNIDO), [International Civil Aviation Organization](https://www.icao.int/Pages/default.aspx) (ICAO), [American Society for Quality](https://asq.org/) (ASQ) and perhaps others. China’s strategy to determine the world’s standards appears to be working. In 2019 alone, China submitted [830 standards proposals to the ITU](https://www.ft.com/content/858d81bd-c42c-404d-b30d-0be32a097f1c). According to [Zhang Xiaogang](https://www.chinadaily.com.cn/m/qingdao/2017-06/23/content_29862586.htm), former president of the ISO, China planned to initiate 395 international standards by 2020 but, in actuality, [it set 495](https://www.sohu.com/a/412713490_362042#:~:text=%E5%A4%AE%E5%B9%BF%E7%BD%91%E5%8C%97%E4%BA%AC8,%E5%87%BA%E6%9C%80%E5%A4%A7%E8%B4%A1%E7%8C%AE%E7%9A%84%E5%9B%BD%E5%AE%B6%E3%80%82). Zhang claims that “China has made the greatest contribution in the field of international standardization in the past five years.” Indeed, China has dominated 5G standard-setting, for example, in the [3rd Generation Partnership Project](https://www.3gpp.org/) (3GPP), an organization to develop mobile broadband standards, and 90 percent of standard proposals in the 5G super uplink field is done by China Telecom. Unfortunately, Western countries fail to see the importance of China’s strategic move. Zhang states, “Whoever leads in standard-setting will be the leader of the technology and the controller of the market.” China’s dominance in 5G standards-setting enables it to avoid the West’s sanctions against its tech giants such as Huawei, continue to expand globally, and to dominate the market. This could be a paramount communication-security problem for the U.S. Of particular importance is China’s standardization strategy — as identified in “[China Standards 2035](https://www.cfr.org/blog/china-standards-2035-and-plan-world-domination-dont-believe-chinas-hype)” — on international bodies engaged in developing and setting standards for select emerging technologies. These include advanced communication technologies and cloud computing and cloud services. The United States and its allies must ensure that international standards for emerging technologies are not being designed to promote the interests of China. If China is successful, it would lead to the exclusion of other participants; China would be the architect, builder and maintainer of the 21st century’s information technology infrastructure.

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

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

However, this previously ‘western’ domain is challenged by a Chinese bloc of private industry actors with centrally directed, strategic motivations for their efforts who have managed to leverage the flaws of this system for political and economic advantage. The market-driven self-regulation model of technical standards has proven itself unsustainable given the geopolitical power achievable through the control of these standards. The marketised approach is easily abusable by a technologically developed nation-state with geopolitical intentions firmly in mind. Obscurity Through Complexity Technical standards have the immediate appearance of being both apolitical and ethically neutral. This seems to set them apart from the debate over standards of state behaviour in [cyber space concerning espionage and actions below the threshold of armed conflict](https://www.cfr.org/blog/unexpectedly-all-un-countries-agreed-cybersecurity-report-so-what). Yet, technological standards are unequivocally connected to normative practices of international behaviour and ethics. The extremely complex nature of the standards under consideration in bodies such as the International Organization for Standardization, the International Electrotechnical Commission (IEC), the International Telecommunications Union (ITU), and the Third Generation Partnership Project (3GPP) obscures the very tangible real-world impact that the standards they set have. The 3GPP is responsible for standards setting for mobile telecommunications. It covers everything from 5G through to autonomous vehicles and the Internet of Things. These are the bodies defining how the modern world is constructed. On the one hand they appear quite benign, responsible for such banalities as the use of Universal Serial Bus (USB) connectors versus proprietary standards. This hardly seems a matter of national security importance. But the same process is responsible for what ultimately shape the basic operating parameters of facial recognition technology in closed circuit television systems, the level of centralised state control at the technical foundations of the internet, and the protections of personally identifiable data. These generate profound implications for international policy and ethics. Internal Competition vs Strategic Direction Technical standards setting processes have, historically, been dominated by private sector actors who have had both the capacity to develop a particular technology to the point of holding a significant market share, and the ability to use that market share to advocate for the standardisation of the technology in line with their own production. The market led approach has continued to be the prevailing model by which American companies have globalised the technical standards behind US dominated technological innovation. This privatised form of self-regulation for technology companies is only partially influenced by the approach taken within the EU where [some licensing of standards are controlled by state or EU led institutions.](https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2019/ui-brief-no.-2-2019.pdf) In contrast to this approach the Chinese model has involved a high level of state-oriented direction, oversight, and direct engagement on the creation and signing off technical standards. Efforts to harmonise and centralise technical standards domestically have become increasingly internationalised as the CCP takes this centralised, strategic approach to technical standards setting bodies such as the ITU, 3GPP, and IEC. Technical standards have also become an increasingly central component of the Digital Silk Road with the openly expressed goal of increasing uptake of Chinese technical standards in partner countries. The implications of this clash between a system of technical standardisation that is driven by the market versus one driven by an authoritarian government subsidised model are a direct challenge to the development of free, open, and ethical technology. Standardisation mechanisms have become political, or rather there has been a gradual realisation of the political power to be gained from the control of technical standards. While the PRC might have come to this awareness first, the US and Europe have since had a rude awakening about the missed opportunity. The privatised model of technical standards setting favoured by European and US markets relies upon the dynamics of financial competition to regulate behaviour. This is in stark contrast to the statist Chinese model.

#### That compromises U.S. military superiority.

Borghard et al. 19, \*Erica D. Borghard is an Assistant Professor at the Army Cyber Institute at West Point. Shawn W. \*Lonergan is a U.S. Army Reserve officer assigned to 75th Innovation Command and a Research Scholar at the Army Cyber Institute. (April 25th, 2019, “The Overlooked Military Implications of the 5G Debate”, https://www.cfr.org/blog/overlooked-military-implications-5g-debate)

There are economic implications for which entities can secure the [greatest global market share](https://www.reuters.com/brandfeatures/venture-capital/article?id=61837) of 5G technology. Technological innovation drives economic growth, job creation, and global economic influence. Huawei may have a long-term market advantage over U.S and Western telecoms because the former has been able to offer 5G products at [far cheaper](https://www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.html) rates than the latter. Furthermore, there are also concerns that Chinese-built 5G technology is likely to [contain backdoors](https://www.wired.com/story/huawei-case-signals-new-us-china-cold-war-tech/) that could be used to enable [Chinese economic or national security espionage](https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html). It is unlikely that Beijing would actively monitor all of the content of the data that comes across Huawei owned or operated infrastructure (although it may collect and analyze metadata). However, it is conceivable that Huawei would get a proverbial “tap on the shoulder” from Beijing to share pertinent information in specific instances. This may include individually targeting senior corporate executives, which is enabled by the millimeter wave frequency that 5G networks employ. The military applications of 5G technology have vital strategic and battlefield implications for the U.S. Historically, the U.S. military has reaped enormous advantages from employing cutting edge technology on the battlefield. 5G technology holds similar innovative potential. Perhaps most obviously, the next generation of telecommunications infrastructure will have a direct impact on improving military communications. However, it will also produce cascading effects on the development of other kinds of military technologies, such as robotics and artificial intelligence. For instance, artificial intelligence and machine learning capabilities, such as those used in the Department of Defense’s [Project Maven](https://dod.defense.gov/News/Article/Article/1254719/project-maven-to-deploy-computer-algorithms-to-war-zone-by-years-end/), could be greatly enhanced when leveraging the data processing speeds made possible through 5G infrastructure. As an [era of great power competition](https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf) emerges between the United States and China, the United States has a compelling strategic interest in being at the forefront of these new technologies. The United States and its allies must also consider the tactical and operational implications on the battlefield of conducting conventional or counterinsurgency operations in an area with Chinese owned or operated 5G infrastructure. This concern stems from the nature of the relationship between Huawei, an [ostensibly private company](https://www.itnews.com.au/news/analysis-who-really-owns-huawei-175946), and the Chinese Communist Party (CCP). While Huawei’s founder and CEO, Ren Zhengfei proclaimed in a February 2019 interview on [CBS This Morning](https://www.cbsnews.com/news/ren-zhengfei-huawei-ceo-says-we-will-never-provide-chinese-government-with-any-information/) that the company never has and never would provide information to the Chinese government, many experts are [skeptical](https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html). Under China’s [2017 National Intelligence Law](https://www.reuters.com/article/us-china-security-lawmaking-idUSKBN19I1FW), the CCP has the authority to monitor and investigate domestic and international companies as well as direct organizations to assist with government espionage efforts. As such, it is conceivable that Huawei will be required to hand over its data to the Chinese government for collection and analysis. Due to this reality, the United States must consider and be prepared to conduct overseas contingency or counterterrorism operations in areas where Chinese telecommunications infrastructure is widely proliferated, thus restricting the United States’ ability to rely on indigenous telecoms. As [noted](https://www.africom.mil/media-room/transcript/31604/gen-joseph-votel-gen-thomas-waldhauser-and-acting-asd-for-international-security-affairs-kathryn) by US AFRICOM Commander General Thomas Waldhauser, this has already become an issue in Africa where Chinese telecommunications companies are poised to dominate. The integrity of U.S. military communications systems that rely on 5G networks could be undermined at key phases of an operation. For example, if the United States is conducting a military operation in an area of interest to China, it is plausible that the Chinese government could leverage Huawei to intercept or even deny military communications. Furthermore, Chinese telecom infrastructure dominance in a theater of operations may limit the U.S. military’s ability to conduct precision targeting that leverages signals intelligence collection on 5G telecommunications networks. The strategic and battlefield implications of who owns and operates 5G infrastructure around the world underscores the national security importance of 5G. The U.S. government and its allies should more systematically assess both the opportunities and risks associated with conducting future military operations in environments that rely on Chinese technology. To date, the U.S. government has devoted significant energy to persuading its allies and partners to follow the United States in prohibiting Chinese telecoms, particularly Huawei, from building and/or operating 5G infrastructure. However, its diplomatic approach has been met with varying degrees of success. While some countries such as [Australia](https://www.ft.com/content/e90c3800-aad3-11e8-94bd-cba20d67390c) and [Japan](https://www.reuters.com/article/us-usa-china-huawei-japan/japans-top-three-telcos-to-exclude-huawei-zte-network-equipment-kyodo-idUSKBN1O90JW) have fallen in line with the U.S. stance on Huawei, many others have not. The European Commission’s recent 5G [recommendations](https://www.cyberscoop.com/5g-eu-huawei-cybersecurity-recommendations/) for member states dismissed a ban on Chinese telecoms. British intelligence has reportedly maintained that the security risks associated with Huawei can be [sufficiently managed](https://www.ft.com/content/619f9df4-32c2-11e9-bd3a-8b2a211d90d5), and New Zealand, after [initially bandwagoning](https://www.nytimes.com/2018/11/28/business/huawei-new-zealand-papua-new-guinea.html) with the United States in December 2018, abruptly [reversed course](https://www.bloomberg.com/news/articles/2019-02-18/new-zealand-says-china-s-huawei-hasn-t-been-ruled-out-of-5g-role) in February 2019. This is concerning for the United States because New Zealand and the UK are members of the Five Eyes intelligence-sharing alliance. Many allies have refused an outright ban of Huawei because of the company’s ability to offer 5G products at far cheaper rates than Western telecoms. It is clear that U.S. diplomatic efforts are not working. The reality is that the bottom line is largely driving decision-making. Therefore, rather than take a purely negative approach, the United States should consider using positive inducements to make its 5G products more appealing. While the United States should not strive to mirror China’s top-down approach to innovation, it should work with allies to use market incentives to make U.S.- and Western-developed 5G infrastructure and products more competitive. Furthermore, the U.S. military needs to anticipate that its use of native telecommunications infrastructure in a future operating environment may be compromised, limited, or denied. The U.S. military will inevitably need greater bandwidth on the tactical edge and this should be an imperative that drives investment in research and development to address this challenge. Technological innovation was at the crux of the United States’ comparative military and economic advantage in the twentieth century. In this contemporary great power competition, U.S. failure to innovate at the scientific and technological frontier will have direct (and deleterious) effects for the United States on the distribution of power in the international system over the long term.

#### Chinese tech superiority upends deterrence and emboldens them to risk conflict over Taiwan---extinction.

Kroenig 18, Deputy Director for Strategy, Scowcroft Center for Strategy and Security Associate Professor of Government and Foreign Service, Georgetown University (Matthew, Nov 12, 2018, “Will disruptive technology cause nuclear war?” *BAS*, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war>)

Rather, we should think more broadly about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict. International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage. You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power. For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full display in its ongoing intervention in Ukraine. Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.” If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war. If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member. Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation. This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly. When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states. These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

#### Taiwan war goes nuclear---entanglement and both sides underestimate escalation risks.

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Alternately, if China did use conventionally armed missiles against U.S. bases in Japan and Guam, perhaps killing not only U.S. and Japanese military personnel, but also local civilians and U.S. dependents, what reaction would that spark? Is it so far-fetched to consider the United States initiating nuclear use under those circumstances? The United States does have viable tactical options, which it has sought to make more robust in accordance with the findings of 2018 Nuclear Posture Review (NPR).45 These include the deployment of the submarine-launched low-yield W76-2 warhead and development of an upgraded version of the B61 tactical gravity bomb.46 Chinese observers have expressly noted that these systems could make U.S. nuclear use more likely, a situation compounded by diminishing U.S. conventional superiority in the Western Pacific.47 To be clear, as with all aspects of this discussion, the point is not to state with certainty that the United States would resort to nuclear use. It might not be even likely. But it is worth acknowledging that it is possible. That is the element that needs to be injected into the debate not only over the future of strategic ambiguity, but over defense planning for Taiwan scenarios more broadly. The preferred U.S. style of warfare—to conduct attacks deep throughout an enemy’s territory rather than simply meeting them at a forward line of engagement—also presents problems and contains the prospect that non-nuclear strikes might unintentionally trip Chinese redlines regarding nuclear use. Within the U.S. academic community, this has produced a small, but important body of literature focused on the subject of “entanglement,” or the co-mingling of systems with both conventional and nuclear applications.48 This discussion has primarily focused on China’s ballistic missile force, as most of its systems are capable of firing both nuclear and non-nuclear warheads.49 China’s increasing reliance on road-mobile ICBMs (such as the DF-31 variants and the new DF-41) complicates this problem, creating the potential for their misidentification as shorter-range systems, such as the road-mobile DF-21 and DF-26, that might be used against U.S. ships or regional bases.50 Analysts have also expressed concern over the potential for U.S. forces to inadvertently sink a Chinese SSBN as part of its ASW campaign during a Taiwan conflict, a fear that echoes similar worries from the U.S.-Soviet struggle.51 Recall again the private comments of Chinese officials about conventional attacks on nuclear systems nullifying its NFU policy. The potential for mutual miscalculation Entanglement issues are far from the whole of the problem. There is still a fundamental misreading—perhaps on both sides—of the ability to manage escalation in Taiwan contingencies for reasons beyond strict operational matters. The very fact of China attempting something as complex and challenging as an amphibious invasion of an island of 24 million people would show an unwelcome tolerance for risk. For that matter, U.S. efforts to defend said island—halfway around the world on another nuclear power’s doorstep—also shows a fair amount of audacity. Put differently, the act of aggression against Taiwan and the effort to repel such an attack both demonstrate that each side is willing to take actions which could be viewed as inherently risky. Through that lens, the additional step to unwanted nuclear escalation is not a great leap. States act rationally, right up until they do not. In considering how a Taiwan contingency would play out, it would therefore be prudent to assume that nuclear use is more viable than cold assessments of each side’s pre-conflict intentions suggest. If academic surveys of Chinese strategic literature are correct, overoptimism on the ability to manage escalation once hostilities commence is not confined to the U.S. side.52

