# Harvard---Round 4---vs. Michigan State BG

## 1NC

## OFF

### OFF---T Courts

#### Courts cannot ‘expand’ antitrust law

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The court’s decision therefore (a) alters the rights of parties in Pennsylvania accused of engaging in anticompetitive behavior to defend against those claims in federal court, (b) creates new causes of action under the Consumer Protection Law, and (c) creates new remedies for antitrust violations that defendants would not face in federal court. These decisions are inherently legislative in nature. See, e.g., State v. Philip Morris, Inc., Nos. 96122017 and CL211487, 1997 WL 540913, at \*6 (Md. Cir. Ct. May 21, 1997) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function.”). If these decisions are legislative in nature, then they are outside the purview of the courts and the executive.

Moreover, when the General Assembly prescribes specific statutory duties and remedies, those provisions must be strictly followed, 1 Pa.C.S. § 1504, and the courts cannot “expand coverage to subsume other remedies.” See Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974) (“A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”). If the Consumer Protection Law is designed to protect buyers in consumer transactions and sets forth specific remedies, the courts are unable to expand the statute to subsume antitrust remedies.

#### Vote neg:

#### Limits—courts explode advantages into unpredictable precedents

#### Ground—mechanism dodges DA links

### OFF---Distinguish CP

#### The United States federal government should hold that states have unfettered regulatory authority to experiment with controls of emerging tech and that Parker immunity does not implicate this. The United States federal government should not narrow the applicability of the Parker doctrine.

#### The CP solves advantage 2 without affecting antitrust

Daniel B. Rice 19, Associate at the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center, and Jack Boeglin, Associate at Covington & Burling LLP, “Confining Cases To Their Facts”, Virginia Law Review, June 2019, 105 Va. L. Rev. 865, Lexis

Perhaps this hypothetical is not as far-fetched as it seems. Through the little-known practice of "confining a case to its facts," courts can achieve the near-equivalent of overruling with only a fraction of the trouble. Under our definition, when a court engages in confining, it repudiates the legal principle underlying a case, replacing it with a new, "correct" principle. 5 In this respect, confining is very much like overruling. But unlike overruling, confining preserves the precedential force of a repudiated principle for future cases presenting the same facts as the one being confined. 6 Confining thus splits a doctrinal area in two. When a confined case's facts recur, the case will continue to be treated as good law. In all other factual scenarios, however, the confined case will be regarded as having been overruled. 7

[\*868] How, one might ask, does creating this doctrinal fissure reduce the costs of overruling? Remember first that courts' desire not to disturb reliance interests ordinarily functions as a brake on legal correction. 8 Confining eases off this brake by enabling certain reasonable expectations - those formed in reliance on the particular facts of the confined case - to remain unaffected by a principle's repudiation. Under certain conditions, then, confining can permit a court to move the law in its preferred direction and avoid overly disrupting reliance on an earlier decision.

Of course, respect for reliance interests is not the only reason courts maintain fealty to precedent. The pace of legal change is slowed, too, by the formal constraints courts have imposed on themselves when deciding whether to overrule a case. Confining has found use as an effective mechanism for casting off these constraints. Consider the Supreme Court's avowed commitment to overruling a case only when it can articulate a "special justification" for doing so - one that transcends mere disagreement with the case's reasoning. This requirement has not been understood to apply to confining, 9 even though confining eviscerates everything a case stands for except its precise result. 10 Similarly, although each federal [\*869] court of appeals forbids three-judge panels from overruling circuit precedent, panels have frequently gutted earlier decisions through the use of confining. 11 By labeling these deviations from precedent "confining," in short, courts have successfully skirted the formal requirements of stare decisis.

Confining likewise enables federal courts to sidestep the Supreme Court's prohibition on "prospective overruling" - i.e., continuing to treat a case as good law only with respect to conduct predating its overruling. 12 During the Warren Court era, prospective overruling was often called upon to soften the blow to reliance interests occasioned by the Court's doctrinal course-corrections. 13 The Court's retroactivity doctrine has since made clear, however, that federal courts may not apply new principles selectively in order to accommodate reasonable expectations. 14 But this is precisely what happens with confining. 15 This discrepancy - oddly - appears to have gone unnoted by jurists and scholars alike.

Finally, courts may have engaged in confining precisely because it is so poorly understood. Judge for yourself the more eye-grabbing headline: "Supreme Court Overrules Smith v. Jones" or "Supreme Court Confines Smith v. Jones to Its Facts." Confining's relative lack of name recognition has allowed courts to quietly sweep aside disfavored precedents. A [\*870] confining judge can say "with a straight face, "I didn't vote to overrule it. I simply limited the earlier decision to its facts.'" 16

Confining can thus embolden courts to depart from precedent even when overruling might come at too dear a price. But the very features of confining that make it so appealing to judges also pose considerable - and strangely underexplored - threats to a judicial system predicated on principled adjudication. By providing a method for courts to carve out exceptions to generally applicable doctrinal rules, confining encourages judges to decide cases based purely on pragmatic concerns, rather than on principle. By creating an easy workaround to the formal obligations that attend overruling precedent, confining dangerously loosens the constraints of stare decisis. And by allowing courts to undermine precedent in a low-visibility manner, confining impairs the public's ability to oversee the work of the judiciary.

Confining also runs headlong into fundamental concerns about the nature and scope of judicial authority. 17 The practice of confining entails a marked departure from the ordinary judicial role in two key respects. First, it causes courts to decide future cases in a concededly unprincipled manner. Once a case has been confined to its facts, the operative question becomes whether a new case is factually distinguishable from it in any respect - even if the cases cannot be distinguished in any principled manner. And second, confining requires courts to continue applying principles that they have already held to be invalid. In this way, confining causes incompatible legal principles to coexist with one another, with each regarded as "good law" in some sense. No other method of treating precedent calls upon courts to engage in purely fact-bound adjudication, or to construct a jurisprudence at war with itself. 18

### 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

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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.

### OFF---States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should:

#### -significantly increase prohibitions on anticompetitive business practices by the private sector by not deferring to the state action immunity doctrine

#### -limit regulatory externalities through enhanced state coordination and cooperation

#### -rapidly assimilate and experiment with regulations over Nextgen technology

#### -staff state agencies & licensing boards with independent state officials who invite comment & input from professionals & adopt private certification requirements

#### -eliminate certificate of need regulations

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

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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---Courts DA

#### The courts careful balancing act will keep Roe afloat.

Kimberly Strawbridge Robinson 21, Reporter for Bloomberg Law, “Barrett Channels Roberts’ ‘Go-Slow’ Approach in Landmark Cases,” Bloomberg Law, 06-18-2021, https://news.bloomberglaw.com/us-law-week/barrett-channels-roberts-go-slow-approach-in-landmark-cases

The U.S. Supreme Court’s newest justice is showing signs that she’s more aligned with John Roberts and Brett Kavanaugh in the center than she is with her other conservative colleagues, refusing to support broad rulings that could shake the court’s credibility.

Amy Coney Barrett is “starting to show her stripes” as a moderate who prefers small movements in the law, not huge shifts, South Texas College of Law Houston professor Josh Blackman said.

The justices handed down victories to both liberals and conservatives on Thursday saving the Affordable Care Act again but siding with a religious group in the latest battle over LGBT protections.

Roberts, the chief justice, is viewed as an institutionalist who wants to conserve the public’s confidence in the court. So far, he favors incremental shifts in the law. “That’s been one of the Chief’s primary goals all along,” said Case Western Reserve law professor Jonathan Adler.

He recently gained an ally in Kavanaugh in this pursuit, and it appears Barrett may join their ranks.

The court as a whole has has largely agreed in cases this year. The unanimous decision in the LGBT case was the 25th time the justices were unanimous in 41 rulings so far this term. There are 15 to go in coming days.

But the big test for Barrett will be next term starting in October when the justices will tackle hot-button issues like guns, abortion, and possibly affirmative action.

“It is a very conservative Court, even if we will only get glimpses of it this year,” said UC Berkeley law school Dean Erwin Chemerinsky.

Kicking the Can

Both the Affordable Care Act and LGBT rulings were “very, very narrow,” Georgia State law professor EricSegall said.

In the Obamacare case, California v. Texas, the 7-2 majority handed down a procedural ruling to avoid undoing the landmark 2010 law. The justices said red states led by Texas didn’t have a legal basis—or standing—to challenge it.

Only Justices Samuel Alito and Neil Gorsuch would have voted to gut the act, long a priority of Republicans.

The LGBT ruling, while unanimous in its outcome, was splintered in its reasoning. Hiding under the 9-0 breakdown was a dispute about whether to overturn the court’s divisive ruling in Employment Division v. Smith, which sparked the passage of the bipartisan Religious Freedom Protection Act and mini state versions across the country.

The court in Smith refused to require an exception from Oregon’s prohibition on peyote, saying religious objectors don’t get a free pass on “generally applicable” laws.

On opposite ends in the court’s LGBT ruling were the liberal justices—Stephen Breyer, Sonia Sotomayor, and Elena Kagan—along with Roberts, who wanted to uphold the court’s precedent in Smith, and the court’s most conservative members—Clarence Thomas, Alito, and Gorsuch—who wanted it overruled once and for all.

In the middle was Barrett, joined by Kavanaugh, who acknowledged Smith‘s shortcomings but was concerned with the fallout should the court overrule it. “Yet what should replace Smith?” Barrett asked in a short concurrence.

Both cases were a punt, Blackman said, with the issues likely to return to the court at some point in the future.

End of the World

But the ACA and LGBT cases, along with the extraordinary agreement all term, suggests a majority of the justices don’t think it’s the right time to make major changes in the law.

“In the throes of everything"—the pandemic, Barrett’s first term, Kavanaugh’s biting confirmation, calls for Breyer to retire, and the caustic 2020 presidential election—"they didn’t want to shock the world this year,” Segall said.

“Preserving the court’s own political capital is incredibly important to the justices because they know their only capital is the confidence of the American people,” he added.

Adler said the court has developed a sort of 3-3-3 split—that is, three liberals, three conservative justices willing to chuck precedents they don’t agree with, and three conservative justices hesitant to overturn cases they may disagree with. Roberts, Kavanaugh, and now, apparently, Barrett make up that last group.

Adler said that split will create some interesting pressures for the three justices in the middle next term, when—as Segall said—"the world will end.”

The end of the world was a reference—in part—to the court’s abortion case, which could call into question the landmark ruling in Roe v. Wade and later cases.

#### The aff destroys ideological balance by contradicting bipartisan precedent.

Dorsey et al. 20, Elyse Dorsey, Adjunct Professor in the Antonin Scalia Law School at George Mason University; Geoffrey A. Manne, Founder and President of the International Center for Law & Economics; Jan M. Rybnicek, Senior Associate at Freshfields Bruckhaus Deringer in Washington D.C., Adjunct Professor and Senior Fellow at the Global Antitrust Institute at Antonin Scalia Law School at George Mason University; Kristian Stout, Associate Director at the International Center for Law & Economics; Joshua D. Wright, Executive Director of the Global Antitrust Institute, Professor in the Antonin Scalia Law School at George Mason University, “Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement,” Pepperdine Law Review, Vol. 47, No. 861, 2020, https://ssrn.com/abstract=3592974

Today there is widespread, bipartisan support for the modern consumer welfare standard. 98That standard has been repeatedly embraced by majorities in Supreme Court decisions that recognize and embrace the economic foundation that the standard provides. In Reiter v. Sonotone, the Court recognized that the Sherman Act is a "consumer welfare prescription." 99Later, in United States v. Baker Hughes, then-Judge Clarence Thomas--joined by then-Judge Ruth Bader Ginsburg--wrote that "[e]vidence of market concentration simply [\*878] provides a convenient starting point for a broader inquiry into future competitiveness." 100And, more recently, in her confirmation hearings, Justice Kagan stated that "it is clear that antitrust law needs to take account of economic theory and economic understandings." 101

In its adjudications, the Court has likewise been faithful to the goal of promoting consumer welfare. In Brooke Group, the Court elaborated on predatory pricing actions, aligning such claims under the Sherman Act and the Robinson-Patman Act. 102In reaching its holding, the Court reasserted the requirement that predatory pricers must have some possibility for recoupment because, without such a requirement, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced." 103

In Leegin Creative Leather Products v. PSKS, Inc., the Court had occasion to consider resale price maintenance restraints, and their effect on consumer welfare. 104In moving resale price maintenance restraints from per se illegal to subject to a rule of reason analysis, the Court held that "[t]hough each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance." 105Further, "[the prior approach to resale price maintenance restraints] hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices." 106

Recent criticisms of the consumer welfare standard, rooted in populist preferences for a return to political antitrust, ignore both this bipartisan support as well as the rigorous analysis and debate that led to the creation of this standard. 107

#### Capital is finite and spills over---the Court won’t repeatedly conflict with political issues

HLR 11 – Harvard Law Review, “ADVISORY OPINIONS AND THE INFLUENCE OF THE SUPREME COURT OVER AMERICAN POLICYMAKING”, June, 124 Harv. L. Rev. 2064, Lexis

In assessing the Court's power relative to the elected branches, it is first necessary to be clear about what motivates the Supreme Court. When exercising judicial review, the Court seeks to vindicate its constitutional vision by striking down legislation repugnant to that vision. This is true whether one believes that the Court seeks in good faith to divine the true meaning of the Constitution and impose it on the elected branches, attempts to interpret the Constitution faithfully but subconsciously imports its own policy views, or disingenuously strives to implement its policy preferences in the guise of neutral interpretation. For the purposes of the present argument it is irrelevant which view or combination of views is most accurate, and the phrase "constitutional vision" will stand for any and all of these. Yet as suggested above, the Court is not unconstrained when it seeks to effect its constitutional vision through judicial review: if it strays too far from the political mainstream, n55 it will face consequences that undermine its constitutional [\*2076] vision even more than would the upholding of a disfavored statute. n56 The upshot is that the Court operates under conditions of scarcity and must economize on its political capital to go as far in implementing its constitutional vision as political realities allow, which sometimes means upholding (or declining to review) government actions that contravene that vision. n57 And, as a distinct matter, most [\*2077] Justices have displayed a desire to conserve the Court's political capital and maintain its institutional prestige as much as possible even where the Court was not immediately threatened with any hard political constraints. n58 This conservatism is especially understandable given that the Justices are generally not political experts and lack the sophisticated public relations apparatuses of the elected branches, and that the elected branches have substantial capacity to shift public opinion about the Court if they so choose; these factors make it rational for the Court to be parsimonious with its political capital in order to avoid blind overreaching.

[FOOTNOTE]

n57. Thus, the Court's decisionmaking process in a judicial review case incorporates its internal preferences and its view of external constraints as follows: R = B / C, where B equals the benefits to the Court's constitutional vision of invalidating a given piece of legislation, C stands for the cost the Justices expect to incur in terms of political capital, and R gives the trade-off rate between costs and benefits in any given case, such that the Court will expend its political capital in those cases where R is highest, so long as R > 1.

A reasonable objection to the model elaborated in this Part is that although the Court is politically constrained, this "bank account" model in which the Court has finite political capital to "spend" by striking down popular government actions is unrealistic: the Court can also increase its prestige - its institutional capital - by exercising judicial review, which has been the effect of Marbury and Brown, two decisions without which the Court would be much weaker now. Nonetheless, most countermajoritarian decisions do seem to cost the Court rather than increase its capital (Marbury was a refusal to make the countermajoritarian decision, see Friedman, supra note 53, at 60-62, and Brown jeopardized rather than solidified the Court's power over the years immediately following the decision, see Klarman, supra note 53, at 312-43). This is especially true in the short run, while the decision remains countermajoritarian, and it is the short run that counts for the current Justices: the fact that Brown is today sacrosanct did not help the Court when Southern resistance threatened that decision's efficacy in the years immediately after its announcement. Cf. Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 743 (2011) ("Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support."). The necessary implication of Levinson's statement is that the "savings account" - and thus the Court's countermajoritarian capacity - is finite. At any rate, the Court's position is no different from that of any other political actor: though the presidency as an institution, for instance, would certainly lose influence as a result of a string of weak, unassertive presidents, and might gain it through the acts of a strong leader, any given President at any given time is undoubtedly limited by political constraints.

#### U.S. reproductive rights gets modelled globally.

GFW 17, “Women’s Movements Matter More Than Ever: A Critical Moment For Global Women’s Rights,” Global Fund for Women, 01-20-2017, https://www.globalfundforwomen.org/what-we-do/voice/campaigns/build-movements-not-walls/womens-movements-a-critical-moment-for-global-womens-rights/

We have decades of proof that U.S. policies and leadership directly influence policies and decisions globally, and we know that it is women who are often most acutely impacted—for better or for worse. For example, we know that U.S. policies can directly block women’s access to reproductive health and rights. The ‘Global Gag Rule’ prohibited U.S. foreign aid to any organization that delivers abortion services, but was repealed by President Obama. Before the law’s repeal, there was a massive chilling effect on many global efforts for reproductive health—and in one of his first executive actions as President, Trump reinstated and expanded the Global Gag Rule, which will have damaging impacts on women’s access to critical health care ranging from maternal care to sex education, to access to contraception and HIV and AIDS prevention and services.

Conversely, the U.S. State Department’s leadership on issues such as ending child marriage has been a positive global force for advancing women’s rights. The U.S.’s stance on human rights is critical to protecting women’s rights all over the world—especially in armed conflict and political turmoil as it is in such scenarios that sexual violence escalates and women’s needs and voices are often silenced.

At this moment of transition, women’s movements around the world are poised to ensure that women’s voices are heard and that human rights are not rolled back. They tell us that they will continue to advocate for key issues like reproductive rights, ending sexual violence in conflict, and girls’ rights. They are determined to grow and flourish, to make connections, and to work together across borders.

“At a time of transition like this it is understandable to worry about the future, especially for women and girls,” says Musimbi Kanyoro, President and CEO of Global Fund for Women. “But I’ve worked my entire career with women’s movements around the world, and because of them, I remain hopeful. At this critical moment, women’s movements are becoming stronger, more global, and more inclusive than ever before. When they have access to the resources and tools that they need, they are a force to be reckoned with. As we commit to resisting regressions in women’s rights and advocating for what we believe in, let’s all work together to #BuildMovementsNotWalls.”

Global Fund for Women spoke with our network of women activists and grassroots leaders from around the world to better understand their hopes and concerns in relation to the new U.S. President and his administration, and the potential for impact on their own work. From Brazil to Iraq, and from Nigeria to the Ukraine and Israel, women’s rights leaders are examining the potential repercussions for women and girls. They offer advice for people in the U.S. for movement-building and resistance, and share their hopes for a strong, collective force that will fight across borders against rollbacks to rights and threats to activists.

A critical global moment for women’s rights

The transition of power in the U.S. comes at a critical time for women’s rights around the world. Women all around the world are facing threats to their fundamental rights, ranging from abortion access and ending sexual violence to racial justice and environmental rights.

Global movements for reproductive health and rights—including campaigns for access to contraceptives and safe and legal abortion—are at a critical moment. They are under threat in countless places, including in Latin America and the Caribbean where maternal mortality rates from unsafe abortions are highest, and facing powerful opposition from religious and cultural fundamentalists and others.

Groups working with refugee women and girls also face a pivotal moment. The vast majority of Syrian refugee women and girls are hosted in Lebanon, Turkey, and Jordan, where women’s groups are focused on providing core services including anti-violence training and healthcare while empowering refugee women with knowledge about their rights, leadership skills, and economic opportunities—and these women’s groups are advocating for critical changes in national laws that restrict refugees’ access to jobs, hospitals, and other basic rights citizens have. Concerns are escalating about how the policies of a new U.S. administration may impact their work.

Feminist activists globally are increasingly facing fears for their safety. For example, in Egypt, Turkey, and several other countries, we’ve witnessed an escalating crackdown on feminist and human rights activism, including harassment against women human rights defenders and threats to journalists and academics. In many places—such as the Inter-American Commission on Human Rights and Court—U.S. influence is a critical factor in enforcing mechanisms for their protection.

In countries from Sub-Saharan Africa to Asia and the Pacific, grassroots women are coming together to protect their land and water rights amid climate change and increased violence to improve their own farming and local food sources, and to increase their economic opportunities.

Women are standing up against rollbacks to rights, resisting the rise of conservatism, blocking dangerous anti-women policies, and fearlessly defending women’s rights amid conflicts and political and economic crises.

Conservative leadership is on the rise in many countries around the world and women’s groups are joining forces to share their strategies of resistance.

Connecting the dots in threats to fundamental rights globally—and learning together

“As far as women and other civil society organizations [in Africa] are concerned, all progressive issues might suffer under a Trump Presidency,” says Bisi Adeleye-Fayemi, co-founder of African Women’s Development Fund and Global Fund for Women Board Member. “Women’s rights, sexual and reproductive rights, climate change, LGBTQ individuals, Muslim people, refugees… are not likely to get the attention they deserve—they will probably get the wrong kind of attention.”

Indeed, policy stances in the U.S. will have a direct impact on global communities and situations. And by and large, many of the key human rights issues that are coming into play in U.S. domestic policy including access to reproductive health and rights and ending violence against women, are issues that are under the spotlight in other places around the world. U.S. leadership could play a significant role—either in moving the needle positively on these critical issues, or in condoning or precipitating the rollback of hard-won gains.

#### Global reproductive freedom solves overpopulation---extinction.

Robert Engelman 16, Vice President for Programs at the Worldwatch Institute, Lead Author of the United Nations Population Fund’s State of World Population 2009 report, “An End to Population Growth: Why Family Planning Is Key to a Sustainable Future,” Solutions, 02-22-2016, https://thesolutionsjournal.com/2016/02/22/an-end-to-population-growth-why-family-planning-is-key-to-a-sustainable-future/

Those who ponder humanity’s future in the twenty-first century generally take at face value demographic projections suggesting that the world population will reach something like 9 billion around 2050 and will then stabilize at about that level.1 The widespread belief that this 30 percent increase from today’s 6.9 billion people is inevitable undermines consideration of the role of population size in climate change, water scarcity, biodiversity loss, rising energy prices, and food security. Contributing to this is the related view that efforts to prevent population growth would require coercive government policies that constrain couples from having the children and the family sizes they want. While some analysts are confident that the world can feed, house, and otherwise support 9 billion or more people, others are less certain, and voices of caution about population growth are heard more often than in the past.2 A logical application of the precautionary principle in the face of current environmental problems would suggest that humanity could more easily accomplish these feats in an environmentally sustainable manner with a smaller population.

In a joint statement in 1993, representatives of 58 national scientific academies stressed the complexities of the population-environment relationship but nonetheless concluded, “As human numbers increase, the potential for irreversible changes of far-reaching magnitude also increases. … In our judgment, humanity’s ability to deal successfully with its social, economic, and environmental problems will require the achievement of zero population growth within the lifetime of our children.”3 In 2005, the United Nations’ Millennium Ecosystem Assessment identified population growth as a principal indirect driver of environmental change, along with economic growth and technological evolution.4

In October 2010, a group of US and European climate and demographic researchers published findings from an integrated assessment model calculating the impact of various population scenarios on fossil-fuel carbon dioxide emissions over the coming century. If world population peaked at close to 8 billion rather than 9 billion, along the lines described in a low-fertility demographic projection published by the UN Population Division, the model predicted there would be a significant emissions savings: about 5.1 billion tons of carbon dioxide by 2050 and 18.7 billion tons by century’s end.5

What if we could prove wrong the popular conviction that a future with 9 billion people and a growing population is inevitable? Suppose we could demonstrate that world population size might peak earlier and at a lower level if government policies aimed not at reproductive coercion but at individual reproductive freedom? Suppose such policies aimed to help all women and girls prevent unwanted pregnancies and conceive only when they want to bear a child? This article presents new data on births resulting from women’s active intentions to become pregnant. The hypothesis it probes may appear counterintuitive: if, starting at any moment, all pregnancies in the world resulted from each woman’s intent to give birth, human population would immediately shift course away from growth toward decline within a few decades.

An Ethical Basis for Action to Slow Population Growth

What can societies that value democracy, self-determination, human rights, personal autonomy, and privacy do to include demographic change among strategies for environmental sustainability? An important answer may lie in a relatively untested set of principles adopted by almost all the world’s nations at a 1994 UN conference held in Cairo. The third of three once-a-decade governmental conferences on population and development, it produced a program of action that abandoned the strategy of “population control” by governments in favor of a focus on the health, rights, and well-being of women.6 An operating assumption of this program is that when women have access to the information and means that allow them to choose the timing of pregnancy, the intervals between births lengthen, average family size shrinks, and teen births become less frequent. All of these improve maternal and child survival and slow population growth.7

Experts disagree on how reproductive autonomy compares with other strategies in slowing that growth. Some assume economic growth is the most effective means, although birthrates rose along with prosperity in many countries after World War II and remain relatively high in several wealthy oil-exporting nations in which women have fewer rights and lower status than men.8 Moreover, some analysts argue that the arrow of causation operates more in the other direction, with low fertility stoking economic growth.9

There is a more robust and demonstrable correlation between female educational attainment and fertility. Worldwide, women with no schooling have an average of 4.5 children, while those who have spent at least a year or more in primary school have just three. Women who complete at least a year or two of secondary school have 1.9 children—well below replacement fertility rates. With one or two years of advanced education for women, average childbearing rates fall even further, to 1.7.10 On this basis alone, those interested in depressing population growth rates might want to focus on improving women’s educational attainment.

Questions remain about whether education alone can bring about declines in fertility without other supporting conditions, especially easy, affordable access to a range of contraceptive options. Similar uncertainties cloud understanding of exactly how improved child survival and the empowerment of women affect fertility. Improving both factors certainly contributes to later births and smaller families and is valuable regardless of its demographic impacts. But without clear data on the magnitude of these influences, interventions related to schooling, child survival, and women’s empowerment are rarely seen as core aspects of governmental population policy.

This brings us to family planning. Access to safe and reliable contraception has exploded since the mid-twentieth century. An estimated 55 percent of all heterosexually active women worldwide now use modern contraceptive methods, while an additional seven percent use less reliable traditional methods.11 As the use of birth control has spread, fertility has plummeted from a global average of five children per woman in 1950 to barely more than 2.5 today.1

### OFF---Common Law

#### Without reference to the laws of the United States, the United States federal government should determine that state-action immunity doctrine should be limited. The United States Congress should restrict the scope of its core antitrust laws to exclude Parker immunity.

#### The CP creates statute-independent common law with the same effect as the plan

HLR 20 – Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law”, Harvard Law Review, 133 Harv. L. Rev. 2557, Lexis

None of this is to say that ERISA preemption fails to raise federalism concerns or that the concerns addressed in Part II are unique to anti- trust. In its decision to expressly preempt state law in ERISA, a wise Congress should have considered the difficulties of preemption via judge-made law. Part II’s concerns with preemption via judge-made law could be applied to any delegation to the judiciary that overrides the states’ will. But given the brevity of federal antitrust statutes and the relative lack of executive branch involvement, Congress should be even more wary if it decides to preempt state antitrust law.159 [FOOTNOTE 159 BEGINS] 159 Complaints about brevity and lack of executive branch involvement land an even stronger blow against preemption via statute-independent federal common law. A grant of federal common lawmaking power does not have to be statutory. All that is needed to support the development of federal common law is “some expressed or implied affirmative grant of power to the national government by the Constitution or a statute enacted pursuant to it.” 19 MILLER, supra note 132, § 4514. When courts make law from a constitutional grant, there may not even be a brief statute. See, e.g., Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943) (“When the United States disburses its funds . . . it is exercising a constitutional function or power. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”); see also 19 MILLER, supra note 132, § 4515; Volokh, supra note 94, at 1429 (discussing courts’ “statute-independent federal common-lawmaking powers”). Because statute-independent common law is created completely by the courts, preemption via statute- independent common law will preempt the states while also excluding the federal executive branch.

Part II’s critique then undermines statute-independent common law preemption even more than it undermines a preemptive Sherman Act. But Part II proffers only an argument that weighs against preemption; that argument must be balanced against the various pro-preemption critiques of Part I. When it comes to statute-independent common law, the pro-preemption arguments may simply be greater than they are in the antitrust arena. After all, such statute-independent common-lawmaking power exists only “in suits implicating a sufficiently strong interest of the national government.” 19 MILLER, supra note 132, § 4515. And it makes sense that common law grounded in the Constitution has more sway than does common law grounded in statute. Although antitrust law has sometimes been likened to the Constitution or other founding documents, see United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (“Antitrust laws . . . are the Magna Carta of free enterprise.”); Thomas B. Nachbar, The Antitrust Constitution, 99 IOWA L. REV. 57, 69 (2013), courts simply give its commands less weight than those of the Constitution. Compare, for example, the (limited) deference given to professionals in the antitrust sphere, see Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 696 (1978) (analyzing agreements by professionals under the rule of reason), to the zero deference given to professionals under the First Amendment, see Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371–72 (2018). Even if statute-independent common law’s complete lack of input from the democratic branches increases the power of the federalism critique, that increase is rebutted by an increase in the power of the pro-preemption arguments. [FOOTNOTE 159 ENDS]

Of course, there is reason to believe that if Congress were to expressly preempt state antitrust law, it would do so as part of a more major antitrust reform effort. Recently, federal antitrust policy has been the subject of critique. Fed up with the seeming omnipresence of corporate giants, some scholarly160 and journalistic161 discourse has turned on the federal government’s antitrust policies. As things stand, if Congress decides to preempt state antitrust law with current federal antitrust jurisprudence, it would have to decide that the pros of preemption mentioned in Part I outweigh the federalism cons of Part II. But if Congress were to reform antitrust law by creating a new, detailed antitrust regime for courts to interpret, preemption of state antitrust law could avoid the perils of preemption via judge-made law.

#### Common law’s currently limited by precedent that requires courts to have explicit statutory delegation

Caleb Nelson 15, Emerson G. Spies Distinguished Professor of Law and Elizabeth D. and Richard A. Merrill Professor, University of Virginia School of Law, “The Legitimacy of (Some) Federal Common Law,” Virginia Law Review, 101 Va. L. Rev. 1, Lexis

This conclusion, however, potentially leaves a lot of room for federal common law. On any question that the Constitution, a federal statute, or a federal treaty prevents state law from answering but does not itself resolve, courts might be able to articulate a rule of decision as a matter of unwritten law. 11 Indeed, according to one commentator who takes a [\*5] fairly broad view of federal common law, that is essentially what the Supreme Court did in the initial decades after Erie: Judges felt free to recognize federal common law "whenever either the Constitution or Congress has "federalized' an area of the law but has failed to provide rules of decision for all issues that may arise." 12

Many modern federal judges deny that unwritten law can operate so broadly at the federal level. Their concerns revolve around the idea that articulating rules of decision as a matter of unwritten law entails a robust type of "lawmaking," analogous to the power that a legislature exercises when it enacts a written law. 13 After Erie, federal judges are used to acting as if state courts enjoy this sort of power (on matters as to which the states have lawmaking authority), but the Supreme Court has said that federal courts are different (even in areas of federal preemption). In Justice Rehnquist's words, "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." 14

For many federal judges and commentators, it follows that every rule of decision that has the status of federal law must be traced in some way to a written federal enactment - not simply in the sense that the written enactment preempts state law, but in the sense that the written enactment either establishes the rule itself or authorizes the judiciary to do so. 15 To be sure, this idea leaves room for disagreement about when a particular statute or constitutional provision should be understood to authorize "federal common lawmaking." 16 But some distinguished commentators [\*6] have advocated restrictive approaches. 17 Justice Scalia has drawn the logical conclusion: "In the federal courts, … with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text - the text of a regulation, or of a statute, or of the Constitution." 18

Academic critics of this logic have tended to accept the premise that all common-law decisionmaking entails robust lawmaking power, while arguing that federal courts can assert more such power than skeptics of [\*7] federal common law think. 19 This Article suggests exactly the opposite criticism. Like Justices Rehnquist and Scalia, I am reluctant to interpret either the Constitution or the typical federal statute as giving federal courts sweeping authority to invent new rules of decision out of whole cloth, even in the service of policies established by Congress. Nonetheless, I see a substantial role for certain types of federal common law in areas of federal preemption, because I do not think that modern federal courts are inventing rules of decision out of whole cloth whenever they articulate and apply any legal doctrines that have not been codified.

I am not trying to revive the old rhetoric that judges simply "discover" the common law and play no role in "making" it. But to say that courts participate in "making" the common law is to speak ambiguously, for there are different senses in which law can be made. 20 As a result, even if all common law is properly characterized as "judge-made," 21 one should not leap to the conclusion that each individual court brings common-law rules into being in the way that a legislature might enact a new statute. 22 While some prominent commentators have indeed spoken of the common law as "judicial legislation," 23 that way of talking is at best "a metaphor," 24 and the comparison that it draws is [\*8] controversial. 25 Part I of this Article therefore summarizes a few other ways of thinking about the common law.

Of course, common-law decisionmaking is extraordinarily complex, and it may not lend itself to a unitary description. In practice, rules of decision recognized by common-law courts presumably reflect a mix of sources, including precedents established by prior courts, customs and other social practices followed in the real world, policies reflected in written laws, modes of reasoning commonly used by lawyers, values widely shared by the public, and the policy preferences of individual judges. The relative importance of each of these inputs may well vary for different judges and in different areas of law. Still, the idea that all common-law decisionmaking is quasi-legislative strikes me as an exaggeration.

Part II discusses some of the questionable conclusions that have flowed from this idea. For instance, skeptics of federal common law sometimes suggest that in the absence of a special delegation of lawmaking authority, federal courts cannot legitimately recognize any rules of decision as a matter of unwritten law in areas of federal [\*9] preemption. This way of talking elides the potential distinction between rules that the courts would be creating out of whole cloth and rules that are firmly grounded in sources outside the federal judiciary (such as widespread customs, traditional principles of common law, or the collective thrust of precedents from across the fifty states). Likewise, to account for the role that unwritten law plays at the state level, many skeptics of federal common law suggest that state law gives state courts robust lawmaking power of a sort that federal law withholds from federal courts. Not only is this distinction implausible, but it may have the unintended effect of encouraging state judges to behave more like legislators when articulating rules of decision as a matter of state common law. By the same token, the premise that all common-law decisionmaking is quasi-legislative may affect how judges behave in the enclaves of federal common law that courts do recognize. The more judges think that articulating rules of decision as a matter of common law entails unfettered discretion to create whatever rules they please, the less they will feel bound to respect either the traditional content of the common law or the trend of opinions from other jurisdictions.

Part III calls attention to a subtler consequence of the skeptics' position: To the extent that judges refuse to recognize federal common law, they may end up compromising their normal approach to the interpretation of written federal laws. Many modern skeptics of federal common law embrace textualism in statutory interpretation and originalism in constitutional interpretation. As a practical matter, however, reluctance to recognize federal common law creates pressure to interpret written federal laws in ways that depart from the tenets of textualism and originalism. In a prior article, I suggested that the felt need to attribute federal rules of decision to written enactments has caused post-Erie judges to expand the domains of individual federal statutes to encompass issues that might more naturally be seen as matters of unwritten law. 26 Consistent with a recent observation by Professor Stephen Sachs, 27 Part III argues that a similar dynamic is at work in constitutional law.

[\*10]

I. Different Senses in Which Judges Might "Make" the Common Law

Over the years, accounts of the nature and sources of the common law have varied. From at least the seventeenth century on, though, many authors associated the common law with customs followed by people in the real world. 28 Proponents of this view tended to be vague about whether real-world customs always preceded the rules of decision that judges and juries applied in court, or whether judicial decisions and custom sometimes had a more symbiotic relationship; perhaps some rules of decision that were recognized as part of the common law had originated in one or more court cases, but customs had grown up around those rules in such a way as to validate them and to dictate the use of the same rules in later cases. 29 On either account, though, the content of the common law was said to reflect social practices rather than simply the ideas of individual judges.

For enthusiasts of the common law, this feature was one of the system's main strengths. To the extent that the rules applied by courts derived from the customs of the people, those rules enjoyed a species of democratic legitimacy. 30 What is more, the processes by which customs [\*11] developed were said to filter out bad ideas and to refine good ones, producing better rules than any single lawmaker could invent on his own. According to this hopeful story, a practice would not gain widespread acceptance unless it seemed sensible to enough people, and people would not continue to follow it unless it stood the test of experience. 31

Of course, widely accepted practices are more likely to resolve some kinds of legal questions than others. In the eighteenth century, perhaps the English rule allowing three "days of grace" for payment on a bill of exchange could plausibly be attributed to the customs of merchants. 32 But judges and juries surely confronted many questions that existing practices did not specifically resolve.

Still, what Professor Gerald Postema calls the "classical" conception of the common law had an answer to this potential objection. 33 According to a substantial group of seventeenth-and eighteenth-century thinkers, the common law reflected not only specific practices but also "the social habits of a people," on the basis of which judges (over time) identified principles that were organic to the community. 34 Even with respect to novel issues, then, these thinkers characterized judges as [\*12] deriving or "discovering" the principles of the common law on the basis of sources external to the courts. 35

Most modern lawyers do not see those sources as being so determinate. In Justice Souter's words,

The prevailing conception of the common law has changed since 1789 … . Now, … in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created. 36

Unfortunately, the modern consensus that judges "make law" obscures potential disagreements about what that means. 37

[\*13] On one possible view, unwritten law does indeed rest partly on sources that exist outside of the courts, such as real-world customs and other social practices, 38 but these sources are only partially determinate. Any time a judge formulates a rule of decision on the basis of these raw materials, or applies a previously recognized rule in a context where its import is uncertain, there is a sense in which the judge has made new law. 39 Still, unlike legislatures (which "make law in the primary literal sense of selecting a norm on the basis simply of its merits and prescribing it ex nihilo" 40), judges who articulate and apply rules of unwritten law are not necessarily asserting authority to enact whatever rules they please. The more one believes that unwritten law has external sources that substantially constrain judicial discretion, the more one might think that common-law decisionmaking entails only a subsidiary type of "lawmaking." At least in the areas where such external sources exist, perhaps common-law decisionmaking is less analogous to legislation than to a species of interpretation. 41

A second possible view maintains that instead of having external sources, the common law "has been made from first to last by judges." 42 In that respect, some commentators have long described the common [\*14] law as "the stupendous work of judicial legislation." 43 But unlike a true legislature (which can repeal existing laws at will), common-law courts are thought to be bound at least to some extent by their own precedents. In a federal system like the United States, moreover, courts in one jurisdiction might also feel some obligation to follow the consensus of decisions by courts in other American jurisdictions. 44 Thus, although proponents of the second view describe the common law as entirely judge-made, they do not believe that current judges have freewheeling power to articulate whatever rules they like. Despite the absence of external sources, common-law decisionmaking is said to be constrained by sources internal to the courts - the precedential effect of "the mass of decisions" that, on this account, "constitute the common law." 45 To the extent that precedents help to "define and point out [the courts'] duty" in particular cases, 46 even someone who thinks that courts made the common law out of whole cloth might not think that any current common-law court enjoys quasi-legislative authority. 47

Jeremy Bentham famously offered a third and more radical view of common-law decisionmaking. To begin with, Bentham vigorously mocked the idea that the common law rests on external sources. [\*15] Throughout his writings, he insisted that "common law" is nothing but an alias for "judge-made law." 48 But he went farther: He suggested that rather than simply having been created by judges in the past, much of what we think of as common law is continually being made by current judges. While Bentham believed that judges in a common-law system should rigidly follow established precedents, 49 he did not think that the doctrine of stare decisis operated as a substantial constraint on judicial discretion. 50 Among other things, common-law courts tended to make [\*16] law for the particular cases that they were adjudicating, and such case-specific law did not provide determinate rules for other cases. 51 Thus, Bentham believed that the common law routinely operated ex post facto: Courts were perpetually making new law, and they announced and applied that law in the context of cases about conduct that had already occurred. 52

Bentham himself did not refer to the common law as "judicial legislation," perhaps because he did not want to dignify the common law by comparing it to written enactments. Indeed, Bentham sometimes wrote as if what common-law judges made was not "law" at all, in the sense of rules applicable to more than a single case; although judges issued orders "bearing upon the individual persons and things in question," and although judges might purport to articulate rules to justify those orders, Bentham argued that the purported rules created so little certainty about the likely resolution of future cases that they were only "sham law." 53 Still, Bentham described common-law judges as usurping the legislative function by inventing the law that they purported to apply. 54

At the time that Bentham was writing, orthodox common lawyers might still have insisted that courts merely discover the common law [\*17] and play no creative role of any sort. Bentham ultimately was very successful in helping to banish that view. 55 Even if some common-law rules are grounded in social practices that exist outside the courts, modern accounts of the common law emphasize the courts' contribution, and participants in the legal system routinely characterize the common law as judge-made law. 56 But while conventional wisdom has shifted toward Bentham on this point, one should not assume that modern lawyers also share Bentham's understanding of the precise sense in which courts "make" the common law. On many modern accounts, common-law judging tends to be more constrained than Bentham suggested. 57

Nonetheless, Bentham's views certainly have modern adherents. Textualists, in particular, have embraced various aspects of his critique of unwritten law. Indeed, an essay that Justice Scalia published in 1997 has accurately been called a "neo-Benthamite attack on the common law." 58 In the essay, Justice Scalia associated common-law decisionmaking with largely unfettered discretion to make policy. 59 He specifically denied that common-law rules have much connection to real-world customs or other social practices; 60 he portrayed the common [\*18] law as essentially anti-democratic, 61 and he quoted extensively from an 1836 speech in which a Benthamite reformer denounced the common law as purely "judge-made." 62 Like Bentham, moreover, Justice Scalia suggested that even the law made by courts in the past does little to prevent current courts from making new law. While Justice Scalia portrayed stare decisis as an essential feature of a common-law system, he also described common-law judges as masters of "the technique of … "distinguishing' cases" in the service of making what they regard as "the best rule of law for the case at hand." 63 In his view, common-law judges have "the mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'" 64

II. The Implications of the Idea that All Common-Law Decisionmaking Entails Robust Lawmaking Power

Appreciating the different senses in which judges might be said to "make" common-law rules is not simply an academic exercise. In combination with one's views of the separation of powers, where one falls on the spectrum described in Part I can affect one's conclusions about the conditions under which common-law decisionmaking is legitimate.

