1AC Worker Welfare Standard

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# 1NC

## OFF

### 1NC

Infrastructure DA

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

Kevin Liptak 9-18, White House Reporter at CNN, BA from William & Mary, Jeff Zeleny, Chief National Affairs Correspondent at CNN, and Phil Mattingly, Senior White House Correspondent for CNN, “Biden Looks To Recapture His Political Momentum With A Full-Court Press On His Domestic Agenda”, CNN Wire, 9/18/2021, Lexis

Now at the lowest approval rating of his nearly eight-month term -- putting him, according to some polls, above only former Presidents Donald Trump and Gerald Ford at similar points in their tenures -- Biden is pressing Democrats to put aside their ideological differences and pass what could become his lasting legislative legacy and a political lifeline. The bills have the potential to overhaul the nation's physical infrastructure and the American social safety net for decades to come and would likely make Biden one of the most consequential Democratic presidents in decades.

The summertime slide in his popularity among Americans has frustrated the President and his team, who believe he is receiving little credit for a rapidly improving economy. Despite setbacks related to the Delta variant surge, the unemployment rate is down, wages are up and retail sales are improving -- tied, in part, to the emergency measures Biden pushed through at the start of his term.

Yet the pandemic is still simmering, delaying a full return to workplaces and complicating the start of the school year for children. A CNN poll conducted by SSRS found 62% of Americans say economic conditions in the US are poor, up from 45% in April and nearly as high as the pandemic-era peak of 65% reached in May 2020.

Biden's attention turns toward Capitol Hill

As a part of his recalibration to his domestic agenda, Biden has spent much more time speaking with Democrats on the other end of Pennsylvania Avenue, both on the phone and in person.

He spoke by telephone Thursday with House Speaker Nancy Pelosi and Senate Majority Leader Chuck Schumer to confer on a path forward on his massive legislative agenda.

"The three are in regular touch and engaging daily on bringing Build Back Better to the finish line," the White House said afterward.

In conversations with other Democrats during periodic "congressional call time" blocked off on his daily schedule, Biden has repeatedly stressed the importance of keeping intact the tangible benefits in the bills that can be easily sold to the American people, according to people familiar with the talks. He has stressed that items like free community college and subsidized child care are clear political winners he says Democrats can campaign on for months or years to come.

Polling and messaging memos sent to congressional Democrats and outside allies have sought to double down on this point, while also pushing lawmakers to focus on a bigger -- and more populist -- picture, rather than get bogged down in the policy disputes that are raging on both sides of the Capitol.

"He's been actively engaged over the last couple of months in helping members of Congress who are more centrists or who are progressive understand and embrace his agenda," said Sen. Chris Coons, a Delaware Democrat who is close to the President.

"President Biden is very persuasive," Coons said, "and I think he's making the case and making it well."

Implicit in Biden's message, as well as those coming from his senior team, is also the clear reality of the moment, according to people familiar with the discussions: For Democrats, there is no alternative path at this point. The specific policy proposals may shift or shrink in scale or duration, but there is no turning back or a broad shift in course in the cards.

If Democrats -- particularly those who are skittish about the political repercussions of enacting such sweeping changes to the role of government in the US economy -- can't unify now, they will likely be left with nothing.

White House tries to keep a level head

It is impossible to know whether Biden's current political predicament will last, and some of his aides are confident that improvements in the pandemic and distance from the chaotic Afghanistan withdrawal will help reverse the fall in approval. They note it is still more than a year before the 2022 midterm elections, when historically the sitting President's party suffers.

A positive result for California's Democratic Gov. Gavin Newsom, for whom Biden campaigned on the eve of his recall vote this week, has also led to renewed confidence in the administration's fights over mask-wearing, vaccines and more.

"California won't end the Covid debate," a White House adviser told CNN, "but it could be a tremendous boost for what Democrats are trying to do."

Biden's team, during last year's presidential campaign, prided itself on avoiding overly reactive steps when negative polls emerged. Officials stress there is no sense of panic in the West Wing, largely pointing to clear opportunities in the high-stakes weeks ahead as clear and tangible opportunities to shift the dynamics that overtook Biden's first summer in office.

But like any political operation, advisers remain highly attuned to shifts in public sentiment, studying focus groups and surveys from top Democratic pollsters who work on behalf of the White House and the Democratic Party.

To be sure, any comparisons in approval ratings between Biden and his predecessors are filled with caveats, given the acrid political climate and the remarkable changes in the presidency over the decades.

The chaos that surrounded the Afghanistan withdrawal has led some advisers to recognize there is less room for error going forward. The drop in Biden's approval ratings has prompted what one adviser called a "hardening" of the President's mission to see his sweeping agenda passed.

The White House softens on a $3.5 trillion price tag

That will require all of Biden's remaining political capital to regain the initiative and see that plan realized. After containing the Covid pandemic -- which is proving to be a prolonged struggle -- aides view passage of the two bills as the single most critical element to Biden's overall political recovery. Yet Democrats are divided over the size and scope of the plan, and the President can afford to lose almost none of them if he hopes to see his vision enacted.

This week, before leaving for his vacation home in Rehoboth Beach, Biden began meeting in-person with moderate Democratic Sens. Kyrsten Sinema of Arizona and Joe Manchin of West Virginia, hearing out their concerns about the amount of spending. With Manchin, he listened patiently to a proposal that would more than halve the size of the final bill. Biden has not endorsed that plan, but also hasn't yet had luck in convincing the skeptical Democrat to come along with his.

In public, Biden has begun signaling the final bill could come in below $3.5 trillion, the figure proposed in an initial blueprint. White House officials acknowledge that's a near certainty at this point in order to secure the votes of Manchin and Sinema. The ever-present balancing act between moderates and progressives has become even more acute as a result.

But Biden is pressuring Democrats to avoid stripping out what he believes will prove to be the bill's most salient selling points.

#### 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

T-Increase

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

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

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

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

### 1NC

States CP

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

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

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

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

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

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

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

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

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

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

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

### 1NC

Memo CP

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

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

Theodore Voorhees 17, Senior Litigator and Member of the Antitrust and Competition Law Practice Group at Covington & Burling LLP, JD from the Catholic University of America, Columbus School of Law, AB from Harvard University, and Leah Brannon, Partner at Cleary Gottlieb Steen & Hamilton LLP, JD from Harvard Law School, BA with Highest Distinction from the University of Virginia, ABA 2016 Presidential Transition Task Force, “Presidential Transition Report: The State of Antitrust Enforcement”, American Bar Association Section of Antitrust Law, January 2017, http://cartelcapers.com/wp-content/uploads/2017/01/ABA-SAL-Presidential-Transition-Report-1-18-17-FINAL-2.pdf

III. ENFORCEMENT MATTERS

A. Agency Enforcement and Policy

1. Guidance

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

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

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

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

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

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

#### It avoids politics.

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

Spillover DA

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

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

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

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

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

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

B. Slow, Usually Predictable Doctrinal Development

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

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

C. Market-Driven Case Selection

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

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

D. Generalists versus Industry Experts

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

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

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Decline cascades---nuclear war

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

### 1NC

Reg Neg CP

#### The United States federal government should convene binding negotiated rulemaking over whether to prohibit private sector business practices that violate an antitrust worker welfare standard and implement the outcome.

#### The CP competes and solves by giving industry genuine input in antitrust design 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.

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

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

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

Intellectual Property in “Interesting Times”

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

The Changes In Intellectual Property Law

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

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

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

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

Patents

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

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

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

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

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

Copyrights

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

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

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

Trademarks

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

Trade Secrets

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

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

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

Privacy Rights

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

America’s Need For Strong Intellectual Property Protection

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

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

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

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

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

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

Conclusion

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

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DOJ DA

#### The DOJ has prioritized combatting COVID related fraud--increased focus strengthens healthcare cybersecurity and fraud protection

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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 with FCA enforcement

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 threaten the entire healthcare sector--weakness poses risk to telehealth, public trust, and digital infrastructure

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.

#### Strong healthcare resiliency solves everything

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.

### 1NC

Advantage CP

#### The United States federal government should:

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

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

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

## Inequality ADV

### Inequality---1NC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Soft power fails.

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

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

## Modelling ADV

### Modelling---1NC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Democracy ADV

### Democracy---1NC

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

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

# 2NC

## Regneg CP

### Solvency---2NC

### AT: Antitrust Key---2NC

#### Every stakeholder will agree AND it produces the most effective antitrust reform

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

B. Negotiated Rulemaking and Online Behavioral Advertising

Should the FTC engage in negotiated rulemaking when issuing rules governing the online collection of personal information? Before considering the potential advantages of this approach, a brief discussion of the FTC's rulemaking authority is needed, given that it stems from two quite different sources. The first is Section 18 of the FTC Act, under which the Commission has limited authority to prescribe rules defining "unfair or deceptive acts or practices in or [\*411] affecting commerce." The second would be a new privacy law authorizing the FTC to issue implementing regulations.

Before commencing rulemaking under Section 18, the Commission must jump over the high hurdles set by Congress in 1980 in response to perceived abuses of the agency's rulemaking authority. These requirements include advance rulemaking notice to Congress and the public, public hearings at which interested parties have limited rights of cross-examination, and a statement of basis and purpose addressing both the prevalence of the acts or practices specified by the rule and its economic effect.

On the other hand, when Congress grants the FTC rulemaking authority to address a more narrowly focused problem under a specific statute, the Commission may, at its discretion, rely on the notice and comment rulemaking procedures followed by most federal agencies or on negotiated rulemaking. In the past, the Commission has followed APA procedures in issuing rules regulating children's privacy, financial privacy, and the standards for commercial [\*412] email marketing. But nothing prevents it from initiating a negotiated rulemaking in the future if it were to modify an existing rule under COPPA, GLBA or CAN-SPAM; or, in the alternative, if Congress were to enact new, substantive privacy legislation and the statute specifically authorized the Commission to engage in APA rulemaking.

With these preliminaries taken care of, if Congress passes a bill along the lines suggested by Rep. Boucher, the FTC should rely on negotiated rulemaking to address the privacy concerns raised by behavioral targeting. The Boucher draft already includes a safe harbor provision in Section 3(e), which exempts advertising networks that track online behavior from having to obtain explicit, opt-in consent provided that they allow consumers to view and modify, or opt out of entirely, the profile maintained about them for advertising purposes, and directs the FTC to promulgate a rule implementing this provision. As discussed previously, negotiated rulemaking is most beneficial when the underlying rule requires information sharing between the regulators, the regulated industry, and other affected parties, and when the parties believe they have something to gain from working together and achieving a compromise. Arguably, these conditions would be met if the FTC formed a negotiated rulemaking committee to tackle a safe harbor rule addressing behavioral targeting.

A negotiated rulemaking for behavioral targeting may strike the reader as quixotic. After all, industry's bottom line is to maintain the free flow of information including personal data needed for ad targeting, which in turn increases advertising revenues. Hence, it strongly favors an opt-out regime backed by accountability measures such as compliance reviews conducted by trade associations. Advocates, on the other hand, seek more meaningful protection from intrusive profiling. Hence, they demand legislative solutions based on opt-in choice, a broader definition of PII, very short data retention periods, and external audits. These differences are deep-seated and perhaps ideological, and thus not easily overcome. Yet there is reason to believe that all of the affected parties-the regulated industry, the [\*413] advocates representing the public interest, and the regulators-might be highly motivated to engage in face-to-face negotiations and would benefit from the information sharing that inevitably occurs in this setting.

As to motivation, industry should first recognize that if Congress enacts a new privacy law, it is very likely to regulate behavioral targeting, while if Congress fails to act, Leibowitz and Vladeck are very likely to reject further self-regulation as inadequate and instead pursue a far more aggressive enforcement strategy or even a new rulemaking directed at behavioral targeting practices (assuming they determine that the FTC has sufficient rulemaking authority under Section 18). Second, advocates should realize that they face an uphill battle in persuading Congress that new privacy legislation would have no negative economic impacts on the online advertising revenues that currently subsidize free online content and services, or that a drop in these revenues won't result in higher costs for consumers. Third, the FTC is not yet locked into any one approach. To the contrary, when Leibowitz was recently asked what people should expect from the FTC's roundtable series on privacy and where the agency was headed, he answered, "I can honestly say: we don't know. Our minds are open."

Finally, as to information sharing, the negotiated rulemaking process by its very nature encourages more credible transmission of information among the parties. To begin with, the network advertising industry undoubtedly possesses greater expertise and insight into the complex technology and evolving business models underlying OBA than either privacy advocates or FTC staff. In the past, this information has been shared or elicited mostly through one-sided communications- unilateral codes of conduct, complaints filed with the FTC, or charges and countercharges at public forums. In a [\*414] negotiated rulemaking process, however, the logic of Coasian bargaining prevails. In other words, each party seeks to "maximize its share of the gains produced by departure from standard requirements" and this requires that parties "educate each other, pool knowledge, and cooperate in problem solving." In short, when both sides engage in explicit bargaining over priorities and tradeoffs, they are far more likely to achieve a satisfactory compromise than by relying on the indirect communications that characterize conventional notice and comment rulemaking.

### AT: Regs Fail---2NC

#### Negotiated rulemaking makes antitrust prohibitions effective---the plan will be gutted by info asymmetries and lack of agency expertise

Dr. Rory Van Loo 20, PhD from Yale University, JD from Harvard Law School, Associate Professor of Law at Boston University and Affiliated Fellow at the Yale Law School Information Society Project, “In Defense of Breakups: Administering a "Radical" Remedy”, Cornell Law Review, 105 Cornell L. Rev. 1955, November 2020, Lexis

Regulatory scholarship can also improve the antitrust conceptualization of breakups. Antitrust scholars focus far more on ex post enforcement actions and legal cases, whereas scholars in environmental law and other regulatory fields extensively analyze the monitoring of firms and design of regulatory processes. In particular, the literature in those other fields is in dialogue with a prominent strand of research, associated with administrative law, arguing for collaborative governance.

Approaching breakup administration less as an adversarial law enforcement procedure and more as collaborative governance could streamline the process, which would speak to one of the biggest critiques of breakups: delay. Also, collaborative governance aims to leverage business sector expertise to compensate for administrative agency sophistication shortfalls and information asymmetries. Most concretely, this would mean not only leveraging the monopoly's resources, but also involving independent third-party M&A consultants. Thus, by drawing on the collaborative governance literature it becomes possible to see beyond the limitations that breakups faced decades ago and adopt a more realistic assessment of how they would work today.

