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#### Dems will pass limited climate provisions, but PC and time are key.

Mike Lillis 2-3, Senior Reporter for The Hill, “House Democrats warn delay will sink agenda,” The Hill, 02-03-2022, https://thehill.com/homenews/house/592594-house-democrats-warn-delay-will-sink-agenda

House Democrats of all stripes are pressing for quick action on the climate, health and education package at the heart of President Biden’s domestic agenda, warning that a long delay in revisiting the Build Back Better Act is the surest way to kill it.

The lawmakers are citing a host of reasons for their pleas of urgency, including the fast-approaching midterm elections, the desperate desire to give an unpopular president a big boost and the party’s fragile Senate majority that’s just one tragedy away from flipping to GOP control — a dynamic highlighted this week when Sen. Ben Ray Luján (D-N.M.) announced that he’s recovering from a stroke.

But the common theme is clear: Time, they say, is not on their side.

“There are great dangers involved in dragging it out, including all kinds of intersecting battles,” said Rep. David Price (D-N.C.), a member of the House Appropriations Committee.

“I, and most members who have been involved in this, who have a stake in it, we have a sense of urgency,” he added. “It’s certainly not an impossible situation. But it’s gone on too long; there’s been too much focus on our internal [disagreements].”

Price has plenty of company.

Last week, Rep. Pramila Jayapal (D-Wash.), head of the Congressional Progressive Caucus, urged Biden and Senate leaders to get moving on efforts to revive the Build Back Better Act or risk its failure this year, while Democrats still control both chambers of Congress. She proposed a specific deadline: March 1, in time for Biden to promote the bill’s many family benefits during his State of the Union address.

“This desperately needed relief cannot be delayed any longer,” she said.

In making their case, liberals like Jayapal are pointing to the economic strains facing families amid the long-running COVID-19 pandemic, including the rising cost of prescription drugs. Vulnerable incumbent Democrats, meanwhile, are eager to have a big legislative victory to take back to their districts ahead of November’s midterms. And environmentally minded lawmakers are warning that a failure to address climate change immediately will only make it harder — and more expensive — to do so in the future.

“The time is now, because the problems are now,” said Rep. Katie Porter (D-Calif.). “I don’t think it’s any particular date. But the answer is: today, tomorrow, the day after — as soon as we can get it done. Because ... it gets more expensive and more difficult and we risk falling farther behind our competitors if we wait.”

Rep. Jared Huffman (D-Calif.) ticked off a host of reasons why a delay is dangerous for Build Back Better supporters, not least the shrinking calendar heading into the midterms.

“Everybody knows there’s a point at which you get too close to the election to do big bills,” he said, adding that “there’s just a bunch of reasons why a four-corner offense is a bad strategy in the Senate.

“You’ve got to move it along.”

They have a difficult road ahead.

The House passed the $2.2 trillion Build Back Better package late last year, but it has stalled in the Senate, where the moderate Democratic Sen. Joe Manchin (W.Va.) has balked at such a massive spending package in the face of skyrocketing inflation and a national debt that just topped $30 trillion.

Manchin had been in talks for months with the White House and congressional leaders in hopes of finding a compromise he could support. But on Tuesday, he deflated hopes that such an agreement is imminent, saying there are no discussions happening at the moment.

“It’s dead,” he told reporters in the Capitol.

The comments have infuriated House Democrats, who were already frustrated with the West Virginia centrist for single-handedly blocking a central plank of Biden’s domestic platform. Some are wondering if Manchin ever had an interest in supporting the legislation at all.

“It’s hard to get inside his head. If I thought he had a strategy, I’d be more comfortable. But I don’t know if he does; he’s just trying to be in the way,” said Rep. Dan Kildee (D-Mich.).

“It raises a lot of questions as to whether there’s anything he would actually be willing to do,” he added. “He’s going to have to show that he’s willing to be for something. And I don’t know why that’s such a hard calculation for him to make.”

To entice Manchin’s support, House Democrats across the spectrum have acknowledged the need to cut a number of provisions from their $2.2 trillion package if they’re to have any chance of getting it through the Senate and to Biden’s desk — cuts they say they’re willing to make.

“I’ve heard the Speaker and others say, ‘This is an agenda that’s big and broad, but if there are pieces that he’s for, we’ll do it,’” Kildee said, referring to Manchin.

Manchin has been nebulous about his demands, suggesting he’s interested in a deal one day and lashing out at reporters for seeking updates the next.

Still, both Biden and Speaker Nancy Pelosi (D-Calif.) have made getting some version of Build Back Better enacted a top priority this year. With that in mind, House Democrats remain optimistic that something will be done, even if they don’t know yet what it will be.

“I don’t know what the deal’s going to look like, but I don’t think in principle it is a multiweek, complicated deal,” Price said. “It’s a matter of getting agreement with the key people on the key points.”

#### The plan saps both

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

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

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

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

#### BBB is key to semiconductors.

Sebastian Moss 12-20, Editor at Data Centre Dynamics, “Collapse of Build Back Better bill impacts US semiconductor incentives,” Data Centre Dynamics Ltd, 12-20-2021, https://www.datacenterdynamics.com/en/news/collapse-of-build-back-better-bill-impacts-us-semiconductor-incentives

With a Democratic senator saying that he will not support the Build Back Better bill, a number of incentive and funding programs are at risk of falling apart.

Joe Manchin's statement that he will not vote for President Biden's flagship legislation will impact several semiconductor manufacturing programs during an ongoing chip shortage.

The $1.7 trillion-over-10-years BBB bill was set to approve $150m "for the creation of a new Manufacturing USA Institute that is focused on semiconductor manufacturing."

It also was set to include the Advanced Manufacturing Investment Credit program, a modified version of the Facilitating American-Built Semiconductors (FABS) Act.

This would create a new investment tax credit for the construction of a facility whose primary purpose is the manufacture of semiconductors or semiconductor tooling equipment. The construction of the facility must have begun before January 1, 2025.

“This credit will provide a strong incentive for the production of semiconductors and semiconductor manufacturing equipment in the United States and make the US more competitive in this vital industry," Ajit Manocha, CEO of semiconductor industry association SEMI, said this October.

"The inclusion of semiconductor tool manufacturing facilities is particularly important, as lead times and demand for new tools grow. In addition, the delayed requirement to amortize research expenses and the maintenance of the Foreign-Derived Intangible Income deduction are other important elements that will preserve and improve the competitiveness of the industry in the United States," Manocha continued.

The Advanced Manufacturing Investment Credit was also set to provide credits for facilities involved in the development of renewable technologies, including solar polysilicon, wafers, cells, and modules, as well as wind blades, nacelles, towers, and offshore foundations.

#### Failure causes extinction

Yinug 16 – Falan Yinug, Director, Industry Statistics and Economic Policy at the SIA, “HOW U.S. SEMICONDUCTOR TECHNOLOGY STRENGTHENS OUR MILITARY ON THE BATTLEFIELD”, SIA Blog, 1-28, http://blog.semiconductors.org/blog/how-us-semiconductor-technology-strengthens-our-military-on-the-battlefield

SIA frequently points out that semiconductors play a critical role in strengthening our country, including our national security. A concrete example comes from a new semiconductor developed by the Defense Advanced Research Projects Agency (DARPA) that gives our military a measurable advantage in one critical arena of the modern battlefield: electronic warfare.

As DARPA explains, the advance is an exceptionally high-speed analog-to-digital converter (ADC) that is enabled by 32 nanometer silicon-on-insulator (SOI) semiconductor technologies. This advance allows the ability to operate spectrum-dependent military capabilities such as communications and radar without allowing the enemy to disable or “jam” them.

The development of this new semiconductor-enabled DARPA technology has a couple critical implications for policymakers. First, it underscores the strategic nature of the U.S. semiconductor industry to our country’s national security. As a recent Washington Post article describes, other “near peer” adversaries have strong electronic warfare capabilities, so to maintain global U.S. military leadership semiconductor technology will continue to play a critical role. As a result, the U.S. semiconductor industry must continue to maintain global industry leadership.

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#### The investment in competition compels imposition of extractive economic relations which are unsustainable and culminate in existential collapse.

Dr. Hubert Buch-Hansen 13, Professor in the Department of Organization at the Copenhagen Business School, PhD from the Department of Intercultural Communication and Management (ICM) at the Copenhagen Business School (CBS), MA in Public Administration from Roskilde University, MScEcon in European Politics from the Department of International Politics at the University of Wales, BA in Public Administration from Roskilde University, and Dr. Angela Wigger, Professor of International Relations at Radboud University, PhD and MA in Political Sciences from Vrije Universiteit Amsterdam, “Competition, the Global Crisis, and Alternatives to Neoliberal Capitalism: A Critical Engagement with Anarchism”, New Political Science, Volume 35, Issue 4, Taylor & Francis

After three decades of neoliberal economic policies, we are in the midst of a major global economic crisis, which has not yet reached its zenith. Disparities in wealth have increased and living standards of the lower strata of society in many countries have deteriorated, while unemployment, underemployment, and informal work are on the rise.4 The depletion of natural resources and environmental devastation is reaching new heights, indicating that the forms of production and consumption of the developed world are no longer tenable.5 Safeguarding unbridled competition is nonetheless seen as the apex of restoring economic growth and social welfare. Seemingly unconcerned with growing social protests against neoliberal capitalism, policy-makers, business people and academics alike continue to be enthralled by the false promises of “free market” policies and even suggest an intensified neoliberalization as the route to salvation. So far, the chosen course has proven to be a blind alley, aggravating the crisis only further. A new phase of capitalist expansion and economic growth within neoliberalism seems unlikely, and even if it were to take place, it would not tackle today's social and ecological problems successfully.6 Therefore, a transformation of the socio-economic system itself is required—a transformation that takes into account not only the organization of the economic realm but also its relationship with nature. The exaggerated faith in competitive markets as a panacea for economic slump and recession forms however an obstacle to such a transformation. Entangled in the “Third Way” rhetoric of the 1990s, the political center-left in both the US and Europe suffers from internal fragmentation and ideological insecurity and lacks a coherent vision of possible alternatives to the prevailing neoliberal trajectory. It suggests at best mere reformist strategies that aim at rescuing capitalism from its internal contradictions, such as the implementation of “better regulation” or a turn toward some form of post-Keynesianism. The center-left has moreover in large part accepted and internalized the neoliberal pro-competition stance (alongside many other features of neoliberal thinking). Preoccupied with how the respective economies can win (or survive in) the global competitiveness race, it is instead concerned with how the detrimental effects of competition can be cushioned. Likewise, only a few academics and intellectuals have analyzed the downsides of competition, let alone thought about viable alternatives for post-neoliberal societies.7

This article attempts to contribute to fill this void. As stated by Robert W. Cox, an integral part of critical scholarship is not only to explain and criticize structures in the existing social order, but also to formulate coherent visions of alternatives that transcend this order.8 To this end, the article offers first an explanatory critique of capitalist competition from the vantage point of historical materialism and argues that today's crisis is partly rooted in excessive competition, here referred to as ”over-competition.”9 This leads to an analysis of the current economic crisis in the second section, where it is argued that over-competition is one of the root causes of the crisis. The next two sections address alternative forms of organization of economic life and critically engage with anarchist values and principles, culminating in some general ideas for a post-neoliberal competition order. The last section before the conclusion reflects on how this alternative competition order could be achieved. To be sure, the ambition is not to outline a blueprint of a post-neoliberal competition order in rigid and minute detail but rather to sketch out its contours, as well as to discuss what it would take for it to emerge.

Cross-fertilizing historical materialist insights on competition with visions inspired by anarchist thought and praxis might not seem obvious at first glance—given the joint history of fierce antagonism between various strands of Marxism and anarchism.10 There is however also much common ground that deserves to be explored when thinking about alternatives that go beyond narrow-minded conceptions of what is acceptable and feasible. Thus, the purpose of this article is not to (re-)construct orthodox platitudes or to arrive at some sort of synthesis that reconciles what cannot be reconciled, but rather to explore the creative tensions that anarchist thought provides for critical social research and emancipatory practice. Both perspectives, broadly defined, are wholeheartedly anti-capitalist and dedicated to understanding social life and inducing social change. It will be argued that anarchism has much to offer, but by giving ontological primacy to local initiatives for building an alternative economic order, it also suffers from limitations. In particular, the problems created by the destructive competitive logics operating at systemic level require solutions that exceed the local level and that institutionalize higher-order nested governance structures.

Capitalist Competition—An Explanatory Critique

The vogue for competition is not new. Already Adam Smith has claimed that competition is “advantageous to the great body of the people.”11 It drives “every man [sic!] to endeavor to execute his work with a certain degree of exactness.”12 Consequently, “[i]n general, if any branch of trade, or any division of labor, be advantageous to the public, the freer and more general the competition, it will always be the more so.”13 Neoclassical economists frequently compare competition to a Darwinist form of market justice in which the uncompetitive, weak, and inefficient perish and the successful and efficient win. Although the zero-sum nature of competition is generally accepted (not everyone who plays can win), competition tends to be confused with success only. In line with neoclassical economic models, it is widely assumed that competitive markets deliver an efficient and just allocation of scarce resources.14 This view ignores, however, that real-world competitive markets are also highly inefficient, for instance by producing so-called negative externalities on a massive scale and “underproducing” public goods.15 Competition and the freedom to compete are moreover frequently associated with broader notions of political freedom and individual self-determination.16 This view is however equally mistaken as competition essentially negates individual freedom. As Karl Marx noted in Grundrisse: “[i]t is not individuals that are set free by free competition; it is, rather, capital which is set free.”17 Competition, he argued, “is nothing more than the way in which many capitalists force the inherent determinants of capital upon one another and upon themselves.”18 In Marx's view, competition represents “the most complete subjugation of individuality under social conditions which assume the form of objective powers […].”19 Rather than being the Smithian invisible hand, competition is an uncompromising fist, which exerts coercive pressures on “every individual capitalist,” irrespective of his “good or ill will.”20 In addition, competition disintegrates more than it unites, which means that in a competitive setting cooperation and mutual aid—the antithesis to competition—are marginalized as organizing principles. Mutual aid refers to altruistic and solidary practices aimed at enhancing the welfare of economic entities without the aid provider directly benefiting from it, while cooperation refers to voluntary arrangements between economic entities that focus on joint projects and reaching common goals. Without doubt, “one certainly can act in a solidaristic and cooperative manner within a competitive market system, but to do so often means having to go against the grain and place oneself at a competitive disadvantage.”21

Historical materialism captures the ineluctable toll of capitalist competition, namely that it exacerbates the intrinsic social contradictions and class antagonisms in the process of capital accumulation. The consumption of labor power and natural resources is seen as the source of real added value that makes capital accumulation possible.22 In other words, capital can only grow through the creation of new surplus value and thereby the further exploitation of labor and nature. As individual capitalists cannot afford to lag behind the price and quality standards set by competitors, defeating contender capitalists becomes essential for the reproduction of capital. In the struggle for economic survival, this means that economic power ultimately gravitates to those capitalists who can keep down the price of labor and other factors of production. Marx noted that “[t]he battle of competition is fought by cheapening of commodities. The cheapness of commodities depends all other circumstances remaining the same, on the productivity of labour […].”23 Employees feel the direct repercussions of competition in the form of labor-saving technologies or increased pressures on productivity, unpaid overtime, and degradation of working conditions, (below) subsistence wages and redundancies. In the presence of what Marx termed the “industrial reserve army,” competition directly or indirectly creates a chronic insecurity about the preservation of employment, leaving many people in dire straits regarding their future careers and living standards. Thus, competition might indeed lower prices, but one should not forget that people need a job first before they can consume. The interests of the wealthy few and the working many in the surplus created in the production process are incompatible from the outset, and competition further exacerbates this antagonism.

The process of the competitive accumulation of capital is thus neither stable nor unproblematic, nor linear nor infinite but pervaded by a range of contradictions. Marx famously suggested that competition is essentially a self-undermining process, which “pushes things so far as to destroy its very self.”24 Ultimately, all capital would be “united in the hands of either a single capitalist or a single capitalist company,” effectively putting an end to competition (and capitalism).25 Clearly we have not reached this stage and doubts about whether we ever will are more than justified.26 Yet, the expansionist and deepening nature of the capital accumulation process conquering ever more dimensions of the non-capitalist realm cannot be disputed. Marx also saw correctly that in order to secure profits and economic survival, many capitalists seek to evade the vicissitudes of competition by seeking synergy effects through mergers and acquisitions.27 Capitalists can also choose to “cooperate” with their competitors by concluding cartels and other collusive arrangements. However, like economic concentration, collusive cooperation aims at raising profits through ever tighter agglomerations of corporate power, which does not solve the pernicious and highly unequal nature of the social relations of capitalist production.

Because of these and other contradictions, capitalist markets depend on various forms of extra-economic stabilization to ensure the continued accumulation of capital.28 State apparatuses provide various forms of regulatory arrangements in the management of such contradictions and rules on competition can be such a stabilizer.29 Competition rules generally seek to enable competition and thereby protect capitalism from the capitalists and, to some extent, the capitalists from each other. In the most abstract sense, such rules usually define the scope of state intervention, corporate freedom, as well as the possibilities for market entry and the level of economic concentration.30 Importantly, competition rules are never a functionalist response to overcoming what neoclassical economists term “market failures,” but result from political struggles among socio-economic groups with different and sometimes opposing ideas on how to organize the economic realm. Competition rules frequently draw on notions of equity and justice. Through law as a fictitious equalizer, corporations are standardized and made comparable; they are unitized into something they are not, namely equal players on a level playing field. Moreover, competition rules can never cure the inherent contradictions in the accumulation of capital but only offer a temporary stabilization. In fact, rules aimed at preserving fierce competition can even buttress such contradictions.

The frailty of capital accumulation becomes particularly apparent in the event of structural crises of over-accumulation, referring to moments when capital owners lack attractive possibilities for reinvesting past profits.31 If expected profits on investments are considered unsatisfactory, capitalists can decide either to hold on to their surplus capital or invest it in another part of the system. An investment slowdown can occur because of a profit squeeze resulting from rising real wages in times of low unemployment levels, strong labor unions, or previous over-investment that has led to overcapacity in a sector.32 Another reason for a profit squeeze can be excessive competition, here referred to as over-competition.33 Once competition reaches a point where capitalists can no longer exploit labor to undercut the prices of competitors (either through technological replacements or by keeping down wages), profits and profit expectations fall, resulting in diminishing levels of investments in real production capacities. Moreover, as fierce competition and its unforgiving logic to reduce prices negatively affect wages and employment, it can backlash in decreasing levels in the consumption of produced goods and services, and slow down investments further. This is even more pertinent in the case of vast waves of mergers and acquisitions, which generally go hand in hand with rationalization processes and the elimination of duplicate job functions. As Marx pointed out, “the competition among capitals” and “their indifference to and independence of one another,” drives the capital-labor relationship “beyond the right proportions.”34 Over-competition can also lead to what Harvey calls a “peculiar combination” of low profits and low wages.35 Surplus capital that is not invested in means of real production and in labor can seek refuge in mergers and acquisitions or speculation with financial assets. Bubble markets created by speculation may temporarily offer new outlets for absorbing liquid capital. In fact, there “are even phases in the life of modern nations when everybody is seized with a sort of craze for making profit without producing. This speculation craze which recurs periodically, lays bare the true character of competition […].”36 Financial transactions may temporarily be disassociated from the real economy and generate high yields by adding ephemeral value through the mere circulation of capital. However, speculative bubbles always burst once the “perpetual accumulation of capital and of wealth” and “the perpetual accumulation and expansion of debt” become too far out of sync.37 It follows that financial crises are deeply anchored in the real economy and intimately related to competition.

