## 1NC

## OFF

### OFF---Midterms DA

#### The plan causes Dem control of the Senate in ‘22

Zephyr Teachout 20, Associate Professor of Law at Fordham University School of Law, BA from Yale in English, MA in Political Science from Duke University, JD from Duke University, National Director of the Sunlight Foundation, Non-resident Fellow at the Berkman Center for Internet and Society at Harvard Law School, “A Blueprint for a Trust-Busting Biden Presidency”, The New Republic, 12/18/2020, https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting

Just as important, given the precarious political footing of the incoming Biden administration, is the potent electoral appeal of such an agenda—something that FDR also well understood as he instituted federal income supports as the basis for a Democratic governing coalition that spanned generations. Antitrust is one of the few policy arenas in which aggressive action will win Biden the devoted support from the activist left wing of the Democratic Party, while splitting apart and exposing the always unsustainable economic arguments mounted against crony capitalism by self-styled populists on the right. For starters, this realignment of the Democratic Party’s vision of the American political economy would go a long way to help Democrats win the Senate in 2022—a cycle that boasts an unusual number of vulnerable GOP incumbents, weighed down with the dismal Trump-McConnell legacy on Covid relief.

The opportunity that Biden and the Democrats need to seize here stems from the basic fact that antitrust politics is not like other politics. Traditional left and right loyalties simply do not hold within its orbit. The economic populists of the right hate corporate monopolies as much as working-class progressives and immigrant small-business owners do. It’s not for nothing that Ted Cruz keeps yelling about monopolies—or that Trump, when he first campaigned in 2016, and when he was clearly losing in 2020, turned to attacking corporate monopolies. Trump of course reneged on his trust-busting promises, but he understood the rhetorical power of saying that “big media, big money, and big tech” were all against him. On the front lines of Democratic policymaking, meanwhile, a generation’s worth of neoliberal giveaways to these sectors is finally yielding to a new social democratic consensus. In antitrust politics, Amy Klobuchar, Elizabeth Warren, and Bernie Sanders share their anger with Andrew Yang and Scott Galloway—a beloved tech business guru who rooted for Bloomberg.

Within the electorate proper, the depth of the emerging new antitrust consensus is even more striking. One recent poll by Data for Progress showed that 74 percent of Republicans and 80 percent of Democrats are “very concerned” or “somewhat concerned” about monopolies in the U.S. economy. The same survey showed the number of people who support breaking up big tech companies outnumbers those who oppose it by a two-to-one margin, again with no significant Democratic-Republican divide on the question. Indeed, some surveys now show that Republicans are more likely to see tech companies as having too much political power. A Harvard CAPS/Harris survey found similar numbers in 2019, with nearly 70 percent of voters saying that big tech should be subject to antitrust review, and had used market power to gain enormous profits. Almost two-thirds of Americans also told Data for Progress they wanted actions against big tech.

And while big tech soaks up a great deal of attention as the most recent monopoly player on the block, the same trend holds through most major sectors of the U.S. economy—voters see a plague of bigness, and are increasingly clamoring for the federal government to intervene. A 2020 poll by RuralOrganizing.org found that among rural voters, fighting corporate power is a top priority. Sixty-nine percent of the respondents in the survey believed that “a handful of corporate monopolies now run our entire economy.” Almost half said they’d be more likely to support a political leader combating this pattern of top-down concentration and endorsed “a moratorium on factory farms and corporate food and agriculture monopolies.” Opposition to the 2018 Bayer-Monsanto merger reached as high as 93 percent in one poll, with critics citing very sophisticated economic arguments for their opposition. More than 90 percent of respondents, for example, were concerned that the newly merged ag-and-medical giant would “use its dominance in one product to push sales of other products.”

These aren’t the voices of diehard Democrats with a few Republican crossovers, or vice versa. Within traditional political and policy disputes, you don’t see anything close to such openings for trans-partisan accord. In one representative 2020 Hill-HarrisX survey, for instance, 88 percent of Democrats supported Medicare for All, while 46 percent of Republicans did. Antitrust, by contrast, is foundationally bipartisan, interdenominational, cross-cutting—everything Biden said he wanted to be during his general election campaign and in his victory speech. Unlike other well-flogged economic or culture-war issues, antitrust affords an inviting path out of the bitter cul-de-sacs of prevailing political debate. In an age of trench-warfare–style base mobilizations, the antitrust agenda promises something else: a vision of widening opportunities for ordinary citizens, the basic American civic ethos of giving people a fair shot, and a governing plan that could actually unite Republican and Democratic support.

#### Flipping the Senate prevents rogue appeasement and defense cuts

Robert B. Charles 21, J.D. from Columbia University Law School, MA from Oxford University, BA from Dartmouth College, Former Professor of Law at Harvard University’s Extension School, Former Assistant Secretary of State, “The Sun Also Rises: 2022 Elections”, AMAC Magazine, 3/12/2021, http://digitaledition.qwinc.com/publication/?m=40499&i=699518&view=articleBrowser&article\_id=3972169&ver=html5

But here is where the "storyline" (sorry, "narratives" are children's stories) changes. The year 2022 represents a chance for a sharp turn back to normalcy. Americans are sick of lockdowns, lost jobs, and canceled pipelines, drilling, and fracking. They are tired of elites not caring.

They are tired of leaders with constitutional immunity from defamation hammering their free speech. They are tired of left-leaning governors halting worship but allowing riots. They are tired of restrictions on assembly, travel, self-defense, and independence. To borrow from Barbara Stanwyck (friend of Ronald Reagan) in Christmas in Connecticut, "In short, they are tired."

They should be. That is why 2022 matters. America deserves better and can get it. Here is how. The House and Senate could be flipped in 2022, throwing brakes on a runaway power grab.

To date, we have seen more executive orders than in recent history. Efforts continue to curtail the legislative filibuster, permitting any random outrages on majority vote. We see bills like H.R. 1, hoping to unconstitutionally federalize state elections and blunt free speech.

So, what do we know? Midterm elections favor the party that does not hold the White House. This year, Republicans need 10 seats to regain the House, putting Nancy Pelosi in the past. As Biden's approval lags—from job cuts, lockdowns, higher taxes, expensive oil and gas, re-indulging China and Iran, defense cuts, "open borders," and attacks on rights—momentum builds.

Fear of Biden-Harris flipped 15 Democrat seats to Republican in 2020. As safety, security, health, and jobs roil people, a wholesale shift may be in the offing. If 2020 was "Year of the Republican Woman," with a record 26 GOP women in the House, 2022 could see more. Experts note that these women are conservative—and their voices are rising.

Other issues play into 2022, especially censorship. Already, 4.6 percent of 2020 Biden voters say they would NOT have voted Biden if they had known more about Hunter. Biden won by 4.4 percent.

Even when lockdowns lift, socialist Democrat priorities are on track to kill jobs, raise taxes and costs, and restrict rights. Reopening schools is a parental priority, yet Democrats are slowing openings to satisfy teacher unions—that is, their donors.

On the numbers, Republicans have a real shot at regaining control of both chambers, which means hope for core values, defense, free markets, constitutional rights, a family focus, safe streets, secure borders, less regulation, and a shot at returning to what most call normalcy.

In the US House, 15 pickups are discussed, including Reps. Carolyn Bourdeaux (D-Ga.), Andy Kim (D-N.J.), Cheri Bustos (D-lll.), Ron Kind (D- Wis.), Peter DeFazio (D-Ore.), Filemon Vela, Henry Cuellar, Vicente Gonzalez, Colin Allred (D-Texas), Sharice Davids (D-Kan.), Katie Porter (D- CA), Deborah Ross (D-N.C.), John Garamendi (D-Calif.), Stephanie Murphy (D-Fla.), and Carolyn Maloney (D-NY).

Beyond these, two vacancies exist for the late Ron Wright (TX) and Luke Letlow (LA). Biden aims to pull Reps. Marcia Fudge (D-OH) and Cedric Richmond (D-LA) into his administration, bringing possible gains to 19. Again, history cuts for Republicans.

In the US Senate, 34 of 100 seats are up in 2022. Of these, 14 are held by Democrats and 20 by Republicans. While this suggests a challenge, especially since four Republican incumbents are not seeking re-election, Democrat seats in Georgia and Arizona were won by slim margins, and trends put Democrats on defense, with Biden's woeful agenda to defend.

Another harbinger is redistricting. The GOP will control two-thirds of all House seats and the Democrats a tenth, the rest settled by divided states and state commissions. Likely, 117 congressional districts will be drawn by Republican-controlled states, 47 by Democrats, 132 by division or commission. Seven are "at large," covering an entire state.

Perhaps the biggest factor, beyond 75 million voters roiled by 2020 and Biden's stumbling start, is history. Looking back, in 19 of the last 21 midterm cycles, the president's party lost seats in one or both chambers. In 18 of those 19, the president lost seats in both chambers. Only John F. Kennedy and George W. Bush gained seats in their first midterm, the latter after 9/11.

Specifically, FDR lost 81 House seats and seven Senate in his first midterm, Truman lost 45 House and 20 Senate, Ike 18 House and one Senate, Johnson 47 House and four Senate, and Nixon 12 House (picking up two Senate). Ford lost 48 House and five Senate, Carter 15 House and three Senate, and Reagan 26 House (picking up one Senate). Bush 41 lost eight House and one Senate, Clinton 52 House and eight Senate, Obama 63 House and three Senate, and Trump 40 House (picking up two in Senate). So, you see which way the wind blows.

The party in the White House loses big in most midterms—and in both chambers, slowing the president's agenda. The only first-term gains were in the Senate, all four Republicans: Nixon, Reagan, Bush 43 (who gained in both chambers), and Trump.

The message is this: have hope and focus on 2022. Sudden turnabouts are not just for movies and not just for one side. The funny thing is that the sun also rises. Much that is wrong can be corrected.

#### Nuclear war

Grady Means 21, Former Policy Assistant to Vice President Nelson Rockefeller, Retired American Business Executive, and MA in Economics and Engineering from Stanford University, Former Systems Engineer for Northrop Corporation, Former Economist in the Office of the Secretary of the U.S. Department of Health, Education, and Welfare, Founder of SAGE Consulting, Author of MetaCapitalism and Wisdom of the CEO, “Biden Brings The World Closer To Nuclear War”, The Hill, 8/30/2021, https://thehill.com/opinion/white-house/569732-biden-brings-the-world-closer-to-nuclear-war

Over the past six months, the world has edged closer to nuclear war than it has been since the Cuban Missile Crisis. The Doomsday Clock is ticking toward midnight. The global power balance has been dramatically reshuffled, and the potential for disastrous miscalculation hasn't been so high in 80 years. The match and fuse for this is instability — an exaggerated sense of U.S. weakness and lack of capability and resolve — that could lead to huge, aggressive military miscalculations and mistakes by our enemies. The Biden administration has set the table for such a catastrophe.

The timing could not be more dangerous. China has changed strategic direction and has been building its nuclear stockpile and delivery systems. China also has continued to develop hypersonic weapons, including stand-off “carrier killers,” space weapons and cyber capabilities to blind opponents’ strategic and conventional systems. Russia has been advertising (mostly for domestic consumption, but nonetheless worrying) its “unstoppable” delivery systems, and has a very capable nuclear stockpile and military. Iran will continue to move forward with building nuclear weapons. Pakistan and India both have significant nuclear capability in an increasingly unstable part of the world. Nuclear-armed North Korea is again assuming a more belligerent posture. Israel has a full nuclear triad (land, air, subs) to respond to existential aggression. The U.K. and France have significant nuclear deterrents. The world is a powder keg.

In Hollywood terms, today’s capacity for nuclear holocaust is thousands of times greater than the era portrayed in the Armageddon films “On the Beach,” “Fail Safe,” or “Dr. Strangelove.” There would not be anything left for “Mad Max.” Climate disasters may be unfolding over the next hundred years. Nuclear disaster is unfolding now. COVID-19 has killed more Americans than the flu typically does. Nuclear war could kill us all. Our leaders must get their priorities straight.

The danger lies in the growing global perception of weakness and incompetence in the Biden administration, combined with claims of the politicized weakening of the FBI, CIA, State Department and Defense Department. This has crystallized in Secretary of State Antony Blinken’s unsure Anchorage meeting with the Chinese, Biden’s wooden Geneva summit with Russia’s Vladimir Putin, the colossal failure of the Afghan withdrawal, which may devolve into a humiliating hostage crisis for America, and the budget- and inflation-based defunding of Defense. In addition, the fully politicized Intelligence and Armed Services committees on Capitol Hill add to the danger. Our enemies may decide that now is the time to move.

It would be a huge miscalculation.

Catastrophic mistakes at this scale often unfold when isolated events light powder kegs, which then inexorably explode into global conflict.

An incident in Sarajevo lit a powder keg of nationalistic, economic and ambitious personality struggles in Europe to unleash World War I. A century later, possible “Sarajevos” are numerous: China’s overly aggressive and self-confident People’s Liberation Army pushing for the use of military force against Taiwan, calculating a weak and ineffective U.S. response, leading to the sinking of a U.S. carrier and a potential march toward nuclear exchange. Major North Korean aggression against South Korea, or an off-course North Korean missile hitting a Japanese city. A successful Iranian (Hamas, Hezbollah) terrorist attack against an Israeli city. The seizure of one or more Pakistani nuclear weapons systems by a Taliban or another terrorist-linked group. Overt aggression or a “misunderstanding” between Pakistan and India. A “Crimson Tide” communications error. Proof that a devastating bioterror attack was intentional. The list of potential doomsday scenarios is endless.

The one powerful factor holding back such miscalculations has been coherent U.S. foreign policy and resolve, combined with pragmatists in Moscow and Beijing. But in the past six months, the world’s confidence in the U.S. leadership has begun to slip. An agonizing hostage crisis would make it even more dangerous. Added to that is the potential that a stubborn and wounded U.S. administration might overreact to try to show its strength. The U.S. has devastating countermeasures for all enemy strategies, and an enemy underestimating that power, combined with a White House trying to prove itself, could be disastrous.

Some will say it started with Donald Trump. That may be true, but it’s irrelevant, and there is some evidence from China, Russia and North Korea that Trump’s loud, unpredictable behavior kept things far more in check than Joe Biden’s overt weakness and blunders.

In addition, there is no room for “disarmament,” “peace movement” or “the squad” nonsense politics. Today, “treaties” are useful but cannot prevent disaster. The return to safe global strategic balance will require America regaining the world’s respect, and our enemies’ fear. That is the only course to create the strategic balance to avert Armageddon. And it requires full bipartisan support — recent patterns of cynical opportunism have no place when facing these threats.

The only way forward is to fully recognize the growing danger and for this administration to immediately replace the inept National Security Council, State Department, Defense and perhaps intelligence teams with truly capable, first-class, experienced leaders. Most of the current team should go. Global security demands an immediate leadership, strategy, organization and process reset.

### OFF---Tapering DA

#### The plan creates pressure on the Fed to contract its monetary policy

Dr. Karl W. Smith 21, PhD in Economics from North Carolina State University, Adjunct Scholar with the Tax Foundation, Former Professor of Economics at the University of North Carolina at Chapel Hill, “Biden Can Promote Both Workers and Competition”, Bloomberg News, 7/13/2021, https://www.bloomberg.com/opinion/articles/2021-07-13/biden-can-promote-both-workers-and-competition

Biden’s antitrust policy threatens to either break up big companies or force them to do business in less efficient ways. That will hurt workers in two ways.

First, it will erode wages. When higher prices come from limiting the economies of scale that come with large efficient firms, there is no corresponding increase in employment. (Higher prices that come from strong demand, by contrast, can have the side effect of boosting employment, as companies need more workers to meet that demand.) Such price increases are more akin to the ones produced by the supply-chain disruptions of the pandemic, leaving workers and their families worse off.

Second, those price increases will put more pressure on the Federal Reserve to increase interest rates and slow down the economy — which would be bad for workers.

#### They’ll accelerate the taper, crashing emerging economies---especially Brazil

Philip Maldia Madsen 21, Research Analyst at Nordea, MSc in the Field of Mathematics and Finance at Copenhagen Business School, and Andreas Steno Larsen, Chief Global FX/FI Strategist at Nordea, “Global: Taper Tantrum 2.0… Time to Worry for Emerging Markets?”, Nordea, 2/25/2021, https://corporate.nordea.com/article/63715/global-taper-tantrum-2-0-time-to-worry-for-emerging-markets

[note – EM FX = Emerging Markets Foreign Exchange]

We see a clear risk that positive data surprises will elevate the possibility for the Fed to start tapering its bond purchasing program or at the very least the market will chase the possible balance sheet debate into the early summer. The Fed will then face its ultimate test of its commitment to AIT, leaving markets once again in a position where it will have a hard time to differentiate between a potential tapering of asset purchases and medium term lift-off expectations, which ultimately risks further increasing real rates.

So, how does this impact emerging market FX? Naturally, such a bond sell-off coupled with rising real rates, holds the potential to derail global market sentiment, which is a key driver of EM FX in general. This was also the case in 2013.

Chart 2. Change in risk sentiment and rising USD real rates will be felt in EM

Chart, histogram

Description automatically generated

In 2013, the “defensive EM” basket of PLN, HUF and CZK were three currencies in EM space that gained during the taper tantrum. On the losing side, the fragility of big current account deficits once again seemed to matter for underlying currencies.

Chart 3. Taper Tantrum led to significant capital outflows in EM (Changes vs USD in % during 2013 taper tantrum)

Chart

Description automatically generated

The dominating fundamental variable behind the 2013 EM-selloff was namely current account deficits. Countries with a big CA deficit are largely dependent on cheap USD liquidity and easy USD funding conditions, why those currencies are usually first in line should USD real rates increase in an adverse way. TRY, BRL, INR and ZAR are among the clearest examples.

Chart 4. Foreign financed current account deficits leave EM vulnerable

Chart, scatter chart

Description automatically generated

The million-dollar question is then whether emerging markets are as exposed to a potential taper tantrum 2.0 as ahead of the 2013 tantrum. History stutters, but does not repeat itself, and we expect an acute felt reaction over the short term in EM but not as a long lasting and violent reaction as in 2013 for the following reasons.

First, we highlight that there is not as large a positioning overhang in Emerging Markets compared to 2013. While long-EM has been a consensus trade during the last few quarters, the bigger picture shows subdued portfolio inflows on aggregate during 2019-2020 compared to the years preceding 2013 where EM had sizeable and stable portfolio inflows over the course of several years.

Nonetheless, Covid-19 sucked out some USD 50 billion in EM portfolio flows, which goes to prove that the recent subdued inflow levels do not preclude as rapid and sharp a flight to safety in case of a huge risk off wave. Regarding the persistence of the drawdown, we do not expect a prolonged period as in 2013-2017, with subdued EM portfolio inflows.

Chart 5. EM positioning is clearly not as heavy as headed in to the 2013 taper tantrum

Chart

Description automatically generated

External imbalances are not as heavy as in 2013. Current account deficits probably look “overly optimistic” due to the recessionary driven drop in exports in EM markets, which may or may not sugar-coat the risk of an EM sell-off should it occur. Structural current account deficits are though highly likely to re-emerge as the global economy gradually recovers, and the fragile five in Turkey, South Africa, Indonesia, Brazil and India still had relatively large current account deficits measured relative to GDP back in Q4 2019 – before the Covid-19 storm hit. Those are (some of the) currencies to watch should we be proven right that a taper tantrum 2.0 could unveil itself during Q2, while Poland e.g. looks structurally better equipped to deal with a tantrum 2.0.

#### Extinction

Luciano Huck 20, JD from the Law School of the University of São Paulo, Host of Rede Globo, Founder of Joá Investments, “This Country Is Vital To 'Global Survival' - Here's The Challenges They Face”, World Economic Forum, 1/15/2020, https://www.weforum.org/agenda/2020/01/what-happens-next-in-brazil-has-global-consequences-here-are-three-priorities-for-the-next-decade/

From spiralling geopolitical tensions in the Middle East to raging forest fires in Australia, 2020 certainly started with a bang. A shortlist of some of our biggest existential threats includes accelerating climate change, staggering inequalities and the failure of nation-states to cooperate to mitigate shared global risks. With all the bad news, it is hard to see the incredible possibilities on the horizon, not least advances in health, education and the boundless potential of new technologies. A growing number of businesses including huge asset managers like BlackRock are also becoming greener. All of these challenges and opportunities are apparent in Brazil, the world’s fourth-largest democracy and its ninth biggest economy.

Brazil will play a leading role in how the next decade unfolds. A big reason for this is its immense natural resources - including over 40% of the world’s tropical forests and 20% of the planet's fresh-water supply. The Amazon is often described as the "lungs of the world" - for good reason. But the lungs are collapsing as a result of man-made fires and runaway deforestation. With more than 210 million citizens, Brazil also has an impressive stock of human resources. But it is also convulsed by breathtaking inequality and grinding poverty. Complicating matters, we are facing a crisis of political leadership and shirking our international responsibilities.

What happens next in Brazil has far-reaching consequences for global survival. The decisions adopted by Latin America's largest country - whether in relation to protecting the Amazon, reducing inequality or strengthening multilateral cooperation - will help determine whether this is the world's best century or its last one. The sheer scope of the challenges facing Brazilians can feel overwhelming. Without a transformative vision and narrative, a renewal of political leadership, and tangible improvement, people feel rudderless and afraid.

For the past 20 years, I've been taking the pulse of Brazil. I produce and present a popular television program reaching roughly 30 million Brazilians every week. Most of the time, I travel across the country listening to the inspiring and heartbreaking stories of my countrymen and women. They remind me every day why I need to contribute to building a better Brazil. So here are three challenges that I firmly believe Brazilians can turn into opportunities.

Amazon 4.0

Dramatic fires and deforestation in the Amazon made global headlines in 2019. Despite the best efforts of the Brazilian authorities to conceal the problem, the Science Ministry's own satellite data showed that deforestation rates were at the highest levels in two decades. While falling out of the international news cycle, the destruction continues. If deforestation persists at current rates, irreversible die-off could convert the world’s largest tropical forests into its largest savannah. This would release up to 140 billion tons of stored carbon into the atmosphere, effectively scuppering efforts to meet the Paris Agreement targets.

A radical new paradigm is needed to ensure the sustainable stewardship of Brazil's stunning cultural and biodiversity. It must harness the Amazon's most powerful resource - the 25 million people who live there. For one, there has to be zero tolerance for deforestation and a concerted focus on improving the productivity of areas where forests have already been cut down. Roughly 90% of deforestation in the Amazon is illegal and at least two-thirds of the 80 million hectares of cleared land are under-used, degraded and abandoned. Just as important as sustainable agri-business, the expansion of eco-tourism, investment in biotechnology research and the development of fairly-traded rainforest products.

In a survey conducted in August of 2019, the majority of Brazilians thought that the Amazon rainforest was a reason for national pride. At that time, up to 68 percent of respondents in Brazil strongly agreed with the sentence

Reducing inequality

Deepening social and economic inequality within countries is fundamentally reconfiguring domestic and international politics. In some cases, governments are retreating from multilateral cooperation and reverting to reactionary nationalism and protectionism. These dynamics are apparent in Brazil, among the world’s most unequal countries. Although Brazil made important advances in reducing poverty since the 2000s, inequality remained stubbornly high. And in recent years, per capita income plunged and the gap between the rich and poor started rising, wiping out many social gains of the previous three decades. Today, the average monthly income of the wealthiest one per cent is more than 33 times the income of the poorest 50%. Inequality not only hinders economic growth, but it also fuels polarization and populism.

Brazil needs to put inequality reduction at the top of the national agenda in 2020. A combination of common-sense interventions are required: ensuring the fairer collection of taxes, reducing subsidies for the wealthy, rolling-out more equal opportunity policies, and stimulating opportunities for the most vulnerable. Most important of all is dramatically improving the quality of basic public education, especially early childhood schooling. Brazil's education system is failing poorer families. Wealth inequality is reinforcing inequality of opportunity for the next generation. To win the war on inequality, Brazil needs an inclusive growth strategy, one that is not limited to growing income and smart deregulation but also ensures that quality public services delivering security, education, health, sanitation and transportation reach all citizens, not just those who pay a premium for them.

Restoring leadership

After years of corruption and stagnation, Brazil is suffering from sharp societal divisions and simmering tensions. In 2013, well before the street protests that flared up in Bolivia, Chile, Colombia and Ecuador, Brazil experienced the largest demonstrations since the restoration of democracy in 1985. The impeachment of President Dilma in 2016, the unprecedented unpopularity of the Temer administration and the election of far-right Jair Bolsonaro in 2018 revealed the extent of dissatisfaction with the status quo. Bolsonaro was partly elected because the credibility of Brazil's political establishment was demolished by ongoing “Car Wash” investigations into government corruption. Exhausted by scandal and stagnation, Brazilians voted for change.

To tackle the big challenges of the next decade, Brazil needs to restore and renew its political leaders from the top to bottom. Accountable, responsible and representative leadership and public service are fundamental to revitalizing the social contract. This won't happen spontaneously. It requires a conscious effort to attract and invest in talent. it also demands that each and every Brazilian gets involved. In 2017, I joined Agora, one of several dynamic civic movements investing in a new generation of leaders committed to a more inclusive and sustainable Brazil. And in 2018, I co-founded RenovaBR, attracting over 4,600 submissions from people who'd never been involved in politics for training in governance and ethics. Of the 120 successful applicants, 17 were elected to federal office that year.

Brazil is a country of infinite possibility. It has achieved breathtaking gains over the last generation - bringing tens of millions of people out of poverty. But these improvements were fragile. As we’ve seen in other parts of the world, when societies and living standards start moving backwards, social protest and unrest are not far behind. This is dangerous. Irresponsible leaders can take advantage of the fear and uncertainty that result. But we can also fight back. We will start rewriting the Brazilian story in 2020, first by acknowledging our most intractable problems and then by leveraging our tremendous creativity, scientific prowess and expertise. This means stepping out of our comfort zones. Powered by civic and social entrepreneurs from across the political spectrum, we can rebuild a positive vision for the future in Brazil.

### OFF---States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should recognize protection of competition as the purpose of antitrust law for the private sector and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies.

#### State action solves, won’t be preempted, and causes federal follow-on

Juan A. Arteaga 21, Partner at Crowell & Moring LLP, Former Senior Official in the Antitrust Division of the US Department of Justice, JD from Columbia Law School, and Jordan Ludwig, Counsel in the Antitrust Group at Crowell & Moring LLP, JD from Loyola Law School, “The Role of US State Antitrust Enforcement”, Private Litigation Guide – Second Edition, Global Competition Review, 1/28/2021, https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[17] State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[27]

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

### OFF---Aerojet DA

#### The Lockheed-Aerojet merger will be approved soon because of existing antitrust precedent, but it’s a politicized test of the FTC

Marcus Weisgerber 21, Global Business Editor at Defense One, “Lockheed’s Proposed Aerojet Rocketdyne Purchase Sets Early M&A Test for Biden”, Defense One, 3/21/2021, https://seniordownsizingsolutions.com/rs1kstuq/frank-kendall-northrop-grumman

The Biden administration’s approval — or disapproval — of Lockheed Martin’s planned $4.4 billion acquisition of rocket engine maker Aerojet Rocketdyne could shape defense industry consolidation for years to come.

If approved, the deal would mean the absorption of the last independent American weapons-grade rocket maker. All U.S. rockets would be produced by Northrop, which bought Orbital ATK in 2018, and Lockheed, the world’s largest defense contractor. It would also turn Lockheed into a key supplier of Raytheon Technologies, its major rival in the missiles sector.

Lockheed executives told investors on a Monday morning call that the acquisition would allow the company to deliver weapons to the military faster and cheaper than it can today.

“This helps position us for even greater growth, in hypersonics, missile defense and space, which are key elements of the national defense strategy,” Lockheed CEO Jim Taiclet said.

Taiclet, who became Lockheed’s CEO in June, also cited flat U.S. defense spending projections as a reason for the sale.

“They're going to be asked to do more in these areas with a flattening budget,” Taiclet said. “Having a more efficient supplier and a more robust supplier ... in uncertain economic times is a positive for the Department of Defense and for NASA.”

The proposed deal — which is expected to close in late 2021 — comes two years after Northrop Grumman acquired rocket maker Orbital ATK, a deal stoked industry consolidation fears. The Federal Trade Commission put conditions on the deal that Northrop had to supply solid rocket motors to competitors.

“Our overall expectation is that that may be the same lens through which this particular transaction is viewed because of the similarities there,” Taiclet said.

Still, Boeing claimed Northrop’s buying Orbital ATK prevented it from entering a bid for an $85 billion contract to build new intercontinental ballistic missiles. That left Northrop as the only bidder.

Orbital ATK, now part of Northrop, and Aerojet Rocketdyne are the only two U.S. makers of the solid rocket motors used in ICBMs and missile interceptors.

“The proposed purchase of Aerojet Rocketdyne (AJRD) by Lockheed Martin (LMT) is the first test of the Biden Administration and its views on defense sector consolidation and structure,” Capital Alpha Partners analyst Byron Callan said in a Monday note to clients. “It may take weeks and months before those views are known.”

Loren Thompson, a consultant and defense industry analyst with the Lexington Institute, said Lockheed’s acquisition of Aerojet would create more competition for solid rocket motors.

“Aerojet Rocketdyne will now have the same kind of financial resources to draw on as Orbital did when it joined Northrop, assuring that both domestic suppliers of large solids can remain active in military and civilian markets,” Thompson wrote Monday in Forbes.

A number of government organizations — including the Defense Department — are involved in the regulatory approval process. When Lockheed acquired helicopter-maker Sikorsky in 2015, Frank Kendall, who served as the Pentagon’s top weapons buyer during the Obama administration, expressed concerns that the deal would reduce competition. Kendall is reportedly under consideration to become Biden’s deputy defense secretary.

#### The plan causes compensating denial of the deal

William E. Kovacic 20, Professor at the George Mason University School of Law, JD from Columbia University, BA from Princeton University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy”, University of Pennsylvania Journal of Business Law, Volume 23, Issue 1, 23 U. Pa. J. Bus. L. 49, Lexis

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters. Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. Many matters involved powerful economic interests, and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of [\*75] intellectual property. In 1974, the agency also initiated a program that required certain large firms to provide "line-of-business" data concerning a range of performance indicators.

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda. Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements. The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.

As a group, the FTC's competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency's actions in court and before Congress. The complaints of industry resonated with a large, powerful bipartisan coalition of legislators who criticized the Commission's activism, proposed various measures to curb the agency's authority, and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 [\*76] (FTC Improvements Act). In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations. Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources. Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit. As Congress considered bills in 1979 to limit the Commission's powers, Congressman [\*77] William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

The Commission, Frenzel concluded, was "a rogue agency gone insane."

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, " . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of [\*78] 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases. This was a shot across the bow of the FTC's pending "shared monopoly" cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition. Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but [\*79] crazy ("insane"), as well. Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, "is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined." David Stockman's initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC "is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC's activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively. Leading members of Congress demanded that the agency [\*80] transform its competition and consumer programs or face extinction. Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects--to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings. During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well." In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash--including from Congress--that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks. In his appearances as FTC chair before [\*81] congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require." McGee closed the proceedings with [\*82] militant instructions:

"Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing."

Kirkpatrick served as the FTC's chair for just over twenty-nine months. The Commission's new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman's confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.

With evident approval, Moss recounted how the FTC had "stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise." The members of the Senate Commerce Committee, Moss concluded, "consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal." Member after member of the Commerce Committee echoed Moss's message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, "I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying "to make the most of that other resource given to us by Congress [\*83] -- our statutory powers." Weinberger said the Commission had "encouraged the staff to make recommendations to us which will probe the frontiers of our statutes," had made progress in "[p]robling the outer limits" and "exploring the frontiers" of the agency's authority, and had shown it "is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices." In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was "moving into 'high gear' in the task of preserving and promoting competition in the American economy." He said he and his fellow board members "fully intend to be in the vanguard of exploration of the new frontiers of antitrust law."

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal and petroleum refining industries. With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies. The Joint Committee's chairman, Senator William Proxmire, told Engman "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." Perhaps astonished to hear that cases to break up the nation's leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, "The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition."

[\*84] Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors. The Commission's decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands. In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry. Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems. In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC [\*85] should do and how it should do it. As described below in Section IV.D., that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel. As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases). The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

[\*86] Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures. Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration -- a period characterized by what one journalist described as an "almost total abandonment of antitrust policy." In 1987, in discussing Reagan-era [\*87] federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced "the most lenient antitrust enforcement program in fifty years." Professor Milton Handler remarked that in the Reagan era "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free." Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, "enforcement ceased."

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party's nomination for the presidency, Barack Obama said the George W. Bush administration "has what may be the weakest record of antitrust enforcement of any administration in the last half-century." The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe. After noting that for most of the 20th century "antitrust enforcement waxed or waned depending on the administration in office," Professor Robert Reich recently wrote that "after 1980 it all but [\*88] disappeared." He added that Presidents Bill Clinton and Barack Obama "allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated."

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s. A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC. The Reagan administration [\*89] is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action. The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms. [\*90] This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots. More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their [\*91] resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

CHICAGO-SCHOOL INSPIRED FOCUS ON PRICE EFFECTS

Critics of modern FTC and DOJ law enforcement often state that the federal agencies focus entirely on price and output effects in selecting and prosecuting cases. This tunnel-visioned approach is said to ignore important considerations involving the harmful effects of business behavior on quality and innovation.

In 2019, in a newspaper op-ed, Rana Fordoohar, a journalist who covers the tech sector, stated: "But monopoly policy in America is currently driven by "Chicago School" thinking, which espouses the idea that as long as consumers aren't paying too much for a good or service, all is well." In August 2020, Joshua Brustein, a business journalist, said: "For decades, antitrust enforcers have centered on the consumer welfare standard, which defined price increases as the only valid focus of antitrust action."

Like the portrayal of activity levels, these positive descriptions of the policy concerns that have guided FTC and DOJ law enforcement are faulty. The claim that the federal antitrust agencies since the late 1970s have focused solely upon price and output effects overlooks the many important instances in which innovation and other quality-related effects were paramount in FTC and DOJ decisions to challenge mergers and bring nonmerger cases. Among other areas from the 1980s to the present, the DOJ and the FTC have emphasized innovation effects in analyzing competitive effects in deals involving defense contractors and transactions [\*92] in the health care sector.

[FOOTNOTE] See, e.g., Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry (Apr. 12, 2016) ("In the defense industry, the Agencies are especially focused on ensuring that defense mergers will not adversely affect short- and long-term innovation crucial to our national security. . . ."); Daniel L. Rubinfeld & John Haven, Innovation and Antitrust Enforcement, in DYNAMIC COMPETITION AND PUBLIC POLICY 65 (Jerry Ellig ed., 2001) (discussing DOJ emphasis on innovation-related effects in antitrust enforcement, including the Department's challenge to Lockheed Martin's effort to purchase Northrop Grumman in the late 1990s); William E. Kovacic, Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX, 27 GEO. MASON L. REV. 863, 867-68, 899-900 (2020) [hereinafter Competition Policy Retrospective] (discussing centrality of innovation issues in modern antitrust analysis of aerospace and defense mergers). [END FOOTNOTE]

INADEQUATE ENFORCEMENT AGAINST DOMINANT FIRM MISCONDUCT

A recurring critique of modern U.S. federal enforcement is the failure of the DOJ and the FTC to police dominant firm misconduct. In 2002, Professor Robert Pitofsky wrote that "during the Reagan years, there was no enforcement whatsoever" against attempts to monopolize and monopolization. At a conference in 2009, Professor Harvey Goldschmid observed that during the George W. Bush presidency "there has been no enforcement" of Section 2 of the Sherman Act.

