FREE *to* PROSPER

A Pro-Growth Agenda for the 117th Congress

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Free to Prosper

A Pro-Growth Agenda for the 117th Congress

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Competitive Enterprise Institute

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Introduction

by Kent Lassman
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"The worst law is better than bureaucratic tyranny."

—Ludwig von Mises

What to do? How to understand the moment in which we live? Where to focus scarce resources—political or otherwise? What course best serves our neighbors and countrymen, ourselves and our posterity, elected government officials and their constituents?

You are not alone to wonder where to focus and how to do the most good. Nor is the 117th Congress the first to meet at a time of great national foment. Fortunately, you are not without resources. In your hands is a practical guide for federal legislative priorities. The latest edition of *Free to Prosper: A Pro-Growth Agenda for Congress* from the Competitive Enterprise Institute is chock full of concrete economic policy proposals and ideas for how to govern better, with more transparency and greater political accountability.

We face the greatest challenges in a generation. The coronavirus pandemic and subsequent shutdowns have devastated local economies and dramatically shifted how and where we work, learn, buy, sell, and make things. Together they have touched and transformed intimate aspects of life that go beyond economic analysis, such as grief, isolation, and for many, loss of faith in pluralism and tolerance as hallmarks of our governing institutions.

These challenges have exposed dysfunctional government institutions and outdated policies. They also present legislators with the special obligation to tone down the rhetoric and scale back the ambitions of winner-take-all policy proposals.

The policies enacted in the coming two years can put America on a path toward greater resilience and fuel a durable and equitable economic renewal. However, while good policy is necessary, it is not sufficient. *How* we make collective decisions, the institutions and processes for making the rules that everyone must live by, also demands careful attention.

Members of the 117th Congress have a fundamental choice to make, and it is not too late. The electoral college certification and its disgraceful interruption, organizing resolutions and confirmation hearings—not even an impeachment—in the initial weeks do not have to set the tone for the next two years.

The Constitution outlines two essential functions for the legislative branch. Congress is imbued with the legislative power—to write laws of general applicability—and with the power to check the executive branch through oversight and the power of the purse. Of course, there are myriad responsibilities and enumerated powers, but they all come back to these essential roles: legislation and oversight.

It is essential for Members of Congress to commit to these fundamental activities on behalf of their constituents and in keeping with an oath to uphold the Constitution, rather than chase the daily, even hourly, news stories while promising ever greater governmental ambition to provide rescues from inequities and hardships. Hardships are an inevitability of life on this Earth, but Congress as an essential functioning institution in a republic is not.

For too long, Congress has been a declining and failing American institution. There are signs of acknowledgement among some of those who serve there. But previous Congresses have failed to overcome selfish and near-term interests to achieve something for the institution and for the nation. It is time to take responsibility. It is not enough to give lip service to the preeminence of the First Branch of Government. Article One of the Constitution is not a talisman to ward off criticism or to give allowance for the failure to perform basic duties.

In Congress, leadership is typically measured by how much political damage is inflicted on partisan opponents. Bills are neither read nor debated. Hearings devolve into a search for confirmation for already-formed views. Genuine oversight is outsourced to an increasingly partisan media and decoupled from the text and meaning of statutes authorizing hundreds of executive branch agencies and programs.

But there is a funny thing about atrophied institutions. Like muscles, they can be strengthened. Step by step, deliberate action is the path toward good health. With repetition come agility and ease. New strength—perhaps in the committee structure or through open debate rules on the floor—can emerge through affirmation of the time-tested virtues of the lawmaking bodies. That includes humility in our aims, transparency to allies and to the public alike, leaving state issues (including financing and the administration of social welfare programs) to the sovereign state governments, and treating executive branch agencies as instruments of the law and not agents of this or that president's near-term agenda.

Our new president began his term with plenty of energy. In less than a fortnight, President Biden issued more than 40 executive actions, including at least 25 executive orders and 10 presidential memos. Governance by pen and phone—through unilateral action and with the presumption of legality unless and until challenged in court—weakens the appropriate role of the legislature in our federalist system. It destabilizes efforts at durable implementation of the law by whipsawing the direction of agencies. Often, it circumvents the constitutional prerogatives of the Senate, like advice and consent for treaties.

President Biden is not a dictator. Most of his actions are either clearly legal or in a gray area. But nearly all of these actions are encouraged by the failures of Congress to perform its core roles. In time, most of these actions fill the legislative void for how to govern and what to emphasize.

Compared to his immediate predecessors in the past three decades, President Biden's first flourish of the presidential pen enacted twice as many executive actions as Trump or Obama while outstripping George W. Bush eight to one and Clinton by almost four to one.

It is fashionable to bemoan polarization and the information ecosystem that seems to accelerate it in our politics. Little noticed is the effect of major areas of governance that radically change direction with each new administration because the law is too ambiguous, contradictory, or outdated. In general, Congress should delegate less to the executive branch, delegate with more specificity, and purposefully review and correct agencies' implementation of the law regardless of which party controls the oversight committees or the White House.

This volume presents specific, practical policy recommendations to restore Congress to its vital place in our government. In doing so, America is put on a path toward greater resilience, and we can fuel a durable economic renewal.

First off, we tackle regulatory reform. The federal regulatory state is large, unaccountable, and everywhere. Bringing it under control requires more than just getting rid of that or that rule. It demands changes to how rules are made, eliminated, and periodically reviewed. From a regulatory review commission to automatic sunsets of new rules to an inventory for guidance documents that carry regulatory weight, there are important institutional reforms to make regulation—and regulators—more accountable and transparent. It would mean better government and a better experience for every encounter that citizens have with the regulatory state.

A priority for this Congress should be to look for ways to facilitate access to potentially lifesaving medical care. These include repealing rules that hinder or forbid telemedicine, safeguarding pharmaceutical innovation by rejecting price controls on prescription drugs, increasing price transparency by giving patients greater responsibility for health care decisions, and modernizing rules for testing and evaluating new drugs, vaccines, and other innovative treatments.

In the area of technology and telecommunications, the COVID-19 crisis has made obvious the need to maintain reliable connectivity. The 2018 repeal of public utility-style "net neutrality" rules for Internet service providers catalyzed new investment in communications infrastructure, which enabled online networks to successfully withstand the added stress resulting from people shifting many activities online. Yet, there is more that Congress can do to further empower private action that increases our resiliency throughout the communications and media ecosystem.

Energy is sometimes called the master resource. It is an ingredient in all other areas of the economy. This volume extends CEI's tradition of leadership in this area with proposals to improve access for plentiful and affordable energy. We offer concrete proposals to ensure America can maintain its edge as an energy producer, which is crucial for a vibrant post-COVID economic recovery, while protecting environmental values. It also details how a balanced, science-based approach to risk can lead to sounder environmental policy.

Also crucial to a functioning economy is access to capital and financial services. Here, CEI experts explain how overly burdensome government regulations hinder access to credit and consumers' financial choices, and propose ways to cut through the regulatory morass.

Equally important, we call on policy makers to respect adult consumers' choices, including in politically controversial products like tobacco and cannabis.

A thriving labor market is essential to the post-pandemic economic recovery. With that in mind, CEI experts call for repeal or reform of obsolete labor laws, to allow workers and employers greater flexibility to determine their work arrangements. One painful lesson for everyone from 2020 is that inflexible labor markets hamper resilient, adaptive solutions to novel economic stresses.

Another key component of economic recovery is free trade. Unfortunately, the trade system has been under attack by politicians from both parties. Here, CEI experts offer clear, practical steps to guide America out of the current impasse, toward a more open world and better relations with international partners and allies.

Finally, we present ways to modernize America's aging transportation infrastructure, which will be crucial as we emerge from the pandemic and start moving around again.

In the face of adversity, Americans demonstrate remarkable resilience, creativity, and entrepreneurship. It has been true for hundreds of years and especially so in the past year. It can be seen everywhere from telework to multiple coronavirus vaccines to millions of small businesses finding new ways to thrive when regulations that were never needed are relaxed and repealed. Time and again, ingenuity and innovation

prove essential to economic recovery and a path forward for tens of thousands of local communities.

Americans deserve more than a recovery. The 117th Congress has an important role to play, if its members choose to pursue it. It requires a posture of institutional vigor married to humility about how much public policy can accomplish. It demands recognition that getting out of the way is often more useful than providing help from Washington. It insists on making common cause with colleagues regardless of partisan allegiance so long as common values can be found. It calls for exercising curiosity and steadfastness in program evaluation and resolve to end failing or otherwise parochial programs.

With this outlook and the proposals on the following pages, the 117th Congress has an opportunity to turn away from decades of decline and toward a renaissance that can light the way for other essential institutions in need of repair.

