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A Pro-Growth Agenda for the 117th Congress

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Few economic sectors rival the technology and telecommunications industries in how rapidly—and momentously—they have evolved. Across the globe, the Internet and high-tech firms have reshaped how we work, live, and interact with one another. Just three decades ago, only a sliver of the population could afford mobile phones, while the World Wide Web had not yet been invented. Today, mobile devices are ubiquitous and more than half of the world's population uses the Internet. Massive investment in information technology and infrastructure has fueled innovation, greatly expanded global productivity, created tens of millions of high-skilled jobs around the world, and improved our lives in ways few could imagine two decades ago.

As technology evolves, new challenges invariably arise, including for policy makers. Establishing ill-conceived rules could stifle the high-tech economy, especially if lawmakers bow to pressure from influential business interests or self-proclaimed consumer advocates to saddle emerging technology markets with arbitrary regulations or draconian liability regimes. This does not mean that government officials should simply ignore disruptive innovations. To the contrary, newcomers who redefine existing markets—or create new markets—often merit a reevaluation of existing rules to eliminate governmental obstacles to innovation. As history shows, most concerns about novel technologies eventually prove unfounded or overblown, especially given our capacity to adapt to a changing world without help from central planners.

As lawmakers consider how to govern the technology and telecommunications sectors, new mandates or prohibitions should be avoided in all but the most exceptional circumstances. Where new services or tools raise legitimate concerns about public health, consumer protection, or competition, lawmakers should resist the urge to act until they first observe how voluntary institutions—the marketplace and civil society—react to supposed market failures, if and when they arise. In the unlikely event that legislative intervention is necessary, Congress should change the law using a scalpel, not a sledgehammer.

At the same time, lawmakers should break out the sledgehammer when it comes to tearing down convoluted statutory and regulatory schemes devised in an earlier era—especially schemes administered by independent regulatory agencies, which in recent years have pulled out all the stops to remain relevant in a world where they may no longer have a useful role to play.

More recently, legislation in Congress from both sides of the aisle threaten Internet freedom in various ways. Democrats, along with some Republicans, have raised antitrust concerns about major Internet firms and threatened them with heavy-handed regulation or even breakup. Meanwhile, Republicans have proposed treating online social media platforms as a "public square," comparing moderation of content by private companies to government censorship. These misguided efforts would put new regulatory shackles on a thriving sector at the time we can least afford it. The connectivity of the Internet has made it easier to work, shop, and access entertainment at home, which has been essential as part of the response to COVID-19.

PROTECT INTERNET FREEDOM AGAINST BURDENSOME NET NEUTRALITY MANDATES

The Internet has transformed global commerce, as American companies have led the way in developing better ways to harness its power and in building the infrastructure to enable this progress. Although the online economy has remained largely free from the shackles of bureaucracy and overregulation for much of the past quarter century, this era of freedom has come under attack in recent years.

On the infrastructure side, a decade-long effort by federal regulators to dictate business models to the companies that provide broadband Internet access to consumers has been halted by the Federal Communications Commission (FCC)—for now. Firms that operate websites, apps, and mobile platforms have managed to evade a similar crackdown so far, but recent legislative proposals raise the concern of greater regulation of various aspects of the Internet.

Since taking off in the 1990s, the Internet has thrived as a platform for free expression, innovation, and experimentation. It helped that federal agencies refrained from regulatory intervention. Unfortunately, during the Obama administration, the FCC attempted to expand its reach over the Internet. This effort initially focused on the principle of "net neutrality," which holds that broadband providers should be barred from blocking or prioritizing time-sensitive Internet traffic—such as videoconferencing or online gaming—either upon the request of broadband subscribers or companies that sit at the "edge" of the network.

Congress should:

- Classify the provision of broadband Internet access to consumers, whether by wire or radio, as an information service not subject to common-carrier regulation under the Communications Act of 1934.
- Comprehensively revise the Communications Act to deny the Federal Communications Commission the authority to regulate either the provision of broadband Internet access or services that use the Internet. Specifically, amend Section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 1302) to clarify that it does not grant to the FCC any regulatory authority not otherwise afforded to the agency by the Communications Act, thereby reversing the D.C. Circuit Court's contrary holding in *Verizon v. FCC*, 740 F.3d 623, 637–40 (D.C. Cir. 2014).

Over 20 years have passed since Congress last made any major changes to the Communications Act of 1934 (47 U.S.C. § 151 *et seq.*). In 1996, Congress passed the Telecommunications Act of 1996 (Pub. L. 104–104, 110 Stat. 56), which contained practically no mention of the Internet. Since then, the FCC has struggled with questions of whether and how it should regulate the Internet. Although the 1996 Act made clear that the FCC could not regulate "information services" (47 U.S.C. § 153[24]), it did not expressly specify whether providing Internet access is an "information service" or a "telecommunications service." The Communications Act empowered the FCC to regulate providers of telecommunications services as common carriers, which it can subject to obligations ranging from mandatory interconnection to price regulation (Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, 11534–35, para. 69 & n.140, 1998).

In the aftermath of the 1996 Act's passage, the FCC exercised restraint in its approach to regulating the Internet. In a proceeding launched by the FCC under Clinton-appointed Chairman William Kennard and completed under Bush-appointed Chairman Michael Powell, the FCC concluded in 2002 that broadband delivered by cable television companies was an information service, not a telecommunications service, and therefore should not be subject to common-carrier regulation. In 2005, the U.S. Supreme Court upheld the FCC's decision as a permissible construction of the 1996 Act (*National Cable and Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 2005).