To recapitulate, a historical materialist perspective highlights the contradictory and crisis-prone nature of capitalist competition. The next section argues that over-competition is one of the root causes of the crisis of neoliberal capitalism that we are currently witnessing.

The Crisis of Neoliberal Capitalism and Over-Competition

Competition is crucial to the capitalist mode of production, and has been present during all stages in the evolution of the capitalist system. It should therefore not be conflated with a particular form of capitalism. This said, competition for profits has probably never been fiercer than in the era of neoliberalism, which gained growing prominence on a global scale in the 1980s alongside what is commonly called the Reagan Revolution in the United States (US), Thatcherism in the United Kingdom (UK), and the dictatorial regime of Pinochet in Chile. Neoliberalism is generally associated with deregulation, the rollback of welfare states, a monetarist focus on keeping inflation low, reduced taxes, fiscal austerity, wage repression, and processes of financialization. Although neoliberal policies have been imposed throughout the world, neoliberalism nowhere became manifest in a pure fashion. Variations in contestation by social groups, regulatory experimentation, and inherited institutional landscapes account for the differences in the neoliberal organization of markets and levels of regulation.38 Nonetheless, as a common denominator, neoliberal policies generally sustain the disembedding of capital from the great part of the web of social, political, and regulatory constraints and the separation of key market institutions from democratic processes.39 Legitimated by neoclassical economics, uncontained competition came to be advertised as the chief catalyzing force for the most efficient and most profitable allocation of the resources of the world.

Rules safeguarding free competition consequently became neoliberalism's juggernaut.40 The expected theoretical benefits of fierce competition and its regulation served to legitimize the opening of markets worldwide: to compete freely eventually requires unimpaired market access. Enforced by “politically independent” (neoliberal newspeak for “democratically unaccountable”) authorities at national and supranational level in the western world, competition rules had to ensure that corporate practices would not interfere with the alleged equilibrium tendencies of capitalist markets (which happen to exist only in the minds of neoclassical economists and their textbooks). Narrow definitions of price competition subsequently received primacy as a benchmark for assessing anticompetitive conduct, supported by sophisticated econometric modeling and complex micro-economic algorithms, leaving no room for social interest criteria or environmental considerations.41 Premised on the idea that economies of scale and scope would be achieved, through competition more efficient corporations would take business away from less efficient ones by decreasing their marginal production costs, which was believed to benefit consumers in the form of price reductions. The particular emphasis on economies of scale and scope implied that economic concentration was not seen as problematic. Neoliberal competition regulation in the western industrialized world hence facilitated a massive centralization and consolidation of corporate power through mergers and acquisitions in nearly every industry, as well as various forms of strategic alliances and joint ventures. Notably, the merger waves that rolled over the global economy in the 1990s and at the dawn of the new century set new records in terms of number and aggregated volume of the companies involved. Under neoliberal capitalism, the conditions once identified by Adam Smith no longer hold: rather than competition between locally based, small-scale, owner-managed enterprises, oligopolistic rivalry of giant transnational corporations constitutes the order of the day.42 Oligopolistic market structures do not however imply that there is no or little competition. Competition between gigantic transnational corporations can be ruthless, as can competition between larger and smaller companies. Indeed, those able to compete set the standards of competition for others: with comparatively easy access to credit and huge advertising budgets aimed at homogenizing consumer preferences across cultures, such corporations can thwart the existence of weaker competitors, including small-scale enterprises at local level.

Alongside the growth of perverse social inequalities, the competitive race to offset products and services to affluent consumers has increased over the past thirty years. In the contemporary context of transnationalized production and geographically segmented, racialized, and gendered labor markets, harsh competition has become an all-pervasive conditioning dynamic. The exhaustion of natural resources, sweeping pollution, and climate change have toughened competition further, and set in motion a vicious spiral causing irreparable damage to the environment worldwide.43 In other words, under the reign of neoliberalism, competition has become ever more tenacious, spanning the entire globe and demanding ever greater competitiveness from capital and labor alike.

#### The alternative is revolutionary optimism targeted at the working class---it overcomes biases towards growth to unleash class consciousness but requires abandoning competition to succeed.

Collin L. Chambers 21, Department of Geography at Syracuse University, “Historical materialism, social change, and the necessity of revolutionary optimism,” Human Geography, Vol. 14, No. 2, 2021, <https://doi.org/10.1177%2F1942778620977202>

The productive forces necessary for socialism exist in the US and throughout the global north. The conditions to eradicate poverty, homelessness, create non-ablest spaces, and so on exist. It just takes the political will to make this material reality free from its capitalist confines. For working-class activists living in the global north, this needs to be emphasized ad nauseum. As Marx says, the bourgeoisie create their own “gravediggers”: “the advance of industry … replaces the isolation of the workers…with their revolutionary combination, due to association (Marx, 1970: 930 FN). However, and most unfortunately, the simple centralization of workers in one place (like a city or a factory) does not automatically produce revolutionary consciousness amongst the workers themselves. Capitalism and all of its vulgarities still persist; something is blocking the transition. Many point to things such as ideology, bourgeois cultural hegemony, “false consciousness,” “desire,” and “mystification” as reasons for the nonexistence of a working-class revolution in the US. The argument goes: the reason feudalism could be transcended was because in feudalism the division between the time when serfs/peasants were working for their own subsistence and directly for the lords was clear as noonday. Feudal exploitation was achieved through “extra-economic” means as Wood (2017) says. In capitalism, “surplus labour and necessary labour are mingled together” (Marx, 1970: 346). “Mystification” is built into the wage-relation itself (see Burawoy, 2012). There is some deal of truth that workers in capitalism can fall for imperialist-capitalist ideology, but I argue that there are actual real material and structural reasons for the nonexistence of working-class revolutions in the US and global north more broadly

If one actually talks to working people, a lot of them know that things in their world are messed up and don’t necessarily buy into capitalist ideology. Though many do not have revolutionary consciousness yet, they are not simply tricked by imperialist-capitalist ideology. “The everyday” for US workers is in the workplace. Many work multiple jobs just to scrape by. Working people just want to come home from work and enjoy the little free time they have, or they are simply working so much that it is almost impossible to have revolutionary consciousness, or if they do they cannot act upon it because they are just trying to survive, and thus doubt better days are ahead. But, these conditions can be overcome.

Truly revolutionary working-class ideas do not arise spontaneously within the working class itself. Marxism has to be learned by the working masses, and it is indeed a science that working and oppressed people can learn; it just has to be introduced. It must be introduced by a revolutionary vanguard party composed of the most advanced and class-conscious working people. Vanguard parties provide the material and infrastructural foundation for working-class people to join the ranks of the revolutionaries (see Dean, 2016). Workers must be able to understand and explain the class character of all political phenomenon—Marxism provides this. In “What Is to Be Done?” Lenin says that a class-conscious worker cannot be left to work 11 hours a day in a factory if we want the worker to develop clear revolutionary class consciousness. Thus, as he says, the party must make the arrangements necessary to ensure that the worker can have more free time for organizing and developing revolutionary class consciousness. The vanguard party form makes joining the revolution truly accessible to the vast masses of people. To paraphrase Lenin (1987 [1929]), the working class left to organize themselves will fall into trade unionism, which is ingrained in bourgeois ideology and thus cannot transcend the capitalist mode of production. A Marxist (i.e. historical materialist) understanding of society can indeed be understood by the masses of people, which will in turn unleash the power of class consciousness itself as a real material power.

The way Marx explains how the capitalist mode of production develops through time empowers workers and provides revolutionary optimism/hope. As the productive forces develop, more and more proletarians are produced and less and less capitalists exist (due to competition and monopolization, etc.). Out of market competition, “[o]ne capitalist always strikes down many others” (Marx, 1970: 929). The means of labor are transformed into forms “that can only be used in common.” Thus, as the capitalist mode of production develops,

The monopoly of capital becomes a fetter upon the mode of production … The centralization of the means of production and the socialization of labour reach a point at which they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated. (Marx, 1970: 929)

The “immanent laws of capitalist production” itself leads to not only class struggle but also to communist revolution. The laws of competition within the capitalist mode of production have the tendency to constantly revolutionize/ develop the productive forces even in the era of monopoly capitalism. The developed productive forces that are created in capitalism create the foundations from which socialist society can arise (see Phillips and Rozworski, 2019).

In Capital, Marx says it will be easier to move beyond capitalism than it was to move beyond feudalism, for the simple fact that during the transition from feudalism to capitalism “it was a matter of the expropriation of the mass of the people by a few usurpers.” But in the case of transitioning out of capitalism, “we have the expropriation of a few usurpers by the mass of the people[!]” (Marx, 1970: 929–930). Thus, to end capitalist private ownership of the means of production, we only have to usurp a handful of capitalists, which numerically speaking should be easier to do than usurping millions of people as what occurred within the process of primitive accumulation that created the social conditions necessary for the capitalist mode of production.

The inert power working people have exists at all times (even in eras of global working-class defeat and retreat); workers can simply shut production by striking, occupying the workplace, and so on (see Allen and Mitchell, 2003; Glassman, 2003). A nice made-up scenario I like to give students is that no one would really notice if all the bosses/ CEOs did not show up to work for one day, but if all workers did not show up for one day, all of society would simply shut down and reach a standstill. Additionally, and most importantly, the proletariat can use its class power to overthrow and transcend the bourgeois order by seizing political power—that is, the state—and radically transform it to serve the class interests of the working class. This cannot be dismissed as utopian. It has been done in history and it will occur again. This revolutionary takeover allows for the working class to make “despotic inroads on the rights of [bourgeois] property, and on the conditions of bourgeois production” (Marx and Engels, 1978: 490; see also Lenin, 1987 [1932]: 336).

Conclusion

This essay was written with two broad goals in mind: first, to review and reaffirm the central tenants of historical materialism; second, to provide an optimistic and revolutionary outlook for the future using historical materialism. Workers across the capitalist world know that their lives are hard. We do not always need to point out all the evils that capitalism creates. What we need to do is to instill hope and emphasizing how capital provides the material foundations for socialism does just that. Marx “regards communism as something which develops out of capitalism. Instead of scholastically invented, ‘concocted’ definitions and fruitless disputes about words (what is socialism? What is communism?), Marx gives an analysis of what may be called stages in the economic ripeness of communism” (Lenin, 1987 [1932]: 346, emphasis in original). We can say to workers: the material conditions exist to end poverty, there are more empty houses than homeless people, the means exist to end societal degradation, it just takes the political will to do so. Emphasizing this political will is empowering; it says we have the power to change things. We need stop with the talk of how workers and oppressed peoples are chained and have no power. Rather, “[i]t is within the present that the future can emerge,” and we need to force the future upon us (Malott and Ford, 2015: 154).

### 1NC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Decline cascades---nuclear war

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

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

### 1NC

#### The United States federal government should require licensing of climate mitigation and adaptation technologies.

#### Regulation solves without ‘antitrust’ or FTC involvement

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A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 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 relationships 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 relationships 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 agencies 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 artificial intelligence 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. Artificial intelligence 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 artificial intelligence, 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 technology is neither inherently good nor bad. Cloud computing and artificial intelligence 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 United States 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 Federal Trade Commission.

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 artificial intelligence. 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 technology- 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 discussing 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, another 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 making 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 enhanced automation24 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 cooperation among different actors in complicated matters such as in matters of information, geopolitics and international relations, 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, environmental 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 eradication 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 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should prohibit the refusal to license climate mitigation and adaptation technologies as an anticompetitive business practice.

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

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

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

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

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

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

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

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

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

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

## TRIPS ADV

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#### The plan kills innovation---it decreases incentives to innovate within green tech which turns the case

Ya-Lan Wang 19, MIPLC, “Patent Protection for Green Technologies – Is Compulsory Licensing the Way of Promoting Technology Transfer?” 9-12-2019, Munich Intellectual Property Law Center, SSRN

While Art. 31 of TRIPS “could conceivably be used by a state in forcing the patentee of an eco-friendly invention to allow its use by the state,”10 some still argue that using compulsory licensing schemes on green technologies is neither the most preferable, nor the least harmful mean of promoting technology transfer of those technologies. Owing to the fact that compulsory licensing decreases incentives to innovation, it might in fact be harmful to the development of green technologies. As developing a new technology, especially a cutting-edge environmental technology, requires tremendously amounts of funds, patentees are expecting to recover their investments from licensing out their granted patent rights. When a technology falls within the scope of compulsory licensing, it might result in the consequences of inventors stop researching and developing the costly new technologies, as inventors can no longer recover their investments from their patent monopoly rights. Critics also point out that, when applying compulsory licensing scheme to green technologies, it will unavoidably face the problems that “such license may be worthless if the state lacks technological and manufacturing capabilities to produce the technology or products.” 11 On account of the fact that most of the Annex II states which bears the obligations of reducing greenhouse gas emissions are in fact developing countries with limited or almost no capacity of producing those novel, advanced technologies, it might in the end means nothing whatsoever granting compulsory licensing of those technologies. These problems essentially set back the effectiveness of using compulsory licensing scheme as a mean of promoting technology transfer.

#### The plan leads to retaliation---it’s resisted, causes economic, and doesn’t ensure proper tech transfer---Kentucky is in yellow

Joshua 1AC Sarnoff and Margaret Chon 18, Prof of Law at Depaul College of Law, served as a Distinguished Scholar at the US Patent and Trademark Office, Margaret, Prof for the Pursuit of Justice at the Seattle Univ School of Law, “Innovation Law and Policy Choices for Climate Change-Related Public-Private Partnerships,” The Cambridge Handbook of Public-Private Partnerships, Intellectual Property Governance, and Sustainable Development, eds Margaret Chon et al, p.265-7

As stated earlier, many people and institutions have recognized the unequal technology transfer framework for climate change and energy innovation. To address these concerns, numerous changes, some highly controversial, have been proposed to the global patent regime.130 These include: broad, categorical exclusions of environmentally sound or climate friendly technologies from the patent system; and regulation of licensing and market behaviors, including compulsory licensing, antitrust scrutiny, and price controls.131 These direct means of regulating prices and competition will remain legally available to governments that hope to induce – but may be forced to compel – more favorable licensing and pricing practices than would voluntarily occur.132

\*\*\*Begin Note 132\*\*\*

Concerns over IP rights and climate change technologies have already caused significant political tensions. At an earlier stage of international negotiations, the UNFCCC Ad Hoc Working Group on Long-term Cooperative Action (WG-LCA) considered various proposals that had been suggested by some countries in the South. These measures would have placed significant restrictions on the traditional operation of the patent system. The measures ranged from requiring patent pooling and royalty free compulsory licensing to excluding green technologies entirely from patenting – even retroactively revoking existing patent rights. See, e.g., Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, 23 UNFCCC (2009); Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Report of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention on its Seventh Session, UNFCCC Doc. No. FCCC/AWGLCA/2009/14, 156 (2009).

\*\*\*End Note 132\*\*\*

Although further amendment of the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement) – as has been discussed by the United Nations Secretariat133 – is a theoretical possibility, consensus for adopting amendments in the short term is highly unlikely. Without such treaty amendments, countries (particularly those in the developing South) may seek to make greater use of existing TRIPS Agreement flexibilities to tailor their patent doctrines to assure access and to lower costs. They may adopt exclusions from patent eligibility, exceptions to patent rights, and alternatives to private licensing (such as a global technology pool). They also may expand access to publicly funded technologies to better promote technology development, transfer, and use.134 These options may provide greater ex ante predictability “in accessing technologies and [may] further enable much-needed research and development for local adaptation and dissemination, which would further reduce the cost of the technologies.” 135 Governments addressing private refusals to license patented technologies or high prices for access to those technologies may regulate such conduct directly, by adopting compulsory licenses or by imposing price control regulations.136 Alternatively, they may regulate such conduct indirectly, by treating restrictive or costly licensing as a competition violation (for example, as an abuse of dominant position) or by treating the patents themselves as essential facilities (that is, as products or services that are considered competitive necessities and for which access also can be required by compulsory licenses).13 Such direct or indirect regulation, moreover, may be largely ineffective in regard to assuring transfers of tacit knowledge.138 Both direct and indirect approaches to regulating access and prices will be highly controversial, and may threaten substantial trade retaliation or may prompt withholding by businesses of technology and foreign investment. Compulsory licensing, price regulation, and antitrust treatment have been repeatedly resisted by the United States and (somewhat less so) by other developed countries, particularly in foreign markets where the countries do not bear the costs but reap the benefits of technology exports.139 The developing South may be unwilling to resist such trade pressures, even if the threats and trade sanctions would be found illegal under WTO rules.140 These legal and political constraints bring us to proposals discussed in the next Part of this chapter, which emphasize private sector, voluntary initiatives to increase access and technology transfer, within a context of public sector laws and policies that promote innovation and access.