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

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

III. CAN WE PLEASE STOP SEARCHING FOR SYSTEMIC HOLD-UP? It is not the purpose of this article to critique the data or methodologies used by researchers who claim that there is no evidence of systemic hold-up. Though questions remain, the data presented in the cited studies finding no empirical evidence of systemic hold-up present plausible descriptions of current markets for products such as smart phones and other connected technology devices. Instead, this critique is directed at the core assumption that runs through each of these studies: that a lack of evidence of systemic hold-up means that hold-up does not represent a threat that justifies policy intervention. In this Part, I argue that, notwithstanding the findings of these studies, patent hold-up in standardized product markets may indeed be a threat that merits preventative policy measures, but that those measures should be directed toward the prevention of well-understood and actionable forms of anticompetitive conduct rather than the economic phenomenon of hold-up. A. The Absence of Systemic Hold-Up Does Not Mean that Hold-Up Does Not Occur In a 2017 article, Galetovic and Haber utilize an extended analogy drawn from the field of Mayan archeology to make the point that scholars sometimes ignore the facts in front of them in order to cling to pre-formed (and empirically unsupported) beliefs.92 In this analogical tradition, I will use a hypothetical from public health epidemiology to illustrate a related point. Let us consider the often fatal and highly contagious viral infection Ebola. U.S. public health officials, aware of the dangerous effects of Ebola, might propose the implementation of prophylactic measures to prevent the spread of Ebola in the United States. Such measures might include early detection systems at U.S. hospitals, a network of Ebola experts ready to investigate suspected cases, and potential vaccines for particularly vulnerable populations. All of these measures, of course, would come at a cost. Those opposing the incurrence of this cost might argue that such measures are unjustified because there is no empirical evidence that Ebola is a problem in the U.S. After all, there are no documented outbreaks of the disease, and the only reported cases have been sporadic and linked to other factors (such as health workers returning from abroad). In fact, both lifespan and overall health in the United States have been improving steadily over the past several decades. Most declines in population health can be traced to causes such as tobacco use, poor dietary choices, lack of exercise and the like, but not to Ebola. Thus, because there is no evidence that Ebola outbreaks have occurred in the United States nor any linkage between decreased health and Ebola, and because the overall health of the United States population continues to improve, there is no justification for preventative measures to stop Ebola outbreaks in the United States. This reasoning is, of course, fallacious and, in the case of a disease like Ebola, dangerously so. In the field of public health, prophylactic measures are often taken before a health risk affects a significant portion of the population. This is the reason for prophylactic measures in the first place. In the field of public health, it is widely recognized that risks arising from any number of environmental and pathogenic sources can be assessed based on laboratory analysis and test cases, without population-level epidemiological data. In fact, once population level data for such outbreaks is available, it is often too late: an epidemic has broken out and millions are at risk. Luckily, it is doubtful that public health officials would apply the fallacious reasoning outlined above to important public health decisions. Curiously, however, this “Ebola fallacy” has taken root in the debate over patent hold-up. As discussed above, the purported lack of empirical evidence of system-wide patent hold-up is used as a justification for abandoning or forestalling policy interventions aimed at reducing the risk of hold-up. Because hold-up has not been detected at a systemic level, so the argument goes, it must not be a problem. Therefore, measures designed to prevent hold-up from occurring must be the result of gratuitous or over-zealous policy making. The logical fallacies in this argument should be apparent. In fact, there are numerous examples of anticompetitive conduct by individual firms in markets that are not otherwise overrun by anticompetitive behavior. For example, in 2009, the Federal Trade Commission brought an action against pharmaceutical manufacturer Solvay and a group of generic drug manufacturers for violating Section 5 of the FTC Act by entering into an arrangement whereby the generic manufacturers agreed not to challenge Solvay’s patent on its AndroGel product and not to market their generic versions of AndroGel, in exchange for a significant payment by Solvay to each of the generic manufacturers (a so-called “pay for delay” scheme).94 The Supreme Court held in 2013 that such conduct was actionable and reversed the Eleventh Circuit’s dismissal of the FTC’s claim.95 Yet even in 2009, the year in which the FTC brought its action, of the 68 agreements settling patent disputes filed by pharmaceutical manufacturers with the FTC,96 the FTC estimated that only 19 of these (28%) were potential pay for delay agreements; and by 2014, the year after the Actavis decision, only 21 out of 160 such agreements (13%) were deemed by the FTC likely to represent illegal pay for delay schemes.97 Thus, while pharmaceutical industry patent settlements have attracted significant attention as potentially anticompetitive arrangements, most such settlements do not merit investigation by the FTC.98 An even more telling example is found in the area of mergers and acquisitions. During fiscal year 2016, a total of 1,832 merger and acquisition transactions were reported to the FTC and DOJ under the Hart-Scott-Rodino Antitrust Improvements Act.99 Of these, the FTC challenged only twenty-two (1.2%). 100 Thus, while some anticompetitive mergers may exist, the vast majority are not anticompetitive.101 But the absence of market-wide anticompetitive conduct in the area of mergers and acquisitions hardly excuses the handful of transactions that do present antitrust risks, nor does it suggest that mergers should not be subject to governmental monitoring and, when merited, enforcement. B. Protective Measures May Already Be Working to Reduce Hold-Up Another important factor that should be considered regarding the purported lack of empirical evidence of systemic hold-up is the effect that existing policy measures have already had in reducing hold-up. As noted above, the threat of patent hold-up was a primary motivating factor for many SDOs to adopt policies requiring the disclosure and licensing of SEPs. These policies have been in place for decades. In the United States, the first such policy was adopted in 1959 by the American Standards Association (the predecessor to today’s American National Standards Institute (ANSI).102 Today, every one of the more than 200 ANSI-accredited developers of American National Standards must adhere to ANSI’s essential requirements, including the adoption of such a licensing policy for SEPs. Similar policies have existed in European and international standards organizations since at least the 1980s.103 These policies, which were developed by SDOs in large part to reduce the likelihood of hold-up within standard-setting systems, have had several decades to work, and it is likely that the lack of observed hold-up in some studies can be attributed to the successful operation of these policies. Similarly, antitrust and competition enforcement agencies in the U.S. and Europe have been aware of the potential for hold-up connected with standardization for many years. Accordingly, they have brought enforcement actions when it has been alleged that hold-up behavior has resulted in a violation of the antitrust laws. High-profile enforcement actions against patent holders such as Rambus, 104 Google 105 and Qualcomm106 send powerful deterrent signals to the market and warn others not to engage in similar behavior lest they, too, become the subject of agency enforcement. Like SDO policies, it is likely that the general market awareness of agency interest in standard-setting and hold-up has, to a degree, limited the amount of hold-up that is actually attempted in the marketplace, thereby limiting the direct evidence of hold-up as a systemic problem. But do the deterrent effects of SDO and agency efforts to reduce hold-up signify that hold-up is not a problem? Certainly not. To reach such a conclusion would be perverse: akin to claiming that burglary is not a problem in a neighborhood that experiences reduced burglary rates after it has implemented an active neighborhood watch program and enhanced policing. C. Indicia of Healthy Markets do not Prove the Absence of Anticompetitive Conduct As noted above, one of the principal arguments advanced by commentators seeking to refute the “hold-up theory” is that markets for telecommunications products, namely smart phones, are robust – evidenced by increasing product functionality, decreasing consumer prices and rapid innovation -- and that this degree of robustness indicates that hold-up cannot be a problem in these markets.107 If hold-up were a problem in these markets, they reason, we would see product stagnation, stable (but high) prices, and a lack of competition – features associated with classic examples of hold-up in markets for products such as natural resources and agricultural goods.108 But this argument relies on a false syllogism: hold-up results in market dysfunction; if a market functions well, then it cannot be subject to hold-up. The weaknesses in this argument are multifold. First, hold-up may exist in individual instances without sufficient weight to affect overall market characteristics, particularly in a large global market such as mobile telecommunications. Thus hold-up may exist, even in a market that outwardly appears to be functioning well. Second, there is no valid counterfactual to use to compare the health and robustness of the market for mobile telecommunications products.109 Other consumer electronics devices, such as televisions and DVD players, do not compare well with mobile telecommunications devices, which have taken on a unique character in the modern networked economy. Thus, observing the strength of the market fails to answer the critical questions “compared to what?” and how much stronger the market might be (through more product diversity, functionality, price reduction) without hold-up? A simple historical illustration is useful in this context. During the decade leading up to the enactment of the Sherman Antitrust Act of 1890, several major U.S. commodity markets (e.g., steel, salt, petroleum, coal, sugar, lead, and others) came under intense scrutiny for a variety of allegedly anticompetitive industrial arrangements. One might have argued that these markets, had they been subject to the sorts of anticompetitive collusion that the Sherman Act sought to address, should have seen reductions of output and increases in price. Yet, between 1880 and 1890, U.S. output of salt, petroleum, steel, and coal all increased significantly, and prices of steel, sugar and lead all dropped significantly.110 Do these positive market indicia demonstrate that the subject markets were not subject to anticompetitive collusion, and that the Sherman Act was not necessary? Certainly, investigations of these industries revealed significant cartel behavior. I would suggest that few commentators today would argue that the coal, steel, sugar and other major industrial producers of the late nineteenth century were innocent of collusive and anticompetitive conduct, or that the Sherman Act was not a necessary and beneficial measure for the U.S. economy.111 Yet, had we relied solely on the positive characteristics exhibited by these markets as proof that anticompetitive conduct did not exist, then perhaps the Sherman Act never would have been enacted. By the same token, the fact that global markets for standardized products such as computers and smart phones appear to be thriving does not itself refute the possibility of hold-up nor the existence of anticompetitive conduct in these markets. Nor does it allow regulators and policy makers to drop their guard or cease to monitor these important industries.

### 1AC---Cybersecurity

#### Advantage 2 is Cybersecurity:

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

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III. COMPETITION AND CYBERSECURITY In addition to the historical review done so far, another approach to understanding the relationship among patents, competition, and national security is to consider the role of cybersecurity. There is little doubt that computer system vulnerabilities that enable hacking and spread of computer exploits are a threat to the nation’s defenses, so better cybersecurity is a key part of national security strategy.155 Strong competition can thus complement national security by enhancing domestic cybersecurity, and patent assertion that unduly weakens competition detracts from cybersecurity.156 Competition promotes better cybersecurity in at least two ways. First, multiple studies show that competition encourages firms to improve their products on multiple vectors including cybersecurity. Second, competition avoids a situation that security experts call a “monoculture,” which increases vulnerability to severe cyberattacks. As former Secretary of Homeland Security Michael Chertoff wrote recently, “We need competition and multiple providers, not a potentially vulnerable technological monoculture,” to guarantee national security.157 Thus, cybersecurity provides a useful lens for understanding how unfettered patent assertion and licensing can detract from national security. A. Cybersecurity as Competitive Value-Add Competition enhances national security by reducing the incidence of technical vulnerabilities. That effect is especially important for security sensitive systems such as mobile telecommunications. Intuitively, a causal chain from competition to cybersecurity makes logical sense. Computer security is a value-added benefit to consumers, so firms in competitive markets are likely to use security to gain an edge over their competitors.158 In monopolized markets, though, there may be less external impetus to test products for flaws, and the monopolist may choose to focus less on security and more on new product features or increased product quality. Economic research confirms these hypotheses about competition leading to better cybersecurity. A 2009 empirical study of web browsers considered the impact of market concentration on the amount of time that vendors took to fix security vulnerabilities as they were discovered.159 The study found that the presence of more competitors correlated with faster cybersecurity response—a reduction of 8–10 days in response time per additional market rival.160 Similarly, business researchers in 2005 modeled incentives for firms to engage in sharing of cybersecurity information, and concluded that the “inclination to share information and invest in security technologies increases as the degree of competitiveness in an industry increases.”161 Another study found that, where two software firms are in competition, at least one will be willing to take on some degree of risk and responsibility for cybersecurity, whereas a monopoly software firm will consistently fail to accept such responsibility.162 To be sure, an unpublished study from 2017 found that some market concentration can make firms more responsive to cybersecurity issues, but only to a point: “being in a dominant position reduces the positive effect of having less competitors on the responsiveness of the vendor,” and indeed the “more dominant the firm is, the less rapid it is in releasing security patches.”163 This research confirms that competition is more conducive to cybersecurity. It is not hard to see how this applies to emerging communication technologies markets. In the absence of competition, the above research suggests that device manufacturers, chip makers, and software developers will lack incentives to respond to vulnerabilities, to share information about cybersecurity practices and issues, and to take responsibility for security matters. Mobile phone chips have had their share of cybersecurity failures already.164 The best way to flush out ongoing and future cybersecurity issues is to maintain competitive pressure at all levels of the supply chain. B. Vulnerabilities of “Monocultures” A second reason why monopoly undermines cybersecurity is that monopoly leads to a “monoculture” of single-vendor products, opening the door to massive systemic failure in the case of a cyberattack. Computer researchers developed the theory of software monocultures in the early 2000s, in response to the regular phenomenon of computer viruses and other attacks spreading rapidly by exploiting flaws in the dominant operating system at the time, Microsoft Windows.165 Where a computer system such as Windows has a commanding share of users, a virus that exploits a flaw in that system can quickly spread to infect a whole interconnected ecosystem. An operating system monopoly thus enables fast and easy spread of cyberattacks, and better cybersecurity would be achieved through greater diversity in online systems.166 As one research group posited, “a network architecture that supports a collection of heterogeneous network elements for the same functional capability offers a greater possibility of surviving security attacks as compared to homogeneous networks.”167 There has been considerable study of the theory that computer monocultures are naturally more vulnerable to attacks.168 In one study, computer science researchers reviewed a catalog of 6,340 software vulnerabilities recorded in 2007, to compare whether comparable software would share the same flaws.169 Of the 2,627 vulnerabilities applicable to application software (as opposed to operating systems, web scripts, and other software components), only 29 (1.1%) applied to substitute products from different vendors but providing the same functionality.170 By contrast, different versions of a single software product were found to share vulnerabilities 84.7% of the time.171 Thus, software monocultures share exploitable flaws even when there is some variation in versions across the monoculture; by contrast, diversity in software is almost guaranteed to prevent a single flaw from affecting all users. In the case of 5G and wireless mobile communications, a monoculture is an especially concerning possibility. To the extent that systems such as smart city sensors or communication networks are widely deployed in a monoculture fashion, a widespread attack could have devastating consequences, potentially blacking out a region and affecting essential services such as 911.172 A monoculture that is vulnerable to so-called “rootkits” or “backdoors”—maliciously installed software that enable bad actors to commandeer systems—could also enable mass surveillance or spying by private hackers or foreign governments.173 The presence of systems from multiple vendors would mitigate these possibilities. The monoculture theory is not without critics, but a review of those criticisms shows them to be inapplicable to contemporary communication technologies. Some critics suggest that software diversity imposes unwarranted costs on firms who must forego economies of scale and devise seemingly duplicative yet different setups of computer systems.174 But those concerns largely focus on the situation where a single firm produces and manages heterogeneous systems, concerns that are avoided where heterogeneity arises naturally through competition between two unrelated firms. Critics also argue that technological measures can create “artificial diversity” through automated randomization of software code, so software engineers can purportedly solve monoculture issues and device users need not worry about the issue.175 But even these critics acknowledge that artificial diversity techniques are often insufficient because they must make assumptions about what aspects of the technology are most vulnerable to attack, and they concede that artificial diversity cannot stop attacks involving operation of legitimate software functions in undesirable ways (sending spam emails or deleting document files, for example).176 It is widely recognized that a monoculture is unavoidable in at least one respect: Most connected devices will need to conform to technical standards.177 5G, for example, is a technical standard developed by a private industry consortium called 3GPP.178 A flaw in any such standard would render all mobile devices implementing the standard vulnerable to an identical attack.179 Avoiding these sorts of systemic flaws in standards requires rigorous development, analysis, and testing of the standard in the development process, which in turn requires ensuring that as many firms as possible, especially firms that share basic American values, are involved in the development of those standards.180 Thus, the necessary standardization of information and communication technologies is perhaps the most important reason why a competitive communication technology market is essential to cybersecurity and national security.

