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#### The United States federal government should

#### require the standard of digital platform interoperability.

#### adopt a progressive data-sharing mandate that meets minimum cryptographic privacy standards.

#### That solves while safeguarding innovation.

Viktor Mayer-Schönberger & Thomas Ramge 18, Professor of Internet Governance and Regulation at the University of Oxford; Technology Correspondent for brand eins, “A Big Choice for Big Tech,” Foreign Affairs, September/October 2018, https://www.foreignaffairs.com/articles/world/2018-08-13/big-choice-big-tech

Luckily, regulators do not have to choose between structurally vulnerable but efficient markets and resilient but inefficient ones. There's an easier way to foster both market diversity and resilience: a progressive data-sharing mandate. Under this system, every company above a certain size, say, those with more than a ten percent share of the market, that systematically collects and analyzes data would have to let other companies in the same market access a subset of its data. The larger a firm's market share, the more of its data others would be allowed to see. Data would be stripped of personal identifiers, augmented with metadata to make clear what sort of information the data provided and where it came from, and selected randomly to prevent companies from gaming the system (by granting access only to largely useless data, for instance). Participants would have to agree to certain restrictions, including rules against sharing data with third parties. The role of regulators would be limited to assessing market share, an area in which they have already accumulated expertise. If necessary, regulators would also enforce access to data, but they would not actively organize or operate the sharing system.

Eventually, data sharing should be mandated across the board. But countries should start with online markets, as these are particularly vulnerable to the dangers of concentration. In the United States, Congress would have to amend the country's existing antitrust regime to develop a comprehensive data-sharing regulation, and in Europe, the EU would have to act as a whole, but a transatlantic consensus would not be necessary. Both the United States and the EU have enough regulatory power and important enough markets to make a mandate enacted in either jurisdiction effective.

A progressive data-sharing mandate would offer several advantages. Unlike a tax, it would not impose any direct cost on firms; companies would remain free to use the data they collect, just as they do now. It would allow many firms and people to use the same data, which would spur innovation; today, although huge quantities of data are collected, it remains underused. If a wide variety of firms had access to market data, a firm's competitive advantage would rest on its ability to extract insights, encouraging companies to develop smarter algorithms and analytics.

The policy would not differentiate between different players that crossed the necessary threshold; even Amazon would have access to data from smaller competitors as long as their market shares were greater than ten percent. But since smaller firms would have less data to share and machine-learning algorithms produce diminishing returns for each new data point, a company like Amazon would gain far less than its smaller competitors. A data-sharing mandate would lift all boats, but to different degrees. That would support diversity, innovation, and competition.

Once companies had access to the necessary raw material, they would launch alternative decision assistants. People might still shop on Amazon or listen to music on Spotify, but they might use a third-party recommendation tool to choose products and songs. Today's decision assistants mostly serve the digital superstars. Tomorrow's more independent decision assistants could far more convincingly represent the interests of consumers. Price-comparison sites already let people find the seller offering the lowest price for a wide range of products. Independent decision assistants would help them identify the best product match, as well.

Creating competition among assistants and markets would eliminate the need to break up digital superstars, because they would no longer enjoy an insurmountable competitive advantage. And because the shared data would be chosen randomly, each competitor would train its systems on slightly different data sets, reducing the risk of systemic failures.

Some may worry that mandated data sharing would only boost the power that firms have over consumers. But so far, regulators have mostly failed to counter power imbalances between users and companies by strengthening individual privacy rights. Even in Europe, which has enacted the strongest privacy protections, most people routinely click "OK" and accept companies' privacy terms rather than exercise their right to choose what information they share. The problem is that current privacy regulations focus too narrowly on the relationship between each consumer and each firm, rather than considering the market as a whole. Mandating progressive data sharing would not solve the privacy challenge. But preventing a small number of digital superstars from monopolizing data would better distribute the power that flows from exclusive access to information. Requiring firms to strip obvious personal identifiers from their data before sharing it would also greatly limit the potential exposure of their users, spreading power more equally among companies without compromising privacy.

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#### 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 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

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

### 1NC

#### ‘Scope’ is the extent of the area covered by the core laws

Oxford 22 – Oxford English Dictionary, ‘scope’, https://www.lexico.com/en/definition/scope

1 The extent of the area or subject matter that something deals with or to which it is relevant.

*‘we widened the scope of our investigation’*

#### It’s bounded by exemptions and immunities

Layne E. Kruse 19, Co-Chair, Melissa H. Maxman, Co-Chair, Vittorio Cottafavi, Vice Chair, Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/2019, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ means to make greater, not clarify its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would *expand* the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The aff intensifies the application of antitrust to already covered activities---it does not curtail an exemption or immunity.

#### Vote neg:

Eliminating exemptions provides a limited and predictable basis for prep and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### 1NC

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

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

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

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

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

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

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

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

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

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

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

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

### 1NC

#### 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.

#### Failure to rescue negotiations causes extinction-level climate change.

Jordan Weissmann 12-23, Senior Editor at Slate, “Up in Smoke,” Slate, 12-23-2021, <https://slate.com/business/2021/12/manchin-build-back-better-environment-biden.html>

The Build Back Better Act might be dead. Or maybe it’s just on life support. Nobody but Joe Manchin can say for sure. The West Virginia senator ambushed his party on Sunday by announcing he was a hard no on the bill, imperiling the core of the Biden administration’s domestic agenda. After the initial furious reaction, both the White House and Democrats in Congress have begun trying to rescue negotiations, but their chance of success is unclear.

One thing is quite certain, though: If the defibrillators fail and President Joe Biden can’t resuscitate a deal, it will be an absolute catastrophe for America’s attempts to combat global warming. The bill that House Democrats passed in November was not everything clean energy and environmental activists had hoped, since some of its most aggressive proposals to limit greenhouse gases were stripped to appease Manchin. But by providing hundreds of billions of dollars to speed up the country’s green transition, it would have been an absolutely crucial and historic step toward meeting the climate goals Biden announced when the U.S. rejoined the Paris accords earlier this year. Without it, the country is unlikely to come anywhere near those targets, even if in an abstract, technical sense they’d still be within reach.

“Let me put it this way. The U.S. can still achieve its [Paris commitments] through pathways that don’t require Build Back Better, which lean heavily on federal regulation and state action,” Anand Gopal, executive director of strategy and policy at the climate think tank Energy Innovation, told me. “But it will be damn hard.”

Here’s a simple way to think about the blow U.S. climate policy is facing. The Biden administration has pledged to reduce U.S. emissions 50 percent from 2005 levels by 2030. Under the House legislation, the United States would cut its carbon footprint by 44 percent, according to an analysis by the REPEAT Project at Princeton’s Zero Lab. But under current law, the U.S. would only cut emissions by 27 percent—not even in the ballpark.

It is possible that the Princeton analysis is overly optimistic about the impact Build Back Better would have. For instance, it factors in reductions from a fee on methane included in the House bill, which looked like it would be pared back in any final version. But almost every analysis of the bill’s key pieces has found that it would have a dramatic impact and potentially put our Paris targets within reach, thanks to roughly $325 billion of green energy, electric vehicle, and other tax credits that anchor its climate section (the bill’s total spending on climate amounts to $555 billion). Those subsidies would bring down the cost of a new solar or wind plant by 30 percent and shave thousands from the price of an EV, making clean tech even more competitive than it already is.

Without Build Back Better, the Biden administration will be left to rely almost exclusively on its regulatory powers to curb emissions. This is the strategy that some progressives already seem to be preparing for. “Biden needs to lean on his executive authority now,” Rep. Alexandria Ocasio-Cortez tweeted earlier this week. “He has been delaying and underutilizing it so far. There is an enormous amount he can do on climate, student debt, immigration, cannabis, health care, and more.”

There are certainly important ways Biden can flex his executive authority on climate. His administration has already announced a strict new rule on methane leaks and tougher fuel economy standards that it could ratchet up again in the future. States could also contribute significantly if, for instance, California follows through on its promise to ban the sale of new gas-powered cars by 2035.

But there are legal and political limits to what Biden can accomplish through regulation alone. The Environmental Protection Agency is often required by statute to weigh the cost to consumers and industry when crafting new rules. And the administration may blanch at pursuing aggressive new regulations on power plants that might increase electricity prices at a moment voters are worried about inflation (and are as sensitive to gas prices as ever).

The tax credits in Build Back Better were meant to lower both of these hurdles by making green technology less expensive. Without them, Biden has less room to be bold. “All of these regulatory actions and state actions are more politically feasible and easier when there’s half a trillion dollars in subsidies to smooth the way,” John Larsen, head of energy systems research at the Rhodium Group, told me. “Without those subsidies, maybe executive actions could make up some of the tons [of CO2 reductions] you don’t get from Build Back Better. But it’s a very big ask from the executive branch to deliver all of the tons without the financial support.” Congress’ failure to legislate will also make it harder for Biden to regulate.

And that’s before you factor in the Supreme Court. In 2016, the justices stayed President Barack Obama’s Clean Power Plan, suggesting they were ready to hem in the administration on climate. Since then, the court has moved further to right with a 6-to-3 conservative majority, and its members have shown an interest in rolling back the power of federal regulators across the government. At the moment, the justices are preparing to hear a case, West Virginia v. EPA, in which they may decide the administration does not have the authority to limit emissions from power plants. In an absolute worst-case scenario, they could revive a version of the nondelegation doctrine, a pre–New Deal idea that would essentially hobble the entire structure of modern administrative government by holding that Congress simply can’t hand certain decision-making powers to executive agencies, which would kneecap the EPA’s authority on climate and other issues.

We might not get to that point. But it’s not unthinkable. “Everyone from me to my first-year law students is guessing what this court is going to do,” Nathan Richardson, a University of South Carolina law professor specializing in climate policy, told me. “It seems inclined to constrain the administrative state more broadly, and the sharp end of that spear is climate.”

Given that Biden’s ability to regulate carbon is limited and vulnerable to being struck down by an activist court, passing Build Back Better may be our last shot at serious climate policy for the next decade. One of the questions hanging over the negotiations is whether Manchin is actually open to a serious green energy plan or has simply pretended to be in order to run out the clock on negotiations. Before talks exploded, he reportedly made a counteroffer to the White House that included $500 billion in climate spending. But the specifics of what the money was for are unknown. Manchin is also tightly connected to the coal companies that dominate his state, still has a financial interest in the family coal brokerage on which he made his personal fortune, and has lately adopted the industry’s talking points criticizing Build Back Better’s energy section. It’s possible he simply doesn’t want a deal, in the end.

If Manchin is still open to something that looks roughly like Build Back Better’s climate plan, though, Democrats should be willing to give up a lot to get the deal. Because when it comes to the future of the planet, our plan B doesn’t look so promising.

## ADV 1

### 1NC---Interop ADV

#### Big companies are inevitable

Steve Denning 21, Senior Contributor at Forbes, formerly held management positions at the World Bank, “Why Biden’s War On Big Tech Is Misguided,” Forbes, 07-11-2021, https://www.forbes.com/sites/stevedenning/2021/07/11/why-bidens-attack-on-big-tech-is-misguided/?sh=42b3681261e0

We are living in a new economic age—the age of digital—and digital giants are an emblem of this fact. They reflect the immense benefits and revenue that digital can generate, in the exponential growth that digital enables and in the competitive threat they represent to traditionally managed firms.

Bigness is an inherent in the digital economy. “In markets with highly scalable assets,” write Haskell and Westlake write in Capitalism Without Capital, (Princeton, 2017) “the rewards for runners-up are often meager. If Google’s search algorithm is the best and is almost infinitely scalable, why use Yahoo’s? Winner-takes-all scenarios are likely to be the norm.” Breaking up Google into ten little Googles, requiring users to go to a different little Googles for different kinds of searches, would destroy much of the ease and convenience of Google.

#### Data isn’t a silver bullet for producing self-sustaining network effects - that’s just economies of scale doing their job.