The implications of a more informed view of breakup administrability are far-reaching. A misguided view of breakups may help explain what many observers see as decades of weak antitrust enforcement, leading to charges that "the deck is stacked in favor of large powerful firms." Executives know that if they execute an anticompetitive merger by quickly integrating the companies, antitrust enforcers or courts will fear breaking up the resulting company. Ironically, unfounded fears of doing harm through breakups may lead to either harmful inaction or weaker remedies that are more likely to prove wasteful. If widespread and unfounded resistance to administering [\*1961] breakups has contributed substantially to the presence of monopolies, it has imposed considerable costs on society.

Once breakups are understood as a normal part of business affairs, and as capable of being co-administered with the private sector, courts and enforcers can deploy them more readily as an antitrust remedy. That shift helps to solve the antitrust problem of what to do after an anticompetitive merger has occurred. But it also informs debates about how to handle monopolies that achieved their dominance in other ways. At the very least, the intuitive resistance to breakups needs to end. Unless and until greater evidence is produced that breakups harm society, judges should be less hesitant to approve breakups, enforcers less tentative to pursue them, and policymakers less resistant to write laws that deploy them.

I The Antitrust Remedy Conundrum

Breakups exist in a state of conceptual tension. They are often described as the preferred antitrust remedy, yet they are persistently avoided in practice. This Part outlines the underappreciated hostility to administering breakups.

A. Breakups as the Favored Remedy

Antitrust remedies can be classified as behavioral or structural. Behavioral remedies - sometimes called conduct remedies - seek to make the monopolist take or stop taking some action, such as providing product access to rivals or prohibiting restrictive contract clauses. In contrast, breakups are a structural remedy in which a company typically transfers assets - such as by selling a business unit or intellectual property to another company - or splits itself into two or more pieces.

[\*1962] The pervasive skepticism about administering breakups is overlooked in part because many judges, scholars, and antitrust authorities have asserted a preference for structural remedies over behavioral remedies. For long periods in antitrust history, courts viewed structural remedies as the best way to address anticompetitive mergers. As the Supreme Court observed over fifty years ago, "divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when [an anticompetitive merger] has been found." In the ensuing decades, courts have left intact that basic idea that divestiture is the "most effective[ ] of antitrust remedies."

Antitrust enforcers are arguably the most important actors in determining remedies because of the Court's observation that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." The two primary federal antitrust enforcers are the Federal Trade Commission (FTC) and the Department of Justice (DOJ). In the context of merger remedies, FTC officials have cited "less oversight by the agencies" as a reason for preferring structural remedies. In a 2004 guidance document, the DOJ reiterated that it prefers structural remedies "because they are relatively clean and certain, and generally avoid costly government entanglement in the market."

Those statements have left the impression that enforcers have retained a strong preference for structural remedies in merger review. In 2018, a federal judge considering a private lawsuit to break up a company that merged six years earlier observed that "the DOJ seeks divestiture in the vast majority of cases like this one." Putting aside for the moment the accuracy [\*1963] of that statement, the judge proceeded to reiterate the Supreme Court's characterization of antitrust law as viewing "divestiture [as] 'the remedy best suited to redress the ills of a competitive merger.'"

For similar reasons as judges and enforcers, scholars have also often stressed the superiority of structural remedies. Structural remedies have the broadest support "in merger cases, where divestiture is the natural remedy for breaking apart what never should have been joined together in the first place." The literature emphasizes that structural remedies are "administratively considerably easier in that, once divestiture has occurred, the agency's job is largely complete."

More recently, Lina Khan argued that structural remedies are superior to behavioral remedies in the context of a proposal for platform separation legislation. A separation mandate would, for instance, prevent Amazon from both operating an online marketplace and selling its own goods on that platform. Khan points out that structural separation regimes have been preferred to behavioral remedies because they are "highly administrable" and require less ongoing monitoring.

Thus, even as some progressive antitrust scholars have called for a "new framework for holding private power to account," in which "structural remedies are to be preferred," they engage with the issue of administering breakups, at most, in passing. In those brief discussions, they understandably echo in more modern contexts many of the same theoretical reasons why courts have long claimed to prefer structural remedies. In light of the pervasive preferences expressed for structural remedies, it is understandable why the deep-seated resistance to administering breakups has remained largely unacknowledged and unchallenged.

[\*1964]

B. Hostility to Administering Breakups

Despite the favored status of structural remedies in theory, antitrust breakups have become rare in practice. Part of the issue is that the statements of preference are relative rather than absolute - even if authorities preferred structural to behavioral remedies, they may prefer inaction to both of those remedies. Additionally, concluding that structural remedies are generally superior to behavioral remedies does not bind the government in any given case.

Another source of confusion is that in some antitrust contexts, divestitures are favored. Companies must obtain government approval for sizeable mergers, and authorities often condition approval on the sale of part of the combined business. However, those divestitures have, until recently, tended to be small - such as a handful of gas stations that would have resulted in local monopolies post-merger in specific towns. Whereas in a 1999 retrospective the highest price paid for divested assets as part of merger approval was "more than a hundred million dollars," Instagram - if Facebook was forced to divest it - would reportedly fetch a price of over a hundred billion dollars.

Even if large, pre-merger divestitures became common, they form part of a reorganization that still makes the divesting company bigger, not - as with breakups in other contexts - smaller. Accordingly, although breakups can be of any size and arguably include divestitures ordered during merger review, the term will be used herein to refer to a significant breakup of a business outside of the merger approval process.

The government has not broken up one of the country's largest firms since 1982, when it split AT&T into seven telephone operating companies and a long-distance carrier. However, the intellectual case against breakups had been building long before. Since at least the mid-twentieth century, courts have been wary of breaking up a unitary company. In a landmark 1953 case, United States v. United Shoe Machinery [\*1965] Corp., the court described the government's request to dissolve a shoe manufacturer into three separate companies as "unrealistic." The court pointed out that United Shoe produced all shoes "at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts."

Much of the intellectual foundation of the opposition to breakups comes from the Chicago School. These scholars have theorized that it is quite difficult to know what makes a firm appeal to consumers. For instance, is Apple popular because of its patents, clever marketing, the genius of Steve Jobs, or something else? Since courts and regulators are unlikely to be able to figure such questions out, a governmental breakup would risk ruining what consumers value most about the company. Thus, regardless of how monopoly power is obtained, once it exists, a breakup risks undermining consumer welfare. These scholars have also pointed out that this risk weighs against breaking up monopolies who gained and maintained their monopoly power by offering superior products rather than through anticompetitive conduct. The law does not allow for breaking up such companies. Stated otherwise, the government wants to avoid smashing success.

Scholars have also long criticized the government's real-world execution of breakups. The main evidentiary foundations of their concerns are twofold. First, many critiques stress the messiness of prior breakups. One cautionary tale is of [\*1966] the 1970 dissolution of El Paso Natural Gas. After antitrust authorities obtained a judicial order to break up the company, implementation took seventeen years and three Supreme Court orders urging the parties to proceed "without delay." Observers believe that these and other incidents raise doubts about competence, as "courts' expertise lies in answering legal questions, not making [day-to-day] business decisions about questions such as pricing, product introduction, and investment in risky ventures."

A second foundation for skepticism of divestiture administrability comes from empirical research. Several studies of DOJ and FTC divestitures in the 1960s and 1970s found that few divestitures contributed to competition, with the earliest and most prominent of these examinations concluding that divestitures "could not be branded anything but a failure."

Despite an already emerging intellectual hostility to breakups, the government proceeded with breaking up AT&T because it was an unusual case. The AT&T monopoly was "substantially a creature of regulation and public intervention." As a result, even those opposed to government intervention in private enterprise could see a breakup of the company as consistent with their values. Moreover, the company had about ninety percent of the market for long-distance calls and owned many local telephone monopolies nationwide. Thus, if someone wanted to make a phone call to or from much of the country, the only option was AT&T.

In the face of that government-created monopoly, Stanford Professor William Baxter assumed leadership of the DOJ antitrust division and sought a dissolution. At the same time, Baxter was a "Chicago school economist" who thus preferred [\*1967] minimal governmental intervention and emphasized efficiency. As he orchestrated the AT&T breakup, Baxter established the principles that would help ensure that another would not happen for decades. Baxter declined to pursue breakups in a number of other cases - including IBM - and espoused a basic principle that "if 'there is no assurance that appropriate relief could be obtained,' then the government must question the value to consumers of prosecuting the antitrust case at issue." That principle, created and embraced by scholars, became akin to a "Hippocratic oath for antitrust enforcers and jurists."

That new cautionary approach to remedies, and to antitrust overall, was put to the test in the DOJ's case against Microsoft in the 1990s and early 2000s. The company supplied the operating system for over eighty percent of computers and allegedly used that position to favor its own computer programs. For instance, it required PCs to install Windows and Internet Explorer. In 2000, the government proposed separating the company's operating system from its software applications - thus creating two entities. The district court agreed to a breakup, mentioning deference to the government on the issue of remedies after it established that Microsoft violated antitrust law.

The Microsoft district court's choice of a structural remedy attracted much attention among legal scholars. By the time the Court of Appeals considered the case in 2001, many scholars had weighed in not only through amicus briefs, but through law review articles that directly referred to the case. Robert Crandall's 2001 study looked at divestiture cases [\*1968] against companies that - like Microsoft - had not obtained their monopoly power through mergers. It found that only in four or five cases had courts ever ordered divestiture. It then examined nine structural relief cases and concluded "that with one exception, ... there is very little evidence that such relief is successful in increasing competition, raising industry output, or reducing prices to consumers." Moreover, in the lone exception - AT&T - Crandall posited that behavioral remedies could have produced comparable results. Crandall concluded that structural remedies to address monopolies like Microsoft were unusual and very likely to fail.

In another 2001 article, Howard Shelanski and Gregory Sidak analyzed the Microsoft context more directly and challenged the common remedy hierarchy in antitrust by observing that "ambitious structural remedies that incorporate supervisory and behavioral elements might require as much, or even more, continued judicial scrutiny as behavioral remedies require." They urged the Microsoft court to tailor the remedy to the context. That argument posed a challenge to breakups because behavioral remedies can be crafted that relate only to the anticompetitive conduct, whereas a breakup does not as directly address the anticompetitive action unless that action was a merger. Thus, Shelanski and Sidak's proposal implied that divestitures should only be applied to monopolies that obtained their dominance through prior mergers - unlike Microsoft. Also, Shelanksi and Sidak argued that the remedy must "advance economic welfare at the lowest possible social cost." A cost-benefit calculation was unlikely to provide support for divestitures under the prevailing zeitgeist because, as Richard Posner stated in a 2001 antitrust textbook, "Structural remedies such as divestiture are, as we know, slow, costly, [and] frequently ineffectual ... ."

In accordance with these and other scholarly views, the Court of Appeals overturned the remedy chosen. The court [\*1969] acknowledged that divestiture "is indeed 'the most important of antitrust remedies'" but noted that, because Microsoft had not obtained its monopoly power through anticompetitive mergers, it was appropriate to proceed cautiously before ordering a breakup.

Several of the opinion's other points signaled a broader decline in the stature of breakups. The court directly dismissed the idea of deferring to the government after it had won its liability case. More ominously, it described divestitures as "radical" and argued that because Microsoft had not obtained its monopoly power through mergers, the "logistical difficulty" of splitting the company may weigh against divestiture. From the resistance to breaking up a single shoe production facility, courts had evolved to skepticism about breaking up a company even along two distinct but technologically linked product lines. Finally, the court seemed to adopt the view of prominent antitrust scholars encouraging a close tailoring of the remedy to the anticompetitive behavior.

By emphasizing that breakups' "long-term efficacy is rarely certain," the court painted uncertainty as cause for skepticism about breakups. That emphasis underscores how the cost-benefit formulation weighs against breakups. It is easier to identify the costs of a breakup than the competitive benefits. After a breakup, there will often be clear increases in ongoing operating expenses because, for example, Facebook and Instagram would need to have two headquarters rather than one. Additionally, perhaps the most concrete and unavoidable category of costs in a breakup relates to the transition. Companies cover moving expenses; hire reorganization specialists, such as attorneys, accountants, and consultants; and absorb considerable employee time lost to managing and implementing the reorganization rather than producing the company's core product. Courts and enforcers must also devote resources to monitoring and overseeing the breakup.

[\*1970] In contrast, it is "axiomatic" that the competitive benefits of a breakup are difficult to predict. Relatedly, it is challenging to quantify the innovation and economic gains from two smaller, more nimble companies. Thus, whereas costs of a breakup are undeniable, inevitable, and identifiable, the benefits are inherently uncertain. Given that uncertainty, the Microsoft court's urging of "great caution" in adopting breakups - if taken literally - could alone make divestitures rare or nonexistent by imposing an impossible evidentiary burden on the government. Whether due to the court's resistance or political changes, the government subsequently decided not to pursue a breakup, instead settling for behavioral remedies.

The shift in thinking about remedies in the early 2000s, albeit limited to merger remedies, can also be seen beyond the courts. In its 2004 Antitrust Division Policy Guide to Merger Remedies, the DOJ announced that "structural remedies are preferred to conduct remedies in merger cases." However, in its 2011 policy guidance, the DOJ provided a more measured assessment of remedies in merger cases, declaring that "in certain factual circumstances, structural relief may be the best choice to preserve competition." Antitrust enforcers went from viewing behavioral remedies as "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent" in 2004 to seeing them as a "valuable tool" in 2011. That shift occurred under the administration of President Barack Obama, who had promised "to reinvigorate antitrust enforcement" by restructuring merger review.

[\*1971] A 2007 case illustrates the government's ambivalence regarding breakups. Seven years had passed since the anticompetitive purchase of a hospital, causing the FTC to decide against a divestiture out of concern about the "potentially high costs inherent in the separation." In the same opinion, the FTC explained that "divestiture is the preferred remedy for challenges to unlawful mergers, regardless of whether the challenge occurs before or after consummation."

Thus, the rhetoric of preferring structural remedies sounds more expansive than it is in practice. Once a few years have passed since a merger, or the entities have integrated, the government is often reluctant to pursue a divestiture. In recent decades, the professed preference for structural remedies should have come with a caveat of "unless it would be costly or messy."