1 Regulatory Reform

The COVID-19 pandemic changed a lot of things. One of those things is regulation. People quickly realized that regulations were making life under lockdown more difficult than it needed to be. Policy makers at all levels of government responded by waiving more than 800 regulations that were hindering the virus response and the economic recovery. These regulations included bans on telemedicine, licensing and permit regulations that made it difficult for workers and businesses to adapt to the new conditions, and rules that made remote education more difficult. As of this writing, the Food and Drug Administration is allowing more reasonable approval times for potential COVID-19 treatments, and fast-tracked approval of recently developed vaccines.

A good policy-making rule of thumb is that if a regulation is not needed during a crisis, then it was probably never needed in the first place. The worry is that those harmful rules will simply return, with reinforcements, once the worst of the crisis passes.

Throughout 2020, the Competitive Enterprise Institute pursued a #NeverNeeded campaign to give policy makers ideas for reining in never-needed regulations that were harming the virus response and the economic recovery. The policy recommendations cover a wide variety of areas, from technology, health care, and energy to the regulatory process itself—just like this document does. But while the virus response and economic recovery will last far beyond 2020, so must the push for needed regulatory reforms. The new Congress has a lot of work to do.

Suspending never-needed rules at all levels of government during the COVID-19 crisis was the most substantial regulatory reform push in America since the Carter and Reagan years. But 800 regulations are not very much when one considers that the *Code of Federal Regulations* contains more than 185,000 pages and features more than 1.1 million individual regulations. This chapter lays out some general principles for sound COVID-relevant regulatory reform, and gives a brief overview of the extent of the federal regulatory state. It then applies those principles to a broad range of system-level regulatory reforms. The rest of this volume contains issue-specific reforms that also follow from these principles.

Principles of Sound Regulatory Reform

- If a rule was not needed during the COVID-19 crisis, it was probably never needed in the first place.
- Getting rid of specific regulations is not enough. Congress must also reform the systems that create those regulations.
- Congress—not just the executive—needs to be involved in reform.
- Congress should require agencies to be more transparent about the regulations they issue and their cost.
- Remember that regulations are made and enforced by the real-world government we have, not the ideal government we want.

Each of these principles deserves attention. During good times, a growing economy can take on more regulatory burdens in the same way that a larger dog can host more fleas. That changes when the dog becomes sick—almost literally, in the case of the COVID-19 crisis. When unemployment spikes into double digits and people fall behind on the rent, there is no case for keeping regulations that prevent people from entering a new line of work or working from home. Moreover, the harms those regulations are causing during COVID-19 should never have come into being. If a regulation does not help during a crisis, it was probably never needed.

The Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Unfortunately, Congress has done little to date to lift never-needed regulations. The White House issued several executive orders encouraging agencies to waive regulations harmful to the virus response and economic recovery, using emergency powers, if necessary. This action is in addition to pre-COVID-19 executive

orders requiring agencies to eliminate two regulations for each new one they enact and to improve disclosure of "regulatory dark matter"—guidance documents and other agency issuances that do not go through the rulemaking process yet carry regulatory weight.

Executive orders can be undone by the next administration. Lasting reform requires congressional action. It is important for this Congress to be more assertive than the last one, and to ensure that beneficial COVID-19 reforms stay in place, so the country can remain resilient when the next crisis strikes.

Part of the problem is transparency. Agencies are required to conduct cost–benefit analysis for many of their rules, but do so for fewer than 1 percent of rules. Congress should hold agencies to a higher standard to ensure that they execute legislation that Congress passes clearly and unambiguously.

Finally, federal regulation is not an appropriate solution for all problems. Regulations are made and enforced by the government we have, not the government we want. Many well-intentioned policies fall prey to bureaucratic bungling, regulatory capture (whereby regulated entities wield outsized influence on the regulatory process in an effort to disadvantage competitors), or both. It is important to remember what a real-world government is capable of—and what it cannot do.

Restraint is a virtue in approaching reform. A cardinal rule of politics is not to give yourself powers you would not want your opponent to have. In a democracy such as ours, where power regularly changes hands, this is an important lesson for Congress to keep in mind as it passes legislation to address the problems of the day.

Moreover, a federal response is not always appropriate. America's federal system has multiple levels of government, with different strengths and weaknesses. That flexibility is crucial for allowing public policy to respond to a rapidly unfolding crisis, especially in a country as large and diverse as the United States. Some policy matters are truly nationwide, and deserve a federal response. Other policy areas can be more effectively addressed by state and local governments that are closer to the problem. COVID-19 affected different states in different ways. A uniform federal policy for lockdowns, school closures, and large gatherings would likely have produced unnecessary public backlash and failed to adapt to diverse local needs and to changing circumstances. In

any trial-and-error process, errors can be fixed as they are discovered. That is far easier to do at the state and local levels than at the federal level.

Finally, governance does not always require government. Regulation is one tool among many for achieving policy goals. Because of its slow pace, resistance to change, enforcement problems, and proneness to special-interest capture, government regulation should be a last resort rather than a default option. These principles hold in COVID-relevant areas as diverse as competition policy, minimum wages, price gouging, health care treatment decisions, and more, as later chapters in this volume will show.

The Extent of Federal Regulation

Most people who follow politics have a rough idea of how much the government spends, how much it collects in taxes, and the size of its budget deficit. In 2020, those numbers were $6.5 trillion, $3.13 trillion, and $3.3 trillion, respectively. Total federal debt—the cumulative result of decades of chronic deficit spending—also surpassed $26.9 trillion in 2020, exceeding the U.S. gross domestic product. The COVID-19 pandemic made those numbers even larger. But few people, even experts, know how much regulation exists. This lack of knowledge is a major obstacle to reform.

One reason regulatory reform is so difficult is that many people have no idea it is such a big problem. Agencies have an incentive to release as little regulatory information as possible. Few regulations receive proper cost–benefit analysis. Regularly scheduled reports often appear late, or not at all. The Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions—in which all rulemaking agencies list their upcoming planned regulations—appeared four months late. During the Obama administration, multiple editions of this legally required twice-yearly document were never published at all. The Competitive Enterprise Institute's Wayne Crews compiles the annual *Ten Thousand Commandments* report in an effort to fill the gap. A few of his key findings follow.

Key Facts about Federal Regulation

- Based on data that agencies have disclosed, the total cost of federal regulation is somewhere around $1.9 trillion per year, or roughly $14,455 per household.
- Regulatory costs are equal to nearly half of all pre-COVID-19 federal spending. Almost none of these costs appear in the federal budget.

- The *Code of Federal Regulations* is more than 185,000 pages long and contains about 1.1 million regulatory restrictions.
- If the federal regulatory state were its own country, it would have the world's eighth-largest economy, ranked between Italy's and Brazil's.
- Over the past decade, federal agencies have issued an average of 28 regulations for every bill Congress has passed.
- 2019 was the first year with fewer than 3,000 new regulations since record keeping began in the 1970s. It missed the mark by just 36 regulations.

Most individual rules are small. By themselves, they might be harmless enough. But their sheer number means that most families spend more on costs arising from regulatory compliance than they do on food, clothing, utilities, and education. The only common household expense that costs more than federal regulation is housing—which itself is made artificially expensive by government policies, such as zoning rules, financial regulations, and tariffs on construction materials like lumber and steel.

Experts: Clyde Wayne Crews Jr., Ryan Young

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PLAN REGULATORY REFORM FOR THE LONG TERM

Each Congress lasts for two years. Few members of Congress have a time horizon longer than that to pursue effective, long-lasting systemic reforms. The deregulation of the airline and trucking industries that occurred in the 1970s and 1980s was the culmination of years of effort; even then, it required a perfect storm of circumstance, politics, and personnel. A large, ideologically diverse coalition of economists and reformers had spent years pointing out that the existing regulatory model had turned the airline and trucking industries into government-protected cartels. When the public discontent over 1970s economic malaise grew, politicians became interested in reform. Figures as diverse as Sen. Ted Kennedy (D-MA), left-liberal economist Alfred Kahn, and Presidents Carter and Reagan took existing reform ideas and implemented them as practical policy. They succeeded because the ideas were well-known, so when the political winds turned in the right direction, they could act.

However, it is not enough to improve or remove harmful regulations. Congress also needs to reform the process the generates them in the first place, or bad rules will keep returning. It is one thing to treat a symptom, and another to treat the root disease. Institutions and incentives matter. The rulemaking process needs to require agencies to confine their rulemaking to areas where Congress has authorized it. Agencies should strictly follow transparency requirements. Institutional rules need to incentivize agencies to remove obsolete or harmful rules. And Congress needs to be more assertive about defending the separation of powers and checks and balances against an executive branch that has grown too powerful.

Congress should:

- Pursue regulatory reform as part of a long-term process that takes longer than an election cycle.
- Prepare reform legislation and have it ready to pass when the time is right.
- Keep improving and reintroducing reform bills every session of Congress.