Martin Casado 19, Martin was awarded both the ACM Grace Murray Hopper award and the NEC C&C award, and he’s an inductee of the Lawrence Livermore Lab’s Entrepreneur’s Hall of Fame. He holds both a PhD and Masters degree in Computer Science from Stanford University.The Empty Promise of Data Moats, Andreessen Horowitz, 5-9-2019, https://a16z.com/2019/05/09/data-network-effects-moats/

Data has long been lauded as a competitive moat for companies, and that narrative’s been further hyped with the recent wave of AI startups. Network effects have been similarly promoted as a defensible force in building software businesses. So of course, we constantly hear about the combination of the two: “data network effects” (heck, we’ve talked about them at length ourselves).

But for enterprise startups — which is where we focus — we now wonder if there’s practical evidence of data network effects at all. Moreover, we suspect that even the more straightforward data scale effect has limited value as a defensive strategy for many companies. This isn’t just an academic question: It has important implications for where founders invest their time and resources. If you’re a startup that assumes the data you’re collecting equals a durable moat, then you might underinvest in the other areas that actually do increase the defensibility of your business long term (verticalization, go-to-market dominance, post-sales account control, the winning brand, etc).

TREATING DATA AS A MAGICAL MOAT CAN MISDIRECT FOUNDERS FROM FOCUSING ON WHAT’S REALLY NEEDED TO WIN

In other words, treating data as a magical moat can misdirect founders from focusing on what is really needed to win. So, do data network effects exist? How might a scale effect behave differently from the traditional network effect? And once we get past the hype of having to have them… how can startups establish more durable data moats — or at least figure out where data best plays into their strategy?

Data + network effects ≠ data network effects

Broadly defined, a “network” is at play when a system of users/customers/endpoints/etc. are structurally arranged in a network. In our context, such networks are often built around a technology, product, or service supporting the network structure, whether constructed around engagement features (e.g., social networks) and/or protocols (e.g., Ethernet, email, cryptocurrencies).

Network effects occur when the value of participating in a network goes up for the participants as more nodes come on to the network, or as engagement increases between existing nodes. Imagine trying to have a one-way phone conversation or call only five people in the world and no one else; the telephone system became more valuable as more users joined the network. Other common, more modern examples of network effects may include social networks, online marketplaces, and cryptonetworks.

Systems with network effects generally have the property of direct interactions between the nodes over a defined interface or protocol. Joining the network requires conforming to some standard, which increases direct interaction for all nodes and makes those interactions increasingly stickier. But when it comes to the popular narrative around data network effects, we don’t often see the same sticky, direct interaction play out (let alone mechanical interdependencies between nodes due to protocols or interfaces).

There generally isn’t an inherent network effect that comes from merely having more data.

Most data network effects are really scale effects

Most discussions around data defensibility actually boil down to scale effects, a dynamic that fits a looser definition of network effects in which there is no direct interaction between nodes. For instance, the Netflix recommendation engine can predict that you’re likely to enjoy show Y if most of the viewers of your favorite film X also tend to watch show Y, even though those users don’t directly interact with each other. More data means better recommendations, which means more customers, and even more data… the famous “flywheel”.

Yet even with scale effects, our observation is that data is rarely a strong enough moat. Unlike traditional economies of scale, where the economics of fixed, upfront investment can get increasingly favorable with scale over time, the exact opposite dynamic often plays out with data scale effects: The cost of adding unique data to your corpus may actually go up, while the value of incremental data goes down!

Take the case of a company using a chat bot to respond to customer support inquiries. As you can see from the graph below, creating an initial corpus from customer support transcripts is likely to provide answers to simple inquiries (“Where is my package?”). But the vast majority of inquiries are far messier, many of which are only ever asked once (“Where is that thing that I’ve been waiting to arrive on my front door step?”). So in this limiting case, collecting useful inquiries becomes more difficult over time. And, after 40% of the queries have been collected in this case, there is actually no advantage to collecting more data at all!

Of course, the point beyond which the data scale effect diminishes varies by domain. But regardless of exactly when this happens, the ultimate outcome is often the same: the ability to stay ahead of the pack tends to slow down, not speed up, with data scale. Instead of getting stronger, the defensible moat erodes as the data corpus grows and the competition races to catch up.

#### No solvency---best studies prove size doesn’t impact competitiveness, and separation decreases global influence.

Mark Jamison 20, Nonresident Senior Fellow at the American Enterprise Institute, Gunter Professor of the Public Utility Research Center at the University of Florida’s Warrington College of Business, Ph.D. in Economics from the University of Florida’s Warrington College of Business, “Breaking up Big Tech will not help the US innovate or compete with China,” American Enterprise Institute, 08-19-2020, <https://www.aei.org/technology-and-innovation/breaking-up-big-tech-will-not-help-the-us-innovate-or-compete-with-china/>

Facebook and Google have argued that breaking them up would damage US competitiveness with China. Vanderbilt Law Professor — and former advisor to Sen. Elizabeth Warren (D-MA) — Ganesh Sitaraman and former Federal Communications Commission Chairman Tom Wheeler (now at the Brookings Institution) take exception. Sitaraman argues in Foreign Affairs that breaking up Big Tech companies would bolster US national security. Wheeler writes that US tech innovation would improve if Big Tech companies were required to make their data assets available to rivals.

It is an open question how regulation might affect whatever competition there might be between the US and China, but Sitaraman and Wheeler are wrong. Sitaraman seems unaware of the five decades of academic research showing that market structure — the number and relative sizes of firms in a market or industry — does not determine the amount of innovation. Wheeler also seems unaware of how markets for ideas work. Here are my explanations.

Regulation and market structure

Both Sitaraman and Wheeler assume that government regulation can define an industry’s market structure, but they are wrong for two reasons.

First, more regulation results in industries having larger firms, not smaller ones, and it also lowers labor productivity. This has been confirmed in several economic studies (see examples here, here, and here). Regulations raise the cost of a firm being in business, which means firms need to be larger to cover those fixed costs.

The other reason is that the economics of social media, search, and e-commerce, etc. have determined today’s market structures. Breaking up the companies wouldn’t repeal these economic realities, so the current market structure would reemerge, except with possibly even larger firms.

Market structure and innovation

Sitaraman assumes that less concentrated markets are more innovative. Decades of scholarly research have shown that this isn’t the case.

In the mid-20th century, some economists believed that monopoly markets would produce more innovations than competitive markets. The argument was that a monopoly could capture more profits from innovation than a firm in a competitive market could, so monopoly markets gave more innovation.

But in the 1960s, economists began testing the hypothesis. Studies examined whether an individual firm’s size or the relative sizes of firms in an industry affected research and development or innovation. The Organisation for Economic Co-operation and Development recently released a paper summarizing the research. The summary finds that the relationships vary over time and across industries, so the best conclusion is that firm size and market structure cannot be used to affect innovation.

Ideas and data

Wheeler believes that innovation comes from companies analyzing data and selling products. Actually, in the tech space, more and more innovations are coming from decentralized, small-scale innovators. This pattern was discovered in academic research about 20 years ago and still holds.

What is happening is that innovators develop ideas for products and demonstrate their potential value. In a few instances, such as in the case of Facebook, the innovator forms a business and succeeds. But more often than not, the innovators sell their company or at least their product to an enterprise that has a proven business model. This was probably the situation with Instagram, which had a great idea and a weak business model at best before selling to Facebook, which then turned the idea into a profitable business.

Wheeler also appears to believe that if a company is unable to uniquely profit from the data it captures, the company will capture extensive data anyway. I have heard many times the argument that profits don’t matter, such as in the net neutrality debates. But the arguments are always made by people who care very much about the profitability of their retirement savings. So I think they know they are wrong.

Market structure and geopolitical competitiveness

Sitaraman also believes that smaller firms would be less likely to want to enter the Chinese market and would thus avoid being compromised by China’s influence. This might be true, but if it is, then it is also true that the US firms would be less active in all global markets, which would decrease US influence. Since part of the rivalry between the US and China is likely to include global influence, retracting US companies from the global economy would certainly decrease US competitiveness.

What’s to be done?

Clearly, some writers need to spend more time reviewing the literature: The flaws in Sitaraman’s and Wheeler’s analyses were refuted long ago by scholarly research. It would also be helpful if advocates for hands-on control of companies were humbler in their beliefs that they fully understand businesses and can redesign them at will.

#### Platform monopolies don’t hurt competitiveness and alternatives are abused more.

Tyler Cowen 19, professor of economics at George Mason University, “Breaking Up Facebook Would Be a Big Mistake”, Slate Magazine, 6-13-19, https://slate.com/technology/2019/06/facebook-big-tech-antitrust-breakup-mistake.html

It is commonly alleged that Facebook has a monopoly on social networking, yet unlike traditional villainous monopolists, Facebook has not raised prices—the service is free—or restricted output. And people do not use Facebook because the company has emptied their lives of alternatives. We can still connect with one another by text, email, telephone calls (yes, they still work), Pinterest, Twitter, LinkedIn, writing a blog and creating an online community (my own favorite), Twitch, Fortnite and other online games and platforms, Snapchat, messaging services (including for instance Apple’s iMessage, and also Facebook’s own WhatsApp, maximized for privacy), and last but not least, knocking on your neighbor’s door.

On the other hand, this is an age of suspicion of power, and the big tech companies are indeed large, highly profitable, and world-spanning. They have overturned how we communicate, and there is a resulting sense, not always backed by hard analysis, that the status quo simply cannot be left alone. But American antitrust law doesn’t penalize bigness or social influence per se. There may well be features of the major tech companies you don’t like, such as their privacy implications or how they have shifted the balance of power in politics, but that is not a sound legal basis for dismantling them. If you wish to address consumer privacy issues on online platforms or foreign interference in elections, push for legislation that does so, but don’t prescribe a remedy for one illness to one that is completely unrelated.

Advocates of splitting up the big tech companies have a utopian vision of what will replace them. Whether you like it or not, we now live in a world where every possible idea (and video) will be put out there in some fashion or another. Don’t confuse your discomfort with reality with your assessment of big tech companies as individual agents. We’re probably better off having major, well-capitalized companies as guardians and gatekeepers of online channels, however imperfect their records, as the relevant alternatives would probably be less able to fend off abuse of their platforms and thus we would all fare worse.

Imagine, for instance, that instead of the current Facebook we had seven smaller companies all performing comparable social networking services, perhaps with some form of interconnectability or data portability. The negative sides of social media, which are indeed real, probably would be worse and harder to control.

It is unlikely that such a setting would result in greater consumer privacy and protection. Instead, we would have more weakly capitalized entities, with less talent on staff and weaker A.I. technologies to take down objectionable material. Probably some of those companies would be more tolerant of irresponsible user behavior as a competitive lure. Fake accounts would proliferate, and social networking sites such as 4chan—often a cesspool of racism and rhetoric that goes beyond the merely offensive—would comprise a larger and more central part of the market.

As for privacy, these smaller Facebook replacements would be more susceptible to hacks, foreign surveillance and infiltration, and external manipulation—the real dangers to our privacy and well-being.

A more modest plan to split up Facebook might just hive off WhatsApp and Instagram, the company’s two most successful acquisitions, leaving “Facebook the page/service” more or less intact. But that won’t work, either. For one thing, it wouldn’t address most of the actual current criticisms of Facebook, which typically revolve around the Facebook page. If we had maintained an independent Instagram, current social media dilemmas wouldn’t be any less acute. Facebook has actually upgraded those services and kept them uncluttered, with the revenue-earning burden placed mainly on the Facebook page itself.

An independent WhatsApp, once placed under the pressure to bring in more revenue and make profits as a solo enterprise, would acquire more of the features Facebook critics find objectionable. Put another way: Facebook resists the temptation to make WhatsApp more like its own ad-driven core product because the company realizes that if it did, it would drive many users away and onto other “pure” texting services. And that curb on Zuckerberg and Co.’s power to monetize WhatsApp is another indication that Facebook’s supposed monopoly power isn’t all that monopolistic.

#### Tech’s spurring smart cities AND innovation now

Tarry Singh 19. Columnist, CEO, Founder and AI Neuroscience Researcher of AI startup https://deepkapha.ai. deepkapha.ai. 03/04/2019. "AI Economy Will Further Accelerate The Pace Of Innovation." Forbes. https://www.forbes.com/sites/cognitiveworld/2019/03/04/ai-economy-will-further-accelerate-the-pace-of-innovation/#4c584a4b2f29

Technological Innovation - why is it speeding up?

I've been writing on Linkedin occasionally and thought of summarizing some massively trending posts that might help explain my motivation for posting these mini-videos.

