**1NC---R1---Harvard**

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**Courts cannot ‘expand’ antitrust law**

George **Bibikos 19**, Founder of GA Bibikos LL.C., J.D. from Widener Commonwealth Law School; Supreme Court of Pennsylvania, “Commonwealth of Pennsylvania, Appelle, vs. Chesapeake Energy Corporation et al., Appellants,” <https://paforciviljusticereform.org/wp-content/uploads/2020/11/PCCJR-Chesapeake.pdf>

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

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

**Vote neg:**

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

**Ground—mechanism dodges DA links**

**1NC**

**The ‘private sector’ is not controlled by the state**

Thomas **Brock 20**, Investopedia, “Private Sector,” 12/25/20, https://www.investopedia.com/terms/p/private-sector.asp

What is the Private Sector?

The private sector is the part of the economy that is run by **individuals** and **companies** for **profit** and is **not state controlled**. Therefore, it encompasses all **for-profit businesses** that are not owned or operated by the government. Companies and corporations that are **government run** are part of what is known as the **public sector**, while charities and other nonprofit organizations are part of the voluntary sector.

**State-created bodies are part of the public sector, not the ‘private sector’**

Robert **Mysicka 20**, Commercial Litigation and Business Lawyer at the Law Firm McIntyre Mysicka LLP. He has written extensively on regulation and regulatory issues in Canada; Lucas Cutler is a lawyer with Grant & Dawn Lawyers Professional Corporation, Ottawa; Tingting Zhang is Assistant Professor of Organizational Studies and Analytics, Girard School of Business, Merrimack College, MA, USA, “Licence to Capture: The Cost Consequences to Consumers of Occupational Regulation in Canada,” Commentary - C.D. Howe Institute, no. 575, C.D. Howe Institute, 07/2020, p. 0\_1,0\_2,1-20

Many commentators, including Mysicka (2011) and others in the competition bar and in academic circles have criticized the RCD for being a vague, differentially applied and conceptually problematic doctrine. The fact that the current version of the Competition Act references the "common law" and therefore passes the buck back to the court system makes competition law weaker. It ensures that an existing patchwork of vague and inconsistently rendered decisions decides what regulations stand and what regulations are set aside. This should be changed. If **competition** policy is to be effective it must be capable of influencing how provinces legislate. If not, the only **teeth** it has is against **private actors**. And as this and other studies have found, competition is **more** at risk from the **public** and **quasi-public** sectors, **not the private sector**. This is **particularly** true since **most professional bodies are born and persist** at the provincial level **by state-granted patent**.

**Vote neg:**

**Limits and ground---they explode the topic to infinite non-private actors that avoid core DAs like econ**

**1NC**

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

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

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

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

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

**-eliminate certificate of need regulations**

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

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

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was **quite robust** in the **U**nited **S**tates 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 – **permit**ted state **a**ttorneys **g**eneral to continue **play**ing 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 19**20s**, 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 **H**art-**S**cott-**R**odino **A**ntitrust 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 **C**rime **C**ontrol **A**ct 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** attorney**s** 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** attorney**s** 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 **a**ttorneys **g**eneral have **increasingly** **play**ed 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** attorney**s** general have **show**n 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** attorney**s** general launched their independent investigations into **‘Big Tech’** companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

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**Infrastructure will pass but continued “good faith” negotiations over the social spending bill are key**

Burgess **Everett et. Al 10/27**, Burgess Everett is the co-congressional bureau chief for POLITICO, specializing in the Senate since 2013, Heather Caygle is a Congress reporter for POLITICO, Sarah Ferris covers the House for POLITICO’s Congress team, focusing on the Democratic caucus, “Liberal frustration imperils quick Dem social spending deal”, <https://www.politico.com/news/2021/10/27/top-dems-social-spending-deal-manchin-sinema-517332>, October 27th, 2021

Manchin argued that "**good faith**" negotiations about a forthcoming climate and social spending bill are enough to **unstick** the Senate’s infrastructure bill. Sinema said she's "doing great, making **progress**."

“The president has made that very clear: He wants to move forward. And we owe it to the president to move forward, take a vote on the **infrastructure** bill,” Manchin told reporters on Wednesday morning. “He believes 100 percent of nothing is nothing.”

Where are Democrats in the tax hike fight?

Manchin explained that when a deal is cut, Biden will “go over to the House, and he’ll basically explain to the House: ‘I have a framework, but there's still an awful lot of work to be done,’” Manchin said.

Speaker Nancy Pelosi told House Democrats on Wednesday morning that her party is “in pretty **good shape**.” Even so, Pelosi continues to face an intense push-pull from liberals — who want to see a full social spending bill before voting on the Senate's bipartisan infrastructure deal — and moderates who want to get the infrastructure vote finally set, as soon as possible.

“It’s lamb eat lamb. There is no bad decision. We have to choose,” Pelosi told her members, according to a source familiar with her remarks. Senate Democrats say it’s highly unlikely bill text will be totally finalized this week, however.

Progressives have also blanched at Sinema’s efforts to avoid raising tax rates and Manchin’s move to cut the bill's top line. Those moves have prompted a deal on a corporate minimum tax and tenuous negotiations on a billionaires tax, as well as potential cuts to plans for Medicare expansion, Medicaid expansion and paid leave. Efforts to lower drug prices through Medicare negotiations are headed toward a more **limited** approach, Democrats said.

By midday Wednesday, the billionaire tax was out of the mix, according to multiple sources familiar with the talks. Manchin said the tax on billionaire’s assets is “convoluted” and instead pitched a “patriotic” 15 percent tax on wealthy people. He said he did not want to target a certain class of people through the tax code.

His comments complicated negotiations, some Democrats said.

"I continue to be **optimistic** that on the spending side, there are pathways toward closing the remaining gaps," said Sen. Chris Coons (D-Del.). "But I recognize that Sen. Manchin's just made a comment that made some of the revenue side" more complex.

With the billionaires tax out, Democrats are now taking another look at a surtax on people making more than $5 million a year that the House Ways and Means Committee passed last month.

Manchin also continued to throw cold water on health care proposals, which Sanders said was not negotiable and “must” be in the bill. His colleague, Sen. Raphael Warnock (D-Ga.), said he’d spoken to Manchin and is “encouraged” that Democrats can find a way to cover Georgians and other Americans who live in states that have not expanded Medicaid but would otherwise be eligible.

Democrats are more **confident** about climate subsidies and universal pre-K making it into in the package, along with an extension of the Child Tax Credit. But it all comes down to where **Manchin** and **Sinema fall** — and whether the rest of the party’s thin majorities go along with Biden's dealmaking. Chairmen of the Senate's climate-related committees met again on Wednesday afternoon, according to Democratic sources.

**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. **A**nother 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.

**Key to grid modernization AND cybersecurity**

David **Smith 21**, Marketing Director at Grid Forward, VP of Creative Services for Publitek North America, “The Grid in the Infrastructure Package – What’s In, What’s Out, What’s Next,” Grid Forward, 8/19/21, https://gridforward.org/the-grid-in-the-infrastructure-package-whats-in-whats-out-whats-next/

By now you are well aware that the U.S. Senate has passed a mammoth $1.2T bill **invest**ing in infrastructure. You may even know that the **energy** investments were **around $100B** – a **lot of funds** no doubt. What you may not have been able to sparse out in the 2700 pages and various steps is exactly what’s in there and what isn’t. Even with funding of this level, there are aspects of the energy grid that made it in the package and some that did not.

What’s In the Bipartisan Package

Resiliency

Right off the top of the energy title are a few sections that invest **$11B** over the next five years to fund **deployments** that **harden our grid** to increasing **disturbances and disruptions**. In 2020 alone, over 20 $1B+ events occurred impacting our lives and communities deeply, so this is a starting point for proactive investment to address the downside of these events. Additional aspects in the package invest in wildfire mitigation efforts including treatment of forest and new commission for coordinated planning. Sen Wyden of Oregon called for funding of $50B in his Disaster Safe Power Grid Act for wildfire work alone, so while this funding is a great start it is not enough to meet the needs of the grid.

Hydrogen

Much talk in the industry surrounds the concept of longer duration **storage** and one solution may come in the form of a dramatic expansion of **hydrogen** capacity. The bipartisan bill places a **big bet** with research, demos, and regional hubs totaling upwards of **$10B** in this area. It’s not quite as big as the investments that Europe is making in the area but it would be an **unprecedented infusion of funds** into this space in No. America.

Nuclear

There has been wide coverage of the inclusion of **nuclear** support in the infrastructure package. Funds to help the few remaining resources in development in this capital intensive sector are somewhat **significant**, however, for the future of this industry, even an investment of over $9B for demos and projects (including smaller scale modular) may only make a moderate impact.

Carbon Capture

Another area that got a rather significant boost in this package is carbon capture, sequestration, storage and utilization. Between demos and other funding support this area receives about $12B. Finding effective ways to use and **store carbon** is certainly going to play a central role in our future, but hopefully, this will not be an uneconomic use of extending assets on our system.

What’s In There but Only Somewhat

Modernization

One of the central aspects of the 2008 ARRA stimulus related to energy was a program that funded grid advancements via the smart grid investment grant projects. One section of the bipartisan bill **rekindles** this program with **$3B** in funding. What constitutes a **smart, modern grid** to help develop necessary grid **flexibility** has advanced quite a lot in the last 13 years, so this program may be a bit limited in scope but has a good starting place. The needs for the grid to instrument expanded flexibility have also advanced, so while this offers critical investment, significant expansion will be necessary for the near term.

Electric Vehicles

Much has been noted about how the package will transform electrified transportation. Yes, there is $7.5B for charging infrastructure, and yes there is another $2.5B for electrified buses (other portions are for other clean transit). But in the overall scheme of what it will take to transition the transportation system, this is a rather minor commitment.

Is the bipartisan package a major investment in our grid? YES! Is this something that the House should take up and pass as soon as possible? YES!

Bryce Yonker, executive director, Grid Forward

Energy Storage

Any energy insiders know that one of the keys to a smoother transition of our energy system is a dramatic expansion of energy storage. This package indeed includes $3B for second use and recycling demos and another $3B for supply chain materials support. However, by way of accelerating deployments of grid storage, this package actually does quite little. Even in the promising area of longer duration demos it only allocates a minor $150M and another section calls for one demonstration project.

Buildings and Efficiency

The overall level of funding and support for efficiency and buildings was somewhat limited in the package. Sure, there was the nearly $500M for revolving loan fund and building codes, and $500M for efficiency and renewables on schools, $3.5B for weatherization funds, and some funds for states that could go to these areas, but it overall was a rather small level of support. The concept of the first resource being the one you don’t build – Amory Lovins now famous negawatt – needs to remain a central part of the grid we are making.

Transmission

Political talking points play up how much support the package has for building out transmission infrastructure. There is a section that identifies critical transmission corridors, but it does not fund them. There is another section that creates a new authority with the ability to offer loans up to $2.5B to support transmission programs with early commercial interest. But this package does not fund, for example, long high-voltage transmission projects or create significantly streamlined processes for these areas moving ahead. Rolling up sleeves to get into the details on permitting and siting on transmission will remain critical and didn’t seem to substantially move in this package.

Cybersecurity

It really has been shocking under investment in grid cyber hygiene and hardening over recent years from federal resources and that cyber funding has not been part of any major energy legislation for over a decade. This package does have **$250M** that will help small, mostly rural **utilities** with the **cyber** capabilities and another **$350M** that will go **quite a way** to support **other cybersecurity programs**, but this is not an area to under invest in and it seems it was under invested in the package.

What’s Not In The Package

Demand-Side Flexibility

Demand response and wider demand side management capabilities are essentially not funded in the bi-partisan package. One section encourages utility demand side management considerations, but no real funding goes to bringing demand side resources on the grid. With the potential of FERC 2222 to bring aggregated demand side and distributed resources into markets, much more widely available and adopted controllable devices, and other market developments necessitating the type of resource coming on the grid, this is a bit striking.

Building Automation

Support to ensure that buildings have higher level controls and capabilities to respond to grid signals was also not in the package. See comments in demand side and DER integration above and below.

Distributed Resource Integration

It’s not a future state, but a current need, in which aggregated edge resources can provide significant value to the grid. Turning distributed assets (solar, storage, EVs, thermostats, generators, hot water heaters, and much more) into a resource requires new technology, evolved models, new partnerships and more. Support to help this transition is essential. When well established values can be equitably dispersed to owners and all grid customers (and for the benefit of the system itself), we will have reached a new milestone in the evolution of our energy system – the grid has not reached this place yet and investing to get there is critical.

Analytics & Digital Infrastructure

Real-time grid telemetry to better understand and optimize the dynamics of the system was essentially not in the package and is also not present in most parts of the grid. What’s the saying ‘you can’t manage what you don’t measure?’ Are there exciting things you can do with the roughly 70% of advanced meters that are now deployed? Absolutely! But additional investments are required to apply a suite of capabilities, largely powered by the cloud, to the grid and it’s time that we take them off the shelf and use them.

