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### T Exemptions

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#### ‘Scope’ is the extent of the area dealt with or relevant to the core laws

Oxford Languages ND, “scope,” shorturl.at/wCDY3

scope

the extent of the area or subject matter that something deals with or to which it is relevant.

"we widened the scope of our investigation"

#### It’s bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The AFF just intensifies the application of antitrust to already covered activities---it does NOT curtail an exemption or immunity.

#### Vote NEG---eliminating exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

## States

#### The 50 states and relevant territories of the United States should promulgate the standard of digital platform interoperability and enforce such standards through the multistate rulemaking authority under the National Association of Attorneys General’s Multistate Antitrust Task Force

#### Multistate rulemaking solves

Snow 18 (Aaron Snow is the Executive Director and a co-founder of 18F, the consultancy inside the U.S. Government's General Services Administration, an honors graduate of Harvard College and Columbia Law School, where he was Technology Editor for the Columbia Law Review, Multistate Rulemaking, 10-7, <https://web.law.columbia.edu/sites/default/files/microsites/career-services/Multistate%20Rulemaking.pdf>, y2k)

Note: the date for the article was found in this URL: http://www.administrativelawreview.org/wp-content/uploads/2019/07/71.1\_Green\_Final.pdf

It is a well-understood strength of multistate litigation1 that together, state attorneys general can influence corporate business practices in ways one state acting alone cannot. But multistate litigation is not a perfect enforcement mechanism, and legitimate criticisms can be made, especially regarding the vagaries of the process by which settlements (for multistate litigation nearly always results in settlement) are reached. Since the advent of modern multistate litigation in the last twenty years, state attorneys general have coordinated their substantive work almost exclusively in the pursuit of litigation. But attorneys general have other tools in their belts: In addition to litigation and prosecution powers, many, in certain spheres, also have substantial rulemaking authority. One such sphere is that of unfair and deceptive trade practices, or “UDAP,” statutes, which are the statutory basis of much multistate litigation.2

#### State antitrust doctrines is key to build state courts autonomy---perm collapses it by forcing a “lockstep” approach

**Waxman 14** (Michael P. Waxman, Professor of Law, Marquette University Law School, Wisconsin's Antitrust Law: Outsourcing the Legal Standard, 94 Marq. L. Rev. 1173 (2011), y2k)

VI. WHERE IS THE STATE OF WISCONSIN TO Go FROM HERE?

To continue the requirement that Wisconsin courts interpreting the Wisconsin Antitrust Act follow in lockstep the interpretations of federal antitrust law by federal decisions is neither necessary nor advisable. Unless the Wisconsin state legislature chooses to adopt a more specific set of antitrust rules, a problematic practice for the same reasons that the United States Congress has avoided this practice with the Sherman Act, the Wisconsin state courts, much like the federal courts, must evolve **their own legal standards** for **antitrust** violations. Necessarily, this does not mean that the state courts must jettison all relationship to the federal law. Rather, Wisconsin **state court** analyses of what constitutes anticompetitive practices should examine federal doctrines with a broader eye to the evolution of antitrust law, and forego **dogmatic** application of the most **recent federal decisions** and **government policies** where they do not fit the nature of Wisconsin's economic concerns and values. In so doing, the Wisconsin courts applying the Wisconsin Antitrust Act will allow for a set of values and interests that reflect the **business** and **consumer communities** in Wisconsin.

As noted above, recent federal decisions that have revealed stark conflicts in economic analysis resulting in close decisions, such as those in California Dental Ass'n and Leegin, have increased the need for flexibility on the part of Wisconsin courts when considering federal interpretations of federal antitrust law. Also, the differences in interpretation of the United States Supreme Court wording in Monsanto Co. v. Spray-Rite Service Corp.,7 brings into sharp focus the problems the Wisconsin courts will face if they continue to follow a policy of doggedly following federal decisions. A further problem arises when the Wisconsin courts must address not only the vague language in Monsanto, but also must consider whether they are bound by federal district and circuit court decisions within their own circuit or should consider decisions by "foreign" district and appellate courts. Worse still, can federal court decisions in diversity cases where the Wisconsin courts have not spoken bind the state courts under the Wisconsin Supreme Court's federal decision policy? Ultimately, the Wisconsin Supreme Court's failure to provide a priority structure among the decisions by the federal courts as well as the federal agency decisions and guidelines has left Wisconsin antitrust law with very little guidance.

Many other states, through legislative action or judicial application, are less tethered to federal court interpretations of antitrust law (in announced policy even if not always in practice). Because the **legislatures** and **courts** of many states have opted to be "**guided**" by **federal** decisions rather than follow **a lockstep approach**, these courts have assured their citizenry of both an **opportunity** to **deviate from** what they believe are **federal decisions** inappropriately applying antitrust doctrine and to look to **sister state courts** for a **commonality of interpretation**. With greater **freedom** the Wisconsin courts may sometimes choose to follow **other states** rather than federal decisions interpreting federal antitrust law.

Finally, some states have taken a more progressive stance. In particular, the Vermont antitrust (and trade) law is patterned after the Federal Trade Commission Act." The leeway the Act gives the state and its courts is much greater than the "Little Sherman Acts," yet allows the principles that are embodied in the Sherman Act to continue to play a significant part in the state antitrust law. Other states have followed the Little Sherman Act model but provided their own "spin," giving courts greater independence without sacrificing the Sherman Act language and application (e.g. California's Cartwright Act).89 Instead of being whipsawed by the hairpin turns of federal judicial policy, Wisconsin should develop its own interpretations of antitrust law where warranted and meet state interests and concerns. Unfortunately, by failing to follow an **independent state policy** over the past century, Wisconsin has **foregone** the natural development of **state antitrust law**. If the Wisconsin Supreme Court could develop an **independent voice** it could not only reflect **state values** and interests but return to its historical role as a **leader** in national economic thinking.

#### State court autonomy is key to transnational legal innovation---federalization of law destroys it

**Marshall 8** (Margaret H. Marshall is Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, State Courts in the Global Marketplace of Ideas, Papers from the Eleventh Annual Liman Colloquium at Yale Law School, 2008, <https://law.yale.edu/sites/default/files/documents/pdf/liman_whyTheLocalMatters.pdf>, y2k)

“Law, like engineering, changes fast.” So observed the late United States Supreme Court Justice William O. Douglas in his 1974 autobiography.1 The law of the internet was unknown then. A robust European Union, much less an impressive body of European Union law, was still on the horizon. Environmental law, sexual harassment law, cable broadcast law—all were in their infancy. Although law indeed changes fast, we know that **tech**nological and social **advances worldwide** will continue to spur demands for **new laws**, and new ways of thinking about law. Law’s frontiers will expand in ways heretofore unimagined. One example: The phenomenon of multinational law firms serving multinational clients, often before newly created international or transnational tribunals, raises urgent questions about, among other things, legal ethics (Which country or entity’s code of professional conduct governs the lawyers’ actions?) and the transjurisdictional licensing of lawyers (Who decides?). Cutting-edge transnational legal issues are hotly debated in the halls of our most influential law schools. Yet something is missing. That something is an understanding of state courts in the evolving legal landscape. To be sure, the existence of state courts in our federal scheme is a topic generally well covered in our law schools. However, because the work of **state courts** is rarely an independent topic of study, far less well understood is their historic and **ongoing role** as portals of **innovation**, incubators of new directions in the law—state courts as indispensable players in forming **national**, and I would argue **global, consensus**. Sheer numbers tell the story, at least in part. These are the statistics for 2006, the latest date for which readily-accessible comparative data are available. The total number of cases filed in the federal district and appellate courts was 402,489.2 In state courts, 46.8 million cases were filed in 2006, not including traffic offenses.3 It is conventionally estimated that each year at least **ninety-five percent** of all litigation in the United States takes place in **state courts**, as do the vast majority of jury trials, **the “lungs” of democracy**, in John Adams’s words. Most civil and criminal cases filed in state courts will not make headlines. But more than a few state court decisions will change **legal** and **social paradigms**. Some examples: Perez v. Sharp4 was the 1948 California state case declaring laws banning interracial marriage to be unconstitutional; it laid the groundwork for the United States Supreme Court’s similar decision in Loving v. Virginia5 nineteen years later. The court on which I serve has a long, proud history of expanding the boundaries of human liberties. The first constitutional matter decided by the Massachusetts Supreme Judicial Court was brought by a runaway slave claiming his freedom under the terms of the new Massachusetts Constitution. Three years after the Massachusetts Constitution was ratified, the court concluded in 1783 that slavery was “repugnant” to the constitutional guarantees of equality and freedom, and that “slavery is inconsistent with our . . . Constitution.”6 It was the first time a court anywhere had abolished slavery. Massachusetts courts were the first, or among the first, to recognize the right of workers to form unions to improve wages and working conditions,7 a decision that flew in the face of settled law deeming such associations criminal conspiracies; to invalidate the use of peremptory challenges based on race8; and to provide counsel for indigent defendants in criminal cases.9 You also may recall a recent case concerning same-sex marriage. The role of state courts in shaping the legal landscape is not confined to questions of personal liberty. State court decisions on other matters also have been game-changers. Consider MacPherson v. Buick Motor Co., 10 a 1916 case before New York’s highest court, which announced what for its time was a radical proposition: an automobile manufacturer could be liable to the purchaser of an automobile for a defective product, even though the manufacturer and the consumer had no contractual relationship with one another. The MacPherson analysis was initially rejected by many state courts. Yet today no one seriously argues that a retail customer cannot recover from an automobile maker for a defective product. Today, just as in 1916, state-court adjudication can and does start legal revolutions, revolutions with broad economic and social consequences. Yet remarkably, my informal survey of hundreds of class offerings by our nation’s top ten law schools in the 2008-2009 academic year reveals one course devoted exclusively to state court litigation, and only two more referring to state courts in a title. Of course state law cases present themselves in legal textbooks, and much litigation in law school legal clinics occurs in state courts. But with rare exception, courses focusing on the comprehensive, systematic study of how state courts advance legal developments are absent from our most prestigious law schools. There are many reasons for this neglect: a student body drawn from many states; the dizzying array of procedural, structural, and substantive differences among state courts; and an entrenched bias that federal court litigation is both intellectually and substantively more challenging than state court litigation.11 My aim here is not to offer a paean to state courts, but rather to point out the disconnect between the goal of influential law schools to train law’s future leaders and the puzzling fact that those same schools ignore state courts as fertile ground for the development of legal principles. The omission is particularly unfortunate today: While **state courts** historically have been important change agents in the **formation** of a national consensus on legal matters, now they are posed to reprise that role in the development and **transmission** of **transnational legal norms**. Understanding why this is so requires some brief historical background. \*\*\* Prior to World War II, the United States, the world’s first constitutional democracy, stood alone among nations in its chosen form of government, in which written guarantees of individual and property rights are enforced by a neutral, independent, co-equal branch of government, the judicial branch. A more popular form of democratic government was the parliamentary model, in which the law of the parliament, the people’s voice, reigned supreme. Under a parliamentary system, it is not possible for judges to say “no” to executive and legislative actors. No matter how oppressive the legislation, the role of the judge is to enforce duly-enacted laws. In a constitutional democracy, on the other hand, the judge’s role is to impartially review whether government action transgresses the boundaries established by the nation’s charter of government, its constitution, and if so, to restrain or forbid the government action. The painful experience of World War II and of the totalitarian regimes associated with it—including the apartheid regime of my native South Africa—illuminated for the world that **independent constitutional review is central to a free and thriving nation**. **Constitutional democracy** with **constitutional courts** has become the international norm from **India** to **Japan**, from South **Africa** to **Canada** to Estonia, Cyprus, Chile, Ireland, Sweden, Fiji, and **beyond**. As the courts of new constitutional democracies set to work, they **look**ed first **to the U**nited **States**, and then increasingly turned to each other, for sources of authority and guidance. This process was spurred and continues to be accelerated by modern technology. Access to the internet gives everyone from Jacksonville to Java a gateway to the best thinking of the world’s most renowned judges and legal scholars. International conferences, an increasingly common occurrence, stimulate global jurisprudential dialogue. And as the world’s lawyers and judges and scholars read and discuss one another’s work, transnational legal norms begin to emerge. I am speaking here not of the norms embodied in treaties and international fora, but of what in an earlier day we called the customary law of nations. Transnational legal norms are legal concepts that transcend fixed geographical boundaries and become a jurisprudential lingua franca. Transnational norms of commerce, intellectual property, due process, state power, human rights—in countless direct and indirect legal “conversations” swirling around us, the international legal community, representing a diversity of personal and property in terests, works its way toward consensus.12 **State courts play a vital**, if largely unrecognized, **role in shaping and transmitting transnational legal norms**. Consider the influence of state court adjudication abroad. While American law students, in their search for persuasive authority, principally focus their sights on federal law, our colleagues around the world cast a broader net. Evans v. United Kingdom, 13 for example, decided by the European Court of Human Rights in 2007-2008, concerns an English couple who had had their frozen embryos extracted and stored by a clinic for future use. The issue confronting the justices was whether the man's attempt to withdraw his consent for his ex-partner's use of the couple's stored embryos outweighed her rights to life, reproductive choice, and freedom from discrimination guaranteed by the European Charter of Human Rights. Both the parties and the justices paid close attention to a handful of United States state court decisions, including A.Z. v. B.Z.,14 decided by my court in 2000. There we held that the woman’s procreative right must yield to the man’s right not to be forced to procreate. The A.Z. v. B.Z. case itself was considered in light of an Israeli decision on similar facts.15 The decision of the European Court of Human Rights echoed that of A.Z. v. B.Z.. From Israel to Massachusetts to the United Kingdom to the European Court of Human Rights, a judicial conversation about reproductive choice, and to a larger extent about human dignity, took shape, each voice having impact on the evolving dialogue. State court decisions also play a decisive role in what Judith Resnik has called the international “migration and sharing of constitutional norms.”16 State v. Makwanyane, 17 decided in 1995, is the Constitutional Court of South Africa’s seminal holding on the death penalty. That punishment, the Justices held, violates South Africa’s constitutional ban on cruel, inhuman, or degrading punishment. Makwanyane is principally grounded, as one would expect, in a close analysis of the circumstances surrounding the adoption of the South African Constitution. But the opinions drew significantly on decisions from the high courts of Massachusetts and California.18 The Justices cited these two state court decisions for more than evidence of the weight of international consensus on the death penalty. They relied on the reasoning of these opinions in their efforts to articulate a constitutional basis for prohibiting capital punishment. Surprisingly, in foreign cases presenting no highly-charged constitutional issues, foreign courts have found models of guidance and authority in **state court** decisions. Again, examples abound. In the 1996 case M.C. Metha v. Kamal Nath & Ors.,19 the Indian Supreme Court undertook an extended analysis of three Massachusetts decisions, among others, in incorporating the public trust doctrine into Indian property law. In Dart Industries, Inc. v. The Decor Corporation Pty Ltd.,20 a 1994 case, the Australian Supreme Court looked to the decisional law of Massachusetts and other states to determine damages in a patent infringement case. The use of state court decisions abroad is, among other things, a testament to two features of American jurisprudence in particular. First is the vitality of federalism. A central feature of American federalism, of course, is its allowance for a diversity of decisional law among the states on issues of general concern. Second is the synthetic method of legal analysis characteristic of the common law that makes state court decisions particularly interesting to foreign jurists. I. Federalism Each U.S. state is independently sovereign, autonomous in its own sphere, so long as it takes no action illegal under federal law. Our fifty autonomous state courts and fifty sovereign state constitutions are the products of highly localized conditions and customs, to be sure. But it would be shortsighted to mistake this localization for provincialism. More accurate is the famous description of former United States Supreme Court Justice Louis Brandeis. Our state courts, he said, have **a unique ability** “to remould, **through experimentation**, our **economic practices** and **institutions** to meet changing **social** and **economic needs.”21** “It is one of the happy incidents of the federal system,” he continued, that “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”22 Today’s state court “experiment” may be—or not—tomorrow’s status quo. A related aspect of our federalist system that may make state court decisions attractive to foreign judges is that state constitutions, unlike the federal constitution, often contain “positive rights” provisions. Such provisions tell governments what they must do, while “negative rights” provisions tell government what they must not do. The right to an adequate public education, for example, is among the most common of positive law provisions in state constitutions, and in many foreign constitutions.23 State court judges, like our counterparts in other contemporary constitutional democracies, are often called upon to interpret such positive rights provisions against a backdrop of limited public resources. Our search for solutions to a common problem make us natural allies. II. The nature of state court analysis There is a second reason that state court decisions have global resonance, while acting as engines of innovation in the United States. To an extent virtually unknown in the federal courts, state court judges are common law judges. Because we are deeply rooted in the common law, we are fluent in its cardinal principle of law’s plasticity. The common law adapts to changing realities with a disciplined incrementalism. Grand principles of our constitutional law—from freedom of speech to freedom from cruel and unusual punishment—are rooted in the common law. Our fundamental tort principles—such as comparative negligence or strict liability—are rooted in the common law. Because of its ordered adaptability, the common law is an ideal medium through which to fashion practical rules from evolving circumstances. In Goodridge v. Department of Public Health, my court redefined the common law meaning of marriage to preserve the constitutionality of the marriage statutes. The ruling built on years of prior decisions that slowly, inexorably but without design, moved the common law in a particular direction. Adoption of Tammy, 24 for example, which we decided ten years before Goodridge, held that, in the absence of a statutory definition of “parent” in our adoption law, we would read the word “parent” to include people of the same sex who wished to adopt together.25 Working with the interplay of statute, constitution, and the common law—that is what state court judges do every day. And that is one reason why foreign judges look to state courts, and state courts look to each other, to adapt the general principles of Anglo-American jurisprudence to actual experience. The methodology of the common law has in a sense become the grammar of our new global conversation about law’s reach. Foreign courts, and foreign lawyers, not infrequently find in state decisional law a rich source for the importation of new legal values. Is the opposite also true? Might not state courts emerge as a significant conduit for the importation of transnational legal norms?26 One unfortu nate result of the new nativist bent of the United States Supreme Court, as many commentators have documented, is that the Court is losing its influence among the world’s constitutional courts. State courts are not burdened by the view that the United States has a special destiny among nations, the so-called exceptionalist view. State courts have shown an increasing willingness to consider transnational legal principles in resolving issues of **domestic law**, including state constitutional law. As a general matter, state court judges are finely attuned to law beyond our own borders. Even where Massachusetts constitutional law is concerned, I find it helpful to consider relevant opinions of state courts whose own constitutions may be a hundred or more years younger, and whose states may be very different from Massachusetts, such as Montana or Oregon. The important principles of our civil and criminal law, developed through the common law, know no boundaries. Other states’ court decisions provide guidance, perspective, inspiration, reassurance, or cautionary tales. Consideration of transnational legal principles fits nicely within the natural comparativist bent of state jurists. That is a good thing, because state courts are increasingly drawn into transnational litigation in many areas of the law. Family law and commercial real estate development are quintessentially local, statecourt matters. Yet today the domestic relations lawyer who knows nothing about the Hague Convention on the Civil Aspects of International Child Abduction or the business litigator unaware of the Hague Convention on Taking Evidence Abroad on Civil or Commercial Matters can hardly be deemed competent in their respective spheres. Recently I had occasion to review cases decided by my court in the past few years touching on foreign and international law. I was as surprised as anyone by the results. Here are two of the many cases involved. When an Indian national residing temporarily in Massachusetts claimed that the Massachusetts Juvenile Court had no jurisdiction to declare him an unfit parent and to approve the adoption of his daughter, also an Indian national, by a Massachusetts couple, we had occasion to consider, among other things, art. 21 of the United Nations Convention on the Rights of the Child and art. 37, the consular notification provision, of the Vienna Convention.27 When a criminal defendant claimed he had been kidnapped from Guyana by Massachusetts police, we construed Section 28 of Guy ana’s Immigration Act and the Extradition Treaty between the United States and the United Kingdom.28 No area of domestic law is untouched by legal globalization. State courts, in the best common-law tradition, look beyond our national borders in a variety of cases in which local and national law may already be developed, offering unparalleled opportunities to align domestic law with emerging transnational legal norms. The 2008 **Ca**lifornia decision on same-sex marriage invokes **numerous international human rights treaties** and **foreign constitutions** as persuasive authority for the proposition that the right to marriage and a family life is a basic human right.29 The **W**est **V**irginia Supreme Court invoked the **U**niversal **D**eclaration of **H**uman **R**ights in faulting the Unites States Supreme Court’s refusal to find a fundamental **right to education**.30 The **Fl**orida Supreme Court looked to the United Nations Convention on the **L**aw **o**f the **S**ea in considering whether the owners of a “cruise to nowhere” owed sales and use taxes to the state for cruise activities.31 In considering whether a parent had a right to use “moderate or physical force” on his or her child without incurring criminal liability, Maine’s Supreme Judicial Court gave extended consideration to a case on the same issue decided by the European Court of Human Rights.32 **There is enormous transformative potential here**. Yet I would be remiss if I conveyed the impression that **state courts are in robust health**, ready to respond to **global challenges**. They are not. Central to the states’ participation in national and international legal dialogue, central to federalism itself, and central to the rule of law, is the ability of state courts to continue functioning as **independent**, **impartial**, **respected arbiters of the law**. This fundamental role of state courts is **under attack**. I briefly describe here two sources of that assault. First, what had been state substantive law has been increasingly federalized. With alarming frequency, the **bubbling-up process of state court innovation is being stifled by** both judicial and legislative **federalization**. In Troxel v. Glanville33 in 2000, the United States Supreme Court undertook to set out due process requirements for decisions in volving grandparent visitation, heretofore a subject confined to state courts. The result was a jumble of opinions, concurrences, and dissents that has created a virtual cottage industry about Troxel’s meaning. Perhaps the Justices cut off the debate among state courts too quickly? And Congress? Increasingly, it has required, or attempted to require, that a wide array of cases that formerly could be heard in state courts be heard in federal courts exclusively. Examples include many class actions, cases involving risk insurance for terrorism-related damages and recovery for harm caused by medical drugs, and gun manufacturer liability. What are the long-term costs—jurisprudential and otherwise—of this mandated shift to the federal courts? Now for the second threat facing state courts: highly politicized judicial elections and retention battles. Space limitations do not permit me to address this serious problem in detail. For that, you may wish to read the report of the American Bar Association’s Commission on the 21st Century Judiciary, on which I served. 34 Here is a quick overview of what we face. Forty-seven states (Massachusetts is not among them) select some or all of their judges by popular vote. Approximately eighty-seven percent of state judges, trial and appellate, are chosen or reappointed in this fashion. Since the late 1980s, special interest groups increasingly have targeted judicial appointments in order to advance their own narrow agendas, and are pouring huge amounts of money into supporting certain candidates for judicial office and opposing others. The upshot? More campaigning, more advertising, more campaign money—a lot more campaign money—and an endless barrage of attack ads and editorials, frequently castigating a judge up for reappointment or reelection for a particular decision. The nonpartisan judicial watchdog group Justice at Stake noted, for example, that in the race for a seat on the Illinois Supreme Court in 2004, two candidates “combined to raise over $9.3 million.”35 More than $5.3 million dollars was spent on the 2008 race for a seat on Alabama’s Supreme Court.36 Behind this influx of judicial campaign money, behind the attention of special interest groups, is the assumption that justice is for sale. In 2008, the New York Times highlighted a case, currently on appeal before the United States Supreme Court, in which the West Virginia Supreme Court overturned a $50 million damage award against a company.37 The deciding vote was cast by a justice who had received campaign contributions of $3 million from the company. Is it little wonder that the public, lawyers, and even judges believe that campaign money leads to conflicts of interest for judges or that it influences judicial decisions? Add to all this an extraordinary decision of the United States Supreme Court, decided in 2002, Republican Party of Minnesota v. White. 38 The case began when a candidate for a seat on the Minnesota Supreme Court distributed campaign literature criticizing the judicial decisions of his opponent—on crime, welfare, abortion, and other issues. By a bare majority, and over scathing dissents, the Justices concluded that the provision of Minnesota’s Code of Judicial Conduct that prohibited a “candidate for a judicial office, including an incumbent judge,” from “announc[ing] his or her views on disputed legal or political issues” violated the First Amendment. The decision effectively permits state court judges to campaign on undertaking to rule a certain way in cases that may come before them. **Federalization** and highly **politicized judicial campaigns** are not isolated phenomena. They are part of one of the most disturbing developments I have seen since I graduated from law school: an **all-out assault on the judiciary** as an independent, counter-majoritarian arm of government. The assaults on state courts are **particularly troublesome** because so much judicial business is conducted in those fora. Remember— at least ninety-five percent. **If state courts fail, justice in America fails**. \*\*\*