A similar story to Carter- and Reagan-era deregulation happened with antitrust regulation. Since the Sherman Act passed in 1890, enforcement policy has gone back and forth between breaking up big companies such as Standard Oil and creating cartels to preserve them, as happened during the New Deal and with AT&T.

This instability has largely resulted from the fact that the Sherman Act, the 1914 Clayton Act, and the Federal Trade Commission Act never defined key terms such as "monopoly," "restraint of trade," and "unfair or deceptive acts and practices." That means that these terms were defined and enforced almost purely at the discretion of judges and regulators. And their discretion changed with the times.

Starting in the 1960s, a growing movement of economists and attorneys devised a better, more stable enforcement standard: the consumer welfare standard. It took two decades of debate, advocacy, and favorable political appointments, but eventually it became standard practice to enforce antitrust penalties only in cases where there was proof of consumer harm. There is currently a bipartisan push to return antitrust policy to a purely discretionary standard (which will be addressed in a later chapter).

For reforms to have staying power, Congress must pass legislation. Many of the reform ideas in this volume are unlikely to pass anytime soon. Members of Congress committed to reform should introduce reform legislation anyway. Windows of opportunity are rare and short. It is important to have legislation ready that can be quickly enacted and—unlike hasty "flash policies" such as stimulus, bailouts, and the PATRIOT Act—that has been carefully thought through, debated, and vetted.

Congress has already passed up two such opportunities for regulatory reform in recent years: in 2017–2018 and again during the 2020 COVID-19 crisis. Republicans held both chambers of Congress for the first two years of the Trump administration, which had signaled interest in regulatory reform early on. It issued executive orders capping regulatory costs and requiring agencies to get rid of two old regulations for each new one they enacted. Reformers had the votes and the president's attention, but they misread the situation. The Trump administration turned out to have a short attention span. Administration officials soon turned to other issues, such as trade, immigration, infighting, and attacking political opponents. They figured they had done enough, and Congress largely agreed.

Republicans then lost the House in 2018, and with it any chance of passing regulatory reform legislation. While the administration would issue further executive orders to improve disclosure of guidance documents and, after COVID-19 hit, to get rid of rules hindering the response to the pandemic, those can be overturned at any time.

One thing congressional reformers did right in 2020 was to introduce several regulatory reform bills despite their having little chance of passing. The following sections discuss these proposed reforms and others:

- Greater transparency for agency guidance documents and other "regulatory dark matter"
- Regular report cards from agencies disclosing important information about the regulations they issue
- An independent commission to assemble repeal packages of obsolete or harmful rules
- Automatic sunsets for new rules
- A requirement for Congress to hold votes on major new regulations
- A regulatory budget similar to the spending budget Congress is supposed to pass each year.

We do not know when the political environment will be favorable for systemic reform, so it is important to have legislation already written. Reintroducing the bills every session will keep the ideas alive. Reformers can come up with ways to continually refine and improve the bills and build public support for enacting them. Congress should think long term and be ready to act quickly.

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

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REFORM THE RULEMAKING PROCESS

It is not enough to reform this or that individual regulation. Lasting reform must also address the underlying process that generates harmful rules in the first place. Without systemic reform, regulatory sludge—as Harvard law professor Cass Sunstein calls it—will build back up and harm the next emergency response. Although the repeal of net neutrality regulations in 2018 made the country more resilient ahead of time by enabling people to more easily work and take classes at home using teleconferencing apps like Zoom and to stream video on a scale never before seen, other regulations on the books slowed down the health care system at the worst possible time, while making it harder for the newly unemployed to find work. Those regulations need to be permanently repealed before they do more harm during the next crisis.

The rulemaking process as we know it today was established by the Administrative Procedure Act (APA) of 1946. It has been amended several times over the years, but the basic framework remains in place. Before an agency can promulgate a new rule, it has to publish a draft version called a notice of proposed rulemaking, or NPRM. The proposed rule must be published in the *Federal Register*, which is published every workday. This opens up a public comment period, usually either 60 or 90 days in length. During this time, anyone can submit comments to the rulemaking agency, which is required to take the comments into account. Only after this period may the agency issue the final version of the rule, which must also be published in the *Federal Register* and contain a date on which it is to take effect.

The public comment period is an essential transparency and accountability measure. Sometimes, an agency will alter or even withdraw a rule because of comments it receives from the public.

Other institutional safeguards exist. Twice each year, the Office of Information and Regulatory Affairs (OIRA) inside the Office of Management and Budget (OMB) must publish a Unified Agenda of Regulatory and Deregulatory Actions that lists all upcoming planned regulations from each agency. Rules are subdivided into categories, such as long-term and short-term actions. The Trump administration added another category to distinguish deregulatory actions from rules that add new regulations.

OIRA also must publish both a draft and a final version each year of a *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*.

Some rules must also go through cost–benefit analysis, especially those with an estimated economic impact of $100 million or more per year.

Although these safeguards are better than nothing, regulations have grown continuously for decades, regardless of which party is in power. Part of the problem is that safeguards are not strictly enforced. Only about 1 percent of all regulations undergo both a cost and a benefit analysis, and even then, agencies often fudge assumptions and other variables to make their rules appear less costly. As many as one-third of regulations never go through the required notice-and-comment process. Congress and the judiciary also exercise little oversight over executive agencies.

Agencies often take advantage of their lack of supervision to pass regulations that have no authorizing statutes from Congress or that directly contradict statutory language. Courts routinely defer to agency interpretations of rules, essentially leaving large parts of the executive branch without any checks or balances. The result is a federal regulatory state that now costs nearly $15,000 per household per year.

For regulatory reforms to have staying power, Congress needs to get involved to restore a proper separation in the lawmaking process. The last several administrations have taken little interest in enforcing existing transparency measures, such as the Unified Agenda and the *Report to Congress*. Therefore, Congress needs to intervene and ensure that the law is followed and institute additional disclosure requirements.

Current regulatory institutions make it easy to pass new regulations, but difficult to remove old ones. The result is that the *Code of Federal Regulations* now exceeds 185,000 pages and contains more than 1.1 million regulations. This existing stock is supplemented by a flow of more than 3,000 new regulations nearly every year.

Effective regulatory reforms make it easier to reform both the stock of existing regulations and the ongoing flow of new regulations. A reform program that trims the stock but ignores the flow will simply see a return of the same old regulatory sludge over time. Similarly, a reform program that slows the flow of new rules but leaves the

existing stock untouched will see a regulatory code that does not shrink, and grows progressively more obsolete. Both shortcomings will leave America less resilient against the next emergency. The rest of this chapter contains institutional reforms that address both stock and flow.

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

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ACCOUNT FOR AND CURB REGULATORY DARK MATTER

As many as one-third of federal regulations currently enforced have never been through the required notice-and-comment rulemaking process. They include agency guidance documents, memoranda, bulletins, blog posts, press releases, and other "non-rule" documents. Thousands of such documents are issued annually—far more than the number of actual rules. Such "regulatory dark matter" can amount to off-the-books regulation, especially since courts nearly always defer to regulatory agencies' interpretations of rules.

The Administrative Procedure Act—which established the notice-and-comment rulemaking process—has a huge loophole that regulators often exploit. Agencies can avoid notice and comment for "good cause," as determined by the agencies themselves. As a 2016 Congressional Research Service report noted:

> While the Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules, the statute's "good cause" exception permits agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest" and bypass its 30-day publication requirement if good cause exists.

That allows agencies a lot of leeway to avoid scrutiny of a wide array of rules. Agencies' declarations face insufficient oversight, yet are binding. Congress has several options for commanding adherence to the APA and affirming the separation of powers.

Over the years, Congress has amended the Administrative Procedure Act in order to subject complex and expensive rules to additional analysis. Those reforms include:

- Paperwork Reduction Act of 1980 (Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–3521)
- Regulatory Flexibility Act (to address small business impacts, Pub. L. No. 96-354)
- Congressional Review Act, which enables Congress to vote on a resolution of disapproval to reject agency regulations (5 U.S.C. §§ 801–808)

Congress should:

- Pass legislation containing reforms similar to the ones in the Guidance Out of Darkness (GOOD) Act (S. 380, 116th Congress) and Executive Order 13891, "Promoting the Rule of Law through Improved Agency Guidance Documents." These would require agencies to publish their guidance documents in a central location in a searchable format, or they would have no effect.
- Amend the Administrative Procedure Act so its notice-and-comment requirements apply to rules with heightened force.
- Abolish, downsize, reduce the budgets of, and deny appropriations to agencies, subagencies, and programs that pursue regulatory actions not authorized by Congress. Congress has the power of the purse, and should use it.
- Repeal or amend enabling statutes that sustain regulatory programs that have proved harmful or have become obsolete.
- Subject regulatory dark matter, alongside ordinary rules, to more intense review by the Office of Management and Budget. By exposing the costs of guidance, this step can provide a public record for future legislative reforms of guidance-as-regulation. President Reagan's Executive Order 12291 provides a model to follow in that it put the burden of proof on agencies to demonstrate the need for a new rule. Guidance should be held to the same standard.
- Pass legislation to expand the Congressional Review Act's (CRA) 60-day resolution of disapproval process to apply to guidance, as well as formally promulgated rules.
- Introduce bills to repeal guidance as appropriate throughout the congressional session, given that agencies can easily time controversial guidance documents to avoid CRA actions.