Renewable Energy

Remember that part of the grid that actually creates the energy we need to run our economy? There are a handful of minor areas of investment in targeted deployments and demonstrations here and there offering a few hundred million dollars. But this package does not help fund the build-out of clean energy resources, nor the grid capabilities to help facilitate it. Economics of resources like wind and solar in many jurisdictions are just so cost-effective that their additions have largely won out over recent years, but if we want a lower carbon society we have to dramatically expand renewable resources. And, importantly, we must build a grid that ensures affordable, reliable power gets to people and businesses when they need it. It seems that the reconciliation package may have central aspects to helping support the further build-out of clean energy resources, but if the IPCC report that came out this week didn’t wake you up to the needs I’m not sure what else may.

What’s Next

The House looks like it will be coming back from recess early later this month to continue work on the infrastructure package. Details of the reconciliation package may be together by mid-September. Early outlines show that of the $198B in energy, the clean energy spending may be a significant portion there and in the $67B for the environment, the clean energy accelerator may be a central feature there.

There are rumblings of the reconciliation package having aspects such as:

More significant support for electrified transportation

Tax and other incentives for storage, transmission and other grid infrastructure

Deeper support for efficiency, connected building and related areas

In Summary: Pass This Package

Is the **bipartisan** package **a major investment in our grid? YES!** Is this something that the **House** should **take up** and **pass as soon as possible**? YES! Would another $200B (or more) for energy and grid in a reconciliation package help move the functionality of our system ahead? YES! Should the reconciliation package take areas of grid modernization and flexibility further? ABSOLUTELY. Should the **bi-partisan** package **wait** and **risk not coming across the line** as the **reconciliation** package comes together? We say **no**, but understand that there are significant political dynamics in play. If the **bi-partisan package falls through** and so does the reconciliation package, support for the nation’s **electric grid** and the **functionally** we want (and really **need**) during the energy transition will be **far below where it needs to be**. It’s time that we dig into modernizing our energy system, let’s get this bill across the line and get to work.

**Extinction**

Benjamin **Monarch 20**, University of Kentucky College of Law, J.D. May 2015, LLM in Energy, Natural Resources, and Environmental Law and Policy from the University of Denver Sturm College of Law, Deputy District Attorney at Colorado Judicial Branch, and Term Member at the Council on Foreign Relations, “Black Start: The Risk of Grid Failure from a Cyber Attack and the Policies Needed to Prepare for It,” Journal of Energy & Natural Resources Law, vol. 38, no. 2, Routledge, 04/02/2020, pp. 131–160

In the industrial world, when a switch is flipped, we take for granted that it will produce light, boot a computer, illuminate a stadium or activate a power plant. We know, of course, that power losses can and do occur. Many of us have lit candles during a thunderstorm or brought out extra blankets when a blizzard takes down transmission lines. As of this writing, the most populated state in the United States, California, is experiencing rolling blackouts.1 Yet even in prolonged power outages, we expect that electricity will be restored and, consequently, life will return to normal. Perhaps we need ask, however, what if power **cannot** be restored in a timely manner? Concern is growing that in the not-too-distant future our electricity supply could be irreparably compromised by a cyber attack. The issue when considering a systemic grid failure of this nature is twofold: how did we reach a point where something so **critical** to **routine life** now presents an **existential threat**, and what can we do to **mitigate** the risk of a catastrophic grid attack?

This article posits that the emergence of cyber attacks on industrial control systems, as a means of war or criminal menace, have reached a level of sophistication capable of crippling those systems. This article argues that a new grid security policy paradigm is required to thwart catastrophic grid failure – a paradigm that recognises the inextricable link between commercial power generation and national security. In section 5, seven policy recommendations are outlined that may, in part, mitigate a future where grid attacks pose **existential risk** to nations and their citizenry. Those recommendations are: first, develop a comprehensive insurance programme to minimise the financial risk of grid disruption; second, train more cybersecurity professionals with particular expertise in industrial control systems; third, institute a federally mandated information-sharing programme that is centralised under United States Cyber Command; fourth, subsidise and/or incentivise cybersecurity protections for small to mid-size utilities; fifth, provide university grants for grid security research; sixth, integrate new technologies with an eye towards securing the grid; and, lastly, formulate clear rules of engagement for a military response to grid disruption.

The purpose of this article is to provide the reader with an introduction to this complex topic. It is the aim of the author to give orientation to this issue and its many branches in the hope that better understanding will animate further curiosity and, ultimately, positive action on the part of the reader. Although many skilled and earnest people work tirelessly to prevent a grid failure scenario, it is essential that more be added to their ranks each day. Advisors, engineers, regulators, private counsel to power generators, and many others who play roles in electric power production are crucial to this subject. So, while this article provides entrée to the topic of grid security, its long-term objective is to spur action by the entire energy-related community. In the end, no one is immune to consequences of grid failure and, therefore, everyone is responsible, in part, for promoting grid integrity.2 In this regard, lawyers who represent various actors in the energy sector are going to be faced with questions and potential legal risks of a magnitude that they have never experienced before.

1.2. Turning the power back on in a powerless world

‘Black start’, not to be confused with the term ‘blackout’, is the name given to the process of restoring an electric grid to operation without relying on the external electric power transmission network to recover from a total or partial shutdown.3 At first glance, this description is unremarkable, but it implies a disturbing catch-22 – how might one restore power if the entire external transmission network is compromised?

If an electric disruption occurs at a household level, some homes may be equipped with a modest gasoline generator to temporarily restore power. If a hospital loses power, it will almost invariably be resupplied by automatic, industrial-scale generators. These **micro** considerations hardly give **anyone pause**; they are hiccups on a stormy night or a snowy day. In other words, their ‘black start’ is a quick and effective process for restoring power. But what happens, at a macro level, when an electric **grid** supplying power to **large portions** of the **U**nited **S**tates goes black, or worse, what happens if **all** of the United States’ electric grids go down **simultaneously?**4 In that scenario, how might enough non-grid power be harnessed and transmitted to turn the United States’ lights back on? Moreover, how might such a catastrophe occur in the first place? Perhaps the more **ominous question** is **not how**, but **whether or not we can survive** such circumstances if they persist in the long term.

The United States electric grid (‘the grid’) is the ‘largest interconnected machine’ in the world.5 It consists of more than 7000 power plants, 55,000 substations, 160,000 miles of high-voltage transmission lines and millions of low-voltage distribution lines.6 The scale and complexity of the grid in the context of the modern digital world are beyond comprehension because within it are innumerable industrial control systems; incalculable connections to digital networks; millions, if not billions, of analogue or digital sensors; many thousands of human actors; and trillions of lines of programming code.7 Further complexifying the grid is that it is comprised of generations of technologies, stitched together in ways that are not inherently secure in a world of cyber threats.8 The vastness of the grid makes security of it challenging. Likewise, the **vastness** of the grid makes the opportunities for intrusion **seemingly infinite**.

By **any measure**, grid **failure** will unleash a **parade of horrors**. **Stores** would **close**, **food** scarcity would follow, **communication** would cease, **garbage** would **pile up**, planes would be grounded, clean **water** would become a **luxury**, service stations would yield **no fuel**, **hospitals** would eventually **go dark**, financial **transactions** would stop, and this is only the **tip of the iceberg** – in a prolonged grid failure **social chaos** would reign, once-eradicated **diseases** would **re-emerge** and, increasingly, hope of returning to a normal life would fade.9 The notion of complete grid failure, once relegated to science fiction comics or James Bond movies, is now not only possible but also one of the most pressing national security threats today.10

**1NC**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Decline cascades---nuclear war**

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

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

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

INTRODUCTION

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

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, **health**care 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 **U**nited **S**tates 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 **forc**ing 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 **S**outh **C**hina **S**ea; **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**

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

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

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

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

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

MS. KAPIN: Thank you.

CONSUMER PROTECTION AND PRIVACY ENFORCEMENT COOPERATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. FEUER: Jeff.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. FEUER: Thank you. Secretary Sullivan.

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

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

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

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

AFTERNOON SESSION

COMPETITION ENFORCEMENT COOPERATION

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

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

MS. COPPOLA: Thanks. Marcus?

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

MS. COPPOLA: Great.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BEZZI: Very much so, yes.

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

MS. PRATT: Yeah, I’ll try not to do –

MS. COPPOLA: So we can just –

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. COPPOLA: Right, right.

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

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

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

MS. COPPOLA: From both.

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

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

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

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

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

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

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

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

MR. BANASEVIC: Nothing spectacular.

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

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

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

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

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

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

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

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

MS. COPPOLA: Right.

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

MS. COPPOLA: Better focused. Right, right.

Jeanne?

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

MS. COPPOLA: Right.

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

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

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

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

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

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

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

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

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

MS. COPPOLA: Right.

MR. BANASEVIC: So what was the –

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

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

MS. COPPOLA: Right.

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

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

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

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

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

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

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

MS. COPPOLA: Thanks.

Nick, Fiona, anything to add?

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

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

(Applause.)

(Brief break.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY

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

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

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

(Applause.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Applause.)

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. CONNELLY: Thank you.

Francis?

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

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

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

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

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

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

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

MS. CONNELLY: Thank you.

Marcela?

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

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

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

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

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

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

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

MS. CONNELLY: Thank you, Marcela. Isabelle?

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

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

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

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

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

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

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

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

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

**Upside AND downside risks of AI are existential---effective governance is key**

Themistoklis **Tzimas 21**, Faculty of Law at the Aristotle University of Thessaloniki, “Chapter 2: The Expectations and Risks from AI”, in Legal and Ethical Challenges of Artificial Intelligence from an International Law Perspective, Springer, 2021, pp. 9–32 Open WorldCat, https://doi.org/10.1007/978-3-030-78585-7

Therefore, it is only natural to be at least skeptical towards a future with entities possessing equal or superior intelligence and levels of autonomy; the prospect even of **existential risk** looms as **possible**.7

AI that will have reached or surpassed our level of intelligence make us wonder why would highly autonomous and intelligent AI want to give up control back to its original creators?8 Why remain contained in pre-deﬁned goals set for it by us, humans?

Even AI in its **current** form and narrow intelligence poses risks because of its **embedded-ness** in an ever-**growing number** of **crucial aspects of our lives**. The role of AI in **military**, **ﬁnancial**,9 **health**, **educational**, **environmental**, **governance networks**-among **others**—are areas where **risk** generated by AI—even **limited**— autonomy can be **diffused** through **non-linear networks**, with **signiﬁcant** impact— even **systemic**.10

The answer therefore to the question whether AI brings risk with it is yes; as Eliezer Yudkowski comments the greatest of them all is that people conclude too early that they understand it11 or that they assume that they can achieve it without necessarily having acquired complete and thorough understanding of what intelli- gence means.12

Our projection of our—lack of complete—understanding of the concept of intelligence on AI is owed to our lack of complete comprehension of human intelligence too, which is partially covered by the prevalent and until now self- obvious, anthropomorphism because of which we tend to identify higher intelligence with the human mind.

Yudkowski again however suggests that AI “refers to a vastly greater space of possibilities than does the term “Homo sapiens.” When we talk about “AIs” we are really talking about minds-in-general, or optimization processes in general. Imagine a map of mind design space. In one corner, a tiny little circle contains all humans; within a larger tiny circle containing all biological life; and all the rest of the huge map is the space of minds-in-general. The entire map ﬂoats in a still vaster space, the space of optimization processes.”13

Regardless of what our well-established ideas are, there are many, different intelligences and even more signiﬁcantly, there are potentially, different intelli- gences equally or even more evolved than human.

From such a perspective, the unprecedented—ness of potential AI developments and the mystery surrounding them emerges as not only the outcome of pop culture but of a radical transformation of our—until recently—self—obvious identiﬁcation of humanity with highly evolved and dominant intelligence.14

The **lack of understanding** of intelligence and therefore of AI may be **frightening** but **does not lead necessarily to regulation**—at least to a **proper** one. We could **even** be led into **mak**ing potentially **catastrophic choices**, on the basis of **false assumptions**.

On top of our lack of understanding, we should add a sentiment of **anxiety** as well as of expectations, which intensiﬁes as an atmosphere of emergency and of expected groundbreaking developments grows. The most graphic description of this feeling is the potential of a moment of singularity, as mentioned above according to the description by Vinge and Kurzweil.

As the mathematician I. J. Good–Alan Turing’s colleague in the team of the latter during World War II—has put it: “Let an ultraintelligent machine be deﬁned as a machine that can far surpass all the intellectual activities of any man however clever. Since the design of machines is one of these intellectual activities, an ultraintelligent machine could design even better machines; there would then unquestionably be an “intelligence explosion,” and the intelligence of man would be left far behind. Thus the ﬁrst ultraintelligent machine is the last invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control.”15 This is in a nutshell the moment of singularity.

The estimates currently foresee the emergence of ultra or super intelligence—as it is currently labelled—or in other words of singularity, somewhere between 20 and 50 years from today, further raising the sentiment of emergency.16 We cannot even foretell with precision how singularity would look like but we know that because of its expected groundbreaking impact, both states and private entities compete towards gaining the upper hand in the prospect of the singularity.17

Despite the fact that such predictions have been proven rather optimistic in the past18 and therefore up to some extent inaccurate, there are reasons to assume that their materialization will take place and that the urgency of regulation will be proven realistic.

After all, part of the disappointments from AI should be blamed on the fact that certain activities and standards, which were considered as epitomes of human intelligence have been surpassed by AI, only to indicate that they were not eventu- ally satisfactory thresholds for the surpassing of human intelligence.19 Partially because of AI progress we realize that human intelligence and its thresholds are much more complicated than assumed in the past.