Trending Video #1 - Pace of innovation in tech is driving traditional companies out of business

This example clearly shows how Apple came from near-bankruptcy to take the crown of the most loved brand in the world. Same applies for companies that did not even exist 20 years ago like Google, Amazon, Facebook.

Future outlook: If your company is not investing heavily in data-driven intelligence, then it will not last the next decade.

Trending Video #2 - Learning genetically programmed cells to hunt and kill cancer cells

Today In: Innovation

This innovation in Nanotech cancer research medicine is one such example.

Future benefit: Here where technology has made it possible for us to see how the right drugs, programmed drugs or cells could save humanity's worst curse.

Trending Video #3 - Learning a Car to Drive Using Evolutionary Algorithms

This example is in the area of Deep Reinforcement Learning that uses the NeuroEvolution Technique to teach a car to learn about racing.

Future outlook: In the 60s driving was fun and a privilege. These days densely connected cities and traffic have made driving a big problem. Algorithms like these will help us develop self-driving cars that can do the job better than us without stress!

WHY is it speeding up?

Fast broadband internet, inexpensive commodity hardware and soon inexpensive HPC hardware too for individual researchers and scientists. Engineers and managers too may have fast computers under their desks soon!

PART 2: What is HPC and why is it becoming the backbone of AI innovation

High performance computing is in the backend making cities smarter, organisations data-driven and decision making a streamlined process that can sift through yottabytes (meaning: huge quantities of data) with ease.

AI will speed up the pace of innovation HTTPS://WWW.HPCWIRE.COM/2018/01/18/NEW-BLUEPRINT-CONVERGING-HPC-BIG-DATA/

Technological innovation is happening at a very rapid pace and with Artificial Intelligence and the associated architectures that come with it, it will even go faster!

PART 3: Artificial Intelligence will further accelerate this pace, but HOW?

This all started when Google open sourced its Machine Learning library TensorFlow, AI library and Tensor Processing Unit.

Someday we will look back and say how this was the turning point of the AI Economy - or whatever fancy term it will be then in 2030.

Obviously Facebook too followed the open source path releasing PyTorch. Today we hear that Uber, Netflix, Tesla and practically all fast growing companies are using some form of Machine Learning and/or Deep Learning architectures.

Nvidia obviously is running ahead with their GPUs (Graphic Cards) but two things will define the next wave of this revolution :

We will have architectures all about Tensors

We will see decline and slow death of 32-bit and 64-bit IEEE 754 floating-point architectures

You might wonder: "Wait, What is a Tensor"

Moving on...

[I apologize in advance for making math out of this fun storytelling but it is crucial, stay with me]

It's nothing new, you've been using this in the 80s as well: Tensor languages have actually been around for years. Programming languages like APL and Fortran have used it in the past.

Numerical computing optimization has been going on for a while: In the 1950s already programmers knew how to make linear algebra go faster by blocking the data to fit the architecture. Matrix-matrix operations, in particular, run best when the matrices are tiled into submatrices, and even sub-submatrices.

Dot Product - Huh?

Perhaps you've have heard from your engineers or employee of this term. If not, you've done this in high school math some time ago.

All the pictures or text corpus that your Machine Learning or Deep Learning engineers are using to do face recognition, securing devices from hacks or analysing traffic for self-driving cars are essentially (somewhere) Matrix-matrix operations.

OK, I'll stop now before your head hurts!

AI will dramatically make many computing paradigms of the 90s and 2000s obsolete as new models, architectures and hardware solutions will flood the market in the next 5-7 year.

## ADV 2

### 1NC---Middleware ADV

#### Smaller company access makes disinfo worse --- gatekeepers are key.

Tyler Cowen 19, professor of economics at George Mason University, “Breaking Up Facebook Would Be a Big Mistake”, Slate Magazine, 6-13-19, https://slate.com/technology/2019/06/facebook-big-tech-antitrust-breakup-mistake.html

Imagine, for instance, that instead of the current Facebook we had seven smaller companies all performing comparable social networking services, perhaps with some form of interconnectability or data portability. The negative sides of social media, which are indeed real, probably would be worse and harder to control.

It is unlikely that such a setting would result in greater consumer privacy and protection. Instead, we would have more weakly capitalized entities, with less talent on staff and weaker A.I. technologies to take down objectionable material. Probably some of those companies would be more tolerant of irresponsible user behavior as a competitive lure. Fake accounts would proliferate, and social networking sites such as 4chan—often a cesspool of racism and rhetoric that goes beyond the merely offensive—would comprise a larger and more central part of the market.

As for privacy, these smaller Facebook replacements would be more susceptible to hacks, foreign surveillance and infiltration, and external manipulation—the real dangers to our privacy and well-being.

#### Data sharing destroys consumer privacy.

Mark MacCarthy 18, Senior Fellow and Adjunct Faculty Member in the Communication, Culture, and Technology Program at Georgetown University, M.A. in Economics from Notre Dame University, “Data sharing: a problematic idea in search of a problem to solve,” CIO, 08-30-2018, https://www.cio.com/article/3301175/data-sharing-a-problematic-idea-in-search-of-a-problem-to-solve.html

If people are willing to share their information with Google or Facebook, it doesn’t follow that they want to share it with all the competitors of these companies. Forced data sharing runs against any notion of effective privacy protection. Companies with attractive and desirable data management practices would be required to pass personal information on to other companies with no established consumer protection processes.

This could all be fixed if companies were required to deidentify the information before passing it on. But of course, identified information is the point. New social networks don’t want anonymous data; they want the list of Facebook’s users and everything Facebook knows about them. Google’s competitors don’t want random search data; they want individual level data, identified by IP address, device ID and other identifiers that privacy regulators treat as personal information. Amazon competitors don’t want aggregated sales data; they want Amazon’s individual level profiles to train their recommendation engines.

#### That spills over to broader democracy.

Joanna Bryson 21, Professor of Ethics and Technology at the Hertie School, Ph.D. from the Massachusetts Institute of Technology, “Neither interoperability nor data sharing will solve transnational monopoly,” Adventures in NI, 05-08-2021, https://joanna-bryson.blogspot.com/2021/05/neither-interoperability-nor-data.html

Every since my awesome if brief visiting professorship at the Tilburg Institute for Law, Technology, and Society in 2019 I've been worrying about why some law professors believe that all data is the same, and that if we forced companies to share theirs that would somehow remedy the inequalities underlying the market dominance of tech giants right now. There are many false premises there – e.g. myth of first-mover advantage (hello IBM, hello myspace, hello Mosaic – yes there are huge network effects, but these can include sudden transitions to new winners.) But the main thing is that it shows an ignorance of the nature of computation. Computation is a physical process requiring, time, space and energy. The tech giants are now enormous global-scale infrastructure, with their own power plants, global fiber-optic networks, satellites, and so forth.

I agree that interoperability where it is viable can be a partial solution to the problems of antitrust, but "where it is viable" is a very small part of the domain of the excesses and assaults we are seeing against antitrust regulation, even if we only focus on the digital sphere – which to be honest, I think is a mistake. Let me unpack these two thoughts.

There are a few services such as texts and email that you might be able to make fully interoperable. But even if you get to the point of thinking hard about twitter vs linkedin, you might already see the problem with interoperability. These are different platforms with different communicative goals and as such will have different ideal representations. No data system captures the entire universe, nor even the universe of human self expression.

We should actively want our technical venders only to retain what data is necessary for their mandates (cf. the GDPR.) And indeed even for all the talk of "the new oil", tech vendors too keep only compressed and filtered versions of all the data they see. This is because retention and transmission take time and energy. The compression and filtering is business-practice specific. Demanding data sharing by e.g. giants to SMEs is really demanding lock-in to particular business models / world views depending on which giant info-ecosystem an SME chooses to deploy within.

Demanding that all the giants become replicas of each other is actually one thing I've thought of with respect to remedies – make big tech "airbus" each other. But I just don't think this is ecologically sound or pragmatic from a power perspective. You would then just essentially unify them into one bigger monopoly by aligning all their interests.

The reason I think focussing only on the digital is a mistake is because in my opinion, one of the fundamental problems underlying our present situation is that we are inadequately governing and regulating all kinds of transnational entities. This includes finance, petrochemical, pharma, and consultancies. If we do something that only addresses Google and Facebook, then yes we do address a couple of the very largest bubbles of the moment – though note that interoperability of doc / ppt / xls only helped Microsoft to further power and success.\* Yes, it did so via providing us with more consumer choice so I do very strongly approve of that legal decision. The goal of antitrust isn't to destroy the real economic and security value these companies provide. It's to defend further innovation and also the rule of law, hopefully via democracy.

So actually, there are two problems with focussing too much on a digital-only remedy like interoperability. First, this lets all the other sectors not being adequately addressed off the hook. I'm suspicious that part of the reason that the market caps / power of big tech have been allowed to get so out-of-control (at least in America) is because the geopolitical power of the peterostates was seen to be surprisingly resurging in the early naughts. There was back then some discussion in the newspapers that perhaps liberal democracy and capitalism couldn't really beat out autocracy coupled with resources and a strong cyber-competent mafia. Now we are hearing about discussions about how separated GAFAM should be from the White House (think for example Schmidt).

But second, Apple, Google, Facebook & Amazon at least benefit most when liberal democracy is strong – when there are many people with enough wealth, education, and freedom to use their products. So these are organisations we should be trying to bring into the fold of understanding and supporting good regulation. My model here is FDR's New Deal and also Bretton Woods. You need enough of the elite on your side to achieve such titanic changes in the regulatory order. This is why I'm personally very worried also about the DMA. We shouldn't be demonising exclusively the digital monopolies. We should be returning antitrust enforcement to its original emphasis on keeping corporations to a size that can be governed by democracies.

So sure, where viable, make demands about interoperability, and for sure let individuals download complete sets of their own records. But don't play into the libertarian fantasies that there's some magic way that the digital economy could represent information and play nice together that would mean we don't have to remain vigilant about the state of our democracies, or that government has no real utility in an adequately transparent world. Government is a means of coordination, when we deploy it well the rest of our problems become simpler. And government is defined by a monopoly of executive force within a geographic region. There will always be at least a leader if not a complete monopoly in that regard. Let's ensure that we keep strong democratic control over ours.

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

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

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

#### 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.

# Block

## States

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

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

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

Ballot Initiatives that Respond to Federal Inaction

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

The Minimum Wage

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

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

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

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

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

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

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

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

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

### Solvency---2NC

#### States can do it.

1AC Kades & Morton ’20 [Michael Kades and Fiona Morton; Director for markets and competition policy at the Washington Center for Equitable Growth, JD from Wisconsin Law. “Competitive Edge: Remedying monopoly violation by social networks—the role of interoperability and rulemaking”. Washington Center for Equitable Growth. Sept 23 2020. https://equitablegrowth.org/competitive-edge-remedying-monopoly-violation-by-social-networks-the-role-of-interoperability-and-rulemaking/]

All eyes are laser-focused on competition in digital technology platforms such as Amazon.com Inc.’s Marketplace, Apple Inc.’s App store, Facebook Inc.’s eponymous social network, and the search engine operated by Alphabet Inc.’s Google unit. Congress, the Federal Trade Commission, the U.S. Department of Justice, and various state attorneys general are investigating their conduct, and, if press reports are to be believed, both Google and Facebook could soon find themselves as defendants in major monopolization cases. By way of comparison, the previous major monopolization case, United States v. Microsoft, was filed in 1998, when “You’ve got mail,” and that static noise of a dial-up connection were common.

It is, however, past time to think only about whether these technology giants are violating the antitrust laws and ask how to address such antitrust violations if they have occurred. Even in the most successful monopoly prosecutions, such as the antitrust cases against AT&T Inc. in the 1980s and against Microsoft Corp. in the 1990s, the courts struggled to develop and implement effective remedies with various degrees of success. Discussing remedy before there is a case may seem like putting the cart before the horse—but think of it as designing the cart before deciding what horses to use.

Today, we have posted a working paper that proposes a remedy for one type of digital platform: a social network such as Facebook. Our remedy proposal relies on five principles, summarized here and discussed in more detail below:

Social networks, like most digital platforms, have large “network effects.” We discuss this concept in detail below, but the basic idea is that like the telephone system and email, the more people on the same network, the more useful it is to its users. Those network effects create entry barriers, which make it easier for anticompetitive conduct to successfully create and protect monopoly power.

