# 1NC

## OFF

### 1NC---New Affs Bad

#### New, undisclosed affs are bad –

#### A – Education–preparation enables more effective research and clash–new Affs only have negative educational externalities—forces zero-sum choices between flowing and reading the 1AC or using lots of prep at the expense of the 2NR

#### B – Fairness–the Neg is already at a strategic disadvantage with aff choice, first/last speech and infinite prep—adding new affs tilts the playing field against teams with fewer resources

#### Disclosing the aff when we ask after the pairing rewards new research while allowing neg prep.

### 1NC---States CP

#### The fifty states and relevant territories ought to

#### adopt a symmetric competition standard for anticompetitive business practices.

#### follow uniform enforcement guidelines and coordinate state antitrust cases in parallel fashion through the National Association of Attorneys General

#### increase funding for enforcement of state antitrust laws, including funding for state attorneys general and state courts, through legalizing deficit spending and borrowing to pay for antitrust enforcement

* **adjudicate antitrust cases arising from aforementioned laws in a consistent manner**

#### The Supreme Court of the United States ought to not preempt state antitrust laws.

#### State antitrust enforcement is constitutional and solves.

First 01 (Harry First, Professor of Law, New York University School of Law, “Delivering Remedies: The Role of the States in Antitrust Enforcement,” *George Washington Law Review*, Vol. 69, Issues 5 & 6 (October/December 2001), pp. 1004-1041)

Of course, neither Illinois Brick, nor the parens patriae provision of the 1976 Act for that matter, spoke to the states' jurisdiction to enforce state antitrust law.5 1 State law antitrust enforcement had coexisted with federal enforcement from the time that the Sherman Act was passed and the constitutionality of such state law enforcement had long been accepted.52 Thus, it should not have been surprising that after Illinois Brick a number of states revisited their own state laws and enacted statutes permitting indirect purchaser suits under state antitrust law.53

The constitutionality of state indirect purchaser legislation was presented to the Supreme Court in California v. ARC America Corp., de- cided in 1989.54 Four states filed federal antitrust actions for damages they had suffered from an alleged nationwide conspiracy to fix the price of ce- ment. Because at least some of their damages were indirect, they appended to their federal cause of action state law claims under their indirect purchaser statutes.5 Following a settlement of all federal and state claims, the states sought to participate in the settlement fund.56 On objection from the direct purchasers, the district court denied the states' indirect purchaser claims to the settlement fund, holding that state indirect purchaser laws were pre- empted by virtue of Illinois Brick.5 7 The Supreme Court reversed. 58

Pointing to "the long history of state common-law and statutory reme- dies against monopolies and unfair business practices," the Court stated that it is "plain that this is an area traditionally regulated by the States. '59 Indeed, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."0 That state law might impose liability beyond what federal law provides does not conflict with any federal policy that the Court identified in prior cases. Writing for a unanimous Court, Justice White stated:

When viewed properly, Illinois Brick was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional pur- poses on which Illinois Brick was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law.

The Supreme Court's decision in ARC America capped fifty years of judicial and legislative development of the jurisdiction of state antitrust en- forcers. Under federal law the states can now seek money damages for federal antitrust violations that injure them or their citizens as direct purchasers. Under state law they can claim damages suffered from antitrust violations that harm them or their citizens as indirect purchasers (if state law provides for such recoveries). The states may also be able to use consumer protection or unfair competition statutes to require defendants who engage in anticompetitive conduct that harms consumers either to disgorge their profits or to provide restitution to their victims.62 Like anti-trust indirect purchaser claims, these state claims can either be brought individually in state court or included as supplemental claims to federal antitrust violations.

Beyond seeking damages, state enforcers are likewise able to use either federal or state courts to seek injunctive relief to prevent future violations. This includes the right to seek divestitures in merger cases and the right to seek structural relief in monopolization cases. So well accepted is the exercise of this right that its assertion now goes unchallenged by defendants. 63 And, finally, individual states' antitrust laws may contain criminal provisions or civil penalties, which the states can enforce in state court.64

Indeed, at least as a statutory matter, the jurisdictional tools available to the states exceed those available to the federal antitrust enforcement agencies. The Justice Department can sue for its proprietary injuries, but it al- most never does so,65 and it has not sought to assert a parens patriae right to sue for injury to U.S. citizens (nor could it likely do so in light of the 1976 Hart-Scott-Rodino Act).66 Federal law would also presumably prevent suit for damages to the U.S. government as an indirect purchaser. There are no civil penalties available for violations of the antitrust laws,67 and the disgorgement or restitution remedy has only rarely been invoked (by the Federal Trade Commission) and is of uncertain legality.68

Similarly, when compared to private enforcement, state antitrust enforcers have stronger jurisdictional tools. The main advantage is that although the federal parens patriae claim for damages under the Hart-Scott-Rodino Act has procedural protections similar to those provided under Rule 23 for class members, such actions need not meet Rule 23's requirements, such as commonality of claims or adequacy of representation. 69 These issues are, of course, major problems in antitrust class actions.70 On the injunction side, standing presents no problems for the states when they are seeking to protect either their economy in general, or the interests of their consumers; private litigants, however, may still face hurdles.71 And on the investigative side, the states generally have broad power to use compulsory process to investigate for possible antitrust violations prior to filing a suit (similar to federal investigative power72). Private plaintiffs, of course, lack this ability.

#### Multistate cases are effective, coordinated, and can take place in state court.

* History thumps federalism DA
* Coordination allows standard application and guidelines

Lynch 1 (Jason Lynch, B.A. in Political Science and J.D. 2001 from Columbia Law, “Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation,” *Columbia Law Review*, Dec., 2001, Vol. 101, No. 8 (Dec., 2001), pp. 1998-2032, <https://www.jstor.org/stable/11237121NC>)

Over the past two decades, state attorneys general have developed and refined the practice of multistate litigation as a powerful law enforcement tool. In groups ranging from two states to all fifty, the attorneys general now routinely prosecute cases jointly, closely coordinating with each other and sharing legal theories, discovery materials, court filings, litigation expenses, and even staff. The approach has been strikingly effective, and prominent corporations that might otherwise have evaded liability in individual state lawsuits-companies like America Online, Bausch & Lomb, Sears, General Motors, and the major tobacco manufacturers-have been forced to change their business practices and pay significant settlements when faced with the combined power and institutional resources that a multistate lawsuit brings to bear upon them. Critics, in response, have raised alarms and attacked the legitimacy of multistate litigation. This Note analyzes an important aspect of those criticisms that in pressing multistate cases, state attorneys general violate fundamental principles of federalism and separation of powers.

Opponents of multistate litigation have been unrestrained in their attacks. One critic of multistate cases, himself an attorney general, has called the phenomenon "the greatest threat to the rule of law today,"2 and opponents of multistate litigation have begun calling on state legislatures and Congress to restrict the powers of state attorneys general to pursue these cases.3 Critics of multistate litigation believe the practice is objectionable on a number of grounds, among which is that multistate cases impermissibly increase the power of state attorneys general in violation of principles of federalism and separation of powers.4 In the words of one critic, through multistate litigation the states "get together and by agreement create a new government or regime among themselves, re- placing the prerogatives and powers of the constitutionally created federal government."5

Another says: Recent abuses in government litigation have undermined both federalism and the separation of powers. The purpose of the tobacco litigation ... was to establish through the action of several states a national policy that is properly reserved first to each state legislature and then to Congress in the exercise of its enumerated powers.6

Their federalism argument is noteworthy in that it is based on the assertion that through multistate cases the states are encroaching on federal power. Federalism concerns have arisen more commonly, at least recently, in the context of protecting state sovereignty from encroachment by the federal government.7

The critics thus far have made their claims primarily in speeches, policy papers, remarks during panel discussions at think tank conferences, and in newspaper opinion pieces.8 Their analyses are often framed in overheated terms such as, "[o]ur forefathers understood the dangers of unchecked power ... [and the] free market and the cause of human liberty cannot survive much more of this litigation madness."9 Despite this inflammatory mode of argument, these claims should be taken seriously because constitutional arguments against features of multistate litigation are beginning to be made in federal courts.10 Moreover, among those making the arguments publicly are prominent current and former public officials who are likely to wield influence in convincing state legislatures and Congress to consider imposing restraints on the ability of attorneys general to pursue these cases.11 The time is ripe, therefore, for a systematic review of these federalism and separation of powers critiques. Using the decisions of the United States Supreme Court as the benchmark articulation of federalism and separation of powers principles, this Note evaluates critiques of multistate litigation and argues that the prosecution of multistate cases comports with the strictures of federalism and separation of powers. In evaluating the claims made by critics of multistate litigation, this Note also develops and considers a constitutional argument that could be, but has not been, made by them.

Part I reviews the powers and duties of state attorneys general and describes the rise of the multistate litigation phenomenon. This Part emphasizes that what is novel about multistate cases is the degree and quality of interstate cooperation being used to enforce the law. Part II evaluates the claim that multistate litigation violates principles of federalism by examining two types of federalism based limits on state action: permanent limits and contingent limits. Permanent limits on state action, as the la- bel implies, are unchanging and include those expressly stated in the text of the Constitution and those that have been inferred by the Supreme Court from the structure of the constitutional plan. Contingent limits on state action-the boundaries of which may shift as a result of action by Congress-include constitutional prohibitions on state action that may be waived by Congress and limits, such as preemption and the Dormant Commerce Clause doctrine, in areas where there is concurrent federal and state authority.

Part III considers the claim that multistate litigation violates principles of separation of powers. This Part finds that critics of multistate litigation have misconstrued separation of powers doctrine in an attempt to apply it to multistate cases. In fact, separation of powers doctrine has little to say about most multistate litigation. Part III then identifies a facet of multistate litigation that may be relevant to a separation of powers analysis but which critics have yet to consider: namely the enforcement of federal law by state attorneys general. While this facet of multistate litigation is the one most vulnerable to criticism on constitutional grounds, Part III argues that several considerations minimize the concerns raised by a separation of powers challenge to enforcement of federal law by state attorneys general.

I. STATE ATTORNEYS GENERAL AND MULTISTATE LITIGATION

1. Role and Powers of State Attorneys General

The office of attorney general originated in English legal history where the attorney general was the appointed representative of the sovereign before the courts.12 Today, state attorneys general are independent executive officers popularly elected in forty-three states.13 In five of the remaining states, attorneys general are appointed by the governor (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming); in Maine the selection is made by secret ballot of the legislature; and in Tennessee it is made by the state supreme court.14 The powers and responsibilities of state attorneys general are defined, often in broad terms, by state constitutions and statutesl5-commonly directing attorneys general no more specifically than to "perform duties 'prescribed by law"'-and in most states attorneys general are recognized as possessing all powers exercised by the office at common law.16 The modern attorney general is the chief legal officer of the state, controlling litigation involving the state and per- forming a range of other functions, including provision of legal counsel to the governor and state agencies, oversight of criminal law enforcement, engagement in public advocacy through the initiation of civil enforcement litigation, and the exercise of investigative authority in the prosecution of government misconduct.17

The specific contents of an attorney general's portfolio of powers and duties vary from state to state because state legislatures may play a role in defining the office by statute and through control over the attorney general's budget.18 State court decisions also have shaped the office differently in different jurisdictions. The power to control state litigation, for example, is often at the center of controversy. It is not uncommon for attorneys general and governors (or other state officers) to disagree over litigation posture, and while in most states the attorney general possesses ultimate authority over litigation, a few disputes have produced state case law giving final authority to the governor.19 Generally, however, the attorney general may "exercise all such authority as the public interest re- quires" and "has wide discretion in making the determination as to the public interest.”20

1. The Rise of Multistate Litigation

Traditionally, in exercising their broad prosecutorial powers, state attorneys general brought legal actions against private parties on an individual and intrastate basis. That is, an attorney general would act as a single plaintiff and sue private parties in the courts of that attorney general's state to enforce, for example, state consumer protection and anti- trust laws.21 In some instances, such as those involving federal antitrust law, attorneys general may pursue enforcement actions as federal claims in federal court.22

Beginning early in the 1980s 23 and without much public attention, state attorneys general began cooperating with each other in ways they never had before. Faced with the daunting prospect of prosecuting large, wealthy, and well lawyered corporations-defendants that often have many times the financial and legal personnel resources of even a large attorney general's office-for violations of state law, state attorneys general began to reach across state lines for help. The attorneys general began looking to other states that might be investigating similar complaints against a defendant and, in groups ranging from two states to all fifty, started to prosecute their cases jointly, sharing with each other legal theories, discovery materials, court filings, litigation expenses, and even staff. This type of cooperative law enforcement activity among state attorneys general became known as multistate litigation. In this litigation, each state is the plaintiff in its own case but the coordination among the attorneys general is close.24 Usually, the offices are so closely coordinated that those participating in the case will choose one or two lead states and cede to them primary responsibility for negotiating with the defendant on be- half of all the states involved. Over the past two decades, multistate litigation has grown to become a powerful and commonly used law enforcement tool.

The trend toward increased cooperation among state attorneys general accelerated later in the 1980s with the promulgation by the National Association of Attorneys General (NAAG) of a series of antitrust and consumer protection enforcement guidelines.25 The guidelines informally coordinated state enforcement actions by encouraging attorneys general to follow uniform standards in the exercise of their prosecutorial discretion.26 Around the same time as the appearance of enforcement guide- lines, cooperation among attorneys general became more formal and effective as they began to coordinate their enforcement litigation on an interstate basis, simultaneously pursuing the same causes of action in different states against the same private parties.27

Contributing to the rise of multistate litigation were the policies of the Reagan Administration. When President Reagan took office, the Jus- tice Department quickly terminated antitrust litigation against IBM, an action that foreshadowed the laissez faire antitrust and consumer protection enforcement guidelines that were soon promulgated by the Justice Department and the Federal Trade Commission.28 During the Reagan years, the size of the staff of the FTC was cut in half, and the agency brought just forty-one new consumer fraud cases in 1982, fewer than half the number under President Jimmy Carter two years earlier.29 State attorneys general stepped in to fill what they perceived to be a void in anti- trust and consumer protection enforcement created by the reduced federal presence in these areas.30

While the policies of the Reagan administration created a climate that encouraged state attorneys general to pursue cases on a multistate basis, the eventual rise of multistate litigation as a frequently used enforcement tool by state attorneys general seems in retrospect to have been inevitable. In enforcement actions against national or multinational corporations, individual attorneys general often had been outgun- ned.31 For instance, New York, which has one of the largest attorney general offices in the nation, has fewer than thirty lawyers assigned to consumer fraud and antitrust cases.32 A state attorney general pursuing a case against a major corporation would have to commit all or significant portions of her resources to the case, thereby preventing work on other cases.33 In addition, after the early multistate cases, the state attorneys general saw how interstate cooperation magnified their power and in- creased the effectiveness of their enforcement actions. As Tom Miller, the Attorney General of Iowa, has said, "What we've found is that by coming together, the dynamics of the cases change .... When a corporation discovered it had to face 30 states, instead of one, it suddenly became much more serious about dealing with the issue."34

Another factor that contributed to the rise of multistate litigation during the past two decades was the dramatic expansion of telecommunications technology since 1980. Fax machines only became widely used in the 1980s, and the development of e-mail allowed for more efficient sharing of information and written work product, such as pleadings and legal briefs, than had been possible before. The wide availability of fax and e- mail technology helped relatively small and overworked offices achieve the level of close cooperation required to pursue multistate cases.35

The multistate case against the major cigarette manufacturers that was launched in 1995 was a watershed for this practice. The forty-six state, $206 billion settlement reached with the major tobacco companies in 199836-a settlement with an industry that had never lost a lawsuit against it and that wields significant clout in Congress-underscored how powerful state attorneys general had become when they worked together and drew national attention to their activities. As one observer noted, "Before the tobacco settlement, most people were only vaguely aware of the role of their state A.G..... But now the A.G.'s have a national aware- ness, and a positive one at that. That's a powerful tool. And you can't underestimate that."37 In the years preceding and following the tobacco settlement, the attorneys general have won scores of significant multistate cases.

As an example of their effectiveness, between 1995 and 1997 the attorneys general reached settlements in multistate cases with America On- line, American Cyanamid, Bausch & Lomb, General Motors, Louisiana Pacific, Mazda, Packard Bell, and Sears, Roebuck.38 In addition to producing agreements under which defendants promise to stop the activity targeted by the litigation, such as price fixing or deceptive advertising, multistate cases have produced significant monetary settlements. In 1987, forty-one attorneys general reached an agreement with Chrysler under which the car company paid more than $16 million to customers whose odometers had been tampered with before they bought their cars.39 Sears, facing multistate litigation pressed by fifty states in 1997, agreed to pay $165 million in penalties, refunds, and legal fees in a case concerning the collection of credit card bills from customers who had filed for bankruptcy protection.40 In a multistate case alleging an unlawful tying arrangement under section 1 of the Sherman Act, the attorneys general of thirty-three states attained a settlement under which Sandoz Pharmaceuticals Corporation agreed to pay $20 million, including $10 million in credits to eligible customers and $4 million in attorneys' fees to the states.41 All fifty states and the District of Columbia reached a $7.2 million settlement with Keds Corporation in a case involving allegations that Keds conspired to fix the resale prices of women's athletic shoes.42 And in 2000, generic drug manufacturer Mylan Laboratories reached a settlement with thirty-three states for $147 million in a case that alleged Mylan had unlawfully attempted to corner the market in two drugs.43

1. The Forms of Multistate Litigation and Methods of Cooperation

Multistate cases can proceed in either state or federal court, depending upon whether the claim being pursued by the attorneys general arises under state or federal law. Multistate litigation arising under state law actually consists of multiple cases: virtual mirror images of the same com- plaint, adjusted if necessary to account for minor differences in state law, filed in the courts of each state participating in the litigation. In 1999 and 2000, for example, a lawsuit filed by a single state was followed by lawsuits by attorneys general in twenty-seven states accusing Publisher's Clearing House of deceptive trade practices in the advertising and pro- motion of its sweepstakes.44 When Publisher's Clearing House settled most of the litigation in August 2001 for $34 million and a commitment to change its business practices, it was actually settling separate legal actions that had been pressed collectively by the states.45

By way of contrast, when states file an action in federal court pursuant to authorization under federal law, the states are joint plaintiffs signing the same complaint.46 There is, in these cases, a single action proceeding before a single court. The recent antitrust suit by nineteen states and the District of Columbia against Microsoft followed this model.47

Whether filed pursuant to state or federal law, multistate litigation is the product of close cooperation among the attorneys general who are parties to the lawsuit. In the typical multistate case, the offices of the attorneys general participating in the litigation form a working group that includes staff from each office but is led by a designated lead state.48 This group meets regularly by conference call to discuss strategy, share information developed through each state's investigation, and agree on how they will proceed with the case. The attorneys general also share staff and the costs incurred during the litigation, creating, in effect, a temporary law firm dedicated to a single case that has more resources available to it than any individual office could commit to the matter alone.49

An important form of cooperation among state attorneys general in multistate cases is the sharing of discovery, pleadings, and legal memoranda. Collaboration on these matters and materials prevents redundant effort among participating states and facilitates the recruitment of other states to join litigation.50 Moreover, even though each attorney general individually files an action in her state's court, because each action is based on the same or similar legal theories and discovery, the defendant is faced with what amounts to a single large lawsuit by multiple states and is forced to engage and negotiate with the participating states as a group.51 Importantly, each attorney general retains the authority to end her participation in a suit or reject the terms of a settlement offer.

Cooperation among the attorneys general is facilitated by the nature and activities of NAAG, which provides attorneys general with a ready- made infrastructure for pursuing multistate litigation. Historically, NAAG has been a nonpartisan organization coordinating the activities of its member attorneys general through several meetings each year.52 In addition, NAAG facilitates the coordination of multistate cases through the efforts of its working groups, such as the active and successful NAAG Multistate Antitrust Task Force.53 NAAG even administers a fund from which attorneys general can draw to pay for expert witnesses and other litigation related expenses.54

1. What Is New About Multistate Litigation

At its core, multistate litigation is about interstate cooperation. Most multistate cases can rely on conventional legal theories and need not pre- sent any radical challenge to the legal status quo.55 "What is new about these cases is the unprecedented level of cooperation and coordination between the states bringing them."56 When states bring actions in their courts that are mirror images of actions being brought by other states, their collective enforcement powers are dramatically enhanced.57 Multistate actions possess a critical mass, both in terms of resources poured into the case by the prosecuting states and the magnitude of potential sanctions a defendant faces, that forces defendant corporations to respond, usually in terms of a settlement correcting the behavior about which the attorneys general are complaining and a monetary payment.

Cooperating states also extend the geographical reach of their enforcement powers. The attorney general of a small or mid-sized state, if she can afford to bring an action at all against a major corporation, can, at best, affect the behavior of the defendant in her state alone. Once several states band together, a litigation victory effectively imposes the settlement terms on the defendant on a national basis. If a corporation is forced to change its activities in several states, it is likely to do so in every state in which it operates.58

Through interstate cooperation, the enforcement powers of the state attorneys general have become more potent. Where before the influence of attorneys general stopped at the borders of their states, today groups of attorneys general can affect the behavior of corporations nationally. It is this rather sudden magnification of the power of the states through the vehicle of multistate litigation that has led some to criticize multistate litigation as violating principles of federalism and separation of powers.59

### 1NC---T---Anticompetitive

#### “Increase” requires the affirmative to augment prohibitions.

Merriam Webster Dictionary, No Date, "Definition of INCREASE," Merriam Webster, <https://www.merriam-webster.com/dictionary/increase>

Definition of increase

 (Entry 1 of 2)

[intransitive verb](https://www.merriam-webster.com/dictionary/intransitive)

1: to become progressively greater (as in size, amount, number, or intensity)

2: to multiply by the production of young

[transitive verb](https://www.merriam-webster.com/dictionary/transitive)

1: to make greater : [AUGMENT](https://www.merriam-webster.com/dictionary/augment)

2obsolete : [ENRICH](https://www.merriam-webster.com/dictionary/enrich)

#### “anticompetitive practices” are business practices that firms engage in to restrict competition to maintain or increase market position.

OECD 3 (Organization for Economic Cooperation and Development, April 24, 2003, “Anticompetitive Practices,” https://stats.oecd.org/glossary/detail.asp?ID=3145)

Definition:

Anticompetitive practices refer to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

Context:

The essence of competition entails attempts by firm(s) to gain advantage over rivals. However, the boundary of acceptable business practices may be crossed if firms contrive to artificially limit competition by not building so much on their advantages but on exploiting their market position to the disadvantage or detriment of competitors, customers and suppliers such that higher prices, reduced output, less consumer choice, loss of economic efficiency and misallocation of resources (or combinations thereof) are likely to result.

Which types of business practices are likely to be construed as being anticompetitive and, if that, as violating competition law, will vary by jurisdiction and on a case by case basis. Certain practices may be viewed as per se illegal while others may be subject to rule of reason. Resale price maintenance, for example, is viewed in most jurisdictions as being per se illegal whereas exclusive dealing may be subject to rule of reason. The standards for determining whether or not a business practice is illegal may also differ. In the United States, price fixing agreements are per se illegal whereas in Canada the agreement must cover a substantial part of the market. With these caveats in mind, competition laws in a large number of countries examine and generally seek to prevent a wide range of business practices which restrict competition. These practices are broadly classified into two groups: horizontal and vertical restraints on competition. The first group includes specific practices such as cartels, collusion, conspiracy, mergers, predatory pricing, price discrimination and price fixing agreements. The second group includes practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance and tied selling.

Generally speaking, horizontal restraints on competition primarily entail other competitors in the market whereas vertical restraints entail supplier-distributor relationships. However, it should be noted that the distinction between horizontal and vertical restraints on competition is not always clear cut and practices of one type may impact on the other. For example, firms may adopt strategic behaviour to foreclose competition. They may attempt to do so by pre-empting facilities through acquisition of important sources of raw material supply or distribution channels, enter into long term contracts to purchase available inputs or capacity and engage in exclusive dealing and other practices. These practices may raise barriers to entry and entrench the market position of existing firms and/or facilitate anticompetitive arrangements.

#### Violation---they increase prohibitions on behavior other than restricting inter-firm competition to maintain or increase market position and profits.

#### That’s a voting issue for predictable limits and ground---allowing the affirmative to redefine “anticompetitive” devolves into 2As picking a new regulation every week. That structurally disadvantages the negative and decreases the quality of clash by stretching neg prep too thin.

### 1NC---Economy DA

#### Big Tech rising now---contained antitrust key---assumes thumpers.

Rob Lever 8-15. Writer at TechXPlore. Big Tech rolls on as investors shrug off regulatory pressure. No Publication. 8-15-2021. https://techxplore.com/news/2021-08-big-tech-investors-regulatory-pressure.html

Pressure is rising on Big Tech firms, signaling tougher regulation in Washington and elsewhere that could lead to the breakup of the largest platforms. But you'd hardly know by looking at their share prices.

Shares in Apple, Facebook, Amazon and Google parent Alphabet have hovered near record highs in recent weeks, lifted by pandemic-fueled surges in sales and profits that have helped the big firms extend their dominance of key economic sectors.

The Biden administration has given signs of more aggressive regulation with appointments of Big Tech critics at the Federal Trade Commission.

But that has failed to dent the momentum of the largest tech firms, despite tough talk and antitrust litigation in the United States and Europe, with US lawmakers eyeing moves to make antitrust enforcement easier.

Big Tech critics in the United States and the EU want Apple and Google to loosen the grip of their online app marketplaces; more competition in a digital advertising market dominated by Google and Facebook; and better access to Amazon's e-commerce platform by third-party sellers.

One lawsuit tossed out by a judge but in the process of being refiled could force Facebook to spin off its Instagram and WhatsApp platforms, and some activists and lawmakers are pressing for breakups of the four tech giants.

All four have hit market valuations above $1 trillion, with Apple over $2 trillion. Alphabet shares are up some 80 percent from a year ago, with Facebook up nearly 40 percent and Apple almost 30 percent. Amazon shares are roughly on par with last year's level after breaking records in July.

Microsoft, with a $2 trillion valuation, has largely escaped antitrust scrutiny, even as it has benefitted from the cloud computing trend.

The surging growth has stoked complaints that the strongest firms are extending their dominance and squeezing out rivals.

Yet analysts say any aggressive actions, in the legal or legislative arena, could take years to play out and face challenges.

Fast-moving environment

"Breakup is going to be nearly impossible," said analyst Daniel Newman at Futurum Research, citing the need for controversial legislative changes to antitrust laws.

Newman said a more likely outcome would be multibillion-dollar fines that the companies could easily absorb as they adjust their business models to adapt to problematic issues in a fast-moving environment.

"These companies have more resources and know-how than the regulators," he said.

Dan Ives at Wedbush Securities said any antitrust action would likely require legislative change—unlikely with a divided Congress.

"Until investors start to see some consensus **on where the regulatory and law changes go** from an antitrust perspective, it's a contained risk, and they see a green light to buy tech," he said.

#### Independently, causes uncertainty and decks stable market activity---results in staffing inefficiencies and regulatory capture---takes out the case.

Sacher and Yun 18 (Seth B. Sacher, Ph.D. in Economics from the University of Maryland and Senior Economist at the Federal Trade Commission, and John M Yun, PhD in Economics from Emory, Associate Professor of Law at George Mason University, and the Director of Economic Education at the Global Antitrust Institute. Prior to joining the GAI, he was the Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission, “Twelve Fallacies of the 'Neo-Antitrust' Movement,” [*George Mason Law Review*, Vol. 26, no. 5, 2019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369013) [George Mason Law & Economics Research Paper No. 19-12](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369013), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369013>)

VI. FALLACY SIX: NOT RECOGNIZING THAT ABANDONING AN ECONOMIC WELFARE FRAMEWORK AND RELYING MORE ON POPULIST GOALS TO GUIDE ANTITRUST WILL LEAD ANTITRUST TO DEPEND MORE ON RHETORIC AND RULES OF THUMB

Amidst all the criticism of the consumer welfare standard, it may pay to step back and consider some of the advantages of the standard. One is that it is a standard grounded in economic reasoning and microeconomic foundations. Given its basis in economic reasoning, the consumer welfare standard forces antitrust to rely on rigorous models of consumer and firm behavior. Economic models allow practitioners to focus on the most important explanations for particular phenomena. Models enable one to input relevant and available evidence to see the likely consequences. Moreover, models are transparent and result in testable implications. This does not mean that they are always simple to understand or apply. Transparency, however, forces practitioners to be explicit about their assumptions, which allows others to evaluate those assumptions and how they affect the implications of the model.

Additionally, the consumer welfare standard, as an economic standard, relies on scientific reasoning. This merely means that it provides a means for falsifiability and self-correction. By forcing practitioners to be explicit regarding theories and assumptions, the standard facilitates testing those theories and assumptions against real-world experience and data. If the facts do not support the theories, new theories will emerge and then be tested. It is undeniable that, in this light, antitrust has seen and continues to see enormous changes and improvements in its methodologies.1 28

A real danger of unmooring antitrust from an economic approach based on foundational welfare concepts and replacing it with a vague reliance on populist goals is that antitrust will become reliant on rhetoric and various rules of thumb rather than scientific reasoning. Examples of rhetoric and rules of thumb in the neo-antitrust movement are not difficult to locate; this is also true of antitrust decisions before the explicit formalization of the consumer welfare standard. For example, in discussing Amazon's highly effective distribution system, which it allows third-party merchants to use, Professor Khan states:

The conflicts of interest that arise from Amazon both competing with merchants and delivering their wares pose a hazard to competition, particularly in light of Amazon's entrenched position as an online platform. Amazon's conflicts of interest tarnish the neutrality of the competitive process. The thousands of retailers and independent businesses that must ride Amazon's rails to reach market are increasingly dependent on their biggest competitor. 129

There certainly can be a viable anticompetitive theory regarding Amazon's behavior. An example may be that, under certain conditions, Amazon could leverage its power as a selling platform into related markets. Indeed, such a theory is already part of the current antitrust toolkit. To result in a violation, the theory would also require evidence of likely or actual competitive harm. The concern is not that there is no viable theory of harm; rather it is that Khan seems to be convicting Amazon with no such evidence. Her contention involves no discussion of harm to consumers or competition, merely a rhetorical display arguing that the neutrality of the competitive process has somehow been "tarnished." As Professor Timothy Muris and former FTC General Counsel Jonathan Nuechterlein pointed out, such rhetorical flourishes against A&P underlays much of the jurisprudence behind the Robinson-Patman Act, which the vast majority of observers agree has been a particularly misguided area of antitrust. 130

Dangerously, rhetoric and rules of thumb can support almost any position. As with many of the concerns expressed above, this will lead to increased unpredictability in antitrust. Indeed, with sufficiently powerful-sounding rhetoric, antitrust can be led to take positions that contradict its prime mission: to ensure competition is based on the merits. Finally, many of the benefits of relying on economic reasoning in antitrust will be lost, such as forcing practitioners to be explicit regarding their assumptions. Given that rhetoric is more art than science, it is also likely that antitrust will lose much of its transparency and ability to self-correct.