The vastness’s of deﬁnitions of intelligence, as well as its etymological roots are enlightening of the difﬁculties: “to gather, to collect, to assemble or to choose, and to form an impression, thus leading one to ﬁnally understand, perceive, or know”.20

As with other relevant concepts, the truth is that until recently our main way to approach intelligence for far too long was “we know it, when we see it”. AI is an additional reason for looking deeper into intelligence and the more we examine it, the most complicated it seems.

The combination of lack of complete understanding of intelligence, the unpredictability of AI, its rapid evolution and the prospect of singularity explain both the fascination and the fear from AI. Once the latter emerges, we have no real knowledge about what will happen next but only speculations, which until recently belonged to the area of science ﬁction.

We are for example pretty conﬁdent that the speed of AI intelligence growth will accelerate, once self—improvement will have been achieved. The expected or possible chain of events will begin from AI capacity to re-write its own algorithms and exponentially self—improve, surpassing human intelligence, which lacks the capacity of such rapid self—improvement and setting its own goals.21

We can somehow guess the speed of AGI and ASI evolution and possibly some of its initial steps but we cannot guess the directions that such AI will choose to follow and the characteristics that it will demonstrate. Practically, we credibly guess the prospects of AI beyond a certain level of development.

Two **existential issues** could emerge: ﬁrst, an imbalance of intelligence at **our expense**—with us, humans becoming the inferior species—in favor of non-biological entities and secondly a lack of even fundamental conceptual communication between the two most intelligent “species”. Both of them heighten the fear of **irreversible changes**, once we lose the possession of the superior intelligence.22

However, we need to consider the **expectations as well**. The **positive side** focuses on the so-called **friendly** AI, meaning AI which will **beneﬁt** and **not harm** humans, thanks to its advanced intelligence.23

AI bears the promise of signiﬁcantly enhancing human life on various aspects, beginning from the already existing, narrow applications. The **enhance**d **automation**24 in the industry and the shift to **autonomy**,25 the take—over by AI of tasks even at the **service sector** which can be considered as “tedious”—i.e. in the banking sector—**climate** and **weather forecasting**, **disaster** response,26 the potentially better **coop**eration among different actors in complicated matters such as in matters of **information**, **geopolitics** and **i**nternational **r**elations, **logistics**, **resources** ex.27

The realization of the positive expectations depends up to some extent upon the **complementarity** or not, of AI with **human** intelligence. However, what friendly AI will bring in our societies constitutes a matter of debate, given our lack of unanimous approach on what should be considered as beneﬁcial and therefore friendly to humans—as is analyzed in the next chapter.

Friendly AI for example bears the prospect of freeing us from hard labor or even further from **unwanted** labor; of generating further economic **growth**; of dealing in unbiased, speedy, effective and cheaper ways with sectors such as **policing**, **justice**, **health**, **environment**al **crisis**, natural **disasters**, **education**, **governance**, **defense** and several more of them which necessitate decision-making, with the involvement of sophisticated intelligence.

The synergies between human intelligence and AI “promise” the **enhancement of humans in most of their aspects**. Such synergies may remain external—humans using AI as external to themselves, in terms of analysis, forecasts, decision—making and in general as a type of assistant-28 or may evolve into the merging of the two forms of intelligence either temporarily or permanently.

The second profoundly enters humanity, existentially—speaking, into uncharted waters. Elon Musk argues in favor of “having some sort of merger of biological intelligence and machine intelligence” and his company “Neuralink” aims at implanting chips in human brain. Musk argues that through this way humans will keep artiﬁcial intelligence under control.29 The proposition is that of “mind design”, with humans playing the role that God had according to theologies.30

While the temptation is strong—exceeding human mind’s capacities, far beyond what nature “created”, by acquiring the capacity for example to connect directly to the cyberspace or to break the barriers of biology31—the risks are signiﬁcant too: what if a microchip malfunction? Will such a brain be usurped or become captive to malfunctioning AI?

The merging of the two intelligences is most likely to evolve initially by invoking medical reasons, instead of human enhancement. But the merging of the two will most likely continue, as after all the limits between healing and enhancement are most often blurry. This development will give rise, as is analyzed below, to signif- icant questions and issues, the most of crucial of which is the setting of a threshold for the prevalence of the human aspect of intelligence over the artiﬁcial one.

Human nature is historically improved, enhanced, healed and now, potentially even re-designed in the future.32 Can a “medical science” endorsing such a goal be ethically acceptable and if yes, under what conditions, when, for whom and by what means? The answers are more difﬁcult than it seems. As the World Health Organi- zation—WHO—provides in its constitution, “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or inﬁrmity”.33

Therefore, why discourage science which aims at human-enhancement, even reaching the levels of post-humanism?34 Or if restrictions are to be imposed on human enhancement, on what ethics and laws will they be justiﬁed? How ethically acceptable is it to prohibit or delay technological evolution, which among several other magniﬁcent achievements, promises to treat death as a disease and cure it, by reducing soul to self, self to mind, and mind to brain, which will then be preserved as a “softwarized” program in a hardware other than the human body?35

After all, “According to the strong artiﬁcial intelligence program there is no fundamental difference between computers and brains: a computer is different machinery than a person in terms of speed and memory capacity.”36

While such a scientiﬁc development and the ones leading potentially to it will be undoubtedly, groundbreaking technologically-speaking, is it actually—ethically- speaking—as ambivalent as it may sound or is it already justiﬁed by our well— rooted human-centrism?37

Secular humanism may have very well outdated religious beliefs about afterlife in the area of science but has not diminished the hope for immortality; on the contrary, science, implicitly or explicitly predicts that matter can in various ways surpass death, albeit by means which belong in the realm of scientiﬁc proof, instead of that of metaphysical belief.38

If this is the philosophical case, the quest for immortality becomes ethically acceptable; it can be considered as embedded both in the existential anxiety of humans, as well as in the human-centrism of secular philosophical and political victory over the dei-centric approach to the world and to our existence.

From another perspective of course and for the not that distant philosophical reasons, the quest for immortality becomes ethically ambiguous or even unacceptable.39 By seeking endless life we may miss all these that make life worth living in the framework of ﬁniteness. As the gerontologist Paul Hayﬂick cautioned “Given the possibility that you could replace all your parts, including your brain, then you lose your self-identity, your self-recognition. You lose who you are! You are who you are because of your memory.”40

In other words, once we begin to integrate the two types of intelligence, within ourselves, until when and how we will be sure that it is human intelligence that guides us, instead of the AI? And if we are not guided completely or—even further—at all by human intelligence but on the contrary we are guided by AI which we have embodied and which is trained by our human intelligence, will we be remaining humans or we will have evolved to some type of meta-human or transhumant species, being different persons as well?41

AI promises tor threatens to offer a solution by breaking down our consciousness into small “particles” of information—simplistically speaking—which can then be “software-ized” and therefore “uploaded” into different forms of physical or non-physical existence.

Diane Ackerman states that “The brain is silent, the brain is dark, the brain tastes nothing, the brain hears nothing. All it receives are electrical impulses--not the sumptuous chocolate melting sweetly, not the oboe solo like the ﬂight of a bird, not the pastel pink and lavender sunset over the coral reef--only impulses.”42 Therefore, all that is needed—although it is of course much more complicated than we can imagine—is a way to code and reproduce such impulses.

Even if we consider that without death, we will no more be humans but something else, why should we remain humans once technologies allow us be something “more”, in the sense of an enhanced version of “being”? Why are we to remain bound by biological evolution if we can re-design it and our future form of existence?

Why not try to achieve the major breakthrough, the anticipated or hoped digita- lization of the human mind, which promises immortality of consciousness via the cyberspace or artiﬁcial bodies: the uploading of our consciousness so that it can live on forever, turning death into an optional condition.43

Either through an artiﬁcial body or emulation-a living, conscious avatar—we hope—or fear—that the domain of immortality will be within reach. It is the prospect of a “substrate-independent minds,” in which human and machine consciousness will merge, transcending biological limits of time, space and mem- ory” that fascinates us.44

As Anders Sandberg explained “The point of brain emulation is to recreate the function of the original brain: if ‘run’ it will be able to think and act as the original,” he says. Progress has been slow but steady. “We are now able to take small brain tissue samples and map them in 3D. These are at exquisite resolution, but the blocks are just a few microns across. We can run simulations of the size of a mouse brain on supercomputers—but we do not have the total connectivity yet. As methods improve, I expect to see automatic conversion of scanned tissue into models that can be run. The different parts exist, but so far there is no pipeline from brains to emulations.”45

The emulation is different from a simulation in the sense that the former mimics not only the outward outcome but also the “internal causal dynamics”, so that the emulated system and in this particular case the human mind behaves as the original.46 Obviously, this is a challenging task: we need to understand the human brain with the help of computational neuroscience and combine simpliﬁed parts such as simulated neurons with network structures so that the patterns of the brain are comprehended. We must combine effectively “biological realism (attempting to be faithful to biology), completeness (using all available empirical data about the system), tractability (the possibility of quantitative or qualitative simulation) and understanding (producing a compressed representation of the salient aspects of the system in the mind of the experimenter)”.47

The technological challenges are vast. Technologically speaking, the whole concept is based on some assumptions which must be proven both accurate and feasible.48 We must achieve technology capable of scanning completely the human brain, of creating software on the basis of the acquired information from its scanning and of the interpretation of information and the hardware which will be capable of uploading or downloading such software.49 The steps within these procedures are equally challenging. Their detailed analysis evades the scope of this book.

Some critical questions—they are further analyzed in the next chapters—emerge however: how will we interpret free will in emulation? What will be the impact of the environment and of what environment? How will be missing parts of the human brain re-constructed and emulated? What will be the status of the several emulations which will be created—i.e. failed attempts or emulations of parts of the human brain—in the course of the search for a complete and functioning emulation? Will they be considered as “persons” and therefore as having some right or will they be considered as mere objects in an experimental lab? How are we going to decode the actual subjective sentiments of these emulations? Essentially, are emulations the humans “themselves” who are emulated or a different person? Even further what will human and person mean in the era of emulation?

From a different perspective, the victory over death may be seen as a danger of mass extinction, absorption or de-humanization. In this new, vast universe of emulations will there be place for humans?50

From the above—mentioned discussion, it becomes obvious that at a large extent, the prospect of risk or of expectation is a matter of perspective, for which there is no unanimous agreement in the present. This may be the greatest danger of all, for which Asimov warned us: unleashing technology while we cannot communicate among us, in the face of it.

The existential prospect as well as the risks by AI may self-evidently emerge from technological advances but are determined on the basis of politico—philosophical or in the wider sense, ethical assumptions. This is where the need for legal regulation steps in. Such a need was often underestimated in the past in favor of a solely technologically oriented approach—although exceptions raising issues other than technological can be found too.51 The gradual raising of ethic—political, philosoph- ical and legal issues constitutes a rather recent development, partially because of the realization of the proximity of the risks and of the expectations.

The public debate is often divided between two “contradictory” views: fear of AI or enthusiastic optimism. The opinions of the experts differ respectively.

Kurzweil, who has come with a prediction for a date for the emergence of singularity—until 2045—expects such a development in a positive way: “What’s actually happening is [machines] are powering all of us,” Kurzweil said during the SXSW interview. “They’re making us smarter. They may not yet be inside our bodies, but, by the 2030s, we will connect our neocortex, the part of our brain where we do our thinking, to the cloud.”52

In a well-known article—issued on the occasion of a ﬁlm—Stephen Hawking, Max Tegmark, Stuart Russell, and Frank Wilczek shared a moderate position: “The potential **beneﬁts** are **huge**; **everything that civilization has to offer** is a product of **human** intelligence; we cannot **predict** what we might achieve when this intelligence is **magniﬁed** by the tools **AI** may provide, but the **eradicat**ion of **war, disease, and poverty** would be high on anyone’s list. Success in creating AI would be the **biggest event in human history**. . . Unfortunately, it **might also be the last, unless we learn how to avoid the risks**.”53

**1NC**

**The United States federal government should establish and advocate a framework for contingent international cooperation that prohibitions on anticompetitive business practices by the private sector by narrowing the state action immunity doctrine.**

**The plan sends a protectionist shockwave that ends the last semblance of global free trade**

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INTRODUCTION

Trump. Le Pen. Brexit. Protectionist **rhetoric** has **consumed** the international political stage. Western countries and their leaders were once the **drivers** of **economic globalization**, relying on free-market speeches and the **prospect** of **removing** trade barriers to appeal to their constituents. 1They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized. 2

Although a system of truly free world trade has never been **perfected**, past world leaders have eliminated **most** of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have **bolstered decades of support** for free trade, or at least some version of it. By and large, **tariff** policie**s** and **other forms** of protectionism were either eliminated or **dramatically reduced**. [\*118] **Now**, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which **sends a shockwave** of significant **global consequences**.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders' best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve **protection**ist goals through more **subtle trade vehicles**, like **antitrust** law. 3So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a **fear** of many that antitrust law may **be**come **overused** and **inequitably applied** to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States ("U.S."), President Trump recently imposed tariffs on steel imports, it appears that his intent is to **limit** this behavior to a **specific** industry rather than institute a **widespread policy** favoring the use of tariffs generally. 4To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes. 5 Many still hope that his course of action will be **retracted** and is merely a strong **negotiation tactic**. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions [\*119] that could counteract that progress. 6Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated **continuation** of **cooperative trade agreements** and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on **existing avenues** to meet protectionist aims. Again, we find ourselves relying squarely on **antitrust law**, the **more subtle** and widely accepted **mechanism** of restricting trade, to address perceived inequities. In the words of the World Trade Organization ("WTO"), "once **formal** trade barriers come down, other issues become **more important**." 7 Among the important issues lies **antitrust law**. **Antitrust** and competition laws can **form a subtle trade barrier** resulting in the **imposition of tariff-like measures**.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the **perception** of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the **death of even the smallest semblance of international free trade that remains** in the international marketplace today.