#### That solves extinction

**Domingo 10** (Rafael Domingo is Professor of Law at the University of Navarra School of Law, The New Global Law, Cambridge University Press, <https://iejiweb.files.wordpress.com/2017/09/the-new-global-law-asil-studies-in-international-legal-theory-1.pdf>, y2k)

We live in a world of **profound change**. The implementation of new **tech**nologies; the growing impact of mass **media** communications; the unprecedented development of **a market economy** on a global scale; the ubiquitous role of a civil society progressively consolidating, vertically and horizontally; the shared desire to address the problems afflicting **humanity**, such as international **terrorism**, arms **trafficking**, **hunger** and **poverty**, **sexual exploitation**, political and economic **corruption**, abuse of power, and increasing **environmental challenges** that threaten the configuration and **peace of the planet** – these are some of the issues that characterize our **unique** and never-recurring **historical moment**. We are propelled through life at a dizzying speed. Perhaps this is the most salient difference from the past: the hectic **pace** of our social relations, which at times makes it difficult to **adapt** to the demands of justice. Our society is the product of a complex mosaic of political, economic, and cultural relationships, the intricacies of which are hardly recognizable merely by applying the social norms of yesteryear. Faced with this reality, which is as certain as our own existence, we **jurists** cannot and should not turn a blind eye, thereby allowing **the law of the jungle to take over** in this age of globalization because of **lack of** foresight, consistency, or **imagination**. We cannot acquiesce to world domination by economic imperialism or political cryptocracy as if it were some kind of private estate. The science of **law** has become obsolete in many respects; it has been **overwhelmed** by new facts and circumstances. The increasingly opaque distinction between public and private spheres, the intrinsic complexity of facts to be ordered by law, and poor planning in the face of a rapidly changing future have eviscerated many legal principles that once might have seemed permanent and unchanging and now seem, at best, mercurial. At times, the weight of cultural idiosyncrasies and circumstance is so great that we think of them as part of nature. Nature itself, however, also changes – at least in part I am reminded of the famous words in Gaius’ Institutes (2.73), where the second-century jurist states that “what a man builds on my land becomes mine by natural law, although he built on his own account, because a superstructure goes with the land” (superficies solo cedit). 1 I doubt that the same jurist would repeat this precept, accepted by courts throughout the ages, if he had taken a stroll along Manhattan's Fifth Avenue. Today, this principle has been overturned in many cases, with “structure prevailing over land.” Thus, natural law, in the modern sense of the term, does not embrace this tenet. In Ancient Rome, however, the inherent nature of things (rerum natura) prevailed as the standard of legal interpretation that led Gaius to formulate this principle. To be sure, though, for a long time, the stricture was observed. In his classical essay Revitalizing International Law, Richard Falk complained that jurists – especially American jurists – are averse to paradigm shifts in response to the complexities of society and political phenomena. 2 Globalization commands a **reformulation of the law**, an appropriate **legal response** to **changing** times to avoid becoming hostage to **outmoded**, **transient paragons**. It is a moral obligation. 3 The time has come for a global law just as earlier, the time was ripe for the law of nations and what later became “international law.” Without the ius gentium, international law cannot be understood. Moreover, absent the development of international law, nascent global law would not come into being. These three legal domains (the law of nations, international law, and global law) are like grandfather, father, and grandson, respectively. They are part of one and the same family. Therefore, they have common traits that bind them even though they are based on different legal principles and were applied at completely different times in history. That they have coexisted and overlapped bespeaks this commonality and difference. I do not, therefore, entirely agree with the great legal scholar Lassa Oppenheim (1858–1919) – nor with his followers – when he suggests that international law in the term's current sense is “a product of Christian civilization” that gradually began to develop in the Late Middle Ages, especially with Grotius, who was the originator of a later conceptualization of the law of nations. 4 Such a point of departure is somewhat artificial. Is it possible to understand Grotius without at least Gentili or Vitoria, Vitoria without Thomas Aquinas, or Aquinas without Isidore of Seville? Can we understand St. Isidore without first knowing Ulpian, Ulpian without Gaius, Gaius without Cicero, the great Roman orator without the Stoics, and stoicism without Socrates? The litany of epistemological “moments” of development leads to a simple and succinct response: Of course not. Certainly, this penchant in favor of fragmentation has occurred within the history of international law, notable for platitudes that, like a family heirloom, have been passed down for generations. I do accept, however, the happy turn of phrase with which Jean Monnet (1888–1979) closes his fascinating memoirs: “les nations souveraines du passé ne sont plus le cadre où peuvent se résoudre les problèmes du present.” 5 It represents an outdated notion and pointless nostalgia, but it also underscores the need to acknowledge that tools useful at certain times in history, such as the concept of the sovereign nation itself, may lose their relevance in another era. The time has come for imagination and creativity. **Humanity** has common problems that must be addressed by the **justice system** and, therefore, by **law** – a law that, to use the well-known expression of the “Father of Europe,” must unite [hu]mankind, not **merely nation-states**. 6

## PTX

#### A stand-alone climate bill will pass but courting for moderate votes is key---solves warming

Steinbauer 1-20 (James Steinbauer, contributing writer covering national environmental policy. He was an editorial fellow at Sierra, Democratic leaders need to salvage this must-pass climate legislation before the midterm elections consume Washington, https://www.sierraclub.org/sierra/it-s-do-or-die-time-for-build-back-better)

In the year since Joe Biden was inaugurated president, environmentalists have said again and again that the combination of this administration and this Democratic-controlled Congress is the last best chance to pass a climate bill. The warning is a year old, but the urgency remains as real as ever. This is a do-or-die moment to pass federal laws to tackle the climate crisis.

Democrats are running against two clocks. One is political: With President Biden’s approval rating flatlining and COVID-19 cases and inflation increasing, most political pundits say Democrats will very likely lose their thin majorities in one or both chambers of Congress this fall. The other is geologic: With global greenhouse gas emissions and temperatures continuing to rise, scientists say we are likely to lose the opportunity to salvage a livable climate without sweeping action.

The extent to which human activity has already destabilized the climate is clear: Historic December tornadoes in the Midwest. Record heat in Alaska the day after Christmas. Wildfires in Colorado months after the end of the traditional wildfire season. According to NOAA, 2021 was Earth’s sixth-warmest year on record. The planet’s seven warmest years have been the past seven. And it is only going to get hotter. Without major action to reduce greenhouse gas emissions, global temperatures are on track to rise 4.5 to 8 degrees Fahrenheit (2.5 to 4.5 degrees Celsius) by 2100. If the United States doesn’t meet its commitment to reduce its emissions, the world will fail to avoid catastrophic climate change.

“These higher temperatures continue to be a blaring siren that Congress needs to take action as soon as possible,” said David Shadburn, a government affairs advocate for the League of Conservation Voters.

The bulk of Democrats’ climate policy has been woven into the $2.2 billion Build Back Better Act. But that proposed bill is stalled in the Senate. Senator Joe Manchin, the Democrat of West Virginia who has made a personal fortune from his fossil fuel investments, gave his party a big fat lump of coal for Christmas when, after months of negotiating, he [Manchin] said he could not vote for the legislative package as is. “I can’t get there,” Manchin told Fox News. “This is a ‘no’ on this legislation.”

But that Christmas Eve bombshell wasn’t the end of the Build Back Better saga. At least one cause for optimism is that Manchin seems to support the climate provisions in the bill. “The climate thing is one that we probably can come to an agreement much easier than anything else,” Manchin told reporters in early January. Democrats' strategy for passing climate policy has been likened to giving medicine to a dog—you have to hide it in a spoonful of infrastructure peanut butter to get it down the legislative gullet. It’s a strategy that explains how the United Mine Workers of America, which describes its mission in life as lobbying for the interests of coal miners, has pleaded with Manchin to reconsider his opposition to the Build Back Better Act.

At the same time, Manchin’s support of the climate provisions in the Build Back Better Act is largely because he has already knocked the teeth out of them. In October, he said he would not vote for Democrats’ flagship climate policy, a program that would have required power companies to rapidly replace fossil fuels with renewables such as solar and wind or pay a penalty. What’s left is more than $500 billion for a suite of clean energy tax credits, making buildings more energy-efficient and restoring forests and farmland so that they sequester carbon.

“He took his pound of flesh,” said Melinda Pierce, the legislative director of the Sierra Club. “Do I expect him to nibble around the edges more, and will those bites hurt? Yes. But the climate piece has largely come to a conclusion.”

#### Antitrust trades-off

Carstensen 21 (Peter C. Carstensen, Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>, y2k)

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

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

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

#### Extinction

David Spratt 19, Research Director for Breakthrough National Centre for Climate Restoration, Ian Dunlop, member of the Club of Rome, formerly an international oil, gas and coal industry executive, chairman of the Australian Coal Association, May 2019, “Existential climate-related security risk: A scenario approach,” https://docs.wixstatic.com/ugd/148cb0\_b2c0c79dc4344b279bcf2365336ff23b.pdf

An existential risk to civilisation is one posing permanent large negative consequences to humanity which may never be undone, either annihilating intelligent life or permanently and drastically curtailing its potential. With the commitments by nations to the 2015 Paris Agreement, the current path of warming is 3°C or more by 2100. But this figure does not include “long-term” carbon-cycle feedbacks, which are materially relevant now and in the near future due to the unprecedented rate at which human activity is perturbing the climate system. Taking these into account, the Paris path would lead to around 5°C of warming by 2100. Scientists warn that warming of 4°C is incompatible with an organised global community, is devastating to the majority of ecosystems, and has a high probability of not being stable. The World Bank says it may be “beyond adaptation”. But an existential threat may also exist for many peoples and regions at a significantly lower level of warming. In 2017, 3°C of warming was categorised as “catastrophic” with a warning that, on a path of unchecked emissions, low-probability, high-impact warming could be catastrophic by 2050. The Emeritus Director of the Potsdam Institute, Prof. Hans Joachim Schellnhuber, warns that “climate change is now reaching the end-game, where very soon humanity must choose between taking unprecedented action, or accepting that it has been left too late and bear the consequences.” He says that if we continue down the present path “there is a very big risk that we will just end our civilisation. The human species will survive somehow but we will destroy almost everything we have built up over the last two thousand years.”11 Unfortunately, conventional risk and probability analysis becomes useless in these circumstances because it excludes the full implications of outlier events and possibilities lurking at the fringes.12 Prudent risk-management means a tough, objective look at the real risks to which we are exposed, especially at those “fat-tail” events, which may have consequences that are damaging beyond quantification, and threaten the survival of human civilisation. Global warming projections display a “fat-tailed” distribution with a greater likelihood of warming that is well in excess of the average amount of warming predicted by climate models, and are of a higher probability than would be expected under typical statistical assumptions. More importantly, the risk lies disproportionately in the “fat-tail” outcomes, as illustrated in Figure 1.

## FTC

#### FTC’s prioritizing privacy and AI regs

Forsheit 1-17 (Tanya Forsheit, Co-Chair, Privacy, Security & Data Innovations @ Loeb & Loeb LLP, Federal Privacy and Data Security Enforcement: A Look Back and a Look Forward, https://www.lexology.com/library/detail.aspx?g=d90db69f-220d-4fd5-b8d6-7574a22e7efe)

The FTC Takes a More Activist Role

Along with the Biden administration, consumer advocates and other regulators have also called on the FTC both to increase the scope and consequence of its enforcement activity and to step in to provide rules around privacy and security in lieu of a federal privacy bill. Over the course of 2021, the FTC responded by taking a number of actions that indicate a willingness to use the full scope of regulatory and enforcement tools at its disposal to put pressure on Big Tech and regulate perceived privacy abuses. The FTC has issued notices of penalty enforcement, the violation of which would allow it to seek civil penalties; issued orders to certain industry sectors requiring reports and responses to questions about their practices; and started the rule-making process. In 2022, we expect to see the FTC initiate rule-makings and potential investigations and issue more notices of penalty enforcement.

Below is a quick recap of the various enforcement tools the FTC may deploy:

Section 5 enables the FTC to prohibit “unfair or deceptive acts or practices.”

Section 5(b) allows the FTC to initiate an administrative proceeding for unfair or deceptive practices and unfair methods of competition. Administrative complaints are adjudicated by an administrative law judge, where parties can seek injunctive relief.

Section 5(l) allows the FTC to seek civil penalties, equitable monetary relief or other injunctive relief in a federal court, if a defendant violates a previous administrative order issued by the Commission.

Section 5(m) permits the FTC to seek civil penalties in federal court (the Build Back Better Act would amend Section 5(m)(1)(A) of the FTC Act to expand the FTC’s ability to seek civil penalties for Section 5 violations—unfair or deceptive acts or practices—and not just violations of FTC rules).

Section 6(b) provides the FTC with the authority to require reports and answers to specific written questions from a company about specific business practices (but doesn’t necessarily require the FTC to have a specific law enforcement goal).

Section 13(b) grants the FTC the ability to seek injunctive relief in federal district court to halt unfair and deceptive practices. Section 13(b) does not authorize the FTC to seek court-ordered monetary relief (as was decided in AMG Capital Management).

Section 18 grants the FTC rule-making authority and allows the Commission to promulgate trade regulation rules concerning unfair or deceptive acts or practices affecting commerce (commonly referred to as “Magnuson-Moss” rule-making). Section 18 also requires a hearing, with an opportunity for cross-examination.

Section 19 authorizes the FTC to bring civil suits for violations of FTC trade regulation rules regarding unfair or deceptive acts, and violations of an FTC cease and desist order. Section 19 also allows the FTC to seek certain types of consumer redress from the court, such as rescinding or reforming contracts, monetary refunds, and damages.

Congress has also granted the FTC specifically enumerated authority—ranging from enforcement to rule-making—under the Equal Credit Opportunity Act, Health Breach Notification Rule, Children’s Online Privacy Protection Act and Gramm-Leach-Bliley Act.

FTC Enforcement Priorities

FTC Chair Khan issued a memo on the Vision and Priorities for the FTC in September 2021, outlining her strategic approach and listing several policy priorities. Specifically, Khan would like the FTC to focus on “rampant consolidation and dominance” where a lack of competition may make unlawful conduct more likely. Khan cites that key projects for the FTC will include revising the merger guidelines (in conjunction with the Department of Justice) and reviewing “take-it-or-leave-it” contracts that could be viewed as potentially unfair methods of competition or unfair or deceptive practices.

And most recently, in December, the FTC issued a Statement of Regulatory Priorities, citing President Biden’s July Executive Order) and affirming that the Commission intends to consider competition rule-makings relating to surveillance, unfair competition in online marketplaces, and noncompete clauses, among others.

We also expect the FTC to continue its focus on children’s data, bias and discrimination in Artificial Intelligence, algorithmic transparency, and dark patterns and negative option marketing (as we saw with the FTC’s Enforcement Policy Statement. To learn more about dark patterns, watch our In The Know Video here.

#### Rulemaking causes distraction away from adjudicatory proceedings

Ohlhausen 21 (Maureen K. Ohlhausen, Chamber of Commerce, Pushing the Limits? A Primer on FTC Competition Rulemaking, 8-21, <https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf>, y2k)

As described below, broad rulemaking of this sort would also be very likely to encounter stiff resistance in the courts due to its tenuous statutory basis and the myriad constitutional and institutional problems it creates. But even aside from the issue of legality, such a move would be a major distraction from FTC’s core mission as an expert case-by-case adjudicator of competition issues. Rather than applying its expertise to specific facts and complex legal issues through administrative adjudication and influencing the development of antitrust law through hard-earned victories supported by substantial evidence, it would be far too tempting for the Commission to simply regulate its way to the desired outcome, bypassing all neutral arbiters along the way. And by seeking to promulgate such rules through abbreviated notice-and-comment rulemaking, FTC would be claiming extremely broad substantive authority to directly regulate business conduct across the economy with relatively few of the procedural protections that Congress felt necessary for FTC’s trade regulation rules in the consumer protection context. This approach risks not only a diversion of scarce agency resources from meaningful adjudication opportunities, but also potentially a loss of public legitimacy for the Commission should it try to exempt itself from these important rulemaking safeguards.

#### That trades off with privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

## Stocks

#### CP: The United States federal government should maintain the scope of antitrust enforcement at status quo levels.

#### Tech stocks on the rise

DeCambre 1/20/22 (Mark, Marketwatch, “The Nasdaq Composite just logged its 66th correction since 1971. Here’s what history says happens next to the stock market.”, https://www.marketwatch.com/story/nasdaq-composite-has-logged-65-corrections-since-1971-and-as-it-heads-for-66-heres-how-the-stock-index-tends-to-perform-afterward-11642623639)

The Nasdaq Composite Index COMP, -1.30% on Wednesday booked its first close in correction territory since March, with a rapid surge in Treasury yields and expectations for interest-rate increases from the Federal Reserve blamed for weakness in the formerly highflying benchmark.

The technology-heavy index is off to a terrible start, down 8.3% so far, in 2022, closing Wednesday down 1.2% at 14,340.26, putting it down 10.69% below its Nov. 19 recent peak, meeting the common definition for a correction in an asset’s value.

The index has registered a correction 65 times (not including Wednesday’s) since it was launched in 1971, and of those corrections, 24 of them, or 37%, have resulted in bear markets, or declines of at least 20% from a recent peak, according to Dow Jones Market Data.

More recently, corrections have served as buying opportunities, with the sojourn into correction territory on March 8 resulting in subsequent gains for the one-week, two-week, three week and one-month periods, going all the way out to six months. A similar uptrend took hold when the Nasdaq Composite slipped into correction territory in early September 2020.

Looking more broadly at the performance of the Nasdaq Composite over the past 65 times it has fallen 10% from a peak, it has finished positive on average by 0.8% in the week after, but returns over that first month are weak, until the benchmark breaks through into the three-month period and beyond, where average gains are 2.2%.

Chart

Description automatically generated

#### The plan unleashes worries of a legal assault against tech giants—causes a stock sell-off

Delavigne 21 (Lawrence, Writer for Reuters, “U.S. big tech dominates stock market after monster rally, leaving investors on edge”, 8/28/21 https://www.reuters.com/article/us-usa-markets-faangs-analysis/u-s-big-tech-dominates-stock-market-after-monster-rally-leaving-investors-on-edge-idUSKBN25O0FV)

BOSTON, MA.(Reuters) - U.S. technology giants are increasingly dominating the stock market in the midst of the coronavirus pandemic, even as they draw accusations of unfair business practices, and some investors fear the pump is primed for a tech-fueled sell-off.

The combined value of the S&P 500's five biggest companies - Apple Inc AAPL.O, Amazon.com Inc AMZN.O, Microsoft Corp MSFT.O, Facebook Inc FB.O and Google parent Alphabet Inc GOOGL.O - now stands at more than $7 trillion, accounting for almost 25% of the index's market capitalization. That compares with less than 20% pre-pandemic.

The quintet’s burgeoning share prices reflect a transition to an increasingly technology-driven economy that has been accelerated by the coronavirus outbreak, as doorways fill with Amazon packages, homebound families stream movies and friends commiserate on Facebook.

Yet the companies are drawing opposition. U.S. lawmakers are accusing them of stifling competition, a charge also leveled in recent days against Apple by Epic Games, creator of the popular game Fortnite.

Some investors worry the companies powering this year’s equity rally could become the market’s Achilles’ heel if a legal assault, a shift to undervalued names or a move higher in bond yields dries up appetite for technology stocks.

“People see these companies as winners and investors are willing to pay any price to own them,” said Michael O’Rourke, chief market strategist at JonesTrading. “That’s always a risk.”

LEGAL THREAT

One potential threat comes from an array of investigations and legal actions.

The latest came Monday, when a federal judge temporarily blocked Apple from cutting off all the developer accounts of Epic Games, pending a full hearing on the issue. It was a partial win for Epic, which had called Apple’s rules an anticompetitive abuse of power.

The standoff centers on Apple’s App Store, which forms the centerpiece of a $46.3 billion-per-year services business that has helped buoy the company’s share price.

The decision “is just a first battle of many on the horizon,” said Dan Ives, an analyst at Wedbush Securities. “From a valuation perspective, there’s clearly an overhang around antitrust.”

Wedbush nevertheless raised its target price for Apple on Wednesday to $700 a share in a “bull case” scenario, citing a “once in a decade” opportunity to take advantage of as many as 950 million potential iPhone upgrades worldwide.

Apple shares on Thursday closed at $500.04.

Still, this week’s Apple court decision may be a taste of things to come for technology giants, whose influence has been one of the few issues capable of galvanizing bipartisan interest among lawmakers.

Alphabet, Facebook, Amazon and Apple face a series of federal government probes into allegations that they unfairly defend their market share, with litigation against Alphabet possible later this year.

“These few behemoths dominate their industry and can set the rules of the global economy,” said U.S. Senator Richard Blumenthal, a Democrat who has been outspoken about antitrust issues. “This kind of concentrated power is always dangerous.”

The opposition is a worry for investors hoping the companies will continue delivering robust growth that justifies their valuations.

Amazon said it operates in a “fiercely competitive” market, citing U.S. Census Bureau data that only about 10% of U.S. retail sales occur online.