In addition, various presidential executive orders govern central review of rules by the OMB to address cost–benefit analysis for some rules. Ronald Reagan's Executive Order 12291 set up central review of agency rules by OMB. President Clinton's E.O. 12866, however, restored "primacy" to agencies, thereby weakening the process. President Obama issued several orders to ostensibly streamline regulation; however, his underlying "pen and phone" approach to policy making eclipsed any regulatory curtailment.

Moreover, the APA's "good-cause"-weakened requirement to publish notice of proposed rulemaking and allow public comment does not even apply to agency guidance, memoranda, and other "regulatory dark matter."

> Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organiza-

> tion, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (Pub. L. No. 79-404, §553)

With respect to "significant guidance," some executive (not independent) agencies comply with a 2007 OMB memo on "Good Guidance Principles"—in effect, guidance for guidance. "Significant" guidance includes those agency issuances with an estimated annual economic effect of $100 million or more, similar to the definition for significant and major rules. With conspicuous exceptions—such as the Departments of Energy, Housing and Urban Development, and Health and Human Services—some agencies continue to invoke the 2007 OMB memo and follow its directive of maintaining Web pages devoted to their "significant guidance." Unfortunately, the directive is a suggestion rather than a command. It allows, for example, for the Food and Drug Administration (FDA) to report no "significant guidance," even though it has issued hundreds of thousands of pieces of acknowledged final guidance documents since the 1970s.

Experts: Clyde Wayne Crews Jr., Ryan Young

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IMPROVE DISCLOSURE BY REQUIRING AGENCIES TO PUBLISH REGULATORY REPORT CARDS

Agencies are required to disclose to the public information about their regulatory requirements, costs, benefits, budgets, and other important items. But that information is scattered so widely that it is difficult to piece together an accurate picture of what agencies are up to, and how burdensome their rules are. Agencies seem content with this arrangement, and do not appear eager to improve transparency on their own. Congress should step in by requiring all rulemaking agencies to publish annual report cards. These report cards should appear in one centralized location, in an easily searchable format, and with historical data on how agencies have performed over time.

Easily accessible regulatory report cards would go a long way toward increasing transparency. Transparency is especially important, particularly now, when a crisis has forced policy makers to evaluate which regulations are helpful to the COVID-19 response and which are not. Current institutional structures do not give them, or the public, the information they need to properly address the crisis.

Since the early 1980s, regulatory oversight has been governed primarily by the semiformal central review of economic, environmental, and health and safety regulations by the OMB's Office of Information and Regulatory Affairs. The process is insufficient, as OMB review captures a fraction of the regulatory enterprise; fewer than 1 percent of rules have "audited" cost–benefit analysis. By requiring a periodic publication summarizing available but scattered data, Congress could make complex regulatory data more user-friendly and encourage public accountability.

Whatever its format, a federal regulatory transparency report card should include the following:

- Tallies of economically significant, major, and non-major rules by department, agency, and commission
- Tallies of significant and other guidance documents and memoranda by department, agency, and commission
- Numbers and percentages of rules and guidance documents affecting small business
- Depictions of how agencies' regulations accumulate as a business grows

Congress should:

- Require agencies to present data regarding regulation and guidance to Congress and the public in a format comparable to the federal budget's Historical Tables.
- Require streamlined, one-location online disclosure of economically significant guidance from both independent and executive agencies, augmenting what a few agencies already voluntarily publish on the basis of the 2007 OMB memorandum to agencies.
- Require centralized disclosure of the thousands of guidance documents issued annually that do not rise to agencies' reckoning of "significant." Currently, disclosure of those documents is enforced only by an executive order that could be repealed at any time.

- Numbers and percentages of regulations that contain numerical cost estimates
- Tallies of existing cost estimates, including subtotals by agency and grand total
- Rules for which weighing costs and benefits is statutorily prohibited.
- Numbers and percentages lacking cost estimates, with reasons for the absence of cost estimates other than weighing costs and benefits being statutorily prohibited
- Aggregate cost estimates of regulation: grand total, paperwork, economic (possibly divided by sector, such as social, health and safety, environmental)
- *Federal Register* analysis, including numbers of pages and proposed and breakdowns of final rules by agency
- Number of major rules reported by the Government Accountability Office in its database of reports on regulations
- Rankings of the most active executive and independent rulemaking agencies
- Identification of agency actions that are deregulatory
- Rules and guidance purported to affect only internal agency operations
- Number of rules new to the Unified Agenda
- Number of rules that are carryovers from previous years
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them
- Percentages of rules reviewed by the OMB and action taken

Regulations fall into two broad classes: (a) those that are economically significant—costing more than $100 million annually—and (b) those that are not. However, many rules that technically fly below the $100 million "significant" threshold can still be highly significant in the real-world sense of the term. Congress could require agencies

to break cost categories into tiers more descriptive of their real-world costs. Table 1.2 presents one possible itemization.

Table 1.2 Proposed Breakdown of Economically Significant Rules

Category 1	> $100 million < $500 million
Category 2	> $500 million < $1 billion
Category 3	> $1 billion < $5 billion
Category 4	> $5 billion < $10 billion
Category 5	> $10 billion

Such additional disclosure is also needed for regulatory guidance documents, memoranda, and other regulatory dark matter that have been neglected in the regulatory oversight process.

Experts: Clyde Wayne Crews Jr., Ryan Young

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ESTABLISH A REGULATORY REDUCTION COMMISSION TO REPEAL OUTDATED AND OBSOLETE RULES

The concept for a regulatory reduction commission is modeled on the Base Realignment and Closure (BRAC) commissions of the 1990s, which successfully saved billions of taxpayer dollars after the end of the Cold War. Many military bases either were no longer needed or could be substantially downsized. Although most members of Congress agreed with the larger goal of closing bases to save resources, no individual member was willing to vote to close the base in his or her district. Congress turned out to be institutionally incapable of taking action, and knew it. The solution was an institution-level reform—and it worked.

In this case, the institutional change was to outsource the tough base closure decisions to an independent commission. Its members compiled their recommendations and sent them to Congress in a comprehensive package to be voted up or down, without opportunity for amendment.

Congress should:

- Establish an independent commission to go through the *Code of Federal Regulations* on a 10-year cycle and vote on its annual recommendations of outdated or harmful regulations to repeal.

The BRAC Commission changed members' incentives in a way that allowed them to enact needed reforms that would have been politically impossible otherwise. Members whose districts were affected could vote for the good of the whole nation and shift any local blame to the BRAC Commission, away from themselves.

A regulatory version of the BRAC idea has been around since at least the early 1980s, when then-Sen. Phil Gramm (R-TX) proposed it in legislation. It has reappeared several times since. More recently, Rep. Josh Gottheimer's (D-N.J.) Regulatory Improvement Act (H.R. 3269, 116th Congress) proposes the creation of a BRAC-inspired regulatory improvement commission that would take a one-time pass through selected titles in the *Code of Federal Regulations* (CFR). In 2020, Rep. Virginia Foxx (R-NC) introduced the Pandemic Preparedness, Response and Rapid Recovery Act (H.R. 8038), which would establish a BRAC-style commission aimed at rules that harm the COVID-19 response and economic recovery.

A regulatory BRAC commission could be designed in various ways. The design proposed here is just one practical option.

The *Code of Federal Regulations* (CFR), at more than 185,000 pages, is a bit much to take on in one go. So a regulatory and COVID-focused version of BRAC would go through five of the CFR's 50 titles each year in a set rotation, starting with the titles most relevant to health care and economic recovery.

Each year's package would cover five different titles. A good first-year reform package would include rules from the following:

- **Title 13**, Business Credit and Assistance
- **Title 21**, Food and Drugs
- **Title 29**, Labor
- **Title 42**, Public Health
- **Title 44**, Emergency Management and Assistance

Keeping in mind the importance of institutional design that was stressed earlier in this chapter, the Regulatory Reduction Commission's design must reflect the fact that legislation is passed by the Congress we have, not the Congress we want. Each year's package would be required to be submitted by a given date, such as June 1. To prevent death by neglect, Congress would then be required to hold a prompt up-or-down vote on the package within 30 legislative days or the end of a congressional session, whichever comes first.