#### No interdependence impact.

Joel **Einstein 17**. Australian National University. 01-17-17. “Economic Interdependence and Conflict – The Case of the US and China.” E-International Relations. <http://www.e-ir.info/2017/01/17/economic-interdependence-and-conflict-the-case-of-the-us-and-china/>

In 1913, Norman Angell declared that the use of military force was now economically futile as international finance and trade had become so interconnected that harming the enemy’s property would equate to harming your own.[1] A year later Europe’s economically interconnected states were embroiled in what would later become known as the First World War. Almost a century later Steven Pinker made a similar claim. Pinker argues, “Though the relationship between America and China is far from warm, we are unlikely to declare war on them or vice versa. Morality aside, they make too much of our stuff and we owe them too much money.”[2] His argument rests upon the liberal assumption that high levels of trade and investment between two states, in this case the US and China, will make war unlikely, if not impossible. It is this assumption that this essay seeks to evaluate. This essay is divided into three sections. The first briefly outlines the theory that economic interdependence results in a reduced likelihood of conflict, breaking the theory down into smaller components that can be examined. In the second section, this essay suggests that the premise ‘more trade equals less conflict’ is simplistic. It does not take into account many of the variables that can influence the strength of economic interdependence’s conflict reducing attributes. Within this section, the essay considers: the extent to which conflict cuts off trade, theories arguing that how and what a state trades matters, Copeland’s theory of trade expectations and the differences between status quo and revisionist states. The final section deals with the realist perspective, concentrating on arguments pertaining to the primacy of strategic interests and arguments that economic interdependence will increase the likelihood of conflict owing to a reduction of deterrence credibility. Each section will be related back to the US-China relationship with a view to assessing Pinker’s claim. The essay will conclude that economic interdependence does reduce the likelihood of conflict but is insufficient on its own to completely prevent it. To calculate the likelihood of conflict correctly one would need to factor in the nature of the economic interdependence alongside the strength of the strategic interests at stake. Economic Interdependence and Conflict The theory that increased economic interdependence reduces conflict rests on three observations: trade benefits states in a manner that decision-makers value; conflict will reduce or completely cut-off trade; and that decision-makers will take the previous two observations into account before choosing to go to war. Based on these observations, one should expect that the higher the benefit of trade, the higher the cost of a potential conflict. After a certain point, the value of trade may become so high that the state in question has become economically dependent on another. Proponents of this theory argue that if two states have reached this point of mutual dependence (interdependence), their decision-makers will value the continuation of trade relations higher than any potential gains to be made through war.[3] It is on this argument that Pinker rests his statement that the economic relationship between the US and China precludes war. One can see evidence of this when analysing US views on China as trade rises. A 2014 Chicago Council on Global Affairs survey indicates that only a minority of Americans see China as a critical threat, compared to a majority in the mid-1990s. This number is even higher when analysing Americans who directly benefit from trade with China.[4] As compelling as this argument may be, high levels of economic interdependence have not always resulted in peace. The decades preceding WW1 saw an unprecedented growth in international trade, communication, and interconnectivity but needless to say, war broke out.[5] This instance alone is not enough to disprove Pinker’s logic. War may become very unlikely but began nonetheless.[6] Let us take two hypothetical scenarios, one in which the chances of war is 80% and the other in which trade has reduced the likelihood of war to 10%. Just knowing that war did indeed take place does not tell us which scenario was in play. Similarly, the fact that WW1 took place gives us no information about whether economic interdependence made war unlikely or not. In fact, evidence even exists to suggest that economic linkages prevented a war from breaking out during the sequence of crises that led up to WW1.[7] However, the fact that a war as detrimental as WW1 could break out despite a supposed reduction of the likelihood of conflict gives us an impetus to examine whether this reduction does take place. Additionally, if this is the case, what variables can weaken this pacifying effect? Does Conflict Cut off Trade? Economic interdependence theory makes the assumption that conflict will reduce or cut-off trade. This assumption appears to be logical, as one would expect that the moment two states are officially adversaries, fear of relative gains would ensure that policy makers want to completely cut-off trade. However, there are many historical examples of trade between warring states carrying on during wartime, including strategic goods that directly affect the ability of the enemy to carry out the war.[8] For example, in the Anglo-Dutch Wars, British insurance companies continued to insure enemy ships and paid to replace ships that were being destroyed by their own army.[9] Even during WW2, there are numerous examples of American firms continuing to trade strategic goods with Nazi Germany.[10] Barbieri and Levy argue that these examples and their own statistical analysis suggest that the outbreak of war does not radically reduce trade between enemies, and when it does, it often quickly returns to pre-war levels after the war has concluded.[11] In response to this result, Anderton and Carter conducted an interrupted time-series study on the effect war has on trade in which they analysed 14 major power wars and 13 non-major power wars. Seven of the non-major power wars negatively impacted trade (although only four of these reductions were significant), but in the major war category, all results bar one showed a reduction of trade during wartime and a quick return to pre-war levels at its conclusion.[12] Accompanying this contradictory finding one must take into account that even if war does not radically reduce trade, if a state believes that it does then potential opportunity cost would still figure in their calculations. Variables that Impact the Pacifying Effect of Economic Interdependence The purpose of this section is to demonstrate that the pacifying effect of economic interdependence is not constant. It achieves this via a discussion of the effect of changes in a number of variables pertaining to how and what a state trades. Once it is established that changes in such variables may alter the effect of economic interdependence on the likelihood of conflict, Pinker’s statement (that the level of trade between the US and China makes conflict unlikely) can be considered to be an over-simplification. One variable is the relative levels of economic dependence. Some argue that asymmetry of trade can increase the chances of conflict if the trade is more important to one state than it is to the other; their resolve would not be reduced by the same degree. The less dependent state would be far more willing than its adversary to initiate a conflict.[13] An example is the possibility of the prevalent idea in China that ‘Japan needs China more than China needs Japan’ leading to China becoming more assertive in Senkaku/Diaoyu islands dispute.[14] It is important to recognize that all trade is asymmetric in one fashion or another. It is radical asymmetry that one has to fear, which at the moment does not appear to be the case in the China-Japan or US-China case. Another variable is the specifics of what is being traded. A study by Dorussen suggests that the pacifying effect of trade is less evident if the trade consists of raw materials and agriculture but stronger if the trade consists of manufactured goods. Even within the category of manufactured goods there are differences in effect. Mass consumer goods yield the strongest pacifying results whilst high-technology sectors such as electronics and highly capital-intensive sectors such as transport and metal industries tend to have a relatively weak effect.[15] If it is a sector with alternative trade avenues then embargos and boycotts as a result of conflict will have far less effect.[16] The rule is that the more inelastic the import demand, the higher the opportunity cost and the smaller the probability of conflict.[17] According to these studies, trade still generally reduces the likelihood of conflict however it is by no means homogeneous in its effects. Additionally, the opportunity costs are not the same for importers and exporters. Dorussen’s study suggests that increased trade in oil tends to make the exporters more hostile and the importers friendlier in relations to their foreign policy.[18] Taking this framework into account, in 2014 China’s top five exports to the US (computers, broadcasting equipment, telephones and office machine parts) all fell under the category of electronics,[19] whilst the US’s top five exports to China (air and/or spacecraft, soybeans, cars, integrated circuits and scrap copper) were all either high-capital intensive sectors or raw materials and agriculture.[20] According to Dorussen’s study, these exports should not yield the strongest possible conflict reducing results, which could impact the validity of Pinker’s statement. Copeland presents another variable, namely expectations of trade. Copeland argues that if a highly dependent state expects future trade to be high, decision makers will behave as many liberals predict and treat war as a less appealing option. However if there are low expectations of future trade, then a highly dependent state will attach a low or even negative value to continued peaceful relations and war would become more likely.[21] As an example, he points out that despite high levels of trade in 1914 German leaders believed that rival great powers would attempt to undermine this trade in the future, so a war to secure control over raw materials was in the interests of German long-term security.[22] Via this framework, if the US began to believe that in future years they would be less dependent on China’s economy, or if it became apparent that a US-China trade war was about to take place, there would be a sharp rise in the probability of conflict. The final variable this essay will discuss relates to the differences between status quo and revisionist states. Most empirical analyses of economic interdependence tend to group together states as different as the United States, Pakistan, Australia, Germany and China and assume that variations in their behaviour would be the same.[23] Papayoanou on the other hand, argues that when analysing the effects of economic interdependence it is useful to differentiate the effects on great power states and states with revisionist aspirations.[24] If a status quo power has strong economic ties with revisionist state there will be interest groups who advocate engagement and who believe that confrontational stances will threaten the political foundation of economic links. This will constrain the response of the status quo state.[25] One can see evidence of such an interest group in the US, a group Friedberg describes as the Shanghai coalition, who he argues advocate engagement with China at the expense of balancing.[26] A study by Fordham and Kleinberg backs up this argument as they find that US business elites who benefit from trade with China tend to see little benefit in limiting the growth of Chinese power.[27] A 21st Century revisionist power is far less likely to be a democracy, and therefore, interest groups will influence the leadership far less. This means an authoritarian revisionist power will be working under fewer constraints and will be able to take a more aggressive stance.[28] This appears to be the case in China where rather than having domestic constraints on taking an aggressive stance against Japan, one of their biggest trading partners, grassroots nationalism has made explicit cooperation a domestically risky option.[29] There are many indicators to suggest that China is a revisionist power willing to wage war. Lemke and Werner argue that an extraordinary growth of military expenditures’ reveals when a state is dissatisfied with the status quo.[30] Data provided by the Stockholm International Peace Research Institute certainly indicates that China qualifies as its military expenditure has nominally increased by 1270% between 1995 and 2015.[31] Additionally, the military modernization appears to be aimed at capabilities to contest US primacy in East Asia.[32] Much like German strategists recognized that Britain was operating under significant domestic constraints, China could realize the same of the US.[33] This is not to say that Chinese decision-makers would be cavalier about making a decision that would be to the detriment its economy. A crash in the Chinese economy due to the loss of exports to the US could potentially undermine the legitimacy of the Chinese Communist party and endanger the regime. However, the view that China is a revisionist power indicates that good trade relations alone will not result in a low probability of conflict. Realist Arguments Pertaining to Dominance of Strategic Interests Having established that if the pacifying effect of trade does exist, it can rise or fall depending on changes in a series of variables this essay proceeds to deal with realist theories arguing that trade has a negligible or even negative effect on the likelihood of conflict. Buzan argues that noneconomic factors contribute far more to major phenomena than liberal theorists usually cite to support their theory.[34] There is evidence of the primacy of strategic interests in Masterson’s 2012 study on the relationship between China’s economic interdependence and political relations with its neighbours. The study concluded that as economic interdependence with neighbouring states increased the likelihood of conflict did indeed decrease, but that the impact was minimal when compared to the impact of relative power capabilities. In other words, political and military issues dominated interstate relations. Growth in power disparities were associated with decreases in dyadic political relations that were greater than the increase caused by economic interdependence.[35] If the pacifying effect of trade can rise and fall so can the provocative effect of strategic interests. It is important to distinguish between the existence of a strategic interest and a situation of unbearable strategic vulnerability. China and the US have many opposing strategic interests, but neither is in a strategically vulnerable position. For example, China shares many borders, but none present the same threat of invasion that Tsarist Russia did to Imperial Germany as none of the current maritime tensions between China, Japan, and the US equate to a matter of national survival.[36] This is crucial as some believe that for a crisis to escalate to a major war an actor who is isolated and believes that history is conspiring against them is needed. Only this actor would take an existential risk to try and offset their strategic vulnerability.[37] Imperial Germany fit this description, but neither China nor the US does. This is largely due to the geography of the region. The tension between the US, China and Japan are over maritime regions. Maritime issues still relate to national interests but, as Krause points out, “Land armies are still the only forces that can conquer and hold territory.”[38] Taking this into account one can argue that the benefits of US-China trade are, for each state, currently greater than the benefits of pursing strategic benefits via force, but this situation will only remain as long as the situation does not become one of unbearable strategic vulnerability. Realist Arguments Pertaining to the Undermining of Deterrence Having established that scenarios exist where strategic interests and vulnerabilities have a greater effect on the likelihood of war than economic interdependence, this essay will now evaluate arguments that economic interdependence can increase the likelihood of conflict through the undermining of deterrence. The argument proceeds as follows: if economic interdependence constrains the ability or willingness of a state to use its military, security is lowered as the state now has a weakened ability to engage in deterrence and defensive alliances. Deterrence relies on the ability of a state to make credible threats and defensive alliances rely on credible promises to protect one’s allies.[39] Credibility is defined as the product of the operational capability to follow through with a threat and the communication of resolve to use force.[40] What is at risk here is that if economic interconnectivity interferes with the communication of resolve to use force then states may end up with a way that neither side expected or wanted. Some argue that it was such a failure to communicate resolve that resulted in the beginning of WW1. Indeed, Jolly claims that: “The Austrians had believed that vigorous actions against Serbia and a promise of German support would deter Russia: the Russians had believed that a show of strength against Austria would both check the Austrians and deter Germany. In both cases, the bluff had been called and the three countries were faced with the military consequences of their actions.”[41] The risk in the US-China case would be that the interest groups described earlier would prevent the US from effectively communicating its resolve to use force if China were to cross a redline. The flaw in this argument lies in the fact that whilst interest groups might push back against public statements outlining redlines; the US has many less overt options available to it to communicate resolve. Modern technology and the forms of interconnectivity have resulted in many more lines of communication between China and the US than adversaries had access to in 1914. Private meetings, electronic communication and numerous other methods of communication have the capability to be candid without being visible to interest groups. It is for this reason that this essay discounts the theory that Sino-American economic interdependence results in a reduction of deterrence and therefore increases the likelihood of conflict. Conclusion This essay has shown that the strength of the pacifying effect of economic interdependence is subject to change depending on a series of dynamic variables. It has also demonstrated that the strength of the conflict provoking effects of strategic interests can change depending on whether the strategic interest amounts to a situation of unbearable strategic vulnerability. It has discounted the theory that interdependence leads to a higher chance of conflict through an erosion of credibility. To sum up, trade does seem to reduce the likelihood of conflict but should not be seen as a deterministic factor as strategic interests, and vulnerabilities also have a large effect. There is no hard rule as to what will be the driving factor as the nature of economic interdependence and of strategic factors impact their relative values. Accordingly, Pinker’s statement that the trade between the US and China makes war exceptionally unlikely is simplistic and misleading because it fails to account for a wide array of variables that can radically change the likelihood of a Sino-American war. An intellectually honest thesis would insist upon a comprehensive approach in which the level of economic activity is simply one of many variables that is required.

#### countries are still bound by TRIPS which views climate change as illegitimate licensing grounds, plus developed countries still litigate post license---Kentucky is in yellow

Kuei-Jung 1AC Ni 15, Prof of Law at the National Chiao Tung University School of Law’s Institute of Technology Law, “Legal Aspects (Barriers) of Granting Compulsory Licenses for Clean Technologies in Light of WTO/TRIPS Rules: Promise or Mirage?” World Trade Review 14.4, p.708-17

