# 1NC---Round 2---NU

### 1NC

T subsets

#### ‘Antitrust’ applies to the entire economy---targeting single industries isn’t topical

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

Although the two regimes share a commonality of purpose--to protect consumers and to promote allocative efficiencies in production--the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving [\*1629] as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws "typically aim at similar goals--i.e., low and economically efficient prices, innovation, and efficient production methods"--regulation looks to achieve these goals directly "through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about." The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets--regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures. Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly. In the vast majority [\*1630] of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

#### Vote neg:

#### Limits---they devolve into infinite specific subsets like aviation, ag, defense or rail AND allow thousands of cases that deny single mergers OR regulate individual companies like Facebook or Amazon

#### Ground---economy-wide change ensures links to core generics like biz con and politics by forcing the aff to structurally change antitrust AND be big enough to deviate from the background noise of daily enforcement actions

### 1NC

Innovation DA

#### The plan’s uncertainty and disruption to capacity for tech innovation decimates growth of the ag sector

Dr. Don Racheter 17, President of the Public Interest Institute, Master's Degree and Ph.D. in Political Science from the University of Iowa, Taught at the University of Iowa and Central College, “Upcoming Mergers Benefit America's Farmers”, Des Moines Register, 8/6/2017, https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2017/08/06/upcoming-mergers-benefit-americas-farmers/537250001/

America’s farmers are being challenged to prepare for a global, growing population and a robust international trade market.

Not only has every farmer had to increase the number of people that he or she is responsible for feeding by almost 130 people since 1960, but international markets also are eager for Iowa’s soybeans and other agricultural products.

These market-based problems need specific market-centric solutions. By leaning on the power of an innovative and dynamic private sector, we can ensure our farmers have the tools to compete in any economic climate.

Industry leaders such as Bayer, Monsanto, Dow and DuPont are meeting these challenges head-on with a commitment to developing the latest technologies that make America’s farms both more efficient and effective. These efforts have filled the gap in public investment to groundbreaking agricultural research and development. According to the USDA Economic Research Service, government investment in agricultural R&D dropped to just 30 percent of total agricultural R&D funding since 2013.

Today, the private sector is responsible for many of the innovations that are currently shaping the future of farming in America, and more resources in the private sector means farmers can expect these advances in technology faster. The latest breakthroughs in precision farming techniques are helping farmers target their crop treatments, saving small farms money while also limiting their environmental footprint. For example, John Deere tractors use GPS sensors so that farmers don’t cover the same area twice, which can reduce their fuel input by up to 40 percent.

More permanent partnerships, such as the potential merger between Bayer and Monsanto, will ensure that leading ag companies are able to invest additional resources to bring advanced solutions to farmers. Farmers will be able to spend less time and resources on daily challenges, enabling them to meet the international demand for Iowa’s ag products.

As opponents to mergers pop up as frequently as weeds after a strong rain, we should examine what might possibly be driving their motivation. Rather than truly believing that these mergers harm consumers, many are driven by political motivations. Case in point is the July 21 commentary by Austin Frerick ["To save rural Iowa, oppose Monsanto-Bayer mega-merger"], a little-known former U.S. Treasury economist under the Obama Administration. One can’t help but question Mr. Frerick’s perspective given his support for greater government interference in the marketplace while government investment in R&D has continued to decline.

Cloaking a progressive agenda behind a call for consumers to reject private sector investment by two leading ag companies with a stake in America’s farming future is both disingenuous and harmful. Anyone who has spent any real time in a farmer’s field knows that what agriculture really needs is to attract, not reject, more investment in innovative agricultural technologies.

What critics fail to highlight is that the Bayer-Monsanto merger is the perfect example of bringing together two companies that operate in largely complementary fields to develop new tools and products with more capital. In fact, Bayer focuses mostly on crop protection, while Monsanto is known for seeds and traits capabilities. Alone, it can take each company more than a decade to create a new product for farmers, but together, the time could shorten significantly.

In an ever-changing free market, it is natural for businesses to seek to maintain a competitive advantage over their rivals by expanding their offerings to the consumers they serve. Bayer-Monsanto’s focus on finding the next generation of farming technology will spur their competitors to do the same to keep up.

Farmers are constantly battling uncertainty in their line of business and don’t have time for political posturing. The benefits from greater private sector investment in innovation from these upcoming mergers are clear and demonstrable and are necessary for the future of American farming.

#### Disrupting stable expansion of U.S. food exports causes nuclear war

John Castellaw 17, National Security Lecturer at the University of Tennessee, Founder and CEO of Farmspace Systems LLC, Former President of the Crockett Policy Institute, Retired Lieutenant General in the United States Marine Corps, “Food Security Strategy Is Essential to Our National Security”, Agri-Pulse, 5/1/2017, https://www.agri-pulse.com/articles/9203-opinion-food-security-strategy-is-essential-to-our-national-security

The United States faces many threats to our National Security. These threats include continuing wars with extremist elements such as ISIS and potential wars with rogue state North Korea or regional nuclear power Iran. The heated economic and diplomatic competition with Russia and a surging China could spiral out of control. Concurrently, we face threats to our future security posed by growing civil strife, famine, and refugee and migration challenges which create incubators for extremist and anti-American government factions. Our response cannot be one dimensional but instead must be a nuanced and comprehensive National Security Strategy combining all elements of National Power including a Food Security Strategy.

An American Food Security Strategy is an imperative factor in reducing the multiple threats impacting our National wellbeing. Recent history has shown that reliable food supplies and stable prices produce more stable and secure countries. Conversely, food insecurity, particularly in poorer countries, can lead to instability, unrest, and violence.

Food insecurity drives mass migration around the world from the Middle East, to Africa, to Southeast Asia, destabilizing neighboring populations, generating conflicts, and threatening our own security by disrupting our economic, military, and diplomatic relationships. Food system shocks from extreme food-price volatility can be correlated with protests and riots. Food price related protests toppled governments in Haiti and Madagascar in 2007 and 2008. In 2010 and in 2011, food prices and grievances related to food policy were one of the major drivers of the Arab Spring uprisings. Repeatedly, history has taught us that a strong agricultural sector is an unquestionable requirement for inclusive and sustainable growth, broad-based development progress, and long-term stability.

The impact can be remarkable and far reaching. Rising income, in addition to reducing the opportunities for an upsurge in extremism, leads to changes in diet, producing demand for more diverse and nutritious foods provided, in many cases, from American farmers and ranchers. Emerging markets currently purchase 20 percent of U.S. agriculture exports and that figure is expected to grow as populations boom.

Moving early to ensure stability in strategically significant regions requires long term planning and a disciplined, thoughtful strategy. To combat current threats and work to prevent future ones, our national leadership must employ the entire spectrum of our power including diplomatic, economic, and cultural elements. The best means to prevent future chaos and the resulting instability is positive engagement addressing the causes of instability before it occurs.

This is not rocket science. We know where the instability is most likely to occur. The world population will grow by 2.5 billion people by 2050. Unfortunately, this massive population boom is projected to occur primarily in the most fragile and food insecure countries. This alarming math is not just about total numbers. Projections show that the greatest increase is in the age groups most vulnerable to extremism. There are currently 200 million people in Africa between the ages of 15 and 24, with that number expected to double in the next 30 years. Already, 60% of the unemployed in Africa are young people.

Too often these situations deteriorate into shooting wars requiring the deployment of our military forces. We should be continually mindful that the price we pay for committing military forces is measured in our most precious national resource, the blood of those who serve. For those who live in rural America, this has a disproportionate impact. Fully 40% of those who serve in our military come from the farms, ranches, and non-urban communities that make up only 16% of our population.

Actions taken now to increase agricultural sector jobs can provide economic opportunity and stability for those unemployed youths while helping to feed people. A recent report by the Chicago Council on Global Affairs identifies agriculture development as the core essential for providing greater food security, economic growth, and population well-being.

Our active support for food security, including agriculture development, has helped stabilize key regions over the past 60 years. A robust food security strategy, as a part of our overall security strategy, can mitigate the growth of terrorism, build important relationships, and support continued American economic and agricultural prosperity while materially contributing to our Nation’s and the world’s security.

### 1NC

Ptx 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.”

### 1NC

States CP

#### The 50 state governments and relevant sub-federal territories should increase prohibitions on anticompetitive business practices in agriculture, including input markets & consolidation.

#### 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]

### 1NC

Memo CP

#### The United States federal government should issue a policy memorandum that increases prohibitions on anticompetitive business practices in agriculture, including input markets & consolidation.

#### 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 FTC politics AND doesn’t drain PC

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.

### 1NC

Reg Neg CP

#### The United States federal government should convene binding negotiated rulemaking over whether to increase prohibitions on anticompetitive business practices in agriculture, including input markets & consolidation and implement the outcome.

#### The CP competes and solves by giving industry genuine input AND avoids reflexive opposition and a wave of litigation in response to mandatory prohibitions

Ira S. Rubinstein 11, Adjunct Professor of Law and Senior Fellow at the Information Law Institute at the New York University School of Law, JD from Yale Law School, BA in Philosophy from Clark University, “Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes”, I/S: A Journal of Law and Policy for the Information Society, 6 ISJLP 355, Summer 2011, Lexis

2. Negotiated Rulemaking

Negotiated rulemaking (also referred to as regulatory negotiation or "reg. neg.") is a statutorily-defined process by which agencies formally negotiate rules with regulated industry and other stakeholders as an alternative to conventional notice-and-comment rulemaking. The core insight underlying negotiated rulemaking is that conventional rulemaking discourages direct communication among the parties, often leading to misunderstanding and costly litigation over final rules. In contrast, negotiated rulemaking brings together agency personnel and representatives of the affected interested groups to negotiate the text of a proposed rule based on (more honestly presented) shared information and willingness to compromise. If the negotiations succeed by achieving a consensus on a proposed rule, the resulting final rule should be of better quality, easier to implement, enjoy greater legitimacy, and lead to fewer legal challenges.

The Negotiated Rulemaking Act of 1990 (NRA) establishes a statutory framework for negotiated rulemaking under which agencies have the discretion to bring together representatives of the affected parties in a negotiating committee (for example, industry, environmental and consumer groups, and state and local governments) for face-to-face discussions. If the committee reaches a consensus, the agency can then issue the agreement as a proposed rule subject to normal administrative review processes. Proposed rules emerging from a negotiated rulemaking process are also subject to judicial review. While the NRA augments Administrative [\*378] Procedure Act (APA) rulemaking, it does not replace it. Indeed, most of the language of the Act is permissive. If negotiations fail to reach a consensus, the agency may proceed with its own rule.

The promise of negotiated rulemaking is that by enlisting diverse stakeholders in the rulemaking process, responding to their concerns, and reaching informed compromises, better quality rules will emerge at a lower cost and with greater legitimacy. Critics counter that the process not only fails to deliver its purported benefits (and then only rarely) but that its very use undermines the foundations of administrative law by shifting the decision-making function from agencies tasked with protecting the public interest to a collection of interest groups with their own private agendas. In 2000, Jody Freeman and Laura Langbein published a comprehensive analysis and summary of an empirical study of negotiated rulemaking. The study compared participant attitudes toward negotiated versus conventional rulemaking. Based on their analysis, they concluded that "reg. neg. generates more learning, better quality rules, and higher satisfaction than conventional rulemaking" as well as increasing legitimacy, which they defined as "the acceptability of the regulation to those involved in its development." But even if this very positive analysis is taken at face value, Lubbers shows that the EPA use of negotiated rulemaking is in fact quite limited, having fallen off in recent years by almost two-thirds. Despite this decline, which Lubbers attributes to budgetary issues and the burdens of complying with federal advisory committee [\*379] requirements, Lubbers insists upon the proven value of reg. neg. in providing creative solutions to regulatory problems.

Other environmental law scholars have identified a few situations where negotiated rulemaking should provide the EPA with significant advantages. For example, Andrew Morriss and his colleagues point to situations "where the substance of the regulation requires the credible transmission of information between the regulated entities and other interest groups, and where the agency's preference for a particular substantive outcome is weak." Reg. neg. also requires "a relatively high degree of shared interest among the groups participating, the existence of gains from trade to allow parties to compromise, and a willingness by interest groups to reject the role of spoiler." These views are largely consistent with the findings of Daniel Selmi, who conducted a detailed study of the negotiation of a regional air quality rule. Selmi explained that the parties were willing to compromise for several reasons: (1) the industry believed that regulation was inevitable; (2) the environmental groups recognized that even though they preferred an outcome based on new and expensive technology, they lacked the political capital to achieve this result; and (3) the agency was not locked into a rigid, initial position, but remained open towards finding a solution that responded to information acquired during the negotiations. But the key factor in reaching a compromise was a very practical one-namely, that the facilitator had the necessary skills to assist the parties in identifying their priorities and to help them make tradeoffs in which they each achieved some of their goals.

In sum, both Project XL and negotiated rulemaking have strengths and weaknesses. Key strengths of a well-designed covenanting approach include innovation (because covenants invite firms to tap [\*380] into their own ingenuity); flexibility (in the form of tailored rules that either match the circumstances of an individual firm, as in Project XL, or the underlying conditions faced by a regulated industry based on superior expertise, as in negotiated rulemaking); greater commitment (because companies write or at least negotiate their own rules rather than having them imposed externally); more effective compliance (because internal discipline as practiced by firms that agree to rules of their own devising is likely to be more extensive and cheaper for everyone than government investigations and prosecutions); and, as a result of these benefits, lower-cost solutions. On the other hand, covenants have a number of obvious weaknesses, including higher administrative burdens associated with negotiating the rules (although this might be mitigated by lower overall costs for compliance and litigation); legal uncertainty in the case of Project XL; and a bias against small firms, which typically lack the resources necessary to negotiate facility-based standards or to participate in a negotiating committee.

C. Normative Framework for Assessing Self-Regulatory Initiatives

Having identified different types of self-regulation and their co-regulatory characteristics, and having investigated environmental covenants such as Project XL and regulatory negotiations (in keeping with Hirsch's suggestion that such covenants may provide the basis for innovative approaches to privacy regulation), this Article now presents a normative framework for evaluating the effectiveness of co-regulatory programs. Part III will apply this normative framework to four instances in which regulators have used co-regulation in the field of information privacy and assess their relative merits. The normative framework developed here melds the discussion of standard public policy criteria in Part II.A with the central features of second- generation strategies as reflected in the analysis of covenants in Part II.B. The resulting framework consists of six elements that are critical to the success of co- regulatory initiatives: efficiency, openness and transparency, completeness, strategies to address free rider problems, oversight and enforcement, and use of second-generation design features.

[\*381]

1. Efficiency

Efficiency may be defined as "achieving regulatory objectives at the lowest attainable cost." For all forms of self-regulation, efficiencies arise from harnessing industry expertise in the development of industry codes, which are inherently more flexible than legislation and may be tailored to the circumstances of individual firms, or adjusted to changes in market conditions or new technologies. In general, self-regulation costs less for government than regulatory rulemaking and enforcement because it shifts costs to industry. Whether it costs less for industry depends on the form of self-regulation and whether industry passes on its costs to consumers.

2. Openness and Transparency

Openness refers to whether the self-regulatory system allows the public to play any role in developing the underlying rules and enforcement mechanisms. Transparency, on the other hand, is a function of a system's ability "to produce and promulgate two kinds of information: (1) information about the normative standards the industry has set for itself; and (2) information about the performance of member companies in terms of those standards." In general, self-regulatory schemes publicize the existence and content of their principles (especially if their rules are determined by statute and hence publicly available). Purely voluntary codes may involve public interest groups at the discretion of member firms. When firms decide to develop codes using a consensus-based process, however, a wider range of interests is likely to be represented. Finally, performance data is not usually shared with the public and most self-regulatory organizations treat enforcement proceedings as private, but may publicly announce the outcome of any enforcement actions involving member firms.

[\*382]

3. Completeness

Completeness is the straightforward matter of whether a self-regulatory code of conduct addresses all relevant aspects of the standards governing industry practices. In privacy terms, these standards are embodied in the FIPPs, which are the benchmark against which the FTC and privacy advocates evaluate any self-regulatory privacy scheme. Unless they adhere to a pre-existing industry standard, voluntary codes often omit principles or practices that their members find too burdensome. In contrast, where government establishes default requirements on a statutory basis, incompleteness is rarely an issue.

4. Strategies to Address Free Rider Problems

Free riding occurs in voluntary programs when members enjoy the benefits of a program without having to meet its obligations. As Fiorino notes, "It reduces confidence in the reliability and quality of participants and thus affects the program's credibility." There are two main versions of the free rider problem. First, some firms may agree to join a program but merely feign compliance. And second, certain firms in the relevant sector may simply refuse to join at all. Both versions are potentially fatal to self-regulatory programs because they create a competitive disadvantage for honest participants. The first version may be counteracted by "peer group pressure, shaming, or more formal sanctions" while the second may require that "government intervenes directly to curb the activities of non-participants." Obviously, free rider problems dissipate when regulated entities are required to participate in a self-regulatory program or when codes of conduct are subject to government review and approval. Self-regulatory initiatives need to incorporate such strategies in order to prove effective.