No amendments would be allowed to be attached to the package to prevent behind-the-scenes vote trading or weakening of the package's reforms. If amendments were allowed, the package would likely devolve into something similar to the coronavirus stimulus packages, which had many provisions unrelated to the pandemic response added to them during negotiations.

While the commission itself can be established by executive order, for reasons of constitutional separation of powers, the voting deadline and no-amendment rules would require legislation from Congress in order to have teeth—and legitimacy.

It is important to keep the committee small to reduce bargaining costs and make consensus easier. It also should be bipartisan, so neither party can stack the deck when it is in power. At a maximum, Amazon founder Jeff Bezos's two-pizza rule for meetings should apply—two pizzas should easily feed everyone in the room. A good size is a five-member committee with no more than three appointees coming from the same party. To avoid lining up with election cycles, members' terms should be staggered, with one term expiring each year, similar to the Federal Communications Commission's design.

Each year's repeal package should have a public comment period , ending 30 calendar days before the commission's annual deadline for sending it to Congress. This period would allow the general public, affected entities, and policy experts to contribute their repeal recommendations or defend rules they believe should be kept. It would increase public accountability and contribute to the commission's research capacity and expertise without increasing its size, budget, or internal bargaining costs.

The commission would begin a new rotation every 10 years. In the intervening decade, some new rules will almost certainly have become obsolete, which would make it worthwhile to make the Regulatory Reduction Commission permanent.

Experts: Clyde Wayne Crews Jr., Ryan Young

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IMPOSE AUTOMATIC SUNSETS FOR ALL NEW REGULATIONS

Regulators have learned a lot recently about how health care, shipping, food, and business permitting regulations affect people during a crisis. The waiving of more than 800 regulations in the wake of COVID-19 is a healthy response. But all of that activity looks small in the larger context of the 185,000-page *Code of Federal Regulations*, plus its state and local equivalents.

Congress should:

- Impose automatic 10-year sunsets on all new federal regulations.

Just as every gallon of milk has an expiration date, so should regulations. Automatic 10-year sunsets for all new regulations, reviewable by Congress, are a reform with the long view in mind. If Congress were to decide to keep an existing regulation in place, it would need to delay the sunset to a later date. This delay might allow some rules to stay on the books much longer than first intended; however, it would place the burden of proof on Congress to affirmatively renew the rule. Rules would no longer survive, zombie-like, by inertia.

Regulations often become obsolete over time. When obsolete rules remain on the books, they can slow economic growth and make it more difficult for new innovations to become widely adopted. For example, when regulators wrote rules favoring compact fluorescent light bulbs, they nearly prevented the rise of superior LED lights.

As time passes and more such regulations block innovation and growth, people have fewer resources and less advanced technology to adapt to new crises than they would have otherwise. Economists familiar with the power of compound interest have been making this point for some time. Now that COVID-19 is making the same argument in plainer language, policy makers should finally respond to it.

Quarantining and social distancing have always been difficult, and the 2020 pandemic lockdown has been no exception. But new technology has made this go-around much easier to endure than in past pandemics. During the 1918 Spanish flu pandemic, people did not have access to telemedicine, videoconferencing, video streaming,

online grocery ordering, social networks, or 24-hour news. Go back another century, and germ theory did not exist. Another century still, and there was no inoculation.

The hope is that, a century from now, so much improvement will have occurred that our descendants will wonder how our generation made it through our era's pandemic with such primitive technology—much as we marvel at how our ancestors survived pandemics without even knowing that regular handwashing is a good thing to do.

Regulatory reform is an important part of this generations-long project. One of those reforms, automatic sunsets, is an especially powerful way to prevent a fresh buildup of post-COVID regulatory sludge from gumming up progress and growth.

One of the most difficult aspects of regulatory reform is that nobody can predict which regulations will hinder which technologies, let alone what the next emergency will be, and how to respond to it. Because it is impossible to target only the "right" rules, it is especially important for automatic 10-year sunsets to apply to all rules.

For example, in 2018, the United States got rid of recently adopted net neutrality rules. Critics argued that the rules reduced incentives for Internet service providers to invest in improving their networks. When the rules were repealed in 2018, it was easy to predict that U.S. Internet speeds would increase quickly, but nobody had any idea that this fresh growth would be essential for a pandemic response. The increased investment in bandwidth that the repeal of net neutrality made possible helped millions of people in lockdown to, almost seamlessly, communicate via Zoom teleconferences, access remote education, order groceries online, access entertainment from Netflix, and keep up with news about the pandemic and how to stay safe, all without straining network capacity. Europe's more regulated networks were required to throttle—deliberately slow the speed for some content in order to conserve bandwidth—and thereby reduce quality for many online services.

That repeal was a lucky accident for Americans. The net neutrality rules had no sunsets, so they would still be on the books were it not for the rare reform effort that succeeded. Nobody knows what other such rules might block a life-saving breakthrough, say, 20 years from now. But if that rule is on the books now, without a sunset it will probably still be there when it could do the most harm.

Sunsets would hardly mean the end of all regulations. As noted, Congress would be able to renew rules that prove worthwhile. But sunsets would provide a regular requirement for agencies and Congress to update rules to reflect changing real-world conditions. Agencies would have an incentive to adapt their regulations to the changing times if they want Congress to keep them alive. Agencies rarely do this under the current rulemaking process; institutions need to be changed to ensure that they do.

Sunsets would also allow harmful rules to die of natural causes with minimum political pain. Rather than having to anger vested interests with a politically painful vote, Congress could help the country become more resilient against future crises by simply doing nothing. All of these institutional changes would be healthy for the regulatory state, healthy for democratic institutions like the separation of powers, and literally healthy for people during future emergency responses.

Experts: Clyde Wayne Crews Jr., Ryan Young

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REQUIRE CONGRESS TO VOTE ON SIGNIFICANT NEW REGULATIONS

Congress is supposed to hold all legislative powers. Yet for every bill Congress passes, agencies issue nearly 30 regulations. This ratio—which we call the Unconstitutionality Index—has remained stable for the past decade under presidents from both parties. Agencies have taken advantage of this lax oversight to issue regulations that Congress never authorized by statute, on issues ranging from cap-and-trade regulations for carbon dioxide emissions to health insurance policy. Undoing these rules requires expensive and lengthy litigation, which does not always succeed. Over time, this makes it easier for agencies to expand their activity into areas for which they have not received statutory authority—and to pay less attention to their assigned tasks. Such tempting distractions left agencies like the Centers for Disease Control flat-footed when COVID-19 hit.

At the very least, Congress should hold votes on new regulations that qualify as "economically significant," defined as having at least $100 million of annual economic impact. Those are only a small fraction of the 3,000 or so rules agencies issued each year. During the Obama administration, there were usually 40 to 50 such rules, and about one-third that many during the Trump administration. This additional check and balance on executive power is a minor burden on the congressional calendar.

The Regulations from the Executive in Need of Scrutiny (REINS) Act (H.R. 3974, S. 92, 116th Congress) would implement this needed accountability measure. It has been introduced for several Congresses running, and has passed the House several times.

Congress should:

- Pass the Regulations from the Executive in Need of Scrutiny Act, which would require Congress to vote on major rules with annual costs of $100 million or more before they become effective.
- Expand the REINS Act to cover any controversial rule, whether tied to a cost estimate or not.
- Expand the REINS Act to cover guidance documents and other agency decrees.

Experts: Clyde Wayne Crews Jr., Ryan Young

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PUBLISH A FEDERAL REGULATORY BUDGET

Federal spending, taxes, and the deficit receive plenty of attention. But it is equally important to monitor and reduce non-tax government expenditures. A periodically published regulatory budget could help incentivize other reforms like cost analysis and sunsets. It would also allow Congress to allocate regulatory cost authority among agencies and better distinguish between categories like economic, health and safety, and environmental regulations.

During a crisis, when government has limited resources and agencies need to have their priorities straight, a regulatory budget is a useful tool to ensure that agencies always focus on their core missions.

Congress should:

- Require agencies to present annual regulatory cost projections to Congress as part of the appropriations process. This would enable Congress to better decide the level of regulatory burden it is willing to impose on a given industry or region.
- Require a "one in, one out" procedure for new rules.

The concept of regulatory budget is both bipartisan and not new. For example, then-Sen. Lloyd Bentsen (D-TX) proposed an "annual regulatory budget" in 1979. Recent legislative offerings include Sen. Marco Rubio's (R-FL) National Regulatory Budget Act (S. 2153, 113th Congress) and Sen. Mike Lee's (R-UT) Article I Regulatory Budget Act (S. 2982, 114th Congress). President Trump's 2018 executive order requiring agencies to have zero net new regulatory costs serves as a kind of informal regulatory budget. However, as with all executive orders, it can be easily repealed.