Suppose that with respect to a particular legal question, one accepts the first view of the common law described in Part I: One thinks that the courts' project is to distill a rule of decision from real-world customs and other external sources. If those external sources of law are "in force" (in the sense of informing the legal rights and duties of the parties to particular transactions) even before judges encounter them, and if they [\*19] are sufficiently determinate to operate like other kinds of law, one might well conclude that common-law decisionmaking needs no special justification. On this way of thinking, a simple grant of jurisdiction can be warrant enough for courts to seek to identify rules of decision supplied by the common law. After all, whenever a court has jurisdiction over a case, the court is presumably supposed to decide the case according to the applicable rules of decision. In the Anglo-American tradition, moreover, that obligation does not depend on whether the applicable rules of decision come from written law (like a statute) or unwritten law (like principles established by social practices). Thus, in cases where the applicable rules of decision come from real-world customs, courts might have not only the power but the duty to investigate those customs and to try to identify the rules of decision that they support.

Someone who accepts the second view of the common law described in Part I - someone who doubts that the common law ever had external sources, but who believes that common-law precedents are internal sources of law for the courts - might reach much the same conclusion. To be sure, such a person might have doubted the legitimacy of common-law decisionmaking in its early days, because "the field of judicial discretion" would have been "almost boundless at first." 65 But as precedents accumulated, they might steadily provide sources of law to future courts, and they might also shape people's expectations in the real world. In both of these respects, judicial precedents might operate in much the same way as real-world customs. Nowadays, then, someone who accepts the second view of the common law could offer much the same justification for its continued applicability as someone who accepts the first view. 66

That is not surprising, for these two views share some important features. If the common law has either external or internal sources that courts have a duty to respect, common-law rules can be thought of as [\*20] existing in at least semi-determinate form before current judges crystallize them in particular cases. Even though the judges are transforming semi-determinate sources of law into fully formulated rules, and even though the judges can therefore be said to be "making" or developing new law, one might think that the judges are doing exactly what they must always do in cases over which they have jurisdiction: They are attempting to determine the rights and duties of the parties according to the applicable rules of decision. If doing so sometimes requires the judges to resolve lingering indeterminacies about the content of those rules, the judges are still adjudicating rather than legislating.

That account, however, will ring false to people who hold the third view described in Part I - people who agree with Jeremy Bentham that the common law has neither external sources nor strong internal sources, and that each new set of common-law judges therefore has freewheeling discretion to make law in the guise of applying it. If that is one's image of all common-law decisionmaking, one might well conclude that courts need more than a simple grant of jurisdiction before they can properly participate in "making" the common law. Unless a court can point to some special delegation of lawmaking power, perhaps the court should confine itself to interpreting and applying laws made by others, and perhaps the court therefore should not purport to articulate rules of common law.

At least as far as federal courts are concerned, Justice Scalia and others have taken positions of this sort. This Part discusses both the premises and the implications of those positions.

A. Federal Common Law as "Delegated Lawmaking"

Federal courts are happy to apply the common law of a particular state (as the highest court of that state would declare it) in cases that lie within the reach of that state's law. But on topics that the Constitution or other aspects of federal law put beyond the states' lawmaking powers, some modern federal judges suggest that courts need special authorization in order to articulate any substantive rules of decision that cannot be traced to a written federal enactment. In Justice Scalia's words, a court that articulated this sort of federal common law would be exercising "substantive lawmaking power," and federal courts enjoy such power only to the extent that something in written federal law [\*21] delegates it to them. 67 A mere grant of jurisdiction, moreover, typically does not confer such lawmaking power. 68

People who hold these views often attribute them to Erie Railroad Co. v. Tompkins. 69 At first glance, the attribution is puzzling. Rather than considering questions that lie beyond the states' lawmaking powers, Erie addressed the relationship between state and federal courts on questions as to which the states do have lawmaking authority. Erie's holding, moreover, can plausibly be understood to have rested on two key propositions: (1) On matters that lie within the reach of the states' lawmaking powers, the unwritten law in force in each state is best regarded as being part of "the law of that State," 70 and (2) in our system of federalism, federal judges should defer to each state's highest court about the content of all aspects of that state's law. 71 These propositions do not tell federal courts how to behave in realms that lie beyond the reach of state law.

Still, Erie can be read to have broader ramifications. Although Justice Brandeis's rhetoric was noncommittal about the sources of the common law, 72 many commentators take his logic to reflect "the recognition that courts "make' law when they engage in common law [\*22] decisionmaking." 73 The more robust one's sense of the relevant "lawmaking," the more likely one is to characterize Erie's holding in these terms: Rather than speaking of deference to the state courts' views about the content of state law, one will speak of the state courts as themselves making laws that federal courts are obliged to follow. Indeed, from the perspective of federal judges, acting as if state courts have very robust lawmaking authority may be the simplest way of conforming to Erie and its progeny. On substantive matters that come within the reach of the states' lawmaking powers, federal courts will not run afoul of Erie if they think of each state's judiciary as "making" the state's common law in much the same sense that the state legislature makes the state's statutes.

For federal judges who are used to acting as if state courts have quasi-legislative power, it may seem but a small step to the proposition that state courts do have quasi-legislative power. Conversely, the fact that federal courts must accept the substantive laws formulated by state courts, rather than being able to formulate laws of their own, might seem to imply that federal courts lack this sort of power. To be sure, in areas where the federal government shares lawmaking authority with the states, Congress can certainly enact written federal laws that will take precedence over any contrary rules of state law (whether written or unwritten). But if Congress has not acted, Erie tells federal courts to apply state law as articulated by the highest court of the relevant state. Erie might therefore seem to carry important lessons not only about federalism but also about the allocation of lawmaking authority within the federal government. Specifically, various scholars have associated Erie with the idea that "principles related to the separation of powers … limit … the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress)." 74

[\*23] There is little question that certain kinds of "lawmaking" are indeed off limits to federal courts. After all, Article I of the Constitution vests the federal government's "legislative Powers" in Congress, not the federal courts. 75 Federal courts therefore lack comprehensive authority to create new rules of decision out of whole cloth, in the way that a legislature might. If that is one's image of common-law decisionmaking, one might conclude that federal courts have no inherent authority to draw rules of decision from the common law. What is more, one might take Erie to support that conclusion. On this way of thinking, one reason why Justice Brandeis refused to treat federal courts as equal partners with state courts in articulating common-law rules on topics that lie within the concurrent legislative powers of the federal government and the states is that separation-of-powers principles ordinarily keep federal courts from participating in the sort of "lawmaking" that common-law decisionmaking entails.

In the late 1970s or early 1980s, some Justices began invoking Erie in just this way. 76 Thus, when Justice Rehnquist proclaimed that "federal courts … are not general common-law courts and do not possess a general power to develop and apply their own rules of decision," he cited Erie. 77 In his view, Erie recognized that "the enactment of a federal rule" is usually a matter for Congress rather than the federal judiciary, and hence that "a federal court could not generally apply a federal rule of decision … in the absence of an applicable Act of Congress." 78

For people who think of the common law in these terms, Erie potentially matters even in realms that lie beyond the reach of state law and that therefore do not implicate Erie's specific holding. 79 Justice [\*24] Scalia has explained that after Erie, "federal common law [is] self-consciously "made' rather than "discovered[]' by judges," and so "federal courts must possess some federal-common-law-making authority before undertaking to craft it." 80 According to Justice Scalia, moreover, Erie establishes that neither the typical jurisdictional statute nor the general language of Article III confers such authority. 81 For a number of federal judges, the upshot seems to be that unless some other written federal law gives the federal courts lawmaking authority in a specific area, courts cannot legitimately articulate any federal rules of decision as a matter of unwritten law, even on questions that the common law or equity jurisprudence has traditionally been understood to address. 82

#### Revitalizing non-statutory common law as binding spurs climate mitigation---extinction

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“Global warming may be a ‘crisis,’ even ‘the most pressing environmental problem of our time.’ Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.”

— Chief Justice John Roberts, dissenting in Massachusetts v. EPA (2007)1

“The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”

— Donald J. Trump, Nov. 6, 20122

INTRODUCTION

Prior to the advent of comprehensive regulatory programs to protect the environment, the common law served as the primary vehicle for redressing environmental harm. More than a century ago, states used the common law of interstate nuisance to seek redress for the most serious transboundary pollution problems.3 Exercising its original jurisdiction over disputes between states, the U.S. Supreme Court issued injunctions limiting smelter emissions4 and requiring cities to build sewage treatment plants5 and garbage incinerators.6

Today the common law has been eclipsed by the enactment of federal legislation requiring agencies to regulate sources of pollution. These statutes have been interpreted broadly to give agencies great power to respond to emerging problems. For example, in Massachusetts v. EPA the U.S. Supreme Court held that the Clean Air Act (CAA) gives the U.S. Environmental Protection Agency (EPA) the authority to regulate greenhouse gas (GHG) emissions if they “endanger public health or welfare”7 by contributing to global warming and climate change.8 The Court rejected not only the claim that EPA lacked such authority, but also the agency’s other rationales for refusing to take action. 9 Following the ruling, EPA had to decide “whether sufficient information exist[ed] to make an endangerment finding.”10 It made the endangerment finding two years later.11

In a series of cases beginning in the 1970s, the Court has held that the comprehensive regulatory programs erected by the Clean Water Act (CWA) and the CAA displace federal common law nuisance claims.12 When states sought to use public nuisance law to address the threats posed by climate change, industry groups urged the Court to bar such actions on constitutional grounds. 13 Instead, in June 2011 the Court held in American Electric Power Co., Inc. v. Connecticut (AEP) that the CAA displaced federal common law nuisance claims in the context of regulating GHG emissions. At the time of the ruling, the Obama Administration EPA was moving aggressively to regulate GHG emissions. But, writing for a unanimous Court, Justice Ginsburg warned that a decision by the EPA not to regulate greenhouse gas emissions would invite litigation and would be subject to judicial review.14

With the election of President Trump, federal environmental policy has sharply shifted. The President has announced his intent to withdraw the U.S. from the Paris Agreement that every other country in the world has accepted as a global response to climate change.15 EPA is moving aggressively to repeal the Obama Administration’s Clean Power Plan, 16 roll back Corporate Average Fuel Economy (CAFE) standards, and attempt to preempt state programs to reduce GHG emissions. 17 Many Trump supporters want EPA to reverse its finding that GHG emissions endanger public health and welfare by contributing to climate change.18

If the Trump EPA reverses the 2009 endangerment finding, this would foreclose the EPA’s ability to use the CAA to regulate GHG emissions. This Article considers whether such an action unwittingly could revive the federal common law of nuisance as a regulatory backstop. While the Supreme Court ruled in AEP that the CAA displaces any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuelfired power plants, this was predicated on EPA actually making a reasoned and informed judgment of GHG emission dangers—not jettisoning agency expertise in favor of politics.19 This litigation, particularly if brought by states as quasi-sovereigns against EPA, could serve as a powerful prod to force federal action on climate change. After all, states have the “last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air.”20

In light of the Trump EPA’s current stance on environmental regulations, the Court’s decision in AEP, and other nuisance cases decided by federal appellate courts, 21 this is a propitious time to reconsider the use of public nuisance law to redress environmental problems. This Article focuses on what we call “the common law of interstate nuisance”—a body of law developed when states, acting in a parens patriae capacity, sought to protect their citizens from environmental harm originating in other states through public nuisance actions under either federal or state common law.22

## Innovation

### AT: China---1NC

#### No US-China war.

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True, throughout history, when a rising power has challenged a ruling one, war has often been the result. But there are notable exceptions. A war between the US and China today is no more inevitable than was war between the rising US and the declining United Kingdom a century ago. And in today’s context, there are four compelling reasons to believe that war between the US and China can be avoided.

First and foremost, any military conflict between the two would quickly turn nuclear. The US thus finds itself in the same situation that it was in vis-à-vis the Soviet Union. Taiwan could easily become this century’s tripwire, just as the “Fulda Gap” in Germany was during the Cold War. But the same dynamic of “mutual assured destruction” that limited US-Soviet conflict applies to the US and China. And the international community would do everything in its power to ensure that a potential nuclear conflict did not materialize, given that the consequences would be fundamentally transnational and – unlike climate change – immediate.

A US-China conflict would almost certainly take the form of a proxy war, rather than a major-power confrontation. Each superpower might take a different side in a domestic conflict in a country such as Pakistan, Venezuela, Iran, or North Korea, and deploy some combination of economic, cyber, and diplomatic instruments. We have seen this type of conflict many times before: from Vietnam to Bosnia, the US faced surrogates rather than its principal foe.

Second, it is important to remember that, historically, China plays a long game. Although Chinese military power has grown dramatically, it still lags behind the US on almost every measure that matters. And while China is investing heavily in asymmetric equalizers (long-range anti-ship and hypersonic missiles, military applications of cyber, and more), it will not match the US in conventional means such as aircraft and large ships for decades, if ever.

A head-to-head conflict with the US would thus be too dangerous for China to countenance at its current stage of development. If such a conflict did occur, China would have few options but to let the nuclear genie out of the bottle. In thinking about baseline scenarios, therefore, we should give less weight to any scenario in which the Chinese consciously precipitate a military confrontation with America. The US military, however, tends to plan for worst-case scenarios and is currently focused on a potential direct conflict with China – a fixation with overtones of the US-Soviet dynamic.

This raises the risk of being blindsided by other threats. Time and again since the Korean War, asymmetric threats have proven the most problematic to national security. Building a force that can handle the worst-case scenario does not guarantee success across the spectrum of warfare.

The third reason to think that a Sino-American conflict can be avoided is that China is already chalking up victories in the global soft-power war. Notwithstanding accusations that COVID-19 escaped from a virology lab in Wuhan, China has emerged from the pandemic looking much better than the US. And with its Belt and Road Initiative to finance infrastructure development around the world, it has aggressively stepped into the void left by US retrenchment during Donald Trump’s four-year presidency. China’s leaders may very well look at the current status quo and conclude that they are on the right strategic path.

Finally, China and the US are deeply intertwined economically. Despite Trump’s trade war, Sino-American bilateral trade in 2020 was around $650 billion, and China was America’s largest trade partner. The two countries’ supply-chain linkages are vast, and China holds more than $1 trillion in US Treasuries, most of which it cannot easily unload, lest it reduce their value and incur massive losses.

To be sure, logic can be undermined by a single act and its unintended consequences. Something as simple as a miscommunication can escalate a proxy war into an interstate conflagration. And as the situations in Afghanistan and Iraq show, America’s track record in war-torn countries is not encouraging. China, meanwhile, has dramatically stepped up its foreign interventions. Between its expansionist mentality, its growing foreign-aid program, and rising nationalism at home, China could all too easily launch a foreign intervention that might threaten US interests.

Cyber mischief, in particular, could undercut conventional military command-and-control systems, forcing leaders into bad decisions if more traditional options are no longer on the table. And Sino-American economic ties may come to matter less than they used to, especially as China moves from an export-led growth model to one based on domestic consumption, and as two-way investment flows decline amid escalating bilateral tensions.

A “mistake” on the part of either country is always possible. That is why diplomacy is essential. Each country needs to determine its vital national interests vis-à-vis the other, and both need to consider the same question from the other’s perspective. For example, it may be hard to accept (and unpopular to say), but civil rights within China might not be a vital US national interest. By the same token, China should understand that the US does indeed have vital interests in Taiwan.

The US and China are destined to clash in many ways. But a direct, interstate war need not be one of them.

### AT: Pandemics---1NC

#### ABR won’t get close to extinction, intervening actors solve it, and their internal link can’t

Ed Cara 17, Science Writer for The Atlantic, Newsweek, and Vocativ, 1/27/17, “The Attack Of The Superbugs,” http://www.vocativ.com/394419/attack-of-the-superbugs/

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here. Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives. For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty. Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess. “There has been a lot of work done the last couple of years, much of it spurned by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture. In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains. Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging. Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC. Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race. But barring the calvary showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability. The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

#### Disease can’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

### Innovation Turn---1NC

#### Can’t affect competion with China---there’s no spillover ev OR brink for how much is required.

#### Antitrust stifles innovation in the healthcare sector

Christopher L. White 21, Chief Operating Officer, General Counsel and Secretary of the Advanced Medical Technology Association (AdvaMed). Mr. White serves as the Association’s Chief Legal Officer and manages AdvaMed’s Legal Committee to develop and promote legal policy positions enhancing patient access to medical technology. Mr. White also leads the Association’s global working groups on legal policy and compliance, including over 1500 in-house medtech lawyers, “FTC: When it Comes to the Medical Technology Industry – First, Do No Harm”, <https://www.advamed.org/2021/08/03/ftc-when-it-comes-to-the-medical-technology-industry-first-do-no-harm/>, August 3rd, 2021

For many years, the Federal Trade Commission (FTC) has devoted more time and resources to healthcare than to any other industry– including high tech. Today, there are calls across the political spectrum for both the FTC and the Department of Justice (DOJ) to apply antitrust laws to reign in the nation’s largest tech/digital platform companies, and even to break them up. The nomination and appointment of Lina Khan to serve as chair of the FTC, and the recent nomination of Jonathan Kanter to serve as the DOJ’s Assistant Attorney General for Antitrust, may signal that President Biden heeded those calls. Notably, those calls have also been joined by those advocating for tougher antitrust enforcement in other industries, including healthcare. But, as medtech and the health care system drive us closer to the pandemic’s end, reflexive and ill-conceived antitrust policy targeting medical technology companies risks thwarting innovation, foreclosing patient access to necessary technology, and reducing patient choice.

Chair Khan was appointed amid a flurry of enforcement actions targeting tech companies, including lawsuits filed by the DOJ against Google, the FTC’s case against Facebook, and numerous state antitrust cases against both companies. Heightened antitrust scrutiny particularly but not exclusively targeting the tech sector, looks to be gaining steam in the Congress too. U.S. Senators from across the aisle have proposed legislation that would make it more difficult for companies to make acquisitions, and chill investor interest in small companies.

It’s clear that robust enforcement of the antitrust laws is a top priority for the government, and tech companies are at the top of the list.

But not all “tech” companies are the same, and it would be a mistake to apply the same level of oversight across all industry sectors – especially to medical technology companies – which already face intense antitrust scrutiny. Continued innovation and growth by medical technology companies is vital for our healthcare system to continue to improve, and even maintain, the quality of care delivered to patients. Antitrust enforcement can promote competition, but it can also impede it, to the ultimate detriment of patients. What the medical device industry and patients need is smarter antitrust enforcement–not more antitrust enforcement.

The medical technology industry is flush with startups and smaller companies that depend on investors to succeed. In fact, the overwhelming majority of AdvaMed’s members are small companies. Mergers and acquisitions in this industry allow innovation to flourish and accelerate by providing smaller companies with the capital they need to grow and conduct research. Mergers of more established medical technology companies often result in synergies that spur more and faster innovation, manufacturing efficiencies, and allow the merged company to deliver lifesaving solutions and technology into the hands of more doctors and patients. These transactions foster patient choice and open greater patient access to the best medical devices, treatments, and cures for their individual needs.

Ill-conceived, protracted antitrust investigations into these mergers can impose enormous costs on the parties, and even quash a promising transaction or venture that would have been a win for caregivers and patients. The potential threat to procompetitive mergers and to patients is now even greater with the FTC’s July 1 decision to make it easier for staff to launch a merger investigation and force merging parties to respond to compulsory process, even with little reason to believe that the merger might harm competition.

Ultimately, the FTC’s mission is to protect competition by ensuring consumer choice. In health care, the patient is the ultimate beneficiary and consumer, so the best way to promote competition is to ensure that the patient has ample choice in selecting the best healthcare technology and care for them.

Ratcheting up antitrust merger enforcement against medical technology companies risks chilling procompetitive, pro-patient transactions and causing investor flight, resulting in less innovation, and reducing patient choice.

The government is on track to bring the full force of the nation’s antitrust laws to bear against the nation’s major technology/digital platform companies such as Google, Facebook and perhaps Amazon and others. In doing so, we must be careful not to sweep within the scope of that heightened scrutiny medical technology companies that have already been under the FTC’s watchful eye for many years, and whose business models raise none of the digital platform antitrust issues that seem to be the government’s primary focus. Otherwise, the FTC risks stifling innovation and growth in an industry that plays a vital role in our nation’s healthcare system, to the substantial detriment of patients.

#### Federal enforcement that allows anticompetitive behavior circumvents---they can’t solve agencies.

## FISM

### Turn---1NC

#### The plan’s new scope trades-off with FTC’s ongoing outreach to globally coordinate investigations---that crushes cooperative controls of AI

Matthew Boswell 19, Commissioner of Competition of the Competition Bureau Canada; Laureen Kapin, Practiced Consumer Protection Law with the U.S. Federal Trade Commission, Molly Askin, Counsel for International Antitrust at the U.S. Federal Trade Commission’s Office of International Affairs, Fiona Schaeffer, Antitrust Partner at Milbank LLP, Maria Coppola, Counsel for International Antitrust at the U.S. Federal Trade Commission, Marcus Bezzi, Executive General Manager at the Australian Competition and Consumer Commission (ACCC), “FTC Hearing #11: The FTC’s Role in a Changing World,” 3/26/19, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century

MR. BOSWELL: Oh, okay. Well, I'll go back to what has been a common theme, which is supporting the ongoing personal relationships between people around the world. You know, people move in and out of jobs. You have to keep those relationships, and it can be expensive. And it can be to certain outside parties hard to justify to expend those resources on having people attend, for example, ICN workshops so that they know people around the world, they're sharing best practices, we’re not reinventing the wheel. Somebody has come up with a good way to do something, we should have those relationships where we can learn it, but it costs money to invest and to always invest in relationships.

MS. KAPIN: Well, I want to thank everyone. I think we heard a recognition that we should recognize the value of infrastructure, some common protocols and definitions and best practices can also help us overcome the challenges for international cooperation. But first and foremost, what I heard echoed was the recognition that this human glue really is the stuff that lets us stick together and accomplish our common goals. So, Molly?

MS. ASKIN: I think one thing I've also heard is the importance of the networks that we have seen evolve over, if we’re looking at the past 25 years, either be founded in the first instance or have changed in their mission to really be able to be nimble enough to address some of these important issues and give agencies a forum for interaction that can facilitate both the tools and the relationships. So thank you all very much for participating. And we are now going to go into a 15- minute break and return for the next panel at 11:30. Thank you.

MS. KAPIN: Thank you.

CONSUMER PROTECTION AND PRIVACY ENFORCEMENT COOPERATION

MS. FEUER: Okay, it’s about one minute early, but we’d like to get started. I’m Stacy Feuer. I’m the Assistant Director for International Consumer Protection and Privacy here at the FTC’s Office of International Affairs. This entire morning we’ve heard about a number of very interesting enforcement developments and challenges all over the world. Now we’re going to take a deeper dive into enforcement cooperation in the area of consumer protection and privacy. One of the most interesting aspects of our work here at the FTC on international consumer protection and privacy matters is the very wide range of issues we cooperate on, everything from telemarketing scams to online subscription traps to cross-border data transfer mechanisms, and to other privacy law violations. Equally remarkable to me is the incredibly wide range of authorities that we cooperate. So, for example, we cooperate with not only consumer protection agencies but data protection authorities, criminal regulators, and sometimes telecommunications and financial regulators. Our panelists that we have here today represent these different strands of our enforcement cooperation activities. They will highlight the issues involved in some of these different cooperation strands, and I will introduce them individually as we move through this panel. I do want to remind you at the outset that we have comment cards available, and please do send up questions. We’ll try and be a little interactive and ask some of your questions during the panel and not just wait until the end. So please ask away. So we’ve segmented our panelists into mini- groups so as to better draw out some of the cooperation strands. I’ll turn first to James Dipple- Johnstone who is the Deputy Commissioner at the UK’s Information Commissioner’s Office and ask him, and then followed by Deputy Assistant Secretary Jim Sullivan from the Department of Commerce’s International Trade Administration for their thoughts about cooperation and particularly focusing on the privacy sphere. We are so pleased that you are both here. So, Commissioner Dipple-Johnstone, can you begin?

MR. DIPPLE-JOHNSTONE: Yes, and thank you, Stacy, and thank you to FTC colleagues for your invite and the opportunity to speak with you today. I’m looking forward to our discussion of these important issues, and it was interesting to hear the different perspectives from the previous panel. A little bit about the Information Commissioner’s Office first, given there’s a range of different types of organizations on the panel, in case it helps with my comments later on. With the implementation of the GDPR, which has already been referenced this morning, I’m pleased to hear, and the new equivalent legislation in the UK, the ICO has been through a significant growth process over the past 12 to 18 months. We’ve taken on new powers, and as has been mentioned this morning, as many other organizations, we’ve been through a capability growth over the past few months, which has begun to see us work more internationally and deal with more complex and challenging caseload. This reflects in part the importance the UK Government places on data protection and consumer protection, but also the seriousness of some of the recent scandals we’ve seen, for example, that involving Cambridge Analytica recently. In granting powers, the UK Parliament has gone further than many other EU legislatures to ensure that the ICO has both the funding through its funding regime to give us the financial resources, but also the new powers to do its work in the digital age. There was significant national debate in the UK about these new powers, many of which are actually quite intrusive and are more common in law enforcement agencies than in a traditional data protection authority and the balances in checks and balances being put in place to go with those powers through the UK’s Information Rights Tribunal who oversee our work and our individual case judgments. I couldn’t come here and talk to you without recognizing there’s quite a lot of difference within the ICO as well. As well as our data protection remit, we have a remit for access to information. So one part of the office is working very hard around keeping privacy concerns and how data can be safeguarded and secured and only disclosed where appropriate; another side of the office is hearing appeals about how to make public information more widely available. We have around 700 officers and new powers to seize equipment, search premises, examine algorithms in situ for bias to make sure that they are working effectively, and audit company systems and processes. We also have powers which were touched upon this morning as well, around the power to compel provision of information from wherever and whomever holds it, which is quite a wide remit for an office of our type. We deal with around 50,000 citizen complaints each year and undertake around 3,500 investigations across different parts of our office. And we cover both the commercial sector, but also the public and law enforcement sector. In many ways, as colleagues are, we're learning as we go with these powers and these new resources. And one of those key areas of learning has been that which has been touched upon this morning. And that’s the importance of working collaboratively with others internationally. Many of the most significant files on my desk -- and I have responsibility for the enforcement and investigation arms of the office -- in the last 12 months, we’ve engaged with 50 international colleagues on various different files. And most of the major cases we have on at the moment are involving international colleagues, either as joint investigations, seconding staff to and from other offices, or sharing information and intelligence about the work we're doing. As our citizens become more aware and concerned about the use of data and as the digital economy becomes the economy, people expect this kind of international engagement. And with this in mind, we value hugely the UK's positive relationship with its colleagues on this side of the Atlantic, the FTC, but also our colleagues in Canada who have been speaking this morning. We value the different networks we're involved in. There have been mention of some of those networks already, but in particularly GPEN, the Global Privacy Enforcement Network, but also those networks which involve looking at unsolicited communications, which continues to be a significant part of my office's work. We learn a huge amount from these relationships, as well as the sort of human glue that was described this morning, just the opportunity to discuss tactics, approaches, to understand how each other work is a real positive that comes out of that work and allows us to do our jobs more effectively. To support this, we have a number of legal gateways to share and receive information. These are backed by strict protections within UK domestic law, which bite both collectively on the organization but also the individual officials within that. They are backed by criminal sanctions, and nothing focuses the mind like those. In the course of our investigation, we could use one or any of MOUs, MLATs, and we’ve heard about the challenges with the time scales that MLATs take. Membership arrangements, such as GPEN or the International Conference of Data and Privacy Commissioner arrangements or, indeed, Convention 108. This very much depends on the exchange of information, what's involved, who it’s going to, who’s asked for it, and what we need to do our work. Of particular note are the DPA 2018, which is the Data Protection Act in the UK. That contains formal information gateways. That allows us to share information for law enforcement purposes or for regulatory purposes where there’s an overlap and there’s a public interest. Of relevance to the FTC in particular is Schedule 2 of the DPA. That sets out the conditions for public interest and information- sharing within the UK law. And I understand the UK has been working through these for a number of years from the 1998 act and now into the 2019 act and working with colleagues at the FTC through the SAFE WEB Act provisions and the criteria for sharing information there with foreign enforcers. And that's been a huge positive. Just in the short time I've been with the Office over the last two years, there have been a number of cases that we've been working on, on sharing information and understanding. And, of course, this goes alongside our EU work. We mustn’t forget that. We are a competent authority under the GDPR, the EU provisions for the one-stop-shop mechanism. And around a fifth of those cases in the mechanism over the past year have involved the UK as either a lead supervisory authority or a concerned supervisory authority. Many of the big issues we are grappling with is privacy authorities, algorithmic transparency, adtech, microtargeting and profiling of citizens, part of the bread and butter of those cases we're working through. And our ability to work with international colleagues, in particular the FTC, has been really helpful in us discharging our role, notably on the Ashley Madison file, but also on other confidential matters more recently, where we found the insight afforded by our bilateral arrangements with the FTC help us fill in the missing pieces. They help us make better investigations. We know that the FTC has helped us by using its SAFE WEB powers to obtain information for us, in particular with some of the -- I think you call them robocalls here, but unsolicited communications in the UK, and that information has been hugely beneficial in protecting UK citizens. And we hope the reciprocal has been helpful to the FTC and colleagues here. And I’m mindful of time, but in closing, I'd just like to say we're very keen in the ICO to continue to use these positive engagements and continue to build them, particularly as you come to look at the renewal of the SAFE WEB Act. Thank you. MS. FEUER: Thank you very much. Deputy Assistant Secretary Sullivan, how does the issue of privacy enforcement cooperation come within your purview at the Department of Commerce?

MR. SULLIVAN: So in my role, I'm in the International Trade Administration, which is one of the agencies at the Commerce Department, and one of the offices that I oversee is responsible -- they are the US Government Administrator for and our interagency lead on different privacy frameworks -- international privacy frameworks, including both privacy shield frameworks, the EU and US Privacy Shield and the Swiss-US Privacy Shield. We're also very actively engaged in promoting the expansion of the Asia-Pacific Economic Cooperation and Cross-Border Privacy Rule system, APEC CBPR as it’s called. And we work extremely closely with the FTC on those issues around the world as we see a growing number of countries grappling with privacy while trying to balance innovation at the same time, which as everyone here knows, I'm sure it's not always the easiest formula. So that's a quick summary of what we do at Commerce. I'll leave it at that for now.

MS. FEUER: Great, great. Well, it's interesting to hear you both speak about the importance of enforcement cooperation in the privacy area, James, for your agency on many, many individual files and Jim as the sort of overarching systemic systems for cross-border transfers. So I want to follow up with a few questions. So, James, sort of the elephant in the room, we've heard a lot this morning in the first panel about privacy as a "barrier" to regulatory enforcement cooperation. And I’m wondering what your view is of that statement or assertion and what kinds of tools do agencies need to cooperate effectively given some of these limitations and, of course, in privacy enforcement investigations?

MR. DIPPLE-JOHNSTONE: Yes, yes. And it's not something we've -- you know, which is uncommon to us. We get that call often. I mean, we want to be clear, we're not the “ministry of no.” But, actually, what’s really important in this space is to do that groundwork and that thinking about what information do you need, how is it going to be transmitted, how is it going to be secured, what purpose is it going to be used for. And we often find there are many avenues and routes to be able to share information. We also get the -- interesting when we ask for information, we sometimes get from colleagues internationally, we can't because of privacy. And, oh, that's an interesting concept. How do we work through that? We've often found there is a way through. Sometimes where these arrangements are being agreed internationally and where, for example, it was mentioned this morning about the challenge with the advent of the GDPR, IOSCO working with colleagues at the EDPB and needing to sort of tease through that, it can sometimes be tough to be the first going through that process, but once those processes are in place, people understand how they work, those relationships are built, that common understanding is built. Things do flow a lot quicker and a lot easier in subsequent cases. And so very much it’s that sort of keep talking, keep engaging. And, importantly, I've recently come back from an international conference working group, where one of the key challenges has been that with the scale and pace of change internationally with enforcement agencies and enforcement bodies, some of which, again, was referenced this morning, just keeping pace of who can do what where and with what data is really important. So if those international networks can really help their members understanding where the right levers are and how their respective national laws work, that can only be a good thing.

MS. FEUER: Thank you. Well, Secretary Sullivan, in your experience, how important has the issue of enforcement cooperation been with the foreign governments and stakeholders that you have negotiated these international data transfer mechanisms with, and how important are the powers that the FTC has in those discussions?

MR. SULLIVAN: So, again, I'm going to refer to the three frameworks that I cited just a moment ago. And both the enforcement power and the international cooperation authority granted to the FTC under the SAFE WEB Act are both integral to the functioning of those frameworks, I think. Without them, they would lack legitimacy or credibility. You have to have some teeth behind these frameworks so that folks know that companies are going to be held accountable for the pledges and the promises and commitments they're going to make to comply with the principles or the practices that they have pledged to comply with in accordance with these frameworks. I don't know how that would be possible without what we just cited to, both the powers to enforce but also to coordinate with other enforcement agencies cross-border.

MS. FEUER: Thanks. As a follow-up, I asked you about how important this is for foreign governments, but I'm wondering what you hear from your industry stakeholders here in the US.

MR. SULLIVAN: I don't want to generalize. We certainly hear a lot. I think there's a strong recognition among most of the stakeholders that we engage with, sort of along the lines of what I just said. I mean, first of all, what would be the incentive to comply with something that really didn't have any teeth? I think they know increasingly how important it is to align their practices with these frameworks, given a lot of the developments. We’ve seen recently, and it's I think -- they generally -- and I am generalizing -- they do want to see strong frameworks that are actually enforceable and, they do want to see, as I think James just alluded to, greater collaboration because that’s going to lead to more consistent best practices or principles and approaches to a lot of these issues as opposed to just this fragmented, diverse, ad hoc approach to a lot of these same dilemmas that we're all facing.

MS. FEUER: Thank you. I want to ask my fellow panelists, while we're talking about privacy, whether there was anything that they want to add in sort of response to what Commissioner Dibble-Johnstone and Secretary Sullivan were talking about. So does anyone want to -- it looks like Marie-Paule wants to hop in.

MS. BENASSI: Yes. What I would like to say is that we should make a difference between issues related to privacy and to the confidentiality of investigations. And very often, indeed, it is quite a common answer to refuse cooperation, to say, oh, no, we cannot share information because of problems of privacy. But in the European Union, first of all, I think we have solved this, and I think that our GDPR itself helps a lot to clarify that authorities can exchange information, including information which contains personal data. And so this enables, in principle, very seamless type of cooperation in the European Union, because for law enforcement purposes, we can exchange this information between authorities in one member state or in other member states. And this -- I think in this way, the GDPR is an enabler. And when we look into the implementation of the GDPR for international cooperation, we should also look at it in the same way as an abler and enabler, because if it is respected; then exchange of information for law enforcement purposes should be facilitated. And, for example, we are also doing adequacy decisions, for example, with some other countries in order to also create the seamless facilities, including for law enforcement purposes.

MS. FEUER: Thank you. Anyone else? Kurt.

MR. GRESENZ: So I agree with Marie-Paule's sentiments there. You know, the issue that we encountered at the SEC as a civil agency with administrative investigatory powers, while the Department of Justice was out in front with an umbrella agreement to facilitate cooperation in the criminal sphere under the public interest mechanism, which is something that James talked about at the beginning, it was less clear how that applies in the civil or administrative context. So the step that IOSCO took to negotiate what is the first administrative arrangement under the GDPR will enable the second step of what Marie-Paule talked about, which are transfers of personal data from the EU to jurisdictions and authorities outside the EU. And now with that process, as Jean-François in the earlier panel talked about, having been blessed by the European Data Protection Privacy Board, we in the security space are looking forward to the data protection authorities in the 28, possibly 27, EU members states adopting that and approving that and so it can be the standard with the securities authorities who are IOSCO members.

MS. FEUER: Thanks. So I want to shift us now from what has been a privacy-heavy conversation to more of a focus on consumer protection. Our second pair of panelists represent two of the different strands of the kind of consumer protection enforcement cooperation we do here. So to hear about the EU enforcement model, we'll have Marie-Paule Benassi from the European Commission’s DG Justice, and to hear about our cross-border work with our Canadian criminal counterparts, we'll hear from Jeff Thompson, Acting Superintendent in Charge of the RCMP's Canadian Anti- Fraud Centre. So, Marie-Paule, can you start us off?