In short, deploying breakups as a remedy faces a considerable barrier beyond those that have been the focus in the budding literature fueling a revival of interest in antitrust. When observers compare breakups to unscrambling eggs, they are usually referring to the undoing of a consummated merger. Scholars and courts are even more resistant to splitting up companies in other contexts.

This harsh view of breakups has larger implications for antitrust as an institution. Behavioral remedies are often costly and messy. The theoretical preference for structural remedies thus poses a dilemma for antitrust. Enforcers must ask "whether any remedy is sufficiently practicable to yield net benefits" to determine whether a case should be brought at all. In other words, the consensus is that if there is no practicable remedy, the government should leave the monopolist alone.

When the most practical remedy available - a breakup - is seen as a "clear[ ] ... disaster" and "slow, costly, [and] frequently ineffectual," the Hippocratic oath for antitrust enforcers [\*1972] would direct authorities not to act. The primary scholarly critique of antitrust law is the failure to act. As Chief Justice John Marshall observed in Marbury v. Madison, the government cannot be called a "government of laws ... if the laws furnish no remedy for the violation of a vested legal right." The view of breakups as the best remedy, but unworkable, makes it less likely that antitrust authorities will take any action against monopolies.

II The Weak Evidence Against Administrability

This Part examines the common assumption that breakups are too unwieldy by exploring its evidentiary foundations. The point is not to debate the competitive impact of divestitures. The goal is instead to understand the literature on the administrability of the breakup remedy. Even if we assume breakups would increase competition once implemented, what is the support for arguments that we cannot trust courts and agencies to manage the process effectively?

A. The Limitation of Case Studies

Narratives hold outsized influence on perceptions and beliefs. The narratives that loom largest in antitrust remedies are of the major historical breakups, which caused many observers to sour on divestiture as a remedy. This Section focuses on two of them. As "the mother of all monopolization [\*1973] cases," Standard Oil holds sway in scholarly conceptions of divestitures and is still debated. AT&T, as the most recent large breakup and "arguably the most significant antimonopoly case [in] the U.S.," presumably demonstrates the most advanced administration yet to be applied to a major government dissolution. Both of these historical breakups have been mentioned repeatedly in discussions of divestitures, even decades after they occurred.

The 1911 breakup of Standard Oil remains "iconic because it was the first time antitrust was used to break up a company, and at the time Standard Oil was the largest company in the United States." In its appeal to the Supreme Court, the company argued that its unitary nature made a dissolution logistically impractical and dangerous to both the oil industry and the economy more generally. "There are many parts, but each part has its place, and if a part is taken out, the whole structure is disintegrated," the company predicted. Those warnings, if believed, would be fatal to breakups because antitrust seeks to increase the number of competitors and overall industry output. Divested pieces cannot provide those benefits if they cease to operate.

The company's defense is noteworthy because critics of breakups have long echoed it. Microsoft used similar arguments to overturn the court-ordered dissolution in 2001, citing the impracticability of undoing its "unitary" organization. [\*1974] The Court of Appeals also referred to that argument in overturning the breakup order. One of today's leading progressive antitrust intellectuals, Fiona Scott Morton, has argued against tech breakups based on integration, saying that "by the time any antitrust verdict is rendered, there will be one coherent Facebook and no divisions to divest."

Standard Oil was correct that its breakup required "a number of complicated restructurings." The court order split the company into "eleven large production and distribution companies" and "forced the spin-off of several smaller refining companies, pipeline companies, and even a tank car company." Nonetheless, the dissolution of Standard Oil proceeded "relatively smoothly even though most of the newly independent entities were deprived of the full-scale integration that Standard had argued was vital to their survival." Even critics of the breakup agree that the oil industry and the divested pieces of Standard Oil thrived in the years after the breakup. We do not know what would have happened otherwise, but Standard Oil's "warnings of industrial apocalypse" turned out to be false.

To be clear, scholars still debate the efficiency benefits of the dissolution. And the structure of Standard Oil was not the worst-case scenario for divestitures. But the breakup succeeded, despite substantial restructuring challenges, in facilitating "the emergence of a number of substantial independent competitors - including Amoco, Chevron, Exxon, and Mobil - where there had been but a single firm before."

Scholars have a more favorable impression of the competitive impact of the AT&T divestiture than that of Standard Oil, with most thinking that AT&T's divestiture was overall beneficial. However, its administration came under withering scholarly attack soon after completion. The main critique was [\*1975] targeted at the degree of court involvement. It took ten years to get from the government's original filing of the lawsuit to the divestiture order, "spanning four Congresses, three Presidents, and two U.S. district court judges." That order then began a period of extensive court monitoring and follow-up legal battles. About "thirty-five to forty separate waiver requests were filed per year in the first eight years of the decree," often taking years to resolve. Some scholars have described the AT&T divestiture as a "failure," either because of the extensive costs and delays of relying on the court or due to flawed decision making by government officials who were tasked with running a business. Like with Standard Oil, it is also impossible to know what would have happened had the government not broken up AT&T.

As some perspective on these critiques, AT&T involved perhaps the largest set of divestitures in history. It thus provides an extreme example of a large-scale and diffuse breakup. Moreover, as the discussion above illustrates, much of the administrability concerns center on the court's involvement. Thus, to the extent that the case furnishes arguments against breakups, it is against a breakup heavily managed by the courts.

This discussion is not meant to suggest that the Standard Oil, AT&T, or other historical dissolutions were perfect. As with most any large-scale project from long ago, whether in the private or public sector, hindsight enables observers to identify improvements. However, it would be perplexing if these cases continue to shape perceptions of divestitures. They are decades, and in the case of Standard Oil over a century, old. Similarly, to cite the United Shoe impracticability of splitting up a single shoe factory as evidence of breakup ineptitude lacks analytic rigor and is anachronistic because today's large shoe companies no longer produce their shoes out of a single factory.

[\*1976] It should also give critics pause that decades after the breakup of AT&T, which by all accounts was followed by innovation, lower prices, and considerable competition, leading antitrust and telecommunications scholars cannot agree on whether the breakup represented "a policy success or a policy failure." At a minimum, the subsequent world leadership of U.S. telecommunications companies and the prosperity of oil companies indicates that even lengthy and messy breakups can still be followed by trailblazing innovation and intense competition. Especially without considering how better design could address any flaws in past breakup administration, the historical record of prominent divestitures should not be cited as reason to condemn large-scale breakups today.

B. The Lack of Systemic Evidence

Beyond case studies, several more quantitative examinations from the 1960s through the 1980s influenced observers to see divestitures as "notoriously ineffectual." The most recent and comprehensive study during that time period, by Robert Rogowsky, came to similar conclusions as the previous one that had painted a "bleak" picture of antitrust remedies. Rogowsky analyzed over one hundred government antitrust cases. Like the other early influential empirical studies, Rogowsky's did not analyze market data or consumer welfare. Instead, he identified success as a divestiture that "reestablishes the acquired firm (1) independent of the parent, (2) viable in the long run, and (3) adequately structured to be an effective competitor." Based on these characteristics, and other factors such as the length of time of the divestiture, Rogowsky classified seventy-five percent of the divestitures as either deficient [\*1977] or unsuccessful, with twenty-eight percent falling into the worst category, unsuccessful.

Rogowsky's metrics for assessing divestitures merit closer scrutiny. Divestitures were labeled as unsuccessful if the purchaser of the vertically divested assets had over ten percent of the relevant market. Not only does owning this much of the market fall far short of proving a monopoly, but this example indicates the study's heavy reliance on industry structure to measure competition. This and other measures of competition used by Rogowsky, such as whether the purchaser was in the Fortune 200, have since been discredited as insufficient bases for establishing a lack of competition. Thus, Rogowsky labeled divestitures as unsuccessful for having characteristics that are well-known today to be perfectly consistent with a divestiture that improves competition.

Additionally, Rogowsky labeled as unsuccessful any divestiture that ordered an insufficient size of assets divested - called partial divestitures. Also, many cases were classified as unsuccessful because the DOJ or FTC did not order any divestiture, or ordered a token amount. In other words, if the enforcers had sought larger-scale divestitures, their success rate would have significantly improved by Rogowsky's metrics. A study that played an important intellectual role in arguments against divestitures instead is perhaps better viewed as indicating that the government should pursue more extensive breakups.

Using a different methodology, the event study, James Ellert's examination of divestitures through the 1970s drew similarly harsh conclusions. Ellert examined the shareholder returns of firms subject to antitrust divestitures before and after those interventions. If divestitures were successful, Ellert expected the divesting firms to offer lower stock market returns and dividends after the antitrust intervention relative to other companies not subject to such interventions. However, Ellert found no significant difference in the returns of [\*1978] divesting companies compared to the returns of companies with different outcomes, such as those whose antitrust cases were dismissed. Moreover, Ellert was unconvinced that anything the antitrust authorities did as part of their merger evaluation program effectively reduced any monopoly gains. Although the stock value of companies subject to antitrust suits dipped by 1.6%, Ellert interpreted that drop as resulting from legal and other costs of such actions.

Rogowsky's study helps clarify Ellert's findings. A large number of divestitures never happened, took many years to implement, or required divestiture of only a small slice of assets. Also, Ellert's interpretation of the 1.6% drop as being attributable to the costs of antitrust action is speculative and reflects an average loss. Ellert's study is consistent with some subset of more extensive and well-designed divestitures reducing stock market returns.

A final shortcoming in Ellert's methodology is the limited value of stock market returns as a metric of anticompetitive earnings. Anticompetitive activities may not always yield higher profits or increase the value of the firm. As a result, if the antitrust authorities' actions had improved competition, the improvements may not be seen in stock market returns.

Even assuming those earlier studies' methodologies were rigorous, there is further reason to doubt their findings' relevance today. The FTC examined the administration of U.S. divestitures of all merger orders between 2006 and 2012. The success rate for structural remedies was eighty percent, with success defined as ultimately at least restoring competition. Moreover, the unsuccessful cases resulted from the FTC divesting piecemeal assets. When the FTC instead divested an ongoing business operation, all of the divestitures [\*1979] succeeded. Therefore, the category of divestitures most relevant to breakups consistently succeeded.

The success rate of pre-merger divestitures is not a perfect comparison in terms of administering breakups, in part because they tend to be smaller scale. Regardless, these findings further undermine the prior empirical studies many have cited as evidence that antitrust authorities administer structural remedies poorly. In particular, because they considered a much later timeframe, the FTC's studies appear to reflect enforcers' and courts' improved approaches to administering divestitures by incorporating lessons learned in the intervening decades.

More recent quantitative studies provide mixed results. Based on stock market returns, an examination of European Union (EU) pre-merger divestitures concluded that divestitures did not lead to significant declines in the stock prices of the firms ordered to divest, but that rivals benefited from those divestitures. However, besides the weakness of stock market value as a metric of antitrust effectiveness, the authors' conclusions provide limited evidence for or against breakups as a remedy because they were most critical of the excessive use of partial divestitures as remedies. They believed enforcers should go further by fully blocking mergers, an intervention that is more akin to a large-scale breakup from a competitive perspective. Stock-market-based studies of uninhibited breakups could show a stronger impact on competition.

A central limitation of the above examinations is that they fail to deploy the most respected empirical mechanism for establishing causality: randomization. The difficulty of knowing [\*1980] the counterfactual thus undermines all of these antitrust empirics. One study addresses that methodological shortcoming by considering the Dutch government's use of randomization in ordering divestitures by gasoline companies of stations along major highways. The divested gas stations were found to lower prices by 1.3 to 2.3%. The narrow market context, hospitable nature of gas stations to ownership transfer, and foreign jurisdiction heavily limit these findings' relevance to U.S. divestitures. Nonetheless, the most methodologically rigorous study available for determining causality indicates that divestitures can improve competition in some contexts.

Finally, none of this review's empirical studies consider deterrence. If breakups deter firms from pursuing monopolistic mergers, they could improve consumer welfare even if the divestiture itself - analyzed narrowly in terms of the immediate price effects in the specific market - did not yield evidence of improved competition. As a result, some of the divestitures labeled "failures" by Rogowsky or found to have had only a minimal impact on stock price by Ellert could - once deterrence is taken into account - be viewed as successful.

In summary, the most influential studies shaping pessimism about governmental administration of breakups relied on questionable methodologies and are outdated. The research is limited by the lack of sophisticated quantification of the effects of divestitures on consumer welfare, the failure to consider deterrence, and the absence of large breakups in the past few decades. More recent studies even provide grounds for cautious optimism that larger, government-ordered divestitures may yield high success rates. Some additional comfort comes from the absence of disaster despite an array of government interventions to separate large firms - including electric companies, railroads, banks, movie theaters, and television companies, among others. In addition, bankruptcy courts [\*1981] regularly order divestitures. The limitations in evidence despite diverse breakups demonstrate the speculative nature of claims about the government being too incompetent to administer breakups.

III A Balanced View of Breakups

Given the limited evidentiary foundations for harsh perceptions of breakup administration, the hostility to that remedy deserves fresh examination. This Part widens the lens on breakups by situating them in their broader business and law enforcement contexts. The literature on private sector divestitures and the goals of antitrust regulation are in tension with core assumptions that breakups are too extreme, complicated, and harmful.

A. Insights from Private Divestitures

Antitrust scholars have largely ignored research concerning an even more numerous category of divestitures: those in the private sector. As a threshold matter, it is helpful to recognize the frequency of private divestitures. In the midst of a growing economy and strong stock market, a 2019 survey of senior corporate and private equity executives found that eighty-four percent of respondent companies were planning a voluntary divestiture within the next two years. Well over three thousand private divestitures occur each year. In contrast, the FTC listed only ten divestiture orders annually to alter proposed or consummated mergers in its latest divestiture study, or less than one percent of all mergers and acquisitions. If for no other reason, the universe of private sector divestitures merits attention because of the considerably larger volume of cases to study.

[\*1982]

1. Are Private Divestitures Too Different To Be Helpful?

The antitrust scholarly omission of private divestitures is to some extent understandable. After all, there are many differences between the two types of divestitures. Most importantly, antitrust divestitures aim to lessen a potential source of monopoly profits, whereas private divestitures aim to increase the value (including the long-term profits) of the company. Antitrust scholars might resist comparisons due to that distinction - and because it changes the composition of divestitures - making it less likely, for instance, that private divestitures will create two horizontal competitors. Additionally, a portion of private sector divestitures are conglomerates selling unconnected businesses. These differences indicate boundaries for finding antitrust lessons in private divestitures.

