# Northwestern---Round 6 vs. Emory PoRi

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Infrastructure DA

#### Infrastructure will pass but PC’s key

Matt Reese 9-14, Columnist for Ohio’s Country Journal, BA from Ohio State University, and Dale Minyo, General Manager for Ag Net Communications, LLC, Farm Broadcaster for the Ohio Ag Net, BA from Ohio State University, “Infrastructure Bill Moving Forward”, Ohio’s Country Journal, 9/14/2021, https://ocj.com/2021/09/infrastructure-bill-moving-forward/

From the local bridge just around the corner to the locks and dams on the nation’s river system, agricultural viability depends heavily on infrastructure. After months of across-the-aisle negotiations, the Senate voted to pass the bipartisan infrastructure package (H.R. 3684) in August.

“This is a very notable move forward. It passed through the Senate with a very bi-partisan vote of 69-30, 19 Republican Senators voted for the legislation. Early on this year, the topic of infrastructure was really expansive. There were a lot of things being discussed that really don’t have a lot to do with what most Americans regard as infrastructure. It has tightened up and we think that is a good thing,” said Mike Steenhoek, executive director of the Soy Transportation Coalition. “We appreciate there are a number of categories within this legislation that, if they come to fruition, would be beneficial to agriculture. There is funding directed at roads and bridges, many in rural areas. There is some funding for our inland waterways and ports. For an industry like soybeans, we rely on robust exports and we have got to have the multi-modal transportation system that can connect our supply with that demand. We think there are some very favorable things in this legislation.”

With Senate passage, attention now shifts to the House on this legislation.

“Very little proceeds on time in Washington, D.C., but it is moving forward. The big question is: does the House adhere to Speaker Pelosi’s stated desire that this bill only gets passed if that $3.5 trillion reconciliation package which involves much more social spending also gets passed? There is still a lot of uncertainty related to this. Clearly there are Democrats and Republicans who support this legislation and it is clearly a priority of the president. It is a big bill. Hopefully it won’t get polluted by some of these more controversial topics.”

If the infrastructure package does get passed, it will hopefully build on existing progress.

“This bill would amplify what is already happening. We have a 5-year Highway Bill that was passed in 2015 and is scheduled to be re-authorized this year,” Steenhoek said. “Last year we had the Water Resources Development Act that paved the way for more funding for the inland waterway system. This is not our only shot for moving the needle on infrastructure. Things are getting done. You could argue that more needs to be done and that is what this bill aspires to do.”

Along with the big picture infrastructure items, there are also some smaller provisions in the legislation that could benefit agriculture, including support for biobased products.

“There is a provision that calls attention to biobased products that have infrastructure implications,” Steenhoek said.“Soy-based asphalt sealants and soy-based concrete sealants that are made largely from soil oil are a sustainable way to elongate the life of roads and bridges and provide another market opportunity for soybeans.”

There is plenty to watch as this continues to move forward.

“This is not a perfect piece of legislation, but we do think when you look at the links in the supply chain that are important to farmers, there are certain investment levels and actions that will improve the supply chain. Overall we look at this legislation favorably,” Steenhoek said. “I think there is a good chance that this does get passed, but as the days progress toward an election year, then the probability of anything getting passed goes down.”

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

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

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

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

#### Big infrastructure’s key to climate mitigation and adaptation---extinction

Reynard Loki 9-8, Senior Writing Fellow and Chief Correspondent for Earth | Food | Life, a Project of the Independent Media Institute, Former Environment, Food and Animal Rights Editor at AlterNet and Reporter for Justmeans/3BL Media, “Extreme Weather Devastating US Raises Calls to Pass Biden’s Infrastructure Bill”, Nation of Change, 9/8/2021, https://www.nationofchange.org/2021/09/08/extreme-weather-devastating-us-raises-calls-to-pass-bidens-infrastructure-bill/

In their latest climate report published in August, the United Nations’ Intergovernmental Panel on Climate Change (IPCC) found that human activity, particularly the combustion of fossil fuels, is the likely driver behind the increase in both the frequency and intensity of hurricanes over the past four decades. “The alarm bells are deafening, and the evidence is irrefutable: greenhouse gas emissions from fossil fuel burning and deforestation are choking our planet and putting billions of people at immediate risk,” UN Secretary-General António Guterres said in a statement on the report. “Global heating is affecting every region on Earth, with many of the changes becoming irreversible.” Linda Mearns, a senior climate scientist at the U.S. National Center for Atmospheric Research and one of the report’s co-authors, meanwhile, offered a stern warning: “It’s just guaranteed that it’s going to get worse,” she said, adding that there is “[n]owhere to run, nowhere to hide.”

Adding to the concern is the fact that the end of hurricane season is still far from over, as meteorologists at the U.S. National Oceanic and Atmospheric Administration (NOAA) monitor Hurricane Larry’s path across the Atlantic Ocean. Moreover, Hurricane Ida is just one of the several extreme weather events that have caused death and destruction across the nation. Massive wildfires, fueled by extreme heat and dry conditions, are ripping through California, where more than 1 million acres have been burned in 2021. These are unprecedented times: Only twice in the history of California have wildfires raged from one side of the Sierra Nevada mountain range to the other, and both of those wildfires took place in August.

The National Interagency Fire Center has reported that more than 5 million acres have been charred this year nationwide as of September 7. Nearly half of the land area of the lower 48 states is currently experiencing drought, with the NOAA warning in August that these extremely dry conditions—with precipitation at below-average levels and temperatures at above-average levels—are likely to “continue at least into late fall,” according to the New York Times. As a whole, the United States experienced its hottest June in the 127 years since temperature records have been maintained, while July was Earth’s hottest month on record.

“Climate scientists were predicting exactly these kinds of things, that there would be an enhanced threat of these types of extreme events brought on by increased warming,” said Jonathan Martin, an atmospheric scientist at the University of Wisconsin-Madison. “It’s very distressing. These are not encouraging signs for our immediate future.”

The increase in both the frequency and intensity of extreme weather events like hurricanes, wildfires, droughts and heat waves is providing a fitting backdrop for amplified calls to pass Biden’s infrastructure bill, which would help mitigate the impacts of the climate crisis by repairing 20,000 miles of aging roads and 10 of the country’s most economically crucial bridges to make them more resilient to extreme weather. The bill also seeks to accelerate the nation’s shift toward clean energy to achieve the Paris climate agreement’s goal of reducing global greenhouse gas emissions in order to limit the planet’s surface temperature increase in this century to 2 degrees Celsius above preindustrial levels. (The agreement’s hope to limit the increase to 1.5 degrees Celsius now seems unlikely, given the findings of the new IPCC climate report.) The bill seeks to utilize a combination of federal spending and tax credits to improve transportation, broadband internet, housing and the electric grid, as well as financial support to advance the nation’s manufacturing capabilities, specifically those industries that the administration believes will help the United States compete economically with China.

The White House issued a fact sheet describing the president’s infrastructure plan, saying that it would “create a generation of good-paying union jobs and economic growth, and position the United States to win the 21st century, including on many of the key technologies needed to combat the climate crisis.” The bill would be the first to earmark spending specifically for climate resilience, including $6.8 billion for the Army Corps of Engineers to address federal flood control and ecosystem restoration projects, with an eye toward environmental justice, and calling for 40 percent of all climate-related investments to happen in disadvantaged communities.

“Mr. Biden’s pledge to tackle climate change is embedded throughout the plan,” reports Jim Tankersley for the New York Times. “Roads, bridges and airports would be made more resilient to the effects of more extreme storms, floods and fires wrought by a warming planet. Spending on research and development could help spur breakthroughs in cutting-edge clean technology, while plans to retrofit and weatherize millions of buildings would make them more energy efficient.”

In August, Schumer said that the bipartisan infrastructure bill and Democrats’ reconciliation spending package would cut the United States’ carbon dioxide emission levels by 45 percent by 2030 compared to 2005 levels. He added, “When you add administrative actions being planned by the Biden administrative and many states—like New York, California, and Hawaii—we will hit our 50 percent target by 2030.” That is the goal that Biden set for the nation after he rejoined the Paris climate accord.

“In order to avoid the worst long-term consequences of the climate crisis, we need to put the U.S. on the path to 100 percent clean energy—otherwise, this summer may just be a preview of the disasters to come,” Brooke Still, senior director of digital strategy at the nonprofit League of Conservation Voters (LCV), told Earth | Food | Life recently in an email. “We know what a transition to clean energy will take: We need to stop using oil and coal and go big on clean energy. It’s clear the public agrees—71 percent of the public supports making the investments in climate, justice, and jobs that President Biden proposed. But climate deniers, fossil fuel interests, and obstructionist members of Congress are slowing things to a crawl.” LCV has launched a public petition urging Congress to “invest in clean energy and… in people and communities who too often have been left behind.”

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T-Increase

#### ‘Increasing’ means to make greater and requires pre-existence

Jeremiah Buckley 6, Attorney, Amicus Curiae Brief, Safeco Ins. Co. of America et al v. Charles Burr et al, <http://supreme.lp.findlaw.com/supreme_court/briefs/06-84/06-84.mer.ami.mica.pdf>

First, the court said that the ordinary meaning of the word “increase” is “to make something greater,” which it believed should not “be limited to cases in which a company raises the rate that an individual has previously been charged.” 435 F.3d at 1091. Yet the definition offered by the Ninth Circuit compels the opposite conclusion. Because “increase” means “to make something greater,” there must necessarily have been an existing premium, to which Edo’s actual premium may be compared, to determine whether an “increase” occurred. Congress could have provided that “ad-verse action” in the insurance context means charging an amount greater than the optimal premium, but instead chose to define adverse action in terms of an “increase.” That def-initional choice must be respected, not ignored. See Colautti v. Franklin, 439 U.S. 379, 392-93 n.10 (1979) (“[a] defin-ition which declares what a term ‘means’ . . . excludes any meaning that is not stated”). Next, the Ninth Circuit reasoned that because the Insurance Prong includes the words “existing or applied for,” Congress intended that an “increase in any charge” for insurance must “apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy.” 435 F.3d at 1091. This interpretation reads the words “exist-ing or applied for” in isolation. Other types of adverse action described in the Insurance Prong apply only to situations where a consumer had an existing policy of insurance, such as a “cancellation,” “reduction,” or “change” in insurance. Each of these forms of adverse action presupposes an already-existing policy, and under usual canons of statutory construction the term “increase” also should be construed to apply to increases of an already-existing policy. See Hibbs v. Winn, 542 U.S. 88, 101 (2004) (“a phrase gathers meaning from the words around it”) (citation omitted).

#### Plan creates new types of prohibition---voting issue for limits---they open the floodgates to any single-article regulation-of-the-week aff---existing activity sets a finite and predictable limit for research and preparation.

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Memo CP

#### The United States federal government should issue a policy memorandum that private sector business practices that violate an antitrust workers welfare standard are unlawful.

#### The CP competes because it’s not legally binding BUT solves by shifting antitrust policy

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III. ENFORCEMENT MATTERS

A. Agency Enforcement and Policy

1. Guidance

Where there are uncertainties in the Agencies' enforcement policies or priorities, it is often essential for the Agencies to provide guidance. The formal guidance can take the form of formal guidance documents (such as the Horizontal Merger Guidelines of 2010) or FTC opinions. Informal guidance can take the form of agency reports, speeches by key agency personnel, amicus briefs, decisions to litigate, or closing statements. Agency guidance is important and beneficial for multiple reasons, such as providing clarity for businesses, moving competition policy in the right direction, and ensuring a U.S. perspective on the international arena. Agency guidance is also particularly useful to communicate a shift in enforcement policy or practice.3

[FOOTNOTE] 3 The recent guidance issued by the Division and the FTC communicating the decision to treat wage-fixing and no-poaching agreements as criminal violations going forward provides an excellent example of this. See DEP’T OF JUSTICE, ANTITRUST DIV., FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), available at www.ftc.gov/system/files/documents/ public\_statements/992623/ftc-doj\_hr\_guidance\_final\_10-20-16.pdf. [END FOOTNOTE]

Furthermore, uncertainty as to the boundaries of antitrust laws may chill potentially procompetitive conduct or enable potentially anticompetitive behavior to continue unchecked. Businesses may be less willing to engage in novel business activities that could benefit consumers. Moreover, agency guidance and enforcement not only define the boundaries of how the Agencies view and enforce the law, but may also impact how courts rule in litigation.

Guidance also ensures a place for the U.S. perspective on the international stage. Because so many foreign antitrust authorities look to the Agencies for leadership and study U.S. enforcement decisions and cases, clearly articulated guidance helps achieve uniformity across jurisdictions. Moreover, an international presence and influence as to antitrust policy is particularly critical in an era in which some foreign competition agencies use the pretense of antitrust enforcement as a cover to mask decisions that are actually based on industrial policy or protectionism.

Speeches, while not binding on the Agencies or as long-lasting as more formal agency documents, can give advance notice of enforcement priorities and the views of agency leadership regarding how best to analyze certain forms of conduct. For instance, in her first speech as Acting Assistant Attorney General, Renata Hesse offered important insights into the use of bargaining models in analyzing vertical mergers and the Division's skepticism of procompetitive claims in horizontal mergers. Indeed, for changes in agency thinking, an agency speech or other non-enforcement guidance can be the fairer approach, at least in the first instance, than initially embarking on litigation.

Business review letters from the Division and advisory opinions from the FTC serve as another avenue for providing guidance on novel conduct. More important, by setting forth the respective agency's reasoning for how it views proposed conduct, these documents in effect make a policy statement as to what characteristics of the conduct are considered to be beneficial or harmful for consumers.

#### It avoids politics.

Dr. Nicholas R. Parrillo 19, Professor of Law and Professor of History at Yale Law School, JD from Yale Law School, PhD in American Studies from Yale University, AB in History and Literature from Harvard University, “Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study”, Administrative Law Review, 71 ADMIN. L. REV. 57, Winter 2019, Lexis

II. BURDEN OF PUBLIC COMMENT ON GUIDANCE LESS THAN LEGISLATIVE RULEMAKING

If the agency is going to solicit public comment on guidance, why not just go the whole nine yards and proceed by legislative rulemaking, which unlike guidance is genuine binding law? The reason is that the actual taking of public comment is only a fraction of the burden that legislative rulemaking imposes, and even if one focuses on the taking of comment alone, it is often less burdensome for guidance than for rulemaking. Thus, for most agencies at least, "notice-and-comment guidance" is considerably faster and less expensive than notice-and-comment rulemaking.

In discussing why legislative rulemaking takes the amount of time and resources that it does, interviewees prominently cited five aspects of the process, all of which are either absent or less costly when the process is voluntary notice-and-comment for guidance. I discuss these in roughly descending order of prominence.

A. Mandates for Cost--Benefit Analysis

Before significant legislative rules can be proposed or finalized by executive agencies, they are reviewed by the President's Office of Management and Budget to ensure, inter alia, that the agency engaged in appropriate cost--benefit analysis. OMB also reviews executive agencies' "significant" guidance documents. The relevant Executive Order's definition of "significant" is, in many ways, open-ended. According to an official at the [\*80] EPA's Office of General Counsel, the decision on which guidance documents to submit to OMB for review is made at the senior management level of the agency, by political appointees, and the handling of the question changes depending on who is in the relevant agency-manager and OMB positions.

Generally, interviewees thought OMB review was less likely for guidance than for legislative rules and, when it occurred, less time-consuming. A former senior official at the EPA's Air Program office said he thought OMB review of guidance took less time than that of legislative rules. Lynn Thorp of Clean Water Action observed that OMB scrutiny of the EPA guidance was less than that for legislative rules. A former senior FDA official noted that OMB was not much engaged with the agency's day-to-day scientific guidance, while a former senior FDA career official said many FDA guidance documents did not go through OMB at all. William Schultz, former HHS General Counsel, in discussing differences between the notice-and-comment process for rulemaking and the notice-and-comment process for guidance, cited OMB delays, which he said can be severe. Daniel Troy, general counsel of GlaxoSmithKline and former chief counsel of the FDA, said one reason for FDA personnel's preference for guidance over legislative rulemaking was that it avoided OMB review. At [\*81] USDA NOP, which does notice-and-comment on "most" of its guidance, the head of the program cited OMB review as one of a few factors that makes legislative rulemaking generally slower than guidance. Richardson, the former chair of the NOSB, said legislative rulemaking was greatly delayed by agency economic analysis in contemplation of OMB review, which was not done for guidance; and whereas OMB was a focal point for private lobbying regarding legislative rules, causing further delay, this was not true of guidance. The result was that legislative rulemaking took "much longer" than guidance even when the latter went through public comment. At the Department of Transportation (DOT), said the former general counsel Kathryn Thomson, guidance, even with public comment, was "much faster" than legislative rulemaking, mainly because it was not necessary to do cost--benefit analysis in contemplation of OMB review; OMB would accept a fast process for guidance more than it would for a legislative rule. At the DOE appliance standards program, recalled a former Department division director, OMB could delay or accelerate legislative rulemaking depending on the administration's calendar and politics, but guidance was not subjected to OMB review.

In banking regulation, where most of the agencies are independent and therefore not subject to OMB review, economic analysis can still cause legislative rulemaking to take longer than guidance, as such analysis may be required on some matters by statute or agency practice. An interviewee who held senior posts at CFPB and other federal agencies said that at the independent banking agencies (i.e., those not funded with tax revenues and not subject to OMB review), where cost--benefit analysis may be required by statute, that analysis would be done for legislative rulemaking but not for guidance, which helped explain why the former took longer. A former senior Federal Reserve official noted that, while the Federal Reserve's legislative-rulemaking-specific cost--benefit analysis was "sometimes a bit skippy," [\*82] the CFPB did voluminous cost--benefit analysis because of its fear of D.C. Circuit case law striking down SEC action for violating cost--benefit requirements.

B. Building a Record and Responding to Comments in Anticipation of Judicial Review

The advent of "hard look" judicial review in the 1970s, ratified by the Supreme Court in Motor Vehicles Manufactures Ass'n v. State Farm, pushed agencies to develop voluminous administrative records to support their legislative rules and to devote countless hours to writing long preambles responding minutely to public comments. An EPA official--in comparing legislative rulemaking (which he said took an "excruciatingly" long time) with guidance (on which he said the agency was "much more nimble")--said that a "huge" difference between the two was the time spent developing the administrative record and replying to comments, both of which he placed under the heading of "judicial review accountability," that is, the agency's "fear" of investing in a legislative rule only to have it struck down in court. EPA lawyers, he explained, were "vigilant" about ensuring that the administrative record was "all there," including the development of supporting documents, with all data gathered and analyzed, which took a "ton of time." Likewise, lawyers were vigilant in making sure the agency accounted for all comments. By contrast, "very little" of this was required for EPA guidance. There might be some accompanying materials, but it was "very rare" to do a full supporting foundation, in part because much of the necessary information would already have been gathered for a prior relevant legislative rulemaking, or would have bubbled up from the implementation process for that prior legislative rule. And even if the EPA took public comment on a guidance document and responded (which it sometimes did), "we're coasting along the surface" compared to what is done for a legislative rulemaking preamble. A former senior official at the EPA Air Program Office concurred that, for guidance, supporting material did not need to be gathered because it had already been assembled in prior legislative rulemakings, and public comments did not need to be addressed [\*83] at the same level of detail as for legislative rulemaking.

There is a similar dynamic at the FDA, which, per the GGPs, takes public comment on a very large proportion of its guidance documents. A former senior FDA official explained the difference. Legislative rulemaking required support for everything in the record and a time-consuming response to comments, and the costs of this process had been part of the agency's drive since the 1990s to rely more upon guidance, for which the process, even with public comment, was much more "abbreviated." Whereas legislative rules were "law" and had to be supported, the agency in issuing guidance felt freer not to develop a voluminous record, and the comments on guidance did not require the kind of response that was required on legislative rules. The fact that the FDA was sued much more on legislative rules than on guidance, he said, was surely part of this. Similarly, a congressional staffer observed that, although the FDA took public comment on guidance, it generally did not give any response to comments, meaning there was not the same kind of " State Farm obligation" as for legislative rulemaking, and so the process did not ensure the same careful consideration of stakeholder views. A former senior FDA official thought the lack of a requirement to respond to comments was a crucial and salutary feature of the FDA's process for guidance: if you required a preamble, you might as well do legislative rulemaking, and the whole thing would become "unworkable." A former senior FDA career official, discussing the difference between legislative rulemaking and guidance, said responding to all substantive comments in a rulemaking in writing for publication added "significantly" to the time spent. Overall, said an FDA Office of Chief Counsel official, whereas legislative rulemaking was criticized for being "ossified," it was possible to issue guidance "pretty quickly."

[\*84] Elsewhere, too, the research and analytic demands are less for guidance than for legislative rulemaking. At OSHA, said the former deputy solicitor of the Department of Labor (DOL), guidance was faster than legislative rulemaking in part because of judicial decisions requiring that the agency in each rulemaking make a showing of significant risk and technological and economic feasibility. By contrast, headquarters might have a regional office draft a guidance document, noted John Newquist, a former assistant administrator of OSHA's Region V (headquartered in Chicago).

C. Taking Comments in Itself

The actual publication of the draft rule/guidance and the taking of comments on it (as distinct from the work of responding to those comments) takes time and effort in itself, but this time and effort did not figure nearly as prominently in the interviews as did cost--benefit analysis, record-building, or responding to comments. And in any event, the burden of taking comment per se tends to be less for guidance documents than for legislative rules. At the banking agencies, said an interviewee who held senior posts at the CFPB and other federal agencies, the comment period tends to be shorter for guidance, and the comments fewer. The comment period was also said to be shorter for guidance at the USDA NOP, and in EPA clean water regulation. Comments were said to be less voluminous on guidance compared to legislative rules at the FDA.

D. Drafting Challenges

Legislative rules are typically harder to draft than guidance, which adds further to the time and resources they demand. Because legislative rules are mandatory, said an EPA official, you "sweat each detail," seeking to account for all factors and contingencies, since once the rule is promulgated, "we can't go back to it for 15 years." Guidance, he said, does not involve the same sweating of details. As to the FDA, a former senior career official [\*85] there said that, in writing guidance, you need not be as careful on wording as on a legislative rule because the language is not binding and is described as reflecting the current thinking of the agency; you are therefore more free to put in details, use narrative form, Q&A form, and plain language, since the document is not "set in stone." He recalled one subject on which he and his colleagues initially sat down to write a legislative rule and found it impossible to start with "codified language," given the complexity of the matter; he therefore suggested handling the problem by writing guidance, as a "dry run," before drawing up binding requirements. In banking regulation, an interviewee who held senior posts at the CFPB and other federal agencies said that guidance was "easier" to write and could be written "faster" than a legislative rule because "you don't need to nail everything down," as the aim is to warn regulated parties to pay attention to certain risks, not prescribe mandatory requirements.

E. Dealing with Mobilized Stakeholders

The length, officially-binding status, and public salience of legislative rulemaking make it a focal point for the mobilization of interest groups to pressure the agency and enlist political allies in Congress, the White House, and elsewhere. This, in turn, makes legislative rulemaking expensive to the agency in terms of political capital. An official at a public interest organization working on immigrants' rights said that, in his experience seeking favorable policies from DHS, he had found that legislative rulemaking tended to "exhaust all [the agency's] political capital," more than issuing guidance did. Legislative rulemaking allowed time for the opponents of an initiative to marshal their forces. If an agency and its stakeholder allies sought to proceed by legislative rulemaking, he said, they were "declaring a grand war" and had to be prepared for greater opposition. A former DOE division director, explaining why there was "no comparison" between the processes for legislative rulemaking and guidance, emphasized that the "politics" of the former process "slowed it down," for whenever the proceeding seemed to veer in a direction that one interest group did not like, [\*86] that group would marshal evidence and political support to stop the process, enlisting friendly members of Congress or the White House. With respect to the USDA NOP, the president of an organic certifier, in discussing factors that slowed legislative rulemaking, immediately cited the agency's internal process for economic analysis (not applicable to guidance), which he said could become a "pawn" in political clashes between different parts of the industry, in which members of Congress might be involved.