The concept of developing countries granting themselves compulsory licenses and gaining access to climate-related technologies was an unwelcome, or even disturbing, proposal for developed countries and their resident companies who hold the IPRs for these technologies.32 They disagreed with the statement that an IPR constitutes a barrier to technology transfer and instead argued that poor IPR enforcement and high tariffs on environmental products should be blamed for the stalemate on transfers.33 On the basis of various promising instances in which Western companies have transferred clean technologies to and deployed them in emerging markets, Lane remains skeptical of the rhetoric that claims IPRs to be an obstacle to technology transfer and dissimilation.34 Thus far, the compulsory licensing of clean technologies seems not to have occurred, despite strong appeals by developing countries for the use of this mechanism. Although the UNFCCC does not have applicable rules specifically pertaining to the use of compulsory licenses per se, the WTO/TRIPS forum appears eligible to govern them, especially regarding the negotiation of a new agenda and law enforcement. The UNFCCC is the major global forum through which developing countries have consistently proposed using compulsory licenses as one means, among others, of gaining access to clean technologies. However, the climate regime does not specify any binding rules or disciplines for regulating the application of such a measure. Instead, the WTO/TRIPS is the competent regime governing the use by national authorities.35 In effect, all WTO members must guarantee that their national laws and measures relating to compulsory licenses are in compliance with the TRIPS obligations in question.36 During the mid-1990s, under the threat of economic sanctions resulting from US Section 301, the GATT Uruguay Round negotiations finally resulted in crafting comprehensive and multilateral protection for IPRs, which operates with an effective dispute settlement mechanism.37 The effectiveness of the TRIPS Agreement represents a triumph for developed countries, particularly the US, which have long called for strong global IP protection. The TRIPS Agreement specifies a minimum threshold of IP protection and enforcement by WTO members.38 To balance the rights of IP owners, most of whom are from developed nations, with the interests of general users and developing countries and to pursue members’ legitimate public objectives, certain measures limiting the prerogatives of IP owners are permissible, especially regarding their monopoly rights. A patentee may prevent others from using a patented technology before the patent expires.39 However, Article 30 of the TRIPS Agreement provides for exceptions to this right. In addition, patentees who are not using the patent themselves may authorize others to make use of their protected subject matter by voluntarily signing a licensing agreement.40 The freedom of contract that individuals and firms have in choosing their partners and deciding the content of deals would be constrained by the governmental authorization of compulsory licenses to other users. Article 31 of the TRIPS Agreement specifies the rules for implementing such licenses.41 An analysis of the structure of Article 31 of the TRIPS Agreement indicates that the provision does not explicitly provide grounds on which compulsory licenses can be based but simply specifies the 12 conditions with which WTO members ought to comply. All conditions are obligatory. Although the incorporation of compulsory licenses into the TRIPS Agreement is part of a balancing act for countering the predominant power of patentees, such a move should not be interpreted merely for the convenience of developing countries.43 The use of compulsory licenses is not intended to be a ‘free lunch’ because the challenges associated with observing the requirements are quite severe and the costs of implementing the collateral duties may be relatively high. The following sections first examine whether a new declaration or similar document is likely to be finalized to underpin developing countries’ proposal. The focus is then on the legal challenges in, and obstacles to, complying with the TRIPS obligations with reference to the compulsory licensing of Philips CD-R patents, which can serve as a benchmark practice. In response to the HIV/AIDS health crises affecting many developing countries, the WTO adopted the Declaration on TRIPS Agreement and Public Health at its 2001 Fourth Ministerial Conference in Doha. The conclusion of the agreement exemplified how the global IP regime can support, rather than hinder, access to the affordable medicines, most of which are covered by IPRs. Regardless of its legal status,44 the Declaration provides developing countries with powerful leverage and flexibility when interpreting and implementing their TRIPS obligations. The flexibilities elaborated by the Declaration consist of compulsory licenses. First, the right to grant compulsory licenses and the freedom to determine the grounds on which to do so are recognized.45 Second, the Declaration confirms the right of WTO members to define the circumstances that constitute a national emergency and explicitly equates public health crises to national emergencies.46 Third, because many members have insufficient manufacturing capacities, the Declaration requested that the TRIPS Council sort out a solution that makes compulsory licenses more effective for these countries.47 Overall, the flexible approach streamlines the compulsory licensing with a view to promoting access to essential drugs. The Doha’s position on global IP enforcement presents an opportunity for balancing private property rights with other societal values, such as human rights and environmental protection. The mandate on IP and public health signals that multilateral trade negotiations and law-making processes can accommodate the interests of developing countries when their demands are on strong moral and legal grounds. The successful experience in Doha provides momentum for developing countries to pursue other similar goals. Although the appeal for adopting a TRIPS declaration on IP and climate-related technologies seems acceptable, at least morally, the feasibility of concluding a similar text as for public health, especially in the WTO community, remains in doubt. From the perspective of international politics, the WTO members’ lack of political will to earnestly negotiate seems unchanged.48 In addition, as opposed to the mandate of the Doha Declaration, most free trade agreements (FTAs) concluded by the US after 2001 have constrained the use of compulsory licenses.49 The prevalence of alleged TRIPS-plus arrangements in US-initiated FTAs heralds greater difficulties ahead for adopting a new declaration on TRIPS-related social concerns at the WTO. Without the support of the US, it would be difficult to achieve a result that facilitates access to climate-related technologies in multilateral trade negotiations. Discrepancies between access to medicine and access to clean technologies and their products may create obstacles for constructing a new declaration. The possible discrepancies can be divided into three parts (Table 1). First, accessing patented drugs appears unaffordable for the public in developing countries, but whether climate-related technologies are too expensive is uncertain. Second, regarding emergency levels, there are strong moral and legal grounds for protecting people from public health crises by, among other approaches, using compulsory licenses as flexibly as possible. Without access to essential drugs, millions of people could die. However, climate change, despite its considerable impact on human society, is a gradual process and not an emergency similar to that of HIV/AIDS.50 In addition, the effective use of compulsory licenses depends on the presence of a competitive local production capacity. Given the relative infancy of climate-related technologies,51 manufacturing capacities for these products may be more insufficient or entirely absent in many developing countries. This limitation could make granting compulsory licenses less fruitful.52 By comparing the distinctive features of pharmaceutical and clean technologies, McManis and Contreras emphasize that market and patent coverage factors may considerably diminish the effects of green compulsory licensing as opposed to that of essential medicines.53 Thus, they are skeptical that ‘an international accord modeled on the Doha Declaration is achievable or desirable in the area of clean technologies’. 54 The authority to grant compulsory licenses lies with governments but is subject to a number of conditions that each WTO member is required to observe. The requirements, listed under Article 31 of the TRIPS Agreement, impose strict discipline on the members and provide competent national authorities with limited discretion. Observing the obligations is a twofold task: first, national authorities must determine the grounds on which such licenses are granted; second, they must fulfill each of the listed conditions, which begin with an appeal for granting the licenses in question and end on their termination. Article 31 does not explicitly regulate the right of members to stipulate the grounds for resorting to a compulsory license, nor does it provide definite parameters for determining the scope of the grounds, apart from the grounds for semiconductor technology.55 Such an omission causes ambiguity concerning the legality of the grounds chosen by national authorities under the TRIPS Agreement. During the Uruguay Round negotiations, most developed countries, including the US, favored a restrictive approach allowing only for matters of anti-trust, public non-commercial use, and national emergencies to legally trigger such licenses.56 In contrast, developing nations argued for an open approach under which there would not be any constraints regarding setting the grounds. In the end, the proposal to limit the grounds for issuing a compulsory license was not adopted. Instead, the final text on compulsory licenses focused on procedural matters and the substantial conditions to be observed.57The TRIPS preparatory work may support the assertion that the drafters had no definite intention of limiting the scope of the grounds.58 Subsequent developments regarding the interpretation of the TRIPS Agreement, particularly evident in the 2001 Doha Declaration, endorse the views of developing countries. However, the controversy regarding the legal status of the Doha text persists, and no judicial decisions have yet been made by the WTO relating to its legal authority. The US considers the Declaration to be a political statement that lacks any binding power on WTO members.59 By contrast, because the Declaration was adopted by consensus, developing countries claim that it represents a genuine and legitimate expectation among WTO members. Despite this disagreement, many academics consider the Declaration as a subsequent agreement that facilitates the interpretation of the TRIPS provisions in question.60 Irrespective of its function for treaty interpretation, debate continues regarding whether the Doha document can shape fields beyond the contexts of IP and public health. Countries in the midst of public health crises may encounter fewer challenges when availing themselves of the TRIPS flexibilities; however, when addressing situations that do not clearly represent public emergencies or that lack nearly uniform public support, a government’s selection of grounds may be severely questioned. Certain grounds specified in the patent laws of many developing countries are applied to balance the prerogatives of patent owners, such as their refusal to deal, failure to produce locally, and failure to obtain licenses under reasonable terms.61 The legality of invoking such grounds appears quite controversial. De Carvalho is strongly skeptical of the contention that countries are free to decide any grounds or can grant licenses on frivolous grounds.62 Considering that the use of compulsory licenses constitutes an exception to the normal exercise of patent rights, he argues that the grounds should be confined to exceptional or critical situations, such as national emergencies and public non-commercial use.63 According to de Carvalho’s argument, compulsory licenses should not be pursued to remedy individual benefit at the expense of eroding patentees’ right to license voluntarily (i.e., ‘say no to third parties’).64 Therefore, commercial disputes between licensees and patent owners, such as disputes over a refusal to license or failure to reach reasonable commercial deals, should not constitute a sufficient cause.65 After a Taiwanese business failed, after a considerable amount of time, to obtain licensing under reasonable commercial terms and conditions from Philips, the Taiwan Intellectual Property Office (TIPO) decided to grant compulsory licenses of the Philips CD-R patents to the local company. The action incited the critical complaints of both the patentee and the EC. The CD-R technologies and correlated patents were owned by Philips, which had acquired patent protection from the Taiwan Intellectual Property Office (TIPO) during the late 1980s.66 By the 1990s, CD-R production in Taiwan had increased considerably, with most production being licensed by Philips.67 However, Gigastorage, a Taiwanese CD-R manufacturer, was unable to reach a licensing deal with the patentee because of a disagreement over royalty rates. TIPO reviewed the appeal of Gigastorage for compulsory licensing of Philips’ five patents and determined the situation facing Gigastorage matched the grounds in question. TIPO’s interpretation as to what amounted to a reasonable commercial term was mainly subject to alleged suitable royalty rates. After reviewing the opinions and findings of public officials and professional institutions, TIPO concluded that Philips’ offer was not a fair and reasonable royalty arrangement.68 Because Gigastorage had spent almost a year engaging in negotiations with Philips, TIPO was satisfied that the period of negotiations had been considerable. In July 2004, according to Taiwan’s Patent Act,69 the decision of TIPO to grant the compulsory licenses was rendered.70 The EC protested that the reason used for triggering the compulsory licenses was a violation of the TRIPS agreement. The EC’s argument was largely based on a textual analysis and was offered with a view to preserving the patentee’s right to license voluntarily. First, the EC argued that Taiwan’s granting of compulsory licenses based on a failure to reach reasonable terms would diminish the protection extended to patent holders and that this effect conflicted with the essence of Article 28 of the TRIPS Agreement. In analyzing Article 28, the EC contended that the provision bestows on patent owners a freedom to license, which inherently carries with it a right to refuse to negotiate.71 Furthermore, the EC emphasized that Article 28 does not obligate patentees to engage in a licensing agreement but rather clearly states that patent owners have a right to do so.72 Second, the alleged ‘failure to obtain reasonable commercial terms’ was strictly categorized by the EC as a procedural condition as opposed to a substantial condition, which is one of the grounds for granting compulsory licenses. Because such a condition is explicitly specified in the first sentence of paragraph (b) of Article 31 as a procedural rule to be observed prior to an authorization of compulsory licenses, the EC insisted that it fell outside of what might be considered substantial grounds. The second sentence of the same paragraph stipulates that the obligation of WTO members to obtain licenses (voluntarily) under reasonable commercial terms in advance may be waived in the event of a national emergency or for public non-commercial use. According to paragraph (k), the members’ obligation to observe such conditions can also be waived when addressing an anti-trust situation. Reading the text restrictively, the EC insisted that Article 31 embodies the intent to distinguish such procedural elements from substantial grounds.73 Thus, the EC concluded that Taiwan’s allowance of Gigastorage’s failure to obtain licenses under reasonable commercial terms as grounds for issuing compulsory licenses was illegitimate. Climate change is a grave global concern; however, as mentioned previously, it may not, in terms of national emergencies, be universally recognized as equivalent to a global public health crisis because it affects countries differently and the problem persists over a long time frame. Some nations, such as small Micronesian island states, are obviously more vulnerable to the effects of climate change, whereas particularly well-developed countries can prove more resilient and adaptive to the challenges. Thus, most developed countries may not be persuaded by the arguments of developing countries and rising powers such as China and India, which attempt to equate the threat of climate change with more immediate national emergencies. Of course, the restrictive European approach toward establishing convincing grounds is open to dispute. In addition, whether a refusal to license or intransigence in negotiations on the part of rights holders constitutes sufficient reason to grant compulsory licenses remains controversial. It has been observed that the practice of refusing licensing for climate-related technologies may grow more common as companies find it profitable to invest in the technologies and ‘thus seek to maintain their competitive advantage’. 74 As tensions between developing countries (including their local companies) and climate-related technology owners increase, undercutting those IP rights by resorting to compulsory licenses under the guise of mitigating global warming will certainly provoke serious complaints from the governments of developed countries. Developed countries will not always ignore the granting of compulsory licenses on technologies critical to their industries and may opt for further legal action. The challenges to Taiwan’s authorization of the use of the Philips CD-R patents, as mentioned previously, could have become an international litigation brought to the WTO mainly because the format of the EC’s trade barrier report nearly constituted a complaint submitted to the WTO. More importantly, the proceedings that occurred both locally and internationally as a whole provide a vivid example of how difficult it is for a WTO member to satisfy the requirements for issuing compulsory licenses under the TRIPS Agreement.

## Climate ADV

### 1NC

#### Licenses are time-limited and cost barriers discourage applicants

Xi Zhang 17, University of Portsmouth, “CLIMATE-CHANGE-RELATED TECHNOLOGY TRANSFER TO CHINA IN THE TRIPS ERA”, September 2017, https://pure.port.ac.uk/ws/portalfiles/portal/11141207/Xi\_Zhang\_Thesis\_639934.pdf

Even if a technology is worthy of filing a compulsory licensing application against the patent, the limited duration of the compulsory licence would become another practical economic disincentive to pursuing one. Green technologies, particularly those that relate to renewable-energy generation: need major manufacturers to build them, skilled installers and operators to deploy them, well-funded project developers to finance the facilities that use them – such as wind farms and solar plants – and utilities to purchase and distribute the energy generated from them.294 Establishing such projects is very time consuming. Therefore, “potential compulsory licensee applicants may be discouraged by the strict time-limited nature of the licence.” 295 The primary business of a number of environmental manufacturers is large equipment production and sales of the equipment. For them, to employ compulsory licensed green-tech would constitute a potential risk in future production. As a licence is “a non-exclusive licence, it does not prevent the patent holder from joining in the same market.” 296 An expensive production line installed by domestic companies could be halted at the expiry of the compulsory license and probably already lose competitive advantage where the owner company has brand-name strength.297 Moreover, significant primary costs for green-tech applications still remain as a great impediment. The actual costs of a solar, wind or biofuel power plant: construction and developing the ancillary infrastructure, or conversion and refitting an emission-control device, could amount to a huge sum. Not to mention the follow-up subsidiary/financial support required from local government (e.g. electricity tariff subsidies); even if states used compulsory licensing to bring these technologies to their local industries, the problem of capital outlay remains in place before the technologies can be effectively implemented.

#### Ideologically conservative judges will gut the plan in court

John Newman 19, Professor of Law at the University of Miami School of Law and Former Attorney with the U.S. Department of Justice Antitrust Division, JD from the University of Iowa College of Law, BA from the Iowa State University of Science & Technology, “What Democratic Contenders Are Missing in the Race to Revive Antitrust”, The Atlantic, 4/1/2019, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/

But the federal courts represent a massive stumbling block for any progressive antitrust movement. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions.

But no matter its content, enforcing a law requires persuading a judge. When it comes to U.S. antitrust laws, federal judges—not Congress, and not regulatory agencies—are the ultimate arbiters. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files all its cases in federal courts. And although the Federal Trade Commission (the other) can decide cases internally, the inevitable appeals eventually end up in court as well.

No matter how strongly worded a law may be, ideologically driven judges can usually find a way around enforcing it. The cyclical history of U.S. antitrust law is proof that judges wield nearly limitless institutional power in this area.

Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to chip away at its effectiveness. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades.

But starting in the late 1970s, conservative judges began to erode the Clayton Act. Today, megamergers among competitors such as Bayer and Monsanto barely raise eyebrows. So-called vertical mergers, which combine suppliers and their customers, are now all but immune from antitrust enforcement—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up.

Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been eviscerated. By the 2000s, the ideas of the conservative Chicago School had become mainstream in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a receptive audience in the federal judiciary. Among insiders, Robinson-Patman is now known as “zombie law.” It remains on the books, but regulators no longer bother trying to enforce it.

If Democrats want to change antitrust law, they will first and foremost need to change the judges who apply it. Yet none of the 2020 contenders championing antitrust reform have even mentioned the possibility of appointing progressive antitrust thinkers to the bench.

Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power.

Recognizing the high stakes, the Republican Party has gone to great lengths to appoint conservative antitrust experts to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing.

And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017.

Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench.

Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the central role judges play in our political system.

There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. Real antitrust reform will require more than regulatory and legislative tweaks; it will require the right judges.

#### Renewables Fail---there’s opposition, they’re resource-intensive, and impoverished nations can’t afford to implement them

Michael Shellenberger 19, “The Reason Renewables Can't Power Modern Civilization Is Because They Were Never Meant To”, Forbes, 5-6-19, https://www.forbes.com/sites/michaelshellenberger/2019/05/06/the-reason-renewables-cant-power-modern-civilization-is-because-they-were-never-meant-to/

Over the last decade, journalists have held up Germany’s renewables energy transition, the Energiewende, as an environmental model for the world.

“Many poor countries, once intent on building coal-fired power plants to bring electricity to their people, are discussing whether they might leapfrog the fossil age and build clean grids from the outset,” thanks to the Energiewende, [wrote](https://www.nytimes.com/2014/09/14/science/earth/sun-and-wind-alter-german-landscape-leaving-utilities-behind.html) a New York Times reporter in 2014.

With Germany as inspiration, the United Nations and World Bank poured billions into renewables like wind, solar, and hydro in developing nations like [Kenya](https://e360.yale.edu/features/how-kenyas-push-for-development-is-threatening-its-prized-wild-lands).

But then, last year, Germany was forced to acknowledge that it had to delay its phase-out of coal, and would not meet its 2020 greenhouse gas reduction commitments. It announced plans to bulldoze an ancient church and forest in order to get at the coal underneath it.

After renewables investors and advocates, including Al Gore and Greenpeace, criticized Germany, journalists came to the country’s defense. “Germany has fallen short of its emission targets in part because its targets were so ambitious,” one of them [argued](https://www.handelsblatt.com/today/opinion/blue-about-green-in-defense-of-germanys-energy-and-climate-policies/23581724.html?ticket=ST-1024018-NkgGCm2Qc1CJQfLY3PPN-ap1)last summer.

“If the rest of the world made just half Germany’s effort, the future for our planet would look less bleak,” she wrote. “So Germany, don’t give up. And also: Thank you.”

But Germany didn’t just fall short of its climate targets. Its emissions have flat-lined since 2009.

Now comes a [major article](https://www.spiegel.de/plus/energiewende-in-deutschland-murks-in-germany-a-00000000-0002-0001-0000-000163724123) in the country’s largest newsweekly magazine, Der Spiegel, titled, “A Botched Job in Germany” ("Murks in Germany"). The magazine’s cover shows broken wind turbines and incomplete electrical transmission towers against a dark silhouette of Berlin.

“The Energiewende — the biggest political project since reunification — threatens to fail,” [write](https://www.spiegel.de/plus/energiewende-in-deutschland-murks-in-germany-a-00000000-0002-0001-0000-000163724123) Der Spiegel’s Frank Dohmen, Alexander Jung, Stefan Schultz, Gerald Traufetter in their a 5,700-word investigative story (the article can be read in [English here](https://docs.google.com/document/d/148Lym3a487S8lha50QXGJfjQ1HmlNyj3QfLqAt0k0ng/edit?usp=sharing)).

Over the past five years alone, the Energiewende has cost Germany €32 billion ($36 billion) annually, and opposition to renewables is growing in the German countryside.

“The politicians fear citizen resistance” Der Spiegel reports. “There is hardly a wind energy project that is not fought.”

In response, politicians sometimes order “electrical lines be buried underground but that is many times more expensive and takes years longer.”

As a result, the deployment of renewables and related transmission lines is slowing rapidly. Less than half as many wind turbines (743) were installed in 2018 as were installed in 2017, and just 30 kilometers of new transmission were added in 2017.

Solar and wind advocates say cheaper solar panels and wind turbines will make the future growth in renewables cheaper than past growth but there are reasons to believe the opposite will be the case.

Der Spiegel cites a recent estimate that it would cost Germany “€3.4 trillion ($3.8 trillion),” or seven times more than it spent from 2000 to 2025, to increase solar and wind three to five-fold by 2050.

Between 2000 and 2019, Germany grew renewables from 7% to 35% of its electricity. And as much of Germany's renewable electricity [comes](https://www.cleanenergywire.org/factsheets/germanys-energy-consumption-and-power-mix-charts) from biomass, which scientists [view](https://www.forbes.com/sites/michaelshellenberger/2019/03/07/with-ethanol-and-biomass-no-longer-viewed-as-green-will-other-renewables-soon-follow/#b819dd97fb98) as polluting and environmentally degrading, as from solar.

Of the 7,700 new kilometers of transmission lines needed, only 8% have been built, while large-scale electricity storage remains inefficient and expensive. “A large part of the energy used is lost,” the reporters note of a much-hyped hydrogen gas project, “and the efficiency is below 40%... No viable business model can be developed from this.”

Meanwhile, the 20-year subsidies granted to wind, solar, and biogas since 2000 will start coming to an end next year. “The wind power boom is over,” Der Spiegel concludes.

All of which raises a question: if renewables can’t cheaply power Germany, one of the richest and most technologically advanced countries in the world, how could a developing nation like Kenya ever expect them to allow it to “leapfrog” fossil fuels?

The Question of Technology

The earliest and most sophisticated 20th Century case for renewables came from a German who is widely considered the most influential philosopher of the 20th Century, Martin Heidegger.

In his 1954 [essay](https://monoskop.org/images/4/44/Heidegger_Martin_The_Question_Concerning_Technology_and_Other_Essays.pdf), “The Question Concerning of Technology,” Heidegger condemned the view of nature as a mere resource for human consumption.

The use of “modern technology,” he wrote, “puts to nature the unreasonable demand that it supply energy which can be extracted and stored as such… Air is now set upon to yield nitrogen, the earth to yield ore, ore to yield uranium…to yield atomic energy.”

The solution, Heidegger argued, was to yoke human society and its economy to unreliable energy flows. He even condemned hydro-electric dams, for dominating the natural environment, and praised windmills because they “do not unlock energy in order to store it.”