MS. BENASSI: So thank you, Stacey and thank you for the FTC to invite me. So, first of all, I would like to remind you that the European Union is currently counting 28 member states, and it's very well known for being something very complicated, and I would like to try to break that myth. But unfortunately, I think, or fortunately for a better understanding of the complexity of the Union, I think that Brexit and the interest which this is bringing in the headlines is also maybe shedding some light on why it is so complicated. So we have an integration of EU-level and national laws, a model, and this is where I think it’s simple. It's based on a very simple principle. We have one EU law in a certain domain, and it tries to harmonize national laws using key high-level principles. What is not harmonized is how this law is implemented. So it is -- except in a very few cases, it is implemented nationally. It is enforced nationally, and we try to do this in a way which preserves the diversity of the enforcement model in the member states. And so in the area of consumer protection, it is how it works. And the European Commission for which I'm working has no direct enforcement power. It is the member states which have the enforcement powers. So when I speak of enforcement, it means enforcement of the law towards businesses and other possible subjects because the European Commission is in charge of checking that the member states are enforcing the laws correctly, but we are not directly involved to stamp out illegal practices. In the area of consumer protection, so we have a strong role. And this role has been strengthened in the recent past. What is our role? Our role is to facilitate the cooperation of the member states because this is a EU, I would say, a harmonized law, and we want it to be implemented in a consistent manner in all the member states. And to do this, the only solution is cooperation. So we have a long tradition of cooperation inside the European Union and now we are doing it via a law which is called the Consumer Protection Cooperation Regulation. This law is establishing the framework for cooperation. So we start by first saying even if the member states are very different, they should have similar type of powers, so investigative powers. For example, the power for mystery shopping, the power to request information on financial flows, the power to obscure illegal content online. Another thing, also, is the framework for cooperation. So we have two types of cooperation now in our new legislation. One is what we call the bilateral cooperation, the more traditional cooperation, where one member state asks -- requests enforcement cooperation from another member state. But now we have this new system which is E- level coordination. And there, the European Commission has a new role because we have a role of market surveillance. And from this role, we can ask the member states to check some practices that we think are likely to be illegal. And if the member states find that there is sufficient evidence to start an investigation, then the Commission is coordinating this investigation. We also have a new power in terms of intelligence I mentioned. And we are also doing coordination of priorities. So, in fact, the role which we have is quite strong. And the new model, which we are going to implement from January next year, in fact, is already functioning, maybe in a lighter way. And it's working. So we have in the past done some coordinated actions, which are concerning. For example, illegal practices by big companies operating at the level of the European Union. Today, we are publishing a press release on an action done in the field of car rental, for example. So with the authorities, we have been working together with the authorities to find -- to analyze bad practices of the five leaders of this sector, and we wrote a common position asking these companies to change their practices. They made commitments, and now we have been monitoring the commitments and concluding that finally these companies are implementing these commitments. This is a negotiated procedure, so this is another element I would like to stress. These EU-level actions are not based on strong enforcement means because they don't exist at the European level. They are based on a coordinated approach and the cooperation with the traders. If the traders refuse to cooperate, do not cooperate sufficiently, or do not follow their commitments, then what is going to happen is coordinated enforcement action by the member states. And we have just added something very recently which is a system of fining that can be applied for this kind of EU-level infringement and coordination of the fines. And this is a big -- it's not yet completely finalized, but it's going to be a big step forward because in certain member states, they don't even have a fining system for consumer offenses. So we are building the system. So for the future, what is -- what can we do? We can do international agreements. So there is a possibility on the basis of this framework to agree international cooperation agreements with certain countries. And the framework which I've described can be applied also with the said countries to the extent possible, of course, depending on the type of base laws that exist in the member states. And what I could say is that we would like to start discussing on the basis of this new regulation with the FTC, if we can progress such an agreement. Why an agreement would be necessary? Because it's important that the formal part is there. Because as we heard from various speakers, the formal part is an enabler also for an efficient cooperation. This system, however, has several challenges. One of the challenges, as I said, it’s based on negotiation with traders. So it doesn't work when there is fraud, fraudulent operators. This is really required to develop additional cooperation, for example, with police forces because in most of our EU member states, they don't have this possibility of going against fraudulent operators. They need the cooperation of police, so this is an area where we need to develop in the future. And then relation with competition, relation with data protection, these are the future avenues for our cooperation. Thank you.

MS. FEUER: Thank you very much, Marie- Paule. And that was the perfect segue to Jeff Thompson, who is from the RCMP's Canadian Anti-Fraud Centre. And, Jeff, maybe you can sort of talk us through a little bit about what some of the tools and challenges you face and we face in cooperating on US- Canada cross-border fraud matters.

MR. THOMPSON: Sure. Thank you, Stacy. It's a pleasure to be here today to talk about international cooperation and consumer protection. Since the start of my career, I've learned that cross- border fraud was an evolving criminal market that cannot be tackled by any one country alone and even more so today. Consumer Sentinel reporting shows more than 1.4 million reports were received in 2018, up from 433,000 in 2005. Similarly, the Canadian Anti- Fraud Centre data shows annual losses to fraud continues to increase, reaching 119 million in 2018, a 495 percent increase since 2005. So it's easy to say that mass marketing fraud and cross-border fraud continues to be a threat to the economic integrity of Canada and the US, furthermore, if you consider technology, voice-over- net protocols, social media, virtual currencies, money service businesses, and other key facilitators that continue to provide criminals and criminal organizations behind a scam opportunities to operate across multiple international jurisdictions. And as we heard this morning, while this is an evolving threat, there is good news. There are, indeed, existing strategies that do exist and tools that provide an effective approach to attack on this criminal market. In fact, as we heard this morning again, the history between Canada and the US is long. It dates back to 1997, when Former President Clinton and Prime Minister Chretien met at the first US Cross- Border Crime Forum. It was at this meeting that telemarketing fraud first got identified as a major Canada-US cross-border crime concern. And it also made a number of recommendations, including the establishment of a multiagency task force, the development of consumer reporting and information- sharing systems, enforcement actions, and better public education and prevention measures. Since then, both US and Canada cooperate to implement and refine a number of these strategies, and while all recommendations made are important, I'm going to focus my discussion on the existing multiagency task force, or in today's terms, strategic partnerships. This case and work that the partnerships have done showcase an effective enforcement approach. They highlight intelligence-led policing and integrated policing models, along with providing insight into some of the tools and approaches to consumer protection. So if we consider the cross- border fraud partnerships as an intelligence-led approach, what we see is a group of key stakeholders joining efforts to achieve a common enforcement objective, namely, reducing fraud. To give you a practical idea of this, I think back to some of my early meetings at the Toronto Strategic Partnership. I did not fully recognize or appreciate the significance of the discussions held around the table. Members from several different agencies and organizations discussed top reported scams, scam trends, top offenders, current investigations, and gaps and challenges in enforcement options. Oftentimes, this intelligence-led approach was started by members from the Federal Trade Commission or the Canadian Anti-Fraud Centre, bringing intelligence developed from their respective central databases, Consumer Sentinel and the Anti-Fraud Centre database. This dialogue helped identify the new and emerging scam trends and discussion around the key facilitators to the scams. It also helped to coordinate joint priority setting, identify lead agencies, investigative assistance, and actions required to complete the files, and in many cases helps with deconfliction amongst the agencies. Sharing information around the table was a key factor, and as long as there’s a willingness to share, there is a way to share. There is also a common trust and understanding amongst the partners to share information within the confines of law. Thus, the partnerships serve as an intelligence-led approach in as far as they create a platform to share and synthesize information from multiple perspectives. Turning now to consider the partnerships as an integrated policing approach, we begin to realize that criminals and criminal markets can be disrupted through civil, regulatory, or criminal investigations and that different agencies and different laws all play a role. If we dissect again the Toronto Partnership, we have a minimum of eight different organizations: the Federal Trade Commission, the Royal Canadian Mounted Police, the United States Postal Inspection Service, Toronto Police, the Ontario Provincial Police, the Ministry of Consumer and Government Services, the Competition Bureau of Canada, and the Ministry of Finance. The FTC alone has 70 different laws that it enforces. Who really knew that the Ministry of Consumer and Government Services enforces numerous consumer protection laws such as the Loan Brokers Act, which can be used to go after the advance-fee loan scammers? Or that, again, as we heard this morning, CASL legislation also has clauses that allow for foreign enforcement to request assistance from respective Canadian law enforcement partners? At the heart of an integrated policing model is a give-and-take approach. And in the US-Canada cross-border partnership context, this approach is formalized by MOUS. As recent as 2017, the Federal Trade Commission and the Royal Canadian Mounted Police formalized an MOU that identifies best efforts that participants can use to further the common interest of combating fraud. The language used highlights the foundation of information-sharing and cooperation. Participants shall share materials, provide assistance to obtain evidence, exchange and provide materials, coordinate enforcement, and meet at least once a year. So, again, if we take a practical view, the strategic partnership model against cross-border fraud uses intelligence-led and an integrated policing approach that allows investigators from Canada and the US to move beyond simply coming together to talk about cross-border fraud concerns to developing investigative plans that identify investigative steps and processes needed to gather that evidence. Each participant brings a range of tools that can be leveraged to ensure the effective cooperation. One such tool that we’ve heard plenty of today is the US SAFE WEB Act. From a Canadian-US perspective or from the Canadian perspective, I mean, it provides us an avenue to formally seek investigative assistance in the US from the FTC. It also formally acknowledges by name some of the regional partnerships that exist today. This act alone has assisted strategic partnerships in countless cases, at least 22 by my count since 2007, and as we’ve heard, a lot more. These cases have led to arrests -- civil arrest charges, civil forfeitures, and, most importantly, victim restitution, which in the Canadian context is often rare to see. This includes Operation Telephony, which involved more than 180 actions brought by the Federal Trade Commission, including actions in Canada and the US, and it also includes the Expense Management Case that we heard about in the last panel involving $2 million that was eventually turned over to the FTC for consumer redress. And while there's a history of success and continuing work and outcomes to look forward to, we know that the criminals adapt. Today's frauds typically involve solicitations coming from one country targeting consumers in another country and funds going to yet another one. Mass marketing fraud is truly a transnational crime. We know that in a number of cases, the criminals and criminal groups involved are deeply rooted in Canada and the US and that moreso today, the work being done by these partnerships exposes these international networks who are also providing each other an opportunity to leverage our international networks to tackle this problem collectively. And we’re already doing this to some extent. The International Mass Marketing Fraud Working Group is another example of how Canada and the US cooperation has extended beyond North America. As recently as March 7th, this group announced -- or the US Department of Justice announced the largest ever nationwide elder fraud sweep, and the International Mass Marketing Fraud Working Group played a role. At least eight different countries were engaged. At the same time, there are other challenges, such as the willingness of other countries to identify mass marketing fraud as a transnational threat, whereas in many cases fraud or financial crime is not a priority. And this even holds true today to some extent. The parties and law enforcement agencies are subject to change, and the ability of any one agency to solely lead a partnership can be impacted by this change. Albeit, there's still partnership models that work in which chairs to partnerships rotate and changing priorities are acknowledged. In May of 2018, the RMCP coordinated a national mass marketing fraud working group meeting whereby we acknowledged the changing nature of mass marketing fraud and sought to renew our efforts. We also sought input from key US stakeholders. The Federal Trade Commission and the United States Postal Inspection Service were at these meetings. And while work continues to renew this renewal, such as the emergence of a Pacific partnership to replace Project Emptor, there's still work to be done. So in concluding, there’s a long and successful history of Canada-US enforcement in consumer protection, and that demonstrates effective cooperation through integrated and intelligence-led approaches and that this continued cooperation is integral to combating this transnational crime today. Thank you.

MS. FEUER: Thank you very much, Jeff. So I think that we now have a couple of very interesting issues out on the table about consumer protection and enforcement cooperation, both the EU model of the CPC network and the FTC Canada model, which focuses on these seven strategic partnerships that exist in Canada. So I want to ask a few questions of our panelists, Marie-Paule and Jeff Thompson, and then I do want to turn back to Secretary Sullivan. But, first, Marie-Paule, I did want to ask you one thing. I know that the CPC network uses a technological tool to facilitate the cooperation among the 28 member agencies. I'm wondering your thoughts about how well that works and how it might work in a more multilateral context.

MS. BENASSI: Thank you, Stacy, for this. So, first of all, I think I would like to make two types of tools. One is the system which we use to network, and I would say this is based on technologies of collaborative websites. And we have been using them now since several years and we are quite confident that it is safe for exchanging information and including information on containing personal data, for example, on businesses or on witnesses, and also it can be adapted. But currently, the CPC system doesn't contain a lot of cases. So it's growing organically, I would say. And it's also very much used to exchange information, best practices, for example. In the future, we are building something which is going to be a case management system and it will contain several modules, including a module for our external [indiscernible]. So we are going to open this to various entities -- NGOs, entities. And so we are going to build doors, in fact, in such a way that the two systems can communicate, but without having [indiscernible] you know, for -- so that the stakeholders will only see their external areas. And I'm quite confident that we can build the same type of modules for international cooperation with our technology. But what I would like to say is that we are also developing technologies for online enforcement tools. And what we want is to create, for example, a system where we would have an internet lab that could be used by the various member states, and we are also building capacities of administration in the EU countries. We are developing training, and we think also that this kind of tools could benefit from pooling of expertise from various agencies, including in an international context.

MS. FEUER: Thank you. So I want to turn -- before I turn back to Jeff Thompson, I want to turn back to Secretary Sullivan and ask what are the tools that can be used to facilitate cooperation under the various cross-border mechanisms? And why are they important?

MR. SULLIVAN: So in terms of why they’re important, I mean, again, a lot of this is probably self-evident to those in this room, but the data explosion we've seen is only going to continue. And we now have these cross-border data flows that really do benefit stakeholders across our societies and our economies. So you’ve seen these cross-border data flows help enable consumers, for example, to access more and better services and products. They help our companies to increase the efficiency of operations and innovation, and they help nations in terms of their competitiveness and their ability to help create jobs and facilitate economic growth. So this is all great. The problem we're dealing with is that different counties now take very different approaches to how they regulate these data flows specifically on privacy. And so what I wanted to just touch on a bit was what we do, the Commerce Department, in conjunction and partnership with the FTC to deal with this issue, this dilemma. How do you continue to facilitate these cross-border data flows when you are dealing with countries that have all adopted varying approaches, legal regimes, or policy priorities. I touched on the three frameworks, and I just quickly wanted to go through some of the tools within those frameworks, if I could, which from our perspective are absolutely critical to digital trade because, again, right now, there is no single comprehensive binding multilateral approach governing these cross-border data flows. So you know, again, I'm repeating myself a bit but we have stakeholders that we meet with all the time coming in, telling us about this constantly shifting and evolving and rapidly accelerating policy landscape that they have to deal with. So in response to this challenge, one approach that we've taken, as I alluded to earlier, for example, is the APEC CBPR system. And it's basically a voluntary enforcement code of conduct based on internationally recognized data protection guidelines. It establishes principles for both governments and for businesses to follow to protect personal data and to allow the data flows between APEC economies. To join this system, an APEC economy has to designate a third party called an accountability agent. And that accountability agent is empowered to audit a company's privacy practices and take enforcement action as necessary in some instances, but if that accountability agent cannot do that, resolve a particular issue, an APEC economy, their domestic enforcement authority serves as a backstop for dispute resolution. And in the United States, the FTC is our designated regulator, obviously, and enforcement authority for the CBPR system. And they enforce the commitments that are made by the CBPR participating companies to comply with the principles that they have committed to comply with. I do want to note all CBPR participating economies also have to join the cross-border privacy enforcement arrangement, CPEA, to ensure cooperation and collaboration among their designated enforcement authorities. To date, if memory serves, I know the FTC has brought four enforcement actions against companies for making deceptive statements about their participation in CBPR, and it’s also used its authority under the SAFE WEB Act to enhance cooperation with other privacy and data protection regulators within APEC. So, again, as I noted at the outset, FTC enforcement and international cooperation are absolutely critical to the credibility, to the integrity, and the success of the CBPR system. There are currently eight economies in APEC of the 21 economies participating in the system: the US, Japan, Mexico, Canada, South Korea, Singapore, Australia, and Chinese Taipei. And the Philippines is currently working on joining the system as well. I want to underscore that if this system were to scale across APEC, the framework would help underpin over a trillion dollars in digital trade. So we regard that as a very big priority and, again, we cannot emphasize enough just how critical the FTC is to that framework. And it's also a similar dynamic with the EU. It's been, the FTC, extremely integral to the success of both privacy shield frameworks. We all know, and it’s been touched on, about a year ago, GDPR was put into effect in Europe. And like the predecessor directed before it, it imposes certain restrictions on the ability of companies to transfer certain data from Europe to other jurisdictions, so we have Privacy Shield. And, again, like CBPR, it's a voluntary enforceable mechanism that companies can use to promise certain protections for data transferred from Europe to the United States, and the FTC enforces those promises made by Privacy Shield-participating companies in its jurisdiction. Again, I talked about how big APEC was and how these data flows underpin trade there. The EU is actually the largest bilateral trade investment relationship with the US in the world. That, too, is valued at over a trillion dollars. And I know the Transatlantic economy accounts for about 46 percent of global GDP, about one-third of global goods trade, and the highest volume of cross-border data flows in the world. And the Privacy Shield program is absolutely key to underpinning this economic relationship. We have about 4,500 companies now participating in the program. They've all made these legally enforceable commitments to comply with the framework, and they range from startups and small businesses to Global 1000 and Fortune 500 companies across every sector, from manufacturing and services to agriculture and retail. And I do want to note that about 3,000 -- nearly 3,000 -- of those companies are actually SMEs, so it’s not just the big tech companies that we're talking about. So to help protect data against improper disclosure or misuse, the Commerce Department and the FTC do work together, and they move swiftly to ensure that participating businesses who join Privacy Shield and certify under Privacy Shield are complying with their obligations. And over the last two years, Commerce, for example, has implemented a buying arbitration mechanism and new processes to enhance compliance oversight and reduce false claims. And by the same token, the FTC has enforced companies’ Privacy Shield declarations and commitments by bringing several cases pursuant to Section 5 of the FTC Act, which prohibits unfair and deceptive acts. We also refer false claims participation in the program to the FTC, which have often resulted in FTC settlement agreements. And under those agreements, the FTC can obtain certain remedies such as remediation measures and compliance monitoring that are, I think, generally otherwise unavailable in an enforcement action. And to date, the FTC has brought about four false claims cases. So, again, as with CBPR and APEC, the FTC has been just an essential element in bridging the gap between the EU and the US approaches to privacy. And, again, I'll just end by saying you're not going to get buy-in legitimacy or credibility without that enforcement power and that collaboration and cooperation that we're all talking about today. So thank you.

MS. FEUER: Thank you very much. I want to turn back to Jeff for a minute. So everyone has done, I think, a really fantastic job of outlining the tools. And, Jeff, you talked about these partnerships, and I guess I'd like to know a little bit more about the partnerships in terms of their status today, whether you think that they kind of could be adapted for a more, I guess, global enforcement model and whether you have any ideas about how cross-border cooperation and consumer protection matters could be improved.

MR. THOMPSON: Sure. Thanks, Stacy. So, yeah, the status of the partnerships -- as I mentioned, the partnerships stem from a 1997 meeting. There were three partnerships created across Canada -- one in Vancouver, one in Toronto, Ontario, and one in Montreal, Quebec. At one point in time, we saw this increase to seven Canada-US cross-border partnerships, but that wasn't maintainable for a number of reasons, primarily being there wasn't a lot of enforcement work in Atlantic Canada and Saskatchewan, for instance. So, I mean, things changed. And, again, as I said, priorities change. So right now we have three partnerships, including the new Pacific partnership which replaced Project Emptor. The Montreal Canada project, Project Colt is also defunct currently, but I mentioned we're working on renewing these efforts and coordinating something there. So, right now, as it stands, there’s the Alberta Partnership and the Toronto Strategic Partnership, and the Montreal Partnership. As far as improvements go, one area for I think more global enforcement cooperation that we discuss a lot at the office is disruption. And by disruption, I'm not talking about actual enforcement action. I'm talking about cooperation with private sector partners, using the data that we capture in our central fraud databases to block, say, shut down foreign numbers, to get bank accounts blocked. In Canada, we're sharing information with banks and credit card providers to go after the subscription traps, the continuity schemes, the counterfeit sales of other goods online and nondelivery goods. So the information we house that there's other alternatives to enforcement, and those are some of the areas that need to be improved on internationally.

MS. FEUER: Thank you very much. I now turn to Kurt Gresenz, who is the Assistant Director at the SEC’s Office of International Affairs. And, Kurt, as we heard earlier from Jean-François Fortin, securities enforcement collaboration is truly global and truly impressive, I have to say. I'm interested in hearing more from your perspective to inform our thinking about the cooperation in the areas that fall within the FTC's jurisdiction.

MR. GRESENZ: Thank you, Stacey. Let me start out by giving the disclaimer I’m required to give, that these are my views, only my views, and not necessarily those of the Securities and Exchange Commission, its Commission, or its staff, which I like doing because that frees me up now to say what I would like to say, which hopefully follows what the SEC would say. Okay, so let me start out with building on some of the themes that have been talked about. One of the reasons, I think, that we have been successful in forging a pretty broad alliance of securities authorities around the world that are cooperating is by virtue of the fact that the IOSCO principles of securities regulation are part of what national economies are assessed against as part of the financial sector assessment program that is done by the IMF. So essentially when the IMF and team comes into a jurisdiction to grade you on your financial resiliency and financial regulation, they're going to look at the IOSCO principles. And the IOSCO principles say that your securities has to have certain minimum powers and also the ability to share information across borders for enforcement purposes. And I think that has been one of the key tools that has caused one of the things that Jean-François talked about from early adoption, say two dozen countries in 2002 under the MMOU to where we are now as 121, that it's an easy way to getting a failing grade by not being signed up to the MMOU. And national legislatures have, for the most part, made the amendments to their domestic law to enable them to meet the MMOU standards. So in the scale of cooperation, Jean- François talked about over 5,000 requests that were made under the MMOU last year. The SEC is, as you might expect, a big user of those, probably 600 to 800 of those were ours. So we have an incentive in that process working smoothly. And where the parallels are, I think, for me is when I talk to my colleagues at the FTC, we're talking about consumer protection. And the concept of investor protection is essentially the same concept. The investor is our consumer. And one of the focuses of our enforcement priorities is on the mom-and-pop investor, the retail investor who really is somebody that will benefit from an active securities authority acting in their stead. In the securities context, one of the things Jeff talked about was he mentioned you have people set up in one country, you have targeting of investors somewhere else and then you have sending the funds elsewhere. I would actually build on that. In an ICO case for example, the entities might be incorporated in two or three different jurisdictions. The investors might be targeted in the UK, Australia, and the US. They might be storing their documents in a fourth or fifth jurisdiction or in the cloud so it’s very difficult to, you know, figure out where those are to begin with. So those are the challenges, and building through those, and I think we've had a good discussion of the privacy challenges, but two things I want to mention that also came up in the earlier points is one is what I call regulatory arbitrage, which somebody called regulatory competition. Cooperation works very well, but we also have to be cognizant that there are competing policy concerns with how we approach our enforcement tasks. So for example, a sophisticated fraudster is going to have some basic awareness of what the regulatory scope is in a given jurisdiction. And these people may set up shop in particular places and do things in particular places for taking advantage of whatever the legal system is there, and often that legal system may be one that is less conducive to cross-border sharing. So then as we advance down the path of the investigation, either related to that or other things, regulators move at different speeds. They may have different approaches as to how they approach witnesses. Are we going to go let everybody know in advance? I will tell you that from an SEC investigative perspective, which I'm sure people around the room and at this table would share, that people acting in a manner that is entirely consistent with their own investigative processes and procedures, but that may be contrary to what somebody is doing elsewhere. Those are things that are going to almost always result in people wanting to control their own investigation, perhaps at the expense of greater coordination. And I think that's where, you know, discussion is certainly important. And I don't know if this is really privacy. Maybe this goes to confidentiality. Also, different authorities have different legal requirements when it comes to what types of information they have to disclose in a particular setting. So let's say that we transmit files to an authority who assigned assurances of confidentiality and then we read a newspaper report that talks about things that we disclosed on a confidential basis, and then we drill down and it turns out that, well, yes, they kept it confidential but not from a lawful request, and it might be a Freedom of Information Act request or something like that. So that’s obviously going to be something that maybe you don't anticipate on the front end, but it might chill information exchanges going forward. And then the case of the ambitious prosecutor, he or she who may leak to the press. I know that that’s always a source of great consternation, whether it's the SEC or DOJ or elsewhere, when you read confidential details that are unattributed by a source who’s not authorized to speak about something that you thought you transmitted in confidence. So I do want to talk about those. I think the last thing I want to talk about in challenges is one of the things that we are dealing with frequently at the SEC, and I think we sort of have a little bit of a handle on it, and I know it must be something that the FTC confronts, also, but the law has been unsettled for a number of years as it relates to the Electronic Communications Privacy Act and what type of records we can get from internet service providers, and maybe who a subscriber is, who is the identity of a particular account. Maybe that’s something that is reachable, but what about the cases where you know there's communications and you want those communications, and maybe there's impediments there. I know that the criminal authorities can go through a warrant process for things like that. What is the recourse of an administrative agency where we don't necessarily have recourse to a criminal mechanism to show just cause, due cause, probable cause, reasonable suspicion, whatever the standard is. So cooperation works, but we have to be, I think, vigilant of the challenges to that, and like we’ve already talked about in the GDPR space, how do we get to a solution that works for most people most of the time.

MS. FEUER: Thank you very much. So let me ask you one follow-up, which is about your statutory authority which underlies your ability to cooperate. I know that you have some tools that you've had since the 1970s that are somewhat similar to what we have in SAFE WEB. And I'm wondering how they actually underpin what you do and how effective you think having that statutory authority has been.

MR. GRESENZ: So there are three sections that I'll talk about. And absent these three things, we would not be able to meet the IOSCO principles, which means we wouldn't be able to sign the MMOU, which means the Treasury Department would be unhappy when we were adjudged to be noncompliant in an FSAP in these areas. The first one is what I call our access request authority, and what this says is the Commission has discretion to share confidential file materials with any person, provided that person demonstrates need and can make appropriate provisions of confidentiality. And I think more or less that tracks what the FTC can do, although maybe the Safe Web is restricted to regulatory authorities, where the SEC, in theory, has discretion to share with any person. Our Commission has delegated that authority to exercise the discretion to the staff in the area where I work with, which is cross-border enforcement cooperation. Now, typically, my office will look at any request for access for SEC files that comes from a foreign authority, and we will make a baseline determination of whether sharing is appropriate with that organization or not. Obviously, if they’re an MMOU signatory, that question is easier. So that's the first one, the ability to give access to materials and files. The second one is to use our compulsory power on behalf of a foreign authority. And I think, again, here, there's probably parallels all down the line with the FTC's existing authority, is we have to make sure that there's -- well, for us to start with, the requesting authority has to be a foreign securities authority, which means do they enforce laws that fall within their securities regulation. Number two, the authority has to be able to provide reciprocal assistance. And, again, if it’s an MMOU party, that's already written in and baked into our principal cooperation mechanism. The sharing has to be consistent with the public interest of the United States, and we go through that process of the deconfliction process with the US Department of Justice. So that's something else that is taken care of. And one interesting fact here is it's not necessary for the conduct to be a violation of US law. So, for example, if it's illegal in Country X but it may not be illegal here, we do have the authority to assist in appropriate circumstances. The third piece after the access request and the compulsory authority, you know, of course, you list three and then you forget the third one. Let me come back to that one. I should have made a note when I was thinking about this.

MS. FEUER: Okay. Well, that's great. So we have a lot here to work with to start us off on questions, and there are so many strands to the strands that we've brought out that it's hard to know where to start, but I am going to start with two questions that have come in. And the first really builds on, Kurt, what you were just talking about, that your investigative assistance power doesn't require the law violation to be a law violation in the United States if it is a law violation in another country. And we actually have a question on that. And this is, I think, to the consumer protection and privacy areas where I think laws diverge more than they do in the securities arena. But the question is this, when an act or practice would violate consumer protection law in a consumer's home country but it isn’t against the law in the seller's country, should agencies cooperate? When there is a conflict of laws, what should consumer and privacy agencies do? And I'm going to throw that out to the panel and see who hops on it. James?

MR. DIPPLE-JOHNSTONE: Is it helpful to say just in terms of our experience at the ICO's offices for that very reason is our legal gateways are framed with a public interest test? And that's a very widely drawn public interest test, so it doesn't need to be a specific offense in the UK for us to be able to cooperate and exchange information, for that very reason is there is quite a variety.

MS. FEUER: So that's helpful to know. By way of background, the FTC's -- yes, I work for the FTC -- the FTC’s authority to obtain investigative assistance for foreign counterparts relates to unfair or deceptive acts or practices, as well as violations of laws that are substantially similar to those that the FTC enforces. So we have a little bit more defined statutory language, although as you can see here, it allows to us cooperate with a wide variety of agencies. Anyone else want to opine on this first question from our audience? Marie-Paule?

MS. BENASSI: Yes, thank you. It's a very important and interesting question. So in the European Union, we have laws which are harmonized, fully harmonized, or minimum harmonization. So our system of cooperation for enforcement actions are based on the minimum harmonization, when it is minimum harmonized. So it means that you cannot take an enforcement action for a violation which goes beyond the minimum harmonization and which would not be the same in one -- in your member state where the trader is established compared to the member states of the consumer. But requests for information and other types of assistance I think can function. And what we see when we work with cooperation in an informal setting with other jurisdictions outside of the European Union is that very often the principles -- at least the principles are quite the same. And so it’s on this basis, I think, that in many cases exchange of information can be possible.

MS. FEUER: Jeff.

MR. THOMPSON: Yeah, I think this touches a little bit on what I was referring to with disruption as well. Enforcement is not the only answer where we can't enforce the law in another country or a law doesn't exist that prohibits a certain action. However, we may be able to work with, again, private sector partners or other agencies to block these services from being offered in Canada. Binary options was a great example in Canada where we worked with credit card companies, and Canadian law prohibits the sale of securities if somebody is not registered. So, therefore, there was no binary options. Companies registered in Canada, therefore, any sales to Canadians are against our laws. So we're able to work with Mastercard and Visa and the credit card companies to prevent any Canadian transactions for binary options.

MS. FEUER: So that’s very interesting. So there are really a range of options here from a very broadly defined public interest standard to the European Union's concept of minimally or maximally harmonized laws, which essentially means whether every EU country has the exact same law or whether they have more leverage and freedom to implement laws differently. To the example that Jeff has given with disruption and also being able to cooperate across the civil and criminal divide, because we obviously cooperate with the RCMP as a criminal agency, and many of our colleagues, for example, the UK ICO, has criminal authority as well as civil authority. Kurt, I saw you want to say one more thing here.

MR. GRESENZ: Yes, I was actually thinking about a topic that you and I have talked about. So one of the questions that can come up in the work that I do is there might be a hesitation on the part of some of our foreign counterparts to work with us in some cases if they are afraid that an SEC outcome will foreclose them from acting. And I think this is the result of different legal interpretations of what amounts to double jeopardy. So you know, in the US, depending, we have different sovereigns for different purposes. What some of my colleagues overseas have said that essentially should the SEC take some action, even administrative action against an actor where the conduct is based on something the foreign authority is looking at that that could potentially preclude the foreign authority from doing any action at all? So that's in one direction we have to be sensitive to that. You know, the question there is let's say we ask for help in a case and they're looking at it and they say, well, we don't want to tell you because you're going to take action and then we're going to be left with nothing. And, again, we would work through that stuff, but it's a real issue. You know, from our side, we take Foreign Corrupt Practices Act violations seriously. And from an economic perspective, my personal view is there's a really good strong reason to do that. That's not always the approach that some foreign jurisdictions take. And we have from time to time encountered hesitancy to help us on our FCPA investigations on the SEC side, not speaking for the Department of Justice, because of a view that well, you know, I don't understand how that falls into a securities violation. It could be just code for, well, we don't really look at it in that way from our country. So we don't think we can help you. Again, people have to decide are they going to step up and are they going to help.

MS. FEUER: Right. So really interesting question and really interesting responses. I want to turn to another question that sort of focuses on one of the hot topics of today, which is this. Congress is considering passage of a comprehensive data protection and privacy law. How might that change or affect the relationship between US regulators and those in Europe and elsewhere, particularly as it relates to privacy investigations and litigation? And I'm going to put James on the spot first.

MR. DIPPLE-JOHNSTONE: Okay. Well, I think in many ways, you know, we should look at the opportunities. There are many countries around the world which are looking either at their first data protection act or privacy act or enhancing the one they’ve got. And I think the key things are to make sure that, you know, as referenced by the international conference, that there are those opportunities to collaborate and cooperate to ultimately do what we’re all there to do, which is to keep our citizens safe. And this will continue to be a theme as we go forward. Countries like India are looking at the data protection bill, going through their Parliament and their legislative process. They will be significant, given the scale and size of their economies and their country. So we should look for the opportunities to work better together.

MS. FEUER: And I thought you were going to mention GPEN again.

MR. DIPPLE-JOHNSTONE: Well, GPEN provides a great opportunity to do that, both in terms of the cooperation, but also more importantly the technical challenges, the assistance. One of the great things GPEN does, if I can make a plug for it, is coordinate around sweeps, so looking at upcoming threats and risks that might affect privacy authorities and sharing that load out and sharing that learning out in terms of all of us looking consistently at threats within each of our nations and then bringing together the results of that for a common discussion.

MS. FEUER: So any other observations on the question? It focuses on whether changes in privacy laws might affect cooperation, but I think the question is really broader. As we talked about this morning, many countries are in the process of updating their laws, whether it be consumer protection laws, privacy laws, securities laws, maybe? And so I wonder how this whole issue of changing laws, changing standards affects the way or the opportunities or the challenges for cooperation. And I'll throw that out to whoever wants to go first. Secretary Sullivan.

MR. SULLIVAN: So I'll just say, we in the International Trade Administration have been working with the National Telecommunications Information Administration and the National Institute of Standards and Technology, also sister agencies at the Commerce Department, to evaluate what, if anything, the Federal Government should do to address some of the privacy concerns that have certainly captured a lot of attention in the last couple of years. I think this goes back to what I was talking about. This is my personal opinion. I think we're probably quite a long ways off from any global standard. I think -- you know, you talked about India, Brazil. A lot of countries, you know, many have been looking to GDPR as an example, but no one is replicating GDPR exactly. There are still these differences, and those are going to continue because, as I think I said earlier, different countries have different cultural norms and legal traditions and histories, and they have different policy priorities that are all going to, you know, result in differences of kind if not degree. Again, I sound like a one-trick pony, but this goes back to the APEC CPBR system because what that basically is, is it takes these internationally recognized norms that we all agree on, which came from the OECD guidelines and the fair information principles before that and said let's all agree to these baselines, because you are going to have these differences. And we have to find a way to bridge these differences between these different regimes that countries have. I think, again, you know, there are aspirations for a single global standard. I don't think that’s about to happen anytime soon, so we’ve got to figure out, you know, how these different regimes can be made to work together. The approach in APEC is this interoperability approach, which I really think has a lot of appeal, is very well developed, and has been embraced, as I said, by a lot of countries in APEC, and we’ve heard a lot of interest from other countries around the world because it really is very flexible and can be adapted. On the one hand, it definitely protects privacy, but it can deal with technology because we in government are always going to be one step behind in regulation and legislation to begin with, but in this space in particular with the technology evolving so quickly, I really think there’s great appeal there.

MS. FEUER: Thanks. Anyone else? Marie-Paule?

MS. BENASSI: I agree with what James Sullivan said. I think it's going to be really incredibly difficult to sort of have a very harmonized universal framework for that data protection but also for consumer protection. And in the European Union, we are -- we have these principle-based laws and even in case of maximum harmonizations, there remain some differences. So our reply is to work on common enforcement actions and develop these actions in a way that they have become also guidance in a way. So -- and they are less theoretical than the law because they are applied to practical problems, practical practices. And in the future, what we want to do is to do more of these actions where, in fact, we have -- we publish the common position of the CPC network in the form of a guidance that can be applied by all the different operators in a certain industry. The other point I wanted to mention is notice and action procedures. So in the European Union, we have a law which is called the E-Commerce Directive, and which provides that marketplaces and social networks do not have a duty to monitor illegal practices, but they have a duty to act upon notification against an illegal practice. And this means, for example, withdrawing the account, obscuring the information. One of the problems of these operators, because we are now discussing a lot with them, is that, first of all, the domain of laws, which should apply, which is enormous and then it's -- for them, it's very difficult in a way to have an efficient action when the domain of law is so big and also the enforcement type are very big. And so I think that also cooperation on common notice and action procedures at the international level with a certain level of recognition, so this is what Jeff is saying about this disruption, so looking into also other type of models which are more based on practical enforcement tools, systems.

MS. FEUER: Thank you. Anyone else? So in the few minutes we have remaining, what I'd like to do is turn to each of the panelists and, similar to the first panel today, ask for a one-, maybe two-minute takeaway of what you see as the most important tools for international cooperation, what you see as your main challenges, and how you might remedy them. So I'm going to put Kurt on the spot and ask our SEC colleague to start first.

MR. GRESENZ: So when you started with tools, I did remember the third tool that was so important that I forgot it, but it actually is very important. So we have two provisions of law which help us protect information we receive from foreign authorities. The first one is a statutory protection that protects from any third parties any materials that we receive from foreign securities authorities. So outside of the litigation context, that essentially gives us ironclad protection for SEC files for enforcement purposes. But more recently, we added a legal amendment, a new tool that protects in litigation any material that would be privileged in the foreign jurisdiction. So let's say, for example, we get confidential financial intelligence from a foreign authority, and as a condition of receiving that, the foreign authority makes a good faith representation that this is for intelligence purposes, and it is privileged from disclosure in our jurisdiction. Under Section 24(f) of our 34 act, that protection would carry over into US law, and there is an absolute privilege it would stand discovery, for example, that it will carry over the foreign privilege to US law. And it could be anything. It could be financial intelligence, it could priest-penitent. I mean, if there is a privilege that is recognized in the foreign jurisdiction and we receive materials pursuant to that privilege without waiver, then there's no examination behind the statute for the court to make. It just has to be the representation. So that, I think, gives us added teeth when it comes to representations that we, in fact, can protect things in our files. So, you know, the takeaway for me is the big difference that I see is it looks like what we do in the security space is much more concentrated. You know, we know exactly who the players are. We see them all the time. There's crossover to some criminal authorities and other domestic agencies, but by and large, we seem to be in a more narrow lane. And I think my takeaway would be that listening to my colleagues here is there's a lot of lanes running in parallel and overlapping and overpasses and other sides that I think that we just don't have that much of in the security space in my view.

MS. FEUER: Thanks. And that raises two interesting points. I think this afternoon we'll have a panel on competition enforcement, and I think there might be a few less lanes, although I know there are some. And, also, your mention of your statutory ability to protect information, we have an analog in the SAFE WEB context for information provided by foreign law enforcement agencies when they ask for confidentiality that gives a privilege against FOIA disclosure. So turning now to Jeff, your top takeaway.

MR. THOMPSON: At the end of the day, what I got out of this is, I mean, there's an increasing abundance of information in the world, and we need to be able to prioritize our enforcement efforts. So it's processing all that information that’s certainly a challenge, and there’s all kinds of technology tools to help us. But not only that, it’s setting the right priorities and working smarter. So the intelligence- led approach, where we’re using the central fraud databases such as Consumer Sentinel or Anti-Fraud Centre to start driving enforcement action in a more targeted and effective manner.

MS. FEUER: Thank you. So intelligence is key to international cooperation. Marie-Paule?