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States CP

#### The 50 state governments and relevant sub-federal territories should prohibit private sector business practices that violate an antitrust workers welfare standard.

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

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

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

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

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

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

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

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

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

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

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

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#### The plan creates an abrupt shift and doctrinal instability in antitrust that spills over throughout the economy---it’s impossible to distinguish specific industries because, unlike regulation, it’s enforced in generalist common law

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable shifts ruin biz con AND overall growth

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

#### 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.

### 1NC

Advantage CP

#### The United States federal government should:

#### ---refrain from decreasing international engagements consistent with internationalism;

#### ---discretely fund that with fiscal responsibility reforms.

#### ---initiate a wealth tax of %5 on wealth in excess of $2.5 million.

#### The federal judiciary should reduce judicial activism in antitrust consistent with a theoretical antitrust worker welfare standard.

### 1NC

Litigation DA

#### Antitrust litigation is uniquely complex and resource-intensive---a spike trades-off with judicial functioning in other areas

Daniel R. Warren 15, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Efficient court review underpins patent-led innovation---that stops nuclear war and a range of existential threats

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

## Inequality ADV

### Inequality---1NC

#### The status quo solves---anti-trust is dynamic and applied consistently---changes destroy balance

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

To understand why the current antitrust statutes should be left as they are, it may help to revisit what the antitrust laws do and how they do it. Experience has taught us that market competition is the best way to secure low prices, high-quality goods and services, and product variety. Not only do competitive markets benefit consumers, they also ensure that society’s productive resources are put to their highest and best ends.2 The goal of antitrust, then, is to promote consumer and societal welfare by ensuring that markets remain competitive.3

To secure that goal, antitrust polices the situations in which competition breaks down, chiefly monopoly (or monopsony), where there is a single seller (or buyer), and collusion, where nominal competitors agree not to compete. The two primary provisions of the Sherman Act correspond to these two paradigmatic defects in competition: Section 1 aims at collusion, declaring “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... to be illegal”; Section 2 seeks to prevent firms from attaining monopoly power, making it illegal to “monopolize, or attempt to monopolize, or combine or conspire ... to monopolize” any market. Section 7 of the Clayton Act bolsters these provisions by forbidding business combinations (mergers and asset acquisitions) that are likely to cause a substantial lessening of competition in a market.

Given the sparseness of the statutory text (not to mention the fact that a literal reading of some provisions is nonsensical),4 determining the scope of antitrust’s prohibitions has largely been left to the judiciary. Indeed, most commentators view the antitrust statutes as an implicit delegation of authority to the federal courts to craft a common law of competition, one that evolves according to our ever-expanding learning about the effects of different business practices.

The courts have responded by positing (mainly) standards—not rules—for determining the legality of challenged business practices.5 They have interpreted Section 1 of the Sherman Act to forbid agreements that unreasonably restrain trade and Section 2 to condemn unreasonably exclusionary unilateral conduct by firms possessing market power.6 In both cases, reasonableness is determined by assessing the actual or likely effect of the challenged behavior on quality-adjusted market output. For a few business behaviors (e.g., naked price-fixing among competitors), experience has shown that the conduct is always or almost always output-reducing, so such practices are deemed per se unreasonable. Such ex ante rules, though, are the exception in antitrust; for the most part, the law consists of ex post standards that require case-by-case assessment. Courts have posited different standards for different types of business behavior, calibrating them (by adjusting the elements of liability, burdens of proof, available defenses, etc.) to reflect judicial experience and economic learning.

In so doing, the courts have been rightly concerned with the costs of the standards they set. One set of relevant costs consists of the welfare losses that result when a standard makes a mistake on liability. The behaviors antitrust polices—agreements that restrain trade, single-firm acts that make life hard for rivals, business combinations—can sometimes enhance market output and sometimes reduce it.7 If a legal standard mistakenly allows conduct that is, on net, anticompetitive, consumers will face higher prices and/or reduced quality, and a deadweight loss will occur. But if the standard wrongly forbids conduct that is, on balance, procompetitive, market output will be lower than it otherwise would be and, again, consumers will suffer. Both false convictions (Type I errors) and false acquittals (Type II errors) generate losses.

In addition to these so-called “error costs,” regulating competitive mixed bags entails significant costs of simply deciding whether contemplated or actual conduct is forbidden or permitted. Such “decision costs” must be borne by business planners (who are attempting to avoid liability), by litigating parties (who are trying to prove their case), and by adjudicators (who must decide whether the law has been broken).

Type I error costs, Type II error costs, and decision costs are intertwined. If courts try to reduce the risk of false conviction (Type I error) by making it harder for a plaintiff to establish liability or easier for a defendant to make out a defense, they will increase the risk of false acquittal (Type II error). If they ease a plaintiff’s burden or cut back on available defenses to reduce false acquittals, they will tend to enhance the social losses from false convictions. And if they make the rule more nuanced in an effort to condemn the bad without chilling the good, thereby reducing error costs overall, they enhance decision costs. As in a game of whack-a-mole, driving down costs in one area will cause them to rise elsewhere.

In light of the inevitable and intertwined costs that will result from any effort to police market power-creating conduct, antitrust standards should be crafted so as to minimize the sum of error and decision costs. The institutions charged with crafting antitrust policies—under the status quo, the courts—should not strive to prevent every anticompetitive act, to allow every procompetitive one, or to keep the rules as simple as possible. In keeping with Voltaire’s prudent maxim, “the perfect is the enemy of the good,” they should eschew perfection along any single dimension in favor of overall optimization. Such an approach ensures that antitrust accomplishes as much good as possible.

As I have elsewhere documented, this prudent approach has largely been embraced by the U.S. Supreme Court in recent years.8 Time and again, the Court has examined the economic learning on different business practices and crafted “structured” rules of reason aimed at separating the procompetitive wheat from the anticompetitive chaff, while keeping decision costs in check. For some practices (e.g., tying) the legal rules have not caught up with economic understanding, but the system as a whole is sound, and one would certainly expect the doctrine to evolve in a salutary direction. With respect to mergers and other business combinations, the judicial precedents are less sound, largely because few merger decisions are appealed to allow for an updating of controlling precedents in light of current economic understanding. In the merger context, though, the federal enforcement agencies (the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice) have taken the lead in updating the standards so as to minimize the sum of error and decision costs; the agencies’ enforcement guidelines, crafted with an eye toward optimizing antitrust interventions and regularly updated to reflect new economic learning, have been extremely influential among the lower courts and have largely remedied the deficiencies in controlling precedents.

To summarize this section, any effort to regulate potentially market power-creating conduct (collusion, exclusionary conduct, business combinations) is sure to create some losses in terms of errors (wrongful acquittals of harmful behavior and wrongful convictions of beneficial conduct) and administrative costs. The approach currently prevailing under the federal antitrust laws—an output-focused, standards-based, common law approach under which courts craft policies in light of evolving understandings of economics and with an eye toward minimizing the sum of error and decision costs—is generally working well.

#### No empirical data to support a linkage between antitrust and inequality

Elyse Dorsey et al. 19, adjunct professor at Antonin Scalia Law School at George Mason University. She previously served as Counsel to the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Her work at the Antitrust Division encompassed a wide array of legal and policy matters, primarily relating to IP and technology issues, the Division’s appellate and amicus brief programs, and its international and competition policy efforts, “Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement”, <https://regproject.org/wp-content/uploads/RTP-Antitrust-and-Consumer-Protection-Populist-Antitrust.pdf>, April 15th, 2019

Second, consider the empirical evidence supporting a causal link between antitrust enforcement and inequality. This proffered link remains, thus far, largely theoretical and undeveloped empirically. Populist papers advocating for increased antitrust as a salve for increasing inequality do not offer empirical support for their preferred course of treatment. But other authors have begun to explore empirically the proposed tie between antitrust enforcement and inequality. Wright et al., for instance, present time series regressions relating measures of inequality to antitrust enforcement measures. While the authors acknowledge the standard reasons that these analyses cannot isolate, with confidence, causation, their work provides a useful foray into the empirical basis for the notion that antitrust enforcement and inequality are causally linked. The authors examine data from DOJ investigations between 1984 and 2016, focusing first on merger investigations, given the populist emphasis on merger activity, and then broadly examine all DOJ investigations for a more general enforcement measure. Their results do not offer “much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality.” Populist claims that increased antitrust enforcement is necessary to combat a severe trend of increasing inequality thus appear to be overstated. While inequality appears to be increasing, the rate is likely more modest than the populist movement implies. And there is, as of yet, no empirical support for the underlying proposition that increasing antitrust enforcement levels would slow, stop, or reverse this trend.

#### Inequality is shrinking---they use bad data

Phil Gramm & John Early 21, former Chairman of the Senate Banking Committee, Visiting Scholar at the American Enterprise Institute; former Assistant Commissioner at the Bureau of Labor Statistics, “Incredible Shrinking Income Inequality,” 03-23-2021, https://www.wsj.com/articles/incredible-shrinking-income-inequality-11616517284

The refrain is all too familiar: Widening income inequality is a fatal flaw in capitalism and an “existential” threat to democracy. From 1967 to 2017, income inequality in the U.S. spiked 21.4%, and everyone from U.S. senators to the pope says it’s an urgent problem. Yet the data upon which claims about income inequality are based are profoundly flawed.

We have shown on these pages that Census Bureau income data fail to count two-thirds of all government transfer payments—including Medicare, Medicaid, food stamps and some 100 other government transfer payments—as income to the recipients. Furthermore, census data fail to count taxes paid as income lost to the taxpayer. When official government data are used to correct these deficiencies—when income is defined the way people actually define it—“income inequality” is reduced dramatically.

We can now show that if you count all government transfers (minus administrative costs) as income to the recipient household, reduce household income by taxes paid, and correct for two major discontinuities in the time-series data on income inequality that were caused solely by changes in Census Bureau data-collection methods, the claim that income inequality is growing on a secular basis collapses. Not only is income inequality in America not growing, it is lower today than it was 50 years ago.

While the disparity in earned income has become more pronounced in the past 50 years, the actual inflation-adjusted income received by the bottom quintile, counting the value of all transfer payments received net of taxes paid, has risen by 300%. The top quintile has seen its after-tax income rise by only 213%. As government transfer payments to low-income households exploded, their labor-force participation collapsed and the percentage of income in the bottom quintile coming from government payments rose above 90%.

In 2017, federal, state and local governments redistributed $2.8 trillion, or 22% of the nation’s earned household income. More than two-thirds of those transfer payments went to households in the bottom two income quintiles. Remarkably the Census Bureau chooses to count only $900 billion of that $2.8 trillion as income for the recipients. Excluded from the measurement of household income is some $1.9 trillion of government transfers. These include the earned-income tax credit, whose beneficiaries get a check from the Treasury; food stamps, which let beneficiaries buy food with government issued debit cards; and numerous other programs in which government pays for the benefits directly.

Americans pay $4.4 trillion a year in federal, state and local taxes. Households in the top two earned-income quintiles pay 82% of the tax bill, although they never see most of this money because it is deducted directly from their paychecks. When measuring income inequality, however, the Census Bureau doesn’t reduce household income by the amount paid in taxes. Had it done so and counted all transfer payments as income, inequality from 1967 to 2017 would have increased by only 2.3% instead of the reported 21.4%. That’s a difference of almost 90%—a rather large error.

Twice over the past 50 years, the Census Bureau has significantly changed how it collects and records income statistics. In 1993 and 2013 the Census Bureau changed its methods in an effort to collect better information from high-income households. These changes created two major discontinuities and distorted the time-series so that the change in measured income inequality in those years was as much as 15 times the average annual change found for the entire 50-year period. At the time, the Census Bureau explained in detail what it had done. It also explained the limitations the changes imposed on the use of its income-inequality measure to look at changes over extended periods. In subsequent use of the data by the Census Bureau and others, however, those warnings have been neglected.

The simple solution would have been to isolate the distortions caused solely by the changes in data-collection techniques and adjusted the previous years’ measures to reflect the effect of the changes. We made these adjustments and they are shown in the nearby figure. The blue line is the actual reported Census Bureau measurement of income inequality. The yellow line eliminates the effects of the 1993 and 2013 discontinuities caused solely by changes in measurement technique. The black line shows income inequality when the value of all transfer payments received is counted as income, income is reduced by taxes paid, and the two technical corrections are made.

Lo and behold—income inequality is lower than it was 50 years ago.

The raging debate over income inequality in America calls to mind the old Will Rogers adage: “It ain’t what you don’t know that gets you into trouble. It is what you do know that ain’t so.” We are debating the alleged injustice of a supposedly growing social problem when—for all the reasons outlined above—that problem isn’t growing, it’s shrinking. Those who want to transform the greatest economic system in the history of the world ought to get their facts straight first.

#### Soft power fails

Lacey 13 — Jim Lacey, Professor of Strategic Studies at the Marine Corps War College, holds a Ph.D. in Military History from Leeds University, 2013 (“Soft Power, Smart Power,” National Review Online, April 22nd, Available Online at http://www.nationalreview.com/article/346131/soft-power-smart-power, Accessed 05-27-2013)

During World War II, Stalin’s advisers encouraged him to seek the favor of the pope. He famously replied: “How many divisions does the pope have?” Decades later, the Soviets came to realize that papal power was not something to cavalierly disregard. Many, in fact, claim that Pope John Paul II’s moral authority was decisive in breaking the Soviet hold on Poland and propelling the Evil Empire toward its final demise. It was, therefore, a true example of the clout of “soft power.” Of course, one can maintain that view only by discounting the massive U.S. and NATO military forces that kept Soviet hard power in check for decades. A few years back, a number of policymakers, jumping on a popular academic trend given its greatest voice by Joseph Nye, began espousing a theory of soft power. In this new and shiny vision, America could wield its greatest global influence through the power of its example. The world would just look at how good we were, and how great it was to be an American, and clamor to follow us. Somehow these visionaries neglected to notice that Europe’s almost total unilateral disarmament had failed to translate into influence on the global stage. Rather, it had done the opposite. In a remarkably short time, European opinions on any matter of consequence ceased to matter. Worse, a large segment of the world took a good look at the American example and was repelled. Some of these people launched the 9/11 attack. At some point, it became clear that those holding a world vision that included returning to eighth-century barbarism were not finding our example attractive. Our deep-thinking strategists realized they needed a new answer. What they came up with was even more seductive than soft power. In the future, America would prosper through the employment of “smart power.” One wonders if our policymakers had been willfully employing “dumb power” for the previous two centuries. In any case, smart-power advocates claimed that a new policy nirvana was attainable, if only we could find the right mix of soft and hard power. Well, soft power and smart power were fascinating intellectual exercises that led nowhere. Iran is still building nuclear weapons, North Korea is threatening to nuke U.S. cities, and China is becoming militarily more aggressive. It turns out that power is what it has always been — the ability to influence and control others — and deploying it requires, as it always has, hard instruments. Without superior military power and the economic strength that underpins it, the U.S. would have no more ability to influence global events than Costa Rica. When President Obama made the strategic decision to pivot toward Asia, he did not follow up by sending dance troupes to China, or opening more cultural centers across the Pacific’s great expanse. Rather, he ordered the U.S. military to begin shifting assets into the region, so as to show the seriousness of our intent. If North Korea is dissuaded from the ultimate act of stupidity, it will have a lot more to do with our maintenance of ready military forces in the region than with any desire the North Korean regime has for a continuing flow of Hollywood movies. By now every serious strategist and policymaker understands that if the United States is going to continue influencing global events it requires hard power — a military — second to none. That is what makes a new report from the well-respected Stockholm International Peace Research Institute troubling. According to SIPRI, in 2012, China’s real military spending increased by nearly 8 percent, while Russia’s increased by a whopping 16 percent. Worse, SIPRI expects both nations to increase spending by even greater percentages this year. The United States, on the other hand, decreased real spending by 6 percent last year, with much larger cuts on the way. After a decade of war, much of our military equipment is simply worn out and in need of immediate replacement. Moreover, technology’s rapid advance continues, threatening much of our current weapons inventory with obsolescence. As much as the utopians (soft-power believers) want to deny it, American power is weakening even as the world becomes progressively less stable and more dangerous. In a world where too many states are led by men who still believe Mao’s dictum that “Power comes from the barrel of a gun,” weakness is dangerous. Weakness is also a choice. The United States, despite our current economic woes, can easily afford the cost of recapitalizing and maintaining our military. We are not even close to spending levels that would lead one to worry about “imperial overstretch.” Rather, our long-term security is being eaten up so as to fund “entitlement overstretch.” I suppose that one day, if left unchecked, the welfare state will absorb so much spending that the only military we can afford will be a shadow of what has protected us for the past seven decades. Soft power will then cease to be one option among many and, instead, become our only choice. We will become as relevant to the rest of the world as Europe. I wonder how many people realize just how different their daily lives will become if that day arrives. For a long time, American hard power has cast a protective shield around the liberal world order. It will not be pretty when that is gone.

## Modelling ADV

### Modelling---1NC

#### No modeling---other countries see US antitrust as irrational, even if we get things right.

William E. Kovacic 15, Professor of Law and Policy at George Washington University, former General Counsel for the Federal Trade Commission, J.D. from Columbia University, “The United States and Its Future Influence on Global Competition Policy,” George Mason Law Review, Vol. 22, 2015, accessed via Lexis

One force that reduces the perceived legitimacy of the U.S. system is a widely accepted narrative, reflected in popular discourse and scholarly commentary, which portrays federal enforcement as irrational and unstable. 65 [\*1172] In this interpretation of modern U.S. enforcement history, antitrust policy undergoes recurring erratic shifts, with a small number of lucid intervals. For the most part, the irrationality narrative suggests that U.S. antitrust policy embraced unsupportable extremes of over-enforcement in the 1960s and 1970s, under-enforcement from 1981 to 1988 and 2001 to 2008, and achieved a sensible, balanced equilibrium only from 1993 to 2000 and 2009 to the present. 66 This accounting of antitrust history raises a troublesome question: why should any jurisdiction outside the U.S. respect a system that has lost its mind in roughly 41 of the past 55 years?

Policy-making in the irrationality narrative is sharply discontinuous, and the enforcement institutions have little evident capacity for self-assessment or correction over time. 67 Individual leaders count for everything, and institutional arrangements fail to discipline policy-making; 68 appoint a wise official and you get good results, but pick a zealot and the agency swerves toward frantic hyperactivity or utter indolence. The irrationality narrative is the public policy equivalent of an interpretation of Formula One racing that attributes the outcome in races entirely to the driver and treats the quality of the car and supporting team as largely irrelevant.

The irrationality account of U.S. enforcement history derives power from the stature of the narrators. Despite its unreliable reading of U.S. experience, the narrative's academic pedigree is daunting. Some of the greatest scholars in U.S. competition law have contributed to the story. If nonentities constructed the narrative, foreign observers would dismiss it out of hand. Instead, the narrative of irrationality and instability, often presented with the metaphor of a wildly swinging pendulum, originated and developed in the work of some of the field's most influential commentators. On many occasions outside the U.S., I have heard enforcement officials, practitioners, and scholars speak of the irrationality narrative as though it were an established truth. To these observers, the stature of the scholars who popularized the irrationality narrative invariably lends verisimilitude to the story.

As described below, the irrationality narrative of the U.S. system serves the aims of the right and the left in the debate about federal enforcement policy. For those who favor more intervention or less intervention, alike, the image of a system dangerously out of control serves to frame their own "sensible" policy proposals. By this technique, the narrator emerges as the voice of wisdom in a crazed policy environment.

[\*1173] The architecture of the modern irrationality narrative took shape in 1978 when Professor Robert Bork published the first edition of his transformative treatise, The Antitrust Paradox. 69 Professor Bork's central thesis was that "modern antitrust has so decayed that the policy is no longer intellectually respectable." 70 Each institution with a role in the implementation of the antitrust laws--the courts, the Congress, and the federal enforcement agencies--caused the decay. On antitrust matters, the Congress displayed the mentality of "the sheriff of a frontier town" who "did not sift evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people." 71 With few exceptions, the courts embraced a view of antitrust law that "teaches the necessity for government intervention when no such necessity exists, and even when intervention is positively harmful." 72 Without regard to adverse economic effects, the DOJ and the FTC "must continually press on to fresh territory, seeking theories that broaden the application of the law and make violations easier to establish." 73

In Professor Bork's telling, the implementing institutions were capricious, reckless, or bent upon self-aggrandizement. 74 As a group, the institutions have gone mad, for they have no tendency or, perhaps, any capacity to reflect on their experience, identify error, and make corrections. 75 Instead, the U.S. antitrust system had "an inbuilt thrust toward greater severity or further extension." 76 Nothing, Professor Bork warned, seemed able to contain the destructive march of intervention: "This process has no obvious stopping point." 77

The image of a system out of control served Professor Bork's rhetorical aims; it showed the urgency for reform by presenting a system in shambles. The image also distorted (more mildly, misread) current trends substantially. When The Antitrust Paradox appeared in January 1978, each institution Professor Bork rebuked--the Congress, the courts, and the federal enforcement agencies--had taken steps to rebalance the antitrust system. 78 The adjustments came slowly, but they were coming, nonetheless. If Professor Bork had acknowledged that the seemingly out-of-control institutions [\*1174] were making important adjustments, his book would have lost some (maybe much) of its force.

A second decisive contribution to the irrationality narrative came in the late 1980s and early 1990s from one of Professor Bork's harshest critics, Professor Robert Pitofsky. Though Professor Pitofsky scorned Professor Bork's calls for a vast retrenchment of antitrust enforcement, he used his own version of the irrationality narrative while setting out a more interventionist agenda. 79 Describing federal merger enforcement from the early 1960s through the early 1990s, Professor Pitofsky wrote:

American antitrust policy has tried to balance possible threats to competition against merger benefits, but remarkably, has careened from one extreme to another in this balancing process. For example, the United States had by far the most stringent antimerger policy in the world in the 1960s, striking down mergers among small firms in unconcentrated markets. By the 1980s, the United States maintained an extremely lenient merger policy, regularly allowing billion dollar mergers to go through without government challenge, even when they involved direct competitors. 80

Like Professor Bork in The Antitrust Paradox, Professor Pitofsky presented a system run amok. Federal policy "careen[s] from one extreme to another," like an automobile with an impaired driver swerving across the centerline. 81 No institutional feature in the U.S. system provided needed balance. 82

In Professor Pitofsky's version of the narrative, the solution to the aberrant enforcement behavior came by way of appointments--including his own--to the federal agencies. 83 In 2002, after chairing the FTC from 1995 to 2001, Professor Pitofsky said federal merger control by the late 1990s "stopped careening from aggressive enforcement based in some part on a populist ideology to minimalist enforcement based on hostility to the core assumptions of antitrust . . . ." 84 Under the Clinton Administration's appointees, federal policy stopped "careening," avoiding the extremes of an overheated, populist-inspired activism of the 1960s and the "minimalist" program of the Reagan presidency with its "hostility to the core assumptions of antitrust." 85

For Professor Pitofsky, like Professor Bork, the narrative of a system gripped by irrational, erratic variations in behavior served an important instrumental purpose. The portrayal of a regime swinging wildly between extremes allowed Professor Pitofsky to claim the role--as suggested in the [\*1175] title of his 2002 article, Antitrust at the Turn of the Twenty-First Century: A View from the Middle--of the wise centrist. 86 Professor Pitofsky underscored the rationality of his own program by juxtaposing it against the irrationality of his predecessors. 87 Clinton Administration antitrust officials strove to claim the mantle of wise centrism. 88 As the following passage from an essay in The Economist in 2000 shows, they framed their program as a sensible middle way between the irrational interventionism of the 1960s and 1970s and the inactivity of the 1980s:

It helps that [DOJ Assistant Attorney General Joel] Klein and his counterpart at the FTC, Robert Pitofsky, have been deliberately low-key in talking about their activities, claiming that they are modest and in the legal mainstream of legal thought and economics. They concede that they have been more interventionist than the laissez-faire ideologues of the Reagan years, but they say they are nothing like the trust-busting zealots of the 1960s who saw evil in every big company or merger. 89

In reporting on the Clinton administration strategy, The Economist presents the federal enforcement policy just as the DOJ and FTC leadership wished: a "modest" and "mainstream" program standing between two eras of irrationality; one guided by "trust-busting zealots" and the other led by "laissez-faire ideologues." 90

Taken on its own terms, the irrationality interpretation of U.S. antitrust history provides a grim picture of the American system. One should be wary of a system that intermittently has lucid policymaking intervals, but its normal state is irrationality. If everything depends on the appointment of wise centrists to head the agencies, nothing good can happen when the [\*1176] choice of DOJ or FTC leadership is not so inspired. Because personalities are decisive, when the wise centrists depart, nothing in the institutions themselves can prevent the system from returning quickly to bad old habits.