5. Oversight and Enforcement

At an early stage of the U.S. government's support for self-regulatory privacy guidelines, the DOC commissioned a study of the [\*383] criteria for effective self-regulation. In addition to substantive criteria based on FIPPs, the DOC study identified three oversight and enforcement criteria: (1) consumer recourse, or the availability of affordable mechanisms for resolving complaints and perhaps awarding some compensation to an injured party; (2) verification, or the nature and extent of audits or more cost-effective ways to verify that a companies' assertions about its privacy practices are true and to monitor compliance with a program's requirements; and (3) consequences for failure to comply with program requirements, such as cancellation of the right to use a seal, public notice of a company's non-compliance, or suspension or expulsion from the program. Voluntary codes are often deficient in all three components. Once again, required government approval of these oversight and enforcement mechanisms ensures that baseline regulatory objectives are met.

6. Use of Second-Generation Design Features

The central features of second-generation environmental strategies are discussed at considerable length by Stewart and Fiorino. For present purposes, their insights may be boiled down (however inadequately) to the following catch phrase: self-interested mutual promises that reward good actors for superior performance. These strategies presuppose direct bargaining, information sharing, and the affected parties buying-in to cost-effective and innovative regulatory solutions. In view of these characteristics, second-generation strategies such as environmental (or privacy) covenants should achieve better outcomes than either conventional rulemaking or voluntary self-regulation.

III. Four Case Studies

This Article now presents four case studies of self-regulatory privacy schemes. The first case study focuses on the Network Advertising Initiative (NAI) Principles, a voluntary code established by an ad hoc industry advertising group that also oversees members' compliance. The second case study looks at a safe harbor solution for [\*384] U.S. firms needing to transfer data from the E.U. to the U.S. without running afoul of E.U. data protection requirements. To benefit from the safe harbor, firms have to certify that they will comply with privacy principles negotiated between the U.S. and E.U. but administered by industry seal programs. The third case study deals with FTC- approved safe harbor programs under COPPA, focusing, in particular, on that of the Children's Advertising Review Unit (CARU). Each of these three self-regulatory schemes will be classified using Priest's typology and evaluated in terms of the six factors identified above in Part II.C. The fourth and final case study begins with a brief overview of privacy covenants, both in the U.S. and abroad, and then turns to a very recent example of a voluntary covenanting approach to privacy. This last case study is less a detailed description and analysis of a specific program, and more a transitional step towards second-generation strategies.

A. The Network Advertising Initiative

On November 8, 1999, the DOC and the FTC held a public workshop on online profiling, which the FTC defined as the collection of data about consumers using cookies and web bugs to track their activities across the web. Although much of this information is anonymous in the narrow sense of not including a user's name, profiling data may include both personally identifiable information (PII) and non-personally identifiable information (non-PII). This data may also be "combined with 'demographic' and 'psychographic' data from third- party sources, data on the consumer's offline purchases, or information collected directly from consumers through surveys and registration forms." The resulting profiles often are [\*385] highly detailed and revealing yet remain largely invisible to consumers, many of whom react negatively when informed that their online activities are monitored.

The FTC recognized several benefits in the use of cookies and other technologies to create targeted ads, such as providing information about products and services in which consumers are interested and reducing the number of unwanted ads. More importantly, targeted ads increase advertising revenues, which subsidize free online content and services. On the other hand, the FTC acknowledged several major privacy concerns raised by online profiling such as the lack of consumer awareness; the scope of the monitoring activities, which occurs across multiple websites for an indefinite period of time; the potential for associating anonymous profiles with particular individuals; and the risk of companies using profiles to engage in price discrimination. Despite these concerns, the Commission, in June 2000, encouraged the network advertising industry to craft an industry-wide self-regulatory program.

Eight firms responded by announcing the formation of the NAI. Their key tenets included notice to consumers of what information network advertising firms collect and how that information is used, the ability to opt out of receiving tailored ads, and consumer outreach and education. Less than a year later, the NAI completed a [\*386] voluntary code of conduct that won the FTC's praise and informal endorsement. Under the original NAI Principles, network advertisers engaging in online preference marketing (OPM) are required to offer consumers notice and choice, both of which vary depending on whether the data collected is non-PII or a combination of PII and non-PII. The use of non-PII requires member firms to post on their websites "clear and conspicuous" notice of profiling activities, including what type of data is collected and how it is used; procedures for opting out of such uses; and the retention period for such data. The opportunity to opt-out must be accessible on the firm's or the NAI's website. Moreover, NAI firms that enter into a contract with a publisher for OPM services must require that they offer similar privacy protections to consumers. The merger of PII and non-PII for OPM purposes are subject to substantially similar notice requirements, but the choice options are more complex. Network advertisers merging PII with previously collected non-PII must first obtain a consumer's affirmative (opt-in) consent, whereas mergers of PII and non-PII collected on a going forward basis must afford consumers "robust notice" and an opt-out choice; the latter rule also applies to using PII collected offline when merged with PII collected online. Enforcement is another requirement that applies to [\*387] all NAI members, and the NAI offers several additional consumer protections as well.

For the next seven years, the NAI principles remained unchanged until two highly publicized incidents sparked renewed concerns over online profiling practices. The first incident involved a civil subpoena to Google seeking search query records. The second involved disclosure of millions of search queries by AOL. Both incidents involved leading search firms, whose business models are premised on providing free searches and a host of related services in exchange for serving targeted ads to customers based on their search queries and other data collected from users of these services. Over the next two years, consumer privacy organizations began filing complaints regarding online advertising practices and the proposed mergers between industry giants such as Google and DoubleClick. Both E.U. data protection agencies and the FTC started reviewing these activities, while the industry responded to the regulatory pressure by proposing new practices and technologies for improving search [\*388] privacy and addressing online profiling practices. Then, in 2007, the FTC held a two-day workshop focused on behavioral targeting. In connection with this workshop, the World Privacy Forum (WPF) prepared a highly critical report attacking the effectiveness of the NAI's self-regulatory scheme during the previous seven years. NAI responded to these and other criticisms by releasing a draft update to its original NAI Principles (this time soliciting public comments on the proposed changes). The newly expanded organization then published its revised code of conduct to mixed reviews.

Clearly, the NAI Principles constitute a voluntary code of conduct, exhibiting virtually all of the relevant characteristics as described in Part II.A. As such, do the original (or revised) NAI principles suffer from the shortcomings associated with voluntary codes, or do they live up to their promise of protecting consumer privacy? In other words, how do the principles fare when assessed against the six elements of the normative framework described in Part II.C?

To begin with, the principles are efficient for member firms, but less so for government (given the ongoing costs of FTC oversight) and for the public (given the negative externalities associated with behavioral profiling). Second, when the original principles were [\*389] issued in 2000, privacy advocates complained about the NAI's lack of transparency. Although the principles were posted online, the preliminary discussions between the NAI firms and the FTC were far less transparent-they took place largely behind closed doors. Third, the original principles were considered weak on notice, choice, and access; and critics were not much happier with the retrograde forms of notice, choice, and access permitted under the 2009 revised Principles. Fourth, at least in the early years, network advertising firms suffered from both versions of the free rider problem (feigned compliance and non-participation) and the NAI program did not include any mechanisms that capably addressed them. It remains to [\*390] be seen whether these issues will persist now that the FTC is again encouraging self- regulation, although current policy may change depending on whether or not Congress enacts new privacy legislation. Fifth, the NAI program is also deficient with respect to all three oversight and enforcement criteria identified in the DOC study referred to above. In terms of consumer recourse, the NAI Principles make formal provision for consumers to file complaints (which are now handled in-house) but are silent on remedies. As to verification and consequences for failure to comply, the NAI track record is extremely poor both on auditing compliance and invoking remedies (such as revocation, public suspension of membership, and referral to the FTC). Indeed, it is not clear whether such actions have occurred during its previous nine years of operation, although NAI's approach to audits seems to be changing for the better. Finally, although the more open process NAI used in revising its principles in 2009 is a good first step towards using second-generation strategies, it is still deficient in terms of direct negotiations, Coasian bargaining, and mutual buy-in.

B. The U.S.-E.U. Safe Harbor Agreement

Article 25 of the European Union Data Protection Directive (E.U. Directive) limits the transfer of personal data to a third country unless it provides an "adequate" level of privacy protection. Unlike the E.U. Directive, which is an omnibus statute protecting all personal information of European citizens, U.S. privacy protection relies on a combination of sectoral laws, FTC enforcement powers, and self-regulation. As a result of these differences, U.S. firms were uncertain about the legality of data flows from the E.U. to the U.S. under the [\*391] Article 25 adequacy standard. After several years of discussion, the European Commission (EC) and the DOC entered into a Safe Harbor Agreement (SHA) spelling out Privacy Principles that would apply to U.S. companies and other organizations receiving personal data from the E.U.

The SHA creates a voluntary mechanism enabling U.S. organizations to demonstrate their compliance with the E.U. Directive for purposes of data transfers from the E.U. They must self-certify to the DOC that they adhere to the Privacy Principles that mirror the core requirements of the E.U. Directive (i.e., notice, choice, onward transfer, security, data integrity, access, and enforcement), and repeat this assertion in their posted privacy policy. Although the FTC has agreed to treat any violation of the Privacy Principles as an unfair or deceptive practice, the SHA also defines the mechanism that firms should use to ensure compliance with these principles. These include: (1) readily available and affordable independent recourse mechanisms for investigating and resolving individual complaints and disputes; (2) verification procedures regarding the attestations and assertions businesses make about their privacy practices, which may include self- assessments (which must be signed by a corporate officer and made available upon request) or outside compliance reviews; and (3) remedies for failure to comply with the Privacy Principles, including not only correction of any problems, but also various sanctions such as publicizing violations, suspension, removal from a seal program, and compensation for any harm caused by the violation. Truste, [\*392] BBBOnline, and several other self-regulatory privacy programs already in operation when the SHA took effect then developed Safe Harbor programs specifically designed to satisfy (1) and (3). The verification requirement is satisfied by self-assessment or third-party compliance reviews.

The SHA has been described as an "uneasy compromise" between the comprehensive regulatory approach of the E.U. and the self-regulatory approach preferred by the U.S. This partly reflects the fact that in providing the Privacy Principles and related documents that form the SHA, the DOC lacked any direct statutory authority to regulate online privacy and therefore had to rely solely on its enabling statute, which only grants authority to foster, promote, and develop international commerce. Applying Priest's typology, it is clear that SHA seal programs more closely resemble regulatory self-management programs than voluntary codes of conduct. One might expect, therefore, that such programs would fare better than NAI in demonstrating greater transparency, fewer free rider issues, better coverage, and meaningful oversight and enforcement. Unfortunately, this is not borne out by the available evidence.

First, as a government initiative, the SHA Privacy Principles are highly transparent, at least in terms of DOC announcing the relevant standards that industry would need to follow. But second, as noted below, virtually no information is available regarding the performance of firms in terms of these standards. Third, SHA seal programs fare better than NAI in terms of formulating program guidelines that-at least in theory-adhere to all of the Privacy Principles. However, both the E.U. Study and the Galexia Study found that a high percentage of [\*393] participating firms did not incorporate all seven of the agreed upon Privacy Principles in their own posted privacy policies. Fourth, the SHA, like the NAI agreement, also suffers from both versions of the free rider problem- many firms self-certify their adherence to the Privacy Principles without even revising their posted privacy policies in accordance with SHA requirements and, even if one excludes firms that rely on alternative methods for demonstrating adequacy, the roughly 2,000 participants on the DOC's Safe Harbor List represent only a tiny fraction of firms that transfer data from the E.U. to the U.S. Fifth, as to oversight and enforcement, the E.C. Study noted that no complaints have been received and handled "despite frequent and even flagrant inconsistencies and violations in implementation," while according to the Galexia Study, fewer than one in four companies registered for safe harbor were in compliance with the Enforcement Principle and even fewer offered an affordable dispute resolution process. Indeed, it was not until the summer of 2009 that the FTC announced its first enforcement action against a U.S. company for violation of the SHA.

The SHA allows firms to meet the verification requirements of the Enforcement Principle either through self-assessment or outside [\*394] compliance reviews. Under the former, the firm must have in place "internal procedures for periodically conducting objective reviews" and must retain any relevant records. They must make the records available upon request in the context of an investigation or a complaint, but have no obligation to share this information with third parties. The same record-keeping requirement applies in the case of outside reviews subject to the same limitation. Thus, both internal and external compliance reviews remain opaque, making it difficult to draw any firm conclusions. Finally, while the SHA in theory fits neatly under Priest's regulatory self-management category, in practice it more closely resembles a voluntary code of conduct given the lack of accountability to government, the free rider problems, the lax monitoring of compliance by seal programs and government agencies, and until quite recently, the absence of enforcement actions or sanctions. In short, it displays none of the characteristics defining second-generation strategies.

C. The COPPA Safe Harbor

Congress enacted the Children's Online Privacy Protection Act of 1998 (COPPA) to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personal information from and about children on the Internet. The statute and Final Rule require operators of websites directed at children and of general audience websites with actual knowledge that a user is a child to meet five requirements: (1) notice; (2) parental consent prior to the collection, use, and/or disclosure of personal information from a child; (3) a right of parental review of such information; (4) proportionality; and (5) reasonable security policies.

[\*395]

COPPA provides both federal and state enforcement mechanisms and penalties against operators who violate the provisions of the implementing regulations. The statute by its terms also establishes an optional safe harbor program as an alternative means of compliance for operators that follow self-regulatory guidelines, which must be approved by the FTC under a notice and comment procedure. There are three key criteria for safe harbor approval. Self-regulatory guidelines must (1) meet or exceed the five statutory requirements identified above; (2) include an "effective, mandatory mechanism for the independent assessment of . . . compliance with the guidelines" such as random or periodic review of privacy practices conducted by a seal program or third-party; and (3) contain "effective incentives" to ensure compliance with the guidelines such as mandatory public reporting of disciplinary actions, consumer redress, voluntary payments to the government, or referral of violators to the FTC.

The avowed purpose of the COPPA safe harbor is to facilitate industry self- regulation, and it does so in two ways. First, operators that comply with approved self-regulatory guidelines are "deemed to be in compliance" with all regulatory requirements. To benefit from safe harbor treatment, operators need not individually apply for approval as long as they fully comply with approved guidelines that are applicable to their business. According to the COPPA Final Rule, such compliance serves "as a safe harbor in any enforcement action" under COPPA unless the guidelines were approved based on false or incomplete information. Second, the safe harbor allows "flexibility [\*396] in the development of self-regulatory guidelines" in a manner that "takes into account industry-specific concerns and technological developments." Industry groups interested in providing safe harbors must submit their self- regulatory guidelines to the FTC for approval. To date, the FTC has reviewed six safe harbor programs and approved four of them. With all of the approved safe harbor programs satisfying the three criteria set out in the preceding paragraph, the COPPA safe harbor exemplifies Priest's regulatory self-management category insofar as the statue sets regulatory policy and rules but assigns program sponsors the responsibility for drafting self-regulatory guidelines, implementing and operating the program, and enforcement. A brief assessment of CARU's monitoring and complaint-handling system shows the success of the safe harbor program from an enforcement standpoint.

Between 2000 and 2008, CARU reported on almost 200 cases; a few originated in consumer complaints and the rest resulted from CARU's routine monitoring of any website that may be reasonably expected to attract children or teen users. Issues ranged from inadequate privacy policies to the lack of a neutral age-screening process to collection or disclosure of PII from children without parental consent. The companies resolved all of the cases in question by agreeing to change their practices as directed by CARU. In [\*397] addition, CARU referred one case to the FTC that resulted in a $ 400,000 settlement. In a second case, the respondent entered into a consent decree with the FTC that included signing up for the CARU safe harbor. And in a third case, the FTC initiated a COPPA lawsuit based in part on CARU's determination of compliance shortcomings. This is an impressive record considering that since 2000, the FTC has brought a total of only fifteen COPPA enforcement cases. In short, CARU's compliance review and disciplinary procedures clearly have been successful in complementing the FTC's enforcement of COPPA, due in no small measure to its policy of engaging in widespread monitoring of child-oriented websites as opposed to members' sites only. This, in turn, allows the Commission to focus its resources on higher profile matters.