Apple declined comment. The company previously said it competes vigorously against Samsung Electronics Co Ltd 005930.KS and other Android device makers in the smart phone markets.

Alphabet declined comment. It previously said it competes with Amazon, Microsoft, Comcast Corp CMCSA.O, AT&T Inc T.N and many others.

Facebook and Microsoft had no immediate comment.

INVESTMENT DILEMMA

For some investors, the companies embody a dilemma that has dogged them at various times during the last decade. Many have found that cutting exposure to tech-related shares has limited portfolio performance over the long term.

The Big Five have seen their shares jump 22% or more to record highs this year, with Amazon soaring 86%. By comparison, the median stock performance across the S&P 500 year-to-date is a 4% drop.

The companies’ “increased market share ... provides potentially huge opportunities supporting growth prospects over many years,” said David Polak, equity investment director at $1.7 trillion Capital Group, which owns shares of big technology companies.

Still, some worry that a bad patch in the companies’ widely owned shares could trigger violent swings in broader markets.

Goldman Sachs analysts said in a recent report that the S&P 500 “has never been more dependent on the continued strength of its largest constituents.”

Another risk is a broad-based economic rebound boosting earnings of companies that have underperformed during the pandemic, potentially making their shares more competitive with tech stocks, said Edwin Jager, head of fundamental equities at hedge fund firm DE Shaw & Co, which oversees more than $50 billion.

In addition, a sustained rise in bond yields could make growth stocks less attractive, Jager said. Longer-term Treasury yields hit multi-month highs on Thursday after the Federal Reserve announced a shift in monetary strategy.

A change of sentiment toward big tech could take a comparatively heavier toll on the shares of less profitable technology companies that have rallied alongside the market’s giants.

#### High tech stock valuation now is key to Chinese rebound after Evergrande

Spilka 10/27/21 (Dmytro Spilka is a finance writer based in London. Founder of Solvid and Pridicto. His work has been published in Nasdaq, Kiplinger, Financial Express, and The Diplomat. “With Tech-Driven Rebound, Asian Markets Turn Corner on Evergrande Crisis”, https://thediplomat.com/2021/10/with-tech-driven-rebound-asian-markets-turn-corner-on-evergrande-crisis/)

Asian stocks, alongside many of their global counterparts, have recently undergone a healthy rebound upward as the embattled Chinese property giant Evergrande reportedly made its bond interest payments – a feat some onlookers feared wouldn’t happen.

Leading technology names across Asia have contributed to the market recovery also. Tech stocks have been at the forefront of the markets as they seek to accelerate away from September’s Evergrande crisis. Notably, the Hang Seng TECH (HSTECH) sub index has helped to drive some growth at the beginning of the fourth quarter, along with the general Hong Kong benchmark Hang Seng Index (HSI).

Analysts have found that a recent Wall Street rally, which helped to cause growth among Apple (APPL), Facebook (FB), and Microsoft (MSFT) stocks, has also helped to restore confidence in Asian tech, soothing concerns surrounding Evergrande. In China, shares have also been rising in what’s reportedly been the country’s weakest period of economic growth in a year.

So have the dark clouds dispersed from Asia’s markets? And can investor interest in big tech help to steer a stock market recovery in what’s been a challenging year for the continent?

The plight of Evergrande has been one of the biggest stories in finance in 2021. Although plans to rescue the Chinese developer are in place, progress has been slow. This led the firm to the brink of default, risking a collapse that would shock China’s real estate industry, house prices, and economy on a domestic and international scale.

With total debts amounting to $305 billion, Evergrande’s floundering stocks have hindered China’s recovery from the financial impact of the COVID-19 pandemic.

However, the recent news that Evergrande has met its deadline to deliver a bond interest payment of $83.5 million has delivered a wave of optimism across Asian markets.

Sadly, the interest payment is unlikely to appease the long-term fears of investors, and although the $83.5 million payment has helped the company to avoid an official default, it’s widely recognized as only a short-term fix at this stage.

Evergrande will need to repeat the process all over again in the coming days with a second offshore bond payment worth $47.5 million. Given that the company’s total liabilities amount to around 2 percent of China’s GDP, the growing debts of Evergrande could lead to a significant economic collapse that’s felt heavily across Asia and the rest of the world alike.

“Evergrande making its interest payment is a positive surprise,” said Paul Lukaszewski, head of corporate debt at Abrdn. “Importantly other developers also confirmed making interest payments – for a market which has fully capitulated, the fact the world did not end overnight could itself be a positive catalyst.”

“Multiple financing channels are effectively closed to developers in response to the policies implemented by the government. For those channels to reopen, investors have to believe these companies can remain going concerns. This means they need to have sufficient access to their own cash flows and to refinancing options to address their debt as it becomes due,” Lukaszewski added.

Although all eyes will remain firmly on Evergrande as the firm seeks to navigate away from its deep crisis, optimism appears to be seeping back into Asian markets, and growth in tech stocks appears to be playing a key role in aiding an economic recovery.

Nasdaq has reported that Asian markets have been trading mostly higher in the wake of the Evergrande crisis, owing to Wall Street support from crude oil prices and technology stocks that have mirrored their peers on Nasdaq.

Big tech firms have played a key role in aiding global markets, and their respective impact on the market was shown as the NYSE FANG+ Index climbed to its fifth consecutive positive session recently – its longest streak since June. In all, the index has climbed some 11 percent from an early October low.

The index is comprised of 10 companies with U.S. and Asia representation included – and shares in the China-based companies Alibaba and Baidu have helped to push more growth. Alibaba and Baidu experienced 4.1 percent and 2.2 percent price rises, respectively, amidst the rally.

The growth of big tech may be bolstered by upcoming developments in emerging technology markets, which could help to mitigate the impact of Evergrande across Asian finance.

Maxim Manturov, head of investment research at Freedom Finance Europe, believes that developments in fintech can carry a positive impact on markets as major financial institutions seek to grow their digital services globally.

With the further growth of financial technology services intending to aid millions of customers, it’s fair to anticipate that the growing fintech market will play a key role in bringing optimism back to Asian markets.

Although there are many hurdles ahead, and investors are rightly looking out for news on the embattled Evergrande, big tech performance has helped to return some optimism back to Asian markets. Provided there are no high-profile defaults on the horizon, tech looks set to help Asia turn the corner on a difficult third quarter and to look with more enthusiasm to a brighter fourth quarter.

#### China’s economy driven by tech growth prevents great power war

Beckley & Brands 9/24/21 (MICHAEL BECKLEY is Associate Professor of Political Science at Tufts University and Jeane Kirkpatrick Visiting Fellow at the American Enterprise Institute. HAL BRANDS is Henry A. Kissinger Distinguished Professor of Global Affairs at the Johns Hopkins University School of Advanced International Studies and a Senior Fellow at the American Enterprise Institute. China Is a Declining Power—and That’s the Problem, https://foreignpolicy.com/2021/09/24/china-great-power-united-states/)

All of this is happening, moreover, as China confronts an increasingly hostile external environment. The combination of COVID-19, persistent human rights abuses, and aggressive policies have caused negative views of China to reach levels not seen since the Tiananmen Square massacre in 1989. Countries worried about Chinese competition have slapped thousands of new trade barriers on its goods since 2008. More than a dozen countries have dropped out of Xi’s Belt and Road Initiative while the United States wages a global campaign against key Chinese tech companies—notably, Huawei—and rich democracies across multiple continents throw up barriers to Beijing’s digital influence. The world is becoming less conducive to easy Chinese growth, and Xi’s regime increasingly faces the sort of strategic encirclement that once drove German and Japanese leaders to desperation.Case in point is U.S. policy. Over the past five years, two U.S. presidential administrations have committed the United States to a policy of “competition”—really, neo-containment—vis-à-vis China. U.S. defense strategy is now focused squarely on defeating Chinese aggression in the Western Pacific; Washington is using an array of trade and technological sanctions to check Beijing’s influence and limit its prospects for economic primacy. “Once imperial America considers you as their ‘enemy,’ you’re in big trouble,” one senior People’s Liberation Army officer warned. Indeed, the United States has also committed to orchestrating greater global resistance to Chinese power, a campaign that is starting to show results as more and more countries respond to the threat from Beijing. In maritime Asia, resistance to Chinese power is stiffening. Taiwan is boosting military spending and laying plans to turn itself into a strategic porcupine in the Western Pacific. Japan is carrying out its biggest military buildup since the end of the Cold War and has agreed to back the United States if China attacks Taiwan. The countries around the South China Sea, particularly Vietnam and Indonesia, are beefing up their air, naval, and coast guard forces to contest China’s expansive claims. Other countries are pushing back against Beijing’s assertiveness as well. Australia is expanding northern bases to accommodate U.S. ships and aircraft and building long-range conventional missiles and nuclear-powered attack submarines. India is massing forces on its border with China while sending warships through the South China Sea. The European Union has labeled Beijing a “systemic rival,” and Europe’s three greatest powers—France, Germany, and the United Kingdom—have dispatched naval task forces to the South China Sea and Indian Ocean. A variety of multilateral anti-China initiatives—the Quadrilateral Security Dialogue; supply chain alliances; the new so-called AUKUS alliance with Washington, London, and Canberra; and others—are in the works. The United States’ “multilateral club strategy,” hawkish and well-connected scholar Yan Xuetong acknowledged in July, is “isolating China” and hurting its development. No doubt, counter-China cooperation has remained imperfect. But the overall trend is clear: An array of actors is gradually joining forces to check Beijing’s power and put it in a strategic box. China, in other words, is not a forever-ascendant country. It is an already-strong, enormously ambitious, and deeply troubled power whose window of opportunity won’t stay open for long. In some ways, all of this is welcome news for Washington: A China that is slowing economically and facing growing global resistance will find it exceedingly difficult to displace the United States as the world’s leading power—so long as the United States doesn’t tear itself apart or otherwise give the game away. In other ways, however, the news is more troubling. History warns the world should expect a peaking China to act more boldly, even erratically, over the coming decade—to lunge for long-sought strategic prizes before its fortunes fade. What might this look like? We can make educated guesses based on what China is presently doing. Beijing is already redoubling its efforts to establish a 21st century sphere of economic influence by dominating critical technologies—such as artificial intelligence, quantum computing, and 5G telecommunications—and using the resulting leverage to bend states to its will. It will also race to perfect a “digital authoritarianism” that can protect an insecure Chinese Communist Party’s rule at home while bolstering Beijing’s diplomatic position by exporting that model to autocratic allies around the world. In military terms, the Chinese Communist Party may well become increasingly heavy-handed in securing long, vulnerable supply lines and protecting infrastructure projects in Central and Southwest Asia, Africa, and other regions, a role some hawks in the People’s Liberation Army are already eager to assume. Beijing could also become more assertive vis-à-vis Japan, the Philippines, and other countries that stand in the way of its claims to the South and East China Seas. Most troubling of all, China will be sorely tempted to use force to resolve the Taiwan question on its terms in the next decade before Washington and Taipei can finish retooling their militaries to offer a stronger defense. The People’s Liberation Army is already stepping up its military exercises’ intensity in the Taiwan Strait. Xi has repeatedly declared Beijing cannot wait forever for its “renegade province” to return to the fold. When the military balance temporarily shifts further toward China’s favor in the late 2020s and as the Pentagon is forced to retire aging ships and aircraft, China may never have a better chance of seizing Taiwan and dealing Washington a humiliating defeat. To be clear, China probably won’t undertake an all-out military rampage across Asia, as Japan did in the 1930s and early 1940s. But it will run greater risks and accept greater tensions as it tries to lock in key gains. Welcome to geopolitics in the age of a peaking China: a country that already has the ability to violently challenge the existing order and one that will probably run faster and push harder as it loses confidence that time is on its side. The United States, then, will face not one but two tasks in dealing with China in the 2020s. It will have to continue mobilizing for long-term competition while also moving quickly to deter aggression and blunt some of the more aggressive, near-term moves Beijing may make. In other words, buckle up. The United States has been rousing itself to deal with a rising China. It’s about to discover that a declining China may be even more dangerous.

## Regulate CP

#### The United States federal government increase regulations of standards of digital platform interoperability

#### Regulation solves without ‘antitrust.’

Dr. Howard Shelanski 18, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust and Deregulation”, The Yale Law Journal, Volume 127, Issue 7, 127 Yale L.J., May 2018, https://digitalcommons.law.yale.edu/ylj/vol127/iss7/5/

A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

## Case

### New Adv

#### Causes firms to piggy-back on other companies:

Bruce Hoffman, 10/26/2020 (Partner, Cleary Gottlieb Steen & Hamilton LLP, D. Bruce Hoffman’s practice focuses on antitrust enforcement, including merger clearance and conduct investigations, and antitrust and other complex commercial litigation.“Deep Dive Episode 141 – Interoperability and Data Sharing: An Antitrust Remedy in Search of a Market Problem?” <https://regproject.org/podcast/deep-dive-ep-141/>, Retrieved 8/4/2021)

So data portability — well, first of all, interoperability raises a lot of questions about, what are you doing to competitive incentives to interactions between competitors? Are you actually just [inaudible 04:27] a situation where firms are going to piggyback on more innovative or more successful firms, which in turn might suppress the incentives of the innovators to really work as a hard as they can to provide the best products or the most innovative products possible.

#### Losing the innovation warfare battle to China causes World War III

Jeanne Suchodolski et al. 20—Attorney with the United States Navy Office of General Counsel where she currently serves as Patent and Intellectual Property Counsel for the Naval Undersea Warfare Center Division Keyport; Suzanne Harrison, Founder of Percipience, LLC, a board-level advisory firm focused on intellectual property strategy, management, and quantifying and mitigating intellectual property risk; Bowman Heiden, co-director of the Center for Intellectual Property, visiting professor at University of California, Berkeley. ("Innovation Warfare," December 2020, from North Carolina Journal of Law and Technology, Volume 22, Issue 2, Article 4, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1416&context=ncjolt)

Innovation, in particular, technology-based innovation, is the key driver for both economic competitiveness and national security. Other nations, with interests adverse to the United States, recognize this fact. In an increasingly interconnected world, nation states seek to accumulate innovation prowess, and hence economic strength, as a key element of their geopolitical power. Especially savvy nation states also pursue such ends as a mechanism to influence or diminish the national security and geopolitical power of the United States. There is no need to inflict upon the world the carnage of war if one’s geopolitical aims can be achieved via alternative competitive means.

Several authors suggest China’s long-term ambitions include unseating the United States as the world’s economic and political leader.1 More compelling than opinions, several United States (“U.S.”) government and private studies document a systematic and coordinated effort by China to achieve technical and economic dominance through misappropriation of U.S. technology.2 These efforts are additionally supported by a companion effort to weaken international economic institutions and norms designed to protect U.S. intellectual property and free trade.3 The Chinese tactics include illegal means, and sophisticated use of legal means, to misappropriate U.S. technology and weaken the U.S. innovation infrastructure including: a) Leveraging the open university and laboratory ecosystem via direct sponsorship and engagement of Chinese nationals;4 b) Devaluing U.S. positions in patents and technology platforms;5 and c) Accessing private sector U.S. technology through acquisitions and ownership stakes in existing firms, funding of high-tech start-ups, and forced joint ventures and other contractual agreements as a prerequisite for entering the Chinese market.6

This particular form of competitive strategy targeting the innovation ecosystem in the United States is labeled by the Authors as “Innovation Warfare,”7 and it is defined as an executable competitive strategy: a) Reflecting an innovation, intellectual property, and technology strategy articulated and executed by the state (e.g. China); b) Using illegal means, political means, and legal economic activities—of the type previously residing solely in the province of commercial enterprise, to achieve the state’s objectives; c) Employing these economic and innovation activities to achieve both economic geopolitical power and to enhance military capabilities; and d) Functioning as a military, national security, and defense doctrine not solely as a reflection of the state’s economic policy goals nor commercial competition in the ordinary course.

Innovation Warfare does not just threaten American jobs and economic prosperity. By simultaneously co-opting and weakening the innovation capabilities of the United States, China seeks to advance its rise to world power. China’s prosecution of Innovation Warfare not only encompasses a rejection of a rules-based international order, but also poses an existential threat. A world where China dominates the technology landscape is not just about who earns the profits or prevails in an abstract geopolitical fight. According to the National Security Strategy of the United States of America (“National Security Strategy”), China pursues a world in which economies are less free, less fair, and less likely to respect human dignity and freedoms.8 China’s Innovation Warfare activities risk the type of economic and geopolitical aggressions that were a root cause of two World Wars.

#### Bio-d loss isn’t existential

Kareiva and Carranza, 18—Institute of the Environment and Sustainability, University of California, Los Angeles (Peter and Valerie, “Existential risk due to ecosystem collapse: Nature strikes back,” Futures, available online January 5, 2018, ScienceDirect, dml)

The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than 0.001% per year (Rockström et al., 2009). There is little evidence that this particular 0.001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook, Ellis, Perring, Mackay, & Blomqvist, 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia. While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species numbers decline locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al., 2013, 2017). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility of our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk.

#### No plankton impact

Andy May 18, 3-15-2018, "The phytoplankton decline, is there anything to it?," Watts Up With That?, https://wattsupwiththat.com/2018/03/15/the-phytoplankton-decline-is-there-anything-to-it/

I appreciate the hard work of all these researchers, but frankly after reading numerous papers, I don’t think they have any idea if total plankton is increasing or decreasing or staying the same. They are sampling a huge ocean with a metaphorical tea cup. According to Boyce, et al. a record of plankton abundance of as many as 40 years is required to separate long-term natural trends from short term fluctuations (Boyce, et al. 2014). Given that the Atlantic Multidecadal Oscillation is about 60 years, more time than that may be required. Further, current high quality in situ data is very sparse and Secchi disk data is problematic. Satellite data is available for less than 30 years and very much affected by weather conditions and a shallow depth of investigation. Satellite data cannot distinguish between vertical movements of the phytoplankton population and their overall abundance. To make matters worse, different researchers using the same satellite data find plankton both increasing and decreasing globally (Boyce, Lewis and Worm 2010). Satellite data may never be adequate for this purpose. In short, this is an interesting and important scientific question, but the data we have available today is clearly unable to answer it. Before I investigated this issue, I had seen Boyce, et al. 2010 cited in media reports many times. It is significant that I have not seen the rebuttals to their paper cited in media reports. Thus, a catastrophic decline in phytoplankton is reported, but extremely important, and valid, criticisms of the study are not worth mentioning? The media are a very poor source of information on science.

#### Quantum tech can’t be used to destroy strategic stability

Vincent Boulanin 18, Senior Researcher at SIPRI, 12-7-2018, "AI & Global Governance: AI and Nuclear Weapons," No Publication, https://cpr.unu.edu/ai-global-governance-ai-and-nuclear-weapons-promise-and-perils-of-ai-for-nuclear-stability.html

Early on, nuclear-armed states not only identified the appeal of AI for nuclear deterrence, they also saw its limitations. Given the dramatic consequences that a system failure would have, they were reluctant to hand over higher-order assessments and launch decisions to AI systems. A human had to remain ‘in the loop’. The Soviet Union is the only country that pursued the development of a fully-automated command and control systems for nuclear weapons. However, this system, known as the Dead Hand, was meant to be activated only in the exceptional case of a decapitating attack on the Soviet nuclear command and control. AI and nuclear warfare toolbox What might change with the current AI renaissance, which is seeing breakthroughs in the areas of machine learning and autonomous systems? Recent advances in AI could be leveraged in all aspects of the nuclear enterprise. Machine learning could boost the detection capabilities of extant early warning systems and improve the possibility for human analysts to do a cross-analysis of intelligence, surveillance, and reconnaissance (ISR) data. Machine learning could be used to enhance the protection of the command and control architecture against cyberattacks and improve the way resources, including human forces, are managed. Machine learning advances could boost the capabilities of non-nuclear means of deterrence: be it conventional (air defence systems), electronic (jamming) or cyber. Autonomous systems could be used to conduct remote sensing operations in areas that were previously hardly accessible for manned and remotely-controlled systems, such as in the deep sea. Autonomous unmanned systems such as aerial drones or unmanned underwater vehicles could also be seen by nuclear weapon states as an alternative to intercontinental ballistic missiles (ICBMs) as well as manned bomber and submarines for nuclear weapon delivery. These would be recoverable (unlike missiles and torpedoes) and could be deployed in ultra-long loitering periods – days, months or even years. At least one nuclear-armed state is already considering that possibility: In 2015, Russia revealed that it was pursuing the development of a nuclear-armed unmanned submarine, called Status-6. Game-changing technologies? Will the adoption of such systems fundamentally transform the field of nuclear strategy? The answer is no, at least not in the near-term, for three reasons. First, these technologies reinforce rather than fundamentally alter the existing application of AI in nuclear force-related systems. Second, the field of nuclear weapon technology is renowned for its conservativeness – it has been historically slow at integrating new technologies. The US military, for instance, allegedly still uses 8-inch floppy disks to coordinate nuclear force operations. In that regard, machine learning and autonomous systems have some critical technical limitations that would make a rapid adoption unlikely in the near future. Machine learning systems operate like black boxes, which makes them potentially unpredictable, while the reliability of advanced autonomous systems is also technically hard to establish. Nuclear-armed states would have to crack difficult testing issues associated with the design of these systems to be confident that they can be used in a predictable and reliable manner and be certified for use. Third, the technology is not at the stage where it would allow nuclear-armed states to credibly threaten the survivability of each other’s nuclear second-strike capability. Some experts have argued that a large-scale deployment of autonomous unmanned systems for remote sensing could make the continuous at-sea deterrence obsolete. In light of the current stage and development trajectory of AI technology and other key enabling technologies (such as sensor and power technology), this is bound to remain a very theoretical scenario for the foreseeable future.