MS. BENASSI: So I wanted to say two things. The first thing Jeff said it already, which is about prioritization. And I think that fraud is becoming internet fraud, all the different facets of it, and its internationalization, I think, is becoming a very big problem in terms of the harm caused to consumers and collectively in the world. And also in this respect, the role of the big platforms, you know? And if we don't prioritize and don't find efficient ways, building also on what this platform can do, I think is going to become more and more difficult to prevent fraud. And we see organized crime moving into these kind of activities, which seems to be giving them the possibility to earn a lot of money very easily. But then we have a different type of problem which we didn't discuss much, because also we have a bit -- had discussions a bit in silos here, but which is how to tackle the new types of misleading practices which are developing and which are based on the data economics. So on this we need to build links between competition, data protection, and consumer protection in order to understand this and see how -- what are the impact on consumers in terms of also the possible harm and also for businesses, possible lack of competition that this type of new data models are creating.

MS. FEUER: Thank you. Secretary Sullivan.

MR. SULLIVAN: So, again, for me, my perspective, the biggest challenge we're dealing with right now is the fragmentation or the vulcanization of the internet around the globe. You're seeing rising delocalization, which, again, I think that just impoverishes everybody, those within the country that have imposed delocalization measures, those that have overly strict restrictions on data flows. I think certainly we share a legitimate and strong desire for consumer privacy with a lot of other countries. And as I noted earlier, we take different approaches. I do think we need to be very wary because these issues, the way we're headed and in the coming years, we're going to be looking at, you know, more and more connected devices that are transmitting data, and this data has to be protected on the one hand, but it can lead to such tremendous opportunities. I mean, in the public sphere, in terms of smart cities and efficiencies and health breakthroughs and precision medicine and detecting disease patterns. And we want to be very wary of going too far in one direction, I think. So I agree with you about the balancing of these interests. And, again, I'll go back to my -- I really think, you know, the EU, for example, and the US do take different approaches, but we ultimately share, at eye level, the very same goal. And I think interoperability between GDPR on the one and CBPR on the other could be a very positive development. I know there was a referential a few years ago with BCRs, binding corporate rules, which is an EU proof mechanism for data transfers and mapping it relative to CBPRs. And, again, these all derive from the same OECD guidelines, and I think there's a lot of overlap. And I know GDPR allows for certification mechanisms, and I think there's a tremendous opportunity there for us to make these systems work together and make sure that we are extending privacy protections around the globe, while at the same time making sure that we're not quashing or squashing innovation and, again, doing damage to our long-term interests. So I think interoperability would be my solution there. And as, again, I've said a couple times already, you know, the FTC is probably the preeminent privacy data protection authority, as it were, in the world going back to the 1970s, has been a great partner as we go around the world and talk to countries on this. And so we should continue to do that. And I hope we can partner with other like- minded countries to that end.

MS. FEUER: Thank you. And the clock is quickly counting down, so I’ll ask Commissioner Dipple-Johnstone to say a final word.

MR. DIPPLE-JOHNSTONE: I will be very quick, then. I mean, I can almost echo the comments of others. I think it’s that keeping updated and keeping pace with vast changes in the landscape and technology and making sure that we don't become the ministries of no, that we support innovation in a very practical sense. And as part of that, it’s making sure we make the right links both internationally with each other but also in each of our respective homes with the other agencies and authorities we have to work with so that the offer we can make internationally is the right one.

MS. FEUER: So thank you very much to the panel for some incredibly thought-provoking ideas. Before we break for lunch, I just want to mention that the Top of the Trade on the 7th floor has catering available for you to purchase. There's a handout on the table just outside with information about nearby restaurants. If you leave the building, you will have to go through security again unless you are an FTC employee. And be mindful that there is a small group of protesters outside the building, so leave ample time to get back in for our fascinating afternoon panels. Thank you. (Applause.)

AFTERNOON SESSION

COMPETITION ENFORCEMENT COOPERATION

MS. COPPOLA: Okay. I’m getting the green light from Bilal Sayyed, our head of Policy. So I think we should get started. Thank you all for coming to this afternoon’s panel. Today, we’re going to talk about enforcement cooperation on the competition side. You’ve just heard, in the break before lunch, about cooperation on the consumer side. It has a very different nature on the competition side. So we’ll be talking about that this afternoon. I’d like to introduce my panelists briefly. Starting with -- going in alphabetical order, Nick Banasevic. Nick is from the European Commission’s DG Competition where he heads the unit that covers IT, internet, and consumer electronics. So we’ve had the very good fortune to cooperate with Nick on a number of cases. Next to Nick is Marcus Bezzi. He is the Executive Director at the Australian Competition and Consumer Commission, where, among other things, he oversees all of the ACCC’s international engagements. So I also have had a great time working with him, even though very often the calls were extremely early for us and extremely late for him. We still have a terrific relationship. Then we have Fiona Schaeffer, who is an Antitrust Partner at Milbank LLP. She has practiced on both sides of the Atlantic. So she brings unique perspective in that sense and has lot of experience in multijurisdictional mergers in particular. Then just to my left -- I was a little thrown off because I thought it was alphabetical and that’s why I was -- yeah, you didn’t look like Jeanne, anyway. So Jeanne Pratt, who is Senior Deputy Commissioner from the Canadian Competition Bureau. She oversees their abuse of dominance and mergers and noncartel horizontal conduct matters. She also has experience at the ACCC. So I’m sure that she will bring that to the discussion today. So those are our panelists and you’re going to hear from them, not from me. Just by way of background, a lot of the cooperation issues that are relevant to the competition enforcement discussion were addressed in this morning’s session. So we’ll try to get into a little bit more granular level so that we don’t repeat what was discussed this morning. Just I guess to set the stage in thinking about cooperation in general, we engage in enforcement cooperation for a number of reasons. Often, we find that it will improve our own analyses. It allows us to identify issues where we have a common interest, it allows us to avoid inconsistent outcomes, and perhaps, most importantly, for the outcome to coordinate remedies. So with that in mind, I have asked the panel to start off -- we’re trying to understand strengths and weaknesses of enforcement cooperation, get some advice for the FTC. So before we delve into specific questions, I’ve asked each of the panelists to deliver the headline of their story. What is your elevator speech? Starting with Nick.

MR. BANASEVIC: Thank you, Maria. Thank you to you and to the FTC. It’s really a great pleasure to be here and, hopefully, share some interesting insights. My elevator ride is 27 floors up and it takes about half a minute. So I don’t know if that’s how long I’ve got. But I think my five-second message is don’t neglect cooperation, it can really bring benefits. Of course, I think the first instinct that we have and what we’re responsible for by definition is our own jurisdiction, and the bread and butter of that is doing individual cases and that’s what we focus on. That’s, as I say, the bread and butter of our work. Beyond that we have our policy, guidance, soft law role which is complementary to the actual case enforcement. I think my core message and, hopefully, I’ll illustrate it during the panel is, although you’re not going to necessarily spend the majority of your time, although you might spend a lot in an individual case on cooperation, I think it’s trying really -- in terms of what agencies can gain and benefit mutually. Don’t view it as add-on activity, something extra that you have to do. It can really bring organic benefits to either an individual case -- and, hopefully, I’ll give some examples -- and also to policy to avoid misunderstandings, to converge where possible. It’s really something that should be fostered over the years. I’ve known Maria and her colleagues and colleagues at the DOJ for many years, and it’s really very useful in terms of building trust, facilitating relationships, and understanding where each of us are coming from. So from my perspective, I’ve had very good experiences over the years and I will give some more insights as we go on.

MS. COPPOLA: Thanks. Marcus?

MR. BEZZI: Well, if Nick had been standing next to me in the elevator, I would say I agree with all of that. I’d also say -- make the point that was made a lot this morning, that commerce is now more global than ever and, indeed, that’s a trend that’s significantly enhanced by the digital economy. And the corollary of that is that enforcers have to respond to the pace of change and globalization by working more closely together. We have to be more joined up and timely. And we need to do this for three reasons. Firstly, because I believe that in doing so, we will facilitate more efficient commerce. It will actually be better for the commercial parties if we are more joined up. Secondly, it will make us better at our jobs. We’ll be more effectively able to police compliance with laws in our jurisdictions. And, finally, because we’ve got scarce resources and working closely together is likely to prevent us from reworking issues, from seeking to reinvent the wheel or overlapping each other’s work. It will make us more efficient. Thanks.

MS. COPPOLA: Great.

MS. SCHAEFFER: Well, hopefully, we’re not in a Dutch elevator so there’s room for me as well. I certainly agree with everything that both Nick and Marcus have just said. I particularly like the idea that cooperation is not the icing on the cake, but, hopefully, the glue, as Kovacic would say, or the icing in the middle. What does cooperation mean? It doesn’t mean achieving the same result on the same timetable in every transaction or investigation. That’s not cooperation. That’s utopia. And that’s never going to exist. But I do think it can and often does mean a greater understanding of the issues, an enhanced understanding, as you said, Maria, for your own investigation and how to address concerns. And it, hopefully, can be used to maximize all of the efficiencies in the process given the substantive constraints and the procedural limitations that each jurisdiction has to live within. So I think from a private practitioner perspective, I agree there is a lot to be gained from cooperation. And I would love to use this panel to talk about practical ways that we can enhance cooperation, again using Kovacic’s human glue analogy, more at that human level than at the formal, procedural MLAT kind of level that I think we’ve all worked with or had our frustrations with over the last decade or so, and have found that it is these informal connections and understandings that have facilitated greater cooperation more than the very formalistic process.

MS. PRATT: Well, I agree with everything that everyone said. The only thing I would add is I don’t think cooperation is only good for enforcement agencies, I think it’s good for business. It allows competition law enforcement agencies to benefit from the experience of one another, reach conclusions quicker, and with less probability of conflict and ultimately, hopefully, increased timeliness and effectiveness of the outcome. But it’s -- as all of these people have said, it’s more than about sharing information, it’s that human glue. It’s having the trust amongst agencies to be able to have productive discussions, to be able to exchange theories of harm, to talk about what they’re hearing from the marketplace, to sort of be in a united front with the businesses so that they understand that it is in their benefit and it will be more efficient for them to cooperate with all of us together. And so I think the result, hopefully, is that investigations aren’t longer, are more focused, and the probability of outcomes being conflicting outcomes is minimized, and ultimately for all of us, the predictability, consistency, and effectiveness of outcomes across jurisdictions is maximized. The Canadian Competition Bureau, as you heard from Commissioner Boswell this morning and as you heard from some of my colleagues from the RCMP, I think Canada generally is a strong advocate for international cooperation and we’re always looking for opportunities to cooperate further, including with respect to not just merger cases, but unilateral conduct cases as well.

MS. COPPOLA: Thanks, Jeanne. Okay. So there’s a lot of human glue. So we seem to all agree that there’s a lot of great things that come out of cooperation, cooperation is very important. I guess drilling down to the next level, what can parties expect for agencies, and I guess for Fiona, what can agencies expect at a more detailed level from cooperation. Why don’t we start with Marcus this time.

MR. BEZZI: Thanks, Maria. Well, there are things like sharing case theories, if waivers are given there will be sharing of information. If we use our formal processes, they can expect them to take a long time. In our experience, MLATs -- well, I’ll just relate one story. We used an MLAT in a criminal matter recently and were absolutely stunned to get a result from the process in one year or a little bit less than one year. That’s the fastest that anyone can ever think of. Mostly, they take two years, three years, four years. We’ve got 19th Century formal cooperation procedures, 19th Century timetable for our formal cooperation procedures. So really we spend most of our time on the informal. And I must say, I listened to some of the sessions this morning and heard people talking about the IOSCO MMOU. I was very envious hearing about how quickly their processes work. They really do seem to operate at a more reasonable speed given the speed of commerce today. I should say that in mergers, the informal cooperation works extremely well and we don’t have to rely upon the formal. A lot of the time in Australia, we use the processes to coordinate remedies and people can reasonably expect us to do that in a fairly efficient way. I think that is a good aspect of the current system.

MS. COPPOLA: Thanks. Jeanne, do you want to –

MS. PRATT: Sure. I mean, we cooperate very closely with the Federal Trade Commission and with the US Department of Justice and the DG Comp. Those are the three jurisdictions or three agencies that we cooperate most with. And if you’re a party either on the merger side or on the conduct side, you can expect that we would have in-depth discussions related to investigative approach, theories of harm, market definition, concerns expressed by market contexts in the various jurisdictions and, frankly, our analysis of the data and evidence that we’ve seen. In some cases, you will see us do joint market interviews of joint market context. We’ll have sometimes joint calls with the parties and we’ll coordinate that interaction with the parties to make sure that the risk of uncertain or conflicting messages is minimized. And where cross border competition concerns are identified, you can expect the Canadian Competition Bureau to engage agencies in remedy discussions, because we need to make sure that those remedy discussions are considered in the broader context, including the need for remedies in one or more jurisdictions and whether a remedy in one jurisdiction may actually be sufficient to address concerns in another, so that we may not need our own consent agreement in Canada. We also look at whether a common monitor should be appointed or looking at the consistency of the language around preservation of assets or hold separate arrangements. And in some cases that cooperation with the Canadian Competition Bureau may ultimately lead to us accepting a remedy that is proposed from a sister agency and it can, where appropriate, ensure the most efficient and least intrusive form of remedy for market participants. So we do cooperate very deeply with our agency. And that, again, is based on a strong foundation of trust that has been built over 20 years of cooperating with the counterparts with whom we cooperate most frequently.

MS. COPPOLA: Thanks, Jeanne, very much. I’m very sorry to have to ask Nick to add to that because I think you about covered the universe. But, Nick, what do you think that parties can expect from cooperation and thinking specifically about your perspective from a shop that deals with conduct matters?

MR. BANASEVIC: I agree with everything so far. So not –

MS. COPPOLA: Okay. Can we be clear? You have to disagree at some point. This would be like dreadfully boring if you –

MR. BANASEVIC: In the post-panel, perhaps. No, but I think, as Jeanne said -- and perhaps -- and this is something I think we’ll develop perhaps as a difference in terms of incentives in conduct in mergers. Most of what my experience, in terms of what parties have incentive-wise, is in conduct. I’ve worked on a few mergers where the incentives have been aligned. We’ve had issues with parties where sometimes they don’t want to give waivers in conduct cases because they feel that that would somehow not be beneficial to them. That is, of course, their prerogative. My personal view is that actually, you know if they’ve got a good story to tell, there’s no issue with giving away, but because it’s precisely those things that we can discuss openly with them and with our colleagues, our sister agencies. But I think exactly the kinds of things that -- whether or not there is a waiver, because I think even without a waiver we’re able to, from our perspective, in terms of what we can gain, talk about theories of harm in the abstract and general levels, test, test theories, test realities. So I think if we’re doing that anyway, there is an interest for parties to give us a waiver. Again, that’s my personal view. But as I say, we’ve had some cases where we haven’t had waivers. To switch, in terms of what -- because I think we do have that responsibility ourselves to parties. And, again, maybe it’s more in mergers that it happens that they have these incentives where they’re aligned in terms of timing, coordination. In terms of what we can expect as an agency, just to develop a bit what I was saying at the beginning, I think, again, it’s not that we must always dream of having the uniform solution worldwide. We all have different legal traditions, different systems. Having said that, I think where we can achieve at least a high level of convergence where possible, I think that’s something that is desirable. So I think we, in terms of both policy development -- and then when we’re doing cases, I think it is invaluable and we each have a lot to gain in terms of, again, coming back to some of the things I’ve said in terms of case specifics, theories of harm, making sure that we’ve got a reality check on whether something is correct or not, testing these theories with each other, and if appropriate, moving the cases forward in the same or similar direction. If not, at least understanding the background to where we’re each coming from and why we may take a different approach. And I found that invaluable over the years in many cases, and I’ll develop that a bit more a bit later.

MS. COPPOLA: Thanks. I think that the last point you mentioned, this idea that the effects of case cooperation are not just contained to the case itself, but to a longer-term story of deepening the understanding between agencies is really important. Fiona?

MS. SCHAEFFER: Sure. Well, I think from the parties’ perspective -- and my comments are primarily in the context of merger reviews -- the goals of what can realistically be achieved from cooperation include reducing duplicative effort, reducing the burdens of investigation, convincing the agency, through cooperation, that just because there is a hill there to climb doesn’t mean that everyone has to climb it. One can climb and report, assuming, of course, it is a similar hill. We hope to have consistent, if not identical, outcomes and that includes, where possible, hopefully convincing an agency that they don’t need to have the same remedy as everyone else just because someone else has a remedy. We don’t have to have every jurisdiction reviewing, believing that it needs to have its pound of flesh in order to believe that it’s conducted an effective review. And that, of course, involves some levels of trust between the different agencies as well, that the enforcement of a remedy in one jurisdiction is going to be sufficiently robust to protect others. And, you know, that may not always be the case and it may vary by jurisdiction. We hope, also, that through cooperation we will, if not have a shorter overall timetable, certainly not a longer one. I think that is sometimes a concern that private parties feel is that a potential cost of cooperation is that you may be put on, in essence, the timeline of the slowest jurisdiction, rather than promoting efficiency throughout the process. I guess a word on waivers just to Nick’s point. In principle, I agree that knowledge is power and I like everyone at the table to have a similar level of knowledge, if we have good substantive points and arguments and documents to share, or even if not so good. The agency can do a better job armed with that knowledge than if there is some game-playing and trying to orchestrate the process and manage who knows what. I do think that that calculus is quite different in merger versus conduct cases. And it’s not a question of giving different agencies the same level of knowledge, necessarily, although in some cases it can be. But I think for us there is a bigger concern in conduct cases that information provided to one regulator and then shared more broadly increases the risk of discovery obligations and private class action consequences that aren’t so much of a practice concern in a merger context. So it’s not the sharing within the agencies necessarily that is the biggest challenge there; it’s what can be done with the information once it is within multiple agencies. We know that we’re dealing with jurisdictions that have very different levels of confidentiality protection, and in some instances, for example, are required to give third parties due process or other government agencies access. So I think there’s a greater feeling of concern about being able to manage the flow of that information in the conduct arena.

MS. COPPOLA: Thanks, Fiona. I think we’ll come back to that point about information exchange in a moment. But I think, before that, I want to pick up on Marcus’ point about keeping pace. I don’t know that -- the 19th Century might be a bit of an exaggeration, but I think even 20th Century tools are not fit for purpose. Last night, I was watching All the President’s Men with my 12-year-old son and they were trying to find the phone number for someone and they had a room full of phone books, and he just kind of said, what’s that, what are they doing? Anyhow, what types of things, what kind of -- what would a tool look like that was fit for the 21st Century? Are these more in the realm of informal cooperation? What tools do you use? What tools do you wish you had? What can we learn from you?

MR. BEZZI: Would you like me to go first?

MS. COPPOLA: Yes. That’s why I’m looking at you. I’m sorry. (Laughter.)

MR. BEZZI: Well, where do I start. So informal -- I’ll start on the informal. And, look, I should say 95 percent of the cooperation that we’re involved in -- probably more than 95 percent is informal and it’s very effective and it involves engagement with the various agencies that we’ve got excellent relationships with. We have many counterpart agencies that we’ve got second generation cooperation agreements with or first generation cooperation agreements with. And they help to create a formal framework in which we can engage in informal cooperation. And I should actually just go back a step. The formal arrangements really do enhance the informal. We have a very formal arrangement with the United States. We have a treaty with the US. I think we’re the only country that has an antitrust cooperation treaty with the US. We rarely use it. I think the number of times it’s been formally used you could probably count on probably less than two hands. But I believe that it promotes the use of waivers, it promotes the cooperation of witnesses, the cooperation of parties with our investigations, and it really facilitates and creates the atmosphere in which informal cooperation works very, very well. So what does that actually mean? It means that we can have case teams that have regular phone calls if we’ve got a common investigation or we’re investigating common or related issues. We can talk about case theories. We can talk about practical things like when we’re going to interview common witnesses. We can talk about lines of inquiry that have not been successful that have been a waste of our time and suggest to each other perhaps don’t bother going there, it won’t lead anywhere or, actually, look here, it’s a better place to look. Those sorts of discussions happen between case teams and they are really valuable. The exchange of information when we’ve got waivers -- confidential information when we’ve got waivers is very, very useful. I should emphasize that we very, very rarely -- in fact, I can’t think of a single occasion that we’ve done it using a waiver, but we very rarely exchange evidence. I can think of two cases where we’ve done that using formal processes. If we want evidence, we will go to the source and get the evidence from the source if we possibly can. It’s much more valuable to us that way, anyway. So I think you said, what would be better? Well, some of the processes that exist under IOSCO where -- and, indeed, exist under the antitrust treaty that we have with the US -- where we can ask counterpart agencies to compel testimony, we can ask counterpart agencies to compel the production of evidence or production of information and to do so in a very timely way, to put in a request that can be responded to in days or weeks rather than months or years. Those sorts of things are things that we aspire to. We get a lot of it informally, I should emphasize that. I don’t want to understate the importance of the informal. But having a more formal framework which would enable more of that -- and I think they have in IOSCO context -- would really be a facilitator of even greater informal cooperation.

MS. COPPOLA: I think we heard on the consumer protection and privacy panel that some of that investigative assistance is already happening on that side. So it’s –

MR. BEZZI: Very much so, yes.

MS. COPPOLA: Since we’re all -- many of us have it housed in the same agency, you would hope that we can have that transfer over to the competition side. Jeanne, could you pick up a little bit on the informal cooperation point and tools?

MS. PRATT: Yeah, I’ll try not to do –

MS. COPPOLA: So we can just –

MR. PRATT: I, again, agree with everything that Marcus said. And I think what I would say is it only works -- those informal cooperation tools, again, only work if you’ve got trust in the legitimacy, the competence, the candor and, frankly, the ethics of your counterparts in the other agency. And you can’t develop that necessarily in the context of just having a case discussion. You’ve got to take the time to have the conversations to understand different frameworks, to understand how they go about doing their work. And, frankly, that in our experience has led to us getting to learn some of the lessons from our colleagues so that we don’t have to repeat the same mistakes and, hopefully, we have also shared some of those with our foreign counterparts. So some of the mechanisms that we use outside of informal cooperation on a case to try and do that are the case team leader meetings that you heard Commissioner Boswell talk about this morning, which I find incredibly useful because it is our officers who are doing the work, that are leading those cases, that will take some time out to talk about how they do their work, what issues they are facing. Sometimes it’s talking about a particular case development or a lesson learned that they have from their jurisdiction. And that builds relationships amongst our staff, it builds trust, it builds confidence in our counterpart’s abilities as economists and lawyers doing the same type of work. Exchanges are another tool. And as was mentioned this morning, I am the very lucky candidate who got to go to the ACCC for a full year and see how they do their merger work, and I benefitted greatly as an individual. But I also I think benefitted the Bureau because we got to see not just how a particular case unfolds, but how you actually manage the organization, how you do your work, what tools you use and, frankly, seeing how something can be so different in some areas, but there’s a lot of commonality in the analysis that we do in mergers.

MR. BEZZI: We loved having you, too, Jeanne. It was great having you.

MS. PRATT: It was a tough winter in Ottawa, I have to say. The other thing that we have found valuable is taking some time out, maybe more publicly, to have workshops on particular issues. The FTC and the DOJ and the Competition Bureau in 2018 had a joint workshop on competition in residential real estate brokerage. And, you know, we had eight years of litigation in the real estate industry surrounding the use and display of critical sales information through digital platforms that wasn’t resolved until years after the US. But because we had taken so long, there had been a lot of evolution in the law and the economy. And so some of the lessons that we learned along the way were also informative to update since the fight in the US. So the only other formal thing that I think I would I say, not the informal, is we have a gateway provision in the Canadian Competition Act, Section 29. So when we’re doing mergers, we don’t ask for waivers in Canada. As long as we’re working on a case and we feel that that cooperation is necessary for enforcement of the Competition Act in Canada, we feel that that gives us the ability to have that conversation with our counterparts. So if you -- and I think this would be particularly useful in the unilateral conduct side where you may be looking at different incentives. The merging parties may want to get through our process as quickly as possible. They, I think, have come to see more of the benefits of our cooperation to get them where they need to get to with less conflict and quicker results. But, you know, that kind of a gateway provision could allow us to have discussions on the unilateral conduct side because the discussion is only as good as the two-way communication allows.

MS. COPPOLA: Thanks. The senior level exchange, I think, would be a big hit here if the destination was Australia. But I guess kidding aside, it’s interesting because what you learn there, you’re coming back and you’re in charge so you can actually implement the changes. So that must have had a terrific effect. Okay, Nick, just thinking a bit more about cooperation in conduct investigations. I almost said antitrust investigations because I was looking at you. What kind of practical experience tips do you have that you would like to share?

MR. BANASEVIC: So I’m going to go back in time a bit and give you a couple of examples of very intense cooperation with the FTC and the DOJ. Actually, let me first say, to go back a step even, for us, cooperation starts at home in the sense that we’ve got the European Competition Network, which in -- I don’t know if “unique” is the word, but it’s the network of us, the European Commission with all the national member state competition authorities in the EEA, the European Economic Area, all applying European competition law. And so we first need to cooperate at home in terms of both just allocating cases and, of course, generally the European Commission does the cases that are over a broader geographic scope, whereas the national agencies tend to focus on more national ones and in terms of substance coordination as well. Beyond that, I think we have extensive international cooperation with all the major competition authorities around the world, including Canada and Australia. But to give the two examples that, for me, have been personally particularly instructive over the years, going back to the beginning of the century is first the Microsoft case with DOJ, where, as background, you remember that the D.C. Circuit Court of Appeals affirmed a monopoly maintenance finding here under Section 2. And that was while our case was still ongoing in Europe. We had an interoperability and a tying abuse, tying of Media Player. And then there was a remedy implemented in the US that changed the way that some things were done. So it had a kind of factual impact on some of the things that we were doing in our case while it was still ongoing. And the issues were also -- even though the liability case here was little bit different, through the remedy, there was an interoperability element as well. So the kinds of issues were very similar. We met, I think, for a period of a few years twice a year. We would come here once a year and the DOJ would come to see us in Brussels. And it was invaluable just to exchange theories, to understand where each side was coming from, and to develop a trust and understanding over the years. So I think it’s fair to say that even though the issues were different, there wasn’t always perfect agreement, but it was a relationship that we valued and that really brought a lot in terms of understanding where we were coming from and in my view, at least, having a solution that was not necessarily exactly the same, didn’t lead to an overt situation of conflict, which, again, in my view was greatly facilitated by these contacts. The second example is the kind of policy and case area standard essential patterns. This goes back to even Rambus with the FTC where we had a similar case ourselves in Europe. But more generally and more recently, or five, six years ago, I guess, this issue of injunctions based on standard essential patterns. The FTC -- I think it was 2013 you had the consent decree with Motorola and we had a prohibition decision against Motorola a year earlier on the same kind of issue. And, again, take a step back or try and remember, this is a very -- I don’t know if “novel” is the word, but it was a controversial area of law. And perhaps it still is. For us in Europe, at least, we adopted a prohibition decision, which said that injunctions against willing licensees, based on standard essential patterns where you’ve given a commitment to license on FRAND terms, are an abuse. That was confirmed by our Supreme Court, the European Court of Justice, in a separate case, but the principle was confirmed. But it was, and still is, a subject that attracts a great deal of attention and a great deal of controversy. There were many people -- and that debate still goes on. But there were many people saying, how can you possibly do this? There are some people saying that. But against that background of that -- again, I’m not sure if “novel” is the word, but a very complex, important issue, it was really invaluable to have both the case coordination with the FTC on Motorola, where we had regular contact in terms of meetings and calls, and then on the policy level with both the FTC and the DOJ, where essentially we were on the same page in terms of developing this policy and this approach towards how we deal with the specific issue of injunctions based on standard essential patterns. I think particularly because it was an area that was so complex and controversial, my personal view is that we all mutually benefitted from being able to really share these experiences and insight. So those are two examples and there are many more, but it’s really, for me, a manifestation of just concrete case teams talking to each other regularly, being open, exchanging ideas, evidence if appropriate, if you have the waiver, and it’s been a great benefit.

MS. COPPOLA: Yeah, I think interplay of the case level and the policy level is a really good point that really deepens greatly the discussion and understanding. Fiona, we’ve heard kind of rah-rah-rah cooperation and lots of pluses on cooperation. You’ve talked about how cooperation doesn’t mean getting to the finish line at the exact same time. What are some of the practical limitations on cooperation from a private practitioner’s perspective?

MS. SCHAEFFER: Well, I think we start out with very different procedural frameworks in different jurisdictions. We happen to have probably two of the closest jurisdictions here in Canada and the US, on process. But others look quite different in terms of the amount of prefiling work in a merger context that needs to be done, the time that that will take, the uncertainty around when you actually get on the clock in say Europe or China versus in the US. And all of that leads to, you know, in many cases, if not an impossibility, certainly, all of the stars would have to align for the timing to actually be the same. So we are working with different processes, different timetables, and I think we have to accept that the timing is not going to be the same. The question is, can we make it sufficiently compatible that we can have substantive discussions at a similar time frame, particularly on remedies. That will, you know, minimize inefficiencies and maximize the ability to have a consistent compatible remedy. And even when you’ve done all of those things and there’s been I think an earnest, concerted goodwill effort to align those discussions, you’re inevitably going to have cases where, you know, something surprising happens like one jurisdiction decides, yes, we like the remedy package that everyone else has agreed to, but lo and behold, we think there ought to be a different purchaser in our jurisdiction, which shall remained unnamed, than in the rest of the world, which as you can imagine when you’re dealing with products that are sold around the globe under one brand name can be pretty challenging. I’m not sure that cooperation could have changed that result. But you’re always going to have these unpredictable aspects of a multijurisdictional merger review that can occur right up until the end. What can we do to enhance practical day-to- day cooperation, I think your earlier question. A lot of the time when we talk about cooperation, it’s really in a bilateral context. You’ve got parties speaking with Agency A, parties speaking with Agency B, parties speaking with Agency C, and then similar conversations happening between those agencies who are essentially, you know, in some cases, playing Chinese whispers, but reporting on conversations they’ve had trying to find common approaches, common understandings. I wonder sometimes can we expedite -- streamline those conversations to have fewer bilateral conversations and more multilateral conversations in the same room. Just as when we are faced with a conduct or a merger investigation ourselves, trying to understand better the facts, what’s going on, where, we often have multijurisdictional, multicounsel calls. I don’t see why we couldn’t do more of that involving multiple agencies on the same video conference or the same phone call. There is a limit, of course, where you get these huge conversations that, you know, are impossible to schedule, and no one says anything because there’s 100 people on the line. So yes, that level of cooperation can be unwieldy, but I think we can do more to explore having simultaneous conversations. I think there’s been a mindset probably maybe more in the minds of -- well, maybe equally in the minds of the companies and counsel, as well as agencies, that everyone needs to have their kind of process, everyone needs to have their separate meeting, everyone needs to have the merger explained to them, you know, Australian or in Canadian or in -- (Laughter.)

MS. SCHAEFFER: But I don’t think that that’s necessarily the case, not for all meetings or forms of cooperation. So that’s something I think we could do more with.

MS. COPPOLA: That’s a really interesting idea. I mean, we’ve heard earlier, and on this panel, that there’s a lot of joint third party calls. I know at the FTC we have limited experience with joint party calls, but that’s a really neat idea and it’s certainly very 21st Century if it’s video. So thinking I guess -- so those are some of the practical limitations on the practitioner’s side. Thinking about some of the practical limitations on the agency’s side, it seems like the one that has appeared a few times in this discussion is confidentiality. Nick has already talked a little bit about what we can exchange when we don’t have waivers. So what falls within the realm of public or agency nonpublic information, so, as he said, theories of harm, market definition, kind of basic thinking on remedies. But, of course, those discussions are much more robust when we’re saying because of evidence of X, Y, and Z. Marcus, you had mentioned that you have an information gateway in Australia. What does that mean and what can the FTC learn from that?

MR. BEZZI: So an information gateway is a legislative provision that enables our Chairman to make a decision to release material that we’ve obtained through some confidential process either a compulsory power, exercise of a compulsory power, requiring compelled production of information, or otherwise, and it enables us to release that information without the consent of the party whose information it is. So it’s something we don’t do lightly and it’s something we don’t do often. And it’s something we’ll only do if there are -- if we’re really 100 percent confident that people are going to comply with the conditions that are imposed on the release of the information. So if we’re dealing with a trusted agency, and we are confident that they will maintain the confidentiality of the information that we disclose, then we have got the capacity to release it. As I say, it doesn’t happen very often. There will be more than just a set of conditions imposed. There’s usually a fairly rigorous process that we put in place to ensure that the conditions are complied with. So there’s reporting. And after the agency that’s received the information has finished with it, we’ll require them to give the information back. And I should say this is a very similar provision to a provision that the CMA has in the UK and that Canada has. And it, as I say can be -- it’s more useful in being there than in being used, if I could put it that way.

MS. COPPOLA: Right, right. Thanks, Marcus. I think, Jeanne, I’ll have you answer next because he’s just talked about your information gateway. Does this have an impact on kind of target parties, third parties’ willingness to provide information, and what kind of notice do they get before you share the information? What are some of the consequences?

MS. PRATT: Yeah, I mean with great -- it’s -- we have to take that very, very seriously. So when we’re using our gateway provision, we have very transparent policies to stakeholders. It’s written in a confidentiality bulletin what the conditions of sharing are. Every time we do a market contact, it is disclosed to that market contact that we do have the information gateway, that we may use it obviously in an international merger context, that we may share it with our counterpart agencies and discuss it where they have waivers. So I think the lesson for us is transparency is really important to maintain your reputation because without our reputation to maintain the confidential information, we won’t be able to do our job and the effectiveness of our agency is diminished. It’s fundamental, frankly, to how we do our job. So in our confidentiality bulletin, we do set out the conditions quite clearly and we do say that we will seek to maintain the confidentiality of information through either formal international instruments or assurances from a foreign authority. And the Bureau also requires as a condition that the foreign authority’s use of that information is limited to the specific purpose for which it was provided. So our information gateway provides that we can use it for enforcement of the Act, which, for us, means if we’re working on a common case with an agency with whom we have a foreign -- or an instrument and we’ve got those certainties that that is when we will do so. Where there is no bilateral-multilateral cooperation instrument in force, the Bureau does not communicate information protected by Section 29 unless we are fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. And this, again, is where trust becomes key for us, we’re not going to put our reputation and our effectiveness on the line if we are not certain that those conditions will be satisfied. In assessing whether to communicate the information and the circumstances, we do also consider the laws protecting confidentiality in the requesting country, the purpose of the request, and any agreements or arrangements with the country or the requesting authority. If we are not satisfied that it will remain protected, it is not shared. Likewise, when foreign authorities are typically communicating confidential information to the Bureau, they are doing so on the understanding that the information will be treated confidentiality and used for the purposes of administration and enforcement of the Act. I should mention, too, we do have another provision in our Act which ensures that all inquiries conducted by the Competition Bureau are conducted in private and that provides some legislative certainty that it will be maintained in confidence on our end. So I guess I would say the gateway for us, while similar to Australia, I think has been used a little bit different and that mostly is a result of practice, our transparency, the market having a lot of faith in our practices and procedures, to maintain confidentiality. And without it, I don’t think it would be as effective.

MS. COPPOLA: Thanks very much. Nick, turning to the European Commission, I mean, you have sort of the highest level of information sharing and investigative assistance with the ECN and you also have things like the second generation agreement that you have with Switzerland. Do you want to share a little bit of your experience with those?

MR. BANASEVIC: Sure. Again, the ECN is -- again, I don’t want to say it’s the highest level of cooperation, but everything is open there.

MS. COPPOLA: Right, right.

MR. BANASEVIC: There’s automatic transmission of everything, there is -- I mean, that’s a consequence of what the EU or the EEA is in a sense. So it’s critical that we share up front information just about who’s got what case so that we can allocate them most efficiently and to coordinate on issues of substance because we’re all applying the same law. In terms of outside the ECN and outside the EEA, I -- as a general point, I think the main issues have been outlined in terms of maybe there being different incentives -- I’m talking outside Switzerland, which I’ll mention briefly now in terms of different incentives maybe between mergers and conduct. I take Fiona’s point about -- concern about disclosure in another jurisdiction. I understand that. I think the instances that I have referred to in some conduct cases have rather been a concern about not wanting agencies to discuss theories of harm even. So that’s a different thing. And in terms of Switzerland, actually, I think it resonated. I mean, we have a second generation agreement with Switzerland, which means in practice that we can transmit evidence between us without consent. Obviously, we’re talking about where the same conduct has been investigated. And what we found -- and this resonated when Marcus was talking about it -- is actually we haven’t needed to use -- to invoke those provisions. And it’s actually encouraged that that framework, and maybe the trust or the mechanics of how things work, have encouraged information provision without needing to use the formal provisions under the agreement. So I think that’s an interesting point.

MS. COPPOLA: Right, yeah, yeah. Fiona, you’ve touched on this a tiny bit already, but what are -- can you bring out a little bit some of the concerns that agencies might have either about these types of agreements or about granting waivers in the nonmerger context? What are some of the red flags?

MS. SCHAEFFER: From a merging party’s perspective or from an investigated party’s perspective?

MS. COPPOLA: From both.

MS. SCHAEFFER: Yeah, I think there is -- certainly in terms of the exchange of confidential information as opposed to permitting agencies to discuss case theories, I think there is an understandable sense that if an agency really needs that kind of information and has a right to obtain that kind of information domestically, then they should just ask the parties for it directly rather than get it -- you know, it sounds a bit pejorative -- but through the back door. I do think, on the merger side, the incentives are greater to provide it anyway. But I think, also, at the same time, the actual exchange of confidential information is relatively rare and I think its use is overrated. I think the biggest benefit that I’ve seen from cooperation from a private party’s perspective -- and I suspect the agencies might agree with this -- is just being able to discuss the case, the theories, the investigation, the legal analysis, the basic understanding of how the products work, what third party concerns are without, you know, revealing any confidential information. And all of that dialogue I’ve found in all of the deals I’ve worked on, and maybe I’ve just been lucky, but I can’t recall a single case where we facilitated cooperation and we suddenly found that Agency C, that had been going on its normal course of business and investigating without big concerns, suddenly had a new theory of the case that was going to put them into an extended review. I’ve always had the opposite. Namely, Agency C, when we have facilitated contact with Agency A and B, typically has been relieved to know that Agency A and B is investigating these particular various areas, that it doesn’t necessarily have to cover all of the same ground. And I have found that it’s expedited, not prolonged, the review or started new lines of attack that didn’t exist before. And I think that could also hold true, although it’s less tested in conduct cases where some of the theories of harm are just more wacky or radical. And I think agencies that have been at it for a longer period of time, in that investigation or generally, may be able to help other agencies understand what are the real issues here, what are some of the false paradigms or paths that, you know, we looked at five years ago but discovered really weren’t productive.

MS. COPPOLA: Right, right. Sometimes that thinking can go the other way, too. The learning can go the other way. I think I want to circle back on your point on forbearance. But before I do that, does anyone have any reactions to what Fiona was saying about information sharing and thinking of it as a backdoor way when it’s done -- the confidential information between agencies?

MS. PRATT: Well, I think it’s -- I guess from my perspective it would -- I’ve never seen that risk become realized. Because each of our agencies are very concerned about the confidential forecast that we have, that we want to minimize the risk of that because, otherwise, it would be a reputational risk for us doing our job.

I do think a lot of the value, unless you are doing a joint investigation where there is evidence that you need in another jurisdiction, most of the value of that cooperation can come from not providing confidential, competitively-sensitive third party information. So if you have waivers or you have a gateway provision, that facilitates that cooperation quite well.

MR. BEZZI: I agree with that. I mean, parties know -- if ever we are using an information gateway, and it happens rarely, but they know. It’s not done secretly; it’s done in their knowledge; it’s done transparently.

MS. COPPOLA: Fiona, I may have misinterpreted you. When you were talking about backdoor, I think you meant even in the presence of waivers. You didn’t mean out extralegally, right?