In a wide-ranging attack upon federal antitrust enforcement since the 1970s, Jonathan Tepper and Denise Hearn concluded:

The evidence confirms the death of antitrust. When surveying merger challenges, [Professor Gustavo] Grullon found that enforcement of Section 2 of the Sherman Act fell from an average of 15.7 cases per year from 1970-1999 to less than 3 over the period 2000-2014. . . . The recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.

In May 2018, Senator Richard Blumenthal and Professor Tim Wu [\*93] authored an op-ed piece that recited similar statistics: "Enforcement of the antimonopoly laws has fallen: Between 1970 and 1999, the United States brought about 15 monopoly cases each year; between 2000 and 2014, that number went down to just three."

Each of these statements about the amount of federal enforcement activity is incorrect. The Reagan antitrust agencies did not bring many cases involving attempted monopolization or monopolization, but the number exceeded what Professor Pitofsky called "no enforcement whatsoever". The number of FTC attempted monopolization and monopolization cases initiated from 2001 through 2008 exceeded what Professor Goldschmid called "no enforcement." From 1970 through 1999, federal enforcement of Section 2 of the Sherman Act and the enforcement of Section 5 of the FTC Act to challenge collective dominance or single-firm exclusionary conduct did not exceed four cases per year - a notably lower rate of activity than the number of cases per year reported by Senator Blumenthal and Professor Wu ("about 15 cases each year") and the number for the same period reported by Jonathan Tepper and Denise Hearn (15.7 cases per year).

[\*94] INADEQUATE MERGER ENFORCEMENT

Inadequacy narratives frequently use categorical statements about activity levels to demonstrate weaknesses in federal merger enforcement. In a discussion of Reagan administration antitrust policy, Professor Eleanor Fox observed that "U.S. federal merger enforcement ground to a halt." In the 2010 edition of their antitrust casebook, Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood observed that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration." In a recent book discussing U.S. antitrust policy, Professor Tim Wu observed that the DOJ in the George W. Bush administration "did not block any major mergers."

The factual claims contained in these assessments are incorrect. Federal merger enforcement during the Reagan administration did not grind to a halt. The George W. Bush Administration did not challenge large numbers of vertical mergers, but the number was greater than the "no enforcement at all" amount claimed by Professor Pitofsky, Professor [\*95] Goldschmid, and Judge Wood. During the Bush administration, the DOJ sued and blocked mergers involving General Dynamics/Newport News Shipbuilding (nuclear submarine design and production) and United Airlines/US Airways (airline transportation services). Given the significance of the merging parties and the importance of the economic sectors at issue, competition law experts, in responding to Professor Wu, likely would score these proposed transactions as "major" mergers.

C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime

Should the competition policy community of academics, advocacy groups, government officials, and practitioners care about these and other inaccurate depictions of federal enforcement activity? Indeed, they should. There is a danger that the fractured positive accounts of past activity will be taken as true and inform the debate about the future of competition policy. There is a fast-expanding literature that contends, as Professor Daniel Crane puts it, that "antitrust enforcement has drifted toward near-oblivion, with potentially dire consequences for our economy, and society more generally." The portrayal of inert federal agencies as abandoning a sensible earlier custom of robust enforcement is a particularly important pillar of modern calls for sweeping reform.

Failure to Learn from Earlier Enforcement Activities. A major hazard of the inadequacy narratives and their dismal depiction of modern antitrust policy is that they impede the learning by which an antitrust agency improves over time. If it is assumed as a fact that the federal antitrust enforcement [\*96] policy was devoid of useful activity for the past forty years or longer, then there is no point in looking for positive accomplishments. A listener who accepts as true the claim that nothing happened, or that what happened was the work of an insane agency, reasonably might conclude that there is nothing worth emulating from the earlier period.

There is a serious cost to embracing the excessive activity narrative or the inadequate activity narrative as resting on sound positive foundations. By writing off the relevant eras as a wasteland, one ignores noteworthy policy developments that modern analysts can use to guide policy going forward. Merger enforcement provides an example. If federal merger enforcement actually ground to a halt between 1981 and 1988, there would be no merger challenges to study. Yet the federal enforcers blocked a number of deals in this period and, in some instances, the government gained favorable judicial decisions that provide clues about how to formulate successful challenges in the future.

Perhaps the most notable of the government's merger litigation victories in the 1980s was the FTC's successful challenge to Hospital Corp.'s effort to acquire Hospital Affiliates International, Inc. and Health Care Corp. The Commission argued that the acquisitions would reduce competition by enabling the surviving firms to coordinate behavior more effectively with regard to pricing and other terms of service. The 117-page opinion for the Commission by Commissioner Terry Calvani is a textbook model of superb opinion-writing, what the Seventh Circuit called a "model of lucidity." Commissioner Calvani carefully set out the arguments of complaint counsel and the defendants, reviewed the precedent and literature regarding the coordinated effects theory of harm, and displayed [\*97] the type of erudition and expertise that is offered as a justification for entrusting antitrust adjudication to an expert administrative body.

Every commissioner who is assigned to write an opinion for the FTC should feel an obligation to read the Calvani Hospital Corp. decision to see the quality of analysis and style of presentation that can impress a court of appeals favorably. Rather than dismiss the period since 1980 as a barren era in federal enforcement, the advocates for a major expansion of intervention should assemble an accurate positive record of every decision and every initiative that can help them achieve their ends.

In the face of a demanding judiciary, the FTC will need every advantage it can obtain, including footholds provided by enforcement measures undertaken from the early 1980s forward. If proponents of fundamental change treat the past forty years as an empty space in antitrust policy, they will walk past precedents and practices that would advance their cause. If one assumes that timidity bordering on cowardice gripped the federal agencies after 1999, there is likewise no point in considering how the FTC in the 2010s achieved considerable success in three consecutive trips to the Supreme Court in antitrust cases - the first time the Commission had won three straight cases before the high court since the 1960s - or bothering to understand what mix of strategy and advocacy (and, perhaps, luck) made it possible.

The analysis of innovation issues provides another example of how an accurate grasp of the positive record can help build a new program. Consider the claim, noted above, that the federal agencies brought no vertical merger cases between 2001 and 2008. An observer who embraced this view is likely to overlook the FTC's decision to block the proposed merger of Cytyc and Digene. The Commission's analysis of this transaction teaches a lot about how to analyze innovation markets that reach back to the earliest stages of an R&D pipeline.

Adherence to the view that modern antitrust policy has ignored [\*98] innovation effects in merger analysis and in nonmerger cases likewise will miss important sources of insight. The experience of the two federal agencies since the early 1980s in reviewing aerospace and defense industry mergers illuminates how to analyze innovation issues and formulate successful merger challenges in dynamic, high technology sectors. The federal government's analysis of these transactions has been representative of a larger awareness that innovation concerns should be decisive, or at least equal in importance to price effects, in a significant number of merger reviews and nonmerger matters.

Diagnosing the Obstacles to Litigation Success and Overcoming Them. A second and closely related reason to resist faulty positive accounts of past experience is that they obscure the path to possible litigation success in single-firm monopolization cases. In the FTC's unsuccessful Rambus case, the U.S. Court of Appeals for the District of Columbia relied heavily on a Supreme Court decision ( NYNEX Corp. v. Discon, Inc. ) that was premised in part on concerns about overdeterrence that might arise from private treble-damage law suits. The FTC might have argued to the D.C. Circuit that the Commission, as a federal government agency, was a responsible steward of the public trust and need not be bound by doctrines designed to confine private litigants. Future attempts to use litigation to condemn dominant firm conduct, and extend the reach of antitrust oversight, might emphasize the distinctive role of public enforcement and, perhaps, resort more extensively to the FTC's administrative adjudication process.

In other words, seeing more clearly the foundations of defendant-friendly doctrine indicates what litigation strategy (i.e., premised on the distinctive role of the public prosecutor and the special capacity of the FTC's administrative process) promises the greatest prospects for success in what is today a daunting judicial environment. To use litigation to expand the zone of potential intervention, the Commission will need to study and build [\*99] upon litigation successes such as McWane, Inc. v. FTC, where the Commission prevailed on a monopolization theory of liability before a court of appeals that has not always been a favorable forum for the review of Commission antitrust cases. If one assumes, as some commentators suggest, that the federal agencies brought no monopolization cases in the past twenty years, then one is unlikely to look for or study McWane - to recognize the doctrinal footholds it provides for future cases, to analyze how the agency assembled a convincing factual record, and, more generally, to see how the agency can replicate the success in the future.

Setting a Common Foundation for Debate About Future Antitrust Enforcement. A third reason to remedy the uncertain grasp of the past is its importance to the modern debates about the proper direction for the U.S. antitrust system. Without a common understanding of what actually happened in the past, how can policy makers and commentators make sound normative judgments about what the U.S. enforcement agencies should do in the future? Professor Douglas Melamed recently has posited that the contestants in the modern debate about antitrust policy often talk past each other and do not engage on questions crucial to deciding whether and how much to modify current antitrust policy, or to create new competition policy instruments and institutions. It is doubtful that what Professor Melamed calls two largely disconnected "conversations" can be joined up without a better common understanding of what actually has taken place. In so many ways, accurate comprehension of what happened is the essential foundation for the processes of interpretation (What explains the behavior in question? What is its significance?), evaluation (Was the behavior good or bad?), and refinement (What should we do next time?).

Think of it in terms of teaching a class. Suppose the bases for the grade in the course are (a) regular attendance in class, (b) contributions to class discussion, and (c) performance on an end-of-term examination. Before we determine the quality of the student's work and assign a grade, we need first to agree about whether the student showed up for class, spoke in class, and turned in an exam. Modern discourse about U.S. competition law indicates a lack of agreement on equivalents of these basic predicates for a normative assessment of the performance of the antitrust enforcement system.

Appreciating How Institutional Arrangements Shape Substantive [\*100] Outcomes. Both of the inadequacy narratives described above lapse into describing the U.S. antitrust system as regularly succumbing to irrational (or, as Representative Frenzel put it, insane) swings in behavior, from wild overreaching in the 1970s and in earlier periods of antitrust history to excessive restraint from the late 1970s to the present. In their positive description of why events transpired as they did, the inadequacy narratives focus heavily on the role of agency leadership and personality. For example, the excessive enforcement narrative portrays federal enforcement officials in the 1960s as possessed by a deranged opposition to mergers and depicts Michael Pertschuk, the FTC's chairman from 1977-1981, as a singularly malevolent force who drove the agency off the rails. The inadequate enforcement narrative damns William Baxter, who chaired the DOJ Antitrust Division from 1981 through 1983, and James C. Miller III, who chaired the FTC from 1981 to 1984, as irrational extremists with no fidelity to norms that promote sound policy making.

The abilities and instincts of individual leaders are undoubtedly important to the success of a competition authority. Yet the personality-driven explanation for agency behavior overlooks the role that institutional arrangements have played in shaping outcomes - for example, by moderating policy impulses of some leaders and creating structures and mechanisms (such as a program of ex post evaluation of agency decisions) that improve policy making regardless of who is in charge. The single-minded focus on personalities also obscures the extent to which various institutional arrangements played central roles in the agency's achievement of successful policy outcomes. In short, one loses the ability to develop a [\*101] better sense of what accounts for policy successes and failures. Replacing a supposed pariah with a presumed miracle worker may not improve the status quo by much if deep-seated institutional weaknesses are major sources of observed policy failures.

#### Blocking the merger obliterates containment of hypersonic threats from Russia and China

Don Nickles 21, Chairman and CEO of The Nickles Group LLC, Former United States Senator, Former Director of Chesapeake Energy and Valero Energy, Degree in Business Administration from Oklahoma State University, “Why Lockheed's Acquisition of Aerojet Will Be A 'Boon for U.S. Innovation'”, Politico, 3/22/2021, https://www.politico.com/news/2021/03/22/lockheed-aerojet-acquisition-477491

The proposed acquisition by defense prime contractor Lockheed Martin of propulsion provider Aerojet Rocketdyne is facing some criticism due to alleged concerns that it would give Lockheed an unfair competitive advantage on missile and missile defense contracts.

Raytheon Technologies in particular has publicly complained that the combination would leave it dependent on a direct competitor for much of the propulsion in its missile offerings. Indeed, Aerojet Rocketdyne is a supplier of solid rocket motors and also is a source of defense technologies including hypersonic engines and the propulsive Divert and Attitude Control System that steers missile defense kill vehicles.

Such concerns ignore the important benefits, including the increased competition, which will result from this merger. And, Lockheed Martin has made it clear that Aerojet Rocketdyne will remain a merchant supplier, so these benefits will flow to all customers, including the U.S. government.

More importantly, the Lockheed-Aerojet merger will be a boon for U.S. innovation and competitiveness at a time when it faces growing threats from increasingly capable adversaries like China and Russia.

There are significant national advantages to bringing Aerojet Rocketdyne under the corporate roof of a prime contractor with $65 billion in annual revenue. Broadly speaking, it will provide financial stability for the propulsion provider while making more resources available for research and development in key technology areas.

As a stand-alone company with $2 billion in annual revenue, Aerojet Rocketdyne’s financial fortunes are tied to a few large programs that are subject to shifting political winds and the whims of prime contractors. A large program cancellation or a prime’s decision to change suppliers could substantially weaken the company, leaving it vulnerable to a takeover on unfavorable terms.

A well-resourced defense contractor like Lockheed Martin, by contrast, could be expected to invest in Aerojet Rocketdyne’s core propulsion capabilities. One area likely to see substantial investment is hypersonic weaponry, where the nation by some estimates has fallen behind Russia and China.

Moreover, by bringing a key link of its supply chain in house, Lockheed Martin will be positioned to offer better prices to its government customers and the transaction also will lead to efficiencies and innovation that will benefit the whole industry.

Such national benefits are not unique to the proposed Lockheed Martin-Aerojet Rocketdyne deal. Consider, for example, what United Technologies Corp. said in announcing its planned merger with none other than Raytheon, a deal which closed last year:

"By joining forces, we will have unsurpassed technology and expanded R&D capabilities that will allow us to invest through business cycles and address our customers' highest priorities,” said then-UTC chair and CEO Greg Hayes, who now sits at the helm of the combined company. “Merging our portfolios will also deliver cost and revenue synergies that will create long-term value for our customers and shareowners."

One of the public comments about the Lockheed Martin-Aerojet Rocketdyne deal is rooted in a commonly held assumption that vertical integration, in which primes take ownership of supply chains, stifles competition by giving these companies excessive marketplace clout. That view is myopic, especially in industries that are highly dynamic such as the defense industry.

Consider the case of United Launch Alliance, the Boeing-Lockheed Martin joint venture that until about a decade ago had a de facto monopoly on the business of launching operational U.S. government satellites. That monopoly was toppled by SpaceX, which builds some 85 percent of the components for its Falcon rockets, notably the engines, in house.

Experts have long cited SpaceX’s vertically integrated structure as the source of the company’s competitive strength, in large part because it eliminates supply chain profit margins. SpaceX founder Elon Musk has applied the same in-sourcing strategy in building up his Tesla electric car company, which has put U.S. industry at the forefront of a global trend in automobile manufacturing.

Vertical integration has been a fact of life in the aerospace and defense industry since the early 1990s, when the end of the Cold War triggered a wave of consolidation that continues today. On the propulsion side, a flurry of activity over a three-year period starting in 2001 reduced the number of U.S. solid rocket motor providers from five to just two: Aerojet Rocketdyne (then known as Aerojet); and ATK.

That situation lasted until 2014, when ATK merged with rocket and satellite maker Orbital Sciences Corp. to create the vertically integrated Orbital ATK. Less than five years later, Orbital ATK was acquired by aerospace and defense giant Northrop Grumman, a direct competitor to Lockheed Martin with nearly $37 billion in annual revenue.

Already the dominant supplier of large-diameter solid rocket motors, ATK can now draw on the resources of Northrop Grumman to advance its capabilities and boost competitiveness. Northrop Grumman recently won the prime contract for the nation’s next-generation ICBM, the Ground Based Strategic Deterrent, ensuring a healthy workload for its solid rocket motor business for years to come and ratcheting up the competitive pressure on Aerojet Rocketdyne.

As it happens, Northrop Grumman tapped Aerojet Rocketdyne for a smaller but significant role on its GBSD team, demonstrating that primes will join forces with competitors when it makes business sense.

Perhaps a better example — one that directly refutes assertions that competition requires subcontractor independence — is Northrop Grumman’s role in the Space Force’s all-important launch services program, where it supplied solid rocket motors for ULA’s Vulcan rocket even as it vied for that business with its own OmegA vehicle. In a similar vein, Blue Origin’s entry into that competition with its New Glenn vehicle didn’t stop it from supplying the main engine for Vulcan, which ultimately won the biggest share of launches.

The defense industry is replete with examples of companies supplying hardware and technology to rivals, even for programs where they compete head-to-head. Another relevant example: Raytheon in 1998 won a lucrative contract to supply missile defense kill vehicles incorporating DACS technology that at the time was supplied by Boeing — a competitor for that same contract.

For acquisitions that raise questions about access to critical capabilities, government regulators sometimes require consent decrees that commit the buyer to make these technologies available to competitors at market rates and to wall off proprietary information they might obtain in the process. In recent years, antitrust agencies have not shied away from investigating and enforcing compliance with consent decrees, including in the defense industry. There is no reason to think that would change in the future.

Some observers view the Lockheed Martin-Aerojet Rocketdyne merger as an early test of the Biden administration’s antitrust enforcement policies, and regulators will no doubt scrutinize it thoroughly to ensure competition is preserved. But there’s much more at stake here: This is about how the administration intends to deal with growing threats posed by peer and near-peer adversaries, who have eroded many of the technological advantages this nation has long taken for granted.

If the U.S. is to retake, and maintain, the lead in areas like hypersonic weaponry, a healthy and vibrant propulsion industry featuring players competing on a level playing field is essential. Regulators and policymakers should view this merger through that lens and render their decision accordingly.

#### Nuclear war

Dr. Richard H. Speier 17, Adjunct Staff with the RAND Corp, Founded the Office of Non- Proliferation Policy at the DOD, Recipient of the Meritorious Civilian Service Medal as the “Father of the MTCR,” now Consults in the Washington DC area; George Nacouzi, Senior Engineer at the RAND Corporation, Supports Projects within PAF (Project Air Force) and NSRD (National Security Research Division), Carrie A. Lee, Researcher at RAND, and Richard M. Moore, Researcher at RAND. 2017. “Hypersonic Missile Nonproliferation: Hindering the Spread of a New Class of Weapons.” RAND. https://www.rand.org/pubs/research\_reports/RR2137.html

Strategic Implications of Hypersonic Weapons Compressed Timelines The U.S. military uses an acronym to describe the decisionmaking and action process cycle: OODA (Observe, Orient, Decide, Act). These four steps take time, and hypersonic missiles compress available response time to the point that a lesser nation’s strategic forces might be disarmed before acting. As an illustration of the time required to act with respect to an existential missile threat, the Nuclear Threat Initiative organization estimated a timeline for a U.S. response to a massive Russian intercontinental ballistic missile (ICBM) attack, as follows:9 • 0 minutes—Russia launches missiles • 1 minute—U.S. satellite detects missiles • 2 minutes—U.S. radar detects missiles • 3 minutes—North American Aerospace Defense Command (NORAD) assesses information (2 minutes max) • 4 minutes—NORAD alerts White House • 5 minutes—first detonations of submarine-launched ballistic missiles • 7 minutes—locate president and advisers, assemble them, brief them, get decision (8 minutes max) • 13 minutes—decision • 15 minutes—transmit orders to start launch sequence • 20 minutes—launch officers receive, decode, and authenticate orders • 23 minutes—complete launch sequence (2 minutes max) • 25 minutes—Russian ICBM detonations. This timeline is not, of course, representative of two hostile parties in closer proximity or with less effective warning systems than Russia and the United States. Nor is it representative of less-than-Armageddon possibilities. However, for adjacent enemies within a 1,000-km range, a hypersonic missile traveling at ten times the speed of sound could cover that distance and reduce response times to about six minutes.10 Targets As discussed earlier, hypersonic missiles increase the threat over current generations of missiles in cases where the target nation has missile defenses. The targets in such nations would primarily be high value and heavily defended. Prime targets could include destroying a nation’s leadership and command and control, referred to as “decapitation,” to prevent the target nation from responding with an effective follow-on attack. Other key targets could be carrier strike groups, with the objective of striking a key blow or pushing the naval formation further from the coast. And, because of their time sensitivity, strategic forces and storage facilities for weapons of mass destruction (WMDs) could warrant hypersonic attack. Implications for Targeted Nations Any government faced with the possibility that hypersonic missiles would be employed against it—particularly in a decapitating attack— would plan countermeasures, many of which could be destabilizing. For example, countermeasures could include devolution of strategic forces’ command and control so that lower levels of authority could execute a strategic strike, which would obviously increase the risk of accidental strategic war; or strategic forces could be more widely dispersed— a tactic risking greater exposure to subnational capture. An obvious measure would be a launch-on-warning posture—a hair-trigger tactic that would increase crisis instability. Or the target nation could adopt a policy of preemption during a crisis—guaranteeing highly destructive military action. To be sure, such measures could be invoked against threats from current types of missiles.11 But, for nations with effective ballistic mis- sile and/or cruise missile defenses in the time frame when hypersonic missiles might proliferate, the hard choices would be forced when facing hypersonic threats. Advanced nations with adequate resources could take other steps against hypersonic threats. They could strengthen the resilience of their command and control, harden the siting of their strategic forces, and make a deterrent force mobile or sea-based. These tactics may or may not be effective, especially for lesser nations. And they certainly will be expensive—putting them out of reach of some. Even for major powers, the proliferation of hypersonic missiles will create new threats by allowing lesser powers to hold them at risk of effective missile attacks especially against “unhardened” targets, e.g., cities. Over the coming decades, the ability of a lesser nation with a handful of ICBMs to threaten major powers will continue to decrease as wide area missile defenses continue to improve. However, HGVs and HCMs will be more difficult to defend against. Implications for Major Powers The ability of hypersonic missiles to penetrate advanced missile defenses will increase the risks for nations with such defenses. Lesser powers with hypersonic weapons may see these weapons as a deterrent against greater power intervention, and feel free to pursue potentially destabilizing regional agendas. Moreover, lesser nations with hypersonic missiles could affect the force deployments of major powers. As noted above, carrier strike groups might be pushed further out to sea or an intervening power’s regional military bases might become exposed to more effective attacks. The Broader Picture of Increased Risk The ability of hypersonic forces to penetrate defenses and compress decision time could aggravate the instabilities in regions that are already tense—for example, Iran-Israel and North Korea–Japan. Conflicts in these regions could evolve to include major powers aligned on opposite sides. An Israel-Iran conflict, with the United States and much of Europe aligned with Israel and Russia and perhaps China aligned with Iran, would create new paths for escalation to an even-larger conflict. The basic roles of external actors would not necessarily change—the alignments would stay the same—but external powers might suddenly find themselves in a more-unstable situation in which their patron states are increasingly trigger-happy. As noted previously, lesser powers could gain influence over major powers by threatening a hypersonic attack. At the least, lesser powers might be emboldened if they saw themselves as possessing a deterrent against major power intervention. Finally, because hypersonic weapons increase the expectation of a disarming attack, they lower the threshold for military action.

### OFF---T Scope Exemption

#### ‘Scope’ is the extent of the area covered by the core laws

Oxford 22 – Oxford English Dictionary, ‘scope’, https://www.lexico.com/en/definition/scope

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

*‘we widened the scope of our investigation’*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Specific Long Term Plans to Strengthen Committee

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

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

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

#### ‘Expand’ means to make greater, not clarify its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

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

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

#### Vote neg:

#### Eliminating exemptions provides a limited and predictable basis for prep and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### OFF---Biz Con DA

#### The plan spills over, decimating business confidence and overall economic recovery

Trace Mitchell 21, Policy Counsel at NetChoice, JD from the George Mason University, Antonin Scalia Law School, Former Research Associate at the Mercatus Center at George Mason University, BA in Political Science and Government from Florida Gulf Coast University, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea”, Morning Consult, 3/3/2021, https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against Google from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The vast majority of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Decline cascades---nuclear war

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

## Innovation Advantage

### Innovation ADV---1NC

#### Innovation is high because of large firms.

Thomas A. Lambert 20, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri School of Law, J.D. from the University of Chicago, “The Case Against Legislative Reform of U.S. Antitrust Doctrine,” University of Missouri School of Law Legal Studies Research Paper No. 2020-13, 05-12-2020, https://ssrn.com/abstract=3598601

Reduced Investment in Innovation? Proponents of reforming the antitrust laws have also pointed to reductions in the level of venture capital investment as indicative of a market power crisis in the U.S. Such investment slowed somewhat after 2015 (though it appears to have rebounded),27 and some venture capitalists have referred to a “kill zone” around dominant technology firms.28 The claim is that big technology firms either usurp small firms’ innovations or use their power over platforms to force smaller firms that need access to those platforms to sell out at a bargain price. Venture capitalists are less inclined to invest if such outcomes are likely, and innovation therefore suffers.

The evidence, however, does not support the view that lax U.S. antitrust is reducing innovation. Eleven of the top sixteen global spenders on research and development are U.S. firms,29 and six of those—Amazon, Alphabet, Intel, Microsoft, Apple, and Facebook—are “Big Tech” firms that have been accused of acting like monopolists. Moreover, the U.S. is home to half (178 of 356) of the world’s so-called “unicorn” companies—i.e., private companies valued at greater than $1 billion. China ranks second with 90, and all of Europe contains a fraction of that number. The U.S. also far outpaces Europe in terms of venture capital spending, with 10,777 investments in 2019 worth $136.5 billion compared to Europe’s 5,017 deals worth $36.3 billion. Finally, the fact that large American technology firms are purchasing smaller producers of complementary products or technologies in no way implies that the incentive to innovate is thereby reduced. Many start-ups are organized with the goal of being bought out by a larger firm; a buy-out option allows the initial investors in a company to enjoy a return on their investment without the company’s having to incur the significant cost of a public offering.

#### Regulating tech destroys innovation key to stop existential threats.

Larry Downes 18, J.D. from the University of Chicago Law School, frequent contributor to The Washington Post, Harvard Business Review, Forbes and CNET, Project Director at the Georgetown Center for Business and Public Policy's Evolution of Regulation and Innovation project, “How More Regulation for U.S. Tech Could Backfire,” Harvard Business Review, 02-09-2018, <https://hbr.org/2018/02/how-more-regulation-for-u-s-tech-could-backfire>

If 2017 was the year that tech became a lightning rod for dissatisfaction over everything from the last U.S. presidential election to the possibility of a smartphone-driven dystopia, 2018 already looks to be that much worse.

Innovation and its discontents are nothing new, of course, going back at least to the 18th century, when Luddites physically attacked industrial looms. Hostility to the internet appeared the moment the Web became a commercial technology, threatening from the outset to upend traditional businesses and maybe even our deeply embedded beliefs about family, society, and government. George Mason University’s Adam Thierer, reviewing a resurgence of books about the “existential threat” of disruptive innovation, has detailed what he calls a “techno-panic template” in how we react to disruptive innovations that don’t fit into familiar categories.

But with the proliferation of new products and their reach ever-deeper into our work, home, and personal lives, the relentless tech revolt of the last year shouldn’t really have come as any surprise, especially to those of us in Silicon Valley.

Still, the only solution critics can propose for our growing tech malaise is government intervention — usually expressed vaguely as “regulating tech” or “breaking up” the biggest and most successful Internet companies. Break-ups, which require a legal finding that the structure of a company is enabling anti-competitive behavior, seem now to have become a synonym for somehow crippling a successful enterprise.

Of course, nobody thinks technology companies should be left unregulated. Tech companies, like any other enterprise, are already subject to a complex tangle of laws, varying based on industry and local authority. They all pay taxes, report their finances, disclose significant shareholders, and comply with the full range of employment, health and safety, advertising, intellectual property, consumer protection and anti-competition laws, to name just a few.

There are also specialized laws for tech, including limits on how Internet companies can engage with children. In the U.S., commercial drones must be registered with the Federal Aviation Administration. Genetic testing and other health-related devices must pass muster with the Food and Drug Administration. Increasingly, ride-sharing and casual rental services must meet some of the same standards and inspections as long-time transportation and hospitality incumbents.

There are growing calls, likewise, to regulate social media and video platforms as if they were traditional print or broadcast news sources, even though doing so would almost certainly run afoul of the very free speech protections proponents are hoping to preserve.

But perhaps what tech critics really want are more innovative rules. Traditional regulations, after all, were designed in response to earlier technologies and the market failures they generated. They don’t cover largely speculative and mostly future-looking concerns.

What if, for example, artificial intelligence puts an entire generation out of work? What if genetic manipulations accidentally unravel the fabric of DNA, reversing evolution in one fell swoop? What if social media companies learn so much about us that they undermine—intentionally or otherwise—democratic institutions, creating a tyranny of “unregulated” big data controlled by a few unelected young CEOs?

The problem with such speculation is that it is just that. In deliberative government, legislators and regulatory agencies must weigh the often-substantial costs of proposed limits against their likely benefit, balanced against the harm of simply leaving in place the current legal status quo.

But there’s no scientific method for estimating the risk of prematurely shutting down experiments that could yield important discoveries. There’s no framework for pre-emptively regulating nascent industries and potential new technologies. By definition, they’ve caused no measurable harm.

In particular, breaking up the most successful Internet and cloud-based companies only looks like a solution. It isn’t. Antitrust is meant to punish dominant companies that use their leverage to raise costs for consumers. Yet the services provided by technology companies are often widely available at little or no cost. Many of the products and services of Amazon, Apple, Google, Facebook and Microsoft — the internet giants referred to by the New York Times as “the frightful five” — are free for consumers.

More to the point, break-ups almost always backfire. Think of the former AT&T, which was regulated as a monopoly utility until 1982, when the government changed its mind and split the company into component long-distance and regional phone companies. The sum of the parts actually increased in value — except for the long-distance company, which faded in the face of unregulated new competitors.

Then, over the next 20 years, the regional companies put themselves back together, and, with economies of scale, reemerged as a mobile internet network and Pay TV provider, competing with cable companies and fast-growing internet-based video services including YouTube, Amazon and Netflix. What started as a regulatory punishment for AT&T led to an even bigger network of companies.

On the other hand, the constant threat of a forced divestiture can be disastrous for consumers and enterprise alike. IBM prevailed against multiple efforts to break it up along product lines, but was so shaken by the decades-long experience that the company became dangerously timid about future innovations, missing the shifts first to client-server and then to Internet-based computing architectures, nearly bankrupting the business.

Microsoft, similarly, was so distracted by its multi-year fight to avoid break-up both by U.S. and European regulators that it lost essential momentum. It mostly missed out on the mobile revolution, and hesitated in responding to open-source alternatives to operating systems, desktop applications, and other software apps that seriously eroded the company’s once-formidable competitive advantage. (The company is now growing a cloud services business, but is still far behind Google and Amazon.)

These examples hint at an alternative to random and unproven new forms of regulation for emerging technologies: simply waiting for the next generation of innovations and the entrepreneurs who wield them to disrupt the supposed monopolists right out of their disagreeable behaviors, sometimes fatally.

Today, it might seem that the companies in the frightful five have unbeatable leads in retailing and cloud services, social media, search, advertising, desktop operating systems and mobile devices. But the landscape of business history is littered with the corpses of supposedly invulnerable giants. In our research on wildly successful enterprises who fail to find a second act, Paul Nunes and I note that the average life span of companies on the Standard & Poor’s 500 has fallen from 67 years in the 1920s to just 15 years today.

In the early years of the internet age, a half-dozen companies were serially crowned the victor in search, only to be unseated by more innovative technology soon after. Yahoo and others gave way to Google, just as Blackberry faded in response to the iPhone. MySpace (remember them?) collapsed at the introduction of Facebook, which, at the time, was little more than a bit of software from a college student. Napster lost in court (no new laws were needed for that), leaving Apple to define a working market for digital music. And who remembers the alarm bells rung in 2000 when then-dominant ISP America On-Line merged with content behemoth Time Warner?

The best regulator of technology, it seems, is simply more technology. And despite fears that channels are blocked, markets are locked up, and gatekeepers have closed networks that the next generation of entrepreneurs need to reach their audience, somehow they do it anyway — often embarrassingly fast, whether the presumed tyrant being deposed is a long-time incumbent or last year’s startup darling.

That, in any case, is the theory on which U.S. policymakers across the political spectrum have nurtured technology-based innovation since the founding of the Republic. Taking the long view, it’s clearly been a winning strategy, especially when compared to the more invasive, command-and-control approach taken by the European Union, which continues to lag on every measure of the Internet economy. (Europe’s strategy now seems to be little more than to hobble U.S. tech companies and hope for the best.)

Or compared to China, which has built tech giants of its own, but only by limiting outside access to its singularly enormous local market. And always with the risk that too much success by Chinese entrepreneurs may one day crash headfirst into a political culture that is deeply uncomfortable with the internet’s openness.

That solution — to stay the course, to continue leaving tech largely to its own correctives — is cold comfort to those who believe tomorrow’s problems, coming up fast in the rear-view mirror, are both unprecedented and catastrophic.

Yet, so far there’s no evidence supporting shrill predictions of a technology-driven apocalypse. Or that existing safeguards — both market and legal — won’t save us from our worst selves.

Nor have tech’s growing list of critics proposed anything more specific than simply calling for “regulation” to save us. Perhaps that’s because effective remedies are incredibly hard to design.