VII. FALLACY SEVEN: NOT RECOGNIZING THAT THEIR PROPOSALS WILL STRAIN COMPETITION AGENCY RESOURCES, INCREASE UNCERTAINTY, AND MAKE THESE AGENCIES MORE POLITICAL AND SUBJECT TO CAPTURE

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff.'3 ' As will be discussed more fully in the context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132 Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists.13 3 Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own.' 3 5

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview. 3 6 Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 3 7 will require significantly more active market supervision than is currently the case. While many proponents of modern antitrust would agree that the antitrust agencies are underfunded,' 8 there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

Second, many of the above proposals would require not only more staff, but also staff with differing expertise from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

Students of bureaucracies consider a visible and measurable output key for quality control in such organizations. 3 9 Currently, the consumer welfare standard provides such a metric.1 40 Abandoning this metric, as advocated by many proponents of the neo-antitrust movement, and replacing it with vague and numerous populist objectives threatens to make the competition agencies more difficult to manage and assess.

For example, some have advocated that the competition agencies adopt a "public interest standard" similar to what is used by the Federal Communications Commission ("FCC") and other agencies.141 However, after ninety years of use, many think the "public interest standard" remains ill-defined. 142 For instance, the FCC's order related to the Comcast-NBCU merger included a number of conditions unrelated to the acquisition, including requirements to increase local news coverage, expand children's programming, broadcast public service announcements, enhance the diversity of programming available to Spanish-speaking viewers, offer discount broadband services to low-income Americans, and provide high-speed broadband to schools, libraries, and underserved communities.1 43 The danger here is that antitrust enforcement becomes less predictable and, consequently, creates uncertainty, which adversely impacts market activity and investments. Further, it also makes the competition agencies more "political" as the stakes of a practice or transaction become higher for both of the parties involved, as well as third parties. Observers have noted that agencies like media regulators tend to be more "political" than antitrust regulators for a number of such reasons. 144

Finally, as noted above, the goal of antitrust enforcement is not to supervise firm or market behavior, but rather to make infrequent interventions so that markets can more nearly achieve certain socially desirable objectives on their own. Other forms of regulation involve a continuing relationship between the firms being regulated and the regulator. The continuing relationship between regulators and the regulated often leads to what is called "regulatory capture." 45 Proposals put forward by the neo-antitrust advocates to expand the objectives and responsibilities of the antitrust agencies would force these agencies into continuing relationships with certain firms and industries and thereby make them more susceptible to many of the phenomena they claim to eschew.

Further, asking competition agencies to consider issues beyond the competitive process and economic welfare can create discontinuities across firms and in the law.14 Thus, expanding antitrust to encompass greater limitations on firm behavior based on considerations such as income inequality, small-business welfare, full employment, or viewpoint diversity can have a different emphasis depending on the political regime in force at a given moment. As a result, firms that have had a merger or other antitrust review may be subject to different restrictions relative to other similarly situated firms that either have not faced agency review or were subject to antitrust restrictions during an administration with differing priorities.

In sum, while the proponents of neo-antitrust do not regard the antitrust agencies as particularly well-functioning now, many of their proposals have the potential to significantly and adversely affect their performance. They would strain resources by requiring involvement in areas that would expand the scale and scope of the agencies, increase uncertainty, and necessarily make agencies more political and subject to capture.

#### Antitrust expansion causes a wave of additional expansions---tanks the economy

Wayne Brough 6-15. Policy Director at R-Street, Technology & Innovation. Washington wants to weaponize antitrust law to attack “Big Tech” and it is going to backfire horribly. R Street. 6-15-2021. https://www.rstreet.org/2021/06/15/washington-wants-to-weaponize-antitrust-law-to-attack-big-tech-and-it-is-going-to-backfire-horribly/

Solutions in Search of a Problem

As with many other regulatory incursions into the digital world, the renewed push for tougher antitrust laws is a solution in search of a problem. Both Republican and Democratic criticisms of Big Tech raise a litany of issues—from an anti-conservative bias to fake news and hate speech—none of which fall within the purview of antitrust law and anticompetitive behavior. Instead, the new regulatory regime under consideration is a punitive and political attack on politically disfavored corporations. Ultimately, that is the larger battle—abandoning the consumer welfare standard and its focus on demonstrable consumer harm in favor of a politicized regime that allows those in Congress greater control over private companies.

And while tech companies may be the exclusive focus of the current reforms, the scope of the proposed legislation could easily be expanded by a future Congress. Even today, many lawmakers are openly hostile toward a growing list of American businesses. Republicans have been vocal in calling for retaliatory measures against “woke” corporations deemed too progressive in their public stances. If policymakers continue to abandon economic principles, it would not be surprising to see calls for additional antitrust enforcement for any company that makes political waves.

Prior to the adoption of the consumer welfare standard almost 50 years ago, antitrust law was often confusing, economically suspect and even contradictory. In one notorious case, the Supreme Court blocked a merger where the merged company would have had a market share of merely 7.5 percent—hardly an example of market dominance. And economists examining antitrust enforcement prior to the consumer welfare standard found no correlation between antitrust enforcement and a reduction in the welfare losses from monopoly. Further research found congressional influence to be a better predictor of enforcement activity.

The consumer welfare standard helped rationalize antitrust enforcement and the case law that has emerged since its adoption has helped curb the political abuse of antitrust policies. Abandoning the need to identify demonstrable consumer harm would return antitrust law to an era characterized by arbitrary enforcement actions that many in today’s Congress seem to have forgotten. But the increased political oversight that comes with adopting more aggressive tools for antitrust enforcement poses a real threat to consumers, to innovation and to economic growth.

Abandoning the American Way in Favor of a European One

The bills introduced in the House can be interpreted as a turn toward a European approach to competition policy. Last year, the EU passed the Digital Markets Act, and the House proposals sound eerily similar. The EU started by defining “gatekeepers,” something similar to the “covered platforms” in the House bills. Restrictions on self-preferencing, interoperability requirements and other elements introduced in the House all have direct counterparts in the EU’s law.

The EU adopted its laws with a clear target in mind—American tech companies that were dominating markets in Europe and outperforming their European rivals. Politically, it made sense to rewrite the rules of the game in favor of homegrown talent. Among other things, this meant the EU could collect billion-dollar fines from American companies, all in the name of “fair competition.”

But the performance of European companies is probably the best reason not to follow the EU’s lead in redefining how we regulate competition. By virtually every measure, U.S. companies have been more innovative, more dynamic and more profitable than their European counterparts. There are more start-ups in the United States and they have greater access to capital. While the United States and the EU have economies of similar magnitudes, in 2019, U.S. startups had a valuation of $1.37 trillion compared to EU startups with an evaluation of $240 billion.

The rise of Silicon Valley is an American success story. Today the top five companies in the United States based on market capitalization are tech companies. They have led the digital revolution, providing consumers a virtually endless stream of new products at low or even zero cost in many cases. These are signs of a robust market that serves consumers well. It is important to remember that big does not equate to bad—sometimes a firm is large because it is efficient at serving its customers what they want. The tech sector supports 12 million jobs and more than $2 trillion in economic output. Current antitrust laws grounded in the consumer welfare standard are part of the institutional framework that make this possible. Congress should ensure antitrust laws fit best into the modern U.S. economy, but the House proposals are a radical departure that shifts the focus to protecting competitors rather than consumers. They would weaponize antitrust law, provide politicians a greater say in America’s boardrooms and replace economic efficiency with political expediency and preference.

#### Wrecks all sectors of the economy.

Daren Bakst and Gabriella Beaumont-Smith 20. Senior Research Fellow in Agricultural Policy in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, The Heritage Foundation. Policy Analyst for Macroeconomics in the Center for Data Analysis, of the Institute for Economic Freedom. A Conservative Guide to the Antitrust and Big Tech Debate. Heritage Foundation. 12-1-2020. https://www.heritage.org/technology/report/conservative-guide-the-antitrust-and-big-tech-debate

The United States should reward success, not punish it. Yet, the “big is bad” mindset is all about punishment. It would move the country to a misguided federal government intervention of “too big to succeed.” This should be rejected. Some of the criticism of Big Tech is reasonable, but it fails to make the case for changing antitrust law. Conservative critics are right to be worried about censorship, but they should not let this worry lead them to use the wrong tool to address their concerns and thereby make bad policy choices.

Increasing the federal government’s control over the economy by using antitrust law to go after the technology sector would be a bad policy choice. Even worse, many of the changes would not merely affect the technology sector, but all sectors of the economy. Policymakers should recognize that antitrust law is perfectly capable of addressing genuine anticompetitive behavior. Conservatives should be the stalwarts of economic freedom and liberty, fighting back against these measures that could undermine Americans’ freedom and prosperity.

#### Growth prevents extinction and the collapse of the rules-based order

Zoë **Baird 20**, A.B. Phi Beta Kappa and J.D. from the University of California, Berkeley, Member of the Aspen Strategy Group, CEO and President of the Markle Foundation, Former Trustee at the Council on Foreign Relations and Partner in the law firm of O’Melveny & Myers, “Equitable Economic Recovery Is a National Security Imperative”, in Domestic and International (Dis)Order: A Strategic Response, Ed. Bitounis and King, October 2020, p. 89-90

Broadly shared economic prosperity is a bedrock of America’s economic and political strength—both domestically and in the international arena. A strong and equitable recovery from the economic crisis created by COVID-19 would be a powerful testament to the resilience of the American system and its ability to create prosperity at a time of seismic change and persistent global crisis. Such a recovery could attack the profound economic inequities that have developed over the past several decades. Without bold action to help all workers access good jobs as the economy returns, the United States risks undermining the legitimacy of its institutions and its international standing. The outcome will be a key determinant of America’s national security for years to come.

An equitable recovery requires a national commitment to help all workers obtain good jobs—particularly the two-thirds of adults without a bachelor’s degree and people of color who have been most affected by the crisis and were denied opportunity before it. As the nation engages in a historic debate about how to accelerate economic recovery, ambitious public investment is necessary to put Americans back to work with dignity and opportunity. We need an intentional effort to make sure that the jobs that come back are good jobs with decent wages, benefits, and mobility and to empower workers to access these opportunities in a profoundly changed labor market.

To achieve these goals, American policy makers need to establish job growth strategies that address urgent public needs through major programs in green energy, infrastructure, and health. Alongside these job growth strategies, we need to recognize and develop the talents of workers by creating an adult learning system that meets workers’ needs and develops skills for the digital economy. The national security community must lend its support to this cause. And as it does so, it can bring home the lessons from the advances made in these areas in other countries, particularly our European allies, and consider this a realm of international cooperation and international engagement.

Shared Economic Prosperity Is a National Security Asset

A strong economy is essential to America’s security and diplomatic strategy. Economic strength increases our influence on the global stage, expands markets, and funds a strong and agile military and national defense. Yet it is not enough for America’s economy to be strong for some—prosperity must be broadly shared. Widespread belief in the ability of the American economic system to create economic security and mobility for all—the American Dream— creates credibility and legitimacy for America’s values, governance, and alliances around the world.

After World War II, the United States grew the middle class to historic size and strength. This achievement made America the model of the free world—setting the stage for decades of American political and economic leadership. Domestically, broad participation in the economy is core to the legitimacy of our democracy and the strength of our political institutions. A belief that the economic system works for millions is an important part of creating trust in a democratic government’s ability to meet the needs of the people.

The COVID-19 Crisis Puts Millions of American Workers at Risk

For the last several decades, the American Dream has been on the wane. Opportunity has been increasingly concentrated in the hands of a small share of workers able to access the knowledge economy. Too many Americans, particularly those without four-year degrees, experienced stagnant wages, less stability, and fewer opportunities for advancement.

Since COVID-19 hit, millions have lost their jobs or income and are struggling to meet their basic needs—including food, housing, and medical care.1 The crisis has impacted sectors like hospitality, leisure, and retail, which employ a large share of America’s most economically vulnerable workers, resulting in alarming disparities in unemployment rates along education and racial lines. In August, the unemployment rate for those with a high school degree or less was more than double the rate for those with a bachelor’s degree.2 Black and Hispanic Americans are experiencing disproportionately high unemployment, with the gulf widening as the crisis continues.3

The experience of the Great Recession shows that without intentional effort to drive an inclusive recovery, inequality may get worse: while workers with a high school education or less experienced the majority of job losses, nearly all new jobs went to workers with postsecondary education. Inequalities across racial lines also increased as workers of color worked in the hardest-hit sectors and were slower to recover earnings and income than White workers.4

The Case for an Inclusive Recovery

A recovery that promotes broad economic participation, renewed opportunity, and equity will strengthen American moral and political authority around the world. It will send a strong message about the strength and resilience of democratic government and the American people’s ability to adapt to a changing global economic landscape. An inclusive recovery will reaffirm American leadership as core to the success of our most critical international alliances, which are rooted in the notion of shared destiny and interdependence. For example, NATO, which has been a cornerstone of U.S. foreign policy and a force of global stability for decades, has suffered from American disengagement in recent years. A strong American recovery—coupled with a renewed openness to international collaboration—is core to NATO’s ability to solve shared geopolitical and security challenges. A renewed partnership with our European allies from a position of economic strength will enable us to address global crises such as climate change, global pandemics, and refugees. Together, the United States and Europe can pursue a commitment to investing in workers for shared economic competitiveness, innovation, and long-term prosperity.

The U.S. has unique advantages that give it the tools to emerge from the crisis with tremendous economic strength— including an entrepreneurial spirit and the technological and scientific infrastructure to lead global efforts in developing industries like green energy and biosciences that will shape the international economy for decades to come.

### 1NC---DOJ DA---Democracy

#### **The DOJ is battling gerrymandering but it’s time and resource intensive**

Beitsch, 9-1-2021, Rebecca, "DOJ issues warning to states ahead of redistricting," TheHill, <https://thehill.com/homenews/administration/570385-doj-issues-warning-to-states-ahead-of-redistricting> -- Iowa

The Department of Justice (DOJ) on Wednesday issued a warning to states ahead of a year of congressional mapmaking that it will pursue cases against jurisdictions that seek to dilute the voting power of various minorities.

The latest guidance from the DOJ signals an administration prepared to take a more aggressive approach in battling gerrymandering.

“We're hopeful that this guidance will give jurisdictions the ability to understand their obligations so that they comply with those obligations without any need for additional enforcement by the Department of Justice,” a senior administration official said on a call with reporters.

“But where jurisdictions don't draw maps that fairly enable all citizens, regardless of race or membership in a language minority, to elect the candidates of their choice — the Justice Department will act,” the official said.

The guidance comes as the Census Bureau has completed its decennial population survey, sharing the data states and local governments will use to draw new political boundaries, including congressional and state legislative districts.

This year will be the first round of redistricting since the 2013 Supreme Court decision in Shelby v. Holder, which gutted Section 5 of the Voting Rights Act that gave the DOJ the right to pre-clear maps in states with a history of racial discrimination.

But the department on Wednesday said it would be ready to go after any jurisdiction that doesn’t meet the “one person, one vote” principle.

The guidance sent to government officials Wednesday breaks down the type of cases the department can bring under Section 2 of the law, which prohibits voting practices that discriminate on the basis of race, color or membership in a language minority group.

That includes any redistricting plan that “minimizes or cancels out the voting strength” of various groups — something often achieved by fracturing a minority group across districts or packing them into one district — as well as whether a jurisdiction has a “history of official discrimination.”

The guidance also takes aim at any states that may seek to redistrict based on the number of U.S. citizens in its boundaries, saying the DOJ “will consider whether any efforts to change the apportionment base for a districting plan to a measure other than total population.”

Doing so would diminish the representation of places with a large migrant population and follows a failed effort by the prior Trump administration to include a question on the census that would ask a resident's citizenship status.

Despite the hope from the DOJ that the guidance will help avoid lawsuits, many redistricting maps often spend years in litigation, with lawsuits at times stretching into the next reapportionment cycle.

The official also noted Wednesday that much of the litigation could be spurred by outside groups — including those that may use the 2020 data to challenge existing maps.

The notice to state and local governments also follows a year in which state governments enacted a number of laws that could restrict access to the ballot.

According to a July analysis from the Brennan Center for Justice at New York University School of Law, 18 states have already enacted 30 laws this year that will make it harder for Americans to vote.

Wednesday’s guidance is the third voting-related guidance released by the Biden administration.

In July, the department issued instructions on post-election audits and a flurry of voting laws passed after the 2020 elections, warning states some of their actions may run afoul of the law.

#### Antitrust decks DOJ resources and time

Mcgill and Overly, 19 – Margaret Harding Mcgill and Steven Overly, "Why breaking up Facebook won't be easy," May 27, *POLITICO*, <https://www.politico.com/story/2019/05/27/breaking-up-facebook-antittrust-1446087> -- Iowa

3) Antitrust cases take time and money

The Justice Department’s antitrust lawsuit against AT&T, and its unsuccessful battle to break up Microsoft, were years-long affairs that started under one presidential administration and ended in another. That means whoever wins the White House in 2020 could well be out of office before a potential case against Facebook is decided or settled.

The AT&T case began in 1974 and ended in 1982, after which the government spent another two years implementing an agreement that split up the company into eight smaller entities.

The government spent another decade in the 1990s and early 2000s waging an antitrust war against Microsoft for anti-competitive behavior, arguing that its operating system and internet browser should be separated. But by the time the court approved a settlement in 2002, requiring changes to the company's business practices but leaving Microsoft intact, the penalties did not have much impact, Verveer said.

“Technology will change, business models will change, consumer preferences will change,” he said. “You could end up at the end of a long process with something that frankly doesn't make very much difference because the world has moved on.”

That's one reason some Facebook critics, including former DOJ antitrust official Gene Kimmelman, argue that imposing restrictions on how social media companies use data could be a more effective strategy than breaking them up.

A lengthy lawsuit against Facebook would also consume a lot of resources at the DOJ, which might have to hire outside attorneys and other experts as it did in the Microsoft case. The expense could even require additional appropriations from Congress, Schwartzman said.

“It is a really daunting enterprise,” Schwartzman said. “The likelihood the Justice Department or Federal Trade Commission would be able to undertake such an activity is remote.”

#### **Redistricting shatters democracy in irreversible ways minus DOJ intervention**

Mansbridge et al, 21 – Jane Mansbridge is Professor Emerita of Political Leadership and Democratic Values at Harvard University writing with over 100+ scholars of democracy. “Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards,” <https://www.newamerica.org/political-reform/statements/statement-of-concern/> -- Iowa

We, the undersigned, are scholars of democracy who have watched the recent deterioration of U.S. elections and liberal democracy with growing alarm. Specifically, we have watched with deep concern as Republican-led state legislatures across the country have in recent months proposed or implemented what we consider radical changes to core electoral procedures in response to unproven and intentionally destructive allegations of a stolen election. Collectively, these initiatives are transforming several states into political systems that no longer meet the minimum conditions for free and fair elections. Hence, our entire democracy is now at risk.

When democracy breaks down, it typically takes many years, often decades, to reverse the downward spiral. In the process, violence and corruption typically flourish, and talent and wealth flee to more stable countries, undermining national prosperity. It is not just our venerated institutions and norms that are at risk—it is our future national standing, strength, and ability to compete globally.

Statutory changes in large key electoral battleground states are dangerously politicizing the process of electoral administration, with Republican-controlled legislatures giving themselves the power to override electoral outcomes on unproven allegations should Democrats win more votes. They are seeking to restrict access to the ballot, the most basic principle underlying the right of all adult American citizens to participate in our democracy. They are also putting in place criminal sentences and fines meant to intimidate and scare away poll workers and nonpartisan administrators. State legislatures have advanced initiatives that curtail voting methods now preferred by Democratic-leaning constituencies, such as early voting and mail voting. Republican lawmakers have openly talked about ensuring the “purity” and “quality” of the vote, echoing arguments widely used across the Jim Crow South as reasons for restricting the Black vote.

State legislators supporting these changes have cited the urgency of “electoral integrity” and the need to ensure that elections are secure and free of fraud. But by multiple expert judgments, the 2020 election was extremely secure and free of fraud. The reason that Republican voters have concerns is because many Republican officials, led by former President Donald Trump, have manufactured false claims of fraud, claims that have been repeatedly rejected by courts of law, and which Trump’s own lawyers have acknowledged were mere speculation when they testified about them before judges.

In future elections, these laws politicizing the administration and certification of elections could enable some state legislatures or partisan election officials to do what they failed to do in 2020: reverse the outcome of a free and fair election. Further, these laws could entrench extended minority rule, violating the basic and longstanding democratic principle that parties that get the most votes should win elections.

Democracy rests on certain elemental institutional and normative conditions. Elections must be neutrally and fairly administered. They must be free of manipulation. Every citizen who is qualified must have an equal right to vote, unhindered by obstruction. And when they lose elections, political parties and their candidates and supporters must be willing to accept defeat and acknowledge the legitimacy of the outcome. The refusal of prominent Republicans to accept the outcome of the 2020 election, and the anti-democratic laws adopted (or approaching adoption) in Arizona, Arkansas, Florida, Georgia, Iowa, Montana and Texas—and under serious consideration in other Republican-controlled states—violate these principles. More profoundly, these actions call into question whether the United States will remain a democracy. As scholars of democracy, we condemn these actions in the strongest possible terms as a betrayal of our precious democratic heritage.

The most effective remedy for these anti-democratic laws at the state level is federal action to protect equal access of all citizens to the ballot and to guarantee free and fair elections. Just as it ultimately took federal voting rights law to put an end to state-led voter suppression laws throughout the South, so federal law must once again ensure that American citizens’ voting rights do not depend on which party or faction happens to be dominant in their state legislature, and that votes are cast and counted equally, regardless of the state or jurisdiction in which a citizen happens to live. This is widely recognized as a fundamental principle of electoral integrity in democracies around the world.

A new voting rights law (such as that proposed in the John Lewis Voting Rights Act) is essential but alone is not enough. True electoral integrity demands a comprehensive set of national standards that ensure the sanctity and independence of election administration, guarantee that all voters can freely exercise their right to vote, prevent partisan gerrymandering from giving dominant parties in the states an unfair advantage in the process of drawing congressional districts, and regulate ethics and money in politics

It is always far better for major democracy reforms to be bipartisan, to give change the broadest possible legitimacy. However, in the current hyper-polarized political context such broad bipartisan support is sadly lacking. Elected Republican leaders have had numerous opportunities to repudiate Trump and his “Stop the Steal” crusade, which led to the violent attack on the U.S. Capitol on January 6. Each time, they have sidestepped the truth and enabled the lie to spread.

We urge members of Congress to do whatever is necessary—including suspending the filibuster—in order to pass national voting and election administration standards that both guarantee the vote to all Americans equally, and prevent state legislatures from manipulating the rules in order to manufacture the result they want. Our democracy is fundamentally at stake. History will judge what we do at this moment.

#### Democratic peace halts great power war

Imai and Lo, 21 – Kosuke Imai is Professor of Government and of Statistics at Harvard University. James Lo is Assistant Professor of Political Science at the University of Southern California. “Robustness of Empirical Evidence for the Democratic Peace: A Nonparametric Sensitivity Analysis,” *International Organization* 75, Summer 2021, pp. 901–19, doi:10.1017/S0020818321000126 – Iowa

The proposition that democratic states do not fight interstate wars against each other is one of the most enduring and influential ideas in international relations. The idea is theoretically rooted in the work of Immanuel Kant, who argued that interactions between states with a republican form of government give “a favorable prospect for the desired consequence, i.e., perpetual peace.”1 This has led to a large literature empirically documenting a negative association between democracy and conflict,2 leading one scholar to comment that the democratic peace is “the closest thing we have to an empirical law in the study of international relations.”3

Despite the law-like nature of this association, no scholarly consensus has emerged on whether the observed association reflects a causal relationship or a spurious correlation. According to a recent survey, more than 30 percent of international relations scholars disagree with the democratic peace theory.4 In particular, skeptics have challenged the democratic peace by arguing that alliance structures from the Cold War,5 capitalism,6 and contract-intensive economies7 confound the observed association. These authors find that adding certain confounding variables to regression models eliminates the statistical significance of the estimated coefficient for the joint democracy variable.8

How should we resolve this empirical debate regarding the democratic peace?9 Unfortunately, in the absence of randomized experiments, we can never completely rule out the possible existence of confounding biases that arise from omitted variables. While scholars in this literature have exclusively relied on parametric regression models, this approach requires strong assumptions, namely that the model accurately characterizes the true data-generating process (correct set of variables, right functional form, valid distributional assumption, etc.). Given that these assumptions may not be verifiable from observed data, it is no surprise that various scholars advocate different regression models with diverging sets of variables, resulting in contradictory findings. The difficulty of adjudicating between these alternative modeling approaches has led to the ongoing controversy in the empirical democratic peace literature.

We propose an alternative approach based on nonparametric sensitivity analysis to formally assess the robustness of the empirical evidence.10 Specifically, we quantify the strength of confounding relationships that could explain away the observed association between democracy and peace. That is, we compute the precise level of unobserved confounding needed to render the observed association between democracy and conflict spurious. The idea is that although not all correlations imply causation, a very strong correlation suggests it. Unlike the parametric regression modeling approach prevalent in the literature, the proposed nonparametric sensitivity approach directly addresses the existence of unobserved confounders without assuming a particular regression model.11 Although one can never know with certainty from observational data whether democracy causes peace, this nonparametric sensitivity analysis can formally assess the robustness of empirical evidence for the democratic peace.

Our analysis applies the nonparametric sensitivity analysis method originally developed by Cornfield and colleagues, who were concerned with the robustness of the positive association between cigarette smoking and lung cancer in the potential presence of unobserved confounders.12 The study of the causal relationship between smoking and lung cancer closely parallels the dispute on the democratic peace. In both cases, randomized experiments cannot be conducted for ethical and logistical reasons, and critics contend that the observed association suffers from confounding biases. While no definitive conclusion can be drawn from observational data, Cornfield and colleagues argue that no existing confounder can explain the strong association between smoking and cancer and therefore this relationship is likely to be causal. Their conclusion is worth quoting here:

Cigarette smokers have a ninefold greater risk of developing lung cancer than nonsmokers, while over-two-pack-a-day smokers have at least a 60-fold greater risk. Any characteristic proposed as a measure of the postulated cause common to both smoking status and lung-cancer risk must therefore be at least nine-fold more prevalent among cigarette smokers than among nonsmokers and at least 60-fold more prevalent among two-pack-a-day smokers. No such characteristic has yet been produced despite diligent search.13

Our application of nonparametric sensitivity analysis to the democratic peace yields striking results. Depending on the definition of democracy, we find that a confounder must be at least forty-seven times more prevalent in democratic dyads than in other types of dyads. Thus, any potential confounder that could explain the democratic peace would have to be at least five times as prevalent as a similar confounder for smoking and lung cancer. In other words, according to our analysis, the positive association between democracy and peace is much more robust than that between smoking and lung cancer.

While no such confounder has yet been found for the relationship between smoking and lung cancer, we examine whether the confounders identified in the democratic peace literature meet the conditions of nonparametric sensitivity analysis. For example, we consider a set of economic confounders proposed by Gartzke who argues that the democratic peace can be explained by capitalism.14 We also consider other confounders, such as military alliances.15 Overall, our findings imply that for a potential confounder to explain away the democratic peace, it must be much more strongly associated with regime types and conflicts than the confounders that have been proposed to date. This finding again demonstrates the robustness of empirical evidence for the democratic peace.

### Adv CP

#### The United States federal government should implement a program of democratic socialism through taxing the rich and redistributing wealth.

#### The United States federal government should require all farms to engage in regenerative agricultural practices.

#### The United States federal government should require firms to increase cooperation with European tech firms.

### 1NC---Infrastructure DA

#### Biden has sufficient PC to tackle climate but message discipline is key

Strassel et al, 9-8 – Kimberley Strassel, a member of the editorial board at Wall Street Journal, along with Byron York, chief political correspondent Washington Examiner and Juan Williams and Shannon Beam of Fox. “Fox Special Report with Bret Baier (6:00 PM EST),” p. Nexis Uni – Iowa

JOE BIDEN, (D) PRESIDENT OF THE UNITED STATES: We're the only country in the world that goes into a crisis, and when we come out of it, we're stronger than before we went in it. That's by building back better.

Climate change poses an existential threat to our lives, to our economy, and the threat is here. It's not going to get any better. This is much, much bigger than anyone was willing to believe.

UNIDENTIFIED FEMALE: For this guy to pull this -- to leave them in ruins and leave Americans behind. Leave Americans behind, that's -- crazy. He will leave you behind.

BREAM: We're back with our panel, the president there trying to speak out on climate change and getting a bit of heckling in the process. Let's take a look at the Real Clear Politics average of how he is doing right now. His poll numbers have been dropping. His approval is at 45.3 percent on average, disapproval 49.5 percent. Juan, those numbers have been steadily moving in the wrong direction for the president. They were before Afghanistan, and since the chaotic withdrawal they have only continued downward. But he wants to move on to a different part of his agenda. Does he have the political capital to do it?

WILLIAMS: Well, I think that it's clear that long before the withdrawal, you had Afghanistan as the forever war, the forgotten war. And now without U.S. troops on the ground, Shannon, I think it is going to be in the rearview mirror pretty soon.

What Biden is doing, though, politically is pretty sound strategy. He's talking about local politics, things like the storm damage, people left in the dark, people suffering flood damage to their property and homes, left homeless in some cases, and also about the rise in COVID. He has got a speech scheduled for tomorrow, a major speech on COVID and what we should do going into the future.

So this is, to me, the politics of the moment. And I think that he is moving in the right direction in terms of his own political strategy.

BREAM: I thought it was interesting today, in "Politico" there was an article that talked about behind the scenes that there are staffers within the Biden administration that want him to stop talking, Kimberley, that they don't like some of his riffing or going off on topics when they need to so tightly control moving some of his domestic agenda forward?

STRASSEL: Yes, that was a pretty remarkable story, saying that they actually mute him. But, again, this is something that everyone in America is seeing.