As the quotation presented above illustrates, the wise centrism story acquires force if periods of thoughtless extremism bracket the sensible policy era. As developed by Professor Pitofsky and other antitrust scholars, the irrationality narrative derives its power from the system's tendency to embrace extremes. 91 Dramatic variations in performance demonstrate the absence of thoughtful policy-making. The narrator seems sane by comparison if all others appear to be deranged. Professor Pitofsky's article in 2002 about the future of antitrust policy used this framing technique. 92 He wrote that "during the Reagan years, there was no enforcement whatsoever against non-horizontal mergers and joint ventures, boycotts, minimum resale price maintenance, exclusive dealing contracts, tie-in sales, attempts to monopolize, and monopolization." 93

The passage quoted above highlights two recurring features of the irrationality narrative. First, Professor Pitofsky's statement uses sweeping, categorical language ("no enforcement whatsoever") to describe the period of extreme inactivity. 94 In the 2002 article and in other papers, Professor Pitofsky made strong claims of inactivity to portray the Reagan Administration antitrust program as a gross departure from good practice. 95 Second, the portrayal of events, though written with the utmost self-assurance, often cannot withstand fact-checking and is verifiably incorrect. 96

[\*1177] Professor Pitofsky has plenty of esteemed company in telling the U.S. irrationality story by making bold claims belied by actual enforcement experience. As noted above, Professor Bork's denunciation of antitrust policy circa 1978 ignored important doctrinal and policy developments that fit poorly with a system out of control. 97 The story of horrible decay is less compelling if the asserted flaws are not so horrible. Other accounts of U.S. enforcement experience by the field's leading commentators include claims that during the Reagan Administration "merger enforcement ground to a halt," 98 that antitrust "[e]nforcement ceased," 99 and that the DOJ and the FTC "did not file a single vertical case." 100 Why did the U.S. system lose its mind? The answer, say two of America's best scholars, is that "extremists" took control of the enforcement agencies. 101 Experts in the U.S. might excuse these descriptions of federal enforcement as careless hyperbole. In my experience, foreign observers are more likely to take them at face value.

The story of U.S. antitrust policy in the 1980s is considerably more complex. Crucial factual tenets of the irrationality narrative are unsupportable. Merger enforcement never halted, 102 enforcement never ceased, 103 and vertical restraints cases (at least a few) still appeared. 104 To look beyond the categorical statements of inactivity and recount enforcement developments [\*1178] accurately would reveal a more thoughtful enforcement program at work. There is a major difference, for example, between saying a merger enforcement program has disappeared, and saying that boundaries have been reset, but policed actively.

Would a fuller, more accurate account of federal enforcement trends over time reveal intense debate about the proper direction of policy? Of course. Has policy shifted across administrations, especially after a regime change? No doubt. Yet, liberated from the irrationality narrative's determination to accentuate the magnitude of changes and cast decision-makers as senseless extremists, a more faithful account of U.S. federal enforcement history would portray adjustments as more gradual and nuanced, in most cases, than the irrationality narrative suggests. The discipline imposed by institutional arrangements, not simply patterns in leadership appointments (whether irrational officials or prudent centrists), would account for refinements over time.

#### Everyone looks to the EU, not the US for antitrust.

Bradford et al. 19, Anu Bradford, Henry L. Moses Professor of Law and International Organization at Columbia Law School; Adam Chilton, Professor of Law and Walter Mander Research Scholar at the University of Chicago Law School; Katerina Linos, Professor of Law and Faculty Co-Director in the Miller Institute for Global Challenges and the Law at the University of California, Berkeley School of Law; Alexander Weaver, Associate at Linklaters LLP, J.D. from Columbia Law School, “The Global Dominance of European Competition Law Over American Antitrust Law,” Journal of Empirical Legal Studies, Vol. 16, 2019, https://scholarship.law.columbia.edu/faculty\_scholarship/2513

The Europeanization, rather the Americanization, of global competition law is notable because the US has a considerably longer history of using competition law. Indeed, the United States the Sherman Act long before the EU and its competition laws were conceived. The US has also been an influential leader in competition economics and law alike, spearheading early efforts to adopt competition law regimes in many parts of the world—including in the EU. However, after the EU adopted its own competition law, it eventually eclipsed the US as the leader in providing the template for the global expansion of competition laws, marginalizing the US’s global influence in the decades that followed. In other fields, such as corporate law, thousands of articles have been devoted to debating whether there’s a race to the top or the bottom, what mechanisms drive the race, whether shareholders or managers benefit, and more (e.g., Romano 1987; Roe 2003).11 However, because the literature on the world’s competition regimes is in its infancy, a key contribution of this article is to document that there exists a global regulatory race in the area of competition law, and that the EU is clearly winning it.

We also advance a set of explanations for why the European model has come to predominate. First, a set of “push factors” explains the EU’s ability to effectively externalize its laws. The EU’s competition law dominance can be partially traced to the EU’s conscious efforts to expand its regulations through a myriad of trade, association, and other political agreements. The EU has required many countries seeking greater market access or closer political association to adopt competition laws. In addition, as Bradford (2012) outlines in “The Brussels Effect,” the EU has the greatest ability to shape foreign jurisdictions’ laws given that the companies often apply the most stringent regulatory standard—typically the EU standard—across their global operations to capture the benefits of uniform production while maintaining compliance worldwide. Second, the EU competition law model also spreads due to strong “pull factors.” In many countries, domestic politics are more conducive to EU-style competition laws, which accommodate more diverse policy goals and defer less to markets and more to governments’ ability to correct market failures. Another major pull factor is the EU’s tendency to promulgate more precise and detailed rules, making them easier to copy in the absence of technical expertise in the adopting country.

Our findings have several implications. First, our results offer evidence of the EU’s outsized influence in regulating global markets. This narrative stands in contrast to many critics who have declared the end of the EU’s influence and ability to shape outcomes globally as its relative economic and political power wanes. Second, our results suggest that, although the law and economics movement may have had a large influence on the development of America’s antitrust law and policy, it may have had a more modest influence on the development of competition policy in the rest of the world (Bradford et al. 2020). Third, and more generally, our analysis illustrates the ability of a single jurisdiction to attract countries with starkly different characteristics into its orbit, vesting it with a sizable regulatory influence that spans economic, linguistic, and political boundaries. Out of this dynamic, a new form of globalization of norms emerges—globalization emerging as a result of EU’s unilateralism as opposed to multilateralism. Finally, beyond illuminating the regulatory influence in the competition law context, our results speak more broadly to the literature on regulatory competition, diffusion of norms, and legal transplants. Competition between the European and US regulatory schemes has been prominent in many areas, ranging from privacy (Schwartz 2013; Schwartz and Peifer 2017), to chemicals (Scott 2009), to finance (Gadinis 2010), to discrimination law (Linos 2010), to name but a few. Documenting the specific pathways through which the EU has succeeded in externalizing its models thus contributes to a broad range of fields and advances the diffusion literature, which to date has primarily focused on countries receiving foreign models and not on the entities promoting them.

#### No populism impact---states won’t risk war, isolation, AND are already stagnant.

John Mueller 21, Adjunct Professor of Political Science and Senior Research Scientist at the Mershon Center for International Security Studies, "The Rise of China, the Assertiveness of Russia, and the Antics of Iran," in The Stupidity of War: American Foreign Policy and the Case for Complacency, Chapter 6, 02/17/2021, pg. 163-167.

Complacency, Appeasement, Self-destruction, and the New Cold War

It could be argued that the policies proposed here to deal with the international problems, whether real or imagined, presented by China, Russia, and Iran constitute exercises not only in complacency, but also in appeasement. That argument would be correct. As discussed in the Prologue to this book, appeasement can work to avoid military conflict as can be seen in the case of the Cuban missile crisis of 1962. As also discussed there, appeasement has been given a bad name by the experience with Hitler in 1938.

Hitlers are very rare, but there are some resonances today in Russia’s Vladimir Putin and China’s Xi Jinping. Both are shrewd, determined, authoritarian, and seem to be quite intelligent, and both are fully in charge, are surrounded by sychophants, and appear to have essentially unlimited tenure in office. Moreover, both, like Hitler in the 1930s, are appreciated domestically for maintaining a stable political and economic environment. However, unlike Hitler, both run trading states and need a stable and essentially congenial international environment to flourish.128 Most importantly, except for China’s claim to Taiwan, neither seems to harbor Hitler-like dreams of extensive expansion by military means. Both are leading their countries in an illiberal direction which will hamper economic growth while maintaining a kleptocratic system. But this may be acceptable to populations enjoying historically high living standards and fearful of less stable alternatives. Both do seem to want to overcome what they view as past humiliations – ones going back to the opium war of 1839 in the case of China and to the collapse of the Soviet empire and then of the Soviet Union in 1989–91 in the case of Russia. Primarily, both seem to want to be treated with respect and deference. Unlike Hitler’s Germany, however, both seem to be entirely appeasable. That scarcely seems to present or represent a threat. The United States, after all, continually declares itself to be the indispensable nation. If the United States is allowed to wallow in such self-important, childish, essentially meaningless, and decidedly fatuous proclamations, why should other nations be denied the opportunity to emit similar inconsequential rattlings? If that constitutes appeasement, so be it. If the two countries want to be able to say they now preside over a “sphere of influence,” it scarcely seems worth risking world war to somehow keep them from doing so – and if the United States were substantially disarmed, it would not have the capacity to even try.

If China and Russia get off on self-absorbed pretensions about being big players, that should be of little concern – and their success rate is unlikely to be any better than that of the United States. Charap and Colton observe that “The Kremlin’s idee fixe that Russia needs to be the leader of a pack of post-Soviet states in order to be taken seriously as a global power broker is more of a feel-good mantra than a fact-based strategy, and it irks even the closest of allies.” And they further suggest that

The towel should also be thrown in on the geo-ideational shadow-boxing over the Russian assertion of a sphere of influence in post-Soviet Eurasia and the Western opposition to it. Would either side be able to specify what precisely they mean by a regional sphere of influence? How would it differ from, say, US relations with the western-hemisphere states or from Germany’s with its EU neighbors?129

Applying the Gingrich gospel, then, it certainly seems that, although China, Russia, and Iran may present some “challenges” to US policy, there is little or nothing to suggest a need to maintain a large US military force-in-being to keep these countries in line. Indeed, all three monsters seem to be in some stage of self-destruction or descent into stagnation – not, perhaps, unlike the Communist “threat” during the Cold War. Complacency thus seems to be a viable policy.

However, it may be useful to look specifically at a couple of worst-case scenarios: an invasion of Taiwan by China (after it builds up its navy more) and an invasion of the Baltic states of Estonia, Lithuania, and Latvia by Russia. It is wildly unlikely that China or Russia would carry out such economically self-destructive acts: the economic lessons from Putin’s comparatively minor Ukraine gambit are clear, and these are unlikely to be lost on the Chinese. Moreover, the analyses of Michael Beckley certainly suggest that Taiwan has the conventional military capacity to concentrate the mind of, if not necessarily fully to deter, any Chinese attackers. It has “spent decades preparing for this exact contingency,” has an advanced early warning system, can call into action massed forces to defend “fortified positions on home soil with precision-guided munitions,” and has supply dumps, booby traps, an wide array of mobile missile launchers, artillery, and minelayers. In addition, there are only 14 locations that can support amphibious landing and these are, not surprisingly, well-fortified by the defenders.130

The United States may not necessarily be able to deter or stop military attacks on Taiwan or on the Baltics under its current force levels.131 And if it cannot credibly do so with military forces currently in being, it would not be able to do so, obviously, if its forces were much reduced. However, the most likely response in either eventuality would be for the United States to wage a campaign of economic and military (including naval) harassment and to support local – or partisan – resistance as it did in Afghanistan after the Soviet invasion there in 1979. 132 Such a response does not require the United States to have, and perpetually to maintain, huge forces in place and at the ready to deal with such improbable eventualities.

The current wariness about, and hostility toward, Russia and China is sometimes said to constitute “a new Cold War.”133 There are, of course, considerable differences. In particular, during the Cold War, the Soviet Union – indeed the whole international Communist movement – was under the sway of a Marxist theory that explicitly and determinedly advocated the destruction of capitalism and probably of democracy, and by violence to the degree required. Neither Russia nor China today sports such cosmic goals or is enamored of such destructive methods. However, as discussed in Chapters 1 and 2, the United States was strongly inclined during the Cold War massively to inflate the threat that it imagined the Communist adversary to present. The current “new Cold War” is thus in an important respect quite a bit like the old one: it is an expensive, substantially militarized, and often hysterical campaign to deal with threats that do not exist or are likely to selfdestruct.134

It may also be useful to evaluate terms that are often bandied about in considerations within foreign policy circles about the rise of China, the assertiveness of Russia, and the antics of Iran. High among these is “hegemony.” Sorting through various definitions, Simon Reich and Richard Ned Lebow array several that seem to capture the essence of the concept: domination, controlling leadership, or the ability to shape international rules according to the hegemon’s own interests. Hegemony, then, is an extreme word suggesting supremacy, mastery, preponderant influence, and full control. Hegemons force others to bend to their will whether they like it or not. Reich and Lebow also include a mellower designation applied by John Ikenberry and Charles Kupchan in which a hegemon is defined as an entity that has the ability to establish a set of norms that others willingly embrace.135 But this really seems to constitute an extreme watering-down of the word and suggests opinion leadership or entrepreneurship and success at persuasion, not hegemony.

Moreover, insofar as they carry meaning, the militarized application of American primacy and hegemony to order the world has often been a fiasco.136 Indeed, it is impressive that the hegemon, endowed by definition by what Reich and Lebow aptly call a grossly disproportionate military capacity, has had such a miserable record of military achievement since 1945 – an issue discussed frequently in this book.137 Reich and Lebow argue that it is incumbent on IR scholars to cut themselves loose from the concept of hegemony.138 It seems even more important for the foreign policy establishment to do so.

There is also absurdity in getting up tight over something as vacuous as the venerable “sphere of influence” concept (or conceit). The notion that world affairs are a process in which countries scamper around the world seeking to establish spheres of influence is at best decidedly unhelpful and at worst utterly misguided. But the concept continues to be embraced in some quarters as if it had some palpable meaning. For example, in early 2017, the august National Intelligence Council opined that “Geopolitical competition is on the rise as China and Russia seek to exert more sway over their neighboring regions and promote an order in which US influence does not dominate.”139 Setting aside the issue of the degree to which American “influence” could be said to “dominate” anywhere (we still wait, for example, for dominated Mexico supinely to pay for a wall to seal off its self-infatuated neighbor’s southern border), it doesn’t bloody well matter whether China or Russia has, or seems to have, a “sphere of influence” someplace or other.

More importantly, the whole notion is vapid and essentially meaningless. Except perhaps in Gilbert and Sullivan’s Iolanthe. When members of the House of Lords fail to pay sufficient respect to a group of women they take to be members of a ladies’ seminary who are actually fairies, their queen, outraged at the Lords’ collected effrontery, steps forward, proclaims that she happens to be an “influential fairy,” and then, with a few passes of her wand, brushes past the Lords’ pleas (“no!” “mercy!” “spare us!” and “horror!”), and summarily issues several edicts: a young man of her acquaintance shall be inducted into their House, every bill that gratifies his pleasure shall be passed, members shall be required to sit through the grouse and salmon season, and high office shall be obtainable by competitive examination. Now, that’s influence. In contrast, on December 21, 2017, when the United States sought to alter the status of Jerusalem, the United Nations General Assembly voted to repudiate the US stand in a nearly unanimous vote that included many US allies. Now, that’s not influence.

In fact, to push this point perhaps to an extreme, if we are entering an era in which economic motivations became paramount and in which military force is not deemed a sensible method for pursuing wealth, the idea of “influence” would become obsolete because, in principle, pure economic actors do not care much about influence. They care about getting rich. (As Japan and Germany have found, however, influence, status, and prestige tend to accompany the accumulation of wealth, but this is just an ancillary effect.) Suppose the president of a company could choose between two stories to tell the stockholders. One message would be, “We enjoy great influence in the industry. When we talk everybody listens. Our profits are nil.” The other would be, “No one in the industry pays the slightest attention to us or ever asks our advice. We are, in fact, the butt of jokes in the trade. We are making money hand over fist.” There is no doubt about which story would most thoroughly warm the stockholders’ hearts.

#### Philippines growth is stable

Fitch 21 – Fitch Ratings, “Fitch Affirms Philippines at 'BBB'; Outlook Stable”, 1/10/2021, https://www.fitchratings.com/research/sovereigns/fitch-affirms-philippines-at-bbb-outlook-stable-10-01-2021

Fitch Ratings - Hong Kong - 10 Jan 2021: Fitch Ratings has affirmed Philippines' Long-Term Foreign-Currency Issuer Default Rating (IDR) at 'BBB'. The Outlook is Stable.

KEY RATING DRIVERS

The affirmation of the Philippines' 'BBB' rating and Stable Outlook balances modest government debt levels relative to peers, robust external buffers and still-strong medium-term growth prospects, notwithstanding the deep pandemic-induced economic contraction, against relatively low per capita income levels and indicators of governance and human development compared to peers.

The economic impact of the Covid-19 shock for the Philippines in 2020 was more significant than we had previously expected due to the domestic infection rate and government policy measures to curb the spread of the virus. In particular, efforts to contain the virus severely affected private consumption and investment, resulting in real GDP contracting by 10% year-on-year in the first nine months of 2020. We estimate full-year GDP to have contracted by 8.5% in 2020, after accounting for an improvement in activity indicators in 4Q.

We expect economic activity to continue to recover in the coming quarters, and project GDP to expand by 6.9% and 8.0% in 2021 and 2022, respectively. New daily recorded Covid-19 cases have been declining in recent months, reflecting an effective government response to the crisis and reducing the risk of renewed lockdowns. The authorities have also engaged in multilateral initiatives and with several pharmaceutical companies to secure vaccines, with a rollout expected to start in May 2021. The potential for a delay poses downside risks to our growth forecasts, while an effective vaccine rollout could result in a faster-than-expected recovery in growth.

#### No piracy impact---lack of incentive, alternative routes, and reactionary forces.

John Mueller 21, Adjunct Professor of Political Science and Senior Research Scientist at the Mershon Center for International Security Studies, "Proliferation, Terrorism, Humanitarian Intervention, and Other Problems," in The Stupidity of War: American Foreign Policy and the Case for Complacency, Chapter 7, 02/17/2021, pg. 184.

In an age of globalization and expanding world trade, many, particularly in the Navy, argue that a strong military force is needed to police what is portentously labeled the global commons. However, there seems to be no credible consequential threat in that arena. As Christopher Fettweis points out, “Today, the free flow of goods is critical to all economies, and no state would benefit from its interruption. ... Free trade at sea may no longer need protection ... because it has no enemies. The sheriff may be patrolling an essentially crime-free neighborhood.”68 Somali pirates hardly present an occasional inconvenience, and, although there exist choke points in international shipping, there are also exist routes around them in the unlikely event that they should become clogged. And any armed cloggers are likely to be as punished and inconvenienced as the clogged. Huge forces-in-being are scarcely required because, in the unlikely event that the problem really becomes sustained, newly formulated forces designed for the purpose could be developed.69

## Democracy ADV

### Democracy---1NC

#### Plan does not take the courts out of antitrust---they still are responsible for lawsuits and determining violations.

#### The plan makes the courts more activist by abandoning consumer welfare.

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

#### Independence is thumped---current court balance AND previous cases.

#### DPT is a statistical artifact---empirical analysis

Michael **Mousseau 18**. Professor @ UCF, PhD PoliSci @ Binghamton. Conflict Management and Peace Science, “Grasping the scientific evidence: The contractualist peace supersedes the democratic peace”, Vol 35(2) 175-192, SagePub.