These weren’t just aesthetic preferences. Windmills have traditionally been useful to farmers whereas large dams have allowed poor agrarian societies to industrialize.

In the US, Heidegger’s views were picked up by renewable energy advocates. Barry Commoner in 1969 argued that a transition to renewables was needed to bring modern civilization "into harmony with the ecosphere."

The goal of renewables was to turn modern industrial societies back into agrarian ones, argued Murray Bookchin in his 1962 book, Our Synthetic Environment.

Bookchin admitted his proposal "conjures up an image of cultural isolation and social stagnation, of a journey backward in history to the agrarian societies of the medieval and ancient worlds."

But then, starting around the year 2000, renewables started to gain a high-tech luster. Governments and private investors poured $2 trillion into solar and wind and related infrastructure, creating the impression that renewables were profitable aside from subsidies.

Entrepreneurs like Elon Musk proclaimed that a rich, high-energy civilization could be powered by cheap solar panels and electric cars.

Journalists reported breathlessly on the cost declines in batteries, imagining a tipping point at which conventional electricity utilities would be “disrupted.”

But no amount of marketing could change the poor physics of resource-intensive and land-intensive renewables. Solar farms take [450](https://www.forbes.com/sites/michaelshellenberger/2018/05/08/we-dont-need-solar-and-wind-to-save-the-climate-and-its-a-good-thing-too/#a6dc94fe4de1)times more land than nuclear plants, and wind farms take [700](https://www.telegraph.co.uk/news/earth/energy/fracking/11034270/Wind-farm-needs-700-times-more-land-than-fracking-site.html) times more land than natural gas wells, to produce the same amount of energy.

Efforts to export the Energiewende to developing nations may prove even more devastating.

The new wind farm in Kenya, inspired and financed by Germany and other well-meaning Western nations, is [located](https://e360.yale.edu/features/how-kenyas-push-for-development-is-threatening-its-prized-wild-lands) on a major flight path of migratory birds. Scientists say it will kill hundreds of endangered eagles.

“It’s one of the three worst sites for a wind farm that I’ve seen in Africa in terms of its potential to kill threatened birds,” a biologist [explained](https://e360.yale.edu/features/how-kenyas-push-for-development-is-threatening-its-prized-wild-lands).

In response, the wind farm’s developers have done what Europeans have long done in Africa, which is to hire the organizations, which ostensibly represent the doomed eagles and communities, to collaborate rather than fight the project.

Kenya won't be able to “leapfrog” fossil fuels with its wind farm. On the contrary, all of that unreliable wind energy is likely to increase the price of electricity and make Kenya’s slow climb out of poverty even slower.

Heidegger, like much of the conservation movement, would have hated what the Energiewende has become: an excuse for the destruction of natural landscapes and local communities.

Opposition to renewables comes from the country peoples that Heidegger idolized as more authentic and “grounded” than urbane cosmopolitan elites who fetishize their solar roofs and Teslas as signs of virtue.

Germans, who will have spent $580 billion on renewables and related infrastructure by 2025, express great pride in the Energiewende. “It’s our gift to the world,” a renewables advocate [told](https://www.nytimes.com/2014/09/14/science/earth/sun-and-wind-alter-german-landscape-leaving-utilities-behind.html) The Times.

Tragically, many Germans appear to have believed that the billions they spent on renewables would redeem them. “Germans would then at last feel that they have gone from being world-destroyers in the 20th century to world-saviors in the 21st,” noted a [reporter](https://www.handelsblatt.com/today/politics/handelsblatt-explains-why-germany-is-leading-the-charge-against-climate-change/23570178.html).

Many Germans will, like Der Spiegel, claim the renewables transition was merely “botched,” but it wasn't. The transition to renewables was doomed because modern industrial people, no matter how Romantic they are, do not want to return to pre-modern life.

The reason renewables can’t power modern civilization is because they were never meant to. One interesting question is why anybody ever thought they could.

#### China’s investing in renewable energy absent the plan

Hinkley 16 (Story, Paul S. Deland Fellow at the CSM, “Have China's carbon emissions already peaked?”, http://www.csmonitor.com/Environment/2016/0404/Have-China-s-carbon-emissions-already-peaked)

China is still the world's largest producer of greenhouse gas emissions — for now. But the energy giant may have already hit its carbon dioxide emissions peak 16 years ahead of schedule, a potential spur for the United States to honor its own climate commitments. Humans' greenhouse gas output increased by about 0.5 percent in 2014, thanks to serious reductions from the world's largest carbon dioxide emitter. Climate scientists say that China’s carbon dioxide emissions may have peaked in 2014, the same year that President Xi Jinping promised President Obama a 2030 peak. Carbon emissions grew by just 0.9 percent in 2014, and coal consumption remained flat, while the economy continued to grow by seven percent. "I'm of the opinion that this is a trend that will continue," Barbara Finamore, Asia director for the environmental-advocacy group National Resources Defense Council, tells Nature. "This is the new normal." Coal, the world’s cheapest and dirtiest energy source, accounted for almost 45 percent of the world’s energy-related carbon dioxide emissions in 2011. And in China, the world’s biggest CO2 emitter, coal accounts for more than 75 percent of China's energy consumption. Earlier studies may have overestimated China's coal use, helping the country meet its goals, but the government has also led efforts to limit nonrenewable energy and boost alternatives such as wind, solar, and nuclear power, strengthened in the country's latest Five-Year Plan. "China's international commitment to peak emissions 'around 2030' should be seen as a highly conservative upper limit from a government that prefers to under-promise and over-deliver," Fergus Green and Nicholas Stern wrote last month in the journal Climate Policy.

# Block

## States CP

### Solvency---2NC

#### 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.

The second point is that the tobacco settlement essentially created a nationwide regulatory regime governing cigarettes.202202Nolette, supra note 13, at 24. The tobacco companies, along with NAAG, petitioned Congress for a national legislative settlement, but no such legislation was ever enacted. Dagan & White, supra note 121, at 369–70. CLOSE It includes, for example, not only payments by the defendants for past harms but also agreements to strengthen warning labels and restrictions on advertising. Because it applies throughout the United States and governs the activities of virtually all tobacco companies doing business here, one could fairly say that it might as well be a federal law.

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Similar multistate litigation efforts have imposed quasi-regulatory regimes via comprehensive settlements with major industry players in the pharmaceutical and other industries.203203See Nolette, supra note 13, at 49–59 (offering a detailed account of the pharmaceutical litigation); id. at 25 tbl.2.1 (listing the top fifteen industries targeted in multistate litigation). CLOSE We expect this phenomenon will continue. In the fall of 2017, for example, the Commonwealth of Massachusetts sued the credit-reporting company Equifax following announcement of a data breach that allegedly affected over 140 million consumers.204204See Sarah T. Reise, State and Local Governments Move Swiftly to Sue Equifax, Ballard Spahr Consumer Fin. Monitor (Oct. 3, 2017), https://www.consumerfinancemonitor.com/2017/10/03/state-and-local-governments-move-swiftly-to-sue-equifax/ [https://perma.cc/K24M-P9W7]. CLOSE Massachusetts brought the suit under its own data privacy statute, as well as a more general consumer protection statute. If other states and credit reporting firms are drawn into this litigation, one might well see another comprehensive settlement with terms that would effectively act as, and possibly obviate, national regulation.

5. State Enforcement of Federal Law.—State AGs also can, and do, enforce many aspects of federal law. State enforcement of federal law is pervasive, from antitrust to consumer protection to environmental law.205205See generally Lemos, State Enforcement, supra note 105, at 707–17 (describing the contours of state enforcement of federal laws in a variety of areas). CLOSE As we explained above, this can happen either through explicit statutory authorization or through states relying on more general private rights of action, often asserting parens patriae standing to sue on behalf of their citizens.206206See supra notes 105–10 and accompanying text. CLOSE

On its face, this category of cases may not seem particularly empowering for states, given that AGs are merely enforcing policies that already have been written into federal statutes and regulations. Yet the level of enforcement can have profound consequences for what the law means in practice, and for how regulated entities view their options. That is true even when the law’s substantive requirements are perfectly clear: higher levels of enforcement are likely to increase deterrence by raising the expected sanction for violations.207207See Lemos, State Enforcement, supra note 110, at 737–40 (describing the power of enforcement). CLOSE And when the relevant statutory or regulatory commands are somewhat less than pellucid—as is often the case—state AGs can shape policy on a national scale by pushing particular interpretations of vague or ambiguous federal laws.208208See, e.g., id. at 739–40 (describing how state enforcement has molded federal antitrust doctrine). CLOSE

Thus, the most interesting instances for our purposes are those where state enforcement reflects a disagreement with national enforcement policy. The most salient recent example was Arizona’s effort to ramp up enforcement of federal immigration laws in response to what it saw as an abdication by federal authorities.209209See Arizona v. United States, 567 U.S. 387 (2012) (holding much of Arizona’s effort preempted). CLOSE Another example, with a different political valence, would be Eliot Spitzer’s effort in New York to enforce federal environmental laws more aggressively than the federal EPA had previously been willing to do.210210See Lemos, State Enforcement, supra note 110, at 743–44 (explaining that the EPA was embroiled with lawsuits at the time but that it adopted Spitzer’s legal strategy within a few weeks, bringing a suit against power plants that New York intervened in). We leave to one side here the converse scenario, which occurs when states refuse to enforce federal law or repeal state laws that parallel federal laws. These state decisions may also significantly undermine or affect federal policy. For example, Colorado’s decision to end state prohibition of most marijuana use made it significantly more difficult for federal authorities to further national drug policies in that state. See generally Ernest A. Young, Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction, 65 Case W. Res. L. Rev. 769, 774–76 (2015). CLOSE

Like the multistate cases described above, state enforcement of federal law can create the equivalent of regulatory policy nationwide. Given the interconnectedness of the national market, it’s hard to confine the effects of state enforcement within a particular state’s borders. If New York aggressively pursues Microsoft, Washington may feel aggrieved. And if pro-environment states undermine the fortunes of big oil companies, the oil-producing states may share in the consequences.

### Solvency---AT: Certainty

#### ‘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.

#### ‘Regulatory uncertainty’ is unproven AND counterbalanced by efficiency benefits of localized variation

Harry First 9, Charles L. Denison Professor of Law at the New York University School of Law, “Modernizing State Antitrust Enforcement: Making the Best of a Good Situation”, The Antitrust Bulletin, Volume 54, Number 2, Summer 2009, p. 295-297

III. MODERNIZING STATE ANTITRUST ENFORCEMENT

A. The good situation

1. THE CASE FOR STATE ENFORCEMENT—The debate over state antitrust enforcement is basically about whether antitrust enforcement should be centralized or decentralized. A number of arguments support decentralization of enforcement. One is that decentralization of the institutions of antitrust enforcement produces policy diversification. 41 Different agencies can reflect different constituencies and interests; they can also develop different competencies and specializations. This policy diversification reduces the risk that violations will go unremedied. A second argument is that different enforcement institutions may have different resource commitments and constraints. It may be the case that having two organizations with different sources of funding or somewhat different missions may provide broader enforcement than a single agency could. A third argument relates to the constitutional structure of public enforcement agencies. Central enforcement agencies often need the factual and political support of more local agencies, particularly when cases involve local interests. The availability of decentralized enforcement institutions can provide that support.

Those who favor centralization argue the advantages of policy uniformity. A single agency increases the coherence of policy choices by avoiding contradictory results. The broader the jurisdictional competence of a single agency, the better able it will be to internalize all the social costs and benefits of any particular decision, leading to better policy choices. With one agency there is no opportunity for a complainant, who may want to use government antitrust enforcement to restrict the conduct of a more successful business rival, to engage in forum shopping to seek the most pro-enforcement agency. A single enforcement agency might also have the size to achieve economies of scale in its operations, making it a more efficient enforcer. Finally, a centralized agency would reduce compliance costs. Not only would regulatory duplication be avoided, but regulatory uncertainty would also be avoided. Parties would have a clearer understanding of enforcement policies and could be more certain as to whether particular business practices comply with the law or not.

The dispute between decentralization and centralization needs both theory and empiricism for its resolution. The theory part involves considering the four dimensions along which enforcement competition can occur: 1) yardstick competition, which enables the performance of one agency to be measured against its peers42; 2) regulatory competition, which pressures legislators to compete for votes pr resources by offering more attractive regulatory regimes43; 3) innovation competition, in which competitive pressures may move maverick players to experiment, forcing dominant players to copy successful experimental outcomes44; and 4) norms competition, in which the presence of different enforcement views helps insure the vigorous policy debate which has been so critical in shaping antitrust enforcement norms.45

I think that these four dimensions of enforcement competition make out a strong theoretical case for the diversification that the states can bring to antitrust enforcement. The empirical effort that the AMC undertook to review state enforcement does not support the concerns that many have had about decentralization and also provides some indication of positive benefit (the states’ general willingness to provide monetary relief to indirect purchasers I take as a virtuous example of diversified enforcement). One must of course recognize that each side of the debate generally has its own specific examples and counter-examples and that some aspects of the debate remain unproved (the question of scale economies in enforcement and the uncertainty costs connected with regulatory diversity, to take two important examples).

### Solvency---AT: Signal---2NC

#### 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.

#### It has all 50 states collectively demand the plan---a literally unprecedented signal of support that’s seen as U.S. interest

Julie Melissa Blase 3, PhD in Government from the University of Texas, BA from the University of Texas at Austin, “Has Globalization Changed U.S. Federalism? The Increasing Role of U.S. States in Foreign Affairs: Texas-Mexico Relations”, Doctoral Dissertation, December 2003, https://repositories.lib.utexas.edu/bitstream/handle/2152/463/blasejm039.txt

Although what the states and cities are doing may not rise to the level of federal law, many of these policy initiatives are in harmony with domestic policy goals. Collectively, it can be argued, they serve to shape the foreign relations of the nation as a whole. Ivo Duchacek sees no difference in relations conducted by federal actors and by subnational actors. "If by diplomatic negotiation we mean processes by which governments relate their conflicting interest to the common ones, there is, conceptually, no real difference between the goals of paradiplomacy and traditional diplomacy: the aim is to negotiate and implement an agreement based on conditional mutuality."45 Brian Hocking objects to treating the foreign relations of subnational governments as if they were something distinct from the federal level. Hocking studies what happens in federal systems when foreign policy issues become local concerns. He sets his approach apart from the complex interdependence crowd, such as Duchacek, saying that ideas such as "paradiplomacy" places subnational activities outside of traditional diplomatic patterns. Hocking sees non-central governments as integrated into a dense web of diplomatic interactions, in which they serve more as "allies and agents" in pursuit of national objectives rather than as flies in the ointment. "The nature of contemporary public policy with its dual domestic- international features, creates a mutual dependency between the levels of government and an interest in devising cooperative mechanisms and strategies to promote the interests of each level."46 Rather than separating the activities of non-central governments from those of central governments, Hocking's goal is to "locate" subnational governments in the traditional diplomatic and foreign policy processes initiated and carried through by the federal government. But what Hocking does not look at as closely are the ways in which subnational governments initiate relations directly with foreign governments. Looking at why states initiate their own foreign relations is the way to determine to what degree the states, in pursuit of their own goals, can be "allies and agents" of the federal government. This dissertation addresses state- initiated relations with foreign governments to see whether the states are acting as de facto agents of the federal government, in pursuit of shared goals or distinct state interests. But one point to consider is that the development of state roles is not a matter of devolution. Many of the developments at the subnational level are state and local responsibilities to begin with. While the federal government is responsible for trade policy, states have the primary role in economic development, and criminal justice is a state and local concern, albeit state and local governments share responsibility with the federal government for public safety. But the states are active in the policy areas examined here not so much because the federal government has mandated they be so, but because globalization has changed the nature of governing at the subnational level. These developments signify not a transfer of power from the federal level to the states but an expansion of traditional state- level powers.

#### State AGs are widely perceived

Lisa Madigan 20, Lecturer in Law at the University of Chicago Law School, Litigation Partner in the Chicago office of Kirkland & Ellis, “The Post-Election State AG Enforcement Landscape”, Law360, 11/5/2020, https://www.kirkland.com/publications/article/2020/11/the-post-election-state-ag-enforcement-landscape

So far, the elections have produced almost no change to the current political attorney general landscape. The only open attorney general seats were in Indiana and Montana. The Republican candidates won both, keeping the number of Republican and Democratic attorneys general even.

In North Carolina and Pennsylvania the incumbent Democratic attorneys general are in tight races but they are likely to prevail once all the votes are counted. Therefore, in the months ahead, watch for state attorneys general to continue to serve as strategic, vital voices at the state and federal levels.

Over the past decade, state attorneys general increasingly exercised their authority to challenge or support the federal policies they believe are best for the people of their state. Their positions on the Patient Protection and Affordable Care Act split sharply along partisan lines and provided a preview to the escalation of attorney general litigation on federal initiatives.

Routinely now, once rumors of a new federal policy surface, state attorneys general start preparing to challenge or support the eventual policy. State attorneys general led legal charges on every major health care, environmental, immigration and civil rights issue coming out of the federal administration using their power to represent the interests of the people of their states all the way to the U.S. Supreme Court. The California attorney general has sued the current administration over 100 times and other Democratic attorneys general are not far behind.

Due to their increased activity, the national stature of state attorneys general grew substantially over recent years. You see their names in the headlines every week and their faces on television almost every day.