A related question arose during those years: How should the FCC treat broadband services offered by incumbent telephone companies—also known as the "Baby Bells," the local telephone providers that were part of AT&T before its court-ordered breakup in the 1980s? The FCC had long regulated these legacy phone companies as common-carrier telecommunications services under Title II of the Communications Act (47 U.S.C. § 201 *et seq.*).

Section 101 of the 1996 Act required the Baby Bells to make their last-mile facilities available at government-regulated rates to third-party competitors. Many of those competitors, like the Baby Bells themselves, had started offering broadband Internet access over telephone wires using a technology known as the digital subscriber line.

In 2005, shortly after the Supreme Court's decision in *Brand X*, the FCC decided to align its treatment of broadband delivered over telephone lines with broadband over cable facilities, so it deregulated the broadband component of all wireline facilities. This decision not only freed phone companies from common carrier regulation of their broadband offerings, but also meant they no longer had to share their private property with broadband rivals.

For a time, wireline broadband providers operated outside the FCC's legacy regulatory regime, and the Internet flourished. Firms such as Google, Facebook, Netflix, and Amazon grew into global high-tech leaders at a time when U.S. Internet service providers operated and innovated largely free from the strictures of federal regulation.

The FCC's initial efforts to regulate Internet service providers—first through adjudication, then through rulemaking—did not end well for the agency. In 2010, the U.S. Court of Appeals for the D.C. Circuit invalidated the FCC's first net neutrality attempt, in which the agency had ordered Comcast to stop degrading certain forms of peer-to-peer file sharing (*Comcast Corp. v. FCC*, 600 F.3d 642 [2010]). In response, the FCC issued net neutrality rules, but those were also invalidated by the court in 2014—even though the D.C. Circuit accepted the agency's argument that section 706 of the 1996 Telecommunications Act granted the FCC an independent source of authority for certain types of regulation (*Verizon v. FCC*, 740 F.3d 623 [2014]). The court nonetheless held that the agency's no-blocking and nondiscrimination rules failed to "leave sufficient 'room for individualized bargaining and discrimination in terms.'"

In response, the FCC launched another effort to impose net neutrality regulation on Internet service providers. In May 2014, after a vigorous campaign by left-leaning activists and the Obama administration to influence the FCC—a putatively "independent" agency—Democratic Chairman Tom Wheeler proposed that the agency reinterpret the term "telecommunications service" as used in Title II of the Communications Act, to encompass broadband Internet access services. That reinterpretation was contrary to the FCC's earlier determinations that Internet access was an "information service." In early 2015, the FCC voted along party lines to approve the proposal.

Several companies and other parties immediately petitioned the U.S. Court of Appeals for the D.C. Circuit to vacate the FCC's order, arguing that the agency's decision to reclassify Internet access service as a telecommunications service was arbitrary and capricious. But in June 2016, the court upheld the agency's order in a two-to-one opinion (*U.S. Telecom Association v. FCC*, 825 F.3d 674 [2016]).

The FCC then embarked on a "regulatory voyage" using its proclaimed authority, intervening in ways that had little to do with net neutrality. For instance, in 2016, the FCC imposed draconian rules on the privacy practices of Internet service providers that curtailed the ability of broadband providers to offer consumers lower prices in exchange for targeted advertising. That made it costlier for broadband companies to do business.

That FCC regulatory onslaught came to an abrupt halt in early 2017, when the agency's leadership changed. Under the agency of Chairman Ajit Pai, the FCC reversed course and issued new regulations in January 2018 to restore Internet freedom (83 Fed. Reg. 7852). Among other things, the FCC reestablished its prior treatment of Internet service providers as information services not subject to utility-style common-carrier rules. Investment increased by $2.1 billion between 2016 and 2017 and to $3.1 billion between 2017 and 2018. Broadband speeds are up by approximately 85 percent since the end of 2016.

In May 2018, the U.S. Senate voted 52–47 to pass a Congressional Review Act resolution of disapproval regarding the FCC's order (S.J. Res. 52, 115th Congress). Congress should reject all proposals to reinstate net neutrality–style regulations of no blocking, no throttling, and no fast lanes. Instead, Congress should pass legislation to ensure that a future FCC cannot restore the onerous regulations the current FCC recently eliminated.

Proof of the success of the light-touch regulatory regime came with the Internet's robust performance in the face of enormous pressure during the COVID-19 quarantine. As tens of millions of Americans shifted their work, school, and entertainment needs online, U.S. broadband infrastructure bore the load well. By comparison, Internet providers in the European Union—with its heavy-handed utility-style regulations having attracted less infrastructure investment before the health crisis—struggled to meet the increased demand.

The second insight gleaned from comparing how the two different regulatory approaches play out in a crisis lies in the European Union's attempt to fix Internet capacity issues. European officials asked content providers to deliberately slow their content. This practice is known as throttling and can be done by edge providers or Internet service providers (ISPs). But it is illegal for ISPs to engage in it under EU net neutrality laws and it is one of the practices that would be outlawed by proposed U.S. net neutrality legislation. Banning ISPs from doing what regulators would end up asking content providers to do is incoherent public policy. Stateside, politicians and regulators should learn from Europe's mistakes and not ban business practices that may come in handy one day, in unforeseen circumstances.

And who is to say the same will not be true for the other two practices that net neutrality regulations seek to ban, namely, blocking and paid prioritization? Net neutrality regulations would ban Internet service providers from blocking any legal content. The reasoning for such a ban is dubious. Broadband companies own their private lines and should be able to choose what goes over them. That raises the question: Do consumers really need the government dictating a no-blocking policy that tramples on Internet service providers' property rights? Furthermore, there is scant evidence that ISPs have ever intentionally blocked access to legal content since the practice was legalized in 2017.