A weighty controversy has enveloped the study of international conflict: whether the democratic peace, the observed dearth of militarized conflict between democratic nations, may be spurious and accounted for by institutionalized market ‘‘contractualist’’ economy. I have offered theory and evidence that economic norms, specifically contractualist economy, appear to account for both the explanans (democracy) and the explanandum (peace) in the democratic peace research program (Mousseau, 2009, 2012a, 2013; see also Mousseau et al., 2013a, b). Five studies have responded with several arguments for why we should continue to believe that democracy causes peace (Dafoe, 2011; Dafoe and Russett, 2013; Dafoe et al., 2013; Ray, 2013; Russett, 2010). Resolution of this controversy is fundamental to the study and practice of international relations. The observation of democratic peace is ‘‘the closest thing we have to an empirical law’’ in the study of global politics (Levy, 1988: 662), and carries the profound implication that the spread of democracy will end war. New economic norms theory, on the other hand, yields the contrary implication that universal democracy will not end war. Instead, it is market-oriented development that creates a culture of contracting, and this culture legitimates democracy within nations and causes peace among them. The policy implications could hardly be more divergent: to end war (and support democracy), the contractualist democracies should promote the economies of nations at risk (Krieger and Meierrieks, 2015; Meierrieks, 2012; Mousseau, 2000, 2009, 2012a, 2013; Nieman, 2015). In the literature are five factual claims for why we should continue to believe that democracy causes peace: (1) an assertion that in three of the five studies that overturned the democratic peace (Mousseau, 2013; Mousseau et al., 2013a, b), the insignificance of democracy controlling for contractualist economy is due to the treatment of missing data for contractualist economy (Dafoe et al., 2013, henceforth DOR); (2) a claim of error in the measure for conflict (DOR) that appears in one of the five studies that overturned the democratic peace (Mousseau, 2013); (3) an alleged misinterpretation of an interaction term that appears in one of the five studies (Mousseau, 2009) that overturned the democratic peace, along with in inference of democratic causality from an interaction of democracy with contractualist economy (Dafoe and Russett, 2013; DOR); (4) a claim of reverse causality, of democracy causing contractualist economy (Ray, 2013); and (5) a report of multiple regressions with most said to show democratic significance after controlling for contractualist economy (DOR). This study investigates all five of these factual claims. I begin by addressing the issue of missing data by constructing two entirely new measures for contractualist economy. I then take up possible measurement error in the dependent variable by reporting tests using both my own (Mousseau, 2013) and DOR’s measures for conflict. Next, I disaggregate the data to investigate a causal interaction of democracy with contractualist economy. I then examine the evidence for reverse causality, and scrutinize the competing test models to pinpoint the exact factors that can account for differences in test outcomes. The results are consistent across all tests: there is no credible evidence supporting democracy as a cause of peace. Using DOR’s base model, the impact of democracy is zero regardless of how contractualist economy or interstate conflict is measured. There is no misinterpreted interaction term in any study that has overturned the democratic peace, and the disaggregation of the data yields no support for a causal interaction of democracy with contractualist economy. Ray’s (2013) evidence for reverse causality from democracy to contractualist economy is shown to be based on an erroneous research design. And of DOR’s 120 separate regressions that consider contractualist economy, 116 contain controversial measurement and specification practices; the remaining four are analyses of all (fatal and non-fatal) disputes, where the correlation of democracy with peace is limited to mixedeconomic dyads, those where one state has a contractualist economy and the other does not, a subset that includes only 27% of dyads from 1951 to 2001, including only 50% of democratic dyads. It is further shown that this marginal peace is a statistical artifact since it does not exist among neighbors where everyone has an equal opportunity to fight. The results of this study should not be surprising, as they merely corroborate the present state of knowledge. This is because, while DOR ardently assert that four alleged errors, when corrected, each independently save the democratic peace proposition—multiple imputation, the exclusion of ongoing dispute years, an interaction term, and their alternative measure for contractualist economy—they never actually report any clear-cut evidence in support of their claims. One issue not addressed is Dafoe and Russett’s (2013) challenge to Mousseau et al. (2013a) on the grounds that our reported insignificance of democracy is not significant. Like the four claims of error made by DOR addressed here, Dafoe and Russett (2013) made this charge without supporting it. Mousseau et al. (2013b) then investigated it and showed that it too has no support. This issue appears resolved, as Russett and colleagues (DOR) did not raise it again. Nor have DOR or anyone else disputed the overturning of the democratic peace as reported in Mousseau (2012a), which has not been contested with any assertion, supported or unsupported. The implications of this study are far from trivial: the observation of democratic peace is a statistical artifact, seemingly explained by economic conditions. If scientific knowledge progresses and the field of interstate conflict processes is to abide by the scientific rules of evidence, then we must stop describing democracy as a ‘‘known’’ cause or correlate of peace, and stop tossing in a variable for democracy, willy-nilly, in quantitative analyses of international conflict; the variable to replace it is contractualist economy. If nations want to advance peace abroad, the promotion of democracy will not achieve it: the policy to replace it is the promotion of economic opportunity The economic norms account for how contractualist economy can cause both democracy and peace has been explicated in numerous prior studies and need not be repeated here (Mousseau, 2000, 2009, 2012a, 2013). An abundance of prior studies have also corroborated various novel predictions of the theory in wider domains (Ungerer, 2012), and no one has disputed the multiple reports that contractualist economy is the strongest non-trivial predictor of peace both within (Mousseau, 2012b) and between nations (Mousseau, 2013; see also Nieman, 2015). The only matter in controversy is whether democracy has any observable impact on peace between nations after consideration of contractualist economy. My investigation begins below with the allegation of measurement error.

## 2NC

## Memo

#### The CP is advice of agency intent with no binding force

Dr. Nicholas R. Parrillo 19, Professor of Law and Professor of History at Yale Law School, JD from Yale Law School, PhD in American Studies from Yale University, AB in History and Literature from Harvard University, “Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study”, Administrative Law Review, Volume 71, Issue 1, 71 ADMIN. L. REV. 57, Winter 2019, Lexis

For individuals and firms regulated by federal agencies, actual regulations are just the beginning of the story. Despite being voluminous and complex, regulations leave numerous important decisions to the agency's discretion or interpretation. Individuals and firms want to know how the agency will use its discretion and how it will read the regulations' ambiguous provisions. And agency officials want individuals and firms to have that knowledge in order to facilitate compliance. So officials provide the public with lots of "guidance," that is, general statements advising the public on how the agency proposes to exercise discretion or interpret law. Guidance comes in an endless variety of labels and formats, depending on the agency: advisories, circulars, bulletins, memos, interpretive letters, enforcement manuals, fact sheets, FAQs, highlights, you name it. Nobody knows exactly how much guidance there is, because it is not comprehensively collected anywhere, but its page count for any given agency is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even [\*168] two hundred. Guidance is "the bread and butter of agency practice," declares a veteran EPA lawyer. "I cannot imagine a world without guidance," says a former senior FDA official.

Though guidance is a ubiquitous and essential feature of the administrative state, it is also controversial. Full-blown regulations that officially bind the agency and the public--known as "legislative rules"--can be enacted by an agency only through a costly, time-consuming set of procedures imposed by the Administrative Procedure Act (APA), including notice and comment, in which the parties who will be bound by a policy can participate in its formulation before it is set in stone. By contrast, agencies can issue guidance without any such process, because of the APA's exemptions for "general statements of policy" and "interpretative rules," which together cover guidance in all its varieties. Thus guidance can be produced and altered much faster, in higher volume, and with less accountability than legislative rules can. What justifies this disparity, in the familiar telling, is that guidance, unlike a legislative rule, is not binding on the agency or the public. It is only a suggestion--a mere tentative announcement of [\*169] the agency's current thinking about what to do in individual adjudicatory or enforcement proceedings, not something the agency will follow in an automatic, ironclad manner as it would a legislative rule. Guidance is supposed to leave space for the agency's case-by-case discretion. If a particular individual or firm wants to do something (or wants the agency to do something) that is different than what the guidance suggests, the agency is supposed to give fair consideration to that alternative approach. If officials treat guidance with this kind of flexibility, it doesn't seem so bad for the agency to be unconstrained in issuing guidance to begin with.

The great fear is that agency officials, in real life, are not tentative or flexible when it comes to guidance but instead follow guidance as if it were a binding legislative rule, and regulated parties are under coercive pressure to do the same. If true, this complaint reveals a giant loophole in the APA: agencies can issue de facto regulations at will, simply by calling them "guidance," with no say from individuals and firms who will be effectively bound. The fear and the controversy have burned for decades, and most hotly in the last few years, giving rise to expos-s, congressional hearings, bills, a 4-4 Supreme Court [\*170] deadlock, and a directive from then-Attorney General Sessions condemning "improper guidance documents."

#### It leaves antitrust law unchanged

Julia Kapchinskiy 18, JD Candidate at the University of San Diego School of Law, MBA from the University of San Diego, “The Duality of Provider and Payer in the Current Healthcare Landscape and Related Antitrust Implications”, San Diego Law Review, Volume 55, Issue 3, 55 San Diego L. Rev. 617, Lexis

B. The Enforcers of the Antitrust Laws and Regulatory Framework

Two separate government agencies, the FTC and the Antitrust Division of the DOJ, enforce federal antitrust laws. Their authority in some instances is shared and in other instances is exclusive to a single agency. For [\*631] example, both agencies enforce Section 7 of the Clayton Act. On the other hand, the DOJ enforces the Sherman Act, while the FTC enforces the FTCA. Historically, the "agencies complement each other [and develop] expertise in particular industries or markets." Following the divide and conquer approach, the FTC has become the leading agency on matters involving providers, and the DOJ has acted as the leading agency on matters involving insurers. Primarily, the two agencies ensure antitrust compliance of mergers and major developments in healthcare that have the potential to impact consumers and result in increased "market power," or the ability to raise prices unilaterally.

Both agencies provided significant input in the area of healthcare antitrust regulation in the years immediately preceding or directly following the enactment of the ACA. They view their role as "help[ing to] maintain competition in the healthcare financing and delivery markets, and ensuring that market participants can compete to satisfy consumer demand." Importantly, the input by the agencies in the form of guidelines does not [\*632] constitute binding legal authority, and therefore, is merely persuasive. Still, the agencies provide guidance to healthcare organizations so that antitrust violations do not arise; they take a proactive rather than retroactive approach. The agencies first jointly issued the Statements of Antitrust Enforcement Policy in Healthcare (Statements) in 1993, amended them in 1994, and further revised in 1996; they have remained unchanged since. The Statements explain the agencies' rationale in antitrust analysis and contain examples of its application, along with outlining "antitrust safety zones." The "safety zones" mean that unless there are obvious violations, the FTC and the DOJ will not challenge the transaction.

#### ‘Prohibitions’ are strictly mandatory

Rodney King Potter 83, Judge on the California Court of Appeal, 2nd District, J.D. from the University of California, Berkeley, BA from the University of California, Los Angeles, Former Partner at O’Melveny & Myers, “People v. Superior Court (Spencer)”, Court of Appeal of California, Second Appellate District, Division Three, 189 Cal. Rptr. 669, 677-678, 1983 Cal. App. LEXIS 1434, 2/25/1983, Lexis

However, the framer's use of the term “prohibited” manifests their intent to make the “Limitation of Plea Bargaining” mandatory. In Bright v. Los Angeles Unified Sch. Dist. (1976) 18 Cal.3d 450, 462 [134 Cal.Rptr. 639, 556 P.2d 1090], the court stated: “We observe that the word ‘prohibit’ is defined as follows: ‘(1) to forbid by authority or command: … 2.a: to prevent from doing or accomplishing something….’ (Webster's Third New Internat. Dict. (1963 ed.) p. 1813.) [\*678] ” It would be difficult to conceive of more mandatory language than that which is employed in section [\*\*21] 1192.7.

#### The must be binding

Dr. Francis Jacobs 90, Member of the European Court of Justice, DPhil from the University of Oxford, Former Professor of European Law at the University of London and Director of the Centre of European Law for King's College London School of Law, “Commission of the European Communities v French Republic – Opinion of Mr Advocate General Roberts”, European Court Reports 1990 I-00925, Case C-62/89, 2/20/1990, p. 942

20. In my view, those arguments cannot be accepted. It is plain from the wording of Article 10(2) of Regulation No 2057/82 and from the scheme and objectives of the Community legislation that Member States are required to anticipate the exhaustion of the quota and to act to prohibit fishing provisionally before the quota is exhausted . That the exhaustion of the quota must be anticipated is indicated by the requirement in Article 10(2) that each Member State shall determine the date from which its vessels "shall be *deemed to have exhausted* the quota ..." ( emphasis added ). The use of the word "prohibit" in Article 10(2) and the mandatory wording of the second subparagraph of Article 10(3) (" Fishing vessels ... shall cease fishing ...") indicate that the measures taken to halt fishing provisionally must be of a binding nature. It is moreover apparent from the scheme of the legislation that the obligation imposed on Member States by Article 10(2) is of crucial importance for ensuring respect for quotas: the obligation must therefore be construed strictly. An interpretation of Article 10(2) which would permit Member States to wait until after the quota was exhausted before taking action, or to adopt measures of a non-binding nature, would be inconsistent with the binding character of the quotas. It would also undermine the underlying objective of quotas, i.e. the conservation of scarce fishing resources.

#### That must be binding

Jennifer Lumley-Hluska 5, J.D. Candidate at the Quinnipiac University School of Law, “The Contest Over "Contested Cases": A Study on How the Connecticut Legislature's Reading of Two Words May be Depriving You of Your Right to Judicial Review and Due Process of the Law”, Quinnipiac Law Review, 23 Quinnipiac L. Rev. 1239, Lexis

The operative word in the definition is statute. The term "statute" is defined as "an act of the legislature declaring, commanding, or prohibiting something." Conversely, the word "law" means "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force." "Law" may embrace body of principles, standards and rules promulgated by government; statutes or enactments [\*1242] of a legislative body; administrative agency rules and regulations; judicial decisions, judgments, or decrees; municipal ordinances; science or system of principles or rules of human conduct. The word "statute" limits the availability of judicial review because it does not encompass the other sources of law that the word "law" does.

#### ‘Increase’

Dr. Howard Newby 4, BA and PhD from the University of Essex, Chair of the Higher Education Funding Council for England, Former Vice-Chancellor of the University of Liverpool, “Joint Committee on the Draft Charities Bill - Written Evidence”, Memorandum from the Higher Education Funding Council for England, 9/30/2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm

9.1 The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[ 45] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity".[ 46]

9.2 Although the word "increase" is used in relation to the functions of a number of statutory bodies,[47] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself.

9.3 HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

#### ‘Resolved’

Words and Phrases 64 (Permanent Edition)

Definition of the word “resolve,” given by Webster is “to express an opinion or determination by resolution or vote; as ‘it was resolved by the legislature;” It is of similar force to the word “enact,” which is defined by Bouvier as meaning “to establish by law”.

#### ‘Should’

David H. Sawyer 17, Judge on the Michigan Court of Appeals, J.D. from Valparaiso School of Law, “Spartan Specialties, Ltd. v. Senior Servs.”, Court of Appeals of Michigan, 2017 Mich. App. LEXIS 1178, 7/20/2017, Lexis

The specifications in the drawings for the mini-piles stated that the capacity for the mini-piles was "to be" 6,000 or 8,000 pounds and that the length of the mini-piles was "to be" adequate to get into undisturbed soil to a depth adequate for obtaining the required capacity. The specifications in the project manual stated that the mini-piles "should" have a capacity of 4 tons and 3 tons, that the mini-piles "should" be driven to minimum depth of 25 feet, and that a grout bulb "should" be formed at the base of a mini-pile. Kenneth Winters, an expert in structural engineering, and Richard Anderson, an expert in geotechnical engineering, agreed with Steve Maranowski, plaintiff's president, that the specifications in the project manual, because those specifications used the word "should," were permissive and suggestions of what plaintiff could do to achieve the required capacity. However, the trial court, when it instructed the jury on how to interpret the contract, instructed the jury that it was to interpret the words of the contract by giving them their ordinary and common meaning. An ordinary and common meaning of the word "should" is that it denotes a mandatory obligation. [\*9] See People v Fosnaugh, 248 Mich App 444, 455; 639 NW2d 587 (2001) (stating that "the word 'should' can, in certain contexts, connote an obligatory effect"); Merriam-Webster's College Dictionary (11th ed) (defining "should," in pertinent part, as "used in auxiliary function to express obligation, propriety, or expediency"). Accordingly, viewing the evidence in a light most favorable to defendant, reasonable jurors could have honestly reached different conclusions on whether the specifications in the project manual were mandatory and, because Maranowski admitted that plaintiff did not use grout bulbs and did not drive all the mini-piles at least 25 feet into the ground, whether plaintiff breached the contract. Morinelli, 242 Mich App at 260-261.

#### ‘Substantial’

Words and Phrases 64 (40W&P 759)

The words" outward, open, actual, visible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain: absolute: real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to inclusive.

#### Antitrust prohibitions require notice-and-comment under the APA---the CP doesn’t because it’s only advisory

HLR 20 – Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law”, Harvard Law Review, 133 Harv. L. Rev. 2557, June 2020, Lexis

Just like the length of the statute, the degree of executive delegation affects the true degree of judicial delegation. Whereas agencies help fill in the gaps of ERISA, thus replacing some judicial delegation with executive delegation, agencies leave all antitrust delegation to the courts. While preemption by agency-made law has some of the same federalism and separation of powers concerns as preemption by judge-made law, agencies are more democratically accountable than are courts and are [\*2577] better equipped to make policy. Notwithstanding the influence of the Merger Guidelines, antitrust executive action has not compensated for the deficiencies of preemption by statutory common law to the same extent as have DOL's regulations. Promulgated regulations, like DOL's, must go through notice and comment under the Administrative Procedure Act. Notice and comment promotes democratic accountability: it "compels the agency to consult each of its stakeholder 'constituents,' ensuring that the ultimate agency action will in some way be responsive to the concerns of all interested parties." Additionally, some scholars argue that notice and comment might lead to better policymaking: it could be "a forum for democratic deliberation, in which agencies and citizens alike will change their views in response to reasoning of others." As such, notice and comment can help executive branch action overcome both the (un)democratic and policymaking critiques of judge-made law. The Merger Guidelines, on the other hand, nonbinding as they are, may be created without any public engagement, and often have been. So, even where federal antitrust law does have executive branch participation, that participation does not provide as meaningful a democratic check as does DOL participation for ERISA.

#### That negates backlash

Jill E. Family 13, Associate Professor of Law and Director of the Law & Government Institute at Widener University School of Law, “Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules”, University of Michigan Journal of Law Reform, Volume 47, Issue 1, 47 U. Mich. J.L. Reform 1, Fall 2013, Lexis

Internal and external political concerns may also influence USCIS to use guidance-based rules. USCIS is located within the Department of Homeland Security (DHS), and DHS holds rulemaking authority over USCIS. To engage in notice and comment rulemaking, USCIS must therefore garner the attention of the much bigger Department of Homeland Security. DHS must agree to raise USCIS's rulemaking agenda to the top of the department's priorities. Rulemaking within the Department of Homeland Security also requires coordination with other immigration agencies within DHS, such as Immigration and Customs Enforcement (ICE). The outlook of USCIS, as the only benefits-granting entity within DHS, may clash with the positions of an enforcement entity like ICE. In addition, avoiding notice and comment rulemaking may lessen the need to solicit input from other agencies or the Office of Management and Budget (OMB). Externally, USCIS may believe that proceeding by guidance document lessens visibility to Congress, the public, and to other executive branch entities, thus decreasing the risk of political backlash.

#### It sets a new status quo, defusing opposition AND backlash will be delayed, after the DA

Connor N. Raso 10, JD Candidate at Yale Law School and PhD Candidate at the Stanford University Department of Political Science, MA in Political Science from Victoria University of Wellington, BA in Finance from Washington University in St. Louis, “Strategic or Sincere? Analyzing Agency Use of Guidance Documents”, Yale Law Journal, Volume 119, 119 Yale L.J. 782, January 2010, p. 799-800

A. Congressional and Presidential Preferences

Guidance documents generally attract less attention from Congress and the President, giving agency leaders greater latitude to impose their preferred policy choices. Guidance is not subject to the many procedural requirements devised to alert the political branches to agency rulemaking activity. In addition, guidance documents arouse less attention and opposition. Agencies can generally issue a guidance document without attracting advance publicity. The agency therefore has the opportunity to set a new status quo before opponents mobilize. This status quo may generate self-reinforcing feedbacks that strengthen the agency's position. By contrast, agencies must solicit comments on legislative rules. This process generates political activity that may be noticed by Capitol Hill and the White House; some important legislative rulemakings gain political salience as interest group conflict escalates during [\*800] the notice and comment process. This comparison is not intended to suggest that interest groups are unaware of guidance documents. Rather, at the margin, legislative rules arouse more interest group attention and opposition, which results in greater congressional interest. Guidance documents, therefore, are relatively more attractive in cases where Congress and the President are likely to intervene against the agency.

#### Guidance reshapes antitrust policy AND creates near force of law

-- it’s uniquely powerful on antitrust because so few cases are actually litigated---agency positions are everything

-- courts will apply the new standard because it is clear that agencies support it

-- businesses and lawyers perceive the CP and will treat it as law

-- the combination of factors creates ‘something close to force of law’

David A. Zimmerman 99, JD from the Emory University Law School, Attorney at Eversheds Sutherland (US) LLP, BA from Vanderbilt University, “Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers”, Emory Law Journal, Volume 39, Issue 1, 48 Emory L.J. 337, Winter 1999, Lexis

B. The Differing Approaches of the NAAG and Federal Guidelines

The idea behind the original promulgation of the Federal Horizontal Merger Guidelines was to provide for greater consistency and easier planning for businesses by allowing them to know what merger actions would and would not be challenged. Although lacking any binding effect on the courts, the Federal Guidelines have had a remarkable impact. Not only have they [\*350] been used to help interpret the Clayton Act in federal courts, but they have greatly impacted antitrust counseling for mergers by giving businesses and their lawyers some guidance on enforcement policy. The FTC and DOJ do not have the resources to challenge more than a small percentage of all mergers. Therefore, the Federal Guidelines represent something close to the force of law because it is clear that certain types of transactions simply will not be challenged. Somewhat ironically, the NAAG Guidelines state a similar purpose to that of the Federal Guidelines: to "help businesses to assess the legality of potential transactions," and to provide a "useful … planning tool." As will be demonstrated, however, the promulgation of a different set of horizontal merger guidelines by NAAG has had the opposite effect: businesses have more trouble knowing when transactions will be challenged, and planning has become much more difficult.

Both sets of guidelines use an approach to analyze the competitive effects of mergers that has been accepted for some time: they define the relevant product and geographic markets, calculate the concentration levels within that market, and then analyze any defenses or efficiencies which may weigh in favor of approving an otherwise questionable merger. However, there are substantive differences in the two sets of guidelines at each of these phases which may affect the final determination of the federal agency or state attorney general as to whether the merger will be challenged.

#### The effect is identical---business will behave as if it were binding and comply

Roberta Romano 19, Sterling Professor of Law at Yale Law School and Director of the Yale Law School Center for the Study of Corporate Law, JD from Yale Law School, MA from the University of Chicago, BA from the University of Rochester, Research Associate of the National Bureau for Economic Research, Fellow of the American Academy of Arts and Sciences and the European Corporate Governance Institute, Recipient of William & Mary Law School’s Marshall-Wythe Medallion, “Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance”, Yale Journal on Regulation, Volume 36, Issue 1, 36 Yale J. on Reg. 273, Lexis

The choice between notice-and-comment rulemaking and guidance is also frequently presented as a tradeoff between regulatory flexibility and effectiveness, on the view that the greater flexibility of guidance compared to notice-and-comment rules is offset by guidance not being legally binding. Although the formal distinction is technically accurate, as numerous commentators have noted, the reality is otherwise, rendering the ostensible distinction quite misleading. As one leading casebook puts it well:

If you are a regulated party, and the agency issues an interpretive rule or policy statement indicating its present view of the law, you will probably make serious efforts to comply with that rule even if it is not formally binding. At a minimum, the rule alerts you to the kind of conduct that the agency regards as worthy of prosecution; at a maximum, the rule may effectively dictate how the agency will [\*283] conduct its prosecutorial adjudications. The *practical effect* of such rules on regulated parties may be hard to distinguish from the practical effect of legislative rules.

The unvarnished reality that firms will behave as though guidance pronouncements are, in fact, binding rules is particularly applicable to financial institutions, the focus of this Article's analysis, given the repeated interaction between financial firms and regulators. This interaction facilitates regulators' ability to retaliate on numerous dimensions through supervision and examination, in addition to their ability to bring enforcement actions for noncompliance with a specific policy. Moreover, the licensing feature of financial regulation (i.e., regulators can shut down a bank's lines of business, as well as a bank itself) is a powerful inducement for financial institutions to comply with, rather than challenge, guidance pronouncements.

As a consequence, by using guidance strategically instead of notice-and-comment rulemaking, particularly in the financial-entity regulatory context, an agency can obtain the benefit of a rule (regulated entities' compliance), without incurring the procedural costs that are legally supposed to accompany the imposition of obligations on private parties under requirements imposed on regulatory decisionmaking by Congress and courts in order to protect the public and regulated entities from arbitrary and capricious decisions. A critical issue, then, is an empirical one: to what extent can an agency shape its agenda to impose rule-like constraints on conduct while avoiding the procedural protections that are supposed to accompany such activity? But consideration of that inquiry is [\*284] not independent of another feature of administrative governance--namely, agency design, the degree to which an agency's structure is insulated from political accountability.

#### It'll be codified later as legally binding

Urja Mittal 18, JD from Yale Law School, Former Executive Editor of the Yale Law Journal, Associate at Jenner & Block, Former Legal Fellow at the Campaign Legal Center, BA in Economics and Political Science and BS in Economics from the University of Pennsylvania, “Litigation Rulemaking”, Yale Law Journal, Volume 127, Issue 4, 127 Yale L.J. 1010, February 2018, https://digitalcommons.law.yale.edu/ylj/vol127/iss4/4/

Litigation rulemaking in this context differs from the previous examples because guidance is not final agency action and is legally nonbinding. In practice, however, guidance can have binding effect, much like rulemaking and adjudication. For instance, if private parties reasonably believe that failure to follow the guidance will have adverse consequences, then guidance can have practically binding effect. This is particularly the case when parties are repeat players before agencies, interacting with or appearing before them multiple times. Additionally, even though the agencies may disclaim the legally binding nature of the document, it can effectively harden into a fixed rule with binding effect if the agencies choose to apply or enforce it consistently.