**Nuclear war**

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Four structural forces will shape the future of **I**nternational **R**elations: **globalization** (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. **Environment**al events, global **health** challenges, **internal political developments**, policy mistakes, **technology breakthroughs or failures**, will **intersect** with structure to **define our future**. But these four structural forces will impact the way states behave, in the capacity of great powers to **manage their differences**, and to **act collectively** to settle, rather than exploit, the **inevitable shocks** of the next decade.

Some of these structural forces could be managed to promote prosperity and **avoid war**. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and **effective conflict management**. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of **decoupling**, including g the current American president. 7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of **increasing internal polarization** and **cross border conflict**, diminished economic growth and poverty alleviation, weakened global **institutions** and **norms of behavior**, and **reduced collective capacity** to confront emerging challenges of global **warming**, accelerating **technology change**, **nuclear weapons** innovation and **prolif**eration. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically pro- Trump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not **harmonization** and cooperation, but **friction** and **escalating trade and investment disputes**.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures **gain traction**, it will **become clear** to states—and to companies—that a global trading system more responsive to raw power than to law entails **escalating risk** and diminishing benefits. This will be the **end of economic globalization**, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of **zero-sum power competition** among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19 Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end.

Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will **respond** to heightened risk and uncertainty with **further retrenchment**. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The **international political effects** will be equally **damaging**. The four structural forces act on each other to produce the **more dangerous**, less prosperous **world** projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from **intensifying competition** among powerful states with divergent interests and identities, but in its effects drives down growth and **fuels increased nationalism/populism**, which further **contributes to conflict**. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to **World War Three**,”21 which examines the pre- World War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war. We are beginning to see a similar approach to the globalization of the 21st century. One by one, the **economic constraints** on **military aggression** are **eroding**. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars. In retrospect, the 30 years of tariff hikes, **trade wars**, and currency conflicts that preceded 1914 were **harbingers** of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the **current moment** is **scarier** than the **pre-1914** era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many **hot spots**—the **Korea**n peninsula, the **S**outh **C**hina **S**ea, **Taiwan**—where the **kindling** seems **awfully dry**.

**The CP’s framework multilateralizes antitrust---explicit reciprocity bypasses generic barriers AND spills over to deep economic integration**

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B. Between Contracts and Networks: Frameworks

**A**nother dichotomy that dominates the integration of competition policy pertains to the **forms** of **internationalization**, which in the competition policy space have generally been dominated by **contract-style treaties** on the one hand and by **open networks** on the other.166 Between these two models lies what seems to be an **under-utilized alternative**, which I call a “**framework** for contingent cooperation.”

[FOOTNOTE] 166 This binary view dominates the literature. See, e.g., Edward M. Graham, “Internationalizing” Competition Policy: An Assessment of the Two Main Alternatives, 48 Antitrust Bull. 947, 949 (2003) (“[M]echanisms [for antitrust internationalization] **range** from bilateral **treaties** creating arrangements for cooperation between or among national competition law enforcement agencies to **informal** working arrangements among agencies.”); Eleanor M. Fox, International Antitrust and the Doha Dome, 43 Va. J. Int’l L. 911, 912 (2003) (contrasting “horizontalism” with “globalism”); Anu Piilola, Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation, 39 Stan. J. Int'l L. 207, 247 (2003) (“Rather than drafting **overarching** multilateral agreements on antitrust laws, cooperation efforts in the immediate future are **more likely to succeed** in managing existing diversity and promoting voluntary convergence based on approximation of **domestic**ally applied standards. **Networks** of **antitrust authorities** are **well-suited** to **facilitate** this process of cooperation and voluntary convergence.”). [END FOOTNOTE]

A “framework” in the sense that I am using that term is a facilitative arrangement that does not constitute a treaty under international law,167 and which does not carry the charge of international legal obligation, but which involves an **exchange** of specific and **reciprocally contingent commitments** by participant jurisdictions to engage in mutually beneficial conduct. Specifically, each party states that it will extend certain benefits to each other party **so long as each other does likewise**; the parties may also create **supplementary mechanisms** to **monitor** and/or **adjudicate compliance** with these commitments.168

A framework of this kind is **not a treaty**: it is what Kal Raustiala calls a **“pledge,”**169 and what Charles Lipson calls an “informal” agreement,170 involving no legal obligation, and it involves no commitment of the parties’ reputation for law-abiding behavior.171 On the other hand, it **differs** from an **open**, information-sharing network because it **precisely specifies** behavioral commitments, and because each of the parties shares an understanding that **concrete consequences** will promptly follow—**exclusion** from the benefits provided by others—if its behavior materially deviates from the terms of the commitment.172 A framework is therefore essentially a specific declaration of intention to engage in conduct that benefits others, **contingent upon parallel behavior** by **other participating states**, without obligatory status under international law.

This is, in some sense, the **direct opposite** of the approach typically taken in competition policy chapters in **trade** agreements. The provisions of competition policy chapters partake of the substance of treaty law, but are generally framed in **broad** terms rather than **specifics**, and generally do not reflect a shared understanding that specific consequences will attend breach. By contrast, frameworks do not bind in international law, are framed in **specific** terms than aspirational generalities, and reflect an understanding that the benefits of cooperation will be **withdrawn** in the **event of violation**.

Contingent cooperation thus depends for its effectiveness primarily upon three important dynamics. The first and most important of these is the rationality of strategic cooperation. A familiar mainstream view holds that to a significant extent states behave in international society in ways that **rationally** serve their interests.173 And when cooperation over a series of interactions is **overall** in the interests of each member of a group, but when each member faces a rational incentive to defect from the terms of cooperation in individual cases, familiar economic theory teaches that a strategic cooperative **equilibrium** can be **maintained** among the parties.174 In contingent cooperation, each party understands that if it **defects** materially from the terms of the framework, the other participants will **withdraw** the excludable benefits of cooperation, and this provides the **incentive to comply**.175

Contingent **coop**eration can be made **more stable** by the introduction of certain structures designed to monitor compliance (just as with a cartel among private companies).176 This might among other things involve the **creation** of a **central “facilitator”** that is responsible, in a general sense, for obtaining, collecting, and processing information necessary to sustain a cooperative equilibrium.177 Depending on the purpose and scope of the cooperation project, this could include (for example): reviewing the text of laws, regulations, and policy documents for consistency with the terms of the framework; conducting peer-review-style evaluations and certifications; hosting voluntary dispute resolution processes, including mediation and/or arbitration, to determine whether and when the framework has been violated; or even receiving and handling complaints of violations ombudsman-fashion (i.e., receiving the complaint, giving the subject of the complaint an opportunity to respond, and publishing findings and conclusions). A central facilitator could also go beyond a policing function and offer a common forum for certain forms of **cooperation** and **information sharing**. The nature of such broader functions, and the extent to which they would be useful or desirable, would depend on the nature and purpose of the cooperation.

The second dynamic that **powers** contingent cooperation is the normative appeal of the project itself. The point here is not unlike what Gráinne de Búrca calls **“mission legitimacy”**: the normative force of the underlying purpose of a cooperative project, and specifically the power of that normativity to secure the acceptance and cooperation of those who participate.178 Parties joining projects of contingent cooperation can be expected to be in some sense **self-selecting**: they join such endeavors because, in part, they are **genuinely committed** to promoting and achieving the ends that the project represents, and they embrace the project of cooperation as worthwhile.179 It may sound a little **naïve** to suggest that a project of cooperation may be more likely to “stick” if it has some normative appeal to the participating polities, but **legal scholarship** **has long recognized** that states do what they undertake to do **more often** than **strictly rational** analysis would predict.180 And I think the proposition that genuine commitment to a goal can contribute to compliance is in truth somewhat less naïve than the converse idea that compliance is just as likely without it.

The third source of a framework’s effectiveness is to be found in the acculturative and socializing effects of interaction in an environment in which values and practices are shared and reinforced as normative, and in which attention is paid to the existence and nature of violations. There is a rich and complex literature on the ways in which states, state actors, and the individuals within them may be “**socialize**d” or **“acculturated”** by **repeated engagement** with others through common institutions and shared environments of normativity, eventually contributing to the **emergence** of **obligations** with **genuine normative force**.181 Jutta Brunnée and Stephen Toope have pointed out ways in which the **force** of **legal obligation itself** arises from **shared communities of practice** grounded in **social reality** and **shared understandings**, **not** **formal commitments**.182 As they put it, “[s]tability may be aided by explicit articulation of a norm in a text, but it is ultimately dependent upon [an] underlying shared understanding and a continuous practice of legality.”183

Participation in an endeavor of contingent cooperation may help to engender the development of such understandings and practices, and these may contribute to the **effectiveness** of the framework. In the **long**er term, this may even result in the creation of a **legal instrument**. But this progression is **not necessary** for acculturation to exert a **reinforcing effect**: for, as Anu Bradford accurately notes, there is no reason to think that “the pathway from nonbinding to binding rules” is an inevitable or even a natural one.184

The distinctive value of a framework is that it provides a **low-cost** way for jurisdictions to explore and participate in possible arrangements of **mutual benefit** that depend upon shared concrete understandings regarding future behavior, but without bearing the burden of an obligation under international law, **without** running the **reputational risk** of having to break a treaty, and without facing the **domestic hurdles** (or **political scrutiny**) that a **treaty** would necessitate.185 Use of such a framework may help to **reduce** the **concerns** grounded in **political morality** that might otherwise attend inter-jurisdictional action in **sensitive areas**:186 to use a term I have coined elsewhere, as contingent practices from which states could withdraw at any time, frameworks would benefit from considerable resources of “exit legitimacy.”187

Frameworks are not suited to every application. They seem particularly apt for types of international cooperation that generate excludable benefits for other participants and can be reasonably well monitored: in the sphere of **competition policy**, for example, this would include commitments to provide nondiscriminatory access to procurement markets as well as many forms of **antitrust cooperation** (including cooperation with one another’s investigations, coordination of enforcement activity, the operation of joint filing systems for merger review and cartel leniency programs, and so on). Certain guarantees of nondiscriminatory treatment by SOEs could also be extended on a selective basis. On the other hand, contingent cooperation is much less suitable for projects that require strong and highly credible guarantees of commitment from the participants (in which case a traditional treaty-contract would seem more appropriate188) or groups of parties still lacking the prerequisite agreement on the terms and ambit of desirable cooperation. Nor is it suitable in the absence of sufficient confidence in the ability or incentive of other parties to deliver on their commitments: in these cases, open dialogue and information exchange through a network would seem preferable. Nor, obviously, is it a good fit for projects in which the benefits of cooperation are non-excludable.189 To pick an obvious example, contingent cooperation would not recommend itself as a natural choice for an international project to introduce SOE discipline: the benefits are non-excludable (there is no obvious way to withdraw them selectively in the event of defection) and compliance is very difficult to monitor, so the use of a framework is unlikely to make much of a contribution.190

**Innovation ADV**

**1NC---Top**

**ZERO China internal link --- healthcare innovation has nothing to do with beating them. their evidence is about broader tech and military innovation which the plan doesn’t affect.**

**Innovation Turn---1NC**

**Antitrust stifles innovation in the healthcare sector**

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

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

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

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

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

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

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

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

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

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

**Innovation optimizes synthetic biology---extinction.**

**Karoui et al. ’19** [Meriem, Monica Hoyos-Flight, and Liz Fletcher; August 7; Centre for Synthetic and Systems Biology in the School of Biological Sciences at the University of Edinburgh; Innogen Institute in the School of Social and Political Sciences at the University of Edinburgh; Frontiers, “Future Trends in Synthetic Biology—A Report,” <https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full>]

Tackling Risk

Synthetic biology is an example of a **dual-use** technology: it promises numerous **beneficial** applications, but it can also **cause harm**. This has led to fears that it could, **intentionally** or **unintentionally**, harm humans or **damage the environment**. For example, there is **huge value** in our ability to **engineer viruses** to be more **effective** and specific shuttles for **gene therapies** of devastating inherited disorders; however, engineering viruses may also lead to the creation of even more **deadly pathogens** by those intent on harm.

“Synthetic biology should be regarded as an extension of earlier developments and technologies”

Some would argue that synthetic biology poses an **existential risk** and needs to be treated with **extreme caution**. However, many new technological advances across the decades have met similar concerns. The **uncertainty** and remote possibility of such risks could **hamper the development** of useful technology. Scientists, their host institutions and funding bodies should (and indeed **already** do) consider whether the research planned could be misused. Measures that reduce the likelihood of misuse and its consequences should be implemented and clearly communicated. The synthetic biology community needs to be aware of, and respond to, these challenges by engaging in horizon scanning exercises as well as open dialogue with regulatory bodies and the media.