How well do COPPA safe harbor programs (and CARU, in particular) fare when evaluated against the now familiar normative criteria? Clearly, CARU harnesses industry expertise, but probably costs more to operate than the NAI or SHA seal programs given its extensive enforcement activities. Second, like the SHA, COPPA is very strong on producing and reporting information regarding relevant legal standards but weak on performance data. Third, as compared to both the NAI and SHA, only the COPPA safe harbor programs achieve full coverage of substantive privacy requirements as might be expected given the FTC's mandatory review of program guidelines, all of which must offer principles that "meet or exceed" statutory [\*398] requirements. Fourth, free rider problems are minimal in the COPPA safe harbor program because firms that resist joining an approved program remain subject to the statutory requirements, thereby deriving little competitive advantage from free riding. Additionally, the number of CARU investigations seems high enough to discourage feigned compliance by participating firms, especially given CARU's willingness to refer cases to the Commission, and the FTC's aggressive enforcement stance with respect to children's privacy issues. Fifth, as to oversight and enforcement, COPPA requires that approved safe harbor programs engage in ongoing monitoring of their members' practices to ensure compliance with program guidelines and the participant's own privacy notices. CARU's strong record of investigating compliance issues identified in complaints or as a result of routine monitoring (coupled with FTC's higher profile enforcement actions) rebuts the usual charge that self-regulatory programs are weak on enforcement. To the contrary, the COPPA safe harbor programs, like other well-organized and committed industry groups, "help free up scarce government regulatory resources to address the recalcitrant few rather than the compliant majority." The CARU program stands out both for publishing case reports on non-member compliance issues and for having, in fact, referred several cases to the FTC.

Finally, while the CARU program is far superior to either the NAI or SHA in terms of the preceding five criteria, it lacks many of the attributes of second- generation regulatory strategies. There is no [\*399] Coasian bargaining and too little industry buy-in. Moreover, the COPPA regulations are neither very flexible nor do they take into account "industry- specific concerns and technological developments." Although the Commission expressly characterized the assessment mechanisms and compliance incentives described in the Final Rule as "performance standards" that may be satisfied by equally effective alternatives, a review of the self-regulatory guidelines of CARU, Truste, ESRB and Privo shows relatively little differentiation by sector, technology, or innovative methods of assessment or compliance. This is at least partly the result of the safe harbor approval process, which requires a side-by-side comparison of the substantive provisions of the COPPA rule with the corresponding provisions of the guidelines. The reason firms participate in safe harbor programs is probably due less to regulatory flexibility, and more to a desire to share in the brand recognition of the program seal, to develop a closer working relationship with FTC staff, and to draw on the additional expertise of program staff.

\*\*\*\*\* [\*400]

The three preceding case studies all describe well-established self-regulatory programs and evaluates them against five public policy criteria and a sixth criteria focusing on second-generation regulatory strategies. This next section is different. It explores a few overseas cases of privacy covenants under law and then hones in on a very recent case in which U.S. firms, when threatened with prescriptive regulation, chose to engage in a multi-stakeholder process (known as the Global Network Initiative or GNI) to define privacy and free speech principles for the Internet. While it is too soon to assess the GNI against the public policy criteria, and while the GNI might fare poorly in operational terms when compared to a statutory safe harbor such as CARU, the GNI nevertheless points the way to the use of mutually self- interested bargaining to achieve superior performance by good actors.

D. Privacy Covenants

In his article discussing innovative environmental privacy tools, Hirsch's primary examples of a privacy covenant are the Dutch codes of conduct. Dutch data protection law (which is a comprehensive statute implementing the E.U. Data Directive) allows industry sectors to draw up codes for processing of personal data, which are then submitted to the Dutch Data Protection Authority (DPA) for review and approval. Specifically, organizations considered "sufficiently representative" of a sector and that are planning to draw up a code of conduct may ask the DPA for a declaration that "given the particular features of the sector or sectors of society in which these organizations are operating, the rules contained in the said code properly implement" Dutch law. Article 25(4) of the PDPA further provides that such declarations shall be "deemed to be the equivalent to" a binding administrative decision, making it similar in effect to FTC approval of COPPA safe harbor guidelines. According to Hirsch, the DPA has approved at least twelve such codes covering various industry sectors, each with its own tailored compliance plan that is nevertheless consistent with the broader requirements of the Dutch data protection law. Outside of Europe, other countries have [\*401] adopted a similar approach to privacy covenants. For example, Australian privacy law also permits organizations to develop sectoral privacy codes for the handling of personal information "designed to allow for flexibility in an organization's approach to privacy," while at the same time guaranteeing consumers "that their personal information is subject to minimum standards that are enforceable in law." Finally, New Zealand privacy law also treats approved codes of conduct as instruments of law with binding effect.

In the U.S., where comprehensive privacy law is lacking, there is no possibility of firms or industry negotiating privacy covenants with regulators, unless one wants to treat FTC consent decrees as a type of covenant. Thus, the covenanting approach in the U.S. arises only when there is a credible threat of federal privacy regulation and firms sit down with regulators to negotiate a code of conduct in lieu of regulation. In his article, Hirsch cites the OPA Guidelines as an "incomplete" step towards a covenanting approach, and gives three [\*402] reasons for this incompleteness. A more recent and telling example of a privacy covenant came about when three leading Internet firms were accused of Internet censorship in China, resulting in a very public controversy and threatened legislation.

In the winter of 2006, Yahoo!, Google and Microsoft had to contend with highly unfavorable publicity and Congressional hearings over their controversial roles in cooperating with Chinese government efforts to monitor and censor the Internet and persecute dissidents. A few months later, Rep. Chris Smith introduced a bill that would have rendered such practices illegal and forced U.S. companies to confront a Hobson's choice: disregard restrictive Chinese licensing requirements imposed on foreign companies as a condition of providing Internet services in the Chinese market or obey Chinese censorship rules in violation of U.S. law. The companies then sat down with a cross-section of human rights organizations, socially responsible investment firms, and academics, and agreed to work on voluntary guidelines for protecting freedom of expression and privacy on the Internet. After eighteen months of negotiations and defections by several NGOs, the multi-stakeholder group reached agreement and launched the GNI, jointly committing to a set of principles and implementation guidelines as well as an accountability [\*403] system based on independent, third-party assessments. More recently, a GNI member (Google) announced that it would shut down its Chinese search engine rather than continuing to censor the results, and began automatically redirecting Chinese customers to an uncensored version of Google search hosted in Hong Kong.

Why did Yahoo!, Google, and Microsoft agree to participate in a multi-stakeholder process in which a successful outcome required convening a group of actors with divergent interests (often at loggerheads with each other), engaging in difficult and protracted negotiations, and staying at the table until a consensus was forged? As described above, the GNI negotiations were an entirely voluntary effort, with no legal mandate as to process or substance. Rather, the parties proceeded on an ad hoc basis and agreed to principles that, while based on international human rights instruments, were not subject to any formal approval criteria or government oversight. Although the U.S. State Department welcomed the GNI initiative, it did not participate in any stakeholder meetings. Cynics may say that the three firms were merely responding to a public relations crisis related to their business operations in China, which forced them to pursue a covenanting approach not only to improve their public image, but to restore public faith in their company integrity and [\*404] mollify Congressional demands for government intervention. But even if GNI was initially spurred by negative publicity and a threat of government intervention, it represents a moderately successfully example of the covenanting approach at work.

#### 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.

#### That underpins patent-led innovation---Extinction

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.

### 1NC

Healthcare DA

#### The DOJ has prioritized combatting COVID related fraud—key to healthcare cybersecurity

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In a recent speech, Department of Justice (DOJ) Acting Assistant Attorney General Brian Boynton provided the first glimpse into DOJ's False Claims Act (FCA) enforcement priorities under the Biden Administration. While much of the speech predictably focused on pandemic-related fraud and opioid enforcement efforts, a few measures announced by the AAG were less expected. In particular, AAG Boynton highlighted DOJ's increased focus on violations of cybersecurity requirements and made clear that FY 2020's increase in cases brought directly by DOJ is a trend we should expect to continue. Unsurprisingly, pandemic and opioid-related fraud top DOJ's priority list. The AAG anticipated that the FCA will be a primary enforcement vehicle for what he called the "inevitable fraud schemes" stemming from COVID-19 relief programs, including the CARES Act and loans through the Paycheck Protection Program (PPP). As we previously reported, just last month, DOJ announced the first civil settlement involving PPP-related fraud allegations—likely the first of many. The FCA will also continue to be one of the primary enforcement tools to hold companies liable for improperly promoting the sale and use of opioids. Opioid-related enforcement produced a blockbuster recovery earlier this year when DOJ announced in October 2020 a $3 billion-plus FCA settlement with Purdue Pharma (part of an $8 billion global criminal and civil settlement). AAG Boynton also explained that we are likely to continue to see more cases brought directly by DOJ. DOJ's FY 2020 stats showed that DOJ filed more direct cases last year than ever before. We now have a better understanding of why that is. AAG Boynton stated that DOJ is looking to "expand its own efforts to identify potential fraudsters" by leveraging its "sophisticated data analytics" system. This is not the first instance of DOJ aiming to enhance its data analytics. You may recall that last year, DOJ announced that it was initiating a data-driven approach to PPP enforcement and investigation. AAG Boynton also explained that DOJ is using data analytics "to identify patterns across different types of health care providers – giving us a way to identify trends and extreme outliers." He said that the data allows DOJ to "see where the highest risk physicians are located in each state and federal district, and how much they are costing" the government. Expect more to come on this front. Also noteworthy from the AAG's speech was DOJ's heightened focus on using the FCA to police compliance with cybersecurity requirements. DOJ has already started to lay the groundwork for enforcement in this area. In the much-discussed decision of United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc., No. 15-cv-2245, 2019 WL 2024595 (E.D. Ca. May 8, 2019), the court upheld the government's enforcement action against a firm that represented it was in compliance with the cybersecurity standards in its Department of Defense (DoD) contract when it allegedly knew these representations were inaccurate. Subsequently, in July 2019, another contractor agreed to an $8.6 million settlement to resolve allegations that it sold cybersecurity-vulnerable software to federal, state, and local government agencies in violation of contractual requirements. This was the first reported settlement based on FCA allegations related to cybersecurity noncompliance—but it is unlikely to be the last.

#### But resource constraints limit cases--the plan trades-off

Alex Kantrowitz 20, Founder at Big Technology | Author of ALWAYS DAY ONE: How The Tech Titans Plan To Stay On Top Forever, “It’s Ridiculous.’ Underfunded FTC and DOJ Can’t Keep Fighting the Tech Giants Like This”, <https://bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators>, September 17th, 2020

As politicians, the press, and the public scrutinize the tech giants and grow wary of their power, the most important organizations tasked with restraining them — the U.S. regulatory agencies — aren’t getting enough funding to do the job. “The agencies are severely resource-constrained,” Michael Kades, an-ex FTC trial lawyer who spent 11 years at the agency, told Big Technology. The Federal Trade Commission and Department of Justice’s antitrust division have a combined annual budget below what Facebook makes in three days. The FTC runs on less than $350 million per year, the DOJ’s antitrust division on less than $200 million. Facebook made $18 billion last quarter alone. The funding disparity between the tech giants and their regulators leads to an unbalanced fight, current and ex-staffers said: The agencies can’t investigate the tech giants to the extent they’d like. They might shy away from complex cases fearing a resource-draining battle. And when they investigate the tech giants, they often see former colleagues with intricate knowledge of their strategy and ability to act (or lack thereof) representing these companies. Without significant budget increases, the tech giants may well continue to act unrestrained with little fear of repercussions. “DOJ is under-resourced, FTC it’s ridiculous,” one ex DOJ-staffer told Big Technology. This doesn’t mean these agencies are entirely hamstrung; they can typically marshall the resources to bring a clear-cut case. “They want to win,” one ex-FTC official said. “If it's really egregious, and they find that in discovery, the attorneys are going to put a case together and go after it.” But when you can only take up a limited number of cases due to resource constraints, things inevitably slip through. “When I was there, the privacy wing had maybe 50 people, and that's probably generous. That's lawyers, support staff, everyone,” Justin Brookman, the former policy director at the FTC’s office of technology research and investigation, told Big Technology. “If they were to bring a case, that would tie up half the resources of the group. And they had two litigations ongoing and that took up most of everyone's time.” The agency’s budget has barely increased since Brookman left in 2017, while the tech giants have added trillions of dollars to their market caps. Inside the FTC and DOJ, employees are aware of the tech giants’ ability to fight, and the corporations’ budgets tend to live inside their heads. “Facebook will have the ability to raise every single issue, if they want to,” Kades said. “It doesn't have to be a winner, doesn't have to be close to winner. If they wanted to take this position in litigation, they can make every procedural maneuver difficult, they can not cooperate on discovery, they can fight on scheduling, they don't have to win even half of those, but it would just suck up resources.” The ability to do this, not even the action itself, can impact regulators’ thinking. Agency staffers are typically mission-driven and knowingly work for salaries below private-sector rates, but the resource-rich tech giants are now poaching directly from agencies at a rate remarkable even for Washington’s revolving door between the private and public sector.

#### Cyberattacks collapse the healthcare sector

Tracy Batsford 21, Owner and President at Communication Anglaise, 15 years’ experience in sales and marketing in the high-tech sector, “How Do Cyber Attacks Happen in Hospitals and Healthcare Clinics?”, <https://hellohealth.com/blog/how-do-cyber-attacks-happen-in-hospitals-and-healthcare-clinics/>, April 15th, 2021

As healthcare institutions grapple with the fight against COVID-19, another fight is also far from over: cyberattacks against hospitals and clinics. According to Cybersecurity Ventures, the healthcare industry, which is a $1.2 trillion sector, will fall victim to two to three times more cyberattacks in 2021 than the average numbers for other industries. Even more worrisome: Black Book Market Research has indicated that: “more than 93 percent of healthcare organizations have experienced a data breach over the past three years, and 57 percent have had more than five data breaches during the same time frame.” Threat analysts from cybersecurity company Emsisoft Ltd. told the Wall Street Journal that medical testing laboratories, medical device manufacturers and carriers of critical medical supplies are also facing a dramatic increase in threats to their cybersecurity. The dramatic increase in attacks compromises both patient safety and the public’s trust in the healthcare sector. But the questions remain: why do cyberattacks happen in hospitals and healthcare clinics? What are the strategies that can help them mitigate the devastating impact of a breach. Why Should Hospitals Care About Cybersecurity? Threats to hospitals’ cybersecurity cost the healthcare sector millions each year. A case in point: Universal Health Services, one of the largest hospital chains in the United States, was attacked late last September, which ended up costing the company $67 million last year. Due to ransomware, which shut down computer systems for medical records, pharmacies and labs across 250 facilities, ambulances had to be diverted to other hospitals and critical surgeries ended up being postponed as IT experts raced to restore infrastructure and even connected medical devices. Unfortunately, cases like Universal Health Services are far too common. Cyberattacks costs hospitals millions each year In a recent IBM report, healthcare clinics and hospitals incur the highest average security breach cost of any industry. In fact, cyberattacks can cost one institution US $7.13 million per incident—and even higher. Take Sky Lakes Medical Center, located in Oregon. In October 2020, the center was dealing with a massive surge in COVID-19 hospitalizations when hackers sent malware to the institution’s network, leaving staff without access to medical records and equipment. One month after the attack, the associated costs of building the network with new servers and computers as well as lost revenue from the incident was estimated at US $10 million. Comparitech analysts estimate that ransomware attacks on US healthcare organizations cost them US $20B in 2020 alone. The company indicates that there has been an increasing trend in double extortion attempts in which cybercriminals not only deny access with a ransom message but also call patients with proof of the data collected. This new trend is often forcing hospitals and clinics to pay out the ransom amounts, which incentivizes future cyberattacks. Patients Put at Risk The barrage of cyberattacks on healthcare organizations is not just about their bottom lines. A 2020 Cybersecurity Survey from the Healthcare Information and Management Systems Society (HIMSS) offered somber news for hospitals and clinics that didn’t invest substantially more in their cybersecurity: “Historically, hackers have threatened the confidentiality of medical information through data breaches where they obtain Social Security numbers or financial data. But if hackers threaten the integrity of medical data, such as by changing laboratory values or hacking a remote medical device, that could pose a very real danger to patients,” said Rod Piechowski, health IT expert and Vice-President of Thought Advisory at the HIMSS, during an interview about the study. Even more disturbing is how sophisticated cyberattacks can become, doing more harm on patients. For example, in a bid to raise awareness in cybersecurity weaknesses in medical equipment and devices, researchers in Israel were able to create a malware capable of adding or removing tumors in CT and MRI scans—tricking radiologists into providing false diagnoses. In 87% of the cases in which the malware removed cancerous modules, doctors concluded very sick patients were actually healthy. The Israeli research team said that the malware could be used for all types of health issues, including brain tumors, heart disease, blood clots, spinal injuries, and more. One cyberattack alone can cost a healthcare organization at least US $7.13 million. Why is The Healthcare Sector a Primary Target for Cyber-Attacks? The healthcare sector is notorious for being a target for cyberattacks. Many hospitals and clinics rely on outdated systems and infrastructure with minimal resilience to cyberattacks. On the other side of the spectrum, more modern healthcare facilities are increasingly reliant on networked digital infrastructure as well as medical equipment and devices that use IoT sensors to connect them to centralized networks. While electronic data sharing and virtual services can facilitate and accelerate patient care, they are still vulnerable to security breaches that affect how they operate. In these cases, cyberattacks can not only access the equipment’s configurations and settings—but also the hospital networks to which they are connected. Another reason healthcare organizations are a goldmine for cybercriminals is their financial resources. In privatized healthcare networks, hospitals and clinics often have substantial financial resources to actually pay ransomware, for example. In the public sector, the situation can be the complete opposite; with lack of financial resources, hospitals and clinics rely on legacy technology that cannot withstand attacks. Furthermore, healthcare organizations have been slow to adopt cybersecurity best practices and technologies, according to the Harvard Business Review. In IBM’s aforementioned survey, just 23% of hospitals and clinics have fully deployed security automation tools. The HIMSS survey showed that healthcare organizations dedicated only 6% or less of their IT budgets to cybersecurity, making them very much prone to hackers. Cybercriminals also don’t just “attack” IT infrastructure. They also target healthcare professionals. This approach is three-pronged. For one, human error accounts for 95% of security breaches. This means that hospital or clinic employees’ unintentional actions, such as downloading a malware-infected attachment or failing to use a strong password, can pave the way for a breach. This situation is exacerbated by the fact that many healthcare professionals in human resources, accounts payable and other departments are working from home. As Jeff Brown, CEO of the cybersecurity company Open Systems, said in a recent interview with Silicon Republic: Cybercriminals “are currently taking advantage of the thousands of healthcare workers in human resources, accounts payable and other departments who are working from home due to the pandemic.” They are also targeting healthcare professionals conducting telemedicine at home. These remote employees all have to connect to applications and data to carry out their day-to-day tasks. Without the proper cybersecurity measures and training in place, hackers can easily penetrate entire hospital networks—either to steal financial, employee or patient data, or hijack accounts for ransom.