For instance, although neither NHTSA nor the CPSC have avowed an intention to enforce their guidance, if, in the future, the agencies were to make final agency action contingent upon the parties adopting these new provisions, then [\*1041] this guidance may appear to have the legally binding characteristics of a legislative rule. Take, for instance, the CPSC, which regularly conducts investigations of potential violations of federal consumer product safety laws. If the agency were to make decisions in the course of its investigations--such as whether to issue subpoenas for information from manufacturers or whether to threaten certain civil penalties--on the basis of whether the manufacturers under investigation had complied with the best-practices guidance, the effect would be to make the guidance practically binding.

Guidance can also be a way for agencies to conduct "trial runs" of litigation rulemaking before crystallizing these changes to the Federal Rules through notice-and-comment rulemaking or adjudication. For instance, if guidance proves effective, then an agency may formalize it into a rule through notice and comment. The agency can then justify the new rule by referencing the effectiveness of the nonbinding guidance. On the other hand, if the guidance is effective in certain instances but not sufficiently widely adopted, then an agency can implement the same rule through notice-and-comment rulemaking or adjudication in order to oblige greater compliance.

By issuing this novel guidance, these agencies have responded to concerns about federal court secrecy and transparency by imposing additional rules atop Rule 26's existing procedural requirements. Through litigation rulemaking, these agencies have effectively amended the Federal Rules regime, tailoring the procedural rules that govern certain federal cases in furtherance of the agencies' goals of promoting public health and safety.

#### Guidance can effectively revise [merger law / antimonopoly interpretations] {not reading YELLOW}

Krista Brown 21, Senior Policy Analyst at the American Economic Liberties Project, Former Research Associate at Open Markets Institute, B.A. in Economics with a Concentration in Mathematics from Colby College, et al., “The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach”, American Economic Liberties Project, January 2021, p. 142-144

Shaping Antitrust Law Through Antimonopoly Guidance and Policy Statements

DOJ and the FTC have significant authority to shape antitrust law by issuing guidance and policy statements. They should use this authority to arrest and reverse monopoly power, including by:

• Instituting New Merger Guidelines: The antitrust agencies should begin drafting new merger guidelines covering all types of mergers and acquisitions, using the 1968 Merger Guidelines as a template.717 Specifically, agencies should announce strict market share, size, or actual competitor thresholds beyond which companies may not consolidate. The agencies should also consider guidelines and enforcement policies toward mergers with a heightened scrutiny toward corporate size, and challenge additional mergers that may entrench corporate power despite not fitting neatly into horizontal, vertical, or conglomerate merger categories. Purported efficiencies should not factor into merger review decisions. Agencies should also think creatively about new ways to address the bargaining power elements of mergers. For example, the DOJ and FTC may clear a merger that may reduce labor bargaining power on the condition that the merged company allow workers to unionize through a “card-check” process rather than a private vote.718 The 2020 Trump Vertical Merger Guidelines, which improperly laud corporate concentration, should be rescinded.719

• Increasing Transparency and Scrutiny of the Merger Review Process: When an agency brings a challenge, it offers a complaint and public trial, creating a useful public record. A refusal to bring a challenge brings no such public accounting, though such a decision can be equally meaningful, if not more so. The antitrust agencies should begin issuing closing statements on all mergers that they review, or at the very least those that trigger the Hart- Scott-Rodino filing requirement. They should also solicit and respond to public comments for all forthcoming merger reviews.

• Reversing or Repealing Agency Initiatives That Hamper Enforcement: Under the Trump administration, the DOJ changed its policy to credit companies at both the charging and sentencing stage for having preexisting antitrust compliance programs in place.720 This policy change makes it easier for lawbreaking companies to avoid prosecution and should be rescinded through speeches, briefs, filings, or other official statements. Similarly, the Trump DOJ hamstrung itself by seeking to expedite merger review timelines by “aim[ing] to resolve most [merger] investigations within six months of filing.”721 The DOJ should clarify in speeches, press releases, or other official statements that it will not attempt to make investigations fit arbitrary, predetermined timetables. The FTC should disband initiatives like its Economic Liberty Task Force, which is used to peddle anti-worker policies such as occupational licensing reform, as well as its Working Groups on Agency Reform and Efficiency that weaken or fail to promote assertive enforcement against corporate monopoly power.

• Issuing Stronger Bank Merger Guidelines: The DOJ is currently reviewing its bank merger guidelines with a goal of facilitating bank mergers.722 The Justice Department should reverse course. Instead of exacerbating the damage caused by deregulation and lax merger enforcement, the division should enact stricter limits on banking activities and ownership.723

• Endorsing the House Antitrust Subcommittee Report: The antitrust agencies should formally adopt and endorse the findings in the House Antitrust Subcommittee’s October 2020 digital markets report. Agency leadership should commit to using all of their authorities to implement the report’s recommendations.

• Adopting Antimonopoly Legal Interpretations: The DOJ and FTC have adopted numerous pro-corporate and pro-employer legal interpretations in recent decades. The agencies should halt ongoing amicus briefs and reorient their efforts to replacing these interpretations and challenging unfavorable court decisions that limit their enforcement power. This includes:

• No-poach agreements: DOJ leadership should argue that worker no-poach agreements, even when initiated by a franchisor in contracts with franchisees, should be judged as a per se offense, not under the rule of reason as DOJ argued in 2019.724 DOJ should formally declare its new position in legal briefs that repudiate past filings and expand on this position in speeches, testimony, or other public declarations.

• Standard essential patents: DOJ should clarify through speeches, briefs, testimony, or official guidance that antitrust law can and should be used to police standard essential patentholders’ abuse of dominance, rescinding the Trump administration’s “New Madison” interpretation.725

• Unfair methods of competition: The FTC should withdraw its 2015 Statement of Principles unnecessarily limiting its ability to address “unfair methods of competition” under Section 5 of the FTC Act.726

• Cancel pending amicus briefs: The FTC and DOJ should immediately review all planned, pending, or draft amicus briefs. The agencies should cancel all briefs that do not advance antimonopoly or pro-worker legal interpretations and, where necessary, file motions to withdraw as amicus curiae from ongoing cases.

#### Court won’t review it

Emily Parsons 20, J.D. Candidate at the University of Washington School of Law, Summer Intern at Morrison & Foerester LLP, BA from the University of Washington, Judicial Law Clerk on the US Court of Appeals, “The Substantial Impact Approach: Reviewing Policy Statements in Light of APA Finality”, Washington Law Review, Volume 95, Number 1, 95 Wash. L. Rev. 495, March 2020, Lexis

Federal agencies engage in a wide range of non-binding action, issuing guidance documents such as policy statements and interpretive rules. Although these guidance documents may have a substantial impact on industries or members of the public, courts often refuse to review their substance. The Administrative Procedure Act requires agency action to be "final" before courts can review it. The D.C. Circuit and the Ninth Circuit have taken conflicting and often messy approaches in determining whether interpretive rules and policy statements are final and thus reviewable. This Comment proposes a new approach: the substantial impact approach. Under this approach - repurposed from a rejected test for procedural sufficiency of guidance documents - courts could review a guidance document that has a substantial impact on affected parties. This Comment analyzes the 2017 Department of Homeland Security memorandum rescinding Deferred Action for Childhood Arrivals, highlighting it as an example of a subset of policy statements that should be reviewable under the proposed substantial impact approach.

#### If they rule, they’ll side with agencies on antitrust

Julia Kapchinskiy 18, JD Candidate at the University of San Diego School of Law, MBA from the University of San Diego, “The Duality of Provider and Payer in the Current Healthcare Landscape and Related Antitrust Implications”, San Diego Law Review, 55 San Diego L. Rev. 617, Lexis

Antitrust laws are static and not easily changed; therefore, the first step to recognize its uniqueness is for the regulatory agencies to provide an adequate framework specifically for healthcare to acknowledge the concerns discussed in this Comment, and to provide the uniform approach for agencies to follow in reviewing healthcare transactions in the future. The agencies' policies are not binding on the courts; however, judicial reaction will follow as courts find the agencies' guidance persuasive. 328 Courts are not always experienced in the economic analysis of antitrust principles, and the regulating agencies must take the lead in offering a comprehensive "translation" of the antitrust principles, especially in the context of healthcare that balances traditional economic well-being with the consumer's social welfare.

[FOOTNOTE] 328 See supra note 85. [END FOOTNOTE]

[REFERENCE FOOTNOTE] 85 The guidelines are the agencies' interpretation of the antitrust law. Courts often rely on them without being required to follow them. See, e.g., Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015) ("Although the Merger Guidelines are "not binding on the courts' … they "are often used as persuasive authority.'" (citations omitted)); United States v. Kinder, 64 F.3d 757, 771 (2d Cir. 1995) ("Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect … courts commonly cite them as a benchmark of legality." (citation omitted)). [END FOOTNOTE]

#### No one will file suit

David L. Franklin 10, Associate Professor at the DePaul University College of Law, J.D. from the University of Chicago Law School, BA from Yale University, “Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut”, The Yale Law Journal, November 2010, 120 Yale L.J. 276, Lexis

If permissive or threshold-setting rules were the only context in which we could reliably predict that the trade-off would not take place, the remedy would be simple - apply the short cut but make an exception for these types of rules. This, however, is not the case: even in instances where agencies issue "traditional" nonlegislative rules concerning positive criteria for enforcement action, the trade-off often fails to take place. This is because many regulated entities choose, as a practical matter, to comply with nonlegislative rules rather than incur the expense and uncertainty associated with pre-enforcement challenges or the risks associated with noncompliance. [180](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n180) As Peter Strauss notes, although regulated entities may theoretically retain the option of challenging the substantive validity of nonlegislative rules during licensing, ratemaking, or other enforcement proceedings, "in practice ... these options entail risks and impose costs that many will be unwilling or even unable to accept." [181](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n181) The risks of noncompliance might decrease somewhat under a short  [\*312]  cut regime (if enforcement actions became more vulnerable to successful challenge because nonlegislative rules lacked the force of law), but there is no reason to believe that they would drop to zero - and good reason to doubt that they would drop substantially. [182](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n182) The trade-off, simply put, makes more sense in theory than in practice.

#### The coercion-based model of compliance is wrong AND the CP is viewed as modifying previously-existing binding obligations

-- the ‘internal point of view’ of law is more accurate; private entities respond to normative aspects of law, not just rote coercion

-- even those driven by strict cost/benefit calculations comply because adherence to guidance is the yardstick for evaluating compliance

-- this is especially true for private sector businesses; the professional class in compliance departments adhere to the internal view

-- the CP is seen as binding because it applies guidance to previously existing statute which is binding

Dr. Blake Emerson 19, Assistant Professor of Law at the UCLA School of Law, JD from Yale Law School, PhD in Political Science from Yale University, MPhil from Yale University, MA from Yale University, BA from Williams College, and Special Counsel to the Administrative Conference of the United States, “The Claims of Official Reason: Administrative Guidance on Social Inclusion”, Yale Law Journal, Volume 128, Number 8, 128 Yale L.J. 2122, June 2019, p. 2156-2161

II. EXTERNAL EFFECTS OF GUIDANCE

Thus far I have focused primarily on how guidance operates as law inside the state. This analysis, on its own, might give the appearance that guidance is merely talk between officials and not something that persons outside the government need to concern themselves with. As the implementation of DACA makes clear, however, guidance is often much more than an intramural affair. Through the DACA program, DHS granted deferred action to over seven hundred thousand people, and DAPA might have done the same for over four million. These deferred-action statuses would, by the operation of independent statutory authority and regulatory provisions, enable recipients to apply for other legal benefits. The internal circulation of nonbinding directives thus [\*2157] yields major social and legal consequences. These consequences arise in part because of the coercive powers that guidance conditions, channels, or holds in check. But I aim to situate this coercive potential in a broader, intrinsically communicative power: guidance can properly specify, or even alter, the normative commitments of private parties without carrying the mandate of binding law.

To explain guidance's normative status for private parties, I turn to the jurisprudence of H.L.A. Hart, whose landmark work, The Concept of Law, has set the stage for contemporary debate concerning the relationship between "law, coercion, and morality." In Part I above, Raz's concept of authority helped to distinguish binding legislative rules from guidance. While the former excludes certain reasons and courses of conduct from official consideration, the latter provides reasons for official action but does not exclude any other reasons or courses of conduct. Hart's concept of the "internal point of view" of law clarifies what it means for guidance to serve as a reason for action of this sort. For Hart, law is normative in the sense that it not only predicts government behavior but is treated as obligatory or evaluative. Agency officials hold this point of view by virtue of the duties of their office. They issue guidance to explain to others what they take these obligations to mean. Private parties may in some cases adopt this point of view so that they too take an internal perspective on regulatory norms. They may treat the existence of the guidance as a reason to act or not to act in their businesses or in their relations with others. And they may do so even though the guidance lays no claim to binding authority.

Guidance therefore has consequences for private parties' practical reasoning. Nonbinding policies can alter private persons' conceptions of their legal interests and liabilities such that they adjust their conduct to conform to the position stated in the guidance. Guidance thus helps shape public legal discourse and practice beyond the walls of the state without committing the agency or the public to any obligatory standard of conduct. As we will see in Part IV, this conclusion has implications for the durability of guidance and the terms on which it may be rescinded.

I lay the groundwork for that discussion by introducing Hart's idea of the internal point of view in Section II.A. In Section II.B, I explain how guidance's effects on private practical reasoning relate to the finality and ripeness doctrines [\*2158] of pre-enforcement judicial review. "Legal consequences" may "flow" from guidance without generating a determinate right or obligation. The legal consequences consist of alterations in official legal reasoning that trigger alterations in private practical reasoning. But these consequences fall well short of binding alterations in legal obligations. Guidance can thus be "final agency action" and yet fall within the APA's exemption from notice-and-comment rulemaking. However, guidance is often not "ripe" for judicial evaluation where the agency's application of it to a particular party would turn on unresolved factual issues. The more guidance takes the form of an open-ended list of factors to be considered in handling particular cases and the less it lays down categorical principles that apply to frontline officials, the less appropriate it is to evaluate its merits prior to enforcement.

A. Externalizing the "Internal Point of View"

H.L.A. Hart famously argued that a theory of law focused solely on its coercive power--"orders backed by threats"--misses something important about legal practice. "[W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying such sanctions." Law speaks in the language of "shall," "right," "duty," and "wrong," because of this normative content. Those who recognize this evaluative dimension of legal rules have an attitude that Hart calls the "internal point of view." Where a legal system exists, at least some persons treat its rules as norms to guide and judge conduct. This does not necessarily mean that they must be motivated to use the law in this way by a belief [\*2159] that its norms are morally obligatory. But it does require a "critical reflective attitude to certain patterns of behavior as a common standard."

According to Hart, the internal point of view need not be accepted by all persons to whom the rules apply. People might simply obey the law because of fear of sanction, autonomous moral judgments, or for some other reason. The internal point of view, however, "must be effectively accepted as common public standards of official behavior by its officials." At a minimum, the people who interpret and apply the law must reason on the basis of the rules. Otherwise, those rules will not govern their conduct and their coercive powers will operate without law. In a "healthy society," where the people believe the law is legitimate, they too will adopt the internal point of view and conclude that they ought to act a certain way because the law says so, not merely because someone in a uniform with a gun might make them.

Hart's observations help make sense of the expressive function guidance can play. Especially where guidance is directed to private parties, rather than solely to persons within the agency, it can extend the internal point of view to a wider circle of persons. Some private actors would then share with officials the sense that regulatory requirements are obligatory, rather than mere notice of when the state will use its coercive power. In this way, guidance can link the discourse of the state with the discourse of civil society, increasing the evaluative interchange between the public and its government. As noted in Part I, all administrative officials take an oath that they will "well and faithfully discharge the duties of [their] office." An office that issues guidance is often an office whose duties [\*2160] are specifically legal: to interpret, implement, and enforce statutory law and the regulations that flow from it, with an eye to the purposes the underlying law is meant to accomplish. Therefore, these officials must treat the law they enforce as a norm to guide their conduct, and not merely as a threat to be avoided. When they issue guidance that reaches a public audience, they can convey this point of view to that audience.

Private persons may simply treat the guidance as a prediction about how the agency is likely to use its enforcement powers and plan accordingly. In that case, the internal, official point of view has been communicated but not accepted. But it is also possible that guidance will have more normative purchase. First, a private party might fundamentally seek to avoid regulatory sanctions, but their way of doing so is to adopt a general norm: follow the guidance. In that case, they have "accepted" the norm in Hart's sense. If they determine on their own that the best way to go forward is to conform to the guidance, then the guidance becomes a norm for them, even if their reasons for adopting that norm are purely instrumental. Even in cases where coercive pressures motivate behavior, guidance can take on normative characteristics. Once people respond to that coercive pressure by using the guidance as an evaluative yardstick for their own or others' conduct, the nonbinding norm has been internalized as a standard of conduct.

A second possibility is that some people may have professional and organizational commitments to the guidance. As Nicholas Parrillo has observed in a detailed empirical study on the use of guidance, "[p]ractical day-to-day decisions on a firm's adherence to guidance often fall to employees whose backgrounds, socialization, or career incentives may motivate them to follow guidance." The growth of corporate compliance departments has created a professional cadre who must usually treat guidance as a norm with which to evaluate the conduct of other persons within their firms, rather than only as a prediction about how the government will act if the firm behaves in a certain way. A compliance officer's obligations and powers as an employee of the firm [\*2161] are intrinsically linked to the officer's ability to communicate and instill the content of guidance as a standard to which corporate behavior ought to conform.

Finally, some people may consider the underlying statute to be worthy of obedience, either because they believe they have a general duty to obey the law, or because the content of that particular statute is consonant with their personal obligations. When an agency whose duty is to implement a law expresses what it thinks the law means, these persons are likely to treat such guidance as clarifying their existing obligations. Knowing less about the content and mechanics of the law than the agency but still committed to the law's general principles, such persons may understand the guidance to have concretized some of their abstract rights and duties. Because of the general terms in which regulatory laws are drafted, this normative clarification may go so far as to alter the substance of individuals' normative commitments from what they were before.

#### FTC and DOJ officials will interpret it rigidly, enforcing it as de facto binding

Dr. Nicholas R. Parrillo 19, Professor of Law and Professor of History at Yale Law School, JD from Yale Law School, PhD in American Studies from Yale University, AB in History and Literature from Harvard University, “Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study”, Administrative Law Review, Volume 71, Issue 1, 71 ADMIN. L. REV. 57, Winter 2019, Lexis

While ubiquitous and essential, guidance also entails a certain danger. To the extent that officials follow guidance rigidly--and they sometimes do--guidance documents become de facto binding regulations, but ones that the agency issues at will, with the public having no say. One might think the solution is to get agencies to use guidance less rigidly, but that is easier said than done, since it is inherently difficult for large cross-pressured organizations like the federal government to be flexible.

An alternative solution is to beef up the procedure by which agencies issue guidance in the first place to make it more participatory. This solution has recently been proposed by academics, members of Congress, and presidential administrations. But the literature on the proposal is mainly theoretical, without much empirical understanding of how these participatory arrangements work when they are tried, or what their consequences are. To fill the gap, this Article draws upon interviews with 135 individuals who had firsthand experience with guidance as employees of agencies, industry, or non-governmental organizations (NGOs). While the interviews indicate that public participation in the issuance of guidance is sometimes worthwhile, they also provide a body of new evidence that the benefits of such participation are uncertain, and the pitfalls complex and potentially severe, in ways that are unknown or underexplored in the literature. In analyzing the interviews, this Article aims to provide a realistic and concrete assessment of participation's value and a guide for what factors an agency needs to evaluate (and what pitfalls it must anticipate) in deciding when and how to invite participation--factors and pitfalls that vary substantially across agencies and even across documents. In light of this variation, I conclude that decisions about whether and how to invite participation should normally be made on a relatively local basis: document by document, or, at most, agency by agency. I caution against hard government-wide mandates of the kind proposed by some lawmakers and scholars.

[\*59] INTRODUCTION

As voluminous and complicated as federal agency regulations are, they leave a great many important matters to the agency's discretion or interpretation. Individuals and firms naturally want to know how the agency regulating them will exercise this discretion and how it will read the regulations' ambiguous words. Agencies respond by issuing huge amounts of "guidance," that is, statements to advise the public on how the agency proposes to exercise discretion or interpret law. Guidance documents--advisories, circulars, bulletins, memos, interpretive letters, manuals, FAQs, and the like--occupy a large portion of the typical agency's website and of the typical regulatory lawyer's day-to-day reading. The total page count of guidance issued by any given agency is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even two-hundred.

Omnipresent and essential though it is, guidance sparks fiery controversy. When agencies impose actual regulations that officially bind the agency and the public (known as "legislative rules"), there are safeguards in place for how they do it: the costly, time-consuming process mandated by the Administrative Procedure Act (APA), including notice-and-comment, in which the parties who will be bound by a policy have input into its formulation. By contrast, agencies can issue guidance without any such process [\*60] because the APA's exemptions for "general statements of policy" and "interpretative rules" combine to cover guidance in all its forms. This means that guidance can be produced and altered at greater speed, in higher volume, and with less accountability than legislative rules can. The justification for this procedural looseness is that guidance, unlike a legislative rule, is not supposed to be binding on the agency or the public. It is merely a tentative suggestion of the agency's current thinking about how to proceed in individual proceedings for adjudication or enforcement, unlike a legislative rule that the agency would follow automatically. Guidance is supposed to leave latitude, in each individual case, for the regulated party to argue for flexible treatment, and for officials to be open to that argument. If officials use guidance flexibly, it does not seem terribly worrisome for the agency to [\*61] be unconstrained in issuing guidance from the beginning.

Yet many observers worry that guidance's official promise of flexibility may not be borne out in reality. One hears complaints that agency officials are not tentative or flexible when it comes to guidance, but instead follow it as they would a binding legislative rule, and regulated parties are under coercive pressure to do the same. The more these complaints are true, the more the APA approaches the status of a dead letter, with agencies free to issue de facto regulations at will, just by couching them as "guidance," without the participation of individuals and firms who will be effectively bound. Invoking this fear, recent exposés on guidance documents have condemned them as "underground regulations" whose escape from APA safeguards reflects "Washington's lawlessness." In 2017, former Attorney General Sessions initiated a campaign to root out "improper guidance documents" and to stop the government from "circumventing the rulemaking process."