Unless a remedy addresses the entry barriers created by these network effects, it will likely fail to fully restore competition or prevent future violations.

Interoperability refers to the way phones from Verizon Communications Inc., AT&T, and other companies can connect with each other, or users of Gmail and Hotmail can write to each other. In the case of a social network, interoperability would enable social network users on different social networks to seamlessly connect with each other, meaning that interoperability is likely to be critical, although not sufficient, to address harms caused by an antitrust violation.

Implementing interoperability poses challenges for the litigation process. It requires the creation of a technical committee to address the technical details. The committee can’t be manipulated by the dominant players. Policing compliance with the remedy must be efficient. And substantial penalties are needed to deter incentives to violate the remedy order.

The Federal Trade Commission could use its rulemaking authority, outside of any particular litigation, to develop a default interoperability order that could increase the workability and effectiveness of any future interoperability requirement.

Digital platforms are under scrutiny

On Capitol Hill, the Senate Judiciary Committee just held a hearing on Google and online advertising. The House Judiciary Committee will release its report on digital platforms shortly. Jason Furman, a professor of the practice of economic policy at the Harvard Kennedy School and a member of Equitable Growth’s Steering Committee, outlined the role of networks on competition in digital markets in testimony before Congress (available as a Competitive Edge), and Equitable Growth has also summarized research more broadly.

A network effect means a digital platform’s value to users increases as the number of users increases. Take Facebook as an example. As the number of users on Facebook increases overall, any individual will need to be on Facebook to communicate with her friends or family; conversely, no one wants to be on a social network if none of their friends or family use it. Similarly, advertising on Facebook becomes more valuable the bigger Facebook’s user base grows, the longer users are on Facebook, and the more Facebook can help target the ads to those who will most likely respond to them, which is a function of the first two benefits of size.

In turn, this network effect can lead to a winner-take-all (or most) dynamic, also known as tipping. When one social network creates an edge in number of users, either legitimately or through exclusionary conduct, that advantage attracts even more users. The social network may become dominant and earn monopoly returns. Ultimately, the network effect creates an entry barrier. Few will join a new social network until their friends, families, and neighbors do.

Neither entry barriers nor tipping present insurmountable barriers for a new competitor, but they do make it easier to monopolize a market. In a market subject to tipping (even if it is not permanent), the value of excluding a competitor is greater because the prize is bigger. If entry barriers are high, any potential competitor’s chance of success is low. As a result, a social network may be able to inexpensively acquire nascent or potential competitors before they pose a threat to the network’s dominance.

A successful remedy will reduce entry barriers created by network effects

If this type of digital platform has violated antitrust laws, it has engaged in anticompetitive conduct that relies on and exploits the network effect and the entry barriers it creates. Absent intervention, the dominant platform will continue to benefit from its conduct; entry is unlikely and difficult. A divested network can compete with its existing installed base of users, and this will create choice for users—provided their friends move with them. So long as the network effect remains, however, the dominant firm continues to have the same incentives to adopt different and new exclusionary conduct to protect its monopoly. For a remedy to be fully effective, it needs to reduce the network effect and the entry barriers it creates.

Network effects manifest themselves across different types of digital platforms: social networks, online marketplaces, app stores, and online advertising. But they can operate differently in each setting. Network effects can be direct or indirect; platforms can have multiple sides. The effects may be asymmetric, and some may be strong and others weak. A remedy that addresses network effects present in a social network market may be meaningless in addressing network effects in an online marketplace. We use Facebook to explore addressing network effects as a remedy for a monopolization violation involving a social network.

Based on allegations currently being made, assume that Facebook has allegedly acquired a series of nascent or potential competitors to eliminate companies; that it cut off access to Facebook when a company could pose a competitive threat; and that those actions violate the antitrust laws as illegal monopolization. How would one remedy the violation? (Our working paper and this column do not comment on the merits of these allegations.)

Certainly, a court could forbid Facebook from repeating the illegal act and similar acts. Facebook could face fines or have to give up its profits from violating the law. But we are doubtful that those remedies alone would recreate the lost competition and thereby give consumers the competition they were earlier denied. Conduct prohibitions are likely to create an expensive whack-a-mole game, with the government and the dominant firm arguing over both the impact of every new strategy and whether it counts as “similar” to what violated the law.

A more substantial remedy would break up a social network into separate parts and provide real benefits by setting the stage for robust competition. A remedy, for example, could require Facebook to divest its Instagram photo- and video-sharing unit and its messaging unit, WhatsApp. Divestiture would significantly benefit users post-break-up as the divested components would compete with each other to attract users. Each network would innovate and provide better service to win an advantage in the number of users. The competition would likely be fierce. But without additional remedies, the market would likely tip again to one of the competitors, creating another monopoly. Then, the winning social network has both the incentive and ability to engage in exclusionary acts to prevent future threats to its newly established or re-established market dominance.

Interoperability has the potential to lower entry barriers

Requiring interoperability can neutralize or significantly reduce the network effect that the incumbent employed to create and protect its monopoly. By interoperability, we mean that users on other or new social networks should be able to friend Facebook users and vice versa. Posts should flow from a Facebook user to her friend on a new network in much the same way email can be sent and received regardless of whether both parties use Gmail, or phone calls connect people regardless of their carriers.

Interoperability reduces the barriers to entry created by network effects. Let’s say, for example, that one of the divested Facebook companies begins to lose users. It radically changes its business model from advertising-supported to a subscription-based business model and promotes the resulting high-quality user interface. It hopes to attract users because it has no advertising and strong privacy protections. Without interoperability, a user who prefers the subscription model and leaves Facebook to join it will lose contact with all her friends on Facebook and perhaps institutions there, such as her child’s school. Such costs might deter her from joining her preferred network. With interoperability, by contrast, she receives school forms and news of family vacations and college reunions that are sent to her through her new network. In short, with interoperability, each person can choose the network they prefer while staying in touch with their social circles. The network effect ceases to be an entry barrier.

In this world, entering social networks could compete on features outside the standard, such as their user interface, policies concerning news or offensive content, and privacy policies. Consumers could change social networks like they change wireless carriers, without losing the ability to stay in touch with their contacts. The need to compete for consumers on the basis of service quality, such as the amount of advertising and how it is targeted, rather than relying on network effects to keep users, would intensify competition among social networks to the benefit of consumers.

Interoperability could be ordered in addition to other relief, such as a divestiture, and could be complementary to it or stand on its own. It could be an appropriate remedy in any situation in which the dominant social networking firm has exploited network effects by violating antitrust laws. In today’s internet-based network markets, interoperability carries no incremental costs such as the dedicated wires and machines that were required for telecom interoperability in past decades. It requires the establishment of an open standard to exchange commonly used functionalities, such as text, calendars, and images between and among competing social networks.

The challenges of implementing interoperability as a remedy

Although interoperability as a concept is straightforward, effectively implementing it raises challenges. In our working paper, we look back at both the AT&T break-up order, where interoperability was effective, and the remedial order in United States v. Microsoft, where those provisions had little impact. From those cases, we suggest several operational principles.

Substantively, the remedy must establish the technical capability for users to communicate across platforms, balance the needs of multiple actors, promote entry, and enhance the user experience, including protecting privacy. Importantly, the remedy order must prevent the offending, dominant social network (or its divested parts) from manipulating the process. This requires that the remedy include provisions that will deter the defendant from violating the order, require standards that many entrants can meet, and not favor large incumbents.

The remedy also must establish a process for determining whether the defendant has violated the order. That process must be fast enough to provide relief to a harmed competitor before that firm fails, and the penalties must be significant enough that the dominant social network will be worse-off for having violated the remedy order.

From a process perspective, creating a technical committee overseen by an antitrust enforcer is the most promising option to solve these implementation challenges. Judge Harold Green used a similar procedure in the AT&T break-up, and Judge Colleen Kollar-Kotelly relied on a technical committee in Microsoft. Such a committee would include representatives of all relevant industry segments, but the antitrust enforcer engaged in policing the remedy would control the decision-making process to prevent capture by the dominant social network (or its divested parts).

FTC rulemaking can improve the remedy process

The final element of our proposal is that the Federal Trade Commission should use its rulemaking authority to develop a default order for interoperability. Rulemaking provides a number of advantages for developing the groundwork for a successful remedy. A default order derived through rulemaking can identify basic principles to apply in monopolization cases involving strong network effects or issue separate rules on remedies for different types of digital platforms.

In an administrative adjudication, where the Federal Trade Commissioners are the judges, the default order would be a mandatory starting point for a remedy. In cases brought in federal court by the Justice Department’s Antitrust Division, the states, or the Federal Trade Commission (the FTC can either bring cases internally, where it acts as a decisionmaker, or in federal court, where it is the plaintiff), courts would not be required to rely on the default order but would be free to do so.

In any individual case, the decision-maker could adjust the terms as necessary to fit the particular situation, but the default order would save time and effort. The default order would also help focus on the issues in dispute. Parties could appeal any of the decisions we describe to the courts. Given the existence of a carefully crafted, robust order, however, those appeals would likely be less frequent and burdensome than if a court had to resolve every issue from scratch.

Conclusion

The debate over whether any digital platform violates antitrust laws will continue in the press, in the halls of Congress, and, probably, in courtrooms across the country. Antitrust policymakers need not—and should not—wait for a liability determination before considering remedies they can apply today, using current law and existing institutions. Our working paper provides a contribution to the remedy discussion and on the need to address entry barriers as a necessary, but not necessarily a sufficient, goal of a successful remedy.

#### More 1AC ev.

1AC Fukuyama ’21 [Francis; Mosbacher Director @ Stanford’s Center on Democracy, Development and the Rule of Law; “Making the Internet Safe for Democracy,” *Journal of Democracy*, 32(2), p. 37-44]

Many people have come to see the internet as one of the chief threats to contemporary democracy. The internet, and large platforms such as Google, Facebook, and Twitter in particular, have been blamed for the rise of Donald Trump and the populism he represents, the proliferation of conspiracy theories and fake news, and the intense political polarization afflicting the United States as well as many other democracies. Across the world, politicians with authoritarian leanings, such as Rodrigo Duterte in the Philippines and Narendra Modi in India, have made effective use of Facebook and Twitter to reach their followers and attack opponents.

There is, nonetheless, a great deal of confusion as to where the real threat to democracy lies. This confusion begins with a question of causality: Do the platforms simply reflect existing political and social conflicts, or are they actually the cause of such conflicts? The answer to that question will in turn be key to finding the appropriate remedies.

This issue came to a head in the aftermath of the 6 January 2021 mob assault on the U.S. Congress that was instigated by the outgoing President Trump. In the wake of that violence, Twitter shut down Trump’s account, cutting him off from the primary channel that he had used to communicate with his followers. While many people applauded this decision and even saw it as overdue, others worried about the sheer power that Twitter had amassed. President Trump was indeed effectively muzzled in the days following the ban. Conservatives immediately castigated the move—and the parallel actions by Facebook, Google, and Amazon that soon followed—for what they labeled “censorship.” And while one may approve of Twitter’s decision as a short-run response to the danger of violent incitement, conservative critics of this move raise legitimate points about the dangers of platform power.

Legally speaking, the censorship charge falls flat. In U.S. law, the First Amendment’s prohibition of censorship applies only to government actions; the Amendment actually protects the right of private parties such as Twitter and Facebook to publish whatever content they want. Beyond these protections, online platforms have been shielded from certain forms of liability by Section 230 of the 1996 Communications Decency Act. The problem we face today, however, is one of scale: These platforms are so large that they have come to constitute a “public square” within which citizens contest issues and ideas. There are plenty of private corporations that curate the information they publish; these are media companies, with names such as the New York Times or the Wall Street Journal. But none of these legacy media companies is as dominant or reaches as many people as Twitter, Facebook, and Google. The scale of these internet platforms is great enough that decisions made by their owners could impact the outcome of democratic elections in a way that legacy media companies� decisions could not.