### Middle Ware –

#### Markets fine with three rate hikes, but persistent inflation causes a quick correction

Cox 1-3 Jeff Cox -- finance editor for CNBC . He is co-author, with Peter Tanous, of the just-released book Debt, Deficits and the Demise of the American Economy (John Wiley & Sons). Jeff previously worked at CNNMoney as a writer and copy editor “Markets and the economy brace as the Federal Reserve’s first rate hike could come in two months” <https://www.cnbc.com/2022/01/03/markets-and-the-economy-brace-as-the-feds-first-hike-could-come-in-two-months.html?__source=google%7Ceditorspicks%7C&par=google>

Engineering a landing Whether the Fed can orchestrate an “orderly coming down” will determine how markets react to the rate hikes, said Mohamed El-Erian, chief economic advisor at Allianz and chair of Gramercy Fund Management. In that scenario, “the Fed gets it just right and demand eases a little bit and the supply side responds. That is sort of the Goldilocks adjustment,” he said Monday on CNBC’s “Squawk Box.” However, he said the **danger is that inflation persists and rises even more than the Fed anticipates, prompting a more aggressive response.** “The pain is already there, so they are having to play massive catch-up, and the question is at what point do they lose their nerve,” El-Erian added. Market veterans are watching bond yields, which are expected to indicate advanced clues about the Fed’s intentions. **Yields have stayed largely in check despite expectations for rate hikes**, but Paulsen said he expects to see a reaction that ultimately could take the benchmark 10-year Treasury to around 2% this year. At the same time, El-Erian said he expects the economy to do fairly well in 2022 even if the market hits some headwinds. Likewise, Paulsen said the **economy is strong enough to withstand rate hikes**, which will boost borrowing rates across a wide swath of consumer products. However, he said he figures a correction will come in the second half of the year as rate increases continue. But Lisa Shalett, chief investment officer at Morgan Stanley Wealth Management, said she thinks market turbulence would be more pronounced even as the economy grows. Markets are coming off a prolonged period of “a long decline in real interest rates, which allowed stocks to break free from economic fundamentals and their price/earnings multiples to expand,” Shalett said in a report for clients. “Now, the period of declining fed funds rates which began in early 2019 is ending, which should allow real rates to rise from historic negative lows. This shift is likely to unleash volatility and prompt changes in market leadership,” she added. Investors will get a closer look at the Fed’s thinking later this week, when minutes of the December FOMC meeting are released Wednesday. Of particular interest for the market will be discussions not only about the pace of rate hikes and the decision to taper asset purchases, but also when the central bank will start reducing its balance sheet. Even as the Fed intends to halt the purchases in the spring, it will continue to reinvest the proceeds of its current holdings, which will maintain the balance sheet around its current $8.8 trillion level. Citigroup economist Andrew Hollenhorst expects balance sheet reduction to start in the first quarter of 2023.

#### Plan causes a short term supply shock even if antitrust is efficient in the long-run

Thomas **Barrabi 12-28** – reporter, citing larry summers “Biden-backed antitrust crackdown could worsen inflation, Larry Summers warns” <https://nypost.com/2021/12/28/biden-backed-antitrust-crackdown-could-worsen-inflation/>

The Biden administration’s push to crack down on antitrust violations **could cause the ongoing inflation crisis to worsen** rather than improve, **economist Larry Summers warned** this week. Summers, the Treasury secretary during the Clinton administration, said proposed antitrust actions were “more likely to raise than lower prices.” President Biden has called for scrutiny of top meat industry firms and US oil companies, arguing that a lack of competition has contributed to artificially high consumer prices during the COVID-19 pandemic. “The emerging claim that antitrust can combat inflation reflects ‘science denial,’” Summers wrote on Twitter. “There are many areas like transitory inflation where serious economists differ. Antitrust as an anti-inflation strategy is not one of them.” US consumer prices surged 5.7 percent in November compared to the same month one year earlier, marking the fastest increase in four decades, according to Commerce Department data. An ongoing labor shortage and supply chain issues have contributed to the problem. Surging inflation has put pressure on American workers by effectively erasing wage gains and raising the cost of everyday goods. Biden has pushed back on critics who argue his pandemic-era economic policies are stoking inflation. In November, Biden asked the Federal Trade Commission to consider opening a probe into whether “illegal conduct” was contributing to higher gas prices. He has repeatedly called out meat providers over increased profits during the pandemic. Summers said he “strongly” supports the Biden administration’s push to ensure fair competition in business. However, the Harvard University economist asserted some measures, such as a Biden-backed **push to crack down** on prominent meatpacking firms, **would result in reduced supply and higher prices.** “**Monopoly may lead to high prices but there is no reason to expect it to lead to rising prices unless it is increasing**,” Summers added. “There is no basis whatsoever thinking that monopoly power has increased during the past year in which inflation has greatly accelerated.” Summers argued the labor shortage will be the “primary root” of inflation over time. He proposed a different approach to addressing the crisis, including a reduced emphasis on buying American-made products, lower tariffs and a cutback on regulatory delays. Summers has been a vocal critic of the Treasury’s handling of the current inflation surge. In October, Summers engaged in a war of words with Treasury Secretary Janet Yellen after she said he was “wrong” to claim the US faced a risk of runaway inflation without proper action. “I don’t think we’re about to lose control of inflation,” Yellen said at the time. “I agree, of course, we are going through a period of inflation that’s higher than Americans have seen in a long time, and it’s something that’s obviously a concern and worrying them, but we haven’t lost control.” Summers fired back, arguing there was “less than a 50/50 chance” that Yellen was correct in her assessment that inflation would soon return to target levels. Yellen long argued rising inflation was transitory in nature and would return to the 2% level the Federal Reserve deems acceptable by 2022. But she reversed course earlier this month, telling lawmakers she was “ready to retire the word transitory” given the rise of new COVID-19 variants.

#### Hard landing causes global debt crisis – especially emerging market

Lachman 12-13. Desmond Lachman. Senior fellow at the American Enterprise Institute. He was formerly a deputy director in the International Monetary Fund’s Policy Development and Review Department and the chief emerging market economic strategist at Salomon Smith Barney. “Will the Fed Be Caught Flat-Footed?” <https://www.barrons.com/articles/will-the-fed-be-caught-flat-footed-51639422248>

The principal U.S. economic policy challenge in the New Year will be to squeeze inflation out of the economy **without** precipitating **a** **hard economic landing**. This will be no easy task. Inflation will need to be tamed at the same time that asset-price and credit-market bubbles are to be found both at home and abroad. If there is to be any chance of success, Federal Reserve monetary-policy tightening will need to be fully supported by budget-policy restraint. Today, the U.S. economy is suffering from a twin good-and-services inflation and asset-price inflation problem of meaningful proportions. Headline consumer price inflation is now running at 6.8%, the fastest pace of increase in the past three decades. Inflation expectations are rising. At the same time, as a result of the Fed’s zero-interest rate policy and around $5 trillion in bond purchases over the past eighteen months in response to the pandemic, both U.S. and world asset price and credit markets are characterized by bubble-like conditions. U.S. equity valuations are now at nosebleed levels. The only time valuations have hit that level in the past 100 years was in the year 2000. U.S. housing prices are now above their pre-2006 housing-bust levels even in inflation-adjusted terms. Meanwhile, instances of credit-market excesses are to be found in the vast amounts of money that have been loaned at very low interest rates to highly leveraged companies and to emerging-market economies with dubious ability to repay. To be sure, the Federal Reserve acting alone could put an early end to inflation. It could do so in the time-honored way of raising interest rates by an amount sufficient to bring aggregate demand back in line with aggregate supply. This would seem to be especially the case since the Fed has been allowing interest rates to become increasingly negative in inflation-adjusted terms at a time that the economy has been receiving its largest peacetime budget stimulus on record. The big fly in the ointment with a Fed go-it-alone approach, however, is that **unduly raising interest rates would risk bursting asset-price bubbles both at home and abroad**. It would also risk precipitating an **emerging-market debt crisis** **that could add to world financial-market instability**. This is particularly the case considering that today’s asset-price and credit-market bubbles have been premised on the assumption that ultra-low interest rates will last forever. **It is also the case considering** the **highly** **compromised** **emerging-market economic fundamentals** in the wake of the pandemic

#### Middleware fails

Daphne Keller 21—director of the Program on Platform Regulation at Stanford University’s Cyber Policy Center. ("The Future of Platform Power: Making Middleware Work," from Journal of Democracy, Volume 32, Number 3, July 2021, pp. 168-172, https://muse-jhu-edu.ezp-prod1.hul.harvard.edu/article/797795/pdf)

Facebook deploys tens of thousands of people to moderate user content in dozens of languages. It relies on proprietary machine-learning and other automated tools, developed at enormous cost. We cannot expect comparable investment from a diverse ecosystem of middleware providers. And while most providers presumably will not handle as much content as Facebook does, they will still need to respond swiftly to novel and unpredictable material from unexpected sources. Unless middleware services can do this, the value they provide will be limited, as will users’ incentives to choose them over curation by the platforms themselves.

But not all content curators should need to do so much work. We want middleware providers to exercise unique judgment about what content is appropriate or what priority to give it on a page. This does not mean that they need to be doing redundant work figuring out basic information. When a risqué Brazilian pop song goes viral, not every provider should pay to get that song’s lyrics translated. Nor should every provider separately retain experts capable of explaining Kurdish-militant slang, the political significance of shirt colors in Thailand, or the meaning of Hawaiian shirts and A-OK hand gestures on the U.S. far right. In theory, that kind of information could be gathered once and then shared. Middleware providers could look up uniquely identifiable content in a database, review the information, and then use it to inform their own, independent judgments about how to rank, remove, or label that content. That is the theory. No one has yet built this database, and the reality is complicated, as always. The line between objective information and subjective judgments can be fuzzy. So it is hard to say what information properly would belong in the database, or how to structure the database in order to make it useful. And this celestial reference book could never approach completion. New content and cultural contexts are endlessly resupplied by internet users, making ongoing assessment and curation costs significant no matter what happens.

More troublingly, there is a risk that this model will end up spreading not just information, but major platforms’ assessments of content. This could reimpose the very speech monoculture from which middleware was supposed to save us. Many critics have raised this concern with regard to existing cross-platform coordination, such as the controversial database used by platforms to identify violent-extremist content. If we cannot afford real, diverse, and independent assessment, we will not realize the promise of middleware.

Similar projects—such as the well-intentioned Internet Content Rating Association (ICRA), which failed in the early 2000s—have foundered on moderation costs before. ICRA’s mission, like Fukuyama’s, was to move control over content away from centralized gatekeepers, out closer to the edges of the network. The plan was to do so in part using customized browser settings, and in part by letting users choose from an ecosystem of trusted third-party curators. A user might subscribe to a block-list from her church, preventing her browser from displaying certain websites. Or she might block most sexual content, but use an add-list from Planned Parenthood to preserve access to health information.

ICRA’s third-party curators never showed up. Assessing all that content was hard and thankless, even when the internet was much smaller. Of course, many things were different then—and, significantly, ICRA offered curators no way to make money. But its demise is a sobering reminder that curation costs matter.

#### Facebook rolling out virtual circuit breakers --- that solves

**Fisher 20** --- Christine Fisher, freelance writer based in Maine. She earned her bachelor’s in journalism at Temple University, “Facebook is reportedly testing a ‘virality circuit breaker’ to stop misinformation”, Aug 2020, Facebook is reportedly testing a ‘virality circuit breaker’ to stop misinformation

Facebook is reportedly piloting a new way to check viral posts for misinformation before they spread too far, The Interface reports. The method is a kind of “**virality circuit breaker”** that slows the spread of content before moderators have a chance to review it for misinformation.

In a recent report, the Center for American Progress (CAP) recommended virality circuit breakers, which **automatically stop algorithms** from amplifying posts when views and shares are skyrocketing. Theoretically, that gives content moderators time to review the posts. According to The Interface, Facebook says it’s piloting an approach that resembles a virality circuit breaker, **and** **it plans to roll it out soon.**

#### No U.S.-Russian war—they’ll never risk it

Ted Galen Carpenter 18, senior fellow in defense and foreign policy studies at the Cato Institute, 7-28-2018, "Russia Is Not the Soviet Union," National Interest, https://nationalinterest.org/feature/russia-not-soviet-union-27041?page=0%2C1)

The problem with citing such examples is that they applied to a different country: the Soviet Union. Too many Americans act as though there is no meaningful difference between that entity and Russia. Worse still, U.S. leaders have embraced the same kind of uncompromising, hostile policies that Washington pursued to contain Soviet power. It is a major blunder that has increasingly poisoned relations with Moscow since the demise of the Union of Soviet Socialist Republics (USSR) at the end of 1991. One obvious difference between the Soviet Union and Russia is that the Soviet governing elite embraced Marxism-Leninism and its objective of world revolution. Today’s Russia is not a messianic power. Its economic system is a rather mundane variety of corrupt crony capitalism, not rigid state socialism. The political system is a conservative autocracy with aspects of a rigged democracy, not a one-party dictatorship that brooks no dissent whatsoever. Russia is hardly a Western-style democracy, but neither is it a continuation of the Soviet Union’s horrifically brutal totalitarianism. Indeed, the country’s political and social philosophy is quite different from that of its predecessor. For example, the Orthodox Church had no meaningful influence during the Soviet era—something that was unsurprising, given communism’s official policy of atheism. But today, the Orthodox Church has a considerable influence in Putin’s Russia, especially on social issues. The bottom line is that Russia is a conventional, somewhat conservative, power, whereas the Soviet Union was a messianic, totalitarian power. That’s a rather large and significant difference, and U.S. policy needs to reflect that realization. An equally crucial difference is that the Soviet Union was a global power (and, for a time, arguably a superpower) with global ambitions and capabilities to match. It controlled an empire in Eastern Europe and cultivated allies and clients around the world, including in such far-flung places as Cuba, Vietnam, and Angola. The USSR also intensely contested the United States for influence in all of those areas. Conversely, Russia is merely a regional power with very limited extra-regional reach. The Kremlin’s ambitions are focused heavily on the near abroad, aimed at trying to block the eastward creep of the North Atlantic Treaty Organization (NATO) and the U.S.-led intrusion into Russia’s core security zone. The orientation seems far more defensive than offensive. It would be difficult for Russia to execute anything more than a very geographically limited expansionist agenda, even if it has one. The Soviet Union was the world’s number two economic power, second only to the United States. Russia has an economy roughly the size of Canada’s and is no longer ranked even in the global top ten . It also has only three-quarters of the Soviet Union’s territory (much of which is nearly-empty Siberia) and barely half the population of the old USSR. If that were not enough, that population is shrinking and is afflicted with an assortment of public health problems (especially rampant alcoholism). All of these factors should make it evident that Russia is not a credible rival, much less an existential threat, to the United States and its democratic system . Russia's power is a pale shadow of the Soviet Union's. The only undiminished source of clout is the country's sizeable nuclear arsenal. But while nuclear weapons are the ultimate deterrent, they are not very useful for power projection or warfighting, unless the political leadership wants to risk national suicide. And there is no evidence whatsoever that Putin and his oligarch backers are suicidal. Quite the contrary, they seem wedded to accumulating ever greater wealth and perks.

# 2NC

## States

#### Multistate rulemaking solves the aff---ther’s no certainty or patchwork deficit---this card is GOLD

Snow 18 (Aaron Snow is the Executive Director and a co-founder of 18F, the consultancy inside the U.S. Government's General Services Administration, an honors graduate of Harvard College and Columbia Law School, where he was Technology Editor for the Columbia Law Review, Multistate Rulemaking, 10-7, <https://web.law.columbia.edu/sites/default/files/microsites/career-services/Multistate%20Rulemaking.pdf>, y2k)

C. Defining Multistate Rulemaking

Suppose that, instead, a handful of attorneys general (and/or other UDAP-enforcing authorities) were to decide to settle the policy questions once and for all. They could pool their resources, agree upon a proposed rule, and, on the same day, begin their separate (but nearly identical) notice-and-comment proceedings. After the close of the last state’s comment period, they could share their gathered data, jointly consider changes to the proposed rule, and then, within days or weeks of each other, issue their (nearly identical) final rules. Such rules would be the result of “multistate rulemaking,” and their cumulative effect, as the next section will demonstrate, would be striking.

D. Advantages of Multistate Rulemaking

All of the benefits of rulemaking enumerated in Part III.B would be significantly magnified by multistate rulemaking. Consider, for instance, the enhanced clarity of laws interpreted through multistate rulemaking. Single state rulemaking establishes clear rules in each state, but there might be dozens of them, and they might all be different. Such variations might be trivial, but they might cause unreasonable headaches, not just for affected parties, who must keep track of and abide by all the different rules, but also for the attorneys general, who in a multistate litigation would lose some of the efficiency of acting in concert if required to prosecute under substantially different statutes. If, on the other hand, a single, nationally consistent rule were to apply to parties that do business in multiple states, that rule would be even more clear to the affected parties and even more persuasive and clear to every court. This is desirable ex ante, as it would probably prevent violations and litigation in the first place, and ex post, since if and when litigation were to commence, with the multistate rule in place, any attorney general’s office litigating or negotiating for settlement would begin from the much stronger position of having clear, explicit law on its side. The “two heads are better than one” benefit also recurs: Teamwork during the rulemaking process would likely enhance the overall quality of the final rules. (It is also worth noting that, even if an attorney general’s rule were not legally binding in court, that fact would be less irrelevant in the multistate context, since the very fact that multiple states’ consumer protection authorities engaged in coordinated rulemaking and agreed upon a single, optimized rule will itself carry substantial persuasive weight in any courtroom.) The notice-and-comment and efficiency advantages inherent in rulemaking would also be enhanced in the multistate rulemaking scenario. Rulemaking would be much more obvious, and more obviously worth paying attention to, if several states were coordinating their rulemaking efforts and synchronizing their release dates; interested parties would have not one but several opportunities to be heard; and states’ rulemaking proceedings would all be able to draw from a single pool of resources for rulemaking expertise, document generation, useful

comments, and so on.

#### Their deficit assumes fragmented actions, not the CP---it’s feasible

Snow 18 (Aaron Snow is the Executive Director and a co-founder of 18F, the consultancy inside the U.S. Government's General Services Administration, an honors graduate of Harvard College and Columbia Law School, where he was Technology Editor for the Columbia Law Review, Multistate Rulemaking, 10-7, <https://web.law.columbia.edu/sites/default/files/microsites/career-services/Multistate%20Rulemaking.pdf>, y2k)

A. Objections to UDAP Rulemaking Generally

Potential objectors to multistate rulemaking draw from several already-visited pools. On the rulemaking side of the question, Massachusetts Assistant Attorneys General Glenn Kaplan and Chris Barry Smith exhaustively enumerate and dismiss possible objections to general attorney general use of UDAP rulemaking authority in an article supporting the use of their state’s UDAP statute to establish gun safety regulations.24 Their arguments lose none of their merit when more than one state engages in rulemaking. In fact, some have even more merit in the multistate rulemaking context, where even more efficiencies are realized and more opportunities for notice and participation in the rulemaking processes are provided.

B. Feasibility

On the multistate side of the equation, there is first the practical question of logistics: How feasible is a multistate rulemaking? Empirical evidence from multistate litigations suggests this is not an obstacle: “When compared to litigation, the regulatory approach . . . is relatively streamlined, expeditious, and ultimately less resource intensive.”25 Surely a multistate approach to rulemaking, where the work consists merely of gathering and considering evidence in support of or against a proposed rule, is a simpler organizational problem than many of the vast, complex multistate litigations undertaken in recent years. As previously noted, the basic mechanisms already exist for coordination among state attorneys general, and recent experience shows that such coordination can be extended effectively to relevant state authorities other than attorneys general.26 And when the resource efficiencies (as previously enumerated) are there for the gaining, offices have an obvious, strong incentive to coordinate. It is true that states’ attorneys general might, in the end, legitimately disagree as to the proper content of final rules, and in the end, that content will be each attorney’s general to decide. But with strong incentives for attorneys general to find common ground, it seems unlikely that serious differences would result.

#### No patents preemption

**Gugliuzza 15** (Paul R. Gugliuzza, Associate Professor, Boston University School of Law, PATENT TROLLS AND PREEMPTION, 101 Va. L. Rev. 1579, y2k)

Drawing on principles of field preemption, one might suggest that **state** anti-troll **statutes** are **preempted** because they touch on a distinctly federal matter: the enforcement of **patents.** The Supreme Court has invoked a similar rationale to preempt, for example, state law tort claims based on fraud before the Food and Drug Administration and an Arizona law that attempted to regulate immigration. The Constitution certainly makes patents a matter of federal concern, and Congress has given the federal courts exclusive jurisdiction over suits arising under patent law. As noted, however, many different bodies of state law govern **patent rights** created by federal law and are **not** preempted, including **contract law,** **family law**, and **probate law**. In fact, the new statutes regulating patent enforcement are not the only statutes state legislatures have passed to specifically govern federal patent rights. **Numerous states** have statutes that regulate the ownership of patented inventions developed by employees. **None of those statutes**, to my knowledge, **have been struck down on preemption grounds**. Moreover, the field preemption argument is weakened by the fact that the federal Patent Act simply does not address the issue of unfair or deceptive patent enforcement - it neither condemns nor immunizes it. This **distinguishes** the new state patent enforcement statutes from state laws the Supreme Court has found preempted for touching on distinctly federal matters. The federal food and drug laws, for instance, contain "various provisions aimed at detecting, deterring, and punishing false statements made during … [the] approval processes," and the federal immigration laws address many of the issues that the Arizona statute sought to regulate, such as registration and employment requirements.

[\*1608] Also, federal courts may be **less willing** to find preemption as state patent enforcement laws continue to **proliferate** and state law enforcement officials take **an active regulatory role**. Indeed, the Supreme Court recently ruled that the federal courts' exclusive patent jurisdiction **does not** extend to **state law** claims alleging legal malpractice in the handling of a patent case, **opening the door for state courts to occasionally opine on the substance of federal patent law**. And even the Federal Circuit, which has generally shielded patent holders from state law liability for their enforcement activity, has **refused** to find field preemption of state law tort and **unfair competition claims** against patent holders.

#### Preemption arguments easily lose

**Johnson 15** (Cheryl Lee Johnson is the Editor-in-Chief of California Antitrust & Unfair Competition Law and a Deputy Attorney General in the California Attorney General's Office, Antitrust Section, CIPRO'S $ 400 MILLION PAY FOR DELAY: HOW CALIFORNIA LAW AND COURTS CAN MAKE A DIFFERENCE IN REVERSE PAYMENT CHALLENGES, 67 Rutgers U. L. Rev. 721, y2k)

C. **Patent Law** Does Not Preempt **State Antitrust Law** Claims Challenging Reverse Payments

Beyond arguments that federal antitrust law preempts state claims, pharmaceutical companies may also claim that **federal patent law** preempts any state law rulings as to reverse payment agreements. After the defendants in Cipro argued patent law preemption, the California Court of Appeal announced, in dicta, that properly pled sham litigation claims are preempted by federal patent law. The court identified no conflict with, or frustration of, patent law principles by such claims, but rather cited the fact that substantial issues of patent law might be involved.

But **preemption of a state law does not turn on the existence of substantial patent law issues**, as the Cipro court indicated in its dicta. Rather, preemption is a question of **congressional intent**, which may be express or implied where Congress intended to occupy an entire field, or where compliance with both state and federal law is impossible, or if state law poses an obstacle to congressional purposes.

Respect for California's independent sovereignty in the federal system is reflected by a strong presumption against preemption absent clear and manifest evidence that Congress intended to **supersede** those state laws. Laws such as the **Cartwright Act** and **the UCL** that embody California's **historic police powers** are subject to a "heightened **presumption against preemption by a federal law."** Moreover, this "strong presumption against displacement of state law … applies not only to the existence, but also to the extent, of **federal preemption**."