#### No AI impact

Stephen **Pinker 18**, professor of psychology at Harvard, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress”

Prominent among the existential risks that supposedly threaten the future of humanity is a 21st-century version of the Y2K bug. This is the danger that we will be subjugated, intentionally or accidentally, by artificial intelligence (AI), a disaster sometimes called the Robopocalypse and commonly illustrated with stills from the Terminator movies. As with Y2K, some smart people take it seriously. Elon Musk, whose company makes artificially intelligent self-driving cars, called the technology “more dangerous than nukes.” Stephen Hawking, speaking through his artificially intelligent synthesizer, warned that it could “spell the end of the human race.”19 But among the smart people who aren’t losing sleep are most experts in artificial intelligence and most experts in human intelligence. The Robopocalypse is based on a muzzy conception of intelligence that owes more to the Great Chain of Being and a Nietzschean will to power than to a modern scientific understanding.21 In this conception, intelligence is an all-powerful, wish-granting potion that agents possess in different amounts. Humans have more of it than animals, and an artificially intelligent computer or robot of the future (“an AI,” in the new count-noun usage) will have more of it than humans. Since we humans have used our moderate endowment to domesticate or exterminate less well-endowed animals (and since technologically advanced societies have enslaved or annihilated technologically primitive ones), it follows that a supersmart AI would do the same to us. Since an AI will think millions of times faster than we do, and use its superintelligence to recursively improve its superintelligence (a scenario sometimes called “foom,” after the comic-book sound effect), from the instant it is turned on we will be powerless to stop it.22 But the scenario makes about as much sense as the worry that since jet planes have surpassed the flying ability of eagles, someday they will swoop out of the sky and seize our cattle. The first fallacy is a confusion of intelligence with motivation—of beliefs with desires, inferences with goals, thinking with wanting. Even if we did invent superhumanly intelligent robots, why would they want to enslave their masters or take over the world? Intelligence is the ability to deploy novel means to attain a goal. But the goals are extraneous to the intelligence: being smart is not the same as wanting something. It just so happens that the intelligence in one system, Homo sapiens, is a product of Darwinian natural selection, an inherently competitive process. In the brains of that species, reasoning comes bundled (to varying degrees in different specimens) with goals such as dominating rivals and amassing resources. But it’s a mistake to confuse a circuit in the limbic brain of a certain species of primate with the very nature of intelligence. An artificially intelligent system that was designed rather than evolved could just as easily think like shmoos, the blobby altruists in Al Capp’s comic strip Li’l Abner, who deploy their considerable ingenuity to barbecue themselves for the benefit of human eaters. There is no law of complex systems that says that intelligent agents must turn into ruthless conquistadors. Indeed, we know of one highly advanced form of intelligence that evolved without this defect. They’re called women. The second fallacy is to think of intelligence as a boundless continuum of potency, a miraculous elixir with the power to solve any problem, attain any goal.23 The fallacy leads to nonsensical questions like when an AI will “exceed human-level intelligence,” and to the image of an ultimate “Artificial General Intelligence” (AGI) with God-like omniscience and omnipotence. Intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains.24 People are equipped to find food, win friends and influence people, charm prospective mates, bring up children, move around in the world, and pursue other human obsessions and pastimes. Computers may be programmed to take on some of these problems (like recognizing faces), not to bother with others (like charming mates), and to take on still other problems that humans can’t solve (like simulating the climate or sorting millions of accounting records). The problems are different, and the kinds of knowledge needed to solve them are different. Unlike Laplace’s demon, the mythical being that knows the location and momentum of every particle in the universe and feeds them into equations for physical laws to calculate the state of everything at any time in the future, a real-life knower has to acquire information about the messy world of objects and people by engaging with it one domain at a time. Understanding does not obey Moore’s Law: knowledge is acquired by formulating explanations and testing them against reality, not by running an algorithm faster and faster.25 Devouring the information on the Internet will not confer omniscience either: big data is still finite data, and the universe of knowledge is infinite. For these reasons, many AI researchers are annoyed by the latest round of hype (the perennial bane of AI) which has misled observers into thinking that Artificial General Intelligence is just around the corner.26 As far as I know, there are no projects to build an AGI, not just because it would be commercially dubious but because the concept is barely coherent. The 2010s have, to be sure, brought us systems that can drive cars, caption photographs, recognize speech, and beat humans at Jeopardy!, Go, and Atari computer games. But the advances have not come from a better understanding of the workings of intelligence but from the brute-force power of faster chips and bigger data, which allow the programs to be trained on millions of examples and generalize to similar new ones. Each system is an idiot savant, with little ability to leap to problems it was not set up to solve, and a brittle mastery of those it was. A photo-captioning program labels an impending plane crash “An airplane is parked on the tarmac”; a game-playing program is flummoxed by the slightest change in the scoring rules.27 Though the programs will surely get better, there are no signs of foom. Nor have any of these programs made a move toward taking over the lab or enslaving their programmers. Even if an AGI tried to exercise a will to power, without the cooperation of humans it would remain an impotent brain in a vat. The computer scientist Ramez Naam deflates the bubbles surrounding foom, a technological Singularity, and exponential self-improvement: Imagine that you are a superintelligent AI running on some sort of microprocessor (or perhaps, millions of such microprocessors). In an instant, you come up with a design for an even faster, more powerful microprocessor you can run on. Now . . . drat! You have to actually manufacture those microprocessors. And those fabs [fabrication plants] take tremendous energy, they take the input of materials imported from all around the world, they take highly controlled internal environments which require airlocks, filters, and all sorts of specialized equipment to maintain, and so on. All of this takes time and energy to acquire, transport, integrate, build housing for, build power plants for, test, and manufacture. The real world has gotten in the way of your upward spiral of self-transcendence.28 The real world gets in the way of many digital apocalypses. When HAL gets uppity, Dave disables it with a screwdriver, leaving it pathetically singing “A Bicycle Built for Two” to itself. Of course, one can always imagine a Doomsday Computer that is malevolent, universally empowered, always on, and tamperproof. The way to deal with this threat is straightforward: don’t build one. As the prospect of evil robots started to seem too kitschy to take seriously, a new digital apocalypse was spotted by the existential guardians. This storyline is based not on Frankenstein or the Golem but on the Genie granting us three wishes, the third of which is needed to undo the first two, and on King Midas ruing his ability to turn everything he touched into gold, including his food and his family. The danger, sometimes called the Value Alignment Problem, is that we might give an AI a goal and then helplessly stand by as it relentlessly and literal-mindedly implemented its interpretation of that goal, the rest of our interests be damned. If we gave an AI the goal of maintaining the water level behind a dam, it might flood a town, not caring about the people who drowned. If we gave it the goal of making paper clips, it might turn all the matter in the reachable universe into paper clips, including our possessions and bodies. If we asked it to maximize human happiness, it might implant us all with intravenous dopamine drips, or rewire our brains so we were happiest sitting in jars, or, if it had been trained on the concept of happiness with pictures of smiling faces, tile the galaxy with trillions of nanoscopic pictures of smiley-faces.29 I am not making these up. These are the scenarios that supposedly illustrate the existential threat to the human species of advanced artificial intelligence. They are, fortunately, self-refuting.30 They depend on the premises that (1) humans are so gifted that they can design an omniscient and omnipotent AI, yet so moronic that they would give it control of the universe without testing how it works, and (2) the AI would be so brilliant that it could figure out how to transmute elements and rewire brains, yet so imbecilic that it would wreak havoc based on elementary blunders of misunderstanding. The ability to choose an action that best satisfies conflicting goals is not an add-on to intelligence that engineers might slap themselves in the forehead for forgetting to install; it is intelligence. So is the ability to interpret the intentions of a language user in context. Only in a television comedy like Get Smart does a robot respond to “Grab the waiter” by hefting the maître d’ over his head, or “Kill the light” by pulling out a pistol and shooting it. When we put aside fantasies like foom, digital megalomania, instant omniscience, and perfect control of every molecule in the universe, artificial intelligence is like any other technology. It is developed incrementally, designed to satisfy multiple conditions, tested before it is implemented, and constantly tweaked for efficacy and safety (chapter 12). As the AI expert Stuart Russell puts it, “No one in civil engineering talks about ‘building bridges that don’t fall down.’ They just call it ‘building bridges.’” Likewise, he notes, AI that is beneficial rather than dangerous is simply AI.

#### No authoritarianism impact---democracy is resilient

Sarah **Repucci 21**, Vice-president of research and analysis at Freedom House. Amy Slipowitz, Research Manager for Freedom in the World and holds a master’s degree in international affairs from Columbia University’s School of International and Public Affairs, where she specialized in human rights policy. She also holds a B.A. in economics and American Studies from Colby College. "Democracy under Siege," Freedom House, 2021, https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege

The resilience of democracy

A litany of setbacks and catastrophes for freedom dominated the news in 2020. But democracy is remarkably resilient, and has proven its ability to rebound from repeated blows.

A prime example can be found in Malawi, which made important gains during the year. The Malawian people have endured a low-performing democratic system that struggled to contain a succession of corrupt and heavy-handed leaders. Although mid-2019 national elections that handed victory to the incumbent president were initially deemed credible by local and international observers, the count was marred by evidence that Tipp-Ex correction fluid was used to alter vote tabulation sheets. The election commission declined to call for a new vote, but opposition candidates took the case to the constitutional court. The court resisted bribery attempts and issued a landmark ruling in February 2020, ordering fresh elections. Opposition presidential candidate Lazarus Chakwera won the June rerun vote by a comfortable margin, proving that independent institutions can hold abuse of power in check. While Malawi is a country of 19 million people, the story of its election rerun has wider implications, as courts in other African states have asserted their independence in recent years, and the nullification of a flawed election—for only the second time in the continent’s history—will not go unnoticed.

Taiwan overcame another set of challenges in 2020, suppressing the coronavirus with remarkable effectiveness and without resorting to abusive methods, even as it continued to shrug off threats from an increasingly aggressive regime in China. Taiwan, like its neighbors, benefited from prior experience with SARS, but its handling of COVID-19 largely respected civil liberties. Early implementation of expert recommendations, the deployment of masks and other protective equipment, and efficient contact-tracing and testing efforts that prioritized transparency—combined with the country’s island geography—all helped to control the disease. Meanwhile, Beijing escalated its campaign to sway global opinion against Taiwan’s government and deny the success of its democracy, in part by successfully pressuring the World Health Organization to ignore early warnings of human-to-human transmission from Taiwan and to exclude Taiwan from its World Health Assembly. Even before the virus struck, Taiwanese voters defied a multipronged, politicized disinformation campaign from China and overwhelmingly reelected incumbent president Tsai Ing-wen, who opposes moves toward unification with the mainland.

More broadly, democracy has demonstrated its adaptability under the unique constraints of a world afflicted by COVID-19. A number of successful elections were held across all regions and in countries at all income levels, including in Montenegro, and in Bolivia, yielding improvements. Judicial bodies in many settings, such as The Gambia, have held leaders to account for abuses of power, providing meaningful checks on the executive branch and contributing to slight global gains for judicial independence over the past four years. At the same time, journalists in even the most repressive environments like China sought to shed light on government transgressions, and ordinary people from Bulgaria to India to Brazil continued to express discontent on topics ranging from corruption and systemic inequality to the mishandling of the health crisis, letting their leaders know that the desire for democratic governance will not be easily quelled.

The Biden administration has pledged to make support for democracy a key part of US foreign policy, raising hopes for a more proactive American role in reversing the global democratic decline. To fulfill this promise, the president will need to provide clear leadership, articulating his goals to the American public and to allies overseas. He must also make the United States credible in its efforts by implementing the reforms necessary to address considerable democratic deficits at home. Given many competing priorities, including the pandemic and its socioeconomic aftermath, President Biden will have to remain steadfast, keeping in mind that democracy is a continuous project of renewal that ultimately ensures security and prosperity while upholding the fundamental rights of all people.

Democracy today is beleaguered but not defeated. Its enduring popularity in a more hostile world and its perseverance after a devastating year are signals of resilience that bode well for the future of freedom.

## Inequality Advantage

### Inequality ADV---1NC

#### No monopsony AND antitrust is irrelevant for labor concentration

Joshua D. Wright 19, Former Commissioner of the Federal Trade Commission, Ph.D. in Economics from the University of California, Los Angeles; Elyse Dorsey, Adjunct Professor at the Antonin Scalia Law School at George Mason University, Deputy Chair of the Antitrust & Consumer Protection Working Group at the Regulatory Transparency Project, J.D. from the Antonin Scalia Law School at George Mason University; Jonathan Klick, Professor of Law at the University of Pennsylvania Carey Law School, J.D. from the Antonin Scalia Law School at George Mason University; Jan M. Rybnicek, Adjunct Professor and Senior Fellow at the Global Antitrust Institute at the Antonin Scalia Law School at George Mason University, J.D. from the Antonin Scalia Law School at George Mason University, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” Arizona State Law Journal, Volume 51, Spring 2019, Lexis

While documenting potential changes in monopsony power over time and across markets is an important research project, and these economists should be applauded for contributing to our knowledge of an understudied phenomena, there is a substantial gap between our current state of knowledge and substantiating a belief that dramatic antitrust policy change would improve welfare. Several pieces of evidence render it difficult to conclude that lax antitrust enforcement has allowed labor market concentration and an anticompetitive increase of monopsony power. The claim and its underlying arguments are not compelling because they do not appropriately consider the level of current antitrust enforcement in labor markets, the theory and empirics supporting the claim are ambiguous, and even if an increase in monopsony power is assumed, it is unlikely (and certainly not established) that lax antitrust enforcement played a causal role. 223

The first piece of evidence opposing the Hipster Antitrust claim is the existing presence of antitrust enforcement in labor markets. The DOJ has issued several high-profile complaints against companies using "no-poaching" agreements to decrease labor competition. 224 For example, in United States v. Adobe, the DOJ filed a complaint alleging that major technology firms (Adobe, Apple, Google, Intel, Intuit and Bixer) anticompetitively agreed to not pursue each other's highly trained [\*348] technology employees. 225 That same year, the DOJ also successfully enjoined similar no-poaching agreements in the motion picture film industry. 226 Antitrust enforcement involving no-poaching agreements has not tapered in recent years. The DOJ issued joint guidance with the FTC in October 2016 warning that naked no-poach agreements would be treated as price fixing, and Assistant Attorney General for Antitrust Makan Delrahim recently signaled the potential for forthcoming criminal cases on no-poach agreements among employers. 227

The FTC also recently enjoined the American Guild of Organists from restricting any members' ability to solicit or accept work from any "consumer" who was currently utilizing another member. 228 The FTC challenged this no-poaching arrangement under § 5 of the FTC Act as a method of unfair competition that increased prices for consumers. 229 However, apart from federal enforcement, employers restricting labor competition has also been the subject of private antitrust class action litigation. 230 A recent class action filed against Carl's Jr. Restaurants, LLC alleged that Carl's and its independent franchises used "no-hire agreements" to collude and prohibit competitive franchisees from hiring employees from other franchisees. 231

The claim that modern antitrust ignores labor markets is certainly incorrect. That said, no credible attempt has been made to systematically measure antitrust enforcement activity as it relates to labor markets and its potential effects on monopsony power. Given the recent series of antitrust cases involving labor claims, it is difficult to view the recent antitrust enforcement in labor markets as a gaping hole in antitrust enforcement that invites anticompetitive abuses. If concentration in labor markets has awarded corporations with the monopsony power to suppress labor shares, it would be unwise to conclude without more evidence that antitrust enforcement's presence or lack thereof in labor markets is the cause.

[\*349] A second piece of evidence undermining the Hipster Antitrust position concerning monopsony power is potentially even more fundamental-it is not clear that monopsony power is, in fact, increasing. The most cited-to stylized fact in support of the conclusion that monopsony power is widespread and increasing in the United States economy is that the labor share is decreasing. 232 There are, of course, many reasons why one might observe a decrease in the labor share. Lax antitrust allowing the creation of monopsony power is one hypothesis. Though the theoretical effects of a massive increase in monopoly and monopsony power through generally lax antitrust enforcement are ambiguous. Indeed, some studies have found a positive relationship between employer size and wages (i.e. bigger employers pay larger wages). 233 It is also unsettled whether employers with more market power pay lower wages. 234 Neither economic theory nor empirical evidence paint a clear picture that an increase in antitrust activity in labor markets would result in a reduction of monopsony power or upward pressure on wages. 235

Finally, even if the increase in monopsony power were empirically assumed to be present, the available evidence does not suggest that consumer welfare focused antitrust enforcement played any meaningful role in that change. 236 Consider the figure below:

The decrease in labor share has been a worldwide phenomenon--with the United States experiencing a comparatively modest drop. However, if the U.S. drop in labor share is indeed attributed to the lax antitrust enforcement of regulatory regimes shackled to consumer welfare, it becomes difficult to explain the global phenomenon (surely the ghost of Robert Bork has not infiltrated each competition authority around the globe). Instead, the global statistics suggest that there are other explanatory variables external to antitrust enforcement that help to explain the recent decrease in labor share. As long as the Hipster Antitrust movement remains transfixed on antitrust enforcement as the cause and solution to decreasing labor shares, it will represent time lost--failing to identify the true causes and most prudent solutions.

#### Businesses shift to end-around antitrust

Kate Tromble 21 & Gregory Nantz, TROMBLE is vice president for Federal Policy at Results for America; NANTZ is a consultant for Results for America, “Federal Evidence-Based Competition Policy,” Inequality and the Labor Market, edited by Sharon Block and Benjamin H. Harris, Brookings Institution Press, 2021, pp. 193–208 JSTOR, https://www.jstor.org/stable/10.7864/j.ctv13vdhvm.17

4. Employer Concentration

A fourth issue contributing to lack of competition in labor markets is increased employer concentration. By one estimate, employer concentration reduces workers’ share of overall economic output by one-sixth to onethird (Naidu, Posner, and Weyl 2018). Increased employer concentration also reduces the number of firms competing within a given market, which reduces the risk to employers of engaging in collusion—even if the collusion is not explicit (Padin 2018). Although federal antitrust reforms could help to reduce employer market concentration, the mechanisms by which employers assert monopsony power are diffuse, requiring action along multiple fronts to successfully increase workers’ bargaining power relative to their employers (Bivens, Mishel, and Schmitt 2018).

U.S. labor laws have been in place for decades, but anticompetitive forces continue to impact workers. Those forces have changed over the years, warranting a systematic review of the cause and effect of statutory and regulatory changes on labor market activity. The federal govern ment has not, however, conducted such a systematic evaluation. Rather, the role of evaluator has been largely outsourced to academic economists and lawyers. Minimum wages, for example, have been the subject of decades of research, with a weak consensus only recently emerging. We need faster and more-robust systems and resources for understanding the impact of our federal labor laws on workers, employers, and markets. The federal government, through the DOL’s Chief Evaluation Office (CEO; the CEO is housed within the Office of the Assistant Secretary for Policy), could provide this kind of cohesive labor market research and evaluation activity.

#### No connection between inequality and conflict

Elise Must 16, PhD Candidate at the London School of Economics, “When And How Does Inequality Cause Conflict? Group Dynamics, Perceptions And Natural Resources”, Doctoral Dissertation, http://etheses.lse.ac.uk/3438/1/Must\_When\_and\_how\_does\_inequality.pdf

Does economic inequality lead to conflict? This question has attracted the attention of prominent scholars at least since the time of Aristotle (Nagel 1974). The frequent assumption that unequal distribution somehow fuels rebellion has resulted in a vast amount of theoretical as well as empirical work. For long, results remained mixed. Despite countless qualitative studies asserting that inequality is a major reason for conflict outbreak, quantitative studies struggled to establish a firm relationship between the two (Blattman and Miguel 2010, Cramer 2005, Lichbach 1989).

These quantitative studies, including the most influential ones by Collier and Hoeffler (2004) and Fearon and Laitin (2003), rely on analysis of individual measures of inequality. However, as most prominently set forth by Frances Stewart, it is minority groups or collectives of individuals who rebel, not the whole population, nor individuals (Stewart 2002). Stewart’s theoretical development has given rise to several quantitative studies which uniformly support the role of economic group inequality in inducing conflict (Buhaug, Cederman, and Gleditsch 2014, Cederman, Weidmann, and Bormann 2015, Cederman, Weidmann, and Gleditsch 2011, Deiwiks, Cederman, and Gleditsch 2012, Østby 2008a, b, Østby, Nordås, and Rød 2009). Hence, there is an emerging consensus in the literature that inequality causes civil conflict when it overlaps with relevant group identities.

Promising as these studies are, they nevertheless neglect a potential crucial part of the inequality-conflict causal chain. Seemingly all studies of inequality and conflict, including those measuring group inequalities, are based on objective inequalities. Yet, as Stewart (2010, 14) herself notes, ‘People take action because of perceived injustices rather than because of measured statistical inequalities of which they might not be aware’. Economic inequality measured by the Gini coefficient, or by local GDP data, is most commonly used as proxies, leaving completely aside how economic inequality is actually interpreted and perceived by both groups and individuals (ref. Zimmermann 1983). It remains obvious, however, that in order for people to take action to address inequalities, the first step is to recognize them and to consider them unjust (Han et al. 2012). The use then, of objective measures in current empirical studies, is based on the assumption that both objective and perceived horizontal inequalities essentially amount to the same thing. Put another way it is assumed that all objective inequalities are actually perceived as inequalities by relevant groups, and conversely all perceived inequalities have an objective basis. These are strong claims that are so far largely untested. Existing studies of the link between objective and perceived horizontal inequalities range from concluding that there is no such link (Langer and Smedts 2013) to documenting imperfect correlations – ranging from 0.27 to 0.30 depending on indicators and datasets (Holmqvist 2012).

While cross-country analyses of conflict have neglected perceptions of inequality, the case study literature does offer some examples demonstrating their importance. Interviewing Muslim immigrants in London and Madrid, Gest (2010, 178) finds that what distinguishes democratic activists from those who engage in anti-system behavior, is the nature of their individual expectations and perceptions about shared economic realities. Moving on to larger conflicts, a recent World Bank report concludes that the so called ‘Arab Spring’ was driven by a decrease in popular subjective satisfaction, while the objective economic situation actually improved in the years before the widespread mobilization (Ianchovichina, Mottaghi, and Shantayanan 2015). The report also points to the importance of inter-group inequality as opposed to individual inequality.

My main argument is that in order to better capture the role of inequality in inducing civil conflict, measures have to account for relevant groups as well as for the perception of inequality in these groups. In addition, my analyses fill two other gaps in the literature. While Stewart emphasizes how groups can mobilize around different identities, current studies have almost exclusively focused on ethnic groups. However, a regional identity might be just as relevant (ref. Posner 2004). I will therefor look at the effect of regional economic inequality on civil war. And finally, most of the studies, and all of those with a global scope, rely on time invariant measures of economic horizontal inequality. This is commonly defended by referring to the demonstrated ‘stickiness’ of horizontal inequalities (see e.g. Stewart and Langer 2008, Tilly 1999). Still, a recent study covering 1992 to 2013 demonstrates a global decline of ethnic inequality (Bormann et al. 2016), while Kanbur and Venables (2005) compare case studies of 26 developing countries and conclude that regional inequalities are rising. The data used in this analysis also show that horizontal inequalities change quite substantially over time. Using inequality data from one particular year to analyze decades of conflict incidents is therefore questionable. Hence, my study represents the first time-variant analyses of the effect of both objective and perceived regional inequality on civil war covering developed and developing countries in all world regions14 .

Analysing data for the period 1989 to 2014 from the World Values Survey (WVS), I find that countries with a high level of perceived regional economic inequality have an elevated risk of civil war outbreak. On the other hand, mere objective regional economic inequalities do not have any significant effect. The group aspect remains essential, as neither objective nor perceived individual inequality is linked to increased civil conflict risk.

#### Inequality doesn’t cause nationalism or diversionary war

Gal Ariely 16, senior lecturer in the Department of Politics & Government, Ben-Gurion University of the Negev, PhD from the University of Haifa’s School of Political Sciences, “Does National Identification Always Lead to Chauvinism? A Cross-National Analysis of Contextual Explanations,” Globalizations, vol. 13, no. 4, Routledge, 07/03/2016, pp. 377–395

With respect to internal explanations, the effects of income inequality and ethnic diversity are presented in Table 3. Models 3.1 and 3.2 indicate that neither directly affects chauvinism. H4 is therefore not supported. The results suggest, however, that both have a negative effect on the national-identification slopes. Contrary to our expectations, countries with higher levels of economic and ethnic division appear to exhibit a weaker relation between national identification and chauvinism. While these findings might seem to contradict H5, the pattern was caused by outliers. After excluding South Africa—the most unequal and ethnic diverse country in our sample—the effect of ethnic diversity is not even of borderline significance. After excluding Chile—the most unequal country in our sample—the interaction effects for economic inequality were also far from significant. The results, therefore, do not support H5.21

Conclusions

During the historic phone call between President Obama and Iranian President Sheikh Hasan Rouhani in September 2013, the latter stated that his country’s nuclear program ‘represents Iran’s national dignity’.22 This declaration reflects the common perception that Iran’s nuclear program mobilizes Iranians in support of resisting further national humiliation at the hands of foreigners (Moshirzadeh, 2007). This reflects the important role national feelings play in the contemporary international arena. Evidence from other examples—such as the Israeli-Palestine conflict—indicates that national identity serves as a key factor in conflict resolution. The prominence of national feelings is not limited to the Middle East, their effect on public attitudes towards international issues, and conflicts also being manifest in the West (Billig, 1995; Kinder & Kam, 2010).

It is thus hardly surprising that scholars seeking to develop a better understanding of conflicts adopt a social-psychology perspective, replacing the deterministic view that identification with one’s in-group necessarily leads to antagonism towards out-groups with an examination of the broader social context. In line with this approach, the present paper focuses on the way in which political and social contexts encourage chauvinistic views towards the international arena and how they affect the relation between national identification and chauvinism.

Integrating various social and psychological theories, we investigated two external contextual explanations (globalization and conflict) and an internal explanation (social division). Employing cross-national survey data, we examined the relation between national identification and chauvinism across 33 countries. The findings indicate that a positive relationship exists between national identification and chauvinism across most of the countries, although the level differs from country to country. Using a multilevel regression analysis, we tested to see whether globalization, conflict, and social division correlate with this variation. The results indicate that social and political contexts are related to chauvinism and the ways national identifi- cation and chauvinism are linked. Although a closer relation exists between national identification and chauvinism in more globalized countries, globalization failed to explain the variation in chauvinism itself. These findings support the notion that globalization highlights the importance of national identity (Calhoun, 2007; Castells, 2011). While those sections of globalized societies that are attached to their country also tend to resist international cooperation and endorse hostile views, the complexity of the phenomenon—as evinced by the divergent findings of previous studies (e.g. Jung, 2008; Norris & Inglehart, 2009)—calls for further research of this interpretation. The fact that the current study is cross-sectional must also be taken into account, the findings adducing the relation but not the causal relations between the variables. In contrast to experimental studies, the present design is similarly limited in its ability to offer a robust control for alternative explanations.

Another external factor found to be relevant—to a certain degree—was conflict. Countries that suffered large numbers of deaths in conflicts and mobilized resources and personnel exhibited higher levels of chauvinism. When other indices for conflict were used, however, these results were not replicated. A possible explanation for this finding lies in the inherent limitation in the way in which conflicts are measured across various countries. Measuring international conflicts is a challenging task (Anderton & Carter, 2011). While the ways of measuring conflict were chosen because they reflect different dimensions of conflict in order to be representative of a wide range of countries, the problem of comparability cannot be ignored. An alternative explanation may derive from the fact that only deaths from conflict and resources/personnel mobilization are sufficiently significant to contribute to chauvinism. The limitations of our measurements of conflict and research design mean that this idea must remain speculative, however. In addition, it is important to emphasize that the sample of countries is also limited as many countries are not involved in conflict and there is also limited variation in the types of conflicts.

Contrary to what the divisionary theory of national mobilization would lead us to expect, neither economic inequality nor ethnic diversity were related to chauvinism or affected the relation between national identification and chauvinism. This finding might also be explained by the limitation of the current research design. The number of countries included in the ISSP 2003 National Identity Module being relatively small and the sample only covering countries with available survey data, the results relate solely to this specific sample of countries. Across another set of countries, social division might play a far more significant role. Another explanation might be the meaning given to national identification and chauvinism across the countries. While evidence exists for the comparability of the scales across most of the countries, the divergent meaning probably attributed to them in Germany, the United States, and Israel might form an additional limitation.

## 2NC

### States CP---2NC

#### State law substitutes for federal enforcement

Randy Stutz 20, Vice President of Legal Advocacy at the American Antitrust Institute, Kathleen Foote, Antitrust Chief at the California Department Of Justice, and Phil Weiser, Hatfield Professor of Law and Telecommunications, and Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado, JD from New York University School of Law, Colorado Attorney General, “The State of State Antitrust Enforcement – Playing a Critical Role Locally and Nationally”, American Antitrust Institute ‘Ruled By Reason’ Podcast, 6/22/2020, Transcribed by Otter.ai, Grammar Edits by Casey Harrigan, https://www.antitrustinstitute.org/work-product/the-state-of-state-antitrust-enforcement-playing-a-critical-role-locally-and-nationally/

STUTZ: Hello, I'm Randy Stutz, the Vice President of Legal Advocacy at the American Antitrust Institute. In this episode of AAI’s *Ruled by Reason* Podcast, we're going to discuss the state of state antitrust enforcement in troubled times when the federal government is either unable or unwilling to adequately enforce the antitrust laws. Fortunately, the US system has an emergency preparedness plan. We have 50 state attorneys general who enforce federal antitrust law as well as their own state antitrust laws. And, in the words of this US Supreme Court, they are ‘an integral part of the Congressional plan for protecting competition’. We're going talk today about some important current state enforcement and legislative initiatives, some recent dust ups among state and federal enforcers over antitrust federalism principle, and how the states are thinking about and responding to the COVID-19 crisis from an antitrust and competition policy perspective. To do that, we are very fortunate to have two eminent leaders from the antitrust community and longtime champions of strong state level antitrust enforcement. Phil Wiser, is currently serving as the 39th Attorney General in the state of Colorado, where he was sworn in in January of 2019. And I have a hard time imagining that any of Phil's 38 predecessors brought anywhere near his level of antitrust expertise to the position. Prior to winning election, Phil served as dean of the University of Colorado Law School, where he also taught antitrust law and founded the law school silicon flat iron Center for Law, technology and entrepreneurship. Before that, Phil served in the Obama and Clinton administration in the White House and Justice Department, and he's also authored numerous books and articles on competition, innovation, and internet and telecom policy. as attorney general Phil sits on numerous standing and special committees of the National Association of attorneys general, and co chairs the antitrust committee, with the Attorney General of my home state Brian frosh of Maryland. Bill, thank you so much for being here. Good to be with you. Kathleen Foote is the senior Assistant Attorney General and antitrust chief in the California Department of Justice, where she has served for 32 years and has led the antitrust unit. For the last 19 years, Kathleen has played a leading role representing the people of California in many of the seminal antitrust cases of our time, including the Microsoft case and the Hartford fire insurance case, among numerous others. Kathleen is also a former chair of the multi state antitrust task force of the National Association of attorneys general. And she's a 2013 recipient of AI Alfred econ award for antitrust achievement. She's also a past recipient of both the antitrust attorney of the Year award given by the California State Bar Association, and the lawyer of the Year award given by California lawyer magazine. Kathleen, thank you for being here. pleasure to be with you. Thank you. Well, I thought it would be interesting to start off for our listeners to hear a little bit about what each of your offices have been up to. Kathleen, I'll start with you. Can you briefly summarize some of your pending in trust investigations or enforcement actions, at least those that are public?

FOOTE: Okay, well, pending investigations, of course, are not public. Let me begin very briefly, with the disclaimer, unlike Attorney General, wiser, I am not I'm not an attorney general. So these are my own opinions. I'm not speaking for the California Attorney General. We are coming off of two major cases, conduct case against a major healthcare system for anti competitive use of power in the provider insurer contracting process. This was the Sutter Health case. It settled last October, almost literally on the courthouse steps in the sense that there was a jury already impaneled. When settlement occurred. We're still working through the approvals of that settlement. The other major one, of course, was the T Mobile sprint merger case that went to trial with a multi state group. California was a co lead and we were heavily invested in that. Of course, there was as you all know, and unfavorable ruling by the trial court after which settlement of the appeal was entered into. I'll also just mention another major case that we filed just this month against two oil and gas trading companies. This one alleges a conspiracy to manipulate prices in the spot market for finished gasoline during the 2015 2016 time period. Phil, what about Colorado? What's new?

WEISER: Well, we have had an active program. What I want to start with is a precedent setting action about a year ago, we took action alone, without another state without the federal government to address any competitive consolidation in healthcare. This was a so called vertical merger involving united healthcare and the vetos Medical Group. The FTC was going to let this go, we had some real concerns, and we obtained some relief for the people of Colorado. We've also been involved in multi state actions. Along with California and other states. There's obviously announced investigations of Google and Facebook, there's been recent discussions of activity in the Meatpacking industry. There's also a multi state generic drug investigation going on that was about a year ago as well, when that was updated. And then, as Kathleen said, there's a lot of investigations that have not necessarily been publicly discussed that we're not at liberty to talk about.

STUTZ: Phil, you mentioned generic drugs, big tech investigations, multi state efforts. I know all of the state attorneys general offices are in frequent communication. Are there any enforcement actions by some of your colleagues from your sister offices that you wanted to draw attention to or that you think are particularly important right now?

WEISER: Yeah, I want to give a shout out to Bob Ferguson, who is here behind me in law school, he has been a real leader in no poach investigations, particularly those where you had a franchise, where the franchise said, all of the relevant franchisees have to agree not to hire workers from each other. And that had no relationship at all to legitimate let's say trade secrets or other issues, was totally about suppressing competition in the labor market to hurt who were often relatively modestly paid workers who needed all the wages they could get, and yet wages were being suppressed by this practice. When I was at the DOJ, we brought the first such action involving a number of Tella tech companies in Silicon Valley who had a no poach set of agreements. I was glad to see Bob Ferguson follow up on this effort. And it's again important to protect workers as well as consumers with antitrust.

STUTZ: That's a great point. And I want to come back to labor market restraints generally, at a later point in this conversation, but Kathleen, let me pose the same question to you. And any shoutouts to some any other states that you want to give?

FOOTE: Well, I couldn't agree more with what Bob just said about the no poach cases. The generic drugs, price fixing cases are certainly very major one series of litigations. And in terms of independent matters, of course, a lot of a lot of states take on independent issues all the time. Most of them never reached the light of day, some of the most important ones are in the health care area. And another shout out to the Washington Attorney General for their recent settlement of the CA dry Franciscan case. It involves merger and it involves conduct and it was, I think, a very important one in terms of the setting some new parameters in that area.

STUTZ: You know, ai recently produced a report on the state of us antitrust enforcement in competition policy and examine some indicators of declining enforcement at the federal level and really emphasize the important role that states play in sort of picking up the slack when when that occurs. And I'm wondering just subjectively, from your both of your perspectives, or objectively, if you have an answer. Did the states seem more busy on the antitrust front than they have historically? That's that's my impression. I'm just curious if that's your impression as well. Phil, I'll ask you first.

WEISER: The challenge is as compared to what and I was not, let's say focused on state interest enforcement, the 1980s. That's a time period where there was also a lot of talk that it was a heyday of state antitrust enforcement. What I will say is true is I believe federalism and State Leadership more generally, is certainly at the fore and that's on a range of fronts, from public health enforcement, to environmental issues to anti trust issues. So maybe if you take State Leadership overall we are in a high point, any trust in particular Obviously, you have different areas where the feds are less active, and that creates more room and indeed, imperative for the state step up. I'm not sure I can compare us today. These are the other heirs.

STUTZ: Kathleen, what do you think?

FOOTE: Well, that feels was a very good answer. I will say that we are in in my unit, we are larger than we have been in the past this is with about 20 to 23 lawyers, we are the largest we have ever been. In terms of antitrust enforcement, we've had a series of this obviously depends to some degree on our legislature and on our attorney general. But they have had sufficient interest all around for the last number of years, to give us better, better support than we had a number of years ago in that area.

STUTZ: I wanted to also ask both of you not only about antitrust enforcement, but also state level legislative initiatives, maybe not directly in the antitrust domain, but that have important implications for antitrust enforcement or competition policy. Kathleen, I'm thinking of California is AB 824, which is a pay for delay law. I'd be curious to hear that the status of AB a 24, but also just any other important legislative initiatives that you think we ought to be paying attention to in California?

FOOTE: ABA 24 is an interesting one, essentially, it was enacted last year, it mandates a structured rule of reason approach in cases involving reverse payment or pay for delay agreements in pharma. In doing so, basically, what it does is track a 2015, California Supreme Court ruling in the inrae, Cipro one and two cases. And, and it is, as far as I know, creates the first sort of structured rule of reason, process. Structured rule of reason is something that is batted around a lot of academic journals and, and even AI publications for quite some time. And this is the first run out of that I'm familiar with. There was naturally an immediate legal challenge, seeking to enjoin its enforcement overall, it was a broad challenge as being unconstitutional, unlawful on its face. And the ruling was that no, no, no, you can't do that. Maybe someday, you can consider it as applied. But that particular that particular decision denying denying a preliminary injunction is now in front of the Ninth Circuit. And I believe there is going to be argument on that in just a few more weeks.

STUTZ: Okay, we'll keep an eye out. Fill any? Excuse me, Kathleen is Was there anything else from California that you wanted to raise?

FOOTE: There is another legislative item in the health care area that is in some early stages of working its way through the legislature, it's a bill called SB 977. It largely relates to expanding what we now have, which is Attorney General regulatory control over nonprofit hospital mergers, it expands it to a larger universe of mergers in the health care area that will pick up clinics, physician groups, and so on. And we'll see where that goes. it's early and the state legislature has a lot of other stuff on its plate right now as we can all imagine.

STUTZ: Yes, Phil, what about Colorado anything any legislative developments that are antitrust and competition policy experts ought to be following.