“Don't avoid risk – manage it”

Being more open about risks, and how they are controlled, provides an opportunity to **shift** discourse toward the **benefits** of synthetic biology in addressing **urgent global needs**, such as the production of **biofuels**, **food security** and more **effective medicines**, a

nd potentially improve public acceptance.

“The questions should not be ‘what’s the next big thing for synthetic biology' but ‘where is the greatest unmet need’.”

Despite the efforts by individual countries to establish synthetic biology research roadmaps, broader, international agreement on common standards (and red lines) across the field may help establish trust and to advance the best pre-competitive research into useful applications.

Meeting participants highlighted the importance of training in responsible research conduct and ethics. Given students' future role as science ambassadors and influencers, their training should not only convey skills and knowledge but also awareness and critical thinking about the prospects and potential for dual use of synthetic biology. All researchers must remain vigilant regardless of the many pressures and distractions of running a successful research lab; they may not have specialist training in identifying the risks of misuse but they are the people **best placed** to maintain **informed oversight** of risks.

One **example** of current synthetic **biology research** with potential dual use is **gene drive technology**, which can be used to propagate a particular **suite of genes** throughout a population. The **benefits** of using gene drive technology include the **eradication** of **disease**-carrying insect populations and the elimination of **invading** pest **species** but it has raised concerns about the **unintended** ecological impacts of reducing or **eliminating a population** ([Callaway, 2018](https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full#B5); [Collins, 2018](https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full#B9)).

Similar release concerns surround research that is harnessing the ability of pathogens to target particular tissues in the body or particular chemicals in the environment, which could greatly aid efforts to deliver targeted therapies or clean-up contaminated sites. To date, such large-scale release for environmental bioremediation interventions has not been possible.

“We need to mind the gap between R&D scale up and communications …. One bad blog can kill a commercial product”

There was consensus that the need for regulation over this community remains important. Regulation needs to keep up to speed with the emerging technologies and should focus on the **product** rather than the process used to create it ([Tait et al., 2017](https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full#B34)). **Unsuitable** regulatory frameworks (as well as unfavorable public perception) could **discourage** private sector **investment** in synthetic biology.

**Competitiveness Turn---1NC**

**Antitrust destroys competitiveness and cements Chinese dominance.**

Robert D. **Atkinson 21**, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill, “Antitrust Can Hurt U.S. Competitiveness,” Wall Street Journal, 07-05-2021, https://www.wsj.com/articles/antitrust-can-hurt-u-s-competitiveness-11625520340

When it comes to technology and the economy, the U.S. is grappling with two contradictory goals: competing with China in advanced technology industries and ramping up antitrust enforcement against leading U.S. tech companies.

Antimonopoly advocates argue that we can have our cake and eat it too. Go ahead and break up big tech, they say; we can still compete with China. But there is a long history of U.S. antitrust actions against **tech**nology companies, and the results suggest **regulators should exercise caution.**

Consider the case of Western Electric, AT&T’s equipment subsidiary. By the early 1920s, it had factories in Austria, Belgium, Canada, China, Germany, France, Italy, Japan, the Netherlands, Russia and the U.K. But because AT&T relied on it exclusively for equipment, in 1925 the Justice Department threatened AT&T with breakup unless it divested Western Electric’s foreign assets, creating International Telephone & Telegraph and ultimately giving birth to robust foreign-owned competitors.

Antitrust regulators also pressured AT&T’s Bell Labs in the early 1950s to license its newly invented transistor technology. That spurred innovation because it helped emerging companies such as Texas Instruments and Fairchild. But because of government pressure, AT&T also licensed its technology, almost for free, to foreign companies. This eventually enabled Sony to take global leadership from the U.S. in consumer electronics, and it gave a major leg up to Europe’s Ericsson and Siemens.

The U.S. also used to be the global **lead**er in television technology thanks to the Radio Corp. of America, the pathbreaker in color television. But in the 1950s the Justice Department required RCA to let other U.S. companies use its patents at no charge. RCA had long relied on licensing revenue, so it started making money where it could—in Japan. “**RCA licenses made Japanese color television possible**,” technology historian James Abegglen has written.

In 1972, the Federal Trade Commission brought a similar antitrust suit against Xerox, the world’s then-leading producer of copier technology thanks in part to its Silicon Valley-based innovation incubator Xerox PARC. Evidently unimpressed, the head of the FTC’s Bureau of Competition F.M. Scherer said he would be “dissatisfied if Xerox’s market share isn’t significantly diminished in several years.” To that end, the FTC forced Xerox to give up its blueprints and other discoveries, allowing an estimated 1,700 patents to make their way to Xerox competitors. Sure enough, **Xerox lost half its market share**—mostly **to Japanese firms** such as Canon, Toshiba and Sharp. Xerox’s only viable path to survival was to strengthen its alliance with Fuji, creating a new giant, Fuji Xerox.

Two years later in 1974, the Justice Department targeted AT&T again, forcing it to break up over the objections of Commerce Secretary Malcolm Baldridge that the suit jeopardized America’s leadership position. This was the death knell for Bell Labs, arguably the most innovative organization that has ever existed.

None of this is to say that antitrust authorities should be passive or turn a blind eye to anticompetitive behavior. But they should recognize that firms’ size can be an important factor in their ability to innovate. Rather than rely on market share as the alarm bell that signals the need for antitrust enforcement, regulators should focus more on firms’ conduct, and they should look first to behavioral remedies, not structural ones. Antitrust analysis should also consider that **tech companies compete globally, not nationally**, so **cutting them down to size** usually **has significant economic consequences**.

The Federal Communications Commission has provided a model for the behavioral approach by conducting a series of inquiries starting in 1970 to investigate the convergence of telephone and computing services and establish rules enabling competition among established and upstart players across sectors that are increasingly intertwined. U.S. courts also provided a model in judgments against Microsoft, which compelled it to let other companies more easily integrate their software into Windows.

As policy makers now consider competition issues related to today’s large technology firms, they would be well advised to learn from this history. With Chinese internet and tech companies waiting in the wings, **aggressive antitrust actions against U.S. leaders run the risk of giving a new generation of foreign rivals the boost they need to dominate global markets**, just as Japanese and European firms have benefited in the past.

**Federalism ADV**

**1NC---Top**

**Advantage is a total joke:**

**No reason Antitrust enforcement spills over to a federal role in AI regulation, or reason why state experimentation in antitrust spills over to state experimentation in AI.**

**Their evidence is about the development of these technologies more broadly, which US leadership doesn’t stop.**

**Parker isn’t key --- tons of other federalism disputes like sanctuary cities and pot legalization thump or solve their internal. Global tech regs are inevitable because their impact evidence proves there’s shared incentives to limit its worst impacts.**

**Federalism---SQUO Solves---1NC**

**FTC regs solve**

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

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

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

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

Budget Analysis

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

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

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

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

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

Enforcement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

**Federalism---I/L Defense---1NC**

**Out of state externalities are exaggerated**

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

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

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

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

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

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

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

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

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

**Impact Defense---Emerging Tech---1NC**

**No emerging tech impact**

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

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

# Block

## States

### Solvency---Overview---2NC

#### CP solves the entire case---it has the states implement multiple reforms while restricting the applicability of Parker immunity

#### States solve, your author agrees

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

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

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

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

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

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

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

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

[Michigan’s Card Ends Here]

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

### Perm: Do Both---AT: Shielding

#### State action doesn’t shield because the plan must be prior AND blame will be properly attributed

Dr. Kathleen Ferraiolo 8, Professor of Political Science at James Madison University, “State Policy Innovation and the Federalism Implications of Direct Democracy”, Publius: The Journal of Federalism, Volume 38, Number 3, January, p. 496-498

Ballot Initiatives that Respond to Federal Inaction

There were a number of policy issues that appeared on multiple state ballots during the past several election cycles. Voters have cast their ballots on topics ranging from same-sex marriage and gambling to education, energy, election reform, and taxes. Eminent domain, the minimum wage, abortion, government finances, and animal rights were other subjects that occupied voters’ attention. This study focuses on four issue areas, most of which were considered in multiple states and targeted federal policy either by responding to perceived inaction or by challenging federal law.

The Minimum Wage

Until the newly elected Democratic Congress tackled the issue in early 2007, the federal government had not enacted a minimum wage increase since 1997, when it was raised to five dollars and fifteen cents an hour. Not content to wait for the federal government to act on what they perceived to be an important issue, in 2006 voters in six states (Nevada, Arizona, Ohio, Colorado, Missouri, and Montana) ratified initiatives to increase the minimum wage and index it to inflation, in some cases overwhelmingly. Eleven state legislatures approved raises in 2006 as well. The average ‘‘yes’’ vote for the 2006 ballot measures was 66 percent, and the average margin of victory was thirty-one points. In 2004, voters in Florida and Nevada overwhelmingly supported minimum wage ballot measures. In total, the National Conference of State Legislatures (2007b) reports that thirty states and the District of Columbia have adopted state minimum wages that are higher than the federal minimum wage. Clearly, despite inaction at the federal level there is much support for raising the minimum wage among both state voters and elected officials, including Democratic and some Republican governors and legislators.

The ballot presence of hot-button issues such as same-sex marriage and the minimum wage has led scholars to investigate the mobilizing effects of these issues (Abramowitz 2004; Smith 2006; Nicholson 2005) and to uncover evidence of initiatives’ educative and electoral spillover effects. Smith and Tolbert, among the first to study the educative effects of direct democracy, found that initiative use is associated with increases in voter turnout, civic engagement, political interest, and political knowledge (Tolbert and Smith 2006; Smith and Tolbert 2004). Smith and Tolbert (2001), Kousser and McCubbins (2005), and others document the spillover effects of ballot initiatives on broader electoral and political processes such as citizens’ voting behavior in candidate elections and political party and interest group strategies. Smith (2006) notes that political officials (such as Arnold Schwarzenegger) and party operatives have skillfully used the initiative process to advance their policy agendas, threaten the legislature into action, and frame candidate elections. Smith, DeSantis, and Kassel (2006) find a positive correlation between support for anti-same-sex marriage measures and the vote for George W. Bush in Ohio and Michigan in 2004. Kousser and McCubbins (2005) describe how Democratic party activists in Colorado helped sponsor a successful 2004 initiative to increase mass transit funding that contributed to high voter turnout and Democratic victories in an election when Republican candidates dominated in many other states. In a wide-ranging study, Nicholson (2005) finds that ballot measures have agenda-setting, priming, and electoral spillover effects, altering the weight voters assign to various issues, the standards by which they evaluate candidates for congressional and gubernatorial offices, and the strategies of political candidates and parties.

No longer the exclusive domain of citizens or interest groups, political party organizations, candidates, and elected officials now use initiative elections for many purposes: To increase voter registration and turnout, advance their political agendas and ideologies, circumvent contribution and expenditure limits in candidate races, selectively mobilize support for their own candidates, prime vote choice for issues on which they believe they have an advantage, or drive a wedge in opponent coalitions (Smith 2005, 2006; Kousser and McCubbins 2005; Smith and Tolbert 2001). As candidates and parties seek initiative success for policy or ideological reasons, they also force their opponents to drain their resources in attempting to defeat initiatives that run counter to their own policy and political goals.

The minimum wage ballot measures that experienced overwhelming success in 2004 and 2006 were part of a concerted effort by progressive activists to mobilize sympathetic voters and sway candidate elections. Support for Florida’s 2004 minimum wage initiative by the Association of Community Organization for Reform Now (ACORN) led to the adoption of the measure as well as a successful voter registration drive. The group appeared to achieve its goals of ‘‘‘driving heightened Democratic turnout, passing the initiative, and building permanent political capacity for future gains’’’ (quoted in Kousser and McCubbins 2005, 973). In 2004 progressive activists in Nevada and Florida, with the approval of the Democratic National Committee, used focus groups and pre-election surveys to pretest the language of a variety of minimum wage proposals. They selected those they believed would mobilize low-income voters who would also support Democratic candidates, including presidential nominee John Kerry (Smith 2006). In 2006, the belief that minimum wage ballot initiatives could mobilize Democratic-leaning voters was an attractive possibility for labor unions (particularly the AFL-CIO, which launched its ‘‘America Needs a Raise’’ campaign that year) and other progressive groups such as ACORN interested in unseating the Republican congressional leadership (Broder 2006; Andrews 2006). The objectives of minimum wage sponsors, then, were manifold, including bringing about both state and federal policy change, boosting voter registration and turnout, and influencing candidate elections.

Even before they appeared on state ballots and in Congress, proposals to increase the minimum wage received high levels of support in public opinion polls (Roper Center 2007, 55). Democrats in Congress are certainly more sympathetic to a minimum wage increase than are most Republicans, and it is not surprising that they would choose to address the issue as one of their signature initiatives in the 110th Congress in early 2007. Still, the evidence presented here suggests that supporters of raising the minimum wage were able to simultaneously achieve three objectives: Advocates took independent state-level action to address a policy issue of public concern; they had a hand in helping to bring about an electoral majority in Congress more favorable to increasing the minimum wage; and their efforts led to increased turnout (if not Democratic victories) in at least some of the states where the measures appeared.