**Federal patent law** contains no express preemption of California antitrust laws and has coexisted with those laws for over 100 years, **demonstrating that Congress has not preempted the field**. Thus, any patent law preemption in a reverse payment case must be of the conflict or obstacle variety which occurs only where "simultaneous compliance with both state and federal directives is impossible" or, when "under the [\*740] circumstances of the case, [the challenged state claim] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Most of the preemption arguments raised in Cipro predated Actavis, and posited that patent law prevented federal or state law from restricting or outlawing reverse payment agreements. But Actavis made clear that **nothing** in the patentee's statutory rights, either expressly or implicitly, provided the patentee with a right to pay its rivals not to compete. Even if there were such a right, Actavis decided it would be incompatible with the more important public interest of eliminating unnecessary monopolies and payments for unwarranted patent grants.

[\*741] Because reverse payment agreements do not lie within the patent monopoly, there is no federal patent law right to enter into these agreements as a reverse payment lies "beyond the limits of the patent monopoly." Thus, when it comes to anticompetitive reverse payments, there is not a patent law policy that conflicts with federal or state regulation of the agreements. Nor is there any logical reason to conclude that state antitrust regulation presents any conflict with patent law not presented by federal antitrust scrutiny.

Thus, though defendants may raise the threshold issues of federal jurisdiction and preemption, those arguments are **easily surmounted**, clearing the way for **state law scrutiny** of reverse payments. Part III will discuss the policy justifications for state challenges to these agreements, along with the particular advantages, both procedural and substantive, that California law offers in challenging reverse payments.

#### The Supremacy Clause doesn’t bar state antitrust

**Lamb 1** (David W. Lamb, JD @ Vanderbilt Law, NOTE: Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce, 54 Vand. L. Rev. 1705, y2k)

A. The Supremacy Clause

Despite the appeal of **state antitrust laws** to potential plaintiffs, opposing litigants have continually questioned the **constitutionality** of such laws under the Supremacy Clause. In many cases, **they have lost**. Generally, the "supremacy" of federal law preempts state regulations only if (1) Congress states an intention to preempt state law in express terms ("express preemption"), (2) Congress enacts a scheme of regulation in a particular field that is [\*1719] "so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it" ("field preemption"), or (3) the state law "actually conflicts with a valid federal statute" ("conflict preemption"). Certainly Congress has not articulated a desire to fully preempt state antitrust laws. Moreover, as demonstrated above, the history and purpose behind the major federal antitrust provisions indicate an absence of Congressional intent to occupy the entire field of antitrust regulation to the exclusion of the states. Upholding the viability of state indirect purchaser laws in ARC America, the Supreme Court stated that "given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the states."

The most plausible challenges to state antitrust provisions involve claims of field or conflict preemption. In cases such as Exxon and ARC America, however, the Supreme Court has indicated its willingness to uphold state antitrust laws **even when they reach beyond the scope of analogous federal statutes**. In Exxon, for example, the appellate oil companies argued that, by imposing certain price restrictions, the Maryland statute at issue could potentially lead to "discrimination between customers who would otherwise receive the same price." The oil companies claimed this would violate the anti-price discrimination policy of the Robinson-Patman Act. Despite this potential "conflict," however, the Exxon [\*1720] Court refused to agree that Robinson-Patman preempted the Maryland statute. Instead, it upheld the statute as a legitimate expression of state authority. According to the Court:

It is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the State's power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption . . . and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar. Both reflect a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions.

In upholding the validity of state laws allowing claims by indirect purchasers--despite the precedent established by Illinois Brick--the ARC America Court maintained a similar position. Noting that state laws permitting indirect purchaser recovery are entirely consistent with the purpose of the federal antitrust laws, the Court reversed the opinion of the Court of Appeals that federal law preempted indirect purchaser statutes. "Ordinarily," the Court held, "state causes of action are **not pre-empted** solely because they impose liability **over** and **above** that authorized by federal law . . . and no clear purpose of Congress indicates that we should **decide otherwise** in this case."

The Court's stance in these cases is logically correct, for despite the **apparent "conflict**" between federal antitrust law and more aggressive state provisions, **the objectives** of both schemes are basically **the same**: protecting **fair trade** and **ensuring a competitive marketplace**. That legislatures in various states have in some instances elected to **surpass** the enforcement standards established [\*1721] by federal law should **not** be justification for preemption. Rather, the determining factor is whether there exists an "irreconcilable conflict between the federal and state regulatory regimes." Considering the mutually reinforcing nature of the state and federal antitrust schemes, it is unremarkable that courts have been "**extraordinarily reluctant**" to hold state antitrust laws **preempted** under notions of federal supremacy.

#### NAAG solves expertise and resources gap

**HLR 20** (Harvard Law Review, ANTITRUST FEDERALISM, PREEMPTION, AND JUDGE-MADE LAW, 6-10, 133 Harv. L. Rev. 2557, <https://harvardlawreview.org/wp-content/uploads/2020/05/2557-2578_Online.pdf>, y2k)

Finally, critics argue that state enforcers will make error-ridden antitrust choices due to a **lack of resources**, **experience**, and **expertise**. Whereas federal enforcers have significant budgets for antitrust enforcement, the percentage of funding set aside for antitrust enforcement by state attorneys general is minute.82 Because of this lack of resources, state enforcers have been accused of staffing antitrust cases with senior attorneys who, while experienced in civil litigation generally, are antitrust novices.83 These factors have led critics to argue that state attorneys general handle antitrust suits poorly, clogging the judicial pipeline with questionable suits.84 State attorneys general are accused of acting as free riders on federal actions and of making settlements more difficult rather than undertaking useful enforcement.85 **But** there is reason to **dispute** critics’ claims. The critique of **individual** **a**ttorneys **g**eneral ignores the states’ ability to **work in unison**. Cooperating through **NAAG**, states are able to **build on each other’s experiences** in antitrust enforcement.86 Thus, worries about **inexperienced** antitrust **divisions** working alone may be overstated. Although interstate coordination may weaken their point, critics can retort that most state actions are not coordinated: according to NAAG’s State Antitrust Litigation Database, only nineteen of the fifty-six civil antitrust actions brought by states between 2014 and 2019 were brought by multiple states working together,87 although many of the noncooperative suits regarded intrastate anticompetitive conduct.88 This same dataset, however, also undermines the critics’ argument that states act only as free riders: only nineteen of the fiftysix suits included federal participation.89 Finally, much of the criticism leveled at state attorneys general occurred before a **renaissance** in state law enforcement. Since Judge Posner derided the skill of state attorneys general in 2001, 90 **lawyers** and **judges**, including Chief Justice Roberts, have recognized a marked improvement in **state** attorney offices’ advocacy.91 Whether or not Judge Posner’s critiques were valid at the turn of the century, it is unclear that the landscape remains the same today. Finally, this critique undermines the arguments, noted earlier, that state law enforcement is overdeterring competition or creating a patchwork of antitrust law. If states are nothing but free riders, then we need not worry about overdeterrence.

#### This turns everything

Rosa **Brooks 14**. Law professor at Georgetown University and a senior fellow with the New America/Arizona State University Future of War Project. She served as a counselor to the U.S. defense undersecretary for policy from 2009 to 2011 and previously served as a senior advisor at the U.S. State Department. “Embrace the Chaos” Foreign Policy. 11-14-2014. <https://foreignpolicy.com/2014/11/14/embrace-the-chaos/>

The last century’s technological revolutions have made our world more globally interconnected than ever. Power (along with access to power) has become more democratized and diffuse in some ways, but more concentrated in other ways. For most individuals around the globe, day-to-day life is far less dangerous and brutal than in previous eras; for the species as a whole, however, the **risk of future global catastrophe has increased.** The continuously accelerating rate of technological and social change makes it increasingly **difficult to predict the geopolitical future.** Nothing is particularly original about these observations; they’re repeated in some fashion in every major national strategic document produced over the last decade. They probably teach this stuff to kindergarteners now. Indeed, we’ve heard it all so often that it’s tempting to dismiss such claims as meaningless platitudes: Been there; theorized that. Can we get please get back to foreign-policy business as usual? No, we can’t. Not if we want our children and grandchildren to live decent lives. If we care about the future at all, we need to do more than prattle on at cocktail parties about globalization, interconnectedness, complexity, danger, and uncertainty. We need to feel these seismic changes in our bones. So bear with me. Let’s try to breathe some life into the clichés. I’ve written about these issues before (here and here), and at risk of being both a narcissist and a broken record, I’ll quote myself: The world has grown more complex. Believe it. The world now contains more people living in more states than ever before, and we’re all more **interconnected**. A hundred years ago, the world population was about 1.8 billion, there were roughly 60 sovereign states in the world, the automobile was still a rarity, and there were no commercial passenger flights and no transcontinental telephone service. Fifty years ago, global population had climbed to more than 3 billion and there were 115 U.N. member states, but air travel was still for the wealthy and the personal computer still lay two decades in the future. Today? We’ve got 7 billion people living in 192 U.N. member states and a handful of other territories. These 7 billion people take 93,000 commercial flights a day from 9,000 airports, drive 1 billion cars, and carry 7 billion mobile phones around with them. In numerous ways, life has gotten substantially better in this more crowded and interconnected era. Seventy years ago, global war killed scores of millions, but interstate conflict has declined sharply since the end of World War II, and the creation of the United Nations ushered in a far more egalitarian and democratic form of **international governance** than existed in any previous era. Today, militarily powerful states are far less free than in the pre-U.N. era to use **overt force to accomplish their aims**, and the world now has numerous transnational courts and dispute-resolution bodies that collectively offer states a viable alternative to the use of force. The modern international order is no global utopia, but it sure beats colonial domination and world wars. In the 50 years that followed World War II, **medical** and **ag**ricultural advances brought unprecedented **health and prosperity** to most parts of the globe. More recently, the communications revolution has enabled exciting new forms of nongovernmental cross-border alliances to emerge, empowering, for instance, global human rights and environmental movements. In just the last two decades, the near-universal penetration of mobile phones has had a powerful leveling effect: All over the globe, people at every age and income level can use these tiny but powerful computers to learn foreign languages, solve complex mathematical problems, create and share videos, watch the news, move money around, or communicate with far-flung friends. All this has had a dark side, of course. As access to knowledge has been democratized, so too has access to the tools of violence and destruction, and greater global **interconnectedness** enables **disease, pollution, and conflict** to spread quickly and easily beyond borders. A hundred years ago, no single individual or nonstate actor could do more than cause localized mayhem; today, we have to worry about massive **bioengineered threats** created by tiny terrorist cells and **globally devastating cyberattacks** devised by malevolent teen hackers. Even as many forms of power have grown more democratized and diffuse, other forms of power have grown more concentrated. A very small number of states control and consume a disproportionate share of the world’s resources, and a very small number of individuals control most of the world’s wealth. (According to a 2014 Oxfam report, the 85 richest individuals on Earth are worth more than the globe’s 3.5 billion poorest people). Indeed, from a species-survival perspective, the world has grown vastly **more dangerous** over the last century. Individual humans live longer than ever before, but a small number of states now possess the **unprecedented ability to destroy** large chunks of the human **race and possibly the Earth** itself — all in a matter of days or even **hours**. What’s more, though the near-term threat of interstate nuclear conflict has greatly diminished since the end of the Cold War, nuclear material and know-how are now both less controlled and less controllable. Amid all these changes, our world has also grown far more uncertain. We possess more information than ever before and vastly greater processing power, but the accelerating pace of global change has far exceeded our collective ability to understand it, much less manage it. This makes it increasingly difficult to make predictions or calculate risks. As I’ve written previously: We literally have no points of comparison for understanding the scale and scope of the risks faced by humanity today. Compared to the long, slow sweep of human history, the events of the last century have taken place in the blink of an eye. This should … give us pause when we’re tempted to conclude that today’s trends are likely to continue. Rising life expectancy? That’s great, but if climate change has consequences as nasty as some predict, a century of rising life expectancy could turn out to be a mere blip on the charts. A steep decline in interstate conflicts? Fantastic, but less than 70 years of human history isn’t much to go on…. That’s why one can’t dismiss the risk of catastrophic events [such as disastrous climate change or nuclear conflict] as “high consequence, low probability.” How do we compute the probability of catastrophic events of a type that has never happened? Does 70 years without nuclear annihilation tell us that there’s a low probability of nuclear catastrophe — or just tell us that we haven’t had a nuclear catastrophe yet?… Lack of catastrophic change might signify a system in stable equilibrium, but sometimes — as with earthquakes — pressure may be building up over time, undetected…. Most analysts assumed the Soviet Union was stable — until it collapsed. Analysts predicted that Egypt’s Hosni Mubarak would retain his firm grip on power — until he was ousted. How much of what we currently file under “Stable” should be recategorized under “Hasn’t Collapsed Yet”? This, then, is the character of world messiness in this first quarter of the 21st century. So on to the next question: Where, in all this messiness, does the United States find itself? II. The United States in the Mess: Goodbye, Lake Wobegon? For Americans, the good news is that the United States remains an extraordinarily powerful nation. The United States has “the most powerful military in history,” Obama declared in a recent speech. Measured by sheer destructive capacity, he is surely right. The United States spends more on its military than China, Russia, Saudi Arabia, France, the United Kingdom, Germany, Japan, and India combined. The U.S. military can get to more places, faster, with more lethal and effective weapons, than any military on Earth. The United States also manages to gobble up a disproportionate share of the world’s wealth and resources. By the year 2000, wrote Betsy Taylor and Dave Tilford, the United States, with “less than 5 percent of the world’s population,” was using “one-third of the world’s paper, a quarter of the world’s oil, 23 percent of the coal, 27 percent of the aluminum, and 19 percent of the copper.” In 2010, Americans possessed 39 percent of the planet’s wealth. The bad news for Americans? U.S. power and global influence have been declining. In part, this is because various once-weak states have been growing stronger, and in part, it’s because no state can be as autonomous today as it might have been in the past. The United States’ geographical position long helped protect it from external interference, while its strong military and economy enabled it to dominate or control numerous less powerful states. But globalization has reduced every state’s autonomy, creating collective challenges — from climate change to the regulation of capital — that no state can fully address on its own. U.S. power and global influence have also declined in absolute terms, as America’s own political and economic health has been called into question. The United States now has greater income inequality than almost every other state in the developed world — and most states in the developing world. American life expectancy ranks well below that of other industrialized democracies, and the same is true for infant mortality and elementary school enrollment. Meanwhile, the United States has the world’s highest per capita incarceration rate, and on international health and quality-of-life metrics, the United States has been losing ground for several decades. This domestic decline jeopardizes the country’s continued ability to innovate and prosper; it also makes American values and the American political and economic systems less appealing to others. Worse, the political system that Americans rely on for reform and repair seems itself to be broken; the federal government shutdown in 2013 offered the world a striking illustration of U.S. political dysfunction. Add to this the divisive national security policies of George W. Bush’s administration — many of which were continued or expanded by the Obama administration — and it’s no surprise that the United States has recently become less admired and less emulated around the globe, reducing American “soft power.” No matter how you slice it, it comes to the same thing: Compared with 30 years ago, the United States today has a greatly reduced ability to control its own destiny or the destiny of other states. The United States still has unprecedented power to destroy (Saddam Hussein and Osama bin Laden both discovered this, to their detriment). But the country’s capacity for destruction is not equaled by its capacity to shape the behavior of other states or their populations, and the United States has less and less ability to insulate itself from the world’s woes. Unfortunately, American political leaders share a bipartisan inclination to deny these realities. Mostly, they succumb to the Lake Wobegon effect: “Declinism” and “declinist” have entered the American political vocabulary, but only as purely pejorative terms. This is both stupid and dangerous. How can we adapt our global strategy to compensate for the ways in which U.S. power has been declining if we refuse to admit that decline? Continued U.S. decline is certainly not inevitable, and some argue that the United States is in fact poised for an economic and political resurgence. There is no way to know for sure — but it’s worth recalling that, historically, every significant empire has eventually declined. Are we prepared to bet that the United States will prove an exception? There is also no way to know for sure what form continued or eventual U.S. decline will take. We don’t know whether it will be fast or slow; we don’t know whether the American Empire is in for a hard landing or a soft one. Will the United States crash, like the former Soviet Union? Or will a slow decline in power leave the country an intact and influential nation, like the United Kingdom? Will America’s future be more like Canada’s present, or more like Brazil’s? III. Behind the Veil of Ignorance: Uncertainty as Lodestone We don’t know what America’s future will look like, and we can make fewer and fewer geopolitical predictions with confidence. The world has changed too much and too fast for us to accurately assess the probabilities of many types of future events. Perhaps this is why it’s so tempting for Americans to stay in Lake Wobegon, with eyes closed and fingers crossed. Uncertainty is frightening. But paradoxically, this very uncertainty should be a lodestone, pointing realists and idealists alike toward a sensible, forward-looking global strategy. In fact, radical uncertainty can be a powerful tool for strategic planning. That may seem oxymoronic, but consider one of the 20th century’s most influential thought experiments: In his 1971 book, A Theory of Justice, philosopher John Rawls famously sought to use a hypothetical situation involving extreme uncertainty to derive optimal principles of justice. Imagine, said Rawls, rational, free, and equal humans seeking to devise a set of principles to undergird the structure of human society. Imagine further that they must reason from behind what Rawls dubbed a “veil of ignorance,” which hides from them their own future status or attributes. Behind the veil of ignorance, wrote Rawls, people still possess general knowledge of economics, science, and so forth, and they can draw on this knowledge to assist them in designing a future society. Their ignorance is limited to their own future role in the society they are designing: “no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.” If we were collectively designing social structures and rules, but could not know our own individual future positions in that social structure, what structures and rules would we come up with? Applying a version of decision theory, Rawls concluded that in the face of such radical uncertainty, rational, free, and equal beings behind the veil of ignorance would be drawn toward a “maximin” (or “minimax“) rule of decision, in which they would seek to minimize their losses in a worst-case scenario. Since those behind the veil of ignorance don’t know whether they’ll be among the haves or among the have-nots in the society they are designing, they should seek to build a society in which they each will be least badly off — even the luck of the draw leads them to start with the fewest advantages. Rawls posited that such a rule of decision should lead those behind the veil of ignorance to support two core principles: the first relating to liberty (“each person [should] have an equal right to the most extensive basic liberty compatible with a similar liberty for others”), and the second relating to social and economic goods. (Social goods should be distributed equally, unless an unequal distribution would serve the common good and be “to the greatest benefit of the least advantaged,” while “offices and positions [should remain] open to all under conditions of fair equality of opportunity.”) This is in some ways intuitive: On a national level, it is the reason Americans across the political spectrum continue to express substantial support for the maintenance of unemployment benefits, Social Security, Medicare and Medicaid, and so on. Any one of us might someday face a job loss or illness; nearly all of us will eventually face old age. We know we might someday need those benefits ourselves. In the face of uncertainty about the future, we all recognize the value of insurance, savings, and at least some minimal social safety net. In the international arena, the same is true. This has obvious implications for global strategy. Empires, like individuals, can sink into poverty, illness, or simple old age — and in an era of uncertainty, empires, like individuals, would do well to hedge against the possibility of future misfortune. Indeed, two decades after the publication of A Theory of Justice, Rawls sought to apply a form of this thought experiment to derive the core principles that he believed would characterize a just global order. His arguments are complex, and I can’t do justice to them here — but fortunately, unlike Rawls, I am not interested in coming up with abstract principles of global justice. My less lofty agenda is limited to arguing that a crude version of Rawls’s thought experiment can help us delineate the contours of a sensible U.S. global strategy — a “maximin” strategy that is well-suited to protecting the interests of the United States and its people, both in today’s messy world and in a wide range of future messes. Here’s my thought experiment. Imagine a crude version of Rawls’s veil of ignorance, with only the United States behind it. This veil of ignorance doesn’t require us to disavow what we know of history (America’s or the world’s), nor does it require us to disavow what we know of recent trends, present global realities, U.S. values, or our current conception of the good. It only hides our future from us: Behind this veil of ignorance, we don’t know whether energy, food, water, and other vital resources will be scarcer or more plentiful in the decades to come; we don’t know whether global power will be more or less centralized; we don’t know whether new technologies and new forms of social organization will make existing technologies and institutions obsolete. Most of all, we don’t know whether, in the decades to come, the United States will be rich or poor, weak or strong, respected or hated. For that matter, we don’t know whether the United States — or even the form of political organization we call the nation-state — will exist at all a century or two from now. In the face of such radical uncertainty, what kind of grand strategy should a rational United States adopt? Of course, this shouldn’t really be called a “thought experiment” at all: The United States already operates behind a veil of ignorance, if we could only bring ourselves to admit it. We know the past; we have a reasonable understanding of recent trends; we know that the world is messy and dangerous; we know that the potential for rapid and potentially catastrophic change is real; and we know that our ability to predict future changes and quantify various risks is profoundly limited. This knowledge is profoundly unsettling. Thus, we try our best to know and not know, at the same time: We speak glibly of complexity, accelerating change, danger, and uncertainty, but then fall back into the comfortable assumption that continued U.S. global dominance is a given and that catastrophic change is unlikely to occur. As long as we remain willfully ignorant of the veil of ignorance that hangs over us, we can avoid asking hard questions and making harder choices. But this is shortsighted and dangerous. Empires that refuse to accept reality tend to rapidly decline. A clear-eyed acceptance of uncertainty and risk is the surest route to a more secure future. Instead of blinding us or paralyzing us, the uncertainty of our future should motivate us to engage in more responsible strategic planning. If the **U**nited **S**tates can manage to be as rational as Rawls’s hypothetical decision-makers, it should adopt a similar maximin rule of decision: It should **prefer international rules** and institutions that will maximize America’s odds of thriving, even in a worst-case future scenario. In fact, we should wish for international rules and institutions that will be kindest to the individuals living in what is now the United States and their descendants, even if the United States should someday cease to exist entirely. Could happen, folks. Look around you. Do you see the Roman Empire, or the Aztec Empire, or the Ottoman Empire?Look around you. Do you see the Roman Empire, or the Aztec Empire, or the Ottoman Empire? IV. From Messiness to Strategy: A Preliminary Sketch This has urgent implications for U.S. strategic planning. Precisely because U.S. global power may very well continue to decline, the United States should **use** the very considerable military, political, cultural, and economic power it still has to **foster the international order** most likely to benefit the country if it someday loses that power. The ultimate objective of U.S. grand strategy should be the creation of an equitable and peaceful international order with an effective system of **global governance** — one that is built upon respect for human dignity, **h**uman **r**ights, and the rule of law, with robust mechanisms for **resolving thorny collective problems.** We should seek this not because it’s the “morally right” thing for the United States to do, but because a maximin decision rule should lead us to conclude that this will offer the United States and its population the best chance of continuing to thrive, even in the event of a radical future decline in U.S. wealth and power. But, one might argue, the United States already tries to promote such a global order — right? Sure it does — but only inconsistently, and generally as something of an afterthought. We p

our money into our military and intelligence communities, but starve our diplomats and development agencies. We fixate on the threat du jour, often exaggerating it and allowing it to distort our foreign policy in self-destructive ways (cf. Iraq War), while viewing matters such as United Nations reform or reform of global economic institutions or environmental protection rules as tedious and of low priority. If we take seriously the many potential dangers lurking in the unknowable future, however, fostering a stronger, fairer, and more effective **system of international governance** would become a matter of urgent national self-interest and our highest strategic priority — something that should be reflected both in our policies and in our budgetary decisions. An effective **global governance** system would need to be built upon the recognition that states remain the primary mode of political and social organization in the international sphere, but also upon the recognition that new forms of social organization continue to evolve and may ultimately displace at least some states. An effective and dynamic international system will need to develop innovative ways to bring such new actors and organizations within the **ambit of i**nternational **law** and institutions, both as responsible creators of law and institutions and as responsible subjects.