And I have to disagree with Juan a little bit here. It was very, very clear from the beginning that the reason that this administration continued to push on with this artificial August 31st deadline despite being requested by allies, international allies, and members of Congress to please put the mission first, is they wanted to draw a line underneath this and turn and pivot back to their domestic agenda.

I think the problem with that is it doesn't necessarily stop the headlines from coming. And we are still going to be hearing about the people who have been left behind, the terrorists who are taking over positions in the government. And Joe Biden can pretend, he can ignore it, but Americans understand the complete disconnect. And I think the real risk to the administration is it makes him end up looking callous. It makes him end up looking as though he is ignoring a crisis and a problem. And that will not be good for his poll numbers, and it will be harder for him to push through a domestic agenda as members of his own party try to begin to distance themselves from that.

BREAM: "Wall Street Journal" talking about those attempts to move forward with the domestic issues says this, "He is seeking to press his legislative agenda and redouble efforts to combat the COVID-19 pandemic after Labor Day, but the tumultuous withdrawal from Afghanistan may cast a long shadow over the fall. The White House and congressional Democrats believe that the infrastructure and the broader legislative package are widely popular. It's a passage of those proposals as key to solidifying support ahead of the midterm elections." Byron, will it work?

YORK: Well, that's why he is desperately trying to change the subject, because, if you look at Biden's job approval for handling the mess in Afghanistan, it's in the 20s. That's down with George W. Bush in the worst days of Iraq. But he's still underwater, the problem is he is still underwater with other things. His handling of the economy, approval of that is under water. And even with COVID, which has always been the most important part of his approval rating, the number of Americans who approve of the way he is handling this has gone down significantly.

And I think what you are going to see tomorrow is an effort to try to show the American people that his administration is on one page, and it knows what to do next in the COVID crisis because the administration has seemed confused. It has had mixed messages. And it, frankly, hasn't had a lot new to think and say about COVID in the last few weeks as people have been so worried about the Delta variant. So he really is trying, I think, to get control of what was his strongest issue.

BREAM: The administration also investing heavily in the Newsom recall effort and fighting that out in California. Quickly, Juan, is it going to be a sort of a litmus test for looking ahead to 2022 how that goes, or is it sort of its own outlier?

WILLIAMS: I think it's an important step. Obviously, for Democrats, there is a lot on the line here. You think about the future of the court, Shannon, something you know a lot about, but also even Senator Feinstein, who at 88 could retire any moment. So all of that is at play and driving.

So I think this is all part of an effort by Democrats to focus on issues where they do have control. They got out 120,000 in the evacuation. I think they can take some pride in that. But this has been a messy exit, as we have all said today. And they have to deal with that reality.

#### Antitrust decks PC and tanks agenda

Carstensen, 21 – Peter C. Carstensen is Chair in Law Emeritus, University of Wisconsin Law School. “The “Ought” and “Is Likely” of Biden Antitrust,” Concurrences, February, N° 1-2021 On-Topic The new US antitrust administration, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen> – Iowa

12. But given a hostile judiciary, the agencies are likely to limit their challenges to the most obvious cases. Important cases will die on the courthouse steps without ever getting into court. To be sure, the agencies are less likely to waste time investigating minor marijuana mergers and to focus resources on more important matters. The emergent judicial demands for detailed proof of actual adverse competitive effects will limit the scope of what can be done. The resources to develop a major case in light of these expectations will be significant and so constrain the agencies further. Thus, while merger enforcement may see an uptick especially where the merger involves two major direct competitors in more than moderately concentrated markets, the incentives to pursue vertical or potential competition cases will be very limited. Similarly, despite the growing recognition of how dominant firms, especially in the high-tech arena, buy up nascent competitors, the current standards for merger analysis will make such challenges very unlikely.

13. Given the American Express decision, the burden of challenging anticompetitive vertical restraints is likely to deter the enforcers from following up on the Dentsply [89] and McWane [90] cases except, where, as in those cases, a clear monopoly existed. Given existing market concentrations in many industries, this will result in the continuation of a plethora of harmful restraints.

14. 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.

15. 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!

16. 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.

#### PC is make or break for meaningful climate action

Okun and Ross, 9-7-21 – Eli Okun and Garrett Ross, POLITICO Playbook (PM), “Playbook PM: Biden’s climate/infrastructure challenge,” <https://www.politico.com/newsletters/playbook-pm/2021/09/07/bidens-climate-infrastructure-challenge-494225> -- Iowa

President JOE BIDEN is putting climate change and his infrastructure agenda front and center today as he journeys to New Jersey and New York to survey Ida’s devastating damage across several communities.

It’s a moment that lays bare both the power and the pitfalls of Biden’s approach to this global existential threat.

First, the power: This summer, nearly a third of Americans suffered an extreme weather event fueled by climate change — massive fires in California, flooding throughout the Midwest and Northeast, supercharged hurricanes on the Gulf Coast and so on.

All of which means that as Biden marshals the bully pulpit to spotlight the ways in which climate change is already altering our lives, he has plenty of tangible examples to draw from.

“For decades, scientists have warned of extreme weather — would be more extreme, and climate change was here. And we’re living through it now,” Biden said in New Jersey this afternoon. “We don’t have any more time. … We’re at one of those inflection points where we either act, or we’re gonna be in real, real trouble.”

Now, the potential pitfalls: As congressional Democrats gear up for a crucial few weeks in which they’ll craft their massive $3.5 trillion reconciliation bill, the White House is linking climate disaster directly to its Build Back Better policy agenda — both the spending package and the bipartisan infrastructure bill that already passed the Senate.

That’s where things get dicier. We don’t need to remind you how difficult it will be for Democrats to thread the needle and get these bills to the president’s desk.

— If Biden and Democratic leaders go too big with their climate planks in the infrastructure bill, they risk losing the support of the moderate JOE MANCHIN types. (That, too, faces its own political obstacles: Speaker NANCY PELOSI this morning, when a reporter indicated she’d have to lower the reconciliation price tag to accommodate moderates, simply responded: “Why?”)

— The perils of going too small, on the other hand, are neatly exemplified by this NYT story about electric cars , a key piece of the economy-wide shift ahead that’s necessary to tamp down emissions and combat climate change: “The country has tens of thousands of public charging stations — the electric car equivalent of gas pumps — with about 110,000 chargers. But energy and auto experts say that number needs to be at least five to 10 times as big to achieve the president’s goal,” write Niraj Chokshi, Matthew Goldstein and Erin Woo. “Building that many will cost tens of billions of dollars, far more than the $7.5 billion that lawmakers have set aside in the infrastructure bill.”

With a crammed legislative calendar, the White House will have to keep the pressure on to make sure meaningful climate provisions don’t fall by the wayside — as seems likely to happen with legislation concerning abortion rights, police reform, immigration reform and raising the minimum wage.

— Our colleagues Anita Kumar and Chris Cadelago have more on “Biden’s growing policy backlog” — and the political risks for Democrats if they let down key constituencies.

Asked this morning how he’d win over Democrats on infrastructure, Biden said simply, “[T]he sun is going to come out tomorrow,” per pooler Brian Bennett of Time. That’s true. But he’s just gotta make sure it’s not warming the earth too quickly.

#### Warming causes extinction

Bryce, 20 – Emma, citing Nelson, Roman, and Kemp---Cassidy *Nelson* is Co-lead of the biosecurity team at Oxford), Sabin *Roman* earned a PhD in Complex Systems Simulation from the University of Southampton, and both Roman and Luke *Kemp* are research associates at the Cambridge University. "What Could Drive Humans to Extinction?" Real Clear Science, 7-27-2020, <https://www.realclearscience.com/articles/2020/07/27/what_could_drive_humans_to_extinction.html> -- Iowa

Nuclear war

An existential risk is different to what we might think of as a "regular" hazard or threat, explained Luke Kemp, a research associate at the Centre for the Study of Existential Risk at Cambridge University in the United Kingdom. Kemp studies historical civilizational collapse and the risk posed by climate change in the present day. "A risk in the typical terminology is supposed to be composed of a hazard, a vulnerability and an exposure," he told Live Science. "You can think about this in terms of an asteroid strike. So the hazard itself is the asteroid. The vulnerability is our inability to stop it from occurring — the lack of an intervention system. And our exposure is the fact that it actually hits the Earth in some way, shape or form."

Take nuclear war, which history and popular culture have etched onto our minds as one of the biggest potential risks to human survival. Our vulnerability to this threat grows if countries produce highly-enriched uranium, and as political tensions between nations escalate. That vulnerability determines our exposure.

As is the case for all existential risks, there aren't hard estimates available on how much of Earth's population a nuclear firestorm might eliminate. But it's expected that the effects of a large-scale nuclear winter — the period of freezing temperatures and limited food production that would follow a war, caused by a smoky nuclear haze blocking sunlight from reaching the Earth — would be profound. "From most of the modeling I've seen, it would be absolutely horrendous. It could lead to the death of large swathes of humanity. But it seems unlikely that it by itself would lead to extinction." Kemp said.

Pandemics The misuse of biotechnology is another existential risk that keeps researchers up at night. This is technology that harnesses biology to make new products. One in particular concerns Cassidy Nelson: the abuse of biotechnology to engineer deadly, quick-spreading pathogens. "I worry about a whole range of different pandemic scenarios. But I do think the ones that could be man-made are possibly the greatest threat we could have from biology this century," she said. As acting co-lead of the biosecurity team at the Future of Humanity Institute at the University of Oxford in the United Kingdom, Nelson researches biosecurity issues that face humanity, such as new infectious diseases, pandemics and biological weapons. She recognizes that a pathogen that's been specifically engineered to be as contagious and deadly as possible could be far more damaging than a natural pathogen, potentially dispatching large swathes of Earth's population in limited time. "Nature is pretty phenomenal at coming up with pathogens through natural selection. It's terrible when it does. But it doesn't have this kind of direct 'intent,'" Nelson explained. "My concern would be if you had a bad actor who intentionally tried to design a pathogen to have as much negative impact as possible, through how contagious it was, and how deadly it was.” But despite the fear that might create — especially in our currently pandemic-stricken world — she believes that the probability that this would occur is slim. (It's also worth mentioning that all evidence points to the fact that COVID-19 wasn't created in a lab.) While the scientific and technological advances are steadily lowering the threshold for people to be able to do this, "that also means that our capabilities for doing something about it are rising gradually," she said. "That gives me a sense of hope, that if we could actually get on top [of it], that risk balance could go in our favor." Still, the magnitude of the potential threat keeps researchers' attention trained on this risk.

From climate change to AI

A tour of the threats to human survival can hardly exclude climate change, a phenomenon that (is) already driving the decline and extinction of multiple species across the planet. Could it hurl humanity toward the same fate?

The accompaniments to climate change — food insecurity, water scarcity, and extreme weather events — are set to increasingly threaten human survival, at regional scales. But looking to the future, climate change is also what Kemp described as an "existential risk multiplier" at global scales, meaning that it amplifies other threats to humanity's survival. "It does appear to have all these relationships to both conflict as well as political change, which just makes the world a much more dangerous place to be." Imagine: food or water scarcity intensifying international tensions, and triggering nuclear wars with potentially enormous human fatalities.

This way of thinking about extinction highlights the interconnectedness of existential risks. As Kemp hinted before, it's unlikely that a mass extinction event would result from a single calamity like a nuclear war or pandemic. Rather, history shows us that most civilizational collapses are driven by several interwoven factors. And extinction as we typically imagine it — the rapid annihilation of everyone on Earth — is just one way it could play out.

## Case

### One Advantage

#### Market concentration doesn’t reduce competition and is *positively correlated* with productivity gains – they can’t solve productivity

**Litan 18** – B.S. in Economics, the Wharton School; J.D., Yale Law School; Ph.D., Yale University. Non-Resident Senior Fellow at the Brookings Institution; previously Vice President and Director of Economic Studies

(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

National market concentration measures, however, do not necessarily prove that actual competition is declining. Carl Shapiro, one of the nation’s leading industrial organization economists and former chief economist for the Justice Department’s antitrust division, has shown that national concentration measures of product or service markets do not always constitute a relevant geographic market where competition takes place.23 Shapiro identifies several industries where this difference is important. Although national chains may account for larger shares of revenue in these industries, there is (yet) no evidence of reduced competition at the local level where these firms tend to compete: accommodations and food, finance, health care, professional services, property, retail trade, transport and warehousing, utilities, and wholesale trade.24

Nonetheless, the growth rate of labor productivity in the U.S. has remained low by historical standards – at around 1 percent – over the past decade. This is worrisome because productivity growth is the key to rising living standards.

One reason for the productivity growth slowdown may be the decline in the rate of formation of new firms, which, over the past two centuries, have been disproportionately responsible for commercializing disruptive innovations.25 Likewise, workers are moving less frequently than they once did – either between firms in the same city or between cities.26

The temptation is great also to blame poor productivity performance on increasing industry concentration, but it should be resisted for several reasons. For one thing, as already noted, trends in national concentration statistics are poor measures of the state of competition. Moreover, as Shapiro has noted, even the increases in concentration that have occurred in narrowly defined industries at the national level – some of which can be attributed to relaxed merger enforcement by the Department of Justice after it updated its Merger Guidelines in 1982 – are mostly in unconcentrated industries and not of a magnitude that would indicate any material diminution of competition.27 And, if competition has not materially declined, then the state of competition cannot be linked to the decline in productivity growth or other measures of economic “dynamism” such as startup activity or worker mobility.

Statistical studies also do not support any connection between the modest increases in national industry concentration and the decline in productivity growth. David Autor and colleagues, who have been critical of increased concentration for its impacts on the labor market, have found a statistically positive relationship between an industry’s concentration level and its productivity improvements.28 Likewise, there is evidence linking investment in information technology (which is productivity enhancing for the firms making the investment), with more industry concentration. However, Bessen argues that – because much IT investment is proprietary and not diffusing to the rest of the economy – the economy-wide impact on productivity may be less than optimal.29

#### No impact to meltdowns – empirics

Marder 11 – staff writer (Jenny, “Mechanics of a Nuclear Meltdown Explained,” PBS, 3/15/2011, <http://www.pbs.org/newshour/rundown/mechanics-of-a-meltdown-explained/>) //RGP

After a powerful explosion on Tuesday, Japanese workers are still struggling to regain control of an earthquake and tsunami-damaged nuclear power plant amid worsening fears of a full meltdown. Which raises the questions: What exactly is a nuclear meltdown? And what is a partial meltdown? “This term ‘meltdown’ is being bandied about, and I think people think that you get the fuel hot and things start melting and become liquid,” said Charles Ferguson, physicist and president of the Federation of American Scientists. “But there are different steps along the way.” Inside the core of the boiling water reactors at Japan’s Fukushima Dai-ichi facility are thousands of zirconium metal fuel rods, each stacked with ceramic pellets the size of pencil erasers. These pellets contain uranium dioxide. Under normal circumstances, energy is generated by harnessing the heat produced through an atom-splitting process called nuclear fission. As uranium atoms split, they produce heat, while creating what’s known as fission products. These are radioactive fragments, such as barium, iodine and Cesium-137. In a working nuclear reactor, water gets pumped into the reactor’s heated core, boils, turns into steam and powers a turbine, generating electricity. “Basically, each uranium atom splits into two parts, and you get a whole soup of elements in the middle of the periodic table,” said Arjun Makhijani, a nuclear engineer and president of the Institute for Energy and Environmental Research. A reactor is like a pressure cooker. It contains boiling water and steam, and as temperature rises, so does pressure, since the steam can’t escape. In the event of a cooling failure, water gets injected to cool the fuel rods, and pressure builds. This superheated core must be cooled with water to prevent overheating and an excessive buildup of steam, which can cause an explosion. In Japan, they’ve been relieving pressure by releasing steam through pressure valves. But it’s a trade-off, as there’s no way to do this without also releasing some radioactive material. A nuclear meltdown is an accident resulting from severe heating and a lack of sufficient cooling at the reactor core, and it occurs in different stages. As the core heats, the zirconium metal reacts with steam to become zirconium oxide. This oxidation process releases additional heat, further increasing the temperature inside the core. High temperatures cause the zirconium coating that covers the surface of the fuel rods to blister and balloon. In time, that ultra-hot zirconium metal starts to melt. Exposed parts of the fuel rods eventually become liquid, sink down into the coolant and solidify. And that’s just the beginning of a potentially catastrophic event. “This can clog and prevent the flow of more coolant,” Ferguson said. “And that can become a vicious cycle. Partial melting can solidify and block cooling channels, leading to more melting and higher temperatures if adequate cooling isn’t present.” A full meltdown would involve all of the fuel in that core melting and a mass of molten material falling and settling at the bottom of the reactor vessel. If the vessel is ruptured, the material could flow into the larger containment building surrounding it. That containment is shielded by protective layers of steel and concrete. “But if that containment is ruptured, then potentially a lot of material could go into the environment,” Ferguson said. Meltdown can also occur in the pools containing spent fuel rods. Used fuel rods are removed from the reactor and submerged in what’s called a spent fuel pool, which cools and shields the radioactive material. Overheating of the spent fuel pools could cause the water containing and cooling the rods to evaporate. Without coolant, the fuel rods become highly vulnerable to catching fire and spontaneously combusting, releasing dangerous levels of radiation into the atmosphere. “Water not only provides cooling, but it provides shielding,” said Robert Alvarez, a nuclear expert and a senior scholar at the Institute for Policy Studies. “[Radiation] dose rates coming off from spent fuel at distances of 50 to 100 yards could be life-threatening.” Since spent fuel is less radioactive than fuel in the reactor core, these pools are easier to control, said Peter Caracappa, a professor and radiation safety officer at Rensselaer Polytechnic Institute. But they’re also less contained. “If material is released, it has a greater potential to spread because there’s no primary containment,” he said. Most of the problems with the backup generators were caused by the tsunami flooding them. But Makhijani suspects that unseen damage from the earthquake may be adding another challenge. “I think because the earthquake was so severe, there’s probably a lot of damage becoming apparent now,” he said. “Valves might have become displaced, and there may be cracked pipes. We can’t know, because there’s no way to suspect. Yesterday, they had trouble releasing a valve. And they’ve had trouble maintaining coolant inside, which means leaks.”

#### No internal link to global inequality---

#### Tam and Bisielkis are literally undergraduates---reject their research.

### Other Advantage

#### symmetric competition standard can’t solve---doesn’t align with the EU. Doesn’t solve backlash

#### No impact to international law leadership -- it doesn’t collapse hegemony writ-large

Burke-White 15- international law professor at Penn with a PhD and MPhil from Cambridge in IR and a JD from Harvard (William W. Burke-White, Winter 2015, “Power Shifts in International Law: Structural Realignment and Substantive Pluralism,” published in the Harvard International Law Journal, vol. 56 p. 1, accessed in lexis)

Writing in 1940, Morgenthau predicted that a "fundamental change in the social forces underlying a system of international law"--such as the power redistribution of the past decade--would result in "a competitive contest for power." He anticipated that "change [in] the existing legal order will be decided, not through a legal procedure provided for by this same legal order, but through a conflagration of conflicting social forces which challenge the legal order as a whole." n488 His prediction has not come to pass. Instead, over the past decade, the international legal system has accommodated an extraordinary redistribution of power. It has changed in the process, but has remained robust and durable. The preferences of states, as well as the distribution of power amongst them, matter to the processes and substance of international law. New powers have embraced the system as a whole because it furthers their interests. They are using their newfound power to adapt it from within. Three implications of this redistribution of power have already become clear. First, international law has transitioned from a unipolar structure to a multi-hub structure. In this new order, leadership has diversified such that far more states are capable of acting as hubs and driving international legal processes. This multi-hub structure is comprised of numerous, flexible subsystems that operate in a kind of variable, issue-specific geometry. It is a structure in which non-hubs often have multiple choices as to which hubs to follow on any given issue. And it is a structure in which legal processes are migrating into these subsystems, often at the expense of global-level alternatives. Second, this multi-hub structure is promoting pluralism within international law. Whereas, during the transatlantic moment, the United States and Europe were largely able to limit international legal discourse and rule development in accordance with their preferences, the multi-hub structure fosters the articulation of alternative preferences. Pluralism has already become evident at three tension points: sovereignty, legitimacy, and economic [\*77] development. Additional points of pluralism are likely to emerge in the years ahead. Even if these preferences themselves are not new, the new power of the states that articulate them is altering the substantive development of international legal rules. The distinct preferences advanced by hubs will challenge the preferences the United States and Europe have successfully embedded in many international legal regimes over the past half century. Overtime, these regimes will adapt to accommodate new preferences, both within separate subsystems and globally. Third, while this new pluralism will have distinct implications in specific areas of the law, a common element emerges from the alternative preferences for sovereignty, legitimacy, and economic development now being articulated. At each of these tension points rising powers are advancing a far more state-centric vision of international law. It is a vision of international law that reaffirms state sovereignty, bases the legitimacy of international legal processes and institutions on long-standing principles of sovereign equality, and puts the state back into the center of economic development. This reassertion of the centrality of the state conflicts with the individualization of international law, a hallmark of the period of U.S. leadership. For legal rules and regimes that seek to advance this individualization or draw their effectiveness from it--human rights law, the law of investment protection, and the law of humanitarian intervention, for example--the return of the state will likely have pronounced negative consequences. Over time these regimes may be ratcheted back as international law returns closer to its Westphalian origins as a system of sovereigns, among sovereigns. It is, however, premature to draw final conclusions. The multi-hub model, as developed here, depends on two assumptions that, while presently valid, could shift. First, the model has assumed that the preferences of rising powers are not consistently aligned n489 in a way that would create a stable coalition to replace U.S. hegemony. n490 Second, the model has assumed that hub leadership and subsystems remain flexible, changing on different issues, and providing non-hubs with choices as followers of different hubs and subsystems. If either of these assumptions proves wrong, the resulting international legal system would look quite different and far less appealing from the U.S. perspective.

# 2NC

## States

#### Causes federal follow-on

Also answers compliance

Lemos 11 (Margaret H. Lemos, Associate Professor, Benjamin N. Cardozo School of Law, 2011, State Enforcement of Federal Law, 86 *New York University Law Review* 698-765 (2011), https://scholarship.law.duke.edu/faculty\_scholarship/2516)

As some of these examples suggest, enforcement authority creates opportunities for states to influence policy not only within their own borders, but also on a national scale. State enforcement may change the federal "law in the books" by generating judicial decisions that clarify the scope of the law. In the 1980s, for example, nineteen states banded together to sue a group of domestic and foreign insurers and reinsurers. The states alleged collusive activity in violation of federal antitrust law. They had urged the Department of Justice to pursue similar claims, but federal enforcers took the view that "collusion is highly unlikely in unconcentrated industries like the property and casualty insurance industry."'191 Nevertheless, the states' lawsuit was successful and resulted in a Supreme Court decision defining the extent of the insurance exemption 92 establishing "an expansive scope for U.S. antitrust enforcement against foreign conduct by foreign parties."'193 The decision has been described as one of the "ten milestones in 20th century antitrust law,"'1 94 and federal enforcers rely on its precedent in many international cartel cases today. 95

State enforcement also may have wide-ranging effects when state practices prompt a shift in enforcement by federal agencies. For example, one commentator has suggested that the FTC's decision to reconsider its use of restitution as a remedy for antitrust violations was spurred by states'

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pursuit of monetary remedies. 196 Similarly, states' enforcement efforts may have nationwide consequences because of their impact on the regulated community, even if the law on the books remains the same. One state's aggressive enforcement can prompt potential defendants to change their practices across the board. 97 The impact is amplified when multiple states work together. 198

#### Numerous examples prove that states participate in international antitrust---makes deficits inevitable and proves solvency.

Swaine 1 (Edward T. Swaine, Assistant Professor, Legal Studies Department, The Wharton School, University of Pennsylvania. A.B., Harvard; J.D., Yale, December 2001, “THE LOCAL LAW OF GLOBAL ANTITRUST,” 43 *Wm. & Mary L. Rev.* 627, https://scholarship.law.wm.edu/wmlr/vol43/iss2/5/)

c. Local Actors

Beyond indicating that they are not intended to alter national or state laws, [121](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) the agreements exhibit little appreciation of the multifaceted nature of U.S. antitrust. The Justice Department and the FTC are each subject to the agreements, but their nominal independence would not in any case threaten international cooperation, [122](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) and they coordinate fairly effectively with other federal agencies having regulatory interests touching on [[\*661]](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) antitrust. [123](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) The lacuna in the agreements, rather, concerns the fact that nonfederal parties may enforce federal law against foreign parties and overseas activities.

Foreign governments were, of course, well aware of the private right of action under the Clayton Act, [124](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) having complained long and loudly about the in terrorem effect of treble damages, [125](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) which bedevil a growing number of international cases. [126](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) But private [[\*662]](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) parties go almost unmentioned in the bilateral agreements. [127](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) The resulting gap in regulatory comity has been noted, however, in academic appraisals of Hartford Fire, and has resulted in calls for a legislative resolution [128](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) or government participation in private suits, [129](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) lest private parties establish an independent and relatively unconstrained international economic policy. [130](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20)

Less attention still has been paid to the state attorneys general, though they were pivotal participants in Hartford Fire. [131](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) The bilateral agreements were not intended, it is clear, to amend state antitrust statutes-the majority of them resembling (if not in every respect) the federal antitrust statutes. [132](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) But states are also able to enforce federal antitrust law. Just like any other "person," [133](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) a state [[\*663]](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) may seek injunctive relief (including divestiture of assets) [134](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) or treble damages [135](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) for threatened or actual antitrust injuries suffered as purchasers of goods or services. Unlike purely private parties, a state may also bring parens patriae actions on behalf of its natural residents, which again may entitle it to equitable relief [136](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) or treble damages. [137](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20)

The inattention to state antitrust is unlikely to persist. State antitrust enforcement has long been controversial domestically, [138](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) and states have no more forsworn intervention in international matters than they have in matters touching on interstate commerce. [139](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) States have been actively involved in a number of [[\*664]](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) recent mergers involving foreign parties or transnational dimen-sions, such as BP- Amoco/Arco, Exxon/Mobil, and MCI/Worldcom, sometimes at cross-purposes with one another or with the federal government. [140](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) States have also been involved in high-profile lawsuits potentially benefitting from international cooperation, such as the continuing Microsoft saga, [141](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) and have proceeded directly against foreign defendants in matters involving parallel federal, state, private, and foreign proceedings, as in the vitamins price-fixing cases. [142](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) The resulting potential for conflict is of no [[\*665]](https://advance-lexis-com.grinnell.idm.oclc.org/document/?pdmfid=1516831&crid=ac031110-3dba-4f74-80dd-2eb832298a35&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A44TN-KNM0-00CW-G11Y-00000-00&pdcontentcomponentid=7413&pdteaserkey=sr1&pditab=allpods&ecomp=ybvnk&earg=sr1&prid=ad3f3d47-a0c2-45b9-afc8-2fee686fcf20) small relevance to foreign governments, but there has been as yet no attempt to moderate the states’ role. 143

#### It has all 50 states collectively demand the plan---a literally unprecedented signal of support that’s seen as U.S. interest

Julie Melissa Blase 3, PhD in Government from the University of Texas, BA from the University of Texas at Austin, “Has Globalization Changed U.S. Federalism? The Increasing Role of U.S. States in Foreign Affairs: Texas-Mexico Relations”, Doctoral Dissertation, December 2003, https://repositories.lib.utexas.edu/bitstream/handle/2152/463/blasejm039.txt

Although what the states and cities are doing may not rise to the level of federal law, many of these policy initiatives are in harmony with domestic policy goals. Collectively, it can be argued, they serve to shape the foreign relations of the nation as a whole. Ivo Duchacek sees no difference in relations conducted by federal actors and by subnational actors. "If by diplomatic negotiation we mean processes by which governments relate their conflicting interest to the common ones, there is, conceptually, no real difference between the goals of paradiplomacy and traditional diplomacy: the aim is to negotiate and implement an agreement based on conditional mutuality."45 Brian Hocking objects to treating the foreign relations of subnational governments as if they were something distinct from the federal level. Hocking studies what happens in federal systems when foreign policy issues become local concerns. He sets his approach apart from the complex interdependence crowd, such as Duchacek, saying that ideas such as "paradiplomacy" places subnational activities outside of traditional diplomatic patterns. Hocking sees non-central governments as integrated into a dense web of diplomatic interactions, in which they serve more as "allies and agents" in pursuit of national objectives rather than as flies in the ointment. "The nature of contemporary public policy with its dual domestic- international features, creates a mutual dependency between the levels of government and an interest in devising cooperative mechanisms and strategies to promote the interests of each level."46 Rather than separating the activities of non-central governments from those of central governments, Hocking's goal is to "locate" subnational governments in the traditional diplomatic and foreign policy processes initiated and carried through by the federal government. But what Hocking does not look at as closely are the ways in which subnational governments initiate relations directly with foreign governments. Looking at why states initiate their own foreign relations is the way to determine to what degree the states, in pursuit of their own goals, can be "allies and agents" of the federal government. This dissertation addresses state- initiated relations with foreign governments to see whether the states are acting as de facto agents of the federal government, in pursuit of shared goals or distinct state interests. But one point to consider is that the development of state roles is not a matter of devolution. Many of the developments at the subnational level are state and local responsibilities to begin with. While the federal government is responsible for trade policy, states have the primary role in economic development, and criminal justice is a state and local concern, albeit state and local governments share responsibility with the federal government for public safety. But the states are active in the policy areas examined here not so much because the federal government has mandated they be so, but because globalization has changed the nature of governing at the subnational level. These developments signify not a transfer of power from the federal level to the states but an expansion of traditional state- level powers.

#### The CP sends a strong signal internationally

Daniel Halberstam 1, Assistant Professor of Law at the University of Michigan Law School, “The Foreign Affairs Of Federal Systems: A National Perspective On The Benefits Of State Participation”, Villanova Law Review, 46 Vill. L. Rev. 1015, Lexis

B. Political Activity

State and local governments have also engaged in foreign policy initiatives with more "political" goals in mind, that is, to promote policies unrelated to their own economic development. n90 Sometimes these "political" activities are difficult to distinguish from the more basic economic and cultural engagement of which they are a part. At other times, the principal purpose of the action is clearly the "political" goal itself. Here, too, we see prominent instances, particularly of collective state and local action, in which such engagement may be considered useful for the Nation as a whole.