The other big problem with the large internet platforms is one of transparency. While Twitter publicly announced its ban of President Trump, it, Facebook, and Google make literally thousands of content-curation decisions each day. The great mass of takedowns are relatively uncontroversial, as with those targeting terrorist incitement, child pornography, or overt criminal conspiracies. But some decisions to flag or remove posts have been either more contentious or simply erroneous, particularly since the platforms began to rely increasingly on artificial-intelligence (AI) systems to moderate content during the covid-19 pandemic. An even more central question concerns not what content social-media platforms remove, but rather what they display. From among the vast number of posts made on Twitter or Facebook, the content we actually see in our feeds is selected by complex AI algorithms that are designed primarily not to protect democratic values, but to maximize corporate revenues. It is thus unsurprising that these platforms have been blamed for propagating conspiracy theories, slander, and other toxic forms of viral content: This is what sells. Users do not know why they are seeing what they see on their feeds, or what they are not seeing because of the decisions of an invisible AI program.

Harms

We thus need to be precise about the nature of the threat that the large platforms pose to modern liberal democracy. It does not lie in the mere fact that they carry “fake news” or conspiracy theories or other kinds of harmful political content. The U.S. First Amendment protects the right of citizens to say whatever they want, short of promoting violence or sedition. Other democracies are less absolute in their free-speech protections, but nonetheless agree on the underlying principle that there should be an open marketplace of ideas in which the government should play a minimal role.

The real problem centers around the platforms’ ability to either amplify or silence certain messages, and to do so at a scale that can alter major political outcomes. Any policy response should not aim at silencing speech deemed politically harmful. The notion that Donald Trump won the 2020 presidential vote in a landslide and that the Democrats stole the election through massive fraud is false and terribly damaging to U.S. democracy. But it is also sincerely believed by tens of millions of Americans, and it is neither normatively acceptable nor practically possible to prevent them from expressing opinions to this effect. For better or worse, people holding such views need to be persuaded, and not simply suppressed.

What policy needs to target instead is the dominant platforms’ power to either amplify or silence certain voices in the political sphere. Up to now we have been relying on people such as Twitter’s CEO Jack Dorsey or Facebook’s Mark Zuckerberg to “do the right thing” and curate harmful political content. This is a response that may work in the short run, when the nation is faced with an imminent threat of political violence. But it is not a long-term solution to the underlying problem, which is one of excessively concentrated power.

No democracy can rely on the good intentions of particular powerholders. Numerous strands of modern democratic theory uphold the idea that political institutions need to check and limit arbitrary power regardless of who wields it. This principle is implicit in John Rawls’s concept of the “veil of ignorance,” according to which fair rules in a liberal society must be drawn up without regard to knowledge of the person or persons to whom they apply. The 1780 Constitution of the State of Massachusetts, drafted by John Adams, Samuel Adams, and James Bowdoin, stated that “the executive shall never exercise the legislative [or] judicial powers . . . to the end it may be a government of laws and not of men.” James Madison’s famous Federalist 51 lays the ground for a system of divided powers by arguing that “in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” The only practical solution to this problem was to comprehend “in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.” In other words, power could be controlled only by dividing it, through a system of checks and balances.

The authors of these strictures were taking aim at state power, but their concerns apply doubly to concentrations of private power. Private power faces no checks comparable to popular elections; it can be controlled only by the government (through regulation) or by competition among power holders. Due to a traditional suspicion of state power, market competition has generally been the preferred means of controlling and limiting private power in the United States. Fear of monopoly power’s economic and political consequences, among other concerns, inspired passage of the legislation making up the backbone of U.S. antitrust law—the Sherman (1890), Clayton (1914), and Federal Trade Commission (1914) Acts.

Remedies

How can we reduce the underlying power of today’s internet platforms? I believe that a potential solution to this problem lies in using both technology and regulation to outsource content curation from the dominant platforms to a competitive layer of “middleware companies.” I advance this proposal not because I am certain that it will work, but because the alternative approaches that have been suggested are likely to be less effective.

The first and most obvious of these approaches is to use antitrust law to break up Facebook and Google, much as the telephone giant AT&T was broken up in the 1970s. After a prolonged period of lax enforcement of antitrust laws, there is a growing consensus that they need to be applied to the big tech companies, and suits have been brought against these platforms by the European Commission, the Justice Department, the Federal Trade Commission, and a coalition of state attorneys-general.

#### State regulation solves platform dominance and causes follow-on.

Dean DeChiaro 21, Staff Writer for CQ Roll Call, “Antitrust hawks offer states a toolbox for regulating Big Tech,” Roll Call, 11-16-2021, https://www.rollcall.com/2021/11/16/antitrust-hawks-offer-states-a-toolbox-for-regulating-big-tech

Antitrust hawks who favor tougher regulations on big technology companies are looking beyond the Beltway to aid state lawmakers who have similar aims — but fewer resources.

The D.C.-based American Economic Liberties Project — a nonpartisan organization that advocates for new antitrust laws to take on the power of companies like Apple, Amazon, Facebook and Google — last week released a toolkit that state officials could use to push policies similar to those that have been proposed, but not yet passed, at the federal level.

"There's something really important about state lawmakers setting the terms for their constituents and their local economies and not waiting for Washington to deliver something that may never actually come along," Pat Garofalo, the organization's director of state and local policy, told CQ Roll Call.

The so-called techlash that has gripped Washington in recent years and resulted in increased scrutiny of major firms like Google and Facebook, which are both facing federal antitrust suits aided by bipartisan groups of state attorneys general, has yet to result in Congress sending new antitrust legislation to President Joe Biden's desk.

The bill that has come the closest, an uncontroversial measure that would update Federal Trade Commission fees charged to merging companies and direct the proceeds to antitrust enforcement, passed the Senate last summer as part of a larger legislative package but is now in danger of floundering because of the packed end-of-year legislative calendar.

For state officials who feel Big Tech's dominance is negatively affecting small businesses that rely on their platforms to do business, depending on Washington has grown tiresome.

"The question has been asked, why states need to step up,'" New York state Sen. Michael Gianaris, a Democrat, said at a discussion hosted by AELP last week. "If we're going to wait for Washington to solve this problem, we could be waiting a very long time."

Gianaris is backing state legislation that would change New York's definition of what constitutes unlawful monopoly power by a single company. Much of antitrust law depends on the consumer welfare standard, which ties monopoly power to the price of goods and services. Because technology companies offer "free" access to their platforms, antitrust hawks say they have become dominant without running afoul of the consumer welfare standard.

'Abuse of dominance'

The New York bill, which passed the state Senate in June, would establish an "abuse of dominance" standard to replace the existing consumer welfare standard.

"These big corporations have monopolized access to the consumer through their various platforms: Google search, Amazon's selling platform, Google and Apple's app stores," Garofalo said. "There are all sorts of ways they can game these platforms to harm the folks that have become reliant on them because there's nowhere else to go."

While the New York bill is the first of its kind, Gianaris is hopeful that it will spark action in statehouses across the country.

"There's a great history in this country of states serving as laboratories and providing solutions that can be exported to other [states] and then adopted throughout the country," he said last week. "I think it's time we step in and take a stand for small and medium-sized companies, for workers and for the general public."

Establishing an "abuse of dominance" standard is one of the nine suggestions outlined in AELP's toolkit for taking on Big Tech.

"These big corporations have monopolized access to the consumer through their various platforms: Google search, Amazon's selling platform, Google and Apple's app stores," said Garofalo. "There are all sorts of ways they can game these platforms to harm the folks that have become reliant on them because there's nowhere else to go."

The toolkit lays out other legislative priorities, including proposals to more strictly regulate the app stores run by Apple and Google, that mirror ongoing efforts at the federal level. It also contains more localized proposals to protect small businesses, especially restaurants that have little choice but to partner with dominant food delivery companies to survive.

The report also urges state legislatures to provide more resources for their antitrust enforcers. While large technology companies can bankroll legions of attorneys and lobbyists, most states employ fewer than three antitrust investigators, the report said. Nearly half of all state-level antitrust enforcers are employed by six states, the report found.

But increased funding is not enough on its own, the report said, and should be paired with other legislative proposals.

"Increased antitrust funding will run up against states' traditional budget priorities," the report said. "And critics will point to the length and difficulty of antitrust cases as a reason not to pursue more of them, which is why increased funding should be paired with other reforms to antitrust law to reflect the realities of today's dominant corporations, particularly in tech."

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

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

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

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

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

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

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

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

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

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

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

### Solvency---AT: Adaptability ---2NC

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

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

D. The Misaligned Incentives Problem

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

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

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

E. The Incompetent States Problem

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

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

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

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

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

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

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

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

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

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

### Solvency---Preemption---2NC

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

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

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

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

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

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

I. The Role of the States in Antitrust Enforcement

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

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

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

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

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

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

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

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

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

IV. An Exchange Theory of Antitrust Federalism

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

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

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

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

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

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

#### No patents preemption

**Gugliuzza 15** (Paul R. Gugliuzza, Associate Professor, Boston University School of Law, PATENT TROLLS AND PREEMPTION, 101 Va. L. Rev. 1579, y2k)

Drawing on principles of field preemption, one might suggest that **state** anti-troll **statutes** are **preempted** because they touch on a distinctly federal matter: the enforcement of **patents.** The Supreme Court has invoked a similar rationale to preempt, for example, state law tort claims based on fraud before the Food and Drug Administration and an Arizona law that attempted to regulate immigration. The Constitution certainly makes patents a matter of federal concern, and Congress has given the federal courts exclusive jurisdiction over suits arising under patent law. As noted, however, many different bodies of state law govern **patent rights** created by federal law and are **not** preempted, including **contract law,** **family law**, and **probate law**. In fact, the new statutes regulating patent enforcement are not the only statutes state legislatures have passed to specifically govern federal patent rights. **Numerous states** have statutes that regulate the ownership of patented inventions developed by employees. **None of those statutes**, to my knowledge, **have been struck down on preemption grounds**. Moreover, the field preemption argument is weakened by the fact that the federal Patent Act simply does not address the issue of unfair or deceptive patent enforcement - it neither condemns nor immunizes it. This **distinguishes** the new state patent enforcement statutes from state laws the Supreme Court has found preempted for touching on distinctly federal matters. The federal food and drug laws, for instance, contain "various provisions aimed at detecting, deterring, and punishing false statements made during … [the] approval processes," and the federal immigration laws address many of the issues that the Arizona statute sought to regulate, such as registration and employment requirements.

[\*1608] Also, federal courts may be **less willing** to find preemption as state patent enforcement laws continue to **proliferate** and state law enforcement officials take **an active regulatory role**. Indeed, the Supreme Court recently ruled that the federal courts' exclusive patent jurisdiction **does not** extend to **state law** claims alleging legal malpractice in the handling of a patent case, **opening the door for state courts to occasionally opine on the substance of federal patent law**. And even the Federal Circuit, which has generally shielded patent holders from state law liability for their enforcement activity, has **refused** to find field preemption of state law tort and **unfair competition claims** against patent holders.

## Interop ADV

### Platform Competition---2NC

#### Good for small businesses – centralized networks make advertising and delivery easier and alternatives are too expensive.

Tyler Cowen 19, professor of economics at George Mason University, “Breaking Up Facebook Would Be a Big Mistake”, Slate Magazine, 6-13-19, https://slate.com/technology/2019/06/facebook-big-tech-antitrust-breakup-mistake.html

Finally, the next time you are tempted to levy a charge of monopoly against Google or Facebook, keep in mind that both companies are significant anti-monopoly engines in their own right. They allow small and midsize businesses to engage in targeted advertising, and therefore to offer niche products that compete against the goods and services of larger companies. Before Facebook and Google, smaller companies had much more limited advertising prospects as they often found it too expensive to advertise on television or radio.

So instead of being price-gouging advertising providers, Google and Facebook allow far smaller companies to spread their message in smart, economical ways, allowing them to compete with larger firms. This is a common trend in the world of accessible, networked tech platforms, of behemoths empowering smaller companies. Think of how much easier Amazon’s Marketplace makes it for small businesses to sell to distant customers, and how much Amazon’s cloud computing services make it easier for individual entrepreneurs to start these small businesses without having to hire in-house tech support.