However, to observe that there are differences between private and public divestitures, and that we must limit inferences accordingly, is to state the obvious. The more challenging question is how much the differences matter in light of the project. Since the project here is to shed greater light on antitrust breakups from a starting point of limited evidence, the existing differences warrant further examination.

Resistance to comparing public and private divestitures due to the prevalence of private equity sales of conglomerate pieces in private divestitures would reflect an outdated view. Even in the 1980s and 1990s, a large portion of private divestitures were not by conglomerates. Since then, the field has shifted considerably. Observers traditionally saw private divestitures as helping bring firms "back to their basics" by shedding peripheral assets, often during times of financial distress. Over time, executives have increasingly pursued larger divestitures [\*1983] for strategic reasons rather than to offload unproductive and peripheral parts. Strategic motives include cost-cutting, the advantages of a leaner organization for innovation, and long-term growth. Some businesses have become so large and unwieldy that they are beyond the point of gaining economies of scale, and their larger size instead creates diseconomies of scale - or increased costs resulting from their size.

By way of illustration, in 2012 Pfizer announced it would divest about forty percent of its business as part of a refocusing on human medicine development. The company proceeded to shed assets that provided synergies in terms of research and distribution. It split off its animal health unit, which develops animal medicines, in a $ 13 billion initial public offering (IPO). As another example, Hewlett-Packard executives opted for a breakup to respond to the increasing pace of technology-driven markets. CEO Meg Whitman described the strategy by observing, "Being nimble is the only path to winning." The expansive motives for pursuing divestitures and the diversity of assets separated mean that private divestitures offer many case studies that are potentially relevant to various antitrust breakup contexts.

As to the observation that private divestitures differ by aiming to increase the firm's value, that distinction speaks more to the goals rather than to the administration. If the private sector demonstrates success splitting up large integrated [\*1984] companies, that experience can provide insights into how or whether antitrust authorities should do something similar, even if the goals for the breakup are different. For instance, Fiona Scott Morton's skepticism about a Facebook-Instagram breakup, based on the observation that those two companies would be integrated by the time the breakup occurred, echoes the view of many antitrust scholars. Indeed, following approved mergers, antitrust authorities have only secured two real post-merger divestitures since 2001 - and each occurred within three years of the merger. If the source of resistance is the degree of integration rather than the particular shape, it is relevant to probe how the private sector has approached the divestiture of companies integrated to a comparable degree.

A note is in order on what is meant by integrated. In the case of Facebook and Instagram, the most compelling integration that gives critics pause is the technical interface of platforms - such as the code that enables users on one platform to message users on another. Even if integrated, the two social media platforms would still under normal circumstances operate as distinct business units within the company, supported by common company-wide functions. Also, consumers would continue to be able to interact with the two integrated platforms as distinct products, in the sense of being able to use one and not the other.

If observers are searching for divestiture case studies to understand a given possible antitrust breakup, some of the tens of thousands of private sector breakups in recent years could - from an administration standpoint - offer some appeal. Many involve the separation of horizontal businesses, technology companies, and prior mega-mergers. Especially on the question of splitting up previously integrated digital companies, private divestitures offer arguably more relevant case studies than the AT&T or Standard Oil breakups that tend to dominate antitrust discussions.

The point is not that any particular private sector divestiture is a clear model for any particular proposed breakup, such as the eBay-PayPal merger and subsequent divestiture as a [\*1985] roadmap for Facebook-Instagram. Large divestitures, public or private, tend towards uniqueness. Observing that a given proposed private sector breakup is different from any given public sector breakup misses the point.

The point in discussing the integration-related resistance to the Facebook-Instagram breakup is to diagnose the type of concern that is prevalent in antitrust discussions of breakups. A big part of that broader resistance is not about the particularity of the proposed breakup at hand. Instead, many observers demonstrate an abstract and generalized concern about breaking up consummated mergers - or breaking up the company once it is integrated. Those concerns should be informed by a set of business questions about how costly, lengthy, and difficult it would be to break the particular company up - not the extent to which a prior merger is consummated or integrated.

In other words, for antitrust scholars to recognize what the field can gain from a more interdisciplinary perspective on breakups, it is necessary to exit the antitrust silo that inclines toward labeling private sector divestitures as different. A more productive approach is to examine whether the points of commonality yield insights. Although the differences are real, it would be misguided to use them as a justification for ignoring private divestitures altogether. Since the private sector has undertaken divestitures of integrated companies with great frequency, study of those undertakings can speak to key business assumptions that have implicitly shaped breakup skepticism.

2. What Insights Might Private Divestitures Offer?

One key difference between private sector and antitrust views of divestitures is how to view the downsides of splitting up an integrated company. Executives who are deciding whether to divest - and business scholars who study those divestitures - are less deterred by the associated risks and costs than observers of antitrust breakups. For instance, while the private sector also prefers to sell a separate business unit rather than one that is heavily intertwined, many strategic divestitures split integrated businesses whose information [\*1986] technology systems have been intertwined for decades. Hewlett-Packard was a fully integrated company - the type of unitary company that deters courts and enforcers from breakups - when it decided to split into two roughly equal halves.

Executives pursue such strategic breakups despite awareness of the expenses and complexity. Again, Hewlett-Packard executives predicted that the divestiture would take several years to complete, cost $ 1.8 billion, require extensive administrative management, and cause great internal upheaval. They proceeded despite that awareness and produced two highly profitable companies.

What about in the context of technology-heavy deals? Antitrust scholars have urged particular caution in pursuing post-merger breakups in that space. The private sector has no such reservations, pursuing a number of divestitures years after consummation. Examples include PayPal and eBay, which had technologically integrated their platforms by the time the combined company decided to split, and AOL-Time Warner.

Shareholders provide another perspective because they also demonstrate relative comfort with divestitures. Following unprofitable mergers and acquisitions, shareholders regularly pressure their managers to undo those consummated mergers [\*1987] even years later. In contrast, as described above, antitrust authorities have consistently declined to undo an anticompetitive merger mistakenly approved, even though they acknowledge - as have many scholars - that such mistakes have occurred. In other words, antitrust enforcers almost never fix their prior mistakes by breaking up a company, but shareholders regularly fix their managers' mistakes by forcing a breakup.

Administrative costs may be systematically higher in forced divestitures, which are inherently adversarial. Higher administrative costs would be expected, particularly if the parties frequently argue over details, requiring more court interventions and likely slowing the breakup down. These differences are real, but some context for them is helpful. Studies have found that private acquisitions are often subject to litigation - by one estimate, over ninety percent. Thus, private divestitures are subject to court delays. They also tend to last years and take longer than executives expect.

The point here is not that private and public divestitures involve the same costs. Ignoring for the moment the possibility that higher antitrust breakup costs may be avoidable with effective regulatory design, large-scale breakups will inevitably be complex, expensive, and lengthy. Rather, the point is that the private sector perspective indicates that many antitrust observers may have inflated negative perceptions of the administrative costs by attributing what is unavoidable - or at least what also occurs in the private sector - to government incompetence. The real question should be whether the inescapably high costs of the breakup are worth the benefits.

The current antitrust analysis may underestimate those benefits. Some, if not most, breakups would be expected to create non-antitrust-related value through the types of efficiency and nimbleness that motivate private sector divestitures. To elaborate, non-antitrust benefits may remain unrealized due to factors such as agency costs, emotional barriers, [\*1988] or monopoly rents that outweigh the divestiture gains. Independent of those considerations, however, any number of current companies might benefit from divestitures without those benefits being sufficient to justify the costs of the divestiture. If it would cost a company $ 500 million to implement a private divestiture, and the efficiency and innovation gains of the divestiture amount to $ 400 million, that company will not rationally choose to divest. However, if the government were to break up that company for independent antitrust reasons, the (non-antitrust) $ 400 million in efficiency gains would need to be added to the benefits side of the breakup - even though those gains would not be the motivating factor.

Whether or not that $ 400 million would rightly be seen as lowering the costs of a breakup's administration is debatable but ultimately unimportant. In some contexts, those side benefits of breakups could offset even higher governmental costs of administering breakups. More importantly, current antitrust cost-benefit analysis could significantly underestimate the benefits of breakups because it pays so little attention to the gains illuminated by private sector divestitures.

Private sector divestitures also inform the high "failure" rate of antitrust divestitures in the 1950s through 1970s that tainted observers' assessments of the remedy. By most accounts, a large portion of all M&A transactions have questionable value, with a representative study putting the failure rate at almost half of all deals. Scholars similarly conclude that private sector divestitures have "mixed results."

Of course, the different metrics do not allow straight comparisons of success rates across antitrust and the private sector. However, both large private and antitrust divestitures are, at their core, about dividing a company into pieces. Thus, private sector success rates can provide perspective on overlapping issues faced in antitrust breakups. For example, when private divestiture failure rates are compared to evidence interpreted as proof that government breakups are costly, messy, and potentially failing, it may suggest that legal scholars unfairly [\*1989] blamed unavoidable challenges on government incompetence. Business scholars who have described over seventy percent of private sector deals as "abysmal failures" do not recommend that executives abandon them. Instead, they view failures as opportunities to improve.

The business sector's persistence in the face of many failed reorganizations has brought benefits in the case of divestitures. Studies have consistently concluded that divestitures overall increase shareholder value. The data also indicates that certain types of divestitures add significantly more value, particularly larger divestitures. If intellectuals had convinced business leaders to abandon large private divestitures based on the high failure rates evident in the 1980s, it would have hurt the economy on a large scale. Yet around that time intellectuals used flawed evidence of antitrust breakup failure to convince authorities to abandon that remedy. Consequently, competition may have suffered due to that faulty evidentiary interpretation.

Although differences must be considered in comparing corporate divestitures to antitrust divestitures, such comparisons should be made rather than ignored. Many important questions still remain unanswered in the business literature on divestitures. Still, the private divestiture literature is far more expansive, recent, and rigorous than the corresponding antitrust literature.

Situating antitrust remedies in the broader context of private sector reorganizations shows how the picture painted of breakups has become distorted. The costs of breakups are not as high as antitrust scholars and judges commonly assume. Businesses regularly expend considerable funds on organizational streamlining and system updating. To estimate the accurate costs for an antitrust breakup, it would be necessary to count only those expenses that would not have otherwise been incurred. It would also be necessary to lower the estimated "cost" of administering breakups by the gains from efficiency and nimbleness, which are currently omitted from relevant antitrust remedy analyses.

[\*1990] An isolated analysis also risks implying that complications and delays are the fault of courts and enforcers, rather than features of divestitures. Indeed, one of the factors driving some CEOs to pursue a reorganization is the belief that the company "needs to be shaken up." Executives are even willing to divide a company up along new lines that do not reflect a prior merger.

That private sector mindset sits in stark contrast to the widespread conception of antitrust breakups of consummated mergers as "unscrambling the eggs." Whereas nobody tries to unscramble eggs, sophisticated and successful business leaders routinely carve up their own integrated companies despite inevitable transaction costs and decades of evidence that many fail. The hostility to breakups is partly born of the disciplinary and academic silo in which breakup conversations have persisted.

B. Shareholder Harm Is Not an Obstacle

The Supreme Court has historically emphasized that "the Government cannot be denied the [divestiture] remedy because economic hardship, however severe, may result." Nonetheless, concerns about shareholders have persisted as a factor influencing the remedy choice. Indeed, in fighting the government's proposal of a breakup, Microsoft wanted the court to consider "testimony from Goldman, Sachs & Co. and from Morgan Stanley Dean Witter that dissolution would adversely affect shareholder value." The district court declined to do so. However, in overturning the breakup order, the Court of Appeals mentioned the value of hearing such testimony about shareholder value. The rest of this Part shows why significant shareholder harm is unlikely to happen and may be economically desirable if it does.

If the concern about shareholders comes from fear of harm to people's retirement and savings, the evolving structure of equity ownership is relevant. Most publicly traded shares of [\*1991] large companies now are owned by mutual funds and other institutional owners holding diverse stocks. As a result, the impact of any given breakup would be diluted for most shareholders. Additionally, if a breakup improved long-term market health - or immediately helped the monopoly's competitors - most of a given monopoly's shareholders could benefit from a breakup even if the broken-up company's stock was hurt. Indeed, one of the leading studies found that although the prosecuted company's stock went down, its rivals' stock went up.

Even if the concern is solely about an individual company's shareholders, a breakup does not mean that a portion of the company is eliminated. If Google is forced to sell YouTube or Facebook is required to divest Instagram, shareholders would receive a massive payment for that sale. Overall, the literature consistently shows that private divestitures "have a positive impact on the divesting parent's share price."

There has been limited direct study of the effects on shareholders of breakups. Moreover, what few studies exist did not examine the ultimate question of how breakups would compare to other antitrust remedies. Nonetheless, the leading quantitative research into stock value following antitrust divestitures suggests that the organizational reconfiguration does not significantly drive the stock value down.

Nor have the most far-reaching antitrust breakups necessarily hurt shareholders. In its failed Supreme Court appeal of dissolution, Standard Oil warned that dissolution would be calamitous to shareholders - a possibility that could not be ruled out with confidence at the time because such a case was unprecedented. But within a year of the court order to dissolve Standard Oil, the company's total stock value had increased. Within two years of the court-ordered divestiture, founder John D. Rockefeller's wealth tripled. It is impossible to know the counterfactual, but the breakup was not - as predicted by Standard Oil's lawyers - calamitous to shareholders.

[\*1992] Of course, because historical antitrust breakups were often poorly designed, more powerful antitrust divestitures may lead to different results. If most scholars are correct that the AT&T breakup overall increased competition, that case study is illustrative. Despite the government's concern about shareholder hardship, AT&T shareholders benefitted substantially following the breakup.

How might breakups fail to harm shareholders even while improving competition? Maintaining a monopoly can be expensive. Instead of focusing on defensive protection of a dominant market position, firms in a competitive industry pursue greater adaptability and innovation. That renewal has the potential to grow the industry at a faster rate than in an industry dominated by a monopolist. Faster-moving companies may be even more important in light of the increasing pace with which technologies are requiring companies to adapt.