#### Extinction

Royi Barnea et. al 20, Barnea is a Business Development Manager and Sales Expert with more than 20 years of experience in the Israeli and US Market, Yossi Weiss , Prof, Head of Department of Health Sciences School, Prof. Joshua Shemer chairs the Assuta Medical Centers network in Israel, “Health: an essential component of national resilience”, <https://www.joghr.org/article/14134-health-an-essential-component-of-national-resilience>, August 17th, 2020

The term “national resilience” originally referred only to a country’s military capacity, but was later expanded to include political-psychological aspects.5 According to Friedland, “national resilience” is the ability of a society to withstand adversities and crises, such as natural disasters or national security events (wars or terror attacks) in diverse realms by implementing changes and adaptations without harming society’s core values and institutions.6,7 Kimhi and Eshel have suggested that community resilience and national resilience are overlapping expressions of public resilience that provides its members with social identity, a sense of belonging and security.5 Since the beginning of the second millennium, there has been a growth in the number of policy documents relating to national resilience published by various organizations and countries (Table 1). These definitions imply that national resilience is usually perceived in terms of well-being and sustainability as well as in terms of risk management which has grown from the need of countries to deal with security threats such as terrorism, economic crises (e.g. the 2008 global economic crisis), and more prevalent natural disasters due to climate change. In 2011, the OECD started a program to measure well-being in various countries. Well-being measures include household, income, employment, community, education, environment, civic obligations, health, satisfaction and life, security and life-work balance. In addition to measuring well-being, the OECD has published an agenda for the advancement of sustainability in the various countries – the ‘2030 Agenda for Changing the World’. Evaluation of national policies for strength, well-being and sustainability of the 38 OECD countries as well as India and China has shown that determinants of resilience included first and foremost health (100% of countries), the economy (in 88% of countries), the environment (68%, including, agriculture, forestry, fishing, and conservation of natural resources), personal security (64%), quality of employment (64%), industry, infrastructure and accommodation (52%), civil and government involvement (52%), information, communication and innovation (48%), education and skills (44%), energy (40%), transportation and logistics (24%), plans for land utilization (12%) and leisure, culture and community (12%). In Israel, following the financial crisis of 2008, a government resolution was put forth to develop indicators and metrics of well-being, sustainability and national resilience that would complement the national accounting system and the gross domestic product. A team of professionals from the Central Bureau of Statistics, the Prime Minister’s Office, the National Economic Council and the Ministry for Environmental Protection established a list of 72 quality-of-life metrics in nine areas: income and capital, civil involvement and government, employment and balance of work and leisure, education and skills, environment, health, personal and social welfare, personal security, and infrastructure and housing.12 The metrics are published annually by the government statistician in order to help and formulate up-to-date policies. Health as a determinant of national resilience A health component is included in all three levels of resilience suggesting that health is an important determinant of resilience at all societal levels. Bonanno et al. defined “personal resilience” as the ability of the individual to function in a stable manner after traumatic events and to maintain healthy functioning over time.12 Community resilience requires the community’s constant and evolving ability to respond to its vulnerability and develop capabilities that help the community (1) prevent, meet and reduce the stress of a health incident; (2) to recover in a manner that will restore the community to a state of independence and at least the same level of health and social functioning after a health incident; (3) using knowledge from past experience to strengthen the community’s ability to withstand the next health incident.13 Thus, community resilience includes the protection of human life, health, economy and preparedness of infrastructures and the environment for coping. There are those who argue that community resilience is also related to perceived social support, to the strength of social connections, and to the physical and mental health of the public.1 According to Wulff et al., community resilience stems from good health and strong health systems, improved health status of populations, and the ability to maintain a healthy physical and mental state of individuals and communities and to deal with major physical and mental changes.14 Consequently, health systems can be regarded as the key to promoting community health resilience. In line with this premise, the WHO contends that the main factor that helps to create strength and resilience is a strong health system that provides a comprehensive response to all citizens. Health resilience is established by improved health status, strong health systems, good health outcomes, and is measured in the ability to preserve the physical, mental and social condition of the community and detail it in the course of large-scale changes.15 The WHO has identified six building blocks to strengthen health systems and increase resilience by improving health outcomes and accessibility as well as the health needs of the population, managing the individual’s economic and social risks, and improving the efficiency of the system. These building blocks relate to public and private resources and include health services, personnel, information, access to medical equipment, vaccines and the quality and safety of technology, finance and coverage, governance and leadership.15 Strengthening the health system by improving health outcomes, such as health indicators, response to health needs, protection from economic and social risks (insurance coverage) and efficiency of the system should increase the strength and resilience of the community and the nation.

## CASE

### Advantage 1

#### Antitrust is developed by adjudication---that creates an ineffective, unpredictable, and unenforceable patchwork that decks enforcement

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I. THE STATUS QUO: AMBIGUOUS, BURDENSOME, AND UNDEMOCRATIC?

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms [\*360] into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication "may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies." 7Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades. 8

#### Transitioning to small farming causes devasting land conversion AND worse fill-in abroad---turns the case

Ted Nordhaus 21, Founder and Executive Director of the Breakthrough Institute and Co-Author of An Ecomodernist Manifesto, and Dan Blaustein-Rejto, Director of Food and Agriculture at the Breakthrough Institute, Conducted Research with the Environmental Defense Fund, International Center for Tropical Agriculture, and Farmers Market Coalition, “Big Agriculture Is Best”, Foreign Policy, 4/18/2021, https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/

Moreover, organic farms, large and small, don’t actually outperform large conventional farms by many important environmental measures. Scale, technology, and productivity make good environmental sense and economic sense. Because organic farming requires more land for every calorie or pound produced, a large-scale shift to organic farming would entail converting more forest and other land to farming, resulting in greater habitat loss and more greenhouse gas emissions. And while organic farming doesn’t use synthetic pesticides or fertilizers, it often results in greater nitrogen pollution because manure is a highly inefficient way to deliver nutrients to crops.

Another benefit of large-scale U.S. farms is that because they are so efficient, economically and environmentally, they are also able to produce vastly more food than Americans can consume, making the country the world’s largest agricultural exporter as well.

That benefits the U.S. economy, of course, but it also comes with an environmental benefit for the world. In the contemporary environmental imagination, highly productive, globally traded agriculture is a bad thing—poisoning the land at home and undermining food sovereignty abroad. But in reality, a pound of grain or beef exported from the United States almost always displaces a pound that would have been produced with more land and greenhouse gas emissions somewhere else.

#### Farming is rapidly becoming sustainable---all environmental metrics are improving

Michael Shellenberger 20, Founder and President of Environmental Progress, Former President of the Breakthrough Institute, Apocalypse Never: Why Environmental Alarmism Hurts Us All, ISBN: 0063001705,9780063001701

As farms become more productive, grasslands, forests, and wildlife are returning. Globally, the rate of reforestation is catching up to a slowing rate of deforestation.19

Humankind’s use of wood has peaked and could soon decline significantly.20 And humankind’s use of land for agriculture is likely near its peak and capable of declining soon.21 All of this is wonderful news for everyone who cares about achieving universal prosperity and environmental protection.

The key is producing more food on less land. While the amount of land used for agriculture has increased by 8 percent since 1961, the amount of food produced has grown by an astonishing 300 percent.22

Though pastureland and cropland expanded 5 and 16 percent, between 1961 and 2017, the maximum extent of total agriculture land occurred in the 1990s, and declined significantly since then, led by a 4.5 percent drop in pastureland since 2000.23 Between 2000 and 2017, the production of beef and cow’s milk increased by 19 and 38 percent, respectively, even as total land used globally for pasture shrank.24

The replacement of farm animals with machines massively reduced land required for food production. By moving from horses and mules to tractors and combine harvesters, the United States slashed the amount of land required to produce animal feed by an area the size of California. That land savings constituted an astonishing one-quarter of total U.S. land used for agriculture.25

Today, hundreds of millions of horses, cattle, oxen, and other animals are still being used as draft animals for farming in Asia, Africa, and Latin America. Not having to grow food to feed them could free up significant amounts of land for endangered species, just as it did in Europe and North America.

As technology becomes more available, crop yields will continue to rise, even under higher temperatures. Modernized agricultural techniques and inputs could increase rice, wheat, and corn yields five-fold in sub-Saharan Africa, India, and developing nations.26 Experts say sub-Saharan African farms can increase yields by nearly 100 percent by 2050 simply through access to fertilizer, irrigation, and farm machinery.27

If every nation raised its agricultural productivity to the levels of its most successful farmers, global food yields would rise as much as 70 percent.28 If every nation increased the number of crops per year to its full potential, food crop yields could rise another 50 percent.29

Things are headed in the right direction regarding other environmental measures. Water pollution is declining in relative terms, per unit of production, and in absolute terms in some nations. The use of water per unit of agricultural production has been declining as farmers have become more precise in irrigation methods.

High-yield farming produces far less nitrogen pollution run-off than lowyield farming. While rich nations produce 70 percent higher yields than poor nations, they use just 54 percent more nitrogen.30 Nations get better at using nitrogen fertilizer over time. Since the early 1960s, the Netherlands has doubled its yields while using the same amount of fertilizer.31

High-yield farming is also better for soils. Eighty percent of all degraded soils are in poor and developing nations of Asia, Latin America, and Africa. The rate of soil loss is twice as high in developing nations as in developed ones. Thanks to the use of fertilizer, wealthy European nations and the United States have adopted soil conservation and no-till methods, which prevent erosion. In the United States, soil erosion declined 40 percent in just fifteen years, between 1982 and 1997, while yields rose.32

#### ‘Small-scale’ farming has the same effect on soil

Ted Nordhaus 21, Founder and Executive Director of the Breakthrough Institute and Co-Author of An Ecomodernist Manifesto, and Dan Blaustein-Rejto, Director of Food and Agriculture at the Breakthrough Institute, Conducted Research with the Environmental Defense Fund, International Center for Tropical Agriculture, and Farmers Market Coalition, “Small Farms, Big Pollution”, Foreign Policy, 6/2/2021, https://foreignpolicy.com/2021/06/02/big-agriculture-pollution-small-farms-inefficient/

A reader could be excused for concluding from Matthew R. Sanderson and Stan Cox’s criticism of our recent essay, “Big Agriculture Is Best,” that virtually all environmental impacts associated with the production of food in the United States and globally can be laid at the feet of “industrial agriculture.” But it is a definitional sleight of hand, not “empirical evidence,” as they claim, that does most of the work here. Sanderson and Cox define “industrial agriculture” so capaciously as to be basically synonymous with “agriculture.”

In the United States, that is arguably true. Most agricultural output—and hence environmental impacts—comes from large-scale, industrial production. Globally, it is not true. In both cases, there is no free lunch. Agriculture, unavoidably, has environmental impacts for the simple reason that growing food requires the conversion of forests, grasslands, and other ecosystems into fields whose biocapacity is then monopolized to produce food for people.

As human populations have grown enormously over the last two centuries, from about a billion people globally in 1800 to nearly 8 billion today, and as those populations have become wealthier and able to eat higher on the food chain, the impacts associated with food production have grown as well. But that has little to do with the prevalence of industrial versus nonindustrial agriculture. Instead, it reflects the basic realities associated with scaling agriculture globally to meet those enormous new demands.

Consider the negative impacts that nitrogen pollution from the American corn belt has had on the Gulf of Mexico. Most of that runoff comes from industrial farms for the simple reason that large-scale, intensive production is the dominant form of agriculture across the region. Shifting production to organic practices, though, wouldn’t much change the situation. Organic farms are typically associated with higher rates of runoff per calorie of food produced, even as they require more land. So unless total production were very substantially scaled back, a corn belt dominated by organic farms rather than conventional ones would require more land while having similar or even greater impacts on waterways and biodiversity.

Sanderson and Cox blame industrial agricultural in the corn belt not only for the dead zone in the Gulf of Mexico but for rendering “entire landscapes uninhabitable” across the region. Millions of Americans still comfortably living in such places would beg to differ. Yes, as Sanderson and Cox note, there are more hogs in the state of Iowa than people. So what? Insofar as the claim is relevant at all, it regards the question of why Iowa has so few people, not why it has so many hogs. And while the expansion of hog farming in the state in recent decades is attributable to industrial production methods, the decline of the human population is not, as large-scale rural outmigration has been underway in Iowa for over a century. As we note in our essay, rural depopulation has been much more the cause of the consolidation and industrialization of American agriculture than it is the result of those farming practices.

Sanderson and Cox similarly attribute the loss of topsoil across the region to industrial farming. But while it is true that a recent study found that lots of topsoil across the Midwest has been lost, that study compared present-day levels against a baseline that estimated the levels of topsoil in the region prior to its conversion to agriculture. The study did not estimate the contribution of current industrial systems versus earlier, less intensive farming practices across the region. Anyone even slightly familiar with the history of the Dust Bowl, though, can figure out that much of the region’s topsoil was lost long before highly intensive, mechanized agriculture became the norm.

#### COVID thumps pandemic impact

#### The overall environment is resilient---‘existential’ threats are false

Ronald Bailey 20, Science Correspondent at Reason, Member of the Society of Environmental Journalists and the American Society for Bioethics and Humanities, “The Global Environmental Apocalypse Has Been Canceled”, Reason Magazine, 8/1/2020, <https://reason.com/2020/08/01/the-global-environmental-apocalypse-has-been-canceled/> [grammar edit]

According to these activists and politicians, humanity is beset on all sides by catastrophes that could kill off civilization, and maybe even our species. Are they right?

Absolutely not, answers the longtime environmental activist Michael Shellenberger in an engaging new book, Apocalypse Never: Why Environmental Alarmism Hurts Us All. "Much of what people are being told about the environment, including the climate, is wrong, and we desperately need to get it right," he writes. "I decided to write Apocalypse Never after getting fed up with the exaggeration, alarmism, and extremism that are the enemy of positive, humanistic, and rational environmentalism." While fully acknowledging that significant global environmental problems exist, Shellenberger argues that they do not constitute inexorable existential threats. Economic growth and technological progress, he says, can ameliorate them.

Shellenberger's analysis relies on largely uncontroversial mainstream science, including reports from the Intergovernmental Panel on Climate Change (IPCC) and the Food and Agriculture Organization. And as a longstanding activist, Shellenberger is in a good position to parse the motives behind the purveyors of doom.

Shellenberger's activism is the real deal. To raise a donation to the Rainforest Action Network, he charged his friends $5 to attend his 16th birthday party. At 17 he went to Nicaragua to experience the Sandinista revolution. In the 1990s he worked with the Landless Workers' Movement in Brazil.

In 2003, Shellenberger and allies launched the New Apollo Project to jumpstart a no-carbon energy revolution over the next 10 years. In 2008, Time named him "A Hero of the Environment." He co-founded the ecomodernist Breakthrough Institute, which advocates the use of advanced technologies such as nuclear power and agricultural biotechnology to decouple the economy from the ecology, allowing both humanity and the natural world to flourish. More recently, he founded Environmental Progress, which campaigns for, among other things, the deployment of clean modern nuclear power. He is an invited expert reviewer of the Intergovernmental Panel on Climate Change's next assessment report.