#### Binding law is slow, litigated, and inconsistently enforced---guidance is key to clarity

David L. Franklin 10, Associate Professor at the DePaul University College of Law, J.D. from the University of Chicago Law School, BA from Yale University, “Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut”, The Yale Law Journal, Volume 120, Number 2, November 2010, 120 Yale L.J. 276, Lexis  
The use of nonlegislative rules generates three fundamental benefits for agencies and the regulated public. First, it provides relatively swift and accurate notice to the public of how the agency interprets the statutes or rules that it administers and how it intends to carry out its statutory mandate. [146](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n146) In particular, the use of interpretive rules allows agencies to clarify their  [\*304]  understanding of ambiguous statutes or rules without initiating a new round of notice and comment. [147](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n147) As Nina Mendelson notes, agencies could use legislative rules for this purpose, but this route would be time-consuming and might expose the agency to subsequent lawsuits alleging noncompliance with the rule. [148](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n148) Second, nonlegislative rulemaking allows agency heads to inform lower-level employees promptly about changes in agency policy (through such means as staff manuals, guidance documents, advice letters, and the like) in order to ensure bureaucratic uniformity and regularity. [149](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n149) [FOOTNOTE] n149. See, e.g., Kalen, supra note 71, at 671 ("Absent such [nonlegislative] documents, agency personnel could interpret or apply a particular regulation or statute inconsistently in various regional or field offices."); Manning, supra note 66, at 914-15 ("Nonlegislative rules potentially allow agencies to supply often far-flung staffs with needed direction ... ."); Mendelson, supra note 41, at 409 ("Agencies rely on handbooks, directives, and other similar guidance documents to ensure that lower-level employees complete forms correctly and make consistent (and thus more predictable) decisions."); Strauss, supra note 70, at 1482 ("Staff instructions, manuals, and other forms of publication rules are essential tools of bureaucratic management, by which the expertise of an agency is shared throughout its structure, and staff operatives are kept under the discipline necessary to the efficient accomplishment of agency mission."). [END FOOTNOTE] Third, nonlegislative rules avoid opportunity costs by freeing up agencies to redirect resources - resources that would otherwise be expended in the cumbersome process of notice-and-comment rulemaking - toward potentially more important priorities. [150](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n150)

#### It’s viewed as certain and predictable

Dr. Pedro Caro de Sousa 21, Advisor at the EUI Florence School of Regulation, Competition Expert with the OECD, DPhil from the University of Oxford, “Competition Enforcement and Regulatory Alternatives”, OECD, 6/7/2021, <https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf>

The OECD Competition Committee recommended in the past that competition authorities should be mindful of the benefits and risks of negotiated procedures when deciding whether to adopt them. One of the ways in which competition authorities have tried to achieve such a balance is through the publication of self-binding guidelines or guidance to enhance transparency and predictability of such procedures (OECD, 2016, p. 4[63]).

However, such guidance instruments raise concerns of their own. The publication by competition authorities of guidelines can have a significant impact on the general understanding of competition rules. Firms often tailor their behaviour to act in conformity with such guidance because compliance may avoid public enforcement or provide plausible defences (Spencer Weber Waller, 1998, pp. 1404-1408[60]) (Dunne, 2015, p. 81[5]). As a result, guidance instruments have been said to change the nature of enforcement from ex post to ex ante (Cave and Crowther, 2004, p. 25[64]).

Ultimately, however, guidance instruments provide significant advantages. They help clarify the law and procedures, significantly increasing legal certainty. They are useful as a means of obtaining clarity regarding competition authorities’ priorities and administrative behaviour, and often restrain their discretion. Further, guidance instruments are typically not binding on courts, which remain competent to interpret competition law – i.e. guidance instruments cannot on their own change the content of competition law. In effect, courts have jurisdiction to scrutinise competition enforcement actions even when these actions follow published guidance.

#### No one will see the difference. The real-world consequence is identical.

Tom J. Boer 99, Attorney at the U.S. Environmental Protection Agency and JD from George Washington University Law School, “Review Of Interpretive Rules And Policy Statements Under Judicial Review Provisions Such As Rcra Section 7006(A)(1)”, Boston College Environmental Affairs Law Review, Spring 1999, 26 B.C. Envtl. Aff. L. Rev. 519, Lexis

n43 See, e.g., Asimow, supra note 19, at 383-84. Although the theoretical difference between the legal effect of legislative and nonlegislative rules is clear, the practical line-drawing problem has proved difficult for a number of reasons. The most important reason for the haziness of the distinction is that the practical impact of either type of rule on the members of the public is the same. Most members of the public assume that all agency rules are valid, correct, and unalterable. Consequently, most people attempt to conform to them rather than to mount costly, time consuming, and usually futile challenges. Although legislative and nonlegislative rules are conceptually distinct and although their legal effect is profoundly different, the real-world consequences are usually identical.

## Inequality ADV

#### Nye is terrible.

Bruce Newsome 21, Lecturer, International Relations, University of San Diego, "The Wokeness of Soft Power," Critic Magazine, 03/03/2021, https://thecritic.co.uk/the-wokeness-of-soft-power/.

Joe Nye, the author of the term “soft power”, was there too, to remind us inadvertently that the wokeness of “soft power” begins with its vagueness. Nobody would disagree with what it’s not. “Hard power” (i.e., military power) is associated with vicious “hawks”, while progressives like to paint themselves as virtuous “doves”. The concept is ancient, although Nye published the term in 1990 when he was a professor of political science at Harvard. Within years, he was serving in Bill Clinton’s administration.

Nye has never defined soft power in any operationalizable way or measured it except by personal judgements. He specifies the objective as getting “other countries to want what you want”, or to “attract” others to your way of thinking. But an objective is not the same as a definition. He breaks soft power down into “culture”, “values”, and “policies”, but your culture, values, and policies appeal most to those who already share them. Meanwhile, soft power can be repellent to others. Nye himself admits that the worst despots had soft power. Moreover, pursuing soft power might mean compromising on one’s values to appeal to somebody else’s.

Nye has never provided a satisfactory guide to navigating these imperfectly competitive choices. Indeed, his later comments became decreasingly helpful. For instance, in 2012, he admired China’s rise with this contradiction: “the best propaganda is not propaganda.” At Thursday’s conference, the closest he came to giving an example of soft power is to hope for a post-Trump return to “values”. In answer to Miliband, he admitted that “hypocrisy” undermines soft power.

Clinton sometimes remembered to include “soft power” in her list of achievements, but she never defined soft power and gave only “diplomacy and negotiation” as examples.

Yet if soft power is just communication, then every state has soft power – at least, as long as any other state wants to talk. People are more likely to talk if you have hard power. Otherwise, they’re being charitable.

Most of the participants advocated charity as the main form of soft power. But then one wonders, in which direction is soft power really moving? Does the aider have soft power, or the recipient for attracting the aid? Or is it the interest groups that drive governments to virtue-signal despite the waste and counter-productiveness? Soft power ends up being used to justify itself.

At times, advocates of soft power see soft power everywhere. Tugendhat cited the use of the Union Jack to decorate mobile phones: “If that’s not soft power, I don’t know what is.” His next example was the appeal of British universities to foreign students. He pointed to foreign consumption of BBC news, but this is British soft power only if the coverage of Britain is positive, which it rarely is.

diversity into account when it is reviewing mergers. Campaign finance reform can help improve both political transparency and democratic processes.

## Democracy ADV

#### Democratic peace theory is wrong and relies on flawed modelling — prefer multilateral, not just dyadic studies.

Campbell et al., 18 — Benjamin W. Campbell; Doctoral Candidate in Political Science, Ohio State University. Skyler J. Cranmer; Carter Phillips and Sue Henry Associate Professor of Political Science. Bruce A. Desmarais; Associate Professor of Political Science, Pennsylvania State University. (September 13, 2018; “Triangulating War: Network Structure and the Democratic Peace;” *Cornell University*; <https://arxiv.org/pdf/1809.04141.pdf>; //GrRv)

Conclusion

The dyadic understanding of the democratic peace has become ubiquitous in International Relations. By looking beyond simple dyadic analysis, accounting for the embededness of states in a much more complex network, we found the democratic peace may not be as robust as previously thought. Our results demonstrate that after accounting for the tendency for like-regime states with common enemies not to fight one another, the effect of the democratic peace not only vanishes, but jointly democratic dyads seem to be *more* conflict prone than mixed dyads. These results are consistent across operationalizations of the outcome variable, our triadic closure predictor, measurements of joint democracy, and a variety of other factors. We believe this explanation for the democratic peace is not a mechanism for understanding the democratic peace, but instead, an alternative. What we have shown here is that conflict between democracies indeed exists and the peaceful relations occasionally found are not necessarily a function of the affinity of democratic states, or intrinsic attributes of democratic states, but instead, a function of the strategic inefficiencies of fighting a state with a shared enemy. While regime type may influence the interests of states, we find that it does not directly influence the probability that any two states fight one another.

There are three major implications to our research. First, scholars should be hesitant to consider dyadic conflict in isolation, as there are network dependencies informing whether a state engages or joins a MID. Second, preferences operating in addition to network interdependencies and collaboration explain much of the democratic peace. Third, when studying conflict, scholars and practitioners should consider the cost structure of collaboration, and how these dynamics inform not only conflict initiation, but conflict escalation. Particularly interesting is that the theoretical mechanism at work here is dramatically simpler than any of the established justifications for the democratic peace. We do not rely on arguments about institutions or norms, but just the simple and intuitive proposition that it does not make much sense for two states fighting a third to also fight each other. What the existing literature seems to have missed, usually theoretically and almost always empirically, is that dyadic conflicts do not occur in isolation, but in the context of a complex network of relations.

#### Democracy doesn’t solve war---leads to fractured states and perpetual intervention.

Michael **Neiberg 18**. Chair of War Studies in the Department of National Security and Strategy at the United States Army War College. 06-19-18. “Predicting War.” Lawfare. <https://www.lawfareblog.com/predicting-war>

Whether influenced by Hollywood or Santa Monica (the California headquarters of RAND), the history of war as Freedman relates it is essentially conceptual. The end of the dominant Cold War paradigm is a case in point. The ahistorical euphoria of the supposed “end of history” misled many western experts into predicting that an age of perpetual peace would at long last come into view because, as one specialist in this period wrote, the “absence of war between democracies comes as close as anything we have to an empirical law in international relations,” thus undergirding the rise of global governance ideals of liberal internationalism. The way forward in those early years after the fall of the Iron Curtain seemed therefore not technological, but conceptual. The key to peace lay in finding ways to help this one supposedly empirical historical law to take hold. Rather than bring peace, however, the pursuit of the concept of perpetual security through democracy only produced a new idea of war. It convinced western leaders of the need to advance the speed of historical progress through carefully managed military action against a select number of dictators. As prosecuted by George W. Bush, Tony Blair, and their advisers, the new paradigm not only made it possible for great powers to consider meddling in the domestic politics of smaller states, it impelled them to do so. By making more states democratic, through the use of force if necessary, these interventions would make the world safer. The idea was at least as old as Woodrow Wilson, but the eras of the world wars and the Cold War had made it too difficult to put in practice. After 1989, with the seemingly insurmountable dominance of western military organizations, the absence of a Soviet Union to balance western intervention, and the general post-Cold War hubris of western leaders, the environment was right for it to return. The result, of course, has not been an end of history and perpetual peace, but an extension of conflict and a reawakening of older grievances. The central problem, as “The Future of War” depicts it, was an all-too-eager willingness to accept the basic principle of democratic peace theory without thinking through the limits of the theory or fully examining alternatives. One clear alternative theory had already begun to emerge from the minds of theorists like Mary Kaldor and Rupert Smith. Their works essentially argued that war as once understood no longer existed. The future belonged to the side that could best exploit the disintegration of state authority, control the messaging, and work among the people in the new megacities. Anne-Marie Slaughter saw the inevitable splintering of the “sovereign state” into sub-sovereign centers of governance power, thereby squeezing out sovereignty in favor of power exercised by non-sovereign or less-than-sovereign institutions, on the one hand, and the ascendant rule of supra-national institutions, on the other. One might argue, although Freedman does not, that Hezbollah, FARC, Hamas, al-Qaeda, the Islamic State, and others have been able to survive against much more technologically sophisticated states because they have indeed made the intellectual shift to the kind of conflict that Kaldor and Smith described. The west has struggled against such adversaries not on the technological level but on the conceptual one. The west had two models on which to draw, neither of which helped them conceptualize the central problem. The “aid to civil power” model suggested building up the capabilities of local authorities so that they could care for their own security needs and maybe even become an exporter of regional security. The second model focused on “peacekeeping,” which required armies to act impartially even when, as in Yugoslavia, such a model indirectly empowered malicious actors like Slobodan Milosevic. Both models were frustrating, but they had just enough successes to keep them viable and allow them to survive intellectual challenges like the ones posed by Kaldor and Smith.

## 1NR

#### Nuke war doesn’t cause extinction

Samuel Miller-McDonald 19, PhD Candidate in Geography and the Environment at the University of Oxford, “Deathly Salvation”, The Trouble, 1/4/2019, https://www.the-trouble.com/content/2019/1/4/deathly-salvation

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices.

An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive.

In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less suicidal civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows?

What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

#### Warming is fast---extinction within 5 years

Dr. Jim Garrison 21, PhD from the University of Cambridge, MA from Harvard University, BA from the University of Santa Clara, Founder/President of Ubiquity University, “Human Extinction by 2026? Scientists Speak Out”, UbiVerse, 7/1/2021, https://ubiverse.org/posts/human-extinction-by-2026-scientists-speak-out

This may be the most important article you will ever read, from Arctic News June 13, 2021. It is a presentation of current climate data around planet earth with the assertion that if present trends continue, rising temperatures and CO2 emissions could make human life impossible by 2026. That's how bad our situation is. We are not talking about what might happen over the next decades. We are talking about what is happening NOW. We are entering a time of escalating turbulence due to our governments' refusal to take any kind of real action to reduce global warming. We must immediately and with every ounce of awareness and strength that we can muster take concerted action to REGENERATE human community and the planetary ecology. We must all become REGENERATION FIRST RESPONDERS, which is the focus of our Masters in Regenerative Action.

#### It makes nuclear war inevitable in every region

Dr. Michael T. Klare 20, Five Colleges Professor of Peace and World Security Studies at Hampshire College, Ph.D. from the Graduate School of the Union Institute, BA and MA from Columbia University, Member of the Board of Director at the Arms Control Association, Defense Correspondent for The Nation, “How Rising Temperatures Increase the Likelihood of Nuclear War”, The Nation, 1/13/2020, https://www.thenation.com/article/archive/nuclear-defense-climate-change/

Climbing world temperatures and rising sea levels will diminish the supply of food and water in many resource-deprived areas, increasing the risk of widespread starvation, social unrest, and human flight. Global corn production, for example, is projected to fall by as much as 14 percent in a 2°C warmer world, according to research cited in a 2018 special report by the UN’s Intergovernmental Panel on Climate Change (IPCC). Food scarcity and crop failures risk pushing hundreds of millions of people into overcrowded cities, where the likelihood of pandemics, ethnic strife, and severe storm damage is bound to increase. All of this will impose an immense burden on human institutions. Some states may collapse or break up into a collection of warring chiefdoms—all fighting over sources of water and other vital resources.

A similar momentum is now evident in the emerging nuclear arms race, with all three major powers—China, Russia, and the United States—rushing to deploy a host of new munitions. This dangerous process commenced a decade ago, when Russian and Chinese leaders sought improvements to their nuclear arsenals and President Barack Obama, in order to secure Senate approval of the New Strategic Arms Reduction Treaty of 2010, agreed to initial funding for the modernization of all three legs of America’s strategic triad, which encompasses submarines, intercontinental ballistic missiles, and bombers. (New START, which mandated significant reductions in US and Russian arsenals, will expire in February 2021 unless renewed by the two countries.) Although Obama initiated the modernization of the nuclear triad, the Trump administration has sought funds to proceed with their full-scale production, at an estimated initial installment of $500 billion over 10 years.

Even during the initial modernization program of the Obama era, Russian and Chinese leaders were sufficiently alarmed to hasten their own nuclear acquisitions. Both countries were already in the process of modernizing their stockpiles—Russia to replace Cold War–era systems that had become unreliable, China to provide its relatively small arsenal with enhanced capabilities. Trump’s decision to acquire a whole new suite of ICBMs, nuclear-armed submarines, and bombers has added momentum to these efforts. And with all three major powers upgrading their arsenals, the other nuclear-weapon states—led by India, Pakistan, and North Korea—have been expanding their stockpiles as well. Moreover, with Trump’s recent decision to abandon the Intermediate-Range Nuclear Forces (INF) Treaty, all major powers are developing missile delivery systems for a regional nuclear war such as might erupt in Europe, South Asia, or the western Pacific.

#### Infrastructure is make-or-break for U.S. climate commitments AND ensures effective mitigation and adaptation

John Van Vliet 9-8, Political Reporter for Inside NJ, “Malinowski: ‘A Make-or-Break Moment for Climate’”, Insider NJ Caucus Room, 9/8/2021, https://www.insidernj.com/malinowski-make-break-moment-climate/

Malinowski championed the Build Back Better plan asserting that, nationwide, millions of jobs would be created focusing on environmental efforts, addressing climate change, community improvement, clean energy, and dealing with toxic industrial sites. The bill is set to be voted on by the end of the month.

Mateo referenced the impacts of Hurricane Ida on New Jersey as a product of climate change. The BBB would, in theory, produce a green energy economy by the 2030s. That is, of course, provided that future leadership did not derail that goal.

“We are pushing to make this legislation as aggressive as possible to meet the needs of this moment,” Mateo said, saying the country needed a fully green economy by 2035, ranging from areas such as transportation, indoor safety, and clean drinking water infrastructure.

Sibley said that the NAACP was, “Eager to support healing historic harms,” referring to the Building Back Better agenda as a “once in a generation opportunity to invest in traditionally disadvantaged communities.” Sibley said it was critical to create “pipelines” to the middle class for communities of people of color, particularly those who have suffered the full brunt of pollution and climate-related impacts. The Newark water crisis was doubtless in mind when Sibley charged that changes must affect improvements so “families are no longer fearful of what flows from their faucets.” Acknowledging that there was an opportunity for the black community to have some justice brought its way, Sibley said, “…we need specificity in the language… Our community has been used to get money, but it doesn’t trickle back to the streets where people really need it. We all have a responsibility to make sure our officials are doing all they can for those who are most exploited and most vulnerable.”

When Malinowski spoke, he addressed the impact of Tropical Storm Ida and described the aftermath of the storm as “an important moment to have this conversation in Central Jersey because climate change just got real again for all of us. The storm that devastated parts of our state was a hurricane that hit Louisiana 1000 miles away–yet in many parts of New Jersey, the damage is as great or greater than what we suffered during Sandy and Irene and those which hit New Jersey directly.”

The skepticism, he believes, is on the decline and that labels “ought not to divide us. The cost is family after family dealing with feet of water in their house, ruined property, worrying—that’s climate change, it’s something very real. Wherever you may live, Americans may be waking up to the fact that this is something we have to deal with.”

The budget reconciliation represents a potential $3.5 trillion in spending investments and Malinowski urged Americans to stand out in the forefront of a new green economy, not only for the climate benefits, but also for the return on the investment. He said he favors market based strategies as the most efficient and effective ways of bringing about change, where the public and private sectors can work together towards a common goal.

In short, the Congressman said, while the price tag may seem steep now, the costs of not doing anything would be infinitely higher. “We are trying to address the effects and the root causes [of climate change] by investing in the infrastructure to protect us, to keep storm water from entering rivers, we have a lot of long overdue projects in New Jersey like controlling flooding. That’s pretty bipartisan. Everyone’s district is affected by flooding, it doesn’t matter what party you belong to.”

Either way, investment will come either in the form of climate effect mitigation—a route which is fundamentally unsustainable, expensive, and futile—or trying to reduce greenhouse gas emissions and embrace new technologies, innovations, and modernize industries. The companion bill, the bipartisan infrastructure bill where U.S. Rep. Josh Gottheimer (D-5) seized headlines by demanding a vote on before the budget reconciliation, goes hand-in-hand with the reconciliation. With the House in Democratic hands and the Senate split 50-50 with Democrat Kamala Harris casting the deciding vote, Malinowski believes that it is now or never. “We have an opportunity this year. There are a lot of things I want to do in Congress that are hard, this is hard but possible… The bipartisan bill is good, it’s not perfect, but it is good and invests tens of billions into climate resilience, flood control, strengthening infrastructure to withstand climate change… I’m making the point that resilience alone is resignation.”

The midterm elections are but a year away and the congressman said he could not be certain the Congress would stay favorable, reemphasizing in his soft-spoken way that this bill needs to get done and get done soon. “This is a year when all America is thinking about this issue, recognizing climate change is here… Next year is an election year, who knows who will be in the congress? This is a make-or-break moment for climate, a code red moment for those of us who want to get something practical done.”

#### Kumar isn’t predictive and our ev postdates---moderates are on board---Biden’s push this week was a game changer

Alexander Bolton 9-15, Senior Reporter at The Hill, AB from Princeton University, “Democrats Hope Biden Can Flip Manchin and Sinema”, The Hill, 9/15/2021, https://thehill.com/policy/energy-environment/572506-democrats-hope-biden-can-flip-manchin-and-sinema

President Biden met face to face with Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) on Wednesday, stepping up his involvement in the effort to unify congressional Democrats behind a $3.5 trillion spending package.

Democratic lawmakers are hailing Biden’s personal attention as a game-changing development at a critical moment.

“The ones who are negotiating publicly, I think it is fair to say, they’re the toughest votes to get,” Sen. Tim Kaine (D-Va.) said of Manchin and Sinema.

“This is really important for the Biden administration, and so it’s all on deck,” he added of the efforts to get the two holdouts to support the reconciliation package.

Kaine noted that Biden “has a strong personal relationship with Manchin.”

“Both Joe and Kyrsten really want [Biden] to be a successful president. (A) It’s good for the country. (B) It’s good for their states. (C) It’s good for their own politics,” Kaine added.

While the White House has been involved in negotiations with Senate Majority Leader Charles Schumer (D-N.Y.) and Speaker Nancy Pelosi (D-Calif.) over the size and scope of the spending package, Biden’s recent public appearances have focused more on the U.S. withdrawal from Afghanistan, the rise in COVID-19 cases, and wildfires and floods in various parts of the country.

White House press secretary Jen Psaki on Wednesday said the president knows the Manchin and Sinema meetings were only the start of negotiations with moderate Democrats.

“The president certainly believes they’ll be ongoing discussions, not that there’s necessarily going to be a conclusion out of those today,” she told reporters at the White House.

John LaBombard, a spokesman for Sinema, called Wednesday’s meeting “productive.”

“Kyrsten is continuing to work in good faith with her colleagues and President Biden as this legislation develops,” he said.

Biden, who spent decades in the Senate before becoming vice president, met separately with each senator in an apparent effort to maximize the effect of his personal involvement.

He sat down with Sinema around 10 a.m. and met with Manchin several hours later.

Manchin was spotted walking into the White House at 5:30 p.m. wearing a blue blazer, gray slacks and rubber-soled boat shoes.

The prospects of passing the entire $3.5 trillion human infrastructure package suffered several setbacks in recent weeks, largely because of Manchin and Sinema.

The two senators raised red flags about the bill’s price tag, and Manchin has criticized specific provisions such as the Clean Electricity Performance Program, which would provide $150 billion to steer electric utilities away from coal to renewable energy sources.

Manchin called for a “strategic pause” on the bill in a Wall Street Journal op-ed with the headline “Why I won’t support spending another $3.5 trillion.”

“Ignoring the fiscal consequences of our policy choices will create a disastrous future for the next generation of Americans,” he warned.

Sinema has also threatened to vote against a $3.5 trillion spending bill, although she has pledged to “work in good faith to develop this legislation with my colleagues and the administration.”

On the other side of the Capitol, Democrats suffered a blow with the drafting of their reconciliation bill Wednesday when three Democrats on the House Energy and Commerce Committee — Reps. Kurt Schrader (Ore.), Scott Peters (Calif.) and Kathleen Rice (N.Y.) — voted against legislation to lower drug prices, which Democratic leaders are counting on as a key pay-for in the larger package.

Separately, Rep. Stephanie Murphy (D-Fla.) sided with Republicans in the House Ways and Means Committee vote Wednesday to advance that panel's portion of the reconciliation package, citing concerns about tax provisions.

Manchin reiterated his concerns with the massive reconciliation bill at a Senate Democratic caucus lunch meeting on Tuesday. The remarks, however, fell flat with colleagues.

“We’re frustrated with Manchin,” said one Democratic senator who attended the meeting. “It’s not like the president has shunned him. He’s reached out to Manchin before. Nobody’s gotten more attention from the White House.”

