# 1NC

## OFF

**1NC**

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

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

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

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

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

**Vote neg:**

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

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

**1NC**

**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 50 state governments and relevant sub-federal territories should establish a presumption of anticompetition for potential anticompetitive business practices in the technology sector.**

**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]

**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 establishes a presumption of anticompetition for potential anticompetitive business practices in the technology sector.**

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

Allison **Murray 19**, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119

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**

Dr. Michael F. **Oppenheimer 21**, Clinical Professor at the Center for Global Affairs at New York University, Senior Consulting Fellow for Scenario Planning at the International Institute for Strategic Studies, Former Executive Vice President at The Futures Group, Member of the Council on Foreign Relations, The Foreign Policy Roundtable at the Carnegie Council on Ethics and International Affairs, and The American Council on Germany, “The Turbulent Future of International Relations”, in The Future of Global Affairs: Managing Discontinuity, Disruption and Destruction, Ed. Ankersen and Sidhu, p. 23-30

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**

Dr. Daniel **Francis 21**, Climenko Fellow and Lecturer on Law at Harvard Law School, Doctorate of Laws Degree from the NYU School of Law, Master of Laws Degree from Harvard University, JD from Trinity College at Cambridge University, Former Deputy Director of the Federal Trade Commission, “Choices and Consequences: Internationalizing Competition Policy after TPP”, in Megaregulation Contested: The Global Economic Order After TPP, Ed. Kingsbury, Revised 8/26/2021, p. 40-48

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**

**No internal link to synthetic bio, their ev is about pharma innovation, no evidence that tech sector innovation spills up to that or solves disease**

**No china internal link --- no reason increased competitive activity results in military innovations that get scaled up to beat china**

**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 **ev**idence, however, **does not support the view that lax** U.S. **antitrust is reducing innovation.** Eleven of the top sixteen global spenders on **r**esearch **and d**evelopment 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 **v**enture **c**apital 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 **tech**nology 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.

**Innovation---Link Turn---1NC**

**Regulating tech destroys innovation key to stop existential threats.**

Larry **Downes 18**, J.D. from the University of Chicago Law School, frequent contributor to The Washington Post, Harvard Business Review, Forbes and CNET, Project Director at the Georgetown Center for Business and Public Policy's Evolution of Regulation and Innovation project, “How More Regulation for U.S. Tech Could Backfire,” Harvard Business Review, 02-09-2018, <https://hbr.org/2018/02/how-more-regulation-for-u-s-tech-could-backfire>

If 2017 was the year that tech became a lightning rod for dissatisfaction over everything from the last U.S. presidential election to the possibility of a smartphone-driven dystopia, 2018 already looks to be that much worse.

Innovation and its discontents are nothing new, of course, going back at least to the 18th century, when Luddites physically attacked industrial looms. Hostility to the internet appeared the moment the Web became a commercial **tech**nology, threatening from the outset to upend traditional businesses and maybe even our deeply embedded beliefs about family, society, and government. George Mason University’s Adam Thierer, reviewing a resurgence of books about the “existential threat” of disruptive innovation, has detailed what he calls a “techno-panic template” in how we react to disruptive innovations that don’t fit into familiar categories.

But with the proliferation of new products and their reach ever-deeper into our work, home, and personal lives, the relentless tech revolt of the last year shouldn’t really have come as any surprise, especially to those of us in Silicon Valley.

Still, the only solution critics can propose for our growing tech malaise is government intervention — usually expressed vaguely as “regulating tech” or “breaking up” the biggest and most successful Internet companies. Break-ups, which require a legal finding that the structure of a company is enabling anti-competitive behavior, seem now to have become a synonym for somehow crippling a successful enterprise.

Of course, nobody thinks technology companies should be left unregulated. Tech companies, like any other enterprise, are already subject to a complex tangle of laws, varying based on industry and local authority. They all pay taxes, report their finances, disclose significant shareholders, and comply with the full range of employment, health and safety, advertising, intellectual property, consumer protection and anti-competition laws, to name just a few.

There are also specialized laws for tech, including limits on how Internet companies can engage with children. In the U.S., commercial drones must be registered with the Federal Aviation Administration. Genetic testing and other health-related devices must pass muster with the Food and Drug Administration. Increasingly, ride-sharing and casual rental services must meet some of the same standards and inspections as long-time transportation and hospitality incumbents.

There are growing calls, likewise, to regulate social media and video platforms as if they were traditional print or broadcast news sources, even though doing so would almost certainly run afoul of the very free speech protections proponents are hoping to preserve.

But perhaps what tech critics really want are more innovative rules. Traditional regulations, after all, were designed in response to earlier technologies and the market failures they generated. They don’t cover largely speculative and mostly future-looking concerns.

What if, for example, artificial intelligence puts an entire generation out of work? What if genetic manipulations accidentally unravel the fabric of DNA, reversing evolution in one fell swoop? What if social media companies learn so much about us that they undermine—intentionally or otherwise—democratic institutions, creating a tyranny of “unregulated” big data controlled by a few unelected young CEOs?

The problem with such speculation is that it is just that. In deliberative government, legislators and regulatory agencies must weigh the often-substantial costs of proposed limits against their likely benefit, balanced against the harm of simply leaving in place the current legal status quo.

But there’s no scientific method for estimating the risk of prematurely shutting down experiments that could yield important discoveries. There’s no framework for pre-emptively regulating nascent industries and potential new **tech**nologies. By definition, **they’ve caused no measurable harm.**

In particular, breaking up the most successful Internet and cloud-based companies only looks like a solution. It isn’t. Antitrust is meant to punish dominant companies that use their leverage to raise costs for consumers. Yet the **services provided by tech**nology **companies are** often **widely available at little or no cost**. Many of the products and services of Amazon, Apple, Google, Facebook and Microsoft — the internet giants referred to by the New York Times as “the frightful five” — are free for consumers.

More to the point, **break-ups** almost **always backfire**. Think of the former AT&T, which was regulated as a monopoly utility until 1982, when the government changed its mind and split the company into component long-distance and regional phone companies. The sum of the parts actually increased in value — except for the long-distance company, which faded in the face of unregulated new competitors.

Then, over the next 20 years, the regional companies put themselves back together, and, with economies of scale, reemerged as a mobile internet network and Pay TV provider, competing with cable companies and fast-growing internet-based video services including YouTube, Amazon and Netflix. What started as a regulatory punishment for AT&T led to an even bigger network of companies.

On the other hand, **the** constant **threat of a forced divestiture can be disastrous for consumers and enterprise** alike. IBM prevailed against multiple efforts to break it up along product lines, but was so shaken by the decades-long experience that the company became dangerously **timid about future innovations**, missing the shifts first to client-server and then to Internet-based computing architectures, nearly **bankrupting the business.**

Microsoft, similarly, was so distracted by its multi-year fight to avoid break-up both by U.S. and European regulators that it lost essential momentum. It mostly missed out on the mobile revolution, and hesitated in responding to open-source alternatives to operating systems, desktop applications, and other software apps that seriously eroded the company’s once-formidable competitive advantage. (The company is now growing a cloud services business, but is still far behind Google and Amazon.)

These examples hint at an alternative to random and unproven new forms of regulation for emerging technologies: simply **waiting for the next generation of innovations and the entrepreneurs who wield them to disrupt** the supposed **monopolists** right out of their disagreeable behaviors, sometimes fatally.

Today, it might seem that the companies in the frightful five have unbeatable leads in retailing and cloud services, social media, search, advertising, desktop operating systems and mobile devices. But the landscape of business history is littered with the corpses of supposedly invulnerable giants. In our research on wildly successful enterprises who fail to find a second act, Paul Nunes and I note that the average life span of companies on the **S**tandard **&** **P**oor’s **500** has fallen from 67 years in the 1920s to just 15 years today.

In the early years of the internet age, a half-dozen companies were serially crowned the victor in search, only to be unseated by more innovative technology soon after. Yahoo and others gave way to Google, just as Blackberry faded in response to the iPhone. MySpace (remember them?) collapsed at the introduction of Facebook, which, at the time, was little more than a bit of software from a college student. Napster lost in court (no new laws were needed for that), leaving Apple to define a working market for digital music. And who remembers the alarm bells rung in 2000 when then-dominant ISP America On-Line merged with content behemoth Time Warner?

The best regulator of **tech**nology, it seems, is simply more **tech**nology. And despite fears that channels are blocked, markets are locked up, and gatekeepers have closed networks that the next generation of entrepreneurs need to reach their audience, somehow they do it anyway — often embarrassingly fast, whether the presumed tyrant being deposed is a long-time incumbent or last year’s startup darling.

That, in any case, is the theory on which U.S. policymakers across the political spectrum have nurtured technology-based innovation since the founding of the Republic. Taking the long view, it’s clearly been a winning strategy, especially when compared to the more invasive, command-and-control approach taken by **the** **E**uropean **U**nion, which **continues to lag on every measure of the Internet economy**. (Europe’s strategy now seems to be little more than to hobble U.S. tech companies and hope for the best.)

Or compared to China, which has built tech giants of its own, but only by limiting outside access to its singularly enormous local market. And always with the risk that too much success by Chinese entrepreneurs may one day crash headfirst into a political culture that is deeply uncomfortable with the internet’s openness.

That solution — to stay the course, to continue leaving tech largely to its own correctives — is cold comfort to those who believe tomorrow’s problems, coming up fast in the rear-view mirror, are both **unprecedented and catastrophic.**

Yet, so far there’s no **ev**idence supporting shrill predictions of a technology-driven apocalypse. Or that existing safeguards — both market and legal — won’t save us from our worst selves.

Nor have tech’s growing list of critics proposed anything more specific than simply calling for “regulation” to save us. Perhaps that’s because effective remedies are incredibly hard to design.

**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 **lead**ers 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. telecomm**unication 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**.

**Innovation---SQ Antitrust Solves---1NC**

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

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

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

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

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

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

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

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

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

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

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

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

**1NC---AT: Disease**

**Big tech solves disease---fills in government gaps---size is key.**

Abhinav **Verma 20**, India Policy and Strategy Lead for The Rockefeller Foundation, Post-Graduate Diploma in International Law from the Indian Society of International Law, “Treading the unusual alliance between Big Tech and the government post-Covid-19,” Observer Research Foundation, 10-02-2020, https://www.orfonline.org/expert-speak/treading-the-unusual-alliance-between-big-tech-and-the-government-post-covid-19-74472/

In a bid to win back waning public trust, Big Tech with its resources and network influence comparable to that of national governments, has dedicated itself to channelizing **tech**nology for pandemic mitigation and relief. It has plugged itself into areas where **state capacity did not exist** (like Google and Apple collaborating to develop a privacy-conscious exposure notification API) and accelerated development of **tech**nology solutions that have become **the cornerstone of the pandemic response** today (for instance, private volunteers from near-unicorn tech start-ups assisting the development of India’s national contact tracing app, Aarogya Setu, the data collected by which is hosted on Amazon Web Services).

This has led to a reinforcement of Big Tech’s civic role, one that de facto existed considering their influence on shaping behaviors and preferences through their consumer-facing pervasive platforms. As per a new Harris Poll, 38% Americans report viewing Big Tech more positively since the pandemic and 71% are willing to share their locational data to receive alerts about possible viral exposure.

On the other hand, the government’s escapades with escalated techno-solutionism has resulted in **behavior mirroring** that of Big Tech. Right from centralized storage and using GPS data in national contact tracing apps to storing data collected anywhere from 60 days (India) to 6 years (Poland), more and more governments are embarking on a journey of collecting immensely personal and real-time data of its citizens.

As both Big Tech and the government embrace new and overlapping roles, it has created an ecosystem where both **interact and collaborate** with each other, encouraged by a society that is increasingly comfortable with or convinced of the necessity of technology playing a bigger role in their lives, at least during the pandemic. The Indian government, for instance, extended a hand to Google, WhatsApp, and Facebook for mass information and risk communications campaigns, given their large user base in the country. It also partnered with Google Maps at the onset of the migrant exodus to adapt the application to highlight night and food shelters in 30 cities.

The pandemic has been a watershed moment in how Big Tech has been traditionally relating with government. While in the United States, Facebook, Amazon, Google, and Apple are being put under scrutiny by the Congress for alleged antitrust behavior and ‘being too big’, the same **bigness** also **makes them apt allies for national governments as they respond** to the wrath of the Coronavirus.

**\*Disease can’t cause extinction**

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

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

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

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

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

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

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

[FOONOTE]

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

[END FOOTNOTE]

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

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

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

**\*Innovation---Regulation Fails---1NC**

**Regulation fails---economists solve tail end risks, but intervention causes ossification and error costs.**

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

Some have suggested that the antitrust approach described above is inadequate to address competition concerns in digital markets. My own view is that this is incorrect. It is true that many digital markets combine features that encourage large firms. Because the firms participating in such markets often have high fixed but low marginal costs, digital markets often exhibit economies of scale, so smaller companies have a cost-disadvantage and therefore cannot succeed.9 Moreover, many digital markets involve direct network effects10 and/or two-sided markets involving indirect network effects.11 Network effects, like economies of scale, tend to reward large businesses.

**Big**, though, **is not inherently bad**. To the extent firms participating in digital markets are big because they are more efficient and/or provide offerings that are subject to network effects, **efforts to break them up or stunt their growth** are likely to **reduce consumer welfare**.

Moreover, to the extent economies of scale and network effects influence competitive dynamics by rendering certain conduct anti- or procompetitive, the current antitrust regime can account for that. Economists understand quite a bit about economies of scale, network effects, and two-sided markets. Under the prevailing antitrust regime, their views are sure to influence both the application and continued calibration of legal standards, and when economic understanding grows or circumstances change, courts may reach different conclusions.

The alternatives to the prevailing antitrust regime are unappealing. Imposing ex ante conduct rules via statute threatens **ossification** and **significant error costs** (as inflexible rules routinely misfire, especially in dynamic, **tech**nology-driven markets). Creating an agency to oversee competition in digital markets, as some have suggested, risks **agency capture** and may ironically **entrench incumbent firms**, which are likely to have an advantage over new entrants in navigating the regulatory arena. The better approach, in my view, is to stay the course.12

**\*Innovation---Breakups Fail---1NC**

**Breakups empirically fail**

Zachary **Karabell 20**, WIRED contributor, President of River Twice Research, “Don't Break Up Big Tech,” WIRED, 01-23-2020, https://www.wired.com/story/dont-break-up-big-tech/

The problems fueling “break them up” are valid; **breaking them up is not the solution**. To begin with, antitrust enforcement has been **romanticized** well in excess of its accomplishments. The breakup in 1984 of the monopolistic AT&T into eight companies unleashed competition for a time, lowering prices and improving services. Eventually, however, as landlines gave way to wireless, the industry reconsolidated and regulators relaxed. Today telecom is dominated by a reconstituted AT&T along with Verizon, with Sprint as a distant third (yet still immense) player. The court-mandated breakup of Standard Oil in 1911 was the culmination of the most significant antitrust action ever, but the company’s dozens of offshoots eventually recombined into massive oil companies that maintain tremendous power. (ExxonMobil and Chevron are the two most notable.) That breakup also made the wealthy Rockefeller family even wealthier, as their shares in one company became shares in many—almost all of which doubled quickly and then continued their upward trajectory from there.

It’s debatable whether antitrust enforcement has ever been particularly effective. Even a charitable reading of its legacy suggests that the first effect of disrupting Big Tech might be to **enrich the oligopoly’s shareholders**, which is certainly not what advocates would want. In fact, as I argued in that earlier WIRED column, industrial conglomerates often spin off businesses strategically. For instance, United Technologies is about to cut loose its multibillion-dollar divisions Otis Elevators and Carrier (one of the world’s largest HVAC companies) as a means of unlocking shareholder value. One wonders why Silicon Valley executives haven’t gone down this path; perhaps the mantras of integration and a hubristic belief that they will never actually be forced to break up has shut down consideration of those strategies.

Would a forced breakup at least be effective at dispersing power? Let’s say that Facebook were strong-armed into disassembling itself. Its logical components would be legacy Facebook (individual pages), Facebook for business, Instagram, WhatsApp, and Oculus. You might be able to slice it even thinner, but assume Facebook would **be**come five companies. Facebook currently has a market capitalization of just over $600 billion. That total market cap wouldn’t be divided equally among the five new companies; WhatsApp might struggle given its lack of discernible income, while Instagram might soar. It’s likely, however, that the resulting businesses would have a combined valuation **greater than $600 billion**, assuming it follows past patterns and that the tech industry remains robust.

Now imagine each of the Big Tech giants gets disassembled in this way. We might end up with a landscape of 30 companies instead of half a dozen. A quintupling of industry players would, by definition, create a more competitive field. But competition in the antitrust framework, stretching back to the original Sherman Anti-Trust Bill in 1890 and then subsequent legislation such as the Clayton Bill in 1914, is not a virtue or need in and of itself. It is the means to a set of ends—namely, “economic liberty,” unfettered trade, lower prices, and better services for consumers. By itself, **competition does not guarantee anything.**

Meanwhile, it’s hard to see how going from six companies to 30 would give consumers any more choice of services or more control over their data, or how it would help to nurture small businesses and lower costs to consumers and society. Perhaps there would be openings for companies with different business models, ones that brand themselves as valuing privacy and empowering individual ownership of data. This can’t be ruled out, but the nature of data selling and data mining is so embedded in the current models of most IT companies that it is very hard to see how such businesses could thrive unless they charged more to consumers than consumers have so far been willing to pay. In the meantime, **the 30 new megacompanies would still have immense competitive advantages** over smaller startups.