Cities, Counties, and States, for example, have forged formalized ties across national boundaries, which promote business, professional, cultural, and educational exchanges as well as advancing political engagement more generally. Currently, 1300 U.S. communities have established formal links with 2400 of their counterparts in 137 nations, and all fifty States, as well as American Samoa, Guam, Puerto Rico and Washington, D.C., have formed a total of 201 relationships with subnational units of government in approximately fifty foreign nations. n91 In some instances, these relationships preceded formal diplomatic ties at the national level, as in the case of Cuba, where at least six U.S. cities have sister city relationships with Cuban counterparts. n92 In others, sister city relationships were used to bring into focus human rights and social justice issues otherwise neglected by the federal government. n93 Local officials have used visits to [\*1033] highlight political issues, n94 and even trade missions have taken on significant political content, as when Idaho sponsored missions to Libya in the 1970s and hosted Libyan missions in the United States. n95 Trade, development and politics are similarly intertwined when the U.S. Conference of Mayors pursues the creation of an international alliance with counterparts throughout the world, engages Chinese mayors in the form of a cooperative agreement and promotes cooperation in the Middle East. n96

Beyond such hybrid activities, many cities and counties have formally expressed their views on a host of foreign policy matters, including the Vietnam War, the Comprehensive Test Ban Treaty, the status of Taiwan and nuclear disarmament. n97 Others have gone further and limited their investments, much in the way Massachusetts did with its procurement regulations, in order to further political objectives. n98 Yet other state and local officials have obstructed the movement of foreign officials in the United States based on foreign policy considerations. n99

[\*1034] More significantly, state and local governments have in recent history intervened collectively in several foreign policy issues that ultimately became issues of national importance. In these instances, the States dramatically imposed economic and regulatory pressures to make their voices heard at national and international levels. And while federal officials have criticized these actions along the way, the federal government ultimately took up these concerns and in some cases embraced subnational government views in resolving the underlying issue.

#### Cartel model---the federal government lets states enforce nationwide antitrust

Greve 5 (Michael S. Greve, John G. Searle Scholar, American Enterprise Institute; Ph.D. 1987, Cornell University, 2005, “Cartel Federalism? Antitrust Enforcement by State Attorneys General,” *University of Chicago Law Review*: Vol. 72 : Iss. 1, Article 6, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5317&context=uclrev)

Largely in connection with the Microsoft litigation, the antitrust enforcement authority of state attorneys general, in their parens patriae capacity, has generated acrimonious debate.' Perhaps the only point of genuine agreement is the complaint over the lack of reliable empirical evidence on state antitrust enforcement. This Essay attempts to make a modest contribution to the data front and a more ambitious and provocative contribution to the theoretical debate. I present and examine two sets of data:

\* A list of state parens patriae antitrust actions, compiled and kindly made available to me by Judge Richard Posner.4 I combined and cross-checked these cases with parens patriae cases extracted from a similar list of state antitrust cases for the 1993-2002 period, compiled by different means by Michael DeBow.5 So amended, the list (hereinafter, "the PosnerDeBow list") comprises 103 parens patriae actions.

\* Sixty-eight antitrust cases, dating back to 1977, in which states submitted eighty-four briefs amici curiae. (In four cases, different states submitted briefs on either side; in the remaining cases, states submitted briefs at different stages of the litigation.) Robert Hubbard kindly supplied this list;' I have added some briefs from a website and a few obviously "missed" Supreme Court cases.

While these sets of data are still incomplete and, perhaps, unrepresentative, they are at least somewhat more comprehensive than the preceding efforts on which they build. They confirm earlier findings about state antitrust enforcement in two respects: the extraordinary extent of state consensus and cooperation on antitrust matters (coordinated, since 1983, through the National Association of Attorneys General (NAAG) Antitrust Task Force);9 and a pattern of limited, somewhat parochial, state enforcement," interspersed by dramatic and increasingly frequent multistate interventions in high-stakes national antitrust proceedings."

To my mind the most intriguing aspect of the data, however, and the principal subject of this Essay, is not what state attorneys general have done but what they have failed to do. In antitrust federalism's "horizontal," state-to-state dimension,2 attorneys general have almost never invoked antitrust laws to challenge sister states' anticompetitive conduct. In federalism's "vertical," state-to-federal dimension, state attorneys general have consistently advocated a partial surrender of state regulatory autonomy.

Horizontal Antitrust Federalism. Some critics -prominently, Judge Posner-have argued that state enforcers may deploy antitrust law for strategic and parochial purposes, as a means to protect domestic producers and to exploit consumers and producers in other jurisdictions.'3 They may do so either by deploying antitrust law as a sword against out-of-state producers or as a shield for domestic producers (for example, by granting exemptions for export cartels). Either way, one would expect the victimized states to resist the imposition.

But they don't. Consider Parker v Brown," origin of the eponymous Parker or "state action" immunity doctrine, which shields certain anticompetitive state laws and their private beneficiaries against liability under federal antitrust laws. California had established an export cartel par excellence, which supplied some 95 percent of the entire U.S. raisin market and earned virtually its entire surplus profit outside California. And yet, no state protested the imposition in an amicus capacity. (It was the federal government that advocated limits on state cartels with pronounced extraterritorial effects.)5 The Parker example illustrates a general pattern: the evidence shows no clear instance of state resistance to exploitation by other states.

Vertical Antitrust Federalism. As a practical matter, both state and federal antitrust enforcers are constitutionally unconstrained with respect to the scope of their jurisdiction. Each may regulate the full range of private conduct that arguably has price effects within their jurisdictions. Consequently, one would expect rivalry, conflict, and turf protection. But while such federal-state disagreements occurred under the Reagan administration," the general pattern is mutual accommodation. The states have supported both broad federal antitrust authority over purely local transactions and a very narrow view of state action immunity. Conversely, federal agencies have consistently tolerated and sometimes supported state antitrust enforcement, even at considerable cost to national priorities.

These findings are orthogonal to ordinary intuitions about (antitrust) federalism. This Essay explains them as the products of an antitrust enforcement cartel built on extraterritorial exploitation: state governments agree to exploit each other's citizens because that leaves all governments better off (and consumers worse off). The model explains both the extraordinary antitrust consensus among the states and some of their otherwise perplexing legal positions on antitrust federalism. An extension of the model interprets the federal government's accommodation of the states as part of a two-way bargain: states support the federal government's quest for a highly restrictive scope of state action immunity in exchange for federal accommodation of aggressive, extraterritorial state antitrust enforcement. Conversely, the federal government supports state enforcement (even at some cost to coherent national policy) in order to gain state acquiescence to federal enforcement against state-sanctioned cartels. The Conclusion notes the limitations and some implications of this analysis.

#### Courts have empirically refused to police state antitrust limits

HLR 20 (Harvard Law Review, June 10, 2020, “Antitrust Federalism, Preemption, and Judge-Made Law,” 133 Harv. L. Rev. 2557-2578, Note, June 10th, https://harvardlawreview.org/wp-content/uploads/2020/05/2557-2578\_Online.pdf)

D. The Misaligned Incentives Problem70

Fourth, in the misaligned incentives problem, critics argue that states do not have proper incentives when they enforce state antitrust laws. Although state antitrust laws are supposed to mainly target intrastate antitrust violations, courts have refused to police that limit too strictly.71 In an interconnected economy where seemingly hyperlocal activity can have national implications,72 courts have admitted that limiting state antitrust laws to cases that do not touch the national economy would “fence[] off” “a very large area . . . in which the States w[ould] be practically helpless to protect their citizens.”73 But, even though suits under state laws may have nationwide consequences, state attorneys general lack nationwide incentives. Critics of the status quo worry that elected attorneys general are more susceptible to lobbying by state interests than are appointed federal enforcers and that a cost-benefit analysis is flawed where a state can attack a company headquartered out of state in order to protect one headquartered in state.74

These fears seem mostly imagined. The idea that elected attorneys general are bringing antitrust suits to hurt competitors of state businesses “appears to [have] little empirical support[,] . . . and none has been provided by the advocates of this position.”75 Past state antitrust enforcers have stated that, while they considered state-specific factors when deciding where to spend their limited resources, those factors would be used only to choose “from among those cases that also made sense on traditional economic grounds.”76

And there is reason to believe that these enforcers are telling the truth. For one thing, states often make antitrust decisions that seem to go against the interests of major state employers. For example, New York antitrust enforcers have taken antitrust positions adverse to both Verizon and IBM, top New York employers.77 For another, a state that is only minutely affected by an antitrust action is unlikely to bring that action alone. If a state is only trivially affected by allegedly anticompetitive conduct, “that state is very unlikely as a practical and political matter to spend the enormous sums of money required to sustain a challenge.”78 If a state is majorly affected but is the only state affected, then the misaligned incentives critique does not apply because there is no competing set of national incentives. And in a case that actually has major impacts in multiple states, it is unlikely that one state could act without other states wanting to join in on the enforcement.79 When states work together on antitrust enforcement, they tend to cooperate closely with one another, especially through the National Association of Attorneys General’s (NAAG) antitrust group.80 Even if an individual state might be swayed by state-specific concerns, it is unlikely that it could convince a multistate coalition to act on those concerns — the group would be forced to evaluate the action on its more national merits.81

#### Congressional intent causes courts to uphold state interstate regulations.

Hovenkamp 83 (Herbert Hovenkamp, J.D. from Univ. of Texas, was an Associate Professor at the University of California, Hastings College of the Law at the time of publishing, 1983, "State Antitrust in the Federal Scheme," Indiana Law Journal: Vol. 58 : Iss. 3, Article 1, https://www.repository.law.indiana.edu/ilj/vol58/iss3/1/)\*\* Excessive quotation marks are due to footnotes not copying properly

Commerce Clause Limitations on State Antitrust

It is sometimes said that the commerce clause of the United States Constitution imposes substantial limits on the power of states to apply their antitrust statutes to activities in or affecting interstate commerce. 8 In fact, however, there is reason to doubt that this is the case. Today, the power of states to regulate under the commerce clause must be viewed in the context of three paradigms. First, in areas where Congress has not spoken, the "dormant" commerce clause restricts the power of states to pass regulations that interfere with the free flow of goods and services from one state to another or impose greater burdens on interstate commerce than they impose on purely local activities. 9 Second, in areas that Congress actively regulates, state regulation might be preempted by a federal statute under the supremacy clause."0 Third, Congress has the authority to give the states broad power to regulate interstate commerce. For example, the McCarran-Ferguson Act5 permits the states to regulate interstate aspects of the insurance industry that they would not have power to regulate absent federal authorization. The statute allows states to levy discriminatory state insurance taxes that fall more heavily on out of state companies than on local companies.2 Such a statute would certainly fall under the commerce clause were it not for the federal enabling legislation.5 3 Under the statute, however, state power to regulate is plenary. In fact, the Supreme Court concluded that "if Congress ordains that the states may freely regulate an aspect of interstate commerce, any action taken by a state within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."'

In passing the antitrust laws Congress intended to permit states to have their own antitrust legislation and enforcement.5 However, the federal antitrust laws do not do for antitrust what the McCarran-Ferguson Act does for insurance. They do not provide that antitrust regulation is the exclusive domain of the states; on the contrary, they create a vast federal network of antitrust enforcement which coexists with state antitrust law.

However, the existence of federal antitrust legislation creates a difficult problem in determining the proper scope of state power. As a matter of history, applications of state antitrust laws to situations "in or affecting" interstate commerce have rarely been condemned

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and nearly all cases that did condemn such applications were decided before 1935, when judges had a much more restrictive view of the power of the states to regulate in interstate commerce, or to exercise their jurisdiction over persons outside the state. 6 The Supreme Court has upheld applications of state antitrust laws where significant interstate commerce or extraterritorial activity is involved, generally on the theory that the state antitrust law was consistent with federal policy. For example, in Standard Oil Co. of Kentucky v. Tennessee,' the Supreme Court upheld the application of Tennessee antitrust law to the activities of a Kentucky corporation which had conspired with Tennessee retailers, resulting in higher oil prices in Tennessee.

No modern court, however, has ruled that state antitrust statutes can be applied to interstate commerce without limit. 8 Some courts have suggested as a standard for such a limit that a state should not have the power to condemn activities that have no injurious effect within the state itself.9 Although this standard may reflect sound policy, it is more a general description of the legislative jurisdiction of the state than of its power under the commerce clause. Not even Congress could give a state the power to apply its laws in violation of the due process clause. 0 When the due process clause or the full faith and credit clause is applied to a state's use of its law to a particular transaction, one must look at the state's interest sought to be protected. That interest is measured in part by examining the effect that the transaction had within the state or upon the people whom the state protects. 1

The commerce clause, however, generally imposes a different kind of limitation on state power. The doctrine of legislative jurisdiction is designed to keep one state from encroaching upon the sovereignty of another state and to ensure that people are not treated unfairly by states with which they have minimal contacts.2 The commerce clause issue in state antitrust litigation, however, is not often the sovereignty of one state vis-a-vis the sovereignty of another, nor is it the relationship to the injury felt within the state. The issue is the authority of a state to apply its law to a transaction in the face of a conflicting federal interest.'

Resolution of the commerce clause issue should not focus on extraterritoriality but on the preservation of a unified, mutually reinforcing, two level antitrust enforcement scheme. The concept of sovereignty based on interest or territoriality that influences state choice-of-law doctrine is simply unable to accommodate antitrust injuries that are not confined within state boundaries. Theoretically, every price-fixing conspiracy in the United States injures everyone in the United States." Most extraterritorial applications of state antitrust law recognize only what is obvious: that a price-fixing conspiracy in Florida can hurt Californians just as much as a price-fixing conspiracy in California." In fact, most assertions of state antitrust authority which conflicts with assertions of federal antitrust authority lie in areas where the effect of the violation in the forum state is obvious and is not an issue in the case.66

Conflicts between states as sovereigns are generally horizontal and are often closely related to geography and to physical territoriality. When a state court seeks to reach persons or transactions outside the state, it balances the right of the forum state to protect people or property within its territory against the competing rights of other states to do the same and the right of people from other states to be treated fairly.6 7 Although questions of personal jurisdiction and choice of law often raise federal issues under the due process clause or the full faith and credit clause, the conflicts are not between the federal and the state government. The conflicts occur between states or between one state and the citizens of a different state. In these cases of competing sovereigns, it makes sense to examine the relationship between a state and a particular transaction by looking at the effects of the transaction within the forum state.

Conflicts between state and federal authority, on the other hand, are generally vertical. Although they are occasionally resolved by reference to geography,68 the geographical reach of the Sherman Act and of state antitrust law in fact overlap almost to the point of congruity 9 Although the interest of a particular state may be weaker when it seeks to apply its law to an out-of-state activity, the interest of the federal government under those circumstances is not necessarily stronger unless the assertion of state authority violates the Constitution."0

Federal antitrust law today applies to real estate brokers, agricultural products located completely within a single state, and even hospital services.7 ' The result of this expansive reach is that the overwhelming majority of assertions of state antitrust are in areas within the reach of federal antitrust law as well. In other words, the classification of restraints as purely intrastate and thus within the exclusive jurisdiction of state antitrust, or interstate and thus within the exclusive domain of federal law has long since passed. The vitality of this distinction is the exception rather than the rule.72

The demise of the interstate-intrastate distinction forces the issue of state antitrust power under the commerce clause back to the question of preemption. Preemption is in turn a question of congressional intent and not of constitutional interpretation. However, the congressional intent of the Sherman Act's framers in the late nineteenth century is inappropriate to the modern situation. 3 Since the Supreme Court has held in a long line of cases that preemption is not to be presumed or inferred,74 and because Congress clearly intended that state antitrust law not be preempted as a general matter,7 5 there are virtually no operative limits on the reach of state antitrust law under the commerce clause.78

#### The CP is core topic education and is empirically included in antitrust debates.

Robert L. Hubbard 5, Director of Litigation at the Antitrust Bureau of the New York Attorney General's Office, and James Yoon, Assistant Attorney General in the Antitrust Bureau of the New York Attorney General's Office, “How The Antitrust Modernization Commission Should View State Antitrust Enforcement”, Loyola Consumer Law Review, 17 Loy. Consumer L. Rev. 497, Lexis

I. Introduction

State antitrust enforcement, long the subject of spirited debate between its critics and supporters, is now a topic for study by the [\*498] Antitrust Modernization Commission (the "Commission" or "AMC"). The Commission's work, the most recent formal federal review of the antitrust law, may culminate in recommendations concerning state antitrust enforcement.

This article unabashedly argues that the Commission should conclude that state antitrust enforcement has benefited consumers; furthered competition throughout the economy including among antitrust enforcers; contributed significantly to antitrust jurisprudence; and helped make our economic system the envy of the world. Part II discusses how state enforcement has emerged as a topic for consideration by the Commission. Part III defines the role and sets the context of state antitrust enforcement, emphasizing what state antitrust enforcers do. Part IV responds to two major themes of the critics of state antitrust enforcement: first, the political context of the actions taken by state attorneys general merits praise, not criticism; second, states have significantly added to antitrust jurisprudence, both theoretically and practically, as is illustrated by how states have investigated, litigated, and resolved antitrust matters, large and small. Finally, this article discusses how state enforcement has enhanced consumer choice and fostered competition among antitrust enforcers.

II. The Commission and State Antitrust Enforcement

The legislation establishing the Commission does not specify what topics should be covered and does not mention state enforcement. Yet, the legislation's sponsor, Representative F. James Sensenbrenner, prominently mentioned state enforcement in his initial press release about the legislation as one of only three topics within the antitrust laws that merited study. Representative [\*499] Sensenbrenner's comments about states at the Commission's first public meeting were more elaborate. He lengthened his list of topics and characterized state enforcers as "vital," while worrying about "divergent and sometimes inconsistent antitrust standards." State attorneys general recognized that the Commission would likely study state enforcement, by expressing concern that no one nominated to be a Commissioner has state enforcement experience.

As expected, state antitrust enforcement was raised in response to the Commission's broad-based request for suggested topics. An antitrust advocacy group, the American Antitrust Institute, suggested that the Commission probe how state enforcement can be made more effective. The Cato Institute, a non-profit public policy research foundation based in Washington, D.C., suggested that state enforcers be stripped of their parens patriae authority. In a letter to the Commission, Senators Mike DeWine, Chairman, and Herbert Kohl, Ranking Member, of the Senate Subcommittee on Antitrust, [\*500] Competition Policy and Consumer Rights stated that "an examination of the proper role of states in enforcing antitrust law would be an important topic for study."

#### Expansive state antitrust legislation is being pursued---proves it’s a relevant debate that antitrust experts are considering.

Gidley et al. 6-11-21 ([J. Mark Gidley](https://www.whitecase.com/people/j-mark-gidley), former ~~Emory~~ Kansas debater and NDT winner with J.D. from Columbia, [George L. Paul](https://www.whitecase.com/people/george-l-paul), J.D. from Harvard, [Rebecca Farrington](https://www.whitecase.com/people/rebecca-farrington), J.D. from Berkeley, [Martin M. Toto](https://www.whitecase.com/people/martin-m-toto), J.D. from NYU, [Kathryn Jordan Mims](https://www.whitecase.com/people/kathryn-jordan-mims), J.D. from the University of Virginia, [Michael Hamburger](https://www.whitecase.com/people/michael-hamburger), J.D. from Fordham, all of whom are partners at the international law firm White & Case. [Daniel J. Rosenthal](https://www.whitecase.com/people/daniel-rosenthal), J.D. from the University of Virginia, [Adam M. Acosta](https://www.whitecase.com/people/adam-acosta), J.D. from Howard, [Jaclyn Phillips](https://www.whitecase.com/people/jaclyn-phillips), J.D. from Georgetown, all of whom are associates at White & Case, 6-11-21, “"New York’s Sweeping New Antitrust Bill—Requiring NY State Premerger Notification ($9.2M Filing Threshold) and Prohibiting “Abuse of Dominance”—Inches Closer to Becoming Law,"” White and Case, https://www.whitecase.com/publications/alert/new-yorks-sweeping-new-antitrust-bill-requiring-ny-state-premerger-notification)

While Congress has been the epicenter of an ongoing antitrust debate—with US legislators on both sides of the aisle urging vast reforms—the New York State legislature is pursuing a state bill that would arguably ensnare more conduct and transactions in antitrust law’s web than anything proposed, or existing, at the federal level to date.

The New York Senate Bill, known as the “Twenty-First Century Anti-Trust Act,” would expand New York’s antitrust laws by establishing first-of-its-kind US state premerger notification requirements for mergers with as low as a $9.2 million threshold in New York, prohibiting “abuse of dominance” by companies with market shares as low as 30%, authorizing private class actions, and raising criminal penalties.

On June 7, 2021, the New York State Senate passed the legislation, indicating momentum is growing towards passage. If the Bill becomes law, companies doing business or buying business in New York1will navigate a more demanding state-law regime in addition to abiding by federal law.

Background: “Big Tech” concerns are catalyst for broad state law antitrust reform

A mere week after a US House of Representatives committee held a hearing with executives of several tech companies in July 2020, New York State Senator Mike Gianaris introduced the first version of what is now New York Senate Bill S933A. The original New York Bill sat in the New York State Senate, but on January 6, 2021, Senator Gianaris reintroduced the Bill with revisions. Echoing the separate legislations proposed by US Senators Klobuchar and Hawley, the Bill proposes to modify New York’s State antitrust act, the “Donnelly Act,” to broaden and enhance New York state antitrust prohibitions. This time, the Bill has found momentum: On Monday, June 7, 2021, the Bill cleared its first major legislative hurdle when the New York State Senate passed the Bill by a 43-20 vote along party lines.2

The Bill applies to all industries. But similar to the several antitrust reform bills proposed at the federal level, concerns about purported anticompetitive behavior in the “Big Tech” sector were the spark. According to the Sponsor Memorandum accompanying the Bill, the purpose of the Bill is to address the concern that “[p]owerful corporations, particularly in Big Tech, have engaged in practices such as temporary price reduction with the purpose of forcing competitors to sell their business to them,” and that “[u]nilateral actions that seek to create a monopoly” should be unlawful in New York.3 State Senator Gianaris explained: “[o]ur laws on antitrust in New York are a century old and they were built for a completely different economy,” and “[m]uch of the problem today in the 21st century is unilateral action by some of these behemoth tech companies and this bill would allow, for the first time, New York to engage in antitrust enforcement for unilateral action.”4

The Bill proposes several fundamental changes to New York antitrust law

The current version of the Twenty-First Century Anti-Trust Act would drastically change the antitrust landscape in New York. The Bill would most notably change New York’s antitrust-law in four main ways:

New York would have first-of-its-kind State premerger notification requirements in the US – with a $9.2M filing threshold

If passed into law, the Bill would create a premerger notification requirement for transactions meeting certain criteria provided that the parties have a qualifying presence in New York.5 At the federal level, the Hart-Scott-Rodino Act (“HSR Act”) requires parties to notify the Federal Trade Commission and the Antitrust Division of the US Department of Justice of certain mergers or acquisitions and to observe a waiting period before consummating the transaction.

Only 2 US states have any form of premerger notification, and they are limited. Although Connecticut and Washington have pre-merger notification statutes, these specifically target only healthcare mergers.

But if passed, the Bill would be the first to have a generalized state premerger reporting statute. The proposed New York Bill is not industry specific.6 If passed, the Bill would create separate, generally applicable state premerger notification requirement.

Nexus to New York, filing thresholds – only $9.2M. This new requirement appears modelled on the HSR Act, but has much lower thresholds that would obligate an acquirer to file a notification with the N.Y. Attorney General for many transaction valued at more than $9.2 million if either the acquiring or acquired person has assets or annual net sales in New York in excess of $9.2 million.7 The thresholds are listed as a percentage of certain federal HSR thresholds, which are adjusted annually based on gross national product.

This means that if the Bill is enacted into law, any business in the world that holds more than $9.2 million of assets or has more than $9.2 million of “net annual sales” in New York State—regardless of where headquartered or incorporated—would have to check virtually every transaction for a potential New York State premerger filing.

While the Bill excludes certain transactions from its requirements8 and authorizes the NY Attorney General to issue rules to implement the Bill’s premerger requirement and to exempt transactions not likely to violate the statute, the $9.2 million threshold in the Bill is substantially lower than the current $92 million size-of-the-transaction test for reportability under the federal HSR Act.9 As such, transactions that fall well below the reporting threshold under the federal HSR Act and with seemingly little nexus to New York may still be reportable to the NY Attorney General under the Bill.

60-day notice period for closing (longer than the 30-day HSR period). Moreover, if passed, the Bill presents new timing considerations for parties negotiating reportable transactions. Under the HSR Act, once filings are submitted, there is an initial 30-day waiting period during which the parties can neither close nor take steps to implement control over the other company’s business. The waiting period is 15 calendar days for cash tender offers and acquisitions of assets out of Chapter 11 proceedings.

The Bill, on the other hand, would require notification to be made 60 days prior to closing the acquisition, including for transactions that are also HSR reportable, (although unlike under the HSR Act, the Bill provides no additional waiting period to bar the parties from closing during the pendency of an investigation, should the New York Attorney General open one).10 So for certain acquisitions subject to the HSR Act notification requirements as well as the Bill’s proposed notification, a transaction may be able to close after 30 days under the HSR Act but would need to wait 60 days under the Bill.

This could have severe timing consequences for transactions. For example, parties to a $10 million deal with absolutely no competitive overlap could still be forced to wait 60 days to close.

Penalty for non-reporting. The penalty for noncompliance with the premerger notification obligations of the Bill is $10,000 per day.11

Whether there may be any arguments that the premerger notification requirement in the Bill is in conflict with—and therefore preempted by—the HSR Act is yet to be seen, and will likely turn on the various rules and regulations New York State will have to promulgate to implement this section. But the Connecticut and Washington notification requirements, though notably more limited, are alive and well.

Finally, when considering whether to approve a merger, the Bill would require the NY Attorney General to specifically take into account a merger’s potential effects on labor markets.12

New York would prohibit “abuse of dominance”—a standard that would apply to firms with low market shares—as well as prohibiting monopolization (as under current federal law

New York’s antitrust law, (the Donnelly Act), currently prohibits only antitrust conspiracies, making unlawful only a “contract, agreement, arrangement or combination” in restraint of trade.13 Thus, New York’s antitrust law currently aligns with Section 1 of the Sherman Act (which prohibits anticompetitive agreements), but has no parallel provision for Sherman Act Section 2 (which prohibits monopolization). The proposed Bill, however, seeks to amend the Donnelly Act law to add a new Subdivision 2 that declares unlawful any monopolization, attempted monopolization, or assertion of dominance that restrains trade or commerce.14

Specifically, Subdivision 2, if enacted, would provide that:

It shall be unlawful: (a) for any person or persons to monopolize or monopsonize, or attempt to monopolize or monopsonize, or combine or conspire with any other person or persons to monopolize or monopsonize any business, trade or commerce or the furnishing of any service in this state; (b) for any person or persons with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position.

Thus, on monopolization, the Bill seems to be aimed at bringing New York’s antitrust law in line with the Sherman Act, as Section 2 of the Sherman Act prohibits monopolization, but the Bill goes much further.15

If passed, New York would be the first US jurisdiction with an “abuse of dominance” standard. The Bill’s proposed prohibition of “abuse of dominance,” however, adds a concept that does not appear in the Sherman Act and generally appears to be more far reaching. Using language similar to that in Article 102 of the Treaty of Functioning of the European Union, which has been interpreted to prohibit broader conduct that Section 2 of the Sherman Act, the Bill apparently seeks to expand antitrust enforcement in New York along the lines of the European counterpart.

Definition of a “dominant” firm: 40% share for sellers, 30% for buyers. The Bill provides that a “dominant position” can be established by direct evidence (like increased prices or reduced output) or indirect evidence (market share), or a combination of the two.16 As an initial matter, under the Sherman Act, it is uncommon for plaintiffs to attempt to prove monopoly power through direct evidence at all, let alone do so successfully. Under the Bill, if the direct evidence is sufficient to show a dominant position, conduct that “abuses” that dominant position is unlawful without regard to a defined relevant market (or the conduct’s effects in that market). This means that an antitrust plaintiff need not define a “relevant antitrust market,” as is the normal first step of an antitrust rule-of-reason analysis under the Sherman Act.17

As to indirect evidence of a “dominant position,” the Bill provides that a market share of 40% or greater for a seller and 30% or greater for a buyer will be “presumed” to have a dominant position.18 In contrast, it is unlikely that a market share of less than 70% is sufficient as a matter of law to prove the existence of monopoly power under Section 2 of the Sherman Act.19

Conduct prohibited as “abuse” of dominance. The Bill does not fully itemize what kinds of conduct constitute an “abuse” of a “dominant” firm’s position, but broadly provides that conduct that “tends to foreclose or limit” the ability of competitors (or potential competitors) to compete is unlawful. The Bill provides several examples, including “leveraging a dominant position in one market to limit competition in a separate market,” and “refusing to deal with the effect of unnecessarily excluding or handicapping actual or potential competitors.”20 The Bill adds that “abuse” of a “dominant position” in a labor market includes, “but is not limited to,” imposing restrictive covenants, or covenants not to compete on employees, or restricting the ability of workers to disclose their wages and benefits.21 The Bill also empowers the NY Attorney General to adopt rules on what constitutes abuse of dominance and issue guidance as to how the AG will interpret market shares and relevant market conditions for a finding of abuse of dominance.22

Importantly, many of these practices are not illegal under federal law and the Bill could capture conduct that is nothing more than hard-nosed competition generally agreed by economists to lead to lower prices and benefits to consumers. Thus, the Bill appears inconsistent with decades of federal law establishing that antitrust is designed to protect competition, not competitors.23

Pro-competitive effects not a defense. In addition, the Bill provides that “[e]vidence of pro-competitive effects shall not be a defense to abuse of dominance and shall not offset or cure competitive harm.”24 This is in sharp contrast to federal law, under which challenged conduct is generally evaluated under the rule of reason and thus procompetitive effects must be considered in assessing whether that conduct is unlawful. By attempting to remove procompetitive effects from the analysis, the Bill may be interpreted to have the effect of creating per se liability for any “abuse” of a “dominant position,” even though under federal law and state law today per se liability applies only to a small subset of conspiratorial conduct.25

In sum, if the Bill is passed, there is a risk that it could prohibit broad swaths of conduct that is not unlawful under the Sherman Act, which contains no language prohibiting the “abuse” of a “dominant position.” Further, any such “abuse” may be interpreted to subject the offender to per se liability, no matter how much the procompetitive effects of a course of conduct outweighed its allegedly anticompetitive effects, thereby depriving all market participants of significant benefits merely because some deleterious effects came along with them. Finally, the Bill appears to dramatically increases the power of the State’s chief antitrust regulator, the AG, apparently granting her the authority to declare any conduct (by large enough companies) to be an unlawful “abuse” of a “dominant position,” simply by adopting a rule banning such conduct.  As we said, this Bill would enact drastic changes.