WEISER: He had a bill passed last year, mandating our office to do a study about insulin pricing. For people who follow this market, you might know that within a four year period from around 2012 to 2016, prices doubled. For us antitrusters out there. We know that's not ordinary, usually competitive markets, you wouldn't see price increases of that amount. And so we've been tasked to evaluate what's going on there. And what recommendations can we offer with any trust or competition policy more generally, to address the increased prices of insulin which for many people, it's life. for Deaf dragon, so having to pay more for insulin is not just problematic, potentially from the health point of view. But it can also be a huge challenge from the quality of life perspective.

STUTZ: Yeah, health care and drugs are an incredibly important topic for a variety of reasons right now, and we're going to talk more about that later during this podcast. For now, I wanted to shift gears a little bit and talk about Have you both talked about an issue that's really as old as antitrust law itself. But that's still managed to manages to generate quite a bit of discussion and debate. And that is the relationship between state enforcers and federal enforcers. And, Kathleen, I thought I would start with you. This came up prominently in the sprint T Mobile merger, which you already mentioned. Of course, a group of states led by California and New York, sued to block the deal, notwithstanding that the DOJ and FCC had approved them. Well, they they agreed the merger was illegal as proposed, but accepted a remedy, which was a hybrid behavioral structural remedy. And California and others, decided to pursue independent relief decided to try to block the deal outright. So hoping you could talk a little bit about what led your office to that decision, and what were some of the considerations practical and otherwise, that drove your decision making?

FOOTE: Well, I guess I should begin by saying I can't talk very much about the decision to file the suit in that case, because that involves internal deliberations that remain confidential. But But I will say that, that the merger, despite its size does meet our usual criteria for taking action in a merger case. Those include harm to California consumers impacts in local markets, and area of recognized state interest, and in this case, state agency concern our California Public Utilities Commission. And and the ability to bring something valuable to the case by virtue of our participation, including, obviously our focus on local markets. That said, it is it's not that it never happens, but only very rarely do we diverged from our federal colleagues on what the outcome of the investigation should be. We did obviously, in this case, the reaction from the antitrust division is was startling, to say the least. First their effort to disqualify our outside counsel. And then and then the motion, essentially asking the court to defer to the divisions, divestiture remedy, past efforts to diminish state enforcement have certainly been made in by the private bar. Very much so in the Microsoft case, for example, but never has that been done by a fellow enforcement agency with whom we've worked closely and cooperatively for decades. The Division did not do so and Microsoft, although the parties did, and, and I wouldn't be surprised if they attempted to get the division to join them in that, but they did not. And of course, the Microsoft judge Koehler catelli, the remedies judge rejected that idea. And it is It has been an idea that has been rejected by every court pretty much, including several times by the Supreme Court down through the years.

STUTZ: And you you helped by raising Microsoft and putting, you know, in many ways, Sprint T Mobile is a small part of a ongoing conversation in a broader conversation, which the assistant attorney general making delrahim continued a bit in a speech he gave in February where he sort of set out his views on this issue of the proper balance between state and federal enforcement in pretty broad constitutional terms. And to summarize briefly, he argues that states really should not independently exercise enforcement authority when it would be incompatible with federal enforcement. He cites concerns about creating a disorderly and inefficient merger review process, and potentially interfering with the federal government's settlements with with private parties. Phil, you recently gave a keynote speech at the Loyola antitrust colloquium that put this general issue into broader Lee goal in historical context, and I was wondering if you could just take a few minutes to talk about the framework you introduced in that speech and what it means

WEIST: Be happy to Randy. And I want to just underscore that the federal government is a very important partner of the states. And there is this great tradition of collaboration that I will continue to work to support every way I can. What is disappointing is that partnership needs to start on a promise of cooperative federalism. And that's something I've thought a lot about, not just in the trust area. But in telecommunications and environmental law. The whole principle of cooperative federalism, which was adopted by Congress in the Hart, Scott Rodino Act in 1976, is that states have the ability to tailor solutions and address concerns in their states, like we did last year in this case I mentioned earlier, that's a critical authority and as you noted, in the Microsoft case, the feds don't get to say to states, ‘you don't have any authority to proceed, if we don't want you to proceed’. Only courts can decide what the law is, not the federal government. The federal government can have a view. But the court has to make the ultimate ruling and the idea that a federal government position in a merger, for example, is preclusive, just isn't right. And, in fact, it's interesting because the speech you made and the argument the DOJ made is actually premised on *dissent* in this *Georgia v. Pennsylvania Railroad* case. The majority holding there was that states *are* authorized to seek injunctive relief. And that is a principle that, again, is codified in the law (Hart Scott Rodino law). It's been the history of practice. And I think the principle, if it's taken to the logical extreme, one of the concerns I'd have is, what about federal regulators who bless a merger, would you then immunize that merger from any trust oversight by *anybody*, a federal or a state authority, we've got to be careful about this principle, particularly because we're living in a time where I don't think it's fair to say that we need more room for concentration, the economy is more concentrated today than it's ever been. And so having state AGs authorized to pick up the slack, develop appropriate solutions, like we did last year, is not only the right thing to do, as a matter of law, it's the right thing to do as a matter of policy.

STUTZ: Kathleen, I want to give you a chance to react to that. And also to, you know, both of you have raised the distinction between sort of local competitive concerns and national competitive concerns, and sometimes, you know, in order to get effective local relief, a remedies going have to have national implications, you know, I'm thinking of Sprint / T Mobile, it would have been hard to tailor a remedy to California, for example. Kathleen, what are you what are your thoughts on Phil’s cooperative federalism framework and these issues?

FOOTE: Well, I couldn't agree more. And I think Phil really said it all. And, you know, in any area of importance, I think, in public life, the designers build redundancy into the system, whether it's emergency responses we're seeing with COVID-19, which is not has been thinned out quite a bit, there was a redundancy that should have been in place, or with law enforcement. And certainly that's, that's clearly always been always been the policy. The legislature's recognized by the courts, for antitrust. Its also the case outside the US in many respects. You know, a number of years ago, following the Microsoft case, this whole issue was teed up before the Antitrust Modernization Commission, and although there were members of that commission going in who had the notion that the state should be state should be pushed into more subsidiary supporting role. Overall, they came out the other way in the end, after they really considered it and studied the history of state enforcement, which the states themselves through NAAG did a lot to document during that period. And there were there were many, many misconceptions about what the states had been doing in antitrust enforcement over the years, and that documentation proved to be quite an important ingredient in the conclusions that the AMC reached.

#### The effect is identical to federal law

Margaret H. Lemos 18, Robert G. Seaks Distinguished Professor of Law at Duke University, JD from New York University, AB from Brown University, Alston & Bird Professor of Law at Duke University, JD from Harvard University Law School, BA in Government and English from Dartmouth College, “State Public-Law Litigation in an Age of Polarization”, Texas Law Review, Volume 97, Issue 1, https://texaslawreview.org/state-public-law-litigation-in-an-age-of-polarization/

As institutional capacity expanded, so too did the opportunities to use it. When federal agencies decreased their enforcement activities in the 1980s, state-level enforcers rushed in to fill the void.109109See William L. Webster, The Emerging Role of State Attorneys General and the New Federalism, 30 Washburn L.J. 1, 5 (1990) (“In short order the states asserted themselves in dramatic fashion. . . . Attorneys general were called ‘fifty regulatory Rambos’ by one individual.”). CLOSE Areas like antitrust and consumer protection, once dominated by the federal government, became enclaves of aggressive state enforcement.110110Id.; see also Clayton, supra note 103, at 535–36 (describing states’ efforts to secure regulatory and enforcement authority in areas including antitrust and consumer protection). CLOSE Many AGs established specialized units and task forces to handle their new responsibilities, thereby “enhanc[ing] the role of the attorney general as a ‘public interest lawyer’ and offer[ing] many opportunities to improve the quality of life for citizens of the states and jurisdictions.”111111NAAG, supra note 95, at 46. CLOSE

Meanwhile, new provisions of federal law facilitated state litigation by authorizing state AGs to enforce federal statutes, often by suing as parens patriae to protect the rights of state citizens.112112See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, sec. 301, § 4(c), 90 Stat. 1383, 1394 (1976) (codified at 15 U.S.C. § 15(c) (2012)) (authorizing states to sue as parens patriae in federal court on behalf of their citizens to secure treble damages for a variety of federal antitrust violations); see also Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 712 (2011) (“As state attorneys general assumed new prominence, provisions for state enforcement began to proliferate in Congress. New provisions have been enacted by virtually every Congress in the last two decades.”). CLOSE The common law doctrine of parens patriae dates back to early English practice, in which the King exercised certain royal prerogatives as “parent of the country.”113113Richard P. Ieyoub & Theodore Eisenberg, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae, 74 Tul. L. Rev. 1859, 1863 (2000); Jack Ratliff, Parens Patriae: An Overview, 74 Tul. L. Rev. 1847, 1850 (2000). CLOSE In its more modern form, the doctrine allows states to vindicate sovereign or quasi-sovereign interests, including an “interest in the health and well-being . . . of [their] residents in general.”114114Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982). CLOSE Today, many state and federal statutes explicitly authorize states to sue as parens patriae.115115Margaret H. Lemos, Aggregate Litigation Goes Public: Representative Suits by State Attorneys General, 126 Harv. L. Rev. 486, 495–96, 496–97 nn.39–40 (2012). Whether Congress could confer authority on state AGs to sue in circumstances where state law denies it is an interesting question, but beyond the scope of this article. CLOSE Others can be read to authorize state suits implicitly by creating broad rights of action for citizens whom the states represent.116116See, e.g., EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003) (citing Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 121 (2d Cir. 2002)) (“[S]tanding provisions in many . . . statutes implicitly authorize[] parens patriae standing by using language that permits any ‘person’ who is ‘aggrieved’ or ‘injured’ to bring suit.”); see also Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 103 (D. Mass. 1998) (quoting 29 U.S.C. § 630(a)) (reasoning that AG has statutory standing to sue under Age Discrimination in Employment Act as “‘legal representative’ of the people of the [state] for the purposes of this action”); Minn. v. Standard Oil Co. (Ind.), 568 F. Supp. 556, 563–66 (D. Minn. 1983) (permitting state to sue as parens patriae under § 210 of Economic Stabilization Act of 1970, which permitted suit by any “person” because “when a state acts in its quasi-sovereign capacity in a parens patriae action, . . . [a] harm to the individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff”). CLOSE And even absent specific statutory authorization, state AGs may (depending on state law) have common law or constitutional authority to litigate as parens patriae on behalf of citizens.117117See generally Ieyoub & Eisenberg, supra note 111, at 1864–75 (describing the contours of parens patriae doctrine and its grounding in common law). CLOSE

The 1990s tobacco litigation built on, and spurred, expansions in AG authority. Prior to the states’ assault on Big Tobacco, countless private plaintiffs had sued under a variety of tort and warranty theories—all seeking to hold the industry accountable for peddling an unreasonably dangerous product. None succeeded.118118Id. at 1860 (“Before the states’ litigation, the tobacco industry had not lost a smoking case . . . .”). CLOSE Many plaintiffs were simply outspent by the defendants; others were turned away on the ground that they had assumed the risk of smoking; and still others were thwarted by courts’ refusal to permit large numbers of smokers to sue together as class actions.119119Anthony J. Sebok, Pretext, Transparency and Motive in Mass Restitution Litigation, 57 Vand. L. Rev. 2177, 2184–88 (2004) (describing the history of tobacco litigation). CLOSE

Then came the states, which were able to avoid the pitfalls of earlier litigation and bring the tobacco companies to the bargaining table. Most states pursued restitution actions, seeking reimbursement for Medicaid expenses incurred in the treatment of smoking-related illnesses.120120Id. at 2189; see also id. (describing Minnesota’s consumer-fraud approach as a notable exception). CLOSE By shifting the focus from individual smokers to the states’ own losses, the state suits were able to cut off the tobacco companies’ prime defense strategy: blaming individual smokers. As Mississippi AG Mike Moore put it, “This time, the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of indigent smokers who did.”121121Mike Moore, The States Are Just Trying to Take Care of Sick Citizens and Protect Children, 83 A.B.A. J. 53, 53 (1997). CLOSE Similarly, the states’ strategy allowed them to avoid the challenges of class certification: “[I]nstead of millions of plaintiffs, there would only be one. Concerns over common issues of fact, which doomed earlier class actions to fail the predominance and superiority tests of federal and state class action statutes, would be finessed.”122122Sebok, supra note 117, at 2190. CLOSE Ultimately, forty-six states joined the Master Settlement Agreement, which required the tobacco companies to pay the states more than $200 billion over twenty-five years and to agree to an array of regulatory constraints.123123Hanoch Dagan & James J. White, Governments, Citizens, and Injurious Industries, 75 N.Y.U. L. Rev. 354, 371–73 (2000). Four states settled separately for approximately $36.8 billion, bringing the total to roughly $243 billion. W. Kip Vicusi, The Governmental Composition of the Insurance Costs of Smoking, 42 J.L. & Econ. 575, 577 (1999). CLOSE

Although the tobacco litigation is in some ways sui generis, it highlights several features that have helped fuel state litigation more broadly. First, the tobacco suits entailed an “unprecedented” degree of interstate cooperation among AGs, and their success made clear—to AGs as well as to potential defendants—the power of concerted multistate action.124124Ieyoub & Eisenberg, supra note 111, at 1860 (“The scope of interstate attorney general cooperation was unprecedented.”). CLOSE Second, the litigation demonstrated the value of cooperation between AGs and private attorneys. The states’ suits benefited from substantial assistance and financing from private lawyers—a pattern that has been repeated in many subsequent actions. By teaming up with private counsel (particularly those willing to work for a contingent fee), state AGs can expand their reach into litigation that would otherwise be prohibitively expensive or resource-intensive, or would require specialized expertise.125125See generally Margaret H. Lemos, Privatizing Public Litigation, 104 Geo. L.J. 515, 532–33, 538–46 (2016) (analyzing the costs and benefits of partnerships between public and private attorneys). CLOSE Third, the staggering size of the settlement—“the largest transfer of wealth as a result of litigation in the history of the human race”126126Michael DeBow, The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage, 31 Seton Hall L. Rev. 563, 564 (2001). Critics are quick to note that the settlement is being financed largely by smokers, who now pay more for cigarettes. Id.; see also Sebok, supra note 117, at 2181 (“As an executive at R.J. Reynolds ironically put it, ‘[T]here’s no doubt that the largest financial stakeholder in the [tobacco] industry is the state governments.’”). CLOSE—revealed just how lucrative state litigation could be. In the years since the tobacco litigation, state AGs have become adept at using large monetary recoveries to publicize the financial contributions they make to the state and its citizens.127127See Margaret H. Lemos & Max Minzner, For-Profit Public Enforcement, 127 Harv. L. Rev. 853, 855 & n.6 (2014) (offering examples); Lemos, supra note 110, at 732–33 & n.153 (same). CLOSE In many states, moreover, AG offices can retain certain types of financial recoveries, making litigation a self-sustaining endeavor.128128Lemos & Minzner, supra note 125, at 866–67 (describing “revolving fund[]” arrangements at the state level). CLOSE

Finally, the states’ legal theories in the tobacco cases created a template for future actions against industries that cause widespread harm to state citizens.129129See Ieyoub & Eisenberg, supra note 111, at 1862 (arguing that “it is [the states’] legal theories, together with the precedent of concerted attorney general action, that have the greatest implications for joint action on other fronts”). CLOSE The recoupment strategy alone is a powerful tool for recovering the states’ own expenses130130See Dagan & White, supra note 121, at 355–57 (focusing on the states’ restitutionary claims and describing similar claims against gun manufacturers and lead-paint makers). CLOSE and becomes more powerful still when combined with the states’ authority to sue as parens patriae to address harms to their citizens.131131See generally Ieyoub & Eisenberg, supra note 111, at 1862, 1875–83 (describing parens patriae standing as applied in the tobacco litigation and its potential for future suits). For a more critical take, see DeBow, supra note 124, at 565 (arguing that “the tobacco template could conceivably be applied to a wide range of industries in future government litigation—including, perhaps, makers of alcoholic beverages, fatty foods, and automobiles” and warning of a “substantial danger that state attorneys general and local government officials will regularly succumb to the temptation of the tobacco example, and will seek to achieve regulatory and tax outcomes through litigation . . . .”). CLOSE In the ongoing state efforts against opioid manufacturers, for example, the states have asserted various common law tort claims and are seeking recovery for harms to citizens and to their own proprietary interests, including “billions of dollars in damages to the State related to the excessive costs of healthcare, criminal justice, education, social services, lost productivity; and other economic losses as a direct result of the illicit use of these dangerous drugs caused by opioid diversion.”132132Complaint at 3, Ohio v. McKesson Corp., No. 1:12-cv-00185-RBW (Ohio Ct. Com. Pl. Feb. 26, 2018). CLOSE

Courts—state and federal—have also played a role in the growth of state AG litigation. Perhaps most importantly, they have taken an expansive view of state standing. In Massachusetts v. EPA, the Supreme Court cited Massachusetts’s “stake in protecting its quasi-sovereign interests” as a reason for “special solicitude” in the standing analysis.133133549 U.S. 497, 520 (2007). CLOSE Long before those words were penned, lower federal courts had held that states can sue as parens patriae to vindicate their citizens’ rights under the federal constitution, even in circumstances in which the citizens themselves would lack standing. For instance, whereas the rule of City of Los Angeles v. Lyons makes it difficult for private parties to seek injunctive relief from sporadic instances of official misconduct,13413446 U.S. 95, 105–07, 110 (1983) (holding that person subjected to illegal chokehold by police lacked standing to seek an injunction, as there was no guarantee that the plaintiff would be subjected to similar acts by police in the future); see also O’Shea v. Littleton, 414 U.S. 488, 490, 503–04 (1974) (denying that a case or controversy existed regarding discriminatory law enforcement practices on similar grounds). CLOSE courts have permitted states to sue in equivalent cases.135135See, e.g., Pennsylvania v. Porter, 659 F.2d 306, 314–15 (3d Cir. 1981) (holding that state had standing as parens patriae to enjoin police misconduct while noting that “many individual victims may be unable to show the likelihood of future violations of their rights”). Courts have reasoned that, because the state represents all of its citizens, it will typically have little trouble establishing that a harm that has occurred in the past will likely befall some citizens in the future. Id. This sort of probabilistic reasoning generally does not work for private litigants. See generally Summers v. Earth Island Inst., 555 U.S. 488, 491, 494–501 (2009) (denying standing to a private environmental organization that had asserted a statistical certainty that some of its members would be injured by some of the challenged Forest Service actions). We suspect the difference is that cases like O’Shea and Lyons are grounded importantly in concerns about judicial intervention in state and local governance—a concern that is radically less compelling when the state itself is the plaintiff. CLOSE Similarly, as noted above, courts recognized states’ standing to sue the tobacco companies to recoup the expenses they had incurred as a result of smoking-related illnesses suffered by their citizens. When unions and other private organizations asserted similar claims, however, courts ruled that their injuries were too remote to establish standing.136136John C. Coffee, Jr., “When Smoke Gets in Your Eyes”: Myth and Reality About the Synthesis of Private Counsel and Public Client, 51 DePaul L. Rev. 241, 241–42 (2001). CLOSE

Representative suits by states also enjoy a host of other procedural advantages over their closest private analogues, class actions. Whereas class actions are governed by a complex set of procedural requirements designed to promote judicial economy and protect the interests of absent class members, courts have declined to apply those rules to similar suits by states—even as they have tightened up the requirements for private suits.137137See Lemos, State Enforcement, supra note 110, at 500–10 (detailing the procedural requirements for private class actions versus the requirements for similar suits brought by the State). CLOSE Courts have likewise refused to subject parens patriae suits to the jurisdictional requirements of the Class Action Fairness Act138138Mississippi v. AU Optronics Corp., 571 U.S. 161, 164 (2014); cf. People v. Greenberg, 946 N.Y.S.2d 1, 7 (App. Div. 2012) (holding that suit by state AG was exempt from similar jurisdictional rules governing private securities actions). CLOSE or to mandatory arbitration clauses.139139See, e.g., EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (holding that arbitration agreement between employee and employer did not bar EEOC from bringing enforcement action). CLOSE And when faced with simultaneous suits by states and by private class counsel, courts have often denied certification to the private class action on the ground that the state suit is the “superior” method of adjudication.140140See Lemos, State Enforcement, supra note 110, at 505–06 (collecting cases). CLOSE As one court put it, “[T]he State should be the preferred representative” of its citizens.141141Sage v. Appalachian Oil Co., Inc., No. 3:92-CV-176, 2:93-CV-229, 1994 WL 637443, at \*2 (E.D. Tenn. Sept. 7, 1994). CLOSE

It is not surprising, then, that state litigation activity has increased markedly in both volume and visibility in recent decades. For example, the number of Supreme Court cases in which states are parties has shot up since the 1980s—spurred in part by the creation in 1982 of the National Association of Attorneys General (NAAG) Supreme Court Project.142142See Douglas Ross, Safeguarding Our Federalism: Lessons for the States from the Supreme Court, 45 Pub. Admin. Rev. 723, 727–28 (1985) (describing NAAG’s genesis and functions). Another significant institutional response was the creation of the State and Local Legal Center (SLLC), which files amicus briefs on behalf of member associations. Id. at 728. CLOSE Even more notable is the increase in states’ filings as amici. Such filings are not command performances but represent AGs’ discretionary decisions to devote limited resources to Supreme Court advocacy.143143See Clayton, supra note 103, at 544 (“[T]he decision to participate as amicus curiae is determined largely by the personal interests and felt political pressures on individual attorneys general.”). CLOSE The most comprehensive study of state litigation in the Supreme Court reports that since 1989 states have “become exceptionally active amicus curiae participants. They account for 20% of all certiorari petitions accompanied by an amicus brief and 18% of the amicus briefs on the merits.”144144Waltenburg & Swinford, supra note 104, at 48. If anything, the number of state briefs filed understates the level of state activity. Thanks in large part to NAAG’s coordination efforts, states frequently band together on amicus briefs. A study of merits-stage state amicus briefs found that the average number of joining states jumped from 2.4 in the 1970s to 13.9 in the 1990s. Clayton & McGuire, supra note 105, at 24–25; see also Waltenburg & Swinford, supra note 104, at 48 (“NAAG’s focus on the coordination of state amicus activity has resulted in substantial levels of joining behavior. Accordingly, where it is rare to find more than two amici joining together on a pre-certiorari amicus brief, on average six states coalesce . . . .”). A more recent study of state amicus filings reveals similar joining behavior at the certiorari stage: using data on state certiorari filings compiled by Dan Schweitzer at NAAG, Greg Goelzhauser and Nicole Vouvalis report that “[d]uring the 2001–2009 terms, state-sponsored amicus briefs urging review in state-filed cases were joined by an average of about 18 states, and only 5 of the 88 briefs filed were signed by a single state.” Greg Goelzhauser & Nicole Vouvalis, State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court, 41 Am. Pol. Res. 819, 825 (2013). One veteran state litigator attributes these changes in part to technological advances, noting that email has made it far easier for dispersed AGs’ offices to share drafts. See Letter from Tom Barnico, Dir. AG Program, Boston College Law School, to authors (July 20, 2018) (on file with authors). CLOSE Today, states’ participation in the Supreme Court—both as direct parties and as amici—is second only to that of the federal government.145145Margaret H. Lemos & Kevin M. Quinn, Litigating State Interests: Attorneys General as Amici, 90 N.Y.U. L. Rev. 1229, 1235 (2015). CLOSE

The Supreme Court may be the most prominent venue for state litigation, but it is hardly the only one. States also have become more frequent litigants in the state and lower federal courts. Texas’s Greg Abbott sued the Obama Administration “at least 44 times”;146146Dan Frosch & Jacob Gershman, Abbott’s Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration, Wall St. J. (June 24, 2016), https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976 [https://perma.cc/D87N-QWXA]. CLOSE AG Maura Healy of Massachusetts reportedly “led or joined dozens of lawsuits and legal briefs” challenging the Trump Administration in 2017 alone.147147Steve LeBlanc & Bob Salsberg, Massachusetts’ Maura Healey Helping Lead Effort to Litigate Trump, Boston.com (Dec. 18, 2017), https://www.boston.com/news/politics/2017/12/18/massachusetts-maura-healey-helping-lead-effort-to-litigate-trump [https://perma.cc/9M9B-GA4X] CLOSE

And states are now far more likely to band together in litigation in order to maximize their impact. For example, Paul Nolette found a marked increase in “coordinated AG litigation”—defined as filed lawsuits as well as preliminary investigations involving coordinated activity by at least two AGs—from 1980 to 2013. Professor Nolette reports: “From a consistently low number of one to four cases a year throughout the 1980s, the quantity of multistate cases . . . gradually increased, reaching twenty for the first time in 1996, thirty in 2002, and forty in 2008.”148148Nolette, supra note 13, at 21 app. at 221; see also id. fig.2.1. CLOSE The number of AGs participating in such cases also has grown, with a greater proportion of multistate cases involving sixteen or more states in recent years.149149Id. at 21–22 & fig.2.2. CLOSE As Nolette explains, “Litigation involving over half of the nation’s AGs, once an unusual event, represents over 40% of all the multistate cases conducted since 2000.”150150Id. at 22. CLOSE For many observers, AG activism amounts to “a major shift in how political fights are waged.”151151Frosch & Gershman, supra note 144. CLOSE

B. MAPPING STATE LITIGATION

We know states are doing more litigation, but the aggregate numbers can only tell us so much. Although discussion of high-profile state litigation sometimes treats it as a unitary category, that perspective obscures important variation within the genre. This section maps state litigation into several discrete types, based on the nature of the claims asserted. We begin with the kinds of cases observers typically associate with state public-law litigation—cases in which states are pitted against the federal government. These include (1) claims that federal government action exceeds the limits of national regulatory authority, as in the state challenges to the ACA; (2) claims that federal government action violates aspects of the national separation of powers, as in state challenges to President Obama’s immigration policies; and (3) claims that federal government action violates individual federal rights, as in the state lawsuits against President Trump’s travel bans. It bears emphasis, however, that states can also shape policy outside their borders by targeting primary behavior directly, in suits against private actors alleging violations of either (4) state or (5) federal law.

To be sure, many prominent lawsuits will fall within more than one of these categories. For example, challenges to President Trump’s travel bans have sometimes included both claims that the bans violate individual rights and claims that the President has exceeded the scope of his lawful executive authority.152152See Complaint at 11–12, Washington v. Trump, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Jan. 3, 2017) (alleging individual rights violations as well as violations of the Administrative Procedure Act (APA)). CLOSE And state amicus briefs concerning the validity of the federal Defense of Marriage Act (DOMA) raised both federalism and individual rights arguments.153153See Brief Addressing the Merits of the State of Indiana and 16 Other States as Amicus Curiae in Support of the Bipartisan Legal Advocacy Group of the U.S. House of Representatives at 4–8, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 390993 [hereinafter Windsor Pro-DOMA States’ Brief] (arguing that neither federalism nor equal protection analysis supported heightened scrutiny of DOMA); Brief on the Merits of the States of New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia as Amici Curiae in Support of Respondent at 3, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 840031 [hereinafter Windsor Anti-DOMA States’ Brief] (arguing that DOMA denied equal protection and infringed states’ authority to regulate marriage). There is, moreover, important diversity within categories. As we discuss further below, the relevant legal constraints in each of the first three categories—federalism and separation-of-powers principles and individual rights—may be either constitutional or statutory in character. We do not distinguish between constitutional and statutory claims because we think that both constitutional and statutory norms serve constitutive functions in many instances. See generally Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 464 (2007) (discussing the constitutive role of statutory and other non-entrenched norms in structuring the government and identifying individual rights). CLOSE

Each category also includes legal claims and arguments asserted by states in a variety of settings—including, for example, not only lawsuits but also amicus filings by state AGs. We define our categories by the legal claim asserted, not the form in which that claim is advanced. And, while we have framed our categories as challenges to the legality of either federal governmental or private action, we also include states’ assertion of arguments—often in opposition to other states—affirming the legality of those actions.154154See, e.g., Windsor Pro-DOMA States’ Brief, supra note 151, at 2–3. CLOSE

1. Federal Power Claims.—This category contains claims that federal action exceeds the legal limits of national authority. The paradigmatic claims are those about the reach of Congress’s enumerated powers.155155These claims almost always concern the Commerce Clause—the catch-all, default power that sustains most federal legislation. But occasionally they involve other powers, such as Congress’s power to enforce the Reconstruction Amendments. City of Boerne v. Flores, 521 U.S. 507, 512 (1997). Boerne was a private claim brought against a local government by church officials under the federal Religious Freedom Restoration Act (RFRA). But the case drew state amici filings on both sides. See Brief of the States of Maryland, Connecticut, Massachusetts, and New York as Amici Curiae in Support of Respondent, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 10282 (defending RFRA); Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, the Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam, and the Virgin Islands in Support of Petitioner, City of Boerne, Texas, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 695519 (attacking RFRA). And Ohio Solicitor Jeffrey Sutton was given oral argument time to argue against RFRA’s constitutionality. CLOSE For example, minutes after President Obama signed the ACA, thirteen states filed suit arguing that Congress lacked power under the Commerce Clause to require individuals to buy health insurance.15615614 States Sue to Block Health Care Law, CNN (Mar. 23, 2010), http://www.cnn.com/2010/CRIME/03/23/health.care.lawsuit/index.html [https://perma.cc/3UPJ-8C8H]; see generally NFIB v. Sebelius, 567 U.S. 519, 547–58 (2012) (opinion of Roberts, C.J.) (accepting those arguments). CLOSE Sometimes states raise these sorts of claims as a preemptive strike on federal legislation, as in the ACA case. Perhaps more often, these issues are raised by private parties as defenses to the imposition of federal requirements or penalties,157157In United States v. Lopez, 514 U.S. 549 (1995), for example, a criminal defendant prosecuted for possessing a firearm within 1,000 feet of a school argued (successfully) that the federal prohibition did not regulate interstate commerce. Id. at 551–52. In United States v. Morrison, 529 U.S. 598 (2000), an individual defendant in a civil case argued (again successfully) that the federal private right of action for victims of “gender-motivated violence” exceeded Congress’s power under both the Commerce Clause and Section Five of the Fourteenth Amendment. Id. at 601–02, 604. CLOSE or in suits for a declaratory judgment or an injunction seeking to bar enforcement of federal law.158158See, e.g., Gonzales v. Raich, 545 U.S. 1, 15 (2005) (addressing claim by users of medicinal marijuana seeking declaratory and injunctive relief that the federal Controlled Substances Act, as applied to them, exceeded Congress’s Commerce power). CLOSE States then come in as amici—sometimes on both sides of the case.159159In Lopez, several states filed in support of the Gun Free School Zones Act. See Brief for the States of Ohio, New York, and the District of Columbia as Amici Curiae in Support of Petitioner, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007793. No state filed in support of Mr. Lopez, but he did get a brief filed by several national organizations representing state and local governments. See Brief of the National Conference of State Legislatures, National Governors’ Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as Amici Curiae in Support of Respondent at 13, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007619 (arguing that “the Commerce Clause does not authorize enactment of the Gun Free School Zones Act”). CLOSE

These cases are high visibility but, we want to suggest, of limited practical importance. They’re just not very promising, given the Court’s capacious understanding of national enumerated powers.160160See generally Raich, 514 U.S. at 15–19; Wickard v. Filburn, 317 U.S. 111, 118–29 (1942). CLOSE The Commerce Clause is very, very broad—and even where it’s not broad enough, there is the Necessary and Proper Clause to fill most gaps.161161See, e.g., United States v. Comstock, 560 U.S. 126, 130 (2010) (upholding broad federal power to imprison sexual predators under the Necessary and Proper Clause); Raich, 545 U.S. at 34–36 (Scalia, J., concurring in the judgment) (arguing that the Necessary and Proper Clause allows Congress to regulate noncommercial activity that affects commerce). CLOSE (In the healthcare case, the Taxing Clause saved the day for the ACA.)162162See NFIB, 567 U.S. at 574 (upholding the ACA under the Taxing Clause). CLOSE We may see occasional wins for states here, but they’re likely—as in Lopez—to be mostly symbolic in their importance.163163See, e.g., Richard H. Fallon, Jr., The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69 U. Chi. L. Rev. 429, 476–77 (2002); Ernest A. Young, Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich, 2005 Sup. Ct. Rev. at 1, 39–40 (“A roll-back of the national regulatory state was never in the cards; there are simply too many precedential, institutional, and political constraints pressing the Court to uphold relatively broad federal power.”). CLOSE

The more significant cases are those in which Congress seeks to enlist state officials to implement federal law but arguably lacks power to do so. Most federal programs rely on state and local officials for enforcement and implementation. Polarization makes states governed by the party that is out of power in Washington particularly likely to want to opt out of such programs. Under the Anti-Commandeering Doctrine, Congress can’t require state officials to implement federal policy.164164See Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 188 (1992). CLOSE Instead, Congress typically conditions federal benefits (usually money) on state cooperation.165165See generally Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1918–19, 1923–31 (1995) (noting the broad potential of conditional spending to circumvent limits on Congress’s enumerated powers). The leading case remains South Dakota v. Dole, 483 U.S. 203 (1987). CLOSE Challengers therefore argue that federal spending conditions are insufficiently clear or amount to federal coercion, as in the Medicaid Expansion portion of the healthcare case166166See NFIB, 567 U.S. at 575. CLOSE or in the current challenges to the Trump order on sanctuary cities.167167See, e.g., City of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507 (N.D. Cal. Apr. 25, 2017). CLOSE Alternatively, states’ claims may focus on whether certain federal requirements really amount to commandeering.168168For example, a thorny question in the sanctuary cities litigation is the extent to which local officials are simply being asked to cooperate with federal law enforcement in the same way any private citizen would have to or are instead being “commandeered” into enforcing federal immigration policy. See, e.g., City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 597–99 (E.D. Pa. 2017); Alison Frankel, DOJ Wants to Change the Constitutional Conversation in Sanctuary Cities Cases, Reuters (Mar. 7, 2018), https://www.reuters.com/article/us-otc-sanctuary/doj-wants-to-change-the-constitutional-conversation-in-sanctuary-cities-cases-idUSKCN1GJ362 [https://perma.cc/XK63-P8YQ]. CLOSE

This latter class of cases operates within a cooperative federalism context rather than a model of federalism where states have their own exclusive sphere of regulatory jurisdiction outside of federal authority.169169See, e.g., Martin H. Redish, The Constitution as Political Structure 26 (1995) (contrasting “dual” and “cooperative” federalism); Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663, 665 (2001) (categorizing congressional acts that “invite state agencies to implement federal law” as “cooperative federalism” programs). CLOSE But rather than seeking to control the content of federal policy, these cases generally try to preserve states’ ability to opt out. The Printz litigation that established the anti-commandeering principle for state executive officers did not try to strike down the federal Brady Act; it simply protected the right of state and local officials not to participate in its enforcement.170170See Printz, 521 U.S. at 933–34. CLOSE Likewise, the Medicaid expansion decision established an opt-out right for states.171171See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585–88 (2012) (opinion of Roberts, C.J.) (stating that states are free to opt out of the Medicaid expansion while remaining within the original Medicaid program). In some circumstances a robust opt-out right could kill a federal scheme that required cooperation, and at that extreme the difference between trying to limit the scope of federal policy and preserving a right of opt-out dissolves. This may have been Justice Story’s hope, for example, in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). Although Prigg upheld Congress’s power to enact the Fugitive Slave Law and broadly construed its preemptive force, Story may have hoped that the Court’s holding that Congress could not require state and local officials to participate in the law’s enforcement would gut its effectiveness. See id. at 532, 598, 672–73; David C. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, 245 n.54 (1985). Unfortunately, he turned out to be wrong about that. See Paul Finkelman, Sorting Out Prigg v. Pennsylvania, 24 Rutgers L.J. 605, 664 (1993). CLOSE

Finally, an important class of federal-power claims involves state immunities from federal regulation. These claims arise defensively, typically in response to claims by private litigants.172172The convoluted saga of attempts to avoid state sovereign immunity also includes cases in which individuals with financial claims against states enlist various other sovereign entities, including state governments, to prosecute those claims on the individuals’ behalf. These efforts have not generally had much success. See, e.g., New Hampshire v. Louisiana, 108 U.S. 76, 88–89 (1883) (holding that New Hampshire could not pursue financial claims against another state where New Hampshire had no interest of its own). CLOSE For a brief period during the late 1970s and early 1980s, state and local governments asserted immunities from federal regulation itself under the now-defunct National League of Cities doctrine.173173See Nat’l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding that, at least in some circumstances, Congress may not regulate state governmental entities performing traditional governmental functions), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985); see also Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 Sup. Ct. Rev. at 1, 31–32 (discussing claims under National League of Cities as a species of “immunity federalism”). CLOSE More enduring principles shield state governments from certain judicial remedies when they violate federal requirements. A line of cases stretching back over a century—but intensifying under the Rehnquist Court—recognized a broad principle of state sovereign immunity shielding states from damages claims brought by individuals for violations of federal law.174174See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996); Hans v. Louisiana, 134 U.S. 1, 18 (1890). CLOSE More recent cases have constricted federal civil rights claims against state and local officers for violations of federal statutory requirements.175175See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (Federal Educational Rights and Privacy Act (FERPA) does not create enforceable private rights under 42 U.S.C. § 1983); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (concluding no implied right of action for disparate impact discrimination under Title VI). CLOSE States have participated in these cases as both party defendants and extensively as amici (again, often on both sides).176176See, e.g., Brief of Amicus Curiae States of California et al., Supporting the State of Florida, et al., at 4, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (No. 94-12), 1995 WL 17008502 (May 3, 1995) (contending that a statute mandating state participation in federal programs was inconsistent with principles of federalism). CLOSE

These immunity cases differ from most of our examples of state public-law litigation in that they arise defensively—they are not, as it were, examples of AGs like Texas’s Greg Abbott going into work and suing the federal government. Nonetheless, they do seem part of a systematic effort to expand protections for state and local governments under federal law. It seems fair to view Jeffrey Sutton’s successful advocacy of an expansive view of state sovereign immunity in cases like University of Alabama v. Garrett177177531 U.S. 356 (2001). CLOSE and Kimel v. Florida Board of Regents,178178528 U.S. 62 (2000). Judge Sutton, then in private practice at Jones Day, argued both Garrett and Kimel on behalf of the state defendants. Id.; Garrett, 531 U.S. at 356. CLOSE for example, as an extension of his entrepreneurial tenure as State Solicitor of Ohio.179179See also Alexander, 532 U.S. at 276, in which Judge Sutton, in private practice, appeared as counsel of record on behalf of the State of Alabama successfully opposing recognition of a private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964. CLOSE

2. Federal Separation of Powers Claims.—It’s less intuitive to think of States making separation of powers arguments, but one can find examples reaching way back: in 1970, for example, Massachusetts filed an unsuccessful original action in the Supreme Court challenging the constitutionality of the Vietnam War.180180Commonwealth of Massachusetts v. Laird, 400 U.S. 886 (1970); see also id. at 886 (Douglas, J., dissenting) (noting that Massachusetts had authorized the suit by a specific legislative enactment). CLOSE Separation of powers claims have become far more prevalent over the past decade or so. As we’ve noted, polarization tends to cause gridlock, even with a nominally unified government in Washington. And gridlock encourages the President to reach for his pen and phone to get things done.181181See CNN, Obama-I’ve Got a Pen and a Phone, YouTube, https://www.youtube.com/watch?v=G6tOgF\_w-yI [https://perma.cc/AV7E-4AU3] (recording a speech by President Obama, wherein he expressed frustration with congressional gridlock and his intent to take unilateral action). CLOSE Resulting challenges sound in separation of powers, not federalism. But the litigation is motivated by states that are either seeking to protect their own autonomy or to find a way to participate in a national lawmaking process that has shifted from Congress to the Executive Branch.