#### Specifically, failure to regulate tech causes extinction

Milan M. **Cirkovic 8**. Professor of Physics, University of Novi Sad; Senior Research Associate, Astronomical Observatory of Belgrade; PhD; Fellow, Institute for Ethics and Emerging Technologies. “How Can We Reduce the Risk of Human Extinction?” Institute for Ethics and Emerging Technologies. September. <http://ieet.org/index.php/IEET/print/2606>

The risks from anthropogenic hazards appear at present larger than those from natural ones. Although great progress has been made in reducing the number of nuclear weapons in the world, humanity is still threatened by the possibility of a global thermonuclear war and a resulting nuclear winter. We may face even **greater risks** from emerging **tech**nologies. **Advances** in synthetic biology might make it possible to engineer pathogens capable of **extinction-level** pandemics. The knowledge, equipment, and materials needed to engineer pathogens are **more accessible than** those needed to build **nuclear weapons**. And unlike other weapons, pathogens are **self-replicating**, allowing a small arsenal to become exponentially destructive. Pathogens have been implicated in the extinctions of many wild species. Although most pandemics “fade out” by reducing the density of susceptible populations, pathogens with wide host ranges in multiple species can reach even isolated individuals. The intentional or unintentional release of engineered pathogens with high transmissibility, latency, and lethality might be capable of causing human **extinction**. While such an event seems unlikely today, the likelihood may increase as biotechnologies continue to improve at a rate rivaling Moore’s Law. Farther out in time are technologies that remain theoretical but might be developed this century. Molecular **nanotech**nology could allow the creation of self-replicating machines capable of **destroying the ecosystem**. And advances in neuroscience and computation might enable improvements in cognition that accelerate the invention of new weapons. A survey at the Oxford conference found that concerns about human extinction were dominated by fears that new technologies would be misused. These emerging threats are especially challenging as they could become dangerous more quickly than past technologies, outpacing society’s ability to control them. As H.G. Wells noted, “Human history becomes more and more a race between education and catastrophe.” Such remote risks may seem academic in a world plagued by immediate problems, such as global poverty, HIV, and climate change. But as intimidating as these problems are, they do not threaten human existence. In discussing the risk of nuclear winter, Carl Sagan emphasized the astronomical toll of human extinction: A nuclear war imperils all of our descendants, for as long as there will be humans. Even if the population remains static, with an average lifetime of the order of 100 years, over a typical time period for the biological evolution of a successful species (roughly ten million years), we are talking about some **500 trillion people yet to come**. By this criterion, the stakes are **one million times greater** for extinction **than for** the more modest **nuclear wars** that kill “**only**” hundreds of **millions** of people. There are many other possible measures of the potential loss—including culture and science, the evolutionary history of the planet, and the significance of the lives of all of our ancestors who contributed to the future of their descendants. Extinction is the undoing of the human enterprise. There is a discontinuity between risks that threaten 10 percent or even 99 percent of humanity and those that threaten 100 percent. For disasters killing less than all humanity, there is a good chance that the species could recover. If we value future human generations, then reducing extinction risks should dominate our considerations. Fortunately, most measures to reduce these risks also improve global security against a range of lesser catastrophes, and thus deserve support regardless of how much one worries about extinction.

#### Perm forces a lockstep approach---undercuts state autonomy

**Logan 14** (Wayne A. Logan, Professor of Law, Florida State University College of Law, A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights, 90 Notre Dame L. Rev. 235 (2014), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4572&context=ndlr>, y2k)

It has also been suggested that **state courts** simply defer to lower **federal court wisdom,**195 including that they follow federal positions in “**lockstep” fashion**, much as they often do in interpreting their own constitutions.196 Such proposals, while ensuring uniformity, are deeply **problematic** because they again **undercut state autonomy** and ignore the instrumental benefits surveyed above.197 They also risk **lock-in** of unfounded or unwise positions adopted by a majority (or consensus) of lower federal courts,198 which could reflect nothing more than a bandwagon effect being at work,199 and would have **the practical effect** of **precluding state courts** from adopting **minority positions** that ultimately get adopted by the Court, such as occurred in Florida v. Jardines, Georgia v. Randolph, and Arizona v. Gant. 200

#### The lock-step approach undermines motives for state judges to innovate

**O’Neill 14** (Timothy P. O’Neill, Professor, The John Marshall Law School, ARTICLE: ESCAPE FROM FREEDOM: WHY "LIMITED LOCKSTEP" BETRAYS OUR SYSTEM OF FEDERALISM, 48 J. Marshall L. Rev. 325, 325-334, y2k)

[\*325] This Symposium celebrates the significance of the Illinois Constitution. Yet the Illinois Supreme Court has ironically chosen to make the Illinois Constitution completely insignificant in several areas of constitutional law. It has accomplished this through "**the limited lockstep doctrine**." This approach is used to interpret cognate provisions of the U.S. and Illinois Constitutions. The Illinois Supreme Court describes the doctrine in this way: [W]hen the **language** of the provisions within our state and federal constitutions is nearly **identical**, departure from the United States Supreme Court's construction of the provision will generally be warranted only if we find 'in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.' The Illinois Supreme Court has applied this to a number of state constitutional provisions. Two excellent new articles by James K. Leven and the [\*326] Honorable John Christopher Anderson critique "limited lockstep" from multiple angles. This Essay, however, approaches the subject from only one relatively narrow perspective: what makes this odd doctrine so attractive to the Illinois Supreme Court? In answering this question, it contends that the use of lockstep flouts basic principles central to the effective running of the federal system. **Limited lockstep** can be characterized as a type of **legal formalism**. Richard Posner, in his recent book Reflections on Judging, notes that "[t]he **character** of legal formalism can be **captured** in such slogans as **'the law made me do it.'"** The legal formalist sees law as largely a "compendium of texts"--e.g., statutes, constitutions, regulations--and rules. The text and rules drive the answer--and there is only one right answer. The rule-driven legal formalist judge can effectively disown personal responsibility for a legal decision. According to Posner, formalism's appeal lies in the fact that judges "usually are happy to **hand off** responsibility for deciding to **another adjudicator**." Formalism's somber invocation of "higher-level rules" masks an approach in which judges can defer to decisions already made by lower-court judges, juries, legislatures, and administrative agencies. With **limited lockstep**, the decision comes **ready-made from the U.S. Supreme Court**. Using lockstep requires **no thinking** from **state court judges**. This has a **deleterious** effect. Because the formalist judge "**minimizes the occasions** on which he has to base a decision on his own notions of a sensible resolution of the case," his ability to **consider** the consequences of his decisions **atrophies**. In Posner's words, **"[j]udges' belief that they don't make law dulls their critical faculties."**

#### Federalization hurts state court innovation

**Zambrano 19** (Diego A. Zambrano, Assistant Professor of Law, Stanford Law School, Federal Expansion and the Decay of State Courts, 86 U. Chi. L. Rev. 2101, y2k)

C. State Courts May Lose the Ability to Shape State Law

**Federal monopolization** of state claims also removes the ability of **state courts** to shape the **common law.** As Professors Sam Issacharoff and Catherine Sharkey worried a decade ago, because the **largest** cases are often litigated in **federal court**--including state-law claims under diversity or supplemental jurisdiction--state courts may no longer have the **docket mix** that allows them to **innovate on cutting-edge areas**. This corrodes the **common law**-making power of elected state judges, prosecutors, and attorneys general, with **harmful consequences**.

One of the most important tasks of a common law court is to generate **precedent**. The resolution of active cases allows stakeholders to **predict** the behavior of **future courts**, and allows market actors to structure their primary behavior in accordance with [\*2177] judicial rulings. Almost every model of how courts operate views the generation of precedent as a fundamental output that can increase social welfare. In a properly working common law system, the generation of precedent must be continuous because societal changes require new legal rules and regimes that can guide market actors. **New technologies**, **tax regulations** or **corporate organizational methods**, for example, have to be integrated into **old** common law **frameworks**, **regulatory regimes**, or **statutory claims**. A properly working common law system requires legislators and common law courts that together **successfully** shape the law.

Given the inherent value of precedent, scholars have long argued that any process that weakens the power of courts to continuously generate precedent might be harmful to the common law and social welfare. Professor Owen Fiss warned in 1984 that the systematic growth of settlements--in lieu of adjudication--could deprive courts of the power to "explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them." More recently, Professor Myriam Gilles has argued that arbitration precludes common law development because it is confidential and nonprecedential--"Put simply: law cannot grow in the darkness with which arbitration shrouds its activities, and when law ceases to grow, it stagnates and eventually ceases to be (or be relevant)." The logic is simple: a process like settlements or arbitration can deprive courts of the necessary raw material to develop, explicate, update, and improve the common law. When that happens, we may worry that "the common law . . . cease[s] to be a living organism."

It is entirely possible that the emigration of large cases from state to federal court may stunt state common law. Like settlements and arbitration, the removal of state cases to federal court [\*2178] "**deprives**" state judiciaries of the power to "explicate and give force to the values embodied" in their statutes and law. Under **Erie**, federal courts must apply state law in diversity cases. **But** their rulings are not precedential for state courts; **they are inert**. This was not an important concern before 1980, when federal courts had a relatively small diversity and supplemental jurisdiction docket. But in the third era of judicial federalism, this may become a problem. Federal courts are now **monopolizing** the largest and most complex cases. And it is specifically those cases--large class actions, complex litigation, and monetarily significant claims--that are most likely to involve sophisticated litigants with innovative arguments, appeals, and creative legal strategies. These are the cases that shape the common law.

Because state courts still retain seventeen million civil cases, a stunted common law may not be a systemic issue--we may only observe it in areas that produce few cases that tend to end up in federal court. According to a study of state-court dockets, 61 percent of cases involve contract law questions (mostly debt collection, landlord/tenant, and foreclosures) while only 6 percent involve torts (mostly automobile accidents) and 2 percent real property. Most of the seventeen million cases, however, are dismissed (35 percent) or end in settlement (10 percent) while only 4 percent are adjudicated on the merits and 1 percent in summary judgment. If federal courts are taking over cases in this narrow band of adjudicated cases, **they could have a significant effect on the common law.**

Moreover, federal expansion's effect may be particularly observable in certain narrow yet cutting-edge areas of the common law. For example, the Fifth Circuit recently noted in the context of a smartphone products liability case against Apple that "where defendants operate nationwide in highly consolidated industries, like Apple in the smartphone industry, the rules governing federal courts in diversity cases may substantially close state courts to novel claims. . . . The result may be a legal system less generative than normal." Similarly, a study by Professors Sam Issacharoff and Florencia Marotta-Wugler--that emerged as part [\*2179] of broader work for the American Law Institute's draft restatement of consumer contracts--recently found that in a sector of electronic consumer contracts post-CAFA, "there is virtually no contract case law at the state level, and [] the driving doctrinal work is being done at the federal appellate level." The authors conclude: "[T]he consequence of the dominance of the federal forum is that the common law is being elaborated in federal court in suits arising under diversity jurisdiction. In turn, those federal courts are largely bereft of any state law moorings," leading to a **hollowing out of the common law**. These smartphone products-liability and electronic consumer-contract cases are precisely the kind of cases in which we may observe a stagnating common law. And this does not even account for the millions of cases that have been privatized through arbitration.

We should care about these **narrow**, **cutting-edge areas** of law because they are the ones that benefit the most from **cross-pollination** by both state and federal courts and a competition between **legal innovations**. State courts and judges have thrived in the past exactly at times of **technological transformation**. It was an unprecedented automobile liability case in 1916, for example, that put Justice Benjamin Cardozo, then Judge on the New York Court of Appeals, "on the map." Similar changes in the context of mass-torts cases and products liability have required multiple state and federal approaches--often benefitting from diverse treatment and an exchange of legal innovations by different courts. A federalized common law, by contrast, shifts common-law development from fifty separate state courts to a few federal district and circuit courts. While this may promote uniformity, it diminishes cross-pollination and innovation, potentially harming the quality of the common law.

Losing innovative common-law cases even in narrow areas also has the potential to harm the stature of state courts in front of their own legislatures and legal communities. Traditionally, commentators have worried that federal " Erie guesses" of state [\*2180] law can be inaccurate and place state law in the hands of nonexpert federal judges. But those concerns are antiquated and overly formalistic--there's no reason to think federal judges decide state law issues in an unfair way, nor that they are so inaccurate as to verge on arbitrariness. A more serious concern is that federal expansion over state law may weaken incentives for the government and private actors to invest in state judiciaries. The issue, in other words, is one of state-court stature, credibility, funding, and legitimacy. If state judges lose the ability to innovate on cutting edge areas of state law, that can affect their ability to attract **high caliber judges** and **budgets**. Historically, state courts have burnished their reputation by creating or updating the common law to address **unforeseen disasters**. From **railroad** and **automobile liability**, to **mass torts** and **consumer rights**, state courts have justified their role as an integral part of a state's democratic polity through common law-making. **Federal expansion places this role at risk**. State legislators may not invest in state courts that do not enjoy the admiration of the local bar and cannot even successfully address current issues. Unlike the vibrancy that exists in Delaware--where courts are seen as an integral part of a larger and highly profitable "brand"--the typical state judiciary may not be able to maintain the requisite stature within their own government, leading to a loss of financial support.

#### Improved state autonomy benefits all cases, not just antitrust

**Zambrano 19** (Diego A. Zambrano, Assistant Professor of Law, Stanford Law School, Federal Expansion and the Decay of State Courts, 86 U. Chi. L. Rev. 2101, y2k)

To the extent that **businesses** do in fact lobby for **better judicial services**, **speedier dockets**, and **better-prepared judges**, they improve **social welfare** for **everybody else** who uses the courts. One of the crucial elements in this logic is that the judiciary is a **nonexcludable public good**. Outside of specialized courts, most state-court judges are **generalists**. When a state court hires a faster, more competent state judge, that can benefit **any member of the public** who uses that court, including criminal **defendants**, **consumers**, and **employees**. That is why empirical measures of judicial quality often focus on a judge's "productivity" and efficient caseload management without differentiating among different substantive areas. And that is also why a long line of distinguished judges, from Justice Oliver Wendell Holmes Jr to Judge Richard Posner and Judge Diane Wood, have defended the value of generalist judges who can "enrich one field with insights from another." Judge Wood has argued that "judges [] are specialists in 'judging,'" and Justice Holmes claimed that all legal cases required the same skill, from "railroad business" to "an admiralty case [] mining law and so on." Indeed, the public choice literature has cast doubt on the idea of "court capture" precisely because it would be highly inefficient to invest resources in an attempt to capture a generalist judge (who may or may not rule over a particular party's legal wrangle).

[\*2172] The next step in the logic here is that once businesses gain the power to opt out of state courts, they may lose any **incentive** to lobby for a more efficient state judiciary but retain an incentive to lobby for bias. Instead of devoting resources to lobby or improve state courts, businesses should reallocate those expenditures toward federal courts. **Lobbying funds** are **zero sum**---as more go to the **federal government** or **federal judicial events**, **fewer dollars** can be devoted to **state politicians**. Of course, businesses cannot **fully** opt out of state court--they must still deal with thousands of state cases. **But** if the **nature** of those cases has **shifted** from a mix of individual lawsuits against businesses and business-to-business litigation to mostly consumer and personal injury-type cases or even just smaller stakes cases, then even if businesses are investing in the state courts, their incentives have **chang**ed. This is especially so **if the largest cases are now in federal court**, like the trades secret litigation discussed above. The larger the stakes, the greater the incentive to invest in shaping federal law and procedure. Moreover, efficiency may no longer be a goal if a party is overwhelmingly a defendant and almost never a plaintiff; in fact, it might be the reverse. It may become less important to invest in support personnel and facilities for the courts, and, instead, businesses would have an increased incentive to lobby for probusiness judges.

## FTC

### 2NC – AT: A/O

#### API interoperability key to medical innovation – solves COVID response surge capacity and device innovation.

MTE, MedTech Europe is the European trade association for the medical technology industry, 10-06-21 “Interoperability standards in digital health” https://www.cocir.org/fileadmin/Publications\_2021/2021-10\_COCIR\_-\_MTE\_Interoperability\_standards\_in\_digital\_health.pdf

Lack of interoperability is a critical barrier to the digital transformation of healthcare. There is broad agreement that digitalisation in the healthcare sector has enormous potential if data is freed from its silos and data flows, data sharing, and advanced use of data are enabled. Some tangible examples of this potential include: • Ready-to-use patient-centric information can enable advanced clinical decision support in diagnostics and treatment. • Care coordination can greatly benefit from sharing data in uniform formats that all players can interpret. • Patients’ access to their own health data can empower them to actively pursue a healthy life and manage their condition. • Operational data can help smoothen workflow and enable outcomes-driven improvement cycles. Thus, interoperability will help deliver better care at a lower cost, leading to higher quality patient outcomes and the support of carers. Achieving these goals requires all relevant data to be accessible without barriers and uniformly interpretable. A recent example from the pandemic was the need to share all information of COVID-19 patients who were moved between hospitals in the Netherlands to balance the capacity of intensive care units (ICUs). A portal was set up using digital health standards to assist these efforts, which provided invaluable support to doctors and healthcare workers during the peak time of hospitalisations. Some fear that sharing interoperable and readily interpretable data makes this data more vulnerable to cybersecurity threats and privacy breaches. However, standards and technical specifications are capable of both ensuring data safety and security, and of delivering audit and control measures for access and control. They can also provide consent management solutions where needed. Similarly, there are concerns that standards inhibit innovation. We believe instead that interoperability is an enabler of innovation: it can create an ecosystem where different players compete based on the strength of their products and features. Such an ecosystem lowers the barrier to entry, especially for innovators and small and medium-sized companies.4

## 1st adv

#### COVID encouraged *more* innovation and productivity growth

Michael Spence & James Manyika 21—Winner of the 2001 Nobel Prize in Economics, Philip H. Knight Professor, and Dean Emeritus at Stanford University's Graduate School of Business; Chair and Director of the McKinsey Global Institute. ("A Better Boom: How to Capture the Pandemic’s Productivity Potential," July/August 2021, from Foreign Affairs, https://www.foreignaffairs.com/articles/united-states/2021-06-22/better-boom)

The pandemic has primed advanced economies for another period of rapid productivity growth. It is too early to say for sure whether such growth will be the product of a virtuous or a vicious cycle, but signs point to the former. Despite uncertainty, stress, and plummeting economic activity in the early days of the COVID-19 crisis, many firms boldly deployed and used new general-purpose technology—especially digital technology—in ways that have driven virtuous productivity gains in the past. In October 2020, we surveyed 900 C-suite executives in various sectors and countries and found that many had digitized their business activities 20 to 25 times as fast as they had previously thought possible. Often, this meant shifting their businesses to online channels, since roughly 60 percent of the firms we surveyed experienced a significant increase in customer demand for online goods and services as a result of the pandemic.

Before the pandemic, e-commerce was forecast to account for less than a quarter of all U.S. retail sales by 2024. But during the first two months of the COVID-19 crisis, e-commerce's share of retail sales more than doubled, from 16 percent to 33 percent. And that growth did not just reflect brick-and-mortar firms setting up shop online for the first time. Firms that were already highly digitized before the pandemic significantly expanded their online capabilities to meet the surge in demand. They also reorganized their operations, including their logistics, to complement what they were doing digitally-for example, by expanding their direct-to-home delivery capabilities.

Businesses also strove to become more efficient and agile. In Europe and North America, nearly half of the respondents to our survey said that they had reduced their operating expenditure as a share of revenue between December 2019 and December 2020. Two-thirds of senior executives said they had increased investment in automation and artificial intelligence, whether to help warehouse and logistics operations cope with higher e-commerce volumes or to enable manufacturing plants to meet surging demand. Many companies used technology to reduce the physical density of their workplaces or to enable contactless service-for instance, by expanding self-checkout in grocery stores and pharmacies and employing online ordering apps for restaurants and hotels. Other businesses, such as meatpacking and poultry plants, accelerated the deployment of robotics to reduce their need for labor. If there was one lesson from the pandemic, it was that digital capability and resilience go hand in hand.

But even as the arrival of vaccines has made it possible to imagine a return to relative normalcy in parts of the developed world, continued digitization and the adoption of other technological innovations promise to deliver still more productivity gains. The largest of these gains—roughly an additional two percentage points per year—could come in the health-care, construction, information technology, retail, pharmaceutical, and banking sectors. In health care, for instance, accelerating the use of telemedicine beyond the pandemic could drive incremental productivity growth for years. According to one recent U.S. poll, 76 percent of patients expressed interest in using telemedicine in the future, and industry experts project that the services for 20 percent of health-care spending could be delivered virtually-up from 11 percent before the pandemic. Other sectors, including automotive, travel, and logistics, show less-but still substantial

-potential for productivity growth as a result of more flexible task scheduling, leaner operations, and smarter procurement.

Overall, these innovations and organizational changes could accelerate productivity growth by around one percentage point per year between now and 2024 in the United States and the six large European economies that we analyzed (France, Germany, Italy, Spain, Sweden, and the United Kingdom). This gain would result in a productivity growth rate twice as high as the rate after the 2008 global financial crisis, and in the United States, it would expand per capita GDP by roughly $3,500 by 2024. That would be a stunning outcome, but it will hinge on continued technology adoption by firms and the maintenance of robust demand.

Even more productivity gains could be on the horizon thanks to other advancements. The accelerating revolution in biology, for instance, could transform sectors from health care and agriculture to consumer goods, energy, and materials. Biological innovation has already enabled the rapid development of new vaccines for COVID-19. Equally impressive revolutions in energy could make possible the widespread adoption of solar and wind power, especially in light of recent progress toward better (and cheaper) batteries. Artificial intelligence is also advancing rapidly, but is still a long way from being deployed widely across companies and sectors. When and if that happens, the productivity gains could be enormous.