 Enhances criminal penalties for antitrust violations

The Bill would amend Section 341 of the Donnelly Act, which provides for criminal penalties for violations of Subdivision 1 (prohibiting an agreement in restraint of trade) and Subdivision 2(a) (prohibiting monopolization) of the proposed Bill. If passed, a violation of the Donnelly Act would now constitute a class D felony.26

For individuals, the Bill increases the maximum fine from $100,000 to $1 million, and the maximum imprisonment term from 4 years to 15 years.27 For corporations, the Bill increases the maximum fine from $1 million to $100 million.28 And for any type of defendant, the Bill would expand the statute of limitations for criminal violations from 3 to 5 years (not retroactive).29

Permits NY State antitrust class actions and recovery of treble damages

Finally, the Bill amends the Donnelly Act to explicitly permit class actions and the recovery of treble damages.30 Currently, antitrust class plaintiffs cannot seek treble damages for Donnelly Act violations (and it is an open question whether plaintiffs can bring a class action for Donnelly Act violations at all).31 But if the Bill passes, class-action plaintiffs will likely be eligible to seek treble damages for antitrust violations in New York.  The availability of class actions and treble damages in antitrust cases is particularly notable in an “Illinois Brick repealer” state, like New York, which permits indirect purchasers to bring antitrust claims (not permitted in federal antitrust cases, pursuant to the Supreme Court’s Illinois Brick decision). The Bill does, however, instruct courts to take steps to avoid duplicative recovery for direct and indirect purchasers, and permits a defendant to prove that damages were “passed on” as a partial or full defense to damages by either direct or indirect purchasers.32

Although the Bill adds a right of class action, it does not change the 4-year statute of limitations, effectively cutting any class-action damages at 4 years prior to filing, just like any individual action.33

What’s Next for NY Bill S933A?

Having passed the New York State Senate, the Bill was pending in the New York State Assembly when the legislative session ended on June 10. When the session resumes, the Bill will need to pass both the Senate (again) and the Assembly without amendment to reach the Governor and be signed into law. Although we will likely have to wait until next year to see if the Bill ultimately passes, and in what form, Senator Gianaris plans to continue to push the Bill towards law next session.34 The Bill appears to have support from New York enforcers—New York Attorney General Letitia James expressed support for the Bill when it was first introduced last year, noting that it is “aggressive” and modeled after Europe’s approach to “abuse of dominance.”35

And there could be legal challenges, even if passed. Even if the Bill becomes law in New York, legal challenges could be brought to strike down or neutralize provisions, including for areas that may be in conflict with federal law, or provisions that are vague and ambiguous.

But if this “aggressive” Bill passes and survives challenges, it has the potential to greatly expand the scope of antitrust enforcement under New York law. It may also signal a trend as other states continue to zero in on the tech industry other large companies.

In particular, if every state had its own unique premerger notification requirement, it would create an almost impossible thicket, even for the most complementary and commonplace transactions, and as such companies in all industries should continue to monitor these developments. And similarly, if “abuse of dominance” becomes the law in many states, private plaintiffs and state enforcers may become emboldened to bring more cases involving single-firm conduct.

The Bill also serves as a reminder that companies need to be mindful not just of potential changes in the federal antitrust laws, but to state laws as well, which may change faster than at the federal level and be even more sweeping in reach.36

#### Uniform state antitrust law answers a question based in the literature---here’s an advocate.

Hanson and Kalinowski 63 (John J. Hanson, B.A.., Mississippi College, LL.B., University of Virginia, member of the ABA Subcommittee on Private Antitrust Litigation, and Julian O. von Kalinowski, A.B. University of Denver and LL.B. Harvard University, Chairman of the ABA Committee on State Antitrust Laws, 1963, “The Status of State Antitrust Laws with Federal Analysis,” 15 *W. Rsrv. L. Rev*. 9 (1963), <https://scholarlycommons.law.case.edu/caselrev/vol15/iss1/4>)

Is A UNIFORM STATE ANTITRUST LAW DESIRABLE?

The renewed vigor which has been demonstrated by the various state enforcement agencies, coupled with the multitude of state antitrust statutes, brings into sharp focus the question of whether there should be a uniform state antitrust law.

Any analysis of the problem must first start with a consideration of the basic objectives of antitrust laws. It has been said that "antitrust is a distinctive American means of assuring the competitive economy on which our political and social freedom under representative government in part depends.""' 5 The economy of the United States is one essentially based upon the free enterprise system. Access to the market place and the fostering of market rivalry are basic tenets of economic organization. Antitrust is thus concerned with the promotion and protection of competition as a matter of public policy.

Fundamentally, our basic antitrust policy, as interpreted by the Supreme Court in Northern Pac. Ry. v. United States,"' rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

It is erroneous to say, however, that antitrust policy is oriented toward a single goal. On the contrary, as Kaysen and Turner said:

Antitrust policy may serve a variety of ultimate aims. We can divide the aims against which any policy proposal may be tested into four broad classes: the attainment of desirable economic performance by individual firms and ultimately by the economy as a whole; the achievement and maintenance of competitive processes in the marketregulated sector of the economy as an end in itself; the prescription of a standard of business conduct, a code of fair competition; and the prevention of an undue growth of big business, viewed broadly in terms of the distributions of power in the society at large."117

How best are these aims to be achieved? The answer to this might be found in posing a threshold question. Is there a need for state antitrust laws at all? As our study has indicated, most state statutes were enacted years ago before expansion of the commerce power took place. Until recent years, state antitrust laws have received little attention while, on the other hand, federal law has been developing at an outstanding rate. Its influence has been felt strongly in all walks of our economic life." 8 The scope of the federal law cannot be underestimated. It could be said that the present pervasive application of federal law leaves little reason for state antitrust laws; and that the instances in which state antitrust regulation will conflict with federal provisions will increase. Several additional arguments also have been advanced for removing antitrust from the states. These arguments run somewhat as follows: (1) The experience and capabilities of the federal judiciary and enforcement agencies, developed during the period of state inactivity, suggests that federal laws are better equipped to achieve the results that are being sought; (2) the private treble damage does not suffer since a treble damage action usually is available under the federal law no matter how local the restraints; (3) the state can recover for damages to the public under federal law; (4) exclusion of state control would eliminate the problem of double penalties in dual prosecution." 9

We believe that reliance upon the pervasive scope of federal law as a reason for abrogating state antitrust law is unfounded and ill-advised.

Although it is said that Congress used all of its power to reach restraints affecting interstate commerce, 2' there are areas of restraints it did not reach. Thus, in recent years, the Sherman Act has been held inapplicable to situations involving a conspiracy to exclude competition in the operation of local taxicabs;. 2' a combination of plastering contractors and employees to allocate and monopolize plastering contracts in Chicago;. 2 a price fixing combination of drive-in theatres; 3 and a combination to drive a newspaper engaged in legal advertising out of business.124

As one court recently observed:

However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous. 125

There are numerous local activities which still are beyond the reach of federal law; such as those involving the local rendition of services, i.e., real estate brokers, dry cleaning establishments, building trades, local printing, and the like. Moreover, even as to those cases which theoretically are within the reach of federal law, federal agencies have admitted that they cannot deal comprehensively with the problem. 2

The argument that federal courts and enforcement agencies are better equipped to achieve the objectives of antitrust laws is not persuasive. Whether the federal enforcement agencies have the expertise which has been attributed to them is open to question. More important, however, there is a diversity of local economic conditions and business problems existing in many of the states, and the states are better equipped to deal with local questions than are their federal counterparts.

The real deficiency in state antitrust law does not lie in inadequacy or lack of expertise of the enforcement authorities, but in whether the state really wants an antitrust law at all. As Professor Rahl recently pointed out:

The most important suggestion may be made at the outset very quickly. It is that for most of the states which now have a law, however antique it may be, a resolution of the legislature directing the Attorney General to enforce it and appropriating some money for that purpose would mean more than a carload of new substantive provisions. For the basic deficiency now is not lack of an ideal statute, but lack of a decision as to whether the state really wants any antitrust law at all.12 7

This is the real key to the problem. The authors believe that state antitrust laws are desirable to carry out basic antitrust policy, that state antitrust can form an integral part of overall antitrust policy, and that federal law alone is not equal to the task.

This brings us back to the question initially propounded. Should there be a uniform state antitrust act?

Analysis of the various statutes demonstrates that many of them use antiquated language such as "pools" and "trusts," are verbose, and are riddled with archaic passages. Nevertheless, to some degree there are discernible common threads. Most of them outlaw price fixing, allocation of markets, limitation of production, group boycotts, and other commonly recognized anti-competitive restraints. The case law that has developed on these subjects has been surprisingly good overall and fairly uniform in approach. These factors provide a sound basis or starting point for a uniform law.

The authors believe that not only is there a need for a uniform law, but that one would be desirable. At the moment, there are 153 state statutes which can be characterized as antitrust in nature. Many of these statutes deal with such complex economic issues as mergers, exclusive arrangements, and price discriminations. The mistakes of federal laws have been parroted in their state counterparts. Repeated again is the strangulation of basic antitrust objectives by the soft competition concepts espoused in the Robinson-Patman Act. The recent Hawaiian statute is a striking example of this businessman's nightmare.

The renewed vitality of state antitrust enforcement already has begun to develop inefficient duplication of effort by federal and state authorities, with dual investigation and prosecution of the same persons for the same acts.'12 The burden on the businessman will increase and he will be required to operate at his peril, dependent upon the peculiarities of various state statutes and the whims of enforcement officials.

Even more important, the basic objectives of antitrust law are in serious danger of being frustrated, and our national economy may be gravely affected if the states should turn their enforcement guns on complex economic areas.

The adoption of a uniform state antitrust act will abate these dangers. Obviously, we cannot expect Utopia. The authors recognize that there are inherent difficulties in a proposed uniform act of this nature. There is the question of accommodation between federal and state authorities. This is particularly difficult because of dual enforcement within the federal scheme by the Department of Justice and the Federal Trade Commission. This problem at least can be partially solved by close cooperation between federal and state authorities in developing areas of prime responsibility. Basic guidelines could be laid down. Cooperation between federal and state authorities already has been initiated within the existing structure of the laws.'29 There is no reason why this could not be expanded.

Another inherent difficulty is that of uniformity of enforcement and approach. This question could be asked. How can a single law handle widely varying conditions in some fifty states? The authors' analysis of state antitrust decisions has demonstrated that this problem is more theory than reality. It has been noted that there is no substantial inconsistency between state and federal antitrust decisions, except those decisions emanating from the state of Texas relating to exclusive dealing and exclusive territorial arrangements. There exists no reason why a simple uniform law would change this pattern. Indeed, if the uniform law were to exclude exclusive dealing and exclusive territorial arrangements - and the authors urge that it do so - then the inconsistency which now exists would be removed.

This raises the question as to what the uniform law should include. In general, it is felt that the law should have as its main thesis the outlawing of the traditional per se type of offenses, i.e., price fixing, group boycotts, allocation of markets, and production control. As to other restraints, it should retain the flexibility of the rule of reason. It should not include the types of offenses found in Clayton Act or Robinson-Patman Act. The act should provide adequate investigatory and remedial powers.

As to investigatory powers, it is felt that, at maximum, the uniform act should provide a provision comparable to the federal civil investigative demand and limited to compelling the production of documents of persons under investigation.

With respect to remedial powers, the authors recommended that: (1) any provision dealing with forfeiture of the charter of a corporation found to have violated the law be discretionary; (2) that it provide for civil sanctions in lieu of criminal sanctions; and (3) that treble damages to injured private persons be discretionary instead of mandatory.

Within the above framework an effective state antitrust act can be drafted, one that would remove the businessman's burden of compliance with ambiguous, verbose statutes and inform him of the line of conduct that is forbidden.

State antitrust law stands at a crossroad. It can assume a responsible role in our federal system of government and become an integral part of our overall antitrust policy, or it can proceed along the road of confusion and darkness. It has the opportunity to benefit from the experience of the past and to help shape the road of antitrust law for the future. As Mr. Justice Holmes once said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. 130

To paraphrase the words of Holmes, antitrust law has had the experience of important segments of our economic life. It is time to take advantage of that experience.

## T

#### They don’t meet their own interpretation!

#### 1) ‘PROHIBITION’---it includes an injunction after a review process, such as rules of reason.

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

C. A Heterogeneous Regulatory Toolkit

Layering the traditional narrative with the contributions of those scholars who have sought to expand beyond it yields the conclusion that environmental law is a heterogeneous field. In an influential article, Larry Lessig identified four different types, or "modalities," of influence on behavior: law, social norms, markets, and architecture. 75 Law "directs behavior" under threat of government sanction; social norms constrain behavior through "the enforcement of a community"; markets "regulate through the device of price"; and "architecture" or "features of the world - whether made, or found - restrict [\*156] and enable in a way that directs or affects behavior." 76 The law may constrain behavior directly, such as by prohibiting a bad act. But the law can also regulate behavior indirectly by shaping or regulating one of the other modalities (social norms, markets, or architecture), which then constrains behavior through its own means of influence. 77 Environmental law employs each of these means of influence both alone and in combination.

Regulators have a diverse set of tools at their disposal to promote environmental values and goals like conservation of common pool resources and the reduction or prevention of pollution. 78 They can use prescriptive rules like technology requirements, or performance standards that require firms to meet certain environmental goals. They can create property rights over common pool resources, impose market-leveraging approaches like taxes and subsidies, or adopt tradable permits for emissions. Regulators can employ informational regulation, requiring the disclosure of environmental information to the public with an eye toward providing incentives for better environmental performance. They can impose environmental standards through procurement rules or supply-chain management, or can mandate or encourage the purchase of insurance for environmentally risky activities.

To take one example, there are many ways to increase recycling and limit the use of virgin materials, 79 a concern that implicates the problem of cumulative harms. A regulator could simply legally mandate the recycling of certain products, or it could ban the use of virgin materials in production. The law could require that products procured for government use contain a minimum percentage of recycled materials in order to encourage the growth of [\*157] a market for recycled goods. 80 The law could encourage recycling behavior by creating exceptions to onerous reporting and handling requirements for solid, hazardous waste if the product is recycled in a closed-loop process. 81 The law could operate through price mechanisms, either by taxing the use of virgin materials or subsidizing the use of recycled ones. Deposit refund schemes can provide incentives for consumers to return objects like plastic or glass bottles to stores for recycling. 82 The law could establish a tradable permit scheme, requiring an allowance to use a certain amount of virgin materials, but permitting firms to trade these allowances. The law could influence the physical convenience or architecture of recycling. Local governments could set schedules for curbside recycling that are more frequent than trash pickups. 83

As alternatives to public law rules, social norms could develop (or be consciously shaped) within a community to identify recycling as "patriotic," or to shame those who discard, rather than recycle, valuable virgin materials. 84 Or a private environmental governance solution could arise in which firms, NGOs, or industry associations employ parallel versions of these public law tools or innovate with new solutions. 85 For example, private firms or NGOs could develop take-back programs that encourage consumers to return old products when they purchase new ones, or firms could impose limits on their suppliers' use of virgin materials. 86

[\*158]

D. What Is Missing

Despite the widespread understanding that environmental law is a heterogeneous field, still missing, even from these discussions that look beyond traditional federal environmental statutes, is an in-depth, holistic account of the impact of corporate, securities, antitrust, and bankruptcy law on firms' environmental decisionmaking. As noted above, to the extent that environmental law scholars have examined these fields of corporate and business law, their approach has tended to focus on a single field, a single doctrine, or a single case. 87

Environmental law casebooks used in law school, which arguably represent what is considered central to the field, likewise do not generally offer any in-depth discussion of whether firm managers have a fiduciary duty only to maximize profit for the benefit of shareholders, or whether they have broader discretion to take into account the long-term interests of a wider class of stakeholders, including customers, employees, the local community, and possibly the environment itself. 88 Nor do they include any discussion of the business judgment rule - a principle of state corporate law that affords firm managers the discretion to act in the best interests of the firm, even taking into account environmental values, without second-guessing by the courts. 89 In discussions of the management of common pool resources, even those casebooks that discuss Ostrom's insider solutions concept do not mention the potentially limiting implications of antitrust law for private industry cooperation. 90 Nor do they discuss the implications of the Bankruptcy Code for a firm that files for bankruptcy and seeks to discharge its environmental liabilities. 91 Perhaps because securities regulations now impose affirmative obligations on publicly traded firms to disclose certain environmental risks, several casebooks do mention these obligations. 92

[\*159] One could argue that it is unfair to criticize environmental law casebooks for failing to discuss multiple fields of law; casebooks are intentionally focused pedagogically on teaching the core of a field in depth. The alternative, one might say, would lead to a kind of hodgepodge approach of combining materials from different fields that existed before environmental law coalesced into a single field. 93 If, however, one takes seriously the arguments that environmental law is a heterogeneous field with numerous tools at its disposal to promote environmental values and goals, and that business firms play a significant role in promoting or hindering progress toward environmental goals, then environmental law casebooks should at least acknowledge the significance of corporate law, securities regulation, antitrust law, and bankruptcy law to the core of environmental law's enterprise.

This Article's analysis thus builds upon the work of those who have raised the profile of the business firm in environmental law, and of those who seek to expand our understanding of environmental law, by offering what is missing in prior environmental law scholarship - a holistic analysis of the role that positive corporate law, securities regulation, antitrust law, and bankruptcy law can and should play in shaping firms' environmental behavior. Each of these fields interacts with environmental decisionmaking - meaning the decisions that firm managers make to comply with public environmental law, or to go beyond compliance by adopting private environmental governance - in different, but sometimes overlapping, ways. They either increase or decrease the likelihood that firm managers will take environmental goals into account. In other words, unlike private environmental governance, these fields themselves constitute positive law. But in their "law"-ness, they operate more indirectly than canonical environmental statutes like the Clean Water Act, which directly prohibit or regulate what can come out of a pipe. These fields of corporate and business law shape norms, markets, and architecture in ways that profoundly affect firms' environmental decisionmaking.

[\*160]

II. The Forms of Interaction

This Part offers the Article's main analytical contribution - a taxonomy of five primary ways in which the fields of law governing the corporation and markets interact with firms' environmental decisionmaking. This analysis demonstrates that viewing each field separately may miss the bigger-picture story about how these fields operate in harmony or conflict not only with traditional environmental law and values, but also with one another. In other words, changing one doctrine may be necessary but not sufficient to change firm behavior with respect to the environment. A unified approach is required.

To build on the example of recycling presented above, 94 if securities regulations mandated disclosure of information on firms' recycling practices, that disclosure mandate would likely provide secondary incentives for improved recycling behavior. 95 Corporate law's business judgment rule would be neutral toward this change: While the rule alone would do nothing to encourage recycling behavior, it would provide a safe harbor for managers to increase such behavior, even if doing so carried short-term costs, against claims by shareholders that the managers' decisions are not in the best interests of the firm. 96 However, if private firms in an industry wanted to collaborate to set industry-wide standards or mandates for recycling, in which firms that did not meet the standard were penalized with a boycott or refusals to deal, this could raise problems under antitrust law, which might either prohibit - or at the very least, discourage - such collaboration. 97 And if bankruptcy law allowed a firm facing financial trouble to discharge its pre-petition liability for failure to comply with legal recycling mandates, this would create disincentives for [\*161] environmental performance by firms anticipating a bankruptcy filing. 98 It is essential to view these fields of law in a larger context.

There are five primary forms of interaction between these fields and firm managers' decisions to promote environmental values and goals: mandates, incentives, safe harbors, disincentives, and prohibitions. 99

Mandates: Corporate and business law can impose mandatory environmental obligations on firms, with the effect that firm managers must take environmental considerations into account in some fashion. Examples in this category include securities regulations that require publicly traded firms to disclose financially material environmental and climate risks to investors. A second example lies in the Department of Justice's use of antitrust law to break up collusion by the major automakers and their industry association which prevented pollution control technology from reaching the market in the 1960s. 100

Prohibitions: On the flip side, corporate and business law can also prohibit firm managers from taking environmental values into account - at least under some circumstances. One example of such a prohibition can be found in the way that antitrust law generally precludes firms from entering into agreements with their competitors to conserve environmental resources [\*162] through industry standards that incorporate price fixing or sanctions on noncomplying firms. 101 And while courts generally do not intrude on firm managers' discretion to take values other than the maximization of short-term shareholder value into account in the day-to-day operations of the firm, 102 in the limited context of firm takeovers, courts have interpreted Delaware corporate law more narrowly to require a connection between managers' decisions and increased short-term shareholder value. 103

Safe harbors: Safe harbors create protected spheres for firm managers, who, in their discretion, wish to take environmental values into account in their decisionmaking. For example, in the ordinary course of business, firm managers may take the interests of multiple stakeholders into account and, under the business judgment rule, courts will not second-guess management decisions even if they fail to maximize short-term shareholder value. 104 Safe harbors do not prohibit such actions. Nor, however, do they mandate or provide incentives for such actions. 105 The mere fact that a manager can exercise her discretion without fear of liability is distinct from an incentive, because nothing in the safe harbor provides a benefit to a firm manager who chooses to take environmental values into account in her decisions. Arguably, the choice is based on the manager's preexisting preferences, and managers may just as easily decline to use the safe harbor.

Incentives and disincentives: The final two categories of interaction occur when a corporate or business law field creates either incentives or disincentives for firm managers to undertake environmentally protective action. Markets affect behavior by making it more or less costly as a function of price, while norms affect behavior by making it more or less costly as a result of social sanction or approbation. When corporate and business law fields operate indirectly in this way, they create either costs or subsidies for firm managers to take the environment into account in their decisions. As an example, the fact that some pre-petition environmental obligations can be discharged in bankruptcy creates disincentives for firms to meet those obligations fully. 106 Similarly, antitrust law does not categorically prohibit under a per se rule all kinds of industry standard setting aimed at promoting the conservation of environmental resources; some are evaluated under the more fact-intensive rule of reason inquiry. To the extent there is uncertainty [\*163] about whether antitrust law prohibits such collective action, this uncertainty may create disincentives for certain forms of private environmental governance. 107

On the flip side, corporate and business law can create incentives for positive behavior with respect to the environment. For example, more than thirty states have created the "benefit corporation" as a new corporate form. While a firm must opt into this form of incorporation, once the firm has selected the benefit corporation form, its directors and officers are obligated to take environmental (or social) values into account alongside corporate profit for shareholders, and must publish reports that evidence their progress toward these commitments. 108 The benefit corporation goes beyond the safe harbor provided by the ordinary business judgment rule: It provides incentives for firm managers to take environmental values into account in their decisionmaking. They gain the reputational benefit of presenting themselves to the public as benefit corporations, and are protected by a bright-line bar to certain shareholder lawsuits. There is, however, some question as to how enforceable such commitments are, leaving them in the category of incentives, rather than mandates. 109 Finally, while Securities and Exchange Commission (SEC) environmental disclosure rules are primarily mandates because they require the disclosure of certain information, they have secondary effects that operate as incentives for better environmental behavior. 110

Laying out these categories according to whether they operate in confluence or conflict with environmental values, combined with the degree of influence they exert, yields the following taxonomy.

[\*164]

Table 1

Five Primary Forms of Interaction

[TABLE 1 OMITTED]

To be sure, any taxonomy of this sort necessarily involves some oversimplification. But these categories are analytically useful nonetheless. The taxonomy supports this Article's holistic account by demonstrating commonalities across fields of law. It also exposes a more nuanced set of influences than mere conflict-versus-confluence or mandates-versus-incentives. Part III will give more content to the categories by highlighting examples of each primary form of interaction. Part IV will then demonstrate that this account of the forms of interaction reveals a more complete set of options available for integrating environmental values into these areas of corporate and business law. These doctrines can evolve not only from conflict to confluence, but also from prohibition or disincentive to safe harbor, from safe harbor to incentive, and from incentive to mandate.

Corporate law, securities law, antitrust law, and bankruptcy law are not just a fourth generation of environmental law. 111 Rather, they have their own environmental narratives to tell. Instead of telling them as discrete stories, the next Part highlights common themes across these fields.

[\*165]

III. Corporate and Business Law as Environmental Law

Having developed the taxonomy, this Part offers detailed examples of each type of interaction. Given the vast nature of each field and the scholarship within it, this Part does not purport to offer a complete account of every such interaction, but rather aims to highlight examples within each category to draw common lessons.

A. Mandates

1. Securities disclosures

Securities regulation offers one of the strongest examples of how business law can affect the environmental decisions of publicly traded firms. 112 After briefly summarizing firms' current disclosure obligations, this Subpart situates securities disclosure requirements in the context of environmental informational regulation more broadly, in order to highlight their primary nature as a mandate while recognizing their secondary nature as an incentive. This Subpart then examines the debate over how broadly to interpret the concept of materiality, which will have significant consequences for the impact of such disclosure requirements on firms' environmental performance going forward. 113

A major purpose of the securities laws in the United States is to provide information to investors concerning securities offered for sale to the public, in order to "protect investors against manipulation of stock prices." 114 Securities law achieves this goal of market integrity largely through informational regulation. Under the Securities Act of 1933 115 and the Securities Exchange Act of 1934, 116 the SEC adopted Regulation S-K to harmonize corporate disclosures of material information to investors when securities are initially offered to the [\*166] public; in connection with the annual shareholders' meeting; in both annual and quarterly reports; and when certain specified events occur, such as a merger or acquisition. 117

Regulation S-K specifies how its general provisions apply to environmental issues and risks. It requires publicly traded firms to disclose the costs of complying with environmental laws, including material capital expenditures; material pending legal proceedings, including environmental legal proceedings; material impacts of risk events, including material "risk factors"; and a general management discussion and analysis of financial condition, including known future trends as well as "uncertainties that are reasonably likely to have a material effect on financial condition or operating performance." 118 In 2010, in response to several investor petitions, the SEC issued an interpretive release to clarify that these existing disclosure requirements apply to climate change, and to provide guidance to public companies on such disclosures. 119 The SEC's release explained that firms must disclose the impact of actual or potential legislation and regulations regarding climate change, including international accords; indirect consequences of regulations or business trends, such as changes in demand for goods or services resulting from climate change; and the physical impacts of climate change, including risks to performance and operations as a result of extreme weather events. 120

Mandatory information disclosure is an important tool of environmental governance. 121 Indeed, NEPA - the first major environmental statute adopted by Congress - contains no substantive performance standards; it requires only the assessment and public disclosure of information about potentially significant environmental impacts of major federal actions. 122 While informational regulation mandates the disclosure of information, it has the secondary benefit of providing incentives to those disclosing that information to [\*167] change their behavior. 123 For example, the EPA's Toxics Release Inventory (TRI) program, which requires certain firms to file public annual reports regarding their use and release of listed toxic chemicals, has coincided with a dramatic reduction in the use of those chemicals and their release into the environment. 124 These reductions have occurred through a combination of self-monitoring by firms and external monitoring of firm actions by the public, regulators, investors, and peers. 125 Publicly traded firms have faced secondary implications of TRI reporting, including drops in stock prices and increases in borrowing and insurance costs. 126

A similar dynamic is at work in the securities regulation context. In some circumstances, environmental and climate-related risks can have a legally material impact on a firm's financial position. 127 A recent high-profile example involved ExxonMobil's failure to disclose environmental and climate-related risks. In 2016, the SEC initiated an investigation into whether the firm's securities disclosures adequately addressed the material risks of climate change to its business, in particular with respect to how the firm valued its oil reserve assets. 128 The SEC's investigation mirrored an earlier, separate inquiry by the [\*168] New York Attorney General into whether ExxonMobil misled its investors about the possibility that its assets - oil resources that remained in the ground to be extracted at some point in the future - could become "stranded" if future environmental regulations precluded the firm from extracting them, or if regulations made extraction unprofitably expensive. 129 ExxonMobil ultimately chose to reduce its estimate of recoverable reserves in a subsequent 10-K filing by more than three billion barrels of oil equivalent, including "de-booking" all the reserves it held in a Canadian oil sands project. 130 Separately, in response to a shareholder proposal requesting a public report regarding the impact of climate change on the firm, ExxonMobil indicated in December 2017 that it would discuss "energy demand sensitivities, implications of two degree Celsius scenarios, and positioning for a lower-carbon future" in subsequent disclosures. 131 In addition to refocusing management attention, mandated securities disclosures can spur more effective public monitoring of firms' environmental behavior when such disclosures are compared to the firms' statements to other stakeholder groups, including regulators, the public, and customers. 132

The key doctrinal debate is how the concept of materiality, the touchstone of what firms must disclose, interacts with both environmental risks to the firm (such as the physical effects of climate change) and environmental externalities caused by the firm, which might be the subjects of regulation or litigation. The U.S. Supreme Court has held that a fact is material to investors if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix' of information made available." 133 Silence on a matter is not [\*169] actionable unless there is a specific duty to disclose information, or if the failure to disclose creates a misleading impression. 134 Thus, what the "reasonable investor" cares about is paramount.