Would the market frictions and disruptions caused by a breakup be worth the possibility that such privacy-focused companies might succeed? Would cracking the current megacompanies into a set of slightly smaller ones effectively balance consumer needs and economic liberty? **You may need to break eggs to make an omelet, but breaking eggs alone doesn’t make one.**

**Antitrust Foundationalism ADV**

**1NC---Top**

**No internal link to labor --- tech mergers don’t solve global labor rights.**

**Hybrid internal link sucks --- hybrid tactics don’t actually work in larger countries like the US, they get deployed in fringe states like the Baltics, and nobody in the middle or in power believes misinfo anyways. Also, none of that would escalate because conventional forces still deter adversaries.**

**Warming inevitable --- they don’t solve other emitters.**

**Inequality---1NC**

**No monopsony AND antitrust is irrelevant for labor concentration**

Joshua D. **Wright 19**, Former Commissioner of the Federal Trade Commission, Ph.D. in Economics from the University of California, Los Angeles; Elyse Dorsey, Adjunct Professor at the Antonin Scalia Law School at George Mason University, Deputy Chair of the Antitrust & Consumer Protection Working Group at the Regulatory Transparency Project, J.D. from the Antonin Scalia Law School at George Mason University; Jonathan Klick, Professor of Law at the University of Pennsylvania Carey Law School, J.D. from the Antonin Scalia Law School at George Mason University; Jan M. Rybnicek, Adjunct Professor and Senior Fellow at the Global Antitrust Institute at the Antonin Scalia Law School at George Mason University, J.D. from the Antonin Scalia Law School at George Mason University, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” Arizona State Law Journal, Volume 51, Spring 2019, Lexis

While documenting potential changes in monopsony power over time and across markets is an important research project, and these economists should be applauded for contributing to our knowledge of an understudied phenomena, there is a **substantial gap** between our current state of knowledge and substantiating a **belief** that dramatic antitrust policy change would improve welfare. Several pieces of **ev**idence render it **difficult to conclude** that **lax antitrust** enforcement has **allowed labor market concentration and** an anticompetitive increase of **monopsony power**. The claim and its underlying arguments are not compelling because they do not appropriately consider the level of **current antitrust** enforcement in labor markets, the **theory** and **empirics** supporting the claim are **ambiguous**, and even if an increase in monopsony power is assumed, it is **unlikely** (and certainly not established) that lax antitrust enforcement played a **causal role**. 223

The first piece of evidence opposing the Hipster Antitrust claim is the existing presence of antitrust enforcement in labor markets. The DOJ has issued several high-profile complaints against companies using "no-poaching" agreements to decrease labor competition. 224 For example, in United States v. Adobe, the DOJ filed a complaint alleging that major technology firms (Adobe, Apple, Google, Intel, Intuit and Bixer) anticompetitively agreed to not pursue each other's highly trained [\*348] technology employees. 225 That same year, the DOJ also successfully enjoined similar no-poaching agreements in the motion picture film industry. 226 Antitrust **enforcement** involving no-poaching agreements has **not tapered** in recent years. The DOJ issued joint guidance with the FTC in October 2016 warning that naked no-poach agreements would be treated as price fixing, and Assistant Attorney General for Antitrust Makan Delrahim recently signaled the potential for forthcoming criminal cases on no-poach agreements among employers. 227

The FTC also recently enjoined the American Guild of Organists from restricting any members' ability to solicit or accept work from any "consumer" who was currently utilizing another member. 228 The FTC challenged this no-poaching arrangement under **§ 5** of the FTC Act as a method of unfair competition that increased prices for consumers. 229 However, apart from federal enforcement, employers restricting labor competition has also been the subject of private antitrust class action litigation. 230 A recent class action filed against Carl's Jr. Restaurants, LLC alleged that Carl's and its independent franchises used "no-hire agreements" to collude and prohibit competitive franchisees from hiring employees from other franchisees. 231

The claim that modern antitrust ignores **labor** markets is certainly **incorrect**. That said, no credible attempt has been made to systematically measure antitrust enforcement activity as it relates to labor markets and its potential effects on monopsony power. Given the recent series of antitrust cases involving labor claims, it is difficult to view the recent antitrust enforcement in labor markets as a gaping hole in antitrust enforcement that invites anticompetitive abuses. If concentration in labor markets has awarded corporations with the monopsony power to suppress labor shares, it would be **unwise** to conclude without more evidence that antitrust enforcement's presence or lack thereof in labor markets is the cause.

[\*349] A second piece of evidence undermining the Hipster Antitrust position concerning monopsony power is potentially even more fundamental-it is not clear that monopsony power is, in fact, increasing. The most cited-to stylized fact in support of the conclusion that monopsony power is widespread and increasing in the United States economy is that the labor share is decreasing. 232 There are, of course, **many reasons** why one might observe a decrease in the labor share. Lax antitrust allowing the creation of monopsony power is one hypothesis. Though the theoretical effects of a massive increase in monopoly and monopsony power through generally lax antitrust enforcement are ambiguous. Indeed, some studies have found a positive **relations**hip between employer **size** and **wages** (i.e. bigger employers pay larger wages). 233 It is also unsettled whether employers with more market power pay lower wages. 234 **Neither economic theory nor empirical ev**idence **paint a clear picture** that an increase in antitrust activity in labor markets would result in a **reduct**ion of monopsony power or upward pressure on wages. 235

Finally, **even if** the increase in monopsony power were empirically assumed to be present, the available **ev**idence does not suggest that **consumer welfare** focused antitrust enforcement played **any meaningful role** in that change. 236 Consider the figure below:

The decrease in labor share has been a **worldwide phenomenon**--with the **U**nited **S**tates experiencing a comparatively **modest** drop. However, if the U.S. drop in labor share is indeed attributed to the lax antitrust enforcement of regulatory regimes shackled to consumer welfare, it becomes **difficult** to explain the **global** phenomenon (surely the ghost of Robert Bork has not infiltrated each competition authority around the globe). Instead, the global statistics suggest that **there are other explanatory variables** **external to antitrust** enforcement that help to explain the recent decrease in labor share. As long as the Hipster Antitrust movement remains transfixed on antitrust enforcement as the cause and solution to decreasing labor shares, it will represent time lost--failing to identify the true causes and most prudent solutions.

**\*Businesses shift to end-around antitrust**

Kate **Tromble 21** & Gregory Nantz, TROMBLE is vice president for Federal Policy at Results for America; NANTZ is a consultant for Results for America, “Federal Evidence-Based Competition Policy,” Inequality and the Labor Market, edited by Sharon Block and Benjamin H. Harris, Brookings Institution Press, 2021, pp. 193–208 JSTOR, https://www.jstor.org/stable/10.7864/j.ctv13vdhvm.17

4. Employer Concentration

A fourth issue contributing to lack of competition in labor markets is increased **employer concentration**. By one estimate, employer concentration reduces workers’ share of overall economic output by one-sixth to onethird (Naidu, Posner, and Weyl 2018). Increased employer concentration also reduces the number of firms competing within a given market, which reduces the risk to employers of engaging in collusion—even if the collusion is not explicit (Padin 2018). Although **federal antitrust reforms** **could** **help** to reduce employer market concentration, the **mechanisms by which employers assert monopsony power are diffuse**, requiring **action along multiple fronts** to successfully increase workers’ bargaining power relative to their employers (Bivens, Mishel, and Schmitt 2018).

U.S. **labor** laws have been in place for decades, but **anticompetitive forces** continue to **impact workers**. Those forces have changed over the years, warranting a systematic review of the cause and effect of statutory and regulatory changes on labor market activity. The federal govern ment has not, however, conducted such a systematic evaluation. Rather, the role of evaluator has been largely outsourced to academic economists and lawyers. Minimum wages, for example, have been the subject of decades of research, with a weak consensus only recently emerging. We need faster and more-robust systems and resources for understanding the impact of our federal labor laws on workers, employers, and markets. The federal government, through the DOL’s Chief Evaluation Office (CEO; the CEO is housed within the Office of the Assistant Secretary for Policy), could provide this kind of cohesive labor market research and evaluation activity.

**Democracy---Big Tech Not Key---1NC**

**There is zero evidence big companies destroy democracy.**

Zachary **Karabell 20**, WIRED contributor, President of River Twice Research, “Don't Break Up Big Tech,” WIRED, 01-23-2020, https://www.wired.com/story/dont-break-up-big-tech/

The idea that breaking up Big Tech would strengthen democracy simply by decreasing the immense power of a few companies may be just as appealing, but **it’s false** too. There is **no** past **ev**idence that **large, dominant companies imperil democracy**; AT&T and IBM had de facto monopolies in the 1960s and 1970s over telephony and computers when democracy in the United States was becoming ever more inclusive. Perhaps it’s not size per se but, rather, the nature of today’s companies—not the “big,” just the “tech”—that is at the heart of such problems.

**Inequality---Impact D---War**

**No connection between inequality and conflict**

Elise **Must 16**, PhD Candidate at the London School of Economics, “When And How Does Inequality Cause Conflict? Group Dynamics, Perceptions And Natural Resources”, Doctoral Dissertation, http://etheses.lse.ac.uk/3438/1/Must\_When\_and\_how\_does\_inequality.pdf

Does economic inequality lead to conflict? This question has attracted the attention of prominent scholars at least since the time of Aristotle (Nagel 1974). The frequent assumption that unequal distribution somehow fuels rebellion has resulted in a vast amount of theoretical as well as empirical work. For long, **results remained mixed**. Despite countless qualitative studies asserting that inequality is a major reason for conflict outbreak, quantitative studies **struggled to establish a firm relationship between the two** (Blattman and Miguel 2010, Cramer 2005, Lichbach 1989).

These quantitative studies, including the most influential ones by Collier and Hoeffler (2004) and Fearon and Laitin (2003), rely on analysis of **individual measures** of inequality. **However**, as most prominently set forth by Frances Stewart, it is **minority groups** or **collectives of individuals** who rebel, **not the whole population**, nor individuals (Stewart 2002). Stewart’s theoretical development has given rise to several quantitative studies which uniformly support the role of economic group inequality in inducing conflict (Buhaug, Cederman, and Gleditsch 2014, Cederman, Weidmann, and Bormann 2015, Cederman, Weidmann, and Gleditsch 2011, Deiwiks, Cederman, and Gleditsch 2012, Østby 2008a, b, Østby, Nordås, and Rød 2009). Hence, there is an emerging consensus in the literature that inequality causes civil conflict when it overlaps with relevant group identities.

Promising as these studies are, they nevertheless neglect a potential crucial part of the inequality-conflict causal chain. Seemingly all studies of inequality and conflict, including those measuring group inequalities, **are based on objective inequalities**. Yet, as Stewart (2010, 14) herself notes, ‘People take action because of **perceived injustices** rather than because of **measured statistical inequalities** of which they **might not be aware**’. Economic inequality measured by the **Gini coefficient**, or by local GDP data, is most commonly used as proxies, leaving completely aside how economic inequality is **actually interpreted and perceived by both groups and individuals** (ref. Zimmermann 1983). It remains obvious, however, that in order for people to take action to address inequalities, the first step is to recognize them and to consider them unjust (Han et al. 2012). The use then, of objective measures in current empirical studies, is based on the assumption that both objective and perceived horizontal inequalities essentially amount to the same thing. Put another way it is assumed that all objective inequalities are actually perceived as inequalities by relevant groups, and conversely all perceived inequalities have an objective basis. These are strong claims that are so far largely untested. Existing studies of the link between objective and perceived horizontal inequalities range from concluding that there is no such link (Langer and Smedts 2013) to documenting imperfect correlations – ranging from 0.27 to 0.30 depending on indicators and datasets (Holmqvist 2012).

While cross-country analyses of conflict have **neglected perceptions of inequality**, the case study literature does offer some examples demonstrating their importance. Interviewing Muslim immigrants in London and Madrid, Gest (2010, 178) finds that what distinguishes democratic activists from those who engage in anti-system behavior, is the nature of their individual expectations and perceptions about shared economic realities. Moving on to larger conflicts, a recent World Bank report concludes that the so called ‘Arab Spring’ was driven by a decrease in popular subjective satisfaction, while the objective economic situation actually improved in the years before the widespread mobilization (Ianchovichina, Mottaghi, and Shantayanan 2015). The report also points to the importance of inter-group inequality as opposed to individual inequality.

My main argument is that in order to better capture the role of inequality in inducing civil conflict, measures have to account for relevant groups as well as for the perception of inequality in these groups. In addition, my analyses fill two other gaps in the literature. While Stewart emphasizes how groups can mobilize around different identities, current studies have almost exclusively focused on ethnic groups. However, a regional identity might be just as relevant (ref. Posner 2004). I will therefor look at the effect of regional economic inequality on civil war. And finally, most of the studies, and all of those with a global scope, rely on time invariant measures of economic horizontal inequality. This is commonly defended by referring to the demonstrated ‘stickiness’ of horizontal inequalities (see e.g. Stewart and Langer 2008, Tilly 1999). Still, a recent study covering 1992 to 2013 demonstrates a global decline of ethnic inequality (Bormann et al. 2016), while Kanbur and Venables (2005) compare case studies of 26 developing countries and conclude that regional inequalities are rising. The data used in this analysis also show that horizontal inequalities change quite substantially over time. Using inequality data from one particular year to analyze decades of conflict incidents is therefore questionable. Hence, my study represents the first time-variant analyses of the effect of both objective and perceived regional inequality on civil war covering developed and developing countries in all world regions14 .

Analysing data for the period 19**89** to 20**14** from the World Values Survey (WVS), I find that countries with a high level of perceived regional economic inequality have an elevated risk of civil war outbreak. On the other hand, **mere objective regional economic inequalities do not have any significant effect**. The group aspect remains essential, as neither objective nor perceived individual inequality is linked to increased civil conflict risk.

**Democracy---Turn---1NC**

**Breaking up tech destroys global democracy**

Mihir **Sharma 21**, Bloomberg Opinion Columnist, Senior Fellow at the Observer Research Foundation, “Big Tech Crackdown Could Have Unintended Victims,” Bloomberg, 06-22-2021, https://www.bloomberg.com/opinion/articles/2021-06-23/facebook-twitter-critics-in-u-s-are-giving-ammunition-to-authoritarian-leaders?sref=X9N3NABa

Nigerians angry about their government’s recent banning of Twitter Inc. have understandably focused their ire on President Muhammadu Buhari: It was Twitter’s decision to take down his tweet implicitly warning separatists that they could suffer the same violent end as former Biafran rebels that prompted the crackdown.

But the Nigerian ban should be a warning to U.S. lawmakers and activists, too. Their **efforts to rein in** U.S.-based **social media giants** such as Twitter and Facebook Inc. **risk restrict**ing **democratic freedoms worldwide.**

Antipathy toward the big platforms is rising across the U.S. political spectrum. Democrats blame them for allowing misinformation to flourish; Republicans, for allegedly censoring right-wing voices. Both agree they should be cut down to size: The Democratic chair of the House Consumer Protection & Commerce subcommittee has said “there is a bipartisan agreement that the status quo is just not working.”

The U.S. consensus has now begun to equate the tech companies’ attempts to maintain the integrity of their platforms through content management with infringements by powerful corporate monopolies on state power. Congress has taken up harsh new bills that are a first step toward using antitrust laws against tech companies.

This **backlash is a gift to authoritarian governments** around the world, who have been looking for a stick with which to beat Twitter and Facebook among others. Illiberal leaders have adopted the language and legal tools being wielded by activists and politicians in the U.S.

Nigeria’s information minister has complained, “Twitter's mission in Nigeria is very suspect, they have an agenda.” Russia, which has started choking Twitter’s bandwidth, last week fined Google and Facebook for “banned content.” Moscow also wants to force the companies to open offices in Russia, so executives and employees can be held hostage to an increasingly arbitrary legal system.

India, meanwhile, reportedly decided last week that Twitter is no longer an “intermediary” but a publisher — and so can be held criminally liable for anything anyone says on it. Police in the northern Indian state of Uttar Pradesh swiftly registered a criminal complaint against Twitter and seven journalists, all of them Muslim.

The reason? A viral video in which an elderly Muslim man claimed to have been attacked because of his religion. (The state police, which answers to a government run by the Hindu nationalist Bharatiya Janata Party, has insisted that there was “no communal angle” to the assault and that both Hindus and Muslims attacked the man.) In response, India’s information minister said, “What happened in UP was illustrative of Twitter’s arbitrariness in fighting fake news.”

What global authoritarians want is for the big U.S.-based social media networks to fall into line with the rest of the local media — which are already, more or less, subject to state control and intimidation. **U.S. action to constrain** the **tech** companies **provides** those **leaders with a toolkit** of controls that **they can justify internationally**. Companies that resist leave themselves open to accusations of hypocrisy if they reject state diktats in the rest of the world but accept them in the U.S.

Many struggling activists in backsliding democracies may not be happy at **depend**ing up**on** the faceless bureaucracies of Big Tech to have their voices heard. Yet not one of them would want that power to devolve instead to the functionaries of their own states, most of whom are eager to silence all dissenters. A U.S. that sets out to subordinate social networks to the government only empowers authoritarian leaders that have wanted to do the same for years.

U.S. activists should take heart in knowing that the state is not the only option for disciplining the social media platforms. Tech companies face another burgeoning check on their power, one some would argue is more trustworthy than any politician: their own workforces.

Facebook, for example, recently had to reorganize its team in India after employees worldwide accused it of being too close to the government. The company’s Israel public policy team, whose head had earlier worked in Benjamin Netanyahu’s office, faced similar accusations last month. Facebook workers fought back, with the New York Times saying, “dozens of employees later formed a group to flag the Palestinian content that they said had been suppressed to internal content moderation teams.”

Authoritarians around the world won’t stop trying to suppress critics online or off. **That doesn’t mean American activists and politicians have to help them**.

**\*Innovation---No Concentration---1NC**

**Concentration is a myth---every shred of data goes neg.**

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, “No, Monopoly Has Not Grown,” National Review, 10-18-2021, https://www.nationalreview.com/2021/10/no-monopoly-has-not-grown

Over the past several years, advocates of much stricter antitrust laws and enforcement have grounded their case on a simple claim: U.S. industry concentration (monopoly) has increased to crisis proportions and the only solution is a radical overhaul of our nation’s antitrust laws, imposing much stricter limits on mergers and breaking up leading companies.

There is only one problem: **Concentration has not increased**, even though the “fact” of rising concentration has been picked up by a large number of pundits and commentators. The Economist got the ball rolling in 2016, concluding that two-thirds of the economy’s roughly 900 industries had become more concentrated between 1997 and 2012. Paul Krugman writes that “growing monopoly power is a big problem for the U.S. economy.” The anti-business advocacy group Open Markets refers to “America’s concentration crisis.” And now leading politicians parrot the claims. Senator Amy Klobuchar (D., Minn.), chair of the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights, states: “We are seeing higher levels of market concentration across our economy.” Congressman David Cicilline (D., R.I.), chair of the House Antitrust Subcommittee, warns that America has a “monopoly problem.” And new Federal Trade Commission chair Lina Khan alleges that the United States faces a “sweeping market power problem.”

You’d think that pundits, advocates, and public officials would make some attempt to rely on data. But alas, that is not the case. The definitive source of data to measure economic concentration comes from the U.S. Census Bureau’s newly released 2017 Economic Census data for over 850 industries, from cane-sugar manufacturing to cable-TV providers. Comparing data from 2017 (the most recent year for which figures are available) and 2002 shows what has really happened with industry concentration. And the data are quite clear: This is much ado about little.