## Disinfo ADV

### No Disinfo---2NC

#### Tech reduces political polarization, and whatever impact exists isn’t unique to big tech.

Atkinson et al. 19, Robert D. Atkinson, President of the Information Technology and Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. from the University of North Carolina, Chapel Hill; Doug Brake, Director of Broadband and Spectrum Policy at the Information Technology and Innovation Foundation, J.D. from the University of Colorado Law School; Daniel Castro, Vice President and President of the Center for Data Innovation at the Information Technology and Innovation Foundation, M.S. in Information Security Technology and Management from Carnegie Mellon University; Colin Cunliff, Senior Policy Analyst at the Information Technology and Innovation Foundation, Ph.D. from the University of California, Davis; Joe Kennedy, Senior Fellow at the Information Technology and Innovation Foundation, Ph.D. from George Washington University; Michael McLaughlin, Research Analyst at the Information Technology and Innovation Foundation, M.A. from Stanford University; Alan McQuinn, Senior Policy Analyst at the Information Technology and Innovation Foundation, B.S. from the University of Texas at Austin; Joshua New, Senior Policy Analyst at the Information Technology and Innovation Foundation, Ph.D. from the University of Tennessee, Knoxville, “A Policymaker’s Guide to the ‘Techlash’—What It Is and Why It’s a Threat to Growth and Progress,” Information Technology and Innovation Foundation, 10-28-2019, https://itif.org/publications/2019/10/28/policymakers-guide-techlash

Techlash critics argue the Internet, especially through social media and search engines, polarizes societies through filter bubbles—echo chambers in which Internet users only consume information from like-minded sources.77 Activist Eli Pariser coined the term “filter bubble” in 2011, but in 2009, American Legal Scholar Cass Sunstein predicted individuals would increasingly inhabit echo chambers. Sunstein has since argued that personalized social media news feeds have contributed to the political divide in the United States by creating informational cocoons that breed extremism.78 And to many, the surprise decision of U.K. voters to leave the European Union, along with the election of U.S. President Donald Trump, confirmed the existence of filter bubbles.79 Indeed, Wired published an article titled "Your Filter Bubble is Destroying Democracy" two days after the 2016 U.S. presidential election.80 If filter bubbles exist, the ramifications are potentially severe, as many argue democracies require voters who understand a variety of views.81

While U.S. society has become more polarized, Internet technologies are not the cause. Indeed, a 2017 study found that between 1996 and 2012, the group that became the most polarized was individuals 75 and older—the group least likely to use the Internet. During the same period, the polarization of individuals 18 to 39, 80 percent of whom use social media, barely increased.82 Moreover, a 2015 study of social media users in Germany, Spain, and the United States found that most users inhabit ideologically diverse networks, and social media use actually reduces political polarization.83 Indeed, the research found that over 75 percent of users are in networks in which they disagree ideologically with more than 25 percent of other individuals.84

Even the studies that find some evidence of filter bubbles on the Internet only provide tepid support to the hypothesis that such bubbles are significantly increasing polarization. For example, a 2016 study found that the link between the Internet and polarization is inconsistent and may only affect individuals who frequently consume news.85 Another study that analyzed the web-browsing activities of 50,000 U.S. Internet users found a link between social media and search engines to increasing polarization between individuals. However, that study also found that social media and search engine use are associated with an increase in exposing individuals to material outside their political spectrum. In addition, the researchers found that the majority of online news consumption stems from individuals visiting the home pages of their favorite news outlets, which are usually mainstream sources.86

As such, research shows the alleged effects of the filter bubble phenomenon are significantly overstated or even do not exist. And in some places where it does exist, it may actually be a positive feature, as it allows for virtual communities to develop among tight-knit groups.87 This does not mean digital and media literacy is not important. One of the reasons people believe filter bubbles exist is they overestimate the degree to which individual factors impact personalized search results. Factors such as location and language, not past browsing history, are the major determinates of different search results.88 More support for policies and programs that increase digital and media literacy, including in public schools, can help users become better consumers of news and information. In particular, this type of training can help individuals learn to differentiate between real news and fake news, as well as make use of new tools, such as browser extensions that automatically show users articles from other perspectives they might not otherwise see.89

Claim #6: The Internet Is Enabling Extremism and Hate Speech

Many worry that social media platforms are becoming hotspots for the proliferation of hate speech

[marked]

and extremism online. And indeed, there is a cause for concern, as social media and other web applications offer the potential for radical groups to more easily recruit followers. One scholar found, not surprisingly, that extremism in online hate groups correlates with more online participation in the groups.90

However, there is no proven connection between consumption of violent extremist online content and the actual adoption of extremist ideologies or violent extremist actions.91 A Rand Institute study concluded that while the Internet can facilitate the process of terrorist radicalization, it neither accelerates it, nor allows radicalization to occur without physical contact, nor supports self-radicalization without contact with others.92 Others scholars are skeptical of the Internet playing a significant role in violent radicalization.93 Nevertheless, there are notable examples of websites, such as 8chan, that glorify radicalization, hate speech, and violence.94 Major platforms have acknowledged that they can do more to moderate content, such as YouTube’s announcement that it will update its policies to better remove hateful and supremacist content.95

On some websites, takedowns occur whenever users or the company’s automated tools flag posts that violate the website’s terms of service, and get sent to moderators to review prior to removal. Others have moderators actively remove content that violates those companies’ terms of service. In time, this process will get better as platforms develop better tools to automatically identify and remove prohibited content. The problem is, automatically identifying the correct information to take down is not easy. Satire, for example, often mirrors and mocks negative posts, and can be hard to detect. Legitimate news coverage of violence, including war crimes, may also be flagged and removed because it shares the properties of violent content.96 However, over time and with lots of trial and error, platforms will be able to more effectively use algorithms to take down prohibited content and prioritize how items are displayed in news feeds. For example, Facebook is very effective at automatically flagging and removing terrorist content.97

The proliferation of online hate is a troubling and growing issue, but policymakers need to ensure responses to it do not curtail beneficial speech. The law at the heart of this debate in the United States is Section 230 of the Communications Decency Act, which ensures online companies are not liable for the content posted by their users.98 This law states that Internet intermediaries are not publishers when facilitating the speech of others, such as user reviews or postings on social media. Unfortunately, some proposals would overcorrect and risk curtailing this beneficial speech. For example, David Ibsen, the executive director of the Counter Extremism Project, has called on Congress to “remove companies’ blanket protections from liability for content posted by third-parties on their platforms when that content is incontrovertibly known to be extremist in nature or otherwise harmful.”99 Several lawmakers have suggested doing just this, such as Sen. Kamala Harris (D-CA).100Other Senators, including Mark Warner (D-VA), Amy Klobuchar (D-MN), Ted Cruz (R-TX), and Josh Hawley (R-MI), have made similar proposals or suggestions to have government agencies enforce online speech on platforms in order to address various perceived problems, such as fake content and extremism.101

Unfortunately, the threat of liability and fines stops companies’ attempts to improve automated takedowns. Without Section 230, as companies would be liable for errors made by automated takedowns, they would likely overcorrect and take down legitimate content. Moreover, they would face difficulty improving these tools because they would need to know what does not work. But this knowledge could trigger liability as well.102 Rather than rush to create a new framework for regulating speech online, and risk accidently harming legitimate speech or reducing the effectiveness of automated takedown mechanisms, policymakers should work with the private sector to improve automated takedown mechanisms, while ensuring platforms have moderation policies that protect free speech.

Claim #7: Social Media Facilitates Disinformation and Deepfakes

Disinformation—defined as “false content spread with the intent to deceive, mislead, or manipulate”—was a problem long before the dot-com era, as virtually every mass media technology, including print, radio, and television, has been subject to manipulation, propaganda, and censorship in order to shape public opinion.103 This manipulation may be for political expediency, such as to deceive voters, or for financial gain, such as when unscrupulous traders manipulate financial markets in order to defraud investors. For example, railing against Big Telegraph in 1872, The London Times wrote, “It is precisely the extension of the electric telegraph across the Atlantic which has facilitated the instant publication of all such words and criticisms, generally without their context and not infrequently with malicious editions in every city of the United States. The mischief that is done can hardly be overstated.”104

The problem has grown more acute in recent years. Disinformation from foreign actors, most notably from the Russian government and other actors under its control, was directed at shaping the outcome of the 2016 U.S. presidential election, the Brexit vote, the 2017 French presidential election, and countless other elections in Europe and elsewhere.105 And these bad actors have used new digital tools to spread fake news more easily.106 The principle medium for these disinformation campaigns is social media, although the effects can spill out into other media channels as well.

One method of spreading fake news is via ads on social networks. After the 2016 U.S. presidential election, Facebook discovered that the Kremlin-backed Internet Research Agency had secretly run around 3,000 ads on Facebook and Instagram that were seen by 10 million people in the United States.107 These ads attacked Hillary Clinton, boosted Donald Trump, and fostered divisiveness in American society on hot-button topics such as race, gun rights, immigration, and LGBT issues.

In response, Facebook has announced a series of changes to prevent these types of deceptive ads in the future, including by making advertising more transparent, improving enforcement for improper ads, tightening restrictions on ad content, and increasing requirements to confirm the identity of advertisers.108 However, there are limits to the effectiveness of these techniques. For example, social networks must also balance free-speech rights and recognize that additional restrictions on advertising can have a negative impact on beneficial activity. Facebook has noted that, while the ads run by the Internet Research Agency violated its policies because they hid the true identity of the advertiser, they did not violate their ad-content policies.109 To help address this problem, Congress should pass legislation such as the Honest Ads Act, which would require social media companies to increase transparency of paid political advertising on their platforms and make reasonable efforts to ensure foreign entities do not purchase political ads. This type of requirement would create parity between the transparency requirements for online and offline political ads and reduce the risk of foreign interference in U.S. elections.

Another tool is bots: automated programs that often masquerade as human users on social media. Bots play an active role on social media sites. A 2017 Pew study found that bots generate two-third of the links on Twitter.110 And Chengcheng Shao et al. found that accounts that actively spread misinformation are significantly more likely to be bots.111 Perhaps even more significantly, bots not only amplify fake news, but they often strategically target messages at influential users, duping these individuals into sharing fake news with their followers, thereby creating viral content.112 Bots have also been involved in a number of financial scams. For example, researchers discovered fraudulent activity by two bots had generated a spike in the price of Bitcoin from $150 to over $1,000 in two months.113

Platforms are getting better at identifying which accounts are run by bots, and then only allowing accounts that disclose this fact and engage in legitimate activities. But those using bots continue to develop techniques to evade these types of controls, creating a cat-and-mouse game between social media sites and these bad actors.

Researchers have found that the bigger the problem is, even without bots, users favor falsehoods over truths on social media—with fake news reaching more people, getting reshared by more users, and spreading faster than true stories.114 Part of the reason is likely due to the content of fake news, which is novel and elicits strong emotional reactions. And part of it likely has to do with the ease with which users on social media platforms can share content, the lack of incentives for users to vet content, and the lack of penalties for sharing false information.

A third source of disinformation is deepfakes—realistic-looking video clips altered, typically by AI, to portray someone doing or saying something that never actually happened. Deepfakes, a portmanteau of “deep learning” and “fake,” have been around since the end of 2017, created mostly by people editing the faces of celebrities into pornography. In April 2018, comedian and filmmaker Jordan Peele worked with BuzzFeed to create a deepfake of President Obama, kicking off a wave of fears about the potential for deepfakes to turbocharge fake news.115 The concern is understandable, as deepfakes can be very realistic, are easy to make with access to enough training data and one of the many deepfake-making programs, and are easily shareable online.116

Deepfakes present a unique challenge, as they can fool both humans and computers, which makes it difficult for platforms to moderate this content. The private sector appears to be taking this concern seriously, as companies such as Facebook have announced significant partnerships with academic researchers in order to find solutions.117 However, even as companies and researchers develop new tools to automatically identify deepfakes, it is likely these tools will later be used to simply create better deepfakes. Policymakers should not expect the private sector to be able to address this issue on its own, and should work with businesses, academia, and news outlets to develop additional tools and techniques to respond to this problem. However, it should not seek to limit the underlying technology that makes deepfakes possible, because this same technology has many legitimate applications in professional video editing and filmmaking.