#### Especially on antitrust AND internationally!

Edward T. Swaine 1, Assistant Professor, Legal Studies Department, The Wharton School, University of Pennsylvania, AB from Harvard University, JD from Yale Law School, “The Local Law of Global Antitrust”, William & Mary Law Review, 43 Wm. & Mary L. Rev. 627, December 2001, Lexis

3. State Enforcement of Federal Law

State attorneys general suing under the federal antitrust laws are often described as private plaintiffs, 495 and it may be wondered why they would be treated any differently. Like private actors, states are not ordinarily the subjects of international obligations, nor are they addressed by the sources giving rise to the specific norm of antitrust comity. Two differences may be relevant. First, precisely because they are more public-oriented, states may prove even more disruptive to antitrust comity. Second, unlike private behavior, conduct by state governments is generally attributed to the United States under international and foreign relations law; for related reasons, states are legally incapacitated from engaging in effective self-regulation, warranting different treatment in the domestic implementation of antitrust comity.

a. The Potential Risk to Comity

State antitrust enforcers are often drawn to precisely the sort of matters in which they offer the greatest added value: that is, local matters unlikely to be scrutinized by federal officials or private-party plaintiffs. 496 But attempts to confine the states to those matters, or even to distinguish between federal and local matters, [\*757] failed long ago, and the borders were largely erased in the 1980s. Spurred by an infusion of federal funds and a decline in federal enforcement, 497 state enforcement activities increased dramatically, including as to interstate matters. 498 Desiring to coordinate efforts and husband resources, 499 the states formed the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG) to coordinate multistate investigations and [\*758] litigation 500 and issue joint guidelines. 501 By 1990, according to one analysis, "the sovereign states, acting voluntarily through the Antitrust Committee and the Antitrust Task Force of NAAG, function as a de facto third national antitrust enforcement agency." 502

This is hyperbole, of course; the states lack the unity, expertise, and resources of the federal agencies. 503 But their authority under federal antitrust law indeed has a public dimension with evident international implications. States have the privilege of representing natural residents, 504 and enjoy substantially enhanced standing to challenge mergers, 505 arguably the most significant and problematic [\*759] context for international cooperation. 506 Although state officials lack the overriding profit motives of private plaintiffs, they are by the same token relatively free to pursue judgments without financial incentive, 507 and enjoy their own immunity from antitrust claims. 508 Such authority will increasingly be exercised with respect to international matters, broadly construed. Like interstate commerce before it, globalization is effective at reducing the significance of borders, and state attorneys general may legitimately perceive that foreign conduct has local effect; in addition, their involvement with local or interstate matters will increasingly touch on matters of interest to foreign sovereigns, perhaps by dint of these governments' own extraterritorial authority. 509

## Bizcon

### U---Growth---2NC

#### Biz con is threading the needle---it’s just strong enough to sustain growth, but fragile

Joe Ucuzoglu 1-26, Chief Executive Officer at Deloitte US, “CEOs Eye 2022 with Optimism and a Dash of Uncertainty”, Ritz Herald, 1/26/2022, https://ritzherald.com/ceos-eye-2022-with-optimism-and-a-dash-of-uncertainty/

The first CEO survey of 2022 shows leaders threading the needle between feeling “hopeful” and “uncertain” about the year ahead. CEOs expect business growth to remain strong, but continue to highlight challenges with talent, the continued pandemic, and supply chain disruptions. Holding steady on expectations for growth, surveyed CEOs appear cautiously optimistic that their organizations have adjusted and adapted to a “new normal” marked by the enduring uncertainty of COVID-19.

When asked in the Fall 2021 survey about when pandemic business effects would be over, nearly one-third of CEOs said they didn’t expect the impact of COVID-19 ending anytime in the “foreseeable future,” while 11% said business effects would be over by the end of 2021, 23% said by mid-2022, and 35% said by the end of 2022.

The timing of the Fall 2021 survey coincided with the rise of the Delta variant in September 2021, while the current survey was fielded at the beginning of January 2022 during a time of high disruption by the Omicron variant. Even so, CEO expectations are remarkably unchanged from four months ago. Similar to predictions they made back in September, 8% of CEOs claim that the business effects of the pandemic are already over for their organization, and just under a third say they will not be over in the “foreseeable future.” About 20% say by mid-2022, and 40% say by the end of 2022.

Expectations for growth are also relatively unchanged from the Fall 2021 survey, with almost two-thirds of CEOs expecting their organization’s growth to be “very strong” or “strong” over the next 12 months. The remaining third expects “modest” growth, and a fractional 2% expect “weak” growth.

However, CEOs have updated their outlook on financial and market instability. In the current survey, 36% of CEOs pointed to this issue as a top external concern, compared to 13% in Fall 2021. That figure rises to 62% for CEOs in the Financial Services industry, where it’s the top-ranked issue.

“Notwithstanding the challenging societal circumstances at this moment presented by the Omicron surge, CEOs remain optimistic about the business environment and see strong growth opportunities over the next year. A new normal appears to be setting in whereby business leaders simply expect new challenges to arise continuously and are confident they can manage through them to achieve positive business results while making a real difference in society.” – Joe Ucuzoglu, Chief Executive Officer, Deloitte US.

### U---AT: Antitrust Now---2NC

#### Nothing concrete has been implemented---the question is what will actually get through

Alden Abbott 1-26, Senior Research Fellow at the Mercatus Center at George Mason University, and Andrew Mercado, Adjunct Professor and Research Assistant at George Mason University's Antonin Scalia Law School, Master's Degree in Economics from George Mason University, “Developments in Competition Policy During the First Year of the Biden Administration”, Mercatus Center Policy Briefs, 1/26/2022, https://www.mercatus.org/publications/antitrust-and-competition/developments-competition-policy-during-first-year-biden

Conclusion

Competition policy developments in the first year of the Biden administration have a common theme. Very few concrete, actionable steps have been taken, but the groundwork has been laid for far greater government intervention to curtail disfavored types of business conduct. By bringing interventionist individuals into top positions at the antitrust agencies and releasing an executive order focused primarily on directing federal agencies to intervene to a greater extent in the economy, the new administration has made it clear that more aggressive antitrust enforcement actions—and novel competition rulemaking proposals—are in the offing. What’s more, growing fervor in the halls of Congress has led to bipartisan support for bills that would expand the power of antitrust agencies to limit or block mergers and other transactions by dominant firms. These developments all point to what may be the largest antitrust policy shift in nearly half a century, one that could significantly reshape the fabric of the economy and the welfare of consumers. Year two of the Biden administration will provide greater insights regarding the extent to which such a dramatic policy transformation will actually come to pass.

#### Antitrust will stall in courts---businesses are watching for a breakthrough that signals a sea change in law

John Ingrassia 22, Senior Counsel at Proskauer Rose LLP, JD from Hofstra University School of Law, BA from Pace University, “How to Navigate the Coming Antitrust Policy Tests”, JD Supra, 1/5/2022, https://www.jdsupra.com/legalnews/how-to-navigate-the-coming-antitrust-7543303/

2021 will be remembered in antitrust law. Not since the 1970s has there been so much chatter over the fundamental purposes of antitrust policy, or such potential for actual sea change.

Half a century ago, Robert Bork and the Chicago School argued that antitrust law had lost its way and should focus on consumer welfare. Bork's view was that antitrust enforcement was getting in the way of legitimate competition, and the U.S. Supreme Court was quick to embrace the consumer welfare standard.

Now, Federal Trade Commission Chair Lina Khan and the new Brandeisians argue that antitrust law has again lost its way and must shed the constraints of the consumer welfare standard.

Khan's view is that consolidation has gone unchecked in the American economy, resulting in structural harms to competition that the consumer welfare standard is unable to address.

She believes the agency has historically defined markets too narrowly to effectively police broader economic impacts of sustained consolidation, and favored gerrymandered remedies over outright challenges.

Khan has imposed sweeping changes aimed at chilling merger activity and shaping the future of merger enforcement. Against dissents from Republican Commissioners Christine Wilson and Noah Phillips, and charge of going rogue from the U.S. Chamber of Commerce, the FTC stripped away long-standing exemptions and interpretations that streamlined merger review.

The action came in response to an unprecedented merger wave — 3,845 acquisitions filed with the agencies in the first 11 months of 2021, substantially more than most full years.

The changes are having an impact, making investigations more intrusive, lengthy and less predictable. Still, policy precedes practice, and while the FTC has been heavy on policy, it has yet to test those policies in the courts.

The tests may come in the next year. Meanwhile, we can also expect the FTC and the U.S. Department of Justice under Assistant Attorney General Jonathan Kanter's leadership, to not only continue the trajectory of policy changes but also begin the task of entrenching them in agency practice.

Here, we review the year in FTC policy moves, what they mean and how to navigate the newly laid minefields.

Warning Letters After the Close of HSR Waiting Periods

In an unprecedented move, the FTC recently began issuing letters to parties in transactions

the agency may intend to investigate after expiration of the Hart-Scott-Rodino Act waiting period. According to the agency in an Aug. 3, 2021, blog, this is the result of "a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines."

Wilson, however, said on Twitter on Aug. 12, 2021, that she was "gravely concerned that the carefully crafted HSR framework is suffering a death by a thousand cuts," following her Aug. 9 statement that said "For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings."

The FTC's jurisdiction to review transactions is independent of the HSR reporting requirements, with the power to investigate any transaction before or after closing, whether subject to reporting or not, and whether the HSR waiting period has expired or not.

There are examples of the agencies reviewing nonreportable transactions, and even investigating reportable transactions after expiration of the HSR waiting period, though they are rare.

The warning letters do not assert new authority not already existing under law, but notifying parties that an investigation may remain open post-HSR clearance implicates finality and certainty of investigations, but not every transaction gets a warning letter. Those with no issues go through unscathed. Those with clear issues are investigated.

The deals that might pose some issues, but not enough to draw an investigation, might trigger the newly minted warning letter. To show the letters have teeth, the FTC will sooner or later have to challenge a deal post-HSR waiting period, putting it to the test before courts, where it is likely to face hurdles to the extent the deal did not warrant a full investigation in the first instance.

Still, the practice is ushering a change in how provisions are drafted in deal documents. A buyer asserting that it is not required to close over the — arguably — still-pending investigation may face an uphill battle depending on how the closing conditions are drafted, for they typically point to the expiration of applicable waiting periods and not the absence of potential ongoing investigations or issuance of warning letters.

So careful buyers seek closing requirements that no investigations are threatened and that no warning letters have been issued. Recent examples include the 3D Systems Corp.'s agreement to acquire Oqton Inc. and Universal Corp.'s agreement to buy Shank's Extracts Inc.

The parties' agreements provided that if a warning letter is issued, the investigation would be treated as closed 30 days after receipt of such letter. Buyers may want to consider similar provisions until more emerges on how the FTC will proceed with warning letter transactions.

More Intensive Merger Investigations

The FTC announced plans on Aug. 3, 2021, to make the second request process both "more streamlined and more rigorous." The changes include the following:

Merger investigations will address additional potentially impacted competition, such as labor markets, cross-market effects, and the impact on incentives of investment firms.

Modifications to second requests will be more limited.

The agency will require parties to provide more information relating to their use of e- discovery in responding to the investigation.

Additional information will be required with respect to privilege claims.

The FTC said these changes are in recognition that "an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation."

Possibly in response to such steeped up investigative techniques and resistance to find common ground with merger parties, Sportsman's Warehouse Holdings Inc. and Great Outdoors Group LLC abandoned their proposed merger at the end of 2021, citing indications that the FTC would be unlikely to approve the outdoor sporting goods transaction.

The changes, though, do little to streamline the second request process. They make it more complex, burdensome and time-consuming.

Perhaps most notable is the use of the process to delve into labor markets. Republicans Wilson and Phillips argued that FTC leadership may have themselves to blame for the merger review crunch, saying in a Nov. 8, 2021 statement:

If the agency is lowering thresholds of concern and broadening theories of harm, this certainly would explain why the FTC is unable to conduct merger reviews in a timely manner while our sister agency remains capable of addressing the same increased filing volumes within statutory timeframes.

More Onerous Consent Decree Provisions

Where merger parties settle a challenge rather than litigate, the consent decree process sets out the parties' obligations. Historically, such consent decrees, among other things, required parties to notify the agency prior to certain future acquisitions.

The FTC rescinded this long-standing policy, noting that it:

Returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged.

The agency will also require divestiture buyers to agree to prior approval for any future sale of the assets they acquire. Khan explained the move was to avoid "drain[ing] the already strapped resources of the Commission" on "repeat offenders."

The FTC included the new provision in its Oct. 25, 2021, consent decree settling a proposed transaction by DaVita Inc., a dialysis service provider. DaVita is now required to receive prior approval from the FTC of 10 years before any new acquisitions, a dialysis clinic business in Utah being in question.

This is a significant change and will chill not only settlements with the FTC, but also M&A transactions at the outset where such provisions are commercially untenable. Wilson and Phillips noted in dissent that "a prior approval requirement imposes significant obligations on merging parties and innocent divestiture buyers."

The FTC clearly aims to chill M&A activity, and merger agreements that provide more optionality to abandon deals will become more common, though parties intent on pushing their deal through may see a consent decree with 10-year approval provisions as less palatable than litigating, and force the FTC to cave or go to court.

Withdrawal of the Vertical Merger Guidelines

In another party-line vote, the FTC withdrew the vertical merger guidelines, which were issued just last year. Democratic commissioners criticized the guidelines as based on "unsound economic theories that are unsupported by the law or market realities," and reflecting a "flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers."

Vertical transactions are between firms at different levels in the supply chain. Historically, antitrust enforcement of exceptional vertical mergers were rare and difficult given the previously presumed efficiencies. Vertical mergers can eliminate double marginalization, in which firms at each level mark up prices above marginal cost. Elimination of one markup results in lower prices and can be pro-competitive.

Khan, however, argues the guidelines' "reliance on [elimination of double marginalization] is theoretically and factually misplaced." Going forward, "the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers."

This too drew a strong rebuke from the Republican commissioners, who said "The FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them."

The commission's challenges to chipmaker Nvidia Corp.'s $40 billion acquisition of U.K. chip design provider Arm Ltd. alleged the transaction would combine one of the largest chip producers with a firm that has essential design technology — critical inputs.

In a Dec. 2, 2021, statement, the FTC said the acquisition "would distort Arm's incentives in chip markets and allow the combined firm to unfairly undermine Nvidia's rivals."

The FTC's lawsuit should "send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations," FTC Bureau of Competition Director Holly Vedova said in the statement.

Given that vertical mergers will be closely scrutinized as a matter of course, parties need to consider concerns the FTC may identify and prepare strong counters — other than elimination of double marginalization.

For example, parties could argue that the transaction expands access to products and expands consumer choice. Parties willing to go the distance with a vertical merger should also remain mindful that the guidelines have never been cited or relied on by a court, and it is the established jurisprudence on vertical transactions that will carry the day.

Rescinding the Consumer Welfare Standard

In July 2021, the FTC rescinded its policy interpreting its statutory mandate to root out "unfair methods of competition" as coterminous with promoting consumer welfare under the Sherman and Clayton Acts.

In a July 19, 2021, statement, the FTC called the rescinded policy was "bind[ing] the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act."

Still, the consumer welfare standard has been entrenched in antitrust jurisprudence for decades, and the FTC cannot change that. The immediate impact is thus more likely to be seen in administrative actions in the FTC's own court.

In a dissenting statement, Republican commissioners countered that FTC leadership does not propose a replacement standard and "that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions," adding that, "unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles."

Labor Market Scrutiny

Government investigations and private litigation relating to no-poach and wage-fixing agreements are ballooning, and criminal indictments are now a reality.

Encouraged by President Joe Biden's executive order on competition, the FTC and the DOJ have doubled down on investigating labor markets. Merger investigations now routinely include requests for employee compensation data, inquiries regarding noncompete and nonsolicit agreements, and are more likely to delve into both the merger's effects on labor, and the parties' prior labor practices.

The DOJ's challenge to Penguin Random House LLC's proposed acquisition of Simon & Schuster Inc. focuses on harm to the labor market — for authors.

In his first public comments, the DOJ's Kanter said:

We will fight for American workers including in connection with illegal mergers that substantially lessen competition for laborers. Going forward, you can expect efforts like these not only to continue but to increase.

Khan echoed the sentiment, saying:

Competition and conduct can hurt us not just as consumers who buy products from a shrinking number of large firms, but also as workers who are especially vulnerable and subject to the whims of a boss we can't equally or practically escape.

Antitrust compliance policies now must extend to addressing practices with respect to employee recruiting and compensation. Antitrust compliance training must extend beyond the sales team, and include HR. Businesses are reviewing and revising their compliance policies, and beginning new antitrust training programs to ensure that they are not subjected to claims of depressed wages and barriers to worker mobility.

Looking Ahead to the Year to Come

The year 2021 has been like no other for antitrust enforcement. While the FTC's various policy pronouncements are clearly intended to chill merger activity, it does not appear to have had the intended outcome.

HSR filings continue at off-the-charts levels. Amid this strong showing of M&A activity, the advice is to keep moving transactions forward, stay ahead of the new tacks the agencies might take, and account for newly injected risk and uncertainty.

Looking ahead, expect another energetic year. So far, the FTC's policy changes have not seemed to slow the pace of merger activity, but the frenzy cannot last forever. Nonetheless, merging parties are now going into the merger review process with eyes open, knowing it is likely to be more intense and uncertain. Parties to vertical transactions will no longer ride easy on double marginalization theories, and parties will be handing over their HR and payroll files.

At the same time, the heavy resistance to these changes will continue, if not strengthen, and will play out not just in courts and the halls of Congress, but will also spill into the political mainstream.

### Link---2NC

#### Even targeted antitrust sends a broad signal of aggressive overregulation

Raymond J. Keating 21, Chief Economist for the Small Business & Entrepreneurship Council and Adjunct Professor in the MBA Program at the Townsend School of Business at Dowling College, “Antitrust Fictions (and Actions) Will Have Real, Negative Economic Consequences”, SBE Council, 6/18/2021, https://sbecouncil.org/2021/06/18/antitrust-fictions-and-actions-will-have-real-negative-economic-consequences/

It needs to be understood that while supposedly targeting so-called “Big Tech,” these intrusive regulations and substantial costs would fall on competitors as well, thereby actually discouraging competition in technology markets. For good measure, moving ahead with his kind of hyper-antitrust regulation of tech firms lays the groundwork for doing so in other industries, such as in retail, energy, health and medical sectors, and so on. This is what Senate anti-trust crusaders hope to accomplish.

The message is clear: Beware entrepreneurs, businesses and investors if you become too successful or if you cross certain political constituencies. The government stands ready to punish you via intrusive and costly regulation.

#### Legally, antitrust is economy-wide, so there’s no way to limit the plan’s scope AND risk-averse firms and lawyers think it’ll be applied, chilling investment

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

That regulatory skepticism had a particular salience for antitrust law, which itself is designed to maintain a particular balance between private and government action in markets. n53 Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

### Link---AT: Turns---2NC

#### Benefits of antitrust require perfect application that’s impossible in practice---costly false positives are inevitable

Thomas A. Lambert 11, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri Law School, JD from the University of Chicago Law School, BA from Wheaton College, “The Roberts Court and The Limits of Antitrust”, Boston College Law Review, 52 B.C. L. Rev. 871, May 2011, Lexis

The enforcement provisions of the antitrust laws ensure that courts are routinely called upon to make these sorts of judgments in lawsuits by private plaintiffs. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a lawsuit in federal court. 25 To account for the fact that many antitrust violations occur in secret and thus escape condemnation, the statute seeks to optimize the deterrent effect of private enforcement by permitting each successful plaintiff to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 What we end up with, then, is a body of law that is ultimately aimed at maximizing competition (understood in terms of market output), is quite general in its literal proscriptions, becomes "fleshed out" by generalist courts adjudicating private disputes, and is highly attractive to private plaintiffs seeking super-compensatory recoveries.