Like the regulatory reduction commission, the "one in, two out" procedure, or something similar, holds bipartisan appeal. For example, Sen. Mark Warner (D-VA) has recommended offsetting every new rule by eliminating an existing one. Such a "one in, one out" system amounts to a status quo regulatory "budget," or a freeze at current levels.

A comprehensive regulatory cost budget should include individual tallies from agencies, paralleling the fiscal budget. Congress should specify the total cost budget

for which it is willing to be held accountable and divide it among agencies. Budgeting would force agencies to "compete" to ensure that their rules save more lives per dollar or correct some alleged market imperfection better than those of other agencies. That should improve decision making and adherence to congressional intent.

A comprehensive budget poses political risks, so limited versions should be implemented first. Agencies should concentrate on assessing costs, much as the fiscal budget focuses on costs, not just benefits. Benefits are what Congress must supervise in the first place via its lawmaking and budgetary authority. Although compliance cost calculations are difficult to determine, they would be easier to manage than separate cost and benefit calculations for every single rule—which is not being done anyway. Agencies regulating recklessly could lose the squandered budgetary allocation to a rival agency, or even face elimination.

Pitfalls of regulatory budgeting include (a) the risk of creating perverse incentives to expand the size of government due to the elevation of utilitarianism over individual rights in the pursuit of "social" benefits; (b) the reality that apart from raw compliance, cost calculations are subjective and involve mere estimations; and (c) the temptation to generate an illusory "net benefit" budget. The latter would mean no end to regulation, as it would give agencies fodder to argue that cutting their regulatory budgets costs lives.

Regulatory transparency; a regulatory reduction commission; rule sunsetting; one-in, one-out approaches; and congressional approval of rules would all lay the needed foundation for more comprehensive versions of a regulatory cost budget. Budgeting can only really work atop a solid foundation of regulatory control and accountability. In particular, an accountable Congress that answers for uncalculated regulatory costs is a prerequisite for a properly functioning regulatory budget.

Experts: Clyde Wayne Crews Jr., Ryan Young

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ABOLISH COUNTERPRODUCTIVE ANTITRUST LAWS

> Deregulators appear to be of two minds about antitrust. They denounce the actual practice of its enforcement. Yet, almost without exception, they endorse it in principle.
>
> —Fred L. Smith, 1982

The founder of the Competitive Enterprise Institute wrote those words almost 40 years ago, and they remain true today. The recent push to expand antitrust law has mainly focused on so-called Big Tech companies. With renewed vigor, regulators and antitrust advocates are considering how to apply existing antitrust law to cover companies' use of customer data, privacy practices, content moderation, and even general social inequality. The stark contrast between this mostly academic and political agenda, on the one hand, and consumers' overwhelmingly positive real-world experience with those same companies during the COVID-19 lockdown, on the other hand, makes this a good time to initiate a frank debate about the merits of antitrust regulations.

In the United States, the stated aim of antitrust law is to preserve competition in the marketplace to the benefit of consumers. In reality, antitrust law prioritizes competitors over consumers. Today's body of antitrust laws is the culmination of over 100 years of unclear objectives, contradictory interpretations, and controversial court decisions. At its most basic, antitrust regulation restricts certain business arrangements and decisions in the name of preserving competition.

The earliest impulses toward federal antitrust legislation grew out of dissatisfaction with the railroads of the late 19th century, which were government-granted monopolies. When the problematic results of that arrangement—including state-sponsored cronyism—began to surface, so did political alliances to call for corrective federal action. To that end, rate discrimination was outlawed with the passage of the Interstate Commerce Act in 1887. By 1888, both major political parties' platforms included pro-antitrust planks.

Congress passed the Sherman Act in 1890. Yet the intent of the legislators who passed the law has been the subject of debate ever since. Was their goal to promote consumer welfare, outlaw certain business practices, prevent cartels, or block mergers? Much of this confusion arises from the wide-ranging nature and vague language of the statute.

For instance, Section I of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade or commerce. Section II outlaws monopolization, conspiracies, and attempts to monopolize. The Act also has criminal consequences for violations and obligations for federal officers to institute equity proceedings on behalf of the public good. Yet the statute does not define any of these broad terms. Instead, it leaves it up to judges and regulators to define them however they want—which they have done, often without rule or reason.

A series of court cases with contradictory reasoning followed: *United States v. Trans-Missouri Freight Association*, *Standard Oil Company of New Jersey v. United States*, and, much later, *United States v. Alcoa*. The Democratic Congress of 1914 made a two-pronged attempt to strengthen antitrust policy. The House created the Federal Trade Commission, while the Senate took the lead in passing the Clayton Act that same year. The Act attempted to provide clarity to the courts by expressly naming prohibited practices and forbade tying and exclusive dealing in situations where those practices could significantly reduce competition. Tying is the practice of selling a product under the condition that the buyer purchase an additional product. Exclusive dealing occurs when a seller agrees to sell all or a substantial amount of its products to a buyer, or, the reverse, a buyer agrees to purchase all or a substantial amount of product from a seller.

The next century saw continued ambiguity and action in antitrust law. Cases included numerous suits against IBM, the breakup of the national Bell telephone system into so-called Baby Bells by consent decree, and the case against Microsoft in the late 1990s.

Since the true aim of antitrust law has been unclear from the start, it is difficult to claim that the policy has been a success. The real cost of antitrust is the innovation it prevents, and it is hard to quantify the extent and specifics of its harmful, unintended consequences. But undeniably, the looming threat of antitrust action has hindered business decisions by entrepreneurs that might have proved beneficial for consumers and wealth accumulation.

Antitrust laws have also cost taxpayers plenty in public enforcement. Antitrust laws introduced a public choice problem in that regulators may exercise their powers to promote their own preferred policies. This dynamic leads to intense lobbying by

regulated entities for relief from antitrust regulation and for the imposition of barriers to entry that limit competition from new entrants into the market.

Congress should:

- 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.

Agencies and courts should:

- Decline to bring new cases.
- Failing that, require proof of consumer harm before bringing a case.

Creative destruction in an open marketplace protects consumer benefit much better than clumsy antitrust law. Economist Joseph Schumpeter aptly identified it as the positive force that drives innovation and raises standards of living for consumers. It was this process of creative destruction in the marketplace, not antitrust law, that allowed innovative competitors to displace long-established incumbent players—such as Kodak, Blockbuster, Myspace, local taxi monopolies, and many more—with alternative offerings that consumers preferred.

The Kodak example is especially illustrative. The company—which has struggled since the rise of digital photography—secured a $765 million federal loan to convert itself into a pharmaceutical company to aid with the COVID-19 response. Company officials bought up tens of thousands of stock shares before making the announcement public, likely in the hope of benefiting from an artificially boosted share price. The loan was quickly put on hold after a wave of bad publicity, and company executives were sued by both investors and the Securities and Exchange Commission.

Markets move faster and have better information than regulators. They are far more effective at fighting poverty and injustices. Markets constantly work to erode competitive advantage. It takes government to maintain cartels and monopolies. No depth of expert knowledge can rival the price signals and incentives of the marketplace. Markets are also more reliably objective than the whim of regulators or politicians. Federal Trade Commission regulators and Department of Justice lawyers are only human and therefore vulnerable to biases and opinions, as well as to regulatory capture.

Capitalism has lifted more people out of poverty than any other socioeconomic system ever attempted. The World Bank defines absolute poverty as an income of less than $1.90 per day. Before COVID-19 hit, an average of 137,000 people rose out of absolute poverty every day—for the past 30 years. A few years ago, the share of global population living in absolute poverty fell below 10 percent for the first time in history. The importance of this world-historical process is on par with the Agricultural Revolution or the invention of fire. Antitrust regulation slows this engine of growth, which could be moving even faster. If progressives and populist conservatives succeed in ramping up enforcement, it will be more difficult for people to access new and existing technologies that could help them recover. The tech companies that regulators have in their sights are mostly headquartered in the United States, but their impact is global.

The Competitive Enterprise Institute advocates abolishing antitrust law, removing all remaining government monopolies, and preventing the creation of new ones. Regulatory barriers that prevent the creative destruction of the marketplace from enabling a more productive allocation of resources should be removed. For example, eliminating the financial regulations that make launching an initial public offering of stock prohibitively expensive would spur more creative destruction in the marketplace, and thus more innovation and wealth creation.

On the flip side of the coin, new regulation of today's Big Tech firms would do more to entrench their dominance of the marketplace than to restrain them. If today's FAANG companies—Facebook, Amazon, Apple, Netflix, and Google—have to operate curtailed by antitrust rules that act as barriers to entry to new competitors, innovation will slow and consumers will suffer. Let the lawyers stamp out fraud and let the market do its job.