Net neutrality regulations would also prevent broadband companies from accepting payment from content providers in exchange for moving their data across the network more quickly. That practice is known as paid prioritization. Yet paying more for some critical services to be delivered faster over networks might be beneficial for consumers. Remote surgeries and telehealth applications come to mind these days. Consumers benefit from more options at different price points. Paid prioritization on broadband service is no exception.

Eliminating the threat of overly burdensome regulations would likely spur continued and increased investment in broadband infrastructure. Similarly, eliminating the threat of a 50-state patchwork of state net neutrality laws would likely incentivize spending for an even more robust network. More than 30 states have made legislative moves toward instituting their own net neutrality regulations since the federal repeal. State proposals are not only ripe for interstate commerce challenges, but also pose a real threat to return on investment for broadband providers. Congress should act to preempt these state laws.

Experts: Clyde Wayne Crews Jr., Jessica Melugin, Ryan Nabil

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PROTECT PRIVACY AND CYBERSECURITY BY SECURING PRIVATE INFORMATION FROM UNDUE GOVERNMENT PRYING

More and more consumers use Internet-based services such as Snapchat and Gmail for their private communications and back up sensitive files with "cloud" platforms like Dropbox and iCloud. These services do not guarantee perfect security. Fortunately, for Internet users who are not celebrities or public figures, malicious actors on the Internet rarely cause catastrophic consequences, especially for users who take reasonable security precautions. But criminals and hackers are not the only adversaries threatening our privacy and security—we should also worry about government.

Evolving technologies have eroded many of the legal constraints that were designed to protect Americans from overzealous or unscrupulous officials who want to access private information that users store with third-party service providers. Numerous government entities—from local law enforcement to federal intelligence agencies—have a powerful arsenal of technological and legal means at their disposal for accessing our communications and our metadata—information about our communications, such as when and to whom a particular email was sent. As several high-profile leaks and recently declassified documents have revealed, the breadth of information the U.S. government collects about its citizens is staggering—and many programs surely exist that the public is not yet aware of.

To level the playing field between the government and the governed, Congress should update and expand the legal framework under which law enforcement and intelligence officials conduct surveillance and can compel private companies to divulge private information. By reaffirming the nation's commitment to individual liberty in the information age, Congress can reassure Americans that using the Internet and other cutting-edge platforms does not mean saying goodbye to privacy, and that fighting crime and protecting national security are consistent with the Fourth Amendment. In fact, Congress can strengthen our privacy while preserving most of the tools that law enforcement and intelligence agencies need to do their jobs.

Congress should:

- Require that all law enforcement and intelligence authorities obtain a search warrant before:
    - Compelling a provider to divulge the contents of a U.S. person's private communications or other personal information stored with a third-party provider, in accordance with the provisions of the Email Privacy Act (H.R. 387, 115th Congress).
    - Tracking the location of a U.S. person's mobile communications device.

The Stored Communications Act is the primary federal statute governing law enforcement access to private information stored by, or transmitted through, a third-party communications service (Electronic Communications Privacy Act of 1986, Pub. L. No. 99–508, title II, 100 Stat. 1848 [1986]; codified as amended at 18 U.S.C. §§ 2701–10 [2012]). This law—enacted in 1986 as part of the broader Electronic Communications Privacy Act—provides for varying degrees of protection for information stored electronically with third parties. Some of these protections are fairly noncontroversial.

For instance, law enforcement may compel a provider to divulge so-called basic subscriber information, including a subscriber's name and address, with a standard subpoena (18 U.S.C. § 2703[c][2]). Yet the same standard applies when law enforcement wishes to access the *contents* of private data stored with a cloud backup provider or folder sync service. (The government must generally give a subscriber notice before accessing the contents of his or her records, although the government routinely delays such notice under 18 U.S.C. § 2705[a].)

These subpoenas are typically issued by a prosecutor and receive no judicial review. On the other hand, the Stored Communications Act requires law enforcement to obtain a warrant issued upon a showing of probable cause before it may compel a provider to divulge the contents of a person's unopened emails stored remotely, provided that such emails are no more than 180 days old (18 U.S.C. § 2703[a]).

In 1986, when Congress crafted the Stored Communications Act, the distinction between opened and unopened mail and that between communications and other information stored electronically online made sense, given the state of technology at the time. Today, Americans reasonably assume that their digital "papers and effects" are safe from warrantless access by government—an assumption that is often inaccurate.

To remedy this mismatch between perception and reality, and to assure consumers that their data in the cloud are safe from law enforcement fishing expeditions, Congress should pass legislation based on the Email Privacy Act, which passed the House of Representatives in a unanimous vote in the 114th Congress (H.R. 699) and passed the House on a voice vote in the 115th Congress (H.R. 387). Congress should also require law enforcement to obtain a warrant before tracking the location of an individual's mobile device, unless a provider agrees to disclose a subscriber's information due to an apparent emergency involving an imminent threat to human life, such as the kidnapping of a child.

Experts: Ryan Radia, Clyde Wayne Crews Jr.

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EMPOWER THE MARKET TO PROTECT CYBERSECURITY

Companies and consumers are increasingly worried about the security of their digital information. A single data breach that compromises a firm's trade secrets or customer information can cost $1 billion or more in identity theft, lost business, system repairs, legal fees, and civil damages. Although cybersecurity is primarily a technological and economic challenge, laws and regulations also shape firms' and individuals' choices about how to secure their systems and respond to intrusions.

Congress should:

- Reject proposals to regulate private-sector cybersecurity practices.
- Focus on defending government systems and networks from cyberattacks.