United States v. Texas—the immigration case—is a good example.182182See 136 S. Ct. 2271, 2272 (2016) (affirming the injunction of the DAPA program and DACA program expansions in Texas v. United States, 86 F. Supp. 3d 591, 606, 678 (S.D. Tex. 2015)). CLOSE When President Obama extended lawful presence to millions of additional undocumented aliens, it was hard to argue that the deferred-action programs (Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA)) fell outside the authority of the national government as a whole. Instead, state challengers contended that the President lacked the authority to—as Obama himself put it—“change the law” without going to Congress.183183Brief for the State Respondents, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1213267, at \*1. CLOSE As was clear to all involved, Congress’s general intransigence on the immigration issue meant that a decision against executive authority would be—for all intents and purposes—a decision against federal authority more generally.

A separate set of process arguments are statutory but serve a constitutional purpose. Again, the immigration case is a good example. Texas’s successful argument in the district court was simply that Obama’s policy change had failed to comply with the Administrative Procedure Act (APA) because it had not gone through notice and comment. Notice and comment isn’t an insurmountable hurdle for agency lawmaking, but it does delay implementation of national policy. More importantly, it allows states—like anybody else—to insist on direct input into the federal lawmaking process. It allows states to be heard at the agency just as they are supposedly heard in Congress, although without any special status vis-à-vis other participants. Provisions in the APA for notice and comment, as well as for judicial review of process failures at the agency, effectively operate as separation of powers-type constraints on the administrative state.184184For assessments of the so-called administrative safeguards of federalism, compare Gillian E. Metzger, Administrative Law as the New Federalism, 57 Duke L.J. 2023, 2028, 2101–09 (2008) (asserting that administrative law is well-suited to preserving federalism), with Stuart M. Benjamin & Ernest A. Young, Tennis with the Net Down: Administrative Federalism Without Congress, 57 Duke L.J. 2111, 2114, 2145–54 (2008) (arguing that federalism requires insistence that Congress play the primary role). CLOSE

The separation of powers principle that Congress—not the President—makes the law also generates a second kind of challenge to federal action. That challenge argues that executive action—like the immigration order or the travel ban or the EPA’s clean power plan—is substantively inconsistent with the underlying statute.185185See, e.g., Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (considering challenge by twenty-three states to EPA rule regulating air pollutants on the ground that the agency did not consider costs of regulation as required by statute). CLOSE Polarization can cause such claims to multiply. The longer gridlock persists, the more likely that new executive initiatives will stray from the obvious purview of the original legislation. So, for example, states challenged the Obama Administration’s transgender bathroom guidance on the ground that its definition of gender discrimination differs from that of the Congress that enacted Title IX of the Civil Rights Act.186186See Texas v. United States, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016) (granting preliminary injunction on behalf of thirteen states and other plaintiffs). CLOSE Likewise, when federal agencies promulgated broad “preemption preambles” during the George W. Bush Administration, a coalition of states, as well as a state governmental association, filed amicus briefs arguing that these preambles exceeded the agencies’ statutory mandate.187187See Brief of Amici Curiae Vermont, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Virginia, Washington, Wisconsin, and Wyoming in Support of Respondent at 4, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249); Brief of the National Conference of State Legislatures as Amicus Curiae Supporting Respondents at 5, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_07\_08\_06\_1249\_RespondentAmCuNatlConfofStLegis.authcheckdam.pdf [https://perma.cc/2BEW-E7YX]; see also Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae Supporting Respondent at 6, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_07\_08\_06\_1249\_RespondentAmCuCtrStEnforcementAntitrustandConsProtLaws.authcheckdam.pdf [https://perma.cc/UD4H-NKFK]. On the preemption preambles, see Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DEPAUL L.REV. 227 (2007). CLOSE

A more difficult class of cases involves litigation challenging federal government inaction. Federal administrative law generally presumes that agency inaction—at least in the form of agency refusals to initiate enforcement proceedings—are not subject to judicial review.188188Heckler v. Chaney, 470 U.S. 821, 832 (1985). CLOSE But this presumption can sometimes be overcome, as it was by Massachusetts v. EPA’s holding that states could challenge the agency’s denial of rulemaking petitions authorized by statute.189189549 U.S. 497, 528 (2007). CLOSE Given Congress’s continued failure to act on climate change, “EPA regulation pursuant to [Massachusetts v. EPA] . . . has served as the core of the US federal efforts on climate change.”190190Hari M. Osofsky & Jacqueline Peel, The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future? 30 Env’t & Plan. L.J. 303, 310 (2013). CLOSE And where an incoming administration seeks to overturn previous executive action—thus arguably returning to the status quo ante of inaction—states may find greater leverage to challenge this departure from the prior baseline. Recent litigation over the Trump Administration’s “repeal” of President Obama’s DACA policy, for example, has gotten significant traction by arguing that the repeal rested on improper reasons.191191See, e.g., Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 407, 438 (E.D.N.Y. 2018) (granting preliminary injunction against repeal of DACA program in suit by New York and fifteen other states). Similar litigation challenges the Trump Administration’s effort to overturn President Obama’s “clean power plan.” See, e.g., Richard Valdmanis, States Challenge Trump Over Clean Power Plan, Sci. Am. (Apr. 6, 2017), https://www.scientificamerican.com/article/states-challenge-trump-over-clean-power-plan/ [https://perma.cc/7JK8-A3TZ]. CLOSE State litigation to enforce the Executive’s statutory obligations can thus force adoption and continuation of executive policies even where national-level gridlock would otherwise foreclose them.

3. Federal Rights Cases.—Some state challenges to federal action rely not just on structural principles but also on individual rights arguments. In the travel ban cases, for instance, state governments assert parens patriae standing to raise the rights of their citizens. Sometimes states assert proprietary interests as well; some of the state plaintiffs in the travel ban cases argued that their state universities had been deprived of faculty and students from abroad.192192See Hawaii v. Trump, 859 F.3d 741, 765 (9th Cir. 2017), rev’d on other grounds, 138 S. Ct. 2392 (2018) (“EO2 harms the State’s interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body.”). CLOSE And sometimes the states participate as amici to express a view on the scope of federal individual rights, as in the same-sex marriage cases.193193See supra notes 10 (Obergefell briefs) and 151 (Windsor briefs). CLOSE

This category also includes state litigation activity contesting federal rights. For example, numerous states have participated as amici opposing Equal Protection challenges to affirmative action in state universities.194194See Lemos & Quinn, supra note 138, at 1257. CLOSE It is even more common to see states opposing rights claims by criminal defendants.195195See id. at 1255–56 (observing that many Republican AG briefs filed in criminal procedure cases are not opposed by state briefs favoring the criminal defendant). CLOSE Similarly, states often play defense against federal civil rights claims brought by private litigants. (These two categories are often related, as many federal civil rights claims involve allegations of improper actions by state or local law enforcement.) In this latter set of cases, state governments are often the defendants; even where they are not (in the many cases against municipalities and their officers, for instance), they may well play a prominent role as amici.196196See, e.g., City of West Covina v. Perkins, 525 U.S. 234, 235 (1999) (Ohio SG Jeffrey Sutton, who had filed an amicus brief on behalf of twenty-nine states, arguing on the city’s behalf by leave of court). CLOSE And in all such cases, other states may support the party asserting federal rights as amici. When he was AG of Minnesota in the early 1960s, for example, Vice President Walter Mondale filed a brief on behalf of twenty-two states urging the Supreme Court to expand the right to counsel in Gideon v. Wainwright.197197372 U.S. 335 (1963). See Yale Kamisar, Gideon v. Wainwright and Related Matters: An Armchair Discussion Between Professor Yale Kamisar and Vice President Walter Mondale, 32 L. & Ineq. 207, 207 (2014) (discussing Mondale’s role in Gideon). CLOSE

As we discuss in more detail in the following Part, these rights cases create the potential for conflicts among states. Whenever state AGs support claims of constitutional rights, they are—in a very real sense—arguing against their own state’s power. More than that, they are seeking to impose a particular rule on all states. Like the statutory challenges described above, then, individual rights cases often involve interstate conflicts over control of federal policy. Those conflicts, moreover, can often be coded as red versus blue. And because they frequently involve “hot button” issues, these cases raise particular risks of politicizing the AG’s office.

4. State Enforcement of State Law that Creates National Regulation.—As we have already noted, the tobacco litigation of the 1990s was a critical watershed for state public-law litigation. To be sure, states have sought to enforce their own laws in ways that affect conditions outside their jurisdictions for a very long time.198198See, e.g., Georgia v. Tenn. Copper Co., 206 U.S. 230, 231, 236 (1907) (hearing the State of Georgia’s public nuisance claim against Tennessee copper companies for discharging noxious gases that crossed the border into Georgia). CLOSE And local governments have also been active in this sort of litigation—for example, in suits against the firearms industry during the 1990s.199199See, e.g., Timothy D. Lytton, Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits, 86 Texas L. Rev. 1837, 1843 (2008) (“By the late 1990s, municipalities began suing the gun industry to recover the costs of law enforcement and emergency medical services related to gun violence.”). CLOSE But the most successful efforts have been undertaken by states. Most observers seem to agree that the tobacco litigation ushered in a new era of state activism that then spread to other regulatory areas and types of litigation.200200See, e.g., Nolette, supra note 13, at 23–24. CLOSE

The tobacco litigation and its contemporary analogs share two related features that differentiate them from ordinary state enforcement of state law against private parties. The first is that rather than a single state suing a defendant within its jurisdiction for torts that harmed its citizens, the tobacco litigation featured a broad coalition of states—ultimately including *all* of them.201201Forty-six states, the District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, and the Virgin Islands, joined the Master Settlement Agreement with the tobacco companies. Four other states—Florida, Minnesota, Mississippi, and Texas—settled their cases separately. Supra note 121 and accompanying text; see also NAAG, supra note 90, at 388. CLOSE And the Master Settlement Agreement that ended the litigation eventually came to include nearly all manufacturers of tobacco in the American market. The litigation thus aimed at global peace—that is, a comprehensive settlement among all the relevant players.

The second point is that the tobacco settlement essentially created a nationwide regulatory regime governing cigarettes.202202Nolette, supra note 13, at 24. The tobacco companies, along with NAAG, petitioned Congress for a national legislative settlement, but no such legislation was ever enacted. Dagan & White, supra note 121, at 369–70. CLOSE It includes, for example, not only payments by the defendants for past harms but also agreements to strengthen warning labels and restrictions on advertising. Because it applies throughout the United States and governs the activities of virtually all tobacco companies doing business here, one could fairly say that it might as well be a federal law.

Similar multistate litigation efforts have imposed quasi-regulatory regimes via comprehensive settlements with major industry players in the pharmaceutical and other industries.203203See Nolette, supra note 13, at 49–59 (offering a detailed account of the pharmaceutical litigation); id. at 25 tbl.2.1 (listing the top fifteen industries targeted in multistate litigation). CLOSE We expect this phenomenon will continue. In the fall of 2017, for example, the Commonwealth of Massachusetts sued the credit-reporting company Equifax following announcement of a data breach that allegedly affected over 140 million consumers.204204See Sarah T. Reise, State and Local Governments Move Swiftly to Sue Equifax, Ballard Spahr Consumer Fin. Monitor (Oct. 3, 2017), https://www.consumerfinancemonitor.com/2017/10/03/state-and-local-governments-move-swiftly-to-sue-equifax/ [https://perma.cc/K24M-P9W7]. CLOSE Massachusetts brought the suit under its own data privacy statute, as well as a more general consumer protection statute. If other states and credit reporting firms are drawn into this litigation, one might well see another comprehensive settlement with terms that would effectively act as, and possibly obviate, national regulation.

5. State Enforcement of Federal Law.—State AGs also can, and do, enforce many aspects of federal law. State enforcement of federal law is pervasive, from antitrust to consumer protection to environmental law.205205See generally Lemos, State Enforcement, supra note 105, at 707–17 (describing the contours of state enforcement of federal laws in a variety of areas). CLOSE As we explained above, this can happen either through explicit statutory authorization or through states relying on more general private rights of action, often asserting parens patriae standing to sue on behalf of their citizens.206206See supra notes 105–10 and accompanying text. CLOSE

On its face, this category of cases may not seem particularly empowering for states, given that AGs are merely enforcing policies that already have been written into federal statutes and regulations. Yet the level of enforcement can have profound consequences for what the law means in practice, and for how regulated entities view their options. That is true even when the law’s substantive requirements are perfectly clear: higher levels of enforcement are likely to increase deterrence by raising the expected sanction for violations.207207See Lemos, State Enforcement, supra note 110, at 737–40 (describing the power of enforcement). CLOSE And when the relevant statutory or regulatory commands are somewhat less than pellucid—as is often the case—state AGs can shape policy on a national scale by pushing particular interpretations of vague or ambiguous federal laws.208208See, e.g., id. at 739–40 (describing how state enforcement has molded federal antitrust doctrine). CLOSE

Thus, the most interesting instances for our purposes are those where state enforcement reflects a disagreement with national enforcement policy. The most salient recent example was Arizona’s effort to ramp up enforcement of federal immigration laws in response to what it saw as an abdication by federal authorities.209209See Arizona v. United States, 567 U.S. 387 (2012) (holding much of Arizona’s effort preempted). CLOSE Another example, with a different political valence, would be Eliot Spitzer’s effort in New York to enforce federal environmental laws more aggressively than the federal EPA had previously been willing to do.210210See Lemos, State Enforcement, supra note 110, at 743–44 (explaining that the EPA was embroiled with lawsuits at the time but that it adopted Spitzer’s legal strategy within a few weeks, bringing a suit against power plants that New York intervened in). We leave to one side here the converse scenario, which occurs when states refuse to enforce federal law or repeal state laws that parallel federal laws. These state decisions may also significantly undermine or affect federal policy. For example, Colorado’s decision to end state prohibition of most marijuana use made it significantly more difficult for federal authorities to further national drug policies in that state. See generally Ernest A. Young, Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction, 65 Case W. Res. L. Rev. 769, 774–76 (2015). CLOSE

Like the multistate cases described above, state enforcement of federal law can create the equivalent of regulatory policy nationwide. Given the interconnectedness of the national market, it’s hard to confine the effects of state enforcement within a particular state’s borders. If New York aggressively pursues Microsoft, Washington may feel aggrieved. And if pro-environment states undermine the fortunes of big oil companies, the oil-producing states may share in the consequences.

#### Congress and the Executive will change policy to align, even when there’s gridlock

Margaret H. Lemos 18, Robert G. Seaks Distinguished Professor of Law at Duke University, JD from New York University, AB from Brown University, Alston & Bird Professor of Law at Duke University, JD from Harvard University Law School, BA in Government and English from Dartmouth College, “State Public-Law Litigation in an Age of Polarization”, Texas Law Review, Volume 97, Issue 1, https://texaslawreview.org/state-public-law-litigation-in-an-age-of-polarization/

Meanwhile, new provisions of federal law facilitated state litigation by authorizing state AGs to enforce federal statutes, often by suing as parens patriae to protect the rights of state citizens.112112See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, sec. 301, § 4(c), 90 Stat. 1383, 1394 (1976) (codified at 15 U.S.C. § 15(c) (2012)) (authorizing states to sue as parens patriae in federal court on behalf of their citizens to secure treble damages for a variety of federal antitrust violations); see also Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 712 (2011) (“As state attorneys general assumed new prominence, provisions for state enforcement began to proliferate in Congress. New provisions have been enacted by virtually every Congress in the last two decades.”). CLOSE The common law doctrine of parens patriae dates back to early English practice, in which the King exercised certain royal prerogatives as “parent of the country.”113113Richard P. Ieyoub & Theodore Eisenberg, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae, 74 Tul. L. Rev. 1859, 1863 (2000); Jack Ratliff, Parens Patriae: An Overview, 74 Tul. L. Rev. 1847, 1850 (2000). CLOSE In its more modern form, the doctrine allows states to vindicate sovereign or quasi-sovereign interests, including an “interest in the health and well-being . . . of [their] residents in general.”114114Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982). CLOSE Today, many state and federal statutes explicitly authorize states to sue as parens patriae.115115Margaret H. Lemos, Aggregate Litigation Goes Public: Representative Suits by State Attorneys General, 126 Harv. L. Rev. 486, 495–96, 496–97 nn.39–40 (2012). Whether Congress could confer authority on state AGs to sue in circumstances where state law denies it is an interesting question, but beyond the scope of this article. CLOSE Others can be read to authorize state suits implicitly by creating broad rights of action for citizens whom the states represent.116116See, e.g., EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003) (citing Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 121 (2d Cir. 2002)) (“[S]tanding provisions in many . . . statutes implicitly authorize[] parens patriae standing by using language that permits any ‘person’ who is ‘aggrieved’ or ‘injured’ to bring suit.”); see also Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 103 (D. Mass. 1998) (quoting 29 U.S.C. § 630(a)) (reasoning that AG has statutory standing to sue under Age Discrimination in Employment Act as “‘legal representative’ of the people of the [state] for the purposes of this action”); Minn. v. Standard Oil Co. (Ind.), 568 F. Supp. 556, 563–66 (D. Minn. 1983) (permitting state to sue as parens patriae under § 210 of Economic Stabilization Act of 1970, which permitted suit by any “person” because “when a state acts in its quasi-sovereign capacity in a parens patriae action, . . . [a] harm to the individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff”). CLOSE And even absent specific statutory authorization, state AGs may (depending on state law) have common law or constitutional authority to litigate as parens patriae on behalf of citizens.117117See generally Ieyoub & Eisenberg, supra note 111, at 1864–75 (describing the contours of parens patriae doctrine and its grounding in common law). CLOSE

The 1990s tobacco litigation built on, and spurred, expansions in AG authority. Prior to the states’ assault on Big Tobacco, countless private plaintiffs had sued under a variety of tort and warranty theories—all seeking to hold the industry accountable for peddling an unreasonably dangerous product. None succeeded.118118Id. at 1860 (“Before the states’ litigation, the tobacco industry had not lost a smoking case . . . .”). CLOSE Many plaintiffs were simply outspent by the defendants; others were turned away on the ground that they had assumed the risk of smoking; and still others were thwarted by courts’ refusal to permit large numbers of smokers to sue together as class actions.119119Anthony J. Sebok, Pretext, Transparency and Motive in Mass Restitution Litigation, 57 Vand. L. Rev. 2177, 2184–88 (2004) (describing the history of tobacco litigation). CLOSE

Then came the states, which were able to avoid the pitfalls of earlier litigation and bring the tobacco companies to the bargaining table. Most states pursued restitution actions, seeking reimbursement for Medicaid expenses incurred in the treatment of smoking-related illnesses.120120Id. at 2189; see also id. (describing Minnesota’s consumer-fraud approach as a notable exception). CLOSE By shifting the focus from individual smokers to the states’ own losses, the state suits were able to cut off the tobacco companies’ prime defense strategy: blaming individual smokers. As Mississippi AG Mike Moore put it, “This time, the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of indigent smokers who did.”121121Mike Moore, The States Are Just Trying to Take Care of Sick Citizens and Protect Children, 83 A.B.A. J. 53, 53 (1997). CLOSE Similarly, the states’ strategy allowed them to avoid the challenges of class certification: “[I]nstead of millions of plaintiffs, there would only be one. Concerns over common issues of fact, which doomed earlier class actions to fail the predominance and superiority tests of federal and state class action statutes, would be finessed.”122122Sebok, supra note 117, at 2190. CLOSE Ultimately, forty-six states joined the Master Settlement Agreement, which required the tobacco companies to pay the states more than $200 billion over twenty-five years and to agree to an array of regulatory constraints.123123Hanoch Dagan & James J. White, Governments, Citizens, and Injurious Industries, 75 N.Y.U. L. Rev. 354, 371–73 (2000). Four states settled separately for approximately $36.8 billion, bringing the total to roughly $243 billion. W. Kip Vicusi, The Governmental Composition of the Insurance Costs of Smoking, 42 J.L. & Econ. 575, 577 (1999). CLOSE

Although the tobacco litigation is in some ways sui generis, it highlights several features that have helped fuel state litigation more broadly. First, the tobacco suits entailed an “unprecedented” degree of interstate cooperation among AGs, and their success made clear—to AGs as well as to potential defendants—the power of concerted multistate action.124124Ieyoub & Eisenberg, supra note 111, at 1860 (“The scope of interstate attorney general cooperation was unprecedented.”). CLOSE Second, the litigation demonstrated the value of cooperation between AGs and private attorneys. The states’ suits benefited from substantial assistance and financing from private lawyers—a pattern that has been repeated in many subsequent actions. By teaming up with private counsel (particularly those willing to work for a contingent fee), state AGs can expand their reach into litigation that would otherwise be prohibitively expensive or resource-intensive, or would require specialized expertise.125125See generally Margaret H. Lemos, Privatizing Public Litigation, 104 Geo. L.J. 515, 532–33, 538–46 (2016) (analyzing the costs and benefits of partnerships between public and private attorneys). CLOSE Third, the staggering size of the settlement—“the largest transfer of wealth as a result of litigation in the history of the human race”126126Michael DeBow, The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage, 31 Seton Hall L. Rev. 563, 564 (2001). Critics are quick to note that the settlement is being financed largely by smokers, who now pay more for cigarettes. Id.; see also Sebok, supra note 117, at 2181 (“As an executive at R.J. Reynolds ironically put it, ‘[T]here’s no doubt that the largest financial stakeholder in the [tobacco] industry is the state governments.’”). CLOSE—revealed just how lucrative state litigation could be. In the years since the tobacco litigation, state AGs have become adept at using large monetary recoveries to publicize the financial contributions they make to the state and its citizens.127127See Margaret H. Lemos & Max Minzner, For-Profit Public Enforcement, 127 Harv. L. Rev. 853, 855 & n.6 (2014) (offering examples); Lemos, supra note 110, at 732–33 & n.153 (same). CLOSE In many states, moreover, AG offices can retain certain types of financial recoveries, making litigation a self-sustaining endeavor.128128Lemos & Minzner, supra note 125, at 866–67 (describing “revolving fund[]” arrangements at the state level). CLOSE

Finally, the states’ legal theories in the tobacco cases created a template for future actions against industries that cause widespread harm to state citizens.129129See Ieyoub & Eisenberg, supra note 111, at 1862 (arguing that “it is [the states’] legal theories, together with the precedent of concerted attorney general action, that have the greatest implications for joint action on other fronts”). CLOSE The recoupment strategy alone is a powerful tool for recovering the states’ own expenses130130See Dagan & White, supra note 121, at 355–57 (focusing on the states’ restitutionary claims and describing similar claims against gun manufacturers and lead-paint makers). CLOSE and becomes more powerful still when combined with the states’ authority to sue as parens patriae to address harms to their citizens.131131See generally Ieyoub & Eisenberg, supra note 111, at 1862, 1875–83 (describing parens patriae standing as applied in the tobacco litigation and its potential for future suits). For a more critical take, see DeBow, supra note 124, at 565 (arguing that “the tobacco template could conceivably be applied to a wide range of industries in future government litigation—including, perhaps, makers of alcoholic beverages, fatty foods, and automobiles” and warning of a “substantial danger that state attorneys general and local government officials will regularly succumb to the temptation of the tobacco example, and will seek to achieve regulatory and tax outcomes through litigation . . . .”). CLOSE In the ongoing state efforts against opioid manufacturers, for example, the states have asserted various common law tort claims and are seeking recovery for harms to citizens and to their own proprietary interests, including “billions of dollars in damages to the State related to the excessive costs of healthcare, criminal justice, education, social services, lost productivity; and other economic losses as a direct result of the illicit use of these dangerous drugs caused by opioid diversion.”132132Complaint at 3, Ohio v. McKesson Corp., No. 1:12-cv-00185-RBW (Ohio Ct. Com. Pl. Feb. 26, 2018). CLOSE

Courts—state and federal—have also played a role in the growth of state AG litigation. Perhaps most importantly, they have taken an expansive view of state standing. In Massachusetts v. EPA, the Supreme Court cited Massachusetts’s “stake in protecting its quasi-sovereign interests” as a reason for “special solicitude” in the standing analysis.133133549 U.S. 497, 520 (2007). CLOSE Long before those words were penned, lower federal courts had held that states can sue as parens patriae to vindicate their citizens’ rights under the federal constitution, even in circumstances in which the citizens themselves would lack standing. For instance, whereas the rule of City of Los Angeles v. Lyons makes it difficult for private parties to seek injunctive relief from sporadic instances of official misconduct,13413446 U.S. 95, 105–07, 110 (1983) (holding that person subjected to illegal chokehold by police lacked standing to seek an injunction, as there was no guarantee that the plaintiff would be subjected to similar acts by police in the future); see also O’Shea v. Littleton, 414 U.S. 488, 490, 503–04 (1974) (denying that a case or controversy existed regarding discriminatory law enforcement practices on similar grounds). CLOSE courts have permitted states to sue in equivalent cases.135135See, e.g., Pennsylvania v. Porter, 659 F.2d 306, 314–15 (3d Cir. 1981) (holding that state had standing as parens patriae to enjoin police misconduct while noting that “many individual victims may be unable to show the likelihood of future violations of their rights”). Courts have reasoned that, because the state represents all of its citizens, it will typically have little trouble establishing that a harm that has occurred in the past will likely befall some citizens in the future. Id. This sort of probabilistic reasoning generally does not work for private litigants. See generally Summers v. Earth Island Inst., 555 U.S. 488, 491, 494–501 (2009) (denying standing to a private environmental organization that had asserted a statistical certainty that some of its members would be injured by some of the challenged Forest Service actions). We suspect the difference is that cases like O’Shea and Lyons are grounded importantly in concerns about judicial intervention in state and local governance—a concern that is radically less compelling when the state itself is the plaintiff. CLOSE Similarly, as noted above, courts recognized states’ standing to sue the tobacco companies to recoup the expenses they had incurred as a result of smoking-related illnesses suffered by their citizens. When unions and other private organizations asserted similar claims, however, courts ruled that their injuries were too remote to establish standing.136136John C. Coffee, Jr., “When Smoke Gets in Your Eyes”: Myth and Reality About the Synthesis of Private Counsel and Public Client, 51 DePaul L. Rev. 241, 241–42 (2001). CLOSE

Representative suits by states also enjoy a host of other procedural advantages over their closest private analogues, class actions. Whereas class actions are governed by a complex set of procedural requirements designed to promote judicial economy and protect the interests of absent class members, courts have declined to apply those rules to similar suits by states—even as they have tightened up the requirements for private suits.137137See Lemos, State Enforcement, supra note 110, at 500–10 (detailing the procedural requirements for private class actions versus the requirements for similar suits brought by the State). CLOSE Courts have likewise refused to subject parens patriae suits to the jurisdictional requirements of the Class Action Fairness Act138138Mississippi v. AU Optronics Corp., 571 U.S. 161, 164 (2014); cf. People v. Greenberg, 946 N.Y.S.2d 1, 7 (App. Div. 2012) (holding that suit by state AG was exempt from similar jurisdictional rules governing private securities actions). CLOSE or to mandatory arbitration clauses.139139See, e.g., EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (holding that arbitration agreement between employee and employer did not bar EEOC from bringing enforcement action). CLOSE And when faced with simultaneous suits by states and by private class counsel, courts have often denied certification to the private class action on the ground that the state suit is the “superior” method of adjudication.140140See Lemos, State Enforcement, supra note 110, at 505–06 (collecting cases). CLOSE As one court put it, “[T]he State should be the preferred representative” of its citizens.141141Sage v. Appalachian Oil Co., Inc., No. 3:92-CV-176, 2:93-CV-229, 1994 WL 637443, at \*2 (E.D. Tenn. Sept. 7, 1994). CLOSE

It is not surprising, then, that state litigation activity has increased markedly in both volume and visibility in recent decades. For example, the number of Supreme Court cases in which states are parties has shot up since the 1980s—spurred in part by the creation in 1982 of the National Association of Attorneys General (NAAG) Supreme Court Project.142142See Douglas Ross, Safeguarding Our Federalism: Lessons for the States from the Supreme Court, 45 Pub. Admin. Rev. 723, 727–28 (1985) (describing NAAG’s genesis and functions). Another significant institutional response was the creation of the State and Local Legal Center (SLLC), which files amicus briefs on behalf of member associations. Id. at 728. CLOSE Even more notable is the increase in states’ filings as amici. Such filings are not command performances but represent AGs’ discretionary decisions to devote limited resources to Supreme Court advocacy.143143See Clayton, supra note 103, at 544 (“[T]he decision to participate as amicus curiae is determined largely by the personal interests and felt political pressures on individual attorneys general.”). CLOSE The most comprehensive study of state litigation in the Supreme Court reports that since 1989 states have “become exceptionally active amicus curiae participants. They account for 20% of all certiorari petitions accompanied by an amicus brief and 18% of the amicus briefs on the merits.”144144Waltenburg & Swinford, supra note 104, at 48. If anything, the number of state briefs filed understates the level of state activity. Thanks in large part to NAAG’s coordination efforts, states frequently band together on amicus briefs. A study of merits-stage state amicus briefs found that the average number of joining states jumped from 2.4 in the 1970s to 13.9 in the 1990s. Clayton & McGuire, supra note 105, at 24–25; see also Waltenburg & Swinford, supra note 104, at 48 (“NAAG’s focus on the coordination of state amicus activity has resulted in substantial levels of joining behavior. Accordingly, where it is rare to find more than two amici joining together on a pre-certiorari amicus brief, on average six states coalesce . . . .”). A more recent study of state amicus filings reveals similar joining behavior at the certiorari stage: using data on state certiorari filings compiled by Dan Schweitzer at NAAG, Greg Goelzhauser and Nicole Vouvalis report that “[d]uring the 2001–2009 terms, state-sponsored amicus briefs urging review in state-filed cases were joined by an average of about 18 states, and only 5 of the 88 briefs filed were signed by a single state.” Greg Goelzhauser & Nicole Vouvalis, State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court, 41 Am. Pol. Res. 819, 825 (2013). One veteran state litigator attributes these changes in part to technological advances, noting that email has made it far easier for dispersed AGs’ offices to share drafts. See Letter from Tom Barnico, Dir. AG Program, Boston College Law School, to authors (July 20, 2018) (on file with authors). CLOSE Today, states’ participation in the Supreme Court—both as direct parties and as amici—is second only to that of the federal government.145145Margaret H. Lemos & Kevin M. Quinn, Litigating State Interests: Attorneys General as Amici, 90 N.Y.U. L. Rev. 1229, 1235 (2015). CLOSE

The Supreme Court may be the most prominent venue for state litigation, but it is hardly the only one. States also have become more frequent litigants in the state and lower federal courts. Texas’s Greg Abbott sued the Obama Administration “at least 44 times”;146146Dan Frosch & Jacob Gershman, Abbott’s Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration, Wall St. J. (June 24, 2016), https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976 [https://perma.cc/D87N-QWXA]. CLOSE AG Maura Healy of Massachusetts reportedly “led or joined dozens of lawsuits and legal briefs” challenging the Trump Administration in 2017 alone.147147Steve LeBlanc & Bob Salsberg, Massachusetts’ Maura Healey Helping Lead Effort to Litigate Trump, Boston.com (Dec. 18, 2017), https://www.boston.com/news/politics/2017/12/18/massachusetts-maura-healey-helping-lead-effort-to-litigate-trump [https://perma.cc/9M9B-GA4X] CLOSE

And states are now far more likely to band together in litigation in order to maximize their impact. For example, Paul Nolette found a marked increase in “coordinated AG litigation”—defined as filed lawsuits as well as preliminary investigations involving coordinated activity by at least two AGs—from 1980 to 2013. Professor Nolette reports: “From a consistently low number of one to four cases a year throughout the 1980s, the quantity of multistate cases . . . gradually increased, reaching twenty for the first time in 1996, thirty in 2002, and forty in 2008.”148148Nolette, supra note 13, at 21 app. at 221; see also id. fig.2.1. CLOSE The number of AGs participating in such cases also has grown, with a greater proportion of multistate cases involving sixteen or more states in recent years.149149Id. at 21–22 & fig.2.2. CLOSE As Nolette explains, “Litigation involving over half of the nation’s AGs, once an unusual event, represents over 40% of all the multistate cases conducted since 2000.”150150Id. at 22. CLOSE For many observers, AG activism amounts to “a major shift in how political fights are waged.”151151Frosch & Gershman, supra note 144. CLOSE

B. MAPPING STATE LITIGATION

We know states are doing more litigation, but the aggregate numbers can only tell us so much. Although discussion of high-profile state litigation sometimes treats it as a unitary category, that perspective obscures important variation within the genre. This section maps state litigation into several discrete types, based on the nature of the claims asserted. We begin with the kinds of cases observers typically associate with state public-law litigation—cases in which states are pitted against the federal government. These include (1) claims that federal government action exceeds the limits of national regulatory authority, as in the state challenges to the ACA; (2) claims that federal government action violates aspects of the national separation of powers, as in state challenges to President Obama’s immigration policies; and (3) claims that federal government action violates individual federal rights, as in the state lawsuits against President Trump’s travel bans. It bears emphasis, however, that states can also shape policy outside their borders by targeting primary behavior directly, in suits against private actors alleging violations of either (4) state or (5) federal law.