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

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Medical Technology and Health Care

2

American consumers benefit from a bounty of choice, competition, and innovation in health care. Nevertheless, America's health care system is plagued by rapidly rising costs, inconsistent quality, and a lack of patient control. Moreover, persistent access and affordability limitations have led policy makers to adopt a series of funding and regulatory measures during the past six decades that have substantially increased government involvement in the health care sector. Ironically, that has exacerbated cost inflation, restricted choice and competition, dampened innovation, and shifted increasingly greater control over health care choices into the hands of governments and health insurers. Yet many advocates and policy makers continue to demand even greater government control.

The cure for America's health care system does not lie in additional increases in government involvement, but in policies that put more control over health care spending in the hands of patients, regulatory approaches that permit and reward innovation and competition, and deregulation of the market for health services, health care technology, and health insurance. Policy makers should embrace dynamic, market-oriented reforms that leverage technology, competition, and innovation to increase health care quality while reducing costs.

PERMANENTLY REPEAL FEDERAL RULES THAT HINDER OR FORBID TELEMEDICINE AND TELEHEALTH

Telemedicine and telehealth—the use of electronic and telecommunication tools by health care professionals to evaluate, diagnose, and treat patients remotely, or by patients themselves to monitor their own health and well-being—have grown in popularity in recent decades. Many health services cannot be provided remotely, but when only consultation is needed, telemedicine can improve access to health specialists located in distant parts of the country, increase convenience for patients who no longer need to travel to a health care provider's physical office, and lower health expenditures by reducing overhead costs and increasing the number of patients a provider can serve.

Congress should:

- Permanently repeal federal rules that hinder or forbid telemedicine and telehealth, including:
  - Medicare and Medicaid reimbursement policies that require in-person consultations.
  - Medicare regulations that specify the types and location of facilities where health services may be provided.
  - Medicare and Medicaid rules that prevent health care providers licensed in one state from offering care to patients in another.
  - Patient privacy and data security rules promulgated under the Health Insurance Portability and Accountability Act (HIPAA).

Telemedicine has become especially useful during the COVID-19 pandemic, as social distancing and concerns about transmission fueled a surge in demand for remote health care consultations. Initially, a number of state and federal policies had hindered the use of telehealth and made it more costly for providers and patients. Many of those policies have been temporarily suspended during the pandemic to ease burdens on health care facilities and to make it easier for patients to stay at home. But easing such restrictions is useful not only during a pandemic. With that in mind, Congress, federal regulators, and state governments should permanently repeal any of the suspended rules that are not clearly necessary to protect patients.

Among the most significant barriers to telemedicine are rules that implicitly forbid its use by requiring the in-person provision of certain health services. For example,

state licensing and scope-of-practice laws often require conducting initial patient consultations in person, as do various Medicare and Medicaid reimbursement policies. Medicare regulations often specify the types and location of facilities where health services may be provided, which tend to preclude remote consultations. And state medical licensing rules, along with Medicare and Medicaid rules, can prevent health care providers licensed in one state from offering care to patients in another, making some telehealth services less useful or practical.

Perhaps the most significant restrictions on telehealth services are patient privacy and data security rules promulgated under HIPAA. Those rules require the following:

- That the technologies health professionals use when providing remote services meet strict standards for health data protection;
- That secure permanent storage of any medical data shared during the telehealth consultations is provided; and
- For health care professionals to have a binding Business Associate Agreement with any third-party platform that shares or stores health information, under which the technology platform assumes legal responsibility for specified privacy protection measures.

Those requirements make it unlawful or impractical to use many common communication tools, such as email, texting, instant messaging platforms, or video chat applications like Skype, Zoom, and FaceTime that are not viewed as sufficiently secure or with whom providers cannot obtain a Business Associate Agreement. Providers generally must select a less convenient and more expensive specialty product, and patients must download and use the telehealth application chosen by their providers.

In March 2020, the Department of Health and Human Services used its enforcement discretion to temporarily allow the use of otherwise noncompliant technologies and to waive various reimbursement and location-of-services rules that would preclude use of telehealth consultations. According to a survey of primary care and specialty providers by the health care consulting firm IQVIA, fewer than 10 percent of patient interactions were conducted via telehealth before COVID-19, but over 50 percent were conducted via telehealth during the month of April. Still, many providers expect use of telehealth services to return to near pre-pandemic levels once the COVID-19

public health emergency ends and HIPAA privacy rules and other restrictive regulations are reinstated.

Congress should act quickly to repeal or reform the various HIPAA, Medicare, and Medicaid rules that inhibit the broader adoption of telehealth services, and it should encourage state governments to act as well.

Experts: Gregory Conko, Joel Zinberg

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REJECT PRICE CONTROLS FOR PRESCRIPTION DRUGS

Prescription drug prices are a significant concern for many Americans, which makes them a popular target for lawmakers. So during the past three decades, Congress and nearly every presidential administration have proposed a range of policies intended to lower pharmaceutical prices. It is worth noting, however, that most Americans do not spend very much on prescription drugs. To the extent that a problem exists with high drug prices, it is a narrower one than often claimed. Therefore, such concerns should be addressed, not by imposing price controls or other heavy-handed measures that would inhibit the development of innovative new treatment options, but by removing obstacles to market access and allowing competitive pressures to help lower prices.

Congress should:

- Reject price controls for prescription drugs, including both express price caps and indirect price controls, such as:
  - Reimportation of drugs from countries that impose their own price controls.
  - Domestic reimbursement rates based on other countries' price controls.
  - Direct negotiation of prescription drug prices by Medicare and Medicaid.
  - Compulsory licensing of innovative drug patents.

In the United States, nine out of every 10 prescriptions are filled with generic drugs, which are much cheaper than their brand-name equivalents. And most Americans have prescription drug coverage as part of a private health insurance plan or as a benefit of their enrollment in government-run health programs, such as Medicare and Medicaid. So, the out-of-pocket expenditures for the average American who uses at least one prescribed drug ($143 per person in 2017) is far less than in many other industrialized nations and roughly on par with that in Canada ($144 per person). Very high prescription drug costs tend to be a problem only for patients who must take a large number of prescribed medicines, patients who suffer from complex chronic diseases, or patients who must take newly approved therapies that have no lower-priced alternatives.

It is not unusual for news headlines to deplore the launch of a new prescription drug with a seemingly exorbitant price tag. For example, in 2014 the hepatitis C drug Sovaldi was introduced at a price of $84,000 for a standard, 12-week treatment regimen. The

drug was the first therapeutic option that could actually cure hepatitis C for most patients, making it superior to the long-term chronic treatments it replaced—which themselves were more expensive than a course of Sovaldi. But politicians and patient advocates roundly condemned the drug's price, initiated investigations into the company's pricing decision, and called for price controls. Within three years, though, several other competing drugs had been introduced, some at prices less than one-third of Sovaldi's, thus forcing the price of all hepatitis C treatments downward sharply.

As the Sovaldi example shows, it is important that policy makers not lose sight of the tremendous value that innovative new medicines deliver. According to one empirical study, new medicines accounted for three-quarters of life expectancy gains in higher-income countries between 2000 and 2009. And expensive drugs that treat cancer, heart disease, and other life-threatening conditions are the main reasons for those gains. That is why health insurers are willing to pay seemingly high prices for prescription drugs.

Using price controls, caps, or other regulatory efforts to artificially bring down drug prices may produce modestly lower prices for some patients in the short term. But doing so would harm patients more than help them by short-circuiting the dynamic research-and-development process that has delivered a steady stream of innovative new treatments. In short, price controls would lead to fewer breakthrough treatment options in the future and would do significant harm to patient health.

The process of developing a new drug and bringing it to market is lengthy and expensive. It takes an average of about 12 years to get a new molecular entity from laboratory testing to final approval. Even then, only about 10 percent of the drugs that enter clinical trials are ultimately approved by the Food and Drug Administration. Including the costs of the drugs that are never approved, it takes an estimated $2.5 billion to get a new drug from the laboratory to the pharmacy. Even then, many of the drugs that are approved never become profitable. A 2018 Congressional Budget Office study concluded that drug companies need to make a profit margin of 62.2 percent on their successful drugs just to average a 4.8 percent rate of return on their entire portfolios.

It is not the case that drug prices are high because manufacturers must recoup the vast expense of research, development, testing, and the drug approval process. After all, many drugs are never profitable, but their manufacturers cannot raise prices because

purchasers (usually private insurance companies or the Pharmacy Benefit Managers that administrate prescription drug programs for insurers and large companies that self-insure) will pay only as much as the expected life-saving or health-enhancing value for prescription drugs. Drug makers will try to charge the highest price that will maximize revenue for their products, but institutional purchasers have negotiating clout and an incentive to pay the lowest prices possible. The prices eventually agreed to by the parties are determined by complex calculations that reflect the availability and cost of alternative treatments, including competing drugs; whether a medicine may reduce doctor visits, hospital admissions, and the use of other health care services; how many patients may want or need the medicine in question; and myriad other factors.