Just **35 of 851 industries are highly concentrated**, with the top four firms’ sales accounting for more than 80 percent of industry sales (this is called the C4 ratio). In 2002, 62 percent of industry output was from industries with low levels of concentration (a C4 ratio below 50 percent), but by 2017, 80 percent of industries had low concentration. Moreover, of the 115 industries with a C4 ratio of 60 percent or more in 2002, the majority got less concentrated. Overall, the average C4 ratio for American industry increased only slightly, from 34.3 percent to 35.3 percent.

In addition, many highly concentrated industries, such as luggage and leather-goods stores (a C4 ratio of 81 percent), performing-arts companies, geothermal power generation, and paint and wallpaper stores, all **face significant competition** from firms in other industries, such as movie theaters, department stores, and natural-gas power generation. Moreover, over those 15 years, imports as a share of GDP have increased, adding even more competition in **many sectors**. And **tech**nology has created new competitors in different industries. Satellite radio and smartphones now compete with over-the-air radio stations, for example.

Anti-corporate populists have taken particular aim at “Big Tech.” However, of the 135 **advanced-tech**nology industries, only eight have C4 ratios above 80, with a majority of sectors becoming **less concentrated** by 2017. And most sectors still face tough competition. For example, even with the rise of Amazon, the C4 ratio of electronic shopping and mail-order houses increased, but only from 24 percent to 37 percent.

Finally, even in sectors where concentration grew to high levels, consumers usually **benefited**. The C4 ratio in the wireless-telecommunications industry increased from 63 percent to 86 percent. But industry productivity grew **84 percent faster** than economy-wide productivity, while capital-investment rates doubled and nominal prices fell by 31 percent from 2011 to 2020.

But surely firms in the few concentrated industries must be making huge profits and jacking up prices, right? In fact, prices **rose less** from 2002 to 2017 in industries with higher levels of concentration than did the overall producer price index. And looking at the 80 industries for which both IRS profit data and Census Bureau concentration data were available, it turns out that there is **no statistical relationship between profits and concentration**. This is consistent with the finding that U.S. non-financial domestic business profits were no higher in the few years before COVID than in the late 19**70s**, when antitrust regulations were supposedly more vigorously enforced.

As Daniel Patrick Moynihan once famously stated, everyone is entitled to his own opinion, but not his own facts. It is time for the debate about “monopoly” and industry concentration to be grounded in facts.

**\*Democracy---Antitrust Fails---1NC**

**Antitrust can’t target democracy---trying to leads to policy incoherence.**

Timothy J. **Brennan 18**, Professor of Public Policy and Economics at the University of Maryland, Baltimore County, Ph.D. from the University of Wisconsin, Madison, “Should Antitrust Go Beyond ‘Antitrust’?”, The Antitrust Bulletin, Vol. 63, No. 1, 2018, https://doi.org/10.1177%2F0003603X18756143

Concern that industrial concentration would lead to concentration of political power is long-standing in economics commentary. Historian Richard Hofstadter suggested in the 1950s that political power should be the main focus of antitrust, in part because economic assessments would typically be too ambiguous to be reliable policy guides.53 This concern has recently surfaced on both sides of the political spectrum. On the progressive side, Sen. Elizabeth Warren has expressed concern that a lack of vigor in the enforcement of antitrust laws has led to, citing Louis Brandeis, the “rule of a plutocracy.”54 During his campaign, President Trump expressed concern with AT&T’s proposed acquisition of Time Warner in such a way to lead some to wonder if he would “[bring] about a return to the populist political consideration (as opposed to a strictly economic analysis) in antitrust enforcement.”55

As with the other goals, the problem is that even if political power is a worthwhile goal, **one still needs to see if it can be coherently integrated into antitrust** law. Wright and Ginsburg argue that antitrust law became coherent only after it rejected this goal.56 Moreover, also as with other goals, more direct ways may be available to address this concern, such as campaign finance reform (including free media time for political candidates) or reducing politically motivated setting of boundaries of legislative voting districts.57 Perhaps few if any of these are feasible following decisions invoking the First Amendment to prevent limits on spending on behalf of candidates or positions.58 But **this is a larger social problem than can be productively resolved on a case-by-case basis by antitrust judges**, even if they had the inclination and ability to weigh this objective to rule against an otherwise benign practice.

# Block

## States

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

#### States are effective regulators of Big Tech AND cause federal follow-on

Richard Cordray 19, JD from the University of Chicago Law School, Former Director of the Consumer Financial Protection Bureau, “Tech Companies May Have Found Their Most Formidable Opponents Yet”, Washington Post, 9/12/2019, https://www.washingtonpost.com/opinions/2019/09/12/tech-companies-may-have-found-their-most-formidable-opponents-yet/

Tech companies may have found their most formidable opponents: state attorneys general.

In the past week, nine attorneys general have joined to examine whether Facebook has engaged in anti-competitive practices, such as stifling competitors or increasing the price of advertising. And 50 announced an investigation into potential monopolistic behavior by Google, which will likely include scrutiny of its search and advertising businesses.

These investigations come against a backdrop of existing regulatory activity by the federal government and European antitrust authorities that continues to ramp up. But the states’ growing interest in reviewing the antitrust practices of the largest tech firms is particularly bad news for the companies. Having so many officials on the case means the investigation will take on a life of its own and will outlast any federal administration — meaning Facebook and Google’s legal headaches won’t be solved any time soon.

It is important to recognize that each state has its own antitrust authority that is distinct from federal authority. For more than a century, state attorneys general have enforced the law against uncompetitive practices that occur within their borders. Sometimes these are local issues. Sometimes they are local manifestations of national issues, as when Ohio, during my term as attorney general, challenged the merger of Continental and United Airlines to secure concessions that saved jobs and flights at Cleveland Hopkins International Airport.

But larger national or multinational companies are often too big for a single state attorney general to keep them in check. The resources needed to pursue such investigations are massive, and in-depth investigations may stretch well beyond the term of a single official. This is not a new phenomenon. The Standard Oil Co. lost its first antitrust suit in Ohio in 1892, but it was not until 1911 that the U.S. Supreme Court finally issued the decisive order that required the company’s dissolution.

When state attorneys general band together, however, they are an imposing force. By pooling their resources and persevering, even as some in their ranks are replaced by others, they can build and maintain the pressure to get results against the most powerful companies. Antitrust claims were part of the fierce war waged by more than 40 state attorneys general who reached the historic settlement against the big tobacco companies. And the 21 state attorneys general who tried the Microsoft antitrust case alongside the Justice Department — their first sally against the big tech companies — helped produce a tough courtroom victory that changed the company’s behavior.

Facebook and Google should expect the entry of the state attorneys general to bear similar influence on these current matters. The involvement of the states is not merely additive but will transform those existing inquiries in unpredictable ways. In the years ahead, it is likely that state investigators will turn up new evidence, find new witnesses, develop new legal support, propose new arguments, devise new claims, fashion new remedies and shape new strategies that affect the timing and direction of the federal and international investigations. The confluence of their many different elements makes these coalitions harder to read and harder to control.

Even more important, the public commitment by the state attorneys general creates other dynamics that are more challenging for the companies. Instead of focused discussions with a single party — be it the Justice Department or the Federal Trade Commission — to persuade or dissuade them on any point, the companies will have to contend with multiple parties. Any decision by federal officials (even the president) to stand down or soften their approach can no longer be counted on to dictate the actual result.

We have seen this same dynamic at work elsewhere in this administration, where state attorneys general are challenging federal actions — or filling the void — to affect the direction of policy in the areas of environmental protection, health care and consumer protection. Federal officials seem sincere in undertaking a vigorous review of the tech industry. But with state attorneys general stepping into the arena as well, we now have an important new backstop to make sure they do.

#### The effect is identical to federal law

Margaret H. Lemos 18, Robert G. Seaks Distinguished Professor of Law at Duke University, JD from New York University, AB from Brown University, Alston & Bird Professor of Law at Duke University, JD from Harvard University Law School, BA in Government and English from Dartmouth College, “State Public-Law Litigation in an Age of Polarization”, Texas Law Review, Volume 97, Issue 1, https://texaslawreview.org/state-public-law-litigation-in-an-age-of-polarization/

As institutional capacity expanded, so too did the opportunities to use it. When federal agencies decreased their enforcement activities in the 1980s, state-level enforcers rushed in to fill the void.109109See William L. Webster, The Emerging Role of State Attorneys General and the New Federalism, 30 Washburn L.J. 1, 5 (1990) (“In short order the states asserted themselves in dramatic fashion. . . . Attorneys general were called ‘fifty regulatory Rambos’ by one individual.”). CLOSE Areas like antitrust and consumer protection, once dominated by the federal government, became enclaves of aggressive state enforcement.110110Id.; see also Clayton, supra note 103, at 535–36 (describing states’ efforts to secure regulatory and enforcement authority in areas including antitrust and consumer protection). CLOSE Many AGs established specialized units and task forces to handle their new responsibilities, thereby “enhanc[ing] the role of the attorney general as a ‘public interest lawyer’ and offer[ing] many opportunities to improve the quality of life for citizens of the states and jurisdictions.”111111NAAG, supra note 95, at 46. CLOSE

Meanwhile, new provisions of federal law facilitated state litigation by authorizing state AGs to enforce federal statutes, often by suing as parens patriae to protect the rights of state citizens.112112See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, sec. 301, § 4(c), 90 Stat. 1383, 1394 (1976) (codified at 15 U.S.C. § 15(c) (2012)) (authorizing states to sue as parens patriae in federal court on behalf of their citizens to secure treble damages for a variety of federal antitrust violations); see also Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 712 (2011) (“As state attorneys general assumed new prominence, provisions for state enforcement began to proliferate in Congress. New provisions have been enacted by virtually every Congress in the last two decades.”). CLOSE The common law doctrine of parens patriae dates back to early English practice, in which the King exercised certain royal prerogatives as “parent of the country.”113113Richard P. Ieyoub & Theodore Eisenberg, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae, 74 Tul. L. Rev. 1859, 1863 (2000); Jack Ratliff, Parens Patriae: An Overview, 74 Tul. L. Rev. 1847, 1850 (2000). CLOSE In its more modern form, the doctrine allows states to vindicate sovereign or quasi-sovereign interests, including an “interest in the health and well-being . . . of [their] residents in general.”114114Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982). CLOSE Today, many state and federal statutes explicitly authorize states to sue as parens patriae.115115Margaret H. Lemos, Aggregate Litigation Goes Public: Representative Suits by State Attorneys General, 126 Harv. L. Rev. 486, 495–96, 496–97 nn.39–40 (2012). Whether Congress could confer authority on state AGs to sue in circumstances where state law denies it is an interesting question, but beyond the scope of this article. CLOSE Others can be read to authorize state suits implicitly by creating broad rights of action for citizens whom the states represent.116116See, e.g., EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003) (citing Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 121 (2d Cir. 2002)) (“[S]tanding provisions in many . . . statutes implicitly authorize[] parens patriae standing by using language that permits any ‘person’ who is ‘aggrieved’ or ‘injured’ to bring suit.”); see also Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 103 (D. Mass. 1998) (quoting 29 U.S.C. § 630(a)) (reasoning that AG has statutory standing to sue under Age Discrimination in Employment Act as “‘legal representative’ of the people of the [state] for the purposes of this action”); Minn. v. Standard Oil Co. (Ind.), 568 F. Supp. 556, 563–66 (D. Minn. 1983) (permitting state to sue as parens patriae under § 210 of Economic Stabilization Act of 1970, which permitted suit by any “person” because “when a state acts in its quasi-sovereign capacity in a parens patriae action, . . . [a] harm to the individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff”). CLOSE And even absent specific statutory authorization, state AGs may (depending on state law) have common law or constitutional authority to litigate as parens patriae on behalf of citizens.117117See generally Ieyoub & Eisenberg, supra note 111, at 1864–75 (describing the contours of parens patriae doctrine and its grounding in common law). CLOSE

The 1990s tobacco litigation built on, and spurred, expansions in AG authority. Prior to the states’ assault on Big Tobacco, countless private plaintiffs had sued under a variety of tort and warranty theories—all seeking to hold the industry accountable for peddling an unreasonably dangerous product. None succeeded.118118Id. at 1860 (“Before the states’ litigation, the tobacco industry had not lost a smoking case . . . .”). CLOSE Many plaintiffs were simply outspent by the defendants; others were turned away on the ground that they had assumed the risk of smoking; and still others were thwarted by courts’ refusal to permit large numbers of smokers to sue together as class actions.119119Anthony J. Sebok, Pretext, Transparency and Motive in Mass Restitution Litigation, 57 Vand. L. Rev. 2177, 2184–88 (2004) (describing the history of tobacco litigation). CLOSE

Then came the states, which were able to avoid the pitfalls of earlier litigation and bring the tobacco companies to the bargaining table. Most states pursued restitution actions, seeking reimbursement for Medicaid expenses incurred in the treatment of smoking-related illnesses.120120Id. at 2189; see also id. (describing Minnesota’s consumer-fraud approach as a notable exception). CLOSE By shifting the focus from individual smokers to the states’ own losses, the state suits were able to cut off the tobacco companies’ prime defense strategy: blaming individual smokers. As Mississippi AG Mike Moore put it, “This time, the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of indigent smokers who did.”121121Mike Moore, The States Are Just Trying to Take Care of Sick Citizens and Protect Children, 83 A.B.A. J. 53, 53 (1997). CLOSE Similarly, the states’ strategy allowed them to avoid the challenges of class certification: “[I]nstead of millions of plaintiffs, there would only be one. Concerns over common issues of fact, which doomed earlier class actions to fail the predominance and superiority tests of federal and state class action statutes, would be finessed.”122122Sebok, supra note 117, at 2190. CLOSE Ultimately, forty-six states joined the Master Settlement Agreement, which required the tobacco companies to pay the states more than $200 billion over twenty-five years and to agree to an array of regulatory constraints.123123Hanoch Dagan & James J. White, Governments, Citizens, and Injurious Industries, 75 N.Y.U. L. Rev. 354, 371–73 (2000). Four states settled separately for approximately $36.8 billion, bringing the total to roughly $243 billion. W. Kip Vicusi, The Governmental Composition of the Insurance Costs of Smoking, 42 J.L. & Econ. 575, 577 (1999). CLOSE

Although the tobacco litigation is in some ways sui generis, it highlights several features that have helped fuel state litigation more broadly. First, the tobacco suits entailed an “unprecedented” degree of interstate cooperation among AGs, and their success made clear—to AGs as well as to potential defendants—the power of concerted multistate action.124124Ieyoub & Eisenberg, supra note 111, at 1860 (“The scope of interstate attorney general cooperation was unprecedented.”). CLOSE Second, the litigation demonstrated the value of cooperation between AGs and private attorneys. The states’ suits benefited from substantial assistance and financing from private lawyers—a pattern that has been repeated in many subsequent actions. By teaming up with private counsel (particularly those willing to work for a contingent fee), state AGs can expand their reach into litigation that would otherwise be prohibitively expensive or resource-intensive, or would require specialized expertise.125125See generally Margaret H. Lemos, Privatizing Public Litigation, 104 Geo. L.J. 515, 532–33, 538–46 (2016) (analyzing the costs and benefits of partnerships between public and private attorneys). CLOSE Third, the staggering size of the settlement—“the largest transfer of wealth as a result of litigation in the history of the human race”126126Michael DeBow, The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage, 31 Seton Hall L. Rev. 563, 564 (2001). Critics are quick to note that the settlement is being financed largely by smokers, who now pay more for cigarettes. Id.; see also Sebok, supra note 117, at 2181 (“As an executive at R.J. Reynolds ironically put it, ‘[T]here’s no doubt that the largest financial stakeholder in the [tobacco] industry is the state governments.’”). CLOSE—revealed just how lucrative state litigation could be. In the years since the tobacco litigation, state AGs have become adept at using large monetary recoveries to publicize the financial contributions they make to the state and its citizens.127127See Margaret H. Lemos & Max Minzner, For-Profit Public Enforcement, 127 Harv. L. Rev. 853, 855 & n.6 (2014) (offering examples); Lemos, supra note 110, at 732–33 & n.153 (same). CLOSE In many states, moreover, AG offices can retain certain types of financial recoveries, making litigation a self-sustaining endeavor.128128Lemos & Minzner, supra note 125, at 866–67 (describing “revolving fund[]” arrangements at the state level). CLOSE

Finally, the states’ legal theories in the tobacco cases created a template for future actions against industries that cause widespread harm to state citizens.129129See Ieyoub & Eisenberg, supra note 111, at 1862 (arguing that “it is [the states’] legal theories, together with the precedent of concerted attorney general action, that have the greatest implications for joint action on other fronts”). CLOSE The recoupment strategy alone is a powerful tool for recovering the states’ own expenses130130See Dagan & White, supra note 121, at 355–57 (focusing on the states’ restitutionary claims and describing similar claims against gun manufacturers and lead-paint makers). CLOSE and becomes more powerful still when combined with the states’ authority to sue as parens patriae to address harms to their citizens.131131See generally Ieyoub & Eisenberg, supra note 111, at 1862, 1875–83 (describing parens patriae standing as applied in the tobacco litigation and its potential for future suits). For a more critical take, see DeBow, supra note 124, at 565 (arguing that “the tobacco template could conceivably be applied to a wide range of industries in future government litigation—including, perhaps, makers of alcoholic beverages, fatty foods, and automobiles” and warning of a “substantial danger that state attorneys general and local government officials will regularly succumb to the temptation of the tobacco example, and will seek to achieve regulatory and tax outcomes through litigation . . . .”). CLOSE In the ongoing state efforts against opioid manufacturers, for example, the states have asserted various common law tort claims and are seeking recovery for harms to citizens and to their own proprietary interests, including “billions of dollars in damages to the State related to the excessive costs of healthcare, criminal justice, education, social services, lost productivity; and other economic losses as a direct result of the illicit use of these dangerous drugs caused by opioid diversion.”132132Complaint at 3, Ohio v. McKesson Corp., No. 1:12-cv-00185-RBW (Ohio Ct. Com. Pl. Feb. 26, 2018). CLOSE