#### Cyber escalation is more likely now than ever---empirics don’t assume intensified competition and acute geopolitical conditions.

Jervis et al. 20, \*Robert Jervis (Ph.D., California at Berkeley, 1968) is the Adlai E. Stevenson Professor of International Politics and has been a member of the Columbia political science department since 1980; \*Jason Healey is a senior research scholar and adjunct professor at the School of International and Public Affairs, Columbia University. He is also a senior fellow with the Cyber Statecraft Initiative at the Atlantic Council, where he was the program's founding director; (Fall 2020, “The Escalation Inversion and Other Oddities of Situational Cyber Stability”, https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/)

Situational Cyber Stability: When Cyber Capabilities Can Be Destabilizing To sum up: Cyber conflict has not escalated and there are strong, theory-backed reasons why it provides negative feedback, acting as a pressure release pushing back against geopolitical crises. We agree with these conclusions, which explain why cyber conflict has not yet escalated and may not in the future. However, we believe they hold only if the next few decades generally resemble the past few. This stability is situational and we see three major, interrelated mechanisms by which it may change. Cyber conflicts and competition are intensifying over increasing stakes and might inadvertently or intentionally spark a larger conflict; there is a higher likelihood of acute crises, far worse than the relatively bland geopolitical conditions of the past decades; and in times of acute crisis, the dynamics go through an inversion, encouraging rather than suppressing escalation. Spark: Cyber Conflict Can Cause Acute Geopolitical Crises As cyberspace becomes increasingly existential for economies and societies, states compete more aggressively over the same cyber terrain and treasure. In such circumstances, cyber capabilities add positive feedback, intensifying conflict within cyberspace. Ben Buchanan has featured some of these dynamics in his book, The Cybersecurity Dilemma. If a “potential adversary bolsters its own security by increasing its methods of secrecy and ratcheting up intrusive collection of its own — or by shooting back at the collectors — the first state will often feel a need to respond” with “still more intrusive collection.”[34](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn34) This situation is one which can easily notch upward but only with great difficulty be reversed. This section will summarize the relevant dynamics of cyber conflict, establish that conflict is escalating in cyberspace, and discuss how this dangerous mix of factors can spark war. Escalation in Cyberspace Cyber conflict and competition are intensifying. A cyber incident might cross the threshold into armed conflict either through a sense of impunity or through miscalculation or mistake. Alternatively, the cyber attack might be brazen or reckless enough to demand a muscular response from the target state. Libicki’s framework of cyber escalation requires three elements: an increase in intensity, the crossing of significant thresholds, and causal links between cyber incidents (i.e., “one attack is in response to another”).[35](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn35) A cyber incident might cross the threshold into armed conflict either through a sense of impunity or through miscalculation or mistake. We believe the first two elements are important and it is not necessary to balance each incident with its tit-for-tat response. Cyber conflict can be escalatory even if there is not a direct retaliation (“you did A, so we will do X”) but rather a trend over time (“we caught you doing A and B, and suspect you of C … so we’ll do X and Y and for good measure see no reason to further hold off on Z”). It is through this larger picture, the series of campaigns and capabilities, that the escalatory mechanics become obvious. Despite no provable chain of causation from A to Z, the series can show evidence of intensification and ignored thresholds, if the direction and magnitude of the vector are consistent over a long period of time. A full analysis of escalation requires its own paper, but as an initial analysis we have selected four points each separated by a decade over forty years in order to illustrate this trend: In 1988, nations did not have major cyber organizations. Within the U.S. Department of Defense, there were small groups planning and conducting offensive operations, but there was no dedicated civilian defensive team in the United States until the creation of the Computer Emergency Response Team, funded by the Defense Department, in November 1988. There were significant incidents — such as the Morris Worm of 1988 and a case known as the Cuckoo’s Egg of 1986 which involved German hackers who searched for information on U.S. ballistic missile defense technologies and then passed their findings along to the Soviet KGB. However shocking at the time, those incidents still had quite modest scope, duration, and intensity.[36](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn36) Ten years later in 1998, the world’s first combat cyber unit — established in the U.S. Air Force — had already been in existence for three years, with 93 officers and enlisted.[37](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn37) The first major cyber bank heist was in 1995 against Citibank, while the U.S. military created the first cyber command in 1998 in response to the internal Eligible Receiver exercise and Solar Sunrise incident.[38](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn38) This command was staffed by about two dozen defenders (including one of the authors) and worked with the larger Computer Emergency Response Team and similar teams in the military services to defend against and trace the major Moonlight Maze espionage case to Russia.[39](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn39) Within two years, the command expanded and took on responsibilities to coordinate offensive operations, growing to 122 personnel with a $26 million budget.[40](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn40) Only 10 years after that, in 2008, Estonia suffered a debilitating cyber attack from Russia. Espionage against the United States from Russia became increasingly worrisome, including a case known as Buckshot Yankee, where Russian spies breached classified networks. Chinese theft of intellectual property would be known as the “greatest transfer of wealth in history” by 2012.[41](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn41) In direct response to these incidents, the Department of Defense combined their dedicated offensive and defensive task forces into a single U.S. Cyber Command in 2010.[42](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn42) What had been a defensive-only command with 25 people in 1998 grew to cover both offense and defense with a staff of over 900 by 2011.[43](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn43) In the decade leading up to 2018, the United States launched a sophisticated cyber assault on Iranian uranium enrichment facilities; Iran conducted sustained denial of service attacks on the U.S. financial system; North Korea attacked Sony; and Russia disrupted the Ukrainian power grid in winter (twice) and the opening ceremony of the Olympics.[44](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn44) U.S. Cyber Command grew to 6,200 personnel just in the operational element.[45](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn45) Iran and China created their own cyber commands as did the Netherlands,[46](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn46) the United Kingdom,[47](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn47) France,[48](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn48) Singapore,[49](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn49) Vietnam,[50](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn50) Germany,[51](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn51) and others. If intensification is measured as worsening levels of violence, then cyber conflict has intensified across all periods. By 2018, the problems faced in 2008 seemed minor and the organizations small and limited, while the cyber incidents from 1998 and 1988 appeared positively trivial. Operations that had appeared risky 20 years beforehand were now routine. The intensification trend is also clear according to the measurement of Libicki’s “number of troops committed to the fight.” The Defense Department expanded the central cyber warfighting force from zero troops in 1988 to 25 in 1998, 900 in 2011, and at least 6,200 in 2018. The first commander of the U.S. Cyber Command noted in 2011 that its creation “garnered a great deal of attention from other militaries,” which he hoped was not a sign of militarization but rather “a reflection of concern.”[52](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn52) Nations must indeed be concerned, as there are now dozens of copycats. Jensen, Valeriano, and Maness, using more quantified methods, have similar findings to this qualitative assessment, tracking a strong growth of latent cyber power by Russia and China from 2001 through 2014.[53](https://tnsr.org/2020/09/the-escalation-inversion-and-other-oddities-of-situational-cyber-stability/" \l "_ftn53) There is no obvious evidence pointing to a decrease or even a plateau in the intensity of cyber conflict, or that fewer thresholds are being passed now than 10, 20, or 30 years ago. The direction and magnitude of the change over four decades has marched in only one direction: a relentless increase as nations build their organizations and employ them in more frequent and more dangerous incidents.

#### 5G rollout is inevitable and vastly broadens America’s cyber vulnerabilities.

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

The continuing rollout of the fifth generation of mobile networks and technologies, known collectively as 5G, is set to radically transform the business world. Incredible new speeds, dramatically reduced latency and fresh swathes of bandwidth will allow real-time connectivity on a whole new scale. Smart cities, autonomous vehicles and augmented reality present amazing opportunities, so it’s no surprise that investment in 5G technologies from governments and businesses is enormous and growing. Amid the excitement of all this technological promise, significant new dangers are being overlooked. As digital connectivity soars to new heights and internet of things devices expand to rapidly become the internet of forgotten things, organizations will face a number of serious security challenges. As someone who specializes in cybersecurity and technology, I believe it’s crucial that organizations start to consider the threats posed by a vastly broadened attack surface, machine learning manipulation and parasitic malware. Securing The Infrastructure From my perspective, organizations, businesses and individuals will quickly become reliant on 5G networks for daily life. Inevitably, 5G technologies and infrastructure will be a prime target for foreign governments and cybercriminals. The line between protectionism and concern about espionage is blurry. Any uncertainty about the technology that forms critical infrastructure should be of major concern to business leaders. While the explosion of digital connectivity presents new opportunities, it also massively increases potential attack surfaces. Many more devices and sensors will be connected by millions of new 5G masts, and these new 5G networks have a heavier reliance on software. What this means is an explosion of new attack vectors, possible vulnerabilities and weaknesses that can be exploited by a range of bad actors. All the benefits that 5G promises in terms of greater speeds and lower latency will also benefit hacktivists, enabling them to carry out attacks more rapidly and at greater scale. Fresh Threat Landscape Spoofing and jamming of 5G networks could cause serious disruption for supply chains and dependent infrastructure. By targeting embedded IoT devices, determined attackers could put vital networks under threat. Greater speed, higher bandwidth and lower latency will enhance the potency of distributed denial of service attacks. Many traditional techniques will find fresh life in the 5G future, and the impact on business could be catastrophic. As more organizations come to rely on machine learning, I predict attackers will find new ways to exploit neural networks and subvert these systems for their own gain. Manipulated machine learning could enable attackers to enrich themselves, obfuscate and deceive, ultimately sowing confusion on a grand scale. What’s worrisome is the opportunity for parasitic malware to burrow into 5G networks and systems to steal processing power and degrade the performance or even shut down critical services like water and power. Any adoption of 5G must include a proper assessment of the risks involved and plans for protection, vigilance and remediation of security incidents.

#### NC3 systems are technically vulnerable, attractive targets.

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

The Nuclear-Cyber Connection These links exist because the NC3 systems of the United States and other nuclear-armed states are heavily dependent on computers and other digital processors for virtually every aspect of their operation and because those systems are highly vulnerable to cyberattack. Every nuclear force is composed, most basically, of weapons, early-warning radars, launch facilities, and the top officials, usually presidents or prime ministers, empowered to initiate a nuclear exchange. Connecting them all, however, is an extended network of communications and data-processing systems, all reliant on cyberspace. Warning systems, ground- and space-based, must constantly watch for and analyze possible enemy missile launches. Data on actual threats must rapidly be communicated to decision-makers, who must then weigh possible responses and communicate chosen outcomes to launch facilities, which in turn must provide attack vectors to delivery systems. All of this involves operations in cyberspace, and it is in this domain that great power rivals seek vulnerabilities to exploit in a constant struggle for advantage. The use of cyberspace to gain an advantage over adversaries takes many forms and is not always aimed at nuclear systems. China has been accused of engaging in widespread cyberespionage to steal technical secrets from U.S. firms for economic and military advantages. Russia has been accused, most extensively in the Robert Mueller report, of exploiting cyberspace to interfere in the 2016 U.S. presidential election. Nonstate actors, including terrorist groups such as al Qaeda and the Islamic State group, have used the internet for recruiting combatants and spreading fear. Criminal groups, including some thought to be allied with state actors, such as North Korea, have used cyberspace to extort money from banks, municipalities, and individuals.[4](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote04) Attacks such as these occupy most of the time and attention of civilian and military cybersecurity organizations that attempt to thwart such attacks. Yet for those who worry about strategic stability and the risks of nuclear escalation, it is the threat of cyberattacks on NC3 systems that provokes the greatest concern. This concern stems from the fact that, despite the immense effort devoted to protecting NC3 systems from cyberattack, no enterprise that relies so extensively on computers and cyberspace can be made 100 percent invulnerable to attack. This is so because such systems employ many devices and operating systems of various origins and vintages, most incorporating numerous software updates and “patches” over time, offering multiple vectors for attack. Electronic components can also be modified by hostile actors during production, transit, or insertion; and the whole system itself is dependent to a considerable degree on the electrical grid, which itself is vulnerable to cyberattack and is far less protected. Experienced “cyberwarriors” of every major power have been working for years to probe for weaknesses in these systems and in many cases have devised cyberweapons, typically, malicious software (malware) and computer viruses, to exploit those weaknesses for military advantage.[5](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote05)