The federal government has two primary roles in cybersecurity. First, it must enforce laws against accessing computers and networks without authorization by investigating suspected intrusions and prosecuting such offenses. Second, it needs to better secure its own computers and networks—with a particular focus on systems that could endanger human life, if compromised.

Some bills introduced in Congress in recent years would have the federal government regulate private-sector cybersecurity practices. Those proposals are unwise. Any improvements they bring about in cybersecurity—if they are even realized—would likely be offset by countervailing economic burdens. Although many businesses have experienced costly cybersecurity intrusions, those businesses also tend to bear much of the ensuing costs—customers leave, insurers increase premiums, and trial lawyers purportedly representing injured classes of people file lawsuits against the business.

Firms that suffer cyberattacks due to their lax cybersecurity practices often impose costs in the form of externalities—such as the time a consumer spends resolving disputes with banks over fraudulent credit card purchases—on third parties that may be unable to recover the losses. But the existence of an externality does not necessarily mean government intervention is needed to eliminate or mitigate it. Even if a systemic market failure existed in cybersecurity, why should regulators be expected to know how a firm should allocate its cybersecurity budget or how much it should spend on cybersecurity? Adjusting liability rules so that companies bear a greater share of the costs resulting from their cybersecurity behavior is far more likely to enhance social welfare than prescriptive regulation.

Experts: Ryan Radia, Clyde Wayne Crews Jr., Ryan Nabil

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PROTECT CONSUMER PRIVACY

As more and more economic activity moves online, especially in the wake of the COVID-19 pandemic, more and more potentially sensitive information about Americans will be recorded, stored, and distributed by electronic devices and Web services. Although this creates obvious risks, it also presents opportunity. Americans undeniably value their privacy, but that value fluctuates drastically from person to person and in different contexts. The fact that individuals value privacy at differing levels tells us that consumer privacy protections are best left to the market, not government edict.

The market is already responding to this demand. Companies compete with one another to offer a growing multitude of privacy protections and trade-offs that best suit individual consumers' preferences and needs. For example, social media platforms allow users to turn targeted advertising on and off. Some users may prefer the comfort of knowing that their online activity is not being recorded. Others may put a high value on seeing advertisements for products and services relevant to their needs and wants. As a result, a blanket ban on targeted advertising may preserve privacy, but could ultimately harm many consumers.

Regardless, state and international laws have already begun to dictate precise standards of privacy practices, affecting American consumers and firms. Examples include the European Union's General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA). When rules and regulations bleed over state and international borders, that is a clear indication that federal intervention is warranted.

The GDPR and CCPA are already producing unintended—yet predictable—outcomes. As former American Enterprise Institute scholar Dr. Roslyn Layton testified before the Senate Judiciary Committee in 2019, "[T]he GDPR and CCPA freeze the status quo in place, rewarding the largest players; punish small- and medium-sized enterprises; and trick people into thinking that they have more privacy when in fact they are being put at greater risk."

Rather than simply develop a federal version of the CCPA or an American version of the GDPR, Congress should preempt regulations like the CCPA with a framework that encourages competition and innovation in the marketplace for privacy protection.

Congress should:

- Protect encryption and resist efforts to weaken it.
- Reform antitrust law to allow for privacy coordination, knowledge sharing, and standard setting within industries.
- Create regulatory safe harbors to encourage good-faith efforts by tech companies to protect consumer privacy.
- Devise policy with an increased focus on the proper role of government in privacy protection—to deter fraud, enforce contracts, and investigate and prosecute malicious acquisition and use of information.

Something Congress can do easily to protect consumer privacy would not require passing any new legislation. In fact, not passing certain legislation is key. At present, efforts are underway to weaken encryption. Encryption is the practice of encoding information in a way that only the devices of the intended recipients or readers can decode. It is a high-tech version of the Little Orphan Annie decoder ring, as seen in the classic film *A Christmas Story*. Encryption offers robust privacy protections for any information transmitted online, from financial transactions to personal chats.

There have been numerous calls and proposals to create a special government "back door" or key to encryption technologies. The problem is that once such a weakness is created, even for well-intended purposes, it becomes available for anyone to potentially exploit. The encryption-based protections that underlie most of the secure Internet today would have to be fundamentally restructured at an enormous cost. This cost would not outweigh the benefits. As experts have noted, even with encryption technologies, law enforcement agencies and other government security agencies have access to exceptional surveillance capabilities and enjoy close cooperation with private firms.

Encryption is a widespread and effective practice voluntarily employed by countless online services. Congress should abandon efforts to undermine encryption and instead focus on promoting more practices like encryption. Congress can do that in several ways.

One way that Congress can promote the development and widespread adoption of new privacy protections is to ensure that antitrust law does not interfere. Firms may be hesitant to coordinate and cooperate to share best practices and new privacy technologies, particularly given the intense antitrust scrutiny surrounding leading American technology companies. If firms choose to work together to achieve a beneficial privacy outcome for consumers, that is not something the law should punish.

On the other side of the coin, firms should also be encouraged to compete and innovate on privacy. Congress can encourage this experimentation through safe harbor incentives. If firms make good-faith efforts to implement new practices and deploy new technologies with the goal of protecting consumer privacy, they should enjoy a degree of liability protection in the event of a breach. No system will ever be perfectly impenetrable, so companies should feel secure in their attempts to stay ahead of bad actors.

Providing safe harbors for innovation in privacy protection is important because breaches may occur even if a company is not being negligent. Many consumer privacy violations are already criminal acts. The law should not hold victims of crime liable. The proper role of government in this area is to deter crime and uphold contractual agreements.