To be sure, many prominent lawsuits will fall within more than one of these categories. For example, challenges to President Trump’s travel bans have sometimes included both claims that the bans violate individual rights and claims that the President has exceeded the scope of his lawful executive authority.152152See Complaint at 11–12, Washington v. Trump, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Jan. 3, 2017) (alleging individual rights violations as well as violations of the Administrative Procedure Act (APA)). CLOSE And state amicus briefs concerning the validity of the federal Defense of Marriage Act (DOMA) raised both federalism and individual rights arguments.153153See Brief Addressing the Merits of the State of Indiana and 16 Other States as Amicus Curiae in Support of the Bipartisan Legal Advocacy Group of the U.S. House of Representatives at 4–8, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 390993 [hereinafter Windsor Pro-DOMA States’ Brief] (arguing that neither federalism nor equal protection analysis supported heightened scrutiny of DOMA); Brief on the Merits of the States of New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia as Amici Curiae in Support of Respondent at 3, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 840031 [hereinafter Windsor Anti-DOMA States’ Brief] (arguing that DOMA denied equal protection and infringed states’ authority to regulate marriage). There is, moreover, important diversity within categories. As we discuss further below, the relevant legal constraints in each of the first three categories—federalism and separation-of-powers principles and individual rights—may be either constitutional or statutory in character. We do not distinguish between constitutional and statutory claims because we think that both constitutional and statutory norms serve constitutive functions in many instances. See generally Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 464 (2007) (discussing the constitutive role of statutory and other non-entrenched norms in structuring the government and identifying individual rights). CLOSE

Each category also includes legal claims and arguments asserted by states in a variety of settings—including, for example, not only lawsuits but also amicus filings by state AGs. We define our categories by the legal claim asserted, not the form in which that claim is advanced. And, while we have framed our categories as challenges to the legality of either federal governmental or private action, we also include states’ assertion of arguments—often in opposition to other states—affirming the legality of those actions.154154See, e.g., Windsor Pro-DOMA States’ Brief, supra note 151, at 2–3. CLOSE

1. Federal Power Claims.—This category contains claims that federal action exceeds the legal limits of national authority. The paradigmatic claims are those about the reach of Congress’s enumerated powers.155155These claims almost always concern the Commerce Clause—the catch-all, default power that sustains most federal legislation. But occasionally they involve other powers, such as Congress’s power to enforce the Reconstruction Amendments. City of Boerne v. Flores, 521 U.S. 507, 512 (1997). Boerne was a private claim brought against a local government by church officials under the federal Religious Freedom Restoration Act (RFRA). But the case drew state amici filings on both sides. See Brief of the States of Maryland, Connecticut, Massachusetts, and New York as Amici Curiae in Support of Respondent, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 10282 (defending RFRA); Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, the Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam, and the Virgin Islands in Support of Petitioner, City of Boerne, Texas, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 695519 (attacking RFRA). And Ohio Solicitor Jeffrey Sutton was given oral argument time to argue against RFRA’s constitutionality. CLOSE For example, minutes after President Obama signed the ACA, thirteen states filed suit arguing that Congress lacked power under the Commerce Clause to require individuals to buy health insurance.15615614 States Sue to Block Health Care Law, CNN (Mar. 23, 2010), http://www.cnn.com/2010/CRIME/03/23/health.care.lawsuit/index.html [https://perma.cc/3UPJ-8C8H]; see generally NFIB v. Sebelius, 567 U.S. 519, 547–58 (2012) (opinion of Roberts, C.J.) (accepting those arguments). CLOSE Sometimes states raise these sorts of claims as a preemptive strike on federal legislation, as in the ACA case. Perhaps more often, these issues are raised by private parties as defenses to the imposition of federal requirements or penalties,157157In United States v. Lopez, 514 U.S. 549 (1995), for example, a criminal defendant prosecuted for possessing a firearm within 1,000 feet of a school argued (successfully) that the federal prohibition did not regulate interstate commerce. Id. at 551–52. In United States v. Morrison, 529 U.S. 598 (2000), an individual defendant in a civil case argued (again successfully) that the federal private right of action for victims of “gender-motivated violence” exceeded Congress’s power under both the Commerce Clause and Section Five of the Fourteenth Amendment. Id. at 601–02, 604. CLOSE or in suits for a declaratory judgment or an injunction seeking to bar enforcement of federal law.158158See, e.g., Gonzales v. Raich, 545 U.S. 1, 15 (2005) (addressing claim by users of medicinal marijuana seeking declaratory and injunctive relief that the federal Controlled Substances Act, as applied to them, exceeded Congress’s Commerce power). CLOSE States then come in as amici—sometimes on both sides of the case.159159In Lopez, several states filed in support of the Gun Free School Zones Act. See Brief for the States of Ohio, New York, and the District of Columbia as Amici Curiae in Support of Petitioner, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007793. No state filed in support of Mr. Lopez, but he did get a brief filed by several national organizations representing state and local governments. See Brief of the National Conference of State Legislatures, National Governors’ Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as Amici Curiae in Support of Respondent at 13, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007619 (arguing that “the Commerce Clause does not authorize enactment of the Gun Free School Zones Act”). CLOSE

These cases are high visibility but, we want to suggest, of limited practical importance. They’re just not very promising, given the Court’s capacious understanding of national enumerated powers.160160See generally Raich, 514 U.S. at 15–19; Wickard v. Filburn, 317 U.S. 111, 118–29 (1942). CLOSE The Commerce Clause is very, very broad—and even where it’s not broad enough, there is the Necessary and Proper Clause to fill most gaps.161161See, e.g., United States v. Comstock, 560 U.S. 126, 130 (2010) (upholding broad federal power to imprison sexual predators under the Necessary and Proper Clause); Raich, 545 U.S. at 34–36 (Scalia, J., concurring in the judgment) (arguing that the Necessary and Proper Clause allows Congress to regulate noncommercial activity that affects commerce). CLOSE (In the healthcare case, the Taxing Clause saved the day for the ACA.)162162See NFIB, 567 U.S. at 574 (upholding the ACA under the Taxing Clause). CLOSE We may see occasional wins for states here, but they’re likely—as in Lopez—to be mostly symbolic in their importance.163163See, e.g., Richard H. Fallon, Jr., The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69 U. Chi. L. Rev. 429, 476–77 (2002); Ernest A. Young, Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich, 2005 Sup. Ct. Rev. at 1, 39–40 (“A roll-back of the national regulatory state was never in the cards; there are simply too many precedential, institutional, and political constraints pressing the Court to uphold relatively broad federal power.”). CLOSE

The more significant cases are those in which Congress seeks to enlist state officials to implement federal law but arguably lacks power to do so. Most federal programs rely on state and local officials for enforcement and implementation. Polarization makes states governed by the party that is out of power in Washington particularly likely to want to opt out of such programs. Under the Anti-Commandeering Doctrine, Congress can’t require state officials to implement federal policy.164164See Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 188 (1992). CLOSE Instead, Congress typically conditions federal benefits (usually money) on state cooperation.165165See generally Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1918–19, 1923–31 (1995) (noting the broad potential of conditional spending to circumvent limits on Congress’s enumerated powers). The leading case remains South Dakota v. Dole, 483 U.S. 203 (1987). CLOSE Challengers therefore argue that federal spending conditions are insufficiently clear or amount to federal coercion, as in the Medicaid Expansion portion of the healthcare case166166See NFIB, 567 U.S. at 575. CLOSE or in the current challenges to the Trump order on sanctuary cities.167167See, e.g., City of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507 (N.D. Cal. Apr. 25, 2017). CLOSE Alternatively, states’ claims may focus on whether certain federal requirements really amount to commandeering.168168For example, a thorny question in the sanctuary cities litigation is the extent to which local officials are simply being asked to cooperate with federal law enforcement in the same way any private citizen would have to or are instead being “commandeered” into enforcing federal immigration policy. See, e.g., City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 597–99 (E.D. Pa. 2017); Alison Frankel, DOJ Wants to Change the Constitutional Conversation in Sanctuary Cities Cases, Reuters (Mar. 7, 2018), https://www.reuters.com/article/us-otc-sanctuary/doj-wants-to-change-the-constitutional-conversation-in-sanctuary-cities-cases-idUSKCN1GJ362 [https://perma.cc/XK63-P8YQ]. CLOSE

This latter class of cases operates within a cooperative federalism context rather than a model of federalism where states have their own exclusive sphere of regulatory jurisdiction outside of federal authority.169169See, e.g., Martin H. Redish, The Constitution as Political Structure 26 (1995) (contrasting “dual” and “cooperative” federalism); Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663, 665 (2001) (categorizing congressional acts that “invite state agencies to implement federal law” as “cooperative federalism” programs). CLOSE But rather than seeking to control the content of federal policy, these cases generally try to preserve states’ ability to opt out. The Printz litigation that established the anti-commandeering principle for state executive officers did not try to strike down the federal Brady Act; it simply protected the right of state and local officials not to participate in its enforcement.170170See Printz, 521 U.S. at 933–34. CLOSE Likewise, the Medicaid expansion decision established an opt-out right for states.171171See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585–88 (2012) (opinion of Roberts, C.J.) (stating that states are free to opt out of the Medicaid expansion while remaining within the original Medicaid program). In some circumstances a robust opt-out right could kill a federal scheme that required cooperation, and at that extreme the difference between trying to limit the scope of federal policy and preserving a right of opt-out dissolves. This may have been Justice Story’s hope, for example, in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). Although Prigg upheld Congress’s power to enact the Fugitive Slave Law and broadly construed its preemptive force, Story may have hoped that the Court’s holding that Congress could not require state and local officials to participate in the law’s enforcement would gut its effectiveness. See id. at 532, 598, 672–73; David C. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, 245 n.54 (1985). Unfortunately, he turned out to be wrong about that. See Paul Finkelman, Sorting Out Prigg v. Pennsylvania, 24 Rutgers L.J. 605, 664 (1993). CLOSE

Finally, an important class of federal-power claims involves state immunities from federal regulation. These claims arise defensively, typically in response to claims by private litigants.172172The convoluted saga of attempts to avoid state sovereign immunity also includes cases in which individuals with financial claims against states enlist various other sovereign entities, including state governments, to prosecute those claims on the individuals’ behalf. These efforts have not generally had much success. See, e.g., New Hampshire v. Louisiana, 108 U.S. 76, 88–89 (1883) (holding that New Hampshire could not pursue financial claims against another state where New Hampshire had no interest of its own). CLOSE For a brief period during the late 1970s and early 1980s, state and local governments asserted immunities from federal regulation itself under the now-defunct National League of Cities doctrine.173173See Nat’l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding that, at least in some circumstances, Congress may not regulate state governmental entities performing traditional governmental functions), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985); see also Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 Sup. Ct. Rev. at 1, 31–32 (discussing claims under National League of Cities as a species of “immunity federalism”). CLOSE More enduring principles shield state governments from certain judicial remedies when they violate federal requirements. A line of cases stretching back over a century—but intensifying under the Rehnquist Court—recognized a broad principle of state sovereign immunity shielding states from damages claims brought by individuals for violations of federal law.174174See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996); Hans v. Louisiana, 134 U.S. 1, 18 (1890). CLOSE More recent cases have constricted federal civil rights claims against state and local officers for violations of federal statutory requirements.175175See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (Federal Educational Rights and Privacy Act (FERPA) does not create enforceable private rights under 42 U.S.C. § 1983); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (concluding no implied right of action for disparate impact discrimination under Title VI). CLOSE States have participated in these cases as both party defendants and extensively as amici (again, often on both sides).176176See, e.g., Brief of Amicus Curiae States of California et al., Supporting the State of Florida, et al., at 4, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (No. 94-12), 1995 WL 17008502 (May 3, 1995) (contending that a statute mandating state participation in federal programs was inconsistent with principles of federalism). CLOSE

These immunity cases differ from most of our examples of state public-law litigation in that they arise defensively—they are not, as it were, examples of AGs like Texas’s Greg Abbott going into work and suing the federal government. Nonetheless, they do seem part of a systematic effort to expand protections for state and local governments under federal law. It seems fair to view Jeffrey Sutton’s successful advocacy of an expansive view of state sovereign immunity in cases like University of Alabama v. Garrett177177531 U.S. 356 (2001). CLOSE and Kimel v. Florida Board of Regents,178178528 U.S. 62 (2000). Judge Sutton, then in private practice at Jones Day, argued both Garrett and Kimel on behalf of the state defendants. Id.; Garrett, 531 U.S. at 356. CLOSE for example, as an extension of his entrepreneurial tenure as State Solicitor of Ohio.179179See also Alexander, 532 U.S. at 276, in which Judge Sutton, in private practice, appeared as counsel of record on behalf of the State of Alabama successfully opposing recognition of a private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964. CLOSE

2. Federal Separation of Powers Claims.—It’s less intuitive to think of States making separation of powers arguments, but one can find examples reaching way back: in 1970, for example, Massachusetts filed an unsuccessful original action in the Supreme Court challenging the constitutionality of the Vietnam War.180180Commonwealth of Massachusetts v. Laird, 400 U.S. 886 (1970); see also id. at 886 (Douglas, J., dissenting) (noting that Massachusetts had authorized the suit by a specific legislative enactment). CLOSE Separation of powers claims have become far more prevalent over the past decade or so. As we’ve noted, polarization tends to cause gridlock, even with a nominally unified government in Washington. And gridlock encourages the President to reach for his pen and phone to get things done.181181See CNN, Obama-I’ve Got a Pen and a Phone, YouTube, https://www.youtube.com/watch?v=G6tOgF\_w-yI [https://perma.cc/AV7E-4AU3] (recording a speech by President Obama, wherein he expressed frustration with congressional gridlock and his intent to take unilateral action). CLOSE Resulting challenges sound in separation of powers, not federalism. But the litigation is motivated by states that are either seeking to protect their own autonomy or to find a way to participate in a national lawmaking process that has shifted from Congress to the Executive Branch.

United States v. Texas—the immigration case—is a good example.182182See 136 S. Ct. 2271, 2272 (2016) (affirming the injunction of the DAPA program and DACA program expansions in Texas v. United States, 86 F. Supp. 3d 591, 606, 678 (S.D. Tex. 2015)). CLOSE When President Obama extended lawful presence to millions of additional undocumented aliens, it was hard to argue that the deferred-action programs (Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA)) fell outside the authority of the national government as a whole. Instead, state challengers contended that the President lacked the authority to—as Obama himself put it—“change the law” without going to Congress.183183Brief for the State Respondents, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1213267, at \*1. CLOSE As was clear to all involved, Congress’s general intransigence on the immigration issue meant that a decision against executive authority would be—for all intents and purposes—a decision against federal authority more generally.

A separate set of process arguments are statutory but serve a constitutional purpose. Again, the immigration case is a good example. Texas’s successful argument in the district court was simply that Obama’s policy change had failed to comply with the Administrative Procedure Act (APA) because it had not gone through notice and comment. Notice and comment isn’t an insurmountable hurdle for agency lawmaking, but it does delay implementation of national policy. More importantly, it allows states—like anybody else—to insist on direct input into the federal lawmaking process. It allows states to be heard at the agency just as they are supposedly heard in Congress, although without any special status vis-à-vis other participants. Provisions in the APA for notice and comment, as well as for judicial review of process failures at the agency, effectively operate as separation of powers-type constraints on the administrative state.184184For assessments of the so-called administrative safeguards of federalism, compare Gillian E. Metzger, Administrative Law as the New Federalism, 57 Duke L.J. 2023, 2028, 2101–09 (2008) (asserting that administrative law is well-suited to preserving federalism), with Stuart M. Benjamin & Ernest A. Young, Tennis with the Net Down: Administrative Federalism Without Congress, 57 Duke L.J. 2111, 2114, 2145–54 (2008) (arguing that federalism requires insistence that Congress play the primary role). CLOSE

The separation of powers principle that Congress—not the President—makes the law also generates a second kind of challenge to federal action. That challenge argues that executive action—like the immigration order or the travel ban or the EPA’s clean power plan—is substantively inconsistent with the underlying statute.185185See, e.g., Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (considering challenge by twenty-three states to EPA rule regulating air pollutants on the ground that the agency did not consider costs of regulation as required by statute). CLOSE Polarization can cause such claims to multiply. The longer gridlock persists, the more likely that new executive initiatives will stray from the obvious purview of the original legislation. So, for example, states challenged the Obama Administration’s transgender bathroom guidance on the ground that its definition of gender discrimination differs from that of the Congress that enacted Title IX of the Civil Rights Act.186186See Texas v. United States, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016) (granting preliminary injunction on behalf of thirteen states and other plaintiffs). CLOSE Likewise, when federal agencies promulgated broad “preemption preambles” during the George W. Bush Administration, a coalition of states, as well as a state governmental association, filed amicus briefs arguing that these preambles exceeded the agencies’ statutory mandate.187187See Brief of Amici Curiae Vermont, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Virginia, Washington, Wisconsin, and Wyoming in Support of Respondent at 4, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249); Brief of the National Conference of State Legislatures as Amicus Curiae Supporting Respondents at 5, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_07\_08\_06\_1249\_RespondentAmCuNatlConfofStLegis.authcheckdam.pdf [https://perma.cc/2BEW-E7YX]; see also Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae Supporting Respondent at 6, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_07\_08\_06\_1249\_RespondentAmCuCtrStEnforcementAntitrustandConsProtLaws.authcheckdam.pdf [https://perma.cc/UD4H-NKFK]. On the preemption preambles, see Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DEPAUL L.REV. 227 (2007). CLOSE

A more difficult class of cases involves litigation challenging federal government inaction. Federal administrative law generally presumes that agency inaction—at least in the form of agency refusals to initiate enforcement proceedings—are not subject to judicial review.188188Heckler v. Chaney, 470 U.S. 821, 832 (1985). CLOSE But this presumption can sometimes be overcome, as it was by Massachusetts v. EPA’s holding that states could challenge the agency’s denial of rulemaking petitions authorized by statute.189189549 U.S. 497, 528 (2007). CLOSE Given Congress’s continued failure to act on climate change, “EPA regulation pursuant to [Massachusetts v. EPA] . . . has served as the core of the US federal efforts on climate change.”190190Hari M. Osofsky & Jacqueline Peel, The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future? 30 Env’t & Plan. L.J. 303, 310 (2013). CLOSE And where an incoming administration seeks to overturn previous executive action—thus arguably returning to the status quo ante of inaction—states may find greater leverage to challenge this departure from the prior baseline. Recent litigation over the Trump Administration’s “repeal” of President Obama’s DACA policy, for example, has gotten significant traction by arguing that the repeal rested on improper reasons.191191See, e.g., Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 407, 438 (E.D.N.Y. 2018) (granting preliminary injunction against repeal of DACA program in suit by New York and fifteen other states). Similar litigation challenges the Trump Administration’s effort to overturn President Obama’s “clean power plan.” See, e.g., Richard Valdmanis, States Challenge Trump Over Clean Power Plan, Sci. Am. (Apr. 6, 2017), https://www.scientificamerican.com/article/states-challenge-trump-over-clean-power-plan/ [https://perma.cc/7JK8-A3TZ]. CLOSE State litigation to enforce the Executive’s statutory obligations can thus force adoption and continuation of executive policies even where national-level gridlock would otherwise foreclose them.

#### It ensures competition, even when left on the books

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, Volume 17, 17 Loy. Consumer L. Rev. 497, Lexis

B. The Context of State Antitrust Enforcement

In addition, the role of state attorneys general in antitrust matters is not merely the accumulation of the civil authority for state attorneys general under federal law, or the criminal, investigatory, and representational authority under state law. State attorneys general exercise their statutory and common law rights to protect their state's proprietary interests and their citizens' interests within a federal system. States enjoy additional rights in this system, particularly in antitrust matters, because state antitrust law is not preempted by federal antitrust law. Indeed, state antitrust enforcement predates federal antitrust enforcement; state antitrust statutes are older than the Sherman Act. Within the substantive area of federal antitrust, private -- including state -- enforcement was not an "afterthought; it was an integral part of the congressional plan for protecting competition."

States are independent decision makers entitled to deference under our constitutional system and state antitrust law is not preempted under that federal system. State attorneys general have the power and indeed obligation, to make independent decisions, including decisions that may diverge from the decisions made by [\*506] federal enforcers. As phrased by one of the founding fathers of modern state antitrust enforcement: "Federalism is not a suicide pact." Antitrust federalism means that the market for antitrust enforcement, like the markets to which antitrust laws apply, is ruled by competition, and that competition among antitrust enforcers and bodies of law fosters alternatives, choice, innovation, and insight.

The independent decision-making of state attorneys general in antitrust matters is most clearly illustrated in the area of vertical restraints. Since the 1980s, states have focused on vertical restraints, primarily resale price maintenance, and provided remedies on behalf of consumers through parens patriae actions. Vertical agreements are among businesses at different levels of distribution such as among a manufacturer, wholesalers, and retailers. Vertical restraints include resale price maintenance, exclusive dealings, and tying arrangements. Horizontal agreements are among entities at the same level of distribution. Horizontal restraints include agreements among competitors to set the price at which the product will be sold or to allocate territories or customers. States have been more active in pursuing vertical restraint cases than the federal enforcers.

C. States' Experience with Securing Remedies Such As Consumer Recovery

Making independent decisions in matters concerning vertical restraints and otherwise, state antitrust enforcers have been instrumental in recovering millions of dollars in cash or other value for injured consumers in checks, coupons, products, or a combination of these. In addition to stopping the anticompetitive activities, states seek to ensure that consumers harmed by antitrust violations receive compensation. States have often provided direct monetary to individual consumers that the states allege were injured by the antitrust violation. In some instances, identifying the individual purchasers may be difficult or impossible, or the average individual recovery may be too small relative to the cost of administering each claim. In that circumstances, states have distributed settlement proceeds cy pres; where states have delivered settlement funds are not delivered directly to consumers, but instead to programs designed to benefit the consumers harmed by the restraint, such as to nonprofit organizations or charities that can provide programs that benefit individuals.

#### ‘Uncertainty’ assumes non-uniform state law---the CP avoids that

Rachel Arnow-Richman 20, Visiting Professor at the University of Florida Levin College of Law, Chauncy Wilson Memorial Research Professor at the University of Denver, Sturm College of Law, L.L.M. from Temple Law School, J.D. from Harvard Law School, B.A. from Rutgers University, “The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision”, Seton Hall Law Review, 50 Seton Hall L. Rev. 1223,

To the extent we conceive of restrictions on employee mobility as an antitrust matter, it is squarely within federal jurisdiction. See Glick, supra note 1, at 404-417 (applying antitrust principles). In addition, federal legislation would create welcome uniformity. See Moffat, supranote 34, at 965. The variation in state laws thus far will doubtlessly pose enormous compliance challenges for employers. On the single issue of vulnerable worker status, for instance, no two state laws passed thus far use precisely the same criteria in establishing the relevant income threshold. See supranote 36 and accompanying text. It is possible that the desire for consistency and lower compliance costs could incent employers to support model or uniform state legislation that, while limiting the enforceability of noncompetes, would achieve greater predictability. The Uniform Law Commission in 2018 appointed a study committee to explore the matter. See https://www.uniformlaws.org/projects/committees/study. As of yet, however, it has issued no proposals.

#### ‘Regulatory uncertainty’ is unproven AND counterbalanced by efficiency benefits of localized variation

Harry First 9, Charles L. Denison Professor of Law at the New York University School of Law, “Modernizing State Antitrust Enforcement: Making the Best of a Good Situation”, The Antitrust Bulletin, Volume 54, Number 2, Summer 2009, p. 295-297

III. MODERNIZING STATE ANTITRUST ENFORCEMENT

A. The good situation

1. THE CASE FOR STATE ENFORCEMENT—The debate over state antitrust enforcement is basically about whether antitrust enforcement should be centralized or decentralized. A number of arguments support decentralization of enforcement. One is that decentralization of the institutions of antitrust enforcement produces policy diversification. 41 Different agencies can reflect different constituencies and interests; they can also develop different competencies and specializations. This policy diversification reduces the risk that violations will go unremedied. A second argument is that different enforcement institutions may have different resource commitments and constraints. It may be the case that having two organizations with different sources of funding or somewhat different missions may provide broader enforcement than a single agency could. A third argument relates to the constitutional structure of public enforcement agencies. Central enforcement agencies often need the factual and political support of more local agencies, particularly when cases involve local interests. The availability of decentralized enforcement institutions can provide that support.

Those who favor centralization argue the advantages of policy uniformity. A single agency increases the coherence of policy choices by avoiding contradictory results. The broader the jurisdictional competence of a single agency, the better able it will be to internalize all the social costs and benefits of any particular decision, leading to better policy choices. With one agency there is no opportunity for a complainant, who may want to use government antitrust enforcement to restrict the conduct of a more successful business rival, to engage in forum shopping to seek the most pro-enforcement agency. A single enforcement agency might also have the size to achieve economies of scale in its operations, making it a more efficient enforcer. Finally, a centralized agency would reduce compliance costs. Not only would regulatory duplication be avoided, but regulatory uncertainty would also be avoided. Parties would have a clearer understanding of enforcement policies and could be more certain as to whether particular business practices comply with the law or not.

The dispute between decentralization and centralization needs both theory and empiricism for its resolution. The theory part involves considering the four dimensions along which enforcement competition can occur: 1) yardstick competition, which enables the performance of one agency to be measured against its peers42; 2) regulatory competition, which pressures legislators to compete for votes pr resources by offering more attractive regulatory regimes43; 3) innovation competition, in which competitive pressures may move maverick players to experiment, forcing dominant players to copy successful experimental outcomes44; and 4) norms competition, in which the presence of different enforcement views helps insure the vigorous policy debate which has been so critical in shaping antitrust enforcement norms.45

I think that these four dimensions of enforcement competition make out a strong theoretical case for the diversification that the states can bring to antitrust enforcement. The empirical effort that the AMC undertook to review state enforcement does not support the concerns that many have had about decentralization and also provides some indication of positive benefit (the states’ general willingness to provide monetary relief to indirect purchasers I take as a virtuous example of diversified enforcement). One must of course recognize that each side of the debate generally has its own specific examples and counter-examples and that some aspects of the debate remain unproved (the question of scale economies in enforcement and the uncertainty costs connected with regulatory diversity, to take two important examples).

#### Uncertainty is inevitable because of FTC/DOJ splits and private enforcement

Donald L. Flexner 94, JD from NYU School of Law, and Mark A. Racanelli, JD from the Georgetown University Law Center, “Merger Control and State Aids Panel: State and Federal Antitrust Enforcement in the United States: Collision or Harmony?”, Connecticut Journal of International Law, 9 Conn. J. Int'l L. 501, Summer 1994, Lexis

While it is the purpose of this paper to explore in detail the nature, extent and effects of the schism between federal and multi-state antitrust enforcement, it is useful first to examine in greater depth the historical context of the dispute. Even before the states became significant antitrust enforcers, consistency and predictability in the law was difficult to achieve. In the first place, the FTC and the Antitrust Division have long had concurrent authority to enforce the federal antitrust laws (except for criminal prosecutions which only the Antitrust Division can bring), and these agencies have not always agreed. For example, historically, the FTC has pursued price discrimination cases while the Division has not, and the FTC probably has been tougher on mergers between competitors than the Antitrust Division. While these agencies have established a "clearance" process that allocates responsibility for a given investigation to one agency, such a process does not prevent them from taking conflicting positions in adjudicatory proceedings, or seeking conflicting legal interpretations and results.

In addition to these sources of confusion and conflict, private plaintiffs, whether consumers or competitors, also can sue under the Sherman and Clayton Acts for treble damages and injunctive relief. These so-called "private attorneys general" have no goal but winning, and the development of the law is influenced heavily by judicial decisions in private antitrust litigation. Indeed, in any given year, private antitrust opinions far [\*503] outnumber all cases brought by federal and state agencies. Notwithstanding the potential for confusion arising from an enforcement system with so many different plaintiffs, certain clear direction lines emerged in courts and the federal enforcement agencies during the 1960s and 1970s.

#### Enforcement beyond federal baselines can’t be preempted

--there’s established ‘cooperative federalism’: the fed sets a baseline for antitrust and states can go beyond that

--their ev mostly doesn’t apply: ‘preemption’ is about state anticompetitive behavior, not antitrust enforcement

--Congress supports this, so even if there’s a legal case, they won’t attempt to preempt

--the Supreme Court recognizes this, so they’ll strike down preemption

Philip J. Weiser 20, Hatfield Professor of Law and Telecommunications, and Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado, JD from New York University School of Law, Colorado Attorney General, BA from Swarthmore College, “The Enduring Promise of Antitrust”, Loyola University Law Journal, 52 Loy. U. Chi. L.J. 1, Fall 2020, https://coag.gov/blog-post/prepared-remarks-the-enduring-promise-of-antitrust/

I. The Role of the States in Antitrust Enforcement

During the 1970s, Congress began to develop a range of "cooperative federalism" regulatory programs. Under such programs, Congress authorizes state enforcement of federal law and generally calls on the federal government to set a floor for enforcement. In so doing, it generally provides states with additional authority to tailor standards as well as pick up any slack in enforcement. By instituting such a model, Congress [\*2] adopted a hedging strategy - ensuring a base level of uniformity, allowing for appropriate experimentation, and building in the opportunity to pick up the slack as to any underenforcement at the federal level.

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

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

One of the questions inherent in a cooperative federalism framework is whether the federal government has the authority to prevent states from going further than the federal government where, in their view, local conditions warrant. In the environmental arena, the EPA has the authority [\*3] to ensure a minimum level of enforcement, but not to prevent states from taking additional action. In the antitrust arena, the situation is similar: the federal government can take action to ensure a basic level of enforcement, but it does not have the power to prevent states from going further - under federal or state law - to stop anticompetitive conduct.

#### The Fed won’t preempt, even if they could, because they need reciprocal state support to limit Parker immunity

--'Parker immunity’ refers to the ‘state action doctrine’ that courts have applied to state-based antitrust violations. Without states acceding to federal demands for political reasons, the fed could not stop state-level anticompetitive behavior

--there’s a QPQ: states don’t fully assert Parker immunity in exchange for the Fed accommodating state antitrust enforcement

--the Fed understands this and values antitrust enforcement over Commerce Clause concerns, so they won’t attempt preemption

Dr. Michael S. Greve 5, Professor at the George Mason University School of Law, PhD and an MA in Government by Cornell University, “Cartel Federalism? Antitrust Enforcement by State Attorneys General”, University of Chicago Law Review, Volume 72, Issue 1, 72 U. Chi. L. Rev. 99, Winter 2005, Lexis

IV. An Exchange Theory of Antitrust Federalism

The model so far fails to explain, first, state enforcers' curiously narrow view of state action immunity, and, second, the federal government's accommodation of the states' aggressive demands for enforcement authority. Federal agencies might oppose those demands for good reasons -- for example, a concern over interstate or international spillovers, or a concern that an aggressive state role might distort national antitrust priorities. But while considerations of this sort have recently prompted calls by some federal officials for improved protection of federal priorities against state interference and for some form of sorting federal from state antitrust responsibilities, the general pattern has been federal accommodation to the states' demands for an expanded role. The list of federally supported -- or at least unopposed -- extensions of state authority includes "indirect purchaser" actions under state law, state divestiture remedies, state antitrust jurisdiction over foreign corporations, and the right of states to pursue equitable remedies even after the defendant's entry of a settlement with federal authorities.

One can interpret these seemingly odd positions -- the states' consistent support for the federal government's bid to limit Parker immunity, and the federal government's equally consistent failure to assert federal prerogatives against the states -- as two sides of a single bargain. On this interpretation, state enforcers have supported the federal position on state action to obtain maneuvering room for state antitrust actions that the federal government might otherwise oppose. Conversely, the federal government has tolerated the expansion of state enforcement authority to make progress at the state action front.

One highly suggestive piece of evidence is the amici states' position in Ticor, where the majority states portrayed a demanding state action requirement and especially its "active supervision" prong as a [\*118] pristinely federalist position. That line of reasoning has been described as "not easy to understand" and as a "challenge to historians." Notwithstanding the Ticor Court's insistence that "states must accept political responsibility for actions they intend to undertake," little in economic theory, and less in federalism theory, recommends that ruling. Someone has to supervise the states' "active supervision," and that "someone" cannot be the citizens in the various states; it has to be the FTC. There may be reasons for such an arrangement, but state autonomy and local accountability cannot be among them.

In fact, Ticor presented the FTC and the U.S. Solicitor General with a massive federalism problem. Among the obstacles was an effusively "federalist," pro-immunity decision by then-Judge Anthony Kennedy in a case presenting very similar questions. Predictably, Ticor played the federalism angle and especially the opinion of Kennedy -- by then, a crucial vote on an increasingly federalism-friendly Supreme Court -- to the hilt. The majority states' brief allowed the federal government, which had theretofore ignored Ticor's federalism [\*119] argument, to denounce that argument as rank opportunism. Justice Kennedy's explicit reliance on the majority states' averments suggests that the FTC might well have lost the case but for the states' support.

If the federal government had every reason to seek the states' support, the states had equally good reasons to lend it. The Ticor briefs were submitted shortly before a certiorari petition in Hartford Fire Insurance Co v California, then described by a leading state antitrust enforcer as "the biggest and most important civil case . . . pending in the United States." The states had initiated the Hartford litigation despite the FTC's severe misgivings, and there was every reason to think that the outcome could well depend on the U.S. government's position before the Supreme Court -- which was by no means a foregone conclusion at the time of Ticor. Lo, at the end of the day, in Hartford the federal government deferred to the states.

The proximity and parallelism between the states' and the federal enforcers' interests do not imply some outright quid pro quo. An explicit bargain actually seems unlikely, since both sides sport multiple institutional actors who cannot easily commit their sister agencies, let alone their successors in interest. Moreover, the analysis is meant to capture the political economy of the federal-state transaction (which the economics literature treats under the heading of "incomplete contracts"), not its social dimension (which will to the participants look like collegial, if not frictionless, "networked enforcement"). So understood, though, the stipulated logic fits, and may help to explain, the trajectory of federal-state antitrust relations from confrontation during the Reagan years to increased cooperation since the first Bush administration and to this day. Throughout, state-sponsored cartels [\*120] were a top enforcement priority for the FTC, under both Republican and Democratic administrations. Federal enforcers soon realized that state opposition often impedes federal enforcement at this front, and that state support is worth something. Conversely, an aggressive state agenda requires federal accommodation. The broad enforcement powers of state authorities, from divestiture remedies to indirect purchaser actions, may now be settled law. But that was not true twenty-five years ago, when state attorneys general aspired to play a more prominent role in antitrust law. At that time, the states needed federal accommodation, both in the everyday enforcement process and in high-stakes cases involving questions of federal preemption and prerogatives, where the federal government's official position often makes a crucial difference. And one of the few meaningful concessions the states had to offer was their support for federal enforcement efforts that might otherwise be perceived as nationalist intrusions into "states' rights."