#### Compromised NC3 escalates to nuclear war---instills use-it or lose-it pressures that upend crisis stability.

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

Although activity in cyberspace is much more difficult to detect and track than conventional military operations, enough information has become public to indicate that the major nuclear powers, notably China, Russia, and the United States, along with such secondary powers as Iran and North Korea, have established extensive cyberwarfare capabilities and engage in offensive cyberoperations on a regular basis, often aimed at critical military infrastructure. “Cyberspace is a contested environment where we are in constant contact with adversaries,” General Paul M. Nakasone, commander of the U.S. Cyber Command (Cybercom), told the Senate Armed Services Committee in February 2019. “We see near-peer competitors [China and Russia] conducting sustained campaigns below the level of armed conflict to erode American strength and gain strategic advantage.” Although eager to speak of adversary threats to U.S. interests, Nakasone was noticeably but not surprisingly reluctant to say much about U.S. offensive operations in cyberspace. He acknowledged, however, that Cybercom took such action to disrupt possible Russian interference in the 2018 midterm elections. “We created a persistent presence in cyberspace to monitor adversary actions and crafted tools and tactics to frustrate their efforts,” he testified in February. According to press accounts, this included a cyberattack aimed at paralyzing the Internet Research Agency, a “troll farm” in St. Petersburg said to have been deeply involved in generating disruptive propaganda during the 2016 presidential elections.[6](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote06) Other press investigations have disclosed two other offensive operations undertaken by the United States. One called “Olympic Games” was intended to disrupt Iran’s drive to increase its uranium-enrichment capacity by sabotaging the centrifuges used in the process by infecting them with the so-called Stuxnet virus. Another left of launch effort was intended to cause malfunctions in North Korean missile tests.[7](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote07) Although not aimed at either of the U.S. principal nuclear adversaries, those two attacks demonstrated a willingness and capacity to conduct cyberattacks on the nuclear infrastructure of other states. Efforts by strategic rivals of the United States to infiltrate and eventually degrade U.S. nuclear infrastructure are far less documented but thought to be no less prevalent. Russia, for example, is believed to have planted malware in the U.S. electrical utility grid, possibly with the intent of cutting off the flow of electricity to critical NC3 facilities in the event of a major crisis.[8](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote08) Indeed, every major power, including the United States, is believed to have crafted cyberweapons aimed at critical NC3 components and to have implanted malware in enemy systems for potential use in some future confrontation. Pathways to Escalation Knowing that the NC3 systems of the major powers are constantly being probed for weaknesses and probably infested with malware designed to be activated in a crisis, what does this say about the risks of escalation from a nonkinetic battle, that is, one fought without traditional weaponry, to a kinetic one, at first using conventional weapons and then, potentially, nuclear ones? None of this can be predicted in advance, but those analysts who have studied the subject worry about the emergence of dangerous new pathways for escalation. Indeed, several such scenarios have been identified.[9](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote09) The first and possibly most dangerous path to escalation would arise from the early use of cyberweapons in a great power crisis to ~~paralyze~~ undermine the vital command, control, and communications capabilities of an adversary, many of which serve nuclear and conventional forces. In the “fog of war” that would naturally ensue from such an encounter, the recipient of such an attack might fear more punishing follow-up kinetic attacks, possibly including the use of nuclear weapons, and, fearing the loss of its own arsenal, launch its weapons immediately. This might occur, for example, in a confrontation between NATO and Russian forces in east and central Europe or between U.S. and Chinese forces in the Asia-Pacific region. Speaking of a possible confrontation in Europe, for example, James N. Miller Jr. and Richard Fontaine wrote that “both sides would have overwhelming incentives to go early with offensive cyber and counter-space capabilities to negate the other side’s military capabilities or advantages.” If these early attacks succeeded, “it could result in huge military and coercive advantage for the attacker.” This might induce the recipient of such attacks to back down, affording its rival a major victory at very low cost. Alternatively, however, the recipient might view the attacks on its critical command, control, and communications infrastructure as the prelude to a full-scale attack aimed at neutralizing its nuclear capabilities and choose to strike first. “It is worth considering,” Miller and Fontaine concluded, “how even a very limited attack or incident could set both sides on a slippery slope to rapid escalation.”[10](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote10) What makes the insertion of latent malware in an adversary’s NC3 systems so dangerous is that it may not even need to be activated to increase the risk of nuclear escalation. If a nuclear-armed state comes to believe that its critical systems are infested with enemy malware, its leaders might not trust the information provided by its early-warning systems in a crisis and might misconstrue the nature of an enemy attack, leading them to overreact and possibly launch their nuclear weapons out of fear they are at risk of a preemptive strike. “The uncertainty caused by the unique character of a cyber threat could jeopardize the credibility of the nuclear deterrent and undermine strategic stability in ways that advances in nuclear and conventional weapons do not,” Page O. Stoutland and Samantha Pitts-Kiefer wrote in 2018 paper for the Nuclear Threat Initiative. “[T]he introduction of a flaw or malicious code into nuclear weapons through the supply chain that compromises the effectiveness of those weapons could lead to a lack of confidence in the nuclear deterrent,” undermining strategic stability.[11](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote11) Without confidence in the reliability of its nuclear weapons infrastructure, a nuclear-armed state may misinterpret confusing signals from its early-warning systems and, fearing the worst, launch its own nuclear weapons rather than lose them to an enemy’s first strike. This makes the scenario proffered in the 2018 NPR report, of a nuclear response to an enemy cyberattack, that much more alarming.

#### Attacks on vital infrastructure cause accidental escalation.

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Yet another pathway to escalation could arise from a cascading series of cyberstrikes and counterstrikes against vital national infrastructure rather than on military targets. All major powers, along with Iran and North Korea, have developed and deployed cyberweapons designed to disrupt and destroy major elements of an adversary’s key economic systems, such as power grids, financial systems, and transportation networks. As noted, Russia has infiltrated the U.S. electrical grid, and it is widely believed that the United States has done the same in Russia.[12](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The Pentagon has also devised a plan known as “Nitro Zeus,” intended to immobilize the entire Iranian economy and so force it to capitulate to U.S. demands or, if that approach failed, to pave the way for a crippling air and missile attack.[13](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The danger here is that economic attacks of this sort, if undertaken during a period of tension and crisis, could lead to an escalating series of tit-for-tat attacks against ever more vital elements of an adversary’s critical infrastructure, producing widespread chaos and harm and eventually leading one side to initiate kinetic attacks on critical military targets, risking the slippery slope to nuclear conflict. For example, a Russian cyberattack on the U.S. power grid could trigger U.S. attacks on Russian energy and financial systems, causing widespread disorder in both countries and generating an impulse for even more devastating attacks. At some point, such attacks “could lead to major conflict and possibly nuclear war.”[14](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote14) These are by no means the only pathways to escalation resulting from the offensive use of cyberweapons. Others include efforts by third parties, such as proxy states or terrorist organizations, to provoke a global nuclear crisis by causing early-warning systems to generate false readings (“spoofing”) of missile launches. Yet, they do provide a clear indication of the severity of the threat. As states’ reliance on cyberspace grows and cyberweapons become more powerful, the dangers of unintended or accidental escalation can only grow more severe.

#### Cracking down on anticompetitive patent licensing post-*Qualcomm* reintroduces cybersecurity-enhancing competition to the market.

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IV. LESSONS AND POLICY DIRECTIONS The above discussion shows that patent protection can have mixed effects on national security: On the one hand, patents can encourage innovation that ensures domestic technological leadership and produces useful security-protective technologies; on the other hand, patents can stifle innovation-producing and cybersecurity-enhancing competition and can stymie the government’s own ability to achieve national security goals. To navigate the complex effects of patent policy on national security, policymakers may consider the following recommendations as guideposts. A. Anticompetitive Patent Licensing An area of particular concern should be the use of patents and patent licensing strategies to diminish competition or put up roadblocks to new entrants. Policymakers should certainly not support these abuses of the patent system, and indeed should take steps to prevent them. In the mobile communications space, patent licensing already plays an outsized role. There are reportedly between 250,000 and 314,000 patents on the smartphone alone, and litigation over cell phone technologies has lasted decades by now. Patents will thus inevitably have an impact on technologies like 5G or the Internet of Things, so the question is what that impact will be. Patents are supposed to encourage innovation, but research finds that patents alone will not do so; competition is another requirement. A 2015 study considered the impact of competition policy and patent strength on innovation among European firms, measured in terms of research and development spending.183 Initially, the study compared firms in countries with strong patent laws against those in countries with weaker patent laws, and found that patent protection has “no effect on R&D intensity,” a conclusion consistent with multiple other studies.184 However, the study found that when a major competition reform went into effect, strong-patent countries enjoyed a boost in innovation greater than that experienced in weak-patent countries.185 In other words, strong patent protection is complementary to strong competition; the former does not promote innovation without the latter. The practical import of this research is that patent protection is beneficial up to a point, but to the extent that patents—or, more commonly, legal strategies involving patents—overreach to suppress competition, that overreach should be cause for concern. Yet today, strategic patent behavior contrary to competition is prevalent. The Federal Trade Commission’s ongoing lawsuit against mobile phone chip manufacturer Qualcomm, for example, challenges Qualcomm’s practice of refusing to sell chips to any phone manufacturer who does not first pay a hefty sum for patent licenses—even if the manufacturer does not actually have need for all those licenses.186 To the extent that Qualcomm’s “no license, no chips” practice is in fact anticompetitive—that is what the courts overseeing the case will decide—monopolization of that market could substantially harm cybersecurity for the reasons noted above.187 The company’s about-50% market share in the advanced mobile chip market 188 means that there is a virtual monoculture of Qualcomm chips already, and there are ongoing concerns about security vulnerabilities in those chips.189 It is thus puzzling that some have opposed the FTC litigation on the grounds that it is making the United States “less competitive in the global 5G arms race.”190 As one scholar explains, this rhetoric “smacks of ‘national champion’ thinking” and ultimately fails to ensure that “national security warnings are being balanced against competitive imperatives.”191 With respect to emerging information technologies, policymakers should be concerned that a leading firm could undertake similar patent licensing strategies to control the market. Indeed, the district court in the Qualcomm litigation found that Nokia and Ericsson already “have imitated Qualcomm’s practice” because it is “more lucrative.”192

### 1AC---Plan

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

#### The plan requires SSO’s to administer reasonable action to prohibit ex post opportunism---that strengthens FRAND effectiveness while enabling SEP holders to capture appropriate royalties---which is the best competition-innovation balance.

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3. Application of the Basic Legal Principles The antitrust principle is straightforward: industry-wide collaboration through SSOs to establish procompetitive standards is permitted only if it is no more restrictive of competition than reasonably necessary to enable creation of the standards. When standard setting predictably creates technology monopolies that, if unrestrained, will enable anticompetitive ex post opportunism that would otherwise not occur, an SSO that does not take effective measures to pre- vent or minimize such ex post opportunism engages in conduct that is more restrictive of competition than necessary. In that case, the SSO and, in appropriate cases, its members, may well violate Section 1 of the Sherman Act. Under this principle, SSO procedures and FRAND rules should be evaluated based on whether they lead to reasonable SEP royalties, using the competitive ex ante licensing standard discussed above, which has been adopted by the courts in patent law. Put differently, FRAND rules should be evaluated based on their ability to prevent SEP holders from obtaining more than the ex ante value of their technology from implementers. This limitation would not prevent a SEP holder from proﬁting, perhaps greatly, from participating in the SSO and having its patented technology included in the standard. The SEP holder continues to be rewarded for its technology because the inclusion of its technology in the standard can still greatly increase the volume of licensing opportunities available to the SEP holder. Whether a particular set of FRAND rules are sufficiently effective in preventing ex post opportunism will depend on the particular circumstances. The procedural unfolding of the case will also depend upon the circumstances. As a general matter, the case would probably be structured as an ordinary Rule of Reason case.82 First, the plaintiff would have to demonstrate harm to competition as a result of the collaboration of the SSO’s members, many of which compete with one another. In this case, the harm to competition would stem from the ability of the SEP holder to exercise monopoly power by obtaining royalties in excess of the competitive, ex ante level. The decision to include patented technologies in the standard would be the allegedly unlawful agreement. Notably, the court need not determine what a FRAND royalty is; it would suffice to determine that market power has been created or exercised, and that existing SSO rules and policies were not adequate to prevent the competitive harm. The defendant, which could be the SSO or perhaps one or more SSO members, would win at this point if the plaintiff failed to show harm to competition. If might fail if the standard faces substantial competition and the court concludes that the SEP holder therefore does not have market power or if the SSO’s rules and policies are found to be effective in preventing ex post opportunism, even if the plaintiff or even the court thinks that other rules and policies would be preferable. Second, if the plaintiff makes the requisite showing of harm to competition, the defendant(s) would then have to show some procompetitive justiﬁcation— in this case, the beneﬁts of the standard. These two initial steps should be straightforward. Third, if as is likely the defendant is able to show a procompetitive justiﬁcation, the plaintiff would have to show that the SSO could have used available, reasonable alternatives to realize the efficiency beneﬁts with less or none of the competitive harms. The plaintiff might identify reasonable alternatives that would have led to a different standard, based on including unpatented technology in the standard or perhaps involving fewer SEPs or fewer owners of SEPs, which would be less subject to patent holdup. More likely, the plaintiff could suggest alternative SSO rules that would not change the standard, but would reduce the likelihood or extent of ex post opportunism. For example, the plaintiff might suggest more rigorous FRAND-type rules, such as rules that set forth more precise principles on which FRAND royalties are to be determined and the circumstances under which SEP holders might seek injunctions. Fourth, the burden would then shift to the defendant(s) to show that the beneﬁts of the standard could not have been realized if the SSO had adopted any of the proffered alternatives or that those alternatives were unrealistic.83 The plaintiff would be entitled to judgment if the court concludes that those beneﬁts could have been realized with less competitive harm if the SSO had adopted the standard with different IPR rules or policies. Our overall sense, based on experience and the empirical literature, is that the extant FRAND rules are generally useful, but tend to be inadequate because they are imprecise and leave unresolved such critical issues as (a) the meaning of a reasonable royalty, even conceptually; (b) the meaning of “non-discriminatory;” (c) to whom licenses must be offered; and (d) under what circumstances may a SEP holder obtain an injunction.84 These imprecise FRAND commitments are therefore not sufficient to adequately prevent ex post opportunism. The recent revisions to IEEE’s FRAND policy represent a signiﬁcant step in the right direction, but even this advance leaves important questions unanswered.85 If FRAND rules are inadequate in these ways, litigation involving extant FRAND rules would likely be resolved only at the ﬁnal, fourth step. The defendant would be able to demonstrate the beneﬁts created by the standard; the plaintiff would be able to demonstrate the creation of market power and that other reasonable and practical rules or policies would ameliorate the problem. The case would thus turn on whether the defendant is able to demonstrate that signiﬁcant beneﬁts associated with standardization could not have been realized if the SSO had adopted those other rules or policies. The court would have available a variety of possible remedies if the plaintiff prevails. Implementers that paid supracompetitive royalties or were unlawfully excluded in whole or in part from product markets as a result of the inadequate FRAND policies would be entitled to damages and, in some cases, to treble damages.86 If the unlawful SSO conduct is regarded as the collective action of the SSO and its members, which is likely to be the case in most instances, SSO members would be jointly and severally liable for the damages. Forward-looking injunctive relief aimed at restoring competition would need to be fashioned to the requirements of the individual case. For example, a court could order the SSO to adopt a new rule or policy proposed by the plaintiff. If the court is reluctant to take on that governance role, it might give the SSO a period of time—maybe ninety days—to develop a rule, subject to the court’s ultimate approval, which would adequately ameliorate the competitive problem created by the SSO. Alternatively or in addition, the court might order the parties to attempt to negotiate a rule or policy on which they can agree. And, depending on the circumstances, the court might order SEP holders, including at least those that were defendants in the case, to comply with the new SSO rules and policies.

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

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

Under our approach, many of these issues should become moot, since the patentee cannot obtain an injunction (or transfer the patent to someone who can) against a willing licensee, and since competitors are not involved in jointly setting the reasonable royalty rate. If SSOs set clear, reasonable rules following the best practices we recommend, and parties follow those rules, there should be little or no need for antitrust to intervene. Indeed, even the risk of non-disclosure of a patent is lessened, since the patentee has committed to license its essential patents whether or not it discloses them. For the most part, the rules we have described are self-executing, meaning that even if a party tries to break the rules set by the SSO there still may be no need for antitrust to intervene. Thus, we suggest that parties who abide by these procedures—patentees, implementers, and the SSOs themselves—should be immune from antitrust liability for activities that merely follow those rules.107 They have entered into an arrangement that is on balance good for competition, one that allows patentees to receive reasonable royalties but prevents holdup and reduces the risk of monopolization by trickery. The fact that antitrust remains a last resort available when SSOs don’t follow best practices may have two practical benefits, however. First, under our approach the promise of avoiding the risk of antitrust liability will be a powerful incentive for both SSOs and patent owners to adopt the best practices we propose. Second, the risk of antitrust liability may be relevant when an individual patentee wants to adopt best practices but the SSO governing the standard has not yet done so. We propose that a patentee that unilaterally commits to the FRAND procedures we describe here should be immune from antitrust liability for following these procedures.108 A patentee’s unilateral binding commitment to arbitration could be enforced whether or not it was elicited by an SSO. Thus, just as the prospect of antitrust immunity might lure SSOs to adopt best practices, it might also lure patentees to implement those practices even if the SSO has not done so. Given the large number of standard-essential patents based on preexisting standards,109 and given that SSOs tend to update their IP rules rather slowly,110 this is not a small matter.