Congress should empower existing agencies—such as the Federal Trade Commission (FTC) and the Federal Bureau of Investigation—not only by providing them with additional resources for this effort, but also by clarifying their role in that regard. As Neil Chilson, former chief acting technologist at the FTC, wrote in 2018:

> Any legislation ought to further detail the Section 5 approach to privacy by specifying the criteria for consumer privacy injury in terms of deception and unfairness and empowering the FTC to bring enforcement actions in cases where such injury occurs or is likely to occur. Penalties ought to be proportional to the harm caused or likely to be caused, but sufficiently high to deter problematic behavior.

Congress has the tools available to ensure rigorous protections of consumer privacy without the need to balance countless permutations of personal privacy preferences through legislation. Instead, Congress should empower firms to adopt and innovate in the area of consumer privacy, in turn empowering consumers.

Experts: Clyde Wayne Crews Jr., Jessica Melugin

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MODERNIZE REGULATION OF TELEVISION AND MEDIA

In recent years, Americans have increasingly augmented or even replaced traditional television viewing with Internet-based video services, such as Hulu, Netflix, Amazon Prime Video, and HBO Max. In fact, just two of these companies—Netflix and Amazon—have as many streaming video subscribers in the United States as every cable and satellite television provider combined. Yet the U.S. television marketplace remains fragmented because of an anachronistic set of laws and regulations that govern broadcasters, cable television providers, and satellite carriers. These outdated rules not only undermine the vitality of traditional media businesses, but also threaten the future of Internet-based television services.

Congress should:

- Amend the Copyright Act to give creators of original television programs the same exclusive rights to their audiovisual works as those afforded to other artists, regardless of whether such programming is transmitted over broadcast stations, cable systems, satellite carriers, or the Internet.
- Repeal Title VI of the Communications Act and related obligations and privileges to which multichannel video programming distributors are currently subject, except for provisions preempting states and their localities from imposing unreasonable regulations on television providers.
- Eliminate ownership limits and similar economic restrictions on legacy media businesses, including the newspaper cross-ownership rule, the television duopoly rule, and limits on local marketing agreements.

Under current law, if a cable or satellite company wishes to retransmit the signal of a broadcast station, such as a local NBC affiliate, it must first secure the consent of that affiliated station's owner (47 U.S.C. § 325[b]). In most circumstances, the station will permit the television content provider to carry its signal only if it agrees to pay the station a monthly fee based on the number of subscribers who receive the station's programming. Ultimately, consumers pay those fees as part of their monthly cable or satellite bill. Most of those fees are not retained by local stations. Instead, stations are typically obligated by contract to pay the fees they collect from cable and satellite providers to the nationwide television network with which they are affiliated.

Additionally, every cable or satellite company that retransmits a broadcast signal must pay the U.S. Copyright Office a legally prescribed amount in exchange for a compulsory copyright license to publicly transmit the underlying television programs. In turn, the Copyright Office distributes those fees to the copyright owners whose works were distributed by the television company.

In contrast to this convoluted regime, when an Internet company like Netflix or Hulu wishes to stream a television show to its subscribers, it must secure the permission of a single entity—the owner of the show's copyright. Both sides are free to come up with mutually agreeable terms. No payments to broadcasters or to the Copyright Office are required. There is no government fee schedule to learn. Of course, Netflix does not always come to an agreement when it wishes to stream a particular television show—from time to time, certain movies and shows disappear from the company's library, only to be replaced by new ones. Similarly, cable and satellite providers sometimes fail to reach an agreement with a broadcast station to carry its signal, resulting in a temporary "blackout" for the provider's subscribers. Neither situation is optimal, but existing law assigns the FCC a role in disputes involving broadcasters and traditional television companies, not in disputes involving Internet-based platforms. Clearly, FCC regulation has not improved market outcomes.

Many other complex regulations affect, and often distort, the market for television distributed by cable and satellite companies. Title VI of the Communications Act contains myriad rules governing cable systems and satellite carriers (47 U.S.C. § 521 *et seq*). For example, cable and satellite companies are subject to "program carriage" regulations that limit their ability to strike deals with video programming vendors to obtain exclusive programming rights (47 C.F.R. § 76.1301). Yet that is precisely the type of arrangement that has been central to the success of Internet streaming platforms, many of which differentiate themselves as the exclusive source of first-run hit shows, such as Netflix's *Umbrella Academy* and Amazon Prime Video's *The Boys*. In fact, the FCC has even suggested that it might reinterpret the Communications Act so that many of those legacy provisions would apply to "linear" Internet-based platforms that distribute live programming at prescheduled times.

Beyond the FCC's rules governing television, many other regulations inhibit diversity and competition in mass media. For instance, in recent years, the newspaper industry has lost billions of dollars in revenue and millions of subscribers. In many cities, iconic newspapers have ceased printing a daily edition or closed their doors entirely. Yet FCC rules effectively bar companies from owning both a newspaper and a broadcast television station serving the same city—despite the natural advantages of consolidating news-gathering operations across various media platforms. That regulation has undoubtedly contributed to the decline of newspapers, ultimately hurting people who live in communities that would otherwise be served by local media outlets with more funding, personnel, and other resources.

Experts: Jessica Melugin, Clyde Wayne Crews Jr., Ryan Radia

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UPDATE COPYRIGHT FOR THE INTERNET AGE

From television shows and music to movies, the United States is home to many of the world's most celebrated artists and creative industries. The nation's legal environment has helped content creators contribute to this cornucopia of creativity.