Ohio Passes Controversial Conscience Clause for Doctors

So what does he say about climate change? "On behalf of environmentalists everywhere, I would like to formally apologize for the climate scare we created over the last 30 years," he wrote in an essay to promote his new book. "Climate change is happening. It's just not the end of the world. It's not even our most serious environmental problem." Needless to say, there are environmentalists everywhere who do not believe they have anything to apologize for. A group of six researchers assembled by the widely respected Climate Feedback fact-checking consortium rated his article as having low scientific credibility.

Shellenberger doesn't devote much of Apocalypse Never to the science behind man-made climate change. He basically accepts the consensus that it's a significant problem and instead focuses on various claims about the harms it is supposedly already causing. In that promotional essay, he argues that (1) human[s] being are not causing a "sixth mass extinction," (2) the Amazon rainforests are not the "lungs of the world," (3) climate change is not making natural disasters worse, and (4) fires have declined 25 percent around the world since 2003.

Shellenberger isn't denying the reality of man-made climate change. He's arguing that humanity is already adapting to the ways climate change has been making weather patterns evolve, and that we will continue to adapt successfully in the future. His book is ultimately a sustained argument that poverty is world's most important environmental problem, and that rising prosperity and increasing technological prowess will ameliorate or reverse most deleterious environmental trends.

#### Industrial ag is soil preserving---no chance of short-term disaster

James Wong 19, Botanist and Science Writer, Trained at the Royal Botanic Gardens, “The Idea That There Are Only 100 Harvests Left Is Just A Fantasy”, The New Scientist, 5/8/2019, https://www.newscientist.com/article/mg24232291-100-the-idea-that-there-are-only-100-harvests-left-is-just-a-fantasy/

When it comes to science reporting, there are some headlines that are so frequently repeated, so intuitively plausible, so closely aligned to our cultural beliefs, that they can seem like incontrovertible truths.

The general public, and indeed many scientists, may fervently believe that these claims reflect the overwhelming scientific consensus. However, sometimes when you dig a little beyond the surface, the evidence underpinning even the most ubiquitous headlines can seem surprisingly shaky.

Perhaps the best example of such an assertion is that of an impending agricultural Armageddon, caused by decades of irresponsible farming practices that have degraded soils across the planet (or so the press narrative goes).

A quick scan of the headlines reveals that despite the confidence with which these forecasts are proclaimed, the actual timescale to D-Day varies rather widely from story to story. While some report that we have 100 years until the end of our soil’s ability to support farming, citing a University of Sheffield study, others claim that this is a mere 60 years away, referencing a speech at the UN’s Food and Agriculture Organization.

Recently, the UK government’s environment secretary even stated that the UK is as little as 30 years away from an “eradication of soil fertility” because we “drench it in chemicals”. If this is indeed a likely end-game scenario, we should probably determine which of these estimates is most plausible as a matter of urgency: 30, 60 or 100 years. So let’s take a closer look at this claim.

Despite dozens of headlines quoting these predictions, surprisingly only one peer-reviewed paper from a scientific journal is ever cited as evidence to back them up. This 2014 study from the University of Sheffield compared the soil quality of a range of sites in the English city, including agricultural, garden and allotment soils.

Now, before we question whether the results of this single, small study can be extrapolated to represent all of England, let alone the whole UK or even the whole world, let us take a look at their findings: basically, some urban soils in Sheffield are higher in carbon and nitrogen than some nearby agricultural ones. OK, but where is the 100-year statistic? It turns out that nowhere in the study was there any calculation, prediction or even passing reference to the claim. None whatsoever. Perhaps not so much shaky evidence to support this assertion as much as non-existent.

“I asked leading soil scientists if they had ever come across such a prediction in published research. Not a single one had”

Maybe this is the result of a typo and the work is in another research paper? After an 8-hour trawl through the academic journals failed to pull up a single study that even attempted to make this calculation, I contacted six leading soil scientists across the world to ask if they had ever come across such a prediction in either the published literature or their work. Not a single one had.

In fact, the words they used to describe this claim were “bold”, “too Malthusian”, “hardly useful”, “almost insulting” and “I have used this in my soil science lectures to show the students to be wary of headlines!”. Ouch.

Does that mean there aren’t real threats to some agricultural soils around the world? Absolutely not. Indeed, all the scientists I spoke to went to great lengths to point these out, where they exist.

However, they also highlighted how incredibly complex the calculations needed to make such predictions would be, based on myriad factors, only some of which can be predicted with any reliability, with generalisations almost impossible. The boring reality is that while soils in some parts of the world might be in decline, others are not.

Furthermore, while agriculture may be one of the factors driving erosion and nutrient depletion, many modern farming practices such as no-till and synthetic fertiliser applications may actually be helping alleviate (rather than drive) this. In fact, according to many objective measures, modern, evidence-based farming techniques are more sustainable than those of an idealised past. Quite a different picture to that painted by the headlines.

Despite the thirst for simple truths in a complicated world, the researchers I contacted agreed that setting such a figure for an agricultural “end-point” would be nigh on impossible, which may explain why no published studies appear to have been able to do so. But this hasn’t stopped the newspapers. Welcome to 2019!

#### Dead zones are inevitable, not caused by ag runoff, and have no impact

Dennis Avery 5, Director of Global Food Issues at the Hudson Institute, “It’s Time To Tell The World How High-Yield Farming Saves Nature”, 2/9/2005, http://www.cgfi.org/tag/farm-productivity/

During the Clinton Administration, a White House Task Force recommended a 30 percent cut in Midwest fertilizer use because of a so-called “dead zone” in the Gulf of Mexico. Fortunately, the task force admitted in its report that it could find no evidence of either ecological or economic harm to the Gulf from the summer algae bloom that causes the “dead zone.” The first reports of such algae blooms in the Gulf go back into the 19th century. Fisheries experts say that most of the nutrients for the Gulf’s vast, rich fishery come down the Mississippi River. Such hypoxic zones are a common feature at the mouths of 40 major rivers around the world, where fresh, nutrient-laden water hits salt water. Under such conditions, the laws of biology and physics guarantee periodic algae blooms. Know also that Midwest fertilizer use has not risen since 1980, while the yields from the corn that gets most of the N fertilizer have risen 25 percent. Obviously, more of the farm fertilizer is being harvested as corn. More of the Midwest’s poultry and livestock have been moved indoors, where their wastes are carefully collected and spread on growing crops. If the “dead zone” is expanding, which is in serious doubt, where is the additional N coming from? The sewage treatment plants of St. Louis and Kansas City? Don’t forget either, that before farmers settled the Great Plains, the grasslands there had 60 million bison, 100 million antelope, billions of birds and grasshoppers, all eating the grass and defecating. The N may have taken longer to reach the Gulf, but it’s likely that Cortez could have found an algal bloom in the Gulf of Mexico when he invaded Mexico in 1520.

#### No chance of peak phosphorus

Eliza Barclay 13, Reporter and Editor at NPR, “Should You Be Worried About Your Meat's Phosphorus Footprint?”, NPR, 2/17/2013, http://www.npr.org/sections/thesalt/2013/02/14/172009950/should-you-be-worried-about-your-meats-phosphorus-footprint

But not everyone agrees phosphorus needs to be a top concern for food security.

"Phosphorus is pretty far down the list of things we're going to suddenly run out of," Steven Van Kauwenbergh, principal scientist and leader of the Phosphate Research and Resources Initiative at IFDC, an international food security and agriculture organization, tells The Salt.

So what is this phosphorus stuff, you say? It's an element that's mostly locked up in rocks in the ground – in this inorganic form, it's called phosphate.

It's an essential nutrient for humans and plants, and much of the world's phosphate gets processed into phosphoric acid to make fertilizer that helps plants grow quickly. Mining more of it from deposits around the world has helped fuel the huge increase in global food production. Phosphate production in 2012 was 220 million tons, up from 165 million tons in 1994.

In the last decade or so, inspired by the conversation about peak oil, a few environmental researchers began talking about the possibility of peak phosphorus and the dangers that a decline in such a critical resource would pose to food production. But even those researchers acknowledged that the estimates of global phosphate reserves — and how long they'll last — were fuzzy.

So the IRDC, which helps farmers in developing countries improve their harvests with fertilizer and other technologies, asked Van Kauwenbergh to do a thorough assessment of world reserves. His report, released in 2010, offered radically higher estimates of how much phosphate was available, and estimated that with current rates of production, phosphate rock reserves will be available for 300 to 400 years.

Other industry analysts agree that there's plenty of phosphate to go around for a long while.

"Peak phosphorus is a total myth, and I don't think it's anything to worry about in our lifetime," says Juan von Gernet, a senior consultant on fertilizers for CRU, a commodities research and consulting firm in London. "There is a huge amount of phosphate in the land, and if we run out of that, there are a lot of unexplored areas on the seabed which can be extracted if required."

Van Kauwenbergh also takes issue with Metson's suggestion that using lots of phosphorus to feed people is a bad thing.

"The people in countries with high [phosphorous] footprints have the opportunity to choose lifestyles and healthy diets," he says, and those diets mean more meat. "Now it seems these scholars would have us believe this approach is wrong."

### Advantage 2

#### No reverse causal ev in the 1AC that says the plan revives democracy

#### Populism, Coronavirus, and Trumpism are alt causes to the collapse of democracy

Rachel **Kleinfeld**, Thomas Carothers, Steven Feldstein, and Richard Youngs 20**21**, Kleinfeld is a senior fellow in the Democracy, Conflict, and Governance Program, where she focuses on issues of rule of law, security, and governance, Carothers is an American lawyer and was senior vice president for studies at the Carnegie Endowment for International Peace, Feldstein and Young are both senior fellows in Carnegie's Democracy, Conflict, and Governance Program. “How Middle-Power Democracies Can Help Renovate Global Democracy Support”, https://carnegieendowment.org/files/Kleinfeld\_etal\_Middle\_Powers.pdf

New Demands on Democracy. When the international democracy support community began to ramp up in the 1990s, it focused significantly on the institutional building blocks of the democratic process, especially free and fair elections, diverse political party systems, functioning parliaments, and independent civil society as manifest in advocacy-oriented nongovernmental organizations (NGOs). Today, such an institutional focus often seems inadequate. Citizens in established and fledgling democracies are questioning the value of formal institutions that seem to produce—or at least be unable to reduce—inequality, social injustice, and corruption. A global surge in mass antigovernment protests in recent years, driven by these and related concerns, has hit many democracies hard.2 Many international actors engaged in democracy support are behind the curve in moving away from old institution-building ways to find new ones to help address democracy’s persistent failings. One arena in which more fundamental challenges are upending prior assumptions of democracy support is that of civil society. First-generation democracy support interpreted civil society building primarily as helping build and back NGOs dedicated to public-interest advocacy and government monitoring. Today, restless citizens in many established and newer democracies question the value of such organizations, viewing many as elitist or even self-serving. Instead, more fluid, less formalized civic activity is mushrooming, whether through grassroots online movements, street-based and protest-oriented activism, or other forms. Such activity often questions the legitimacy of political parties and traditional ideas of democratic political representation. Technological change is facilitating this evolving scene, enabling rapid mobilization, new forms of association, and the decentralization of civic authority and initiative. The democracy support community is only just starting to adapt to this rapid pace of change in the civic sphere of many countries. 6 Political and social polarization has also risen in many democracies, driven by and enabling anti-democratic populists. In extreme cases, like Turkey, this has allowed democracy itself to die “by suicide,” in the words of Abraham Lincoln.3 Severe polarization threatens democracy because, as Milan Svolik has written, while extreme partisans voice approval for democracy, they may often care for favorable partisan outcomes more.4 In polarized electorates, this generates a willingness by hardened partisan actors to degrade democracy from within, often with significant or even majority support from the public. Here too, the democracy support community is behind the curve, without a well-developed set of operational principles and approaches for addressing rising polarization where it is occurring. Pandemic Backsliding The coronavirus pandemic has put further pressure on the overburdened field of democracy support. Many authoritarian or authoritarian-leaning governments have used the public health emergency as an excuse to enact new constraints on political and civic freedoms, causing a spike in the already worrisome global authoritarian trend.5 Some authoritarian powers, above all China, are trying to exploit the crisis to advance their narrative about the value of authoritarianism compared to democracy. Caught up with the struggle to address the pandemic at home, some established democracies have less time and attention for democracy abroad. Others have been caught so flat-footed in their response that this has lessened the attractiveness of the system of democracy itself. Unable to set aside its polarization even to protect its citizens from death, the United States has particularly weakened its power of attraction. Meanwhile, many of the usual forms of democracy assistance and pro-democracy diplomacy are blocked by travel restrictions and domestic lockdowns. The unfolding global economic crisis has also constricted domestic and international resources for democracy support. Some foreign-aid funds have been shifted to near-term medical and poverty-related relief. Diminished U.S. Leadership Just when these multiple challenges have been coming to a head, underlining the need for renewed engagement and innovation in international democracy support, U.S. leadership has been at a low point. While in the decades prior to Trump’s presidency, U.S. leadership on democracy issues was at times inconsistent, ineffective, or unwelcome, it was nevertheless on the whole a foundation stone for the field. As has been extensively chronicled, Trump abandoned this position. His administration embraced dictators rather than democratic allies; repeatedly failed to mount high-level pro-democracy diplomacy at critical junctures, including in strategically salient states such as Belarus and Ethiopia; engaged ineffectively or not at all in vital multilateral forums and alliances with democratic import, from the North Atlantic Treaty Organization (NATO) to the Open Government Partnership; and propagated antidemocratic ideas and practices at home, from undermining the rule of law to attacking independent media.6 As vice president and a senator, Biden has a long history of valuing democratic allies and alliances as well as of understanding the worth of a more democratic world. During the election campaign, he made clear his intention to return the United States to the table of international democracy support; and his administration is already moving forward in that regard.7 This will be a significant boost for the field, yet the United States will face constraints. To start with, institutional renovation is not an overnight process. Even for a Congress with slim Democratic majorities in each chamber, the rebuilding of what William Burns described as “the demolition of U.S. diplomacy” under Trump will be slow and difficult for the Biden administration.8 In addition, the myriad forms of damage to U.S. democracy inflicted by an antidemocratic president, opportunistic national and state politicians, and politically motivated violence during the last four years have badly weakened the United States’ status as an international supporter and model of democracy. Trying to repair its status will absorb a significant share of energy and political capital that might otherwise be available to help support democracy abroad. While the United States’ soft power has been profoundly damaged, its hard power is also not what it was when it took the lead in many areas of international democracy support in the first two decades after the end of the Cold War. U.S. military power has been chastened by the interventions in Afghanistan and Iraq. Washington’s principal geostrategic rivals have gained considerable influence in Africa, Asia, Latin America, and the Middle East.9 China’s military growth and the rise of cheap weapons such as unmanned drones have created a more level playing field than the United States has faced in modern history.