The relevant question here is whether materiality encompasses environmental disclosure only when environmental issues are connected to a firm's financial performance, or if it applies more broadly, covering environmental issues for their own sake, even if unrelated to financial performance. 135 While SEC regulations repeat the Supreme Court's broad language defining materiality, 136 the agency has generally interpreted this language to encompass those environmental disclosures that are material to a firm's financial performance. 137 For example, in its 2010 interpretive release providing guidance on climate disclosures, the SEC explained why regulatory and ecological developments in the climate arena are worthy of disclosure, noting that such developments "could have a significant effect on operating and financial decisions," such as by "changing prices for goods or services" and creating "new opportunities for investment." 138 Empirical data bear out a positive relationship between financial and environmental performance. A 2015 meta-analysis of more than 2,000 empirical studies exploring the relationship between environmental, social, and governance (ESG) performance and corporate financial performance concluded that the two are "positively correlated." 139

Several legal scholars have argued that materiality should be understood more broadly to require disclosures about environmental and social risks even if they do not rise to the level of financial materiality, because these risks, too, are of legal significance to investors. 140 Empirical studies have demonstrated that private investor interest in firms' social and environmental risks and their [\*170] environmental decisionmaking has increased in recent years. 141 In 2016, the SEC issued a concept release "to seek public comment on modernizing certain business and financial disclosure requirements in Regulation S-K," including social and environmental disclosures. 142 More than 80% of the non-form comments received by the SEC relating to sustainability called for improved disclosure and standardization of such disclosure. 143 One recent high-profile example demonstrates investor concern for social and environmental governance. In January 2018, Laurence Fink, CEO of the investment firm BlackRock - the largest institutional investor in the world - wrote a letter to the CEOs of publicly traded companies in which the firm invests, admonishing that "to prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society." 144

There is a statutory basis for a broader understanding of materiality as encompassing nonfinancial environmental and social risks. Beyond information explicitly required to be disclosed, the SEC has broad authority to require disclosure of "such other information … as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors," regardless of whether such information is financially material. 145 Indeed, the SEC has made certain disclosures mandatory, such as those relating to board members' attendance at meetings; board committee structure; executive compensation; and, since Watergate, illegal actions by management, even in the absence of any link to financial materiality. 146

[\*171] Although at present it appears unlikely that the SEC will take further action to require social and environmental reporting in response to its 2016 concept release, 147 the possibility remains for another administration to take such action in the future. The broader interpretation of materiality would be consistent with the environmental priority principle put forth below, arguably offering stronger incentives for firm managers to take environmental values into account in their decisionmaking. 148

2. Antitrust law

Antitrust law offers a second example of how business law can mandate or prohibit environmentally positive behavior by firms. While several scholars have identified a conflict between antitrust law's goal of promoting competition and the environmental norms of promoting conservation, 149 the relationship between the two is more complex. Before this Article turns to how antitrust law prohibits and creates disincentives for certain forms of industry environmental cooperation, 150 this Subpart first offers a narrative of confluence, describing how antitrust law can advance the goals of environmental protection by prohibiting anti-environmental collusion.

Antitrust law has long been said to serve many purposes, including promotion of "efficiency" in markets; 151 promotion of justice; 152 protection of consumers from monopoly firms' ability to increase prices; 153 and protection [\*172] of competitors, especially small businesses, from "larger, more efficient firms." 154 But antitrust statutes adopted after the Sherman Act, 155 including the Clayton Act 156 and the Federal Trade Commission Act, 157 focused more squarely on the notion of promoting market competition and targeting anticompetitive behavior. 158

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 159 There are certain kinds of actions that are per se illegal under the antitrust laws, rendering antitrust law an absolute bar. 160 Such actions include price fixing, horizontal boycotts, and output limitations. 161 Courts apply the per se rule when firms aim to "disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" 162 In the per se unreasonableness context, the plaintiff need not show anticompetitive effect, as harm to competition is presumed. 163

Before the enactment of the Clean Air Act, the federal government invoked antitrust law to end a collusive agreement among major automakers and their industry association to keep pollution control technology from reaching the California market. By 1952, authorities addressing air pollution in Los Angeles County had accepted scientific findings that motor vehicle emissions were the major source of the smog that blanketed the Los Angeles basin. 164 Local officials began to reach out to the major automobile [\*173] manufacturers about research on emissions-control technology. 165 In 1953, the Automobile Manufacturers' Association (AMA), an industry trade group, began a campaign to study the issue and committed to funding research. 166 In 1955, several automobile manufacturers, including the four major manufacturers - General Motors, Ford, Chrysler, and American Motors - entered into a formal cross-licensing agreement to share technological information and data on the development of emission-control technology, 167 an action that later became the subject of antitrust litigation. 168 They announced their decision publicly, garnering some praise for addressing the smog problem. 169

In 1960, California passed the California Motor Vehicle Pollution Control Act. 170 The Act mandated that manufacturers of new cars install emissions-control devices; however, the mandate was only triggered once such devices had been certified by the newly created Motor Vehicle Pollution Control Board. 171 By 1964, the Board had certified four emissions-control devices as meeting the state's standards, triggering the mandate under the Act. 172 Independent firms, rather than the major automakers, had developed these devices. 173 Shortly after the state certified these devices, the major automakers announced that they, too, had developed their own emissions-control technology, 174 arguably so that they would not be required to license technology from other firms. This sequence of events led some officials in California to conclude that the major automakers had conspired to delay making their own technologies publicly available. 175 After Los Angeles County officials asked the U.S. Attorney General to investigate possible collusion, a grand jury was convened. 176

Although the Department of Justice did not file criminal charges, in January 1969 it filed a civil antitrust suit against the AMA and the four major [\*174] automakers, alleging that the defendants had conspired among themselves and with smaller motor vehicle manufacturers "to eliminate competition in the research, development, manufacture and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights, covering such equipment," in violation of section 1 of the Sherman Act. 177 In response to the complaint, the defendants argued that their cooperation had actually accelerated the development of emissions-control devices and noted that collaboration was required to ensure that all manufacturers would be able to comply with the increasingly stringent standards. 178 After the lawsuit was filed, a partner in the law firm representing the AMA penned an article 179 explaining that individual consumers had been "unwilling to spend the additional small amount" necessary to purchase vehicles equipped with emissions-reducing devices. 180 Thus:

So far as the installation of devices was concerned, therefore, the manufacturers had a substantial and legitimate interest in cooperating. No company wanted to incur a cost disadvantage, either in terms of an increase in sales price or an adverse effect on vehicle driveability, without some assurance that all manufacturers were incurring similar disadvantages in the marketplace. 181

Arguably, this was as much a problem of the interaction between corporate law and antitrust law in competitive markets as it was one of antitrust law alone. If firms had a broader mandate beyond profit maximization, including to contribute to the public interest, perhaps they would have been more willing to incur a short-term cost disadvantage, even in a competitive market, rather than enter into an agreement to limit competition.

The parties resolved the suit by entering into a consent decree, which required the defendants not to conspire to delay the development of emissions-control devices and to make available without royalties both patent licenses and data on the emissions-control devices they had developed. 182 However, the decree did not require the defendants to admit liability or pay monetary penalties or damages for environmental harm; nor did it require the [\*175] retrofitting of vehicles. 183 Despite the lack of damages or penalties, in this case antitrust law served as a mandate to promote environmental goals, preventing collusion in the market when firms feared that developing an environmental product would put them at a competitive disadvantage.

A second, more recent example of antitrust law serving as an environmental mandate comes from the European Union, not the United States, but the example offers a similar lesson about the potential confluence, rather than conflict, between antitrust principles and environmental goals. In 2011, the European Commission fined two consumer products firms, Unilever and Procter & Gamble, more than 300 million euros combined for entering into an agreement to maintain prices for laundry detergent while the firms switched to selling a more concentrated, environmentally preferable formulation. 184 The firms switched to the more environmentally friendly formulation as a result of their participation in a voluntary industry initiative called the "Code of Good Environmental Practice for Household Laundry Detergents," 185 a classic example of private environmental governance. The voluntary initiative included reducing the amount of detergent needed for each load of laundry, as well as overall product weight and packaging. 186 The industry initiative appropriately did not include any commitments regarding price fixing. 187

However, the firms privately "agreed to keep the price unchanged" when the "products were "compacted'" in a way that might appear to a consumer that he would be able to wash fewer loads of laundry than the compacted product was capable of cleaning. 188 In addition, they engaged in other forms of price collusion, including "restricting their promotional activity" and "deciding not to pass the benefit of cost savings (reduced raw materials, packaging and transport costs) on to consumers." 189 The firms further agreed on direct price [\*176] increases and "exchanged sensitive information on prices and trading conditions, thereby facilitating the various forms of price collusion." 190

In this case, just as in the case of the automakers, antitrust law enforcement served as an environmentally positive mandate. Relying on antitrust law, the European Commission fined these firms for seeking to avoid passing cost savings from an environmentally beneficial product onto consumers. The motivations of the consumer products firms mirrored those of the automakers: In both cases, the firms feared that being the first to market an environmentally preferable product would reduce profits or create a competitive disadvantage vis-a-vis other firms in the marketplace. This example likewise suggests the importance of viewing antitrust law in connection with other fields, such as corporate law. Firms driven by a profit motive experience that motive in the context of a competitive environment. 191

B. Prohibitions and Disincentives: The Antitrust Per Se Rule and the Rule of Reason

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive.

As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition.

The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199

#### 2) “Business practices” include tactics or activities.

Free Dictionary ND, “Business Practice,” No Date, https://financial-dictionary.thefreedictionary.com/Business+Practice

Business Practice

Any tactic or activity a business conducts to reach its objectives. Ultimately, a business's objective is to make money. Business practices are the ways it attempts to do so in the most cost effective way. A company may have rules for business practices to ensure that its employees are efficient in their work and abide by applicable laws. See also: Business ethics.

#### Specifically, individual acts.

G. Dolph Corradino 3, Judge, New Jersey Municipal Court, Passaic, “TMK Assocs. v. Landmark Dev.,” 2003 Conn. Super. LEXIS 2464, Lexis

They argue that "in order to successfully allege a violation of CUTPA, the plaintiff must allege more than a singular occurrence"; "there must be a pattern of unfair or deceptive trade practices"; "the plaintiff failed to plead more than a single act (of) unfair [\*14] or deceptive business practices." This argument was laid to rest in Johnson Electric Co. v. Salce Contracting Assocs., 72 Conn. App. 342, 805 A.2d 735 (2002). There, "the trial court held that, because the plaintiff did not prove that the defendant had engaged in a repeated course of misconduct, the plaintiff did not establish that the defendant violated CUTPA." Id. page 349. The court disagreed, ruling that, 'The trial court improperly declined relief to the plaintiff on the ground that it had alleged and proven only a single act of misconduct." Id. page 353.

## Biz Con

#### Uncertainty causes regulatory capture and delay.

Wright 17 (Joshua D. Wright, University Professor, Antonin Scalia Law School at George Mason University; Executive Director, Global Antitrust Institute; Senior Of Counsel, Wilson Sonsini Goodrich & Rosati PC; former Commissioner, U.S. Federal Trade Commission. DECEMBER 13, 2017. This statement was made before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Protection Hearing on “THE CONSUMER WELFARE STANDARD IN ANTITRUST LAW: OUTDATED OR A HARBOR IN A SEA OF DOUBT?” <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Wright%20Testimony.pdf>)

Second, altering the applicable antitrust standard would necessarily entail trading away some amount of consumer welfare in favor of some other—often undefined or illdefined—values. Consumer welfare is the lodestar of antitrust analysis today: conduct that makes consumers better off does not violate the antitrust laws; but behavior that impairs consumer welfare does. Current proposals to abandon the consumer welfare standard necessarily require antitrust law enforcers and judges to assess how much consumer welfare we are willing to lose to increase such other values—after all, the distinction between the consumer welfare standard and some other standard matters only when there is a conflict, i.e., when conduct is welfare-enhancing or –neutral. This is problematic not only because it means certain reductions to consumer welfare—as it most certainly does—but also because there is little to no evidence to support the promise that “more” antitrust enforcement will deliver the elusive and theoretical “other” benefits promised by critics of the current standard. To my knowledge, those who suggest we need to consider goals other than consumer welfare have failed so far even to recognize there is a tradeoff between achieving these goals and reducing consumer welfare, much less offer a way to reconcile these sometimes conflicting goals.

Third, both antitrust skeptics and critics of the current standard share a concern over regulatory capture and industry control of antitrust institutions. Any student of public choice economics shares these concerns. Rejecting the consumer welfare standard in favor of a multi-dimensional alternative would, however, increase agency discretion to justify any regulatory decision as consistent with the law. This increases the incentive and ability of rent seeking firms to exert control over agencies. Indeed, history has shown us time and again that establishing amorphous standards in antitrust law and enforcement invite rent seeking, which in turn promotes corporate welfare over consumer welfare—the powerful over the powerless. The clear meaning of the consumer welfare standard fosters the rule of law and allows the courts (and the public) to hold antitrust agencies accountable for their enforcement efforts and to prevent agencies from fostering corporate over consumer welfare.

#### CWS straight turns protectionism---empirics demonstrate that other standards ensure protectionism against U.S. companies and regulatory capture---turns case

Wright 17 (Joshua D. Wright, University Professor, Antonin Scalia Law School at George Mason University; Executive Director, Global Antitrust Institute; Senior Of Counsel, Wilson Sonsini Goodrich & Rosati PC; former Commissioner, U.S. Federal Trade Commission. DECEMBER 13, 2017. This statement was made before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Protection Hearing on “THE CONSUMER WELFARE STANDARD IN ANTITRUST LAW: OUTDATED OR A HARBOR IN A SEA OF DOUBT?” <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Wright%20Testimony.pdf>)

The consumer welfare standard has benefitted antitrust jurisprudence and the general public tremendously. This standard was adopted after decades of substantial debate involving some of our most renowned jurists, legal scholars, and economists— including several Nobel laureates. As with any common law area, the developments within antitrust case law and precedent are the result of deep intellectual thought and serious consideration from our full court system. Today, the overwhelming consensus among those who do antitrust for a living—be they established antitrust scholars, practitioners, or law enforcers serving under both Republican and Democratic administrations—is that the consumer welfare standard has served antitrust well, is the best available legal framework, and that abandoning it now will have serious detrimental effects for consumers, the American economy, and international antitrust.

The current debate arises from proposals that antitrust law adopt a standard that would reduce consumer welfare—that is, to diminish the well-being of consumers and their ability to consume everyday goods and services—in exchange for advancing some combination of other, vague goals ranging from increasing fairness, to reducing income inequality, to protecting specific national interests or markets, or to protecting particular jobs. Specifically, critics of the consumer welfare standard have proposed steps including that we ban all vertical mergers, make per se unlawful horizontal mergers based solely upon the a firm’s size—i.e., return to the ‘big-is-bad’ enforcement style of early antitrust—and even prohibit Amazon from selling groceries. These proposals come despite that the economic evidence makes quite clear that such moves would make consumers worse off.1

While I reject these proposals, I believe the current debate is a healthy one and I am pleased to be a part of it. It is always worthwhile to revisit whether antitrust law and antitrust enforcement institutions can better calibrate their missions to serve their purpose of protecting competition. But it is also important to learn from the history of antitrust—including how poorly antitrust performed when its law and institutions were untethered from the consumer welfare standard. It is equally important to understand that abandoning the consumer welfare standard would be a dramatic step backwards from the development of antitrust law and the likely consequences of such a change for consumers and the economy.

There are three points I’d like to highlight in my testimony today.

First, the consumer welfare standard offers myriad benefits. It brings coherency and credibility to an area of law once roundly condemned for its internal inconsistencies and incoherent standards. It tethers antitrust analysis and law to economic insights and evidence, thus providing a principled framework for evaluating competitive effects and finding violations. And it provides a disciplined standard— requiring a demonstration of anticompetitive effects—that can be implemented globally to ensure jurisdictions worldwide are not subverting antitrust results to favor domestic firms or to discriminate against U.S. firms. In these ways, the consumer welfare standard fosters a strong rule of law in antitrust cases. The consumer welfare standard’s tethering to economic learning also provides an inherent ability for antitrust law to evolve alongside evolutions in our economic understanding and to address new types of business models and industries that advances in technology and innovation have made possible. The flexible consumer welfare standard provides ample room for current debates.

Second, altering the applicable antitrust standard would necessarily entail trading away some amount of consumer welfare in favor of some other—often undefined or illdefined—values. Consumer welfare is the lodestar of antitrust analysis today: conduct that makes consumers better off does not violate the antitrust laws; but behavior that impairs consumer welfare does. Current proposals to abandon the consumer welfare standard necessarily require antitrust law enforcers and judges to assess how much consumer welfare we are willing to lose

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## Harmonization

#### Concedes climate change is a larger cause

Dr. Liz 1ac Kimbrough 21, Ph.D. in Ecology and Evolutionary Biology from Tulane University, BS in Botany from Humboldt State University, Journalist at Monga Bay, “Are Major Insect Losses Imperiling Life on Earth?”, Monga Bay, 1/28/2021, https://india.mongabay.com/2021/01/are-major-insect-losses-imperiling-life-on-earth/

New studies assessing insect declines around the planet find that on average, the decline in insect abundance, seen on nearly every continent, is thought to be around 1-2% per year or 10-20% per decade.

Precipitous insect declines are being escalated by humanity as soaring population and advanced technology push us closer to overshooting several critical planetary boundaries including biodiversity, climate change, nitrification, and pollution.

Action on a large scale (international, national, and public/private policymaking), and on a small scale (replacing lawns with insect-friendly habitat, for example) are desperately needed to curb and reverse insect decline.

Chances are, the works of the world’s insects touch your lips every day. The coffee or tea you savor, both are pollinated by insects. Apples, oranges, cabbages, cashews, cherries, carrots, broccoli, watermelon, garlic, cinnamon, basil, sunflower seeds, almonds, canola oil — all are insect-pollinated. Honey, dyes, even some vaccines require insects to come to fruition.

Vital to the world’s food web, nested in nutrient cycling, and embedded in industries — the closer we look, the more we see insects as vital to maintaining life’s frameworks. Referring to this fact, famed biologist E.O. Wilson wrote in 1987, “[I]f invertebrates were to disappear, I doubt the human species could last more than a few months.”

Which is why the precipitous decline of insects is raising alarms.

Insect populations are being reduced at varying rates across space and time, but on average, the decline in their abundance is thought to be around 1-2% per year, or 10-20% per decade.

“Think of a landowner with a million-dollar house on a river that’s a little bit wild. And they’re losing 10% to 20% of their land every decade, and it’s horrifying. It means that after even a century, you really don’t have anything left,” David Wagner, an entomologist with the University of Connecticut told Mongabay in an interview. That, he says of this comparison, is the danger we now face.

Wagner has just edited a newly released in-depth feature in the Proceedings of the National Academy of Science, Global Decline of Insects in the Anthropocene, in which 56 researchers present scientific studies, opinions and news on insect declines. The journal offers perspectives on the ecological, taxonomic, geographical and sociological dimensions of insect declines, along with suggestions on how we move forward to study and reverse this drain on global biodiversity.

Insect “death by a thousand cuts”

In a perspective piece that leads off the special issue, Wagner and his co-authors address the likely causes of insect decline. The main stressors to insects, they write, are changes in land use (particularly deforestation), agriculture, climate change, nitrification, pollution and introduced species. However, the importance of each stressor and how they interact still puzzles scientists.

“There are so many good scientists that can’t figure out what the cause is,” Wagner said. He poses the well-known honeybee as an example. “I mean, this thing is worth billions upon billions of dollars and we don’t know why it’s having such a hard time. And I think the reason is, it’s death by a thousand cuts… most of these things are hit by four or five pretty important stressors, and they’re acting synergistically.”

The articles that follow that opening essay zero in on the key causes for some of the biggest known losses:

A study by Wagner and Peter Raven, president emeritus of the Missouri Botanical Garden, concludes that declines in insect biodiversity and biomass are linked to the intensification of agriculture over the past 50 years.

Research by Dan Janzen and Winnie Hallwachs — both biologists from the University of Pennsylvania who describe themselves as “intense observers of caterpillars, their parasites, and their associates” — focuses on climate change as a stressor. Since the late 1970s, they write, they’ve watched as insect declines came to the dry forests, cloud forests, and rainforests of Costa Rica’s Guanacaste Conservation Area, as the region was plagued by rising temperatures, increasingly erratic seasons and inconsistent rainfall.

Another study in the special feature, titled, Insects and recent climate change, argues that climate may be playing even more of a role in declines than land-use change — which is massive around the planet mostly due to agribusiness expansion. The authors base their climate findings on a Northern California butterflies case study, where declines were severe even in areas suffering little habitat loss. Similar losses within well-protected areas have been detected in Germany and Puerto Rico.

Likewise, butterfly populations in Europe face challenges. In the UK, butterfly numbers have declined by around 50% over the past 50 years, with 8% of known resident species considered extinct. In the Netherlands, upwards of 20% of species have been lost and in Belgium 29%. Researchers suggest habitat loss, habitat degradation and chemical pollution as the primary causes. The authors offer conservation solutions and recommend policy changes to conserve butterflies and other insects — but so far political will has been lacking.

Moving from the winged creatures of the day to night fliers, Wagner and colleagues give an overview of the global state of moth declines. Moths are extremely diverse and cosmopolitan. “For every butterfly that Mongabay readers see during the daytime, there are 19 species of moths flying around at night,” Wagner revealed.

Although moth numbers have declined in some areas, such as in parts of Europe and Central America, in other, mostly temperate areas, many moth taxa are increasing in abundance. Another study found that the overall abundance of arthropods in the Arctic has increased in recent years. Researchers attribute these increases in insect abundance to climate change, which scientists say has both its species winners and losers. As warmer temperatures march northward, new suitable habitats open up for insects. The consequences of this range expansion — and the conflicts which may occur with plant and insect species already occupying those ranges — have yet to be analysed.

Insect declines are emblematic of a larger problem: the earth is in the midst of what some call the “sixth mass extinction.” Birds, amphibians, freshwater mussels, large mammals, all have seen dwindling numbers. The question for entomologists, Wagner said, is whether or not the decline of insects is actually occurring faster than for some other groups, especially because insects are often the direct target of destruction by human, due to pesticide and herbicide use.

Sarah Cornell, a scientist at the Stockholm Resilience Centre (SRC), raises an insect-related question relevant to our time: “There might have been many more mass extinctions. It’s just that we only see extinctions with the things that leave a record… things with skeletons… When people [say], ‘we’re entering the sixth mass extinction.’ Okay, well, how do we know that? We might be entering the 17th?… We might make ourselves extinct before we even reach these hallowed glories of the sixth.”

Overshooting planetary boundaries

Clearly, the loss of insect abundance — depending on where and how fast it occurs — could have far more dire, unforeseen impacts than the loss of coffee or cashews. The wholesale transformation of global ecosystems, triggering mass insect declines, could be pushing the Earth past what scientists have dubbed as a “planetary boundary.”

#### Loss of ILaw leadership is better for U.S. interests than the current model

Burke-White 15- international law professor at Penn with a PhD and MPhil from Cambridge in IR and a JD from Harvard (William W. Burke-White, Winter 2015, “Power Shifts in International Law: Structural Realignment and Substantive Pluralism,” published in the Harvard International Law Journal, vol. 56 p. 1, accessed in lexis)

Perhaps most surprisingly, the multi-hub structure actually serves United States interests very well. Admittedly, in this new structure the United States will not be able to prevail on every issue or in every legal process. Even during the period of U.S. hegemony, however, it could not do so. Yet, the United States stands to benefit in the multi-hub system for three reasons. First, the United States has long sought flexibility in international law so that it could use the system to advance whatever preference or strategic interest it might have at a given time. As a hegemon, the United States enjoyed the flexibility that comes with shaping and running the system. n492 The greater pluralism of the multi-hub structure allows the United States to continue to enjoy this flexibility

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even as its hegemony declines. The United States can pick and choose among different preferences being articulated by other hubs or articulate its own preferences when necessary. Pluralism may [\*79] mean that international law provides less constraint or certainty, but that is exactly what the United States has long sought. Second, in a system in which legal processes migrate downward into flexible subsystems, the United States can advance its interests through international legal processes contained within such subsystems. During the period of U.S. hegemony, the United States often undertook the arduous and costly task of building global consensus. Relying on "coalitions of the willing" was a second best alternative subject to significant criticism. In the multi-hub system, in contrast, legal processes are occurring within such subsystems with greater regularity. As a result, the United States can work through smaller, less costly coalitions of states that share its interests on particular issues. Given the groundwork laid during the period of U.S. hegemony, the United States is the beneficiary when variable geometry becomes the norm, not the exception, for international legal processes. n493 Third, the fact that rising powers have chosen to operate within the international legal system, rather than challenge the system itself, means that, in order to advance their own interests, rising powers will share the costs of leadership. New hubs are beginning to lead legal processes within their own subsystems, assuming costs of enforcement, and helping bear the burdens previously carried by the United States alone. The United States may not always see its preferences articulated in the rules and interpretations other hubs are advancing. It may not always like the rules that new hubs choose (or refuse) to enforce. But, if it embraces pluralism, the United States can share the overall costs of managing a surprisingly robust system.

## Convergence

Filippo Maria Lancieri 19, Doctor of Jurisprudence Candidate at University of Chicago Law School, M.S in Economics from INSPER, Currently Postdoctoral Researcher at ETH Zurich, Digital Protectionism? Antitrust, Data Protection, and the EU/US Transatlantic Rift, The Journal of Antitrust Enforcement (UK), 2019, 7(1): 27-53, Nexis Uni, Lexis Has a Display Issue: In the Original Article---Single Quote(s) Appears As “&#8242;” Edited Here for Readability and Clarity\*

IV. The Way Ahead: Convergence or Divergence?

So far, this article presented how the differences between the American and European approaches to data protection provide EU regulators with motivation to strengthen antitrust enforcement in data markets. Moreover, it argued that once this process starts, the unique features of European antitrust policy will prove a perfect incubator, so that antitrust cases against US tech companies for dominance violations should grow. Americans do not share and may not understand neither the motivation nor the antitrust tools employed in the EU. 110 As the Atlantic divide on antitrust enforcement widens (and given that actual protectionist policies are on the rise) 111 calls of digital protectionism should afloat. Tensions run both ways, as Europeans may also be startled by American complaints against what they see as a regular application of the rule of law. 112

With a trade war between the EU and the US looming after a series of trade sanctions, 113 increased strains between two of the world’s leading trade and security partners can do little good. 114 The digital economy is a sensitive area and the EU/US safe harbour for data transfer is proof of the damage that may arise from disputes. The first Safe Harbor came after a major trade conflict between the EU and the US over personal data. 115 By striking it down, EU Courts’ placed thousands of American and European companies in disarray, 116 reason why business leaders in both jurisdictions welcomed the swift conclusion of the Privacy Shield. 117 The challenge remains, however, on whether it is desirable or possible to bridge such significant cultural differences, or at least develop clear mechanisms that prevents tensions arising from pure misunderstanding.

This remains a contingent question. On one side, convergence may never be necessary. It is perfectly reasonable and may even be optimal that different legal systems will provide different solutions to challenges of a new internet era, forcing agents to adapt to the norms of a given jurisdiction. 118 Lack of convergence is burdensome and may increase the cost of doing business across the Atlantic, 119 but the so far successful implementation of the ‘right to be forgotten’ experience in Europe demonstrates that both markets are large enough to justify companies adopting different solutions. The risk is that shifts in market behaviour may lead to the ‘Brussels’ effect’ and the export of stricter standards, 120 something that may trigger unpredictable reactions by US authorities facing loss of sovereignty.

On the other, the safe harbour demonstrates how convergence is possible if parties move to bridge differences. As there is more to explore from an academic perspective in this second scenario, this section will focus on that. Bringing together such disparate regimes will require both political motivation and a coherent framework. This part argues that: (i) convergence efforts will require a balancing of the role that economics plays in antitrust enforcement on internet markets on both sides of the Atlantic; and (ii) that recent EU reforms open a window of opportunity for this to happen. In addition, it presents data portability as a mitigating measure that companies may explore to decrease tensions while and if converge does not take place.

#### Can’t resolve authoritarian regimes

Julian Cribb 19, Principal of Julian Cribb & Associates, Founding Editor of ScienceAlert, Author, Journalist, Editor and Science Communicator, “6 - Food as an Existential Risk,” 10/03/2019, Food or War, 1st ed., Cambridge University Press. DOI.org (Crossref), doi:10.1017/9781108690126

– The advent of quantum computers and blockchain herald an age in which it will be possible to spy on every person on the planet for the whole of their lives, by mining the data that already exists in their bank accounts, mobile phones and computers, medical records, CCTV, employment history, etc. In the wrong hands, this could be used to influence or compel people to vote for dictators. In terms of human survival, it could be used to enforce beliefs – like climate denial – which threaten the very existence of humanity.

– Deliberate misuse and/or accidental disasters created by biotechnology and nanotechnology, such as the manufacture of uncontrollable new lifeforms which prove dangerous, or genetically altered humans.

The essential point is that there is no public or ethical oversight of these ultra-powerful technologies, which are open to exploitation by anyone with the resources and who can afford the expertise.

They are emerging and evolving far faster than legislators or regulators can keep up. Without strong public oversight, they can very easily be used to enslave humanity, silence dissidents or to control or destroy by various means those whom their overseers want controlled or destroyed.

The connection between these supertechnologies and twentyfirst-century warfare is evident. Most are being developed as military technologies, not only by democracies where there is little or no public scrutiny, but also by dictatorships and corporations where there is no public oversight at all. Links with food include the deployment of artificial intelligence for managing corporate super-farms (which may or may not be sustainable), the use of robot swarms and cyber warfare to attack the food systems of potential enemies, and the use of universal surveillance to silence or deter people who wish to produce food sustainably and who find themselves opposed to the dominance of oil and coal companies, agribusiness corporates, their puppet governments and other wielders of power.

The over-arching issue is that use of universal spying systems to subordinate and censor the whole society could very easily silence the warning voices who presently speak out about risks to our future. Such a development would increase the likelihood of human extinction.

#### Collapses internet openness---extinction

Lee C. Bollinger 13, President of Columbia University in New York City and a Member of the Faculty of the Law School, Graduate of the University of Oregon and Columbia Law School, and Julius Genachowski, Former FCC Chair, JD from Harvard Law School, Managing Director at The Carlyle Group, “The Plot to Block Internet Freedom”, Foreign Policy, 4/16/2013, https://foreignpolicy.com/2013/04/16/the-plot-to-block-internet-freedom/

The Internet has created an extraordinary new democratic forum for people around the world to express their opinions. It is revolutionizing global access to information: Today, more than 1 billion people worldwide have access to the Internet, and at current growth rates, 5 billion people — about 70 percent of the world’s population — will be connected in five years.

But this growth trajectory is not inevitable, and threats are mounting to the global spread of an open and truly "worldwide" web. The expansion of the open Internet must be allowed to continue: The mobile and social media revolutions are critical not only for democratic institutions’ ability to solve the collective problems of a shrinking world, but also to a dynamic and innovative global economy that depends on financial transparency and the free flow of information.

The threats to the open Internet were on stark display at last December’s World Conference on International Telecommunications in Dubai, where the United States fought attempts by a number of countries — including Russia, China, and Saudi Arabia — to give a U.N. organization, the International Telecommunication Union (ITU), new regulatory authority over the Internet. Ultimately, over the objection of the United States and many others, 89 countries voted to approve a treaty that could strengthen the power of governments to control online content and deter broadband deployment.

In Dubai, two deeply worrisome trends came to a head.