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

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

2. Why Antitrust Enforcement Is Necessary Some SSO members have an interest in ensuring that the SSO takes steps to minimize the potential harms from the SEP holders’ monopoly power, and this undoubtedly explains in part why most SSOs have adopted FRAND policies or similar requirements. But, as shown in the economic model in the Appendix,73 SSOs cannot in general be counted on to adopt effective FRAND policies. The bases for this conclusion, which is central to our argument for the applicability of Section 1 to SSO FRAND rules, can be summarized as follows.74 First, the SSO members collectively have an interest in permitting SEP holders to charge supracompetitive royalties that elevate the downstream price of compliant devices to the monopoly level. Doing so will enable the members in aggregate to collect increased revenues from consumers, and thus to generate increased profits that in theory could be shared by all the members. In other words, supracompetitive royalties can enrich industry participants as a group at the expense of final consumers. This fact alone should serve as a clear and strong signal regarding the dangers of counting on SSOs to implement effective FRAND policies: if the SSO members negotiate efficiently, the outcome will be just as bad for consumers as if the members agreed to fix downstream prices.75 The fundamental problem is that final consumers are not at the table when the SSO rules are negotiated. Second, SSO members that own SEPs but earn little or no profits as implementers have a powerful self-interest in being able to exercise the ex post monopoly power associated with their SEPs. Because SSO policies are usually determined by a consensus process, these members will likely be able to block the adoption of fully effective FRAND policies. Moreover, these SSO members often have the greatest interest in SSO patent policies. Since much of their income may be attributable to patent licensing, they can be expected to devote substantial resources to block the adoption of FRAND policies that effectively prevent patent holdup. Third, even SSO members that earn significant profits as implementers may have mixed incentives if they also own SEPs, which can also lead to weak or in-effective FRAND rules. In the Appendix, we show that, if the requisite share of votes in the SSO are cast by firms whose share of SEP royalties is at least as large as their share of downstream profits, and if these firms can coordinate their voting over the FRAND rules, then an SSO unconstrained by antitrust laws will establish FRAND rules leading to an outcome no better for consumers than would result from an integrated monopolist controlling all SEPs and all downstream sales.76 Fourth, even SSO members that are downstream implementers and own few, if any, SEPs may have only a modest interest in promoting effective policies to restrict ex post opportunism. Because all implementers will be subject to the opportunism, all of them will face increased licensing costs, and therefore will likely be able to pass on most or all of the increased costs to their customers.77 Furthermore, these implementers might not be especially active or effective in the standard-setting process for free-riding or public-good reasons, especially if SEP royalties constitute only a relatively small portion of the costs of their standard-implementing products. Public choice theory predicts that the highly motivated SEP holders are likely to have the greatest influence over patent policies. Empirical evidence bears out these concerns. As a starting point, we find it striking that SSO FRAND rules are almost always quite vague.78 Notably, SSOs in which SEP holders are more prevalent tend to have weaker FRAND rules.79 Further, to our knowledge, SSOs have made almost no effort to enforce their FRAND rules and have, instead, left enforcement efforts to others.80 This evidence raises serious doubts about the effectiveness of the existing FRAND rules in preventing ex post opportunism.

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

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

The truth is most companies have not had to think too much about antitrust regulations. The basic rules are pretty well known. But that is potentially changing quickly as antitrust concerns focus on not only high-tech companies, but businesses across the economy, from startups to global conglomerates. It means antitrust is at an important inflection point. Changes are occurring at multiple levels — from [rule reform](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf) to [new applications](https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big) of existing rules to [increased enforcement](https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=A4EF296B-9072-4244-90AF-54FE43BB0876). Some of these changes are a reflection of the economic upheaval ushered in by the digital economy, which has prompted businesses and governments to look to antitrust rules to solve their problems. Witness [President Biden](https://thehill.com/people/joe-biden)’s [July 9 executive order](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/) whose 72 provisions include requests ranging from asking the FCC to reinstate net neutrality rules to directing the FDA to issue rules to allow more competition in the hearing aid market. It’s a reflection of a general zeitgeist whose goal is to slow the onslaught of consolidation in technology across industries, from news media to healthcare to agriculture. And it’s gathering momentum as new rules are being proposed from both sides of the aisle. Many look to the 449-page [“Investigation of Competition in Digital Markets”](https://www.nytimes.com/interactive/2020/10/06/technology/house-antitrust-report-big-tech.html?action=click&module=RelatedLinks&pgtype=Article) report from the judiciary committee on antitrust as the opening salvo. The report took aim at Amazon, Apple, Facebook, and Google, outlining how those once scrappy startups now leverage their market position in ways not seen since “the era of oil barons and railroad tycoons.” The judiciary report’s conclusion: prevent big tech from acquiring smaller tech with tougher policing — and reform antitrust laws. Both Democrats and Republicans have since voiced their support for such ideas. Aimed at the seemingly intractable challenges of the digital era, Sen. [Amy Klobuchar](https://thehill.com/people/amy-klobuchar)’s (D-Minn.) “[Antitrust Law Enforcement Reform Act”](https://www.congress.gov/bill/117th-congress/senate-bill/225/text) would create barriers to prevent consolidation across industries, not just in tech, but in any business that might be connected to “dominant digital platforms.” The legislation would have a prescriptive force, creating a presumption against certain mergers, whether they be in biotech or burgers. Meanwhile, on the Republican side, Sen. [Josh Hawley](https://thehill.com/people/joshua-josh-hawley) (R-Mo.) has rolled out a bill that looks even more severe, blocking some mergers and acquisitions outright. The [“Trust-Busting for the Twenty-First Century Act”](https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big) would ban any acquisitions by companies with a market cap of more than $100 billion. The act would also make it easier for the FTC to classify a company’s behavior as anti-competitive, and then extract penalties (including profits) based on that behavior. And it’s not just the Federal government. Several states have proposed their own legislation to prevent and punish what they see as anti-competitive behavior. Arizona narrowly passed initial legislation that would prevent app store operators, specifically Apple and Google, from forcing developers to use their payment systems. Meanwhile in New York State, the [Twenty-First Century Anti-Trust Act (S933)](https://www.nysenate.gov/legislation/bills/2019/s8700/amendment/a) includes a first-of-its-kind state merger notification of any deal in which the buyer would end up with more than $8 million in assets of the target. It would also create an “abuse of dominance” offense and give the N.Y. attorney general rulemaking authority — whether or not the company was based in New York. These proposals have a long way to go before becoming law, but they demonstrate potentially significant antitrust adjustments coming. Expanding antitrust view The ripple effects will be profound, affecting transportation, communications, banking and healthcare companies. Incumbents looking to diversify their business are vulnerable, as are startups looking for profitable partners. Unhappy competitors who feel stymied may look to antitrust rules for remediation. And private equity moves to consolidate fledgling, fragmented industries will face tougher questions about overlap and industry concentration. So, we are going to see antitrust being used in industries and in ways that haven’t been considered in many years, with views about market concentration expanding to encompass what used to be considered diverse or vertical markets. In fact, both Sen. Klobuchar’s and Sen. Hawley’s proposals specifically target consolidation across industries. Sen. Hawley’s $100 billion ban explicitly targets vertical acquisitions. It would certainly prevent deals like Facebook’s acquisition of WhatsApp or Google’s purchase of Fitbit.

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

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

A federal judge fundamentally altered Apple’s App Store business model on Friday in a landmark ruling that accused the iPhone maker of illegal anticompetitive behavior and is likely to have ripple effects across the U.S. antitrust landscape. In a decision on an antitrust lawsuit brought by Fortnite maker Epic Games, U.S. District Judge Yvonne Gonzalez Rogers ruled that Apple must allow app developers to “steer” customers to alternatives to the tech giant’s payment processing service, which collects a 30 percent fee on most digital transactions. That was previously not allowed by the company, and marks a major victory for developers which have long complained of the tight grip the tech giant holds over its App Store on the roughly one billion iPhones currently in use. [The blockbuster trial between Apple and the maker of ‘Fortnite’ goes out with a ‘hot tub’ session](https://www.washingtonpost.com/technology/2021/05/24/apple-epic-trial-hot-tubbing/?itid=lk_interstitial_manual_5) Gonzalez Rogers also found that Apple was in violation of California state competition laws because of the way it forces developers into using Apple’s payment processing service without allowing them to tell customers there are alternatives, which are often cheaper. She stopped short of ruling in favor of Epic‘s claims that Apple is a monopolist, although she left the door open by suggesting more evidence could have changed her decision. “The court does not find that it is impossible; only that Epic Games failed in its burden to demonstrate Apple is an illegal monopolist,” she wrote. Epic spokeswoman Elka Looks said the company plans to appeal the ruling. Tim Sweeney, chief executive of Epic, said in a tweet that, “Today’s ruling isn’t a win for developers or for consumers.” Apple did not respond to requests for comment. The ruling, one of the first major legal actions taken against a tech giant in a new era of antitrust scrutiny, is sure to echo loudly both in Washington, where a legislative effort to rein in the power of Big Tech is underway, and in the courts, which are facing the biggest test of existing antitrust laws in decades. Tech giants have come under the microscope in recent years as it became clear that current antitrust law does not effectively address their power, and regulators and lawmakers have been pushing to change that.

#### Biden executive order outweighs.

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

CHICAGO – US President Joe Biden’s new executive order on “Promoting Competition in the American Economy” is more significant for what it says than for what it does. In fact, the order doesn’t actually order anything. Rather, it “encourages” federal agencies with authority over market competition to use their existing legal powers to do something about the growing problem of monopoly and cartelization in the United States. In some cases, the relevant agencies are asked merely to “consider” ramping up enforcement; in others, they are directed to issue regulations, but the content of those regulations remains largely up to them. Nonetheless, it would be a mistake to dismiss the order’s tentative language as mere rhetoric. Antitrust is the main body of law governing market competition in the US, and it has been the object of sustained attack by business interests and conservative intellectuals for more than 50 years. Biden is the first president since Harry Truman to take a strong public [anti-monopoly stand](https://www.project-syndicate.org/commentary/new-brandeisians-antitrust-for-big-tech-by-eric-posner-2021-06), and he has backed it up by [appointing](https://www.politico.com/news/2021/07/20/biden-picks-doj-antitrust-chief-500310) ardent anti-monopoly advocates to his government. The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality. The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

#### The DOJ is already prepared to engage in more antitrust litigation over SEP’s.

Love 21, \*Bruce Love, writer at the National Law Journal; (June 15th, 2021, “As DOJ Confirms a Change in Antitrust Patent   
Policy, Lawyers Prepare for Shifting Demand”, https://www.mckoolsmith.com/assets/htmldocuments/2021%2006%2016%20As%20DOJ%20Confirms%20a%20Change%20in%20Anittrust%20Patent%20Policyk%20Lawyers%20Prepare%20for%20Shifting%20Demand%20-%20The%20National%20Law%20Journal.pdf)

The Justice Department has confirmed it is looking to develop new policies surrounding how standard-essential patents might be used as tools for anticompetitive practices. The change in policy will mean big business for law firms that can combine highly technical IP advice with their antitrust and litigation practices, with one lawyer likening the demanding skill set to “three-dimensional chess.” Standard-essential patents, or SEPs, are a fundamental piece of intellectual property for business and innovation because they are used under license so frequently by manufacturing companies other than the patent owners. The policy change was hinted at during an online event in late May, when Richard Powers, the acting attorney general of DOJ’s antitrust division, gave an indication that the government might be walking back the relaxed approach implemented by the DOJ under the Trump administration. A DOJ spokesperson confirmed in an email Tuesday to Law.com that it will change its policy on SEPs and antitrust behavior, with the agency still working out the details. The new administration, said the DOJ spokesperson, is rethinking what policies at the intersection of IP and anti- trust will best serve competition and consumers. “New Department leadership is working with career staff on developing a more balanced approach,” said the DOJ spokesperson. “The department wants to develop neutral and balanced policies in this area that recognize the importance of both antitrust enforcement and JUNE 15, 2021 As DOJ Confirms a Change in Antitrust Patent Policy, Lawyers Prepare for Shifting Demand BY BRUCE LOVE U.S. law has often shied away from enforcing essential patent obligations. That’s set to change. The result could be “a significant change in the volume and nature of business for IP trial lawyers and their clients,” one lawyer said. Office of the Attorney General at the U.S. Department of Justice in Washington, D.C. June 6, 2020. THE NATIONAL LAW JOURNAL JUNE 15, 2021 intellectual property protection to our economy and that do not favor one set of interests over others.” Such policy changes could result in a swell of business for law firms with deep, technical IP benches and strong experience representing the industry in enforcement actions, lawyers said. Trump’s DOJ had “taken its foot off the gas” when it came to SEPs as the focus of anti-competitive behavior, said one Washington-based lawyer, speaking on the condition of anonym- ity because he currently has active cases that involve both SEP enforcement and defense. “It didn’t mean we weren’t busy as litigators. There was a lot of work enforcing SEPs against infringers and defending against infringement allegations,” he said. “But we weren’t busy in the antitrust arena. A greater focus on SEPs—not just by the DOJ but also other agencies—might mean more litigation, but it will also mean a more transparent field of play. It doesn’t do companies any good for there to be unfettered SEP enforcement.”

# 2AC

## ADV---Innovation

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

#### Yes patent holdup---EVEN IF not empirically systemic---post-Qualcomm, a new wave of anticompetitive behavior will cause rampant holdup as firms follow Qualcomm’s lead---that’s Contreras

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

#### Yes 5G race---1ac Duan cites Chinese national plans to establish global standards in order to beat the US. 1nc author focuses on telecom companies but ignores the military applications of the tech.

#### [AT: Weaponization] Not the internal link, because it’s about status, even if 5G is integral to military communications which could cause miscalc.

### 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

#### Taiwan war is coming---1NC doesn’t assume 5G, which tilts the power balance and emboldens aggression---that’s Kroenig and Borghard. Goes nuclear through miscalc and US first-use doctrine---that’s Sweeney.

## ADV---Cyber

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

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

#### 1nc evidence is about low level attacks, but 1ac Jervis says North Korea, Russia, and China are all increasing attack magnitude to test redlines.

## AT: CP---Regulation

### 2AC---Permutations

#### Permutations:

#### 1---do both

#### 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.”

### 2AC---Links

#### Links to net benefit---[ regulation doesn’t deter action, but forces litigation over patent law which saps resources, links to politics because it targets big companies]

#### 1NC cross ex said they reverse the ninth circuit decision, that is a ruling on an antitrust law---no take backs, means no net benefit.

### 2AC---AT: CP

#### 1NC solvency advocate is about music copyright licenses---NOT the tech industry.

#### 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: Deterrence

#### Pre-emptive action is key and solves the link to the net benefit, regulation is only for post violation remedies---that’s Lemley.

#### 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---Deficit: FTC

#### 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.

### 2AC---Deficit: Courts

#### Court ruling is key

Reed 19, \*Morgan Reed, President of the App Association, represents more than 5,000 app makers and connected device companies in the mobile economy; (March 13th, 2019, “An FTC Settlement with Qualcomm Could Hold the Entire IoT Economy Hostage”, https://actonline.org/2019/03/13/an-ftc-settlement-with-qualcomm-could-hold-the-entire-iot-economy-hostage/)

Any Outcome that Allows Qualcomm to Export its Illegal Behavior to New Markets Would Be Devastating

Qualcomm’s executives are desperate to save their jobs as shareholders fume over the $121 billion offer they rejected, and time is running out to turn the ship around. Qualcomm’s history, and its current desperate situation, mean that FTC cannot take any promises Qualcomm makes at face value, and must ensure any remedies they reach are iron clad and not limited to a few companies or even the broader smartphone industry. Any company willing to argue that the refusal to license patents to competitors is perfectly legal under its FRAND commitments clearly has no qualms about breaking its contracts and legal commitments. With shareholders demanding results immediately, Qualcomm’s executives will be looking for any loophole or gray area they can exploit as long as possible.