## 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.

#### 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.”

### U---Climate Provisions

#### They’ve still got Manchin.

Sahil Kapur & Benjy Sarlin 2-3, Senior National Political Reporter for NBC News; Policy Editor for NBC News, “Manchin says Build Back Better is 'dead.' Here's what he might resurrect.”, NBC News, 02-03-2022, https://www.nbcnews.com/politics/congress/manchin-says-build-back-better-dead-here-s-what-he-n1288492

Every morning at about 8:30, Sen. Joe Manchin receives a text message from a staffer informing him what the national debt is. He replies quickly: “Thanks.”

On Wednesday, it crossed $30 trillion for the first time.

That mundane ritual offers a clue to how President Joe Biden might win back Manchin, the pivotal centrist Democrat from West Virginia, on his climate change and social spending ambitions, which have been frozen since Manchin rejected the House’s Build Back Better Act.

In an interview Wednesday, Manchin said his priority is to “fix the tax code” — and he’s willing to bypass Republicans and use the filibuster-proof reconciliation process to do it.

“It's the reason we have reconciliation. And everyone's talking about everything but that,” he said. “Take care of the debt. $30 trillion should scare the bejesus out of your generation.”

Manchin once again said this week that the Build Back Better Act is “dead,” referring to the $2 trillion-plus bill that passed the House. A nonnegotiable red line for him is that all new programs must be permanent and fully financed.

But even as he says there are no “formal talks” going on about a sequel, he keeps dropping hints about which policies might be worthy pursuits in some hypothetical future bill, perhaps one with a different name.

Clean energy? “We believe that basically, yes, we can do something,” Manchin told reporters, even as he stressed the need to maintain enough fossil fuels for “reliability.” More subsidies for the Affordable Care Act? “Anything that helps working people be able to buy insurance that's affordable, I've always been supportive of,” he told NBC News. Extending coverage in states that limit Medicaid? “I've been very receptive on Medicaid expansion to the states that got left behind,” as long as there's an incentive to expand, he said.

### 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.”

### U---AT: Thumpers---SCOTUS Confirmation

#### Doesn’t cost PC---its Schumer’s, and Dems are unified.

Jordain Carney 1-28, Reporter for The Hill, “Schumer finds unity moment in Supreme Court fight,” The Hill, 01-28-2022, https://thehill.com/homenews/senate/591753-schumer-finds-unity-moment-in-supreme-court-fight

Senate Majority Leader Charles Schumer (D-N.Y.) is looking to go on offense in the looming Supreme Court fight and shift gears after two high-profile setbacks.

Justice Stephen Breyer’s announcement that he’ll retire this summer, presuming his successor is ready to go, sets up a high-stakes battle for Schumer, who will be the first majority leader to need to get a Supreme Court nominee confirmed in a 50-50 Senate.

But it also puts him in line for a big win, if he can keep his 50-member caucus united after months of high-profile tensions.

“It will be as much of a victory for Chuck Schumer as it will be for Joe Biden. ... Schumer’s got a difficult caucus, obviously, and this is going to be a historic nomination,” said Meagan Hatcher-Mays, Indivisible’s director of democracy policy.

“The stakes are pretty high for Chuck Schumer, but he’s done really, quite a good job over the last year of the Biden administration getting his nominees through,” she added.

Schumer is making it clear that he intends to move quickly once Biden names his nominee, who is expected to be the first Black woman nominated to the Supreme Court.

The Democratic leader is eyeing a similar timeline to the one Republicans used to confirm Justice Amy Coney Barrett, a source familiar with his planning told The Hill. The Senate voted to confirm her 30 days after then-President Trump announced her nomination.

“The Senate will have a fair process that moves quickly so we can confirm President Biden’s nominee to fill Justice Breyer’s seat as soon as possible,” Schumer said after Breyer’s announcement.

Democrats on the Senate Judiciary Committee — led by Sen. Dick Durbin (D-Ill.), Schumer’s No. 2 — also held their first meeting on the issue, via Zoom, on Thursday night, as they lay the groundwork and wait for Biden to name a nominee.

On paper, the Supreme Court confirmation process might be read as placing Schumer in another no-room-for-error showdown, where much of the public focus will be on members of his party and the potential for Democratic divisions.

Democrats can confirm a Supreme Court nominee on their own if every member of the Democratic caucus supports the person and Vice President Harris breaks the tie.

But Schumer is entering the Supreme Court discussion on easier footing than he’s had in recent Democratic brawls. Unlike legislative fights and Democratic opposition to some of Biden’s executive nominees, Democrats have been totally unified in their support of the 42 judicial nominees they’ve confirmed for Biden so far.

“Just judging by the way 2021 and early 2022 have gone in terms of judicial confirmations, we feel pretty good,” said Adam Bozzi, a spokesperson for End Citizens United.

That’s a shift from the dynamic on Build Back Better (BBB), Biden’s sweeping social and climate spending bill, and a long-shot, Biden-backed push to change the Senate’s rules to pass voting rights, both of which had Schumer having to manage high-profile infighting amongst his own members.

The back-to-back setbacks reopened old fault lines among progressives and moderates, the House and Senate, and even between Schumer and Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.). And many of those same tensions are lingering as Democrats try to revive BBB.

“It is ... being opposed by two members of the Democratic caucus. Forty-eight members are for this, the House of Representatives are for this, two Democrats are against it,” Senate Budget Committee Chairman Bernie Sanders (I-Vt.), who has opened the door to supporting primary challenges to Manchin and Sinema, said during an event with advocates this week.

But Democrats view the upcoming Supreme Court nomination, absent a massive stumble, as an opportunity to unify the Democratic caucus heading into November and deliver a big win for Biden.

“I don’t think that it will be particularly difficult to confirm. ... I think there will be some Republican yeses, and I think there will be overwhelming Democratic support,” Sen. Sherrod Brown (D-Ohio) told WTRF, a local TV station that is part of Nexstar Media Group, which also owns The Hill.

That’s making activists less worried about Schumer needing to arm-twist Manchin and Sinema, the two senators who have emerged as perennial headaches for progressives, and hopeful for the potential for bipartisan support. GOP Sens. Lindsey Graham (S.C.) and Susan Collins (Maine) are the two Republicans left in the chamber who voted for former President Obama’s Supreme Court nominees.

“I think it’s very different from a situation where it was true from the jump that this was going to be a party-line vote, so you’re asking Manchin to stay on board because you can’t afford to lose him," said Brian Fallon, the co-founder and executive director of Demand Justice, contrasting the Supreme Court nomination with the dynamic over BBB.

"In a scenario where there’s the very real prospect of bipartisan support from the beginning, it just changes the complexion of the whole conversation,” Fallon, who is also a former Schumer staffer, added.

Manchin has typically been deferential to a president’s judicial nominees. He voted for Trump’s first two picks, Justices Neil Gorsuch and Brett Kavanaugh, and said he only opposed Barrett’s nomination because it was in the lead up to the 2020 elections after Republicans refused to move Merrick Garland in 2016.

Manchin said during an interview with West Virginia MetroNews’s Hoppy Kercheval that he was open to supporting a nominee that is more ideologically liberal than he is, while quipping that “it's not too hard to get more liberal than me.”

"As far as just the philosophical beliefs, no, that will not prohibit me from supporting somebody," Manchin added.

Sinema, in a statement, said that she would make her decision based on three qualifications: “whether the nominee is professionally qualified, believes in the role of an independent judiciary, and can be trusted to faithfully interpret and uphold the rule of law.”

Democrats have been increasingly energized by Supreme Court fights, and judicial nominations more broadly, after watching Republicans, led by then-Senate Majority Leader Mitch McConnell (R-Ky.), block Garland and get three justices confirmed for Trump.

Schumer, who is up for reelection in 2022, has touted Democrats’ ability to get more than 40 judicial picks through the Senate in Biden’s first year, the most since former President Reagan’s first year in office.

And activists credit Schumer with making it clear at the outset that he’ll move quickly on whoever Biden picks, characterizing the win as a boon for the party’s base.

“The crown jewel of Biden’s presidency thus far has been his judicial nominees. And this is really a chance for him to make ... a lifetime impact on the makeup of the court,” said Indivisible's Hatcher-Mays. “It’s going to be exciting for the movement to get a win like that.”

#### It’s literally the only thing every Democrat agrees on, and Republicans are on board.

Paul McLeod 1-26, Politics Reporter for BuzzFeed News, “Biden’s Supreme Court Nominee Could Have A Surprisingly Smooth Ride In The Senate,” BuzzFeed News, 01-26-2022, https://www.buzzfeednews.com/article/paulmcleod/democrats-stephen-breyer-confirmation-manchin-sinema

The retirement of Stephen Breyer sets the stage for another heated Supreme Court confirmation battle in a divided Senate. But despite expectations, the nomination might not be very dramatic at all.

The razor-thin Democratic majority in the Senate has famously failed to come together on huge issues like the Build Back Better Act and overriding the filibuster to pass voting rights reforms. Republican opposition has been consistently high to unanimous.

But on judicial nominees, it’s a different story. Republican opposition remains high, but Democrats have moved in harmony to move President Joe Biden’s judicial nominees forward at a rapid pace. Confirming judges has been the one area where Senate Democrats have consistently unified. Not a single Biden judicial nominee has been blocked.

Even former president Donald Trump — who nominated three current justices — at times faced blowback from his own party over judicial nominations. Republican Sen. Tim Scott blocked a US Circuit Court nominee because of the judge’s past comments about race. Louisiana Sen. John Kennedy told a doomed Trump nominee “just because you’ve seen My Cousin Vinny doesn’t qualify you to be a federal judge.”

Biden has faced no such humiliations. Democrats confirmed 42 judges during his first year in office, outpacing the confirmation rates of any recent president. That is partly because Republicans changed the rules midway through Trump’s term to speed up the nomination process. But it is also partly because Democrats have worked together to move Biden’s nominees ahead.

The Senate is split 50-50, but Democrats hold the majority because Vice President Kamala Harris decides the tie-breaking vote. Any single Democrat, then, has the power to swing a vote. Sens. Joe Manchin and Kyrsten Sinema have used this power to great effect in legislative battles, but neither has done so when it comes to nominations.

The most controversial Biden nominee may have been Jennifer Sung. Republicans were angered by her previously signing of an open letter calling Supreme Court Justice Brett Kavanaugh “intellectually and morally bankrupt.” But it didn’t matter. Sung did not receive a single Republican vote, but Democrats stuck together and confirmed her to the 9th Circuit Court of Appeals in a tight 50–49 vote.

Up until 2017, Senate rules required 60 votes to confirm a Supreme Court justice. Republicans nuked that higher threshold to confirm Neil Gorsuch, and tight votes along mostly partisan lines have quickly become the norm.

“It’s a new ballpark for Supreme Court nominees,” Brookings Institution senior fellow Sarah Binder said. “The terrain here is majority rule. And Democrats on judges have been remarkably on the same page.”

Biden also has a chance of winning over some Republican votes. Sen. Susan Collins has voted for every Democratic nominee to the Supreme Court before her. Her one "no" vote was to a Trump nominee, Amy Coney Barrett. Although a number of recent nominations to the court — specifically the decision from then–Senate majority leader Mitch McConnell not to hold hearings for nominee Merrick Garland in 2016, and the contentious Kavanaugh process — have been complicated and vicious, a number of recent Supreme Court justices haven't been. Barrett's confirmation was little in doubt once announced. Republicans held a majority of Senate votes like Democrats do now.

Former Judiciary Committee chair Lindsey Graham is on record as saying qualified nominees should be approved and voted to confirm both Obama nominees. Graham is already predicting the success of the next Supreme Court nominee.

“If all Democrats hang together — which I expect they will — they have the power to replace Justice Breyer in 2022 without one Republican vote in support,” he said in a statement. “Elections have consequences, and that is most evident when it comes to fulfilling vacancies on the Supreme Court.”

Collins and Graham are the only current Republicans who voted for President Barack Obama’s Supreme Court nominees. But Sens. Lisa Murkowski and Mitt Romney have consistently proven to be swing votes on politically divisive issues.

The debate will likely get underway soon. Senate Majority Leader Chuck Schumer released a statement Wednesday saying Biden’s nominee will receive a prompt hearing and will be “confirmed by the full United States Senate with all deliberate speed.”