United States copyright law confers upon creators of original expressive works an attenuated property right in their creations. Copyright serves important societal interests—enriching not only artists, but also consumers, who benefit from works that might not have been created but for copyright protection. The Internet has made it easier than ever to sell copies and licenses to original works, but it has also facilitated the unauthorized distribution of such works on an unprecedented scale. Therefore, Congress should amend copyright laws to address provisions that inhibit consumers' ability to enjoy original works while also considering reforms to better protect creative works from infringement.

Congress should:

- Amend the U.S. Copyright Act so that it:
  - Bans tools that circumvent technological protection measures only if they are likely to undermine the value of the underlying creative works they seek to protect.
  - Affords users of copyrighted works an affirmative defense to charges of infringement if they cannot find the copyright holder despite conducting a good-faith, reasonable search for the owner.
  - Enhances the ability of copyright owners to ensure that infringing copies of their works on the Internet are permanently taken down without imposing undue burdens on online service providers that host or index content.

Article I of the U.S. Constitution empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Since the nation's founding, Congress has enacted a series of federal copyright statutes—including, most recently, the Copyright Act of 1976 (Pub. L. No. 94–553, 90 Stat. 2541 [1976]; codified as amended at 17 U.S.C. §§ 101–810). For the most part, that regime works well, enabling artists who create popular works to earn a commensurate return on their efforts.

However, the Copyright Act could be improved. For instance, its prohibition of tools that are designed to circumvent digital rights management (DRM) is overly broad. Although effective DRM can be invaluable in enabling content owners to better combat the infringement of their expressive works, not all forms of DRM circumvention are illegitimate or unlawful. Yet section 1201 of the Copyright Act makes it illegal to create or distribute technologies that are primarily designed to "circumvent a technological measure that effectively controls access" to a work or circumvent "protection afforded by a technological measure that effectively protects a right of a copyright owner" in a copyrighted work (17 U.S.C. § 1201).

In general, companies and individuals who sell or create tools that contribute to copyright infringement are not liable for those infringing acts if the tools are "capable of commercially significant non-infringing uses," to borrow a line from the U.S. Supreme Court's famous "Betamax" opinion in 1984 (*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417). Similarly, for firms that distribute tools designed to circumvent technological protection measures, courts should assess, on a case-by-case basis, whether those tools are designed and marketed *primarily* to infringe on the underlying work, as opposed to merely facilitating non-infringing uses of the work, including fair use (17 U.S.C. § 107).

Congress should also address the "orphan works problem" that plagues the continued enjoyment of millions of copyrighted works. The Copyright Act protects the exclusivity of each original work for the life of its author plus 70 years, or for works of corporate authorship, for 120 years after creation or 95 years after publication, whichever end point is earlier (17 U.S.C. § 302–4). People eventually die, and corporations are regularly acquired or cease to exist. Yet many works created by deceased persons or defunct corporations remain subject to copyright protection, making it difficult or impossible to ascertain who holds the copyright for those works. Companies that wish to monetize and distribute these so-called orphan works often forgo the opportunity, out of fear that the true owner might emerge out of nowhere and sue the company for copyright infringement.

To encourage copyright holders to come forward, and to protect firms that genuinely cannot find the owner of a work despite reasonable efforts to do so, Congress should amend the Copyright Act to create a new defense to copyright infringement lawsuits. A person who uses a copyrighted work should enjoy an affirmative defense to copyright infringement if he or she could not find the copyright holder after conducting a good-faith, reasonable search for the owner. This reform would not resolve the orphan works problem entirely, but it would mark a major step toward allowing consumers to enjoy the wealth of protected works with unknown owners.

Creators seeking to prevent the online infringement of their works regularly make use of the Copyright Act's notice-and-takedown regime, which Congress created in 1998 (17 U.S.C. § 512). Under that process, online service providers that store digital files on behalf of users—such as video hosting sites—or provide tools for locating information on the Internet—such as search engines—are eligible for a safe harbor from copyright infringement liability if they expeditiously remove content or links to infringing materials upon receiving notification from a copyright owner regarding the unauthorized work. Although that system has proved to be invaluable for creators seeking to protect their exclusive rights in their original works, many artists—especially those without the resources of larger content companies—struggle to effectively combat the unlawful dissemination of their creations. Therefore, Congress should carefully explore potential revisions to the Copyright Act's notice-and-takedown provisions to ease the burden on copyright owners whose works are repeatedly reposted after being taken down from the same provider's site.

In considering such reforms, lawmakers should resist calls to impose technological mandates on online service providers that could greatly increase the cost of operating user-centric platforms or encourage the use of tools that indiscriminately filter content without regard to whether it is protected by fair use.

Experts: Ryan Radia, Clyde Wayne Crews Jr.

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END UNNECESSARY MEDIA OWNERSHIP RESTRICTIONS

Local print and broadcast news organizations were already struggling before the COVID-19 crisis. Hundreds of newspapers and stations have shuttered over the past few years. In 2019, bipartisan legislation was floated to grant an antitrust exemption to local news publishers to allow them to collectively negotiate with tech platforms, where their content is often reposted. There have been repeated calls and proposals to extend various kinds of emergency funding to local broadcast stations and newspapers.

Some lawmakers have proposed injecting money into news outlets or letting them band together in certain ways, but outdated regulations remain on the books that explicitly prohibit local newspapers and broadcast stations from investing in one another.

Congress should:

- Repeal 47 U.S. Code § 257(b), Federal Communications Commission rules promulgated under said section pursuant to 47 U.S.C. §303 note, or both.

In 2017, the Federal Communications Commission, in compliance with its statutory mandate, reviewed its rules related to media ownership. The commission made several changes, including removing rules prohibiting common ownership of newspapers, television, and radio stations in a given local market. The FCC also relaxed rules related to the number of the largest broadcast stations by audience in a given market that could be commonly owned.