Perhaps most importantly, the FTC must ensure any outcome of this case protects competition beyond the smartphone industry.  Any court decision or settlement in this case should be comprehensive (i.e., fully address each charge the FTC has made in its enforcement action), enforceable, and as transparent as possible in order to provide small business innovators with maximum clarity.

As we move toward a 5G connected world, Qualcomm’s practices represent a clear and present danger to the entire economy. We must protect these standards which form the foundation for competition in the connected economy, and that means holding Qualcomm to their FRAND commitments across the board in a way that leaves no room for the gamesmanship it is famous for in this context. Anything less will only serve to encourage Qualcomm to export its anticompetitive behavior to every corner of the economy.

## AT: CP---Patent Law

### 2AC---Permutations

#### Permutations:

#### 1---do both

#### 2---do the cp

### 2AC---Links

#### Links to net benefit---[ same reasons as regulatoon]

### 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: CP---States

### 2AC---Permutations

#### Permutations:

#### 1---do both---shields politics

#### 2---do the cp

#### 3---do the plan and increase enforcement resources

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

### 2AC---Theory---Fifty State Fiat

#### Fifty-state fiat destroys equity and fairness---it’s a stacked deck that allows multi-actor fiat in unrealistic ways and makes generating solvency deficits impossible absent a stable lit base.

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

#### Condo is a voting issue---causes strat skew and argumentative irresponsibility---leads to shallow policy analysis and undermines research. One condo solves their offense.

### 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: DA---Business Confidence

### 2AC---UQ---Business Confidence

#### Business confidence is non-unique, FRAND will collapse now creating uncertainty and lack of trust that destroys network innovation.

#### Business confidence low---structural factors

Goll 8-21, \*Vince Goll; (8-24-2021, “US business confidence slows to an eight month low on supply woes”, https://www.independent.ie/business/world/us-business-confidence-slows-to-an-eight-month-low-on-supply-woes-40780967.html)

US business activity continues to downshift, with growth slowing to an eight-month low in August against a backdrop of materials shortages, a lack of labor and an upswing in coronavirus infections. The IHS Markit flash August composite index of purchasing managers at services and manufacturers dropped to 55.4 from 59.9 a month earlier, the group reported yesterday. Readings above 50 indicate growth and the gauge has decreased each month since hitting a record 68.7 in May. The pullback this month underscores the extent to which supply chain disruptions are hammering firms already struggling to meet demand. Service providers and manufacturers continue to face challenges attracting workers and obtaining the supplies they need. At factories, for instance, an IHS gauge of supplier deliveries showed the longest lead times in records back to 2007. "Not only have supply chain delays hit a new survey record high, but the August survey saw increasing frustrations in relation to hiring," Chris Williamson, chief business economist at IHS Markit, said. "Jobs growth waned to the lowest since July of last year as companies either failed to find suitable staff or existing workers switched jobs." Limited capacity is translating into sustained inflationary pressures as well. The group's composite index of input prices increased in August to the second-highest reading in data back to 2009. A measure of prices received also advanced, indicating companies are having some success passing along higher costs. The IHS Markit index of services activity declined to show the slowest pace of growth since December, while a measure of new business dropped to a one-year low.

### 2AC---AT: Link

#### No link---the plan only affects Qualcomm, and spurs rapid small business growth via. access to patents.

#### Thumpers---Apple, Biden, Lina Khan all disrove, court is willing to make a change.

### 2AC---AT: Link---Antitrust

#### Turn---antitrust intervention strengthens business confidence---no evidence supports the DA.

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>)

Other commentators believe that there are strong policy arguments against employing antitrust law to police the conduct of SSOs because it will undermine the incentives of SSO participants to innovate. For example, David Teece and Edward Sherry have argued that “antitrust intervention” could “re-duce the clarity of [SSO] rules thereby making participation in SSOs more risky and reducing the willingness of firms with valuable IP (and which there-fore presumably have much to contribute to selecting the appropriate standard) to participate.”44 As a result, they contend that there is a “significant risk of slowing down the standards-setting process, thus delaying the adoption of new standards and new products made in accordance with those standards, to the detriment of consumers and of society generally.”45 In effect, Teece and Sherry’s concern is one of delay—antitrust enforcement could delay innovation. In a commentary accompanying Teece and Sherry’s article, Michael Carrier found their claims to be overstated because they failed to engage in any serious antitrust analysis.46 We agree. But more importantly, Teece and Sherry make empirical claims without any evidence. In particular, they do not even offer anecdotal evidence that firms are discouraged from participating in SSOs because of the prospect of antitrust enforcement. Indeed, the opposite could be equally argued: participation in SSOs would be discouraged to the extent that participants could not rely on the commitments of their fellow participants to disclose and abide by other commitments intended to preclude opportunism. Teece and Sherry’s argument sounds a familiar refrain against antitrust: antitrust enforcement discourages procompetitive behavior and therefore should be limited. The conclusion rings hollow without facts.

### 2AC---AT: Link---Monopolies

#### Monopoly pricing and selective licensing undermines investor certainty.

Actonline 20, the App Association represents more than 5,000 app companies and information technology firms across the mobile economy; (August 26th, 2020, “Save Our Standards: The Ninth Circuit Court of Appeals Reverses Decision in FTC v. Qualcomm”, <https://actonline.org/2020/08/26/save-our-standards-the-ninth-circuit-court-of-appeals-reverses-decision-in-ftc-v-qualcomm/>), ability edited

Moreover, the FRAND agreement is a critical tool used by standard setting organizations to ensure the process enhances competition and does not run afoul of antitrust laws. Generally, a collaboration between competitors to choose market winners or set prices raises significant questions for competition regulators. Royalty free and FRAND licensing requirements were created by standards bodies to avoid potential antitrust scrutiny by limiting the market power and the potential for abuse by those involved in developing a standard. This is why the American National Standards Institute (ANSI) will not accredit any standards developing organization (SDO) that does not require standard-essential patent holders to provide licensing terms at least as favorable as FRAND. The most important beneficiary of open interoperability standards and FRAND licensing requirements are the entrepreneurs and small businesses that have long fueled America’s innovation engine. They don’t have giant patent portfolios, market power, or the resources to hire legions of lawyers and spend years battling SEP abusers in civil court. Without some level of certainty about their ability to obtain licenses—let alone what they may cost—entrepreneurs will have trouble justifying the pursuit of any innovation that uses a standard and will certainly struggle to raise money from investors for such innovation. And Qualcomm’s vague and toothless promise simply “not to sue” smaller companies and component makers is no substitute for a license. The adoption of 5G technology is expected to open unprecedented opportunities for innovation and economic growth as we move toward a world where everything from cars to tractors to buildings will connect to wireless networks. At every stage of the information technology revolution, America has been the undisputed leader because of the unparalleled entrepreneurial innovation ecosystem that we have built. If 5G SEP holders are able to arbitrarily refuse licenses to smaller firms, it would ~~cripple~~ undermine America’s innovation ecosystem at the start of the next big wave of innovation. As economic tensions continue to rise with China, Chinese-based companies could use their 5G SEPs as international economic weapons to thwart U.S. competitors. The 5G standard is supposed to be a platform for competition, innovation, and entrepreneurship, but if the Ninth Circuit decision is allowed to stand, it will become a chokepoint for snuffing out competitors and demanding monopoly rents. Open standards and FRAND licensing commitments are fundamental to competition in the modern economy, and the idea that they aren’t a subject for antitrust enforcement is patently absurd.

### 2AC---AT: Impact---Econ

#### Aff outweighs---cyber attacks are coming now, that controls major financial infrastructure and turns the disad.

#### No impact to delayed recovery

Acharya 18, UNESCO Chair in Transnational Challenges and Governance and Distinguished Professor of International Relations at the School of International Service, American University (Amitav Acharya; “The End of American World Order” Second Edition; pgs. 157-161; Accessed: July 8, 2018)//TS

To sum up, I do not suggest that a multiplex world will be free from conflict and violence. Rather, my argument is that just because American dominance is declining, it does not mean the world is catching fire. The US and other Western countries will remain engaged in conflict control around the world, not due to any liberal altruism, but to protect their own homelands from the spill-over of regional conflicts in an increasingly globalized world. The emerging powers may seek to reform the current order, but most of them, including China, India, Brazil, South Africa, and Indonesia, are not seeking to destabilize the world. On the contrary, they are increasingly engaged in peace operations under the UN auspices. There has been a marked reversal in the contributions of developed and developing countries to the UN, with all the top ten contributing countries in 2013 coming from the developing world, compared to the situation in 1990 when seven out of the top ten were from the developed world.45 China’s contribution to US peacekeeping missions jumped 20-fold between 2000 and 2010, and China is the largest contributor to UN peacekeeping troops among the Permanent 5 members of the UN.46 India’s contribution exceeds China’s; it is historically the largest contributor to UN peacekeeping, having participated in 48 of the 69 UN peacekeeping missions until 2015.47 As the emerging powers and other non-Western countries bring more resources and influence to the table, there is a growing opportunity for shared leadership between them and the West in addressing the world’s trouble spots. Yet, instead of recognizing and advancing these opportunities, the West is busy complaining and lamenting about the erosion of the American World Order, and even pining for its restoration. The reluctance of the US and the Western powers to accept the decline of the American World Order and seek out new pathways to cooperation and peace may prove in itself to be a major challenge to global stability. Let me conclude with a few observations that might help the international community, the US included, to manage the transition to a multiplex world. First, stop pining for the return of liberal hegemony, by which I mean the post-World War II international order created and dominated by the US and centered around Western interests, values, and institutions. That order might have delivered much good (and lots of bad) for the world, and some of its institutions (such as the UN system) will continue, but the particular historical circumstances behind the rise of liberal hegemony are gone. The global power shift is for real and here to stay. In a multiplex world liberal internationalism will not disappear. But it has to come to terms with other ideas about and approaches to world order. At the same time, while China and other rising powers may be tempted to push for a “world of their own making,” or a “parallel” global order, with their own institutions and linkages, I doubt if this can be substantially delinked from the remnants of the liberal order. These different worlds will have powerful incentives to collude, not just collide. It is this complex dynamic of parallel and intersecting orders that will be a defining feature of the emerging multiplex world. Second, unless and until the Trump administration radically changes course or is replaced, prepare to live without significant US support for multilateralism. Under Trump, US support might come selectively and sparingly, but its absence should not deter international cooperation if other major players participate or offer support. Third, avoid undue pessimism and learn from past mistakes in understanding conflict and conflict management. Despite claims about the world catching fire, some forms of international violence are on a long-term decline. Moreover, many of the signs of “anarchy” today, including death tolls in the Middle East, are the result of failed but avoidable policies pursued by the US and its key Western allies. Fourth, give due credit to the contribution of non-Western actors to the marketplace of ideas for global cooperation. Neither hubris nor cynicism about the role of the emerging powers is warranted. Most of the emerging powers, notably China, India, Brazil, and South Africa, are neither status-quo nor revisionist powers, but reformist ones who are willing to contribute to peaceful change in world order. Fifth, encourage pragmatic globalism, in place of ideologically charged liberal internationalism, a term that is deeply associated with Western hegemony and hypocrisy. History provides many examples: the drafting of the UN Convention on the Law of the Sea (UNCLOS), the 2008 financial crisis, Libya till the Anglo-French regime change, fighting terror, and the Paris Agreement on Climate Change, of practical, non-ideological, issue-based cooperation among nations of diverse political make-up to uphold international stability. Sixth, embrace G-Plus global governance. The growing complexity of global governance is inevitable due to the proliferation of a variety of new actors (including the rising powers like China, but also civil society and private actors) and transnational issue areas. It is impossible for the state-centric bureaucratic institutions crafted in the 1940s to cope with these changes. These institutions should welcome the proliferation of “demanders” of global governance and learn to work with them, avoiding duplication of resources. The ongoing fragmentation in global governance creates new opportunities for closer partnership between inter-governmental institutions, private sector, and civil society. Finally, take regional powers and regionalism seriously. Regions are crucial sites for both conflict and cooperation. In considering ways to develop a new world order, one should not focus too much on the big emerging powers like China and India, or neglect the role of other regional powers in the developing world such as Indonesia in ASEAN. Not all forms of regionalism are harmful to global cooperation; indeed they may contribute to it. Many regional organizations share normative concerns about peace and justice, and deserve their space in any meaningful scheme for global order. The traditional liberal universalist tendency to associate regionalism with spheres of influence or power balancing is misplaced, since many examples of regionalism (notwithstanding exceptions such as the Russia-led Eurasian Union) today are open, interactive, and inclusive. The complexity of international politics today calls for questioning the existing theories and vocabulary of international relations, especially of liberalism and realism. Liberals often profess a monopoly over all “good things” in international life, such as rationality, respect for human dignity, and good governance, free trade, and rule-based order, and trace their origins exclusively from the Western civilization. Yet these ideas and practices could be found in other, non-Western civilizations, including but not limited to Islamic, Chinese, and Indian. But liberal theory has shown little acknowledgment of the multiple sources of and contributions to the development of those ideas and practices. As a result, liberalism is seen today as asking and expecting the Rest to follow ideas that it claims to have been solely developed in the West, even as the leading liberal Western nations grossly violate them. With liberalism now under challenge at home, it will be even harder to sell to the rest of the world. When facing the future, while many liberals remain in denial, realists return to the past. Instead of fresh ideas to understand and explain change in world politics, they keep rehashing notions like multipolarity or power transition. Another such concept is the “Thucydides Trap. “ 48 But this is a misreading of history. As discussed in chapter 1, the world today is a far cry from the nineteenth-century multipolar era; it’s even more misleading to view it from the prism of the self-styled and limited geopolitics of Greek city-states. The era of liberal hegemony is past. The remnants of the liberal international order would form one of the multiple, but cross-cutting systems, and coexist or enmesh with other ideas in a world of growing complexity and interconnectedness. International relations scholars should be wary of conventional wisdom and be open to new concepts and theories, and hence to new possibilities of world order that have no precedent in history. The multiplex world is Star Trek world, where the challenge is to “boldly go where no one has gone before.”