The lawmaker said Manchin reprised some of the arguments he made in The Wall Street Journal and during appearances on CNN’s “State of the Union” and NBC’s “Meet the Press” over the weekend.

“The $64,000 question is, what’s his endgame? We don’t know,” said the lawmaker. “Part of what Biden is trying to figure out is, where does Manchin want to go?”

On Tuesday, Manchin questioned the need to spend $150 billion on weaning power plants away from coal when there are already plenty of private sector incentives to do so.

“Why should we be paying utilities to do what they’re already doing? We’re transitioning. Fifty percent of our power came from coal in the year 2000. Twenty years later, [it’s] 19 percent,” he told reporters.

Manchin also said he’s concerned about the reliability of depending entirely on renewable energy sources.

Senate Democrats have grown frustrated over what they view as Manchin’s “vague” demands for what the reconciliation bill should look like.

They also didn’t appreciate the double-barreled criticism in his Wall Street Journal op-ed that caught them off guard during the August recess.

“I was on a [congressional delegation trip] overseas with several colleagues when we read the op-ed, and we were aghast,” said another Democratic senator, who requested anonymity to discuss the internal dynamics of the Democratic caucus.

Manchin said fellow Democrats were “rushing” to spend another $3.5 trillion without fully understanding the potential ramifications of their actions. He warned that the bill could leave the federal government short of resources to respond to the pandemic if it gets worse because of viral mutations or if there’s another financial crisis like the Great Recession.

While some Democratic strategists have privately complained that Biden has not made more of a public sales pitch on behalf of his human infrastructure proposal, Democratic senators say they’re happy the president has let the talks play out on Capitol Hill without much interference.

Kaine said “it’s really important” that Biden is now getting personally involved in trying to persuade Manchin and Sinema get on board with the reconciliation bill.

“There’s a time when you get involved, and now is that time,” he said.

Kaine said Biden’s intervention in negotiations over the bipartisan $1 trillion infrastructure bill that passed the Senate last month was “very critical” to keeping it on track.

Senate Majority Whip Dick Durbin (D-Ill.) said Wednesday that he hopes Biden’s personal involvement will be a difference-maker with Manchin and Sinema.

“That conversation is important,” he said.

#### There’s a deal that’ll thread the needle

Robert Kuttner 9-15, Co-Founder and Co-Editor of The American Prospect Magazine, Longtime Columnist for BusinessWeek and The Boston Globe, “A Grand Bargain on Infrastructure and Saving Democracy?”, American Prospect, 9/15/2021, https://prospect.org/blogs/tap/grand-bargain-on-infrastructure-and-saving-democracy/

Due to the interesting timing, there may be an even grander bargain here. As I reported Monday, there also seems to be a deal in the making whereby the spending part of Biden’s Build Back Better program is cut by at least a trillion dollars in budget reconciliation; but in return, a lot of de facto spending is done through what are described as “middle-class tax cuts,” most notably the Child Tax Credit.

So progressives get their $3.5 trillion total package, and fiscal conservatives get their spending cuts. This deal is also tailor-made to get Joe Manchin’s support.

#### Disputes will be resolved

Louis Jacobson 9-14, Senior Correspondent at PolitiFact, Innovator-in-Residence at West Virginia University's Reed College of Media, Visiting Scholar at St. Bonaventure University's Jandoli School of Communication, “The Democrats’ Reconciliation Bill: What You Need To Know”, Tampa Bay Times, 9/14/2021, https://www.tampabay.com/news/nation-world/2021/09/14/the-democrats-reconciliation-bill-what-you-need-to-know/How united are Democrats?

Progress on hammering out the details of a reconciliation bill has been hampered by internal sparring among Democrats.

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

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

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

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

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

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

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

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

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

#### Ignore snapshots of temporary disagreement

Alexander Bolton 9-8, Senior Reporter at The Hill, AB from Princeton University, “Biden's Muscle Questioned Amid Falling Polls”, The Hill, 9/8/2021, https://thehill.com/homenews/senate/571190-bidens-muscle-questioned-amid-falling-polls

Getting all Democrats back on the same page once both the House and Senate are back may leave Biden relying heavily on Schumer and Pelosi.

“The package is going to have its own long and winding road to the president’s desk,” Kessler predicted.

Kessler said he thinks Biden will be able to get the bill passed along with a separate $1.2 trillion infrastructure package already approved by the Senate. Liberals in the House want the larger $3.5 trillion measure to move before the smaller infrastructure bill.

“Along the way it’s going to look like it’s going to fail dozens of times. We’re now entering the bleak period of reconciliation dynamics in which it just looks like it’s going to come apart and red lines are being drawn and different factions of the party are at each other’s throats, but through it all you’ve got three of the most skilled politicians at the helm,” Kessler said.

“You’ve got Biden, Pelosi and Schumer and they’ve proven very adept at landing the planes. They’re going to land these planes, [but] I don’t know at which airport,” he added.

#### All Biden’s PC is going to infrastructure

Andy Meek 21, Contributor at Fast Company and The Guardian, Tech Reporter at BGR, “There’s No Fourth Stimulus Check From The IRS – Here’s How You Might Get One Anyway”, BGR, 8/30/2021, https://bgr.com/politics/theres-no-fourth-stimulus-check-from-the-irs-heres-how-you-might-get-one-anyway/

The federal government is bogged down with a number of catastrophes and politically thorny legislative priorities at the moment. The Biden administration, for example, is trying to call on every drop of political capital it can to push an infrastructure bill over the finish line. Meanwhile, unrelated crises in Afghanistan as well as damage stemming from Hurricane Ida are demanding immediate attention. All of which is to say, finding enough votes in Congress to pass some sort of new stimulus legislation that funds an all-new round of checks anytime soon seems like a mountain that no one has the stomach to climb right now.

#### Afghanistan was popular and conserves PC for infrastructure

Dr. William G. Nomikos 9-1, Assistant Professor of Political Science at Washington University in St. Louis and Director of the Data-Driven Analysis of Peace Project, Ph.D. in Political Science from Yale University, “Everyone Has An Opinion On Afghanistan — Do Voters Care?”, The Hill, 9/1/2021, https://thehill.com/blogs/congress-blog/politics/570422-everyone-has-an-opinion-on-afghanistan-do-voters-care?rl=1

In February 2020, the Trump administration signed a peace agreement calling for the withdraw of American troops, but it is President Biden who ultimately pushed ahead and ended what he called “America’s longest war.” Even now, with the Taliban in Kabul, Biden remains defiant and defends his decision. Democrats worry this will hurt Biden politically, and Republicans are doing their best to make sure it does.

But existing research suggests otherwise.

Americans don’t prioritize foreign policy when voting

International relations scholars long have argued that voters punish presidents who back down from confrontations with foreign adversaries, because doing so could tarnish the U.S.’s reputation abroad. But the magnitude of the effect on presidential approval varies depending on whether Democrats or Republicans are in power, the composition of the president’s constituency, and the persuasiveness of the justification for backing down.

Indeed, as my own research has shown, the actual behavior of the president in crises may not matter at all. Ultimately, voters care about whether a president makes the right policy decisions, not whether American forces remain deployed abroad to maintain their reputation.

What’s more, Americans are far more likely care about domestic issues such as health care or the economy than foreign policy. For example, even as Barack Obama rode opposition to the war in Iraq to electoral victory in 2008, more than five times as many respondents to the American National Elections Survey (ANES) listed the economy as the most important problem facing the nation compared to the war.

Military interventions are unpopular with voters

We tend to associate wars with “rally-around-the-flag” effects, in which conflicts lead to popularity bumps for presidents and their parties. Such effects may have been true during WWII, but 21st century military interventions are long, drawn out affairs — and political losers.

This is due to what I’ve identified in past research as the time inconsistency between costs and benefits of military interventions. While the costs of intervention accrue immediately, both in terms of actual money as well as human lives, the best-case scenario benefits of intervention take decades, sometimes generations to bear fruit.

For politicians facing election campaigns, this means that there is just no incentive to pay the costs of war up front when you might never see the benefits. In research I conducted on troop contributions to the war in Afghanistan, I found that contributors to the war effort — including the United States — withdrew around 10 percent of their forces whenever they were up for reelection.

The politics of U.S. casualties

Voters do care deeply about the loss of American lives. While images from Kabul evoke memories of Saigon and withdrawal from Vietnam, the more apt comparisons are the capture and failed rescue of U.S. hostages in Teheran following the Iranian revolution in 1979 or the Benghazi embassy attacks in Libya in 2011.

Both the Iran hostage crisis and Benghazi negatively affected perception of two presidential candidates, Jimmy Carter and Hillary Clinton, respectively. Biden’s ability to avoid the political fallout might hinge on whether all Americans are evacuated safely.

Sadly, this political calculus suggests there may be little room for humanitarian evacuations and refugee resettlements. While Biden has pledged to bring any trapped Americans home, there simply may not be much political incentive to evacuate Afghan refugees – especially if doing so endangers American lives.

Moreover, accepting refugees means finding areas in the U.S. willing to resettle them. Conservative media commentators have already seized upon this issue, with one prominent pundit warning his viewers that they will be “invaded” by Afghan refugees.

Biden’s political calculation

Voters are not closely engaged with current events, often seeking to avoid politics altogether. Humanitarian disasters quickly disappear from headlines. Consider that less than a week after the Taliban overtook Kabul, news from Afghanistan did not make the front page of newspapers is several major cities.

On the flip said, the potential costs of staying in Afghanistan would be enormous. Currently, President Biden is focused on getting Congress to pass a $1 trillion infrastructure bill and a $3.5 trillion budget reconciliation bill that, together, would comprise much of his first term agenda. Given the importance of these domestic issues to voters relative to foreign policy, passing the bills through Congress will be the most important politically for Biden.

According to estimates, the war in Afghanistan alone has already cost American taxpayers more than $2.2 trillion. Concerns about the combined price tag of Democrats’ legislative agenda have triggered concerns about federal spending and inflation. More spending on Afghanistan would make Biden and his fellow Democrats even more vulnerable to such attacks.

The slim margins in Congress suggests that Biden must reserve his political capital to maintain the existing coalitions to pass these two bills, not a new war effort. Doing so would also offer the Democrats the best chance for retaining control of Congress in the 2022 midterm elections.

#### It’s top of the docket---vote’s this month

George Cahlink 9-9, Congressional Reporter at Energy & Environment News, Former Editor and Budget Tracker at CQ Roll Call, BA from Saint Joseph’s University, “4 Deadlines to Watch on Capitol Hill This Fall”, E&E Daily, 9/9/2021, https://www.eenews.net/articles/4-deadlines-to-watch-on-capitol-hill-this-fall/

Here are the dates to watch in coming weeks on Capitol Hill as both chambers enter a high-stakes legislative period that could set the course for the administration’s handling of energy and environmental issues over the next three-plus years.

1. Sept. 15 — Reconciliation bills due

House and Senate Democratic leaders are pressing to have their $3.5 trillion plan for carrying out Biden’s domestic goals ready to move to the floor by mid-September.

Both chambers are planning to assemble various bills into a single budget reconciliation package that would be able to pass the Senate with only 50 votes, meaning it could not be filibustered. It’s expected to contain a clean energy payment program, invest heavily in electric vehicles, create a Civilian Climate Corps and overhaul the energy tax code (E&E Daily, Aug. 12).

House Democrats are marking up their versions of the bill this week and next in committee — including the Natural Resources and Ways and Means committees today (see related story). The Senate is expected to compile its version mostly behind closed doors.

The sequencing and composition of the legislation on the floors will be crucial, even as there is no near-term deadline for passing reconciliation. Leaders would like to move it this fall rather than risk pushing votes on the partisan plan into an election year.

House Democratic leaders will need to balance competing progressive and moderate interests, while in the Senate a single Democratic defection could sink the package.

Senate Energy and Natural Resources Chair Joe Manchin (D-W.Va.), a fossil fuel ally, rattled Democrats last week when he called a “strategic pause” in reconciliation, saying he does not support the $3.5 trillion spending goal and warned against setting artificial deadlines (Greenwire, Sept. 3). He’s raised similar concerns in the past, often to position himself as a dealmaker.

Majority Leader Chuck Schumer (D-N.Y.) took the latest warning from Manchin in stride, saying yesterday “we’re moving full speed ahead,” though adding, “Without unity, we’re not going to get anything.”

2. Sept. 27 — House infrastructure vote

Speaker Nancy Pelosi (D-Calif.) meanwhile, only got House Democrats on board with the budget framework last month by agreeing to a demand from moderates that the chamber vote on a bipartisan infrastructure bill no later than Sept. 27.

Centrist Democrats are anxious to get the Senate’s $1.2 trillion infrastructure bill — backed by many Republicans — signed into law. But House progressives have said for months they won’t support the bipartisan funding for road, bridges and other assorted infrastructure until they first are assured that the Senate will back the far larger $3.5 trillion reconciliation effort.

#### It's the #1 priority

Eli Stokols 21, White House Reporter for the Los Angeles Times, and Noah Bierman, National Desk and White House Reporter for the Los Angeles Times, “Biden Focuses on Domestic Agenda, Even as Hot Spots Flare Up Elsewhere”, Los Angeles Times, 8/21/2021, https://www.latimes.com/politics/story/2021-08-21/la-na-pol-biden-priorities

Every morning this week at 8:45, a newly established “war room” has convened at the White House, with about 20 staffers logging onto a Zoom call to coordinate messaging and deployment of critical resources.

The operation has nothing to do with the crisis in Afghanistan — it’s about keeping President Biden’s big infrastructure push on track. Even amid the fall of Kabul to the Taliban and the frantic, last-minute military operation to rescue thousands of Americans and vulnerable Afghans, the White House has maintained its overarching focus on the domestic matters it has prioritized for the last eight months.

“The No. 1 priority for our cabinet overall, from our perspective here, is to build support throughout the [August] recess process for the legislative agenda,” said Neera Tanden, a senior advisor to the president who has overseen the war room since July. Tasked with building support for a $1.2-trillion bipartisan infrastructure measure and the Democrats’ $3.5-trillion budget proposal, Tanden is dispatching cabinet members to key states, monitoring lawmakers’ town halls and arranging hundreds of local TV interviews with administration officials.

#### Institutional hurdles block the XO

Cassidy 7/12—(staff writer). John Cassidy. July 12, 2021. “The Biden Antitrust Revolution”. The New Yorker. <https://www.newyorker.com/news/our-columnists/the-biden-antitrust-revolution>. Accessed 7/14/21.

To be sure, there are reasons for skepticism regarding how much the new executive order will actually achieve. Some obvious moves to curtail corporate abuses, such as empowering Medicare to negotiate drug prices with Big Pharma, would require new legislation. Even in areas where federal agencies do have authority under existing law, they tend to operate on a timeline of years, rather than months. Any new rules that the F.T.C. proposes, for example, will have to go through a lengthy process of public comment before being enacted.

Furthermore, it is far from certain that the courts will go along with key items of the new policy agenda, such as changing the rules for approving corporate mergers. “There’s a headwind there that may or may not be overcome,” William J. Baer, a former head of the antitrust division at the Justice Department, told the Times. Even in a best-case scenario for the new antitrust movement, it will take years, or maybe even decades, to reverse the near-hegemony that conservative economic ideas have established in the judiciary.

The fact that the stock market rose on Friday suggests that Wall Street isn’t very worried about the executive order crimping the profits of big companies. But all policy crusades have to start somewhere, and, as Wu indicated in his 2018 book, the stakes involved in this one couldn’t be higher. Absent a successful effort to demonstrate to the American people that the economic system can be made to work fairly for them, the foundations of democracy will continue to erode. No one should be under any illusions about the scale of the task that the Biden Administration has taken on, or how quickly it might be accomplished. But, at least, the effort has begun, and in a memorable manner. “Let me be very clear,” Biden said, on Friday. “Capitalism without competition isn’t capitalism; it’s exploitation.” When was the last time you heard a Democratic President speak so plainly about economics?

#### It’s only recommendations AND relies on state cooperation

Levitz 7/9—(staff writer). Eric Levitz. July 9, 2021. Biden Unveils Bid to Reform Economy Through Executive Power”. New York Magazine. <https://nymag.com/intelligencer/2021/07/biden-unveils-sweeping-anti-monopoly-executive-order.html>. Accessed 7/14/21.

A significant percentage of the order’s provisions are merely recommendations directed at commissions that boast legal independence from the White House: the FTC and FCC. Meanwhile, some of Biden’s proposed reforms (such as the occupational licensing ban) concern state law, and would thus require the cooperation of authorities outside executive control. And even if every federal agency abides by Biden’s dictates, a conservative-dominated judiciary could still strike down many of his reforms.

#### The last mile to reform is a tough fight, tanking Biden’s other agenda

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]

Meanwhile, on Capitol Hill …

Down the avenue, Congress is debating whether to provide the agencies with additional tools and resources. But how realistic are the prospects for legislative reform?

In short, although the prospects for sweeping legislative reform of the antitrust laws are dim, targeted reforms appear increasingly likely, especially increased funding for the agencies. In October 2020, the House antitrust subcommittee concluded a year-long bipartisan investigation into these issues, and the House Democrats published a lengthy report detailing their findings and making recommendations for reform. Notably, the House Republican response identified several areas of agreement, including “providing antitrust enforcement agencies with the necessary resources.” [3] House Republicans also made it clear that they too are concerned about tech companies “using ‘killer acquisitions’ to remove up-and-coming competitors from the marketplace,” and that the burdens of proof for mergers and predatory pricing cases need to be reevaluated.[4] On March 18, 2021, however, the Republican ranking member on the committee reiterated a shared interest in reforming the evidentiary burden of proof in merger cases, which he described as having become “essentially insurmountable” and “a grant of near total immunity to big tech companies.” Although a path to agreement on more substantive issues typically has many obstacles, reforming the burden of proof in certain instances may be emerging as the most likely candidate for significant legislative action.

In the Senate, on February 4, 2021, newly installed antitrust subcommittee chair Senator Amy Klobuchar (D-MN) introduced a bill that would overhaul existing antitrust laws. Among other reforms, it would lower the government’s burden of proof to block a merger, shift the burden of proof in certain cases and require the merging parties to justify the deal, and increase funding for both the DOJ Antitrust Division and the FTC. At the subcommittee’s March 11, 2021 hearing related to the bill, subcommittee ranking member Senator Mike Lee (R-UT) (who promptly released a statement noting his opposition to Ms. Khan’s nomination) made it clear that he firmly opposes “a sweeping transformation of the antitrust laws.” Throughout the hearing, however, there appeared to be bipartisan support for taking some sort of action to address these issues, and at the very least to provide increased funding to the DOJ and FTC. Even Senator Lee, who recently introduced a bill that would combine the DOJ and FTC to avoid inefficiencies in antitrust enforcement, acknowledged that agency leaders need the resources that are necessary to vigorously enforce antitrust laws.

So, what does it all mean?

In these circumstances, the most likely outcome appears to be antitrust officials creatively using their existing tools to enhance enforcement while not so quietly pressing Congress for additional assistance. On March 16, 2020, acting FTC Chair Rebecca Slaughter advocated for increased scrutiny of mergers between pharmaceutical companies. She also told the House antitrust subcommittee that the agencies “should consider withdrawing” the guidance for “vertical” mergers issued during the last administration to allow for more aggressive enforcement.[5] But at the same time, FTC Commissioner Noah Phillips explained that the agency would not be able to challenge certain deals without more funding. The Biden administration and the agencies will need to determine how to square those positions. Also, even assuming Congress could provide the agencies with additional funding quickly (on top of the additional $20 million Congress provided to the FTC in December 2020), using that funding to hire additional attorneys will take time.

The path for meaningful legislative reform remains extremely complicated. The prospect for reform depends significantly on whether members of Congress, congressional leadership, and the Biden administration are willing to expend the time and political capital necessary to pass a reform bill (which also assumes the relevant parties can agree on what should be included—or, perhaps more importantly, excluded—from that bill). In light of competing priorities, the absence of key personnel, and the already narrowing congressional calendar (major non-appropriations legislation typically will not move after July in an election year (2022)), those prospects appear to be slim. In the meantime, we expect that Congress will continue to focus attention on these issues with more hearings and new legislative proposals, but it remains to be seen when attention will become action.

#### The GOP will refuse, triggering partisan fights

Claude Marx 20, Reporter for FTCWatch, Graduate Work at Georgetown University, BA from Washington University St. Louis, “Partisan Splits on Capitol Hill Over Antitrust Likely, but Less Rancor Between DOJ, FTC”, mLex, 11/9/2020, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/partisan-splits-on-capitol-hill-over-antitrust-likely-but-less-rancor-between-doj-ftc

At a time when once arcane issues involving antitrust are making headlines, including whether the laws are even adequate to rein in tech giants, it’s doubtful a newly elected Congress will succeed in tackling such big matters.

Voters have once again elected a Democratic House and, at press time, it appears a Republican Senate. If that partisan division holds, look for clashes in the two chambers’ views on updating the antitrust laws, though there’s some overlap in concerns about the power of the Goliath digital platforms.

The recent release of the House Judiciary Committee’s mammoth report on competition in the digital markets is a prime example. Its pitch for a sweeping overhaul of antitrust law isn’t likely to find a receptive hearing in the Republican Senate, though some of its more modest proposals might win some bipartisan support.

What both chambers are expected to agree on is to boost resources for the Federal Trade Commission and the Justice Department’s antitrust division, especially given the large jump in merger and acquisition activity, which is set to accelerate in coming months.

Seven-term Senator Charles Grassley of Iowa, the second-oldest member of the upper chamber at 85, takes the gavel of the Judiciary Committee after a two-year hiatus. Though he isn’t a lawyer, Grassley has been active on antitrust issues, usually focusing on narrow subjects within the field.

“He comes at the issue because of his interest in agriculture. His heart is in the right place and he’s had staff that is knowledgeable about antitrust,” Seth Bloom, the top Democratic staff member on the antitrust subcommittee during much of the time from 1999 to 2008, told FTCWatch.

Senator Dianne Feinstein of California is likely to remain the top Democrat on the panel. Like Grassley, she is a non-lawyer, but unlike the chairman she hasn’t been active on antitrust issues. At 87, she’s the oldest member of the Senate.

Bloom added that committee chairs typically give the subcommittee a fair degree of autonomy. Don’t look for the committee to be on the cutting edge of antitrust reform, but instead, expect Grassley to work with Antitrust Subcommittee Chairman Mike Lee on less politically combustible issues such as legislation that would more closely align the merger review procedures of the DOJ and FTC — a move that House Democrats are likely to resist.

Lee, a Utah Republican, is the main sponsor of the Standard Merger and Acquisition Reviews Through Equal Rules Act, which would eliminate the FTC's power to conduct an administrative review of a proposed merger. The DOJ has no such power, as it must fight its merger challenges in federal court.

Lee also has led the charge that the big tech platforms — Facebook, Google and Twitter — have used their market power to thwart conservatives by engaging in “ideological discrimination.” He’s promised more oversight as Republicans pursue modifications to Section 230 of the Communications Decency Act of 1996. The law provides a legal shield for the platforms against lawsuits arising from user-generated content.

Democrats have fired back, charging the real problem isn’t bias, but that the platforms have failed to do enough to take down harmful posts that spread misinformation.

Bloom added Lee has been critical of Google. For example, the senator cheered the Justice Department’s landmark lawsuit challenging the company for using anticompetitive practices to maintain its monopoly. Lee tweeted it’s “an encouraging sign in our country’s ongoing battle against the pernicious influence of Big Tech.”

Still, Bloom said Lee is generally skeptical of broader antitrust overhauls, though he’s likely to support efforts to boost the antitrust watchdogs’ budget.

Senator Amy Klobuchar, a Minnesota Democrat and ranking member of the antitrust subcommittee, wants to modify the antitrust laws to help undo what she sees as the increasingly pro-defendant tilt of courts. She would shift the burden of proof in certain large deals to the companies to show that their tie-up won’t undermine competition.