Agency theory and organizational psychology help to explain this conundrum of effective antitrust breakups still increasing shareholder value. Senior managers have often pursued growth, especially through mergers and acquisitions, even when growth would not improve the company's value. Yet many companies hold those acquisitions even after it is clear that they were failures, only divesting them when forced to do so by shareholders. Agency theory helps explain how these divestitures demonstrate a misalignment of incentives: managers' compensation may depend on the size of the company, whereas owners care more about profit. Or executives may direct a large share of the monopoly rents toward salaries [\*1993] while the shareholders' portion does not offset the corresponding costs.

Because the design of executive compensation structures has improved, CEOs' motivation to grow counterproductively is presumably lessened today compared to decades ago. Moreover, increasing external pressures on managers - including from activist shareholders - have presumably made it more likely managers will pursue value-creating divestitures. Nonetheless, the agency problem persists. There is also some evidence that organizational inertia and emotional factors may cause companies to hold onto assets that they would economically benefit from divesting.

Another way of conceptualizing the potential benefits to shareholders is to view antitrust breakups as a tool of corporate governance to push executives away from self-serving acquisitions. A primary goal of corporate law is to align the incentives of shareholders and managers by, for instance, imposing a fiduciary duty on managers. Yet it is costly for shareholders to monitor and influence their agents in the firm - managers and directors - which helps explain why "the problem of managerial agency costs dominates debates in corporate law." By discouraging managers from pursuing growth that harms shareholders, or by encouraging beneficial divestitures, antitrust enforcers may benefit shareholders by addressing some harmful effects of high agency costs.

It is unclear what percentage of breakups would add value to shareholders by solving agency costs or otherwise improving the firm's performance. But recent empirical evidence indicates that when CEOs propose mergers, "there is a very large [\*1994] thumb on the scale that pushes all deals toward approval." It is plausible that a substantial portion of antitrust breakups would not harm shareholders, and many may even benefit them. Of course, it is not, and should not be, the goal of antitrust to break up a company to bring shareholders unrealized gains. Still, the evidence available suggests that any resistance to breakups out of concern for significant harm to shareholders rests on weak foundations.

Despite the absence of evidence of extreme harm to shareholders in the past, to the extent that a monopoly is earning considerable profits from its market dominance, lower stock value would be expected following at least some effective breakups. Putting aside for now the questions surrounding deterrence and fairness, what does the private sector literature on divestitures add to this issue?

As the primary tool for assessing corporate law and antitrust, efficiency would presumably weigh heavily in the comparison of shareholder interests to consumer welfare. Antitrust laws arguably already prioritize consumer welfare over the monopoly owners' interests. To that preexisting hierarchy, this Article has illuminated another efficiency contributor omitted from those analyses: Breakups can help ensure that managers only retain "assets for which [their firms] have a comparative advantage and sell assets as soon as another party can manage them more efficiently." That additional efficiency consideration further weakens the argument for letting shareholder harm obstruct breakups.

In summary, substantial valuation drops as a result of breakups are uncertain to happen and of little societal concern if they do. Indeed, as the next subpart shows, even if every future breakup harms monopolies' shareholders that result may be desirable for addressing monopolies.

[\*1995]

C. Costly Breakups May Increase Deterrence

The discussion so far has questioned whether breakup costs are prohibitively high, especially viewed through the private sector lens on such costs. But the argument has yet to examine the predominant assumption in the literature that high breakup costs are unequivocally bad. Upon closer examination, that assumption is incomplete.

Of course, holding all else equal, it is desirable to expend fewer public resources and seek minimal waste to achieve the same antitrust goal. Nonetheless, to be effective, antitrust remedies must prevent companies from seeking to abuse monopoly power in the future. As mentioned above, however, the existing empirical critiques that labeled breakups a failure did not consider deterrence. In other words, the indictment of breakups is uninformed by what is arguably the field's main function, because "U.S. antitrust policy is primarily a deterrence system."

One reason for that omission is that the difficulty in measuring deterrence makes it impossible to draw firm conclusions. However, breakups must play a central role in the architecture of antitrust. Unlike in Europe, where "the civil fine is the tool of choice," U.S. "antitrust laws do not now provide for a 'civil penalty' for monopolization." Nor do antitrust enforcers exercise their ability to pursue disgorgement, which requires a monopoly firm to forfeit its illegal profits. The costs imposed by a breakup are thus a potential substitute for the deterrent effects of disgorgement and civil penalties. [\*1996] If remedies were only pursued when they imposed minimal burdens on companies, then there would be few downsides for companies pursuing anticompetitive mergers: in the worst case scenario they still gain because they keep the monopoly profits earned prior to the low-cost breakup.

The current breakup paradigm also gives businesses a blueprint for strategically positioning themselves to avoid breakups. Scholars and courts have emphasized that although it is relatively easy to split a company up when it has merged but kept its operations separate, it would be unwise to break up those same companies once integrated. In 2012, an FTC Bureau of Competition director clarified in an official statement that the agency "is most likely to ... divest an autonomous, on-going business unit that comprises at least one party's entire business in the relevant market." That policy seeks to ensure that the divested "business unit contains all components necessary to operate autonomously, that it has operated autonomously, that it is segregable from the parent, and that the unit's buyer will be able to maintain or restore competition almost immediately."

Courts have offered related details for merging companies wishing to avoid a later breakup. If a business that merged illegally has been together for some length of time, the court will look at investments made after the merger that may be diminished by a breakup. In the case of two hospitals that merged seven years earlier in violation of antitrust law, for instance, the FTC found divestiture too costly because the combined company had invested in improvements to a cardiac surgery program and computer systems. A divestiture could cause delays in the surgery program and glitches in the computer systems.

The implication from these guidance statements and court orders is that executives running a monopoly - whether built organically or through illicit mergers - can improve their chances of avoiding being broken up by integrating all business [\*1997] units. The current framework incentivizes executives to make rapid investments, such as in common technological interfaces that link different parts of the company and ensure that no significant piece operates autonomously.

Anecdotal evidence points to such strategic positioning. In 2018, after a wave of calls to break up Facebook took particular aim at its acquisition of Instagram and WhatsApp, CEO Mark Zuckerberg announced plans to connect these platforms more closely. More generally, executives dislike breakups and often take steps to grow their companies even when it is unprofitable to do so. This aversion to breakups suggests that business leaders would take steps to prevent breakups.

Thus, there is reason to believe that companies strategically take steps post-merger to lessen the likelihood of authorities breaking them up in the future. Such maneuvering may help explain the dearth of breakups, particularly if savvy businesses are able to integrate more quickly than antitrust authorities can learn that a merger was anticompetitive. Although other reasons to integrate exist, excess integration motivated by breakup avoidance is wasteful. Excess integration is thus doubly harmful, through both short-term higher costs and long-term thwarting of antitrust. Yet these skewed incentives are omitted from the recent literature on breakups.

Additionally, it is difficult, if not impossible, for executives to rigorously identify harms to the company caused by excess integration, such as making the business "too big to manage." While identifying the more concrete potential benefits of avoiding a breakup and costly reorganization is easier, the indeterminacy of estimating breakup effects makes it impossible to know whether antitrust currently over-deters or under-deters. There is a risk of over-deterring, which could prevent [\*1998] some beneficial mergers or investment in innovation. However, the weight of the evidence suggests that antitrust enforcers have been more likely to err on the side of underenforcement. This Article's demonstration of the underappreciated analytic and institutional resistance to breakups strengthens the case for concluding that the current antitrust framework under-deters.

In the extreme, in theory costly breakups could be preferable to low-cost breakups if the benefits of improving deterrence outweigh the administrative waste. From a more realistic perspective, the implication is that the unavoidable costs of breakups can provide societal benefits by discouraging anticompetitive mergers and inefficient integration. To be clear, enforcers should not purposefully make breakups extra costly. But understood as a byproduct of improving firm-level efficiency, deterrence, and competition, substantial breakup administration costs can contribute to an optimal antitrust policy.

IV Implications

The statutory root of antitrust authority, the Sherman Act, did not specify divestiture as a remedy. Instead, that authority flows from courts' equity powers, and "is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" As a result, a shift toward viewing breakups as administrable can immediately improve antitrust without changing statutes or upending doctrine. Breakup administration also speaks to possible legislative reforms to antitrust that could better address monopolies.

A. Administering Breakups

In assessing breakups as a remedy, the question is how the government might perform today rather than how it performed decades ago. The literature on private sector breakups emphasizes that divestitures' success varies depending on the design [\*1999] and management of the process. Three principles are important for designing the administration of antitrust breakups: leveraging business sector expertise, streamlining court involvement, and remaining open to large breakups.

The first of these principles, business expertise, is important in light of perhaps the primary source of resistance to breakups: "Judges aren't good at breaking up companies." Observers are right to doubt courts' competence in administering such day-to-day business decisions. However, that critique of breakups reflects an antiquated understanding of governance.

Since the last large-scale breakup, many agencies have evolved toward what scholars have described as "new governance" and "collaborative" methods of regulation. These and related concepts speak to regulatory process design and are most closely associated among legal scholars with administrative law. In the context of breakup administration, this model of governance would encourage the regulator to leverage private-sector expertise and knowledge rather than recreating it. The Environmental Protection Agency (EPA), Consumer Financial Protection Bureau (CFPB), and other agencies now pervasively rely on large businesses to develop internal self-regulatory processes, often through a compliance department or third-party inspectors. The agencies then monitor or manage the firm's internal self-policing infrastructure.

These new governance models allow the agency to benefit from the firm's skill in designing the best path to achieving a regulatory goal. A key design feature is establishing a regular dialogue with regulated entities, in which the regulator learns about and assesses the process and outputs. Viewed through this more expansive new governance lens, the government's competence in designing and managing breakups [\*2000] should not be the determinative factor in assessing whether breakups are administrable.

By some measures, the FTC has been slower than other agencies in shifting toward new governance. For instance, whereas the CFPB and EPA have about as many lawyers as monitors (which are called examiners or inspectors), the FTC enforces the law almost entirely through lawyers. However, the FTC appears open to relying on private parties, such as independent third-party monitors in divestitures. Assuming a large gap exists between the FTC's tactics and regulatory best practices, the differences should lend further confidence that improvements in its historic approach to breakups are possible by moving closer to administrative best practices.

### Perm: Do Both---2NC

#### It’s an alternative to fixed rulemaking

Julie Moroney 21, JD Candidate at the University of Michigan School of Law, “Reviving Negotiated Rulemaking for an Accessible Internet”, Michigan Law Review, 119 Mich. L. Rev. 1581, May 2021, Lexis

Negotiated rulemaking arose as an alternative to traditional notice-and-comment rulemaking. Philip Harter first popularized this term in a 1982 law review article, proposing negotiated rulemaking as a cure for the "malaise" in administrative law and the ossification of rulemaking. Under traditional notice-and-comment rulemaking, as governed by the Administrative Procedure Act, the agency makes the initial policy determination, and then responds to comments from industry and public interest groups. Negotiated rulemaking flips this script, bringing together these groups before a rule is announced in order to build consensus, engage in give-and-take, and develop a proposed rule to then pass on to the agency. As the product of negotiated rulemaking is intended to eventually be adopted by the agency [\*1601] through notice-and-comment rulemaking, negotiated rulemaking is more accurately understood as a supplement, rather than an alternative, to notice-and-comment rulemaking.

#### a) Fixed position---inclusion of the plan’s predetermined outcome makes the negotiation empty. Parties must have the opportunity to modify the rule, not just provide one-shot comments.

Gwendolyn Mckee Savitz 21, J.D. from American University, LL.M. from Yale University, and Visiting Assistant Professor at the University of Tulsa College of Law, “The Key to Solving Agency Lock-In: Prepublication Regulatory Discussions (Pre Reg)”, Administrative Law Review, 73 ADMIN. L. REV. 255, Spring 2021, Lexis

c. The Drawbacks of Advanced Notices of Proposed Rulemaking

In many instances, ANPRs will still require the same work from the agency as a traditional notice of proposed rulemaking. Thanks to executive oversight through the OMB, ANPRs can often require the same analysis that traditional proposed rules do. In some cases, this is partially avoidable. OMB review is relatively straightforward for open-ended ANPRs (there is little to review if the agency has not yet made any decisions and is merely asking for general feedback from the public). While an open-ended ANPR may have an easier time getting through OMB review, that is not the most useful type of ANRP for commentors. The same lack of specifics that speeds the ANPR through OMB review means [\*279] that the public will have a difficult time providing meaningful feedback.

This points to the biggest problem with ANPRs. While they can increase general participation by the public earlier in the process, they do not necessarily increase the amount of useful public feedback. This is due to the catch-22 of rulemaking and agency lock-in. In order for interested parties to be able to comment effectively, they need to know what the agency is currently considering. However, the more effort the agency has already put into considering different options, the more likely it is that the agency choice is already locked in.

An extensive and detailed proposal by the agency will give the public a great deal of specifics to respond to, but it will be much harder to get through OMB and will work to psychologically lock in the agency, making it less receptive to the feedback. These types of ANPRs will also be the most labor intensive for the agency, making it less likely to voluntarily undertake them to begin with, as they begin to strongly resemble traditional notices of proposed rulemaking. In such a case, therefore, the agency is simply choosing from the outset to go through all the work of a traditional notice of proposed rulemaking twice, while if the agency had instead started with a notice of proposed rulemaking it could potentially [\*280] avoid repeating the process.

The fundamental problem with ANPRs, and the true cause of this issue, is that there is no back and forth between commentors, as is possible in formal rulemaking, so there is nothing to build from or to directly comment on absent specifics from the agency. Commentors can themselves suggest solutions (which the agency cannot effectively expose to public scrutiny before lock-in for the same reasons as in traditional notice-and-comment rulemaking) or the public must rely purely on policy ideas, which might help the agency understand the public mood but will not solve the problem of specific issues being presented only at the risk of agency lock-in. This issue is at least partially addressed by the next incomplete solution: negotiated rulemaking.