MS. SCHAEFFER: Yeah, I meant exchange of confidential information, where there are waivers, but the agency couldn’t get the information directly.

MS. COPPOLA: Right, right. Nick, do you have anything you wanted to add here?

MR. BANASEVIC: Nothing spectacular.

MS. COPPOLA: Okay. I have one question from the audience, but before we -- and I encourage other questions. So now is the time to write them. But before we get to that, I wanted to talk, I think because at the end of the day, the immediate goal in a particular case of cooperation is making sure that you don’t have conflicting remedies, that you have remedies that are, if not identical, at least interoperable. And we’ve heard some discussion today that, you know, there’s been a lot of agencies, more agencies looking at things than there used to be. And sort of the question about should we be giving more attention to cooperation, in the form of forbearance, than coordination. And, Fiona, if you could start that discussion for us.

MS. SCHAEFFER: Sure. Well, we were having a discussion at lunch and Marcus mentioned the magic pudding story. I said to Marcus, will this audience understand the magic pudding story? And looking around the room, I see there are bemused faces. Well, it’s a story we all told our children growing up in Australia where, as a child, I really enjoyed it. The magic pudding just never stopped producing pudding until the entire town was flooded with porridge and pudding everywhere. Well, no agency is a magic pudding. Agencies have limited resources. They can’t just keep on producing. And I think from an agency perspective, as well as from the parties’ perspective, one always ought to ask what are the incremental benefits of this additional investigation we’re doing over -- you know, on top of what five other agencies are doing? What are the incremental benefits of a remedy that is the same or virtually identical to what another agency has obtained as opposed to taking our limited resources and using them for investigations and transactions that these other five agencies couldn’t review? And it’s been interesting to me just to look at how different agencies have been allocating their resources over time. Brazil is an agency that comes to mind. When I come to think about some of the cartel investigations, the merger investigations they focused on maybe ten years ago, my anecdotal perception is that there was a lot more of an international dimension to them than there is today. I think some of the larger Brazilian investigations have involved, in more recent times, transactions in the educational sector and the health care sector, in the domestic financial services sector. And their bang for their buck in those investigations I think is significantly higher than it would be if they were another me-too in a global transaction. Having said that, is it realistic to say if the US is looking at a deal or the EU is looking at a deal or Canada and they’ve got remedies, that everyone else should just back off? No, of course not. But I think at each stage of the investigation, it’s useful for the agencies to ask themselves, what is the incremental value and what are the areas of this transaction that may be specific to our jurisdiction that the other people aren’t covering? What are the holes that we need to fill potentially for our jurisdiction that the others aren’t worrying about as opposed to retreading the same ground? And as counsel to parties to transactions and conduct investigations, we ought to be asking ourselves those same questions about what are the specific impacts of this transaction or our conduct on this jurisdiction.

MS. COPPOLA: Mm-hmm, mm-hmm. That’s very interesting. Thank you, Fiona. Marcus, what did you say to the magic pudding discussion and what are your thoughts on the topic more generally?

MR. BEZZI: Well, exactly, we are not a magic pudding. We have limited resources. We’ve got to use them intelligently. So we’ve got to focus on the things that are most important within our jurisdiction.

Fiona raised the cartel issue and international cartels. We could all spend all of our time doing international cartels and nothing else. But -- and they’re important, don’t get me wrong. Many international cartels have a big impact in Australia. But we’ve explicitly said in our enforcement and compliance policy, which sets out our priorities for enforcement and is adjusted each year, that we will focus on international cartels that have an impact on Australians and Australian consumers. It’s the detriment in Australia that is the focus. If there’s no detriment in Australia, then we’ll let other agencies deal with those cartels.

Similarly, in mergers, we will focus on the detriment in Australia. We’ll focus on a remedy that can fix the problems we have identified in Australia, and if it happens that that remedy has already been devised somewhere else and the remedy somewhere else will completely fix the problem in Australia, then what we can do is accept what’s called an enforceable undertaking, which is essentially a statutory promise, which requires the parties to give effect to whatever the commitment that’s being given outside Australia is, give them -- they are required to give that commitment to us in Australia, and that essentially is -- deals with the problem that we’ve got jurisdiction to deal with.

MS. COPPOLA: Right. That allows you to have something that you can enforce of there is a –

MR. BEZZI: We’ve got something that we can enforce.

MS. COPPOLA: Right.

MR. BEZZI: And we’re recognizing that our resources will be managed in a better way.

MS. COPPOLA: Better focused. Right, right.

Jeanne?

MS. PRATT: Well, I guess speaking -- the Canadian approach in mergers in particular, we actually have accepted and gone probably one step further than what Marcus was saying and not even put a consent agreement in place in Canada because we have been satisfied that the remedy mostly in the United States addresses our concern.

The only way we get there, though, is, again, to have really close cooperation. We need to understand the scope of the issues, we need to understand the scope of the remedy, and, frankly, we also need to have trust in the agency that they are going to enforce that remedy at the end of the day, which we have full faith in the US Department of Justice and the US Federal Trade Commission to do that.

One of the primary reasons that we do use comity and forbearance is because we think it allows a more effective and streamline remedy that’s least intrusive to business, avoids conflict, and simultaneously allows us, as a very small agency north of the 49th Parallel, to focus our scarce enforcement resources.

So two examples I would give, we had one where we accepted the US FTC’s remedy in the GSK/Novartis merger in 2015. So we were satisfied there. We didn’t even need a me-too registered consent agreement. We were fully satisfied that the scope of the remedy addressed our concerns and would address the anticompetitive effects on the Canadian market.

The second one, which is more recent, was a case we cooperated on with the US Department of Justice, UTC/Rockwell last year, which was an aerospace systems review, and in that case just to underscore the importance of the cooperation to get us to the comity, we cooperated closely with the US DOJ and the DG Comp throughout the review.

There were waivers in place in both those jurisdictions by all the parties. We shared information and conducted some joint market calls. We discussed issues of market definition, presence of global effective remaining competition and remedies. And we determined that there were likely a substantial lessening of competition in two product markets for pneumatic ice protection system and trimmable horizontal stabilizers actuators, THSAs.

And Rockwell’s relevant business -- they were located primarily in the US and Mexico and these products were distributed on a global basis. So we got to a place where we didn’t have any assets relevant to the remedy in our jurisdiction and we were fully satisfied that the remedy addressed our concerns.

The other side of comity, which, you know, I’m not sure the parties appreciated at the time, Commissioner Boswell talked about our simultaneous filing of litigation in the Staples/Office Depot merger a couple of years ago. Part of that was we did not see the need to file an injunction the same day because we knew that there would be an injunction proceeding by the FTC. So the parties did actually benefit because they didn’t have to face an injunction proceeding north of the border as well as south of the border. We benefitted greatly from cooperation in that case.

Again, we had one of our Department of Justice lawyers come and was seconded and was actually part of the FTC counsel team to see how the injunctive process worked, to see the evidence go in, and at the end of the day, the injunction in the United States took care of the issues in Canada. So they still benefitted. They probably didn’t like it because it was in the form of litigation, but it could have been worse.

MS. COPPOLA: You know, in GSK/Novartis, it’s interesting, we did a lot of trilateral calls in that case with the EC, Canada, and the US. And that’s not obvious in a pharmaceutical case where you expect the markets to be very different. But, certainly, in trying to understand the markets, I think the third parties were very happy to have one call and not three. So that’s an interesting case.

Nick, we haven’t heard from you yet on remedies coordination or forbearance. Is there anything you want to add?

MR. BANASEVIC: The first thing I want to say is I’m going to look up, after this panel, what a trimmable horizontal actuator is.

(Laughter.)

MS. SCHAEFFER: I was going to say, that’s what you need cooperation for. It takes three agencies to understand that.

MS. COPPOLA: Right.

MR. BANASEVIC: And there was another adjective there as well. But, anyway, for us, I mean, if you look at mergers and conduct, of course, we have an obligatory notification system in mergers, once you reach certain thresholds. I mean, you have to reason every decision whether it’s a clearance of remedies or a prohibition. So there’s no discretion as such in that sense. But, of course, there’s great benefit in the cases that we’re looking at more closely and we’ve got many examples that have been mentioned in terms of coordinating on the substance, on the timing, and, if appropriate, the remedies and the potential impact and how that might read across. Where we have the discretion in terms of choosing which cases we do and which cases we don’t,

with scarce resources that any public body has by definition, is a number of things, but not least the impact -- the potential impact in our market, in our jurisdiction. We’re responsible for a jurisdiction of 500 million people.

So I think it’s likely if we believe that there is an issue in that market that we are going to want to look at it more closely, even if there are similar investigations going on or not around the world. So I think that’s the first thing to say.

That being said, I think I understand as well the argument, particularly in the sector for which I’m responsible, the high-tech sector, companies operate globally, so the issue is raised, well, could you have different solutions in different jurisdictions? I actually think this risk of diversion is somehow overblown in terms of just perception. It’s not that this is going around willy- nilly in every case in every sector. I think that’s slightly a perception issue and, actually, more generally illustrates my core point in the benefits of really having up front, preemptively with partner agencies, discussions about the approach to be taken.

Again, it’s not that one can or need guarantee precisely the same outcome, given the differences possibly in even conduct. I mean, some of our markets are national for some of the products even if the companies are operating globally. But I think there is a great benefit in this up-front shaping, sharing thoughts to, to the extent possible, minimize the risk of divergences.

MS. COPPOLA: We have a question from the audience about the ongoing investigations of the tech platforms. The EC, the Japan Fair Trade Commission, are already investigating these firms. What’s important to effectively investigate, including cooperation? Another question, what you can expect from the FTC, but as I’m not a speaker, but a moderator, I think I will punt that to what can you expect from the investigating agencies. And, Nick, according to this week’s Economist, you guys are the determinators. So I’m going to let you answer that question.

MR. BANASEVIC: Is that a type of actuator? A determinator?

MS. COPPOLA: There’s these like big guns and, yeah, sledgehammers.

MR. BANASEVIC: I’m not allowed to say anything about ongoing cases, so –

MS. COPPOLA: Right.

MR. BANASEVIC: So what was the –

MS. COPPOLA: The question was, how can -- I think the question is, how can those agencies effectively investigate? What kind of joint –

MR. BANASEVIC: I think I have to go back to my examples from the past. I think that’s the most instructive thing. I mentioned two. There have been others where in the US and in the -- particularly the same cases or the same issues have been looked at. In some, we’ve had waivers; in others, we haven’t. I don’t want to monopolize the last 2 minutes and 30 seconds.

MS. COPPOLA: Right.

MR. BANASEVIC: It’s really been of tremendous use. And it’s my opening statement, it’s not an add-on. It can really -- for these big cases where they’re very important, sensitive, and you want to get it right, there’s just a great benefit in sharing experiences, knowledge, with colleagues who have the same -- who want to get it right as well and get the best result. So it’s a very good thing that we shouldn’t have just as just a bolt-on.

MS. SCHAEFFER: Can I just add on to that? Maybe the Cooperation 2.0 for digital platform investigations is not necessarily between antitrust agencies, but between antitrust agencies, consumer protection, and privacy agencies. Because -- and I think the term “forbearance” might come in there as well, in that not everything involving a digital platform is necessarily an antitrust issue.

And we certainly have a lot of intermelding of privacy and consumer protection concerns, as we see with the Australian ACCC report. And how do we jointly investigate those issues or maybe have antitrust not be the primary investigation and enforcement mechanism there?

MS. COPPOLA: We are very close to the end of the session. So I guess, Marcus and Jeanne, starting with you, and if there’s time, we’ll move on to Fiona and Nick. What are your last words of advice for the FTC in the area of enforcement cooperation?

MS. PRATT: I’m not sure I have advice. I think, as you’ve heard, I have found or we have found that gateway provision in our legislation to be particularly useful and, you know, it might be interesting to consider that in your context and whether it’s appropriate.

And I would just want to lastly say thank you very much for having us here. I know the FTC can continue to rely on the Canadian Competition Bureau’s commitment to continuing to build upon the solid cooperation foundation that we have and in particularly dynamic fast-moving markets that we have today. I think the business case for cooperation is only getting stronger and will only get better from here.

MR. BEZZI: So I won’t advise the FTC, but the advice that I’ll give to the ACCC is that we need 21st Cooperation and mutual assistance frameworks.

MS. COPPOLA: Thanks.

Nick, Fiona, anything to add?

MR. BANASEVIC; I’ve said it all, I don’t want to repeat. I think it’s don’t underestimate it, use it, and benefit from the interactions and the knowledge you can have with colleagues.

MS. COPPOLA: Well, thank you all very much for your insights. These have been tremendous. Coming into the panel, I wasn’t sure I would learn anything since I spend most of my day engaged in enforcement cooperation. But I did. So bravo. Thanks so much for participating. I think we’ll move on to the next panel now.

(Applause.)

(Brief break.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY

MS. WOODS BELL: Hello, everyone. Welcome back from break. I’m Deon Woods Bell. I’m a lawyer in the Office of International Affairs at the Federal Trade Commission. I’m so excited to be here today.

It is my extreme pleasure to introduce Julie Brill. Julie is Corporate Vice President and Deputy General Counsel for Global Privacy and Regulatory Affairs at Microsoft. Of course, everybody in the building knows her as a former Commissioner and friend of the Federal Trade Commission. She’s widely recognized for her work on internet privacy and data security issues related to advertising and financial fraud.

She’s received so many awards we could not list them all in her bio, nor could I enumerate them here today. One of my favorite is the Top 50 Influencers on Big Data in 2015. And one of my favorite memories is working together with her in Brussels on these same issues. Thank you, and please welcome Julie.

(Applause.)

MS. BRILL: Thank you, Deon. I remember that event, too, and it was great to work with you there. And it’s really an honor to be here today to contribute to today’s important discussions on the FTC’s international role in a world transformed by digital technology.

I am particularly excited to begin this session today that focuses on artificial intelligence. We have a truly distinguished panel, some of whom are -- here they come -- of experts from around the world, who will explore the implications of artificial intelligence at a time when innovative technology calls for innovative thinking about policy and regulation.

Today’s discussion comes at a critical moment. During the past few years, how people work, play, and learn about the world has been transformed. Industries have been reinvented. New ways to treat diseases emerge almost every day. Driving all this change are groundbreaking technologies like cloud computing that enable us to collect and analyze data scale that has never before been possible. But what we have experienced so far is just the beginning.

Rapid progress in the field of artificial intelligence has delivered us to the threshold of a new era of computing that will transform every field of human endeavor. Already, almost without us noticing, AI has become an essential part of our day- to-day lives. It powers the apps that help us get from place to place, predict what we might want to buy, and protects our systems from malware and viruses.

This is just a hint of what’s possible. Artificial intelligence has the potential to improve productivity, drive economic growth, and help us address some of the most pressing challenges in accessibility, health care, sustainability, poverty, and much more. Yet, history teaches us that change of this magnitude has always come with deep doubts and uncertainty.

I believe that if we are to realize the promise of artificial intelligence, we must acknowledge these doubts and work to build trust, trust that technology companies are working not just to maximize profits, but to improve people’s lives; trust that we use the personal data we collect safely, responsibly, and respectfully. But as we are learning the hard way, in the technology industry, trust is fragile.

In the wake of the Cambridge Analytica scandal and the spectacle of tech industry experts being hauled before Congress to answer for their business practices, people wonder if technology and technology companies can be trusted. The truth is that technology is neither inherently good nor bad. Cloud computing and artificial intelligence are just tools that people can use to be more productive and effective, basically the equivalent of the first Industrial Revolution’s steam engine. But it is also true that because technology has never been more powerful, the potential impact, both positive and negative, has never been greater.

So where does trust come from? It begins when companies like Microsoft, that are at the forefront of the digital revolution, acknowledge that in this time of sweeping change, we must consider the impact of our work on individuals, businesses, and societies. Today, we must ask ourselves not just what computers can do, but what they should do. This means there may be times when we have to be willing to decide that there are things that they should not do as well.

To guide us as we weigh these decisions at Microsoft, we have adopted six ethical principles for our work on artificial intelligence. It starts with transparency and accountability. We know that trust requires clear information about how AI systems work, coupled with accountability for the people and companies who develop them. We believe strongly in the principles of fairness which means AI must treat everyone with dignity and respect and without bias.

Our fourth principle encompasses reliability and safety, particularly when AI makes decisions that affect people. We also are strongly committed to the principles of privacy and security, for people’s personal information. And we believe that AI solutions should be built using inclusive design practices that affect the full range of experiences of all who might use them.

Now, while these principles are at the center of every decision we made about artificial intelligence research and development, we also know that the issues at stake are simply too large and too important to be left solely to the private sector. Trust also requires a new foundation of laws.

Here in the United States, right now, one area of the law demands our attention above all others. That area is privacy. Because so much of who we are is expressed digitally and so much of how we interact with each other and the world is captured and stored in digital form, how people think about privacy has changed. For more than a century, our understanding of this most fundamental human right has been shaped by the definition set forth by the great American legal thinker and fathers of the FTC, Louis Brandeis, who defined privacy as the right to be let alone. That right will always be important. But, by itself, it is no longer sufficient.

Now, modern privacy law must embrace two essential realities of life in the digital age. The first is that people expect to use digital tools and technologies to engage freely and safely with each other and with the world.

The second is that people expect to be empowered to control how their personal information is used. Whether we protect these two things is one of the critical challenges of our time. What we need is a new generation of privacy policies that embrace engagement and control without sacrificing interoperability or stifling innovation.

This is why we were the first company to extend the rights that are at the heart of the European general protection regulation, and we extended those to our customers around the world, including the right to know what data is collected, to correct that data, and to delete it or take it somewhere else. And over the last year, we’ve seen

the rise of a global movement to adopt frameworks that enhance consumer control mechanisms modeled on those required by Europe’s GDPR.

With participants here from India, Kenya and Brazil, this panel of distinguished guests is a perfect illustration of this important trend. Brazil’s general data protection law, which goes into effect a year from now, includes provisions that extend new privacy rights to individuals and mandates new requirements for notification, transparency, and governance for organizations. All of these requirements that will be new in Brazil are tightly aligned with GDPR.

In India and Kenya, new privacy laws modeled on GDPR are also currently moving through the legislative process.

Here in the United States, the California Consumer Privacy Act includes provisions that give people more control over their data. And Washington State is considering legislation based on consumer rights protected by GDPR as well.

As part of Microsoft’s commitment to privacy, we offer a dashboard where people can manage their privacy settings. Since May of last year, more than 10 million people around the world have used this tool, with the number growing every day. I think it is telling that while millions of people around the world are using our tool, our data demonstrates that US citizens are the most active in controlling their data. All of this should serve as a wakeup call for US companies and the US Government.

At Microsoft, we believe it is time for United States to adopt a new legal framework for access and use of data that reflects our new understanding of the right to privacy. To achieve this, I believe a strong US framework -- frankly, a strong privacy framework anywhere in the world -- should incorporate four core elements, transparency through robust standards that include and appropriate privacy statements within user experiences, individual empowerment that grants people meaningful control of their data and privacy preferences, corporate responsibility that is built on rigorous assessments that weigh the benefits of processing data against the risk to individuals whose data may be processed, and strong enforcement and rule-making. And, here, that means in the United States that should be all embedded at the US Federal Trade Commission.

While updated privacy laws are essential to building trust, new uses for artificial intelligence are emerging that will require special consideration for their own specific regulations. Facial recognition is a prime example. This technology has shown that it can provide new and positive benefits when used to identify missing children or diagnose diseases. But there is a real risk that -- there is a real risk which includes the danger that it will reinforce social bias and be used as a surveillance tool that encroaches individual freedom.

This is why Microsoft has called on the US Government to regulate facial recognition with a focus on preventing bias, preserving privacy, and prohibiting government surveillance in public places without a court order. It is also one of the reasons we have testified in support of the Washington State privacy bill, which includes provisions that address many of these important concerns about facial recognition technology.

We need laws that place appropriate guardrails to ensure that companies don’t take unfair advantage of individuals or violate people’s fundamental rights. That is the essence of trust. We believe that guardrails can be designed in ways that facilitate global interoperability and promote innovation so we can all work together to continue to harness the potential of the digital revolution to improve people’s lives and drive economic growth.

This will require a commitment from all of us to engage in ongoing discussions and consultations that span governments and sectors. This means it’s essential for the US Government and its agencies, including the FTC, to engage in a broad range of discussions with other governments on digital issues like we are doing with the honored guests here today.

Just as important are gatherings like this that will bring people together from around the world to explore policy approaches to new emerging technologies like artificial intelligence. More than 100 years ago, when Brandeis defined the right to be let alone in his famous Law Review article, The Right to Privacy, he described, with great eloquence, the ongoing process by which rights evolve as humanity progresses and how the law adopts and adapts in response.

“Political, social, and economic changes entail the recognition of new rights,” Brandeis wrote, “and the law in its eternal youth grows to meet demands of society.” Brandeis was moved to write this article because of the impact of photography, mechanical printing presses, and other disruptive new technologies of his time.

Today, we stand at the beginning of a new era of disruption and change, a time of technology- driven transformation that will require the recognition of new rights and the development of new laws to meet the demands of our societies. It’s a task that will ask us to convene in hearings like this one and in forums, meetings and conferences around the world to grapple openly and honestly with a host of issues that will touch on virtually every aspect of our lives and our businesses.

We, at Microsoft, look forward to being a part of these conversations and to working in close partnership with all of you to make sure that technology moves forward within a framework of respect for human dignity and with the goal of serving the greater good. Thank you.

(Applause.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY (PANEL)

MS. WOODS BELL: Thank you. Thank you very much, Julie, for those remarks. You outlined very well the tremendous potential of AI and that’s one of the reasons why we’re here today, to discuss them even further.

Well, I’m still Deon Woods Bell. And my co- moderator here is Ellen Connelly, an Attorney Adviser in the Office of Policy and Planning. And, together, we want to welcome you to our panel on international engagement and emerging technologies focusing on artificial intelligence.

You’re in for a treat. As Julie described, we have quite a panel assembled for you here today. This session is a follow-on to the hearings in November, which focus on the same topic. And following the November meetings, colleagues here at the FTC -- and a lot of influence from Ellen here -- said we should go deeper, we should focus on international issues. So today, we’re thrilled to have this impressive group of international officials, practitioners, and academics here and on the line from Harvard.

During this panel, we’ll touch upon a variety of issues and we’ll go deeper and let you see what these colleagues have to offer. We won’t go into great detail on their bios, but we couldn’t resist showing off a little bit for you and letting you know who they are.

On the line from Harvard is Chinmayi Arun. She’s a fellow at the Harvard Berkman Klein Center for Internet & Society, and she’s the Assistant Professor of Law at the National Law University in Delhi. Her chair is there and her picture will soon be on the line as she can hear us right now.

Next, we have, again, he’s still James Dipple-Johnstone. You saw him earlier. He’s a Deputy Commissioner from the UK’s ICO, and prior to the ICO, he was in the Solicitor’s Regulatory Authority where he had been Director of Investigation and Supervision, and he’s not from the ministry of no.

(Laughter.)

MS. WOODS BELL: Next, Francis Kariuki, Director General of the Competition Authority of Kenya. Mr. Kariuki is the founding member and the current Chairman of the African Competition Forum. He’s also an expert in FinTech.

Next over to Marcela. She’s a partner at VMCA Advogados in Brazil focusing on data protection and antitrust. She’s served as Advisor and Chief of Staff for the President of Brazil’s famous CADE.

Over to Isabelle. She’s President and Member of the Board Autorité de la Concurrence, as she was previously the President of the Sixth Chamber of the Conseil d'État, the French Supreme Administrative Court, and other governmental capacities.

And last but not least, we have Omer Tene. Omer is a Vice President and Chief Knowledge Officer at the International Association of Privacy Professionals. He wears so many hats, we couldn’t list them either. He’s an Affiliate Scholar at Stanford and Senior Fellow at the Future of Privacy Forum.

So, before we get started, we want you to be open to looking to questions. We have our colleagues here. We’re going to have short introductory comments from each colleague, and then after this, we’ll have a moderated panel discussion, and we hope that you enjoy.

MS. CONNELLY: Great. So I will start us off by giving each of our panelists a chance to make a brief introductory statement to describe for us the key competition, consumer protection and privacy issues that they see emerging around the artificial intelligence field. We will start with Chinmayi.

MS. ARUN: Thank you for having me. It’s such an honor to be a part of this panel, and I’m happy to see that the FTC is listening to voices from around the world.

If I were to give you the three or four big highlights of how I would think about AI and the right to privacy in data sets in India, it would be -- the first would be in terms of global companies, usually American companies, operating in India versus Indian companies operating both in India, as well as elsewhere in places like Kenya.

The second would be in terms of data because, as you know, it’s a very big country and it provides large and rich data sets that can be complicated in ways that I’m going to describe to you shortly.

The third is that perhaps some of you have heard that there has been a rich and, again, contentious conversation about the right to privacy in India in the context of state surveillance, but also in the context of state protection. So we’ve had a major case on the right to privacy, and we’ve also got a data protection bill, which is very interesting, so I’m going to describe the highlights of that for you.

And the final -- because we’re discussing this in such an international context is this sort of almost a clash of jurisdictions that arises from the Indians, for example, floating proposals of data localization in certain contexts, but also the ways in which India is coping with norms that are emerging from the US and from Europe.

So the first is very simple, which is that as you know the major technology platforms, like Facebook and WhatsApp and Google, are used extensively in India and they have huge user bases in India, but there are also many Indian citizens that access them and have their data on them. Although I will focus a little bit more on the information platforms, it’s good to know that Airbnb, Uber, and other technology platform companies are also offering services in India.

So our legislation, our new privacy act, our proposed amendment to our information technology act are all coping now with the very real idea that there are many Indian citizens whose lives are affected by these technologies that are designed elsewhere based on rules from elsewhere. At the same time, they’re also trying to keep Indian companies competitive because there are Indian companies offering similar services in India.

Our NITI Aayog, which is sort of our version of the planning commission, has described India as the AI garage for 40 percent of the world, and they’ve got a strategy paper on AI. As you know, the big data set question, it’s complicated because, again, India is looking at it as a way towards machine learning, but there are also concerns of data protection and privacy that arise in that context.

And the big tension really is that, on one hand, the policymakers want to leverage this and have this data and sort of learn from it and, on the other, of course, there’s the question of the privacy rights of Indian citizens and especially of marginalized citizens, people who are not able to assert their rights in the consumer forum.

And the final -- so none of this is law yet, but both in the proposed privacy legislation and in the proposed IT amendment act, the question has arisen of whether foreign companies with a sizable user base in India should be asked to localize data in India. So both these proposed legislations have suggested that these companies might be made to host their data sets in India, and I think that that also is cause for concern if they’re thinking about it from a privacy and data protection point of view.

I’m going to stop here. I just wanted to flag all of this in case anyone has questions later. Thank you so much.

MS. CONNELLY: Thank you very much for those really interesting comments.

We’ll move down the line and next up is James.

MR. DIPPLE-JOHNSTONE: Thank you very much and thank you. It’s an honor to be here on this panel with you today.

So I’ve got four issues. And I think the first, which has already been very ably covered, which is that about public trust and the risk of losing public trust in the rollout of AI systems and the role of regulators needing to work together both within country, but also internationally, which is my second theme.

This is an emerging area, one where I don’t think we still have a clear picture of what AI’s impact on our societies will be. And with that in mind, it’s important that regulators keep themselves up to date, keep relevant and work together with others. And that’s very much the approach we’ve taken in the UK. The ICO has a remit in some of the technology, but actually, we work very closely with, for example, colleagues at the Competition and Market Authority, the Financial Conduct Authority, the Center for Data Ethics and Innovation and the Alan Turing Institute to look at the common issues that face us all and how we can improve our regulation.

An important third issue is to look at not only whether the data’s held -- and when we talk about big data sets, we sometimes think of the big tech companies, but in the UK context, the state has large and valuable data sets, too. The UK National Health Service and the UK Education Service have very comprehensive data sets with millions of data points, which would be of value to a number of organizations around the world.

And we are seeing increasing use of AI in the public sector as a model of efficiency and to help us all strive to meet our budget considerations. AI is being looked at for use to decide whether UK citizens are likely to commit crimes, which crimes should be investigated, who’s likely to reoffend, who’s likely to pay their rent on time. And that is beginning to introduce issues of fairness, accountability, and transparency.

And so that’s why, as a regulator, we are really keen to keep abreast of developments. So we are putting a lot of effort into doing that. We are recruiting post-doctoral researchers to help us look at how to regulate AI. We’ve taken new powers to examine AI’s use and look at AI systems in practice and in operation and we’ve reconfigured the office to set up an entire part of the office that will just focus on innovation and technology.

I said it this morning; I’ll keep saying it. We’re not the ministry of no, but we think the GDPR provisions around data protection impact assessments and our work around, for example, regulatory sand boxes and innovation hubs with other regulators. We’re trying to encourage early dialogue to tease through some of these issues together, because I’m not sure any one of us has the perfect answer for all the scenarios.

MS. CONNELLY: Thank you.

Francis?

MR. KARIUKI: Thank you, Ellen and Deon. It’s a pleasure for me to be here and to share my thoughts in regard to AI.

And my view is as a competition and consumer protection regulator, what am I worried about? And I have about four issues, and these are transparency and information asymmetries. What I would like to say is that AI has both created positive and external -- externalities. And in terms of competition and consumer protection, there’s an argument which has been found that they bring more efficiency in terms of prices and greater transparency compared to the traditional retail sales channels, and this is an inquiry which has been conducted in Europe and it has shown that. And, also, they provide additional benefits on these platforms. For example, AI [indiscernible], such platforms could improve choice and value for consumers.

However, the other challenge of -- an encountered challenge in regard to we don’t appreciate the criteria behind the decisions of AI, they are only known to the designer of these systems, and, therefore, the merchant or the consumer may not be aware of how the system has been created and it’s allocating the prices. So there’s the risk of intentional design of the systems in favor of certain participants in the market.

And this could be quite catastrophic in the continent I come from where there’s a lot of market concentration, and, therefore, the companies which are in Africa then can expand their space by being biased against the consumers in Africa.

The other areas that’s also barriers or pathways to entry are, in Kenya, I’ve seen some positive externalities especially AI has enabled new innovations, where in Kenya we have seen recent expansion of financial services for people who are not included in the financial services. And, therefore, companies have been enabled to expand financial services through lending positions for previously people who were not captured in the financial services and also in the insurance sector.

The challenge I see also from the AI is the line between open and proprietary data. AI often creates what is called, in fair data, an individual that is not perhaps -- not factual but opinion based, and, therefore, we may not get an optimal position for the product which is being offered or the prices which are being offered in the market. And, therefore, the challenge going forward is how do we determine data which is a product and which data is an input, and this choice of where the line is will have significant competitive implications as we move.

Besides information asymmetry, I’ve seen AI can also be used in consumer protection issues, discrimination based on other social issues like the region where people come from or even race, as I had mentioned earlier, and these are some of the things where we need, as regulators, both competition and consumer, to look before we fly, because right now is that we are flying blindly and we might be flying into a storm.

MS. CONNELLY: Thank you.

Marcela?

MS. MATTIUZZO: So first of all, thank you, Deon and Ellen, for the invitation for the FTC, to you both for inviting me personally, but also Brazil to be a part of this discussion.

A lot of the points that have been raised here focus on procedural challenges of AI. What I would like to also mention is perhaps the difficulty in both attaining international convergence in these topics, not necessarily laws that are exactly the same, but that point in the same direction, and also convergence within the many fields of law that are connected to AI.

So here, at the FTC, we’re naturally discussing antitrust, consumer protection, and privacy. And even when we’re speaking only of these three areas of law, we can already see that sometimes the objectives of these policies are not always totally convergent.

So, what I would like to -- just to give an example, I guess, that is comparing privacy and antitrust that to me is very clear. What technology has enabled today is for many companies to unilaterally access information and AI has also allowed that information, this data, to be combined and used efficiently for many purposes. So now we can know who bought something, how that person bought it, and so forth, and create, for example, consumer profiles.

Perhaps from an antitrust point of view, one of the solutions to a potential problem of unilateral abuse of this information would be to share the databases with other companies. So we would have many companies that have the access to the same set of data and, therefore, of course, we can have problems of collusion. But leaving that aside, we would have a level playing field.

If, however, we look from the consumer or data protection side of the discussion, we may come to a very different conclusion. And we may come to realize that, perhaps, consumers don’t want their data shared across different platforms and shared across many companies. So, naturally, both objectives pursued by either antitrust or privacy and consumer protection agencies, in the case of Brazil specifically as I hope to make clear throughout my interventions, we are at very different development stages. When it comes to antitrust and consumer protection, we are much more developed and, as you may be aware and former Commissioner Julie Brill already mentioned, in regards to data protection legislation, our specific legislation was approved just last August, August 2018, and has not yet come into force.

So building policy that brings all of these areas of law together in a coherent fashion to address AI challenges seems to me to be a particularly important goal and a particularly important topic for us to focus on.

MS. CONNELLY: Thank you, Marcela. Isabelle?

MS. DE SILVA: Thanks a lot to the FTC for the invitation. I’m really glad to be here.

I would like to say that, for me, the main point is that we think data, artificial intelligence, algorithm, are really key to the competitive process and that is why we must look at it closely. Of course, those processes affect also the way the state is being run. They also affect and they change society, but for us, the main issue is how do they affect the competitive process and the way companies do business?

So what we see is that we really need to invest a lot more than before in understanding what is going on in the market, in the companies, and also to use all our different tools, legal tools, to gain a better understanding and also to give better vision to the market, and I will try to illustrate this with some examples.

So first of all, we use sector inquiries. That is a tool that is common among agencies. But how do we use it? We really take a lot of time to understand a specific market that we deem to be interesting or a process. So that’s what we did with online advertising last year, and, of course, we had very interesting dialogue and followup with Australia, who has finished a very interesting report on online advertising.

And in this way, we get a lot of information from companies. They are sometimes reluctant to give information, but we have the legal framework that enable us to get a lot of information.

And also we give information back to the market. I think this is really something interesting because some sectors are moving so fast that even the companies engaging in the sector don’t always have the big picture, and that is something that has been deemed very useful in the field of what we did about programmatic advertising and the way it’s being run because it’s a very complex and new ecosystem.

Another type of tool we are using very much is the joint studies with other agencies. That’s what we did with the CMA about closed ecosystem in 2014, what we did with the German agency in 2016 about big data, and what we are doing right now about algorithm still with the German agency.

So what is the interest of this? It’s really to show the impact we see that algorithms have on the competitive process and maybe I will tell about a little bit more about this later. This is really something where we draw about, of course, what the experts have written about algorithm, but also in a very practical manner how do companies use algorithm and how does it change the way they do business in the market?

And, finally, another tool that we use is the conference or hearings like you have today at the FTC, but really focusing on what is new, for example, in the field of algorithm. Last year, we had lots of meetings with scientists, sociology experts about what is new about algorithm and also about companies. For example, we had meetings with Google and Facebook to know how they use algorithm in a very precise and detailed matter to help us to understand how it’s being used.

### Top Level---1NC

#### 1---No spillover---no ev says antitrust immunity prevents state regs over tech

#### 2---No emerging tech impact

Caitlin Talmadge 19, Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. "Emerging Technology and Intra-War Escalation Risks: Evidence from the Cold War, Implications for Today." https://www.tandfonline.com/doi/full/10.1080/01402390.2019.1631811

Yet the future relationship between emerging technologies and escalation may not be as straightforward as these statements imply. The debate about emerging technologies tends to portray them as a powerful independent variable – an exogenous factor that is both necessary and sufficient to cause conflict escalation. This paper argues instead that emerging technologies are more likely to function as intervening variables; they may be necessary for escalation to happen in some cases, but they alone are not sufficient, and sometimes they will not even be necessary. The strongest drivers of escalation will actually lie elsewhere, in the realms of politics and strategy. As a result, concern about new technologies is warranted, but determinism is not. An overemphasis on the dangers of technology alone ignores the critical role of political and strategic choices in shaping the impact of technology, and also could lead to a misplaced faith in arms control or other means of trying to stuff the technological genie back in the bottle.5

#### 3---AI Impact is wrong

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.

#### 4---Plan does not regulate state government anticompetitive behavior---they are not the private sector---no solvency

#### 5---Tech Regulation is happening now---their ev is super outdated---no 1AC card says states can’t continue regulating AI

#### 6----Grey goo is impossible

Ben Goertzel 17, Chair of Humanity+, PhD, CEO of AI Software Company Novamente LLC and Bioinformatics Company Biomind LLC, Advisor to the Singularity University and Singularity Institute, Research Professor in the Fujian Key Lab for Brain-Like Intelligent Systems at Xiamen University, “SHOULD WE DEVELOP NANOTECHNOLOGY? NANOWEAPONS AND GREY GOO”, Humanity+, 10-12, <https://humanityplus.wordpress.com/2017/10/12/grey-goo-how-probable-is-a-nanobot-apocalypse/> [grammar edit]

2 Decades ago, Nanoengineer Eric K. Drexler had a shocking realization. All it would take was one malfunctioning nanomachine to glitch and potentially undergo runaway replication, unstoppably consuming everything on earth to assemble the molecules that their programming dictates. It’s a threat that stems from two extremely powerful forces: unchecked self-replication and exponential growth. All it takes is a corrupt government, non-state actor, or individual to engineer a single microscopic machine that would devour our planet’s critical resources at a rapid-fire rate to replicating themselves. In this sense, one person really CAN change the world. It could start as easily as nanites being hijacked from a powerful nation’s military, re-programmed for a terrorist action, and blindly convert all matter on earth without end. Drexler calls this the Grey Goo Theory, and it’s the idea that rogue self-replicating nanotechnology has the potential to cause many more problems than it might solve, eating up anything and everything until the environment and all of us in it are completely deconstructed, leaving behind only useless bi-products and residue we’d call “grey goo”. It’s a kind of conundrum that might discourage us from even wanting to develop nanomachines in the first place and would be characterized by the speed at which a true nanomachine would be able to create copies of itself. Drexler proposed it because of scaling laws in mechanical engineering, meaning that the smaller you can make a nanofactory, the more percentage of the total input for buiding those factories gets converted into product. In other words, you get increasingly more for less. We’re talking machines that are invisible to the naked eye, meaning one the size of a flea would be considered a very large nanobot. Preliminary estimates suggest a nanofactory could potentially output its own weight in product in as quickly as 15 hours, meaning it would grow buildings faster than bamboo at about 20 feet per day. Drexler predicted that if a nanomachines took 1000 seconds to replicate then just one going haywire would create 68 billion new machines within 10 hours, and under 48 hours, they’d be as heavy as the Earth. Through the magic of exponential growth the’d be able to eat through walls, destroy cities, and reduce all land based biomass into paperclips. Once programmed, nothing could stop them and if they were to gain a sufficient degree of intelligence, then why shouldn’t they reproduce themselves just as all life does? Drexler compares the functionality of nanobots to the functionality of life itself, believing they would even out-compete actual plants until we no longer have a green planet, but a grey one. Us humans are just more ressources for fuel and replication. The sci fi video game Horizon zero dawn presents us with a world where a nanobot uprising has destroyed all human civilization and have become the new dominant species. But could this actually happen in real life? Probably not, and if it did, a hostile earth would be the least of our problems. If AIs built for these nanites were ever to become that intelligent, it’s likely they would gain the power of space travel, meaning they wouldn’t just overrun the mass of planet Earth, but overrun the universe itself until all reality is ecotophaged into a hell of self-replicating nanobots. There’s a peculiar spot in the night sky called the Bootes void, millions of light years in diameter with not a single star in sight, a mysterious black patch on an otherwise starlit sky. Since the skewed distribution of stars doesn’t make statistical sense, some have suggested that the void actually is full of stars, but nanomachines covered them in solar powered dyson spheres to drain their energy. Grey goo wouldn’t care what it is or why it does anything it would would simply just “do.” This has lead more extreme doomsayers to suggest that this hole in the sky might actually be a cancerous tumor of nanites slowly consuming our entire universe, but I think that idea might be a little too crazy.