First, we see that the Arab Spring and similar events have awakened nondemocratic governments to the danger that the Internet poses to their regimes. In Dubai, they pushed for a treaty that would give the ITU’s imprimatur to governments’ blocking or favoring of online content under the guise of preventing spam and increasing network security. Authoritarian countries’ real goal is to legitimize content regulation, opening the door for governments to block any content they do not like, such as political speech.

Second, the basic commercial model underlying the open Internet is also under threat. In particular, some proposals, like the one made last year by major European network operators, would change the ground rules for payments for transferring Internet content. One species of these proposals is called "sender pays" or "sending party pays." Since the beginning of the Internet, content creators — individuals, news outlets, search engines, social media sites — have been able to make their content available to Internet users without paying a fee to Internet service providers. A sender-pays rule would change that, empowering governments to require Internet content creators to pay a fee to connect with an end user in that country.

Sender pays may look merely like a commercial issue, a different way to divide the pie. And proponents of sender pays and similar changes claim they would benefit Internet deployment and Internet users. But the opposite is true: If a country imposed a payment requirement, content creators would be less likely to serve that country. The loss of content would make the Internet less attractive and would lessen demand for the deployment of Internet infrastructure in that country.

Repeat the process in a few more countries, and the growth of global connectivity — as well as its attendant benefits for democracy — would slow dramatically. So too would the benefits accruing to the global economy. Without continuing improvements in transparency and information sharing, the innovation that springs from new commercial ideas and creative breakthroughs is sure to be severely inhibited.

To their credit, American Internet service providers have joined with the broader U.S. technology industry, civil society, and others in opposing these changes. Together, we were able to win the battle in Dubai over sender pays, but we have not yet won the war. Issues affecting global Internet openness, broadband deployment, and free speech will return in upcoming international forums, including an important meeting in Geneva in May, the World Telecommunication/ICT Policy Forum.

The massive investment in wired and wireless broadband infrastructure in the United States demonstrates that preserving an open Internet is completely compatible with broadband deployment. According to a recent UBS report, annual wireless capital investment in the United States increased 40 percent from 2009 to 2012, while investment in the rest of the world has barely inched upward. And according to the Information Technology and Innovation Foundation, more fiber-optic cable was laid in the United States in 2011 and 2012 than in any year since 2000, and 15 percent more than in Europe.

All Internet users lose something when some countries are cut off from the World Wide Web. Each person who is unable to connect to the Internet diminishes our own access to information. We become less able to understand the world and formulate policies to respond to our shrinking planet. Conversely, we gain a richer understanding of global events as more people connect around the world, and those societies nurturing nascent democracy movements become more familiar with America’s traditions of free speech and pluralism.

That’s why we believe that the Internet should remain free of gatekeepers and that no entity — public or private — should be able to pick and choose the information web users can receive. That is a principle the United States adopted in the Federal Communications Commission’s 2010 Open Internet Order. And it’s why we are deeply concerned about arguments by some in the United States that broadband providers should be able to block, edit, or favor Internet traffic that travels over their networks, or adopt economic models similar to international sender pays.

We must preserve the Internet as the most open and robust platform for the free exchange of information ever devised. Keeping the Internet open is perhaps the most important free speech issue of our time.

# 1NR

### DA

#### Biden has sufficient PC to deliver infrastructure but preserving it is key

Kapur, 8-22-2021, Sahil, "Honeymoon over? Afghanistan chaos comes at a critical moment for Biden," NBC News, <https://www.nbcnews.com/politics/white-house/honeymoon-over-afghanistan-chaos-comes-critical-moment-biden-s-agenda-n1277338> -- Iowa

And those moderates are more likely to stick with Biden if their voters support him. “I am curious to figure out how much this is actually going to hurt President Biden. It’s probably a moving target for members,” Kristen Hawn, a former Democratic aide for the moderate Blue Dog Coalition, said of the Afghanistan conundrum. “I don’t think we’ll know that immediately. This is still playing out. “I do think that Democratic allies of the president want to deliver a win for him,” she said. “The bipartisan bill would be a very big win for the president at a very troubling time right now. There would be an incentive there to pass something, have it signed into law. Particularly with infrastructure, there are real-world impacts. People can see it.” A group of centrists, including Rep. Josh Gottheimer, D-N.J., is pushing for a swift vote on the infrastructure bill before the House proceeds to the budget bill. But Pelosi has said infrastructure doesn’t have the votes to pass unless it is linked to the larger package, which is a top priority for progressive lawmakers. Pelosi needs all the help she can get from Biden to get most reluctant Democrats to back her plan. “It’ll be interesting to see if Democrats, especially in the House, think he is weakened and they try to jam him on infrastructure and reconciliation,” Manley said. “Presidents and their staff as a general rule like to preserve their political capital for tough times. And they’ve done a good job of doing that so far,” he said. “But based on how difficult this is, they’re going to have to start calling in some chits.”

#### 1 – Snapshot vs. predictive – Biden will broker passage – pressure drives compromise

Jacobson 9/10 [Louis; citing Marc Goldwein, senior vice president at the Committee for a Responsible Federal Budget. 9/10/21; senior correspondent with PolitiFact; "The Democrats’ reconciliation bill: What you need to know," <https://www.politifact.com/article/2021/sep/10/democrats-reconciliation-bill-what-you-need-know/>]

The Democrats’ narrow margins in the House mean that factions within the caucus potentially have a lot of leverage to shape the final bill. The two most important factions so far have been progressives and centrists.

Progressives, including Rep. Alexandria Ocasio-Cortez, D-N.Y., see even the maximum $3.5 trillion amount as a downward concession from what they were initially seeking. Meanwhile, centrist Democrats, including those who could face tough reelection bids in 2022, are wary of spending that much and are seeking to shrink the reconciliation bill’s bottom line.

This intra-party conflict forced House Speaker Nancy Pelosi, D-Calif., to draw on her legislative experience just to secure passage of the budget resolution that needed to precede any reconciliation bill. Progressives want to vote on the reconciliation bill first, before the bipartisan infrastructure bill; centrists want to do the opposite.

Ultimately, a "rule" governing a floor vote on the budget had to be debated and renegotiated three separate times in about 24 hours before progressives and centrists would agree to proceed to the vote. Centrists settled for an agreement from Democratic leaders to hold a vote on the infrastructure bill no later than Sept. 27.

Democrats "need virtually unanimous support" to pass the reconciliation bill, said Marc Goldwein, senior vice president at the Committee for a Responsible Federal Budget. "They need enough policies to make people satisfied. It’s a delicate tightrope."

And that’s just for House consideration. Over in the Senate, the challenges are equally steep.

Democratic Sen. Joe Manchin of West Virginia, whose state strongly backed Donald Trump for president in 2016 and 2020, has said he won’t support a reconciliation bill as big as $3.5 trillion. Other Democrats may join him.

Since every Democratic vote in the Senate will be needed to pass the reconciliation bill, Manchin’s opposition, and the possible opposition of others, means that a reconciliation measure with a chance of making it to Biden’s desk may have to end up well below $3.5 trillion in spending.

"There is zero chance of a reconciliation bill getting a party-line vote in the Senate and the House without major concessions to moderate Democrats on the price tag and how it’s paid for," said Donald R. Wolfensberger, director of the Congress Project at the Woodrow Wilson International Center for Scholars.

What could be done to trim the reconciliation bill?

Democrats could cut specific spending programs entirely, or they could cut a whole lot of initiatives by the same percentage, perhaps by authorizing programs for a shorter period of time. They could also propose more tax increases on high-income taxpayers or corporations than they were initially considering. These options are likely part of the closed-door negotiations now under way.

Of course, cutting the reach of the bill risks losing the support of progressive Democrats, and that would torpedo the entire effort unless Democrats can pick up enough moderate Republicans to balance out the progressive losses.

How serious are the centrists and progressives about derailing the process if they don’t get their way?

Experts said it’s certainly possible that either centrists or progressives would tank the bill if they can’t get everything they want, though such a course would be risky since the Democrats are at risk of losing their slim majorities in the 2022 midterm elections.

"It may be too early to be talking about a snowball’s chance in Hades, but the intraparty heat in the Democratic caucuses has already set off the pre-melt warning sirens," Wolfensberger said.

Goldwein said that while the factions’ positioning is deeply felt, he added that there’s a good chance that Democrats want to get to yes. "I think the leadership and the administration will lead them to a deal," he said.

#### They’ll ultimately agree

Joan E. Greve 9-7, citing congresswoman Suzan DelBene, who chairs the centrist New Democrat Coalition, 9/7/2021, “Joe Biden to referee Democrats in brewing battle over $3.5tn budget bill,” https://www.theguardian.com/us-news/2021/sep/07/biden-democrats-brewing-battle-budget-bill, Stras

Despite the war of words between moderates and progressives, the White House has continued to express confidence that Congress will ultimately reach an agreement on the legislation.

“The president and his whole team are proud of and fighting for the substance of his Build Back Better agenda,” a White House official said in a statement. “These are complex processes, but as recent weeks have demonstrated, leaders in Congress and the President know how to move them forward.”

And DelBene similarly said that her group, which represents 95 Democrats in the House, remains committee to advancing both the bipartisan infrastructure bill and the spending package.

“The strength of the legislation, both on the infrastructure side and the reconciliation bill, is what people are going to look at moving forward,” DelBene said. “I think we want to see the infrastructure deal and the reconciliation bill get done.”

#### 2 – Link controls UQ – ups and downs are inevitable, but PC will persuade all quarters

Brown, USA Today White House Reporter, 9-7, 2021, (Matthew, "Biden's ambitious agenda faces decisive September as crises divide White House's attention," USA Today, PAS) <https://www.usatoday.com/story/news/politics/2021/09/07/bidens-agenda-hits-crucial-moment-amid-priorities-emergencies/5751441001/>

WASHINGTON — President Joe Biden's promise to unite the country and advance a bold agenda for the 21st century faces a fateful season this fall, as the window to advance his plans narrows amid crises. September especially will be a pivotal moment as the administration's attention is divided among multiple emergencies just as Congress tackles Biden's legislative priorities. The coronavirus pandemic continues to ravage the country. Communities from New Orleans to New York have only begun to recover from the damages of Hurricane Ida. A dozen new wildfires erupted in California over Labor Day weekend as crews start to get control of the Caldor fire near Lake Tahoe. Back in Washington, Biden's legislative vision for shoring up the nation's physical and social infrastructure faces a make-or-break moment in which the president is one of the few leaders who can persuade all quarters of his party to come together to fulfill his grand ambitions. The emergencies come as the administration manages the diplomatic and logistical challenges that arose after the fall of Afghanistan to the Taliban. Taken together, the events paint an urgent moment that will likely significantly shape this president's legacy. Here's what we know: Congress faces a packed September This month, two bills that embody much of Biden's philosophy face their moments of truth in Congress. House Speaker Nancy Pelosi, D-Calif., has set a Sept. 27 deadline to vote on the bipartisan infrastructure deal brokered in the Senate. That cutoff comes only days before Sept. 30, the deadline to raise the national debt limit and avoid a government shutdown. In August, Senate Democrats advanced a resolution on a $3.5 trillion reconciliation deal, a sweeping proposal that includes a number of the party's longstanding priorities like housing affordability, universal pre-K, an expanded child tax credit, Social Security and climate readiness policies. A range of congressional committees are deliberating over what the package's final form will look like, with some policies, especially relating to taxes and funding, still dividing Democrats. The White House has mostly let congressional leadership navigate the negotiations, which have no room for error in a closely divided Congress. Biden, who views both bills as central to his political worldview, has been in frequent conversation with members across the ideological spectrum to reconcile differences. Central to that role is satisfying the concerns of both progressives and moderates. Progressives like Sens. Bernie Sanders, I-Vt., and Ron Wyden, D-Ore., chair the powerful Senate Budget and Finance committees, respectively, and are in frequent communication with the White House over their priorities in both bills. On Thursday, Sen. Joe Manchin, D-W.Va., a pivotal moderate vote, said he would not support spending another $3.5 trillion in an op-ed for the Wall Street Journal, citing fears about inflation and debt. The White House did not appear fazed by Manchin's comments. "It's not abnormal for this to happen in the legislative process," said Cedric Richmond, a senior adviser to Biden, during an interview on ABC News' "This Week" on Sunday. Richmond said the administration is "still full steam ahead on trying to get our legislation passed" and that Manchin remains a "valued partner" but that "we're going to continue to push our agenda." "We're all, from senior levels of the White House, in close touch with a range of members, including Sen. Manchin and his team," White House press secretary Jen Psaki said Tuesday. "There are going to be a range of negotiations and ups and downs, and it's going to be called dead several more times over the next couple of weeks. We fully expect that." Psaki noted Tuesday that Biden "agrees that these plans need to be paid for" and that "we should take inflation seriously."

#### 3 – Time pressure pushes it but there’s no room for error.

Sahil Kapur, 9-7-2021, [Sahil Kapur is a national political reporter for NBC News., "'A train wreck': Congress faces a daunting September as deadlines pile up", NBC News https://www.nbcnews.com/politics/congress/train-wreck-congress-faces-daunting-september-deadlines-pile-n1278565 //DMcD]

"The margin for error is razor-thin, the stakes are high, and Republicans have made clear they'll be of no help," said Democratic consultant Matt House, a former aide to Senate Majority Leader Chuck Schumer, D-N.Y. "That's been true throughout the Biden administration, but September requires tackling the toughest issues yet, more of them, and with real deadlines attached." Congressional committees have advanced some measures in recent weeks to fund the government. In the House, a group of Democrats joined Republicans to boost military spending by $23.9 billion. Raising spending on the Defense Department is a high priority for Senate Minority Leader Mitch McConnell, R-Ky., who will be key to defeating a filibuster and securing 60 votes to pass any bill. But McConnell has said the GOP won't support a debt limit increase, setting up a showdown. And Democrats, who are seeking to pass a transformative economic agenda with wafer-thin majorities, are squabbling among themselves about the way forward on the infrastructure and safety net packages, which are the linchpin of Biden's domestic agenda. Centrist Sen. Joe Manchin, D-W.Va., last week called for a "strategic pause" on the $3.5 trillion bill, saying he's unwilling to spend "anywhere near" that amount until his concerns about debt and inflation are quelled. His remarks sparked a fierce backlash from progressives, who threatened to tank the infrastructure bill, which he co-wrote, if he stands in the way of budget reconciliation.

Biden's role as peacemaker

Democrats will also have to agree on a series of tax increases on upper earners and corporations to help pay for the budget bill. Senate Finance Committee Chair Ron Wyden, D-Ore., circulated a menu of options over the recess, several of which don't have party consensus. It's unclear how the looming fights will affect Democrats' ability to coalesce behind a strategy to advance infrastructure and budget reconciliation. "Late September stands to be a train wreck for congressional Democrats, with their dual-track strategy on a collision course, but it also presents a faint silver lining in the form of a familiar foe," said Liam Donovan, a lobbyist and former Republican operative. "There's virtually no way the reconciliation package can be ready in time to satisfy all the promises that have been made by leadership, meaning President Biden will have to play a more active role as peacemaker. "The question is whether the muscle memory of fighting Republicans on the debt limit and the rest of the policy cliff helps paper over the party's divisions and heal intramural wounds," he added. "Either way, it's the biggest inflection point left in what might be the last fruitful year of the Democratic trifecta." In addition to all that, Pelosi last week put a bill on the schedule to enshrine protections for abortion rights into federal law after the Supreme Court refused to block a new law in Texas that bans the vast majority of abortions. And the devastation wrought by Hurricane Ida, from Louisiana to New York, could spark a debate about authorizing new relief funding. There are also calls from progressive Democrats to extend the lapsed eviction moratorium, as well as unemployment benefits that expired over the recess, but neither appears to have the votes to pass. Democrats' ability to handle these grueling tasks in September will shape their prospects to maintain control of Congress in the midterm elections next year, as history favors the party out of power to make gains. Party elites want to campaign on the multitrillion-dollar safety net package, which includes new benefits that voters could feel quickly in the form of Medicare expansion, paid leave and a direct cash allowance for raising children. "It's crunch time for Washington Democrats. Their odds of holding the House in the midterms are long, and campaign season will begin soon," said Michael Steel, a former House GOP leadership aide. "They have the slimmest margin possible and no room for error."

#### It's on track but it’s not certain

FABBS '9/8 [Federation of Associations in Behavioral & Brain Sciences; 9/8/21; coalition of scientific societies that share an interest in advancing the sciences; "Congress Debates Spending Priorities," https://fabbs.org/2021/09/opportunities-and-cause-for-concern-as-congress-debates-spending-priorities/]

Also important for federal science budgets is the Democratic budget reconciliation plan (see details below). This legislation is not sure to pass, but could provide significant funding boosts for federal research and development in the coming years.

The House Science, Space, and Technology Committee meets on September 9 to consider its portion of the budget reconciliation legislation. The committee has released draft text, which includes $11.03 billion of new money for the National Science Foundation over the next 10 years. This includes $3.43 billion for research infrastructure and $7.55 billion for research, scholarships, and fellowships, of which $700 million must go to Historically Black Colleges and universities and other Minority Serving Institutions. The House Committee on Education and Labor has also released draft text which would provide $2.00 billion over ten years to improve research infrastructure at minority serving institutions. Draft legislation that may include funding for other agencies relevant to FABBS members, such as NIH, is not yet available. Expect to see more details in the coming weeks.

House and Senate Committees are currently crafting the legislative text of the $3.5 trillion budget reconciliation package that aims to encompass much of President Biden’s legislative agenda. This process requires only 50 votes in the Senate, allowing Democrats to enact major party priorities, such as prescription drug pricing reform and free community college, without any Republican votes. Most recently, Democrats used the budget reconciliation process to pass additional COVID relief in the American Rescue Plan and, before that, Republicans used it to pass the Tax Cuts and Jobs Act in 2017.

Democratic leadership has vowed to pass the legislation this fall. In the House of Representatives, the legislation has been tied to a bipartisan infrastructure bill set for a vote on September 27. Due to conflict within the Democratic party, it is unlikely that one bill can pass without the other, meaning that House leaders will have to hold both votes by the end of September.

Senate Democratic leadership released an outline of provisions they would like to see included in the reconciliation package, though details will be determined by individual committees over the coming days and weeks. These details will determine the ultimate size of the bill, how much spending is paid for, or deficit-funded, and which programs and priorities are included. Here is a good explainer of the budget reconciliation process.

The House and Senate will need to come to agreement on the final legislation. If the appropriations process is any indication, and given the tight timelines, the process is likely to move quickly with little opportunity for input from the science community.

#### More ev – Infrastructure will pass but there is no margin for error.

Tony Romm, 9/7/21, Washington Post, “with bulk of their agenda on the line, Democrats gird for battle over $3.5 trillion budget package,” https://www.washingtonpost.com/us-policy/2021/09/07/democrats-reconciliation-bill-budget/, mm

The fate of President Biden’s $3.5 trillion economic agenda hinges on work that’s slated to resume on Capitol Hill this week, as Democrats attempt to overcome their internal divisions and craft what could be the largest spending package in U.S. history. The next few days could prove daunting for top lawmakers in the party tasked with assembling a bill that can satisfy their past promises to remake broad swaths of the American economy. The work is set to unfold primarily in the House beginning Thursday, when the chamber has scheduled a series of grueling marathon legislative sessions to toil over the finer details of its plans. Biden and his Democratic allies have pledged to expand Medicare, commit new sums to combat climate change, raise taxes on the wealthy, and boost federal programs that aid low-income families and children. In doing so, they have made grand proclamations about the need for historic investments, especially in the penumbra of a coronavirus pandemic that has left millions of Americans facing financial ruin. But significant political quarrels already have plagued the party, complicating its attempts to adopt a proposal as large as $3.5 trillion before the end of the month. Chief among their headaches is Sen. Joe Manchin III (D-W.Va.), who said last week that he would not support a package with that price tag and called on Congress to hit “pause” on its breakneck legislative pace. Manchin’s threat created political complications even beyond the Senate, where Democrats possess only a tiebreaking majority and require his support to proceed. With no room for error, Democrats have been forced to confront the reality that they may have to compromise some of their own ambitions, not to overcome opposition from Republicans but rather to quiet dissent among their own ranks. “If [Manchin] just wants to tank the whole effort, he just ought to say so,” said Rep. John Yarmuth (D-Ky.), the leader of the House Budget Committee, which oversees the spending process. “He’s playing this game that conceivably gives other members who might be on the fence some cover. That’s not helpful. I’m worried about it.” But Yarmuth insisted he is optimistic about the road ahead, given polling he cited that shows Democrats’ plans are popular with the public. “It would be the largest single piece of legislation in history,” he said. The precarious dynamic only underscores a tough political reality in Democrat-dominated Washington: Even with control of Congress and the White House, there are still limits to what the party can accomplish on its own. Since the 2020 campaign that catapulted Biden and his allies to power, Democrats have rallied behind his oft-repeated promise to “build back better,” hoping to expand government to a level not seen in a generation. Their $3.5 trillion spending plan is a central part of that vision, which also includes a separate roughly $1.2 trillion measure to improve the country’s roads, bridges, pipes, ports and Internet connections. Republicans joined Democrats in the Senate to adopt the infrastructure proposal in a rare overwhelming bipartisan vote last month. Some Republican lawmakers are expected to do the same when the House takes up the package later in September. But they have rejected the rest of Biden’s agenda, arguing another round of trillion-dollar spending could worsen the country’s fiscal troubles and intensify inflation. GOP leaders also have fought vigorously against its proposed tax increases, which would reverse the cuts they secured four years ago under former president Donald Trump. To sidestep that Republican opposition, especially in the narrowly divided Senate, Democrats plan to advance their economic package through a legislative move known as reconciliation. Biden has described both spending plans in equally urgent terms, stressing last week they would help ensure future prosperity. “It’s about investing in America’s future, not about short-term stimulus. That’s not what we’re talking about,” the president said in a speech at the White House on the heels of a disappointing jobs report Friday. First, though, Democrats actually need to agree on a bill. At the center of the fight is the package’s price tag, since the final figure ultimately determines the policies that lawmakers can adopt. Moderates including Sen. Kyrsten Sinema (D-Ariz.) already have sounded public skepticism about shelling out as much as $3.5 trillion on reconciliation, while others, such as Manchin, have raised fears that too much spending would worsen the deficit at a time when prices are on the rise. Sen. Kyrsten Sinema (D-Ariz.), center, is joined from left by Sens. Bill Cassidy (R-La.), Lisa Murkowski (R-Alaska), Susan Collins (R-Maine), and Rob Portman (R-Ohio), as they speak at a news conference on Capitol Hill after the vote to start working on the $1 trillion bipartisan infrastructure package in July. (J. Scott Applewhite/AP) Adding to the trouble, Democrats also remain unsettled over exactly how to pay for the package, no matter its final size. Hoping to cover its costs in full, Biden has proposed a series of tax increases, including raising the corporate rate from 21 percent to 28 percent, while newly seeking to extract more revenue from wealthy families and investments. Senate Democrats have explored additional elements, including new taxes targeting executive compensation and carbon emissions, according a plan circulated among lawmakers last week and obtained by The Washington Post. Some in the party see in the spoils of the 2020 election a mandate to rethink the tax code so that those who earn more ultimately pay the government more. But Democrats are not united on how to accomplish these aims, creating the potential for public sparring between party members as key legislative committees convene for a series of debates and votes starting Thursday. One Democratic lawmaker, speaking on the condition of anonymity to describe the party’s internal deliberations, said they are already resigned to a corporate tax increase that is closer to 25 percent — and have yet to build enough support for other tax hikes targeting investments or corporate income earned abroad. “The money is just not there,” the lawmaker said, expressing a belief that the package is likely to come down closer to $2 trillion. For now, House Speaker Nancy Pelosi (D-Calif.) has tasked each of the key panels to complete its work by Sept. 15, with the hopes of adopting the final reconciliation bill before the end of the month. Hoping to quicken the process, House Democrats also have huddled with their Senate counterparts over video and phone calls in recent days, aiming to try to address potential policy hurdles before they erupt in public view. “We need 218 votes in the House, and we need a bill that can be passed in the Senate and signed by the president,” said Rep. Suzan DelBene (D-Wash.), the leader of the moderate-leaning New Democrat Coalition. She added that voting on policies that have the support of one chamber, but not the other, “doesn’t help anyone if we don’t get it across the finish line.” But the tensions around taxes and spending for now have put centrists in direct conflict with Democrats’ more liberal wing, which had spent months encouraging Biden to go bigger. Many of these progressive Democrats see $3.5 trillion as their compromise, especially after recommending as much as double that amount for reconciliation earlier this year. The dynamic flashed in a hearing last week, when a key climate-focused House panel led by Rep. Raul Grijalva (D-Ariz.) began its work to consider how to spend roughly $30 billion to stem the deadly consequences of global warming. Democrats have said they hope to reverse years of underinvestment in the environment, but their new reconciliation efforts have raised some early concerns among panel moderates, especially about the cost. “I have to ask, where are the revenues to support that spending coming from? We just borrowed over $5 trillion for covid-19 emergency assistance in the last 18 months,” said Rep. Ed Case (D-Hawaii), a centrist-leaning lawmaker on the panel. Noting his interest to address the threat of climate change, he added, “We cannot afford to continue these borrowings in reconciliation.” Many liberal lawmakers contend that a smaller package forces Democrats to make improper trade-offs, sacrificing programs that families need in a way that threatens the party with lasting political harm. “There is no flexibility on the price tag, and it’s not because I care about what the top line is,” said Rep. Pramila Jayapal (D-Wash.), the leader of the roughly 100-member strong Congressional Progressive Caucus. “It’s because I care about delivering on these benefits.” Jayapal added the stakes are high for Democrats, given the package’s potential for “transforming lives” as well as the party’s own prospects entering what could be a tough midterm election cycle next year. “If we don’t deliver, then I think all of the people who came out and voted for Democrats to take control of the House, the Senate and the White House, are going to come out and say, ‘that’s it,’” she said. Behind the scenes, though, the work already has started to slim down some of the Democrats’ ambitions. Some party leaders have eyed scaling back some of their tax benefits, for instance, including a popular poverty-fighting credit program that aids low-income families with children. Increasingly, Democrats believe they should authorize these tax credits for a limited number of years, rather than making the spending permanent. The move could lessen the price tag of the reconciliation bill, but would require Democrats to reauthorize some of their work later. The same cost concerns also threaten to hamstring a revived campaign on the part of nearly 130 Democrats to lower the Medicare eligibility age. Progressives and moderates alike introduced a new bill on the issue last week, hoping a reduction in enrollment age to 60 from 65 might become part of the reconciliation law. Democrats also have sought to expand Medicare to cover dental, vision and hearing benefits, while giving the government new powers to negotiate drug costs in a move that could lower seniors’ costs. But lawmakers like Manchin previously have expressed opposition to lowering the age in the package. Nor is it clear Democrats even have the budgetary room to do it, given the wide array of other health programs they seek to fund, including the extension of expanded tax credits that lower the costs of other Americans’ insurance payments. The tall task ahead of them has left some Democrats to acknowledge they may not have the money or votes to tackle one of their top priorities. The skeptics include Yarmuth, who joked about his decision to endorse the bill last week: “That doesn’t mean it can pass.” The disagreements set the stage for an all-out scramble ahead of Sept. 27, at which point Pelosi has pledged to begin debate over the $1 trillion infrastructure bill that previously passed the Senate. The mad dash is a result of an earlier standoff between moderates and progressives over the order in which they would vote on the bills, a stalemate that ultimately led Pelosi to turn up the heat on her caucus. “It creates pressure,” acknowledged DelBene, when asked about the road ahead. “But I’ve also found during my time in Congress that sometimes pressure is needed to force folks to come to conclusion on issues.”

#### Biden’s political capital is finite; maintaining prioritizes is key

Brandus**,** 6-8-21

(Paul, “The four best ways Team Biden can show America the Donald Trump era is really over,” USA Today, accessed 6-10-21, <https://www.usatoday.com/story/opinion/2021/06/08/trump-capitol-attack-taxes-russia-dejoy-rule-of-law/7503927002/>) JFN

**Tame the COVID-19 pandemic**? Check. **Move on an infrastructure and jobs plan**? Check. **Restore ties with key allies**? Check. **Presidents only have so much time and so much political capital, and not everything can be done at once**. President Joe **Biden has correctly focused on the big stuff**, things that he thinks will pay big dividends down the road.

#### AND, here’s empirical mathematical modeling – PC is real, finite, and trades off with other initiatives.

Beckmann 11 (Mathew Beckmann, Associate Professor of Political Science at UC Irvine with a B.A. from UCLA and Ph.D. from the University of Michigan, 2011, "How presidents push, when presidents win: A model of positive presidential power in US lawmaking,” Journal of Theoretical Politics 23(1), DOI:10.1177/0951629810378545, acc6/17/21, pg15-17) mamk-j1

Agreeing that presidents’ strategic options in Congress do indeed depend heavily on factors beyond their control, our model’s first insight is explicating the two systematic strategies presidents have available for exerting influence in Congress: they can target marginal voters to shift the preference distribution on roll-call votes and they can tar-get congressional leaders to censor the policy alternatives making it that far. While the first of these is widely recognized and studied, the second is not. By detailing the actual mechanisms of president-led coalition building on Capitol Hill, ours is a theory that puts positive presidential power on a firmer conceptual footing; legislative opportunities are predictable (if not controllable) and capitalizing on them depends on nothing more heroic than the normal grist of legislative politics: arm-twisting, brow-beating, and horse-trading. In this way, we subscribe to President Eisenhower’s observation: ‘I’ll tell you what leadership is: it’s persuasion, and conciliation, and education, and patience. It’s long, slow, tough work’ (Hughes, 1963: 124). However, if spending political capital in the service of vote-centered and agenda-centered strategies is a necessary condition for presidents to have positive influence in Congress, it certainly is not a sufficient condition. Instead, we find the exact policy return on a particular presidential lobbying campaign is conditioned by the location of the status quo, and the nature of leading opponents’ and pivotal voters’ preferences. Beyond enjoying ample political capital, then, those presidents who seek to change far-off status quos and confront pliable leading opponents and/or pivotal voters are expected to wield the greatest policymaking impact. By comparison, presidents with little to no political capital, seeking to change centrist status quos, or confronting opposing leaders and pivotal voters who staunchly oppose their proposals can find themselves with ‘nothing to do but stand there and take it’, as Lyndon Johnson once put it. Going forward, then, this more nuanced conception of presidential power suggests presidential leadership in lawmaking works through mechanisms different from those recognized previously and is manifested in ways different from those tested previously. In fact, our theoretical results set forth specific guidelines for properly testing presidents’ legislative influence. To conclude, let us briefly delineate these empirical implications of our theoretical model. The first and perhaps most important prescription is that the White House does not treat all presidential positions equally: most receive nothing more than a mere comment, a precious few get the White House’s ‘full court press’, and such prioritizing matters. Specifically, our basic hypothesis holds that presidents’ positive influence depends heavily on lobbying to work. The corollary, therefore, is that the crucial test of presidents’ influence is not whether ‘skilled’ presidents fare better than their ‘unskilled’ counterparts, at GEORGIAN COURT UNIV on April 25, but rather whether Congress responds differently to bills depending on the presidents’ lobbying, all else being equal. Second, our model underscores the important distinction between policy outcomes and roll-call votes. Because the White House wants to change the nation’s laws, the paramount metric of presidential success is the substantive result. While political scientists lack any precise measure of policy content, that is, there is no metric to judge one policy as ‘units’ more liberal or conservative than another, the foremost tests of presidents’ influence should still highlight outcomes; they should address the legislative process’s ideological results. At the same time, to say presidents’ influence is primarily evidenced in substantive outcomes does not mean its symptoms cannot be seen in roll-call votes. After all, a requisite part of winning on the overall outcome is winning on the relevant votes. On this score, our model has shown (1) tests of presidential power should emphasize those votes that best indicate the substantive outcome, such as CQ’s ‘key’ votes and (2) tests based exclusively on roll-call votes have missed an important aspect of president-led coalition building. To properly test presidents’ influence on votes, researchers must simultaneously account for voting and pre-voting processes. A final empirically relevant point about testing presidential influence in Congress is the relative unimportance of each president’s personal character or idiosyncratic traits. Like other recent scholars, we predict that because presidents’ strategic opportunities are constrained, their tactical resources are limited, so all presidents will execute more or less comparable strategies (see Cameron (2000), Edwards (1989), Hagar and Sullivan (1994),Jones (1994), and Moe (1984, 1993)). This is especially true for presidents’ congressional relations since all modern White House staffs include a team of Washington’s most experienced, successful legislative operatives (Collier, 1997). Thus, we echo the growing scholarly consensus that the presidency’s institutional incentives trump presidents’ personal characteristics.