Taken together, these aspects of American antitrust law--all of which predate the Roberts Court by decades--render antitrust adjudication an inherently limited enterprise. In most challenges to novel business practices (and the prospect of treble damages guarantees that there will be many such challenges), whether liability is appropriate will be difficult to determine. Challenges to concerted conduct are frequently perplexing because a great many, perhaps most, output-enhancing business innovations involve cooperation among independent economic [\*877] actors, frequently competitors. 27 Challenges to unilateral conduct that may enhance market power are often hard to resolve because all actions that help a seller win business from its rivals--even pro-consumer actions like most price cuts--technically "exclude" those rivals. 28 Distinguishing output-reducing collusion from output-enhancing coordination (in section 1 cases) and unreasonable from reasonable exclusionary acts (in section 2 cases) can be exceedingly difficult. 29 To draw the necessary distinctions, judges and juries usually must weigh conflicting testimony from economic experts and reach conclusions on a number of complex subsidiary issues, such as the contours of the relevant market, the existence and magnitude of entry barriers, and the elasticity of demand and/or supply for the product at issue.

Antitrust adjudication is thus exceedingly, and inevitably, costly. 30 Most obviously, there are significant costs involved in simply reaching a decision. The parties themselves, with the aid of lawyers and, in most cases, economic experts, must gather, process, and present a large amount of complex data. 31 The fact finder must then deliberate over the information presented and reach conclusions on both subsidiary issues (e.g., the contours of the relevant market) and the outcome-determinative question (e.g., whether the challenged trade restraint is "unreasonable" because it reduces overall market output). 32 Taken together, these costs constitute the decision costs of an antitrust adjudication.

But those are not the only relevant costs. Given the complexity of the issues presented in antitrust cases, mistakes are inevitable, and those mistakes will themselves impose costs

[marked]

On the one hand, when a fact finder wrongly acquits an anticompetitive practice, market power is created or enhanced, causing loss in the form of allocative inefficiency; [\*878] consumers are injured because output is lower and prices higher than they otherwise would be. 33 On the other hand, when a fact finder wrongly convicts a practice that is, in fact, output-enhancing, the market is denied the greater output (and lower prices) that practice would have produced, and a productive inefficiency results. Again, consumers are injured by reduced output, less product variety and innovation, and higher prices. Taken together, the productive inefficiencies spawned by false positives (hereinafter "Type I errors") and the allocative inefficiencies resulting from false negatives (hereinafter "Type II errors") constitute the error costs of antitrust adjudication. As explained below, there are good reasons to believe that the costs of false positives will exceed those of false negatives. 34 But, for present purposes, the important point to see is that antitrust adjudication will inevitably involve some mistakes, and those mistakes--be they false acquittals or false convictions--will impose social costs. 35

## Climate

### Solvency---Barriers---2NC

#### only a risk of neg offense---Tech and importation barriers make licenses useless

Robert Fair 10, University of Pennsylvania Law School, J.D. 2010; Vassar College, B.A. 2004 “Does Climate Change Justify Compulsory Licensing of Green Technology?”, Brigham Young University International Law and Management Review, 1-15-2010, Volume 6, Issue 1, Article 3

Furthermore, inadequate manufacturing capabilities may impede the value of compulsory licensing in the context of green technology. Even if compulsory licenses for a particular product are granted in a certain state, such a license may be worthless if that state lacks the technological and manufacturing capabilities to produce that product. For example, if a state wishes to make effective use of a compulsory license on a pharmaceutical product, it must either have the manufacturing capacity to produce the drug domestically, or be able to import the products from a state (e.g., India) that is able and willing to do so.126 Even though Thailand was able to grant compulsory licenses for AIDS drugs and heart medication, domestic production has proven to be too expensive, and access to these medicines has actually decreased.127 For states without technological and manufacturing capabilities, importation is the only available method to acquire green technology. The 2003 WTO Decision discussed above allows compulsory licenses for exports of “pharmaceutical product(s)” under certain conditions.128 Canada took advantage of this provision when it used a compulsory license to export AIDS drugs to Rwanda.129 However, using compulsory licensing to export patented products to developing states is much more feasible for products like pharmaceutical drugs (which are small) than it is for green technologies (which are sometimes massive).

Even if importation is feasible for a particular green technology, it is unclear whether the 2003 WTO Decision goes beyond pharmaceutical products and can be used in the context of green technology. The 2003 WTO Decision defines “pharmaceutical product” very broadly as “any patented product . . . needed to address public health problems”130 and the 2001 Doha Declaration clearly states that “each [m]ember has the right to determine what constitutes a national emergency.”131 Consequently, the 2003 WTO Decision is meant to be broad in scope. However, it states that member obligations under Article 31(f) of the TRIPS agreement may be waived only “for the purposes of production [and export] of a pharmaceutical product.”132 A state trying to extend the scope of compulsory licensing beyond the realm of pharmaceutical products would risk violating the 2003 WTO Decision. Therefore, if a developing state lacks the technological capability to domestically produce the particular green technology for which a compulsory license is granted, and if it is either unfeasible or illegal (under WTO rules) to import such technology from abroad, then that compulsory license is essentially worthless. The state would be left without the benefits of the license, while still attracting the negative backlash discussed above.

## TRIPS

### Innovation Turn---Link---2NC

#### That’s essential to the effectiveness of renewables---otherwise they fail

IRENA 17, International Renewable Energy Agency, 2017, IRENA, https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2017/Nov/IRENA\_Accelerating\_research\_2017.pdf?la=en&hash=2A53295A57DD87A0A451E68A2CE7EA020729871F

The worlds’s energy transformation is accelerating. This is due to a combination of technological progress, developmental priorities and rising environmental concerns. Past experiences suggest that energy transformations were driven primarily by economic opportunity and technological development, not fuel resource scarcity. The ongoing transformation is evolving in the same vein, with innovation as one of its pillars.

The International Renewable Energy Agency (IRENA) estimates that by 2050, the accelerated deployment of renewables and energy efficiency can achieve 90% of the emissions reductions needed to achieve Paris Agreement climate goals.1 This is, however, a major undertaking that requires significant acceleration in the deployment of existing solutions and additional innovation efforts. Given the rapid rate of change, an ongoing review is needed to focus efforts on priority areas and policy frameworks necessary to achieve energy transformation (IRENA, 2017e).

Looking beyond the power sector at total energy supply, economically scalable solutions are available for around two-thirds of supply requirements. For the remaining one-third, no solutions exist today. These solutions are needed most in end-use sectors (IRENA, 2017a). On the one hand, we need innovation to accelerate deployment: driving cost reduction, improving performance and enabling integration of existing and emerging renewable technologies in energy systems. On the other hand, innovation is also needed to unearth and develop new technologies. Incremental improvements will continue to foster significant progress, but may not lead us to a complete transformation of the energy sector – game-changing technologies and approaches will be needed as well. Whether today’s breakthroughs and early-stage technologies will become commercially available, and how soon, is difficult to determine in advance. Many new technologies for achieving decarbonisation undoubtedly have yet to be envisioned, and the solid prospects of today’s solutions are no reason for inaction given the serious consequences of climate change.

Despite the encouraging progress observed in the power sector, policy makers need to further encourage both incremental R&D and breakthroughs, nurturing all phases of the technology life cycle, from early-stage research to commercialisation. Importantly, accelerating the deployment of the available low-carbon technologies requires not only continuous technology improvement, but also innovations to integrate those technologies. Innovation policy needs to be broader than technology R&D. Beyond generation technology, system integration entails innovation in infrastructure, new ways to operate energy systems, innovative business models to monetise services, and enabling policies and financial instruments. The four elements to be included in such an innovation policy framework for the energy sector are set out in Figure 1.

The growing number of initiatives that focus on innovation serve an important purpose to accelerate progress in R&D and technological innovation. But they need to align with priority areas. This brief offers the climate community suggestions for the means to refine and sharpen the innovation framework to better meet priority needs. Innovation is of paramount importance for energy transformation.

### Innovation Turn---AT: New Tech---2NC

#### Patents are key to innovation in new areas, especially in climate tech

Arielle Aberdeen 20, 4IP Researcher, “Patents to climate rescue: how intellectual property rights are fundamental to the development of renewable energy”, 4IP Council, October 2020, https://www.4ipcouncil.com/application/files/4516/0399/1622/Intellectual\_Property\_and\_Renewable\_Energy.pdf

Climate change is the most pressing global challenge and with the international commitment to reduce greenhouse gas emissions under the Paris Agreement,1 there needs to be a global energy revolution and transition.2 This is where innovative technology can help meet the challenge of reducing our dependency on finite natural capital resources. The development and deployment of innovative technology play a pivotal role in enabling us to replace fossil fuel use with more sustainable energy solutions.

Patents have facilitated the development of such innovative technologies thus far and will continue to be the catalyst for this transition. Patents are among a group of intellectual property rights (‘IPRs’). 3 These are private and exclusive rights given for the protection of different types of intellectual creations. IPRs are the cornerstone of developed and knowledge-based economies, as they encourage innovation, drive the investment into new areas and allow for the successful commercialisation of intellectual creations. IPRs are the cornerstone of developed and knowledge-based economies.

Empirical evidence has shown that a strong IPRs system influences both the development and diffusion of technology. Alternatively, weak IPRs protection has been shown to reduce innovation, reduce investment and prevent firms from entering certain markets.4 1

Once patent protection has been sought and granted, it gives a time-limited and exclusive rights to the creator of an invention. This allows the inventor or patentor the ability to restrict others from using, selling, or making the new invented product or process. Thereby allowing a time limited monopoly on the exploitation of the invention in the geographical area where it is protected.

During the patent application procedure, the patentor must make sufficient public disclosure of the invention. This will allow others to see, understand and improve upon it, thereby spurring continuous innovation. Therefore, the patent system through providing this economic incentive is a successful tool which has encouraged the development and the dissemination of technology. Patents like all IPRs are key instruments in the global innovation ecosystem.5

When developing innovative technology, patents play a role throughout the “technological life cycle”,6 as shown in Figure 1. This lifecycle involves the invention, research and development (‘R&D’), market development and commercial diffusion. Patents are most effective when sought at the R&D stage. Once a patent has been granted, it becomes an asset which can then be used to7:

Gain Market Access: Patents can create market advantages; to develop and secure market position; to gain more freedom to operate within a sector and reduce risks of infringing on other patents; protect inventions from being copied, and removes delaying by innovative firms to release new or improved technology and encourage the expansion of their markets.

Negotiation leverage: Patents can build a strong brand or company reputation which can enhance the company’s negotiation power and allow for the creation of equal partnerships.

Funding: Patents can generate funding and revenue streams for companies. Having a strong patent portfolio especially in small businesses or start-ups can be used to leverage investor funding; while also be a source of revenue for companies through licensing fees, sales, tax incentives, collateral for loans and access to grants and subsidies.3

Strategic value: Patents can be used to build “synergistic partnerships”8 through which collaboration on R&D and other partnerships; be used to improve in-house R&D and build and/ or develop more products.

As such, obtaining and managing patent as part of a patent and broader IPRs strategy are key tools for business success, especially within highly innovative and technology-driven industries.9

## Politics

### U---2NC

#### They’ve got Manchin on clean energy.

Joseph Zeballos-Roig 2-2, Senior Economics Reporter at Insider, “Joe Manchin declared Biden's Build Back Better plan was 'dead.' Here's what could get a thumbs-up from him in a skinnier package,” Insider, 02-02-2022, https://www.businessinsider.com/manchin-build-back-better-biden-democrats-climate-childcare-2022-1

Democrats increasingly view the Build Back Better bill as their last chance to enact sweeping measures to mitigate the heating of the planet. The US has recently experienced a spate of wildfires, strong storms, and droughts that were likely more severe due to the climate emergency.

Much of the legislation is devoted to a series of tax credits and incentives meant to smooth the transition from fossil fuels to cleaner energy sources like wind and solar power. One part of the bill sets aside funding for electric-vehicle buyers to get up to $12,500 in tax credits.

Manchin appears to favor that chunk of the bill over the rest. "The climate thing is one that we probably can come to an agreement much easier than anything else," he said on January 4. "There's a lot of good things in there."

Biden has said he believes that part of the package could be salvaged. "I think it's clear that we would be able to get support for the $500 billion plus for energy and the environment," he said last week.

#### Reject media hype.

Arthur Delaney 2-2, Senior Reporter for HuffPost, “Democrats Insist Build Back Better Only Somewhat Dead,” HuffPost, 02-02-2022, https://www.huffpost.com/entry/build-back-better-dead-joe-manchin\_n\_61f9a1d1e4b02136b6ecff2a

Sen. Joe Manchin (D-W.Va.) annoyed some of his fellow Democrats on Tuesday by describing the Build Back Better Act as “dead” even as they try to resurrect parts of the bill.

Senate Majority Leader Chuck Schumer (D-N.Y.) told reporters that Democrats are “fighting hard” for the legislation, which Manchin basically killed last year when he said he wouldn’t support it.

“There are lots of provisions in that bill that are very important, many of which Sen. Manchin supports such as, say, drug pricing,” Schumer said. “And so we are continuing to work on it. And there are conversations going on between Senator Manchin and different senators right now.”

Manchin described Build Back Better as dead in response to a reporter’s question about whether he had talked to his colleagues about the legislation.

There’s no doubt about it ― the Build Back Better Act, at least the version of the bill that existed last year, is dead so long as Manchin won’t support it.

“If we’re talking about the whole big package, that’s gone,” Manchin said.

But the West Virginia Democrat also repeated what he’s said before many times: that he is happy to talk to his fellow Democrats about a smaller bill with some of Build Back Better’s components.

Higher taxes on the wealthy and lower pharmaceutical costs, Manchin said, were two components of the package that are still “extremely available.” But Manchin lost his patience when asked whether he could support the bill’s provision expanding access to prekindergarten, telling a reporter she was “causing more problems” just by asking.

He also seemed to contradict Schumer’s claim that there are ongoing conversations about the bill.

“There’s no organized conversations going on,” Manchin said.

The bill is not any deader than it was in December after Manchin said definitively that he wouldn’t vote for it. Whatever form it eventually takes, Democrats will need Manchin’s vote, since they control just 50 out of 100 Senate seats.

Still, some Democrats seemed annoyed by Manchin’s morbid assessment of the bill’s prospects.

“We have a proposal that has the overwhelming support of the American people. It addresses the long-neglected crises facing working people,” Sen. Bernie Sanders (I-Vt.) said. “We cannot allow that to die. If Mr. Manchin chooses to side with corporate America in this issue, that’s his business.”

Rep. Alexandria Ocasio-Cortez (D-N.Y.) said that kids in her district sleep in winter coats because funding for public housing repairs is tied up in the stalled bill.

“Where should I direct them to wait out the cold?” Ocasio-Cortez tweeted. “Manchin’s yacht?”

Senate Democrats are shifting their focus toward confirming a Supreme Court nominee and reforming the congressional role in certifying presidential elections, meaning any action on Build Back Better could be a long ways off.

Meanwhile, there seems to have been no progress on winning Manchin’s support for the parts of Build Back Better he doesn’t like, such as the expanded child tax credit that paid families a monthly child benefit last year.

In a Tuesday memo the Center for American Progress Action Fund, the liberal think tank’s advocacy arm, urged Democrats to focus on clean energy, health care and child care in a slimmed-down version of the bill that would omit the child tax credit.

Sen. Michael Bennet (D-Colo.), a top proponent of the child credit, disliked that idea, noting that the monthly benefit cut child poverty last year.

“We should make sure that the reductions in childhood poverty and the reductions in hunger in this country remain in place for kids living in this country that unfortunately don’t have lobbyists in Washington, D.C.,” Bennet told HuffPost.

#### Their evidence doesn’t assume climate’s power to unify Dems.

Joseph Morton 1-31, Energy and Environment Reporter for CQ Roll Call, “Some Democrats hope climate consensus can save budget bill,” Roll Call, 01-31-2022, https://rollcall.com/2022/01/31/some-democrats-hope-climate-consensus-can-save-budget-bill

Proposals for tackling climate change are emerging as an area of Democratic unity that could reach the congressional finish line and potentially bring with them at least some other measures in the party’s budget reconciliation bill.

Senate Democrats returning to Washington this week will resume talks over the $2.2 trillion package approved by the House last year.

Their House counterparts from the party’s progressive wing, as well as some swing district moderates, have been urging the Senate to get moving on a version of the legislation that would be centered around its climate provisions, which include more than half a trillion dollars in tax incentives and spending measures.

Sen. Joe Manchin III, D-W.Va., at one point suggested starting from scratch because of his problems with some areas of the House-passed bill, but he’s also indicated he’s in agreement with much of the climate portion as it now stands.

During a Zoom session with environmental activists last week, Rep. Pramila Jayapal, D-Wash., suggested the Senate should act in time for President Joe Biden’s March 1 State of the Union address, a timeline she said was not the result of any naivete or idealism on her part.

“It’s because I actually spoke to Sen. Manchin,” she said. “Over several months I’ve been speaking to him, and the climate provisions as they are crafted are crafted with and by him.”

In fact, it was in large part due to Manchin’s concerns that Democrats made a number of changes to their original proposals, paring back spending levels, ditching a Clean Electricity Performance Program that would have pushed utilities to switch to renewable energy sources, and tweaking a methane fee to phase in its implementation and provide $775 million in EPA funding to help companies cover their compliance costs.

Despite those changes, a number of environmental groups and their allies on Capitol Hill have touted what remains in the bill, saying it would still represent the largest congressional action ever on climate. Jayapal said the bill’s climate provisions would help achieve the goal of significantly reducing carbon emissions in the coming years.

“We believe that the things that we have crafted in the current investments in Build Back Better will take us a very long way towards reaching that goal,” Jayapal said.

She added that other steps will be required through executive action to tackle what couldn’t be included in the bill, specifically citing areas such as fossil fuel subsidies, power plant emission standards and vehicle standards.

Motivation

Altogether such actions would solidify Biden’s environmental legacy and help motivate voters in the crucial upcoming midterm elections, she said.

“We’ll get as much through legislation as we can, and then we need to use executive action as well,” Jayapal said.

The March 1 timeline Jayapal and others have floated seems unlikely given that both the White House and congressional leaders have pushed back on the idea.

The Senate has a laundry list of other immediate priorities to tackle: funding the government, reviewing a Supreme Court nomination and hammering out differences with the House over a bipartisan technology competition bill.

Manchin also could demand further changes based on his opposition to preferential treatment in the electric vehicle tax credits for union-made cars and trucks.

Still, Senate Democrats are hopeful that they can eventually get the budget bill passed and are looking to use the climate section as a foundation.

Derek Murrow, senior director of the climate and clean energy program at the Natural Resources Defense Council, said in a statement that the bill would speed the growth of renewable energy sources, make electric vehicles more affordable and deliver benefits to communities with historic ties to fossil fuels.