As predicted, the success of minimum wage initiatives in multiple states during the 2004–2006 election cycle ultimately resulted in intergovernmental policy consensus. Impatient with the pace of federal efforts to raise the minimum wage, state lawmakers and voters used the legislative process and direct democracy institutions to address the issue, ultimately producing a divergence in policy not only between states and the federal government but across states as well. The newly elected Democratic Congress resolved this federal–state policy diversity (if not state-to-state diversity; many states set their minimum wage rates higher than the federal level) by acting to raise the minimum wage for the first time in ten years. However, some evidence suggests that state voters and policymakers, and not federal lawmakers, receive most of the credit for policy innovations that originate at the state level. The House of Representatives passed a bill to raise the minimum wage during the second week of the congressional session, but in an early February 2007 poll fewer than one in five respondents gave the House credit for this accomplishment (Roper Center 2007, 131); 84 percent of survey respondents favored a minimum wage increase in 2006, but in March 2007 a mere 2 percent of respondents cited the issue when asked what was the most important thing Congress had done in its first few months (Roper Center 2007, 090). While Congress received little credit for its support for a minimum wage increase, the initiatives’ overwhelming success and the Democratic takeover of Congress in 2007 brought state and federal policy more in line with public opinion, enhancing the opinion-policy connection particularly at the state level and fostering vertical policy consensus and diffusion.

#### State action avoids politics---but the plan gets drawn into partisan wrangling

Peter Beilsenson 10, M.D., CEO and President of the Evergreen Health Cooperative, “Let the States Lead”, Baltimore Sun, 1/31/2010, http://articles.baltimoresun.com/2010-01-31/news/bal-op.health31\_1\_national-health-care-reform-health-status-hospital-and-emergency-room

An additional benefit of reforming health care at the state level first is simply getting the debate out of Washington, where any good-faith effort at figuring out what works for everyday Americans is completely overwhelmed by partisan firefights. In contrast, at the state level, the partisan gridlock and rule by lobbyists is less entrenched, and the media glare that brings out excess partisanship is less extreme. Instead of imagining what a proposal might mean, we could see and weigh results, as we've done with Healthy Howard; the country could then follow the lead of "pioneer" states, saving money and time in the process. Maryland is well-positioned to be among those chosen.

### Solvency---Innovation Adv---2NC

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

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

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

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

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

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

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

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

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

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

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

### Solvency---Federalism Adv---2NC

#### State regulation over tech now & it’s effective

Thomas Hemphill 21, Associate Professor of Strategy, Innovation, and Public Policy in the School of Management, University of Michigan-Flint and an Economic and Regulatory Expert at the American Action Forum, “How State ‘Regulatory Sandboxes’ are Laboratories for Innovation”, The National Interest, 6/13/21, https://nationalinterest.org/feature/how-state-%E2%80%98regulatory-sandboxes%E2%80%99-are-laboratories-innovation-187259

With the nation moving to a post-coronavirus living and working environment, the question confronting policymakers is: How to stimulate the U.S. economy to encourage entrepreneurship, growth, and expanded employment? In our Federalist system, the most effective avenue for managing this economic challenge is found at the state level of governance. State governments are not simply “laboratories of democracy,” but also “laboratories of innovation” that test creative policy ideas that—if evaluated as successful—could be transferred to other states, and perhaps adopted at the federal level. And in the case of local and regional “innovation hubs,” these creative policy ideas can have a significant impact on creating an environment conducive to state (and regional-level) technological entrepreneurship and corporate innovation.

One recent public policy concept that has generated public interest in incentivizing technological economic development is the “regulatory sandbox.” The first such regulatory sandbox was launched in 2015 in the United Kingdom by the government’s Financial Conduct Authority and focused on the country’s emerging financial services technology (“fintech”) industry. A regulatory sandbox creates a “test area” for developing public regulation that stays current with the rapid pace of innovation.

This regulatory sandbox allows established firms and entrepreneurial challengers to test the societal introduction of emerging technologies and/or business models at the leading edge or outside of the existing public regulatory framework. While evaluating demonstration projects and collecting data, technology innovators and public regulators are learning in real-time from each other and better understanding the data results before developing public regulation. Each regulatory sandbox is designed with its own terms and conditions for entry, exit, relief, reporting, and timeframe specific to the establishing government. This “win-win” situation should create more effective and efficient regulation, which is implemented faster and, therefore, benefits society.

Regulatory sandboxes offer a potential solution to the “barrier to entry” challenge by assisting innovative, entrepreneurial businesses in commercializing their products and services with the collaboration of public regulators. Thus, by lowering the initial regulatory costs for new market entrants, these firms have the opportunity to develop into competitors that can absorb standard compliance costs, at which point they “graduate” from the sandbox or, if their business model fails, the entrepreneurs exit without losing as much investment. Yet, regulatory sandboxes also entail risks, as regulatory sandbox critics point out that relaxation in regulatory standards will increase the probability that consumers are harmed. Furthermore, any benefit accrued to one firm in a developing market may result in a disadvantage to all of that firm’s competitors.

The intellectual foundation for governments to embrace the concept of the regulatory sandbox can be found in “Martec’s Law,” an organization/technology relationship first introduced by marketing technologist Scott Brinker in 2013: technological change is exponential, but organizational change is logarithmic. Translated, this “law” means that innovative change is rapid and accelerates as it develops, but for a firm or public regulator organizational change is slower, i.e., gradual.

In pre-coronavirus 2019, there were six state governments—Arizona, Kentucky, Nevada, Utah, Vermont, and Wyoming—that enacted legislation creating fintech regulatory sandboxes within their respective states. In 2020, Florida also enacted legislation creating a fintech regulatory sandbox, and in 2021, both the North Carolina and Tennessee state legislatures are presently considering similar legislation. However, Utah is now considering new legislation expanding its current range of industry-specific regulatory sandboxes—financial technology, insurance, and legal services—to encompass all industries, and thus opening up opportunities for its citizens to take entrepreneurial advantage of a greater range of technological innovations and entrepreneurial opportunities both in and outside innovation hubs.

In 2015, a research group called “Entrepreneurial Spaces and Collectives” conducted inductive observations of innovation hubs and related collaborative organizations worldwide. Their findings focused on four key characteristics that define innovation hubs: first, hubs build collaborative communities with entrepreneurial individuals at the center; second, they attract diverse members with heterogeneous knowledge; third, they facilitate creativity and collaboration in physical and digital space; and fourth, they localize global entrepreneurial culture.

Moreover, researchers at the University of New South Wales, Faculty of Law, published a 2019 study that reviewed over fifty jurisdictions that announced or established fintech sandboxes and other jurisdictions that announced or established innovation hubs. The study results suggest that stand-alone regulatory sandboxes are not the most effective policy approach to building fintech ecosystems, as innovation hubs are overall more effective. Nevertheless, the paper does highlight three key benefits of implementing a fintech regulatory sandbox:

First, the message it sends to the market, i.e., signaling a regulator’s flexibility, approachability, propensity to support innovation, and engage with innovative enterprises.

Second, the boost to innovation, and the incentivizes it provides financial services firms to accelerate their digital transformation programs, while also promoting competition among financial centers to publish—and review—their dispensation policies.

Third, relates to how much the regulator stands to learn about innovation from fintech firms due to their freedom to operate and communicate openly.

This study concludes that in many cases, the “maximum benefit” can be achieved by integrating an innovation hub with a fintech regulatory sandbox “as part of a strategy support the evolution of an innovative fintech ecosystem.”

Regulatory sandboxes may be structured for a particular industry, e.g., financial services, or more generally, e.g., across industries, as is being considered by legislators in Utah. Utah is an early example of the next phase in the evolution of the regulatory sandbox concept, where it will be integrated in support of emerging state-level innovation hubs, potentially creating regional, border-spanning economic opportunities. In the latter case, potential across-state regulatory and economic development alliances will also need to be negotiated for industrial ecosystem harmonization. The opportunities for developing new, smaller innovation hubs in previously non-traditional geographic areas may now be feasible.

In conclusion, states are considering establishing non-industry-specific regulatory sandboxes designed to encourage “smart” public regulation of entrepreneurial activities, while creating a business environment built upon the future prospects of evolutionary industrial ecosystems offering new products and services.

## ADV 1

### U---General---2NC

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

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

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

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

A trajectory of explosive growth

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

Health-tech venture funding reached record levels in 2020

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

Maturing technologies

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

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

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

Fundamentals continue strong

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

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

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

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

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

More innovation on the horizon

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

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

### Link---Overview---2NC

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

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

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

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

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

Does M&A bring higher prices?

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

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

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

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

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

Large firms feed innovation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Innovation---UQ---1NC

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

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

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

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

### Competitiveness---UQ---1NC

#### American tech dominance is high. Only antitrust threatens it.

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

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

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

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

## ADV 2

### 2NC---Top

#### The plan being “signalled” is fake.

David J. Gerber 12, Distinguished Professor of Law at Chicago-Kent College of Law, B.A. from Trinity College, M.A. from Yale University, and J.D. from the University of Chicago, Awarded the Degree of Honorary Doctor of Laws by the University of Zurich, Former Visiting Professor at the Law Schools of the University of Pennsylvania, Northwestern University, and Washington University, Global Competition: Law, Markets, and Globalization, p. 150

f. International implications

These fundamental changes in the aims, methods and dynamics of US antitrust have important transnational implications. One set of implications involves foreign perceptions of US antitrust law. As we have seen, the changes are easily overlooked or misunderstood. They have not been signaled by a new statute or by new institutions or procedures. They are buried in the language of cases and in the actual operations of the legal system. As a result, observers often simply do not perceive the changes or recognize their implications. For example, non-US supporters of an economics-based system have often claimed that it would reduce uncertainty, simplify antitrust law and reduce costs. At a conceptual level it does. In practice, however, the picture has been more complicated.

### AT: Externalities---2NC

#### AFF doesn’t solve and no impact to it anyways, but the CP solves through interstate cooperation

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

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

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

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

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

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

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

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

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

## PTX

**Will Pass---2NC**

**Negotiations will get infrastructure passed—Manchin & Sinema are on board & bipartisanship will cajole progressives**

Susan **Ferrechio 10/27**, Chief Correspondent for Congress in the Washington Examiner, “Pelosi announces hearing on unfinished spending bill in bid to kick-start stalled Biden agenda”, <https://news.yahoo.com/pelosi-announces-hearing-unfinished-spending-185800687.html>, October 27th, 2021

Speaker Nancy Pelosi told fellow House Democrats they’ll begin **consideration** of a massive social welfare package tomorrow, even as President Joe Biden and key Senate Democrats **negotiate** significant remaining **differences** in the legislation.

Pelosi wrote to Democrats Wednesday that the House Rules Committee will hold a hearing on Biden’s "Build Back Better" plan, a social welfare package that would provide new government programs and subsidies, including free day care and monthly payments for families.

The hearing would be the first step in **advancing** the legislation through the **House**, which some Democrats are demanding in exchange for voting to **pass** a **bipartisan** infrastructure bill by the end of the month.

“As we have insisted, we are **close** to agreement on the **priorities** and the **topline** of the legislation, which can and must pass the House and Senate,” wrote Pelosi, a California Democrat. “At the same time, we are facing a crucial deadline for the Bipartisan Infrastructure Framework to pass. To do so, we must have trust and confidence in an agreement for the Build Back Better Act.”

Democrats are closing in on a deal with a price tag of roughly $1.75 trillion, far lower than the $3.5 trillion the party hoped to spend.

Party **lawmakers** continue to negotiate **important** details of the legislation, such as whether or how to include a provision providing paid family and medical leave and expanded Medicare benefits.

Democrats are also squabbling over how to pay for the bill.

Key Democratic centrist Sens. Joe Manchin and Kyrsten Sinema have forced a smaller cost and price tag for the bill, and Manchin does not back the latest attempt to offset the legislation with a special tax on billionaires.

**Nonetheless**, Manchin and Democratic leaders said a framework is **within reach** this week, and there’s enough known about the legislation for Pelosi to call for a hearing.

“I have asked the Rules Committee to hold a hearing tomorrow, Oct. 28, to advance this spectacular agenda For The People,” she wrote.

Pelosi told fellow lawmakers that Democrats “are still fighting for a paid family and medical leave provision,” and she praised the extension of the child tax credit and the inclusion of free preschool and money for the care of the elderly and the disabled.

In the Senate, Democrats scrambled to close in on a deal despite pushback from Manchin on the billionaire tax plan.

“It’s a question of insisting that we have a consistent tax program which demands that those people on top, who are not paying their fair share of taxes, do it,” Sanders told reporters. “And there are a number of options.”

Pelosi, meanwhile, is hoping to provide as much of a framework as is needed to **cajole progressives** who make up the bulk of her caucus to vote in favor of the bipartisan **infrastructure** bill.

The Senate passed the $1.2 trillion bill over the summer, and Biden is **eager** to sign it and declare a significant legislative victory.

The measure is **popular**, according to **polls**.

It would provide **new funding** for roads, bridges, water projects, and broadband expansion, as well as new electric vehicle charging stations.