The go-to answer to the grey goo scenario is that it will never happen. While it’s highly uncertain when molecular manufacturing will be developed, there are a few reasonable arguments for its feasibility, the most obvious being that life itself constantly does molecular manufacturing in the form of protein synthesis so why can’t we? In general, I personally don’t believe in the Grey Goo and think it’s ridiculously inefficient, because in the end, it’s more productive to just create stationary nanofactories fastened in vacuum-filled chambers rather than develop the complex motion dynamics needed for independant flying swarms of nanobots that have to carry the factory within them. These nanoscopic miracle workers will also unlikely be able to fit supercomputers inside their tiny bodies, implying that their very existence doesn’t violate the laws of physics in the first place.[19][20] Nanobots as they are being developed at MIT clearly won’t be little A.I robots like everyone expects, but rather, carefully designed biomechanical structures, similar to enzymes or vectors. A nanopocalypse might still [face] energy constraints related to how fast it can spread, with natural obstacles and a lack of raw materials making continuous propagation difficult. Even Drexler himself argues that self-replicators would be too complex and inefficient for any practical manufacturing scenario, Furthermore, the Royal Society’s 2004 report on nanoscience declares that the grey goo scenario to be highly unlikely There’s still a debate today about whether or not grey goo is even practical or not, but let’s just say Grey Goo is utterly impossible, it doesn’t mean nanotechnology an’t create other kinds of apocalyptic weapons. This is the idea of “Red Goo” or Nanoweapons and it’s not too far from the idea of Bioweapons we are all familiar with. Nanotechnology theorist Robert Freitas coined the term Aerovores, otherwise known as “Grey Dust”, to illustrate the dangers of nanotech based weapons.

#### 7---Bostrom can shut the fuck up

Eli Horowitz 18. MA in Bioethics. 01-19-18. “Let's pretend that Nick Bostrom is worth taking seriously.” Rust Belt Philosophy. http://rustbeltphilosophy.blogspot.com/2018/01/lets-pretend-that-nick-bostrom-is-worth.html

As the paradigm example, this is meant to set the stage for all that is to follow. And, indeed, it's vitally important for Bostrom to rely on "subjective probability" rather than "objective...chance," because the former is infinitely more forgiving than the latter. (And yes: I do mean "infinitely." I have a math degree.) Subjective probability - what I've been calling the "merely possible" for nigh on eleven years now - is really just a way of measuring ignorance, and when it comes to something like "existential risk," our ignorance may as well be boundless. (In fact, Bostrom admits as much himself: "It would be foolish to be confident that we have already imagined and anticipated all significant risks," he says.) Thus, by leveraging what he doesn't know rather than what he does know, Bostrom gives himself an effectively endless sandbox in which to play. (As I said in that post from yesterday, this is what philosophers like Bostrom do: they wave their dumbness in your face and scream about how it's actually wisdom.) There's just one problem with this approach: it's not good for scaring people, which is Bostrom's ultimate goal. Look again at his first example. He classifies "the inaugural detonation of an atomic bomb" as an existential risk, and then he immediately explains that such detonations actually have a 0% chance of immediately causing human extinction. That, friends, does not exactly make for a terribly compelling case-in-point: "You must listen to me! If you don't, there's a real chance that nothing could go wrong!" Yet Bostrom knows that his entire "existential risk" schtick will be meaningless unless he can make it seem relevant - that is, unless he can make it seem scary. As a result, he spends the entire article vacillating shamelessly between "subjective probability" and "objective chance" - that is, equivocating between two different senses of what counts as a "risk." The first example of this equivocation comes merely one paragraph after he talks about the first nuclear bomb, when he says this: "Our approach to existential risks cannot be one of trial-and-error. There is no opportunity to learn from errors." Clearly, though, this is laughably absurd. Not two hundred words prior to this sentence, Bostrom gives a concrete, real-world example in which we did take a "trial-and-error" "approach to existential risks" and in which we did "learn from [an] error" in judgement (i.e., the nuke thing). Again, this is his own example! How, exactly, does he manage to forget about it in the space of one paragraph? The answer is depressingly simple: because, in the space of that one paragraph, he allows himself to slip from mere possibility (epistemic possibility; subjective probability; ignorance) to actual possibility (ontological possibility; objective chance; knowledge). In the case of a merely theoretical risk - that is, an event that seems to be risky but is not actually risky - we can afford to take all the chances we like; this is the story of the first nuke, and it's the supposed basis of Bostrom's entire article. But in the case of an actual risk - i.e., an event that will actually cause a catastrophe - there would indeed be "no opportunity to learn from errors." Both of these lines of thought are extremely straightforward and are entirely easy to understand. They are, however, not the same line of thought, and as such we can't sloppily combine them or haphazardly switch between them. If we want to operate from ignorance, we need to be consistent in operating from ignorance; if we want to operate from knowledge, we need to be consistent in operating from knowledge. The single most egregious error in Bostrom's paper is that he doesn't even try to be consistent in this way. Here's another example: "Reductions in existential risks are global public goods." But no: again, the decision not to detonate a nuke would not have avoided any actual global threat. (The decision not to use nukes would have spared a whole bunch of Japanese civilians, but that's a separate conversation.) We mistakenly believed that there was a "global public good" at stake, but that belief turned out to be pure ignorance on our part and not knowledge. Once more: "My subjective opinion is that setting this probability lower than 25% would be misguided, and the best estimate may be considerably higher. But even if the probability were much smaller (say, ~1%) the subject matter would still merit very serious attention because of how much is at stake." Here we see Bostrom transitioning from "subjective opinion" to "objective chance" in the space of two sentences. First he begins by offering a totally arbitrary (and suspiciously round) number based entirely on his own personal ignorance, and then he moves to a claim about "how much is at stake" - which, as a claim, can only be justified if he has real knowledge about the situation and not just a way to measure his ignorance. Once again, it's instructive to turn back to his example with the nukes: when we tested the first nuclear weapon, nothing was at stake (except, I guess, some sundry desert flora and fauna). People certainly had "subjective opinion[s]" about what was at stake, but in actual, objective reality there was nothing at stake at all. Bostrom's dedication to equivocating between risk-as-ignorance and risk-as-knowledge completely dooms his entire project, and it reveals him to be a shoddy, undisciplined thinker - or, at least, a thinker who's willing to shelve rationality in order to further his own career: "We need more research into existential risks – detailed studies of particular aspects of specific risks as well as more general investigations of associated ethical, methodological, security and policy issues. Public awareness should also be built up so that constructive political debate about possible countermeasures becomes possible. Now, it's a commonplace that researchers always conclude that more research needs to be done in their field. But in this instance it is really true." It would be easier to forgive Bostrom's transparently, almost comically self-serving attitude if he bothered to demonstrate even the slightest idea of what he's talking about. Yet not only do the very terms of the conversation make this impossible (in that risk-as-ignorance presumes ignorance, which by definition is the opposite of knowing what you're talking about), it also turns out that Bostrom is just not all that interested in knowing things. When he talks about a speculative, "mature" type of nanotech, for example, he argues that it "could prove hard to regulate, since it doesn't require rare radioactive isotopes or large, easily identifiable manufacturing plants, as does production of nuclear weapons." But how could he possibly know now what a purely hypothetical future technology would require? Even current, "immature" nanotech relies (entirely unsurprisingly) on highly specialized technologies - to name just a few, wiki lists atomic force microscopes and focused ion beams. Is it actually difficult to track and regulate such equipment, or is Bostrom simply making shit up? Because governments already track similar products all the time without very much difficulty at all, which sure seems to suggest that Bostrom is simply making shit up. Likewise, when he starts listing ways for society to end in a "bang," the last one mentioned in terms of probability - the last one! - is global warming. That puts it behind nanotech terrorism, nuclear war, "we're living in a simulation and it gets shut down,"

a monster AI, bioterrorism, a nanotech accident, "something unforeseen"(!), "physics disasters," a natural pandemic, and "an asteroid or comet." Again, to reiterate: Bostrom evidently thinks that global warming is less likely than all of those other things. He thinks that global warming - which is a real thing and is actually happening - is less of a threat than the possibility that reality is a simulation and it's gonna get shut down. He thinks that it's less of a threat than us accidentally blowing up our corner of the universe by playing around with particle accelerators. Frankly, this is utterly nuts, and, again, it speaks to Bostrom's willingness to wallow in his ignorance like a pig in shit. In fact, his apathy towards knowledge is even more appalling than that. If Bostrom were satisfied to be ignorant on his own, that would be one thing. Instead, though, he turns his ignorance into an attack on other people who try to know things: "There is more scholarly work on the life-habits of the dung fly than on existential risks." As easy as it is to score snobby elitist points by jeering at people who study flies, it's actually pretty fucking important to study flies. Flies, as it turns out, play a number of non-trivial roles in the ongoing functioning of our biosphere. As such, major ignorance about flies may well hinder our ability to manage the increasingly artificial ecologies that we're planting across the globe, and a global ecological failure would count as - what's it called again? Oh, yes - an existential fucking risk. But Bostrom doesn't understand that, because he's incapable of understanding that, because he's an idiot. Even his proposed solutions are usually amazingly bad: "Some of the lesser existential risks can be countered fairly cheaply. For example, there are organizations devoted to mapping potentially threatening near-Earth objects (e.g. NASA's Near Earth Asteroid Tracking Program, and the Space Guard Foundation). These could be given additional funding." Yeah, okay - and then what? Even NASA doesn't currently have any known ways of actually dealing with something that's about to smack into the planet. They know of two "promising techniques," and they're "investigating" those techniques, but they still couldn't actually do anything. Moreover, it should be blindingly obvious that simply "mapping" a threat doesn't do shit. So when Bostrom says that we can "cheaply" protect ourselves from asteroids by simply watching them, he's either lying to us or he's saying something so dumb that he needs to be disqualified from the conversation. And amazingly, Bostrom never considers the human element of any of the "existential risks" that he names. Even when the human element is at the forefront (e.g. with terrorism, which requires there to be terrorists, which are humans), he never bothers to propose a solution that starts with the humans in question (by contrast). In his mind, everything is best considered as a regulatory challenge, an engineering challenge, or both (cf). Yet it's far from obvious that this is the best approach - or even a sensible approach in the absence of major sociopolitical changes. His desire to form an international coalition to address existential risk, for instance, sounds like an utter pipe dream in today's age of Trump, Brexist, Catalonian independence, and so on. But even in 2002, when his article was first published, Bostrom should have known that his proposal requires levels of international goodwill never before witnessed on Earth. For fuck's sake, we can barely agree to fund organizations whose purpose is to prevent us from actively slaughtering each other. What makes him think that we'd suddenly be willing to dump a bunch of money into the completely speculative matter of "existential risk" management? This point applies practically across his entire set of concerns. If the threat is terrorism, we should be addressing the root causes of terrorism (by, say, refraining from bombing countries for no reason). If the concern is a monster AI, our very first course of action needs to be improving our own values so that we have non-monstrous values to teach. And so on and so forth - basically, without offering sociological, cultural, and political solutions, Bostrom isn't offering solutions at all. His response to global warming is a perfect demonstration of this point. He waves off the threat of global warming because he guesses (based, again, on nothing at all) that "we will have technological means of counteracting such a trend by the time it would start getting truly dangerous," but any such technology would be a major double-edged sword. Geoengineering is not fucking child's play. These technologies would, of necessity, be so powerful that their misuse could completely shroud the planet in ice or boil the majority of its water away. In this way, any geoengineering "solution" to global warming simply opens up a new existential risk, namely, the risk of geo-terrorism or even geo-war. Fundamentally, technology cannot eliminate existential risks - and yet technology is Bostrom's go-to answer. In the face of all of this - his second-rate logic, his stunning faith in his own subjective opinion, his open disregard for fact, his unapologetic egocentrism, the utter paucity of his proposed solutions - it's a wonder that Bostrom ever found a way to get his article published at all. But the crowning moment of the whole piece has to be this part, near the end: "Moral action is always at risk to diffuse its efficacy on feel-good projects rather on serious work that has the best chance of fixing the worst ills. The cleft between the feel-good projects and what really has the greatest potential for good is likely to be especially great in regard to existential risk. Since the goal is somewhat abstract and since existential risks don't currently cause suffering in any living creature, there is less of a feel-good dividend to be derived from efforts that seek to reduce them. This suggests an offshoot moral project, namely to reshape the popular moral perception so as to give more credit and social approbation to those who devote their time and resources to benefiting humankind via global safety compared to other philanthropies." The irony here is absolutely staggering. A lesser sophist, I think, would have keeled over from the sheer effort required to type this paragraph after having just proposed a financially boundless, rationally unjustifiable, worldwide "feel-good project" that, instead of "fixing the worst ills," aims at defeating purely imaginary villains that "don't currently cause suffering in any living creature." Credit where credit is due, though: Nick Bostrom is not just some run-of-the-mill hack. He's a professional bullshitter, and every ounce of that professionalism comes through in this article. From his initial head-scratcher of a definition all the way through to this final act of self-indictment, Bostrom shows us nothing but ineptitude and trickery. And, for the record, this is not to say that the idea of an existential risk is inherently incoherent or unreasonable. Again, global warming comes to mind as an all too coherent and all too reasonable example of an actual existential risk. You could even make the case that we aren't currently paying enough attention to those existential risks that are, like global warming, both broadly realistic and empirically plausible. (For the moment, I think that list is: global warming, nuclear global war...and that's it.) If Bostrom had written that article, we'd be having a very different conversation. But Bostom didn't write that article. His actual article does everything possible to downplay reality in favor of fever dreams and nerdy wish fulfillment. His actual article hops restlessly back and forth between two radically different concepts of what a "risk" is. His actual article undermines itself at every turn and then, at the very end, attempts to brazenly reclassify the armchair reverie as a new form of "philanthrop[y]." And so his actual article can't be taken seriously by anybody with even a shred of intellectual integrity - which, of course, brings us back to Scott motherfucking Alexander. In his whiny, lie-filled attack on Ted Chiang, Alexander huffily (and falsely!) declares that runaway AI "theory comes from Nick Bostrom, a professor at Oxford." But d'you know what? Nick Bostrom, professor at Oxford, is a fucking moron. He's utterly incompetent by every measure other than fame, and his signature accomplishment is, as we've just seen, a joke. So you'll have to excuse me for not taking Bostrom seriously all those years ago when I first ran into him. In some ways, it was an oversight on my part - or, to be slightly more precise, an attempt to skip some steps. But we've covered those steps now, so I consider my due diligence to have been done. Fuck Nick Bostrom, fuck his bobbleheaded version of "existential risk" studies, and fuck anybody who turns to him for aid or comfort.

## 2NC

### States CP---2NC

#### States solve, your author agrees

2AC Weber 16 [Jayme Weber, University of Arizona, James E. Rogers College of Law, J.D., 2016 https://www.cato.org/sites/cato.org/files/pubs/pdf/teladoc-285th-cir-29.pdf]

III. REFUSING SELF-INTERESTED BOARDS IMMUNITY FROM ANTITRUST LIABILITY IS FULLY CONSISTENT WITH FEDERALISM

“Federal antitrust law . . . is ‘as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.’” Dental Exam’rs, 135 S. Ct. at 1109 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)). Every business, regardless of its size, is guaranteed the freedom “to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.” Topco, 405 U.S. at 610. Antitrust laws—particularly the Sherman Act—are “the Magna Carta of free enterprise,” and play a crucial role in upholding the national policy of economic freedom for anyone wishing to compete in the marketplace. Id.

In line with this national policy, the states clearly have an interest in preventing anticompetitive behavior and fostering robustly competitive markets within and across their borders. State governments also have an interest in reserving the ability to create regulatory subdivisions to which they can delegate some of their authority to accomplish specific tasks. At times, the states may deem it appropriate to design a regulatory body to deliberately exempt it from antitrust laws to achieve a specialized purpose.

States may confer antitrust liability on regulatory bodies—but only under certain conditions. Applying the state-action immunity doctrine too broadly and giving private actors a limitless ability to claim antitrust immunity for themselves would empower state-created cartels to “make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects,” disrupting the free enterprise system that protects the national policy of economic freedom. Lafayette, 435 U.S. at 408.

Furthermore, broad application of the Parker-immunity doctrine would actually undermine the states’ ability to effectively delegate authority to specialized or local regulatory bodies by endowing these bodies with an antitrust immunity that state governments may have never meant to give them. “Neither federalism nor political responsibility is well-served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends.” Ticor, 504 U.S. at 636. The doctrine enables states to create regulatory subdivisions that do not interfere with the interest in preserving the benefits of competition. By “adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws,” courts actually increase rather than diminish the states’ regulatory flexibility. Id. State legislatures may wish to make broad delegations of authority to their political subdivisions in order to maximize the benefits of the specialized governance those bodies offer— but that does not necessarily mean that state legislatures always want to give those entities the ability to violate the federal antitrust laws.

“When a state grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively.” Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 225a, at 131 (3d ed. 2006). Relying on the backdrop of the national policy favoring competition, states may enact such broad delegations that are nevertheless intended to create specific and narrow, rather than general and wide-reaching, regulatory schemes. Giving regulatory agencies state-action immunity too readily would undermine states’ ability to do so, creating the hazard that legislatures will inadvertently authorize anticompetitive conduct. State legislatures cannot possibly anticipate every potential anticompetitive consequence of these delegations of authority and explicitly disavow antitrust immunity for every one. “‘No legislature . . . can be expected to catalog all of the anticipated effects’ of a statute delegating authority to a substate governmental entity.” Phoebe Putney, 133 S. Ct. at 1012 (quoting Hallie, 471 U.S. at 43).

If a state intends a specific anticompetitive result, it may clearly articulate that result—or make it plainly foreseeable, see id. at 1011—giving voters the chance to oppose immunity-creating legislation before it becomes law and making it easier to hold legislators accountable. Otherwise, states would be impeded in their freedom of action because they would have to act “in the shadow of state-action immunity whenever they enter[ed] the realm of economic regulation.” Ticor, 504 U.S. at 636. The limited and careful application of the state-action immunity doctrine gives states the most freedom in delegating power and crafting regulatory entities, ensuring legislatures that they will not accidentally confer immunity and allow regulatory bodies to go rogue with anticompetitive conduct that deviates from the states’ interest of preserving robust marketplace competition for the benefit of their residents.

[Michigan’s Card Ends Here]

Nor is it necessary for a state wishing to obtain the specialized knowledge of professionals to establish a regulatory system that merely rubber-stamps the often self-interested assertions of these professionals. One can easily imagine such alternatives. See Edlin & Haw, Cartels by Another Name, 162 U. Pa. L. Rev. at 1155. The agency could be staffed by independent state officials who invite comment and input from professionals while retaining final decision-making authority in official hands. (Agencies already routinely do this.) Or, agencies could be 24 made up of retired members of the profession, or could include existing members without their making up the majority of the board. States could adopt private certification requirements, an alternative to statutory licensing that allows consumers to choose what services to purchase and what practitioners to patronize. These and other “active supervision” alternatives would easily accommodate the state’s legitimate interests in obtaining specialized knowledge while also resisting the danger of private exploitation of public power. Ultimately a state-empowered but non-sovereign entity like a licensing board—essentially, a private actor for whom the temptation to engage in cartel behavior is all too great—cannot merely declare by fiat that it automatically deserves antitrust immunity in regard to any anticompetitive restraint it may wish to issue. These entities may be tasked with executing state policy, but courts must rigorously demand that they do so without simply using their regulatory power as a shield to pursue their own parochial interests and restrict others’ economic freedom. Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Neither these regulatory bodies nor the states themselves may “thwart the national policy in favor of competition” 25 simply by “casting . . . a gauzy cloak of state involvement” over the selfinterested cartel behavior of private actors. Id. at 106.

#### States are key to promote competition in health care innovation & state self-restraint in applying immunity solves

Martin S. Gaynor et. Al 17, E.J. Barone University Professor of Economics and Public Policy at Carnegie Mellon University and former Director of the Bureau of Economics at the U.S. Federal Trade Commission. Professor Gaynor's research focuses on competition and incentives in health care, and on antitrust policy, “3 Ways States Can Infuse Innovation Into Our Health-Care System”, <https://www.govtech.com/opinion/3-ways-states-can-infuse-innovation-into-our-health-care-system.html>, May 16th, 2017

As the seemingly endless debate over our dysfunctional system of health-care roils Washington, too little attention is being paid to the unique position state governments are in to influence the "rules of the road" that provide the basic operating environment.

In particular, states have the opportunity to bring more competition to our health-care markets. That would help not only to control costs but also to stimulate the kind of innovation that characterizes so much of the rest of our economy.

Ensuring that markets function efficiently is critical to an effective health system that provides high-quality, accessible, affordable care. Research shows that patients, employers, and private insurers pay more for health care in highly consolidated provider markets -- where, for instance, only one or two hospital systems exist. Higher health care costs lead to higher premiums. Even in public programs such as Medicare, a lack of competition among providers is associated with lower-quality care.

We propose a new "competition policy" for health care that involves multiple actors at the state level. State executive agencies, legislatures and attorneys general would play a more critical role than they do today, from adopting policies that encourage new competitors and ensuring transparency on quality and cost to preventing anticompetitive practices.

1. Promoting competition: To remove barriers and promote entry for new competitors, states should eliminate certificate-of-need regulations, which require government permission for a health-care facility to be built or expanded, as well as "any willing provider" laws that require insurers to contract with any provider willing to accept the network's terms. States also should amend their criteria for scope-of-practice decisions, the actions a practitioner can take within the terms of a professional license; the only justification for restricting scope of practice should be the safety of the public. States should not issue certificates of public advantage that, in shielding providers from federal antitrust action, impose oversight on provider collaborations and mergers. Finally, state licensing boards should facilitate practices that promote competition and innovation.

The guiding concept in crafting these regulations or modifying existing ones should be approaches that place the fewest restrictions on competition and innovation while still satisfying the goals of public health and safety.

2. Bolstering transparency for consumers and providers: States should create and make public a core set of quality measures, and they also should give consumers the tools to compare costs by making public the total amounts paid to providers for various procedures. This could take the form of all-payer claims databases or a national claims data repository that utilizes common data elements and a common format. Insurers should be required to disclose out-of-pocket costs for health services that enrollees are considering. To provide this information, states should consider creating entities to engage in monitoring and public reporting on price, quality and other measures of health care performance.

3. Preventing anticompetitive practices: Mergers that pose risks of higher prices and lower quality should continue to be scrutinized. State antitrust enforcers should actively monitor and pursue the use of anticompetitive practices by health-care and insurance firms. State legislatures should closely examine clauses and language in contracts between providers and insurers, while state insurance commissioners should review insurers' contracts with providers. If commissioners have the power to reject problematic contract features, they should do so. If they do not have such powers, then they should draw problematic contracts to the attention of the offices of their attorneys general.

These are specific, actionable policies that can have an immediate and meaningful impact. States have the opportunity to take a leadership role in promoting policies that improve the functioning of the health care system and benefit all Americans. It's an opportunity that states should seize now rather than waiting for solutions from Washington.

### Federalism ADV---2NC

#### Internal link is reversed

Abbott 21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### There’s no internal link---externalities don’t apply and antitrust doesn’t bar it

HLR 20, “Antitrust Federalism, Preemption, and Judge-Made Law”, <https://harvardlawreview.org/2020/06/antitrust-federalism-preemption-and-judge-made-law/>, June 10th, 2020

The Maryland and Ninth Circuit examples may be more bogeymen than real threats to federalism. First, alternate doctrines aside from antitrust preemption work to keep individual state interests in check. For example, the Fourth Circuit enjoined enforcement of the Maryland law on dormant commerce clause grounds.

Where one state intrudes too much on other states’ ability to regulate antitrust — where “[t]he potential for ‘the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude’ is . . . both real and significant”

— the Constitution, rather than Congress, can prevent the one-state dominator problem’s greatest harms. Dormant commerce clause challenges are not limited to the Maryland case’s facts. In fact, the Fourth Circuit dissent complained that the majority’s logic would invalidate other state antitrust laws, including Illinois Brick–repealer laws.

Second, the trouncing of federalism in cases like these is often overstated. Take the defendant-appellant’s depiction of the interests in the Ninth Circuit case as an example of exaggerated federalism costs. The district court found that the nonrepealer states had no interest in having their laws applied because the defendant-appellant was a California company; California’s more consumer-friendly law would only help nonrepealer-state residents, not hurt nonrepealer-state businesses.

If the nonrepealer states have an interest in denying their own consumers access to relief when there is no benefit to their own businesses, it seems tangential to an interest in striking their own consumer-business balances. Instead, a choice to prioritize foreign defendants over in-state consumers appears more like an attempt to govern the national consumer-business balance, a choice imbued with far less federalism oomph than the defendant-appellant portrayed.

Whether exaggerated or not, a worry that antitrust federalism allows one state to dominate national antitrust policy weighs in favor of congressional antitrust preemption. This problem, however, is not unique to antitrust. Any area of law in which states fail to internalize the harms of overregulation, meaning any law that regulates businesses with a national footprint, could be dominated by one state.

61. The interstate externalities that the one-state dominator problem implicates are separate from the “race-to-the-bottom” problems that Professor Richard Revesz discusses in the environmental arena. See Revesz, supra note 46, at 1222–23. In a race to the bottom, the concern is that states will compete with each other for business by lowering regulation below the otherwise-optimal level. Id. at 1213–19. The concern of a dominated antitrust regime, on the other hand, is that one state will overregulate, and, because a national business cannot easily exit a single state, will thereby drag other states upward. In the environmental context, the one-state dominator problem is more akin to a critique of California’s ability to set national automobile standards because of its major market for automobiles — although that ability is congressionally condoned.

If Congress were to take the one-state dominator problem too seriously, it would swallow up huge swaths of state regulation, excluding states from their traditional role in consumer protection, at least where the largest (and potentially most worrisome) industries are implicated.

#### AI regulation is the top priority---they’re using every all their resources for enforcement

Kyle Fath 10-19, Kristin Bryan, Christina Lamoureux and Elizabeth Helpling, Associates at Squire Patton Boggs LLP, “Data Privacy and Cybersecurity FTC Priorities Going Forward”, Lexology, 10/19/2021, https://www.lexology.com/library/detail.aspx?g=f65502dd-d96e-44c3-a636-428f76def9e4

The Federal Trade Commission (FTC) has made it clear: data privacy and cybersecurity are now a priority, and will be for years to come. In the wake of PrivacyCon 2021, the FTC’s sixth annual privacy, cybersecurity and consumer protection summit, held this summer, the FTC finally took official and sweeping action on privacy and cybersecurity. In particular, the Commission recently designated eight key areas of focus for enforcement and regulatory action, three of which directly implicate privacy, cybersecurity, and consumer protection. Below, we discuss the FTC’s action and what it means for businesses, the three key areas of interest to consumer privacy that are now in the FTC’s spotlight, as well as their relation to state privacy legislation and their anticipated impact to civil litigation. Full details on PrivacyCon 2021 and the FTC’s resolutions following the summit can be found on the FTC’s website, linked here for your convenience.

The FTC’s Actions and Areas of Focus

In mid-September, the FTC voted to approve a series of resolutions, directed at key enforcement areas, including the following, each discussed in further detail below:

* Children Under 18: Harmful conduct directed at children under 18 has been a source of significant public concern, now, FTC staff will similarly be able to expeditiously investigate any allegations in this important area.
* Algorithmic and Biometric Bias: Allows staff to investigate allegations of bias in algorithms and biometrics. Algorithmic bias was the subject of a recent FTC blog.
* Deceptive and Manipulative Conduct on the Internet: This includes, but is not limited to, the “manipulation of user interfaces,” including but not limited to dark patterns, also the subject of a recent FTC workshop.

The approval of this series of resolutions will enable the Commission “to efficiently and expeditiously investigate conduct in core FTC priority areas. Through the passage of the resolutions, the FTC has now directed that all “compulsory processes” available to it be used in connection with COPPA enforcement. This omnibus resolution mobilizes the full force of the FTC for the next ten years and gives FTC staff full authority to conduct investigations and commence enforcement actions in pursuit of this goal. The FTC has offered very little elaboration on this front, however, regarding how it will use such “compulsory processes,” which include subpoenas, civil investigative demands, and other demands for documents or testimony.

What does seems clear, however, is that the FTC is buckling down on the enforceability of its own actions. Previous remarks by Chair Lina M. Khan before the House Energy and Commerce Committee expressed frustration at the frequent hamstringing of the agency at the hands of courts in its enforcement efforts in the past. With this declaration of renewed energy, the FTC is summoning all the power it can to do its job, and we should expect to see an energized FTC kick up its patrol efforts in the near future. Businesses that conduct activities that implicate these renewed areas should be aware of the FTC’s focus and penchant for investigations and enforcement in such areas.

Children Under 18

The FTC’s mandate to focus on harmful conduct directed at children under 18 is a signal that the Commission plans on broadening and doubling down on its already active enforcement efforts in this area. Areas of the Commission’s prior and current focus on children include marketing claims, loot boxes and other virtual items that can be purchased in games, and in-app and recurring purchases made by children without parental authorization. Most importantly, the FTC is the main arbiter of children’s online privacy through its enforcement of the Children’s Online Privacy Protection Act (“COPPA”), but that law only applies to children under 13 (i.e., 12 and under). With this new proviso to focus on children under 18, we can certainly expect the FTC to focus on consumer privacy issues, broader than COPPA, for children from ages 13 to 17 as well.

Algorithmic and Biometric Bias

The FTC already has enforcement capabilities to regulate the development and use of artificial intelligence (“AI”) and its associated algorithms. These include the Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices,” the Fair Credit Reporting Act, which rears its head when algorithms impact lenders’ decisions to provide credit, and the Equal Opportunity Credit Act, which prohibits the use of biased algorithms that discriminate on the basis of race, color, sex, age, and so on when making credit determinations. In using these tools, the FTC aims to clarify how algorithms are used and how the data that feeds them contributes to algorithmic output, and to bring to light issues that arise when algorithms don’t work or feed on improper biases.

#### Regulation over emerging tech now---y’all need updates

Shari Claire Lewis 21, Member of Rivkin Radler’s Complex Torts & Product Liability, “Here’s How the FTC Is Tackling Emerging Technology”, New York Law Journal, 6/14/21, https://www.law.com/newyorklawjournal/2021/06/14/heres-how-the-ftc-is-tackling-emerging-technology/

https://www.law.com/newyorklawjournal/2021/06/14/heres-how-the-ftc-is-tackling-emerging-technology/?slreturn=20210825224614

A wide range of federal and state authorities are involved in the regulation of emerging technologies in one way or another. Numerous agencies as well as the U.S. Department of Justice lead the national effort, while the Department of Financial Services, the attorney general and local prosecutors are the principal parties in New York state.

Perhaps no federal or state entity, however, is more focused on the plethora of legal issues raised by new innovations than the Federal Trade Commission (FTC).

Budget Analysis

One way to understand the depth of the FTC’s interest is by examining the budget justification for fiscal year (FY) 2022 that it just submitted to the Office of Management and Budget. The budget justification is intended to support a request for $389,800,000 for 1,250 full time positions (FTEs), which is an overall increase of $38,800,000 and 110 FTEs compared to the FTC’s FY 2021 enacted appropriation.

As detailed in the budget justification, 40% of the new FTEs requested by the FTC are related to its work on emerging technologies. On the consumer side, the FTC is seeking to add two FTEs in its Bureau of Consumer Protection (BCP) “to address emerging technology in the area of marketing practices” and six FTEs to enhance the BCP’s “ability to understand quickly evolving technological issues implicated by its casework” and to “keep pace with litigation demands.”

The FTC also is seeking to add 36 FTE in its Bureau of Competition (BC) specifically to support identifying and challenging anticompetitive mergers and conduct in the “complex and increasingly pervasive technology markets.”

Significantly, the very first section of the FTC’s budget justification, titled “Planned Activities in FY 2021 and Beyond,” begins with the stated goal of “Protecting Consumers as Technology Evolves.” Here, the FTC says, it will “continue to focus on identifying consumer protection issues associated with the use of new technology.” According to the FTC, this involves considering the costs and benefits of practices and the importance of fostering innovation as well as taking enforcement action against deceptive advertisements that appear in new formats and new media (e.g., apps, games, videos and social networks). Among other things, the FTC also said that it will continue to conduct research on emerging technologies to assist with enforcement actions, educate consumers and inform policy.

The FTC’s next stated goal—“Protecting Consumer Privacy and Data Security”—also is an acknowledgment of the growing importance of emerging technologies. This goal highlights the FTC’s desire to “protect consumers from unfair or deceptive practices related to the privacy and security of their personal information” while preserving “the many benefits that technological advances offer.”

Enforcement

The FTC’s focus on emerging technologies also can be seen from a review of five enforcement actions it has taken over the past few months.

Facial Recognition. The FTC recently finalized a settlement with the developer of a photo app that allegedly deceived consumers about its use of facial recognition technology and its retention of the photos and videos of users who deactivated their accounts.

In its complaint, the FTC alleged that Everalbum misled users of its Ever mobile app by representing that it would not apply facial recognition technology to users’ content unless they affirmatively chose to activate the feature. According to the FTC’s complaint, the company nevertheless automatically activated its face recognition feature—which could not be turned off—for all mobile app users except those who lived in three U.S. states and the European Union. The FTC alleged that the company also failed to keep its promises to delete the photos and videos of Ever users who deactivated their accounts and instead retained them indefinitely.

As part of its settlement with the FTC, Everalbum must obtain consumers’ express consent before using facial recognition technology on their photos and videos. The settlement also requires the company to delete the photos and videos of Ever app users who deactivated their accounts and the models and algorithms it developed by using the photos and videos uploaded by its users.

In addition, if the company markets software to U.S. consumers for personal use, it must obtain users’ express consent before using biometric information it collected from them. See Federal Trade Commission, FTC Finalizes Settlement with Photo App Developer Related to Misuse of Facial Recognition Technology (May 7, 2021).

Mobile Banking. The FTC also recently reached a settlement with a mobile banking app over allegations that it misled users about their access to funds and interest rates.

Here, the FTC alleged that Beam Financial and its founder and chief executive officer, Yinan Du, also known as Aaron Du, promised users of Beam’s free mobile banking app that they could make transfers out of their accounts and would receive their requested funds within three to five business days. In fact, some users waited weeks or months to receive their money, which was particularly difficult for users who were struggling with lost income as a result of the COVID-19 pandemic, the FTC alleged.

According to the FTC, Beam also failed to give users the high interest rates it promised. Beam repeatedly represented that users would receive at least 0.2% or 1.0%, but many new users received a much lower interest rate of 0.04% and stopped earning any interest after requesting that Beam return their funds.

As part of the settlement, Beam is banned from operating a mobile banking app or any other product or service that can be used to deposit, store, or withdraw funds. It also is prohibited from misrepresenting the interest rates, restrictions and other aspects of any financial product or service.

In addition, Beam must provide full refunds, including interest, to all of Beam’s customers, and must periodically update the FTC on its refund efforts, including identifying any consumer complaints. It also is prohibited from benefitting from any personal information collected from customers. See Federal Trade Commission, Mobile Banking App Settles FTC Allegations that It Misled Users about Access to Funds and Interest Rates (March 29, 2021).

Antennas and Amplifiers. Sometimes what’s old becomes new again. In another recent action, a New York-based company and its chief executive officer agreed to settle FTC charges that they sold indoor TV antennas and signal amplifiers to consumers using deceptive claims that the products would let users cancel their cable service and still receive all of their favorite channels for free.

According to the FTC’s complaint, Wellco and its owner and chief executive officer, George M. Moscone, violated the FTC Act by making deceptive performance claims for their over-the-air television antennas and related signal amplifiers, using deceptive consumer endorsements, and by misrepresenting that some of their web pages were objective news reports about the antennas.

The FTC alleged that, starting in 2017, the defendants marketed and sold more than 800,000 indoor TV antennas and more than 272,000 amplifiers to consumers online under the TV Scout, SkyWire, SkyLink and Tilt TV brand names.

The FTC alleged that the defendants’ websites made multiple deceptive claims for their antennas, including that users could stop paying for cable or satellite TV subscriptions and still receive all of their favorite TV channels; that a substantial portion of users received 100+ premium channels in high definition (HD); that their antennas enabled consumers to receive more channels than most other TV antennas on the market; and that their products were the top rated indoor HDTV antennas in America. The FTC also alleged that the defendants deceptively represented that their amplifiers substantially increased the number of stations received with their antennas and that, by using both their antennas and amplifiers, consumers received HBO and AMC.

In addition, the FTC alleged that the defendants fabricated testimonials by copying them from competitors’ antenna ads. The FTC also alleged that the defendants deceptively used web pages that appeared to reproduce objective news reports and misrepresented that objective news reporters had performed independent tests demonstrating the effectiveness of their antennas.

The settlement prohibits the defendants from making claims about any product’s rating, ranking, or superiority to other products, the channels users will receive, or any material aspect of a product’s performance, efficacy, or central characteristics, unless the claims are true and substantiated. The order also prohibits the defendants from making any misrepresentation through a product endorsement, that a website is an objective news report, or that independent tests demonstrate the effectiveness of a product.

Finally, the settlement imposed a $31.82 million judgment against the defendants, suspended upon the defendants’ payment of $650,000 to the FTC based on their inability to pay. See Federal Trade Commission, New York-based Defendants Settle FTC Charges They Deceptively Advertised SkyLink TV Antennas as an Effective Way to Get a Hundred Plus Premium Channels Free (March 15, 2021).

BOTS. Earlier this year, the FTC brought its first case under the Better Online Ticket Sales (BOTS) Act, which was enacted in 2016 and which gives the FTC authority to take law enforcement action against individuals and companies that use bots or other means to circumvent limits on online ticket purchases.

The FTC alleged that a group of related defendants—Cartisim, Simon Ebrani, Just In Time Tickets, Evan Kohanian, Concert Specials and Steven Ebrani—purchased more than 150,000 tickets for popular events. To do so, according to the FTC, they engaged in a variety of practices that violated the BOTS Act, such as by their use of automated ticket-buying software to search for and reserve tickets automatically, software to conceal their IP addresses, and hundreds of fictitious Ticketmaster accounts and credit cards to get around posted event ticket limits. The FTC asserted that the defendants took in millions of dollars in revenues from the resale of the tickets they purchased using these unlawful means.

The settlement subjects the ticket brokers to a judgment of more than $31 million in civil penalties to be partially suspended, requiring them to pay $3.7 million. The settlement also prohibits the defendants from further violations of the BOTS Act, including using methods to evade ticket limits, using false identities to purchase tickets, or using any bots to facilitate ticket purchases. See Federal Trade Commission, FTC Brings First-Ever Cases Under the BOTS Act (Jan. 22, 2021).

Zoom. Finally, it is worth mentioning the settlement that the FTC reached earlier this year with Zoom Video Communications over allegations it misled consumers about the level of security it provided for its Zoom meetings and compromised the security of some Mac users.

The final settlement order required Zoom to implement a comprehensive security program, review any software updates for security flaws prior to release, and ensure that updates will not hamper third-party security features. The company also must obtain biennial assessments of its security program by an independent third party, which the FTC has authority to approve, and notify the FTC if it experiences a data breach. See Federal Trade Commission, FTC Gives Final Approval to Settlement with Zoom over Allegations the Company Misled Consumers about Its Data Security Practices (Feb. 1, 2021).