## 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---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---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---Doesn’t Solve Warming

#### 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.

### 2AC---Winner’s Win

#### Winner’s win---spending PC rebuilds it [their ev is premised on outdated political theory]

Kane 7-24-2021, The Washington Post's senior congressional correspondent and columnist (Paul, “Day-to-day, Biden’s agenda looks rocky. But congressional Democrats say things are far rosier if you take the long view.,” *Washington Post*, https://www.washingtonpost.com/powerpost/biden-agenda-democrats-congress/2021/07/24/83b776be-ebc0-11eb-ba5d-55d3b5ffcaf1\_story.html)

There is, so far at least, little fear that Democrats are spreading themselves too thin by eschewing the traditional practice of focusing on a handful of domestic policy issues in the first two years of an administration. “Political momentum and political capital is like a muscle. The more you exercise it, the more of it you have. It is not like a finite resource that you can run out of if you spend too much of it. What happens is that if we do a lot of positive things, then we’ve got more political clout to do even more positive things,” Sen. Brian Schatz (D-Hawaii) said. But there is an undercurrent of fear that Democrats lost focus on battling the pandemic and that those gains might be forgotten if current trend lines prompt new shutdowns. “We’ve done a good job over the last several months. But we’re going to have to continue to do it with aggressiveness and precision because the other side has no interest in governing and is going to spend all their time trying to mischaracterize public policy wins,” Rep. Hakeem Jeffries (D-N.Y.), who is in charge of messaging in Pelosi’s leadership team, said. Some worry that the Biden administration needs to stay focused on promoting the $1.9 trillion American Rescue Plan, fearful of mistakes similar to 12 years ago, when the Obama administration neglected to promote its roughly $800 billion economic recovery bill after it passed a month into office. “I don’t think they’ve gotten enough credit for the extraordinary logistical and managerial effort to manage the rollout of the vaccine. That was a big task. And I think it was managed effectively. And I think that’s maybe the most important thing and the least discussed,” Sen. Angus King (I-Maine) said. In late 2010, while he was still a college professor, King wrote an essay, “The Democrats Beat Themselves,” citing how poorly the Obama administration sold the economic recovery. “Basically, the President was subjected to a two-year, nonstop ‘Swift Boating’ and never really fought back,” King wrote after the 2010 political bloodbath for Democrats. So, yes, on Tuesday, federal health officials reported more than 62,000 new cases of the deadly virus as 314 Americans died of the virus. A day earlier, the stock market tumbled more than 700 points amid fears of the health crisis causing another economic shock. But exactly six months earlier — Jan. 20, the day Biden was sworn in under strict social distancing and masking guidelines outside the Capitol — there were more than 185,000 new virus cases and a rolling weekly average of almost 200,000, with 4,440 deaths caused by covid-19 that day. On Jan. 20, the Dow Jones industrial average stood at 31,188, far below the closing of 34,512 six months later. Labor Department reports this month showed strong wage growth amid steady job growth that suggests sometime next year, the economy will recover all the lost jobs from the pandemic. In June and most of July, Biden tried to move past the pandemic and focused his attention on the bipartisan infrastructure plan and the proposed $3.5 trillion budget plan that is favored by liberals. Those two packages are filled with campaign pledges to remake government support for the middle class, the most ambitious budgets since the Great Society proposals of the 1960s. Democrats will need to make Congress spend a lot more time in Washington if they want to get Biden’s agenda passed Democrats defend these proposals as worthy of the big moment the nation faces. “We are confronting a multitude of crises, including a once-in-a-century covid-19 pandemic, a democracy crisis, a racial justice crisis and a climate crisis all at the same time,” Jeffries said. Schatz views the old presidential model of focusing on a couple big things as outdated. “The model from the ’80s was if you do too many things, people are going to get freaked out. And I think the danger here is not doing enough rather than doing too much,” he said.

## AT: DA---FTC

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

#### The aff does not mandate FTC action. It fiats a set of principles courts use to adjudicate antitrust cases against SSO’s---which means in the event the FTC DOES BRING a suit, it won’t be condemned because they’re doing their job.

#### DA starts at 50%---equally likely its enforced by the DOJ.

#### 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.

1ac Thumpers

#### 1ac Thumpers disprove the link---Biden, Apple, and SEP lawsuits now. 1nc Link is about prosecution which we have super recent ev for.

#### 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---AT: Terror

#### No chance this bill passes 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.”

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

Michael Tierney 18, 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).

# 1AR

## Advantage---Innovation

### 1AR---AT: No Patent Holdup---TL

#### 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.

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

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

D. Empirical Support for the General Theory of Holdup An impressive body of empirical work supports the general theory of holdup described above. Literally hundreds of papers have been published in peer-reviewed journals developing and testing the general theory of holdup. As Robert Gibbons, one of the editors of the Handbook of Organizational Economics, stated in his article on transaction cost economics, “the huge body of TCE literature is overwhelmingly empirical.”28 One extensive line of research uses transaction cost economics to explain the scope and incidence of vertical integration.29 Put differently, these papers use transaction cost economics to explain the “make vs. buy” decisions of firms. A closely related line of research uses transaction cost economics to explain how firms structure their contractual relationships. Shelanski and Klein provide an early survey of this literature.30 As they conclude, “Studies that examine the make-or-buy decision and the structure of long-term contracts, in particular, overwhelmingly confirm transaction cost economic predictions.”31 Masten assembles some of the best early empirical articles on vertical integration and vertical contracting.32 Whinston notes that “TCE predicts that any increase in quasi-rents will increase the likelihood of vertical integration (a finding that is so far consistent with nearly all of the existing empirical literature).”33 Macher and Richtman reviewed “over 3,500 abstracts from which [they] obtained approximately 900 articles that empirically test some aspect of TCE theory.”34 After recognizing considerable variability in the quality of the empirical work that they surveyed, they concluded, “[e]ven so, the volume of our findings lend considerable support overall for the main predictions of TCE.”35 In addition, there is an enormous amount of anecdotal evidence based on long-term contracts between sophisticated parties in situations where substantial specific investments are involved and the parties come to rely on each other. It is safe to say that anyone who has seen a good number of such contracts will confirm that they normally contain provisions by which one party obtains price and performance protections to limit opportunism by the other party.

#### 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.

#### Stop searching for systemic holdup---individual instances matter significantly more.

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

V. CONCLUSION

The policy debate surrounding patent hold-up in markets for standardized products is now well into its second decade with no end in sight. Fundamental questions including the definition of hold-up, the extent to which it exists in the marketplace, and the impact it has on innovation, continue to bedevil scholars, policy makers, and industry. Yet it is not clear that this debate needs to continue. Patent hold-up is a form of market behavior, but not a legally cognizable wrong. Whether it is commonplace or rare is largely irrelevant to liability in any given case. To the extent that hold-up behavior constitutes an abuse of market power, with resulting harms to competition, longstanding doctrines of antitrust and com- petition law exist to sanction it. To the extent that hold-up impedes the efficient operation of standard-setting processes, SDOs can, and have, adopted internal procedures, including disclosure and licensing requirements, to curtail that behavior. Thus, the ongoing hunt for empirical evidence of systemic patent hold- up in standardized product markets, or a lack thereof, seems a fruitless academic exercise. This is not to say, of course, that empirical research into these questions is itself undesirable; only that the questions that have been posed to date are not worth answering. Findings that systemic hold-up has not occurred, even if accurate, tell us little about individual firm behavior that can and should be sanctioned by the law. It may thus be time to close the debate over systemic patent hold-up.

#### Qualcomm devotes millions in funding to university’s that publish papers disproving holdup---that’s Shapiro.

#### 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)?”

### 1AR---AT: DA---Antitrust

#### Antitrust intervention preserves and strengthens innovation incentives.

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

IV. AN APPLICATION OF THE PROPOSED APPROACH: UNILATERAL REFUSAL TO LICENSE

To demonstrate the application of the proposed approach, this Section will focus on how it applies to the analysis of a unilateral refusal to license a patent.198 Unilateral refusal to license a patent is one of the most controversial areas of the patent-antitrust interface. To those staunch defenders of intellectual property rights, imposing a duty to license on a monopolist patentee constitutes a direct affront to private property. In some ways, compulsory licensing has become a taboo in the U.S. antitrust circle.199 Mention of compulsory licensing seems to be greeted with skepticism, if not derision.

The most common defense against imposing a duty to license is that it will undermine innovation incentives. The conventional wisdom is that if an innovator is forced to share its creation with competitors, it will be less likely to invest in innovations in the future. Other innovators will be similarly deterred. By refusing to order compulsory licensing, the courts will effectively force rivals to develop their own technologies, which leaves society better off. Therefore, compulsory licensing undermines the innovation incentives of the patentee, the putative licensees, and potential future inventors. This innovation incentive argument presumes that any reduction in patentee reward will reduce innovation incentives, and that the putative licensees possess the technological capacity and commercial interest to innovate.

As has been repeatedly asserted in this Article, the former presumption is not true. So long as the innovator is compensated for its innovation costs, including the opportunity cost of innovation, innovation incentives will be preserved. Prominent commentators and empirical evidence have affirmed this view. Hovenkamp has advocated a nuanced and balanced stance on compulsory licensing:

One corollary of the principle that an IP right is simply property is that no special deference is due to the IP laws when courts fashion remedies for proven antitrust violations. For example, ordering compulsory licensing for a proven antitrust violation is no different than fining a firm or ordering divestiture of a plant. While we do not want to deter innovation, we do want to deter antitrust violations either.200

In fact, it seems that patent lawyers and economists are less apprehensive about compulsory licensing than antitrust lawyers themselves.201 Levin and his co-authors concluded that compulsory licensing does not undermine innovation incentives in any significant manner.202 Scherer found that “the substantial amount of evidence now available suggests that compulsory patent licensing, judiciously confined to cases in which patent-based monopoly power has been abused . . . would have little or no adverse impact on the rate of technological progress . . . .”203 He further referred to specific conversations with executives of Xerox, which had been subject to compulsory licensing order in the 1970s, that refuted the popular belief that compulsory licensing had adversely affected the firm’s R&D.204 Scherer goes so far as to conclude that “a massive antitrust attack on business firms’ use of patents to monopolize markets or enhance profit returns appears to have had negligible adverse consequences for the vigor of innovative activity in the United States.”205

While this Article in no way advocates a massive attack on patent rights, this author believes that imposing a duty to deal in limited instances will enhance social welfare. Preservation of innovation incentives cannot be treated as a trump card in every refusal to license case. It must be scrutinized with care to verify that those incentives will truly be undermined if compulsory licensing is ordered. In particular, the applicability of the innovation incentive argument depends on market conditions. There are at least two circumstances under which the argument is unlikely to be valid: (1) aftermarkets; and, (2) patent holdup.

A. Aftermarkets

As suggested earlier, the conventional argument against a duty to license presumes that reduced patentee reward will undermine innovation incentives and that the spurned rivals would have developed their own technologies. The extent to which the latter is true depends on a variety of factors. Of particular interest to us is the consideration about the level on which the rivals compete with the innovator. If the rivals do not compete in the primary technology market and only compete in the aftermarkets in the provision of derivative products or services, denying them access to the technology will be unlikely to encourage innovation in the primary market. They will simply exit the aftermarkets altogether. This is aptly illustrated by the Federal Circuit CSU v. Xerox case,206 and the Ninth Circuit Image Technical Services v. Kodak case,207 which contains practically identical facts as CSU. In those two cases, the request to deal was not made by Kodak’s and Xerox’s rivals in the primary photocopying machine market, but by independent service organizations (“ISOs”) that provide repair services for photocopying machines. It is difficult to see how a rejection of a duty to deal would have spurred these ISOs to develop their own photocopying machine technology to compete with Kodak and Xerox. Compulsory licensing need not undermine the innovation incentives of the putative licensees.

The patentee will no doubt focus on the first presumption and argue that profits generated from the aftermarkets are necessary for it to recoup R&D investment. Unlike the case for the second presumption about rivals’ innovation incentives, it does not seem possible to come up with a categorical rule that will help the courts to distinguish valid and invalid claims about the first presumption. The courts must instead scrutinize such claims closely and not accept them at face value. The patentee should be required to produce concrete evidence to substantiate the claim, including evidence that shows that profits from the primary market is insufficient to cover the R&D costs.

For instance, this claim about aftermarket profits would have been unlikely to hold in Image Technical Services, where Kodak had initially welcomed ISOs to provide maintenance and repair services. It was only after the maintenance and repair market had become lucrative and Kodak had lost an important maintenance contract with the state of California that Kodak altered its prior policy of supplying parts to ISOs.208 If Kodak had considered profits from the aftermarket essential to its recoupment of R&D investment from the start, it would have been unlikely to have adopted an open policy with the ISOs initially. The Ninth Circuit eventually dismissed Kodak’s business justifications for the refusal to deal on the ground that they were pre-textual, focusing on the subjective state of mind of Kodak’s employees.209 This approach has been criticized as being inconsistent with the modern antitrust focus on objective effects rather than subjective intent.210 By focusing on Kodak’s employees’ subjective state of mind, the Ninth Circuit was in fact attempting to verify Kodak’s innovation incentives argument. This focus is clearly correct. The Ninth Circuit’s mistake was its reliance on the wrong type of evidence. To determine the veracity of the innovation incentive argument, the Ninth Circuit should not have relied on what Kodak’s employees thought, but whether profits from the aftermarket were objectively necessary for Kodak to recoup its investment.

B. Patent Holdup

Patent holdup presents another situation in which imposing a duty to license may be appropriate. Patent holdups are detrimental because they are likely to ~~retard~~ slow cumulative innovation. They are also likely to provide a windfall to the patentee that is above and beyond the profit necessary for the recoupment of innovation costs. The previous two Sections explain the importance of cumulative innovation as a major source of social benefits. Among the three models of cumulative innovation, patent holdup may be a particularly serious problem in the trunk-branch and the anticommons models.211 As discussed earlier, both situations present great potential for social welfare loss due to patent holdups. Moreover, in the trunk-branch model, the Ramsey intuition means that antitrust can restrict patent exploitation at the margin without causing much effect on patentee reward. Cumulative innovation hence can be unlocked without substantial loss of patentee rewards. Patent holdup is likely to provide a windfall to patentees.212 In the event of a holdup, the negotiation usually takes place ex post after the innovation has already been made and the R&D costs are sunk. The follow-on innovator is in a very weak bargaining position to secure a surplus from the negotiation that will allow it to recover those costs. It may need to accept any licensing arrangement that allows it to cover its variable costs. In fact, Lemley and Shapiro argue that ex ante negotiation would not significantly improve the follow-on innovator’s bargaining position.213 Cumulative innovation will be deterred over the long haul.

### UQ

#### Qualcomm specific ev key ⁠— dropped stinction with military tech

**Stats vote aff — specifically in the context of SEP’s**

**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.

## Regulation CP

#### Deterrence matters---SEP holders will remain opportunistic absent the threat of antitrust.

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

Antitrust could play a meaningful role.165 The most important contribution of antitrust enforcement against abuses of SEPs is its deterrent effect.166 Although patent law reforms or contractual binding of subsequent SEPs-holders to FRAND licensing would provide to victims of hold-up useful defences in court, they do not sufficiently deter abusive assertion of SEPs in the first place. For instance, the contractual binding to FRAND could raise counterclaims of breach of contract or/and contractual performance; however, the opportunistic SEP-holder will, in case it loses on such grounds, be left no worse than with a licence on FRAND terms. In the end, a patent hold-up is indeed precluded, but contractual constraints can do little to prevent opportunistic assertion of SEPs in the first place. The victims still suffer the costs of uncertain and resource-draining litigation; most importantly, the reliability of the standards-setting process might still be at risk. Antitrust enforcement on the other hand, in imposing tortfeasors positive monetary losses in the form of fines, alters the profit-cost calculus of opportunistic behaviour in the first place; opportunistic assertion of SEPs will come at a cost. Of course, a too-heavy-handed approach could have a chilling effect on legitimate patent assertions against implementers that are reluctant to pay FRAND royalties, thus leading to false positives. Antitrust enforcement should carefully examine the specificities of each case, such as the particular PAE conduct, the relationship between PAEs and practicing entities, the structure of downstream markets.167 More importantly, an economically informed antitrust analysis focusing on the actual and potential anticompetitive effects of opportunistic SEPs assertion should prohibit behaviour that is truly harmful to consumers. Safeguarding the inclusive and efficient character of the standards-setting process is a competition law problem. Informed antitrust analysis could provide adequate responses to opportunistic PAE behaviour and privateering.