### Link---2NC

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

CONGRESS HAS LITTLE TO SAY ABOUT THE SPECIFICS

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

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

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

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

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

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

The representatives ought to consider it, too.

#### FTC enforcement causes political backlash from lobbies and Congress

Alison Jones 20, Professor of Law at King's College London and Solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, Professor at the George Mason University School of Law, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy”, The Antitrust Bulletin, Volume 65, Issue 2, p. 238-239

In the end, FTC’s efforts to improve capability proved insufficient to support the expanded enforcement agenda, partly because the Commission failed to formulate an adequate plan to overcome the full range of implementation obstacles. The FTC seriously overreached because it did not grasp, or devise strategies to deal with, the scale and intricacies of its expanded program of cases and trade regulation rules, the ferocious opposition that big cases with huge remedial stakes would provoke from large defendants seeking to avoid divestitures, compulsory licensing, or other measures striking at the heart of their business, and the resources required to deliver good results. The Commission lacked the capacity to run novel shared monopoly cases that sought the break-up of the country’s eight leading petroleum refiners and four leading breakfast cereal manufacturers79 and simultaneously pursue an abundance of other high stake, difficult matters involving monopolization, distribution practices, and horizontal collaboration. The FTC also overlooked swelling political opposition, stoked by the vigorous lobbying of Congress, that its aggressive litigation program provoked.80

New legislation envisaged by reform advocates could ease the path for current government agencies seeking to reduce excessive levels of industrial concentration by arresting anticompetitive behavior of dominant enterprises (through interim and permanent relief) and by blocking mergers that pose incipient threats to competition. It seems clear, however, that such dramatic legislative proposals are likely to be fiercely contested through the legislative process and so will take time, and be difficult, to enact. Further, even if armed with a more powerful mandate, the DOJ and the FTC will still have to bring what are likely to be challenging cases applying the new laws (see Section F). The adoption, setting up, and bedding in of new legislation or regulatory structures and bodies is therefore unlikely to happen very quickly and is, consequently, unlikely to meet the demands of those seeking urgent and immediate action now.

#### ‘Political independence’ is fake

William E. Kovacic 15, Global Competition Professor of Law and Policy, George Washington University Law School and Non-executive Director, United Kingdom Competition and Markets Authority, JD from Columbia University Law School, BA from Princeton University, and Marc Winerman, Formerly of the Federal Trade Commission, “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness”, Iowa Law Review, 100 Iowa L. Rev. 2085, https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

The notion that any competition agency is so isolated from the political process is a fiction. For older and newer competition agencies alike, pressure from elected officials is ubiquitous and relentless. The real questions for those designing a competition agency are how much independence is desirable and what mechanisms will most likely allow effective agency functioning with adequate accountability. From the competition agency’s perspective, a continuing challenge—even for an agency with years of experience and nominal institutional safeguards to create autonomy—is how to blunt attempts at destructive political intervention and see that harmful political influence does not infect the agency’s operations and, ultimately, risk destroying it.

A further tradeoff exists between independence and the agency’s effectiveness. One valuable function of a competition agency is to advocate that legislatures and other government departments adopt pro-competitive policies. Fulfillment of this function requires engagement with elected officials. A completely autonomous competition agency is unlikely to build the political relationships needed to serve as an effective advocate, or to be consulted in a manner timely to ensure that its voice will be heard in the formulation of legislative or regulatory measures.

III. The Sources of Political Pressure

The intensity of political pressure a competition agency faces depends upon the functions it performs, the sanctions it can impose, and how aggressively it performs its duties. As powers grow, efforts by elected officials to determine how the agency uses such powers expand. Feeble public institutions generally attract tepid interest among politicians (except on rare occasions when the agency’s perceived weakness itself becomes a political issue).

In its century of experience, the FTC has occasionally had volatile relations with Congress. In part, the Commission’s broad statutory mandate elicits interest from Congress. The FTC Act gives the FTC jurisdiction over much of the economy and directs the agency to operate in political terrain. Below we explore the implications, for drafting laws and designing institutions, of the tasks Congress assigned the FTC in 1914 and the design choices Congress made in creating the agency.

### Link---AT: Plan Popular---2NC

#### The plan is politically dead in the water

Chris Matthews 12-27, Stocks Reporter at MarketWatch, “Look for Washington Regulators — Not Congress — To Try to Block More Mergers in 2022, Analysts Say”, MarketWatch, 12/27/2021, https://www.marketwatch.com/story/look-for-washington-regulators-not-congress-to-try-to-block-more-mergers-in-2022-analysts-say-11640110564

Antitrust reform was supposed to be one of the best chances for bipartisan compromise during the current Congress. But critics of monopoly power will likely have to rely on independent agencies for any federal government action against Big Tech next year, experts tell MarketWatch.

“There is still pervasive angst toward Big Tech, but we are no closer to a coordinated bipartisan response,” even after a year of hearings and scandals that has created the perception of a united political front against powerful tech platforms, Robert Kaminski, policy analyst at Capital Alpha Partners, said in an interview.

The chances for a bipartisan push to strengthen antitrust enforcement was likely highest in June, when Democratic Rep. David Cicilline of Rhode Island and Republican Rep. Ken Buck of Colorado led the passage of seven new antitrust bills through the House Judiciary Committee.

If the bills were to become law, they would make it more difficult for large tech platforms to acquire smaller companies, ban large tech firms from using their platforms to promote their own products at the expense of rivals, and force social media companies to make it easier for users to switch to a rival service.

The most sweeping bill of the six is the Ending Platform Monopolies Act, which would end “the ability for dominant platforms to leverage their control over multiple business lines to self-preference and disadvantage competitors,” and could potentially deal a serious blow to the business models of companies like Amazon.com Inc. AMZN, -1.14% and Google parent Alphabet GOOG, -0.91%.

That these were able to pass the House Judiciary Committee in a bipartisan fashion was seen at the time as evidence of broad support for these strict measures, but the unique composition of the panel means that those results cannot be extrapolated to Congress at large, according to a recent analysis of antitrust dynamics published by Beacon Policy Advisors.

“While this package of bills was voted out of committee in a relatively contentious markup, they have completely stalled on the House floor,” Beacon analysts wrote. “This is not too surprising given the resistance that they face from much of the House Republican caucus and lack of unified Democratic support.”

Sen. Amy Klobuchar, a Minnesota Democrat, has taken up the cause of these bills, putting forth bipartisan legislation in the Senate that scales back the Cicilline-Buck legislation in an effort to get broader support. While she has gotten support from high-profile Republicans like Sen. Chuck Grassley of Iowa, the lack of public support for these measures from Republican Sen. Mike Lee of Utah illustrates the difficulty any tough antitrust legislation will have getting 60 votes in the Senate and a majority in the House.

Lee, as the ranking Republican on the Senate antitrust subcommittee, is “one of the more influential members of the Republican caucus on antitrust policy,” the Beacon analysts argue, and GOP senators, most of whom are skeptical of government oversight of the private sector, will take his lead on the issue.

The Beacon analysis also points to the importance of the 42 Democrats representing California in the House after the state’s moderates — including Reps. Zoe Lofgren, Lou Correa, Ted Lieu and Eric Swalwell — voted against the measures in the judiciary committee, arguing that they went too far. “It should also be said that without the support from House Speaker Nancy Pelosi [also a California Democrat], these bills would be effectively dead on arrival,” they wrote.

#### Even if popular, it 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.

### Warming---BBB Key---2NC

#### It gets modelled globally.

David Sherfinski 2-1, U.S. Correspondent at the Thomson Reuters Foundation, “Stalled Build Back Better package threatens US influence on climate,” Guam Daily Post, 02-01-2022, https://www.postguam.com/the\_globe/nation/stalled-build-back-better-package-threatens-us-influence-on-climate/article\_35cd60aa-8317-11ec-abc9-772a7df28ca8.html

Failure to push Joe Biden's signature climate legislation through Congress could jeopardize Washington's influence in the fight against global warming and open the door for China and other nations to backslide, lawmakers and activists say.

The White House is battling to salvage some $500 billion in climate funding measures contained in Biden's stalled "Build Back Better" spending bill at the start of another crucial year for international climate action.

"We essentially promised the world we were going to do this," said U.S. Rep. Jared Huffman of California. "If we go (to COP27) empty-handed, it's potentially lights-out for climate action," referring to U.N. talks due to be held in November.

The legislative wrangling is being closely watched by countries including China, currently the world's biggest greenhouse gas emitter, climate policy analysts said.

Failure by Washington to make good on commitments to cut emissions and other promises contained in the legislation could affect climate action by Beijing despite a bilateral deal last year, they said.

"There will be a direct impact ... on China's appetite to embrace climate action," said Li Shuo, senior global policy advisor at Greenpeace East Asia.

Indian Prime Minister Narendra Modi has pledged that India will hit net zero emissions by 2070, but the country continues to be intensely protective of its coal industry.

The U.S. stall-out highlights broader global cost challenges in the climate mitigation fight, said Vaibhav Chaturvedi, fellow at the Council on Energy, Environment and Water, a research group in New Delhi.

"This development would have significant negative implications for the availability of climate finance for pushing renewable energy in the developing world," he said.

Closer to home, U.S. trade cooperation with Canada that could help both countries develop their electric vehicle industries could also be affected, said Eddy Perez from Climate Action Network Canada, an advocacy coalition.

"The U.S. can't go around the world telling others to increase their climate action if they ... don't clean up their house first," he said.

'Ambitious goal'

Soon after he was sworn in, Biden rejoined the 2015 Paris Agreement following the withdrawal led by his predecessor, Donald Trump, and has launched numerous climate-related policies during his year-plus in office.

The White House defended Biden's record on climate change, pointing to his "whole-of-government" approach and highlighting measures such as building electric vehicle infrastructure and fast-tracking clean energy projects.

"The President set an ambitious goal to reduce greenhouse gas pollution ... by 50-52% in 2030, empowering the U.S. to create good jobs and improve public health ... while rallying the world to make their own bold contributions," an official said by email.

But negotiations in the U.S. Congress over the multibillion-dollar plan for clean energy investments and tax credits have stalled over objections from U.S. Sen. Joe Manchin, a Democrat who represents coal-rich West Virginia.

Mid-term elections, due in November, could bring further trouble for Biden's climate agenda, incentivizing Democrats to salvage as much as possible before the elections.

Republicans, who oppose his polices on global warming, look set to retake control of at least one chamber of Congress, according to political analysts.

"That will really have a big impact on climate work internationally," Isabella Lovin, a former Swedish environment and climate minister, said at a recent event.

The administration has said the stalled bill is not the only way of reaching the president's emissions targets, which experts say are needed to help limit global temperature rise to no more than 1.5 degrees Celsius, the lower target of the Paris accord.

Congress passed a $1 trillion-plus infrastructure package last year that included money for initiatives such as electric vehicle charging stations, for example.

A State Department spokesperson said U.S. leadership has led to initiatives like a global pledge to cut methane emissions and the U.S.-China accord, and that 2021's COP26 talks represented the "largest raising of ambition in the history of the global climate fight."

But independent analyses have shown it will likely take additional congressional legislation, plus further action from Biden, U.S. states and the private sector, to hit the 2030 target.

Picking up the pace

Criss-crossing the globe to push for collective action, Biden's own special climate envoy, John Kerry, has called for faster emissions-cutting since the COP26 talks in Glasgow.

"Bottom line: Glasgow was a huge step forward," Kerry said at a World Economic Forum event this month. "But we also know no one is moving fast enough. The world has to really pick up the pace."

While no one doubts Biden's commitment to the issue, the legislative gridlock is damaging when time is of the essence, said Rachel Kyte, dean of The Fletcher School at Tufts University in Massachusetts.

"The inability to put in place an implementation plan around the ambition announced by the administration is massively distracting," Kyte said.

"It is undoubtedly suboptimal if the largest power in the world isn't able to be at the front of the line, as it were."

### Warming---Impact---2NC

#### It’s the only existential risk

Samuel Miller-McDonald 19, PhD Candidate in Geography and the Environment at the University of Oxford, “Deathly Salvation”, The Trouble, 1/4/2019, https://www.the-trouble.com/content/2019/1/4/deathly-salvation

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices.

An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive.

In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less suicidal civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows?

What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.