#### Every thumper is reason there’s zero room for error and quickly infrastructure push is key

Montonaro, 8-24 – Domenico, “Here's How Democrats Get Their Domestic Agenda Through — And It's Not Easy,” NPR, <https://www.npr.org/2021/08/24/1027592836/heres-how-democrats-get-their-domestic-agenda-through-and-its-not-easy> -- Iowa

For Democrats, getting their historic domestic agenda done was already going to be a tough needle to thread, with a narrowly divided Congress and tensions within the party itself. But now, because of the resurgent coronavirus due to the delta variant and the chaotic U.S. withdrawal in Afghanistan, President Biden's approval rating has dropped. His reduced influence and political capital don't leave much room for error on items that might be difficult to get through Congress. And it doesn't get much more challenging than the path Democratic leaders are going down, pushing dual-track, multitrillion-dollar pieces of legislation — a $1 trillion infrastructure bill and a budget plan that could be $3.5 trillion. "I think it is like backing a big semitrailer truck into a small loading dock," David Axelrod, a former senior adviser in the Obama White House, said in a recent interview. "It is an arduous, precise kind of maneuver where you have to move a little to the left, a little to the right, and hope at the end of the day, you land it right." At the same time, Biden's recent political troubles have increased Democrats' sense of urgency to get as much done as possible, as quickly as possible, especially as party leaders and operatives are growing increasingly pessimistic about Democrats retaining control of the House of Representatives after next year's elections.

#### Biden has momentum despite every thumper but focus and PC are try or die

Cuts emissions by 50% by 2030!

Cochrane, 8-27 – Jim Tankersley and Emily Cochrane. “Biden, Needing a Win, Enters a Sprint for His Economic Agenda,” The New York Times - International Edition, p. Nexis Uni – Iowa

WASHINGTON - President Biden, his aides and his allies in Congress face a September sprint to secure a legislative victory that could define his early presidency. Democrats are racing the clock after party leaders in the House struck a deal this week to advance the two-track approach that Mr. Biden hopes will deliver a $4 trillion overhaul of the federal government's role in the economy. That agreement sets up a potentially perilous vote on one part of the agenda by Sept. 27: a bipartisan deal on roads, broadband, water pipes and other physical infrastructure. It also spurred House and Senate leaders to intensify efforts to complete a larger, Democrats-only bill to fight climate change, expand educational access and invest heavily in workers and families, inside that same window. If the party's factions can bridge their differences in time, they could deliver a signature legislative achievement for Mr. Biden, on par with the New Deal or Great Society, and fund dozens of programs for Democratic candidates and the president to campaign on in the months to come. If they fail, Mr. Biden could find both halves of his economic agenda dashed, at a time when his popularity is slumping and few if any of his other top priorities have a chance to pass Congress. The president finds himself at a perilous moment seven months into his term. His withdrawal of American troops from Afghanistan has devolved into a chaotic race to evacuate tens of thousands of people from the country by the month's end. After throwing a July 4 party at the White House to "declare independence" from the coronavirus pandemic, he has seen the Delta variant rampage through unvaccinated populations and send hospitalizations and death rates from the virus soaring in states like Florida. Mr. Biden's approval ratings have dipped in recent months, even on an issue that has been an early strength of his tenure: the economy, where some recent polls show more voters disapproving of his performance than approving it. The country is enjoying what will most likely be its strongest year of economic growth in a quarter century. But consumer confidence has slumped in the face of rapidly rising prices for food, gasoline and used cars, along with shortages of home appliances, medical devices and other products stemming from pandemic-fueled disruptions in the global supply chain. While unemployment has fallen to 5.4 percent, workers have not flocked back to open jobs as quickly as many economists had hoped, creating long waits in restaurants and elsewhere. Private forecasters have marked down their expectations for growth in the back half of the year, citing supply constraints and the threat from the Delta variant. White House economists still expect strong job gains through the rest of the year and a headline growth rate that far exceeds what any forecasters expected at the start of 2021, before Mr. Biden steered a $1.9 trillion stimulus plan through Congress. But the White House economic team has lowered informal internal forecasts for growth this year, citing supply constraints and possible consumer response to the renewed spread of the virus, a senior administration official said this week. Mindful of that markdown, and of what White House economists estimate will be a hefty drag on economic growth next year as stimulus spending dries up, administration officials have mounted a multiweek blitz to pressure congressional moderates and progressives to pass the spending bills that officials say could help reinvigorate the recovery - and possibly change the narrative of the president's difficult late summer. The importance of the package to Mr. Biden was clear on Tuesday, when he pre-empted a speech on evacuation efforts in Afghanistan to laud House passage of a measure that paves the way for a series of votes on his broader agenda. "We're a step closer to truly investing in the American people, positioning our economy for long-term growth, and building an America that outcompetes the rest of the world," the president said. Many steps remain before Mr. Biden can sign both bills into law - but his party has given itself only a few weeks to complete them. The infrastructure bill is written. But the House and Senate must agree on the spending programs, revenue increases and overall cost of the larger bill, balancing the desires of progressives who see a generational chance to expand government to address inequality and curb climate change and moderates who have pushed for a smaller package and resisted some of the tax proposals to pay for it. It is a timeline reminiscent of what Republicans set for themselves in the fall of 2017, when they rushed a nearly $2 trillion package of tax cuts to President Donald J. Trump's desk without a single Democratic vote. Sticking to it will require sustained support from administration officials both in and out of Washington. In the first three weeks of August, Mr. Biden dispatched cabinet members to 31 states to barnstorm for the infrastructure bill and his broader economic agenda, with events in the districts of moderate and progressive members of Congress, according to internal documents obtained by The New York Times. His secretaries of transportation, labor, interior, energy, commerce and agriculture sat for dozens of local television and radio interviews to promote the bills. Even with those efforts, the initial clash over advancing the budget this week was resolved with a flurry of calls from Mr. Biden, top White House officials and senior Democrats to the competing factions in the House. Congressional leaders say they have spent months laying the groundwork so that their party can move quickly toward consensus. Speaker Nancy Pelosi of California told colleagues in a letter on Wednesday that "we have long had an eye to having the infrastructure bill on the president's desk by the Oct. 1," the date when many provisions in the bipartisan package are slated to go into effect. Committee leaders have been instructed to finish their work by Sept. 15, and rank-and-file lawmakers have been told to make their concerns and priorities known quickly as they maneuver through substantive policy disagreements, including whether it should be as much as $3.5 trillion and the scope of Mr. Biden's proposed tax increases. "I'm sure everybody's going to try their best," said Representative John Yarmuth of Kentucky, the House Budget Committee chairman. "Some committees will have it rougher than others." Senator Ron Wyden of Oregon, the chairman of the Senate Finance Committee, has been releasing discussion drafts of proposals to fund the $3.5 trillion budget reconciliation spending - the larger bill that Democrats plan to move without any Republican support - including raising taxes on high earners and businesses. On Wednesday, he provided granular details of a plan to increase taxes on the profits that multinational companies earn and book overseas. "I'm encouraged by where we are," Mr. Wyden said in an interview. Democratic leaders and the White House have pushed analyses of their proposals that speak to core liberal priorities; on Wednesday, Senator Chuck Schumer of New York, the majority leader, released a report suggesting the two bills combined would "put our country on the path to meet President Biden's climate change goals of 80 percent clean electricity and 50 percent economywide carbon emission reduction by 2030." White House economists released a detailed report this week claiming the spending Mr. Biden supports, like universal prekindergarten and subsidized child care, would expand the productive capacity of the economy and help reduce price pressures in the future. While Republicans are not expected to get on board with the larger spending bill, they are still making their concerns known, labeling the bill socialist and a spending spree and claiming it will stoke inflation and drive jobs overseas. Mr. Biden can pass the entire agenda now with only Democratic votes, but the party's thin majorities - including no room for even a single defection in the Senate - complicates the task. Ms. Pelosi said on Wednesday that the House would "write a bill with the Senate, because there's no use our doing a bill that is not going to pass the Senate, in the interest of getting things done." As part of an agreement to secure the votes needed to approve the $3.5 trillion budget blueprint on Tuesday, Ms. Pelosi gave centrist and conservative Democrats a commitment that she would only take up a reconciliation package that had the support of all 50 Senate Democrats and cleared the strict Senate rules that govern the fast-track process. "I'm not here to pass messaging bills - I'm here to pass bills that will actually become law and help the American people," said Representative Stephanie Murphy of Florida, one of the Democrats who initially announced that she would not support advancing the budget, but ultimately joined every Democrat in advancing it. For moderates, Ms. Pelosi's commitment served to shield them from potentially tough votes on provisions that the Senate may reject. It also signaled the political realities that could shape the final legislation. No Democrat will want to vote on a large spending bill doomed for failure. It will be Mr. Biden's job to lead his coalition to a bill that can pass muster with moderates and progressives alike - and to convince every holdout that failure is not an option.

#### It’s only about what Biden presses – he’s pressing climate

Kate Sullivan, Cnn, 9-2-2021, "Biden says he'll press Congress on infrastructure after wildfires and Ida wreak havoc on US: 'The climate crisis is here'," CNN, <https://www.cnn.com/2021/09/02/politics/biden-hurricane-ida/index.html> -- Iowa

(CNN) President Joe Biden said Thursday he plans to press Congress to take further action on his infrastructure proposals that he says will better prepare the nation for future natural disasters and the effects of climate change.

Speaking hours after remnants of Hurricane Ida caused dangerous flash floods and tornadoes across the Northeast and as wildfires burn their way across the western US, Biden said his infrastructure proposals would shore up infrastructure that will be challenged in the coming decades.

#### The bill slashes emissions 50% before 2030

Ella Nilsen, Cnn, 8-25-2021, "Climate measures in reconciliation, infrastructure bills will mostly meet Biden's emissions goals, Schumer says," CNN, <https://www.cnn.com/2021/08/25/politics/reconciliation-climate-change-emissions-schumer-biden/index.html> -- Iowa

(CNN) An analysis from Senate Majority Leader Chuck Schumer's office estimates that combined, the bipartisan infrastructure bill and $3.5 trillion budget reconciliation bill can meet the majority of President Joe Biden's target to drastically slash emissions by the end of the decade.

In a letter sent Wednesday to congressional Democrats, Schumer said new analysis shows the combined impact of both bills would put the US on track to reduce its greenhouse gas emissions by approximately 45% below 2005 levels by 2030.

"When you add Administrative actions being planned by the Biden Administration and many states -- like New York, California, and Hawaii -- we will hit our 50% target by 2030," Schumer wrote in the letter.

#### Infrastructure is the biggest step the US take against climate

Bordoff, 21 – Jason Bordoff, professor of professional practice in international and public affairs and the founding director of the Center on Global Energy Policy at Columbia University. "The Time for a Green Industrial Policy Is Now," Foreign Policy, March15, <https://foreignpolicy.com/2021/03/15/biden-climate-energy-transition-green-new-deal-industrial-policy/> -- Iowa

Now that U.S. President Joe Biden’s $1.9 trillion plan for economic stimulus and pandemic relief has become law, his administration will turn its attention to a multitrillion-dollar plan to rebuild the United States’ ailing infrastructure. Its scope goes far beyond roads and bridges. Viewed in combination with other parts of Biden’s economic agenda, it reflects a new openness on both sides of the aisle to what has traditionally been known as industrial policy. Critics deride industrial policy as protectionist and as the government picking “winners,” but when it comes to clean energy—a top priority for Biden—a push by his administration to build new and innovative clean energy sectors using industrial policy may actually be the greatest contribution it can make to combating climate change.

Industrial policy, long anathema to mainstream economic policymakers in Washington, is back in vogue. The Biden administration’s Build Back Better economic plan includes targeted support for specific industries to make them more competitive with Asia and Europe and government procurement provisions to boost domestic manufacturing with “Buy America” requirements. As White House economist Jared Bernstein wrote in Foreign Policy, “the rationale for industrial policy is as strong as ever.” Biden’s national security advisor, Jake Sullivan, similarly wrote in Foreign Policy that “advocating industrial policy … should be considered something close to obvious.” Even Republicans, such as Sen. Marco Rubio, have been willing to deviate from the free-market’s gospel by endorsing industrial policy.

The push for industrial policy has been particularly strong for clean energy—as a way to combine battling climate change with building strategically important parts of the economy. The Green New Deal in 2019 drew the link between achieving net-zero emissions and creating millions of jobs by investing in the “industry of the United States.” Biden’s top economic advisor, Brian Deese, said, “some of the biggest opportunities” in climate policy right now are “what some people would call straight-out industrial policy.”

Industrial policy is a phrase used to mean different things. Broadly speaking, it refers to government intervention in the economy to promote and protect targeted sectors, often those considered strategically important. The term is therefore instinctively distasteful to those schooled in the laissez-faire, free-market orthodoxy of Adam Smith’s “invisible hand.” They worry about a creeping state capitalism that favors well-connected companies, stifling innovation and competition.

In reality, of course, the energy sector has never been free of government intervention. Nearly every source of energy receives some degree of favorable tax treatment. Nuclear energy receives government liability protection. Government investment and research gave rise to the shale revolution. As Robert McNally points out in his book, Crude Volatility: The History and the Future of Boom-Bust Oil Prices, the Texas Railroad Commission was the most successful oil cartel in history in setting prices, and even a Republican president like Dwight D. Eisenhower protected the domestic oil industry from the threat of imported oil.

To be fair, there are good reasons for government intervention in the energy market. Energy use and production can impose harm on others, such as through air pollution and carbon emissions. Energy innovation delivers benefits to all of us beyond the economic gains the innovator can capture. Energy infrastructure investment, such as pipelines, transmission lines, and electric vehicle chargers, may be hampered if any one firm’s investments benefit all their competitors or if it risks monopolistic market power of energy delivery mechanisms.

The argument for government’s role in the energy sector is even stronger today. First, the world faces an existential threat from climate change. With time running short to begin sharply curbing emissions, market forces will not deliver the pace of transition needed without robust government intervention. Second, the scale of that transition creates enormous economic opportunity to build new energy sectors. With the economy in a deep hole from the pandemic, leading in these new sectors can spur significant job growth. Finally, given the strategic importance of energy—critical to every citizens’ economic and physical well-being and safety, as the recent crisis in Texas reminded us—there is a strong national security rationale to develop these technologies and capabilities in the United States. As the energy system transitions to cleaner alternatives, there will be new risks associated with the critical minerals’ supply chains required for renewable energy and batteries, cybersecurity, and global trade chokepoints, which argues for reinforcing the domestic U.S. industrial base in these technologies.

To tackle the problem of climate change, Sullivan and Biden’s China advisor, Kurt Campbell, persuasively argued that the United States must pursue not only cooperation but also economic competition with China, for example. Noting that both Democrats and Republicans “are making a convincing case for a new U.S. industrial policy,” they called for more government investment in infrastructure and research in clean energy, among other areas, to confront such a “challenging economic competitor” as China.

The argument against industrial policy to combat climate change is that the government cannot anticipate which technologies will deliver the cheapest solutions. Yet, as the International Energy Agency explained, most of the key technologies the energy sector needs to reach net-zero emissions are known today. Market forces are still powerful—when properly directed by a carbon price—to give firms and consumers the right incentives to adopt and develop those technologies and to determine which ones emerge as the best solutions in different energy sectors.

Moreover, critics of industrial policy argue that if the goal is to reduce emissions as fast as possible, it should matter less whether the technology is made in the United States than whether it is as cheap as possible so more people will adopt it. Germany’s Energiewende, a comprehensive plan to shift the country to renewable energy, has been criticized for its high cost per ton of emissions avoided, which economists have estimated to be between $600 and $1500, much costlier than most other policy interventions. (To put the German numbers in context: The Obama administration estimated the total harm caused by one ton of carbon dioxide to be around $50, although there are good arguments to revise that figure higher.) Jason Furman, a Harvard professor and former Obama administration economic advisor, said “if you think climate change is the biggest challenge facing the country … you should want to make sure a lot of solar and wind energy is produced in the United States. You shouldn’t care nearly as much where panels and turbines are produced.”

Furman’s view is correct if the goal is to cut emissions in the United States as fast as possible. But what if the goal is to decarbonize the entire world’s emissions as fast as possible? What if the goal is to show climate leadership by helping all nations achieve net-zero emissions? In that case, the measure of U.S. climate policy should be less about how fast it brings down domestic emissions, only 15 percent of the world’s annual total, than about how fast it brings down the cost of clean technologies needed for the rest of the world to decarbonize.

Some clean energy technologies, such as solar and wind power or electric vehicles, are fairly cost competitive today relative to their carbon-intensive counterparts. Yet as Bill Gates explained in his new book, the cost difference between carbon-emitting and carbon-free production—what he calls the “green premium”—remains exceptionally high for many sectors and technologies, such as cement and steel, air travel and shipping, long-duration energy storage to cope with the intermittency of renewable energy, and steady sources of electricity like nuclear power or natural gas with carbon capture and storage. These technologies may not be needed to make a large dent in emissions by 2030, but they will absolutely be needed to achieve net-zero emissions by mid-21st century. Consider that the largest source of global greenhouse gas emissions comes from what Gates calls “making things,” such as the production of cement, steel, and plastics—sectors that will almost certainly need nascent technologies to decarbonize.

To promote domestic industries developing technologies for such hard-to-decarbonize sectors, policies should boost demand for such products, spur their deployment, and lower production costs. As first U.S. Treasury Secretary Alexander Hamilton famously explained: “In matters of industry, human enterprise ought, doubtless, to be left free in the main, not fettered by too much regulation; but practical politicians know that it may be beneficially stimulated by prudent aids and encouragements on the part of the Government.”

What might such a clean energy industrial policy look like? Dramatically increasing clean energy research and development funding can accelerate needed innovation. Subsidies can lower the cost of clean energy technologies, and a carbon price can increase the cost of carbon-intensive alternatives. The government can use its procurement power to create more demand or reduce risk for developers by signing long-term energy purchase agreements or guaranteeing them a certain price by paying the difference to prevailing market prices (the “contract for difference” model used in the United Kingdom). Low-cost loans and loan guarantees can support projects by lowering the cost of capital and the barriers to accessing private capital because of perceived technological risk. Infrastructure investment and streamlined permitting can boost demand and overcome chicken-and-egg problems. For example, there may be little incentive to develop zero-carbon hydrogen or install carbon-capture technology on power plants if there are no pipelines to transport fuel or carbon dioxide—but firms will not build the infrastructure until the new technology is commercialized. Trade and economic policy can align U.S. competitiveness with a global clean energy transition, such as through export finance to help clean energy companies compete with Chinese and other competitors in emerging markets. Some argue industrial policy should also protect U.S. firms through import tariffs or “Buy America” provisions, but such protectionist tools risk backfiring if retaliatory measures by other countries close export markets to these new domestic industries.

There are three reasons a U.S. clean energy industrial policy makes particular sense today. First, the technologies needed for sectors that are hard to decarbonize also offer many of the biggest economic opportunities for growth. According to the International Energy Agency, almost half of the cumulative emission reductions needed to achieve net-zero emissions by 2050 come from technologies that are not yet commercially available. China already dominates the market for solar panels and batteries, a result of government decisions taken more than a decade ago, so it would be very difficult for the United States to displace China in these technologies, which China already produces very cheaply. By contrast, the United States is well-positioned to build a strong industrial base to produce and export zero-carbon energy in the form of hydrogen and ammonia, fuel cells to produce zero-carbon electricity, or carbon-capture and removal technologies.

Second, these technologies will be needed to decarbonize globally, and by bringing the cost of these technologies down through government investments, Washington can help accelerate their deployment outside the United States as well. In this way, a U.S. industrial policy to promote clean energy can serve not as protectionism but as one of the country’s greatest contributions to global efforts to combat climate change. In the future, roughly 95 percent of all greenhouse gas emissions will come from outside the United States. Yet developing market countries, which are poorer and use much less energy per capita than developed countries do, will not adopt low-carbon solutions unless they are affordable.

To rebuild the U.S. economy and demonstrate global climate leadership, clean energy industrial policy is an idea whose time has come.

Third, industrial policy that drives down the cost of clean energy “green premiums” while also putting U.S. citizens to work can be among the most effective ways to account for the United States’ historic responsibility for the climate change problem. Climate change results from the cumulative total of all carbon emissions over time, and as of 2019, the United States has contributed 25 percent. By contrast, the entire continent of Africa represents only 2 percent. One way to address this inequity is for wealthy countries to send cash to poorer countries. For example, the Biden administration has pledged that the United States will fulfill its 2014 commitment to provide climate-related assistance to poorer countries, of which $2 billion is still outstanding. But making it affordable for developing countries to grow their energy use and prosperity in climate-friendly ways can be a far greater contribution.

At present, U.S. climate policy ambition is being framed around what commitment Biden will make to reduce domestic emissions by 2030. Yet the steps the Biden administration takes to invest in nascent clean energy technologies and research can be even more important to long-term temperature stabilization goals, even if most of the dividends come after 2030 because of the time it takes for hydrogen, long-duration power storage, carbon capture, advanced nuclear power, and other emerging technologies to scale.

Measured only by how much it costs to reduce a ton of carbon emissions, industrial policy that targets specific sectors of the clean energy economy at home may seem misguided. After all, it’s cheaper to import a solar panel from China than to manufacture it domestically. But at a time when the U.S. economy is in a deep hole and clean energy represents a sector of both rapid growth and national security significance, industrial policy is looking more attractive. That is even truer when considering the United States’ responsibility for climate change and what breakthroughs are needed to make it feasible for poorer countries to develop without exacerbating the problem. To rebuild the U.S. economy and demonstrate global climate leadership, clean energy industrial policy is an idea whose time has come.

#### Biden’s XO is modest, incrementalist, pebble-throwing

Silverman**,** 7-9-21 (Jacob, “Biden Wants to Tame Big Tech With a Thousand Paper Cuts,” accessed 8-6-21, <https://newrepublic.com/article/162940/biden-executive-order-big-tech-monopoly>) JFN

On Friday, **the White House announced a** potentially important, if **modest, effort to** further **tamp down the power of the technology industry**. This time the instrument is **an executive order**—the kind of wide-ranging declaration that often gets called “sweeping” or “major,” though **its efficacy may take years to gauge**—that covers everything from competition in the economy to drug prices to reforming a tech sector that is defined by a handful of seemingly unstoppable titans. Offering a mix of general recommendations, requests for action from other government agencies, and new administration policies, the Executive Order on Promoting Competition in the American Economy may be just what our overconsolidated economic system needs. But in tackling the power of a tech sector that has not only wrested control of the economy but remade it in its own data-hungry image, **the Biden administration is** still **throwing pebbles at its enemy’s parapets**. The tech industry has had 20 years to establish a stranglehold over our personal data, attention, and consumer choice. To tackle these problems, we need more, much more. Despite promising to take on the power of Big Tech, President Joe **Biden** and his administration **have** so far **taken a cautiously incrementalist approach**. He’s appointed tough industry critics like Lina Khan to be commissioner of the Federal Trade Commission, but he has yet to name a head of the Justice Department’s antitrust division, a key role for any future enforcement action. In Congress, Democrats have introduced six smallish antitrust bills, but their path out of the House is murky, as ongoing disputes between Republicans and Democrats over how to fight this legislative battle mean that the final bills could look much different than they did in committee—if they make it to a floor vote at all. (It doesn’t help that some Silicon Valley–adjacent Democratic politicians, like Representative Ted Lieu and Representative Ro Khanna, have been less than supportive of the bills.)

#### Infrastructure is key to provide “game-changing” cybersecurity protections to smaller communities k2 prevent grid collapse

Marks 8-12 (Joe Marks writes The Cybersecurity 202 newsletter focused on the policy and politics of cybersecurity. Before joining The Washington Post, Marks covered cybersecurity for Politico and Nextgov, a news site focused on government technology and security. 8-12-21. “The Cybersecurity 202: The bipartisan infrastructure bill could bring a cyber bounty for state and local governments” <https://www.washingtonpost.com/politics/2021/08/12/cybersecurity-202-bipartisan-infrastructure-bill-could-bring-cyber-bounty-state-local-governments/>) iowa js

The mammoth bipartisan infrastructure deal that passed the Senate this week includes a $1 billion pot of cybersecurity money to help state and local governments battered by ransomware and other digital attacks. If the bill becomes law, it would be especially helpful for local governments, which are often a weak link in cybersecurity. They struggle with cyber protections that are years out of date, leaving them vulnerable to hacks that can impact everything from 911 services to the ability to produce marriage licenses. While cyberattacks that impact [federal government agencies](https://www.washingtonpost.com/business/the-facts-and-mysteries-about-russias-hack-of-the-us/2021/01/05/b8677266-4fa7-11eb-a1f5-fdaf28cfca90_story.html?itid=lk_inline_manual_6) and [major corporations](https://www.washingtonpost.com/national-security/microsoft-hack-china-biden-nato/2021/07/19/a90ac7b4-e827-11eb-84a2-d93bc0b50294_story.html?itid=lk_inline_manual_6) draw far more public attention, local government hacks can have the most direct impact on citizens. “When a police department has a dispatch system that’s hit with ransomware, that directly affects public safety,” Denis Goulet, New Hampshire’s chief information officer and president of the National Association of Chief Information Officers (NASCIO), told me. “Having those systems functioning is not a ‘nice to have.’ It’s a ‘must have.’ It’s a real existential threat to citizens.” The $1 trillion infrastructure bill [passed the Senate](https://www.washingtonpost.com/us-policy/2021/08/10/senate-infrastructure-bill-vote-biden/?itid=lk_inline_manual_9) with 19 Republicans joining Democrats in supporting it. But it faces challenges in the House, where liberal Democrats are pushing for far bolder spending. House Speaker Nancy Pelosi (D-Calif.) has [said](https://www.washingtonpost.com/politics/2021/08/10/democrats-infrastructure-budget/?itid=lk_inline_manual_49&itid=lk_inline_manual_9) the chamber won’t vote on the package until it votes on the Democrats’ $3.5 trillion budget. The past few years have seen devastating ransomware attacks that locked up city computers for days or weeks in Atlanta, Baltimore, Greenville, N.C., and Pensacola, Fla., among others. Such attacks are likely to become even more common as hacking gangs get bolder. Without a cyber funding surge, some of the worst damage could be done in smaller cities that don’t have dedicated IT staff to help them recover. “At least Atlanta and Baltimore have robust IT departments and information security teams,” Ed Mattison, an executive vice president at the Center for Internet Security, told me. “They had some semblance of a plan. Many smaller municipalities don’t have that. This could be a game changer for them.” The cyber dangers facing cities have grown exponentially with the rise of ransomware, in which hackers lock up a victim’s computers and demand a payment to unlock them. Before that, the greatest danger facing cities was hackers stealing citizen and employee information and selling it to identity thieves — a damaging but far less lucrative form of cybercrime. “I want municipalities protecting my information so I don’t get my identity stolen. I also depend on the services they provide,” Mattison said. “I want clean water and I want sewage treated and I want the DMV and everything else I pay taxes for. All those things are at risk if municipalities don’t have the correct cyber protections.” The Senate bill would deliver the cyber money in grants spread out over four years. At least 80 percent of it would have to go to local government and 25 percent of it to rural areas, according to a [fact sheet](https://www.hassan.senate.gov/news/press-releases/hassan-led-state-and-local-cybersecurity-grant-program-passes-senate) from the bill’s sponsor, Sen. Maggie Hassan (D-N.H.). States and cities would have to outline exactly how they plan to spend the money to the Cybersecurity and Infrastructure Security Agency. And they would have to put up matching money that would add up to about $250 million over four years. “A cyberattack on a state or local government network can put schools, electrical grids and crucial services in jeopardy,” Hassan said. “Even though cyberattacks are becoming more and more common in today’s threat landscape, state and local governments often do not have the adequate resources to defend against them.” Some top priorities for the spending include replacing outdated software that isn’t being patched for security bugs, setting up systems that better identify workers when they log on to city computer networks and removing those log-ins when they leave the job, Matt Pincus, NASCIO director of government affairs, told me. Another major priority is making sure cities have a game plan for if they get hacked and in some cases can enlist experts at the state level to help, Pincus said. “This is a continuity of government issue,” he said. If a city’s computers are locked up by ransomware, “people can’t get driver’s licenses, they can’t get marriage licenses, they basically can’t do anything. It impacts everything and it leads to a lack of trust in government.”