**It’ll pass through the margins----midterm pressure & negotiations get it done but it’s close**

Lisa **Mascaro &** Farnoush **Amiri 10/29**, Lisa Correspondent for Congress in the Associated Press, Amiri is an Iranian-American journalist for The Associated Press, “Big, messy, complicated: Biden’s plan churns in Congress”, <https://www.miamiherald.com/news/business/article255376086.html>, October 29th, 2021

Fallout was brutal Friday on Capitol Hill after Biden’s announcement of a $1.75 trillion framework, chiseled back from an initial $3.5 trillion plan, still failed to produce ironclad support from two key holdout senators — West Virginia's Joe Manchin and Arizonan Kyrsten Sinema. Congress adjourned the night before with fingers pointed, tempers hot and so much at stake for the president and his party. **Yet** a formal nod of **endorsement** of Biden's plan from the party’s **C**ongressional **P**rogressive **C**aucus late Thursday moved the president one step **closer** to the support needed for **passage** in the House. Determined to **wrap it up**, the House will try next week to **pass** Biden's big bill, along with a companion $1 trillion bipartisan infrastructure package. “It’s only 90% done,” said Rep. Joyce Beatty, D-Ohio, the chair of the Congressional Black Caucus. “So you got to get through the complicated — the last 10%, as you know, is always the most difficult.” The fast-moving — then **slow**-crawling — state-of-play in Congress puts the president and his party at significant political **risk**. Biden’s slipping approval rating and the party’s own hold on Congress are at stake with the 2022 midterm **election** campaigns soon underway. Democrats are struggling in governor's races next week in Virginia and New Jersey, where safe victories might have been expected. "It’s sort of stunning to me that we’re in this place,” exasperated Stephanie Murphy, D-Fla., told reporters late Thursday as the House adjourned. Biden arrived that morning on Capitol Hill triumphant in announcing a historic framework on the bill that he claimed would get 50 votes in the Senate. But the two Democratic Senate holdouts Manchin and Sinema responded — maybe, maybe not. Manchin and Sinema's reluctance to fully embrace Biden's plan set off a domino series of events that sent Biden to overseas summits empty handed and left the party portrayed as in disarray. House Speaker Nancy Pelosi was forced to abandon plans to pass the related measure, the $1 trillion bipartisan infrastructure plan, that has become tangled in the deliberations. Progressives have been **refusing** to vote for that public works package of roads, bridges and broadband, withholding their support as leverage for assurances that Manchin and Sinema are on board with Biden’s big bill. "Everyone is very clear that the biggest problem we have here is **Manchin** and **Sinema**,” Rep. Ruben Gallego of Arizona told reporters. “We don’t trust them. We need to hear from them that they’re actually in agreement with the president’s framework.” **Still**, step by step, Pelosi and Senate Majority Leader Chuck Schumer are **edging** their caucuses closer to **resolving** their **differences** over what would be the most ambitious federal investments in social services in generations and some $555 billion in climate change strategies. “We will vote **both** bills through,” said Rep. Pramila Jayapal, D-Wash., the chairwoman of the progressive caucus, after endorsing Biden's plan. Lawmakers are expected to spend the weekend **negotiating** final details on text that’s swelling beyond 1,600 pages. Some are trying to restore a paid family leave program or lower prescription drug costs that fell out of Biden's framework. Manchin and Sinema, the two holdouts, now hold **enormous** power, essentially deciding whether Biden will be able to deliver on the Democrats’ major campaign promises. Both have **privately** indicated that they are on board, according to Democratic Sen. Chris Coons of Delaware, a Biden ally. “I have new **optimism**,” tweeted Sen. Brian Schatz, D-Hawaii, who was part of a small entourage that met privately with Sinema at the Capitol. “Same,” responded Rep. Joe Neguse, D-Colo., who served as a bridge between progressives and the Arizona senator. But it **won’t be easy**, if past congressional **battles** are any measure. Legislating is work that takes **time** and rarely happens on schedule.

**AT Courts shield the link**

**Biden gets the blame**

Jeffrey **Toobin 15**, Senior Legal Analyst at CNN, “Obama’s Game of Chicken with the Supreme Court”, The New Yorker, 5/21/2015, http://www.newyorker.com/news/daily-comment/obamas-game-of-chicken-with-the-supreme-court?intcid=mod-latest

For many people, the President of the **U**nited **S**tates **is the government** of the **U**nited **S**tates. It’s why he **gets the credit and blame** for so many things, like the economy, where his influence can be **hard to discern**. This is particularly true for a subject in which the President has invested so much of his personal and political capital. If the Supreme Court rules against him, the **Pres**ident can blame the Justices or the Republicans or anyone he likes, and he may even be correct. But **the buck will stop with him**.

**Court action is politicized and blamed on Biden. No cover.**

Lindsay **Harrison 5**, Professor of Law at the University of Miami, “Does the Court Act as “Political Cover” for the Other Branches?”, Legal Debate, 11/18/2005, http://legaldebate.blogspot.com/

While the Supreme Court may have **historically** been able to act as **political cover** for the President and/or Congress, that is **not true** in a world post-Bush v. Gore. The Court is seen today as a **politicized** body, and especially now that we are in the era of the Roberts Court, with a Chief Justice hand picked by the President and approved by the Congress, it is highly unlikely that **Court action will** not, at least to some extent, **be blamed on** and/or credited to **the President and Congress**. The Court can still get away with a lot more than the elected branches since people don't understand the technicalities of legal doctrine like they understand the actions of the elected branches; this is, in part, because the media does such a poor job of covering legal news. Nevertheless, it is preposterous to argue that the Court is entirely insulated from politics, and equally preposterous to argue that Bush and the Congress would not receive at least a large portion of the blame for a Court ruling that, for whatever reason, received the attention of the public.

**Congress closely watches the Court and will backlash to unpopular decisions**

Dr. Alicia **Uribe 13**, Lecturer in Political Science at University of Illinois, PhD University of Washington St. Louis, “The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions”, Law & Society Review, <http://faculty.ucmerced.edu/thansford/Articles/congress_reaction_to_court.pdf>

Conclusion Congress and the Supreme Court interact in a separation-of-powers framework as each attempts to shape policy. While the broader congressional politics literature provides convincing empirical evidence that legislative preferences have a significant effect on Members’ votes and the passage of legislation (e.g., Poole and Rosenthal 2007), no systematic evidence demonstrates legislative overrides of Supreme Court opinions result from congressional preferences. This lack of empirical support exists despite the widespread application of a spatial modeling approach to understand Congress-Court relations, which assumes overrides occur when Court decisions are ideologically distant from Congress. Our first goal was to show, consistent with existing spatial models in the literature, that Congress is more likely to pass laws **overrid**ing Supreme Court decisions the further ideologically removed a decision is from the legislative gridlock interval. Our statistical results, for the first time, demonstrate **Congress overrides Court decisions the further ideologically removed it is from them**. A two standard deviation shift around the mean of the ideological distance of Congress from a Court decision increases the likelihood of an override by 66.4%. This result indicates **Congress takes notice of the policy import of a Court decision and is more likely to reject those it dislikes on ideological grounds**. We therefore provide evidence in support of a core part of SOP models, showing Congress does indeed respond to Court decisions based on its preferences. This result is important because it confirms a fundamental component of nearly all SOP explanations of the relationship between Congress and the Court. Future studies can now be confident that their assertion that legislative preferences influence overrides is on a strong empirical footing. We further demonstrate Congress does not act strategically by avoiding legislative overrides when the Court is likely to reject them. **The implication is that Congress is motivated by position-taking goals** rather than the ultimate effect of its policy actions and the separation-ofpowers. That is, our data suggest Congress cares more about the short-term gains from overriding legislation (e.g., passing the legislation for **electoral purposes**) than the ultimate shape of the policies it chooses to override. This result suggests the Court may, at least when it concerns the ultimate effect of override legislation, have greater influence on the ultimate location of public policy. Of course, this conclusion is tempered by the fact that Congress and the Court rarely disagree about whether the status quo should be altered; Congress wishes to override a Court decision preferred by the Court only 2.5% of the time in our data. As Dahl (1957) famously declared, the Court is not often out-of-step with the elected branches, and as a result Congress and the Court tend to agree on the desirability of previously decided Court cases. Finally, we show the effect of ideological distance matters for all types of Court decisions, including constitutional ones. Thus, while the Court may, as some suggest (e.g., King 2007), **attempt to insulate its decisions from congressional override by using constitutional interpretation, it appears this tactic does not work**. **When Congress is ideologically distant from a Court decision**, regardless of whether the decision is based on constitutional, statutory or common law interpretation, **it is more likely to override it**. This result is new to the literature, and it means subsequent studies cannot exclusively focus on statutory cases.

**AT: Not Intrinsic**

**AT vote switching**

**AT June**

**That’s now**

Ronald **Goldfarb 16**, Professor Emeritus at Middlesex County College, “Abortion Rights Questions are Back Before Supreme Court”, My Central Jersey, 8/23/2016, http://www.mycentraljersey.com/story/money/business/ron-goldfarb/2016/08/23/abortion-rights-questions-back-before-supreme-court/89212944/

Balancing the possible benefits of the Texas law with the right to the services of a professional abortion provider, the court found the “virtual absence of any health benefit.” In his opinion, Breyer wrote that the statute “vastly increases the obstacles confronting women without providing any benefit to women’s health capable of withstanding any meaningful scrutiny.” One fact that certainly played a part in the decision is that if the law were given full effect, the number of women living more than 200 miles from a provider would have increased by more than 7,000 percent.

Next time, we will look at some of the cases that the Supreme Court already has agreed to decide in the new term that begins the **first Monday in October**.

**PC Key---2NC**

**His last minute push is vital**

**PRG 10-1** – Policy Resolution Group at Bracewell LLP, Including Liam Donovan, Principal at Bracwell, served as lead on Tax, Energy and Fiscal Legislative Issues for Associated Builders and Contractors, Worked for the National Republican Senatorial Committee, “Policy Resolution Group Reconciliation & Infrastructure Update,” Policy Resolution Group, 10/1/21

At any rate, **all eyes are on** President **Biden as we enter the endgame**. The storybook ending would be for the **old lion of the Senate** to serve as the **closer**, **sealing the deal**, **uniting the clans**, and **selling the framework** as the **key to enacting his agenda**, with passage of the bipartisan bill as the next step toward Building Back Better. Whether we've reached that chapter yet remains to be seen, and with the debt limit impasse encroaching on the schedule, that page may have to be dog-eared unless an agreement can be reached in the coming days.

Follow Liam on Twitter: @LPDonovan

The Breakdown with Yasmin Nelson

The Breakdown: Whoever blinks first loses. Congress managed to temporarily avert a government shutdown yesterday, extending government funding to December 3. Big cheers because this was not easy. The next big vote is the Bipartisan Infrastructure Bill (BIF). To the dismay of House Progressives, it seems as though Speaker Nancy Pelosi is pushing through on her plans to separate the BIF and the reconciliation package, even with the threat from Progressives to kill the BIF. As you know, the original plan was to vote on the BIF and reconciliation bill in tandem. It is not clear whether Pelosi is hoping Democrats will come together on this or will look to Republicans to pass the bipartisan infrastructure bill. She doesn’t need 218 from her party, meaning she could lose several votes on the floor, but not too many or she risks the bill not passing. Democrats will need to pick up somewhere around 12 Republicans votes should Speaker Pelosi not be able to unite the entire caucus.

In the Senate, Senators Manchin and Sinema have shared that the $3.5 trillion reconciliation package is too expensive, potentially threatening the Biden-Harris domestic policy agenda. Progressives will not support the BIF without also voting on the reconciliation package. Revealed today was a document Manchin shared with Leader Schumer on July 28 cutting the reconciliation bill down from $3.5 trillion to $1.5 trillion, among other propositions from the West Virginian.

There’s a lot left to be determined however, we may know more after this weekend. I don’t expect Speaker Pelosi to put a bill on the floor if she doesn’t have the votes, so if you see a vote on the BIF happening, she likely has created some kind of deal with Progressives or another path to passage with help from the Republicans.

Follow Yasmin on Twitter: @YasminRNelson

Where We Are With Energy Tax by Timothy Urban

Notwithstanding this **dramatic period of conflict** amongst different factions of the Democratic party over the contours of the FY2022 budget reconciliation package, we continue to believe that the **outlook for enactment of an energy and environment** tax **title looks positive**. Since negotiations among the principals are **proceeding today** (Friday, October 1) it is likely that circumstances will require that PRG transmit another update soon. However, as a reminder, the **fundamentals remain** the same: Democrats control the White House, the Senate, and the House; the **legislation** described in the FY2022 budget reconciliation package constitutes a **very high priority for the President**; there is a legislative procedure that allows Democrats to process this package **without GOP votes** and **without** fear of a **GOP filibuster**; everyone acknowledges that a failure to bring this process to fruition could hurt the party in the upcoming midterm elections; and **this President, more than some of his predecessors, has a demonstrated proficiency at bringing Members together and concluding legislative deals**.

**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 **pres**ident **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 **push**ing 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 compartmentalized**

**Grid---Infrastructure Key---2NC**

**Infrastructure will pass & disputes will be resolved---passage is key to modernize the grid**

James **Turner 10/28**, Democratic primary for Tennessee House of Representatives District 52, “Infrastructure Plan to Boost Eminent Domain Activity”, <https://bbgres.com/infrastructure-plan-to-boost-eminent-domain-activity/>, October 28th, 2021

Eminent domain activity is expected to **strengthen** in the years ahead as a result of the Biden administration’s proposed infrastructure bill. The bill’s passage would create one of the **largest** public-use building programs in the nation’s **history**.

Eminent domain gives government entities the power to take private land for public use. In exchange, property-owners are compensated for the fair market value of their property.

As of this writing, a House vote on the bill has been **stalled** by a group of Democrats who won’t act on the legislation until funding is approved for proposed social and climate change programs. **However**, the Biden administration is **working** to **end** the dispute, and there is a good chance that the **impasse** will soon be **resolved** within a matter of weeks, if not **sooner**.