#### Democracy necessitates remote warfare

Jolle **Demmers AND** Lauren **Gould**, Jun 20 20**20**, Demmers is a Professor in Conflict Studies at the History of International Relations section of the Department of History and Art History, Gould is an Assistant Professor in Conflict Studies at the Centre for Conflict Studies at the History of International Relations section of Utrecht University. Together with Jolle Demmers she is the founder and the project leader of The Intimacies of Remote Warfare program, “The Remote Warfare Paradox: Democracies, Risk Aversion and Military Engagement”, https://www.e-ir.info/pdf/85426

Liberal Western democracies are increasingly resorting to remote warfare to govern security threats from a distance. From the 2011 NATO-led bombings in Libya, the US Africa Command training Ugandan soldiers to fight al-Shabaab, or the US-led coalition against IS in Syria and Iraq, violence is exercised from afar. Remote warfare is characterised by a shift away from ‘boots on the ground’ deployments towards light-footprint military interventions. This may involve using **drone and air-strikes**, special forces, intelligence operatives, private contractors, and training teams assisting local forces to do the fighting, killing, and dying on the ground (Demmers and Gould 2018: 365; Watts and Biegon 2017: 1). Violence is thus exercised without exposing Western military personnel to opponents in a declared warzone under the condition of mutual risk. This chapter aims to understand why we see this shift to remote warfare and reviews the moral and political challenges that this new way of war has given rise to. Our key argument is that the secrecy around remote warfare operations, their portrayal as ‘precise’ and ‘surgical’, as well the asymmetrical distribution of death and suffering they entail, thwarts democratic political deliberation on contemporary warfare. We foresee that it is these qualities of remote warfare that will make Western liberal democracies more war prone, not less. This is the remote warfare paradox: the military violence executed is rendered so remote and sanitized, that it becomes uncared for, and even ceases to be defined as war. To empirically illustrate these points, we start with two vignettes. The first highlights how ‘war’ was taken out of the air-strike campaign in Libya in 2011. In 2011, when NATO bombs were dropped on Libya, U.S. President Obama faced a dilemma: would he have to end US airstrikes after the sixtieth day, as required by the War Power Resolution? The War Powers Resolution (WPR) is a 1973 law that orders the president to withdraw US forces from ‘hostilities’ within 60 days in the absence of congressional authorisation. It was clear at the time that Congress had little interest in supporting the intervention in Libya with a war declaration or statutory authorisation. In response, White House lawyers crafted a legal rationale that allowed Obama to bypass the WPR predicament. The Libya war did not ‘rise to the level of hostilities’, they concluded, because military engagement was limited by design, conducted without the involvement of US ground forces, and therefore free of any risk of friendly casualties. The lawyers’ report asserted that ‘US operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of US ground troops, US casualties or a serious threat thereof (…)’ (US Department of State 2011). By placing U.S. airstrikes outside the realm of hostilities as envisioned by the WPR, it was argued that Obama did not need Congressional authorisation to engage in an offensive mission involving sustained bombardments of a foreign government’s forces. With this argument, the Obama administration set a precedent, drawn upon by his successor, that consistent bombing does not rise to the level of ‘hostilities’ (Olsen 2019). In 2019, the Trump administration was easily able to claim that US support for the Saudi-led coalition in Yemen—merely refueling jets and intelligence sharing, well short of direct airstrikes—does not constitute hostilities. Our second vignette shows another dimension of remote warfare: here, too, a Western democracy is waging remote war, but here the remoteness entails an ‘outsourcing’ that is shrouded in secrecy. In 2015, the Dutch parliament authorised the Ministry of Foreign Affairs to provide non-lethal support to militias fighting the Islamic State and Assad in Syria. This permission was granted under the conditions that only ‘moderate’ groups with respect for international humanitarian law would be assisted; support would be terminated immediately if this proved not to be the case, and the parliament would be given frequent updates about the programme. In 2018, newspaper Trouw revealed that the Netherlands had supported over 22 militias by providing them with 25 million euros worth of pick-up trucks, laptops and uniforms. Trouw also exposed that this support had been used for ‘lethal’ ends and the Ministry of Foreign Affairs was well aware that a number of these militias were human rights abusers (Dahhan and Holdert 2018). The Dutch Public Prosecutor had even labelled one, Jabhat al-Shamiya, as a terrorist organisation. The parliament was shocked by these revelations; however, in response the Ministry of Foreign Affairs labelled the programme as ‘classified,’ thereby ruling out public, political and legal enquiry. These vignettes illustrate how removing Western military personnel from the theatres of war through airstrikes or the financing of local militias and framing these distant engagements as ‘non-hostile’, ‘non-lethal’ or ‘classified’ offers room for governments to bypass domestic public scrutiny and political debate. Aiming to explore this ‘depoliticization move’ in more detail, we do three things in this chapter.

#### That causes miscalculation, drone prolif, and WMD usage---extinction

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Increased Risk of Misperception and Escalation

Pushing limits in already unstable regions is complicated by questions raised regarding rules of engagement: how would states respond to an armed drone in what they contend is their sovereign airspace, and how would opposing sides respond to counter-drone tactics? Japanese defense officials claim that shooting down Chinese drones in what Japan contends is its airspace is more likely to occur than downing manned aircraft because drones are not as responsive to radio or pilot warnings, thereby raising the possibility of an escalatory response.28 Alternatively, Japan might misidentify a Chinese manned fighter as an advanced drone and fire on it, especially if the aircraft’s radar signature is not sufficiently distinctive or if combat drones routinely fly over the disputed area.

Thus, the additional risks associated with drone strikes, combined with the lack of clarity on how two countries would react to an attempted downing of a drone, create the potential for miscalculation and subsequent escalation. As U.S. Air Force commanders in South Korea noted, a North Korean drone equipped with chemical agents would not have to kill many or even any people on the peninsula to terrorize the population and escalate tensions.29 This scenario points to the spiraling escalatory dynamic that could be repeated—likely intensified in the context of armed drones—in other tension-prone areas, such as the Middle East, South Asia, and Central and East Africa, where the mix of low-risk and ambiguous rules of engagement is a recipe for escalation. Not all of these contingencies directly affect U.S. interests, but they would affect treaty allies whose security the United States has an interest in maintaining. Compared with other weapons platforms, current practice repeatedly demonstrates that drones make militarized disputes more likely due to a decreased threshold for the use of force and an increased risk of miscalculation.

Increased Risk of Lethality

The proliferation of armed drones will increase the likelihood of destabilizing or devastating one-off, high-consequence attacks. In March 2013, Senator Dianne Feinstein (D-CA) observed of drones: “In some respects it’s a perfect assassination weapon. . . . Now we have a problem. There are all these nations that want to buy these armed drones. I’m strongly opposed to that.”30 The worst-case contingency for the use of armed drones, albeit an unlikely circumstance, would be to deliver weapons of mass destruction. Drones are, in many ways, the perfect vehicle for delivering biological and chemical agents.31 A WMD attack, or even the assassination of a political leader, another troubling though unlikely circumstance, would have tremendous consequences for regional and international stability.

#### Food disruptions are temporary and adaptable AND war turns the case

Gene Tunny 12, Economic Consultant, Trading as Adept Economics, Former Consultant with the Commonwealth Treasury, “Should We Worry About Food Security?”, Queensland Economy Watch, 7/9/2012, https://queenslandeconomywatch.com/2012/07/09/should-we-worry-about-food-security/

The push for greater local food production in urban and peri-urban areas makes no economic sense in a country where there is abundant farm land, and hence I was pleased to learn about the views of a University of Queensland expert on food security, Michael D’Occhio, in Queensland Country Life today (Food security ‘overblown’):

…with Australia producing a huge surplus of food relative to its population, “I think we’re a little bit indulgent when we talk about food insecurity in Australia”.

But a combination of fears about food security and food miles (how far the food travels before it gets to the table and hence how much greenhouse gas is created) is driving urban planners to promote inefficient agriculture within and close to our cities. For example, in a piece at the Conversation today, Griffith University Professor of Urban Management and Planning Paul Burton writes (Grow your own: Making Australian cities more food secure):

A significant opportunity exists to support the re-localisation of food production, processing, and consumption. While cities historically grew as places where local food surpluses were traded, urban food supply lines have become increasingly long, complex, and vulnerable to disruption by a number of factors, including climate change but also by natural disasters and by wars and other conflicts. By growing more of our food within our cities and in their immediate peri-urban hinterlands we can become less dependent on these vulnerable supply lines.

I find it hard to worry about supply lines getting disrupted, as any disruption is likely to be temporary and there are still other supply lines to ensure our cities won’t starve. The risk of all the potential supply lines – roads, rail, shipping, air freight – getting knocked out at the same time for an extended period seems very remote to me, outside of a nuclear war, in which case a bunker full of baked beans and pop tarts would be the best contingency.

Hence I agree that concerns about food security domestically are overblown. All the discussions I’ve had with people in rural communities in Queensland suggest there is clear potential to grow more food, but economics dictates it isn’t feasible (e.g. it can’t economically be grown at current prices, or it can’t economically be taken to the port because there isn’t a rail line nearby).

#### U.S. farm emissions are a drop in the bucket AND already declining---other GHGs thump

Dr. Frank Mitloehner 19, PhD, Professor and Air Quality Specialist in Cooperative Extension in the Department of Animal Science at UC Davis, “It’s Time to Stop Comparing Meat Emissions to Flying”, 11/13/2019, https://ghgguru.faculty.ucdavis.edu/2019/11/13/its-time-to-stop-comparing-meat-emissions-to-flying/

I can appreciate how having a sound bite is tempting and even useful like the recent Bloomberg assertion “… that the humble hamburger is a bigger contributor to the warming of the planet than the jumbo jet,” for example. The problem is, it’s not as simple as all that. Animal agriculture’s impact is overstated when speaking to an American audience, and aviation’s effect is understated when speaking to any audience.

U.S. livestock farmers have – and continue to – reduce GHGs

Globally, animal agriculture accounts for 14.5 percent of GHG emissions, the number that tends to be used to support the claim that eating meat is a bigger planetary enemy than the combustion of the fossil fuels used in aviation. But in the United States, isn’t it more helpful to look at U.S. animal agriculture statistics, especially when they’re vastly different from the global picture?

Here in the U.S., animal agriculture makes up a far smaller percentage of total GHG emissions than worldwide: 3.9 percent, according to the U.S. Environmental Protection Agency (EPA). Granted, the lower U.S. percentage is due in some part to the fact that the United States is highly industrialized and wealthy, and we are major users of energy, fossil fuels and transportation. So as those percentages swell, animal agriculture takes up a smaller piece of the pie.

Even so, our farmers are the most efficient in the world. Case in point: In Mexico, it takes up to five cows to produce the same amount of milk as one U.S. cow, and in India, it takes up to 20. These statistics point to the United States having the lowest GHG emissions per unit of milk of any country in the world. It’s a similar story for other ruminant and non-ruminant animals that produce meat in the United States. In fact, emissions from all U.S. livestock species are much lower than those in Brazil, China, India and countries in the European Union, among others.

Americans fly more – much more – than people in any other country

Consistent with using a global number for animal agriculture is the tendency to do the same thing with the GHG emissions of air travel, and that likewise distorts the picture for the United States. Whereas the global animal agriculture figure is inflated for a U.S. audience, the global aviation figure downplays the role air travel plays in the United States’ GHG emissions.

That’s because Americans fly much more than people in other countries, including China, the United Kingdom, Germany and Japan, other top consumers of air travel. According to Bureau of Transportation Statistics, there were 1 billion passengers on U.S. airlines and foreign airlines serving the U.S. in 2019, a record and yet another year-over-year increase since the global recession of 2008-2009.

Aviation is two to three times more damaging to the environment than is often reported

In our hamburger-airplane example, aviation is assigned a GHG emissions number of 2 percent, giving most readers reason to have a clear conscience when boarding a plane. But that number doesn’t capture a plane’s full emissions footprint.

A 2 percent “GHG emissions” figure for aviation accounts only for the amount of carbon dioxide (CO2) air travels puts in the atmosphere. It ignores, the other GHGs that come from planes (for example, nitrous gases, water vapor, soot, particles and sulphates).

In addition, the 2 percent number is a tailpipe assessment, meaning what is being measured are the direct CO2 emissions from the jet fuel that is combusted in the planes’ turbines. The figure fails to consider things such as the manufacture of materials for parts used in the aircraft, the transportation of materials and parts to factories where planes are made, wear and tear on roads and runways, and many more.

Life-cycle assessments and tailpipe emissions are GHGs’ apples and oranges

When we look at our metaphorical burger, we’re taking into account pretty much every GHG that is emitted by the activities and processes required to get the proverbial burger on a dinner table. Called a life-cycle assessment (LCA), it provides a more accurate and total picture of GHG emissions than does a direct (tailpipe) assessment.

In the same example, air travel gets a huge break by being subjected only to a measurement of its (direct (i.e. tailpipe) emissions. To make a fair comparison, the same system of quantification must be used for both the burger and the airplane ride, and ideally, a life-cycle assessment would provide the figures. The thing is, we don’t have life-cycle assessment numbers for planes, or other parts of the transportation sector.

Methane is a short-lived GHG; carbon dioxide might be forever

When we talk about the GHG emissions of livestock or the carbon footprint of meat, methane is often at the heart of the matter. Ruminant animals such as cows emit methane. As far as global warming potential, methane is a powerful GHG, with about 28 times the warming potential of carbon dioxide over a period of 100 years.

But methane doesn’t hang around for a century; it’s a short-lived GHG. In about a decade’s time, it’s converted to water vapor and carbon dioxide, which is part of the cycle whereby plants take CO2 out of the atmosphere and convert it into feed via photosynthesis. Animals eat the non-human edible vegetation and upcycle it to meat and dairy products that provide efficient sources of protein and other essential nutrients to humans. It’s a cyclical process, also referred to as the biogenic carbon cycle, that’s been around as long as life itself.

Given the advances American farmers have made in animal agriculture, today we are producing as much food as we did 50 years ago from cattle herds that are far smaller. All told, the U.S. herd is contributing *less methane* to the environment as a result.

On the other hand, our voracious appetite for fossil fuels has resulted in an enormous glut of carbon dioxide in the atmosphere. According to the EPA’s GHG inventory, CO2 accounted for 82 percent of GHGs in 2017, with industry, transportation and electricity contributing nearly 80 percent of the total. It’s so much more emissions than oceans, rainforests and plants can absorb, by conservative accounts, it will hang over the planet for a thousand years. Realistically, it could be forever.

#### Warming won’t be catastrophic

Dr. Benjamin Zycher 21, Senior Fellow at the American Enterprise Institute, Doctorate in Economics from UCLA, Master in Public Policy from the University of California, Berkeley, and Bachelor of Arts in Political Science from UCLA, Former Senior Economist at the RAND Corporation, Former Adjunct Professor of Economics at the University of California, Los Angeles (UCLA) and at the California State University Channel Islands, and Former Senior Economist at the Jet Propulsion Laboratory, California Institute of Technology, “The Case for Climate Change Realism”, 6/21/2021, https://www.aei.org/articles/the-case-for-climate-change-realism/

CLIMATE TRENDS

Beyond exhibiting extreme overconfidence in a cherry-picked analysis of climate-change causes, politicians and activists frequently ground their alarmism in frightening predictions about consequences that are likewise far from certain. This is not only true within the very new (and still quite unreliable) field of predictive climate science; it is true even in the context of ongoing climate phenomena. Indeed, politicians and journalists frequently characterize dramatic or unusual climate phenomena as the product of anthropogenic climate change, yet there is little evidence to support those claims.

For one thing, there is no observable upward trend in the number of “hot” days between 1895 and 2017; 11 of the 12 years with the highest number of such days occurred before 1960. Since 2005, NOAA has maintained the U.S. Climate Reference Network, comprising 114 meticulously maintained temperature stations spaced more or less uniformly across the lower 48 states, along with 21 stations in Alaska and two stations in Hawaii. They are placed to avoid heat-island effects and other such distortions as much as possible. The reported data show no increase in average temperatures over the available 2005-2020 period. In addition, a recent reconstruction of global temperatures over the past 1 million years — created using data from ice-sheet formations — shows that there is nothing unusual about the current warm period.

Rising sea levels are another frequently cited example of impending climate crisis. And yet sea levels have been rising since at least the mid-19th century. This rise is tied closely with the end of the Little Ice Age that occurred not long before, which led to a rise in global temperatures, some melting of sea ice, and a thermal expansion of sea water. There is some evidence showing an acceleration in sea-level rise beginning in the early 1990s: Satellite measurements of sea levels began in 1992 and show a sea-level rise of about 3.2 millimeters per year between 1993 and 2010. Before 1992, when sea levels were measured with tidal gauges, the data showed an increase of about 1.7 millimeters per year on average from 1901 to 1990.

But because the datasets are from two different sources — satellite measurements versus tidal gauges — they are not directly comparable, and therefore they cannot be interpreted as showing an acceleration in sea-level rises. Moreover, the period beginning in 1993 is short in terms of global climate phenomena. Since sea levels have risen at a constant rate, remained constant, or even fallen during similar relatively short periods, inferences drawn from them are problematic. It is of course possible there has been an acceleration in sea-level rise, but even still, it would not be clear whether such a development stemmed primarily from anthropogenic or natural causes; clearly, both processes are relevant.

A study of changes in Arctic and Antarctic sea ice yields very different inferences. Since 1979, Arctic sea ice has declined relative to the 30-year average (again, the degree to which this is the result of anthropogenic factors is not known). Meanwhile, Antarctic sea ice has been growing relative to the 30-year average, and the global sea-ice total has remained roughly constant since 1979.

Extreme weather occurrences are likewise used as evidence of an ongoing climate crisis, but again, a study of the available data undercuts that assessment. U.S. tornado activity shows either no increase or a downward trend since 1954. Data on tropical storms, hurricanes, and accumulated cyclone energy (a wind-speed index measuring the overall strength of a given hurricane season) reveal little change since satellite measurements of the phenomena began in the early 1970s. The number of wildfires in the United States shows no upward trend since 1985, and global acreage burned has declined over past decades. The Palmer Drought Severity Index shows no trend since 1895. And the IPCC’s Fifth Assessment Report, published in 2014, displays substantial divergence between its discussion of the historical evidence on droughts and the projections on future droughts yielded by its climate models. Simply put, the available data do not support the ubiquitous assertions about the causal link between greenhouse-gas accumulation, temperature change, and extreme weather events and conditions.

Unable to demonstrate that observed climate trends are due to anthropogenic climate change — or even that these events are particularly unusual or concerning — climate catastrophists will often turn to dire predictions about prospective climate phenomena. The problem with such predictions is that they are almost always generated by climate models driven by highly complex sets of assumptions about which there is significant dispute. Worse, these models are notorious for failing to accurately predict already documented changes in climate. As climatologist Patrick Michaels of the Competitive Enterprise Institute notes:

During all periods from 10 years (2006-2015) to 65 (1951-2015) years in length, the observed temperature trend lies in the lower half of the collection of climate model simulations, and for several periods it lies very close (or even below) the 2.5th percentile of all the model runs. Over shorter periods, such as the last two decades, a plethora of mechanisms have been put forth to explain the observed/modeled divergence, but none do so completely and many of the explanations are inconsistent with each other.