Yet in September 2019, two judges on the Third Circuit Court of Appeals reversed the FCC's changes. Of note, those same judges have blocked several attempts by the FCC to update its ownership rules over the past two decades.

The logic behind the FCC's changes is straightforward. First, all of those businesses are ultimately driven by advertising sales. Allowing common ownership of newspapers and broadcast stations would allow those businesses to achieve economies of scale in their sales departments and other aspects of their operations. Second, they would be able to offer a wider range of products and packages to potential advertisers.

Finally, new technology has rendered the rules obsolete. The original intent of restrictions on common ownership of various local media outlets was to ensure a diversity of voices and perspectives while preventing any single entity from dominating the flow of information in any given area. The Internet has rendered such concerns moot.

Today, virtually anyone with an Internet-connected device can share information or opinions and narrowly target audiences on the basis of any number of categories, including geography. Furthermore, newspapers now have their own podcasts and YouTube channels, while local broadcast stations have their own blogs. All are economically relevant substitutes for one another.

Those opposing the FCC's changes, including the Third Circuit judges, insist that the rules must be retained to protect minority and female voices in local news. Yet it seems none have considered the fact that no voices—minority, female, or otherwise—are protected when a newspaper stops the presses or airwaves go silent.

Entrepreneurs and companies with active investments in local media are natural suitors of other local outlets desperately seeking capital and other efficiencies. Yet regulations are keeping those ideal investors on the sidelines.

Congress has the power to eliminate restrictions on media ownership. As stated, the rules are unnecessary in an era when anyone with a smartphone can become a reporter and publisher. By removing unnecessary media ownership restrictions, or at least affirming the FCC's changes, Congress can ensure that fresh private capital reaches struggling local newspapers and broadcasters without creating new red tape or spending another borrowed dime.

Expert: Jessica Melugin, Ryan Nabil

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DISCOURAGE ANTITRUST ACTIONS AGAINST TECHNOLOGY COMPANIES

The real cost of antitrust regulation is the innovation it prevents. The risk of precluding advances and solutions that could prove critical to helping revive a struggling economy and provide relief to a stressed people is too high to justify lengthy investigations and harmful new legislation.

In its final months, the Trump administration filed antitrust suits against Google and Facebook, and 48 states jointly filed an additional complaint against Facebook. The cases will continue in some form under the Biden administration. Other cases are possible against Amazon, Apple, and other major tech companies. Those are the largest antitrust cases since the 1998–2002 Microsoft case, and the largest ramping up of overall activity since the 1960s. The push is also bipartisan.

U.S. antitrust policy operates under a consumer welfare standard. Companies, even large ones, operate largely free from antitrust enforcement unless there is evidence that their business practices are harming consumers or suppliers. Prices for many of Big Tech's services and products are zero. Prices for digital ads—which are online platforms' main source of revenue—fell by roughly half over the 2009–2019 period. With low and falling prices, continued innovation in the industry, and companies competing vigorously for consumers' attention, the Big Tech cases are unlikely to meet that threshold.

Antitrust advocates are arguing instead for using antitrust enforcement as one policy tool in a larger ideological campaign. Rather than focusing on consumer harm, they call for expanding antitrust enforcement to include data practices, privacy concerns, competitor interests, the environment, economic inequality, and political speech, among other sundry causes—with the emphasis varying across the political spectrum. There are also calls for federal price gouging legislation and a moratorium on mergers.

An expansion of current interpretations of antitrust law would return to the incoherence and unpredictability that marked antitrust policy for most of the 20th century. That would harm consumers and businesses at the worst possible time. Tech companies have made life during the COVID-19 pandemic safer and a little more bearable by (a) enabling telemedicine, remote work, and education; (b) making it easy for people to keep informed about the virus and how people are responding to it; (c) helping physically distanced people stay in touch with family and friends via social networks and teleconferencing; and (d) providing entertainment, such as streaming movies and cat videos, at a time when people could use it.

Congress should:

- Repeal all antitrust statutes.
- Repeal the Sherman Act, as amended.
- Repeal the Clayton Act of 1914.
- Repeal the Federal Trade Commission Act of 1914, as amended, including the Celler-Kefauver Act of 1950 and the Hart-Scott-Rodino Act of 1976.
- Reject the Competition and Antitrust Law Enforcement Reform Act (S. 225, 117th Congress) and any other legislation to expand antitrust regulations.

Short of that, Congress should:

- Resist any expansion or altering of antitrust law beyond the current consumer welfare standard.
- Resist passing federal anti-price-gouging legslation.
- Oppose legislation that delays or inhibits mergers and acquisitions.
- Avoid pursuing new antitrust investigations and abandon any that are ongoing.

Antitrust law has a history of contradictory court decisions, internal conflicts, and protection of competitors over consumers. One reason for that incoherence is that U.S. antitrust law tries to both serve consumers and protect competitors—separate goals that can come into conflict. It also has a substantial history of regulatory capture. Companies too often succumb to the temptation of trying to burden competitors with the costs of defending against antitrust lawsuits. Building and improving a business take more effort, and consumers tend to be harder to persuade than agency officials.

Furthermore, there is little evidence of dangerous market concentration or insufficient competition in U.S. digital markets. A 2020 letter by 23 prominent economists, legal scholars, and practitioners submitted to the House Judiciary Committee notes:

> The weight of the literature today—much of which is no more than a couple years old and some of which is still in working paper form—does not support the conclusion that the economy has been trending inexorably toward increased market power and greater consumer harm, especially for the purpose of justifying dramatic legislative changes to the antitrust framework.