Passage of the infrastructure bill would allocate $1 trillion to finance a wide array of projects. They range from improving deteriorating roads and bridges to expanding the country’s **aging** and **inadequate** electrical power grid. The magnitude of rebuilding the nation’s infrastructure would likely require the government or other entities using eminent domain to meet project demands. Some of those projects include:

Roads and bridges – The infrastructure bill proposes $110 billion to repair and upgrade **roads** and **bridges**. The nation’s roads and bridge were built several decades ago, many of which are in disrepair due to the expanding volume and weight of cars and trucks. According to a White House report, approximately 20 percent, or 173,000 miles, of the country’s highways and major roads and 45,000 bridges are in poor condition.

Transit and rail systems — The legislation would invest $105 billion for public **transit** and **rail transportation**. A large portion will be given to Amtrak, the federally supported passenger train service.

Electric **power** – The spending plan would provide $65 billion to **modernize** the nation’s electric power **grid**, installing new power lines and increasing **renewable** energy resources. Another $15 billion will be allocated to boost the use of electric vehicles. The addition of new power transmission lines is critical to expanding the use of electric vehicles as many urban and suburban areas lack adequate infrastructure to meet power requirements needed to charge large numbers of these vehicles.

Upgrading **broadband** – The infrastructure bill would invest $65 billion in upgrading broadband, which would improve **internet** access in rural areas. This would most likely require using right-of-way acquisitions for the installation of fiber optic cable in rural and remote areas. Right-of-way, a type of easement, is another way eminent domain can be used in acquiring properties for public use.

Airports and seaports – More than $40 billion is expected to be allocated to fund the **upgrade** and **expansion** of airports and seaports. Airports will require additional land acquisitions to extend runways and aerial easements over private properties. Increased lighting, parking and other airport upgrades will also be needed. Funds also will be used for repairs and maintenance, and to **limit** traffic **congestion** near seaports and airports.

Other infrastructure projects – The legislation will provide **billions** of dollars for other infrastructure projects in need of **repairs**, upgrades and expansion including **water** and sewage **systems**, **environmental** remediation, flood **mitigation**, and pedestrian **safety** programs.

**Grid---Impact---2NC**

**Blackouts cascade globally AND it’s irreversible---extinction**

Martin **Rees 18**, Astronomer Royal, Founded the Centre for the Study of Existential Risk, Fellow of Trinity College and Emeritus Professor of Cosmology and Astrophysics at the University of Cambridge, “2. Humanity’s Future on Earth,” in On the Future: Prospects for Humanity, 10/16/2018, Princeton University Press, pp 61-119

2.5. TRULY EXISTENTIAL RISKS?

Our world increasingly depends on elaborate networks: electricity **power grids**, **air traffic control**, **international finance**, globally dispersed **manufacturing**, and so forth. Unless these networks are **highly resilient**, their benefits could be **outweighed** by **catastrophic** (albeit rare) **breakdowns**— realworld analogues of what happened in the 2008 global financial crisis. Cities would be ~~paralysed~~ **[gridlocked] without electricity**— the lights would go out, but that would be far from the most serious consequence. Within a few days our cities would be **uninhabitable** and **anarchic**. Air travel can spread a pandemic worldwide within days, wreaking havoc on the disorganised megacities of the developing world. And social media can spread panic and rumour, and economic contagion, literally at the speed of light.

When we realise the power of biotech, robotics, cybertechnology, and AI— and, still more, their potential in the coming decades— we can’t avoid anxieties about how this empowerment could be misused. The historical record reveals episodes when ‘civilisations’ have **crumbled** and even been **extinguished**. Our world is so interconnected it’s unlikely a catastrophe could hit **any region** without its consequences **cascading globally**. For the first time, we need to contemplate a collapse— societal or ecological— that would be a truly **global setback to civilisation**. The setback could be temporary. On the other hand, it could be **so devastating** (and could have entailed so much environmental or genetic **degradation**) that the survivors could **never regenerate** a civilisation at the present level.

**Destroys food and risks disease---extinction**

Laurence **Hecht 11**, Editor in Chief at 21st Century Magazine, “Solar Storm Threatening Power Grids – Yet no Action Taken to Implement Defences”, <http://oilprice.com/Energy/Energy-General/Solar-Storm-Threatening-Power-Grids-%E2%80%93-Yet-no-Action-Taken-to-Implement-Defences.html> [language modified]

A prolonged lack of electricity in any of these areas would reduce the population to **Dark Age-like conditions**. Drinking **water supply** would break down for lack of pumping, and sewage service would cease shortly thereafter. For lack of refrigeration, the **food chain would collapse**, and medical supplies would be lost. Fuel could not be pumped, and thus transportation would break down. Heating and air conditioning systems would cease functioning. Communication would be [undermined] ~~crippled~~ by the lack of electricity as well as from the direct damage to satellites and sensitive electronics which a solar storm produces—perhaps no Internet and no cell phones. **Modern life would come to an end**, and a population and economic infrastructure unprepared for a return to pre-electricity conditions could **descend into chaos**.

**Collapses warfighting---nuclear war**

Dr. Richard **Andres 11** and Hanna Breetz, Professor of National Security Strategy at the National War College and a Senior Fellow and Energy and Environmental Security and Policy Chair in the Center for Strategic Research, Institute for National Strategic Studies, at the National Defense University, doctoral candidate in the Department of Political Science at The Massachusetts Institute of Technology, “Small Nuclear Reactors for Military Installations: Capabilities, Costs, and Technological Implications”, [www.ndu.edu/press/lib/pdf/StrForum/SF-262.pdf](http://www.ndu.edu/press/lib/pdf/StrForum/SF-262.pdf) [language modified]

The DOD interest in small reactors derives largely from problems with base and logistics vulnerability. Over the last few years, the Services have begun to reexamine virtually every aspect of how they generate and use energy with an eye toward cutting costs, decreasing carbon emissions, and reducing energy-related vulnerabilities. These actions have resulted in programs that have significantly reduced DOD energy consumption and greenhouse gas emissions at domestic bases. Despite strong efforts, however, two critical security issues have thus far proven resistant to existing solutions: bases’ vulnerability to civilian power outages, and the need to transport large quantities of fuel via convoys through hostile territory to forward locations. Each of these is explored below. Grid Vulnerability. DOD is unable to provide its bases with electricity when the civilian electrical grid is offline for an extended period of time. Currently, domestic military installations receive 99 percent of their electricity from the civilian power grid. As explained in a recent study from the Defense Science Board: DOD’s key problem with electricity is that critical missions, such as national strategic awareness and **national command authorities**, are almost entirely dependent on the national transmission grid . . . [which] is fragile, vulnerable, near its capacity limit, and outside of DOD control. In most cases, neither the grid nor on-base backup power provides sufficient reliability to ensure continuity of critical national priority functions and oversight of strategic missions in the face of a long term (several months) outage.7 The grid’s fragility was demonstrated during the 2003 Northeast blackout in which 50 million people in the United States and Canada lost power, some for up to a week, when one Ohio utility failed to properly trim trees. The blackout created cascading disruptions in sewage systems, gas station pumping, cellular communications, border check systems, and so forth, and demonstrated the interdependence of modern infrastructural systems.8 More recently, awareness has been growing that the grid is also vulnerable to purposive attacks. A report sponsored by the Department of Homeland Security suggests that a coordinated cyberattack on the grid could result in a third of the country losing power for a period of weeks or months.9 Cyberattacks on critical infrastructure are not well understood. It is not clear, for instance, whether existing terrorist groups might be able to develop the capability to conduct this type of attack. It is likely, however, that some nation-states either have or are working on developing the ability to take down the U.S. grid. In the event of a war with one of these states, it is possible, if not likely, that parts of the civilian grid would cease to function, taking with them military bases located in affected regions. Government and private organizations are currently working to secure the grid against attacks; however, it is not clear that they will be successful. Most military bases currently have backup power that allows them to function for a period of hours or, at most, a few days on their own. If power were not restored after this amount of time, the results could be disastrous. First, military assets taken offline by the crisis would not be available to help with disaster relief. Second, during an extended blackout, **global military operations** could be **seriously compromised**; this disruption would be particularly serious if the blackout was induced during major combat operations. During the Cold War, this type of event was far less likely because the United States and Soviet Union shared the common understanding that ~~blinding~~ [disrupting] an opponent with a grid blackout could escalate to **nuclear war**. America’s current opponents, however, may not share this fear or be deterred by this possibility. In 2008, the Defense Science Board stressed that DOD should mitigate the electrical grid’s vulnerabilities by turning military installations into “**islands**” of energy self-sufficiency. The department has made efforts to do so by promoting efficiency programs that lower power consumption on bases and by constructing renewable power generation facilities on selected bases. Unfortunately, these programs will not come close to reaching the goal of **island**ing the vast majority of bases. Even with massive investment in efficiency and renewables, most bases would not be able to function for more than a few days after the civilian grid went offline Unlike other alternative sources of energy, small reactors have the potential to solve DOD’s vulnerability to grid outages. Most bases have relatively light power demands when compared to civilian towns or cities. Small reactors could easily support bases’ power demands separate from the civilian grid during crises. In some cases, the reactors could be designed to produce enough power not only to supply the base, but also to provide critical services in surrounding towns during long-term outages. Strategically, islanding bases with small reactors has another benefit. One of the main reasons an enemy might be willing to risk reprisals by taking down the U.S. grid during a period of military hostilities would be to affect ongoing military operations. Without the lifeline of intelligence, communication, and logistics provided by U.S. domestic bases, American military operations would be compromised in almost any conceivable contingency. Making bases more resilient to civilian power outages would reduce the incentive for an opponent to attack the grid. An opponent might still attempt to take down the grid for the sake of disrupting civilian systems, but the powerful incentive to do so in order to win an ongoing battle or war would be greatly reduced.

**Impact---Cyber---2NC**

**Externally, they dropped that infrastructure’s key to cybersecurity:**

**Attacks cause nuclear retaliation**

Vladimir **Orlov 20**, Founder & Director of the PIR Center, President of the Trialogue Club International, Head of the Center for Global Trends and International Organizations at the Diplomatic Academy, Ministry of Foreign Affairs of the Russian Federation, Co-Founder and Academic Supervisor of the International Dual Degree MA Program in Nonproliferation and Global Security Studies, MGIMO University, Professor at MGIMO University, author (or coauthor) of more than a dozen books and monographs and more than three hundred research papers, articles, and essays, publishes his views in Russian and foreign periodicals, “‘No Holds Barred’ and the New Vulnerability: Are We in for a Re-Run of the Cuban Missile Crisis in Cyberspace?,” SSRN Scholarly Paper, ID 3538078, Social Science Research Network, 02/14/2020, papers.ssrn.com, doi:10.2139/ssrn.3538078

Not hundred per cent of the dialogue has been frozen, fortunately. Certain informal, mostly offthe-record, meetings of US and Russian experts on cyber agenda continue taking place, both through Track 2 and Track 1.5. One of the most intellectually stimulating meetings, with frank exchanges, took place in Vienna in December 2018. The report produced after the meeting stressed “the significant risk […] that cyber-attacks could conceivably lead to a military **escalation** that may further trigger a **nuclear** weapons **exchange**, a fact that became more **explicit** with the adoption of the current **N**uclear **P**osture **R**eview. This issue gets complicated given that **third parties** may have the capabilities to **invoke** a cyber conflict between **Russia** and the **U**nited **S**tates. Whether a country or a non-state actor, they could put the two countries on the verge of an armed conflict by attacking **critical infrastructure** of either of them and making it **look** as if the aggressor were the **other** one”[22]. However, one should have no illusion: such informal meetings may be fully fruitful only when their reports and policy recommendations are utilized by the governments. And for that, a warmer climate in bilateral relations is a must. So far, we see exactly the opposite: mercury falling to freezing levels.

Risk of cyber clashes growing into a chaotic global cyber war has been emphasized by the UN Secretary-General Antonio Guterres in his Agenda for Disarmament: “Malicious acts in **cyber**space are contributing to **diminish**ing **trust** among States… States should implement the recommendations elaborated under the auspices of the General Assembly, which aim at building international confidence and greater responsibility in the use of cyberspace.[23]” However, as the members of the US-Russian Track 1.5 working group on strategic stability recently concluded, “without a constructive dialogue on cyber issues between the United States and Russia, the world would most likely fail to agree on any norms of responsible behavior of states in cyber space”[24].

Do we really have to survive a cyber equivalent of the **Cuba**n Missile **Crisis** to realize the **importance** of achieving some kind of agreement on cyber issues, and on the broader agenda of international information security**?**[25] Or is that kind of talk plain old alarmism?

I don’t want to sound a fatalist, but I am even less keen on sounding like an **ostrich that’s buried its head in the sand**. We cannot ignore the **obvious**: whether the world’s most powerful actors like it or not, the world is **sliding to another major crisis** like the one in 1962. The cyber war is **already raging**. There are **no rules of engagement** in that war. The **uncertainty** is **high**. The spiral of **tension** is **getting out of control**. The cyber arms race is gaining momentum. And there are **no guarantees that the next crisis will be controllable**, or that it will result in a **catharsis** as far as international information security regulation is concerned. There’s no telling what will happen once the cyber genie is out of the bottle.