Courts—state and federal—have also played a role in the growth of state AG litigation. Perhaps most importantly, they have taken an expansive view of state standing. In Massachusetts v. EPA, the Supreme Court cited Massachusetts’s “stake in protecting its quasi-sovereign interests” as a reason for “special solicitude” in the standing analysis.133133549 U.S. 497, 520 (2007). CLOSE Long before those words were penned, lower federal courts had held that states can sue as parens patriae to vindicate their citizens’ rights under the federal constitution, even in circumstances in which the citizens themselves would lack standing. For instance, whereas the rule of City of Los Angeles v. Lyons makes it difficult for private parties to seek injunctive relief from sporadic instances of official misconduct,13413446 U.S. 95, 105–07, 110 (1983) (holding that person subjected to illegal chokehold by police lacked standing to seek an injunction, as there was no guarantee that the plaintiff would be subjected to similar acts by police in the future); see also O’Shea v. Littleton, 414 U.S. 488, 490, 503–04 (1974) (denying that a case or controversy existed regarding discriminatory law enforcement practices on similar grounds). CLOSE courts have permitted states to sue in equivalent cases.135135See, e.g., Pennsylvania v. Porter, 659 F.2d 306, 314–15 (3d Cir. 1981) (holding that state had standing as parens patriae to enjoin police misconduct while noting that “many individual victims may be unable to show the likelihood of future violations of their rights”). Courts have reasoned that, because the state represents all of its citizens, it will typically have little trouble establishing that a harm that has occurred in the past will likely befall some citizens in the future. Id. This sort of probabilistic reasoning generally does not work for private litigants. See generally Summers v. Earth Island Inst., 555 U.S. 488, 491, 494–501 (2009) (denying standing to a private environmental organization that had asserted a statistical certainty that some of its members would be injured by some of the challenged Forest Service actions). We suspect the difference is that cases like O’Shea and Lyons are grounded importantly in concerns about judicial intervention in state and local governance—a concern that is radically less compelling when the state itself is the plaintiff. CLOSE Similarly, as noted above, courts recognized states’ standing to sue the tobacco companies to recoup the expenses they had incurred as a result of smoking-related illnesses suffered by their citizens. When unions and other private organizations asserted similar claims, however, courts ruled that their injuries were too remote to establish standing.136136John C. Coffee, Jr., “When Smoke Gets in Your Eyes”: Myth and Reality About the Synthesis of Private Counsel and Public Client, 51 DePaul L. Rev. 241, 241–42 (2001). CLOSE

Representative suits by states also enjoy a host of other procedural advantages over their closest private analogues, class actions. Whereas class actions are governed by a complex set of procedural requirements designed to promote judicial economy and protect the interests of absent class members, courts have declined to apply those rules to similar suits by states—even as they have tightened up the requirements for private suits.137137See Lemos, State Enforcement, supra note 110, at 500–10 (detailing the procedural requirements for private class actions versus the requirements for similar suits brought by the State). CLOSE Courts have likewise refused to subject parens patriae suits to the jurisdictional requirements of the Class Action Fairness Act138138Mississippi v. AU Optronics Corp., 571 U.S. 161, 164 (2014); cf. People v. Greenberg, 946 N.Y.S.2d 1, 7 (App. Div. 2012) (holding that suit by state AG was exempt from similar jurisdictional rules governing private securities actions). CLOSE or to mandatory arbitration clauses.139139See, e.g., EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (holding that arbitration agreement between employee and employer did not bar EEOC from bringing enforcement action). CLOSE And when faced with simultaneous suits by states and by private class counsel, courts have often denied certification to the private class action on the ground that the state suit is the “superior” method of adjudication.140140See Lemos, State Enforcement, supra note 110, at 505–06 (collecting cases). CLOSE As one court put it, “[T]he State should be the preferred representative” of its citizens.141141Sage v. Appalachian Oil Co., Inc., No. 3:92-CV-176, 2:93-CV-229, 1994 WL 637443, at \*2 (E.D. Tenn. Sept. 7, 1994). CLOSE

It is not surprising, then, that state litigation activity has increased markedly in both volume and visibility in recent decades. For example, the number of Supreme Court cases in which states are parties has shot up since the 1980s—spurred in part by the creation in 1982 of the National Association of Attorneys General (NAAG) Supreme Court Project.142142See Douglas Ross, Safeguarding Our Federalism: Lessons for the States from the Supreme Court, 45 Pub. Admin. Rev. 723, 727–28 (1985) (describing NAAG’s genesis and functions). Another significant institutional response was the creation of the State and Local Legal Center (SLLC), which files amicus briefs on behalf of member associations. Id. at 728. CLOSE Even more notable is the increase in states’ filings as amici. Such filings are not command performances but represent AGs’ discretionary decisions to devote limited resources to Supreme Court advocacy.143143See Clayton, supra note 103, at 544 (“[T]he decision to participate as amicus curiae is determined largely by the personal interests and felt political pressures on individual attorneys general.”). CLOSE The most comprehensive study of state litigation in the Supreme Court reports that since 1989 states have “become exceptionally active amicus curiae participants. They account for 20% of all certiorari petitions accompanied by an amicus brief and 18% of the amicus briefs on the merits.”144144Waltenburg & Swinford, supra note 104, at 48. If anything, the number of state briefs filed understates the level of state activity. Thanks in large part to NAAG’s coordination efforts, states frequently band together on amicus briefs. A study of merits-stage state amicus briefs found that the average number of joining states jumped from 2.4 in the 1970s to 13.9 in the 1990s. Clayton & McGuire, supra note 105, at 24–25; see also Waltenburg & Swinford, supra note 104, at 48 (“NAAG’s focus on the coordination of state amicus activity has resulted in substantial levels of joining behavior. Accordingly, where it is rare to find more than two amici joining together on a pre-certiorari amicus brief, on average six states coalesce . . . .”). A more recent study of state amicus filings reveals similar joining behavior at the certiorari stage: using data on state certiorari filings compiled by Dan Schweitzer at NAAG, Greg Goelzhauser and Nicole Vouvalis report that “[d]uring the 2001–2009 terms, state-sponsored amicus briefs urging review in state-filed cases were joined by an average of about 18 states, and only 5 of the 88 briefs filed were signed by a single state.” Greg Goelzhauser & Nicole Vouvalis, State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court, 41 Am. Pol. Res. 819, 825 (2013). One veteran state litigator attributes these changes in part to technological advances, noting that email has made it far easier for dispersed AGs’ offices to share drafts. See Letter from Tom Barnico, Dir. AG Program, Boston College Law School, to authors (July 20, 2018) (on file with authors). CLOSE Today, states’ participation in the Supreme Court—both as direct parties and as amici—is second only to that of the federal government.145145Margaret H. Lemos & Kevin M. Quinn, Litigating State Interests: Attorneys General as Amici, 90 N.Y.U. L. Rev. 1229, 1235 (2015). CLOSE

The Supreme Court may be the most prominent venue for state litigation, but it is hardly the only one. States also have become more frequent litigants in the state and lower federal courts. Texas’s Greg Abbott sued the Obama Administration “at least 44 times”;146146Dan Frosch & Jacob Gershman, Abbott’s Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration, Wall St. J. (June 24, 2016), https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976 [https://perma.cc/D87N-QWXA]. CLOSE AG Maura Healy of Massachusetts reportedly “led or joined dozens of lawsuits and legal briefs” challenging the Trump Administration in 2017 alone.147147Steve LeBlanc & Bob Salsberg, Massachusetts’ Maura Healey Helping Lead Effort to Litigate Trump, Boston.com (Dec. 18, 2017), https://www.boston.com/news/politics/2017/12/18/massachusetts-maura-healey-helping-lead-effort-to-litigate-trump [https://perma.cc/9M9B-GA4X] CLOSE

And states are now far more likely to band together in litigation in order to maximize their impact. For example, Paul Nolette found a marked increase in “coordinated AG litigation”—defined as filed lawsuits as well as preliminary investigations involving coordinated activity by at least two AGs—from 1980 to 2013. Professor Nolette reports: “From a consistently low number of one to four cases a year throughout the 1980s, the quantity of multistate cases . . . gradually increased, reaching twenty for the first time in 1996, thirty in 2002, and forty in 2008.”148148Nolette, supra note 13, at 21 app. at 221; see also id. fig.2.1. CLOSE The number of AGs participating in such cases also has grown, with a greater proportion of multistate cases involving sixteen or more states in recent years.149149Id. at 21–22 & fig.2.2. CLOSE As Nolette explains, “Litigation involving over half of the nation’s AGs, once an unusual event, represents over 40% of all the multistate cases conducted since 2000.”150150Id. at 22. CLOSE For many observers, AG activism amounts to “a major shift in how political fights are waged.”151151Frosch & Gershman, supra note 144. CLOSE

B. MAPPING STATE LITIGATION

We know states are doing more litigation, but the aggregate numbers can only tell us so much. Although discussion of high-profile state litigation sometimes treats it as a unitary category, that perspective obscures important variation within the genre. This section maps state litigation into several discrete types, based on the nature of the claims asserted. We begin with the kinds of cases observers typically associate with state public-law litigation—cases in which states are pitted against the federal government. These include (1) claims that federal government action exceeds the limits of national regulatory authority, as in the state challenges to the ACA; (2) claims that federal government action violates aspects of the national separation of powers, as in state challenges to President Obama’s immigration policies; and (3) claims that federal government action violates individual federal rights, as in the state lawsuits against President Trump’s travel bans. It bears emphasis, however, that states can also shape policy outside their borders by targeting primary behavior directly, in suits against private actors alleging violations of either (4) state or (5) federal law.

To be sure, many prominent lawsuits will fall within more than one of these categories. For example, challenges to President Trump’s travel bans have sometimes included both claims that the bans violate individual rights and claims that the President has exceeded the scope of his lawful executive authority.152152See Complaint at 11–12, Washington v. Trump, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Jan. 3, 2017) (alleging individual rights violations as well as violations of the Administrative Procedure Act (APA)). CLOSE And state amicus briefs concerning the validity of the federal Defense of Marriage Act (DOMA) raised both federalism and individual rights arguments.153153See Brief Addressing the Merits of the State of Indiana and 16 Other States as Amicus Curiae in Support of the Bipartisan Legal Advocacy Group of the U.S. House of Representatives at 4–8, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 390993 [hereinafter Windsor Pro-DOMA States’ Brief] (arguing that neither federalism nor equal protection analysis supported heightened scrutiny of DOMA); Brief on the Merits of the States of New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia as Amici Curiae in Support of Respondent at 3, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 840031 [hereinafter Windsor Anti-DOMA States’ Brief] (arguing that DOMA denied equal protection and infringed states’ authority to regulate marriage). There is, moreover, important diversity within categories. As we discuss further below, the relevant legal constraints in each of the first three categories—federalism and separation-of-powers principles and individual rights—may be either constitutional or statutory in character. We do not distinguish between constitutional and statutory claims because we think that both constitutional and statutory norms serve constitutive functions in many instances. See generally Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 464 (2007) (discussing the constitutive role of statutory and other non-entrenched norms in structuring the government and identifying individual rights). CLOSE

Each category also includes legal claims and arguments asserted by states in a variety of settings—including, for example, not only lawsuits but also amicus filings by state AGs. We define our categories by the legal claim asserted, not the form in which that claim is advanced. And, while we have framed our categories as challenges to the legality of either federal governmental or private action, we also include states’ assertion of arguments—often in opposition to other states—affirming the legality of those actions.154154See, e.g., Windsor Pro-DOMA States’ Brief, supra note 151, at 2–3. CLOSE

1. Federal Power Claims.—This category contains claims that federal action exceeds the legal limits of national authority. The paradigmatic claims are those about the reach of Congress’s enumerated powers.155155These claims almost always concern the Commerce Clause—the catch-all, default power that sustains most federal legislation. But occasionally they involve other powers, such as Congress’s power to enforce the Reconstruction Amendments. City of Boerne v. Flores, 521 U.S. 507, 512 (1997). Boerne was a private claim brought against a local government by church officials under the federal Religious Freedom Restoration Act (RFRA). But the case drew state amici filings on both sides. See Brief of the States of Maryland, Connecticut, Massachusetts, and New York as Amici Curiae in Support of Respondent, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 10282 (defending RFRA); Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, the Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam, and the Virgin Islands in Support of Petitioner, City of Boerne, Texas, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 695519 (attacking RFRA). And Ohio Solicitor Jeffrey Sutton was given oral argument time to argue against RFRA’s constitutionality. CLOSE For example, minutes after President Obama signed the ACA, thirteen states filed suit arguing that Congress lacked power under the Commerce Clause to require individuals to buy health insurance.15615614 States Sue to Block Health Care Law, CNN (Mar. 23, 2010), http://www.cnn.com/2010/CRIME/03/23/health.care.lawsuit/index.html [https://perma.cc/3UPJ-8C8H]; see generally NFIB v. Sebelius, 567 U.S. 519, 547–58 (2012) (opinion of Roberts, C.J.) (accepting those arguments). CLOSE Sometimes states raise these sorts of claims as a preemptive strike on federal legislation, as in the ACA case. Perhaps more often, these issues are raised by private parties as defenses to the imposition of federal requirements or penalties,157157In United States v. Lopez, 514 U.S. 549 (1995), for example, a criminal defendant prosecuted for possessing a firearm within 1,000 feet of a school argued (successfully) that the federal prohibition did not regulate interstate commerce. Id. at 551–52. In United States v. Morrison, 529 U.S. 598 (2000), an individual defendant in a civil case argued (again successfully) that the federal private right of action for victims of “gender-motivated violence” exceeded Congress’s power under both the Commerce Clause and Section Five of the Fourteenth Amendment. Id. at 601–02, 604. CLOSE or in suits for a declaratory judgment or an injunction seeking to bar enforcement of federal law.158158See, e.g., Gonzales v. Raich, 545 U.S. 1, 15 (2005) (addressing claim by users of medicinal marijuana seeking declaratory and injunctive relief that the federal Controlled Substances Act, as applied to them, exceeded Congress’s Commerce power). CLOSE States then come in as amici—sometimes on both sides of the case.159159In Lopez, several states filed in support of the Gun Free School Zones Act. See Brief for the States of Ohio, New York, and the District of Columbia as Amici Curiae in Support of Petitioner, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007793. No state filed in support of Mr. Lopez, but he did get a brief filed by several national organizations representing state and local governments. See Brief of the National Conference of State Legislatures, National Governors’ Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as Amici Curiae in Support of Respondent at 13, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007619 (arguing that “the Commerce Clause does not authorize enactment of the Gun Free School Zones Act”). CLOSE

These cases are high visibility but, we want to suggest, of limited practical importance. They’re just not very promising, given the Court’s capacious understanding of national enumerated powers.160160See generally Raich, 514 U.S. at 15–19; Wickard v. Filburn, 317 U.S. 111, 118–29 (1942). CLOSE The Commerce Clause is very, very broad—and even where it’s not broad enough, there is the Necessary and Proper Clause to fill most gaps.161161See, e.g., United States v. Comstock, 560 U.S. 126, 130 (2010) (upholding broad federal power to imprison sexual predators under the Necessary and Proper Clause); Raich, 545 U.S. at 34–36 (Scalia, J., concurring in the judgment) (arguing that the Necessary and Proper Clause allows Congress to regulate noncommercial activity that affects commerce). CLOSE (In the healthcare case, the Taxing Clause saved the day for the ACA.)162162See NFIB, 567 U.S. at 574 (upholding the ACA under the Taxing Clause). CLOSE We may see occasional wins for states here, but they’re likely—as in Lopez—to be mostly symbolic in their importance.163163See, e.g., Richard H. Fallon, Jr., The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69 U. Chi. L. Rev. 429, 476–77 (2002); Ernest A. Young, Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich, 2005 Sup. Ct. Rev. at 1, 39–40 (“A roll-back of the national regulatory state was never in the cards; there are simply too many precedential, institutional, and political constraints pressing the Court to uphold relatively broad federal power.”). CLOSE

The more significant cases are those in which Congress seeks to enlist state officials to implement federal law but arguably lacks power to do so. Most federal programs rely on state and local officials for enforcement and implementation. Polarization makes states governed by the party that is out of power in Washington particularly likely to want to opt out of such programs. Under the Anti-Commandeering Doctrine, Congress can’t require state officials to implement federal policy.164164See Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 188 (1992). CLOSE Instead, Congress typically conditions federal benefits (usually money) on state cooperation.165165See generally Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1918–19, 1923–31 (1995) (noting the broad potential of conditional spending to circumvent limits on Congress’s enumerated powers). The leading case remains South Dakota v. Dole, 483 U.S. 203 (1987). CLOSE Challengers therefore argue that federal spending conditions are insufficiently clear or amount to federal coercion, as in the Medicaid Expansion portion of the healthcare case166166See NFIB, 567 U.S. at 575. CLOSE or in the current challenges to the Trump order on sanctuary cities.167167See, e.g., City of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507 (N.D. Cal. Apr. 25, 2017). CLOSE Alternatively, states’ claims may focus on whether certain federal requirements really amount to commandeering.168168For example, a thorny question in the sanctuary cities litigation is the extent to which local officials are simply being asked to cooperate with federal law enforcement in the same way any private citizen would have to or are instead being “commandeered” into enforcing federal immigration policy. See, e.g., City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 597–99 (E.D. Pa. 2017); Alison Frankel, DOJ Wants to Change the Constitutional Conversation in Sanctuary Cities Cases, Reuters (Mar. 7, 2018), https://www.reuters.com/article/us-otc-sanctuary/doj-wants-to-change-the-constitutional-conversation-in-sanctuary-cities-cases-idUSKCN1GJ362 [https://perma.cc/XK63-P8YQ]. CLOSE

This latter class of cases operates within a cooperative federalism context rather than a model of federalism where states have their own exclusive sphere of regulatory jurisdiction outside of federal authority.169169See, e.g., Martin H. Redish, The Constitution as Political Structure 26 (1995) (contrasting “dual” and “cooperative” federalism); Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663, 665 (2001) (categorizing congressional acts that “invite state agencies to implement federal law” as “cooperative federalism” programs). CLOSE But rather than seeking to control the content of federal policy, these cases generally try to preserve states’ ability to opt out. The Printz litigation that established the anti-commandeering principle for state executive officers did not try to strike down the federal Brady Act; it simply protected the right of state and local officials not to participate in its enforcement.170170See Printz, 521 U.S. at 933–34. CLOSE Likewise, the Medicaid expansion decision established an opt-out right for states.171171See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585–88 (2012) (opinion of Roberts, C.J.) (stating that states are free to opt out of the Medicaid expansion while remaining within the original Medicaid program). In some circumstances a robust opt-out right could kill a federal scheme that required cooperation, and at that extreme the difference between trying to limit the scope of federal policy and preserving a right of opt-out dissolves. This may have been Justice Story’s hope, for example, in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). Although Prigg upheld Congress’s power to enact the Fugitive Slave Law and broadly construed its preemptive force, Story may have hoped that the Court’s holding that Congress could not require state and local officials to participate in the law’s enforcement would gut its effectiveness. See id. at 532, 598, 672–73; David C. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, 245 n.54 (1985). Unfortunately, he turned out to be wrong about that. See Paul Finkelman, Sorting Out Prigg v. Pennsylvania, 24 Rutgers L.J. 605, 664 (1993). CLOSE