#### Models are fucked

Michael Slezak 15, 10-26-2015, "Ocean’s hidden green plankton revealed by fixing glitch in model," New Scientist, https://www.newscientist.com/article/dn28391-demise-of-the-worlds-plankton-has-been-greatly-exaggerated/

The rate at which phytoplankton are disappearing as oceans warm has been vastly overestimated by a glitch in models. That’s good news given that phytoplankton support almost all life in the oceans and are responsible for half the carbon dioxide removed from the atmosphere each year – as well as up to 70 per cent of the oxygen we breathe. Phytoplankton are single-celled plants and microbes that live in the ocean and convert light and nutrients into organic material, which is then fed up through the food chain. A lot of that carbon is buried after the phytoplankton die and sink to the seabed. In 2006, Michael Behrenfeld of Oregon State University and his colleagues concluded that when oceans warm, the amount of phytoplankton declines. By analysing the colour of oceans in satellite images – with the assumption that green chlorophyll was a marker of phytoplankton – the team found that chlorophyll levels, and therefore phytoplankton numbers, went down whenever the water warmed. Phytoplankton need light and nutrients, so their growth is fuelled when nutrient-rich deep water mixes with shallow water in areas where there is enough light. But as surface water warms, it becomes more buoyant and mixes less with deeper water, limiting the phytoplankton’s nutrient supply. That was bad news, considering the oceans are now hotter than ever in the modern record and continue to warm at a breakneck pace. This is happening as they absorb about 90 per cent of the excess heat created by our carbon emissions. In 2010, another study that used images of the ocean and took chlorophyll levels to be synonymous with phytoplankton abundance concluded that the oceans had lost 40 per cent of their phytoplankton since the 1950s. Lower impact It now seems that this method exaggerated the impact of warming on phytoplankton by as much as seven times in some regions. Reduced mixing caused by warming means that plankton near the surface becom

e exposed to light for longer, whereas deeper plankton are less exposed to it. Studies have shown that phytoplankton acclimatise to changes in light, producing less chlorophyll when more exposed to it and vice versa. But nobody had built those changes into models used to interpret the satellite measurements of chlorophyll – until now. Taking these changes into account, Behrenfeld’s team has now found that in 40 per cent of the ocean, more than 85 per cent of drops in chlorophyll levels are caused by acclimatisation to different light conditions rather than a reduction in phytoplankton. In other words, estimates of plankton death were previously exaggerated more than sixfold in much of the oceans. “While the relationship between phytoplankton [decline] and warming is still there, the magnitude of the response is smaller than we thought earlier,” says Behrenfeld.

## MiddleWare

#### Democracy resilient

Daniel Treisman 18, UCLA political science professor, 6-7-2018, “Is Democracy in Danger? A Quick Look at Data,” online pdf

Available measures suggest the proportion of democratic countries in the world today is at or near an all-time high. The few indicators that show some backsliding indicate only a return to the level of the 1990s, a time when liberal democracy was widely considered triumphant. The rate of increase has slowed. But this follows the stunning surge of democracy’s “third wave.” The rate of failures among existing democracies is close to that predicted by their levels of economic development, income growth, and past democratic experience. Moreover, whereas previous waves have been followed within 10-15 years by a significant fall in the proportion of democracies, that has not occurred this time, at least so far. Neither the rate of democratic breakdowns nor that of quality deteriorations in existing democracies is historically high. Previous literature and the survival models presented here confirm that high economic development, positive economic growth, and extensive democratic experience

are associated with much lower odds of democratic breakdown. Based on such estimated relationships, the hazard of a breakdown in the US today appears extremely low. While some data suggest a weakening of commitment to democracy among parts of the US public—which is worrying in itself—it is hard to find any systematic evidence that low or falling public support for democracy causes democratic breakdowns. As for elite norms, Latin American countries where a radicalized military supported dictatorship have sometimes succumbed to antidemocratic coups. But excluding such extreme cases, the claim that eroding norms cause democracies to fail appears to rest on anecdotal evidence. Even if it does not constitute a general trend, deterioration in the quality of democracy in countries such as Hungary and Poland is obviously cause for concern, as is the reversion to authoritarianism in Russia and Turkey. It is certainly possible that a global slide in democracy has begun that will accelerate in coming years. It is also possible that US institutions will prove weaker than expected. Few democracies have been tested by the kind of demographic change forecast for coming decades, as the previously dominant race loses its majority status. Still it is important to distinguish between fears for the future and expectations that are reasonable based on available evidence. The historical record suggests that democracies like the US have inner resources that distinguish them from younger and poorer ones. They are far less vulnerable to destructive demagogues than much current commentary implies

# 1NR

**FTC**

**It’s the key regulatory priority**

**Mendelsohn 1-13** (Aaron Mendelsohn, Principal Director, Risk & Compliance @ Accenture, Another U.S. Regulator is coming after Companies for Data Privacy and Security Violations: The Federal Trade Commission Tries to Up the Ante, https://financialservicesblog.accenture.com/another-us-regulator-coming-after-companies-for-data-privacy-security-violations)

Background

As background, the FTC is the “**only** federal agency with **both** consumer protection and **competition** jurisdiction” in the United States. Created in 1914 and with a $383 million operating budget in 2021, the FTC is an independent law enforcement agency whose stated mission is “protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices” in **broad sectors** of the economy. In addition to its authority to investigate potential violations of the law by companies and individuals, the agency also has federal rule-making authority to issue industry-wide regulations, including the Federal Trade Commission Act, Clayton Act, Telemarketing Sales Rule, Fair Credit Reporting Act, Identity Theft Act, the Equal Credit Opportunity Act, and more than 70 other laws.

Here, the FTC’s announcement of its Notice of proposed **data privacy** and **security** rulemaking coincided with its annual Statement of **Regulatory Priorities**, also issued on December 10, 2021. In its Statement, the agency outlined other potential rules, including proposed measures to (a) prevent “abuses stemming from surveillance-based business models,” (b) define “unfair methods of competition,” and (c) “define with specificity unfair or deceptive acts or practices” by companies. The goal of all these proposed rules appears to be to protect consumers’ **data** and to **sanction** companies that commit **data privacy and security abuses**. Moreover, the FTC looks to be targeting companies’ surveillance-based business models for intrusive instances, anti-competitive behavior, and **AI-driven discriminatory decision-making practices**.

Notably, in addition to the FTC’s Notice and Statement, the agency also updated its ongoing data privacy and security rulemakings, including the Children’s Online Privacy Protection Act (COPPA), the Privacy of Consumer Financial Information Rule, and the Safeguards Rule, which is a breach notification requirement. No doubt as a result of rapid changes in the marketplace involving unprecedented digital growth, big data, and data monetization, the FTC issued a request for public comment on its definitions, notices, parental-consent requirements/exceptions, and safe-harbor provisions in the above rules. All of these actions by the FTC evince an increasingly **aggressive regulatory** and **enforcement** stance by the agency.

**PTX**

**Discard any preconceived notion about the politics DA you have based on how BBB failed last month---we all knew that the original bill was too large to pass, so clearly it didn’t work, but the stand-alone approach will be a game changer**

**Shafer 1-18** (Jack Shafer is Politico’s senior media writer, Why You Can Count On a **Biden Bounce**, The **counterintuitive**, **data-supported**, not-that-unlikely case he’ll have **a good 2022**, https://www.politico.com/news/magazine/2022/01/18/biden-poll-comeback-527339)

Prepare yourself for the **Biden comeback**.

We’ve already seen the weeks and weeks of coverage marking **the end of his presidency**, capstoned by his twin failures to navigate his multitrillion-dollar **B**uild **B**ack **B**etter bill past Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) and get his **voting bill** passed.

Here’s another way to see it: **He may be cratering at just the right time**.

This isn’t to suggest that Biden is about to become so **popular** that they’re going to break ground for his presidential memorial next week. But there’s most of a year before the 2022 elections, and nearly three years before Americans vote for president again — and two big things have sorted themselves out over the last couple of weeks that could play to the president’s political advantage over the long haul.

First, now that the **vast progressive legislative agenda** that he adopted — an agenda that was really **not** very **popular** — has been **flushed** to the Blue Plains Treatment Plant on the Potomac River, he can return to the **smaller-gauge policies** that made him **popular** in the first place. There’s **still** legislative time to **break out** smaller, more **executable** chunks of the **BBB** bill for passage — including stuff that Manchin **will** support — that will give Democratic candidates more to crow about and restore Biden’s previous reputation as a moderate fiscal drinker and not a drunk. The BBB debacle might be the **best thing** to happen to the Biden presidency yet.

**The change of passage is at 90%**

**Bolton 1-21** (Alexander Bolton, Democrats hope to salvage Biden's agenda on Manchin's terms, https://thehill.com/homenews/senate/590698-democrats-hope-to-salvage-bidens-agenda-on-manchins-terms?rl=1)

In the wake of a **failed effort** to pass **voting rights** legislation, Democrats are **turning** their **attention** back to **reviving** President Biden’s stalled **B**uild **B**ack **B**etter Act, which hit a wall in December when Sen. Joe Manchin (D-W.Va.) announced he couldn’t support it.

Biden gave the legislation **new momentum** this week when he announced he’s **willing** to **sign** whatever **“chunks”** of the **climate** and social spending **bill** can get through Congress.

Democratic lawmakers say they’re willing to **concede** more **ground to Manchin** in order to get something passed into law, even though it will fall well short of the ambitious vision they announced last year.

“I think we should tell Sen. Manchin, ‘You won, write the bill and tell us what you can support,’” said one Democratic senator, who requested anonymity to discuss party strategy. “That way he would stop dancing around.”

Sen. Ben Cardin (D-Md.) said he wouldn’t put Manchin’s victory so bluntly, but acknowledged that the West Virginia senator is in the driver’s seat.

“At this point we are willing to look at any proposal that can get 50 votes in our caucus. We’re at that point where we really need to take a look at what can get that 50 votes and I think Sen. Manchin has been pretty clear about his **concerns** and **priorities**,” he said.

Manchin on Thursday told reporters that he’s ready to rip up the Build Back Better Act. “We’re going to start with a clean sheet of paper and start over,” he said.

Manchin dismissed the idea that any proposals are guaranteed to be included in any package he’s likely to support, insisting that negotiators will “just be starting from scratch.”

Speaker Nancy Pelosi (D-Calif.) on Thursday suggested dropping the name “Build Back Better” to help the talks get off to a fresh start.

“What the president calls ‘chunks’ I would hope would be a major bill going forward. It may be more limited, but it is still significant,” she said.

It’s quite a reversal from last year, when Democrats promised Build Back Better would be a transformational bill that would tackle income inequality by increasing taxes on the wealthy and dramatically expanding an array of social services.

In the end, Senate Majority Leader Charles Schumer (D-N.Y.) was forced to drop what were thought to be consensus proposals, such as raising the corporate tax rate and the top marginal income tax rate.

Several Democrats say a lot of work has already been done on core elements of the bill and that much of it still can be salvaged.

“The **good news** is that **90 percent** we’re in **agreement** on, let’s get that done,” Cardin said. “There’s **enough** here of common agreement that **we should be able to get to the finish line**.”

Democratic senators say they believe they can get **Manchin** and fellow centrist Sen. Kyrsten **Sinema** (D-Ariz.) to support **a bill** focused on **climate**-related **provisions** such as the clean manufacturing tax credit, a compromise proposal to lower the cost of prescription drugs, and funding for child care and universal pre-kindergarten.

“There are some clean energy tax provisions that it’s my understanding Sen. Manchin has always supported that would make a huge difference in terms of the competitiveness of our economy and accelerate cleaner energy technology deployment. I think it would be great if we can move that,” said Sen. Chris Coons (D-Del.), a key ally of Biden’s on Capitol Hill.

“I support moving forward as much of the Build Back Better bill as we can,” he added.

Coons cited compromise language to reduce the cost of prescription drugs and funding for universal pre-K as likely candidates to include in a final bill, along with a package of tax incentives and funding to address climate change.

Senate Environment and Public Works Committee Chairman Tom Carper (D-Del.) said he thinks a proposal negotiated with **Manchin** to reduce **methane emissions** could still be included in a bill that passes under the budget reconciliation process.

“I thought we had a **good agreement** on a methane reduction program a month, a month and a half ago,” he said. “I asked my staff to reach out to their counterparts in Sen. Manchin’s [office] to make sure we’re still good to go.”

One of the biggest sticking points is the fate of the enhanced child tax credit, which Democrats passed as part of the $1.9 trillion American Rescue Plan and expired last month.

The talks between Manchin and the White House fell apart in December after Manchin balked at a one-year extension of the tax credit, insisting that a 10-year extension be included instead so that voters would know how much the proposal would really add to the federal debt.

Democrats involved in **negotiations** now say they think Manchin could be **persuaded** to agree to a three- or four-year extension that would allow the child tax credit to be included without crowding out other spending priorities.

**Media bias---everything they read is crap because journalists want to hype failures**

**Rubin 1-19** (Jennifer Rubin, Commentator @ WaPo, Opinion: The media wants to paint Joe Biden as a failure. He won’t let that happen, <https://www.washingtonpost.com/opinions/2022/01/19/media-wants-paint-joe-biden-failure-he-wont-let-that-happen/>

President Biden, while marking the end of his first year in office on Wednesday, met **a press corps** anxious to paint him as a **failure**. While conceding that his voting rights bill and **B**uild **B**ack **B**etter package have both stalled, Biden stuck to one core theme: The **economy** and the effort to **crush** the pandemic are **improving** because of his administration.

Many of the questions from reporters verged on **self-parody**. Fox News’s Peter Doocy comically asked why Biden is pulling the country so far to the left. (Disclosure: I’m an MSNBC contributor.) The right-wing outfit Newsmax asked about his mental fitness for the job. It seemed **everything** was **his fault**, from Republicans’ refusal to support virtually any proposal to the fight between airlines and telecom companies over 5G.

Biden, for the most part, remained a “glass half full” president. “I’m not going to give up and accept things as they are now,” he said. “I call it ‘a job not yet finished.’” He stressed that the situation with covid-19 is improving. On school closures, he emphasized that 95 percent remain open.

He also seems to have heard complaints from Democrats, who have practically been begging him to focus more on his legislative successes. He started the news conference with a lengthy and passionate recitation of the low unemployment, widespread vaccination and infrastructure investment he achieved during his first year. “It’s been a year of challenges but also enormous progress,” he declared, conceding the nation should have done more testing earlier in the omicron surge. He also vowed to spend more time telling the country what he’s done and stressed the need to contrast his ambitions agenda with the stand-pat Republicans.

On inflation, he shifted attention to the Federal Reserve, which is responsible for price stability. He nevertheless took credit for untangling supply chains. Instead of austerity, Biden’s solution is a more vibrant economy.

While he argued that his BBB plan would have helped to address rising prices, such as for child care and prescription drugs, he recognized for the first time that the bill may need to broken into “big chunks.” While he initially denied that he was going to “scale back” his ambitions, this suggested he was doing just that. He speculated that investments in clean energy and universal pre-K might get through, but that an expanded child tax credit and free community college would not.

Nearly half of every dollar spent on brand medicine goes to middlemen like insurance companies, PBMs, the government and others. Learn about what’s missing from the drug pricing legislation and why we must fix it so middlemen share these savings with patients.

And while he has not given up on voting rights, he indicated he might be able to pass a bill to reform the Electoral Count Act. He remained upbeat about Americans’ willingness to defy voting suppression efforts and turn out in large numbers. He dismissed Republicans’ false claims that he compared them to Bull Connor and George Wallace in a recent speech. (In reality, the speech asked if Republicans would side with the segregationists of history over John Lewis.) Instead, Biden pointed out that 16 sitting Republican once voted to reauthorize the Voting Rights Act.

Biden also responded to demands from his base for tougher rhetoric against the do-nothing Republicans. “What are Republicans for?” he asked repeatedly. He also humorously needled the Senate minority leader. “I actually like Mitch McConnell … but he has one straightforward objective: Make sure there’s nothing that makes me look good … with the public at large.” Again, he asked: “What’s Mitch for?”

He did stumble at one point. In response to a question about Russia, he almost certainly caused his foreign policy team to cringe when he suggested that the United States might not retaliate to a “minor incursion” by Russia into Ukraine. Even worse, he said cyberterrorism might not trigger a full-scale response. His discussion of Russia was at best confusing, and at worst an echo of Dean Acheson, the secretary of state under President Harry S. Truman who was blamed for triggering the Korean War. Indeed, minutes after the news conference, the White House issued a written statement reaffirming any invasion would result in severe consequences.

In a moment of candor, he confessed, “I haven’t been out in the community enough and I haven’t been connecting with people,” and that this was a problem of “my own making.”

In a show of bravado, he asked if the reporters wanted to continue the presser for another hour or two. (He gave them 20 more minutes.) By then, he had demonstrated he had far more patience than was necessary considering the questions’ low quality.

In short, with the exception of the Russia questions, Biden turned in a **strong performance** that **belies** the right’s accusation that he is **feeble**. He was **determinedly upbeat**, ready to defend a productive first year and more pointed than he has been in dealing with Republican extremism. **The press corps**, by contrast, revealed once more that they put **more** emphasis on **sounding tough**, asking **unanswerable questions** and creating **conflict** than they do on exploring some of the gravest problems our country has ever faced. Our democracy deserves better.

**Big Tech lobbying groups will oppose efforts at data portability and interoperability—they will manipulate public opinion to oppose the plan:**

John D. **McKinnon and** Julie **Bykowicz**, 6/24/20**21** (covers tax policy and related fiscal issues for The Wall Street Journal, & national political reporter, focusing on money and influence in Washington, “Google, Facebook, Amazon Among Those Set to Fight House Big Tech Antitrust Package,” <https://www.wsj.com/articles/house-judiciary-committee-passes-final-piece-of-big-tech-antitrust-package-11624562811>, Retrieved 8/5/2021)

Another measure requires that the largest internet platforms make it easier for users to transport their data to other platforms and even communicate with users on other platforms. The bill—known as the Augmenting Compatibility and Competition by Enabling Service Switching, or Access, Act—would give the Federal Trade Commission extensive new powers to set individualized standards for the large tech companies. Already on Thursday, **lobbyists and trade groups for the large tech companies** were complaining that the House bills are being rushed through with little thought to the impact they will have on consumers. If the process slows, they say they believe they will win over enough lawmakers to defeat most or all of the measures. Tech companies also were **weighing more outreach to the public** to raise warnings about the legislation. The Chamber of Progress—a new advocacy group funded by Amazon, AMZN 0.11% Google and Facebook, among others—has been circulating a survey it commissioned showing **Americans are reluctant** to give up services provided by the companies that are targeted by the tech bills. Apple’s hardware, software and services work so harmoniously that it is often called a “walled garden.” The idea is central to recent antitrust scrutiny and the Epic vs. Apple case. WSJ’s Joanna Stern went to a real walled garden to explain it all. (Video published June 4) Photo illustration: Adele Morgan/The Wall Street Journal While the survey found that more than half of respondents favored Congress imposing new regulations on tech, people were much less likely to back restrictions on specific services offered on the sprawling platforms, such as Amazon Prime. “Part of what we are trying to say to members is this is not something that voters are clamoring for,” said Adam Kovacevich, who founded the Chamber of Progress and is a former Google lobbyist. “People don’t want Congress to break something that is working well, and I think members are **underestimating the consumer backlash** they would face if they break up these consumer conveniences.”

**Large Cost to Companies**

**Londoño, 21** - Technology & Innovation Policy Analyst at the American Action Forum (Juan, “The ACCESS Act Raises More Questions Than It Answers,” 6-22-21, <https://www.americanactionforum.org/insight/the-access-act-raises-more-questions-than-it-answers/>)

Introduction Recently, a package of antitrust bills aimed at “big tech” companies such as Amazon, Google, Facebook, and Apple was introduced in the House of Representatives. One of the key bills in this legislative package is the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, which establishes mandates for interoperability and data portability. Specifically, the legislation would require large platforms to make their interfaces compatible with competing platforms and to establish data transfer protocols. Advocates for these types of mandates claim the nature of the digital marketplace locks in consumers to bigger platforms, regardless of the quality of the service, as switching to a new platform implies losing access to a valuable network of users. While both data portability and interoperability may be beneficial in some scenarios, the ACCESS Act has the potential to severely disrupt the digital economy and the tech industry in the United States. Many key aspects of the bill focus on the Federal Trade Commission (FTC), increasing the agency’s power as well as the government intervention into this market. The bill establishes new technical committees inside the FTC, which will determine the conditions of these mandates for each covered platform. This primer reviews the bill’s main provisions and its potential impact on the tech industry. The Key Measures of The ACCESS Act While often confused with each other, the mandates for data portability and interoperability have two different implications. Data portability allows users to initiate a transfer of their data from one service to another, while interoperability requires a platform to allow other parties to interact and exchange data with it. These definitions can seem broad, and there is a spectrum of portability and interoperability options. **The impact of these mandates depends highly on the definition of these concepts, as it can raise different technical, economic, and privacy concerns.** The central proposals of the ACCESS Act establish a data portability mandate and interoperability mandate for large companies that meet certain thresholds established in the bill. Platforms that are considered to be violating these mandates will be considered to be in violation of Section 5 of the FTC Act, which prohibits unfair or deceptive business practices. For a platform to be subject to the bill’s requirements, it must meet the following criteria: Have at least 500,000 U.S.-based monthly active users or 100,000 U.S.-based monthly active business users in the year preceding the filing of a complaint; Be owned or controlled by a person, partnership, or corporation with net annual sales or a market cap greater than $600 billion in the 2 years preceding the filing of a complaint; and Be considered a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform. The act defines a critical trading partner as a “trading partner that has the ability to restrict or impede (A) the access of a dependent business to its users or customers; or (B) the access of a dependent business to a tool or service that it needs to effectively serve its users or customers.” The covered platform designation applies for 10 years, a significant time in a perpetually evolving field such as technology, and the designation can only be dropped with approval from the FTC. ACCESS requires the FTC to establish requirements for portability and interoperability and enforce compliance with these requirements. To aid the FTC in this task, the bill also establishes a technical committee for each covered entity. Each committee is composed of representatives of businesses that the FTC considers users or competitors of the platform, representatives of competition or privacy advocacy organizations, a representative from the National Institute of Standards and Technology, and a nonvoting representative of the covered platform. Reassessing the Impact of Switching Costs Advocates for interoperability and portability mandates often cite concerns about the switching costs consumers face that create a “lock-in” to existing social media platforms or mobile operating systems. Advocates for these mandates claim that these costs are particularly high in the tech space, as digital platforms benefit from “network effects,” a term used to describe products that become more useful as their user base increases. Mandating interoperability and data portability would significantly reduce such costs and enable newer platforms to compete on a more level playing field, they contend. Assessing the competitiveness of the digital market merely on user count ignores other relevant metrics, however, such as screen time, user engagement, or marketability. In the digital market, unlike the physical goods and services market, competition in not zero-sum. While buying one particular box of cereal in a grocery store usually means that a competing brand’s similar cereal isn’t being bought, this is typically not the case in the digital marketplace. There, signing up for Facebook does not bar a user from signing up to other social media platforms such as Twitter or TikTok, as there are no sign-up fees. Getting users to sign up to a platform is the first level of competition, while the fiercest competition is for users’ attention and advertisement revenue. Establishing mandates is not necessary to spur competition or lead consumers to new products. Innovators are aware of the necessities of growing their user base to compete in these markets and have incorporated measures to do so. For example, Tik Tok and Snapchat severely limit the content users are able to access without signing up and downloading their applications. This way, they increase the incentives for users to sign up for their service, thus making their content more exclusive. Mandated interoperability would prohibit this strategy, damaging competition and aiding established players. Mandated interoperability also diminishes the ability of platforms to stand out for their ad-targeting strategy, as all information they collect on users is automatically shared with competitors. Initially, this sharing would be helpful for small platforms, as it gives access to the customer data from bigger platforms. This interoperability would prevent them from gaining an edge by implementing new data-collection strategies, however, a crucial step in the consolidation of platforms such as Facebook and Google. Any new data collected would automatically be shared with competitors, preventing emerging platforms to stand out to advertisers for their targeting mechanisms. Additionally, **major platforms Google, Apple, Microsoft, Facebook, and Twitter co-created the Data Transfer Project**, an initiative to **establish a protocol to enact data portability in a way that is compatible with multiple platforms**, while also addressing privacy and security concerns for their users. This project acknowledges the benefits portability could give to consumers, but it also has enabled the involved companies to work through the challenges that may come with portability apart from ill-considered mandates. As a voluntary, open-source initiative, this project will allow for the establishment of a shared portability protocol and platform, where platforms that deem it useful will make use of it. On the other hand, ACCESS will create **a one-size-fits-all blanket mandate that will lock down companies and users who may not agree with it, reducing overall choice in the market**. The Questions Left Unanswered by ACCESS ACCESS fails to address many practical concerns regarding the implementation of its new mandates. As mentioned previously, many key aspects will be left to the newly established FTC committees. For example, while the bill requires platforms to implement an interoperability interface that is transparent and third-party-accessible, it also mandates that competing business have reasonable data security for the data they request. ACCESS does not, however, define what the terms “transparent,” “accessible,” or “secure” look like, leaving those definitions to the FTC committees. In general, ACCESS establishes the mandates, but **leaves many of the specifics—**such as its terms or how they are to be implemented—**vague and for the future determination of the FTC.** In addition to data security questions, the interoperability aspects of the bill also raise concerns about how they may apply to existing understandings of data privacy. In order for interoperability to be effective, third parties must have access to the data of users who may or may not have signed up to the competing platform. When implementing interoperability, it is important to consider what data are to be shared, what steps platforms can take to limit how much of that data is accessible to competing platforms, and how appropriate liability for data access will be established. ACCESS does not clearly establish the legal framework for such key elements, leaving existing privacy concerns unanswered. An overly broad access standard **could force platforms to share sensitive user data with potentially insecure third parties**. Additionally, some have expressed concerns over the implementation of the data security requirement, as the bill stipulates **platforms will be held liable not only for the data they acquire from the interoperability platform, but from their systems as a whole, a liability that would have a significant impact on the current platform ecosystem.** Conclusion The ACCESS Act seems to raise more questions than it answers. Its interoperability and data portability mandates defer largely to the FTC and neglect to answer many of the key questions around interoperability and portability. Even if it were to lower “switching costs,” as its proponents claim, it could do so at the expense of users’ privacy and safety. When assessing tech platforms, ACCESS focuses too narrowly on certain elements such as user count, and it ignores many important metrics such as screen time and ad revenue that show the digital economy is already both highly competitive and diverse. As a result, despite its intentions to improve the technology market, the interventions in ACCESS could harm consumers as well as both current and emerging platforms.