### 1AR---Deficit: FTC

#### Only antitrust can differentiate severity of misconduct

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>)

C. NON-ANTITRUST REMEDIES CANNOT ADEQUATELY REPLACE ANTITRUST REMEDIES Apart from preemption arguments, some have argued that patent, contract, and tort law offer a comparative advantage over antitrust law in addressing the SSO-patent holdup problem because remedies under these bodies of law are less likely to impose social welfare costs associated with misidentifying anticompetitive holdup.106 There is no suggestion that these other bodies of law (with the exception of patent law) impliedly preempt antitrust remedies, but rather that they offer a “comparative advantage,” which is based in part on the misguided view that antitrust remedies are strongly disfavored after CreditSuisse.107 This argument may stem from the belief that SSO-patent hold up rarely harms competition, which if true could give rise to a concern about transforming such cases, which may involve nothing more than “bad business behavior,” into treble-damages antitrust cases.108 But the concern that antitrust law can be misused to address commercial disagreements when competition issues are not in play is hardly unique to the SSO-patent holdup cases. For the concern to have salience here, one would need to show that patent holdup in the standard-setting context typically does not harm competition. We find that conclusion counterintuitive given that standard-compliant products usually come to dominate particular industries, and that, at its core, standard-setting efforts are collective decisions by an industry to select a single technology over competing alternatives.109 Moreover, compared to the patent law of equitable estoppel and misuse, the antitrust laws are better developed and provide more guidance for separating bad behavior cases from true antitrust cases.110 On a more basic level, this argument, which amounts to little more than the broad assertion that remedies under patent, contract, and/or tort law will im-pose lower “welfare costs,” fails on the merits. Indeed, it is not clear what the specific advantages of these alternative remedies are or what desirable conduct antitrust law would deter that would not be deterred by these other remedies. Nor is there evidence that any such advantages are preferable to the established doctrines of antitrust law that have evolved over the past 120 years.

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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>)

C. NON-ANTITRUST REMEDIES CANNOT ADEQUATELY REPLACE ANTITRUST REMEDIES Apart from preemption arguments, some have argued that patent, contract, and tort law offer a comparative advantage over antitrust law in addressing the SSO-patent holdup problem because remedies under these bodies of law are less likely to impose social welfare costs associated with misidentifying anticompetitive holdup.106 There is no suggestion that these other bodies of law (with the exception of patent law) impliedly preempt antitrust remedies, but rather that they offer a “comparative advantage,” which is based in part on the misguided view that antitrust remedies are strongly disfavored after CreditSuisse.107 This argument may stem from the belief that SSO-patent hold up rarely harms competition, which if true could give rise to a concern about transforming such cases, which may involve nothing more than “bad business behavior,” into treble-damages antitrust cases.108 But the concern that antitrust law can be misused to address commercial disagreements when competition issues are not in play is hardly unique to the SSO-patent holdup cases. For the concern to have salience here, one would need to show that patent holdup in the standard-setting context typically does not harm competition. We find that conclusion counterintuitive given that standard-compliant products usually come to dominate particular industries, and that, at its core, standard-setting efforts are collective decisions by an industry to select a single technology over competing alternatives.109 Moreover, compared to the patent law of equitable estoppel and misuse, the antitrust laws are better developed and provide more guidance for separating bad behavior cases from true antitrust cases.110 On a more basic level, this argument, which amounts to little more than the broad assertion that remedies under patent, contract, and/or tort law will im-pose lower “welfare costs,” fails on the merits. Indeed, it is not clear what the specific advantages of these alternative remedies are or what desirable conduct antitrust law would deter that would not be deterred by these other remedies. Nor is there evidence that any such advantages are preferable to the established doctrines of antitrust law that have evolved over the past 120 years.

## CP ⁠— States

### 1AR ⁠— Conditionality

## DA

### 1AR---UQ---Business Confidence

#### Business confidence is in long term free-fall

Chesto 9-7, is a staff writer for the Boston Globe citing the AIM Business Confidence Index that polls 130 independent firms across the United States. (John, 9-7-2021, “Delta and economic disruptions dent confidence among Mass. Companies; August saw biggest drop in state business confidence index since the pandemic began,” The Boston Globe, https://www.bostonglobe.com/2021/09/07/business/delta-economic-disruptions-dent-confidence-among-mass-companies/)

What a difference a month makes. In July, business confidence levels tracked by Associated Industries of Massachusetts reached a three-year high as employers hoped an end to the COVID-19 pandemic was just around the corner. Then came the Delta variant: COVID case counts shot up again, causing many companies to put off their return-to-office plans and implement new vaccination requirements for workers. That’s one big reason the AIM Business Confidence index shed 3.6 points in August, its largest drop since March 2020, according to a report Tuesday. The index fell to 62.0, keeping it squarely in positive territory — the breakpoint between an overall negative mood and an upbeat one is 50 — but the trajectory changed significantly, for the worse. (About 130 employers, ranging in size from one- and two-person firms to billion-dollar companies, responded to the latest poll.) “There’s no question that concern about COVID is giving employers pause,” said Chris Geehern, executive vice president at AIM. “The uncertainties swirling around employers have kind of slowed things down a bit.” The uncertainties extend beyond public health concerns. They also include significant supply chain disruptions and the struggle to hire enough workers. One respondent remarked that costs have shot up because parts need to be imported to the United States by plane, as it’s impossible to get supplies on a container ship. Another said they are not bidding on potentially lucrative contracts because they don’t have the staff necessary to fulfill them. And then there are the persistent headlines about office delays: Big Boston-area employers that have publicly announced they would keep most workers remote for longer than anticipated range from Google to John Hancock to Dell Technologies. The AIM report comes days after the National Federation of Independent Business reported poll results that showed half of small-business owners reported they had job openings they could not fill, a record high. The primary factor: Too few qualified applicants. Chris Carlozzi, state director with the federation, said he’s seeing this dynamic play out in Massachusetts. He has one member, a small construction company on Cape Cod, that ran a want ad in the local paper for five months and didn’t get one applicant. No sector of the economy is immune, he said. Carlozzi worries about restaurants and brick-and-mortar stores in particular; subpar service in those places might chase away customers for good. “You don’t want the consumer experience to be bad at a time when you’re trying to do everything possible to get people back, to shop and dine,” Carlozzi said. “It really causes problems with the recovery if businesses are saying ‘Come back, come shop, and come dine’ and then you wait in lines to be served as a consumer.” Jon Hurst is hearing similar concerns from members of the group he leads, the Retailers Association of Massachusetts. Retailers are also worried about getting enough supplies to stock their shelves for the all-important fourth quarter of the year. Inadequate inventory could send customers to the Internet again. And this time, they might not come back. “A lot of them are on edge about when things will correct,” Hurst said. “There are real issues getting things from China. I don’t care if you make a car, an appliance, or clothing . . . I view this fall, clear through Christmas, as absolutely critical.”

#### COVID-19, worker shortages, and supply chain disruptions hurt business confidence.

Geehern 9/6/21, \*Chris Geehern; COVID, (September 6th, 2021, “Worker Shortages Dampen Business Confidence”, https://aimnet.org/blog/covid-worker-shortages-dampen-business-confidence/)

Resurgent COVID-19 cases, persistent worker shortages and supply chain disruptions combined to dampen business confidence in Massachusetts during August. The Associated Industries of Massachusetts Business Confidence Index (BCI) declined 3.6 points to 62.0 after hitting a three-year high during July. The BCI remains 16 points higher than a year ago. Employers grew less optimistic last month about everything from their own companies to the state and national economies. Confidence among manufacturing companies declined for the first time this year as companies faced the twin challenges of surging prices and shortages of key raw materials. The report came as hiring nationally slowed sharply during August to 235,000 jobs. “Business owners and managers remain solidly optimistic overall, but express growing concern as COVID-19 cases increase both in Massachusetts and globally,” said Sara L. Johnson, Chair of the AIM Board of Economic Advisors and Executive Director of Global Economics at IHS Markit. “Everyone from manufacturers to retailers is struggling to provide product amid renewed pandemic-containment measures and critical shortages of labor and materials.” Employers say supply chain issues have become a drag on an otherwise solid economy. “The supply chain lead-times are killing our ability to drive business in the short-term. Trying to get key supplies on a container is impossible so our costs keep going up due to having to airfreight parts in,” wrote one employer. The AIM Index, based on a survey of more than 140 Massachusetts employers, has appeared monthly since July 1991. It is calculated on a 100-point scale, with 50 as neutral; a reading above 50 is positive, while below 50 is negative. The Index reached its historic high of 68.5 on two occasions in 1997-98, and its all-time low of 33.3 in February 2009. Constituent Indicators The constituent indicators that make up the Business Confidence Index all moved lower during August. The confidence employers have in their own companies fell 5.0 points to 62.7, leaving it 13.7 points better than it was during the pandemic a year ago.

#### Low confidence now hurts investment prospects.

Zandi 8/18/21, \*Mark Zandi, CNN Business Perspectives; (August 18th, 2021, “Here's what the Delta variant means for the economic recovery”, https://www.actionnewsnow.com/content/national/575121712.html)

Businesses have also suddenly become more nervous. According to Moody's Analytics weekly [business confidence index](https://www.economy.com/economicview/indicator/usa_dsbc/DFBA2A45-8167-4D14-8763-EE4F343ACD15/World-Moodys-Analytics-Survey-of-Business-Confidence), sentiment had significantly improved this spring when vaccinations ramped up and the pandemic was steadily winding down. But it has gone sideways since mid-June. Businesses' assessment of current conditions has turned particularly soft in the past few weeks, with more survey respondents saying conditions are weakening than those that say they are improving. This is the first time this has happened since the vaccines became widely available. Businesses' expectations regarding the economy's prospects for the remainder of this year have also diminished significantly. The number of respondents that say the economy will continue to improve has declined from more than 60% to less than half, and those that say the economy will weaken has increased from near 30% to more than 40%. This hasn't impacted businesses' hiring and investment decisions yet, according to our survey, but it bears close watching, as the job market and broader economic recovery would be in jeopardy if businesses pull back on hiring and investments.

### 1AR---AT: Link

#### Antitrust enforcement solves covid uniqueness concerns and promote long term economic growth

Baer 20, served as Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice from 2013 to 2016, and as Director of the Bureau of Competition at the Federal Trade Commission from 1995 to 1999. (Bill, 4-22-2020, “Why we need antitrust enforcement during the COVID-19 pandemic,” Brookings, https://www.brookings.edu/blog/techtank/2020/04/22/why-we-need-antitrust-enforcement-during-the-covid-19-pandemic/)

Antitrust enforcers need to be vigilant in these uncertain and troubling times. Think about the effect on consumers from price gouging, price fixing, mergers in concentrated markets and the unilateral exercise of monopoly power. We rely on vigorous rivalry between firms—in good times and bad—to deliver us quality goods and services at competitive prices. The American consumer remains entitled to the benefits of competition, especially during a major health and economic crisis. It is up to federal and state enforcers to serve as the economic cops on the beat as we begin the long road to recovery. What needs to be done? In the short term, the Department of Justice and the Federal Trade Commission need to facilitate legitimate cooperation among manufacturers, distributors, and retailers to ensure critical goods and services—think masks and respirators—get to market in a timely fashion. To their credit, the two agencies are trying to do just that. In late March the two agencies jointly announced an expedited process for reviewing and green lighting collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic. And true to their word, 10 days later DOJ formally advised certain medical supplies distributors that it would not stand in the way of a joint effort to work with FEMA and expedite sourcing, production and delivery of personal protective equipment. But getting out of the way at the right time is just one priority. Antitrust enforcers must be vigilant in attacking efforts by firms to limit competition

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in a time of crisis. And the temptation will be there. Those of us involved over the years in investigating and prosecuting price fixing and bid rigging know well that the urge to cartelize markets is strongest in the face of falling prices triggered by reduced demand. Although it is often rationalized during tough economic times as “not raising prices, just stabilizing them,” or “just protecting our margins, not increasing them,” agreements between companies that restrict competition are per se unlawful and subject the companies and their executives to criminal prosecution. Consumers deserve the benefit of market competition regardless of where we are in the economic cycle. The temptation to cheat is not limited to traditional brick and mortar commerce. While at DOJ in the Obama Administration we uncovered a scheme involving two online sellers of poster art on Amazon Marketplace. After experiencing shrinking margins due to price competition, executives of the two companies got together and wrote an algorithm that priced their online offerings identically when consumers searched for poster art. The result was corporate and individual criminal charges. Antitrust enforcers will need to vigilantly police mergers and acquisitions as the economy struggles to regain its footing. Our sudden but necessary shutdown has put business of all sizes at risk of permanent closure. Economists see small businesses as particularly vulnerable, and the CARES Act only begins to address the problem. Policy makers must continue to provide financial support and other incentives to keep small and medium-sized businesses afloat. But realistically, not all businesses are going to be able to get up and running again. That means many markets are going to become more concentrated. We will see it in all sectors, from agriculture and retail to manufacturing and travel. Fewer competitors means less competition, more market power for some sellers and some buyers, and more risk of tacit price coordination. At the end of the day consumers will pay more. And competitors will want to combine. We have seen this before as the U.S. and world economies struggled to get back on track from prior recessions. Firms will see horizontal and some vertical mergers as the quickest way to raise shareholder value. That is where tough merger enforcement will be critical, because shareholder value should not be given priority at the expense of the American consumer. It is easy to imagine scenarios where airlines or cruise ship companies, supermarket and drugstore chains, agricultural producers and processors, and wireless providers will argue that the weakness of one or more firms in those sectors requires consolidation and quick merger approval. In unconcentrated markets, that may be the right outcome, but in markets with just a handful of players, that is likely to be the wrong move for the American consumer, with long-term adverse consequences on innovation, quality, and price. There is an exception in antitrust law allowing a competitor to acquire a “failing firm” in limited circumstances. The would-be buyer must show that it is effectively the only company willing to pay any meaningful value for the distressed firm. That is rarely the case. A competitor in a concentrated market may well be willing to pay the most for the firm. But if this is a “market power premium” premised on the belief that the buyer will be able raise prices to consumers and recoup its acquisition costs at our expense, the merger should not be allowed. We face an uncertain path to economic recovery in the days, months, and years ahead. The public policy choices we make today and tomorrow will live with us for a long time. We need to make sure the steps we take to get back to normal do not irreversibly alter markets and deprive consumers of competition in the long run. Our antitrust enforcers—the economic cops on the beat—have a big job to do.

#### 5G development radically increases confidence

Conte 21, is a communications director for Verizon. (Matt, 1-27-2021, “U.S. business leaders believe 5G will aid recovery from economic impact of COVID-19,” Verizon, https://www.globenewswire.com/news-release/2021/01/27/2165170/0/en/U-S-business-leaders-believe-5G-will-aid-recovery-from-economic-impact-of-COVID-19.html)

BASKING RIDGE, N.J., Jan. 27, 2021 (GLOBE NEWSWIRE) -- Verizon Business today released findings from its “Verizon 5G Business Report” highlighting the impact 5G technology is expected to have across the United States. The findings show that technology decision-makers overwhelmingly agree 5G high-speed communications networks and devices will create new growth opportunities and applications for their companies and industries within the next two years. “Over the last year, 5G has become top-of-mind for businesses as they manage through condensed digital transformation timelines,” said Tami Erwin, CEO of Verizon Business. “Today’s findings underscore the critical role 5G will play in economic recovery and growth, and we stand committed and ready to help our partners make that transition quickly and seamlessly.” In terms of use cases, 73% of decision-makers polled also said they already know which 5G applications will be most beneficial to their enterprises, and seven in 10 believe that 5G technologies will help them accelerate their companies’ recovery from issues posed by the COVID-19 pandemic. Approximately 80% of decision-makers agreed that 5G would provide new growth opportunities for their companies. While upfront costs of 5G ranked as the highest barrier to adoption (41%), an inability to make a clear business case (10%) ranked among the lowest barriers, highlighting the high confidence among business executives regarding the power of 5G.