While such ideas may not gain much traction in a GOP-controlled Senate, Klobuchar has joined Grassley on legislation to update merger filing fees and lower the burden on small and medium businesses. The proposal would raise additional revenue to pay for beefing up the DOJ’s and FTC’s enforcement efforts.

Over in the House, the leadership of the Judiciary Committee and its antitrust subcommittee are expected to remain the same. Judiciary Committee Chairman Jerrold Nadler of New York hasn’t been especially active on antitrust matters. By contrast, during his two years at the helm, Antitrust Subcommittee Chairman David Cicilline of Rhode Island has aggressively led the investigation into the dominance of tech platforms, focusing on Amazon, Apple, Facebook and Google.

The provocative report that followed included a tough indictment of the companies’ abuse of their monopoly power to throttle competition and charged that there’s serious under-enforcement by the antitrust agencies. Given those dynamics, it calls for the laws to be revamped, including a shift so that mergers resulting in a single firm controlling an outsized market share be presumptively prohibited. The report also calls for shifting the burden of proof to the merging parties to show their deal won’t reduce competition — a move aimed at increasing the likelihood that anticompetitive deals are blocked.

Although the report’s more modest proposals, including the one to shift the burden of proof, attracted some GOP support on the committee, its push for more sweeping changes faces big challenges. Even on the burden shift proposal, former FTC Commissioner Joshua Wright tweeted he is “very skeptical” it “will get much, if any, support from conservatives.”

Recurring efforts to move privacy legislation will continue, but the same hurdles remain. A measure by Senator Jerry Moran, the Kansas Republican who chairs the Senate Commerce Subcommittee on Manufacturing, Trade, and Consumer Protection, would give consumers expanded powers, but it would not allow individuals to sue companies for violating their privacy. It also would preempt state laws. Democrats oppose those two provisions and have introduced measures in the House and Senate without them.

Jeff Chester, executive director of the Center for Digital Democracy and a veteran of the privacy wars remains optimistic despite the obstacles. “There is more pressure coming for change,” he said.

New look at the top

Still, as partisan divisions on Capitol Hill will probably continue, so will such differences be evident on some big-ticket issues at the FTC. The agency has long been known for its bipartisanship regardless of which party controls the White House, but the five commissioners who assumed office at roughly the same time in 2018 have clashed over a number of high-profile cases.

#### It’s entwined in broader cultural battles, making reform extremely difficult

Mark Whitener 21, Adjunct Professor at Georgetown University's McDonough School of Business and Senior Fellow at the Georgetown Center for Business and Public Policy, “The Future of Antitrust: Ideology, Alternative Facts, and the Rule of Law”, ABA Antitrust Law Section - American Bar Association, 35 Antitrust ABA 3, Spring 2021, Lexis

THE FUTURE OF EVERYTHING SEEMS to be up for grabs, and antitrust is no exception. Like other aspects of society, antitrust has become somewhat disoriented, searching for solid ground while the landscape shifts. The basic consensus about antitrust fundamentals that formed over the past half-century, centered on economic analysis and the consumer welfare standard, is being challenged by critics who variously urge that antitrust be modernized to deal with new issues or returned to what they argue are its historical roots. Antitrust is offered as a means to address broad economic, political, and social concerns. Political opposites like Elizabeth Warren and Josh Hawley call for breakups of the same big firms.

As the antitrust policy discussion moves beyond its cloistered walls into the broader public forum, it is--for better or worse--starting to resemble debates over divisive issues like immigration, elections, racial justice, and climate change. Antitrust's future may hinge on the answers to the same questions that underlie these other policy controversies: Is consensus on common goals achievable, or will conflicting factions seek fundamentally different things? Can we arrive at an agreed set of facts on which to base policy decisions, or will everyone assert their own ("alternative") facts, or underlying beliefs? And, can our institutions--of government, politics, academia, social and other media--help us answer these questions, or will they stand by ineffectually as confidence in them declines?

Ideological Divisions vs. Consensus . If the first step in solving a problem is recognizing that one exists, the second step is agreeing on what exactly the problem is. Progress on some issues, like climate change, is impeded by the fact that a sizeable portion the public and many politicians deny that there is a real problem at all. On other issues lots of people are concerned, but they disagree, often vehemently, over the nature of the problem. Is the real issue with elections one of voter suppression, or election fraud? Should immigration reform focus on stronger border security, or fairer treatment of immigrants? The intensity of the public discussion of these issues often seems to hinder consensus, not further it.

In contrast, antitrust policy has over much of its history evolved through a more insular process, driven by the relatively few scholars, jurists, and politicians who made antitrust their concern. Public awareness of antitrust has generally been limited, and political intervention sporadic, often driven more by the concerns of particular industries or interest groups than by broad public interests. Partisanship in antitrust enforcement has typically been nuanced, with occasional shifts in emphasis from one administration to the next, but with a good measure of continuity. Even the major doctrinal shift in the 20th century toward economic analysis, while initially developed by academics who had free-market philosophies, ultimately became mainstream antitrust thought, as the Chicago School's underpinnings took hold in the enforcement agencies and the courts. Many of the economics movement's core principles continue to underlie Post-Chicago pro-enforcement theories that were developed by antitrust progressives. Until fairly recently, disagreements over antitrust policy tended to focus more on analytical details or individual case outcomes than on doctrinal fundamentals.

Now that antitrust is attracting a larger and often more politically motivated audience, there are both new opportunities and new challenges for antitrust policy. A more inclusive policy process could, in theory, lead to reforms that make antitrust more effective in dealing with a wider range of problems. But this assumes, first, that antitrust policy is in need of major changes; and second, that our political and other institutions are capable of producing reforms that will make things better, not worse. Even back in the days when a less gridlocked Congress was capable of passing major reform bills, there was a saying that proposing antitrust legislation was like opening Pandora's Box: once antitrust is exposed to the vagaries of the political process, anything can happen, much of it bad. Think of the various [\*4] industry-specific antitrust exemptions Congress has enacted over the years, for example, or misguided expansions of the antitrust laws like the Robinson-Patman Act.

For now, partisan and ideological stalemate will probably forestall the passage of major antitrust legislation. While there is support among both Democrats and Republicans for changes in antitrust policy, their main concerns differ widely, ranging from some Democrats' focus on addressing various forms of inequality to some Republicans' charges that big social networks stifle conservative viewpoints. If significant policy changes are to occur in the near term, they will probably have to come from the enforcement agencies and then, perhaps over time, from the courts. The U.S. agencies and the states filed several high-profile cases against large technology firms in the waning months of the Trump administration, and presumably these cases will be prosecuted vigorously by the Biden administration. But the cases, as noteworthy as they are, focus on relatively narrow conduct and break no new analytical ground, relying instead on established antitrust theories such as exclusive dealing and potential competition. As such, the cases have disappointed critics who want to use antitrust to address a wider range of ills they attribute to the excessive size and power of Big Tech.

#### Even if popular, it requires difficult battles for floor time

Paul H. Sukenik 19, JD from the University of North Carolina School of Law, BA in Government and History from the University of Virginia, “The Earth Belongs to the Living, or at Least It Should: The Troubling Difficulty of Modifying Antitrust Consent Decrees”, North Carolina Law Review, Volume 97, Number 3, 97 N.C.L. Rev. 734, March 2019, Lexis

Even if a party were to convince enough lawmakers of its proposed legislation, those lawmakers would still need to wait for the opportune time to introduce the bill to ensure that it gets passed. That timeline could be at the mercy of the current partisan makeup in Congress or many other factors. In that sense, subjecting antitrust regulation to the political process would only magnify Konczal's concerns about certainty and finality.

#### The GOP will reflexively oppose anything Biden pushes AND the plan’s narrow scope makes its support weak and fragile

David Dayen 21, Executive Editor of The American Prospect, Work Appeared in The Intercept, The New Republic, HuffPost, The Washington Post, the Los Angeles Times, “Congressmembers Roll Out an Anti–Big Tech Agenda”, The American Prospect, 6/15/2021, https://prospect.org/power/congressmembers-roll-out-an-anti-big-tech-agenda/

What began in the House Antitrust Subcommittee as an open-ended investigation into the power of the large tech platforms has culminated over two years later in a package of five bipartisan bills informed by that investigation. Each targets a specific aspect of Big Tech’s power, from platform websites self-preferencing their own products, to serial acquisitions that entrench market dominance, to vertical integration across multiple business lines, to network effects that lock in customers. Each bill has multiple Republican co-sponsors, and one has already passed through the Senate.

But Congress is an inhospitable place these days for lawmakers who want to make things happen. Ideological distancing could still frustrate efforts on this legislation, regardless of their level of support. The relative narrowness of the package, despite a concentration problem that spans industries throughout the economy, could also present a challenge. This battle is more likely to be waged at the state level, in the courts, and inside the federal antitrust agencies than in precarious coalitions for somewhat myopic bills.

In any other context throughout U.S. history, a legislative agenda offered in tandem by the chair and ranking member of a committee would have good prospects for success. And if the “Opportunity, Innovation, Choice” agenda were to pass, it would have positive effects for the country.

The bills include the American Choice and Innovation Online Act, which would ban online platforms from giving their own services advantages over rivals, through for example placing their links at the top of the page. It would also prohibit conditioning access to platforms on buying services from them (a seeming reference to Amazon’s dangling of fulfillment services for third-party sellers as the only way to win the “buy box” where most products are sold); using nonpublic data to inform a platform’s competing goods or services (a reference to Amazon Basics informing their product line from seller data); or requiring pricing ranges from third-party sellers (something being litigated right now in D.C.’s lawsuit against Amazon).

The Platform Competition and Opportunity Act prohibits platforms of a certain size from making mergers or acquisitions. The Ending Platform Monopolies Act would structurally separate platforms that host sellers or partners from business lines they own that compete with them, by allowing enforcement agencies to force divestiture of anything that creates a “conflict of interest.” (Rep. David Cicilline has in the past compared this to a “Glass-Steagall” act for Big Tech.) The ACCESS Act would require platform sites to make their data portable and their network interoperable with competing services, the way texting services ICQ and AOL Instant Messenger and iMessage were all interoperable in the late 1990s and early 2000s. The idea here is to lower barriers to entry for building a new social media site by allowing Facebook or Instagram data and friends to freely move over.

Finally, the Merger Filing Fee Modernization Act increases payments for large corporations engaging in mergers, which would allow for more funding to the Justice Department Antitrust Division and the Federal Trade Commission without new federal outlays. This bill, which applies to all mergers and not just Big Tech, has already passed the Senate, inside the so-called “China bill” that now awaits House action.

House Antitrust Subcommittee chair Rep. David Cicilline (D-RI) and ranking member Rep. Ken Buck (R-CO) endorsed the package, and several Republicans co-sponsored some or all of the bills, including Reps. Lance Gooden (R-TX), Burgess Owens (R-UT), Chip Roy (R-TX), and even far-right members like Madison Cawthorn (R-NC) and Matt Gaetz (R-FL).

However, as the Prospect has reported, there’s an ideological split among Republicans on the House Judiciary Committee. Buck has become convinced that Big Tech has too much power and steps must be taken to weaken that, while the ranking member of the committee, Rep. Jim Jordan (R-OH), has been far more receptive to traditional pro-corporate, libertarian antitrust policy. When Jordan responded to former President Trump’s continued ban from Facebook by tweeting, “Break them up,” it was thought that he was perhaps moving to Buck’s interpretation of the issue. But upon release of this package, Jordan responded with the same old partisan bomb-throwing about Big Tech censoring conservatives and Democrats just wanting big government to solve the problem. A Jordan spokesperson expressed skepticism to Politico that any bill written by “impeachment manager David Cicilline and other progressives” would pass conservative muster.

Jordan simply has more juice among Republicans than Buck. When the House Judiciary Committee adopted the Big Tech antitrust report, they did it on a party-line vote, because Jordan rejected it wholesale. Many of the Republicans who co-sponsored these bills, including Ken Buck, voted no. If Jordan is not on board, most Republicans won’t be either, and it’s doubtful that the House would be able to pass much of this agenda, given that some tech-friendly Democrats would probably drop off as well. You can see how muddled Republican aims are by a Senate GOP antitrust bill introduced on Monday, which while claiming to strengthen enforcement would actually harm it by codifying the consumer welfare standard that artificially narrows harms arising from concentration down merely to price.

There’s an ideological split among Republicans on the House Judiciary Committee.

We’ve already seen Big Tech’s lobbying skill at fending off scrutiny in the China bill, when a measure that would have forced Amazon to confirm the identity of their third-party sellers to prevent largely Chinese counterfeits got stripped at the last minute. Lobbying would clearly be fierce here, given that the most powerful and free-spending companies in the world are on the opposite side.

The filing fee legislation, which doesn’t cost any money, is not really targeted at Big Tech, and already has Senate support, would be the likeliest candidate of the five to get out of Congress. It’s also the least impactful; more money for merger enforcement means little without the will and creativity to act.

The Biden administration has left key positions in those enforcement agencies vacant, nearly five months into his presidency. But other agencies with anti-monopoly capabilities have begun to act. The U.S. Department of Agriculture commenced work on a rewrite of enforcement of the century-old Packers and Stockyards Act. Among other things, the new rules would clarify that farmers and ranchers do not have to show sector-wide impediments to competition to bring action for individualized harm. This was one of the biggest barriers to enforcing this law. But the agency responsible for enforcement, the Grain Inspection, Packers and Stockyards Administration (GIPSA), was dissolved under the Trump administration and folded into an agricultural marketing service.

Two Republican senators, Chuck Grassley (R-IA) and Mike Rounds (R-SD), have introduced a bill that would add a specific anti-competition watchdog at USDA to monitor meatpacking industry concentration. That legislation didn’t get the fanfare of the suite of Big Tech bills, with their high-profile subject covered incessantly by coastal media. But it probably has a better chance of becoming law, and it indicates how the competition issue goes well beyond Silicon Valley, and could attract bipartisan support if it addressed other areas important to conservatives.

Meanwhile, outside Washington, anti-monopoly movement continues. In Ohio, Republican Attorney General Dave Yost last week asked a state judge to declare Google a public utility, following on the logic of conservative Supreme Court Justice Clarence Thomas. This would achieve what the antitrust bills banning self-preferencing want through court action, and since robust antitrust laws exist on the books, changing legal precedent would encompass much of what antitrust reformers seek.

At the state level, New York has shown the possibilities of real action. SB 933, which passed the state Senate last week, would upend the Empire State’s antitrust law, clarifying that an “abuse of dominance” standard predominates for antitrust enforcement, rather than a standard that narrowly focuses on consumer welfare. As Matt Stoller notes, this transformative change in how the state approaches monopoly was supplemented by two other bills. One passed by the state Senate allows a right to repair for users who buy electronics or other products; companies like Apple and John Deere often block third-party and consumer repairs, citing proprietary information. The other would regulate pharmacy benefit managers, obscure middlemen that lead to rising prescription drug prices.

PBM regulation and right to repair bills have been sweeping through red and blue states in the past few years. It reinforces that the action on anti-monopoly policy has been everywhere but Congress. Despite the promising array of Big Tech bills, that’s probably still the case.

#### Republican support for curtailing corporate power is entirely cynical and fake---they’ll oppose actual restrictions on corporations at every turn

Adam Serwer 21, Staff Writer at The Atlantic Covering Politics, 4/6/2021, “‘Woke Capital’ Doesn’t Exist”, The Atlantic, https://www.theatlantic.com/ideas/archive/2021/04/dont-buy-conservative-rebellion-against-corporations/618519/

As such, the Republican anti-corporate turn is entirely superficial. That’s a shame, because the concentration of corporate power has had a negative effect on American governance, leading to an age of inequality in which economic gains are mostly enjoyed by those in the highest income brackets. Since the 1970s, despite massive gains in productivity, most Americans have seen their wages rise very slowly, while the wealthiest have reaped almost all the gains of economic growth. That outcome was a policy choice, not an inevitability.

“Starting in the 1970s, the people in charge of designing and implementing the tax code increasingly favored those at the very top,” the political scientists Jacob Hacker and Paul Pierson wrote in Winner-Take-All Politics. “The rich are getting fabulously richer while the rest of Americans are basically holding steady or worse.” Notably, they argued, this trend “is not obviously related to either the business cycle or the shifting partisan occupancy of the White House.”

Economists on the left have concluded that this is because the extremely wealthy have a stranglehold on American politics that prevents policy changes that would more fairly distribute economic gains. And that, in turn, helps explain the seemingly high stakes of the culture war over corporate-branding decisions: The concentration of corporate power means that large companies wield outsize cultural influence, and their policy priorities are more often translated into law than those with broader public support.

“One thing that is clear from the emerging evidence is that economic inequality reinforces differences in political and social power, and these in turn affect market outcomes,” the economist Heather Boushey, now a member of President Joe Biden’s Council of Economic Advisers, wrote in Unbound.

This diagnosis lends itself to certain solutions, some of which are apparent in the Biden administration’s agenda. Although in the past, Democratic Party policies have exacerbated the problem, in recent years, much of the party has moved left on economic issues and now appears to recognize the threat that extreme inequality represents. The obvious Republican insincerity on deficits, and the depth of the coronavirus crisis, expanded the horizon for Democrats as they contemplated policy changes. The design of generous unemployment provisions, direct-aid payments, and the recently passed child allowance, all of which disproportionately benefit the low-wage workers who have borne the brunt of the pandemic, reflected that new ambition, and Biden has already proposed modestly raising corporate tax rates in his infrastructure plan.

But reducing corporate power, and with it the grip of the wealthy on government, will require more than that. Strengthening organized labor through the PRO Act, which would make it easier to unionize, would provide a needed counterbalance to corporations. The Biden administration has also indicated a willingness to use antitrust regulations against tech firms that have amassed a stunning amount of power over Americans’ daily lives in the past few decades. Proposals from the left wing of the party to reestablish postal banking and mandate worker representation on corporate boards would further diminish the influence of the extremely wealthy.

Perhaps Republicans don’t like these ideas. They are, after all, liberal and left-wing ideas. But when it comes to breaking the concentration of political and economic power in the hands of the very wealthy, Republicans have no ideas of their own to speak of, beyond issuing colorful threats to employ state coercion against firms that fail to do their bidding.

The GOP is unbothered by the concentration of wealth or power as such, which is not only why it opposes all of these measures, but also why the centerpiece of its agenda the last time it controlled both Congress and the White House was a massive and regressive tax cut. What vexes Republicans is the sight of corporations responding to market incentives by making public displays of support for egalitarianism and nondiscrimination, which is not the same as corporations actually supporting those things.

Putting out statements supporting Black Lives Matter or adorning their logos with pride colors is very easy for big corporations, but such gestures do not signal a commitment to fair wages, safe working conditions, or a willingness to pay their share in taxes, let alone racial egalitarianism in all but the most cosmetic sense. They are merely brand management. “Woke capital” does not actually exist, only capital—and its interests remain the same as they have always been.

Like the Republican turn against democracy, the newfound opposition to the market fundamentalism that conservatives once espoused and the free-speech principles they pretended to revere is superficial and contingent. Free speech, democracy, and free-market capitalism were fine as long as Republicans could expect victory in these arenas. But with public opinion shifting against them on key priorities, their focus has now turned to rigging the rules of the game to their advantage rather than winning over a larger share of the public. They do not seek to achieve a more equitable distribution of either money or power, but to ensure that the present inequities work to their political advantage.

An irony is that the era with which the right is enraptured was in part a product of a set of mid-century economic arrangements—higher taxes on the wealthy, greater union density, stronger regulations—that the left is attempting to restore, in some form, while including a novel commitment to racial and gender equality. Republicans have no interest in curtailing corporate power in this fashion—not when they believe that power could be used to reimpose a diminished cultural hegemony. These so-called populist Republicans do not wish to throw the one ring into Mount Doom; they simply want to wield it on their own behalf.

#### Partisan backlash wrecks the effectiveness of antitrust

William E. Kovacic 14, George Mason University Foundation Professor at the George Mason University School of Law, “Politics and Partisanship in U.S. Federal Antitrust Enforcement”, Antitrust Law Journal, Volume 79, Number 2, p. 688-690

What accounts for these and other notable variations in federal enforcement activity? One common explanation is “politics”9—a shorthand expression for the capacity of elections and elected officials to bend the antitrust enforcement system to serve a set of policy preferences or constituent desires. By this view, the political process affects enforcement through presidential elections, the selection of agency leadership, the intervention of executive branch and congressional officials in routine agency decision making, and the appointment of federal judges who hear antitrust cases.

It is unsurprising that a regulatory system rich in power and prosecutorial discretion would have some connection to the political process. The substantial economic significance of the statutes whose enforcement is entrusted to the DOJ and the FTC ensures that elected officials will study what these agencies do and sometimes seek to influence the exercise of their prosecutorial authority. It is also difficult to imagine that a nation would give significant responsibility to law enforcement bodies without some means for elected officials to hold agency officials to account for their policy choices. Expansive grants of authority tend to come with accountability strings attached.10

For academics, practitioners, and public officials, the question is not whether political forces surround the DOJ and the FTC

, or whether decisions by elected officials sometimes influence agency behavior. They assuredly do.11 The relevant queries are how, and how much? This Article addresses these questions by examining one dimension of the relationship between the federal antitrust agencies and the political process. It discusses how electoral politics can increase the influence of partisanship in the operation of the DOJ and the FTC. As used in this Article, partisanship is a determined commitment to party goals and causes. It manifests itself in a tendency to exaggerate the virtues of the party and to disregard or devalue the accomplishments of political rivals. Through the political appointment of the DOJ and FTC leadership, partisanship can spill over into the formulation and presentation of agency policy.

As will be shown, partisanship can have destructive effects. Among other consequences, partisan attitudes can lead officials to act in ways that serve party goals at the expense of the agency’s programs and reputation. The partisan tends to overlook how continuity of policy and incremental improvements have strengthened the DOJ and FTC antitrust programs regardless of which party controls the White House.12 Partisanship impedes the development of a norm that recognizes the importance of cumulative improvements, respects past contributions to agency effectiveness regardless of party origin, and encourages long-term investments that enhance the agency’s capability and reputation. 13 The striving for electoral success can beget partisanship, and, by eroding support for a norm that encourages cumulative investments for improvement over the long term, partisan attitudes can diminish agency effectiveness. In this sense, politics can influence federal antitrust enforcement, and influence it negatively.

#### Partisan backlash destroys U.S. credibility AND modeling

William E. Kovacic 14, George Mason University Foundation Professor at the George Mason University School of Law, “Politics and Partisanship in U.S. Federal Antitrust Enforcement”, Antitrust Law Journal, Volume 79, Number 2, p. 710

3. Reduced Influence Abroad

Partisanship can diminish the stature of the agency in interactions with foreign competition agencies. One reason involves the reputation of the United States abroad. In the eyes of foreign competition agencies, the legitimacy of the U.S. antitrust system depends partly upon the perceived motives that guide implementation.90 Foreign observers may not respect a regulatory system in which regime changes yield abrupt adjustments in enforcement policy. An antitrust system that lacks a widely-accepted foundation of enduring principles risks seeming capricious, unpredictable, and menacing.

Stark policy variations are only a presidential election away.

Foreign perceptions assume ever greater importance in a world of multiple competition authorities. Only a relatively short time ago, antitrust law was chiefly a concern of U.S. economic policy alone. Today over 120 jurisdictions have antitrust laws, and more are on the way.91 The United States participates in numerous endeavors to encourage acceptance of sound enforcement norms.92 The ability of the DOJ and the FTC to encourage other jurisdictions to adopt sound practices and to resist destructive political influence may suffer if its own system is believed to be manifestly infirm.