Similarly, climatologist John Christy of the University of Alabama in Huntsville observes that almost all of the 102 climate models incorporated into the Coupled Model Intercomparison Project (CMIP) — a tracking effort conducted by the Lawrence Livermore National Laboratory — overstate past and current temperature trends by a factor of two to three, and at times even more. It seems axiomatic to say we should not rely on climate models that are unable to predict the past or the present to make predictions about the distant future.

The overall temperature trend is not the only parameter the models predict poorly. As an example, every CMIP climate model predicts that increases in atmospheric concentrations of greenhouse gas should create an enhanced heating effect in the mid-troposphere over the tropics — that is, at an altitude over the tropics of about 30,000-40,000 feet. The underlying climatology is simple: Most of the tropics is ocean, and as increases in greenhouse-gas concentrations warm the Earth slightly, there should be an increase in the evaporation of ocean water in this region. When the water vapor rises into the mid-troposphere, it condenses, releasing heat. And yet the satellites cannot find this heating effect — a reality suggesting that our understanding of climate and atmospheric phenomena is not as robust as many seem to assume.

The poor predictive record of mainstream climate models is exacerbated by the tendency of the IPCC and U.S. government agencies to assume highly unrealistic future increases in greenhouse-gas concentrations. The IPCC’s 2014 Fifth Assessment Report, for example, uses four alternative “representative concentration pathways” to outline scenarios of increased greenhouse-gas concentrations yielding anthropogenic warming. These scenarios are known as RCP2.6, RCP4.5, RCP6, and RCP8.5. Since 1950, the average annual increase in greenhouse-gas concentrations has been about 1.6 parts per million. The average annual increase from 1985 to 2019 was about 1.9 parts per million, and from 2000 to 2019, it was about 2.2 parts per million. The largest increase that occurred was about 3.4 parts per million in 2016. But the assumed average annual increases in greenhouse-gas concentrations through 2100 under the four RCPs are 1.1, 3.0, 5.5, and an astounding 11.9 parts per million, respectively.

The studies generating the most alarmist predictions are the IPCC’s Special Report on Global Warming of 1.5°C and the U.S. government’s Fourth National Climate Assessment, both of which were published in 2018. Both assume RCP8.5 as the scenario most relevant for policy planning. The average annual greenhouse-gas increase under RCP8.5 is over five times the annual average for 2000-2019 and almost four times the single biggest increase on record. Climatologist Judith Curry, formerly of the Georgia Institute of Technology, describes such a scenario as “borderline impossible.”

RCP6 is certainly more realistic. It predicts a temperature increase of 3 degrees Celsius by 2100 in the average of the CMIP models. But on average, those CMIP models overstate the documented temperature record by a factor of at least two. Ultimately, models with a poor record of successfully accounting for past data and highly unrealistic future greenhouse-gas concentrations should not be considered a reasonable basis for future policy formulation.

# 2NC---Round 2---NU

## T---Subsets

#### ‘Antitrust laws’ are economy-wide, not those that apply only to specific markets

David Gerber 20, Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust, “What is It? Competition Law’s Veiled Identity”, Ch. 1, October 2020, p. 14-15

C. A Core Definition

The Guide uses the terms “competition law” and “antitrust law” to refer to a general domain of law whose object is to deter private restraints on competitive conduct. We look more closely at the terms:

1. “General”—The laws included are those that are applicable throughout an economy and thereby provide a framework for all market operations (there are always some exempted sectors). Laws dealing only with specific markets (e.g., telecommunication) do not play that role.

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

#### ‘Private sector’ means all businesses

Aminu Muhammad Fagge 14, and Mustapha Adamu Zubairu, “Private Sector and Youth Employment Generation in Nigeria: A Review”, SEAHI Publications, https://www.voced.edu.au/content/ngv%3A65719#:~:text=youth%20employment...-,The%20private%20sector%20refers%20to%20all%20economic%20institutions%2C%20business%20firms,not%20owned%20by%20the%20government.

The private sector refers to all economic institutions, business firms, foundations, and cooperatives etc., that are not owned by the government. Generally speaking, the contributions of the private sector to the development of the Nigerian economy cannot be over emphasized in terms of employment generation, capital savings and mobilization, efficiency, strong linkages with other sectors, and utilization of local technology training ground for entrepreneurs and self-reliance. The objective of this study is to examine the role and contribution of private sector on youth employment generation in Nigeria. The data for this paper were derived from a secondary source which includes previous research and analyses of scholars, government documents, newspaper/magazines as well as journal articles. Inequality of income is one of the effects of unemployment in Nigeria. In addition, unemployment resulted in increased activities of Boko Haram and many other crimes going on in the affected areas especially the north-west and north-east of Nigeria which resulted in closure of schools. In a place like Jos, people were divided along ethnic lines due to unemployment and poverty which adversely affected the role of the private sector. The findings of this work recommends an enabling environment for a vibrant private sector to create jobs in labour-intensive industries; exploration of employment opportunities not only available domestically but also outside Nigeria; and the federal government should hasten the power sector reforms and destabilize the power sector to end the looming energy crisis in Nigeria.

#### ‘The’ refers to the group as a whole

Merriam-Webster’s 21 Online Dictionary, ‘the’, https://www.merriam-webster.com/dictionary/the

—used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole

*the* elite

#### ‘Prohibitions’ and ‘practices’ are plural, requiring more than one

Oxford 21 – Oxford Online Dictionaries, ‘plural’, https://www.lexico.com/en/definition/plural

1Grammar

(of a word or form) denoting more than one, or (in languages with dual number) more than two.

postpositive ‘the first person plural’

#### ‘Of’ means whole

CJS 78 – Corpus Juris Secundum, 67, p. 200

Of: The word "of" is a preposition. It is a word of different meanings, and susceptible of numerous different connotations. It may be used in its possessive sense to denote possession or ownership. It may also be used as a word of identification and relation, rather than as a word of proprietorship or possession. "Of" may denote source, origin, existence, descent, or location, or it may denote that from which something issues, proceeds, or is derived. The term may indicate the aggregate or whole of which the limited word or words denote a part, or of which a part is referred to, thought of, affected, etc.

## CP---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.

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

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.

#### Later application makes it binding:

#### 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."

#### 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.

## CP---Reg Neg

## Adv 1

#### Every antitrust action is brought to federal judges---but, they’re incapable of getting tough economic calls right

Dennis W. Carlton 6, Professor of Economics at the The University of Chicago Graduate School of Business and Research Associate at NBER, and Randal C. Picker, Paul and Theo Leffmann Professor of Commercial Law at the The University of Chicago Law School and Senior Fellow at The Computation Institute of the University of Chicago and Argonne National Laboratory, “Antitrust and Regulation”, John M. Olin Law & Economics Working Paper No. 312, October 2006, p. 10

As noted in the introduction, antitrust and regulation have different comparative advantages. To grossly simplify, while both antitrust and regulation are a mix of economics and politics, antitrust is now organized around an economic core, while regulation is frequently shaped by the political process. To draw that out, while the decision by the Antitrust Division in the Department of Justice or by the Federal Trade Commission to bring a case may be influenced by politics, once a case is brought, the ultimate decision regarding the case is made by a federal judge.

Federal courts are a poor forum for reflecting democratic values. Federal judges are supposed to enforce the law, not make political judgments. Judges implementing the Sherman Act are poorly situated to make assessments about the “right” price or quality for anything, be it a cup of coffee or a kilowatt of electricity. Pricing in electricity, for example, will depend on our willingness to endure blackouts, and if we think that at least parts of the electricity system are a natural monopoly—the transmission grid itself—the government will almost certainly be involved in price setting. Judges have little if any ability to determine the public’s tolerance for blackouts and we should want that to be determined as part of a political process. That means industry-specific regulation and accountable regulators, and not general rules for competition implemented by judges separated from democratic forces.

#### Downsizing requires massive land expansion AND it’s unique: there’s gradual re-wilding because of high-intensity improvements

Ted Nordhaus 15, Founder and Executive Director of the Breakthrough Institute, “The Environmental Case for Industrial Agriculture”, The Breakthrough Institute, 6/8/2015, https://thebreakthrough.org/issues/food/the-environmental-case-for-industrial-agriculture

Debates about specific agricultural technologies and environmental impacts often lose sigh of the forest through the trees in terms of the relationship between food production and the environment. Low-productivity food systems have devastating impacts on the environment. As much as three-quarters of all deforestation globally occurred prior to the Industrial Revolution, almost entirely due to two related uses, clearing land for agriculture and using wood for energy. Indeed, many places that we now think of as vast wilderness were once farmed. Even the Amazon basin, long thought to have been a primeval Eden turns out to have been the site of extensive agriculture prior to the decimation of the pre-Columbian population due to conquest and disease. Today, forests have come back in New England and many other parts of the world not due to disease, privation, or genocide but rather because agricultural productivity has risen so dramatically that many marginal agricultural lands have been abandoned.

Meanwhile, everywhere that people depend upon bushmeat for protein, forests and other habitat continue to be defaunated. Moreover, low-intensity pasturing of livestock represents the largest single human land use, larger even than cropland. When leading public intellectuals and chefs like Michael Pollan and Alice Waters decry feedlot meat and rhapsodize about the culinary and environmental benefits of grass-fed beef, what they are really proposing is a vast expansion of human impacts on the land.

Even with much lower levels of per-capita beef consumption, there is no way that American beef consumption, much less global consumption, could be met with pastured beef without dedicating much more land to pasture. Even accounting for the immense amount of grain needed to feed cattle, feedlot beef is more land efficient than grass-fed.

In short, were such a thing even possible, attempting to feed a world of seven-going-on-nine billion people with a preindustrial food system would almost certainly result in a massive expansion of human impacts through accelerated conversion of forests, grasslands, and other habitat to cropland and pasture.

#### It’s the single largest cause of biodiversity loss

Dr. Angela Logomasini 12, Senior Fellow at the Competitive Enterprise Institute, Ph.D. in American Government from The Catholic University of America, “Rachel Was Wrong: Agrochemicals’ Benefits to Human Health and the Environment”, Competitive Enterprise Institute, Issue Analysis, Number 8, November 2012, <https://cei.org/sites/default/files/Angela%20Logomasini%20-%20Rachel%20Was%20Wrong.pdf>

Environmental Conservation Benefits

While many environmental advocacy groups suggest that chemicals have tremendously adverse impacts on the environment and wildlife, the fact is that these products have substantial environmental benefits. We consider a few here, such as the impacts on habitats and water quality.

Researcher Roger Sedjo of Resources for the Future notes: “Almost certainly the primary cause of contemporary biodiversity decline is habitat destruction and the degradation that results from the expansion of human populations and activities.”40 Clearing land for agriculture is surely one of those human activities, as is clearing land for living space.

Many people assume that any deforestation is bad. They forget that deforestation has made it possible for developed nations to provide an abundant food supply for domestic and international markets. As populations grow and people switch from gathering food to farming, some deforestation becomes necessary. History shows that once enough agricultural land is set aside and farming practices become sustainable, forests stabilize.

Steven Hayward of the Ashbrook Center at Ashland University documents such trends in his Environmental Almanac 2011, showing how deforestation has declined in recent years in many parts of the world and in some cases reforestation has begun. He notes:

Although data on the global scale are inconsistent and incomplete, the rate of deforestation appears to be steadily declining. Between 1995 and 2005, Asia dramatically reversed its deforestation trends; it is now reforesting rapidly. Africa and South America still experience the highest rates of deforestation.

Brazil, which along with Indonesia had the highest net loss of forests in the 1990s, has significantly reduced its rate of loss. Recent data suggest that Indonesia’s rate of deforestation is also slowing.41

Such reforestation would not be possible without high-yield agriculture and the chemicals that are part of that process.

From a conservationist perspective, the problem is not deforestation and habitat destruction, per se, but mismanagement of resources. This is true for both the developed and developing world. A large part of the problem stems from the tragedy of the commons—the fact that much of the world’s forests are owned by central governments that do not exercise any management or control over the lands. As a result, much of the forests are an open resource lacking a steward, which leads to serious abuse as everyone takes from the forest, yet no one has an interest in maintaining the resource. In addition poverty contributes as clearing more and more land for agriculture becomes necessary to produce food.

There is much debate as to the extent of rainforest deforestation. It is clear that high-yield farming helps reduce encroachment into wildlife habitat, and the measured impact is substantial. If farmers continued to use 1950s technology—when most of the world did not use pesticides and fertilizers— they would have to plant 10 million square miles of additional land to generate the food that is produced today, notes researcher Dennis Avery of the Hudson Institute.42 That is more land than all of North America (about 9.4 million square miles) and almost as much as all the land in Africa (about 11.7 million square miles). Researcher Indur Goklany has also quantified these conservation gains. He explains:

If U.S. agricultural technology had been frozen at 1910 levels— i.e. if cropland per capita had stayed at 1910 levels—then to produce the same output as achieved in 2004, U.S. farmers would have had to utilize 1,007 million acres rather than the 305 million acres that were actually harvested that year. That’s more than four times the total amount of land and habitat under special protection in the U.S. in 1999— including National Parks, National Wildlife Refuges, and National Wilderness Areas. Quite possibly, the increase in land productivity averted a potential catastrophe for U.S. wildlife and perhaps even biodiversity more generally.43

## Adv 2

# 1NR

## Memo

#### 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.

## Ptx

#### It’s the only existential risk

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.

#### It’s 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’s key to competitiveness

Laura Tyson 9-9, Elliott’s Mom, Former Chair of the US President's Council of Economic Advisers, Professor of the Graduate School at the Haas School of Business and Chair of the Blum Center Board of Trustees at the University of California, Berkeley, and Lenny Mendonca, Senior Partner Emeritus at McKinsey & Company, Former Chief Economic and Business Adviser to Governor Gavin Newsom of California and Chair of the California High-Speed Rail Authority, “Why America Must Go Big on Infrastructure”, Project Syndicate, 9/9/2021, https://www.project-syndicate.org/commentary/infrastructure-plan-biden-budget-needed-for-recovery-by-laura-tyson-and-lenny-mendonca-2021-09

Although the US economy has enjoyed a strong recovery from the pandemic-induced recession, its prospects for more robust, sustainable, and equitable long-term growth remain tenuous. Much will depend on whether Congress can muster the will to invest massively in physical and social infrastructure.

Economists across the political spectrum have long advocated an increase in infrastructure investment in the United States. Now, Congress is debating infrastructure spending packages that would secure the current economic recovery and boost potential growth over the next decade.

Despite deep partisan divisions on most other issues, the Senate recently passed the $1 trillion Infrastructure Investment and Jobs Act (IIJA) by a large majority. The bill now must pass the House of Representatives, where Speaker Nancy Pelosi has secured an agreement for a vote by the end of September. Approval looks likely but is by no means certain, given complete lack of support from House Republicans and ongoing divisions among House Democrats.

The IIJA focuses on traditional physical infrastructure, where much of the need is for long-overdue maintenance, committing about $550 billion for investment in items like roads and bridges, water infrastructure, and broadband. The bill also contains climate-related investments in clean-energy transmission and electric-vehicle infrastructure, including electrification of school and transit buses.

These investments would be paid for through a combination of unspent emergency relief funds, corporate user fees, strengthened tax enforcement, and revenues from stronger economic growth. The Congressional Budget Office warns that the IIJA could increase the fiscal deficit by $256 billion over the next decade. But additional borrowing to finance infrastructure is warranted, given that the real cost of federal borrowing is currently in the 2% range, while the projected return on investment in physical infrastructure is around 7%.

The IIJA, moreover, is only a down payment on the investments in physical and human capital needed to achieve inclusive and sustainable growth. Congress must pass an even bigger and bolder plan that focuses on human development, economic mobility, and climate resilience.

To that end, the Senate, with only Democratic support, recently passed a $3.5 trillion budget resolution for the next ten years that includes such investments, and the House has now incorporated the plan into its budget framework. Again, passage of the plan is by no means certain. Major details need to be decided, and tough negotiations on financing and non-infrastructure items (including immigration) lie ahead.

The US economy rests on fragile foundations. While the rebound from the COVID-19 recession has been surprisingly rapid and robust, the US Federal Reserve may soon start to taper its monthly bond purchases, and the earlier fiscal emergency and stimulus spending packages will soon run their course. The spread of the Delta variant (owing to vaccine hesitancy) has already curtailed demand in pandemic-sensitive sectors like travel, tourism, and hospitality. Worse, the recovery has yet to reach many workers hit hardest by the “dual recession,” especially non-college-educated people, lower-wage women, and people of color in vulnerable sectors.

Moreover, labor-force participation remains low, largely because school closures have forced many parents (predominantly women) to leave the workforce to care for their children. Politically motivated claims that expanded unemployment benefits have fostered low labor-force participation will disappear as those benefits expire this month. Indeed, the experience of states that decided to cut enhanced benefits earlier has already refuted the argument that those provisions were undermining work incentives.