“Making these sound investments now; implementing new and ambitious carbon pollution standards at the federal, state and local levels; and making sure every agency of the federal government is part of the climate fix; will set the nation on track to achieve President Biden’s goal of cutting carbon pollution 50-52 percent by 2030,” Murrow said. “That’s what the science says we must do to avert the worst consequences of climate change. It’s time for the Senate to act.”

When combined with state and federal actions, as well as private sector moves, passing those climate provisions would help realize the Biden administration’s goal of cutting emissions by at least 50 percent from peak levels by 2030, said Trevor Higgins, vice president of climate policy at the Center for American Progress.

The bill’s clean electricity tax credits are central to decarbonizing the power sector, he said, and helping the country compete with China in areas such as solar power and battery storage. The bill would help cut energy costs, improve domestic manufacturing and “put victory within reach” on emissions reductions.

“Investments are important not because they do the job by themselves but because they make it possible for all the other policies and technical innovations and things like private actions that are planned — it makes all of those more cost-effective, easier to attain, and it kind of moves the whole system along at once,” Higgins said.

One example is how the bill’s credits for electric vehicles wouldn’t have to stand on their own. Instead, they would support the administration’s move to bolster vehicle emission standards by making it easier for consumers to purchase plug-in cars and trucks and thereby encourage manufacturers to produce them.

And the compromise version of the methane fee would help support the administration’s move to implement new methane-related regulations.

“My sense is that the climate components are going to be a part of what’s driving the bill forward,” Higgins said. “But they’re not going to be the whole deal by themselves and as you add other pieces to the package I think it only strengthens the case for enactment.”

#### Kentucky in blue

Ferrechio 1/29 (Susan, “Build Back Better: New bill, same stumbling blocks,” The Colorado Gazette, https://gazette.com/news/build-back-better-new-bill-same-stumbling-blocks/article\_e0e170fd-b9ef-5551-8cb2-35b220af9ca6.html)

Like the first version of Build Back Better, a rewrite will also run into obstacles from centrist Democrats. A group of Democrats from high-tax states is warning they won't support the legislation if it modifies the tax code but leaves out a provision ending the $10,000 cap on state and local tax deductions, or SALT. "SALT remains a top priority," said Reps. Josh Gottheimer and Mikie Sherrill of New Jersey and Tom Suozzi of New York in a statement. "We support the President's agenda, and if there are any efforts that include a change in the tax code, then a SALT fix must be a part of it. No SALT, no deal." Sen. Robert Menendez, a New Jersey Democrat, also wants a SALT modification, and like Manchin, his vote is essential if Democrats hope to pass a new version of Build Back Better in the evenly divided Senate. Menendez took aim at fellow caucus member Bernie Sanders, a Vermont independent and socialist, after the latter tweeted he was "glad to hear" the SALT cap provision is "no longer in play" in the revised version of Build Back Better.

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

#### It passes despite other priorities.

Eric Lutz 1-31, Contributor for Vanity Fair, “‘Desperately Needed Relief’: Democrats Rally to Save Biden’s Climate and Economic Agenda,” Vanity Fair, 01-31-2022, https://www.vanityfair.com/news/2022/01/desperately-needed-relief-democrats-rally-to-save-bidens-climate-and-economic-agenda

After a string of dispiriting legislative setbacks, Democrats are looking to regroup this week and begin a new push to salvage at least part of Joe Biden’s domestic agenda, with both progressives and moderates in the House calling on their Senate colleagues to pass the Build Back Better Act by the end of February — even if in some slimmed-down form. “In the months since negotiations around the Build Back Better Act stalled, the case for this legislation has only become more urgent,” Pramila Jayapal, chair of the House Progressive Caucus, said in a statement Friday. “This desperately needed relief cannot be delayed any longer.”

“The time for [Biden] to work with the Senate to finalize and pass the strongest and most comprehensive version of the [BBB] that can get 50 Senate votes is right now,” a group of vulnerable moderates said in their own letter Monday. “We must seize this moment for all Americans and enact these vitally important climate investments into law in the coming weeks.”

A renewed push to pass elements of BBB that the party broadly agrees on could help resuscitate Biden’s climate and economic agenda in time for the midterms. But the questions facing Democrats now are the same as when Senator Joe Manchin blew up intra-party talks late last year: Are the votes there? And what compromises will it take to get them?

Progressives are already signaling that they would be willing to give up ground in the interest of securing a legislative win. “There is agreement among Senate Democrats on significant parts of this bill,” particularly on some climate initiatives and on healthcare costs, Jayapal noted. “We’re trying to jumpstart the negotiation,” she told Politico last week. “As people always say to progressives, you’ve got to understand that you’ve got to get 50 votes in the Senate.”

House moderates also seem to be looking for areas of compromise. Many recognize that their political fortunes ten months from now could rely on Democrats both making a better case to voters about what they’ve already accomplished—and securing more legislative wins moving forward. One of those issues could be climate action: “These provisions are necessary for our districts and what constituents are demanding,” California Representative Mike Levin, who flipped his district in 2018, told the Washington Post Monday of the bill’s climate measures.

The Biden administration has also suggested the bill could be narrowed or broken into “big chunks,” as the president put it in a news conference earlier this month, to pass through the Senate. “I think we can break the package up, get as much as we can now, and come back and fight for the rest later,” Biden told reporters. So progressives, moderates, and the White House are all aligned in wanting to get something done — that should be easy, right?

Not exactly. As the Post’s Paul Kane reported over the weekend, Democrats right now have “more hope than they do a plan.” They don’t want to let BBB die, viewing it as both important politically and necessary for the country. (“Public housing residents have endured devastating fires, the cost of insulin and other prescription drugs continue to crush working people, and parents are desperate for child care support,” as Jayapal put it.) But negotiations have still been on ice since December, when Manchin said he “can’t get there.” Democrats also return to work this week with a long list of other agenda items to tend to — including the America COMPETES Act and, soon, the confirmation of Biden’s pick to replace the retiring Stephen Breyer on the Supreme Court.

That doesn’t necessarily mean BBB is dead or that pressure from progressives and vulnerable moderates can’t lead to greater urgency among party leaders. But it does make Jayapal’s proposed March 1 deadline a little harder to meet: “That’s an aspiration they have,” House Speaker Nancy Pelosi said of that date in a press conference last week. “We will pass the bill when we have the votes to pass the bill.”

#### 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.

### U---AT: Thumpers---Manchin

#### BBB-lite passes with key climate provisions.

Jackie Calmes 2-4, Columnist for the Los Angeles Times, “Democrats can do more, and take credit for more, before the midterms,” Los Angeles Times, 02-04-2022, https://www.latimes.com/opinion/story/2022-02-04/democrats-joe-biden-agenda-approval-midterm-elections-joe-manchin

More broadly, Democrats must start by addressing their self-inflicted damage: Fight with Republicans instead of each other. Replace the incessant headlines about infighting over Biden's Build Back Better package by uniting over a pared-down version of the $2-trillion package of domestic investments that Manchin and Arizona Sen. Kyrsten Sinema blocked last year by joining Republicans in opposition.

Manchin lately has outlined what an acceptable BBB-Lite would look like. More than $500 billion for climate change initiatives. Universal pre-K. Child-care subsidies. Aid to help more working families get health insurance under the Affordable Care Act. Expanded Medicaid in states that limit it. Tax increases on corporations and wealthy Americans to offset the costs. Though Manchin has opposed extending last year's expanded child tax credit, he suggested last week to a West Virginia radio host he could support a credit more targeted to lower-income households.

Let him write the bill. While some progressives would balk, increasingly others are joining a new "don't let the perfect be the enemy of the good" caucus.

### Link---2NC

#### Patent reform is especially controversial

George S. Cary 11, Steven J. Kaiser, and Alex R. Sistla, Members of the California and District of Columbia Bars, Mark W. Nelson, Member of the New York and District of Columbia Bars, “The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting”, Antitrust Law Review, Volume 77, https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf

Despite the seeming consensus that holdup causes serious economic inefficiencies, 32 whether antitrust remedies should be available to redress the harm from the standard-setting patent holdup problem has become the subject of some debate.33

[FOOTNOTE] 33 See, e.g., Kobayashi & Wright, supra note 31, at 470 (“The patent holdup problem has become one of the most controversial issues in antitrust policy.”). [END FOOTNOTE]

Several commentators question as an empirical matter just how pervasive the patent holdup problem is for SSOs.34 Indeed, in the wake of the D.C. Circuit’s decision in Rambus, Inc. v. FTC,35 and subsequent denial of certiorari by the Supreme Court,36 some have questioned whether antitrust will continue to play any significant role in addressing the patent holdup problem.37

#### Even if popular, the plan requires difficult battles for floor time

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

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

### Impact---Semiconductors---BBB Key---2NC

#### BBB Shores up the supply chain and enhances governmental support for the semiconductor industry.

Kay Georgi 21, leads the International Trade group at Arent Fox and has more than 32 years' experience advising clients on all aspects of international trade, “Biden Puts Semiconductor Supply Chains Under Microscope”, JD Supra, 10-5-2021, https://www.jdsupra.com/legalnews/biden-puts-semiconductor-supply-chains-2173739/

Regarding Congress, Fazili and Harrell wrote that there are two steps lawmakers can take to “accelerate our progress towards more resilient supply chains.” First, they ask that Congress “fund the bipartisan CHIPS for America Act, which would enable transformative investments in domestic semiconductor research, design, and manufacturing.” Second, they said Congress should “establish the new Critical Supply Chain Resiliency Program (CSCRP) at the Department of Commerce” as called for in President Biden’s Build Back Better plan. The program would “serve as a central node in the federal government for supply chain resilience, facilitate better coordination and planning across federal agencies to address vulnerabilities, and invest in critical supply chains where the private market has failed to allocate sufficient capital.”

The CSCRP has not yet been authorized or funded by Congress. However, after a complex multi-committee process, on June 8, 2021, the Senate advanced the United States Innovation and Competition Act (USICA), which would, among other things, create a “Supply Chain Resilience Program” with broad authority. In fact, under the Senate-passed bill, this new program would also incorporate the CHIPS for America Act’s centerpiece effort to incentivize domestic manufacturing of semiconductors. While USICA has apparently stalled on the House side, it may come back to life later this year or early next year.

Meanwhile, the House’s massive budget reconciliation package, which would implement President Biden’s “Build Back Better” agenda, contains a provision written by the House Committee on Energy and Commerce that would provide relevant funding. The bill, which is now under consideration, would appropriate $10 billion over five years for a seemingly related program to allow the Commerce Department to provide grants to domestic enterprises, manufacturers, regional and technology hubs, and other entities in order to shore up U.S. supply chains.

#### It allows the US to keep pace with other semiconductor proposals globally, advancing innovation.

SEMI 21, SEMI connects more than 2,400 member companies and 1.3 million professionals worldwide to advance the technology and business of electronics design and manufacturing. SEMI members are responsible for the innovations in materials, design, equipment, software, devices, and services that enable smarter, faster, more powerful, and more affordable electronic products. Electronic System Design Alliance (ESD Alliance), FlexTech, the Fab Owners Alliance (FOA) and the MEMS & Sensors Industry Group (MSIG) are SEMI Strategic Technology Communities, defined communities within SEMI focused on specific technologies. “SEMI Applauds Inclusion of Advanced Manufacturing Investment Credit in US Build Back Better Reconciliation Bill”, HPCWire, 10-28-2021, https://www.hpcwire.com/off-the-wire/semi-applauds-inclusion-of-advanced-manufacturing-investment-credit-in-us-build-back-better-reconciliation-bill/

SEMI, the industry association serving the global electronics design and manufacturing supply chain, today applauded the inclusion of an Advanced Manufacturing Investment Credit in the Build Back Better reconciliation bill. A minimum credit of 5%, increasing to 25% if certain conditions are met, would be provided for buildings and equipment to manufacture semiconductors and semiconductor tooling equipment if the facility commences construction before January 1, 2027.

“SEMI is thrilled that a semiconductor manufacturing tax credit for the production of chips and semiconductor tools has been included in the Build Back Better reconciliation bill,” said Ajit Manocha, SEMI president and CEO. “This credit will provide a strong incentive for the production of semiconductors and semiconductor manufacturing equipment in the United States and make the U.S. more competitive in this vital industry. We thank President Joe Biden, Senate Finance Committee Chairman Ron Wyden for his leadership and determination to include this provision, and the original co-sponsors of the FABS Act.”

“We look forward to working with Congress to pass this bill and fund the CHIPS Act programs, which together will further strengthen the semiconductor supply chain in the United States, help U.S. policies keep pace with incentive proposals around the world, and create thousands of high-skill jobs,” Manocha said. “The inclusion of semiconductor tool manufacturing facilities is particularly important, as lead times and demand for new tools grow. In addition, the delayed requirement to amortize research expenses and the maintenance of the Foreign-Derived Intangible Income deduction are other important elements that will preserve and improve the competitiveness of the industry in the United States.”

### Impact---Semiconductors---Bioterror---2NC

#### Semiconductor innovation’s key to threat detection – solves bioterror and prevents the existential outcomes of nuclear war.

John Holdren et al 17, Assistant to the President for Science and Technology Director, Office of Science and Technology Policy, Eric S. Lander, President Broad Institute of Harvard and MIT, “Ensuring Long-Term U.S. Leadership in Semiconductors”, President’s Council of Advisors on Science and Technology, January 2017, <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_ensuring_long-term_us_leadership_in_semiconductors.pdf>

Context: The technology to develop and deploy biological, chemical, and nuclear threats has become increasingly accessible, but our ability to detect these threats has not kept pace. Smart phones and IoT devices, in combination with cellular service and the Internet, form a vast sensing and communication network that could offer early detection and efficient warning for these threats.36 Goal: Develop a high-speed biological, chemical, and/or nuclear threat detection network through deployment of electronic devices that incorporate chemical, bio-chemical, spectral imaging, and radiation sensors in addition to sensors for primary functions, that would cut detection times by an order of magnitude. Benefits would include: • Early detection of toxic biological, chemical, and/or nuclear materials could facilitate intervention by first responders before deployment and ensure medical personnel are appropriately equipped for an evolving event • Ubiquitous sensing and robust communications after a nuclear event would facilitate appropriate guidance to the public based on location (e.g., whether to shelter in place, or safest escape routes) reducing casualties from fallout Challenges/Innovation: Achieving these goals would demand simultaneous advances in semiconductor technologies: • Advances in special purpose processor design to support real-time data analytics based on classic and machine learning algorithms in edge devices to detect biological threats • Ultra-Secure cryptographic algorithms to simultaneously authenticate sensor data and protect privacy of device owners These advances would need to be paired with application-specific innovations, including: • Design of advanced and low-cost sensors (chemical, biochemical, multi-spectral imaging, and others) that are also easily integrated into devices such as smartphones, automobiles, buildings, security cameras, and other IoT devices • Real-time communication protocols for rapid dissemination of threat information Key Government Stakeholders: The Department of Homeland Security (DHS) and NSF. Potential supporting roles for DARPA, IARPA, and NIST. Other Potential Applications: The sensor advances developed in this moonshot would also contribute to the realization of “smart dust” technologies (see moonshot A.2.1 for details). Advances in special purpose processor design to support real-time data analytics and machine learning in edge devices would offer significant benefits in autonomous systems such as self-driving vehicles.

#### Bioterror is likely, feasible, and causes extinction

Phil Torres 21, Visiting Researcher at the Centre for the Study of Existential Risk, M.Sc. Doctoral Candidate at Leibniz Universität Hannover, Affiliate Scholar at the Institute for Ethics and Emerging Technologies, Master's Degree in Neuroscience from Brandeis University, “Can We Clean Up The Mess We've Created? We Have To Do It Now, or Face Extinction”, Salon, 9/5/2021, https://www.salon.com/2021/09/05/can-we-clean-up-the-mess-weve-created-we-have-to-do-it-now-or-face-extinction/

So, what do the trend lines show? The rapid takeover of Afghanistan from the Taliban is fueling worries that al-Qaida could make a comeback, which once again raises the prospect of terrorist attacks against the U.S. Although al-Qaida is weaker than before, it is worth recalling that the core membership of the group in 2002 was only around 170 people. But this time around the inventory of political grievances that drive Islamist terrorism has grown, thanks to the U.S.-led pre-emptive invasion of Iraq, the indefinite detention of "detainees" in Guantánamo Bay, the use of torture as "enhanced interrogation" and so on.

One heard the slogan "never forget" from Americans ad nauseam after 9/11, but the cultural memory of peoples in the Middle East is far more robust than ours. Consider "The Management of Savagery," an influential jihadist manual published in 2004, which foregrounds a number of past foreign policy missteps by the West, including the Sykes-Picot Agreement that carved up the Middle East after the Ottoman Empire collapsed in the aftermath of World War I. As the now-deceased "caliph" of ISIS, Abu Bakr al-Baghdadi, declared in 2014, "this blessed advance will not stop until we hit the last nail in the coffin of the Sykes-Picot conspiracy." If events from the World War I era have prominently driven extremism over the years, imagine how long the atrocities committed by Western forces since 2001 will continue to motivate actions and recruitment in the future. To borrow an insight from Robert Pape at the University of Chicago, terrorism is a demand-driven rather than supply-limited phenomenon.

Add to this the fact that emerging technologies, most notably synthetic biology, cyber-technologies and artificial intelligence, will place unprecedented destructive power in the hands of non-state actors — e.g., terrorists — meaning that the next 9/11 could claim far more victims. In fact, ISIS — which grew out of al-Qaida in Iraq and espoused an even more violently apocalyptic ideology — explicitly fantasized about weaponizing the bubonic plague. As an ISIS member who was educated in physics and chemistry wrote in a document obtained by the U.S., "the advantages of biological weapons is the low cost and high rate of casualties."

The growing power and accessibility of so-called "dual-use" technologies (those that can be used to benefit humanity or inflict terrible harms) is one of the main reasons global catastrophic risk scholars believe the threat of civilizational collapse and even human extinction is higher today than ever before. As Lord Martin Rees famously speculated in his 2003 book "Our Final Hour," civilization has no better than a 50/50 chance of surviving this century. Three years earlier, the co-founder of Sun Microsystems, Bill Joy, compellingly argued in a much-discussed Wired article that, because of technology,

it is no exaggeration to say we are on the cusp of the further perfection of extreme evil, an evil whose possibility spreads well beyond that which weapons of mass destruction bequeathed to the nation-states, on to a surprising and terrible empowerment of extreme individuals.

The intersection of these historical and technological trend lines — of religio-political terrorism and the democratization of science and technology — do not bode well for the future. Add to this the fact that climate change may have played an integral role in the creation of ISIS (by causing record-breaking droughts in Syria that fueled the Syrian civil war, which spawned the organization), and one wonders whether the mayhem since late 2001 might be a mere preview of what's to come.