Finally, an important class of federal-power claims involves state immunities from federal regulation. These claims arise defensively, typically in response to claims by private litigants.172172The convoluted saga of attempts to avoid state sovereign immunity also includes cases in which individuals with financial claims against states enlist various other sovereign entities, including state governments, to prosecute those claims on the individuals’ behalf. These efforts have not generally had much success. See, e.g., New Hampshire v. Louisiana, 108 U.S. 76, 88–89 (1883) (holding that New Hampshire could not pursue financial claims against another state where New Hampshire had no interest of its own). CLOSE For a brief period during the late 1970s and early 1980s, state and local governments asserted immunities from federal regulation itself under the now-defunct National League of Cities doctrine.173173See Nat’l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding that, at least in some circumstances, Congress may not regulate state governmental entities performing traditional governmental functions), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985); see also Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 Sup. Ct. Rev. at 1, 31–32 (discussing claims under National League of Cities as a species of “immunity federalism”). CLOSE More enduring principles shield state governments from certain judicial remedies when they violate federal requirements. A line of cases stretching back over a century—but intensifying under the Rehnquist Court—recognized a broad principle of state sovereign immunity shielding states from damages claims brought by individuals for violations of federal law.174174See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996); Hans v. Louisiana, 134 U.S. 1, 18 (1890). CLOSE More recent cases have constricted federal civil rights claims against state and local officers for violations of federal statutory requirements.175175See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (Federal Educational Rights and Privacy Act (FERPA) does not create enforceable private rights under 42 U.S.C. § 1983); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (concluding no implied right of action for disparate impact discrimination under Title VI). CLOSE States have participated in these cases as both party defendants and extensively as amici (again, often on both sides).176176See, e.g., Brief of Amicus Curiae States of California et al., Supporting the State of Florida, et al., at 4, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (No. 94-12), 1995 WL 17008502 (May 3, 1995) (contending that a statute mandating state participation in federal programs was inconsistent with principles of federalism). CLOSE

These immunity cases differ from most of our examples of state public-law litigation in that they arise defensively—they are not, as it were, examples of AGs like Texas’s Greg Abbott going into work and suing the federal government. Nonetheless, they do seem part of a systematic effort to expand protections for state and local governments under federal law. It seems fair to view Jeffrey Sutton’s successful advocacy of an expansive view of state sovereign immunity in cases like University of Alabama v. Garrett177177531 U.S. 356 (2001). CLOSE and Kimel v. Florida Board of Regents,178178528 U.S. 62 (2000). Judge Sutton, then in private practice at Jones Day, argued both Garrett and Kimel on behalf of the state defendants. Id.; Garrett, 531 U.S. at 356. CLOSE for example, as an extension of his entrepreneurial tenure as State Solicitor of Ohio.179179See also Alexander, 532 U.S. at 276, in which Judge Sutton, in private practice, appeared as counsel of record on behalf of the State of Alabama successfully opposing recognition of a private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964. CLOSE

2. Federal Separation of Powers Claims.—It’s less intuitive to think of States making separation of powers arguments, but one can find examples reaching way back: in 1970, for example, Massachusetts filed an unsuccessful original action in the Supreme Court challenging the constitutionality of the Vietnam War.180180Commonwealth of Massachusetts v. Laird, 400 U.S. 886 (1970); see also id. at 886 (Douglas, J., dissenting) (noting that Massachusetts had authorized the suit by a specific legislative enactment). CLOSE Separation of powers claims have become far more prevalent over the past decade or so. As we’ve noted, polarization tends to cause gridlock, even with a nominally unified government in Washington. And gridlock encourages the President to reach for his pen and phone to get things done.181181See CNN, Obama-I’ve Got a Pen and a Phone, YouTube, https://www.youtube.com/watch?v=G6tOgF\_w-yI [https://perma.cc/AV7E-4AU3] (recording a speech by President Obama, wherein he expressed frustration with congressional gridlock and his intent to take unilateral action). CLOSE Resulting challenges sound in separation of powers, not federalism. But the litigation is motivated by states that are either seeking to protect their own autonomy or to find a way to participate in a national lawmaking process that has shifted from Congress to the Executive Branch.

United States v. Texas—the immigration case—is a good example.182182See 136 S. Ct. 2271, 2272 (2016) (affirming the injunction of the DAPA program and DACA program expansions in Texas v. United States, 86 F. Supp. 3d 591, 606, 678 (S.D. Tex. 2015)). CLOSE When President Obama extended lawful presence to millions of additional undocumented aliens, it was hard to argue that the deferred-action programs (Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA)) fell outside the authority of the national government as a whole. Instead, state challengers contended that the President lacked the authority to—as Obama himself put it—“change the law” without going to Congress.183183Brief for the State Respondents, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1213267, at \*1. CLOSE As was clear to all involved, Congress’s general intransigence on the immigration issue meant that a decision against executive authority would be—for all intents and purposes—a decision against federal authority more generally.

A separate set of process arguments are statutory but serve a constitutional purpose. Again, the immigration case is a good example. Texas’s successful argument in the district court was simply that Obama’s policy change had failed to comply with the Administrative Procedure Act (APA) because it had not gone through notice and comment. Notice and comment isn’t an insurmountable hurdle for agency lawmaking, but it does delay implementation of national policy. More importantly, it allows states—like anybody else—to insist on direct input into the federal lawmaking process. It allows states to be heard at the agency just as they are supposedly heard in Congress, although without any special status vis-à-vis other participants. Provisions in the APA for notice and comment, as well as for judicial review of process failures at the agency, effectively operate as separation of powers-type constraints on the administrative state.184184For assessments of the so-called administrative safeguards of federalism, compare Gillian E. Metzger, Administrative Law as the New Federalism, 57 Duke L.J. 2023, 2028, 2101–09 (2008) (asserting that administrative law is well-suited to preserving federalism), with Stuart M. Benjamin & Ernest A. Young, Tennis with the Net Down: Administrative Federalism Without Congress, 57 Duke L.J. 2111, 2114, 2145–54 (2008) (arguing that federalism requires insistence that Congress play the primary role). CLOSE

The separation of powers principle that Congress—not the President—makes the law also generates a second kind of challenge to federal action. That challenge argues that executive action—like the immigration order or the travel ban or the EPA’s clean power plan—is substantively inconsistent with the underlying statute.185185See, e.g., Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (considering challenge by twenty-three states to EPA rule regulating air pollutants on the ground that the agency did not consider costs of regulation as required by statute). CLOSE Polarization can cause such claims to multiply. The longer gridlock persists, the more likely that new executive initiatives will stray from the obvious purview of the original legislation. So, for example, states challenged the Obama Administration’s transgender bathroom guidance on the ground that its definition of gender discrimination differs from that of the Congress that enacted Title IX of the Civil Rights Act.186186See Texas v. United States, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016) (granting preliminary injunction on behalf of thirteen states and other plaintiffs). CLOSE Likewise, when federal agencies promulgated broad “preemption preambles” during the George W. Bush Administration, a coalition of states, as well as a state governmental association, filed amicus briefs arguing that these preambles exceeded the agencies’ statutory mandate.187187See Brief of Amici Curiae Vermont, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Virginia, Washington, Wisconsin, and Wyoming in Support of Respondent at 4, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249); Brief of the National Conference of State Legislatures as Amicus Curiae Supporting Respondents at 5, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_07\_08\_06\_1249\_RespondentAmCuNatlConfofStLegis.authcheckdam.pdf [https://perma.cc/2BEW-E7YX]; see also Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae Supporting Respondent at 6, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_07\_08\_06\_1249\_RespondentAmCuCtrStEnforcementAntitrustandConsProtLaws.authcheckdam.pdf [https://perma.cc/UD4H-NKFK]. On the preemption preambles, see Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DEPAUL L.REV. 227 (2007). CLOSE

A more difficult class of cases involves litigation challenging federal government inaction. Federal administrative law generally presumes that agency inaction—at least in the form of agency refusals to initiate enforcement proceedings—are not subject to judicial review.188188Heckler v. Chaney, 470 U.S. 821, 832 (1985). CLOSE But this presumption can sometimes be overcome, as it was by Massachusetts v. EPA’s holding that states could challenge the agency’s denial of rulemaking petitions authorized by statute.189189549 U.S. 497, 528 (2007). CLOSE Given Congress’s continued failure to act on climate change, “EPA regulation pursuant to [Massachusetts v. EPA] . . . has served as the core of the US federal efforts on climate change.”190190Hari M. Osofsky & Jacqueline Peel, The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future? 30 Env’t & Plan. L.J. 303, 310 (2013). CLOSE And where an incoming administration seeks to overturn previous executive action—thus arguably returning to the status quo ante of inaction—states may find greater leverage to challenge this departure from the prior baseline. Recent litigation over the Trump Administration’s “repeal” of President Obama’s DACA policy, for example, has gotten significant traction by arguing that the repeal rested on improper reasons.191191See, e.g., Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 407, 438 (E.D.N.Y. 2018) (granting preliminary injunction against repeal of DACA program in suit by New York and fifteen other states). Similar litigation challenges the Trump Administration’s effort to overturn President Obama’s “clean power plan.” See, e.g., Richard Valdmanis, States Challenge Trump Over Clean Power Plan, Sci. Am. (Apr. 6, 2017), https://www.scientificamerican.com/article/states-challenge-trump-over-clean-power-plan/ [https://perma.cc/7JK8-A3TZ]. CLOSE State litigation to enforce the Executive’s statutory obligations can thus force adoption and continuation of executive policies even where national-level gridlock would otherwise foreclose them.

3. Federal Rights Cases.—Some state challenges to federal action rely not just on structural principles but also on individual rights arguments. In the travel ban cases, for instance, state governments assert parens patriae standing to raise the rights of their citizens. Sometimes states assert proprietary interests as well; some of the state plaintiffs in the travel ban cases argued that their state universities had been deprived of faculty and students from abroad.192192See Hawaii v. Trump, 859 F.3d 741, 765 (9th Cir. 2017), rev’d on other grounds, 138 S. Ct. 2392 (2018) (“EO2 harms the State’s interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body.”). CLOSE And sometimes the states participate as amici to express a view on the scope of federal individual rights, as in the same-sex marriage cases.193193See supra notes 10 (Obergefell briefs) and 151 (Windsor briefs). CLOSE

This category also includes state litigation activity contesting federal rights. For example, numerous states have participated as amici opposing Equal Protection challenges to affirmative action in state universities.194194See Lemos & Quinn, supra note 138, at 1257. CLOSE It is even more common to see states opposing rights claims by criminal defendants.195195See id. at 1255–56 (observing that many Republican AG briefs filed in criminal procedure cases are not opposed by state briefs favoring the criminal defendant). CLOSE Similarly, states often play defense against federal civil rights claims brought by private litigants. (These two categories are often related, as many federal civil rights claims involve allegations of improper actions by state or local law enforcement.) In this latter set of cases, state governments are often the defendants; even where they are not (in the many cases against municipalities and their officers, for instance), they may well play a prominent role as amici.196196See, e.g., City of West Covina v. Perkins, 525 U.S. 234, 235 (1999) (Ohio SG Jeffrey Sutton, who had filed an amicus brief on behalf of twenty-nine states, arguing on the city’s behalf by leave of court). CLOSE And in all such cases, other states may support the party asserting federal rights as amici. When he was AG of Minnesota in the early 1960s, for example, Vice President Walter Mondale filed a brief on behalf of twenty-two states urging the Supreme Court to expand the right to counsel in Gideon v. Wainwright.197197372 U.S. 335 (1963). See Yale Kamisar, Gideon v. Wainwright and Related Matters: An Armchair Discussion Between Professor Yale Kamisar and Vice President Walter Mondale, 32 L. & Ineq. 207, 207 (2014) (discussing Mondale’s role in Gideon). CLOSE

As we discuss in more detail in the following Part, these rights cases create the potential for conflicts among states. Whenever state AGs support claims of constitutional rights, they are—in a very real sense—arguing against their own state’s power. More than that, they are seeking to impose a particular rule on all states. Like the statutory challenges described above, then, individual rights cases often involve interstate conflicts over control of federal policy. Those conflicts, moreover, can often be coded as red versus blue. And because they frequently involve “hot button” issues, these cases raise particular risks of politicizing the AG’s office.

4. State Enforcement of State Law that Creates National Regulation.—As we have already noted, the tobacco litigation of the 1990s was a critical watershed for state public-law litigation. To be sure, states have sought to enforce their own laws in ways that affect conditions outside their jurisdictions for a very long time.198198See, e.g., Georgia v. Tenn. Copper Co., 206 U.S. 230, 231, 236 (1907) (hearing the State of Georgia’s public nuisance claim against Tennessee copper companies for discharging noxious gases that crossed the border into Georgia). CLOSE And local governments have also been active in this sort of litigation—for example, in suits against the firearms industry during the 1990s.199199See, e.g., Timothy D. Lytton, Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits, 86 Texas L. Rev. 1837, 1843 (2008) (“By the late 1990s, municipalities began suing the gun industry to recover the costs of law enforcement and emergency medical services related to gun violence.”). CLOSE But the most successful efforts have been undertaken by states. Most observers seem to agree that the tobacco litigation ushered in a new era of state activism that then spread to other regulatory areas and types of litigation.200200See, e.g., Nolette, supra note 13, at 23–24. CLOSE

The tobacco litigation and its contemporary analogs share two related features that differentiate them from ordinary state enforcement of state law against private parties. The first is that rather than a single state suing a defendant within its jurisdiction for torts that harmed its citizens, the tobacco litigation featured a broad coalition of states—ultimately including *all* of them.201201Forty-six states, the District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, and the Virgin Islands, joined the Master Settlement Agreement with the tobacco companies. Four other states—Florida, Minnesota, Mississippi, and Texas—settled their cases separately. Supra note 121 and accompanying text; see also NAAG, supra note 90, at 388. CLOSE And the Master Settlement Agreement that ended the litigation eventually came to include nearly all manufacturers of tobacco in the American market. The litigation thus aimed at global peace—that is, a comprehensive settlement among all the relevant players.

### 2NC---AT: Signal

#### ‘Uncertainty’ assumes non-uniform state law---the CP avoids that

Rachel Arnow-Richman 20, Visiting Professor at the University of Florida Levin College of Law, Chauncy Wilson Memorial Research Professor at the University of Denver, Sturm College of Law, L.L.M. from Temple Law School, J.D. from Harvard Law School, B.A. from Rutgers University, “The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision”, Seton Hall Law Review, 50 Seton Hall L. Rev. 1223,

To the extent we conceive of restrictions on employee mobility as an antitrust matter, it is squarely within federal jurisdiction. See Glick, supra note 1, at 404-417 (applying antitrust principles). In addition, federal legislation would create welcome uniformity. See Moffat, supranote 34, at 965. The variation in state laws thus far will doubtlessly pose enormous compliance challenges for employers. On the single issue of vulnerable worker status, for instance, no two state laws passed thus far use precisely the same criteria in establishing the relevant income threshold. See supranote 36 and accompanying text. It is possible that the desire for consistency and lower compliance costs could incent employers to support model or uniform state legislation that, while limiting the enforceability of noncompetes, would achieve greater predictability. The Uniform Law Commission in 2018 appointed a study committee to explore the matter. See https://www.uniformlaws.org/projects/committees/study. As of yet, however, it has issued no proposals.

#### Antitrust ‘signaling’ 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.

### 2NC---AT: Patchwork

#### The text fiats coordination through NAAG---that ensures uniformity

HLR 20 – Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law,” 6/10/20, https://harvardlawreview.org/2020/06/antitrust-federalism-preemption-and-judge-made-law/

D. The Misaligned Incentives Problem

Fourth, in the misaligned incentives problem, critics argue that states do not have proper incentives when they enforce state antitrust laws. Although state antitrust laws are supposed to mainly target intrastate antitrust violations, courts have refused to police that limit too strictly. In an interconnected economy where seemingly hyperlocal activity can have national implications, courts have admitted that limiting state antitrust laws to cases that do not touch the national economy would “fence[] off” “a very large area . . . in which the States w[ould] be practically helpless to protect their citizens.” But, even though suits under state laws may have nationwide consequences, state attorneys general lack nationwide incentives. Critics of the status quo worry that elected attorneys general are more susceptible to lobbying by state interests than are appointed federal enforcers and that a cost-benefit analysis is flawed where a state can attack a company headquartered out of state in order to protect one headquartered in state.

These fears seem mostly imagined. The idea that elected attorneys general are bringing antitrust suits to hurt competitors of state businesses“appears to [have] little empirical support[,] . . . and none has been provided by the advocates of this position.” Past state antitrust enforcers have stated that, while they considered state-specific factors when deciding where to spend their limited resources, those factors would be used only to choose “from among those cases that also made sense on traditional economic grounds.”

And there is reason to believe that these enforcers are telling the truth. For one thing, states often make antitrust decisions that seem to go against the interests of major state employers. For example, New York antitrust enforcers have taken antitrust positions adverse to both Verizon and IBM, top New York employers. For another, a state that is only minutely affected by an antitrust action is unlikely to bring that action alone. If a state is only trivially affected by allegedly anticompetitive conduct, “that state is very unlikely as a practical and political matter to spend the enormous sums of money required to sustain a challenge.” If a state is majorly affected but is the only state affected, then the misaligned incentives critique does not apply because there is no competing set of national incentives. And in a case that actually has major impacts in multiple states, it is unlikely that one state could act without other states wanting to join in on the enforcement. When states work together on antitrust enforcement, they tend to cooperate closely with one another, especially through the National Association of Attorneys General’s (NAAG) antitrust group. Even if an individual state might be swayed by state-specific concerns, it is unlikely that it could convince a multistate coalition to act on those concerns — the group would be forced to evaluate the action on its more national merits.