**Digital companies oppose all efforts at regulation:**

Tom **Wheeler,** et al, 8/20/20**20** (businessman, author, and was the 31st Chairman of the Federal Communications Commission (FCC) from 2013 to 2017. He is presently a Senior Fellow at the Shorenstein Center at Harvard Kennedy School and a Visiting Fellow at the Brookings Institution, “New Digital Realities; New Oversight Solutions,” <https://shorensteincenter.org/new-digital-realities-tom-wheeler-phil-verveer-gene-kimmelman/>, Retrieved 8/5/2021)

Yet attempts at **agile regulation** built on the application of general conduct concepts **have also been opposed by the digital companies.** Despite its successful use in corporate management, such circumstances-based agility suddenly becomes “regulatory uncertainty” when adopted by government.

**Big tech antitrust splits the party---it’s divisive**

**Nylen 6-23** (LEAH NYLEN , Politico staff, **Progressives**, **moderate Democrats** tussle over tech **antitrust** package, <https://www.politico.com/news/2021/06/23/democrats-tech-antitrust-package-495644>, y2k)

A package of **antitrust bills** to rein in the **big**gest U.S. **tech** companies is proving **divisive** not just for Republican lawmakers, but also for **Democrats** who are **split** on whether the legislation goes too far.

The six bills being marked up Wednesday by the House Judiciary Committee speak to an oft-repeated goal of many Democrats: curbing the power of Silicon Valley. Four of the bills would **zero in** on Apple, Amazon, Facebook, Google and Microsoft for greater **regulation**, limiting their ability to buy up promising startups that could grow into rivals and prohibiting them from using their platforms to discriminate against competitors.

The push to crack down on those tech giants has drawn support from a broad coalition of lawmakers fed up with Silicon Valley, from progressive leaders like Reps. Pramila Jayapal (D-Wash.) and David Cicilline (D-R.I.) to outspoken allies of former President Donald Trump like Reps. Ken Buck (R-Colo.) and Matt Gaetz (R-Fla.). On the Republican side, it has also prompted public rebukes by party detractors who call the legislation an affront to conservative values.

But **a growing number** of **moderate Democrats** are also **voicing concern** about the **proposals** under consideration this week, which they warn could have a vast impact on the **U.S. economy**. That includes at least two key California Democrats that sit on Judiciary, Zoe Lofgren and Lou Correa, who will have a say Wednesday on which bills make it out of the panel and which don’t.

**Agencies link---this is true for antitrust**

**Jones 20** (Alison Jones, Professor of Law, King's College London, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, 3-20, The Antitrust Bulletin. 2020;65(2):227-255. doi:10.1177/0003603X20912884, y2k)

D. **Political Backlash**

As we have already indicated, the government’s **prosecution** of high stakes antitrust cases often inspires defendants to **lobby elected officials** to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “**independent”** regulatory agency, but Congress interprets independence in an **idiosyncratic way**.126 Legislators believe independence means insulation from the executive branch, **not from the legislature**. The FTC is dependent on a **good relationship** with Congress, which controls its budget and **can react with hostility**, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the **DOJ** and the **FTC** launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be **ineffective**. At a minimum, the agencies would need to consider how many battles they can fight at **one time**, and how to foster a countervailing coalition of business interests to oppose the defendants.

**Efforts are finite – backlash kills the agenda**

**Pillar 16**

(Paul R. Pillar, Nonresident Senior Fellow at the Center for Security Studies at Georgetown, The National Interest, “Principle and Pragmatism, Here and Abroad,” http://nationalinterest.org/blog/paul-pillar/principle-pragmatism-here-abroad-15808)

Those on the other side of the debate, who stress the need to pay attention to priorities and practicality, correctly observe that political capital is limited and that one has to work with the political system one has and not what one would wish it to be. They note that compromise and log-rolling are intrinsic to politics and policy-making. They are mindful of the risk that if you try to accomplish everything you may bring about reactions that lead you to accomplish next to nothing. They correctly point out the risk that a political leader who is seen, for better or worse, as going against a generally accepted playbook on too many issues will lose credibility as being outside the mainstream and will lose the political clout to do good works.

**Solves climate---it’s the largest climate investment in history**

**Morse 1-21** (Brit Morse, ASSOCIATE EDITOR @ INC., Biden's Build Back Better Agenda Gets Second Chance, https://www.inc.com/brit-morse/biden-build-back-better-climate-change-bill-agenda.html)

For **green-energy** businesses and **e**lectrical-**v**ehicle makers, the move brings them a step closer to what will likely be **boom times** for their industries. A **standalone** climate bill is expected to cost an estimated **$555 billion** over the course of 10 years. It would be the **largest climate investment** in U.S. history. Though, the negotiations have only just begun and the bill may get paired back. Build Back Better, if you recall, started at $3.5 trillion but was pared back to $1.75 trillion after negotiations with the conservative party.

If the bill passes as it's currently proposed, however, a majority of the **funds** would subsidize **alternative energies** such as **wind**, **solar**, and **nuclear power**--which could **bring down prices** and theoretically make it easier and less expensive for households and companies to switch over. Consumers would also receive a $7,500 rebate on electric vehicles, and additional subsidies for solar panels and energy-efficient appliances.

**Try-or-die---it’s impossible to meet the emission targets without it**

**Davenport 1-20** (Coral Davenport covers energy and environmental policy for the climate desk from Washington, ‘Build Back Better’ Hit a Wall, but Climate Action Could Move Forward, https://www.nytimes.com/2022/01/20/climate/build-back-better-climate-change.html)

The **climate portion** of Build Back Better includes about **$555 billion** aimed at moving the American economy away from its 150-year-old reliance on **fossil fuels** and toward **clean energy** sources.

Instead of **penalties** to punish polluters, the bill offers **incentives** for **industries**, **utilities** and **individuals** to **shift** from burning oil, gas and coal for energy and transportation to using wind, solar and other forms of power that do not emit carbon dioxide, the most plentiful of the greenhouse gases that are warming the world.

It would provide about $320 billion in tax credits for producers and buyers of wind, solar and nuclear power. Buyers of electric vehicles would receive up to $12,500 in tax credits. It would extend existing tax credits to lower costs for homeowners of installing solar panels, geothermal pumps and small wind turbines, covering up to 30 percent of the bills.

The bill also includes $6 billion to make buildings more energy efficient and another roughly $6 billion for owners to replace gas-powered furnaces and appliances with electric versions. And it provides billions of dollars for research and development of new technologies to capture carbon dioxide from the air.

“I think it’s clear that we would be able to get support for the $500 billion plus for energy and the environment,” President Biden said of Congress on Wednesday

Voters across the political spectrum — including conservative Republicans — strongly support tax credits and rebates to consumers, businesses and landlords for energy efficient heating and cooling, solar panels, electric vehicles and other low-emissions or no-carbon technology, according to a September 2021 poll conducted by climate change communications programs at Yale and George Mason universities.

And many of the clean-energy tax credits in Build Back Better have been backed by Republican lawmakers in the past and even written by them. The tax credits, some of which have been law since the 1970s, have typically been extended for just a few years at time. The pending legislation would keep them in place for a decade, lending more certainty to markets, which is designed to spur more investment.

“Lots of the direct benefits of these tax credits already go to red states,” said Barry Rabe, a professor of political science and environmental policy at the University of Michigan. “We have seen major growth of wind and solar production in predominantly Republican states, such as Texas, Oklahoma and North Dakota. And these policies have had bipartisan support over time.”

In saying they would not vote for a stand-alone climate bill, some Republicans promoted their own ideas about curbing emissions. “If you’re serious about climate, put a price on carbon,” said Senator Mitt Romney of Utah. Many lawmakers consider passing a tax on carbon dioxide emissions politically unworkable.

A warming trend. European scientists announced that 2021 was Earth’s fifth hottest year on record, with the seven hottest years ever recorded being the past seven. A Times analysis of temperatures in the United States showed how 2021 outpaced previous years in breaking all-time heat records.

U.S. emissions bounce back. After a record 10 percent decline in 2020, America’s greenhouse gas emissions rose 6.2 percent in 2021 as the economy began recovering from the pandemic. The uptick underscored the challenges President Biden faces to fulfill his climate agenda.

Sounding the alarm. A report on the state of the Arctic highlights troubling and consistent trends in the region that are linked to global warming. Researchers are also growing increasingly concerned about Antarctica, where ice shelves are melting and wilder winds are altering crucial currents.

Senator Kevin Cramer of North Dakota said he preferred solutions like support for technologies to capture carbon dioxide from the air and it store it underground. The **B**uild **B**ack **B**etter Act does include billions of dollars for **r**esearch **and** **d**evelopment of so-called “**carbon capture**,” a technology that is not in use at any commercial scale because it is prohibitively expensive.

Mr. Cramer recently joined with former President Trump’s national security adviser, H.R. McMaster, in calling for the United States and Europe to impose a carbon fee on imported goods as part of “a trans-Atlantic climate and trade initiative.”

Senator Chuck Grassley of Iowa, who often refers to himself as the “father” of the wind-energy-production tax credit, said he could support provisions in the bill that bolster wind and solar power but is opposed to sections that would help make electric vehicles more affordable. That would hurt his state’s ethanol industry, he said.

Senator Kevin Cramer, Republican of North Dakota, said he didn’t “adhere to the alarmism of ‘we’re doomed and we’re doomed soon’.”

President Biden wants to **significantly** cut the pollution generated by the United States, the country that has historically pumped the most planet-warming gasses into the atmosphere. He aims to reduce the nation’s greenhouse gas emissions at least 50 percent below 2005 levels by 2030, which is roughly the pace that scientists say the whole world must follow to keep the Earth from warming more than 1.5 degrees Celsius (2.7 degrees Fahrenheit) since the Industrial Revolution. That’s the threshold beyond which scientists say catastrophic events will become more frequent.

Average global temperatures have already increased 1.1 degrees Celsius.

It will be **extremely** difficult to meet Mr. **Biden’s target** without **the clean energy tax credits** in the **B**uild **B**ack **B**etter Act, analysts say.

“This is a **make-or-break** moment on the climate crisis,” said Jamal Raad, executive director of the climate advocacy group Evergreen Action. “Tough choices need to be made on the other pieces of Build Back Better to get this over the finish line,” he said, adding that he and other environmental groups have communicated this to the White House and Chuck Schumer of New York, the Senate majority leader.

**Biden’s PC ain’t half-bad**

**Powers 1-21** (Kristen Powers, CNN Senior Political Analyst, Joe Biden is not failing or flailing, https://www.kake.com/story/45700095/joe-biden-is-not-failing-or-flailing)

Here's an apparently unpopular opinion: **Joe** Biden **is not failing** or flailing. His presidency is **not** in peril.

It's **hard** to see this through **the blizzard** of **over-the-top headlines** such as, "Biden Can Still Rescue His Presidency," "How the Biden Administration Lost Its Way" and "Biden's **Epic** Failures."

**Everyone needs to take a breath**: It's been one year. These headlines could just as easily read, "Joe Biden Fails to Fix Every Problem in the World in 365 days."

What drives much of the "presidency in peril" coverage is Biden's approval ratings. CNN's poll of polls, released Thursday, found that 41% of Americans approve of the way Joe Biden is handling his job while 54% disapprove.

Low approval ratings are used as a proxy by various political and ideological factions to argue that the president needs to do more of what they want and if he doesn't, he won't get reelected. (Spoiler alert: nobody will cast their vote in three years based on how they feel today about Biden). Progressives argue ratings are low because Biden is not progressive enough and moderates and "Never Trump" Republicans argue it's because Biden is too liberal. It's become conventional wisdom in the media that Biden's approval ratings started dropping because of how he handled the Afghanistan withdrawal. But Gallup's senior editor Jeff Jones told Politico in November that his declining poll numbers began before that, during the Delta Covid-19 variant surge.

The fact is, **approval ratings** are most closely tied to how people feel about their day-to-day lives. Americans are understandably fatigued as we enter the third year of the pandemic and, until the US gets back to some semblance of normal, we should expect Biden's approval ratings to reflect that frustration. Moreover, gas prices are high and research has shown that presidential approval ratings often track with gas prices, even though the president's power over these prices is limited. The **economic news** is **mostly good** for Biden -- **unemployment is down** and **wages are up** -- but inflation is high and rising. Taken together, this means the day-to-day life of many Americans feels really hard.

It doesn't help that the media **reinforce** the idea that Biden is somehow failing because he hasn't solved issues that have bedeviled his predecessors over longer periods of time. The New York Times dinged Biden this week, noting that, "The president has not yet succeeded in meeting his own goals for combating climate change,...[hasn't] delivered on his broader promise for a pathway to citizenship for millions of undocumented Americans" and has failed "on the central promise he made during the 2020 campaign -- to 'shut down' the pandemic..."

**This is bananas** , but it's a fairly typical roundup of the disconnected-from-reality analysis of Biden's first year.

No president has been able to achieve a pathway to citizenship for undocumented immigrants, including presidents Barack Obama and George W. Bush, who were not able to accomplish immigration reform over an eight-year period each. Biden should not be expected to do what they couldn't, in a single year, in the middle of a global pandemic.

Speaking of the pandemic, it's hard to shut it down when conservative leaders across the country are committed to making sure that doesn't happen. Biden, for his part, signed into law the historic $1.9 trillion American Rescue Plan to ensure broad distribution of vaccines. But he can't force people to get vaccinated. He did issue vaccination and testing mandates for businesses, but those were rebuked by the Supreme Court. He also isn't responsible for conservative disinformation and efforts to thwart measures to protect people from Covid by Republican elected officials, which is the primary reason the US is still struggling with the virus in a way that some other industrialized countries aren't.

What about Biden's alleged lack of success in solving the climate change issue in a single year? Biden has taken many steps that are within his authority on climate change such as rejoining the Paris climate accord, canceling the Keystone XL pipeline and undoing many Trump-era anti-climate executive orders. He has pushed climate priorities in his Build Back Better bill which anyone who is sentient knows hasn't passed because Biden enjoys the slimmest of majorities in the Senate and he couldn't win over Sen. Joe Manchin of West Virginia. There is also the fact that Republicans have zero interest in this bill. Republican obstructionism is not Biden's fault.

Biden is **not** a magician; he is **president**. He can't shout "**abracadabra**" and produce 50 Democratic senators who will support every element of his agenda. There aren't 10 GOP senators to pull out of a hat to back common sense and patriotic priorities like protecting voting rights. "But he didn't end the filibuster for voting rights," is the complaint. Right, because he doesn't have the votes.

This doesn't mean that Biden couldn't have done some things better in his first year. The administration was caught flat-footed by the Omicron variant and failed to deliver on promises to make testing easier and more available to Americans. Biden should have called Sen. Manchin's bluff on Build Back Better a long time ago and struck a deal if there was one to be had (which is debatable). If Manchin wouldn't strike a deal, Biden should have moved on to something more achievable like breaking the bill into smaller parts (something he said in his press conference this week he is open to doing).

Ultimately, we need to remember that Biden entered the White House during one of the most difficult periods this country has ever faced. "**The worst pandemic in 100 years**. The worst economic crisis since the Great Depression," he said during his campaign. "The most compelling call for racial justice since the 60's. And the undeniable realities and accelerating threats of climate change." We can now add to that list an attack on democracy by one of the two major political parties.

It seems that **whatever Biden's flaws,** the country is in a **better place** than it was when he took office, something that was not a given considering the challenges he was up against. Like **all** presidents, he is clearly **absorbing the lessons** of the first year and **recalibrating** for the next.

**Discussions are ongoing**

**Delaney 1-19** (Arthur Delaney, Democrats Are Rebuilding The Build Back Better Act, https://nz.news.yahoo.com/democrats-rebuilding-build-back-better-215217867.html)

Senate Democrats are **quietly** trying to **revive** the **B**uild **B**ack **B**etter Act with a **new version** of the bill that Sen. Joe Manchin (D-W.Va.) might like better than the old one.

Democrats turned to voting rights this month after Manchin said in December he couldn’t support Build Back Better.

The bill he disliked had billions for green energy; subsidies for child care, home care and health care; expanded access to prekindergarten and a continuation of monthly child tax credit payments.

A source **familiar** with Senate Democrats’ legislative efforts said they were considering a more **Manchin-friendly measure** that would likely drop child care and tighten rules for the child tax credit, such as by requiring parents to have employment-related tax forms in order to qualify. NBC News first reported the possible changes.

“There are **ongoing discussions**,” Sen. Chris Van Hollen (D-Md.) told HuffPost on Wednesday. “I don’t know where all the details lie right now. It is a priority of mine to extend the child tax credit, and we’re going to look for every way to do it.”

President Joe Biden sounded **a confident note** Wednesday at a press conference that Democrats could pass something related to the Build Back Better agenda before the midterm elections.

“I’m confident we can get pieces — big chunks — of Build Back Better signed into law,” Biden said.

Specifically, Biden said he believes there is enough support to pass the more than $500 billion in proposed climate and energy proposals. Biden also cited Manchin’s support for early childhood education as an opening for further negotiations.

“It’s clear to me we’re going to have to break it up,” Biden said, repeatedly saying that he didn’t anticipate such fervent opposition from Republicans on all aspects of his agenda. “I think we can break the package up, get as much as we can now and get back and fight for the rest later.”

Biden admitted he is “not sure” the expanded child tax credit and free community college — two big features of the original Build Back Better proposal Biden campaigned on — would make it in any broken up proposal.

Meanwhile, Manchin said Wednesday evening that no one had yet approached him about a renegotiated, slimmed down, proposal or Biden’s suggestion that the agenda would be broken down into “chunks.”

Many **Senate Democrats**, however, seem on **board**.

“We need to get as much as we can across the finish line,” Sen. Elizabeth Warren (D-Mass.) said. “That’s hard because we have the skinniest possible majority and that means it takes every vote so that means we have to do whatever it takes to get every vote.”

Since Manchin and Sen. Kyrsten Sinema (D-Ariz.) have both refused to support the Senate rules changes Democrats would need to make in order to pass voting rights bills, Democrats will likely return to their unfinished economic policy business after this week.

The failure to pass Build Back Better last year meant 36 million households did not receive a child tax credit payment last week for the first time in six months, even though Democrats vowed the money would continue indefinitely and said it would define their legacy. The cash put a major dent in child poverty.

Most families in the U.S. received the payments, which amounted to $300 for kids under age 6 and $250 for kids under 18, so long as their parents earned less than $150,000. The median household income in the U.S. is about $67,000.

Manchin has complained about households receiving the payments even if the parents aren’t working at all and even if they make six-figure incomes and don’t need the extra help. He told his colleagues that some parents waste the money on drugs.

Democrats increasingly realize they need to accommodate Manchin with tighter eligibility rules, the source said, or else the monthly payments won’t come back.

Democrats resisted adding a “work requirement” last year. One possible solution, short of requiring a certain income level for eligibility, would be to require at least some parents have a W-2 tax form, the document that employers use to report employee wages. The Niskanen Center think tank highlighted W-2s as a possible compromise last week. Senate Finance chairman Ron Wyden (D-Ore.), whose committee oversees tax policy, told HuffPost that he would consider it.

Manchin has said recently that he himself is not involved in any Build Back Better negotiations. His office did not respond to a request for comment about the W-2 idea.

“I don’t think it’s **rocket** science,” Rep Mike Thompson (D-Calif.) said. “We’ve got to find something [Manchin] will **support** and **move forward**.”