2. Negotiated Rulemaking

Negotiated rulemaking represents a fundamentally different approach to the creation of a proposed rule. Rather than proposing a rule and allowing interested parties to submit comments, negotiated rulemaking puts representatives of different interests in a room together and allows them to determine what the proposed rule should be. This can help address the problems caused by lock-in by allowing the representatives taking part in the process to learn from each other and potentially work together to come up with a better solution than any party acting alone would have.

a. The History of Negotiated Rulemaking

Originating in the 1980s, negotiated rulemaking is a process through which the government gathers representatives of different interests who will be affected by a potential regulation (including the agency) and, with the help of a neutral third party, works with all the parties to negotiate an acceptable rule. The consensus rule emerging from the negotiated rulemaking is generally used as the proposed rule, which goes through the traditional notice-and-comment process.

[\*281] Negotiated rulemaking helps solve agency lock-in by allowing issues to be aired before the initial rule is published, when the agency could be expected to be more open to alternatives. However, this was not the original purpose of the process. Instead, it was motivated primarily by two factors: the frequency with which new rules were immediately being challenged in litigation and the ossification of the rulemaking process.

The hope was that by working with the parties ahead of time and allowing them to reach agreement, there would be greater buy-in to the final rule. The parties would understand the different considerations that had gone into the rule and realize the final rule would likely be the best achievable option.

People decried the rulemaking process as ossified due to all the procedural requirements, which were largely intended to prepare for judicial review. Reducing the likelihood of judicial review and allowing issues to [\*282] be aired ahead of time (when they were not necessarily required to be part of the record for judicial review) would help reduce this problem.

After a few trial runs, the idea was popular enough that general requirements for the process were federally codified and negotiated rulemaking began to be required in some statutes.

Negotiated rulemaking was never intended to be a panacea for all the problems in the rulemaking process. From the beginning, it was clear that there were instances where it would not be advisable. The different interested parties must be willing to compromise, which means putting aside the "all-or-nothing" posturing common in the traditional comment process. The hoped-for reduction in litigation appears to be true, in the sense that such rules survive substantive judicial review. However, it does not appear that regulatory negotiation speeds the rule development process.

b. The Benefits of Negotiated Rulemaking

Negotiated rulemaking, like the other two notice-and-comment extensions discussed here, occurs before publication of the proposed rule. It therefore takes place before the agency is structurally locked into a choice. And, because the rule emerges from the negotiation itself and not by agency decree, the agency is not necessarily locked into a decision at all.

Because negotiated rulemaking consists of a dialogue between different interests, groups other than the agency are able to propose possible solutions (as they could in response to an ANPR). They are also able to identify and examine weaknesses in arguments put forth by others, as they can in formal rulemaking.

Negotiated rulemaking is also the only partial solution where parties can work collaboratively to come up with a rule. They do not need to merely point out the issues with a proposal someone else has made; they can offer a slightly better version of it. As a government report noted: "Solving problems, particularly with innovative approaches, is often an iterative process, i.e., a suggested approach elicits information, which causes a change in or clarification of the approach, which elicits additional information, and so on. A one-or-two shot opportunity for public comment is inconsistent with this type of process." Of all the incomplete solutions, negotiated rulemaking is the only one that really offers a chance for this type of approach. This means there is the potential not only for a solution that the agency would not have initially chosen but a solution that no one else would have been able to come up with alone--one that came about only because of the process.

#### b) Sequencing---enacting the plan without prior negotiation locks in opposition

Charles B. Craver 15, Freda H. Alverson Professor at the George Washington University Law School, JD from the University of Michigan, “New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution: The Use of Mediation to Resolve Community Disputes”, Washington University Journal of Law & Policy, 48 Wash. U. J.L. & Pol'y 231, Lexis

III. Initiating Mediation Process

The timing of initial mediation efforts can be critical with respect to community disputes. If neutral intervention begins prematurely, the conflicting parties may be unreceptive. They may not be sufficiently prepared to participate meaningfully in mediation sessions. On the other hand, if conciliatory efforts begin too late, the bargaining participants may be locked into unyielding positions that would be difficult for them to alter.

### Perm: Do the CP---2NC

#### ‘Substantial’ means fixed AND closed to outside input

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.

#### ‘Increase’ is a mandate, not a process that could lead to protection

HEFC 4 – Higher Education Funding Council, “Joint Committee on Draft Charities Bill: Evidence”, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/1 67/167we98.htm# n43

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.

#### It must be proscribed by a command from authority

Pungki Ekopratomo Rusmayadi 16, Degree in the English Language Program in the Department of Language and Arts Education at Sanata Dharma University, “A Corpus Based Comparative Analysis of Two Synonymous Words: *Prohibit* and *Forbid*”, p. 10-12

1. Definitions of Forbid

There are two main definitions according to The Macmillan Dictionary (MD) entry of *forbid*. The first definition is not allowing to do something against the rule or law. The second definition is to make something impossible or to prevent something from happening.

The Collins American Dictionary (CAD) defines three definitions of *forbid*. The first definition clearly mentions the word *prohibit*. It indicates that those two words have a shared central meaning and as Cruse (1986, p. 270) said that those two words are in hyponymous relation, close in meaning and can be accounted as near synonyms. The second definition, The CAD also states the same definition as The MD which is to make impossible and prevent. The last definition that CAD define is to command or to stay away from something and exclude.

The Merriam Webster Dictionary (MWD) has the same definition with the other Dictionaries. *Forbid* is described as to proscribe from or as if from the position of one in authority and also to prevent as if by an effectual command.

2. Definitions of Prohibit

The MD defines *prohibit* as to stop and prevent from something being done especially by making it illegal. *Prohibit* is defined as something related to law and authority. The CAD and MWD state the same definition by mentioning the word *forbid* in their definition. They also state the word prevent in defining *prohibit*.

3. Comparison of Definition

In terms of comparing the dictionary entries, the lexical items are commonly defined by using one or more near-synonyms of the word. The following Table 2.1 illustrates this phenomenon. The first column states the near-synonym in question and the X in the following columns signify which near-synonyms are used to define the word in the first column.

|  |  |  |  |
| --- | --- | --- | --- |
| Words | forbid | prohibit | prevent |
| forbid |  | x | x |
| prohibit | x |  | x |

The table suggests that *prohibit* and *forbid* are defining each other. *Forbid* is defined by the word *prohibit* while *prohibit* is defined by the word *forbid* in the dictionary. Regarding to the three online dictionaries, The MD, CAD, and MWD, these two words share another lexical item in their definition which is to prevent. As Cruise (1986, p. 265) said there are sets of words or lexical items which point towards a special similarity called synonym. It appears that the word prevent also have a shared central meaning with *prohibit* and *forbid*. The word prevent is the most frequently stated near-synonym in their definitions. This could indicate that the meaning of prevent is the most diverse, consequently and more interchangeable. In order to have deeper understanding, the following example of prevent which is lexical item of words *prohibit* *and forbid* shared.

#### The products of negotiation are not ‘prohibitions’

Robert L. Fischman 21, George P. Smith, II Distinguished Professor of Law at the Maurer School of Law at the Indiana University Environmental Resilience Institute, Vicky J. Meretsky, Professor at the Indiana University O'Neill School of Public and Environmental Affairs and Affiliated Professor of Law at the Maurer School of Law, and Matthew P. Castelli, Senior Assistant Regional Counsel at the U.S. Environmental Protection Agency, Region 8, “Collaborative Governance Under the Endangered Species Act: An Empirical Analysis of Protective Regulations”, Yale Journal on Regulation, 38 Yale J. on Reg. 976, Summer 2021, Lexis

Our research demonstrates that collaborative governance guides many elements of the protective regulations covering threatened species. [\*1056] Our recommendations point the way to negotiating more deals that employ incremental, tailored approaches in place of the dramatic disparity between unlisted status and endangered species prohibitions. Our most important result is that almost three-quarters of protective regulations substitute practice-based limitations for difficult-to-detect proximate consequences of an activity. In that respect, collaborative governance transforms the ESA from a statute that prohibits biological entities from crossing invisible ecological thresholds (i.e., harm, jeopardy, recovery impairment) into a regulatory program insisting on best practices. Greater compliance with collaboratively crafted, practice-based conservation requirements may improve the prospect for recovery, even if they are less stringent than the standard statutory prohibitions. That is a paragon of the "win-win" scenario often promised by supporters of collaborative governance.

#### ‘Law’ must be permanent

V.C. Fallon 29, Judge on the Court of Chancery of New Jersey, “Ex Parte Hague”, 104 N.J. Eq. 31, 34, 144 A. 546, 548, 1929 N.J. Ch. LEXIS 186, 1/5/1929, Lexis

A statute (law) is something permanent, uniform and universal. The term law, when used without restriction or qualification, refers to the public law of the state. It is not every act, legislative in form, that is a law. An appropriation bill, for instance, is not a law in its ordinary sense. Such a bill pertains only to the administrative functions of government. A resolution of a legislative body is not a law. The chief distinction between a resolution and a law seems to be that the former is used whenever the legislative body passing it wishes merely to express an opinion as to some given matter or thing, and is only to have a temporary effect on such particular thing; while by the latter it is intended to permanently direct and control matters applying to persons or things in general.

### Impact---2NC

## Memo CP

### Solvency---2NC

### AT: Binding Key---2NC

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

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

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

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

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

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

B. The Differing Approaches of the NAAG and Federal Guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Inequality ADV

### Innovation---SQ Antitrust Solves---2NC

#### Investigation always happens and restricts the worst practices.

Alden Abbott 18, Former Deputy Director of the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation, General Counsel of the Federal Trade Commission, J.D. from Harvard Law School, M.A. in Economics from Georgetown University, “Antitrust and the Winner-Take-All Economy,” Heritage Foundation, 01-23-2018, https://www.heritage.org/government-regulation/report/antitrust-and-the-winner-take-all-economy

Have American antitrust enforcers vigorously scrutinized the activities of giant two-sided platforms? Yes. The Justice Department’s Microsoft case, previously discussed, led to a judicial finding of antitrust liability and a subsequent settlement. The Federal Trade Commission (FTC) vigorously investigated allegations that Google manipulated its search engine algorithm to favor sites with commercial ties to the company over other unaffiliated sites. In January 2013, the FTC entered into a consent decree with Google regarding the licensing terms of certain “standard essential patents.”31

The FTC, however, ended its search-engine investigation. According to the FTC’s outside counsel leading the Google investigation,

[R]egarding the specific allegations that the company biased its search results to hurt competition, the evidence collected to date did not justify legal action by the Commission. Undoubtedly, Google took aggressive actions to gain advantage over rival search providers. However, the FTC’s mission is to protect competition, and not individual competitors. The evidence did not demonstrate that Google’s actions in this area stifled competition in violation of U.S. law.32

There is every reason to believe that U.S. federal antitrust enforcers will continue to investigate practices by the dominant platforms (and, more generally, by firms engaged in Internet commerce)33 to identify those that may inefficiently skew competition and merit challenge. Those enforcers will not, however, seek to challenge economically efficient platform conduct that disadvantages rivals but benefits consumers.

#### Their authors lost this debate 30 years ago to the econ DA and case defense.

Christopher S. Yoo 20, John H. Chestnut Professor of Law, Communication and Computer & Information Science and the Founding Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania, “Hipster Antitrust: New Bottles, Same Old W(h)ine?”, University of Pennsylvania Law School Institute for Law and Economics, 04-06-2020, https://ssrn.com/abstract=3567928

The contours of this debate are well documented in the antitrust literature, outlined quite nicely in Michael Jacobs’s 1995 historical survey. During the 1970s and 1980s, antitrust populists waged an unsuccessful war against the growing dominance of the economic approach to antitrust and attempted to preserve the Warren Court jurisprudence that regarded large firm size and industry concentration as inherently problematic without any need to analyze the impact of particular business practices on consumers. They faced a vigorous academic critique showing that large size may well be the product of economies of scale inherent in a particular industry or from being a more efficient competitor. As the consumer welfare standard became entrenched in judicial decisions, the academic literature, and agency practice and guidance documents, populist criticism “took on a frantic tone” and eventually “grudgingly acknowledged the success” of the consumer welfare approach. By the end of the 1980s, the debate between the populist and the economic approaches “ha[d] lost its drama,” and “[t]he victory of a purely economic analysis . . . could hardly seem more complete.”2

Gone were the days when big was regarded as inherently bad and when small firms were protected for their own sake. Instead, firm size was relevant only to the extent that it benefitted or harmed consumers. Herbert Hovenkamp has noted that the problem with applying standards other than consumer welfare is that the goals:

are unmeasurable and fundamentally inconsistent, although. . .their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.3

It thus comes as no surprise that during this period, the Supreme Court embraced consumer welfare as the appropriate standard under the Sherman Act.4 The emergence of a consensus that economic analysis should dictate the contours of antitrust did not, of course, mean the end of all controversy. As anyone who has worked with economists knows, agreement that consumer welfare is the goal of antitrust still leaves a great deal of room for differences of opinion. During the 1990s and 2000s, these disputes took place between the largely price-theoretic approach of the Chicago School and the more game-theoretic approach of the post-Chicago School. More recently, antitrust has taken a more empirical turn. It would be a mistake, however, to regard these disputes as a rehash of the old fight between the economic and populist approaches. Instead, these arguments took place within a shared commitment to consumer welfare as the proper antitrust standard. In the words of Carl Shapiro, Berkeley business professor and former Deputy Assistant Attorney General for Economics of the U.S. Department of Justice’s Antitrust Division, “If ‘Post-Chicago Economics’ stands for the notion that . . . antitrust should move away from promoting efficiency and consumer welfare, count me out.”5

#### At best, the aff gets circumvented.

Christopher S. Yoo 20, John H. Chestnut Professor of Law, Communication and Computer & Information Science and the Founding Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania, “Hipster Antitrust: New Bottles, Same Old W(h)ine?”, University of Pennsylvania Law School Institute for Law and Economics, 04-06-2020, https://ssrn.com/abstract=3567928

In short, to experienced observers of antitrust, the current uproar about hipster antitrust has the familiar ring of a debate that both sides thought had been long settled. The new bottles do not hide the fact that the wine is the same, and the same vinegary flavor that led to its rejection a generation ago remains. Although complaining about large companies has always had a certain appeal in some quarters and may have new appeal in others, mere slogans and epithets do not represent an adequate substitute for reasoned analysis. This is particularly true in the digital economy, which has yielded specular economic growth and value and in which the need for large investments in R&D and other features of the market may necessitate the existence of large firms if consumers are to enjoy these benefits. Moreover, the classic nirvana fallacy reminds us how easy it is to point out the flaws of one approach while foregoing any close examination of the proffered alternative, which no doubt suffers from flaws of its own that may be even greater. The absence of a coherent alternative to the consumer welfare standard thus limits the seriousness with which complaints about it are taken. All of these considerations are framed by the backdrop that vague standards open the door to political manipulation and abuse and that enforcement authorities around the world typically watch U.S. antitrust law closely and often take cues from how it develops. They underscore the importance of avoiding the seduction of basing legal changes on mere demagoguery and insisting that any reforms be based on a solid analytical foundation.