E. The Incompetent States Problem

Finally, critics argue that state enforcers will make error-ridden antitrust choices due to a lack of resources, experience, and expertise. Whereas federal enforcers have significant budgets for antitrust enforcement, the percentage of funding set aside for antitrust enforcement by state attorneys general is minute. Because of this lack of resources, state enforcers have been accused of staffing antitrust cases with senior attorneys who, while experienced in civil litigation generally, are antitrust novices. These factors have led critics to argue that state attorneys general handle antitrust suits poorly, clogging the judicial pipeline with questionable suits. State attorneys general are accused of acting as free riders on federal actions and of making settlements more difficult rather than undertaking useful enforcement.

But there is reason to dispute critics’ claims. The critique of individual attorneys general ignores the states’ ability to work in unison. Cooperating through NAAG, states are able to build on each other’s experiences in antitrust enforcement. Thus, worries about inexperienced antitrust divisions working alone may be overstated. Although interstate coordination may weaken their point, critics can retort that most state actions are not coordinated: according to NAAG’s State Antitrust Litigation Database, only nineteen of the fifty-six civil antitrust actions brought by states between 2014 and 2019 were brought by multiple states working together, although many of the noncooperative suits regarded intrastate anticompetitive conduct. This same dataset, however, also undermines the critics’ argument that states act only as free riders: only nineteen of the fifty-six suits included federal participation. Finally, much of the criticism leveled at state attorneys general occurred before a renaissance in state law enforcement. Since Judge Posner derided the skill of state attorneys general in 2001, lawyers and judges, including Chief Justice Roberts, have recognized a marked improvement in state attorney offices’ advocacy. Whether or not Judge Posner’s critiques were valid at the turn of the century, it is unclear that the landscape remains the same today. Finally, this critique undermines the arguments, noted earlier, that state law enforcement is overdeterring competition or creating a patchwork of antitrust law. If states are nothing but free riders, then we need not worry about overdeterrence.

#### a) Uniform 50 state action is consistent AND displaces otherwise inevitable ad hoc state enforcement

Clark L. Hildabrand 14, JD Candidate at Yale Law School, BA from Washington & Lee University, “Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now”, Transactions, Volume 16, Issue 1, 16 Transactions 67, Lexis

State antitrust laws and enforcement also encourage greater consistency in antitrust enforcement over time by weakening barriers to enforcement from financial, jurisdictional, and political restrictions. First, dual enforcement of antitrust regulations allows access to the resources of both the federal government and state governments. Government agency budgets certainly are not immune to reductions and limitations in times of fiscal difficulty. The DOJ's Antitrust Division announced in 2012 that it planned to close four field offices following the 2013 budget process in an effort to reduce costs. According to Judge Dan Polster, who presides over the United States District Court for the Northern District of Ohio and started his career in the Cleveland field office of the Antitrust Division, closing the field offices will reduce the DOJ's ability to prosecute regional antitrust cases and resolve local price fixing disputes. These cases "really have a direct impact on [the] local economy and people's pocket books," but the DOJ Antitrust Division has turned its focus toward larger domestic and international cases. Encouraging state enforcement of state and federal antitrust statutes may alleviate concerns about a lack of regional enforcement. State attorneys general can pool their resources for enforcement and even appear together as amici curiae to better inform courts as to the interests of state consumers. One widespread fear was that states might pool their resources in order to pursue protectionist litigation in their mutual favor, and to the disadvantage of a few states. In response to this criticism, Congress dramatically limited the availability of multistate actions "by requiring that any state enforcement action take place 'in any district court of the United States in that State or in a State court that is located in that state and that has jurisdiction [\*75] over the defendant.'" Thus, state antitrust enforcement and limited regional pooling enable greater consistency in antitrust enforcement even in the presence of shifting federal priorities.

#### b) Federal action is splintered between the DOJ, FTC, and private rights of action AND also inevitably implemented by divergent state interpretations

Margaret H. Lemos 11, Associate Professor at the Benjamin N. Cardozo School of Law, Former Furman Fellow and Program Coordinator at New York University School of Law, Bristow Fellow at the Office of the Solicitor General, and Law Clerk for Judge Kermit V. Lipez of the U.S. Court of Appeals for the First Circuit and U.S. Supreme Court Justice John Paul Stevens, “State Enforcement of Federal Law”, New York University Law Review, Volume 86, 86 N.Y.U.L. Rev. 698, June 2011, Lexis

A final factor that bears on the potential for disuniformity is the breadth of the relevant federal rule. While many federal statutes are written in sweeping terms, that is not always the case - as the phthalates ban discussed in the previous Part demonstrates. And much state enforcement of federal law entails enforcement of agency regulations, which on the whole tend to be more specific than the statutes that inspire them. The few scholars who have taken notice of state enforcement have focused primarily on antitrust law. But antitrust is an extreme and unusual example, not only because of the breadth of the relevant statutory language, but also because it is an area where no federal agency has the authority to adopt binding regulations clarifying [\*759] the statutory text.

[FOOTNOTE] 271 It bears emphasis that antitrust is also an area where state law is not preempted. See supra note 256. Moreover, even if state antitrust law were preempted and states were prohibited from enforcing federal antitrust law, federal law would still permit private antitrust suits and divide federal enforcement authority between the FTC and the antitrust division of the DOJ. Thus, while the risk of disuniformity may be particularly stark in the antitrust context, given the breadth of the relevant federal rule, it is far from clear that states' authority to enforce federal law is the root of the problem. Other contributing factors, including the splintering of federal enforcement authority, the availability of private rights of action, and the continued validity of divergent state laws, are at least as important - and probably more so. [END FOOTNOTE]

That scenario is not unique, but it is fairly rare. To return to the FTC example above, the FTC Act's prohibition of "unfair" practices is quite broad. The FTC's interpretation of the prohibition, embodied in the 1980 Policy Statement and later codified in the statute, is far more limited. Should state attorneys general be given authority to enforce the FTC Act in federal court (as NAAG has suggested ), they would be constrained by the FTC's interpretations and by the body of case law that has developed in response to FTC enforcement efforts. Both limitations differentiate state enforcement of federal law from state enforcement of state law and help explain why the former may be tolerable even when the latter is preempted.

### 2NC---AT: Strikedown

#### The DCC doesn’t preclude state antitrust, even when regulation has interstate effects

Clark L. Hildabrand 14, JD Candidate at Yale Law School, BA from Washington & Lee University, “Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now”, Transactions, 16 Transactions 67, Lexis

On one hand, some critics of state antitrust enforcement focus on the interstate character and impact of state antitrust litigation. Due to the nationalization and increased interconnectivity of the country's economy, a broader reading of the Interstate Commerce Clause and other federal antitrust laws, that at one time simply precluded state enforcement of activities with interstate effects, would, today, effectively render state antitrust laws useless. However, the U.S. Supreme Court has consistently held that federal antitrust laws do not preclude or preempt application of similar or more far-reaching state antitrust statutes. As long as the state law or policy in question reflects a legitimate state public interest and is not excessively discriminatory or protectionist, state antitrust enforcement does not run afoul of the Dormant Commerce Clause. State antitrust enforcement thus overcomes one potential barrier for situations in which the regulated activity has interstate effects.

[FOOTNOTE] 31Link to the location of the note in the document

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Lamb, supra note 2, at 1722-23; see also Parker v. Brown, 317 U.S. 341, 342, 362 (1943) (upholding the validity of a California state program that did not violate the Commerce Clause despite its anticompetitive effect). [END FOOTNOTE]

#### Enforcement beyond federal baselines can’t be preempted

--there’s established ‘cooperative federalism’: the fed sets a baseline for antitrust and states can go beyond that

--their ev mostly doesn’t apply: ‘preemption’ is about state anticompetitive behavior, not antitrust enforcement

--Congress supports this, so even if there’s a legal case, they won’t attempt to preempt

--the Supreme Court recognizes this, so they’ll strike down preemption

Philip J. Weiser 20, Hatfield Professor of Law and Telecommunications, and Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado, JD from New York University School of Law, Colorado Attorney General, BA from Swarthmore College, “The Enduring Promise of Antitrust”, Loyola University Law Journal, 52 Loy. U. Chi. L.J. 1, Fall 2020, https://coag.gov/blog-post/prepared-remarks-the-enduring-promise-of-antitrust/

I. The Role of the States in Antitrust Enforcement

During the 1970s, Congress began to develop a range of "cooperative federalism" regulatory programs. Under such programs, Congress authorizes state enforcement of federal law and generally calls on the federal government to set a floor for enforcement. In so doing, it generally provides states with additional authority to tailor standards as well as pick up any slack in enforcement. By instituting such a model, Congress [\*2] adopted a hedging strategy - ensuring a base level of uniformity, allowing for appropriate experimentation, and building in the opportunity to pick up the slack as to any underenforcement at the federal level.

The environmental laws provide the classic example of cooperative federalism in action, with the Clean Air Act being a clear case in point. Under the Clean Air Act's model, the Environmental Protection Agency (EPA) authorizes state agencies to address air pollution using a variety of tools, provided that they ensure a basic level of air quality. Where state agencies decide to go above the level specified by the EPA, they are permitted to do so. Following this precedent, both telecommunications regulation and health care policy later adopted a cooperative federalism architecture, blending state and federal authority and calling on state agencies to develop and enforce federal regulatory standards.

Antitrust law operates in a functionally similar manner to other cooperative federalism regimes. In 1976, by adopting the Hart-Scott-Rodino Antitrust Improvements Act, Congress embraced the ability of state AGs to enforce federal antitrust law on behalf of their states, using what is called "parens patriae" authority. The theory of this delegation of authority, like other cooperative federalism programs, is twofold: (1) states may be better positioned to know of competitive issues in their jurisdictions; and (2) states may have a greater willingness to take action and have the ability to collect damages on behalf of their citizens, thereby further advancing the goals of antitrust law. As the Supreme Court stated, the role of states in antitrust enforcement "was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."

One of the questions inherent in a cooperative federalism framework is whether the federal government has the authority to prevent states from going further than the federal government where, in their view, local conditions warrant. In the environmental arena, the EPA has the authority [\*3] to ensure a minimum level of enforcement, but not to prevent states from taking additional action. In the antitrust arena, the situation is similar: the federal government can take action to ensure a basic level of enforcement, but it does not have the power to prevent states from going further - under federal or state law - to stop anticompetitive conduct.

#### The Fed won’t preempt, even if they could, because they need reciprocal state support to limit Parker immunity

--'Parker immunity’ refers to the ‘state action doctrine’ that courts have applied to state-based antitrust violations. Without states acceding to federal demands for political reasons, the fed could not stop state-level anticompetitive behavior

--there’s a QPQ: states don’t fully assert Parker immunity in exchange for the Fed accommodating state antitrust enforcement

--the Fed understands this and values antitrust enforcement over Commerce Clause concerns, so they won’t attempt preemption

Dr. Michael S. Greve 5, Professor at the George Mason University School of Law, PhD and an MA in Government by Cornell University, “Cartel Federalism? Antitrust Enforcement by State Attorneys General”, University of Chicago Law Review, Volume 72, Issue 1, 72 U. Chi. L. Rev. 99, Winter 2005, Lexis

IV. An Exchange Theory of Antitrust Federalism

The model so far fails to explain, first, state enforcers' curiously narrow view of state action immunity, and, second, the federal government's accommodation of the states' aggressive demands for enforcement authority. Federal agencies might oppose those demands for good reasons -- for example, a concern over interstate or international spillovers, or a concern that an aggressive state role might distort national antitrust priorities. But while considerations of this sort have recently prompted calls by some federal officials for improved protection of federal priorities against state interference and for some form of sorting federal from state antitrust responsibilities, the general pattern has been federal accommodation to the states' demands for an expanded role. The list of federally supported -- or at least unopposed -- extensions of state authority includes "indirect purchaser" actions under state law, state divestiture remedies, state antitrust jurisdiction over foreign corporations, and the right of states to pursue equitable remedies even after the defendant's entry of a settlement with federal authorities.

One can interpret these seemingly odd positions -- the states' consistent support for the federal government's bid to limit Parker immunity, and the federal government's equally consistent failure to assert federal prerogatives against the states -- as two sides of a single bargain. On this interpretation, state enforcers have supported the federal position on state action to obtain maneuvering room for state antitrust actions that the federal government might otherwise oppose. Conversely, the federal government has tolerated the expansion of state enforcement authority to make progress at the state action front.

One highly suggestive piece of evidence is the amici states' position in Ticor, where the majority states portrayed a demanding state action requirement and especially its "active supervision" prong as a [\*118] pristinely federalist position. That line of reasoning has been described as "not easy to understand" and as a "challenge to historians." Notwithstanding the Ticor Court's insistence that "states must accept political responsibility for actions they intend to undertake," little in economic theory, and less in federalism theory, recommends that ruling. Someone has to supervise the states' "active supervision," and that "someone" cannot be the citizens in the various states; it has to be the FTC. There may be reasons for such an arrangement, but state autonomy and local accountability cannot be among them.

In fact, Ticor presented the FTC and the U.S. Solicitor General with a massive federalism problem. Among the obstacles was an effusively "federalist," pro-immunity decision by then-Judge Anthony Kennedy in a case presenting very similar questions. Predictably, Ticor played the federalism angle and especially the opinion of Kennedy -- by then, a crucial vote on an increasingly federalism-friendly Supreme Court -- to the hilt. The majority states' brief allowed the federal government, which had theretofore ignored Ticor's federalism [\*119] argument, to denounce that argument as rank opportunism. Justice Kennedy's explicit reliance on the majority states' averments suggests that the FTC might well have lost the case but for the states' support.

If the federal government had every reason to seek the states' support, the states had equally good reasons to lend it. The Ticor briefs were submitted shortly before a certiorari petition in Hartford Fire Insurance Co v California, then described by a leading state antitrust enforcer as "the biggest and most important civil case . . . pending in the United States." The states had initiated the Hartford litigation despite the FTC's severe misgivings, and there was every reason to think that the outcome could well depend on the U.S. government's position before the Supreme Court -- which was by no means a foregone conclusion at the time of Ticor. Lo, at the end of the day, in Hartford the federal government deferred to the states.

The proximity and parallelism between the states' and the federal enforcers' interests do not imply some outright quid pro quo. An explicit bargain actually seems unlikely, since both sides sport multiple institutional actors who cannot easily commit their sister agencies, let alone their successors in interest. Moreover, the analysis is meant to capture the political economy of the federal-state transaction (which the economics literature treats under the heading of "incomplete contracts"), not its social dimension (which will to the participants look like collegial, if not frictionless, "networked enforcement"). So understood, though, the stipulated logic fits, and may help to explain, the trajectory of federal-state antitrust relations from confrontation during the Reagan years to increased cooperation since the first Bush administration and to this day. Throughout, state-sponsored cartels [\*120] were a top enforcement priority for the FTC, under both Republican and Democratic administrations. Federal enforcers soon realized that state opposition often impedes federal enforcement at this front, and that state support is worth something. Conversely, an aggressive state agenda requires federal accommodation. The broad enforcement powers of state authorities, from divestiture remedies to indirect purchaser actions, may now be settled law. But that was not true twenty-five years ago, when state attorneys general aspired to play a more prominent role in antitrust law. At that time, the states needed federal accommodation, both in the everyday enforcement process and in high-stakes cases involving questions of federal preemption and prerogatives, where the federal government's official position often makes a crucial difference. And one of the few meaningful concessions the states had to offer was their support for federal enforcement efforts that might otherwise be perceived as nationalist intrusions into "states' rights."

### 2NC---AT: Enforcement

#### States have robust antitrust capabilities and expertise AND the CP’s collective action causes resource-sharing that makes regulation effective

[blue = always, yellow = AT: Posner]

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

E. The Incompetent States Problem

Finally, critics argue that state enforcers will make error-ridden antitrust choices due to a lack of resources, experience, and expertise. [\*2568] Whereas federal enforcers have significant budgets for antitrust enforcement, the percentage of funding set aside for antitrust enforcement by state attorneys general is minute. Because of this lack of resources, state enforcers have been accused of staffing antitrust cases with senior attorneys who, while experienced in civil litigation generally, are antitrust novices. These factors have led critics to argue that state attorneys general handle antitrust suits poorly, clogging the judicial pipeline with questionable suits. State attorneys general are accused of acting as free riders on federal actions and of making settlements more difficult rather than undertaking useful enforcement.

But there is reason to dispute critics' claims. The critique of individual attorneys general ignores the states' ability to work in unison. Cooperating through NAAG, states are able to build on each other's experiences in antitrust enforcement. Thus, worries about inexperienced antitrust divisions working alone may be overstated. Although interstate coordination may weaken their point, critics can retort that most state actions are not coordinated: according to NAAG's State Antitrust Litigation Database, only nineteen of the fifty-six civil antitrust actions brought by states between 2014 and 2019 were brought by multiple states working together, although many of the noncooperative suits regarded intrastate anticompetitive conduct. This same dataset, however, also undermines the critics' argument that states act only as free riders: only nineteen of the fiftysix suits included federal participation. Finally, much of the criticism leveled at state attorneys general occurred before a renaissance in state law enforcement. Since Judge Posner derided the skill of state attorneys general in 2001, lawyers and judges, including Chief Justice Roberts, have recognized a marked improvement in state attorney offices' advocacy. Whether or not Judge Posner's critiques were valid at the turn of the century, it is unclear that the landscape remains the same today. [\*2569] Finally, this critique undermines the arguments, noted earlier, that state law enforcement is overdeterring competition or creating a patchwork of antitrust law. If states are nothing but free riders, then we need not worry about overdeterrence.

#### The threat of state enforcement is enough

David A. Zimmerman 99, JD from the Emory University Law School, “Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers”, Emory Law Journal, 48 Emory L.J. 337, Winter 1999, Lexis

Conclusion

Enforcement decisions made by state and federal antitrust enforcement agencies are very important for two reasons. First, lower court decisions on mergers are unpredictable because the Supreme Court has not decided a merger case in twenty-four years. 146Link to the text of the note Second, the cost of defending an enforcement action is very high. Because many merging parties would rather not deal with this uncertainty or bear these costs, state and federal enforcement agencies can quash many mergers merely by threatening enforcement actions.

## Innovation ADV

### 2NC---AT: Kill Zones

#### Kill zones are wrong---the possibility of a merger motivates innovation---increasing amounts of deals prove.

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, “How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine,” Information Technology & Innovation Foundation, 03-10-2021, https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new

Large U.S. technology platforms invest almost as much in R&D as the entire U.K. economy does (business and government).29 But knowing that innovation is important, neo-Brandeisians have argued that big technology companies actually limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in them (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation.