#### Biden and the Dem Congress will support state antitrust

Dylan Jackson 21, Writer for the National Law Journal, Senior Staff Writer at The American Lawyer, BA in Journalism from the University of Missouri-Columbia, AA from Valencia College, “Shifting Scrutiny: State AG Practices Prepare for New Priorities Under Biden”, National Law Journal, 1/3/2021, https://www.law.com/nationallawjournal/2021/01/03/shifting-scrutiny-state-ag-practices-prepare-for-new-priorities-under-biden/?slreturn=20210602160610

For the last four years, state attorneys general practices at law firms have been operating and growing in a space where leading state prosecutors were often working against the federal government. That dynamic is about to change, and it will only further their growth and activity.

Big Law state attorneys general practices are anticipating President-elect Joe Biden’s administration to strengthen the regulatory powers of state AGs through greater collaboration in areas such as civil rights, environmental and antitrust enforcement.

The extra muscle, attorneys say, will allow AGs to compound their platforms, as well as divert precious resources to “core functions” such as financial, consumer and tech fraud—a dynamic that is sure to bring more scrutiny to companies and corporate clients.

“The pendulum will swing from state AGs being the primary civil rights enforcers to the federal government. That relieves pressure on the states to focus on core functions,” said Daniel Suvor, co-chair of O’Melveny & Myers’ state AGs practice group.

State AG practices have become an increasingly popular practice area in Big Law. The growing list of firms with this offering includes Holland & Knight, Crowell & Moring; Blank Rome; O’Melveny & Myers; Cozen O’Connor; Wilmer Cutler Pickering Hale and Dorr; Squire Patton Boggs; Cadwalader, Wickersham & Taft; King & Spalding; and Alston & Bird. Attorneys who head these practices represent clients that are regulated by AGs, in industries including technology, retail and pharmaceuticals. Suvor and O’Melveny, for example, represent Johnson & Johnson, which is facing roughly 2,000 lawsuits, including those brought by a coalition of Democratic and Republican AGs.

Under the Trump administration, the federal government was a lax enforcer in areas like civil rights and environmental regulation, making for fewer lawsuits and investigations into allegedly offending companies. In that vacuum, state AGs such as California Democratic Attorney General Xavier Becerra had to fill the void by committing attorneys and resources to fighting federal environmental regulatory rollbacks.

“Our clients are going to have an active federal government again. On top of that, they won’t be able to ignore state AGs,” Suvor said.

“State AGs have often been overlooked by large corporations. That has changed in the last few years,” he explained. “Now, clients are going to have to think about both federal and state enforcement at the same time.”

#### Courts will side with the states, allowing unlimited regulatory authority

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, Volume 17, Issue 4, 17 Loy. Consumer L. Rev. 497, Lexis

B. States' Claims Add to Antitrust Jurisprudence

The next criticism is that states do not add to the antitrust jurisprudence. In the words of Judge Posner:

Because of resource constraints that I have mentioned, it is unlikely that state attorneys general will be sources of innovative antitrust doctrines or methods of proof -- and in fact, I know of no examples where they have been.

But a simple recitation of leading United States Supreme Court cases brought by state attorneys general belies the assertion that state attorneys general are not sources of innovative antitrust doctrines or methods of proof. In *California v. ARC America Corp.*, the Court unanimously held that claims under state antitrust law, even when inconsistent with claims under federal antitrust law, can be secured in federal court litigation. In *ARC America*, four states sued in federal court on behalf of themselves and all governmental entities within their respective states as "downstream" or "indirect" purchasers of cement and concrete used in state projects. The United States Court of Appeals for the Ninth Circuit held that, although state antitrust laws permitted recovery for these purchasers, these state antitrust laws were preempted by contrary federal antitrust laws.

On writ of certiorari, the issue before the Supreme Court in *ARC America* was whether *Illinois Brick*, which usually prevents "indirect" purchasers from recovering damages, also prevents recovery under state statutes. The Court considered a California statute that declared that California law was different than federal law, a Minnesota statute that rejected the Illinois Brick prospectively, an Alabama statute that since 1907 had permitted "indirect" damages, and an Arizona statute that used language similar to the federal statute but which had not been construed by Arizona state courts. The Court found no preemption by Congress of any of these state antitrust [\*517] laws. The Court held that state indirect purchaser statutes were not preempted and that Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies. *ARC America*'s endorsement of state antitrust law has allowed the development of a whole new area of practice, including recent state litigation in the pharmaceutical industry.

Similarly seminal is *Arizona v. Maricopa County Medical Society*, in which the State of Arizona sought review of a judgment of the United States Court of Appeals for the Ninth Circuit that denied the state's motion for summary judgment against defendant medical societies. Arizona sued the defendant medical societies for price-fixing in violation of Section 1 of the Sherman Act. Arizona alleged that agreements among competing physicians to set maximum fees for health services that they rendered to insured patients were a per se illegal price-fixing conspiracy. The medical societies argued that the *per se* rule was inapplicable because the agreements were among doctors and that the judiciary had little antitrust experience in the health care industry. The Supreme Court held that the *per se* rule was as applicable to the medical profession as to any other provider of goods or services; the Sherman Act establishes one uniform rule for price-fixing agreements applicable to all industries alike.

*California v. American Stores Co.*, another very important Supreme Court decision, involved state enforcement in a merger case. In American Stores, the Court held that divestiture is a form of injunctive relief within the meaning Section 16 of the Clayton Act. The State of California sued to enjoin American Stores from merging with a competitor to double its share of supermarkets in California [\*518] after the Federal Trade Commission ("FTC") gave its final approval to the merger. California sought a preliminary injunction to prevent the integration of the two merging companies and a divestiture of all the acquired stores located in California, which the district court granted. On appeal, the Court of Appeals for the Ninth Circuit set aside the injunction granted by the district court reasoning that divestiture is not a remedy available in private actions under Section 16 of the Clayton Act. The Supreme Court reversed the Court of Appeals, concluding that the plain text of Section 16 authorizes divestiture decrees as a form of injunctive relief to remedy Section 7 violations in private actions.

#### The text fiats coordination through NAAG---that ensures uniformity

HLR 20 – Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law,” 6/10/20, https://harvardlawreview.org/2020/06/antitrust-federalism-preemption-and-judge-made-law/

D. The Misaligned Incentives Problem

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. In an interconnected economy where seemingly hyperlocal activity can have national implications, 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.” 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.

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.” 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.”

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. 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.” 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. 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. 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.

E. The Incompetent States Problem

Finally, critics argue that state enforcers will make error-ridden antitrust choices due to a lack of resources, experience, and expertise. Whereas federal enforcers have significant budgets for antitrust enforcement, the percentage of funding set aside for antitrust enforcement by state attorneys general is minute. Because of this lack of resources, state enforcers have been accused of staffing antitrust cases with senior attorneys who, while experienced in civil litigation generally, are antitrust novices. These factors have led critics to argue that state attorneys general handle antitrust suits poorly, clogging the judicial pipeline with questionable suits. State attorneys general are accused of acting as free riders on federal actions and of making settlements more difficult rather than undertaking useful enforcement.

But there is reason to dispute critics’ claims. The critique of individual attorneys general ignores the states’ ability to work in unison. Cooperating through NAAG, states are able to build on each other’s experiences in antitrust enforcement. Thus, worries about inexperienced antitrust divisions working alone may be overstated. Although interstate coordination may weaken their point, critics can retort that most state actions are not coordinated: according to NAAG’s State Antitrust Litigation Database, only nineteen of the fifty-six civil antitrust actions brought by states between 2014 and 2019 were brought by multiple states working together, although many of the noncooperative suits regarded intrastate anticompetitive conduct. This same dataset, however, also undermines the critics’ argument that states act only as free riders: only nineteen of the fifty-six suits included federal participation. Finally, much of the criticism leveled at state attorneys general occurred before a renaissance in state law enforcement. Since Judge Posner derided the skill of state attorneys general in 2001, lawyers and judges, including Chief Justice Roberts, have recognized a marked improvement in state attorney offices’ advocacy. Whether or not Judge Posner’s critiques were valid at the turn of the century, it is unclear that the landscape remains the same today. Finally, this critique undermines the arguments, noted earlier, that state law enforcement is overdeterring competition or creating a patchwork of antitrust law. If states are nothing but free riders, then we need not worry about overdeterrence.

#### a) Uniform 50 state action is consistent AND displaces otherwise inevitable ad hoc state enforcement

Clark L. Hildabrand 14, JD Candidate at Yale Law School, BA from Washington & Lee University, “Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now”, Transactions, Volume 16, Issue 1, 16 Transactions 67, Lexis

State antitrust laws and enforcement also encourage greater consistency in antitrust enforcement over time by weakening barriers to enforcement from financial, jurisdictional, and political restrictions. First, dual enforcement of antitrust regulations allows access to the resources of both the federal government and state governments. Government agency budgets certainly are not immune to reductions and limitations in times of fiscal difficulty. The DOJ's Antitrust Division announced in 2012 that it planned to close four field offices following the 2013 budget process in an effort to reduce costs. According to Judge Dan Polster, who presides over the United States District Court for the Northern District of Ohio and started his career in the Cleveland field office of the Antitrust Division, closing the field offices will reduce the DOJ's ability to prosecute regional antitrust cases and resolve local price fixing disputes. These cases "really have a direct impact on [the] local economy and people's pocket books," but the DOJ Antitrust Division has turned its focus toward larger domestic and international cases. Encouraging state enforcement of state and federal antitrust statutes may alleviate concerns about a lack of regional enforcement. State attorneys general can pool their resources for enforcement and even appear together as amici curiae to better inform courts as to the interests of state consumers. One widespread fear was that states might pool their resources in order to pursue protectionist litigation in their mutual favor, and to the disadvantage of a few states. In response to this criticism, Congress dramatically limited the availability of multistate actions "by requiring that any state enforcement action take place 'in any district court of the United States in that State or in a State court that is located in that state and that has jurisdiction [\*75] over the defendant.'" Thus, state antitrust enforcement and limited regional pooling enable greater consistency in antitrust enforcement even in the presence of shifting federal priorities.

#### b) Federal action is splintered between the DOJ, FTC, and private rights of action AND also inevitably implemented by divergent state interpretations

Margaret H. Lemos 11, Associate Professor at the Benjamin N. Cardozo School of Law, Former Furman Fellow and Program Coordinator at New York University School of Law, Bristow Fellow at the Office of the Solicitor General, and Law Clerk for Judge Kermit V. Lipez of the U.S. Court of Appeals for the First Circuit and U.S. Supreme Court Justice John Paul Stevens, “State Enforcement of Federal Law”, New York University Law Review, Volume 86, 86 N.Y.U.L. Rev. 698, June 2011, Lexis

A final factor that bears on the potential for disuniformity is the breadth of the relevant federal rule. While many federal statutes are written in sweeping terms, that is not always the case - as the phthalates ban discussed in the previous Part demonstrates. And much state enforcement of federal law entails enforcement of agency regulations, which on the whole tend to be more specific than the statutes that inspire them. The few scholars who have taken notice of state enforcement have focused primarily on antitrust law. But antitrust is an extreme and unusual example, not only because of the breadth of the relevant statutory language, but also because it is an area where no federal agency has the authority to adopt binding regulations clarifying [\*759] the statutory text.

[FOOTNOTE] 271 It bears emphasis that antitrust is also an area where state law is not preempted. See supra note 256. Moreover, even if state antitrust law were preempted and states were prohibited from enforcing federal antitrust law, federal law would still permit private antitrust suits and divide federal enforcement authority between the FTC and the antitrust division of the DOJ. Thus, while the risk of disuniformity may be particularly stark in the antitrust context, given the breadth of the relevant federal rule, it is far from clear that states' authority to enforce federal law is the root of the problem. Other contributing factors, including the splintering of federal enforcement authority, the availability of private rights of action, and the continued validity of divergent state laws, are at least as important - and probably more so. [END FOOTNOTE]

That scenario is not unique, but it is fairly rare. To return to the FTC example above, the FTC Act's prohibition of "unfair" practices is quite broad. The FTC's interpretation of the prohibition, embodied in the 1980 Policy Statement and later codified in the statute, is far more limited. Should state attorneys general be given authority to enforce the FTC Act in federal court (as NAAG has suggested ), they would be constrained by the FTC's interpretations and by the body of case law that has developed in response to FTC enforcement efforts. Both limitations differentiate state enforcement of federal law from state enforcement of state law and help explain why the former may be tolerable even when the latter is preempted.

#### States are only a backstop to federal under-enforcement---they can’t create runaway or inconsistent litigation

--litigation must still go through the courts, which can reject baseless claims

--the fed can weigh in and oppose state litigation, which courts will consider

--the states will never ‘displace’ federal regulators, only create a backstop where there’s inaction

Philip J. Weiser 20, Hatfield Professor of Law and Telecommunications, and Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado, JD from New York University School of Law, Colorado Attorney General, BA from Swarthmore College, “The Enduring Promise of Antitrust”, Loyola University of Chicago Law Journal, 52 Loy. U. Chi. L.J. 1, Fall 2020, Lexis

In a later speech, DOJ Antitrust Division Chief Makan Delrahim defended the DOJ's position. He argued that allowing states to bring antitrust actions of their own "creates the risk that a small subset of states, or even perhaps just one, could undermine beneficial transactions and settlements nationwide." Moreover, he suggested that states should not be authorized to seek any "relief that is incompatible with relief secured by the federal government." This concept of federal supremacy is incorrect and ignores the fact that states can enforce the federal antitrust laws only by bringing cases in federal court. If states advance claims that are unfounded and would undermine procompetitive mergers, the courts will reject them. And the courts can, of course, take into account any action or decision by the federal antitrust agencies in assessing a state's claims, just as the Court in Philadelphia National Banktook into account the actions of federal bank regulatory agencies. But there is no basis in the statutes, the cases, or sound policy for a decision by a federal agency to preclude the states from exercising their rights under the antitrust laws by asking a federal court to prevent or provide remedies for a violation of those laws.

Although the court ruled against the states in the T-Mobile case, Judge Marrero declined to adopt Delrahim's proposed limit on the states' role. Rather than reject the states' authority to bring the action, the court [\*7] evaluated the case on the merits, noting that the views of federal regulators can be informative, but are not conclusive. To be sure, the presence of a remedy - a fix to the harm occasioned by the merger, as it were - is a fact of life that the litigating states and the court rightly had to address. Similarly, the DOJ would also need to "litigate the fix" if another federal regulatory agency (say, the FCC) adopted a remedy in the face of a DOJ merger challenge. But to face challenges in litigation is a far cry from being barred from the courtroom.

In short, the states are partners in antitrust enforcement, reflecting the cooperative federalism architecture adopted by Congress. In effect, Congress has empowered states to act as a check on federal enforcement, or, more precisely, on instances of federal underenforcement; as such, it declined to allow federal inaction or preference for particular remedies to remove the states from antitrust enforcement. In this sense, the central question is not - as the DOJ suggests - whether states might "displace the federal government's role as the nation's federal antitrust enforcer," but rather whether states are positioned to pick up any slack and ensure that important issues are raised before the courts, whether or not the federal agencies are inclined or able to do so.

#### The threat of state enforcement is enough

David A. Zimmerman 99, JD from the Emory University Law School, “Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers”, Emory Law Journal, 48 Emory L.J. 337, Winter 1999, Lexis

Conclusion

Enforcement decisions made by state and federal antitrust enforcement agencies are very important for two reasons. First, lower court decisions on mergers are unpredictable because the Supreme Court has not decided a merger case in twenty-four years. 146Link to the text of the note Second, the cost of defending an enforcement action is very high. Because many merging parties would rather not deal with this uncertainty or bear these costs, state and federal enforcement agencies can quash many mergers merely by threatening enforcement actions.

## 1NR

### Midterms DA---1NR

#### It solves the case---gridlock ramps up executive action, including antitrust

Victor Reklaitis 21, Money & Politics Reporter at MarketWatch, Former Assistant Editor and Reporter at Investor's Business Daily, “2022’s Midterm Elections Already Are Pressuring Democrats, As Wall Street ‘Might Be Praying For Republican Gains’”, MarketWatch, 6/30/2021, https://www.marketwatch.com/story/2022s-midterm-elections-already-are-pressuring-democrats-as-wall-street-might-be-praying-for-republican-gains-11624982036

Individual sectors and the broad market won’t necessarily benefit from Republican control of the House or Senate while Biden is president, according to Mills, the Raymond James analyst.

“The general view is if Congress switches over, the most regulated sectors might get relief. However, if Congress does switch, all of the activity moves to regulation, and so we would see — at least for the last two years of Biden’s term — much more aggressive actions as it relates to bank regulation, energy regulation, health-care regulation, antitrust regulation,” he said.

“So in some ways, a change in party control of Congress could actually add to the D.C. concern of the market, rather than alleviate that concern, especially if that is accompanied with less spending that could occur under a divided government. The market has been up quite a bit in this last year due to strong fiscal spend and a focus on what can be done legislatively vs. a lot of focus on regulatory action.”

The S&P 500 SPX, -0.03% has gained 14% so far this year, and the stock index is up 39% over the past 12 months.

History suggests a Republican edge in 2022

“If we look at the historical record, midterm elections favor the party out of power. Those are the most angry voters, and most likely to turn out,” said Farnsworth, the Mary Washington professor.

Since the time of Franklin D. Roosevelt, presidents for the most part have seen their side lose seats in the House and Senate during midterm elections, as shown in the table below, which is based on data from the American Presidency Project at the University of California, Santa Barbara.

#### It turns growth:

#### 1. Revisionist challenges obliterate financial markets

Alex Hempel 16, Reporter at White Fleet, Economics and European Studies at Trinity College, “Why the US Should Not Leave NATO”, White Fleet, 7/26/2016, https://whitefleet.net/2016/07/26/why-the-us-should-not-leave-nato/

The goal here is not to compare Russia to Nazi Germany. Rather, the events that lead up to World War II offer an insight into how small nations can be overrun by a powerful neighbor when not properly supported. Many people think of wars between countries as features of a bygone era, and thus attack NATO as outdated and useless. People of that opinion should speak with a Ukrainian. Many powerful states currently engage in warfare or aggression either outright or by proxy, and NATO deters such destabilizing conflict.

While small nations such as Estonia and Latvia may not be militarily crucial, their hypothetical fall would certainly have global repercussions. Global financial markets would falter if any European nation were to be invaded. Foreign leaders would quake in their boots, wondering who could be next. And, most importantly, the US would be drawn in eventually. In both World War I and World War II the US thought it could watch from the sidelines, but in reality this is never the case. Better to deter aggression in the first place than to let the situation escalate into a bloody world war. The inconvenient truth is that leaving NATO to avoid wars could backfire spectacularly and actually make the US more likely to be dragged into a conflict.

#### 2. Defense cuts cause a recession and end competitiveness

Clayola Brown 12, National President of the A. Philip Randolph Institute, “Sequestration Cuts Would Destroy U.S. Economy Congress Must Not Allow Devastating Cuts in Defense Spending”, Baltimore Sun, 8/27/2012, https://www.baltimoresun.com/opinion/bs-xpm-2012-08-27-bs-ed-sequestration-20120827-story.html

Sequestration cuts in the defense budget — a key driver of this Frankenstein's monster of job destruction — would be especially devastatnig to the economy because of the aerospace sector's importance to local economies across America. One study estimated that 1 million to 1.5 million workers would lose their jobs, increasing the unemployment rate by a full percentage point.

An estimated $86 billion would be removed from the economy from defense cuts alone, reducing economic growth by 25 percent. The respected, nonpartisan Congressional Budget Office warns explicitly that defense sequestration cuts could help push the economy into another recession.

Sequestration would devastate our country's manufacturing base, not only destroying hundreds of thousands of decent jobs that bring economic security and dignity to American families, but also permanently weakening our ability to compete.

#### Antitrust is broadly popular, especially with the middle class---they’ll credit the Dems and flip

Claude Marx 21, MA in American Politics from Georgetown University, BA in Political Science and History from Washington University in Saint Louis, Reporter at MLex/FTC:Watch, “Biden’s Bid to Boost Competition Could Reap Political Benefits”, mLex Market Insight, 7/26/2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/bidens-bid-to-boost-competition-could-reap-political-benefits

It mostly comes down to a five-letter word.

President Joe Biden’s moves to ramp up antitrust enforcement could impact how companies do business and what people pay for goods and services. But they could also help Biden and his partisan allies get something even more valuable: votes.

Biden has long made his political brand that of a pragmatic champion of the middle class. It’s a group that the Democrats have sometimes struggled to win over in recent years.

While the average voter might think the Sherman Act deals with tanks, the administration is gambling that if its actions free up markets that help lower prices and create job opportunities, people will credit the Democrats.

The executive order on competition outlines the administration’s priorities. Among the contents are provisions strongly encouraging the Federal Trade Commission to promote competition in the labor and repair markets and to be more rigorous in reviewing corporate mergers.

And polling data indicates there’s an opportunity for Biden and his party.

A recent Gallup Poll found that 73 percent of respondents were somewhat or very dissatisfied about the “size and influence of major corporations.” Last year, the poll found 58 percent of respondents had those beliefs.

#### It swings youth voters---they’re key

Ben Koltun 21, Director of Research at Beacon Policy Advisors LLC, Former Senior Analyst at Hamilton Place Strategies, BA in Economics from Northwestern University, “Biden's Gambit to Lock in the Youth Vote for Democrats”, The Hill, 8/14/2021, https://thehill.com/opinion/campaign/567880-bidens-gambit-to-lock-in-the-youth-vote-for-democrats

The kids are alright, but they are moving left — and some elder politicians are moving left with them.

In a July poll, Gen Z’ers (born after 1996) viewed socialism more favorably than capitalism. A 2019 poll showed Gen Z’ers and Millennials (born after 1980) with equally favorable views of the two economic systems.

America's youth aren't calling each other "comrade." Rather, there isn't a knee-jerk anti-socialism reaction compared to older generations who came of age during the Cold War. The formative years of today's youth were characterized by capitalism challenges — the financial crisis, the long but slow economic recovery, and the pandemic recession (albeit with robust pharmacological, fiscal, and monetary responses).

Kids today define "socialism" differently, viewing it as representing greater equality or government activism rather than government ownership or modified communism. A "helping hand" is preferable to the "invisible hand" of a free-market economy.

America's elderly can't just dismiss these ‘krazy kids.’ Millennials in 2019 surpassed Baby Boomers as the largest generation. In the 2020 election, Millennials and Gen Z’ers made up nearly one-third of all voters, while Boomers and older generations declined to under 50 percent of the electorate. This trend will only continue; in fact, the younger generations could constitute the largest vote share as soon as 2024.

The kids aren't necessarily going through an angsty socialist phase. The most formative time for the development of voting preferences is between the ages of 14 and 24. Those views tend to stick with a voter well into future election cycles. In a race to capture this growing generation of voters, Democrats have an early advantage, winning Millennials and Gen Z’ers by 20 points in 2020.

Despite being the largest generation, Millennials make up just 6 percent of Congress. Constitutional age limits prohibit Gen Z’ers from holding office, although some can run come 2022. So, it's up to America's gerontocracy to win this group over.

To that end, President Biden is making a go of it. He's not an obvious champion of America's youth. The oldest president ever, Biden is the consummate institutionalist who began his career representing the "corporate state of Delaware" eight years before the first Millennials were born. He's unhip to issues like cannabis legalization that are overwhelmingly popular with younger Americans. Biden is also uneager to take sweeping action on student debt forgiveness.

Yet FDR was an unlikely New Deal icon as a New York patrician, and LBJ was an unlikely civil rights champion as a Southern Democrat. Biden wants his presidency to be "transformational" not "transitional" and is looking towards history to best position his own legacy and the Democratic Party.

Having a keen understanding of where the middle of his country and party are, Biden spots an opening where both extremes in a politically polarized era want to reform American capitalism. He's taking a "whole-of-government" approach with an overarching theme that the government, in fact, may know better than the market. From climate change to industrial policy to corporate taxation, Biden is channeling “Scranton Joe” populism over “Corporate Joe” pragmatism. It's a $6 trillion legislative agenda that rivals the likes of FDR and LBJ.

Biden's latest move — a competition executive order — goes to the heart of American capitalism. Federal Trade Commission Chair Lina Khan and Assistant Attorney General for Antitrust-designate Jonathan Kanter are among the band of hipster antitrusters who want to make what's old cool again in embracing a “New Brandeis” approach to regulating corporate power. Instead of looking at just prices, Biden’s antitrust personnel are focused on the impact to small businesses, workers, and democratic norms. If implemented, it could upend 40 years of competition policy.

It's too soon to declare America's youth as Biden-stans. They are the most supportive of regulating big businesses, but they are also big fans of some of them. Amazon has a higher favorability rating among young Americans than Biden, Sen. Bernie Sanders (I-Vt.), and even the Black Lives Matter movement.

#### It’s uniquely cross-partisan AND taps into deep base support

Zephyr Teachout 20, Associate Professor of Law at Fordham University School of Law, BA from Yale in English, MA in Political Science from Duke University, JD from Duke University, National Director of the Sunlight Foundation, Non-resident Fellow at the Berkman Center for Internet and Society at Harvard Law School, “A Blueprint for a Trust-Busting Biden Presidency”, The New Republic, 12/18/2020, https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting

The opportunity that Biden and the Democrats need to seize here stems from the basic fact that antitrust politics is not like other politics. Traditional left and right loyalties simply do not hold within its orbit. The economic populists of the right hate corporate monopolies as much as working-class progressives and immigrant small-business owners do. It’s not for nothing that Ted Cruz keeps yelling about monopolies—or that Trump, when he first campaigned in 2016, and when he was clearly losing in 2020, turned to attacking corporate monopolies. Trump of course reneged on his trust-busting promises, but he understood the rhetorical power of saying that “big media, big money, and big tech” were all against him. On the front lines of Democratic policymaking, meanwhile, a generation’s worth of neoliberal giveaways to these sectors is finally yielding to a new social democratic consensus. In antitrust politics, Amy Klobuchar, Elizabeth Warren, and Bernie Sanders share their anger with Andrew Yang and Scott Galloway—a beloved tech business guru who rooted for Bloomberg.

#### Marx concedes that it would draw voters.

Claude Marx 21, MA in American Politics from Georgetown University, BA in Political Science and History from Washington University in Saint Louis, Reporter at MLex/FTC:Watch, “Biden’s Bid to Boost Competition Could Reap Political Benefits”, mLex Market Insight, 7/26/2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/bidens-bid-to-boost-competition-could-reap-political-benefits

But the public is less certain about remedies.

A June Morning Consult poll for Chamber of Progress, a Democratic-leaning pro technology organization, found that 53 percent of 2,000 registered voters supported more regulation of large tech firms. But the number dropped to 39 percent when people were informed that some of the changes might result in fewer offerings to consumers.

When people were told that a series of antitrust bills approved by the House Judiciary Committee last month would ban free shipping by Amazon Prime, 59 percent were more likely to oppose the bills, which are awaiting action by the full House.

University of Virginia political scientist Larry Sabato told FTCWatch that most policy issues don’t by themselves influence election outcomes but are part of an overall image that voters have.

“They contribute to how people feel about parties and individuals. And that’s important in these very partisan times. So it reinforces the Democrats’ image as skeptical of Big Tech. It won’t have a great effect on the 2022 election, but the impact isn’t non-existent either,” he said.

Paul Swanson, an antitrust partner at Holland & Hart, thinks the effectiveness of the initiatives by the administration will depend on messaging.

“The issues of competition and antitrust are abstract

, and the administration is wise to issue a list of how people are affected,” he said. “But it will be really hard to make it resonate with people. Even though people think tech is too big, they love their iPhone, they love Facebook. However, there are many areas where the average American feels the pinch, and if the administration can say ‘if companies get too big, it locks you in and limits choices and raises prices,’ that could work with some voters.”

#### Replacing the CWS is a bold move that energizes the base

NLR 19 – National Law Review, “Antitrust Enforcement “Reform” as a Political Issue: The Good, the Bad, and the Ugly”, 11/8/2019, https://www.natlawreview.com/article/antitrust-enforcement-reform-political-issue-good-bad-and-ugly

In the 2020 presidential race, some proposed antitrust enforcement reforms are eclipsing that “Better Deal” platform in scope. For example, Bernie Sanders recently proposed antitrust enforcement changes, including:

* Replacing the consumer welfare standard for merger reviews;
* Breaking up “existing monopolies and oligopolies” that have “accumulated dominant market share and are able to wield their market power in anti-competitive ways;”
* Taking “antitrust enforcement out of the control of the captured judiciary” and allowing the agencies (or at least FTC) to “halt mergers without challenging them in federal court;”
* Reviewing and, “when necessary,” unwinding previously approved transactions;
* Directing the agencies to “establish new guidelines that restrict mergers and acquisitions,” which include a “special focus on economic security, job security, and competition,” and “bright-line merger guidelines that set caps for vertical mergers, horizontal mergers, and total market share;”
* Rejecting all mergers involving companies found to engage in certain behaviors: “No merger will be approved for companies that engage in the behaviors identified by the FTC as harming workers, competition, or fair pricing;” and
* Banning the “revolving door of personnel” between industries and regulators.

Proposed antitrust enforcement “reforms” were even discussed during the fourth televised debate of Democratic Party candidates, held on October 15, 2019. Senator Warren repeated her call to break up certain consummated mergers involving “Big Tech” firms and has proposed a “platform utility” rule” that would bar Big Tech firms from selling products that competed with third-party vendors on the platforms controlled by those firms. Senator Warren and other candidates have repeated calls for increased agency scrutiny of mergers.

Presidential primary contests often invite surprising proposals, whether politically viable or not, intended to energize a candidate’s political base, and the scope of the proposals for antitrust enforcement reform is no exception. The “New Brandeis School” view of competition, moreover, a relatively new academic proposal that challenges the “Chicago School” focus on consumer welfare, cites market structure as a better inquiry for competition policy, recognizes that numerous federal agencies (and state governments) exercise “antimonopoly” powers already, and proposes direct government regulation of some large firms.

#### Antitrust is extremely popular---it has broad, bipartisan backing, so strong action wins votes

David Dayen 18, Executive Editor of The American Prospect, Author of Monopolized: Life in the Age of Corporate Power, Investigative Fellow with In These Times ' Leonard C. Goodman Institute for Investigative Reporting, “Attacking Monopoly Power can be Stunningly Good Politics, Survey Finds”, The Intercept, 11/28/2018, https://theintercept.com/2018/11/28/monopoly-power-corporate-concentration/

Open Markets intended to publicize the data to show the enormity of America’s monopoly problem. But never-before-seen polling obtained by The Intercept suggests that the public already knows about, and is gravely concerned by, the concentration of economic power in fewer and fewer hands.

According to the survey, conducted in September by Public Policy Polling, 76 percent of respondents were either somewhat or very concerned that “big corporations have too much power over your family and your community.” The figure grew when asked whether big corporations have too much power over politicians: a stunning 88 percent were at least somewhat concerned, with 71 percent very concerned.

The poll finds more concern with the power and influence of major corporations than annual Gallup polls on the subject, which over the past few years have registered between 58 and 64 percent dissatisfaction.

The Gallup polls suggest a desire for mildly more regulation of American business. But by a 65-19 figure, those surveyed in the PPP poll believed that the government “should do more to break up corporate monopolies.” And by a 55-24 count, respondents said they were more likely to support a candidate who vowed to “work to break up monopolies and reduce corporate power.” After citing recent research suggesting that increased corporate concentration can reduce wages or make it more difficult to start a business, support for anti-monopoly candidates jumps to 60-15.

Even Trump voters pronounced themselves wary of corporate power by a 61-38 split and concerned about the political power of corporations by 83-12. Fifty-four percent of Trump voters said that the government should bust monopolies, with only 28 percent opposed. Anti-monopoly sentiment was relatively consistent among men and women, whites and nonwhites, young and old, even Democrats, Republicans, and independents.

The Open Markets Institute underwrote the polling but never released it.

The poll numbers suggest broad bipartisan support for anti-monopoly politics, which has been largely untested as a front-line platform since Woodrow Wilson’s 1912 presidential campaign or perhaps Franklin D. Roosevelt’s condemning of “economic royalists” in 1936. While more academics, writers, and thinkers have been raising the issue of corporate consolidation of late, and while some powerful politicians, including 2020 presidential hopefuls Elizabeth Warren, Cory Booker, and Amy Klobuchar, have embraced the concepts, it played only a minor role in the midterms.

The Democrats’ “Better Deal” campaign document had a plank on bolstering antitrust policy and cracking down on monopolies, but it never really took center stage and pointedly left out the modern age’s most fearsome trusts: the tech platforms. Senate Minority Leader Chuck Schumer, whose office was instrumental in putting together the “Better Deal” agenda, has a daughter who works in marketing at Facebook and reportedly told fellow Sen. Mark Warner to back off an investigation of the social media giant.

Rebecca Kelly Slaughter, a Schumer aide who drafted much of the “Better Deal” documents, was later installed by her former boss as a commissioner on the FTC, which has jurisdiction over the tech industry. On Tuesday, Kelly Slaughter commended the Open Markets Institute for compiling the information on concentration across sectors. “We should all be concerned about rising levels of concentration; understanding the scope of the problem across the economy is key to addressing it,” she wrote on Twitter.

The statistics on corporate concentration reinforce the fact that consumers, workers, and business owners cannot escape the ever-present shadow of monopolies in American life. Even when offered the illusion of choice, you don’t have it, because the same parent company often owns multiple different brands.

Two companies, Kraft and Unilever, control 87 percent of the mayonnaise market, selling numerous different brands. Three firms manufacture all washers and dryers, including market leader Whirlpool, which controls Maytag and Amana. Nestlé controls 57 percent of the cat food market; its portfolio includes Purina, Fancy Feast, Felix, and Friskies. Overall, four firms are responsible for 97 percent of all cat food sales. “They have all these little brands, from the low shelf to the high shelf,” said Austin Frerick, a former congressional candidate and a fellow with Open Markets who assembled the data.

This branding sleight of hand is presumed to fool the public into thinking that they have a wider array of choices. But the polling data suggests that virtually nobody is fooled.

If anything, concentration looks worse at the regional level, as cable and broadband companies divvy up the country to give consumers no choice, not even a figment of it, while local monopolies like hospital networks dominate individual metro areas. This increased concentration and political intervention has led to skyrocketing economic inequality, slashed entrepreneurship and innovation, and soaring political polarization.

The Open Markets data also looks at changes to industries over time, finding that virtually every industry studied has gotten more concentrated. Frerick highlighted the fact that the few industries that have opened to more competition in recent years did so in response to an actual divestment order from the FTC or the threat of one. “It shows that they do have power and we can have more competition,” said Frerick, “but not when the agencies are asleep at the switch.”

If the polling is even close to accurate, lawmakers would be rewarded for bold stances on reducing corporate power, whether through new anti-merger legislation or spurring antitrust authorities to act more aggressively to rein in the behemoths. On Tuesday, the Senate Commerce Committee did just that in an oversight hearing with FTC commissioners, urging them to do more to investigate and regulate Facebook. “Big tech is maybe no longer entitled to be as big as it is,” said Sen. Richard Blumenthal, D-Conn.

#### It’s the #1 issue

Tim **Wu 19**, Professor of Law at Columbia University, JD from Harvard Law School, BSc from McGill University, “Antitrust Returns to American Politics”, New York Times, 3/13/2019, <https://www.nytimes.com/2019/03/13/opinion/antitrust-2020-campaign.html>

Thankfully, monopoly power is shaping up as a **central issue** in the 2020 campaign.

Senator Elizabeth Warren’s announcement on Friday of a plan to break up major tech monopolies like Facebook and Google was critically important — not just as a policy proposal, but also as a **sign** of the **return** of antitrust to politics.