The recovery has been kind to shareholders, homeowners, and the wealthy. Stock markets are hitting record highs, and home prices are up by 25% from a year ago. The number of billionaires continues to grow, with their overall wealth increasing by 62% since 2020. Overall, inequality has continued to increase while economic mobility has declined, leaving a growing number of Americans further behind.1

The $3.5 trillion budget plan proposes major investments in social infrastructure to change this trajectory. These include $726 billion for preschool services, childcare for working families, tuition-free community college, increased funding for historically black universities and colleges, and expansions of Pell grants and primary health care. There is also more than $300 billion earmarked for public housing, the Housing Trust Fund, housing affordability, and equity and community land trusts.

To foster sustainable, equitable growth, the plan includes nearly $200 billion for clean-energy development and $135 billion to address forest fires, droughts, and other climate-driven challenges. As evidence of the adverse effects of climate change mounts, denialism and resistance to mitigation and adaptation policies have waned both in the US and around the world. Recent polls show that over two-thirds of Americans now want the government to do more to address climate change. As more communities experience its adverse effects, voters are increasingly joining major investors in demanding action.

The $3.5 trillion plan would be funded through a combination of new tax revenues, strengthened tax enforcement, health-care savings, and revenues from long-term growth. The main revenue generators are an increase in the corporate tax rate to the 28% range, a global minimum corporate tax in the 20% range, and higher tax rates on personal income and capital gains for wealthy Americans (those with taxable incomes over $400,000). Recent polls indicate that there is robust voter support across party lines for tax increases on both corporations and high-income earners.

A recent report by Moody’s Analytics concludes that over the next decade, the $3.5 trillion budget along with the IIJA would accelerate the economy’s recovery to full employment, increase employment by 20 million, and boost long-term growth, the benefits of which would mostly accrue to lower- and middle-income families. Moreover, even if these plans increase the deficit more than anticipated, this is still an especially propitious time for the federal government to borrow to increase investments in infrastructure, given the anticipated returns and extraordinarily low interest rates.

Infrastructure investment is a twofer: in the short run, it stimulates demand through strong fiscal multiplier effects, and it strengthens the supply foundations of economic growth and competitiveness over time. The infrastructure plans being debated this month would generate these macroeconomic benefits in ways that would also foster greater equity and climate resilience. Congress holds the keys to a future of inclusive and sustainable growth for America. Now it needs to muster the courage to use them.

#### Extinction

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

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

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

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

Shared Economic Prosperity Is a National Security Asset

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

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

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

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

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

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

The Case for an Inclusive Recovery

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

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

#### It’ll have funding offsets that get Manchin and Sinema on board

Susan Ferrechio 9-10, Chief Congressional Correspondent at The Washington Examiner, Degree in Journalism from the Harvard Extension School, BA from Clark University, “Pelosi Pushes Speedy Timeline to Pass Massive Spending Package”, MSN, 9/10/2021, https://www.msn.com/en-us/news/politics/pelosi-pushes-speedy-timeline-to-pass-massive-spending-package/ar-AAOjtf6?li=BBnbcA1

House Speaker Nancy Pelosi told fellow Democrats in a visual conference call on Friday that she hopes to begin consideration of a $3.5 trillion social welfare spending package as soon as Sept. 20, the day lawmakers return from their summer recess.

The California Democrat outlined the ambitious schedule as the House Ways and Means Committee worked to advance part of the measure over the objections of at least one party centrist who argued the process is moving too quickly for careful consideration.

Democrats are also working to overcome internal differences over the cost of the bill as well as how to pay for it.

But Pelosi urged the lawmakers to see the advantages of quickly passing the legislation, a source with knowledge of her comments during the virtual meeting said.

“In a couple of weeks, we will have made a transformative difference,” Pelosi told lawmakers.

Senate Democrats are on track to finish writing legislation by Sept. 15, Pelosi told Democrats, which leaves the two chambers in a position to complete the package quickly.

The Senate has already passed a $1.2 trillion hard infrastructure package that Democrats consider part of the overall deal, and Pelosi has promised centrists she will aim to bring up the Senate-passed measure for a vote by Sept. 27.

The bill funds roads, bridges, water projects, expanded broadband, and some green energy initiatives, including $7.5 billion to build electric vehicle charging stations.

Pelosi is sticking to her pledge to first pass the social welfare spending package before taking up the infrastructure measure, meeting a demand made by her majority liberal caucus.

The bill would find a broad array of social welfare programs long sought by liberals including free universal preschool, paid family leave, free community college, money for the care of the elderly and disabled, expanded Medicare, and an extension of the child tax credit.

During the virtual conference call on Friday, Pelosi touted the party’s rare opportunity to pass such a massive list of new benefits.

It would be the first time, Pelosi said, that women, children, and people with disabilities “have so much leverage in this debate.”

To pass the measure, Democrats will have to iron out differences within their party.

Sen. Joe Manchin of West Virginia warned his Democratic leaders he is not willing to spend $3.5 trillion, with at least one media outlet reporting Manchin’s top-line figure is $1.5 trillion. Arizona Democrat Kyrsten Sinema said she, too, would seek a lower price tag.

But Pelosi suggested this week Manchin could be satisfied with the measure if half or more is offset with other revenue.

Democrats want to raise taxes on corporations and the wealthy to pay for the measure.

It’s not about the cost, Pelosi said.

“We will pay for more than half,” Pelosi said. “Maybe all of it. We will be taking responsibility for what is in there.”

#### They’re posturing---it’ll get resolved

Jim Newell 9-3, Senior Politics Writer at Slate Magazine, “What Is Joe Manchin Doing Now?”, Slate, 9/3/2021, https://slate.com/news-and-politics/2021/09/manchin-debt-oped-what-it-means.html

And so it does not surprise me that, shortly after House moderates put an expiration date (Sept. 27) on whatever leverage progressives had, Joe Manchin would write an op-ed calling for a “strategic pause” to slow the reconciliation process down. There is indeed a considerable amount of strategy in the pause Manchin proposes, but it has little to do with the misleading debt and inflation arguments he makes in his piece. Manchin, and fellow moderates, want to see the bipartisan infrastructure deal passed out of the House so that they have the ability to walk from the reconciliation bill if they want to. That ability would give them the absolute upper hand in negotiations over it.

Progressives do still have another card to play, and they’re talking a big game about playing it: They could vote down the bipartisan infrastructure bill when it comes to the House floor until there is, at least, some shared understanding about the broad contours of the reconciliation bill. But they may not have the numbers, depending on the number of House Republicans who will vote for the bipartisan infrastructure bill. They would also find themselves in a difficult spot, as time went on, holding out against a top piece of Biden-supported legislation while surface transportation authorization has lapsed.

Again, odds are this all gets worked out some way, as both pieces of the Biden agenda have attained a certain too-big-to-fail status. If it all goes south, though, there will have been a bigger problem at play from which all the threats and hostage-taking were merely symptoms: Democrats on opposing wings of the party do not trust each other to hold up their ends of the bargain. If they did, there would not be so much angst and strategic plotting about something as basic as the sequencing of votes.

#### Moderates will be on board

Thomas Franck 21, Columnist and Investment Reporter at CNBC, BA in Economics from Harvard University, “Wall Street is Telling Investors to Prepare for the Two Big Spending Bills Congress is Set to Pass”, CNBC, 8/23/2021, https://www.cnbc.com/2021/08/23/wall-street-says-to-prep-for-infrastructure-and-budget-reconciliations-bills.html

Major Wall Street brokerages are urging clients to look past Democratic infighting and prepare for a torrent of new government spending as House Speaker Nancy Pelosi brings two historic measures up for a vote.

Strategists say that moderate Democrats hoping to persuade Pelosi, D-Calif., to vote on the bipartisan infrastructure bill before a $3.5 trillion budget resolution will ultimately concede for fear of risking their reelection chances in 2022.

“Our base case has been and remains that Congress will approve” a significant expansion of fiscal policy, Morgan Stanley’s head of public policy, Michael Zezas, wrote in a note published Monday.

“Democratic leadership is behaving as if they’ve made the calculation that neither bill has the votes to pass independently of the other one,” he added. “Our base case assumes that this reality ultimately persuades the group of House moderates to support the budget resolution vote and allow the dual track process to continue, though perhaps not without some attendant headlines and/or modest concession.”

Cornerstone Macro, another Wall Street research firm, reinforced Morgan Stanley’s optimism on both Democratic initiatives with some early-week humor.

“Trivia question. Name a top Democratic presidential priority House Democratic moderates have killed in the last four decades?” Cornerstone’s strategists asked their clients. “It’s a trick question. There aren’t any.”

Both firms say it’s unlikely a group of nine centrist Democrats will follow through on a threat to hold up President Joe Biden’s $3.5 trillion package of health-care, education and climate provisions currently being drafted.

#### 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.

#### 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.

#### Afghanistan won’t derail infrastructure

Thomas Gift 9-7, Associate Professor of Political Science at UCL and Director of the Centre on US Politics (CUSP), “Biden’s Mishandled Afghanistan Withdrawal is Unlikely to Have a Large Effect on the 2022 Midterms”, London School of Economics, 9/7/2021, https://blogs.lse.ac.uk/usappblog/2021/09/07/bidens-mishandled-afghanistan-withdrawal-is-unlikely-to-have-a-large-effect-on-the-2022-midterms/

Will perceptions of Biden’s botched Afghanistan withdrawal thwart his domestic agenda?

It’s possible to overstate how much recent events in Afghanistan will shape what Biden can achieve legislatively at home; any effects will be case-specific. It’s still much more likely than not that the $1 trillion infrastructure bill that’s already passed the Senate will become law, which only requires that Democrats vote along party lines in the House. But Biden’s additional $3.5 trillion spending proposal—which was already going to be a tough sell for the White House to pass through reconciliation in ideal circumstances—might become even less likely. That’s a bill that that’s jam-packed with progressive wish-list items, including on clean energy, family leave, housing, and pre-K schooling. Some Democrats, particularly from swing districts and moderate states, would’ve been reluctant to vote for that bill anyway. But Biden’s diminished political stature might give those lawmakers even more pause about toeing the party line. In fact, there’s already evidence of this hesitation, with West Virginia Senator Joe Manchin demanding a “strategic pause” on the bill, which should concern the White House.

#### It 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’ll blow over if Biden can successfully pivot to popular domestic issues---the plan derails that

Zeke Miller 9-7, White House Reporter at The Associated Press, Former President of the White House Correspondent’s Association, BA in Political Science from Yale University, “Biden Looks To Get His Agenda On Track After An Unrelenting Summer”, The Philadelphia Inquirer, 9/7/2021, https://www.inquirer.com/politics/nation/biden-congress-infrastructure-budget-bills-20210907.html

Never has that been more true than summer 2021, which began with the White House proclamation of the nation’s “independence” from the coronavirus and defying-the-odds bipartisanship on a massive infrastructure package. Then COVID-19 came roaring back, the Afghanistan pullout devolved into chaos and hiring slowed.

Biden now hopes for a post-Labor Day reframing of the national conversation toward his twin domestic goals of passing a bipartisan infrastructure bill and pushing through a Democrats-only expansion of the social safety net.

White House officials are eager to shift Biden’s public calendar toward issues that are important to his agenda and that they believe are top of mind for the American people.

“I think you can expect the president to be communicating over the coming weeks on a range of issues that are front and center on the minds of the American people,” said White House press secretary Jen Psaki.

“Certainly you can expect to hear from him more on his Build Back Better agenda, on COVID and his commitment to getting the virus under control, to speak to parents and those who have kids going back to school."

During the chaotic Afghanistan evacuation, the White House was central in explaining the consequences of Biden’s withdrawal decision and the effort to evacuate Americans and allies from the country. Now, officials want to put the State Department and other agencies out front on the efforts to assist stranded Americans and support evacuees, while Biden moves on to other topics.

It’s in part a reflection of an unspoken belief inside the White House that for all the scenes of chaos in Afghanistan, the public backs his decision and it will fade from memory by the midterm elections.

Instead, the White House is gearing up for a legislative sprint to pass more than $4 trillion in domestic funding that will make up much of what Biden hopes will be his first-term legacy before the prospects of major lawmaking seize up in advance of the 2022 races.

On Friday, in remarks on August's disappointing jobs report, Biden tried to return to the role of public salesman for his domestic agenda and claim the mantle of warrior for the middle class.

#### What comes next determines PC

Thomas Gift 9-5, Associate Professor of Political Science at UCL and Director of the Centre on US Politics (CUSP), “Kabul's Largest Currency Exchange Market Reopens; Taliban Tase, Beat Women Protesters; Death Toll Rises To At Least 50 After Storm Hits East Coast; Cuban Doctors Criticize Government's COVID-19 Response; U.S. President Joe Biden's Agenda Faces Setbacks On Multiple Fronts; Biden To Visit All Three 9/11 Attack Sites; Over 40,000 Afghan Evacuees In U.S. For Resettlement; China Aims To Ease Inequality With Antitrust Probes And Fines. Aired 5-6a ET”, CNN Newsroom, 9/5/2021, Lexis

THOMAS GIFT, ASSOCIATE PROFESSOR, UNIVERSITY COLLEGE LONDON: Approval ratings for the White House have dipped in to negative territory according to some polls.

Republicans are using the images coming out of Kabul to reinforce this narrative of an unreliable commander in chief. Even Democratic allies have questioned how Biden's recent decisions square with a leader, who promised to be a steady hand and to restore American trust.

So this is really Biden's first true foreign policy test and it is not a trivial one. I think what will ultimately determine whether this sticks, whether this is just a down political period for Biden or the beginning of a more protracted loss of political capital, is how well the administration can flip the script.

#### Ag antitrust is broadly unpopular AND confronts huge lobby opposition

Billy Hackett 21, Policy Fellow at the National Coalition for Sustainable Agriculture, “The Time is Ripe for Competition and Antitrust Reform in Agriculture”, 2/12/2021, https://sustainableagriculture.net/blog/the-time-is-ripe-for-competition-and-antitrust-reform-in-agriculture/

Resistance to change

A nationwide poll this year revealed that a striking 81 percent of rural voters would support a candidate who said, “A handful of corporate monopolies now run our entire food system. We need a moratorium on factory farms and corporate monopolies in food and agriculture.” Just ¼ of these self-proclaimed rural voters identify as “liberal” or “progresssive,” suggesting that the issue transcends the bitter partisanship which defines our age. Despite the salience of this issue in rural communities, neither the Republican nor Democratic party have formally claimed its mantle.

Isolated attempts have been made by policymakers on both sides of the aisle to address anticompetitive practices, but no meaningful reforms have passed through Congress. The Farm Bill does not acknowledge the corporate capture of the food system, instead perpetuating the bifurcation of the food system with the consolidation of financial resources and land in the hands of its largest actors. If a popular consensus exists to democratize the food system, why do these attempts consistently fail?

Part of this is the commanding voice of agribusiness interests in Washington. Nine political action committees (PACs) representing large pork, dairy, corn, soybeans, wheat, beef, cotton, and chicken producer groups donated $3.2 million in campaign contributions to farm-state lawmakers through October of the 2020 election cycle. These lobbying groups donated most heavily to Republican campaign committees, though outgoing House Agriculture Chair Collin Peterson (D-MN-7) earned the most contributions of any individual. Without campaign finance reform, the ability of these corporations to influence legislation to maintain the status quo, or at most allow modest reforms within acceptable guardrails, will continue unabated.

In addition, agribusiness corporations with concentrated market share possess leverage to deter small producers from exposing anti-competitive practices in the industry. Those that do call attention to anti-competitive behavior face retaliation in an industry that has no whistleblower protections. While a bipartisan piece of legislation was passed in December to address this gap, its impacts on industry practice once enacted remain to be seen. Just speaking out against malpractice would hold little weight, however, if existing laws meant to preserve competition are not enforced to their fullest extent. Litigation is not a realistic avenue to compel such action; even if it were reasonable for a small farmer to take a multinational corporation to court, mandatory private arbitration – a method of dispute settlement behind closed doors, free from a neutral third party and independent of court precedent – has become the corporate-friendly status quo consistently upheld by the Supreme Court since the 1980s.

“These corporations are very, very good at messing with your head,” said Dave Bishop, 70, a small farmer in rural Illinois. Today, the popular narrative in agriculture is that the rapid concentration of the industry is a natural consequence of advancing technology, not the result of conscious decisions made by agribusiness and government leaders. The food system is hailed as better for consumers, demonstrated by a lower cost for food, while ignoring the rising health issues, environmental degradation, and rural depopulation that it creates. These hidden costs challenge the mainstream rhetoric about the food system’s superior efficiency. “This is a design issue. This is a choice,” Bishop explained.

#### 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.

#### Sectoral-specific agricultural antitrust is perceived as partisan and special-interest driven---that obliterates political support AND the overall legitimacy of the plan

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

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

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

#### 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.

#### 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.