### No SP---2NC

#### Nye is terrible.

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

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

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

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

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

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

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

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

## Modelling ADV

### No Antitrust Modeling---Irrationality---2NC

### No Antitrust Modeling---EU---2NC

#### Specifically true of the Philippines---asserting they model the US reflects outdated understanding.

Clifford Chance 15, International Law Firm, “A guide to the Philippine Competition Act,” November 2015, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2015/11/a-guide-to-the-philippine-competition-act.pdf

Competition law has long been part of the Philippines' legal system, but prior to the enactment of the Competition Act there was no single comprehensive competition law regime in the Philippines. Rather, the laws were scattered between the Revised Penal Code (the country's principal criminal statute) and various sector-specific legislation.

While earlier drafts of the Competition Act borrowed concepts from US antitrust law, many of the key provisions in the finalised version of the Competition Act are based on the EU model, particularly the provisions on anti-competitive agreements and abuse of a dominant position. This is more in line with antitrust regimes adopted in other ASEAN countries, as well as with countries in the wider Asia Pacific region.

### Philippines Growth---2NC

#### Philippines growth is stable

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

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

KEY RATING DRIVERS

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

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

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

## Democracy ADV

# 1NR

## Advantage CP

### Solvency

### AT: Do Both

### AT: Do the CP

### AT: ADV 1

### AT: ADV 3

## Infrastructure DA

### Impact---2NC

#### 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.

#### Partisan backlash wrecks the effectiveness of antitrust

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

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

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

For academics, practitioners, and public officials, the question is not whether political forces surround the DOJ and the FTC, or whether decisions by elected officials sometimes influence agency behavior. They assuredly do.11 The relevant queries are how, and how much? This Article addresses these questions by examining one dimension of the relationship between the federal antitrust agencies and the political process. It discusses how electoral politics can increase the influence of partisanship in the operation of the DOJ and the FTC. As used in this Article, partisanship is a determined commitment to party goals and causes. It manifests itself in a tendency to exaggerate the virtues of the party and to disregard or devalue the accomplishments of political rivals. Through the political appointment of the DOJ and FTC leadership, partisanship can spill over into the formulation and presentation of agency policy.

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

### AT: Won’t Pass

#### 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.

### AT: Thumpers

#### 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.

### AT: Afghanistan

#### 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.

### AT: Debt Ceiling

#### Debt ceiling will be later

George Cahlink 9-9, Reporter at Energy & Environment News, “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/

4. October — Debt ceiling

Treasury Secretary Janet Yellen warned Congress yesterday that a federal debt crisis is coming next month.

Yellen said that sometime in October, the U.S. Treasury will run short of options for paying it debts, which would force the nation into default. She said that could be averted by having lawmakers agree to raise the nation’s debt ceiling for the first time in two years.

“A delay that calls into question the federal government’s ability to meet all its obligations would likely cause irreparable damage to the U.S. economy and global financial markets,” Yellen wrote in a letter to Pelosi.

Congress has been sparring over raising the debt ceiling for months. Democrats insist it must be a bipartisan effort, while GOP leaders have said they won’t back adding to a cap estimated at $28.5 billion and blame Democrats for increased spending.

#### It’s after infrastructure

Aris Folley 9-5, Social Editor at The Hill, BA in Journalism from Long Island University, Brooklyn Campus, “Congress Braces for Spending Fights Amid Threat of Government Shutdown”, The Hill, 9/5/2021, https://thehill.com/policy/finance/570456-congress-braces-for-spending-fights-amid-threat-of-government-shutdown

With its hands full with the reconciliation package this month, Moller predicted the House would not take immediate action to address the debt ceiling, but he added that the Senate might.

### AT: PC Low

#### Biden’s personally holding the deal together

Christina Wilkie 9-16, White House Reporter at CNBC, Political Reporter at The Huffington Post, “His Economic Agenda on the Line, Biden Prepares to Fight for Tax Increases on the Wealthy”, CNBC, 9/16/2021, https://www.cnbc.com/2021/09/16/biden-prepares-to-fight-for-tax-increases-on-wealthy-families-corporations.html

Central to this mammoth effort will be Biden himself, both as the leader of his party and as a skilled congressional negotiator in his own right.

Any doubt about how involved the president intends to be in the nitty gritty of the legislative battle were put to rest on Wednesday, when Biden hosted separate private meetings at the White House with the Senate’s two most centrist Democrats, Arizona Sen. Krysten Sinema and West Virginia Sen. Joe Manchin.

Both Manchin and Sinema have both expressed skepticism about the size and scope of the social safety net bill. Specifically, Sinema has questioned the size of the bill and Manchin has expressed concerns over some of the tax hikes.

Biden was set to continue his outreach on Thursday, holding phone calls with Senate Majority Leader Chuck Schumer and House Speaker Nancy Pelosi.

Not a done deal

Biden will need the vote of every Democratic senator in order to pass the bill along party lines through the 50-50 split Senate, with a tie-breaking vote cast by Vice President Kamala Harris.

One factor working in Biden’s favor so far is public opinion. Americans by-and-large support raising taxes on the wealthy and corporations in order to fund infrastructure and expand benefits for working families.

#### Every bit is critical---Dems will jam up the bill if he’s weak

Sahil Kapur 21, National Political Reporter at NBC News, Former National Political Reporter at Bloomberg News, Former Senior Congressional Reporter at TPM Media, BA in Economics and Government from Claremont McKenna College, “Honeymoon Over? Afghanistan Chaos Comes at a Critical Moment for Biden's Agenda”, NBC News, 8/22/2021, https://www.nbcnews.com/politics/white-house/honeymoon-over-afghanistan-chaos-comes-critical-moment-biden-s-agenda-n1277338

The president needs all the political capital he can muster in the coming weeks to pass his ambitious agenda with thin Democratic majorities.

President Joe Biden’s honeymoon with congressional Democrats appeared to reach an abrupt halt last week when a number of his allies on Capitol Hill began pummeling his execution of the U.S. withdrawal from Afghanistan, promising investigations.

It’s a precarious moment for Biden, who needs to save his political capital to pass his ambitious agenda with thin Democratic majorities. House leaders are battling dissent among moderate lawmakers skeptical of the dual-track strategy to approve a $550 billion infrastructure bill and a $3.5 trillion package to expand the social safety net and raise taxes on the wealthy.

Some insiders see a new phase for relations between Biden and Democrats.

“The relationship has certainly hit a rough spot,” said Jim Manley, who was an aide to former Senate Democratic leader Harry Reid of Nevada. “On a whole host of issues, he’s had a pretty good run since becoming president. Now I think the relationship is going to get a little trickier from here on out.”

He said he was “surprised by the tough tone” that key Democratic committee chairs like Rep. Gregory Meeks of New York and Sen. Bob Menendez of New Jersey took on Afghanistan, adding that they appear determined to conduct “rigorous” oversight of Biden, their fellow Democrat.

The larger political impact of the chaos in Afghanistan is unclear. Polls taken during the chaos found that Americans still prefer withdrawing over remaining. But the situation has enveloped the White House in a near-term crisis that may limit its persuasive powers over Democratic lawmakers.

An NBC News poll released Sunday found that Biden's job approval rating is 49 percent, while 48 percent of U.S. adults disapprove. That is down from April, when Biden drew 53 percent approval and 39 percent disapproval.

Dan Pfeiffer, who was a senior adviser to former President Barack Obama, said he doesn’t believe the situation will harm Biden’s agenda, but he said the concern is understandable.

“Democrats have so little margin of error in Congress that even a little bit of turbulence is concerning, and the instinct for self-sabotage in centrist Democrats is always prevalent,” he said.

Pfeiffer said Biden’s popularity will have an impact on Democrats down the ballot in the congressional elections next year, giving them an incentive to strengthen him and his presidency.

“From the perspective of raw politics, the urgency to quickly pass the Biden legislative agenda is increased by recent events. Congressional Democrats need a strong Biden to have any chance of holding the majorities,” he said. “If the president takes a political hit from what's happening in Afghanistan, passing very popular, impactful legislation is the best way to ensure that blip is temporary.”

Recommended

The Senate has passed a $550 billion infrastructure bill on a vote of 69-30. The House is set to return Monday and kick off the process of advancing the bill and the separate $3.5 trillion budget resolution. Speaker Nancy Pelosi, D-Calif., has said the infrastructure legislation won’t get a vote until the Senate passes the multitrillion-dollar bill, which has sparked dissent from moderates.

And those moderates are more likely to stick with Biden if their voters support him.

“I am curious to figure out how much this is actually going to hurt President Biden. It’s probably a moving target for members,” Kristen Hawn, a former Democratic aide for the moderate Blue Dog Coalition, said of the Afghanistan conundrum. “I don’t think we’ll know that immediately. This is still playing out.

“I do think that Democratic allies of the president want to deliver a win for him,” she said. “The bipartisan bill would be a very big win for the president at a very troubling time right now. There would be an incentive there to pass something, have it signed into law. Particularly with infrastructure, there are real-world impacts. People can see it.”

A group of centrists, including Rep. Josh Gottheimer, D-N.J., is pushing for a swift vote on the infrastructure bill before the House proceeds to the budget bill. But Pelosi has said infrastructure doesn’t have the votes to pass unless it is linked to the larger package, which is a top priority for progressive lawmakers.

Pelosi needs all the help she can get from Biden to get most reluctant Democrats to back her plan.

“It’ll be interesting to see if Democrats, especially in the House, think he is weakened and they try to jam him on infrastructure and reconciliation,” Manley said.

“Presidents and their staff as a general rule like to preserve their political capital for tough times. And they’ve done a good job of doing that so far,” he said. “But based on how difficult this is, they’re going to have to start calling in some chits.”

### AT: PC Fake

#### The consensus of recent research proves PC is real

Dr. Jason S. Byers 20, PhD in Political Science at the University of Georgia, Postdoctoral Fellow at the University of Michigan, BA from the College of Charleston, et al., “Policymaking by the Executive: Examining the Fate of Presidential Agenda Items”, Congress & the Presidency, Volume 47, Issue 1, Taylor & Francis

A number of studies have shown that Congress considers current levels of presidential approval when passing legislation (Brady and Volden 1998; Cohen et al. 2000; Edwards 1980, 1989). Early studies were able to find correlations between approval ratings and success in Congress (see, e.g., Edwards 1980; Ostrom and Simon 1985). However, later research depicts the relationship between approval ratings and legislative success as more conditional (Canes-Wrone and De Marchi 2002; Edwards 1989). Supporting a piece of legislation championed by an unpopular president could ultimately result in negative consequences for members of Congress. If presidents propose legislation to Congress that is salient with the mass electorate and has higher levels of approval, however, then members stand to gain from supporting the president.9

On a similar note, the honeymoon period of a president’s initial time in office has been shown to increase the likelihood of legislative success (Beckmann and Godfrey 2007; Brace and Hinckley 1991; Farnsworth and Lichter 2011; McCarty 1997). Presidents lose their favorability with the public and with Congress the longer that they are in office (McCarty 1997), which is why they often push for significant legislative accomplishments early in their term. Members of Congress are uniquely aware of the public’s sentiments after a presidential election, especially because they share a common constituency with the president and are more likely to capitulate to a president’s agenda.10 Therefore, a president should receive more cooperation from members of Congress for their legislative agenda items earlier in his term.

We should also expect the president to have varying levels of success depending on the policy in question (Ragsdale 2014). One area where the president is more likely to succeed in Congress is in foreign policy. The amount of knowledge the president possesses in matters of foreign policy, compared to members of Congress, is usually much greater (Canes-Wrone, Howell, and Lewis 2008; Wildavsky 1966). This information asymmetry in foreign policy leads Congress to be relatively deferential to the president’s proposals, therefore often negating their need to act unilaterally in order to achieve the president policy goals (Marshall and Pacelle 2005).11 Furthermore, members of Congress often have little incentive to get involved in foreign policy as there is little or no direct electoral return for them (Mayhew 1974).12

A president’s ability to pursue policies with Congress is also affected by institutional features such as unified government, polarization, filibuster or veto pivots, and the partisan composition of the chambers (Bond and Fleisher 1990; Howell 2005; Krehbiel 1998; Mayhew 2011). Much of the previous work on presidential success in Congress has focused on the distinction between unified versus divided government and has found that presidents are more likely to shift policy when there is unified government, which makes intuitive sense (Barrett and Eshbaugh-Soha 2007; Bond and Fleisher 1990; Mayhew 2011). If the same party controls the presidency and both chambers of Congress, then it is reasonable to assume that a majority of the legislation that is proposed by the president will at least make it onto the legislative agenda. It also follows that during times of divided government, the president would have a harder time getting legislation passed through Congress as a result of more divergent policy preferences, which therefore impedes their ability to form the necessary coalition needed to move the status quo (Mayhew 2005; Ragusa 2010).13 The effect of divided government is likely to be exacerbated with greater polarization as well. As the parties’ ideologies diverge, fewer opportunities exist for bipartisan compromise on issues, therefore potentially hampering the president’s ability to move policy.

Beyond simple majority status, the actual size of the president’s party within Congress also matters. Prior research demonstrates that the size of the coalition that the president has within Congress affects the likelihood that policy change is enacted (Bond and Fleisher 1990; Deering and Maltzman 1999). A bare majority is insufficient unless there is no diversity among members’ ideologies, and even substantial majorities may not suffice if one faction holds substantially different policy preferences from the rest of the party (such as the Southern Democrats during the 1950s and 1960s). Therefore, simple majority status is not sufficient for understanding policy changes. Instead, one must consider the size of the president’s coalition and its ideological homogeneity as well (Rohde 1991). Increasing the size of the coalition the president has in Congress should result in an easier path in passing legislation.14 This should be especially true during times of distinctly different ideological preferences between the majority and minority parties.