In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firms to benefit from economies of scale or network effects, and enable the smaller firms to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell therefore might make it harder for promising firms to find funding.

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler that guides entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring, as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities.

Moreover, if they are creating kill zones, why did the number of angel and seed deals rise almost sixfold between 2006 and 2019, peaking in 2015? The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down. (See figure 5.)  
Chart, line chart

Description automatically generated

## Institutionalism ADV

### Inequality---No Monopsony---2NC

#### It’s explained by regional dynamics

Robert D. Atkinson 21, Founder and President of the Information Technology and Innovation Foundation (ITIF), the world’s top think tank for science and technology policy, internationally recognized scholar and a widely published author whom The New Republic has named one of the “three most important thinkers about innovation,” member of the Markle Foundation Task Force on National Security in the Information Age and serves on the boards or advisory councils of the Internet Education Foundation, the NetChoice Coalition, the University of Oregon’s Institute for Policy Research and Innovation, and the State Science and Technology Institute, “The Myth of Local Labor Market Monopsony,” ITIF, 5-7-2021, https://itif.org/publications/2021/05/07/myth-local-labor-market-monopsony

Many economists and advocates, particularly progressives, have raised concerns in the past decade about the fact that wages have increased slower than productivity. Notwithstanding the fact that this divergence is overstated, it is true that raising wages is important.

The problem is that, rather than keep the focus on real solutions, such as raising taxes on wealthy individuals, increasing the minimum wage, promoting greater unionization, and spurring faster productivity growth, progressives proffer a dark narrative in which monopoly is the villain lurking in the background. If only we could break up big companies, they argue, all other economic problems would be easier to solve.

To prove that the U.S. economy is being crushed by rapacious monopolies they constantly repeat a host of claims: Price markups have increased, labor’s share of income has decreased, corporate profits are up, new firm start-ups are down, and the overall trend toward monopoly has grown. These are, by and large, false.

Yet, in their ongoing quest to find a monopolist under every bed, progressives have latched onto the notion of labor market monopsony. In other words, they claim that in too many local labor market, workers have only a few choices of firms to work for, and this enables firms to squeeze wages.

The most commonly cited scholarly work on the topic is from liberal economists Jose Azar, Ioana Marinescu, and Marshall I. Steinbaum. Indeed, their work has become the de facto view on the issue, with government officials, the media, and others citing it as scripture.

While Azar, Marinescu, and Steinbaum have published a number of articles on the topic, all of their work uses a similar methodology. They analyze local labor markets in the United States by comparing job openings and salaries using online job tools.

They looked at a combination of U.S. commuting zones and 200 six-digit occupational codes to assess the state of more than 117,000 specific labor markets in 2016. They found that 60 percent of markets were highly concentrated, while another 11 percent were moderately concentrated.

At first glance, it would appear they are on to something and that antitrust officials better get on the ball. But on closer inspection, while it helps advance the “monopoly crisis” narrative, it is actually much ado about nothing.

The reality is that most of the labor markets with high levels of employer concentration are rural and small-town areas with few employers overall. As they wrote, “Commuting zones around large cities have lower levels of labor market concentration than smaller cities or rural areas.” Ioana Marinescu explains, “This may contribute to explaining why wages are higher in urban areas.”

As any regional economist knows, wages are lower in rural Wisconsin than in Manhattan, not because there are more employers in Manhattan than in rural Wisconsin, but because it costs more to do business in Manhattan than it does in rural Wisconsin. For example, the cost of living in Dyersburg, TN (a community of about 18,000 people), is almost 25 percent lower than it is in Fort Lauderdale, FL, and home prices are 46 percent lower. So, you can be sure that workers in Dyersburg are paid lower wages than workers are paid in Fort Lauderdale.

### Democracy---Big Tech Not Key---2NC

#### The threat to democracy is manufactured for political gain.

Thibault Schrepel 20, Assistant Professor at the Utrecht University School of Law, Faculty Affiliate at Stanford University’s CodeX Center, Ph.D. in Antitrust Law from Université Paris-Saclay, “Antitrust Without Romance,” NYU Journal of Law & Liberty, Vol. 13, No. 2, 2020, https://dx.doi.org/10.2139/ssrn.3395001

As personal interests reflect the current populism of legislatures, an understanding of how this populism functions is essential to understand why the use of moralizing concepts is growing.

A key characteristic of populism is the opposition of the people with the elite, encapsulated by "Us vs. Them." 102The further away the elites are said to be from the people, the greater the theoretical threat and the more populism grows. Recent events show that the United States and Europe are facing such growing populism. The election of Donald Trump symbolizes the coming to power of populist ideas in the United States. 103As for Europe, "26.8 percent of [\*356] voters in Europe - more than one in four - cast their vote for an authoritarian populist party last time they voted in a national election," and "vote support for authoritarian populists increased in all six elections in Europe during 2018 and has on an aggregated level increased in ten out of the last eleven elections." 104

By calling the existence of technological elites or dominant companies unjust, by playing on fears and by waving the flag of a threat to democracy, antitrust authority personnel are implying that this elite has interests opposed to those of the people, and should be stopped. 105They portray the actions of antitrust authorities as [\*357] protecting the interests of "pure people" by sanctioning "the corrupt elite." 106This helps mobilize a majority in support of antitrust personnel's actions, which they co-opt to serve their personal interests. The political elite opposes the technological one to this end.

This scheme is what we see in antitrust law nowadays. Populism leads to the demonization of the technological elite whose interests are said to be contrary to those of the people whom they dominate. Indeed, some say that "we're living in a time when many people have the sense that something has gone out of balance. That companies have become more powerful than people. And it seems as though that may be more than just a feeling." 107A corollary is the need to protect helpless consumers and the stereotypical inventor in his garage who can be "killed" by the elite. 108Small has been beautiful for a long time, and now, small is always more beautiful than big. This Manicheism leads to the "curse of bigness" which has recently been brought back to the forefront. 109

In any case, the new challenges created by digital markets seem to give rise to more romance in antitrust. Technological elites are said to pose fundamentally new threats to the public by endangering not [\*358] only the markets but democracy or non-economic interests, 110leading to new calls for more regulatory power and intervention. In the absence of concomitant studies showing why the power of technology giants is fundamentally different from the power of industrial giants, and why market failures would be more damaging than potential governmental and political failures, the growth of digital markets calls for caution regarding the action of antitrust authorities. Indeed, the risk is high that they may seize the occasion to obtain new prerogatives that their personnel will co-opt for their sole benefit. 111

## 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 Congressional Progressive Caucus 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.’

### Link---2NC

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

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

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

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

Two to go

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

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

Meanwhile, on Capitol Hill …

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

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

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

So, what does it all mean?

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

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

### Big Tech Link---2NC

#### The plan’s unpopular with the GOP and splits Dem unity

Casey Newton 21, Contributing Editor at The Verge, Founder and Editor of Platformer, BS from Northwestern University, “Why The Tech Antitrust Reform Bills Are Struggling To Move Forward”, The Verge, 6/24/2021, https://www.theverge.com/2021/6/24/22548317/tech-antitrust-reform-bills-congress-democrats-republicans-editorial

Watching Congress debate a package of tech reform bills this week has been sort of like watching a group of people ordered to eat a giant submarine sandwich all at the same time. Everyone has started in a different place, no one agrees on a path forward, and people almost can’t help butting heads.

This should be a moment of huge importance in the history of tech and democracy in the United States. The House Judiciary Committee investigated competition in the tech industry for a year. During that time, Congress held 10 hearings. In the end, a 449-page report on the subject was produced. And from that report came a package of bills that, if passed, would reshape the tech industry and probably some other large corporations as well.

The bills are rooted in concerns that I have long shared and written about. A small number of companies now controls vast sectors of the economy with little oversight or accountability. How their platforms are used and abused is of huge consequence globally. And in many cases these companies have acted to stifle competition — lowering prices to drive their rivals under; privileging their own products over competitors; preventing competitors from using their services entirely; using near-monopoly profits to maintain their positions; and acquiring potential threats before they can disrupt the incumbent.

At the same time, despite Congress taking so long to intervene, market competition has continued anyway. Google may spend billions to ensure it is the default search engine on the iPhone; but its rival DuckDuckGo just raised $100 million amid record growth, and the Brave browser just introduced a search engine of its own. Facebook had social networking mostly to itself in the mid-2010s, and is currently working to own the future of virtual reality. But TikTok and Snapchat now dominate the attention of younger users, and the company is gradually remaking all of its apps in an anxious effort to respond.

AT STAKE: THE STATE-LIKE POWER A HANDFUL OF APPS HAVE OVER ASPECTS OF OUR DAILY LIVES

Of course, the mere existence of rivals doesn’t necessarily mean that the current market is perfectly fair or functional. But it does increase the challenge for writing legislation that addresses our underlying concerns about the platforms. Members of Congress talked at great length on Wednesday about wanting to make markets more competitive, but what is really at stake is the state-like power a handful of apps have to control aspects of our daily lives. It isn’t that no one can conceivably compete with them in the future; it’s that they have too much power now.

That’s why I like this bill, which would increase funding for antitrust enforcement by 30 percent. Rather than simply ban most mergers and acquisitions by default, as another bill in the package would do, this one empowers the Federal Trade Commission and the antitrust division of the Department of Justice to scrutinize M&A more carefully. The downside of such an approach is that absent other legislation, courts could strike down the agencies’ enforcement actions; the benefit is that agencies can make more informed, case-by-case decisions.

I also like a bill designed to make it easier for consumers to switch between platforms, even if it raises real privacy concerns. (Are the phone numbers in my contacts app really mine to share, even if it makes consumer apps much more competitive?) I also like aspects of Rep. David Cicilline’s bill American Choice and Innovation Online Act, which would restrict platforms from indulging in some of their worst impulses: Amazon using third-party seller data to inform its own product development, for example, or Apple advertising its many subscriptions throughout the operating system.

But at the risk of sounding incredibly naive about the political process, this is not really the debate we just had during a marathon bill markup session in the judiciary committee.

II.

The House bills all have Republican co-sponsors, and appear to enjoy some support in that delegation. But key Republicans have so far refused to engage with any of these bills on a policy level, insisting instead that tech reform begin (and possibly end?) with prohibitions on “censorship.”

Galled by the removal of former President Trump from Facebook, Twitter, and other platforms, and perhaps energized by Florida’s recent passage of a (likely unconstitutional) bill that would make such content moderation illegal, some Republicans want to throw out the entire process. Members of Congress in this camp include the House minority leader, Kevin McCarthy, and Rep. Jim Jordan, the ranking Republican on the Judiciary Committee.

This piece from Politico this week gives you some flavor of the discussion:

Jordan has been publicly pushing against the bills, while McCarthy has said he’s planning to unveil his own tech reform agenda.

“We’ve got a beef with all Big Tech in the sense of the censorship they have of conservatives now,” Jordan told Fox Business on Tuesday. Jordan added, however, that the antitrust bills coming to a vote are sponsored by “four impeachment managers” — questioning top Democrats’ ability to write legislation that conservatives can favor.

REPUBLIC OUTRAGE IS ROOTED IN THE IDEA THAT ANYONE ELSE MIGHT HAVE POWER OVER THEIR SPEECH

Set aside for a moment the fact that Trump was removed from these platforms because he was using them in an effort to overturn the results of a fair election, the thing to highlight here is that Republican leadership’s concerns have nothing to do with “competition” per se. Instead, their outrage is rooted in the idea that anyone else might have power over their speech.

We know what happens when elected officials are allowed to post whatever they want online — they attack minorities, they manufacture influence operations against their own citizens, they chip away at the foundations of democracy. (This has been the story in India for the past year, and if you assume it is a preview of the next Republican administration here in the United States, as I do, it’s quite chilling.)

For these Republicans, then, the goal is not actually to make platforms like Facebook and Twitter less powerful — it’s to ensure that they can use those platforms’ power to achieve their own ends, and to make it illegal for anyone to stop them. When Trump shut down his blog 29 days after starting it, it wasn’t in protest of platforms’ power — it was out of the frustration that he no longer had access to it.

The Politico story and other reporting on the subject suggests that Democrats will struggle to find 10 Republicans in the Senate to sign on to most of these bills, and perhaps to any but the one providing extra funding for antitrust enforcement.

For as long as the parties have spent agreeing that somebody ought to do something about Big Tech, in important ways they are still talking past one another.

III.

I mean, the Democrats aren’t exactly all in agreement, either.

There is a split between progressive and moderate Democrats in just how far these bills should go to reshape the economy. And some bills go quite far — Rep. Pramila Jayapal’s Ending Platform Monopolies Act would permit the government to sue big platforms to break them up — Amazon could be forced to divest itself of its logistics network and of Amazon Web Services, for example; Facebook could have to spin out Instagram and WhatsApp.

That has made some Democrats uneasy, as Leah Nylen and Cristiano Lima reported Wednesday in Politico:

A growing number of moderate Democrats are also voicing concern about the proposals under consideration this week, which they warn could have a vast impact on the U.S. economy. That includes at least two key California Democrats that sit on Judiciary, Zoe Lofgren and Lou Correa, who will have a say Wednesday on which bills make it out of the panel and which don’t.

“My concern is that this legislation will essentially push away investment in this area, it will stifle the economics behind it, the job creation,” Correa, whose district includes parts of Orange County, said in an interview Tuesday.

CONGRESS HAS LITTLE TO SAY ABOUT THE SPECIFICS

I think these concerns are fair? It’s remarkable that, after years of deliberations, we still don’t know exactly how the government would proceed if these bills became law. Would they sue each platform simultaneously and force them to divest most of their acquisitions? Would they begin new, more targeted investigations of the platforms before they acted? And what would the platforms look like after they were through?

A coalition of advocacy groups, most supported by the big tech platforms, wrote in a letter to Congress that: “Rep. Cicilline’s bill would ban Google from displaying YouTube videos in search results; ban Alexa users from ordering goods from Amazon; block Apple from preinstalling ‘Find My Phone’ and iCloud on the iPhone; ban Xbox’s Games Store from coming with the Xbox; and ban Instagram stories from Facebook’s news feed.”

Those would represent enormous changes to the economy, and yet Congress — which rarely discusses individual products when talking about these issues — has little to say about the specifics. Given that consumers generally do love all these products, that seems risky and ill advised.

I am trying not to be a regulatory nihilist here. Like I said, I think aspects of these bills could do some good. I hope the FTC and DOC get more funding. I hope Apple enables sideloading on iOS, whether or not Congress forces it to. I hope future mergers get more scrutiny, particularly those related to next-generation platforms, rather than last-generation ones.

But two big concerns hang over everything else here. One is that in a Congress where a small handful of Republicans can derail almost anything, there are seemingly more than enough here to stop most of what has been presented in its tracks. And two is that as grateful as I am for the bipartisan group’s work here, it’s hard to shake the feeling that they both took too long to act and bit off more than they can chew.

A member of the bipartisan group, Rep. Ken Buck (R-CO), called the package of bills “a scalpel, not a chainsaw, to deal with the most important aspects of antitrust reform.” But it sure looks like a chainsaw to me. And before Congress revs it up much more, Americans may want to consider exactly what their representatives are proposing to do with it.

The representatives ought to consider it, too.

#### Big Tech will viciously oppose antitrust enforcement and Congress will fall in line

Jeffrey Bone 20, Assistant Professor of Legal Studies, Haub School of Business, Saint Joseph's University, “Antitrust Reform: Implications of Prospective Threats by Digital Platforms to Relocate Abroad”, Belmont Law Review, 8 Belmont L. Rev. 164

To curb the excessive power of the major digital platforms such as Facebook, Amazon, Apple, and Google, some commentators have called for a series of legislative reforms in the U.S. These reforms include changes to antitrust policy as well as the establishment of a specialized antitrust court. Perhaps the most ambitious proposal is a call for a sectoral regulator to govern the conduct of digital platforms. The scope of this regulator would be comprehensive and include issues outside of an antitrust purview, such as privacy, media, data-use restrictions, and consumer protection.

Such proposed reforms are likely to be met with resistance by the major digital platforms. What is less clear is the reactions and responses of politicians; in particular, the responses of those in Congress who have the power to enact these reforms into law. In order to become law, these regulations must go through Congress, which is a politically charged environment that is subject to pressure from the very companies who stand to lose their market power if subject to increased antitrust oversight.

It has been suggested that some corporations such as Facebook, Apple, Amazon, and Google, are uniquely set apart from other multinational enterprises in that they are multifaceted, political agents capable of preventing further government oversight. These advantages are varied in nature. First, these companies are well financed and positioned in order to lobby politicians and regulators. Second, in some cases these [\*167] corporations' role as media outlets allows them to claim First Amendment protections which can potentially hinder certain regulatory changes. For instance, these digital platforms increasingly control the means through which politicians reach their constituents. Third, their connectivity allows them to directly engage users in challenging political initiatives that disadvantage them. Fourth, their growing importance as leading exporters allows them to raise "national champion" arguments asserting that the corporations interests should be protected and unhindered by U.S. regulation.

Part I of this paper outlines the various regulatory concerns that are posed by the market dominance of the major digital platforms. These concerns include antitrust issues, as well as other salient challenges presented by digital platforms. These challenges include the protection of customer privacy, pervasive control over the distribution of media, and as a corollary, the ability to effectively coordinate political messaging and outlets. It is argued that if Congress proceeds to introduce fresh legislation to deal with these concerns, then it is possible that companies such as Facebook, Amazon, Apple, and Google will threaten an expatriation of some or all of their U.S. business operations. In the face of these threats, it is likely that Congress will cede to the demands of these companies.

Part II sets out a literature review on the scope of U.S. antitrust regulation. There are at least two viewpoints towards antitrust policy. The first viewpoint is the Consumer Welfare model, which asserts that businesses that maximize consumer benefits through efficiencies and low prices should not be scrutinized as potential antitrust violators. This is a somewhat relaxed approach to antitrust policy and enforcement and is the fundamental underpinning of the current U.S. framework. The approach in the U.S. towards antitrust regulation was once much more active in breaking up large-scale corporations. However, since a 1979 Supreme [\*168] Court decision, the Consumer Welfare approach has been the principal strategy of U.S antitrust policy.

Contrasting the Consumer Welfare model is the Brandeisian conception of antitrust law. The Brandeisian model focuses on whether a business has accumulated significant political power that requires intervention by courts and regulators. This is a much more robust approach to antitrust enforcement compared to the Consumer Welfare model.