Conclusion

Businesses that create and develop emerging technologies have a host of regulations, and regulators, that they must keep in mind, especially when their products are directed to consumers. As this column has explained, the FTC is one of the most significant government agencies overseeing this industry. The FTC’s recent history, goals and budget requests all make clear that it will continue to play an important role in this area for quite some time to come.

#### It’s zero-sum---the plan draws resources away from other priorities

R. Mark McCareins 19, Clinical Professor of Business Law in the Strategy Department at Northwestern University, JD from the Washington University in St. Louis, BA from Northwestern University, “Why Antitrust Regulators Don’t Scare Big Tech”, KelloggInsight, 8/19/2019, https://insight.kellogg.northwestern.edu/article/why-antitrust-regulators-dont-scare-big-tech

In McCareins’s view, these large businesses have to date played within the antitrust rules to keep markets competitive. Large-scale government investigations like the ones the DOJ and FTC plan could not only prove costly and ineffective, but could also draw resources away from targeting actual abuses in other markets.

“It’s a trade-off,” he says. “If regulators bring a highly speculative case in one of these big-name markets because they think it will show America that they are tough on regulation, and they lose—and while they’ve been doing that, they let 20 other markets go unattended—I don’t know if that’s a good allocation of our prosecutorial resources. The Antitrust Division’s loss earlier this year in the ATT/Time Warner merger litigation is an example of the government rolling the dice with a speculative case and limited resources. One would think with respect to the current tech investigations that the government cannot afford a repeat of the ATT/Time Warner outcome.”

#### Human resources are constrained and trade-off

Alison Jones 20, Professor at King’s College London & William E. Kovacic, Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, Volume 65, Number 2, SAGE Publications Inc, 6/01/2020, pp. 227–255

B. Augmenting the Human Capital of the Enforcement Agencies

Measures to expand federal antitrust intervention dramatically—through the prosecution of lawsuits or the promulgation of trade regulation rules—will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (again, we assume that legislation to change the doctrinal status quo will not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies will create a serious gap between the teams assembled for the prosecution and defense, respectively. Although therefore the public agencies can match the private sector punch for the punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases, seeking powerful remedies upon global giants.

An enhanced litigation program will therefore go only as far as the talent of the agencies will carry it. We propose three steps to build and retain the human capital—attorneys, economists, technologists, and administrative managers133—to undertake a more ambitious litigation program. The first is to use antitrust as a prototype for a program to raise civil service salaries. The second two steps consist of cautions about the dangers of (a) denigrating the skills and accomplishments of existing agency personnel and (b) attempting to shut the revolving door through which professionals move between the public and private sectors. We discuss all three of these steps below.

1. Resources and compensation

To accomplish the desired expansion of enforcement, we see a need for more resources.134 Nonetheless, budget increases that simply allow the enforcement agencies to hire additional staff, while useful, are not enough. We would use more resources to boost compensation for agency employees. This means taking the antitrust agencies out of the existing civil service pay scale. The need is not simply to hire more people. It is to attract a larger number of elite personnel who are equal to the tasks that the ambitious reform agenda will impose. We do not see how the public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to case handlers and to senior managers. It surprises us that none of the proposals for bold reform mention compensation for civil servants.

### Innovation ADV---2NC

#### Innovation has been turbocharged---Big pharma is driving the boom

Kenan Insight 21, “Turbocharging Healthcare Innovation”, <https://kenaninstitute.unc.edu/kenan-insight/turbocharging-healthcare-innovation/>, June 9th, 2021

As COVID-19 began to spread around the globe, companies and entrepreneurs stepped up to develop new technologies and redeploy existing technologies in their portfolio to tackle the disease and cope with the constraints it brought. The pandemic forced telemedicine into the mainstream and brought mRNA vaccine technology to the forefront. At the same time, new technologies such as CRISPR gene editing and artificial intelligence (AI) approaches have been finding their niche for speeding up drug discovery and development.

Healthcare innovation was already on the fast train before the pandemic. Now, it’s been turbocharged. In this Kenan Insight, we explore why the 2021 Trends in Entrepreneurship Report names emerging technology in the healthcare industry as a key trend for entrepreneurship, along with some of the challenges that come with fast-moving technology advances.

A trajectory of explosive growth

The healthcare industry has experienced extraordinary growth over the past four decades. Big pharma is driving much of this boom, accounting for 10% of the U.S. economy’s overall R&D spending at the end of 2020.1 The medical device industry, expected to generate $54.5 billion over the next four years, is another important player.2 This growth is catching the attention of investors. In 2020, health tech startups raised approximately $14 billion in venture capital funding, nearly double that of 2019.3 CB Insights estimates there are now 51 healthcare unicorns, defined as startups valued at $1 billion or more.

Health-tech venture funding reached record levels in 2020

Innovation is a critical driver in the healthcare sector. Increasing rates of innovation can be seen in the sharp rise of U.S. patents granted for pharmaceuticals and medical devices in recent years. Between 2013 and 2019, more than 60,000 pharmaceutical patents and more than 125,000 medical device patents were granted.4 Today, there are more than 18,500 drugs at various stages of the development process worldwide.5

Maturing technologies

The increasing numbers of patent applications, clinical trials and collaborations are leading indicators of a vibrant and growing biopharmaceutical ecosystem. However, the proliferation of innovation tools, rather than just innovative products, is what will allow the next generation of pharmaceutical drugs to be discovered more quickly and more efficiently, to provide more effective treatments and to target diseases that have so far evaded our collective intervention efforts. As scientists learn more about human genes and their connection to diseases, these insights can feed into tools that make drug R&D faster, less expensive and more precise.

#### Integration between pharma and biotech is accelerating, unlocking innovation.

Cancherini ’21 [Laura; April 30; Consultant in McKinsey’s Brussels office; McKinsey, “What’s ahead for biotech: Another wave or low tide?” https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/whats-ahead-for-biotech-another-wave-or-low-tide]

Fundamentals continue strong

When we asked executives and investors why the biotech sector had stayed so resilient during the worst economic crisis in decades, they cited innovation as the main reason. The number of assets transitioning to clinical phases is still rising, and further waves of innovation are on the horizon, driven by the convergence of biological and technological advances.

In the present day, many biotechs, along with the wider pharmaceutical industry, are taking steps to address the COVID-19 pandemic. Together, biotechs and pharma companies have [more than 250 vaccine candidates in their pipelines](https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/on-pins-and-needles-will-covid-19-vaccines-save-the-world), along with a similar number of therapeutics. What’s more, the crisis has shone a spotlight on pharma as the public seeks to understand the roadblocks involved in delivering a vaccine at speed and the measures needed to maintain safety and efficacy standards. To that extent, the world has been living through a time of mass education in science research and development.

Biotech has also benefited from its innate financial resilience. Healthcare as a whole is less dependent on economic cycles than most other industries. Biotech is an innovator, actively identifying and addressing patients’ unmet needs. In addition, biotechs’ top-line revenues have been less affected by lockdowns than is the case in most other industries.

Another factor acting in the sector’s favor is that larger pharmaceutical companies still rely on biotechs as a source of innovation. With the [top dozen pharma companies](https://www.mckinsey.com/business-functions/m-and-a/our-insights/a-new-prescription-for-m-and-a-in-pharma) having more than $170 billion in excess reserves that could be available for spending on M&A, the prospects for further financing and deal making look promising.

For these and other reasons, many investors regard biotech as a safe haven. One interviewee felt it had benefited from a halo effect during the pandemic.

More innovation on the horizon

The investors and executives we interviewed agreed that biotech innovation continues to increase in quality and quantity despite the macroeconomic environment. Evidence can be seen in the accelerating pace of assets transitioning across the development lifecycle. When we tracked the number of assets transitioning to Phase I, Phase II, and Phase III clinical trials, we found that Phase I and Phase II assets have transitioned 50 percent faster since 2018 than between 2013 and 2018, whereas Phase III assets have maintained much the same pace. There could be many reasons for this, but it is worth noting that biotechs with Phase I and Phase II assets as their lead assets have accounted for more than half of biotech IPOs. Having an early IPO gives a biotech earlier access to capital and leaves it with more scope to concentrate on science.

Looking forward, the combination of advances in biological science and accelerating developments in technology and artificial intelligence has the potential to take innovation to a new level. A [recent report](https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/the-bio-revolution-innovations-transforming-economies-societies-and-our-lives) from the McKinsey Global Institute analyzed the profound economic and social impact of biological innovation and found that biomolecules, biosystems, biomachines, and biocomputing could collectively produce up to 60 percent of the physical inputs to the global economy. The applications of this “Bio Revolution” range from agriculture (such as the production of nonanimal meat) to energy and materials, and from consumer goods (such as multi-omics tailored diets) to a multitude of health applications.

#### Biopharma innovation is flourishing, but the AFF’s attempt to clamp down hinders growth

Angus Liu 21, senior staff writer in FierceMarkets’ Life Sciences group. He earned his Master’s at Northwestern University’s Medill School of Journalism, where he worked as a health reporter besides learning pertinent skills in magazine editing and interactive production, “Do pharma buyouts hurt innovation and lead to higher prices? Analyst hits back at FTC's push for tougher reviews”, <https://www.fiercepharma.com/pharma/large-pharma-m-as-hurt-innovation-drug-price-analyst-counter-ftc-s-arguments-for-stricter>, April 26th, 2021

In recent years, Democratic commissioners at the U.S. Federal Trade Commission (FTC) have clashed with their Republican counterparts over the agency's standards for large biopharma transactions. Now that they’ve come into power under the Biden administration, the Democrats have launched a sweeping review that threatens to clamp down on industry deal-making.

One influential biopharma analyst disagrees with the FTC's stated reasoning for implementing tougher reviews. In fact, the new stance could be counterproductive, he argued.

Large pharma consolidation can hurt R&D and lead to higher drug prices, Democratic commissioners have said. But those concerns are unfounded, SVB Leerink analyst Geoffrey Porges countered in a recent note to clients.

Does M&A bring higher prices?

There’s simply no evidence that larger companies raise drug prices faster than small companies do, Porges wrote. Instead, small companies often have few options in their toolbox and therefore tend to resort to price increases to invigorate performance. Large firms have more “skin in the game” in the overall healthcare system and have been more careful, he argued.

In her dissenting opinion opposing Bristol Myers Squibb’s $74 billion acquisition of Celgene, FTC acting chair Rebecca Kelly Slaughter noted that "branded drug prices have increased substantially in recent years, and pharmaceutical merger activity persists at a high pace.”

Still, the question is, does M&A lead to faster drug price increases? After digging into recent buyouts, Porges found a range of possible outcomes.

Drugs he examined include blood cancer drugs Revlimid and Pomalyst from Bristol’s acquisition of Celgene; Otezla, which Amgen bought from Celgene; PARP inhibitor Zejula, the centerpiece of GlaxoSmithKline’s purchase of Tesaro; cancer combo drugs Braftovi and Mektovi as part of Pfizer’s purchase of Array BioPharma; and pulmonary arterial hypertension drugs Opsumit and Tracleer, which Johnson & Johnson picked up with Actelion.

Among them, Amgen's Otezla’s 2021 price increase came in higher than the med's prior-year price hike. Pfizer's first list price increases for Braftovi and Tracleer ticked up, but the magnitudes have since trended down. For the other meds, new owners didn't raise prices as much as prior owners.

Large firms feed innovation

Ultimately, clamping down on drug prices does more to stifle innovation than M&A, Porges said. The analyst criticized the “shallowness” of the regulators’ view as serving a political objective—namely, lowering drug prices—rather than trying to protect competition.

“The recent flowering of innovation in the biopharmaceutical industry in the U.S. is mainly based on an assumption of free pricing and open market access, thus providing a (somewhat) predictable return for investing in innovation,” Porges said.

Larger companies can be more efficient on the R&D front because their efforts are spread across multiple products and candidates, Porges said. When a company's cost structure is based around just one product, prices either need to be higher or R&D investment lower to support commercialization, he said.

#### Antitrust will be misguided---acquisitions create organizational capabilities that’ll commercialize innovations, but scale is key

Aurelien Portuese 21, director of antitrust and innovation policy at ITIF. He leads ITIF’s Schumpeter Project on Competition Policy for the Innovation Economy, advancing a dynamic framework for competition policy in which innovation is a central concern for antitrust enforcement, not a secondary consideration. He is also an adjunct professor of law at the Global Antitrust Institute of George Mason University, and at the Catholic University of Paris, “Comments to the FTC on Pharmaceutical Consolidation and Competition”, <https://itif.org/publications/2021/06/25/comments-ftc-pharmaceutical-consolidation-and-competition>, June 25th, 2021

In pharmaceutical markets, more than anywhere else, “innovation is the name of the game.” Innovation rather than production drives the industry’s growth. Pharma markets are the pinnacle of “innovation markets” as defined by Richard Gilbert and as enshrined in the 1995 I.P. Guidelines. Because innovation requires sufficient scale, firms have often gained that scale through mergers.

The FTC’s strong enforcement record in pharma mergers suffers a paradox: While more than 50 consent decrees over the last 25 years required divestitures of products as a condition for merger approval, the political pressure for stricter antitrust enforcement continues ramping up. In the year 2020 for instance, notable pharma mergers included AstraZeneca acquiring Alexion for $39 billion, Gilead acquiring Immunomedics for $21 billion, BMS acquiring MyoKardia for $13.1 billion, and Johnson & Johnson acquiring Momenta for $6.5 billion. While popular perception of the pharmaceutical industry greatly improved with its effective response to the COVID-19 pandemic, these and other pharma mergers garnered political concerns.

The political pressure increased partly in response to an academic paper, “Killer Acquisitions,” by Colleen Cunningham, Florian Ederer, and Song Ma. The idea behind killer acquisition theory is that an incumbent buys an innovative nascent company developing a competing product and discontinues the competing product. The acquisition pre-empts future competition. The incumbent killed the potential rival and thereby distorted competition and stifled innovation. The antitrust implications are straightforward: Killer acquisitions go unnoticed by antitrust authorities and require a change of law and new theories of harm. In that regard, the present call for public input fits into the perceived need that the current antitrust framework cannot catch some detrimental mergers. Cunningham et al. assert that killer acquisitions represent only a small share of mergers: 5.3 to 7.4 percent of mergers.

But does the killer acquisition theory materialize in business reality? Do incumbents ever discontinue the acquired firm’s products for anticompetitive reasons? At least one study finds a similar share as Cunningham et al. and suggests that approximately 95 percent of pharma mergers are not “killer acquisitions.” And within the five percent that are allegedly problematic, any discontinuation of products requires balancing against counterfactuals absent the merger. Would discontinuation of the drug have occurred irrespective of the merger due to changing market circumstances or due to different corporate strategies? The authors of the killer acquisition theory assume that these five allegedly problematic percent are all anticompetitive acquisitions. In fact, this number could very well be less. Madl qualifies the very notion of killer acquisition stating that:

The mechanism of action used in the Cunningham, Ederer, and Ma study to identify cases of overlap is not mutation-specific, meaning that two drugs targeting the same enzyme and having the same net effect (e.g., inhibition) may not treat the same patients. Accordingly, purchasing the second drug could expand the acquirer’s market, rather than cannibalize sales.

In other words, Cunningham et al. overlook the possible positive effects on competition and innovation of these acquisitions. The notion of killer acquisitions overly emphasizes Kenneth Arrow’s concept replacement effect of innovation and overlooks the Schumpeterian aspect of innovation. In other words, the tenets of the notion of killer acquisitions rest upon the assumption that a dominant firm would acquire a rival to avoid the rival’s product “cannibalizing” the dominant firm’s profits. However, the acquiring firm may seek to create complementarities, thereby opening new markets. Schumpeter indeed wrote that entering new markets (through organic growth or mergers) “incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.”

Moreover, killer acquisitions suggest that the phenomenon of buying up nascent competitors is new and has not been addressed by antitrust agencies. The recent Illumina-Grail debacle proves the contrary: the desired acquisition of Grail by Illumina following its spinoff four years ago would generate considerable innovation and progress in the field of multi-cancer early detection tests. The merger aims at providing Grail with the regulatory and organizational capabilities necessary to commercialize its breakthrough inventions given Grail’s near zero revenue. Grail is a nascent company, but not a nascent competitor to Illumina as the theory of killer acquisitions would have it. Yet, because the competitive effects of such acquisitions arguably are positive, the FTC asked a federal judge to dismiss the lawsuit, because of the high probability the federal judge would approve this beneficial merger. Beyond the antitrust agency’s’ regrettable “gamesmanship,” one cannot reasonably conclude that the FTC is unable to block acquisitions of nascent companies. Current antitrust rules fully equip the FTC with such capability, although this ability may result in applying a misguided theory of killer acquisition to a pro-competitive enabler-acquisition.

More generally, antitrust enforcers and commentators have historically considered the acquisition of potential competitors. Indeed, in their study of pharma mergers, Balto and Mongoven consider that “an acquired firm’s disappearance can have a negative impact on competition, regardless of whether or not it was producing in the market. Potential competitors also wield market power.” Antitrust agencies have traditionally considered potential competitors—referred to as “nascent competitors” in the killer acquisition’s rhetoric—as part of the merger review. For instance, in Zeneca where Zeneca could acquire Astra, the consent order required Zeneca to transfer and surrender all of its rights and assets relating to levobupivacaine to the firm Chiroscience within 10 business days. Zeneca was not an actual competitor to the long-acting local anesthetics, but it was a potential competitor by virtue of its agreement with Chiroscience. The FTC thus required a spinoff to address the competition concerns raised by such potential competition.

Another case is Hoechst. The German pharmaceutical company acquired MMD in 1995, thereby creating the third-largest pharmaceutical company. Dominant in four product markets (i.e., hypertension, angina, arteriosclerosis, and tuberculosis), the merged entity needed to divest either the current line of business or the potential new product to a buyer who could market the drugs. More specifically, Hoechst owned the patent for the only drug that at the time was approved by FDA for intermittent claudication, but MMD had one of the few drugs in development that could compete with Hoechst’s drug. The consent order protected potential competition by requiring Hoechst to divest its drug for intermittent claudication. The settlement also required Hoechst to maintain its research and development (R&D) efforts.

Against that backdrop, should the FTC introduce novel theories of harm for reviewing pharma mergers specifically? There is no need to introduce novel theories of harm, especially if the concern is allegedly excessive drug prices. Concerning higher drug prices, antitrust authorities have seminally stated that increases in drug prices are not illegal under U.S. antitrust laws. Indeed, as recently as 2018, the FTC and the DOJ wrote for the Organisation for Economic Co-Operation and Development that “excessive pricing in pharmaceuticals by itself is not an antitrust violation under U.S. antitrust law, although soaring prices may be indicative of anticompetitive conduct.”

Although excessive prices may support the finding of anticompetitive conduct, increasing prices per se may actually reflect innovation in the sense of the ability to develop a unique patented drug before any other competitors. U.S. antitrust agencies identify drug shortages, regulatory factors, and unilateral conducts other than antitrust violations as potential explanations for increased drug prices absent anticompetitive conduct. Moreover, there is strong scholarly research showing that increased drug company revenues spur more funding on research and development.

Novel theories of harm appear to constitute a way for the FTC to block mergers otherwise lawful under current antitrust laws because they are pro-competitive and pro-innovative (as illustrated in the recent case of Illumina-Grail). Indeed, under current laws, anticompetitive mergers can not only be investigated but most importantly blocked whenever they are anticompetitive. In other words, it appears regrettable that the FTC wants to break its adequate compass for the sake of reaching the detrimental ends it seeks to achieve. Namely, blocking lawful and pro-competitive acquisitions in the pharma industry. To paraphrase the Supreme Court, the FTC’s desire to alter its merger review (and only regarding pharmaceutical companies) is a regrettable attempt to make the government “always wins” in challenging mergers. Such inconsistent policy is both detrimental—for consumer benefits and innovation purposes—and regrettable—for representing a discriminatory stance against pharma mergers without legal consistency.

Novel theories of harm can be appealing and coherent only if the diagnosis of pharma markets underpinning those proposals is correct. Unfortunately, such diagnosis is not. We demonstrate how a misguided diagnosis may lead to costly novel theories of harm.

#### No US/China war

Dr. Joshua Shifrinson 19, Assistant Professor of International Relations at Boston University, 2/8/2019, "The ‘New Cold War’ With China Is Way Overblown. Here’s Why.," Washington Post, https://www.washingtonpost.com/news/monkey-cage/wp/2019/02/08/there-isnt-a-new-cold-war-with-china-for-these-4-reasons/?utm\_term=.b58a10cd7c9e

Is a new Cold War looming — or already present — between the United States and China? Many analysts argue that a combination of geopolitics, ideology and competing visions of “global order” are driving the two countries toward emulating the Soviet-U.S. rivalry that dominated world politics from 1947 through 1990. But such concerns are overblown. Here are four big reasons why. 1. The historical backdrops of the two relationships are very different When the Cold War began, the U.S.-Soviet relationship was fragile and tenuous. Bilateral diplomatic relations were barely a decade old, U.S. intervention in the Russian Revolution was a recent memory, and the Soviet Union had called for the overthrow of capitalist governments into the 1940s. Despite their Grand Alliance against Nazi Germany, the two countries shared few meaningful diplomatic, economic or institutional links. In 2019, the situation between the United States and China is very different. Since the 1970s, diplomatic interactions, institutional ties and economic flows have all exploded. Although each side has criticized the other for domestic interference (such as U.S. demands for journalist access to Tibet and China’s espionage against U.S. corporations), these issues did not prevent cooperation on a host of other issues. Yes, there were tensions over the past decade, but these occurred against a generally cooperative backdrop. 2. Geography and powers’ nuclear postures suggest East Asia is more stable than Cold War-era Europe The Cold War was shaped by an intense arms race, nuclear posturing and crises, especially in continental Europe. Given Europe’s political geography, the United States feared a “bolt from the blue” attack would allow the Soviet Union to conquer the continent. Accordingly, the United States prepared to defend Europe with conventional forces, and to deter Soviet aggrandizement using nuclear weapons. Unsurprisingly, the Soviet Union also feared that the United States might attack and wanted to deter U.S. adventurism. Concerns that the other superpower might use force and that crises could quickly escalate colored Cold War politics. Today, the United States and China spend proportionally far less on their militaries than the United States and the Soviet Union did. Though an arms race may be emerging, U.S. and Chinese nuclear postures are not nearly as large or threatening: Arsenals remain far below the size and scope witnessed in the Cold War, and are kept at a lower state of alert. As for geography, East Asia is not primed for tensions akin to those in Cold War Europe. China can threaten to coerce its neighbors, but the water barriers separating China from most of Asia’s strategically important states make outright conquest significantly harder. Of course, as scholars such as Caitlin Talmadge and Avery Goldstein note, crises may still erupt, and each side may face pressures to escalate. Unlike the Cold War, however, U.S.-Chinese confrontations occur at sea with relatively limited forces and without clear territorial boundaries. This suggests there are countervailing factors that may give the two sides room to negotiate — and limit the speed with which a crisis unfolds.

#### Competition’s restrained and stable

Timothy Heath 17, Senior International Defense Research Analyst at the Nonprofit, Nonpartisan RAND Corporation and Member of the Pardee RAND Graduate School faculty, and William R. Thompson, Distinguished and Rogers Professor at Indiana University and Adjunct Researcher at RAND, "U.S.-China Tensions Are Unlikely to Lead to War", National Interest, https://nationalinterest.org/feature/us-china-tensions-are-unlikely-lead-war-20411?page=0%2C1

Graham Allison's April 12 article, “ How America and China Could Stumble to War ,” explores how misperceptions and bureaucratic dysfunction could accelerate a militarized crisis involving the United States and China into an unwanted war. However, the article fails to persuade because it neglects the key political and geostrategic conditions that make war plausible in the first place. Without those conditions in place, the risk that a crisis could accidentally escalate into war becomes far lower. The U.S.-China relationship today may be trending towards greater tension, but the relative stability and overall low level of hostility make the prospect of an accidental escalation to war extremely unlikely. In a series of scenarios centered around the South China Sea, Taiwan and the East China Sea, Allison explored how well-established flashpoints involving China and the United States and its allies could spiral into unwanted war. Allison’s article argues that given the context of strategic rivalry between a rising power and a status-quo power, organizational and bureaucratic misjudgments increase the likelihood of unintended escalation. According to Allison, “the underlying stress created by China’s disruptive rise creates conditions in which accidental, otherwise inconsequential events could trigger a large-scale conflict.” This argument appears persuasive on its surface, in no small part because it evokes insights from some of Allison’s groundbreaking work on the organizational pathologies that made the Cuban Missile Crisis so dangerous. However, Allison ultimately fails to persuade because he fails to specify the political and strategic conditions that make war plausible in the first place. Allison’s analysis implies that the United States and China are in a situation analogous to that of the Soviet Union and the United States in the early 1960s. In the Cold War example, the two countries faced each other on a near-war footing and engaged in a bitter geostrategic and ideological struggle for supremacy. The two countries experienced a series of militarized crises and fought each other repeatedly through proxy wars. It was this broader context that made issues of misjudgment so dangerous in a crisis. By contrast, the U.S.-China relationship today operates at a much lower level of hostility and threat. China and the United States may be experiencing an increase in tensions, but the two countries remain far from the bitter, acrimonious rivalry that defined the U.S.-Soviet relationship in the early 1960s. Neither Washington nor Beijing regards the other as its principal enemy. Today’s rivals may view each other warily as competitors and threats on some issues, but they also view each other as important trade partners and partners on some shared concerns, such as North Korea, as the recent summit between President Donald Trump and Chinese president Xi Jinping illustrated. The behavior of their respective militaries underscores the relatively restrained rivalry. The military competition between China and the United States may be growing, but it operates at a far lower level of intensity than the relentless arms racing that typified the U.S.-Soviet standoff. And unlike their Cold War counterparts, U.S. and Chinese militaries are not postured to fight each other in major wars. Moreover, polls show that the people of the two countries regard each other with mixed views —a considerable contrast from the hostile sentiment expressed by the U.S. and Soviet publics for each other. Lacking both preparations for major war and a constituency for conflict, leaders and bureaucracies in both countries have less incentive to misjudge crisis situations in favor of unwarranted escalation. To the contrary, political leaders and bureaucracies currently face a strong incentive to find ways of defusing crises in a manner that avoids unwanted escalation. This inclination manifested itself in the EP-3 airplane collision off Hainan Island in 2001, and in subsequent incidents involving U.S. and Chinese ships and aircraft, such as the harassment of the USNS Impeccable in 2009. This does not mean that there is no risk, however. Indeed, the potential for a dangerous militarized crisis may be growing. Moreover, key political and geostrategic developments could shift the incentives for leaders in favor of more escalatory options in a crisis and thereby make Allison’s scenarios more plausible. Past precedents offer some insight into the types of developments that would most likely propel the U.S.-China relationship into a hostile, competitive one featuring an elevated risk of conflict. The most important driver, as Allison recognizes, would be a growing parity between China and the United States as economic, technological and geostrategic leaders of the international system. The United States and China feature an increasing parity in the size of their economies, but the United States retains a considerable lead in virtually every other dimension of national power. The current U.S.-China rivalry is a regional one centered on the Asia-Pacific region, but it retains the considerable potential of escalating into a global, systemic competition down the road. A second important driver would be the mobilization of public opinion behind the view that the other country is a primary source of threat, thereby providing a stronger constituency for escalatory policies. A related development would be the formal designation by leaders in both capitals of the other country as a primary hostile threat and likely foe. These developments would most likely be fueled by a growing array of intractable disputes, and further accelerated by a serious militarized crisis. The cumulative effect would be the exacerbation of an antagonistic competitive rivalry, repeated and volatile militarized crisis, and heightened risk that any flashpoint could escalate rapidly to war—a relationship that would resemble the U.S.-Soviet relationship in the early 1960s. Yet even if the relationship evolved towards a more hostile form of rivalry, unique features of the contemporary world suggest lessons drawn from the past may have limited applicability. Economic interdependence in the twenty-first century is much different and far more complex than in it was in the past. So is the lethality of weaponry available to the major powers. In the sixteenth century, armies fought with pikes, swords and primitive guns. In the twenty-first century, it is possible to eliminate all life on the planet in a full-bore nuclear exchange. These features likely affect the willingness of leaders to escalate in a crisis in a manner far differently than in past rivalries. More broadly, Allison’s analysis about the “Thucydides Trap” may be criticized for exaggerating the risks of war. In his claims to identify a high propensity for war between “rising” and “ruling” countries, he fails to clarify those terms, and does not distinguish the more dangerous from the less volatile types of rivalries. Contests for supremacy over land regions, for example, have historically proven the most conflict-prone, while competition for supremacy over maritime regions has, by contrast, tended to be less lethal. Rivalries also wax and wane over time, with varying levels of risks of war. A more careful review of rivalries and their variety, duration and patterns of interaction suggests that although most wars involve rivalries, many rivals avoid going to war. Misperceptions and strategic accidents remain a persistent feature of international politics, and it may well be that that mistakes are more likely to be lethal in periods of adjustment in relative power configurations. Rising states do have problems negotiating status quo changes with states that have staked out their predominance earlier. Even so, the probability of war between China and the United States is almost certainly far less than the 75 percent predicted by Allison. If the leaders of both countries can continue to find ways to dampen the trends towards hostile rivalry and maintain sufficient cooperation to manage differences, then there is good reason to hope that the risk of war can be lowered further still.

#### No impact

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Yet despite epidemic after epidemic, despite mass killers like smallpox and the 1918 flu, at no point has disease threatened humans with extinction. Even the Black Death, likely the most concentrated epidemic of all time, now appears as little more than a minor downturn in what has otherwise been a bull market for long-term human population growth. That’s true for animals as well. The International Union for Conservation of Nature reports that of the 833 plant and animal extinctions that have been documented since 1500, less than 4 percent can be attributed to infectious disease. Those species that were eradicated by disease tended to be small in number and geographically isolated—very much unlike human beings, who are both numerous and have spread to every corner of the world.38

With the exception of HIV—which can now be managed as a chronic condition with antiviral drugs—every major epidemic mentioned above took place before the dawn of modern medicine, before the development of antibiotics and widespread vaccines. Smallpox was even fully eradicated from the wild in 198039—the only known samples of the virus are kept at highly secure government facilities in Atlanta and Koltsovo, Russia.40 Plague is now so rare that when it breaks out in countries like Madagascar, it makes global news—yet fewer than 600 deaths from the disease were reported between 2010 and 2015. Studies have shown that most of the fatalities from the 1918 flu were actually due to secondary bacterial infections that today could be controlled by antibiotics,41 which were introduced less than a century ago. Influenza pandemics remain the great fear of infectious disease experts, but the most recent one in 2009 killed only about 284,000 people worldwide.42 That was fewer than the number of people who die from seasonal flu in an ordinary year.43

Modern science has defanged most infectious diseases, at least outside the developing world—and great progress has been made there in recent years—but basic evolution also plays a role in limiting the catastrophic potential of natural disease. Every pathogen faces a trade-off. In general, the more rapidly it kills, the harder it is to spread widely, because an extremely virulent disease would run out of victims and hit an epidemiological dead end. Pathogens that are highly transmissible, like influenza, rarely kill, even absent the countermeasures of modern medicine. The 1918 flu had a fatality rate of about 2.5 percent.44 That’s tremendously high by the standards of the flu, but it still meant that more than 97 out of every 100 patients survived. Even a virus like HIV—which kills slowly and shows no symptoms for years, permitting the infected plenty of time to spread the disease—is hindered because transmission requires direct contact with blood or with bodily fluids. The self-replication that makes infectious disease such an effective weapon also prevents it from becoming a true existential threat. What viruses and bacteria want—if packets of genes and single-celled organisms can be said to want anything—is to survive and to replicate. They can’t do that if they kill all humans.

#### Interconnectedness is balanced by increased immunity and advances in medicine and sanitation

Dr. John Halstead 19, Doctorate in Political Philosophy, “Cause Area Report: Existential Risk, Founders Pledge”, https://founderspledge.com/research/Cause%20Area%20Report%20-%20Existential%20Risk.pdf

However, there are some reasons to think that naturally occurring pathogens are unlikely to cause human extinction. Firstly, Homo sapiens have been around for 200,000 years and the Homo genus for around six million years without being exterminated by an infectious disease, which is evidence that the base rate of extinction-risk natural pathogens is low.82 Indeed, past disease outbreaks have not come close to rendering humans extinct. Although bodies were piled high in the streets across Europe during the Black Death,83 human extinction was never a serious possibility, and some economists even argue that it was a boon for the European economy.84 Secondly, infectious disease has only contributed to the extinction of a small minority of animal species.85 The only confirmed case of a mammalian species extinction being caused by an infectious disease is a type of rat native only to Christmas Island. Having said that, the context may be importantly different for modern day humans, so it is unclear whether the risk is increasing or decreasing. On the one hand, due to globalisation, the world is more interconnected making it easier for pathogens to spread. On the other hand, interconnectedness could also increase immunity by increasing exposure to lower virulence strains between subpopulations.87 Moreover, advancements in medicine and sanitation limit the potential damage an outbreak might do.

#### ABR doesn’t get close to extinction---vast majority of treatments will still be effective, no huge death tolls

Drew Smith 16, former R&D director at MicroPhage and SomaLogic, 6/14/16, “The Myth Of The Post-Antibiotic Era,” <https://www.forbes.com/sites/quora/2016/06/14/the-myth-of-the-post-antibiotic-era/#db027696fa83>

The worst-case scenario would be that it would be like 1940, only without a raging World War. Keep in mind that by 1940, before the introduction of penicillin, deaths from infectious diseases in the US had been reduced by 90% from their 19th century levels [1]. This reduction was entirely due to the provisions of clean food, water, and vaccines. We have (or should have) better systems for delivering these public health goods than we did 75 years ago.

But there is never going to be a post-antibiotic era. Antibiotic therapy will continue to be effective most of the time. If antibiotic therapy is informed by rapid microbiology testing, then it will be effective nearly all of the time. Very few bugs are, or will be, pan-resistant and untreatable by antibiotics. Even the worst superbugs—MRSAs, CREs, ESBLs, and now MCR-1s—are almost always susceptible to at least one clinically useful antibiotic (XDR TB is the most troubling exception to this rule).

What has changed is that resistance to at least one first-line antibiotic is now common, and doctors will have to become smarter about their prescribing practices. They can no longer mindlessly write scripts based on signs and symptoms alone and expect good results every time. Doctors consistently underestimate local levels of resistance, and exhibit high levels of complacency about the impacts of resistance on their practices [2] [3] [4] . This culture of complacency will have to change.

Antibiotics will continue to be effective, but our traditional method of prescribing them, called empiric therapy [5], will become increasingly ineffective. This will require a change in the way that we use antibiotics, but will not be an end to the usefulness of antibiotics. That is an important distinction to keep in mind when reading articles about the coming antibiotic apocalypse: change, yes; the end, no.