In the United States, economic policy is ostensibly a matter of democratic governance, but for too long antitrust has been viewed as a **technocratic matter** best left to experts. This is a mistake: Excessive corporate size and power can be linked to many voter concerns, including stagnant wages, the invasion of privacy, the rise of fake news, the demise of the middle class and an unresponsive democracy.

Antitrust is **especially salient today** because we witness the tremendous power of the tech monopolies **firsthand**, in our daily lives. Nearly everyone uses Facebook, Google, Amazon, Apple and Microsoft, and **nearly everyone** can **see** how smaller businesses have been hurt by their dominance. Nearly everyone has an opinion about whether they are too powerful, whether they know too much, whether they ought to be admired or feared.

Add to these concerns the dangers of agricultural monopolies, rising costs for cable and broadband, and anticompetitive drug pricing, and it is clear that for Ms. Warren and other presidential hopefuls in the Democratic field, the problem of monopoly power should be a central issue — perhaps ***the* central issue** — in the 2020 campaign.



#### This winter is defining---Biden either rebounds now or is doomed in the midterm

Stephen Collinson 9-7, White House Reporter for CNN, MA from the University of Aberdeen, MA from Simon Balle School, Hertford, Former White House Correspondent for the AFP, Former Reporter for DC Thompson, “The Coming Weeks Will Define Biden's Presidency and Shape the Midterm Elections”, CNN, 9/7/2021, https://www.cnn.com/2021/09/07/politics/joe-biden-september-battles-ahead/index.html

President Joe Biden must define the politics of this fall before they define him, as he seeks to re-establish the authority of an administration that often appeared overtaken by a relentless summer of challenges.

The weeks following Labor Day will reveal answers that will set the stage for next year's congressional elections. They will also help decide whether Biden has the potential for a historically significant presidency or gets swamped by the crises he was elected to conquer.

A crush of challenges and political battles are dominated by a pandemic Biden hoped would now be history. But the crisis is beginning to feel endless, and, as it batters national morale, is denting his political standing. The fallout from a chaotic exit from Afghanistan that encapsulated the ignominy of a US defeat is meanwhile raising questions about Biden's core promise of competency. The internal Democratic Party tussle between progressives and moderates is highlighting the huge bet of the Biden presidency: That, at a time of national crisis, voters want a multi-trillion-dollar assault on climate change and the remaking of the social safety net.

Reverberations still ring from the conservative Supreme Court's decision not to block the effective eradication of a woman's constitutional right to an abortion in Texas, which promises multiple political consequences. The House Republican Party's radical turn to pro-Donald Trump authoritarianism also underscores the deep peril still facing American democracy.

Biden's critical few months will unfold with his presidency tested as never before. His approval rating dipped over a brutal August, and he often seemed obstinate and impatient at criticism of his performance. But he has the tools of a political rebound at hand. He's been underestimated almost his entire career -- including during a campaign for the 2020 Democratic nomination that only his close family and most loyal aides believed he could win. While all presidents endure rough patches, only the most successful pull themselves out of political slumps.

#### The campaign script will be set now---it’s not too early

David M. Shribman 21, Pulitzer Prize Winner and Former Executive Editor of the Pittsburgh Post-Gazette, “Next Year's Midterm Battles Are Already Underway”, Salem News, 8/14/2021, https://www.salemnews.com/opinion/columns/shribman-next-years-midterm-battles-are-already-underway/article\_dbd38b9f-a6af-5bfd-9662-3dbe4dcad544.html

The battles of next year's midterm congressional elections will be won on the playing fields of this summer.

Political professionals know this is not a fallow period in the struggle for control of Congress -- and in the fight for the destiny of Joe Biden's presidency. The contours of next year's political contests are being established in the sunshine of August. There are, to be sure, many moving parts -- candidate recruitment, for example, and reapportionment -- but the point is that these vital parts are moving now.

So in our summertime reveries, it is not too soon to look ahead by looking behind the curtain. Here is a viewers' guide to this important passage in the political season:

-- The Democratic agenda. The script for the rhetoric of 2022 is being drafted in 2021. For Democrats, it involves what they have accomplished while they've controlled the White House and Capitol Hill. For the Republicans, it is the opposite: how they prevented Democratic excesses this year, and how the Democrats have overplayed their hands -- seemingly contradictory notions but, in fact, complementary themes.

"This is the definitive period," said Tad Devine, a leading Democratic political consultant. "The Democrats are putting their agenda out for public inspection. The bottom line will be how that agenda is defined."

#### Theoretical research proves---initial preferences are key

Dr. William Jennings 16, PhD, Senior Lecturer in Politics and International Relations at the University of Southampton, and Dr. Christopher Wlezien, Professor at University of Texas-Austin; American Journal of Political Science, “The Timeline of Elections: A Comparative Perspective”, January 2016, p. 231

Discussion and Conclusion

Voter preferences evolve in a systematic way over the election timeline in a wide range of representative democracies. There is structure to preferences well in advance of elections, indeed, years before citizens actually vote. That is, very early polls predict the vote, at least to some extent. This largely reflects differences in the equilibrium support of parties and candidates. Polls do become increasingly informative over time, however, pointing to real evolution of preferences. That this pattern holds across countries is important and points towards 35 a general tendency in the formation of electoral preferences. But the pattern is not precisely the same in all countries. Political institutions structure the evolution of voters’ preferences.23

Government institutions are important. Preferences come into focus later in presidential elections than in parliamentary ones. A year out from Election Day, parliamentary elections are more predictable from the polls than are the outcomes of presidential races. This presumably reflects the greater uncertainties involved in the assessment of presidential candidates and also the time it takes for voters to directly factor in their dispositions toward the political parties (Erikson and Wlezien 2012). In parliamentary systems, by contrast, parties matter more early on. This is important because partisan dispositions, while not fixed, are more durable than those toward candidates. That preferences are in place much later in presidential systems thus comes as little surprise. That there is no real difference between legislative elections in presidential and parliamentary systems may surprise, however. It implies that parties do not matter consistently more to voters in the latter.

Electoral institutions also are important. Preferences in legislative elections come into focus more quickly and completely in proportional systems. We find limited evidence of general differences across systems—that proportional representation per se is what matters. We find stronger evidence that the party-centricity of the systems matters most of all. Although closely related to proportionality, there is significant variation in party-centricity within both proportional and plurality systems, and this variation is of consequence for the formation of electoral preferences. The number of parties, meanwhile, appears to have little effect.

We have only scratched the surface of the variation in context. To begin with, political institutions differ in ways that we have not considered. Perhaps more importantly, there are other differences in context that we have not even begun to explore. Some of the differences relate to countries themselves. For instance, following Converse (1969), there is reason to think that the age of democracy is important to the formation and evolution of preferences. Other differences relate not to political institutions or the countries themselves, but to characteristics of political parties. There are numerous possibilities here, most notable of which may be whether parties are in government or opposition, as is suggested by the literature on economic voting (e.g. Fiorina 1981; Duch and Stevenson 2008). Another is whether parties are catch-all or niche. The age and size of parties also could matter. Clearly, much research remains to be done, and our methodology can guide the way.

That said, we have learned something about the general pattern relating preferences and the vote over the election timeline and the structuring influences of political institutions. We have shown that preferences are often in place far in advance of Election Day and that they evolve slowly over time. Indeed, the final outcome is fairly clear in the polls before the election campaign really begins. This is not to say that the campaign does not matter, as it does, particularly in 37 certain types of countries and elections where candidates are central. Even there, however, it is clear that the “long campaign” between elections matters most of all.

#### Black swans are priced in BUT extremely unlikely nonsense

Lars Christensen 12, Chief Analyst at Danske Bank, Founder and CEO of Markets & Money Advisory, Senior Fellow at London’s Adam Smith Institute, Master’s Degree in Economics from the University of Copenhagen, Market Monetarist, “Seriously People, It's Time To Stop Talking About Black Swans”, Business Insider, 5/10/2012, https://www.businessinsider.com/its-time-to-forget-about-black-swans-2012-5

It has become highly fashionable to talk about “black swans” since the crisis began in 2008 and now even Scott Sumner has talked about it in his recent post “Don’t forget about those black swans.”

Scott's headline reminded me how much focus there is on “black swans” these days – especially among central bankers and regulators and to some extent also among market participants.

What is a black swan? The black swan theory was popularized by Nassim Taleb in his 2007 book “The Black Swan.”

Taleb’s thesis is basically that financial markets under-price the risk of extreme events happening. Taleb obviously felt vindicated when the crisis hit in 2008. The extreme event happened and it had clearly not been priced by the market in advance.

Lets go back to to Scott’s post. Here he quotes Matt Yglesias:

Here’s a fun Intrade price anomaly that showed up this morning. The markets indicate that there’s more than a 3 percent chance that neither Barack Obama nor Mitt Romney will win the presidential election. That’s clearly way too high.

Scott then counters Matt by saying that we should not forget about “something unusual happening”:

1. One of the two major candidates is assassinated, and the replacement is elected (as in Mexico’s 1994 election.)

2. Ditto, except instead of assassination one candidate pulls out due to health problems, or scandal.

3. A third party candidate comes out of nowhere and gets elected.

Scott is of course right. All this could happen and as a consequence it would obviously be wrong if the market had priced a 100% chance that nobody other than Obama or Romney would become president.

Scott and I tend to think that financial markets are (more or less) efficient and as a consequence we would not be gambling men. Scott nonetheless seem to think that the odds are good:

“But 3% is low odds. It’s basically saying once in every 130 years you’d expect something really weird to happen in US presidential politics during an election year. That’s a long time! Given all the weird things that have happened, how unlikely is it? Some might counter that none of the three scenarios I’ve outlined have occurred in the U.S. during an election year (my history is weak so I’m not certain.) But mind-bogglingly unusual things have happened on occasion. On November 10, 1972, what kind of odds would Intrade have given on neither Nixon nor Agnew being President on January 1, 1975?”

Scott certainly has a good point, but I will not question the market on this one. Market pricing is the best assessment of risk we have. Obviously Taleb disagrees as he believes that markets tend to underprice risk. However, I fundamentally think that Taleb is wrong and I don’t see much evidence that markets underprice black swan events. The fact that rare events happen is not evidence that the market on average underprices the likelihood of these events.

The long-shot bias and central banks

In the evidence from betting markets it seems to indicate that if anything bettors tend to have a favorite-longshot bias meaning that they tend to over-price the likelihood that the favorite will lose elections or sport games. Said in another way if anything bettors tend to over-price the likelihood of black swan events. I happen to think that this is not a problem for markets in general, but it nonetheless indicates that if anything the problem is too much focus on black swan events rather than too little focus on them.

This to a very large extent has been the case for the past 4 years – especially in regard to central banking and banking regulation. There seems to be a near-obsession among some policy makers that a new black swan could turn up. How often have we heard the talk about the major risk of bubbles if interest rates are kept too low too long? Most of the new financial regulation being pushed through across the world these days is justified by reference to the risk of some kind of black swan event.

Media and policy makers in my view have become obsessed with extreme events happening – you will be reminded about that every time you go through the security check in any airport in the world.

The obsession with black swan events is highly problematic as the cost of policy makers obsessing about very unlikely events happening leads them to implement very costly regulation that leads to massive waste of resources.

Again just think about how many hours you have spent waiting to get through airport security over the last couple of years and if you think that is bad just think of the cost resulting from excessive new regulation of the global financial markets.

So my suggestion is clearly to *forget about those black swans*!

#### Election modeling is broadly accurate

Scott Tranter 20, Head of Data Science for Decision Desk HQ and Founder of Øptimus Analytics, a Data Science Firm, Former Data Science Director for Marco Rubio for President in 2016, and Adjunct Professor at the American University School of Public Affairs, “A Defense of Election Forecasting Models”, 8/19/2020, https://centerforpolitics.org/crystalball/articles/a-defense-of-election-forecasting-models/

Despite those blind spots, we believe our model is still informative to readers and does a good job of capturing uncertainty and providing insight into what is going on. Our confidence comes from our internal testing and public track record of forecasting. Our model in 2018 for the House and the Senate performed very well. Our mean prediction for the House was 233 Democratic seats, and Democrats ended up winning 235. In the Senate, our mean prediction had 52 Republican seats, and Republicans ultimately won 53. Overall, the 2018 model’s accuracy was 94% in the Senate and 97% in the House. And outside of toss-ups, the model “missed” only one individual Senate race and four House races.

#### ‘Antitrust not key’ is our argument---it’s a low priority now because Dems haven’t seized the issue by making substantive progress, but could be revived as a central issue if championed by Biden---its direct connection to the economy creates huge latent potential for political resonance

Bill Scher 21, Host of the History Podcast "When America Worked" and Co-Host of Bipartisan Online Show and Podcast "The DMZ", “A Short History of Democrats and Antitrust”, Washington Monthly, 7/19/2021, https://washingtonmonthly.com/2021/07/19/a-short-history-of-democrats-and-antitrust/

Biden’s legislative agenda reflects that view. But in his antitrust remarks, Biden stressed that for “long-term” economic growth, we can’t depend simply on the market. The government must fix the market.

By elevating the importance of antitrust policies, Biden was returning the Democratic Party to its roots planted in the Progressive Era of the early 20th century. His antitrust speech lauded Teddy Roosevelt for battling the trusts and giving “the little guy a fighting chance.” But Biden’s rhetoric had more in common with Roosevelt’s 1912 rival for the progressive mantle, Woodrow Wilson.

In 1911 President William Howard Taft accused his former ally Roosevelt of getting snookered by the steel trust in approving the purchase of a competitor. Roosevelt’s answer was that “size in itself does not signify wrong-doing.” Only when a “huge corporation … has gained its position by unfair methods” should it be broken up and further regulated. In a 1912 campaign audio recording, Wilson laid into Roosevelt—running against both Taft and Wilson on the Bull Moose ticket—for saying that:

Mr. Roosevelt puts forth an admirable platform of what he would like to do for the people. But how is he going to do it? He proposes in his platform not to abolish monopoly, but to take it under the legal protection of the government and to regulate it. In other words, to take the very men into partnership who have been making it impossible to carry out these great programs by which all of us wish to help the people …

There are two programs. The Democratic program is this: to see to it that competition is so regulated that the big fellow cannot put the little fellow out of business, for he has been putting the little fellow out of business for the last half generation.

The program of the third party is to take these big fellows that have been putting the little fellow out of business, and regulate them, saying, “That is all right. You have put the other fellows out of business. But we are not going to put the little fellows back where you destroyed them. We’re going to adopt you and say, ‘run the business of the country, but run it in the way we tell you to run it.’”

As president, Wilson signed into law the Clayton Antitrust Act, which banned anti-competitive mergers and pricing, while also taking care that its provisions didn’t bar workers from unionizing and striking. He also created the Federal Trade Commission to enforce the Clayton Act, as it continues to do today.

In the run-up to the 1914 midterm elections, Wilson drew a clear contrast between the two parties: “while our opponents were ready to … merely regulate it … it is our purpose to destroy monopoly and maintain competition as the only efficient instrument of business liberty.” The Democrats lost House seats that year, but they gained three Senate seats and kept control of both chambers.

After that, Democratic Party platforms supported antitrust policies in every presidential election year until 1992 with Bill Clinton. But as Biden seeks to return to the Democratic past, he should be mindful that past Democratic presidents—even Wilson—were often pulled in the two opposite directions Wilson described, and struggled to tame corporate power.

Wilson biographer John Milton Cooper noted Wilson’s initial appointments to the FTC “hobbled its effectiveness,” and that the “need for cooperation between government and business during World War I would dampen the Wilson administration’s anti-trust ardor.”

Franklin Roosevelt began his presidency with a suspension of the Democrats’ prized antitrust law as part of the National Industrial Recovery Act, accepting the U.S. Chamber of Commerce’s argument that corporations needed the power of price fixing in order the end the Great Depression. Roosevelt envisioned a grand partnership between government and big business. Populists and many Progressives were horrified. An apoplectic Senator Huey Longdecreed that “The Democratic Party dies tonight … We wrote the platform in which we said we would not emasculate the antitrust laws. … We are now guaranteeing that the antitrust law can be emasculated, that the clothing men can get together, and that the shoe men can get together, and raise the prices of the commodities of industry without anything whatever to take care of the population on the farms.”

Roosevelt’s record on antitrust was actually more mixed than that. Biden’s speech noted that FDR “ramped up antitrust enforcement eightfold in just two years, saving families billions in today’s dollars and helping to set the course for sustained economic growth after World War Two.” Perhaps Biden picked that up from a New York Times op-ed by former Democratic Senator Mark Pryor, published in March, that lauded one of FDR’s Justice Department antitrust division leaders, Robert Jackson (later chief prosecutor at the Nuremberg Trials and a Supreme Court justice). “Jackson’s 14-month stint as head of the antitrust division in 1937 and ’38,” Pryor wrote, “was the most consequential in the agency’s history.”

As with Wilson, though, when war broke out, Roosevelt rekindled his relationship with big business, and many antitrust cases were suspended. A strategy that deemphasized antitrust and instead pursued government partnership with and regulation of corporate giants prevailed through the 1960s in what John Kenneth Galbraith described approvingly as “the new industrial state.”

John F. Kennedy’s and Lyndon Johnson’s presidencies did have some notable antitrust successes. The Kennedy administration won one Supreme Court case establishing that the Clayton Act applied to banks, and the Johnson administration won another preventing the combination of two local banks. But there was often less to these presidents’ determination to check business power than met the eye.

In 1962 Kennedy famously threatened a price-fixing investigation into U.S. Steel after it surprised him with an inflationary price increase. Kennedy was furious because he’d just got done persuading the Steelworkers to moderate their wage demands. “My father always told me that all businessmen were sons of bitches,” he said privately, “but I never believed it until now.” After Kennedy’s saber-rattling, U.S. Steel backed down and cancelled the increase.

But that victory didn’t last long. Steel prices soon went back up anyway, just more quietly and gradually. Kennedy and Johnson largely remained passive during a wave of corporate mergers that began in the previous decade.

Reagan and Bush curbed antitrust enforcement much more sharply (and without compensatory regulation on the “new industrial state” model). Democrats railed against a wave of mergers, but were circumspect about ways to stop it.

The Clinton and Obama presidencies continued the postwar Democratic tradition of a mixed approach to antitrust enforcement, though with differing approaches to finance and technology. The Clinton administration repealed FDR’s Glass-Steagall law, which had long separated commercial banking from investment banking, while Obama stepped up bank regulation with the Dodd-Frank law. But when it came to the rising power of the corporate Internet, it was Clinton’s Justice Department that swung hard, suing Microsoft for wielding monopoly power illegally to control web browsing. Antitrust advocates cringe that Obama’s FTC took a pass on Google despite evidence of monopolistic behavior. Still, the rise of Big Tech is a major reason why Democrats have brought antitrust policy back to center stage, starting with the Hillary Clinton campaign in 2016, which put antitrust policy back in the party platform for the first time since her husband’s campaign took it out.

Now Biden has returned antitrust to the prominence it held in Democratic Party politics a century ago. In his remarks, Biden cannily plucked examples where stronger antitrust enforcement could deliver real world benefits without the hassle of navigating Congress. For example, in pledging that the Federal Trade Commission would “ban or limit” non-compete clauses in employment contracts, Biden noted the rank absurdity of imposing them on workers “running the machines that lay down asphalt. If, in fact, you get offered a job and … you’re in Arkansas doing it … you can’t take a job in west Texas to do it. What in the hell does that have to do with anything?” This was Biden at his best, framing his appeal in the common sense ticked-off language of the average, normal person.

Biden’s revival of antitrust isn’t just good policy; it’s also good politics. That’s because it can bridge ideological tensions between the party’s younger left flank and its older centrists. Antitrust has appeal to both factions. Talk of restoring competition may upset a handful of giant corporations, but not the wider swath of smaller businesses and entrepreneurs. Socialists may not love capitalism but it’s hard to see them getting too mad at moderate Democrats who draw real corporate blood in the name of repairing capitalism.

#### Their generic ‘ranking the issues’ evidence is irrelevant---most are partisan, where views are locked in. Antitrust is distinct because it’s a jump ball---Dems could seize it to swing votes.

Guy Cecil 21, Chairman of Priorities USA and President of Miles Strategies, “Democrats Must Push an Antitrust Agenda”, Washington Monthly, 3/31/2021, https://washingtonmonthly.com/2021/03/30/democrats-must-push-an-antitrust-agenda/

The five biggest tech companies in the U.S. have gone from $2 trillion dollars in value to $7 trillion in just the past five years. To put that in perspective, if you took all U.S. currency in circulation worldwide, you wouldn’t be able to purchase even a third of their value. That hasn’t just made them rich, it’s made them “too big to care.” It’s no coincidence that Big Tech companies have caused chaos and controversy in two presidential elections, supercharged health misinformation during a global pandemic, and stifled economic competition while suppressing worker wages. As Democrats settle in for at least two years of full control in Washington, they need to respond—not just because it’s the right thing to do, but because it’s a political necessity.

From a policy perspective, the merits of cutting Big Tech down to size are clear. For years, large tech companies have amassed and wielded power with impunity, and America’s economy and democracy have paid the price. Companies like Amazon and Google have engaged in anticompetitive practices that harm small businesses and undermine entrepreneurship, while social media giants like Facebook have built business models designed to radicalize users and sow division. Rather than compete fairly, they just buy up competitors or force them out of business. On nearly every issue Democrats care about—from climate change and racial justice, to economic inequality and free and fair elections—a tech company is on the other side standing in the way.

But for Democrats that care about making progress, reigning in Big Tech isn’t just a substantive issue, it’s a political one. We’ve seen that unchecked extremism and misinformation online tilts the electoral playing field away from Democrats who believe in science and facts and toward Republicans who traffic in toxic conspiracy theories. And recent polling shows an overwhelming majority of Americans have grown concerned about the concentrated power of the largest tech companies. They also believe that companies like Facebook drive people apart, that Big Tech’s economic power is a problem, and that the federal government should implement stronger tech regulations. Mark Zuckerberg is less popular than Donald Trump.

Republican politicians like Ted Cruz and Josh Hawley recognize the political upside of challenging Big Tech. While they may not care about actually blunting the economic and social harms big tech companies cause, faux Republican outrage is designed to draw contrasts with Democrats—painting them as coddling mega corporations and donors. Americans saw this on full display recently when Hawley grilled Merrick Garland over news reports he was considering a former outside Facebook lawyer to lead the DOJ’s antitrust division. While Garland denied the reports, it highlighted the fact that there are fringe members of the GOP caucus who see opportunity in being perceived to lead on antitrust issues.

The good news for Democrats is this issue is still a jump ball politically. According to new polling by the advocacy group Accountable Tech, voters are evenly split when asked which party they trust more to hold Big Tech accountable. So what should Democrats do to deliver?

First, they should use the power of the White House. President Biden has a short window to take decisive action across a range of issues, and that starts by putting the right people in charge. So far, President Biden is on the right track, appointing Lina Khan and Tim Wu to the Federal Trade Commission (FTC) and National Economic Council respectively, as well as experienced, pro-consumer leaders to head up the Securities Exchange Commission and Consumer Financial Protection Bureau. But there are jobs that still need to be filled, most notably, that of Assistant Attorney General for Antitrust. And filling that slot with another antitrust champion will send a resounding signal that President Biden and Congressional Democrats won’t stand for Big Tech abuses and that the administration is serious about aggressively enforcing the nation’s antitrust laws, which Republicans have undermined for years. The majority of Americans agree, with nearly twice as many voters supportive of breaking up big tech companies than opposed.

Second, Congress needs to put this issue front and center. In February, Senator Amy Klobuchar introduced legislation to broaden the standards for antitrust enforcement and increase funding for federal antitrust agencies. Senator Klobuchar, the chair of the Senate Judiciary Committee’s antitrust subcommittee, also plans to hold hearings that focus on Big Tech’s harmful effects on the economy. Her counterpart in the U.S. House of Representatives, Congressman David Cicilline, has already produced a sweeping report on Big Tech’s antitrust violations and is proposing increased scrutiny of price gouging and a pause on mega-mergers during the economic crisis. Democratic leaders in both chambers should make this a priority.

Finally, in addition to getting the substance right, Democrats need a focused message that cuts through the Republican noise. The harms of Big Tech are not theoretical—from the Capitol riots to Covid-19 recovery to the lack of choice and competition online, Americans are seeing them every day. Democrats should meet Americans where they are and talk about solutions in the context of day-to-day life. Arguments centered on pocketbooks and healthcare are more powerful than empty and misleading Republican complaints about free speech

In confronting the impact of Big Tech on our society, we face a looming problem that cuts across every aspect of our economy and our society. As a country, we need to reign in Big Tech. As a party, Democrats have the power to pick up the mantle. We should lead as though our political lives depended on it, because they do.

#### It's a top issue that wins votes

Sean McElwee 21, Executive Director of Data for Progress, Former Policy Analyst at Demos, Former Researcher at the Comeback America Initiative, “Voters Want The Biden Administration to Hold Big Tech Accountable. His Choice of Personnel Should Reflect That”, Data for Progress, 3/11/2021, https://www.dataforprogress.org/blog/2021/3/10/voters-want-biden-personnel-to-reflect-antitrust

In the past few years, antitrust policy has returned to the forefront of American politics, and for good reason. The rise of Big Tech and increased corporate concentration has made clear the need for strong antitrust enforcement to tackle America’s economic woes. As he considers candidates for top antitrust positions, President Joe Biden should look to strong proponents of antitrust enforcement, not individuals with close ties to embattled tech companies. Not only would this be good for policy, it’s good politics too: our polling at Data for Progress shows voters want the federal government to take a hard line on reigning in Big Tech, and this means appointing antitrust personnel committed to strong enforcement.

In Data for Progress’ latest polling with Demand Progress, we found that voters widely oppose the appointment of attorneys, executives, or lobbyists for Big Tech companies facing lawsuits and investigations being appointed to federal office. By a net 44% margin, respondents indicated they believed Biden should refuse to give these individuals appointments. In addition to having exciting policy implications, the prospect of antitrust warriors like Lina Khan at the Federal Trade Commission (FTC) and Jonathan Kanter as Assistant Attorney General for the Antitrust Division would likely be welcomed by voters.

The “revolving door” between public office and the private sector is increasingly a major concern among voters. Polling conducted by Demand Progress and Data for Progress asked respondents if Biden should avoid appointing alumni of Big Tech companies and close the revolving door between tech and government that tilts policy-making away from the interests of working families. By a 28% margin, voters agreed with this proposition. By eschewing tech lawyers in favor of strong antitrust proponents working in the public interest, Biden would show he’s serious about closing the revolving door.

On his part, Biden has already chosen not to appoint potential personnel with ties to Google to his administration on multiple occasions. These include Roger Ferguson, who served on the Board of Directors of Google’s parent company Alphabet Inc., and Michèle Flournoy, an associate of former Google CEO Eric Schimdt. Polling by Data for Progress and the American Economic Liberties Project (AELP) found wide support for Biden’s decision to not appoint Ferguson or Flournoy, with respondents indicating their support for their exclusion by a 37% margin.

The future of the Department of Justice (DOJ) suit against Google will be partially dependent on who Biden appoints to lead the Antitrust Division. The suit against Google has the potential to not just set precedent for future suits against tech giants, but against other corporations engaging in anti-competitive practices, too. Appointing an individual committed to holding Google accountable would be in line with popular support for the suit. Polling by Demand Progress in October 2020 found that voters supported the federal lawsuit by a 16% margin.

In a deeply-divided country, there are few issues that both Democrats and Republicans can agree on. Fortunately, one of those issues is holding Google accountable for its anti-competitive practices. The Demand Progress survey found that 52% of Republicans and 49% of Democrats supported the federal suit against Google, with 26% and 32% indicating their opposition, respectively. Biden has stressed the need to unite the country, and filling his administration with strong proponents of reigning in corporate power through antitrust enforcement is a good way to go about this.

Big Tech companies have long engaged in anti-competitive behavior at the expense of competitors and consumers alike. It’s of little surprise, then, that polling has found wide concern among voters about the influence of Big Tech on government policy. Polling taken last fall by Data for Progress and Demand Progress found that respondents agree that Big Tech executives wield too much influence over policy-making by a 30% margin.

Only 24% of respondents said they were satisfied with the current level of influence Big Tech executives wield in Washington, with an even smaller 7% saying they wanted the group to have more influence. This overwhelming display of concern about the power Big Tech executives wield in government was seen across partisan lines, with a majority of Democrats (56%), Republicans (52%), and Independents (55%) alike indicating their unease.

There are far too many situations in which one must weigh public approval against the need for sound policy. This is not one of them: by eschewing Big Tech attorneys for antitrust roles in favor of strong advocates of combatting monopoly power, Biden will be able to win public approval while helping secure a better future in the process.

#### ‘Other issues’ prove it’s key because antitrust intersects with all of them

Benjy Sarlin 19, Policy Editor and Political Reporter at NBC News, BA in Political Science from Vassar College, “Break 'Em Up, Say Dems: Why the 2020 Field is Taking Aim at Monopolies”, NBC News, 3/30/2019, https://www.nbcnews.com/politics/2020-election/break-em-say-dems-why-2020-field-taking-aim-monopolies-n988876

Drawing a page from turn-of-the-century populists, Democrats running for president are increasingly railing against monopoly power on the campaign trail, as candidates embrace policies aimed at breaking up conglomerates and cracking down on practices they say weaken competition.

The conversation touches on numerous areas of the economy: Wall Street, hospitals, drug companies and, increasingly, big tech. It's a shift from prior elections, when questions about the scale of big business were often a niche issue behind other economic debates.

## 2NR

### Midterms DA---2NR

#### Antitrust will stall in the courts---only the plan’s success signals a sea change in the law

Tara L. Reinhart 10-6, Partner for Antitrust/Competition at Skadden, Arps, Slate, Meagher & Flom LLP, J.D. from the Catholic University of America Columbus School of Law, B.A. from the University of North Carolina, et al., “FTC Chair Khan Highlights Key Policy Priorities Going Forward, but Aggressive Agenda Faces Uphill Climb”, JD Supra – Newstex Blogs, 10/6/2021, Lexis

Practical Limitations on Implementation of Chair Khan's Policy Priorities

Chair Khan describes the antitrust agenda outlined in her memorandum as 'robust,' and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will face substantial practical challenges.

Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the conduct in question is unlawful. Chair Khan's memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms beyond the traditional focus on consumer welfare and price effects. However, courts have — and will likely continue to — rely on existing standards developed in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. Absent legislative change, then, a practical gap will persist between Chair Khan's vision of refocused and more assertive antitrust enforcement, on the one hand, and the law that would apply to any FTC enforcement action, on the other.2[2]

Moreover, Chair Khan's plan to revise the merger guidelines and her desire to target 'facially illegal deals' will also face constraints based on current law. First, the antitrust guidelines typically incorporate existing legal standards, making radical change difficult to achieve. The 1982 Guidelines, which impactfully affected merger enforcement with the implementation of the hypothetical monopolist test, provide the last dramatic revision. Whether courts will accept major revisions at this stage will be an open question. Second, agency merger review is shaped by the existing review process enacted by the Hart-Scott-Rodino Act, regardless of whether the FTC believes a deal is facially illegal. Unlike regulators in other jurisdictions, the FTC must file a lawsuit and prevail in court if the agency wants to block a pending transaction.

Relatedly, Ms. Khan's ability to implement her ambitious agenda will be subject to the fact that changing these legal frameworks will depend on either Congressional action, which is far from certain, or litigation victories, which require the commitment of significant resources at a time when the FTC claims to already be stretching its capacity. Despite her recognition of the demands already imposed on FTC staff and plan for 'intentional' resource allocation, Chair Khan envisions the FTC undertaking increased vigilance and a more assertive agenda. If the existing resource constraints grow in response to Chair Khan's enhanced enforcement ambitions, the FTC could face difficulty balancing its investigatory agenda with the ability to litigate those cases, particularly considering the complex nature of antitrust matters, which often take years to resolve and require millions of dollars for experts and other related costs as well as a large team of attorneys and staff to manage. In addition, though Chair Khan referenced her hope for increased cross-bureau coordination in cases, it is unclear that such coordination would be efficient or create the capacity needed to fulfill the new agenda, especially when attorneys from other government divisions have already been recruited to help reduce burdens on matters of antitrust enforcement.

Finally, Chair Khan's desire to expand the agency's regional footprint and supplement the staff with various nonlawyer roles may further strain the budgetary resources needed to keep pace with the new agenda and present their own management challenges. Whether funding from Congress is imminent, whether it would be used to onboard lawyers or the other potential staff Ms. Khan desires, and how quickly hiring could reach the scale necessary to support the FTC's newly announced enforcement priorities are not yet clear.

Conclusion

Given the challenges to implementing the generalized policy goals set by Chair Khan, we do not expect an immediate fundamental sea change in antitrust enforcement. The practical obstacles described above mean that Chair Khan's FTC will be unable to contest every instance of what the agency might perceive to be unlawful conduct or unfair competition. We expect that the FTC will need to continue to be selective in the cases that it brings, which may mean that in the near-term, it will focus available resources on sectors of the economy perceived as involving 'the most significant actors,' such as large technology firms that Chair Khan has frequently referenced, particularly to the extent they engage in transactions that implicate the novel considerations under the proposed 'holistic' approach to identifying antitrust harms.3[3] We still expect to see some matters receive extensive investigations and proceed to litigation, and the outcomes of these matters will likely partially signal the success of the new agenda.

#### The XO is empty talk that’s years from being implemented

Jeff Jaeckel 21, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, Alexander Paul Okuliar, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Lisa M. Phelan Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Megan E. Gerking Partner at Morrison & Foerster, “Charting a New Course for Antitrust: President Biden’s Executive Order Promoting Competition in the American Economy”, Client Alert, 7/14/2021, https://www.mofo.com/resources/insights/210714-president-biden-executive-order-antitrust.html

Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.

#### It's non-binding AND will be blocked by the court and Congress

Lewis Brisbois 21, Lewis Brisbois Bisgaard & Smith LLP, “President Biden Signs Executive Order on Promoting Competition in the American Economy”, 7/12/2021, https://lewisbrisbois.com/newsroom/legal-alerts/president-biden-signs-executive-order-on-promoting-competition-in-the-american-economy

On July 9, 2021, President Biden signed an “Executive Order on Promoting Competition in the American Economy.” According to a Fact Sheet released in advance of the signing, the Executive Order takes “decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

Among other things, the Executive Order encourages the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) to focus enforcement efforts on problems in key markets and coordinate other federal agencies’ responses to corporate consolidation. Further, the Executive Order calls on the FTC and DOJ to “enforce the antitrust laws vigorously.” The Executive Order would also make it easier for high tech workers to change jobs by banning or limiting non-compete agreements, lower prescription drug prices by supporting programs to import cheaper prescription drugs from Canada, make it less expensive to repair products by limiting manufacturers from barring self-repairs or third-party repairs of their products, and increase opportunities for small businesses by directing all federal agencies to promote greater competition through procurement and spending decisions. In all, the Executive Order outlines 72 initiatives that attempt to rein in corporate powerhouses that control markets.

In the Fact Sheet, the Biden Administration compared its Executive Order to the responses of previous Administrations to “growing corporate power,” expressly citing the trust-busting efforts of the Theodore Roosevelt and FDR Administrations’ “supercharged antitrust enforcement” agendas.

Although Democratic lawmakers and union leaders have cheered the Executive Order, some business advocacy groups have reportedly warned that such measures as those in the Executive Order could slow the economy.

Executive Orders are expressions of policy intent that have no actual binding legal force.

Mkd

Their ability to change the law lies in follow-up implementation by federal agencies that act to implement presidential initiatives. Those changes are limited by the extent of underlying statutory authority, and the courts in recent years have appeared reluctant to expand the scope of what is considered anticompetitive activity under the antitrust laws. Business interests should keep a close eye on the regulatory proposals that result from this Executive Order and consider engaging on those that affect their business operations.