A variety of factors could influence the success of a president’s legislative proposal in Congress. Based on the president’s proclivity to have legislative proposals realized through law, the previous factors will influence the success or failure of a president’s ability to have proposals make it through Congress. Although presidents may not witness a specific proposal become law, this does not mean their initiatives will necessarily remain unrealized. Allowing an issue to remain at its status quo is indeed an option; however, the president may also decide (or be forced) to move policy unilaterally.15 There are a multitude of reasons that a legislative proposal would receive no action by Congress or the president. At times it is unclear why no action is initially taken in Congress, because it is difficult to ascertain a legislator's motivations in not pursuing a particular course of action. In addition, the use of the Hastert Rule in the House and the filibuster in the Senate could result in no action taken on specific policy proposals. Gridlock is an issue that must be addressed before legislation moves out of either chamber, which would stall progress and result in no action taken by the legislative body. Unpopular presidents usually struggle to have their legislative proposals acted on by Congress (Canes-Wrone and De Marchi 2002); based on the fact that the public does not support the president, Congress will decide not to act. When dealing with legislative proposals, there are two specific endings—either the status quo is changed (i.e., Congress or the president creates a policy shift) or the status quo remains the same and the proposal receives no action.

#### It overwhelms ideology

Dr. Matthew J. Lebo 11, Associate Professor in the Department of Political Science at Stony Brook University, PhD in Political Science from the University of North Texas, and Andrew O'Geen, PhD Candidate in the Department of Political Science at Stony Brook University, “The President’s Role in the Partisan Congressional Arena”, Journal of Politics, Volume 73, Number 3, August 2011, Jstor

In many ways, the separation of powers between the executive and legislative branches in the constitution is mirrored in the way the two institutions are studied. Even as the study of parties in Congress continues to deepen our understanding of that branch, the role of the president is usually left out or 3 marginalized. At the same time, research that centers on the president’s success has developed in parallel with little crossover. The result of this separation is that well developed theories of parties in Congress exist but we know much less about the important interactions between the executive and the legislature and the parties that connect them. For example, between models of conditional party government (Rohde 1991; Aldrich and Rohde 2001), cartel theory (Cox and McCubbins 1993, 2005), and others (e.g. Lebo, McGlynn and Koger 2007; Patty 2008), we have an advanced understanding of how parties are important in Congress, but little knowledge of where the president fits. As the head of his party, the president’s role in the partisan politics of Congress should be central. Keeping this centrality in mind, we use established theories of congressional parties to model the president’s role as an actor within the constraints of the partisan environment of Congress. We also find a role for the president's approval level, a variable of some controversy in the presidential success literature. Further, we are interested in both the causes and consequences of success. We develop a theory that views the president’s record as a key component of the party politics that are so important to both the passage of legislation and the electoral outcomes that follow. Specifically, theories of partisan politics in Congress argue that cross-pressured legislators will side with their parties in order to enhance the collective reputation of their party (Cox and McCubbins 1993, 2005), but no empirical research has answered the question: "of what are collective reputations made?" We demonstrate that it is the success of the president – not parties in Congress – that predicts rewards and punishments to parties in Congress. This allows us to neatly fit the president into existing theories of party competition in Congress while our analyses on presidential success enable us to fit existing theories of party politics into the literature on the presidency.

### Link---2NC

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

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

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

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

Two to go

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

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

Meanwhile, on Capitol Hill …

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

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

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

So, what does it all mean?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New look at the top

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

#### The plan triggers GOP backlash AND a huge firestorm

Jeff L. White 19, American Bar Association, “The Politics of Antitrust: Candidates & Newsmakers Bringing Antitrust into the Spotlight”, 9/13/2019, https://www.americanbar.org/groups/business\_law/resources/materials/2019/annual\_materials/politics\_of\_antitrust/

The conventional wisdom among antitrust practitioners is that antitrust is largely apolitical – administrations come and go, but the Federal Trade Commission and the Antitrust Division of the Department of Justice mostly stay the same. For decades, the consumer welfare standard has been the core principle underlying U.S. antitrust policy no matter who sits in the White House. The result has been a continuous focus both at the agencies and in the courts on whether consumers – not competitors, small businesses, or employees – will be harmed by a firm’s conduct or a proposed combination of firms. Reflecting this long-standing bipartisan consensus, annual reports summarizing the agencies’ collective enforcement efforts evidence minimal year-to-year variation in how many conduct investigations are launched, how many mergers attract a prolonged investigation, and how many deals are challenged in court. Where there is variation, it does not necessarily track with the broad assumption that Republican administrations will be less enforcement-minded than Democratic ones. While there were and are sometimes differences in approach, these were largely more nuanced – e.g., what types of remedies are acceptable to address potential merger-related harms, or the perceived level of risk posed to consumer welfare from mergers between companies at different levels of the supply chain.

Recently, however, there has been a shift in public discourse around the primary goals of antitrust enforcement and whether current tools are sufficient to address the growing concerns in some circles about the level of concentration in many industries, particularly with respect to tech platforms. Notably, there are increasing calls on the left for revisiting the consumer welfare standard itself. A widely read and cited law review article by Lina Khan in December 2017 crystalized the issue thus: “[a]ntitrust law and competition policy should promote not welfare but competitive markets.”1 Ms. Khan views the consumer welfare standard, in practice, as having been overly-narrowed to focus on short-term impacts on consumer prices and output, with the result that conduct that could have a long-term negative impact on market structure escapes legal scrutiny.2 Her primary criticisms are that “current doctrine underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive”3 and, perhaps more fundamentally, that in passing the antitrust laws, Congress intended “to promote a host of political economic ends – including our interests as workers, producers, entrepreneurs, and citizens.”4

As Ms. Khan notes in her article, the 2010 Merger Guidelines do take into account non-price impacts on competition, such as lower quality products, reduced product variety, lower service levels, or a decrease in innovation, and roughly one-third of FTC merger challenges brought in the last decade alleged potential harm to innovation as one basis for the complaint.5 Assistant Attorney General Makan Delrahim, head of DOJ’s Antitrust Division, has voiced his support for the consumer welfare standard in part by pointing to the non-price effects regularly considered by the antitrust authorities, and criticizing “the incorrect notion that antitrust policy is only concerned with keeping prices low.”6 Republican FTC Commissioners Phillips and Wilson have also spoken out consistently in favor of the consumer welfare standard.7 While the Republican Commissioners on the FTC have consistently defended the existing framework, the FTC has also provided a forum for the ongoing debate. Over the last year, the FTC held a series of hearings on “Competition and Consumer Protection in the 21st Century,” including a session on the “Role of the Consumer Welfare Standard in U.S. Antitrust Law.” The agenda addressed questions such as whether the consumer welfare standard remains the most appropriate standard for evaluating compliance with the antitrust laws and explored alternative frameworks that could be used to evaluate compliance.

These debates, while seemingly academic, are reverberating in the mainstream business media. While major antitrust investigations and litigations have always received significant coverage, the policy discussion has spilled over onto the pages of Forbes and the Wall Street Journal. There have also been increased calls for more robust antitrust enforcement from members of Congress as well as many Democratic candidates for president. Senator Elizabeth Warren, who gave a high-profile speech in June 2016 criticizing increased levels of concentration among American industries, recently called for the breakup of Facebook, Google, and Amazon. Senator Amy Klobuchar co-sponsored legislation that would flip the burden of proof for some mergers, requiring merging parties to demonstrate that merging would not materially harm competition, rather than requiring the reviewing antitrust agency to establish that it would substantially harm competition. Representative David Cicilline of Rhode Island, the antitrust subcommittee chairman, is investigating concentration in the tech industry, while tech platforms are also the focus of a newly-formed FTC Technology Task Force and, separately, the subject of an investigation by DOJ’s Antitrust Division. While most of the calls for a new approach to antitrust enforcement have come from the Democratic side of the aisle, President Trump has repeatedly criticized the market position held by the largest tech and media companies. His 2016 campaign promised to use the antitrust laws against companies that were “destroying an American democracy that depends on a free flow of information and freedom of thought.”8 Last summer in an interview with Bloomberg, President Trump called out tech giants such as Google and Facebook, noting that they could represent “a very antitrust situation.”9 Since then, technology platforms, the role they play in American society, and whether antitrust law should play a bigger role in governing their actions have continued to be a focus for the administration. Overall, across multiple forums, the core tenets of long-standing antitrust laws and policy are being called into question.

#### There’s solid political opposition to the plan

Daniel A. Crane 18, Frederick Paul Furth, Sr. Professor of Law at the University of Michigan, “Antitrust's Unconventional Politics”, Virginia Law Review, September 2018, Lexis

Standing against the anti-incumbent challengers from both political wings is a broad, bi-partisan establishment center seeking to defend the consumer-welfare framework. Until recently, this establishment center seemed far from unified. Since the rise of the Chicago School in the 1970s, antitrust law has been contested on terms that seemed generally to track left--right political ideology, with those on the left favoring more aggressive intervention and those on the right more laissez faire. But the rising tide of calls for a radically different version of antitrust has led to a circling of establishment wagons around the consumer-welfare standard. Left-leaning organizations that once led the charge for more aggressive enforcement now find themselves defending the consumer-welfare idea in principle, even while calling for more aggressive enforcement within that paradigm. Meanwhile, conventionally conservative or pro-business leaning organizations continue to defend the consumer-welfare standard against assaults from their own right flank.

### Impact---Grid---2NC

#### Solves grid collapse

PPG 3/2 – Pittsburgh Post-Gazette Editorial Board, “Invest In Infrastructure”, 3/4/2021, https://www.post-gazette.com/opinion/editorials/2021/03/05/Invest-in-infrastructure/stories/202102270028

Now is the time for a reckoning, a realization: While it’s important to study the past to avoid repeating the same mistakes, the country must also look to its future and see the obvious — that America’s infrastructure as a whole needs some serious upkeep.

Democrats and Republicans alike have flirted with the idea of a sweeping infrastructure bill in recent years, and President Joe Biden’s team is working to outline such legislation. These efforts should proceed swiftly — now is the time for Congress to invest in infrastructure, not only to help prevent crises, but also to jump-start an economy mired in the coronavirus pandemic.

Despite being one of the richest countries in the world, the U.S. seems constantly to hover on the edge of disaster, with news of natural forces smashing through power grids and levies and fire prevention strategies on a yearly or monthly basis. Texas is only the most recent state to have been pushed over the edge.

The American Society of Civil Engineers just this week gave America’s infrastructure an overall grade of C-minus in its quadrennial report card. The last grade was D-plus and that report cited decades of underfunding and unheeded recommendations. C-minus is an improvement but deserves not just federal attention but actual intervention. The report notes “we are heading in the right direction, but a lot of work remains.”

There is opportunity in the recent economic and environmental devastation that grabs headlines and breaks hearts. In the aftermath of the Great Depression, the government put millions to work improving parks and building roads and bridges and airports. President Dwight Eisenhower’s interstate highway system remains the life veins of interstate travel.

A new and vigorous infrastructure package for America would fix what needs to be fixed and offer the promise of an economic boon.

The purpose of the federal government is to address the needs of American society in a way that can’t be tackled by states in a piecemeal fashion. What has happened in recent days within The Lone Star State demonstrates keenly that this is the time — actually past the time — that our federal leaders must shore up the foundations of our federation. Congress should act swiftly to lead states in reversing the entropy chewing away at America’s foundations. Until this happens, society stands on shifting sands.

#### Extinction

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Societies and nations are examples of large-scale, complex social-physical systems. Thus, societal resilience can be defined as the ability of a nation, population, or society to anticipate and prepare for major stressors or calamities and then to absorb, adapt to, recover from, and restore normal functions in the wake of such events when they occur. A nation’s dependence on its Critical Infrastructure systems, and the resilience of those systems, are therefore major components of national and societal resilience.

There are a variety of events that could deal crippling blows to a nation’s Grid, Critical Infrastructure, and social fabric. The types of catastrophes under consideration here are “very bad day” scenarios

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that might result from severe GMDs induced by solar CMEs, HEMP attacks, cyber attacks, etc.5

As briefly discussed in Sec. III.C, the probability of a GMD of the magnitude of the 1859 Carrington Event is now believed to be on the order of 1%/year. The Earth narrowly missed (by only several days) intercepting a CME stream in July 2012 that would have created a GMD equal to or larger than the Carrington Event.41 Lloyd’s, in its 2013 report, “Solar Storm Risk to the North American Electric Grid,” 42 stated the following: “A Carrington-level, extreme geomagnetic storm is almost inevitable in the future…The total U.S. population at risk of extended power outage from a Carrington-level storm is between 20-40 million, with durations of 16 days to 1-2 years…The total economic cost for such a scenario is estimated at $0.6-2.6 trillion USD.” Analyses conducted subsequent to the Lloyd’s assessment indicated the geographical area impacted by the CME would be larger than that estimated in Lloyd’s analysis (extending farther northward along the New England coast of the United States and in the state of Minnesota),43 and that the actual consequences of such an event could actually be greater than estimated by Lloyd’s.

Based on “Report of the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack: Critical National Infrastructures” to Congress in 2008 (Ref. 39), a HEMP attack over the Central U.S. could impact virtually the entire North American continent. The consequences of such an event are difficult to quantify with confidence. Experts affiliated with the aforementioned Commission and others familiar with the details of the Commission’s work have stated in Congressional testimony that such an event could “kill up to 90 percent of the national population through starvation, disease, and societal collapse.” 44,45 Most of these consequences are either direct or indirect impacts of the predicted collapse of virtually the entire U.S. Critical Infrastructure system in the wake of the attack.

Last, recent analyses by both the U.S. Department of Energy46 and the U.S. National Academies of Sciences, Engineering, and Medicine47 have concluded that cyber threats to the U.S. Grid from both state-level and substatelevel entities are likely to grow in number and sophistication in the coming years, posing a growing threat to the U.S. Grid.

These three “very bad day” scenarios are not creations of overzealous science fiction writers. A variety of mitigating actions to reduce both the vulnerability and the consequences of these events has been identified, and some are being implemented. However, the fact remains that events such as those described here have the potential to change life as we know it in the United States and other developed nations in the 21st century, whether the events occur individually, or simultaneously, and with or without coordinated physical attacks on Critical Infrastructure assets.