Part III of the paper sets out a proposed hypothetical circumstance to question what the political implications will be if these digital platforms use the prospect of new federal antitrust regulations as a reason to relocate or move significant assets abroad. Pragmatic options and methods to expatriate the business operations of the major digital platforms are then addressed. This hypothetical scenario is worthy of exploration because it sheds light on whether members of Congress are likely to capitulate to the demands of large digital platforms when attempting to craft new antitrust mechanisms in order to further regulate their activities.

It is argued in this paper that capitulation by Congress is the likely outcome. This is due to the comprehensive and sustained power structures of these corporations in the economy, and perhaps more importantly, throughout society. The result is that regulatory power over digital platforms has shifted away from government institutions and into the private sector. Such a result signifies a relationship between market concentration and undesirable political outcomes, which poses a threat to democracy and to the sustainability of transparent, open markets.

#### COVID changed everything. There’s no longer support for breaking Big Tech.

Jacob Silverman 20, MA in Humanities and Social Thought from New York University, BA from Emory University, Staff Writer at The New Republic, Author of Terms of Service: Social Media and the Price of Constant Connection, “The End of the Backlash to Big Tech”, The New Republic, 5/28/2020, https://newrepublic.com/article/157834/end-backlash-big-tech

As America suffers, Amazon prospers. The company is hiring 175,000 new staff and even investing in its own Covid-19 testing program. Amazon’s Web Services division faces enormous demand as housebound Americans require more technical infrastructure for shopping, gaming, Twitching, and the like. And Amazon is not alone in enjoying the strange fruits of the pandemic. Apple and Google have announced development of a contact-tracing smartphone technology that will alert users of possible exposure to the novel coronavirus. A number of facial recognition companies—including the farcically villainous Clearview AI—are now pivoting their products to track coronavirus patients, while temperature-reading drones and other forms of privacy-invading security theater are being sold to law enforcement agencies worldwide. In May, New York Governor Andrew Cuomo announced that former Google CEO Eric Schmidt would lead a commission to reimagine how the state does business, focusing on remote education, telehealth—and, of course, expanded access to the internet.

Big Tech’s newfound role as all-purpose savior marks something of a turnaround for the industry, which not long ago was facing serious political scrutiny for the first time in its young life. Both Democrats and Republicans had called for investigations into issues of competition, privacy, data security, and political advertising. Members of both parties had also floated the possibility of breaking up Silicon Valley’s monopoly power, treating tech CEOs like the robber barons of the Gilded Age. At Facebook, Congress’s favorite target, Mark Zuckerberg, fretted to company insiders about the potential influence of Senator Elizabeth Warren, while, in a possible attempt to complicate a breakup, the company’s engineers worked to merge the back-end technologies powering its suite of messaging apps. Other large tech companies assembled armies of lobbyists to win favor on Capitol Hill, even as back home they saw their traditional talent pipelines begin to dry up.

In a couple of antic months, all of that has changed. The Covid-19 pandemic has rolled back the tide of congressional inquiry, as both the public and lawmakers have grown even more reliant on the technologies of Silicon Valley. From messaging to food delivery to video chats to online shopping, the dial of our tech dependency has been turned to 11. We should now be “grateful” for the presence of Big Tech in our lives, says Eric Schmidt. Critics like Warren and Republican Senator Josh Hawley will presumably continue to press the issue, but there is less incentive to aggressively investigate an industry that, despite its obvious defects, is suddenly responsible for keeping hundreds of millions of people connected, fed, working, and entertained. If, as some hope, Silicon Valley can provide important technologies and engineering and production capacity to help fight the viral epidemic, so much the better.

A recent Washington Post article summarized the political situation: Congressional antitrust inquiries have been back-burnered, as the government, in the name of contact tracing, has a new interest in Silicon Valley’s consumer surveillance technologies. The techlash is over.

#### Even if they support the substance, the GOP will object to the lack of content moderation requirements---that derails agreement

Dave Perera 21, Master’s Degree from the Columbia University School of International and Public Affairs, Technology Reporter at mLex, Veteran Cybersecurity Reporter for Politico and Former Editor for FierceMarkets Publications, “US Antitrust Legislation Faces Uphill Battle Despite Unified Democratic Government”, mLex, 3/12/2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-antitrust-legislation-faces-uphill-battle-despite-unified-democratic-government

Whether Republicans and Democrats in the Senate can find common cause is an even more fraught question. Unlike its House counterpart, the Senate Judiciary subcommittee on antitrust hasn't conducted a 16-month investigation into digital monopolization. The subcommittee’s senior Republican, Utah’s Mike Lee, is prone to touting the importance of the consumer welfare standard and rails against online platforms “eager to impose the ideological censorship called for by their political benefactors.”

Lee also says he’s open to working with subcommittee Chairwoman Amy Klobuchar on strengthening enforcement, adding the caveat that current antitrust laws are sufficient.

Klobuchar, a Minnesota Democrat, doesn’t need Lee to get a bill through her subcommittee, but failing to find consensus with Republicans imperils her chances of making law. The prospects for her Competition and Antitrust Law Enforcement Reform Act becoming law as current written aren't good.

— 'Big tech is out to get conservatives' —

A looming question hanging over any bill, even one tailored to win bipartisan support, is whether it could be derailed by Republican anger at online platforms for alleged anti-conservative bias.

A right-wing trope especially spread by President Donald Trump during his last year in office — the belief that platforms use their content moderation powers to silence conservatives — has mainstream acceptance in Republican circles. It’s a refrain almost obligatory for Republican lawmakers to repeat when discussing any issue related to online platforms. “Big tech is out to get conservatives,” House Judiciary Committee ranking member Jim Jordan of Ohio has said more than once.

Democrats have their own share of anger at online platforms’ content-moderation practices, to be sure. They accuse online platforms of circumventing consumer protections, undermining civil rights laws and not doing enough to stymie disinformation.

It’s Republicans, though, who appear the angriest, and are the more likely to insist that any legislative reform touching online platforms address content moderation, with the intention of making it harder, not easier, for online platforms to remove users, potentially imperiling a compromise measure.

There is one bill that just might thread that narrow opening between antitrust and content. It has a bipartisan coalition in the House and the Senate. Attached are House antitrust subcommittee Chairman David Cicilline of Rhode Island, Representative Buck, Senator Klobuchar and Senator John Kennedy, a Louisiana Republican. It’s the Journalism Competition and Preservation Act, and it would establish a four-year safe harbor from federal and state antitrust laws for news organization to collectively negotiate with online platforms.

It isn't antitrust reform. Critics say it’s the opposite of reform, as the answer to monopoly shouldn’t be the mere suspension of antitrust law. But it’s something they agree on, and for lawmakers looking to lodge a win, it might suffice.

### Big Tech---AT: Bipart

#### Bipart has crumbled---Big Tech is now a battle

Cecilia Kang 20, National Technology Correspondent for The New York Times, and David McCabe, Reporter for Technology in the New York Times, “Big Tech Was Their Enemy, Until Partisanship Fractured the Battle Plans”, The Pacific Business Journals, 10/6/2020, https://www.bizjournals.com/pacific/news/2020/10/06/partisanship-divides-congress-over-big-tech.html

For all the divisions in Washington, one issue that had united Republicans and Democrats in recent years was their animus toward the power of the biggest tech companies.

That bipartisanship was supposed to come together this week in a landmark House report that caps a 15-month investigation into the practices of Amazon, Apple, Facebook and Google. The report was set to feature recommendations from lawmakers to rein in the companies, including the most sweeping changes to U.S. antitrust laws in half a century.

But over the past few days, support for the recommendations has split largely along party lines, said five people familiar with the talks, who were not authorized to speak publicly because the discussions are private.

On Monday, the Democratic staff on the House Judiciary Committee delayed the report’s release because they were unable to gain Republican support. Rep. Jim Jordan of Ohio, the top Republican on the committee, has asked his colleagues not to endorse the Democratic-led report, said two people with knowledge of the discussions. And Rep. Ken Buck, R-Colo., has circulated a separate report — titled “The Third Way” — that pushes back against some of the Democrats’ legislative recommendations, according to a copy obtained by The New York Times.

The Republicans’ chief objections to the report are that some of the legislative proposals against the tech giants could hamper other businesses and impede economic growth, said four people with knowledge of the situation. Several Republicans were also frustrated that the report didn’t address claims of anti-conservative bias from the tech platforms. Buck said in “The Third Way” that some of the recommendations were “a nonstarter for conservatives.”

The partisan bickering has cast a cloud over what would be Congress’ most aggressive act to curtail the power of technology companies since Microsoft stood trial on antitrust claims two decades ago. And while the House report may still be released this week, it is likely to lose some of its force if Democrats, led by Rep. David Cicilline of Rhode Island, the chairman of the antitrust subcommittee, are unable to gain many signatures from Republican members.

The turmoil gives Amazon, Apple, Facebook and Google a reprieve, even if only temporarily. The House committee was expected to accuse them of rising to the top of the global economy by gobbling up nascent rivals, bullying businesses that needed them to reach users and reducing competition across the economy, said three people familiar with the report.

The report was also expected to kick off other actions against the tech giants. The Justice Department has been working to file an antitrust complaint against Google, followed by separate suits against the internet search giant from state attorneys general.

Cicilline declined to comment. Russell Dye, a spokesman for Jordan, also declined to comment.

“I agree with Chairman Cicilline that Big Tech has acted anti-competitively,” Buck said in a statement. But, he added, “with a problem this significant, I’m not surprised that there’s a variety of legislative options.”

The House Judiciary Committee began its investigation into the four tech giants in June 2019 with bipartisan support. The committee interviewed hundreds of rivals and business clients of the platforms, such as third-party sellers on Amazon and developers who distribute their apps through Apple’s App Store.

In July, the chief executives of the tech behemoths — Jeff Bezos of Amazon, Tim Cook of Apple, Mark Zuckerberg of Facebook and Sundar Pichai of Google — testified in a hearing with the committee to defend their companies. Republican and Democratic lawmakers directed sharp questions at the chief executives, repeatedly interrupting and talking over them.

But the bipartisanship has eroded. Jordan, who became the committee’s top Republican this year, has been publicly skeptical of the investigation. He spent much of his time in the July hearing attacking the chief executives for their platforms’ alleged bias against conservatives, straying from the session’s stated focus of antitrust laws and Silicon Valley’s market power.

#### The GOP will backlash to any substantive regulation of Big Tech

Emily Birnbaum 20, Tech Policy Reporter with Protocol, “Cracks Are Appearing in the Bipartisan Pushback Against Big Tech”, Protocol, 5/13/2020, https://www.protocol.com/congress-antitrust-big-tech-bipartisan

The bipartisan energy around the most important congressional investigation into the tech industry could be in jeopardy.

As the House Judiciary Committee's nearly yearlong antitrust investigation into Facebook, Google, Amazon and Apple nears completion, some Republicans involved have started to distance themselves from the Democrats on the committee, and even the probe itself.

That distance was brought into sharp relief Wednesday, when every Republican member of the antitrust subcommittee pushed back against the Democratic chairman in charge of the investigation. In letters to the Federal Trade Commission and Department of Justice, the six Republicans on the antitrust subcommittee, including ranking member Jim Jordan, derided recent Democratic proposals to pause mergers amid the pandemic.

Rep. David Cicilline, the top Democrat on the antitrust subcommittee, recently proposed such a moratorium, as did the progressives Rep. Alexandria Ocasio-Cortez and Sen. Elizabeth Warren. Cicilline on Tuesday criticized a potential takeover of Grubhub by Uber, calling it "a new low in pandemic profiteering."

The Republicans on the antitrust subcommittee disagree. "These lawmakers … are using the crisis as a pretense to rail against firms being free to make decisions they perceive to be in their best interests," the Republicans wrote in their letter. They added that they believe the federal regulators in charge of antitrust law are conducting proper reviews amid the pandemic, and delaying M&A activity could "stunt economic development and development."

The merger moratorium did not even make it into the Democrats' economic stimulus package proposal, which was unveiled on Tuesday. But the letter signals that, despite a bipartisan "techlash" in Washington, many Republicans' pro-business inclinations could yet prevent them from getting behind the farthest-reaching proposals to rein in tech.

Though Republicans and Democrats have coalesced around heated criticism of Facebook and Google, particularly since 2016, significant differences in approach and style have emerged — and there are serious limits as to how far many Republicans will go in calling for government regulation of the tech industry.

### U---AT: Thumpers---2NC

#### 1. Issue-specific uniqueness first.

#### It’s the top priority---Biden’s clearing his agenda to lobby Congress.

BBC News 10/1, “Biden visits Congress to lobby for stalled bill,” 10-1-2021, <https://www.bbc.com/news/world-us-canada-58758738.amp>

US President Joe Biden has made a surprise visit to Congress one day after it delayed a crucial vote on his $1tn (£750bn) infrastructure plan.

Part of his Democratic Party refuses to move forward with the plan until Congress signs off on a separate $3.5tn welfare and climate change bill.

The bill is at the heart of the party's agenda and passions are high as Mr Biden appeals to unruly Democrats.

Centrists want to downsize the package, while liberals push for more funding.

Ahead of Mr Biden's visit on Friday, Congresswoman Pramila Jayapal, the chairwoman of the House Progressive Caucus, praised the president as "deeply involved" in the budget negotiations.

Her comment comes amid criticism from some Democrats that Mr Biden has taken a backseat in the intra-party talks.

However, after the roughly 30 minute meeting, Democrats emerged saying that Mr Biden had not indicated his top line price tag, leaving the future of the vote uncertain.

"It doesn't matter whether it's in six minutes, six days, or six weeks, we're going to get it done," Mr Biden told journalists after the meeting.

The bipartisan $1tn public works bill, which would apply to routine transportation, broadband, water systems and other projects, enjoys wide support but liberal (or progressive) Democrats are linking its passage to their more ambitious welfare and climate change bill.

That bill would raise taxes on corporations and the rich, investing the revenue in a broad array of social programmes, including early childhood education, universal preschool, government-funded two-year college education, paid family and medical leave, an expansion of government health insurance and environmental spending.

President Biden and House Speaker Nancy Pelosi have been trying to reconcile the liberals with the centrists.

Mrs Pelosi has vowed to hold a vote on the infrastructure bill on Friday, though it's not clear when that vote will take place.

Earlier this week, the White House cancelled Mr Biden's trip to Chicago so he could focus on whipping the needed votes.

#### 2) Specific constituencies---Biden might be using PC with Republicans, but that doesn’t affect support from moderate Dems.

#### 3) Only votes cost PC---not controversies

Kevin Drum 10, Political Blogger, Mother Jones, former contributing writer for the WASHINGTON MONTHLY http://motherjones.com/kevin-drum/2010/03/immigration-coming-back-burner

Not to pick on Ezra or anything, but this attitude betrays a surprisingly common misconception about political issues in general. The fact is that political dogs never bark until an issue becomes an active one. Opposition to Social Security privatization was pretty mild until 2005, when George Bush turned it into an active issue. Opposition to healthcare reform was mild until 2009, when Barack Obama turned it into an active issue. Etc. I only bring this up because we often take a look at polls and think they tell us what the public thinks about something. But for the most part, they don't.1 That is, they don't until the issue in question is squarely on the table and both sides have spent a couple of months filling the airwaves with their best agitprop. Polling data about gays in the military, for example, hasn't changed a lot over the past year or two, but once Congress takes up the issue in earnest and the Focus on the Family newsletters go out, the push polling starts, Rush Limbaugh picks it up, and Fox News creates an incendiary graphic to go with its saturation coverage — well, that's when the polling will tell you something. And it will probably tell you something different from what it tells you now. Immigration was bubbling along as sort of a background issue during the Bush administration too until 2007, when he tried to move an actual bill. Then all hell broke loose. The same thing will happen this time, and without even a John McCain to act as a conservative point man for a moderate solution. The political environment is worse now than it was in 2007, and I'll be very surprised if it's possible to make any serious progress on immigration reform. "Love 'em or hate 'em," says Ezra, illegal immigrants "aren't at the forefront of people's minds." Maybe not. But they will be.

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

#### Issues over the framework will be resolved---clears passage for infrastructure

David Morgan & Jarrett Renshaw 10/23, Renshaw is an award-winning, multimedia business journalist with a proven track record of securing sources and delivering high-quality stories, Morgan covered news from Wall Street and Fleet Street to the White House, the Pentagon and Congress, “U.S. Democrats narrow differences on Biden's agenda, mull billionaire tax”, <https://www.reuters.com/world/us/hoyer-sets-end-weekend-goal-us-spending-deal-framework-2021-10-22/>, October 23rd, 2021

Democrats are closing in on a deal on President Joe Biden's social and climate-change agenda by narrowing their differences over healthcare and other issues, U.S. House of Representatives Speaker Nancy Pelosi said after a White House meeting on Friday.

"We had a very positive meeting this morning. I'm very optimistic," Pelosi told reporters on her return to the Capitol.

Democrats in the House, Senate and White House hope an agreement on a framework of $2 trillion or less will allow the House to move forward next week on a $1 trillion bipartisan infrastructure bill and set the stage for passage of Biden's larger "Build Back Better" social package.

Pelosi said there were only a few outstanding issues on the legislation's healthcare provisions and that decisions also remained on which revenue provisions to include.

"There are many decisions that have to be made, but more than 90% of everything is agreed to and written," Pelosi said. "We're narrowing the differences."

**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**.”

### 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.

### Grid---Impact---2NC---Turns Case

#### Turns modeling and U.S. credibility

Dr. Stephen Walt 13, Professor of International Relations at Harvard University, “The Eclipse of American (Electrical) Power", Foreign Policy, 2/4/2013, <http://walt.foreignpolicy.com/posts/2013/02/04/the_eclipse_of_american_electrical_power>

I've made this point before -- here and here -- and I suspect I'll have to make it again. But whatever you think of the outcome of yesterday's Super Bowl, the unexpected second half power outage was a small blow against U.S. power and influence. Why? Because one of the reasons states are willing to follow the U.S. lead is their belief that we are competent: that we know what we are doing, have good judgment, and aren't going to screw up. When the power goes out in such a visible and embarrassing fashion, and in a country that still regards itself as technologically sophisticated, the rest of the world is entitled to nod and say: "Hmmm ... maybe those Americans aren't so skillful after all." Or maybe we've just spent too much money building airbases in far-flung corners of the world, and not enough on infrastructure -- like power grids -- here at home.

### 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 Nuclear Posture Review. This issue gets complicated given that third parties may have the capabilities to invoke a cyber conflict between Russia and the United States. 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 cyberspace are contributing to diminishing 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 Cuban 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.