## 1NR

### Biz Con DA---1NR

#### It causes terrorism, civil wars, and diversion that go global---nothing checks

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The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington , considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

#### Turns every impact

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The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

#### Including China war---Decline causes lash-out and war with the U.S.

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So far, China’s high level of economic growth has meant that widening social cleavages have not presented a serious threat to the rule of the CCP, which has managed to bolster its legitimacy by positioning itself as a regime capable of delivering prosperity to its people.14 However, it must be kept in mind that China’s developmental model is predicated on economic growth and positive relations with the USA, the country that its rise is supposedly threatening to unseat as hegemon of the international system. Despite the global economic downturn, the USA remains China’s most important export market, making up close to 20% of China’s foreign trade in 2010.15 There are two major reasons why this is the case. The frst has to do with the value of the Renminbi vis-à-vis the US dollar. By comparative standards, China’s currency is pegged well below its US counterpart, providing an immediate economic incentive to American consumers to buy Chinese goods. The second has to do with the low wages paid to Chinese workers. Although the wages of China’s urban workforce have increased over the past decade, they still remain extremely low by American standards. These low wages decrease production costs, which further lowers the price of goods and encourages US consumption.16 As a result of these factors, Washington has been placing pressure on China to revalue the Renminbi, arguing that it provides an unfair advantage to Chinese producers while at the same time hindering domestic production and consumption.17 Beijing’s resistance to this pressure stems from its fear that increasing the value of the Renminbi too rapidly could serve as a disincentive for investment, slowing exports to the USA and leading to unemployment to China. Since a major downturn in the economy could lead to protests and riots against the ruling party, as well as reducing the resources available for programs designed alleviate China’s social ills, the Chinese government remains dependent on US consumer demand in order to provide the prosperity that it uses to justify its rule. One consequence of China’s reliance on American consumption to ensure its own economic prosperity has been willingness of the Chinese government to invest heavily in US debt. Throughout the 2000s, Americans were able to borrow massive sums of money at low interest rates without having to worry about a negative reaction from fnancial markets, and much of that money was provided by Chinese banks. The Chinese were willing to invest in American debt for a number of reasons, the most important being that US Treasury bonds were seen as a safe investment, but also because buying up these assets allowed American consumers to keep spending money on Chinese goods. The trillion dollar obligation the US owes the Chinese places Washington in a weakened position, and on the surface, it does seem as if China holds a great deal of economic leverage over the USA. However, China’s vast exposure to American debt is a double-edged sword. The Chinese are too invested in the USA to withdraw their fnancing, which in turn decreases any leverage Beijing might have over American economic policy. This reason behind this entrapment has to do with several important pathologies of Chinese development. Stateowned enterprises continue to be a key component of China’s domestic economy; they depend upon growth in China’s privately owned foreign investment for growth and proftability (Vermieren 2014). This has led to a broad penetration of the use of fxed assets in both state-owned enterprises and in private enterprises that rely upon exports (Ibid 2014). Deleveraging itself from the USA would be diffcult. Even if the government slowly started selling off Treasury bonds, it would shake the confdence of international investors, leading to an increase in interest rates as the USA struggled to fnance its defcit and avoid default.18 Higher interest rates would also slow US consumer spending, hurting Chinese exports and its state-owned enterprises and leading to unemployment as factories close and workers are laid off. In addition to the domestic repercussions, any remaining US debt held by the Chinese government would decline in value, since it would become harder to sell off bonds as US interest rates rose. China’s economic future is therefore tightly bound to that of America, since any action that undermined the US economy would have dire consequences for the Chinese economy as well. Also, China has not completely insulated itself from domestic and international economic turmoil. It has started to reach a development plateau with its low-wage workforce requiring higher value-added industries in order to keep up its economic growth.19 Similar to other Asian countries, China must diversify its economic and political system if it wants to continue to develop. This does not suggest China will democratize in the near future, however, China’s continued development requires increasing the value of the Renminbi to lower the cost of purchasing foreign technology and reducing the intervention of the Chinese government in order to better meet domestic and foreign consumer demand.20 Thus far, the CCP has been willing to gradually increase the Renminbi but has been far more reluctant to withdraw its control from the economy—a testament to a regime that is highly self-conscious. Though China’s growth since 2008 had been mainly due to domestic consumption, there are limits on how protracted this recovery can be if the EU and America fall back into recession. Despite a burgeoning middle class, China still relies on foreign exports in order to keep its job market growing. If another major fnancial crisis hits a major trading partner, despite the resources of the CCP, it could hamper China’s economic growth. There are also fears China could experience a housing market collapse similar to the USA and Europe. Since the crisis occurred in 2008, the CCP introduced a series of stimulus measures coupled with low interest rates on loans from Chinese banks.21 The intent of these policies was to prevent a protracted economic recession from threatening China’s growth and ipso facto the legitimacy of the regime. Similar to the USA in the early 2000s, many Chinese people took out cheap loans and began to speculate on the value of their property.22 This has led to a housing market boom in areas of China, but has led many to worry that a collapse of the market may harm the Chinese economy. The government has begun to raise interest rates to lower demand, but a correction in the value of the market of this scale could represent the loss of the billions in equity for many Chinese people. While China’s banks have considerable government oversight—preventing a similar bankruptcy to Lehman Brothers in the USA—there is potential for a major recession to hit the Chinese economy. So, despite its institutional barriers in place by the CCP, the liberalization of the economy has made China vulnerable to fnancial markets. This could have massive potential consequences on the stability of the Chinese regime and on global economic stability. More recently, China’s economy has experienced a stock market crisis in 2015, though this has not translated into a broader economic downturn in the economy. There is, of course, some diffculty in relying upon government-based reports, since the government has a political incentive to promote data favourable to the regime. Nonetheless, despite the lack of reliable information there has been a slowdown in private-sector investment, from growth of more than 40% in 2011 to just 2.8% in the frst half of 2016 (Economist 2016). Rather than an anomaly, the lack of private-sector investment is indicative of other worrying signs in the economy. Although the Chinese economy is still growing, there are other sign of underlying economic strain. The credit market in China is on a sharp increase compared to nominal growth, growing at 16% this year, meaning loose monetary policy set by the central bank is allowing for both private and state-owned enterprises to leverage at a rapid pace. Moreover, China’s debt-to-GDP level has exploded—from roughly 150% before the 2008 global fnancial crisis to more than 250% in 2016 (Economist 2016). This puts it similar to countries such as Spain and Japan, both have long-term structural economic problems that will undermine growth for the foreseeable future. In a period of eight years since the onset of the fnancial crisis, China has gone from a country that was praised for its resilience, to one of the most in debt large economies in the world. While it would be premature to suggest China will face similar economic problems, the sheer amount of debt in China has led the IMF to publish a working paper on how to ease China’s debt problems before they lead to a crisis that will affect the domestic and international economy. The IMF report identifed several measures to ease China’s debt burden and aid its economy to transition from a middle-income country to a higher income country. The paramount recommendation is that the Chinese government must recognize and cease supporting, through favourable loans and government-backing, failing and bankrupt companies (IMF 2016). The Chinese government has long protected industries that have close ties to the party. Though there has been a recognition by the Chinese government to tackle corruption within state-owned enterprises, there is still a reluctance by offcials to let companies go bankrupt if they face signifcant economic problems. There is excessive corporate debt and a reluctance among the political establishment to lift the implicit guarantees on SOEs and make the necessary structural changes to reform China’s economy including the privatization of telecommunications and energy sectors (Economist 2016). While these economic recommendations may be necessary to avoid a crisis in China’s economy by providing some “short-term pain for long-term gain”, the political will to implement them is lacking (IMF 2016). There is a reluctance within the Chinese political establishment to accept policies that may undermine economic growth for fear of causing political strife in the country, even if in the long-term it may be benefcial to the country. These economic problems have not gone unnoticed by the people of China—there has been an exponential increase in the quality and quantity of strikes and protests from Chinese workers and social groups. As economic growth has slowed, wages and job growth have declined as well—many workers have been denied wages, leading to strikes and labour protests erupting across the country (Hernandez 2016). A labour rights group based in Hong Kong—the Chinese Labour Bulletin— recorded more than 2700 strikes and protests in 2015, more than double the number in 2014; the strife appears to have intensifed in the early months of 2016, with more than 500 protests in January alone (Ibid). Yet again, we get a signifcant tension between the top-down policy from the Chinese government and the response from people who are faced with precarious working conditions and less pay. If the Chinese government does implement structural reform to the economy, it will lead to the failure of many SOEs that have been propped up through favourable conditions by the Chinese government. However, if they are allowed to fail, more protests with erupt from angry workers who are either unemployed or must continue to accept less wages. Despite the sophisticated mechanisms for repression from the Chinese government, the protests are becoming increasingly better organized and sophisticated. Since protests have become widespread, protesters have been using social media as an organizational tool (Minter 2016). The response of the Chinese government to these protests across stateowned and private enterprises has been the same: to arrest dissidents, clamp down on social media and delete news reports on strikes (Ibid). In particular, the Chinese government has devoted more resources to limiting social media and quickly deleting protests and anti-government riots from dissenting workers. The Chinese government has a long-standing policy to block platforms that may be used to organize dissent or spread messages that threaten its legitimacy. For example, some of the largest social media sites used in the West, like Facebook and Twitter, have been blocked by the Chinese government and politically sensitive phrases are often quickly deleted from blogs and other websites (Bamman 2012). Even with these obvious impediments, labour groups use social media platforms to organize and spread their discontent. Some of the largest and well-organized protests, typically numbering in the thousands though diffcult to confrm, have come from China’s north-eastern state-owned coal industry, which has been hit by the slowing of the Chinese economy. The demands of the workers are commonplace payment of wages and better working conditions. However, the state-owned coal industry is caught in a bind: demand for coal has declined by 6% in 2015, while the industry must provide the supply at below market prices to keep energy prices low for other Chinese industries and for growing cities (Hornby 2016). The case of the coal worker strike highlights a growing tension within China: between the economic restructuring that is necessary to prevent a widespread recession throughout the country and the expedient political and economic policies that maintain control for the Communist Party. Indeed, the crackdown on worker protests and censorship is not a sign of strength, but speaks to the fragility of the regime: Despite appearances, China’s political system is badly broken, and nobody knows it better than the Communist Party itself. China’s strongman leader, Xi Jinping, is hoping that a crackdown on dissent and corruption will shore up the party’s rule. He is determined to avoid becoming the Mikhail Gorbachev of China, presiding over the party’s collapse. But instead of being the antithesis of Mr. Gorbachev, Mr. Xi may well wind up having the same effect. His despotism is severely stressing China’s system and society—and bringing it closer to a breaking point. (Shambaugh 2015: 2) The actions of the Chinese party against dissent are not a testament to its power, but a sign of its weakness. Unlike democratic countries, where people can voice their dissent and periodically vote their leaders out, the Chinese government is unwilling to tolerate political opposition to the regime. While the methods to combat protesters are getting more sophisticated, every time the Chinese government intervenes, it shows the vulnerability of the government: it is a self-conscious regime that is aware that its own legitimacy may be threatened. The actions of the business elite in China are another sign of discontent with the regime: 64% of 393 millionaires and billionaires polled by the Hurun Research Institute are currently emigrating or planning to leave China, and they are sending their children to study abroad (Shambaugh 2015). While it is far too premature to tell if the regime is threatened, the protests from industrial workers and the reluctance of elites to commit to the country’s future offer worrying signs for the regime. Moreover, China’s rapid development has not gone unnoticed by the American security establishment. Currently, two contradictory streams of thought about the relative rise of China are common among Washington policy-makers. First is that a prosperous China will be a positive outcome for regional and global security and development.23 Some policy-makers argue China has already integrated peacefully into the international institutions and a wealthier China could be a large market for imports from the USA. Thus far, at least, Beijing has been relatively accommodating to Western interests and open to Western investment. Even when tension has occurred in the past, such as when the Americans bombed a Chinese embassy in Kosovo, the close economic ties have been a stabilizing force in China’s relationship to the West.24 Thus China’s ascent could be peaceful if both sides are willing to continue compromising on economic and security matters. Indeed, thus far, the relationship between China and the USA has been called “interdependent hegemony”: the two powers have built a political and economic framework that provides accommodation and integrates China into the pre-existing hegemonic system where confict can be resolved through institutional channels (Christensen and Xing 2016). On the other hand, some in the security establishment believe it is only a matter of time before China becomes more assertive over Taiwan and scarce oil and other natural resources.25 They argue a rising China will displace the contemporary balance of power and instigate conflict with the USA. The past may not be indicative of the future and China is facing a series of domestic and international challenges moving from a middle-income to high income country. Also due to US pressure, China is facing growing pressure to realign its currency, a greater number of trade investment and intellectual property disputes, a more hostile security environment and exclusionary regional trans-Pacifc and transAtlantic trade agreements, such as the Trans-Pacifc Partnership (Glenn 2017). While US–China relations have been relatively stable for the past 40 years, it is not necessarily an indication that they will remain so inevitably as China continues to grow as a global power and the USA becomes more protectionist. With recent historical examples such as the ascent of Germany leading to the two world wars or the Soviet Union’s 50-year Cold War, they argue Washington should take precautions over a rapidly developing China. These policy-makers advocate heightened preparedness with increased military spending and stronger ties to allies in Southeast Asia.26 Washington should not be reluctant to take a hard line to defend its economic and security interests when they will be, inevitably, threatened by Beijing. This has led to a contradiction between those in the security establishment and those in the economic and business community. China is both a potential threat and a potential stabilizing force. As discussed earlier, China and the USA are highly interdependent with the Chinese holding trillions in US debt while relying upon the Americans to consume Chinese-made products. Many realists often point out Europe was highly integrated prior to the First World War, particularly Britain and Germany, but this did not prevent a catastrophic conflict from engulfing the continent.27 This ignores the fact many European leaders believed the war would be short and inexpensive, and not a long, protracted, violent affair that left millions dead and four empires in ruins.28 The war also displaced international economic integration for the next 50 years— not exactly a predictable outcome from a confict that was supposed to be over by the Christmas of 1914. Few, if any, scholars or policy-makers are under the illusion that a confict between China and the America would be cheap in terms of materiel or human lives or easily resolvable once started. Both Beijing and Washington recognize their mutual economic reliance and the advent of nuclear weapons, perhaps a key reason the Cold War did not cascade into a full out war, raises the costs of great power confict even further. Yet, many in Washington still view China as threat to American interests. While seemingly unaffected by the fnancial crisis, by 2015, China began to experience an economic downturn of its own. In many ways, China is a victim of its own economic model. Its stock market, which continued to grow after many in the West were mired in recession, experienced a rapid decline in the summer of 2015, losing almost $5 trillion in value. While stock markets are not the only, or even the best, test of a country’s economic vitality, there are other worrying signs China may be in for a diffcult period. The very industrial process behind China’s economic development—manufacturing goods for export—is being adopted by other countries in the region with cheaper labour markets, such as Vietnam. Though China is still a strong regional power, it seems to be experiencing a middle-income country trap. It is fnding the transition from middle-income status to high income, diffcult for a series of international and domestic economic problems. The rise of China could lead to tension with the USA, but conflict between these two countries would have dire economic consequences for the global economy. It is possible that domestic or international factors could lead Beijing to be more aggressive on issues such as Taiwan leading to a direct confrontation with the USA, but if the economic consequences of 9/11 or the fnancial crisis are any indication, fnancial markets will limit the policies of these countries. Both countries are reliant upon the free mobility of goods and fnance to maintain economic growth and prosperity. In China’s case, the regime depends on job creation for stability. The international economy in this case has conditioned the two countries to, at least thus far, peacefully co-exist with each other, with neither country willing to destabilize the global economy. Financial markets have the capacity to punish countries for acting contrary to the demands of capital and the USA and China are no exception.

#### Agencies will cease enforcement during the downturn

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

#### 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.

#### It's not law---changes to statute won’t happen

Joseph Charles Folio 21 III, Lawyer at Morrison Forrester, and Lisa M. Phelan Co-chair Global Antitrust Law Practice Group at Morrison Forrester, Jeff Jaeckel, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, and Alexander Paul Okuliar, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, “Antitrust Update: Up and Down the Avenue”, 3/22/2021, https://www.mofo.com/resources/insights/210322-atr-update.html

Are the stars aligning for antitrust reform? President Biden is filling key positions in the White House (Timothy Wu, National Economic Council) and at the FTC (Lina Khan, nominee for commissioner) with lawyers who have advocated for increased antitrust enforcement, especially against “big tech.” In Congress, the House antitrust subcommittee concluded a year-long investigation in October 2020 and found bipartisan agreement on discrete areas for reform. With Democrats now in control of both houses of Congress, antitrust legislation seems close. But not so fast.

The House and Senate antitrust subcommittees have held four hearings since February 25, 2021, but it is crucial to view these recent developments in their proper context. Even when politicians and enforcers appear to agree on a goal, it can still be a long and winding road to actual policy reform.

Two to go

Although antitrust reform advocates cheered President Biden’s initial appointments, two of the most consequential antitrust positions—the assistant attorney general (AAG) for antitrust and the FTC chair—remain open. Both the AAG and FTC chair wield tremendous authority; they approve cases, guide investigations, and will decide how to proceed with ongoing litigation. It is unlikely that the Biden administration will make any significant decisions, or support any particular legislation, before its key personnel are firmly in place. And that can take time. Former AAG Makan Delrahim was nominated in March 2017 but not confirmed until September 2017.

Interestingly, the pressure to nominate like-minded antitrust reformers for these two positions is coming from multiple angles. One public interest group recently sent a letter to White House chief of staff Ron Klain and, after “highly commend[ing]” the nomination of Ms. Khan to be an FTC commissioner, warned against the influence of certain White House and DOJ officials over the AAG and FTC chair nominations because of their links to “big tech” companies.[1] Additionally, many in the press have been critical of the level of tech enforcement activity during the Obama administration and want to avoid a replay of those years.[2]

#### Enforcement’s declining

Scott Helfstein 19, Co-Head of Market Research and Strategy and Head of Thematic Portfolios at Morgan Stanley Wealth Management, Former Professor of Social Science at the United States Military Academy, Research Director at the Combating Terrorism Center, and Analyst at the Federal Reserve Board of Governors, “What Happens When Antitrust and Protectionism Cycles Collide”, Harvard Business Review, 12/4/2019, https://hbr.org/2019/12/what-happens-when-antitrust-and-protectionism-cycles-collide

Decision Nodes

There are two critical questions that impact decision makers. First, is this the beginning of an antitrust cycle or the last days of the past cycle? Second, is this the start of a new protectionist period or short-lived noise? These questions help determine whether we should prepare for protectionism, antitrust activity, or the unusual confluence of both.

Antitrust activity reached an all-time high in 2011 when there were 111 cases filed. That number has dropped precipitously with only 42 actions in 2018 and 18 year-to-date in 2019. While the number of filings is down, the targets of recent government probes are disproportionately large entities that represent $3.2 trillion in market capitalization or 12.3% of S&P 500. Further, the domestic drivers of prior antitrust periods, such as frustration with the status quo, appear firmly in place reflected by the anti-establishment movements arising around the world.

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

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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. 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.

#### Even if, it’s moderate and restrained

Andrew Coopersmith 21, Managing Director of the Penn Program on Regulation, “The Biden Executive Order on Restructuring Competition”, The Regulatory Review, 7/26/2021, https://www.theregreview.org/2021/07/26/coopersmith-biden-executive-order-restructuring-competition/

Hovenkamp, while still supporting the consumer welfare basis for antitrust decision-making, sees some potential for applying antitrust law in new ways, especially in the regulation of Big Tech. “There are certain types of mergers that we’re not going after because our current merger guidelines don’t cover them, particularly mergers that are intended to eliminate competitors”—for example, Facebook buying Instagram—“or that entail other anticompetitive practices that are not collusive,” he explained.

Hovenkamp stated that he thinks that the U.S. already has effective tools such as the Sherman Act that can allow regulators to use “focused injunctions to stop the conduct without doing unnecessary harm … to the efficiencies and the network effects that have made the tech market so valuable.”

Part of what impressed Hovenkamp about Biden’s executive order is how moderate and un-political it seems. “While this was widely touted as a progressive document,” Hovenkamp noted, “the fact is that it preserves the centrality of economic concerns in antitrust. It never speaks of political power as an antitrust concern.” And it never uses the word “breakup” in reference to Big Tech.

#### It’s only advisory AND won’t be implemented for years

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Over the course of his first six months in office, President Joe Biden has signaled a clear commitment to reinvigorate antitrust enforcement. On July 9, 2021, he took his most specific and comprehensive action on the subject yet, issuing an Executive Order on Promoting Competition in the American Economy (the Order).1 A newly created White House Competition Council will oversee what is described as a “whole-of-government approach” that involves over a dozen federal agencies collaborating to carry out the Order’s 72 initiatives. The council, led by the director of the National Economic Council, will act as the nerve center, coordinating the implementation of the Order’s initiatives.

The Order “affirms that it is the policy of [the Biden] Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony,” and to “enforce the antitrust laws to meet the challenges posed by new industries and technologies.” The Order encourages agencies to “vigorously” enforce the antitrust laws, including through rulemaking, and touches on almost every corner of the American economy, from labor markets to health care, transportation to financial services, and technology to agriculture.2 It thus adds significant policy detail to supplement signals that the Biden administration has sent through personnel decisions — the appointments of progressives Tim Wu to the National Economic Council and Lina Khan as chair of the Federal Trade Commission (FTC).3 For the most part, however, the Order launches — rather than completes — the policymaking process, and much of the important detail will emerge through the labyrinth of enforcement, regulation and (inevitable) litigation.

The Order

While proponents of antitrust reform were quick to praise the Order and the policies it reflects, the signing of the Order will not immediately revolutionize antitrust enforcement. As an initial matter, the Order primarily directs the relevant agencies to “consider” using their respective authorities to further its policies and “encourages” the agencies to take certain actions. For the most part, its only firm requirements are the submission of reports and plans by designated agencies to the Competition Council. The Order leaves the agencies with significant discretion, does not create any right of action and acknowledges that its enforcement must be consistent with existing applicable law. To the extent the Order calls for administrative rulemaking, that process is inevitably lengthy and complicated, with a notice and comment period that can often take years to finalize and face substantial litigation challenges.

Not surprisingly, the Order contains various initiatives to be spearheaded by the FTC and the Department of Justice (DOJ), the two principal federal antitrust enforcement agencies. For example, the Order encourages the two agencies to consider whether to revise the jointly issued Antitrust Guidance for Human Resource Professionals from October 2016. The Order also encourages the FTC and DOJ to review the existing merger guidelines and consider whether changes are needed; and within hours of the Order’s issuance, the DOJ’s Acting Assistant Attorney General for Antitrust Richard Powers and FTC Chair Lina Khan issued a joint statement committing to quickly launch a joint review.4 The Order emphasizes scrutiny of certain mergers, including so-called serial mergers or those involving nascent competitors, already well underway at the agencies. And while reform of merger analysis has gained momentum in Congress, for now enforcement actions spurred by these new policies will be judged through the lens of existing law and well-established precedent.5 As the recent dismissal of the FTC’s Section 2 monopolization suit against Facebook demonstrates, a change in enforcement priorities can run aground in the courts.6

The Order additionally urges the FTC to engage in rulemaking on such topics as noncompete clauses, data collection and surveillance, occupational licensing, product labeling, prescription drugs, real estate, and “any other unfair industry-specific practices that substantially inhibit competition.” Under Chair Khan’s leadership, and with two other Democratic commissioners who are committed to progressive — and aggressive — antitrust enforcement (Commissioners Rohit Chopra and Rebecca Slaughter), the FTC may set a more robust enforcement and rulemaking agenda. Perhaps not coincidentally, on July 1, 2021, the FTC approved — by a 3-2 vote — changes to its rulemaking procedures under Section 18 of the FTC Act to “modernize” and “streamline” the rulemaking process.7 The Order’s initiatives may offer the FTC its first opportunity to test these procedural reforms.

In the meantime, additional important personnel decisions remain. FTC Commissioner Rohit Chopra’s seat will become available if he is confirmed (as expected) for the role of director of the Consumer Financial Protection Bureau, and the position of assistant attorney general for antitrust at the DOJ still remains open. Although we expect the nominee for either position to support the Order’s goals, the candidate may bring a more moderate (or, alternatively, more reform-minded) perspective.

Political Landscape

The current antitrust reform effort has its roots in the 2017 “A Better Deal” agenda proposed by House and Senate Democrats, culminating in a Fall 2020 report by the House Judiciary Committee Subcommittee on Antitrust, Commercial and Administrative Law. The House Judiciary Committee report outlined several reforms focusing on large technology companies, and has served as the basis for current legislative proposals. Also, a remarkable bipartisan consensus has emerged around antitrust enforcement in the House of Representatives: Most recently, House Democrats and Republicans released a bipartisan package of five antitrust reform bills to address the practices of large technology companies and online marketplaces.

On the other side of the Capitol, Sen. Amy Klobuchar, the chair of the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, also introduced expansive antitrust reform legislation in 2021. The “Competition and Antitrust Law Enforcement Act”8 would change the long-standing standard for proving that a merger breaches the Clayton Act. Rather than “substantially lessen competition,” a merger would only need to pose “appreciable risk of materially lessening competition” to be prohibited. The bill would also shift the burden to the defendants to show that a merger would not raise such an appreciable risk. Although members of both political parties appear to support enacting changes to antitrust statutes, the details remain in dispute.

Conclusion

The Order is designed to convey a clear message: the Biden administration is serious about reinvigorating antitrust policy through a coordinated government-wide effort to reshape the antitrust laws and rethink enforcement. But the Order’s goals will soon face difficult and time-intensive challenges to implementation. While the Order may embolden federal agencies to take a tougher stance in enforcing the antitrust laws, we expect any changes requiring rulemaking to be lengthy and complex. Any enforcement actions and regulatory changes will be adjudicated under current statutes and precedents, and the scope of legislative reforms may depend on the shape of potentially fragile bipartisan consensus.

#### It doesn’t affect current laws AND agency implementation is TBD

Sullivan 21 – Sullivan & Cromwell LLP, “President Biden Issues Executive Order on Promoting Competition in the American Economy”, 7/12/2021, https://www.sullcrom.com/blog-president-biden-issues-executive-order-on-promoting-competition-in-the-american-economy

The Order does not impact current laws governing non-competition agreements, including those between employers and employees. While it is not clear whether or how the FTC will respond to this Order, employers should continue to watch for developments in this space, on both a federal and state level.

#### It’s only administrative, bound by existing law AND tied up in litigation

Dr. Harry G. Broadman 21, PhD in Economics from the University of Michigan, AB in Economics and History from Brown University, Managing Director and Chair of Emerging Markets and CFIUS Practices at Berkeley Research Group LLC, “Biden’s Antitrust Policy Mustn’t Throw Out The Baby With The Bathwater”, Forbes Magazine, 7/31/2021, https://www.forbes.com/sites/harrybroadman/2021/07/31/bidens-antitrust-policy-mustnt-throw-out-the-baby-with-the-bathwater/?sh=6d0d7ec911db

While *some* of the policy actions that may stem from Biden’s Executive Order could be implemented—particularly certain initiatives undertaken by the Federal Trade Commission (FTC), an independent agency, and to a lesser extent the Department of Justice’s Antitrust Division (DOJAD)—the reality is that both executive orders and the appointment of certain personnel ultimately can do only so much. And for so long – for example, a duration equal to the tenure of an administration, assuming a subsequent administration issues executive orders rescinding previous ones.

This is because most will likely be *administrative* actions bound by existing law and thus open to challenge in court. Yet what is often under-appreciated under such scenarios, is that the policy uncertainty engendered during such a period may well affect decisions by investors, businesses, workers, and consumers that could run counter to those otherwise preferred.

#### Antitrust law applies across all sectors---there’s no exemption unless explicitly expressed

Dr. Niamh Dunne 14, Fellow in Law at Fitzwilliam College, Cambridge, and Affiliated Lecturer at the University of Cambridge, PhD from the University of Cambridge, LLM from the NYU School of Law, MA from King’s College London, “Between Competition Law and Regulation: Hybridized Approaches to Market Control”, Journal of Antitrust Enforcement, Volume 2, Issue 2, 10/1/2014, Lexis

In order to understand how hybridized instruments of this nature can be constructed, it is necessary, first, to consider briefly the conventional understanding of the interaction between competition law and regulation. At a general level, competition law refers to those legal rules intended to protect the process of competition in order to maximize consumer welfare. 8 More specifically, most competition systems encompass three sets of provisions: prohibitions on anticompetitive agreements or concerted practices between two or more firms, most typically cartels; prohibitions on anticompetitive unilateral behaviour by single firms that hold a dominant or monopoly market position; and rules controlling, and potentially prohibiting, mergers that may have anticompetitive market effects. Identifying a single exhaustive definition of regulation is more complex; 9 numerous formulations have been advanced, suggesting a looser, and potentially a much broader concept that typically includes both social and economic controls. 10 For the purposes of this article, regulation should be understood, more narrowly, as economic supervision of market power, 11 the standard example of which is utility regulation. Both competition law and regulation address forms of market failure, 12 yet utilize different means, and often to divergent ends. The archetypal explanation of the relationship between these legal mechanisms is therefore characterized by a series of dichotomies that contrast the objectives and modes of operation, and possible outcomes achieved, of both instruments. These can be summarized briefly as follows.

First, it is assumed that competition law is generally applicable across all markets, unless a sector is expressly or impliedly exempted, whereas regulation is enacted on a sector-by-sector basis, to address (typically) identified and discrete failures within particular markets. 13 As a corollary of this generalized-versus-specialized divergence, competition authorities have specialist expertise in antitrust law and economics, whereas regulators tend to have greater technical market expertise and institutional resources relating to the sectors under their control. 14 Secondly, regulation is viewed as a prospective phenomenon, imposed ex ante to create a structural framework intended to prevent market failures from occurring, whereas (with the exception of merger control) competition law is retrospective in application, utilized ex post once competition problems arise or anti-competitive behaviour is identified. 15 Accordingly, competition law intervention tends to be piecemeal, whereas regulation provides a systemic solution. 16 Thirdly, regulation can pursue a broad range of social objectives, including express redistributive goals. In contrast, it is generally denied that competition law incorporates redistributive aims: instead, the primary objective is the pursuit of consumer welfare, which is cast in increasingly economic, efficiency-focused terms. Fourthly, competition law and regulation are viewed as imposing qualitatively and quantitatively different obligations. 17 Competition law typically proscribes certain broad categories of conduct involving the anticompetitive exercise of market power, but otherwise defers to the market mechanism to solve market failures. In contrast, regulation usually prescribes the desired outcome for the market, and, to that extent, oversteps the market mechanism entirely. 18

#### AGENCY APPLICATION---they’re procedural opportunists who’ll exploit that plan as a green-light for cross-industry enforcement---antitrust is unique and distinct from targeted regulation because of its plenary status over all commercial actors

Dr. Babette E.L. Boliek 11, Ph.D. in Economics from the University of California, Davis, J.D. from the Columbia University School of Law, Professor of Law at Pepperdine University, “FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries”, Boston College Law Review, 52 B.C. L. Rev. 1627, November 2011 Lexis

The analysis of the relevant jurisdiction is broken into two rival camps: (1) regulatory jurisdiction and (2) antitrust jurisdiction. The first camp, regulatory jurisdiction, the more complex of the two, is further divided into two subparts of particular concern (a) legacy-based regulation and (b) "satellite jurisdiction." The first subpart of regulatory jurisdiction, legacy-based regulation, refers to the FCC's congressionally designated core industry. The concern with legacy-based regulation is that the FCC will engage in *procedural opportunism*: that is, the agency may exploit the service classification process to extend its own regulatory authority.

The second subpart of regulatory jurisdiction analyzed is "satellite jurisdiction." 30 This is a new and unique grouping of various theories of regulatory jurisdiction. This novel grouping brings keen focus to those exertions of FCC authority that are the most legally and politically troubling--areas where the FCC may engage in substantive opportunism. These areas include certain uses of the FCC's Title I service classification, its spectrum licensing authority, and the FCC's authority to approve mergers in the telecommunications arena. 31

In contrast to regulatory jurisdiction, however, antitrust jurisdiction is not tethered to categorical classifications but, when triggered, is plenary over all private commercial actors. 32 The jurisdictional question for antitrust authorities is not in what legacy-based category Internet access properly exists, but whether an Internet access provider, in a properly defined market, is acting or is likely to act counter to competitive norms. Antitrust jurisdiction is largely conduct-based and not limited [\*1636] to technical distinctions between industries 33 but, rather, assessed against anticompetitive conduct within relevant markets.

#### PERCEPTION---industry expectation of possible future application crushes confidence---actual application isn’t necessary

Gabriel Caldas Montes 21, PhD Candidate in the Department of Economics at Fluminense Federal University and Fabiana da Silva Dr. Leite Nogueira, PhD in Economics from Universidade Federal Fluminense, Professor of Economics at the Universidade de Vassouras, “Effects of Economic Policy Uncertainty and Political Uncertainty on Business Confidence and Investment”, Journal of Economic Studies, April 2021, Emerald Insights

Bloom (2009) provides evidence that increases in political and economic uncertainties affect investment and employment. In line with Bloom (2009), other studies point to the adverse effects of unexpected increases in uncertainty on output, employment, productivity, consumption and investment (e.g., Colombo, 2013; Caggiano et al., 2014; Nodari, 2014; Alexopoulos and Cohen, 2015; Leduc and Liu, 2016). Using the Economic Policy Uncertainty index (EPU) proposed by Baker et al. (2016), Nodari (2014) and Stockhammar and €Osterholm (2016) show that macroeconomic variables such as GDP and employment are negatively affected by increased economic policy uncertainty.

Studies indicate that firms adopt more conservative policies during times of high economic policy uncertainty when the cost of borrowing increases (Pastor and Veronesi, 2012; Kelly et al., 2016; Jens, 2017; Colak et al., 2017; Al-Thaqeb and Algharabali, 2019). As surveyed by Al-Thaqeb and Algharabali (2019), during times of high economic policy uncertainty, firms spend less on capital (Gulen and Ion, 2015), launch fewer initial public offerings (IPOs) (Colak et al., 2017), engage in fewer merger and acquisition (M&A) activities (Bonaime et al., 2018), and hold more cash (Demir and Ersan, 2017; Im et al., 2017).

Regarding business and consumer confidence, few studies address the effects of political uncertainty and economic policy uncertainty. Donadelli (2015) proposes three measures of economic uncertainty based on Google searches. The results indicate that measures of economic policy uncertainty in the US affect consumer sentiment and other macroeconomic variables. Also, for the US economy, Mumtaz and Surico (2018) suggest shocks of uncertainty affect the real economy as well as consumer and business confidence – their results indicate that uncertainty about public debt has a large and persistent effect on consumer and business confidence, and has negative effects on output, consumption and investment. The work of de Mendonça andAlmeida (2019) finds that political uncertainty affects business confidence in Brazil.

In turn, there exist studies addressing the relationship between business confidence and investment (e.g., Khan and Upadhayaya, 2020), and whether business confidence acts as a transmission channel (e.g., Montes, 2013; Montes and Bastos, 2013).

Khan and Upadhayaya (2020) analyze whether business confidence matter for investment. They find that business confidence leads US business investment growth by one-quarter; and business confidence has predictive ability for investment growth. Montes (2013) finds evidence that entrepreneurs’ expectations act as a monetary policy transmission channel to investment decisions. Montes and Bastos (2013) reveal that entrepreneurs’ expectations and business confidence act as monetary and fiscal policies transmission channels to industrial production.

#### DEFENSIVE EXPENSE---businesses will divert resources to build up a legal war chest. The mere possibility of new suits is enough.

Elyse Dorsey 20, Adjunct Professor at Antonin Scalia Law School at George Mason University, JD from George Mason University, BA from Clemson University, et al., “Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement”, Pepperdine Law Review, 47 Pepp. L. Rev. 861, Lexis

B. More Politicized Antitrust

The populist movement's effort to shift the economic constraints on modern antitrust jurisprudence to more open-ended enforcement would expose antitrust law to increased politicization. 277 If enforcers can call upon a large list of political justifications for their enforcement decisions, they will be able to pursue cases that best fit within a political agenda--which will necessarily change over time as political administrations change--rather than being forced consistently to focus upon the limited practices that are most injurious to consumers. In proposing such a political regime, the populist antitrust model thus largely fails to offer a definable set of metrics to distinguish strong cases from weak ones. What would stand in its place is political discretion.

But our lived experience is that political discretion is a poor substitute for economically-grounded antitrust enforcement. 278 As discussed above, United States antitrust struggled to incorporate a wide variety of often conflicting values throughout the early and mid-twentieth century--and it was anything but successful. 279

Despite our nation's negative experiences with politicized antitrust, many modern populist antitrust calls sound remarkably similar to earlier ones. 280 One particularly persistent effort relates to condemning market concentration and firm size independently of any evidence of actual anticompetitive effects, which is primarily rooted in a reflexive application of the largely-discredited 281 [\*910] structure-conduct-performance (SCP) paradigm. 282

Such calls are in vogue today, but it is far from the first time. 283 In 1973, for instance, "Michigan Senator Philip Hart introduced Senate Bill 1167, the Industrial Reorganization Act [(IRA)], 284in order to address perceived problems arising from industrial concentration." 285 Among other things, 286 the bill would have required the creation of an "Industrial Reorganization Commission" to "study the structure, performance, and control" of seven "[p]riority" industries, 287 and, for each, to "develop a plan of reorganization . . . whether or not any corporation [was determined to possess monopoly power]." 288 "The bill was [grounded] in the belief that industry concentration led inexorably to monopoly power; that monopoly power, however obtained, posed an inexorable threat to freedom and prosperity; and that the antitrust laws . . . were insufficient to address the purported problems." 289That sentiment has "resurfaced today as the asserted justification for similar . . . antitrust" reform legislation. 290 But as discussed, the populist movement fundamentally fails to grapple with the reality that "constraining firm size in an effort to promote the political and economic power" of consumers (or of [\*911] favored businesses) "may actually have the opposite of its intended effect." 291

Another driving force behind the IRA--which we also see echoed today--was the allegation that economic power leads to political power. This is, perhaps, the most consistently leveled attack today: that economic concentration and the presence of large firms lead inexorably to the subversion of democracy. 292 But this purported causal relationship has already been rejected as having no basis in reality; and no new evidence suggests otherwise. 293 As Henry G. Manne explained in his senate testimony on the IRA in 1974:

There is, however, a "political" argument that should also be considered. It is that some corporations are so large that they are able to "control" the Government, presumably as it were, to "buy" the protection, the subsidy, the transportation system, the war, or whatever they want from the Government. . . .

Unfortunately, the energy utilized in making these assertions is about the only force behind them, and again it does not require complicated empirical studies to show the error, or perhaps the mendacity . . . behind these assertions.

There is simply no correlation between the concentration ratio in an industry, or the size of its firms, and the effectiveness of the industry in the halls of Government.

This scare argument about the political power of large corporations [\*912] is a sham.

We all know that the institutions that influence policies in Washington are those that can deliver the votes or utilize their finances to secure votes.

And these are the very practices that large corporations are relatively weakest in performing, especially as compared to unions, farmers, consumer organizations, environmentalists, and other large voting blocks.

There is even less substance to this political argument about corporate concentration than there is to the economic ones. 294

Many things other than dollars influence political decision-making. It can hardly be said that any large company succeeds in all its efforts to influence politics--just as it must be acknowledged that relatively small companies, labor unions, activist organizations, and even well-connected individuals often succeed in theirs. 295 Not only is the risk of political influence arising from concentrated industry overstated, the risks and costs of adopting politicized enforcement are, as discussed, significantly understated.

Indeed, we have observed the costs of politicized antitrust, and our experience is that they are both real and significant. When "imbue[d] . . . with an ill-defined set of vague [socio-]political objectives," antitrust becomes a sort of "meta-legislation." 296 "As a result, the return on influencing a handful of government appoint[ees] with authority over antitrust becomes huge . . . [thereby] increasing [significantly] . . . the incentive[s] to do so." 297

[\*913] As Baumol and Ordover observe, antitrust law is inherently prone to rentseeking, especially protectionism. 298 This rent-seeking, in turn, leads to numerous harms, including the misallocation of resources (both government and private), less efficient firms, and a diversion of firms' energies towards less productive ends, including both offensive (aimed at having enforcers investigate and prosecute competitors) and defensive (protecting oneself from such endeavors and actions) efforts. 299 It can also lead to regulatory capture, whereby enforcers may be "captured" by certain interests and fail to act in a way that aligns with their stated objectives. 300 Explicitly incorporating opaque socio-political goals into antitrust enforcement only exacerbates these harmful tendencies--and simultaneously decreases the ability to hold captured enforcers responsible, as they can justify nearly any outcome. 301 Indeed, evidence drawn from analyzing early enforcement actions, arising before antitrust fully embraced the consumer welfare standard--and when it was seeking to further a wider set of socio-political goals--indicates that such public interest factors failed to explain significant percentages of enforcement actions. 302

The economically grounded consumer welfare standard helped substantially to cabin such harms and align enforcement with consumer interests. 303 But reintroducing a political dimension to antitrust law would reestablish a regime inherently prone to capture by rivals seeking to ride populist waves of protectionism to economic dominance. And so politicized antitrust is, quite contrary to the populist movement's stated goals, a recipe for a corporate welfare regime.

Moreover, as discussed, when antitrust policy is unmoored from economic analysis, it exhibits fundamental and highly problematic contradictions. 304 Perhaps most critically, attempting to promote socio-political goals [\*914] through competition laws tends to undermine competition itself. 305 If competition law is unconstrained on its own terms--that is, if it is unmoored from a set of subject-specific limitations imposed by courts and legislatures--it threatens to morph into a large, sprawling, economy-wide set of regulations resembling a national industrial policy. 306 The merits or demerits of actually having an economy-wide industrial policy aside, it is unquestionably a perversion of competition law to facilitate the imposition of policies from law and regulation outside of competition policy in ways that, of necessity, will promote other polices at the very expense of competition.

#### CARVE OUTS ARE BAD---if targeted, that amplifies the link by making antitrust look unprincipled and driven by special interests

Fiona Scott Morton 19, Theodore Nierenberg Professor of Economics at the Yale School of Management, et al., “Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report”, George J. Stigler Center for the Study of the Economy and the State The University of Chicago Booth School of Business, 7/1/2019, https://www.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf

The risk, of course, is that new legislation will not be enacted by experts committed to sound, economically-focused antitrust. It will be designed by Congress in a politically charged environment subject to pressure from the very companies who stand to lose their market power if subject to increased antitrust oversight, or who benefit if their trading partners are subjected to excessive oversight.

There is more at stake than the risk of flawed legislation. Antitrust law has maintained legitimacy and widespread support for nearly 130 years in part because it applies to all forms of commercial activity and is not perceived as special interest legislation. In our view it is very important that antitrust law not have different rules aimed at different sectors—such as technology151 or agriculture152—that would differentiate industries and undermine political support for antitrust law in general. For this reason, the report outlines a number of useful digital platform interventions that can be undertaken by a sectoral regulator rather than falling to the task of antitrust enforcement.

#### Even targeted antitrust sends a broad signal of aggressive overregulation

Raymond J. Keating 21, Chief Economist for the Small Business & Entrepreneurship Council and Adjunct Professor in the MBA Program at the Townsend School of Business at Dowling College, “Antitrust Fictions (and Actions) Will Have Real, Negative Economic Consequences”, SBE Council, 6/18/2021, https://sbecouncil.org/2021/06/18/antitrust-fictions-and-actions-will-have-real-negative-economic-consequences/

It needs to be understood that while supposedly targeting so-called “Big Tech,” these intrusive regulations and substantial costs would fall on competitors as well, thereby actually discouraging competition in technology markets. For good measure, moving ahead with his kind of hyper-antitrust regulation of tech firms lays the groundwork for doing so in other industries, such as in retail, energy, health and medical sectors, and so on. This is what Senate anti-trust crusaders hope to accomplish.

The message is clear: Beware entrepreneurs, businesses and investors if you become too successful or if you cross certain political constituencies. The government stands ready to punish you via intrusive and costly regulation.

#### The plan’s abrupt expansion creates major uncertainty that disrupts business planning

Alden F. Abbott 21, Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University, “Competition Policy Challenges for a New U.S. Administration: Is The Past Prologue?”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [16] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)