The authors cite several economic analyses that reach similar conclusions. In the widely panned 1966 decision in *United States v. Von's Grocery*, the Supreme Court blocked the merger of two grocery store chains with a combined market share of 9 percent in Los Angeles. Today, regulators are threatening cases against tech companies like Amazon, which controls perhaps 5 percent of the retail market. The Supreme Court long ago rejected *Von*-style reasoning, which Justice Potter Stewart described thusly in his dissent: "The only consistency I can find is that in litigation under § 7 [of the Clayton Act, used to block mergers], the government always wins." Today's antitrust advocates on both the left and right should keep that in mind.

With little economic evidence of a problem, legislators and agency regulators should reject any expansion of antitrust laws beyond the consumer welfare standard.

Price gouging is not typically an antitrust issue, but it has become one during the coronavirus crisis, with growing calls for federal price gouging legislation. Such legislation is a bad idea for several reasons. Those go well beyond the "price controls make shortages worse" argument that is taught to every first-year economics undergraduate—and forgotten by most policy makers.

Price gouging legislation harms consumers, especially in the long run. In the tech industry in particular, it is important for prices to accurately reflect supply and demand, so innovators can turn their attention to the most urgent problems. Price controls such as price gouging legislation suppress this information.

Calls for price gouging legislation ignore what happens in the real world. Many companies have already developed effective ways to fight price gouging without regulation. For instance, Amazon deploys dynamic automated technology to proactively seek out and pull down unreasonably priced offers and has a team to identify and investigate unfair pricing of products in high demand. Company policies can change more quickly than federal policies as technology and market circumstances evolve.

In fact, anti-price-gouging technology could be a profitable business opportunity for some companies. If Amazon is not already doing so, it could license or sell its anti-price-gouging technology to competitors for a profit. A startup with a killer app for use by online retailers could make a lot of money. Federal price gouging legislation would largely end that competitive behavior—precisely the opposite of antitrust regulators' stated goal.

One of the strongest arguments against antitrust regulation is that it creates opportunities for "rent-seeking"—economists' term for using government to gain an unfair advantage. Established companies often favor new regulations for a reason: The rules can help block competitors from entering the market or expanding. Price gouging legislation is an example of the same rent-seeking process, as it can allow large companies to raise rivals' costs without having to improve their own offerings.

Another misguided idea is a proposed moratorium on large-scale mergers and acquisitions. In the 116th Congress, Sen. Elizabeth Warren (D-MA) and Rep. Alexandria Ocasio-Cortez (D-NY) co-introduced the Pandemic Anti-Monopoly Act (H.R. 6989, S. 4013). The bill, among other things, would put a hold on all mergers and acquisitions large enough to require disclosure to the Federal Trade Commission.

Mergers and acquisitions are simply another form of investment. In the same way that individual investors can provide needed capital and other resources to struggling businesses—saving jobs and safeguarding products and services for consumers—mergers and acquisitions do much of the same. A ban on investment, particularly in the middle of an economic crisis, would invite disaster. Mergers and acquisitions are not only a source of new capital; they free up other resources that can go toward serving consumers or developing new products.

Mergers and acquisitions also enable businesses to achieve economies of scale and other efficiencies. For example, companies that merge may be able to consolidate offices or warehouses. The cost savings can be redirected toward expanding production or service in other areas. In addition, companies that offer different but complementary products and services can combine to provide consumers with a wider range of options and cost savings.

The extent of competition in the market is determined not by the number of competitors, but by the ability of competitors to challenge one another. Competition quality is far more important than competition quantity. That is evident as Big Tech companies compete vigorously not only against one another, but also against traditional firms in advertising, online search, and retail.

Entrepreneurs and investors are attracted to a given market in the expectation that their hard work and investments will be rewarded one day. Mergers and acquisitions are a key element of that risk–reward structure. The prospect of being bought out by major players in a given market plays an increasingly important role in encouraging investors and entrepreneurs to get into the market in the first place. Yet burdensome regulations have made public stock offerings increasingly difficult for small and medium-sized firms. That makes it harder for them to be available for being bought out in the first place.

In a 2004 study, "The Dynamics of Market Entry: The Effects of Mergers and Acquisitions on Entry in the Banking Industry," economists Allen N. Berger, Seth D. Bonime, Lawrence G. Goldberg, and Lawrence J. White looked at market entry in the banking sector following mergers and acquisitions and concluded:

> Our findings are strongly consistent with the hypothesis that M&As are associated with subsequent increases in the probability of entry into the markets in which the M&As occur. The results are both statistically and economically significant.

There are several examples of significant market entrance during past recessions. Many tech giants of today, such as Microsoft, Uber, Airbnb, Venmo, and Square, among others, were founded during recessions. The new companies set to challenge today's major incumbent firms are probably being founded today. The avenues by which those nascent firms entice prospective and transformational investors must not be closed off.

Taken cumulatively, antitrust policy's flaws are fatal. Congress should repeal all antitrust statutes. However, since that is unlikely to happen in the near future, at the very least policy makers should abandon any ongoing antitrust investigations and avoid passing legislation that expands antitrust regulation, interferes with market solutions to problems like price gouging, or chills merger and acquisition activity. As the cases against Google, Facebook, and other tech companies proceed, Congress should resist the urge to legislate settlement terms if the court cases do not go well for the prosecution.

Even those simple acts of restraint would boost consumer benefits and business resiliency as the COVID-19 recovery continues.

Experts: Clyde Wayne Crews Jr., Ryan Young, Jessica Melugin, Iain Murray

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