Ultimately, given very high development and approval costs, manufacturers cannot afford to lower prices because the revenues are necessary to incentivize investment in the next generation of pharmaceutical products—each of which has a low probability of success. So, imposing pharmaceutical price controls will inevitably lead to less medical research and development and, as a result, fewer new drugs reaching patients in the future.

For the reasons stated above, Congress should reject both express price caps and indirect price controls, such as legalizing the reimportation of drugs from countries that already impose price controls, domestic reimbursement rates based on other countries' price controls, direct negotiation of prescription drug prices by Medicare and Medicaid, and compulsory licensing of innovative drug patents.

Instead, Congress should take efforts to incentivize greater competition among pharmaceutical manufacturers by reducing the time and expense of bringing new prescription drugs to market, and by streamlining the generic drug approval process.

Experts: Gregory Conko, Joel Zinberg

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PROMOTE REAL HEALTH CARE PRICE TRANSPARENCY BY GIVING PATIENTS MORE INCENTIVE AND RESPONSIBILITY FOR HEALTH CARE CHOICES

Advocates of government involvement in the health care market have long argued that rising costs are an unavoidable part of any health care system because patients are incapable of making fully informed decisions about the care they receive. They claim patients lack the specialized knowledge needed to know which treatment options are necessary, so they seek and obtain unneeded health services.

In addition, health services are what economists call credence goods, meaning that, even knowledgeable patients generally cannot judge the quality of the care they receive until after the service is rendered.

Most importantly, private insurance plans—often chosen by employers or government health programs—pay the vast majority of health care expenses. That means that providers treat payers, not patients, as their true customers. Thus, patients generally are not given access to useful price or quality information and have little or no incentive to comparison shop.

Congress should:

- Promote real price transparency by giving patients more responsibility for health care choices, and therefore an incentive to demand and heed pricing information. Options to accomplish that include the following:
  - Encourage and facilitate the growth of high-deductible health insurance plans, coupled with generous health savings accounts.
  - Eliminate the tax preference for employer-sponsored health insurance plans, which put third parties in charge of selecting many health plan options.

Many policy makers propose to address the lack of price sensitivity among patients by putting more control over health care decision making in the hands of government and providing greater information to patients about health care price and quality. But while many health policy experts recognize that greater government involvement would separate patients and doctors even further, thereby jeopardizing health care

quality, nearly all believe that increasing price transparency would help combat rising costs. A number of recent policy changes—including elements of the Patient Protection and Affordable Care Act and Trump administration price disclosure regulations—have sought to make information about health care prices public, so patients can comparison shop for the best values.

Unfortunately, many of those attempts at increased price transparency have provided incomplete, out-of-context, or irrelevant information to patients that simply cannot empower them to make value-maximizing choices. Some proposed policies also violate constitutional free-speech protections. And they almost all suffer from a significant flaw that renders them incapable of controlling runaway costs.

As long as third-party payers—whether private insurance plans or government-run health programs—insulate patients from the financial cost of their health-purchasing decisions, they will have little incentive to maximize value because they reap the benefit of higher-quality care while the third-party payer bears most of the cost. A patient with a $150 co-pay or a $1,000 deductible has no clear or direct reason to care whether the hospital charges his or her insurance company $25,000 or $50,000 for a knee replacement surgery.

Recent efforts to force pharmaceutical drug manufacturers and hospitals to disclose prices suffer from all three of those defects. In 2019, for example, the Centers for Medicare and Medicaid Services (CMS) published a rule that would have forced television advertisements for prescription medicines covered under Medicare or Medicaid to disclose the products' "wholesale acquisition cost," which is the price at which manufacturers sell drugs to pharmacies, hospitals, and other providers. The rule could not require disclosure of the prices that consumers are actually charged for prescription drugs because those prices are controlled more by pharmacies than drug manufacturers. They also vary from patient to patient, sometimes substantially, and are influenced by co-pays, deductibles, and dozens of other variables. Because the CMS rule required disclosure of information that patients cannot act on directly, it could not reasonably have been expected to meaningfully influence comparative shopping behavior.

The rule was struck down by the U.S. District Court for the District of Columbia, which held that the CMS lacked statutory authority to promulgate it. But that only

served to revive interest in Congress for legislation to grant the CMS that power. Doing so would be pointless, however, as decades of court precedent make clear that neither private citizens nor businesses can be compelled to say or print things unless there is a substantial government interest in doing so. Because no viable mechanism exists through which the wholesale acquisition cost disclosure rule could achieve its stated goal of "empowering consumers to make better-informed decisions" and "slow[ing] the growth of federal spending on prescription drugs," such a poorly designed transparency requirement would almost certainly be struck down as unconstitutional.

Ironically, some economists believe that, in the absence of incentives to economize, price transparency may lead to higher spending if patients view higher prices as a sign of greater quality. If Congress genuinely wants to empower consumers to make meaningful, price-conscious, and value-maximizing health care choices, it must do two things: (a) ensure that consumers have access to price and quality information that is relevant to them individually as patients and (b) give them greater incentive to choose the value-maximizing option and greater responsibility for making health care choices.

Some policies that require price disclosures may be warranted, but only if they truly give patients information about the prices they pay directly. A more effective approach would be for Congress to minimize the role of third-party payers in the American health care system. Only when patients bear the full cost of their health care purchases will they have the requisite incentive to seek pricing information and maximize value. Correspondingly, once patients actually have an incentive to comparison shop, health care providers will in turn have an incentive to compete for patients by providing pricing information.

We see that phenomenon at work in parts of the health care market, such as elective cosmetic surgery and laser vision correction, where patients generally pay most if not all expenses out of pocket. It is common for providers of laser eye surgery, for example, not only to make pricing information available to patients, but also to advertise and compete on the basis of prices in order to attract patient customers.

Ultimately, Congress can promote real health care price transparency by giving patients more incentive and responsibility over their health care choices. One way of

doing so is to encourage and facilitate the growth of high-deductible health insurance plans, coupled with generous health savings accounts. Another is to eliminate the tax preference for employer-sponsored health insurance plans, which puts third parties in charge of selecting many health plan options. Only when patients themselves are in the driver's seat and benefit directly from economizing health care choices can we expect price transparency to generate lower health care costs.

Experts: Gregory Conko, Joel Zinberg

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MODERNIZE THE FDA'S RULES FOR EVALUATING NEW DRUGS BY EXPANDING FLEXIBILITY IN ADAPTIVE CLINICAL TRIAL DESIGNS

First developed more than 50 years ago, the approach to clinical testing by the U.S. Food and Drug Administration (FDA) relies on multiple trials in three phases of testing in humans. It is premised on the belief that (a) most patients will have similar responses to medical interventions and (b) a drug's benefits and side effects will be easy to identify, given a large enough test population of patients with similar health and physical characteristics. However, we now know that apparently similar patients often respond differently to the same medications, and that the homogeneous patient pools and tightly controlled clinical environments associated with randomized trials do not reflect real-world practice and outcomes well. Such methods are ill-suited for detecting and testing subtle differences that occur in small patient subpopulations. That makes them poor tools for fast-paced, adaptive learning.

Congress should:

- Modernize the FDA's rules for evaluating new drugs by expanding flexibility in its use of adaptive clinical trial designs.

A 2007 report by the FDA Science Board concluded that "FDA's evaluation methods have remained largely unchanged over the last half-century," and that the agency's "inadequately trained scientists are generally risk-averse, and tend to give no decision, a slow decision or even worse, the wrong decision on regulatory approval or disapproval." That report and other critiques served as a wake-up call to the agency and Congress. Coupled with pressure from the public health community, patient advocacy organizations, and the pharmaceutical industry, it prompted the FDA to begin to change. That evolution was pushed along further with Congress' enactment of the 21st Century Cures Act in 2016, but progress in changing the way the FDA regulates clinical trials has remained slow.

To minimize hindsight bias in data analysis, clinical trials begin with a "prespecified" hypothesis and a carefully constructed methodology for testing that hypothesis. When an unexpected or idiosyncratic effect is detected among a subpopulation of the test group, the FDA typically demands that the sponsor form a new hypothesis and initiate one or more entirely new trials. In the process, adaptive learning is

short-circuited, the development process is prolonged, and the costs of drug development rise.

Today, however, new computational tools, a better understanding of disease pathways, the development of biomarkers to predict drug effects, and other technological advances are enabling the use of innovative, adaptive clinical trial methods that allow researchers to learn while trials are in progress and, in turn, change dosing regimens or isolate patient subpopulations that respond especially well or poorly to the test drug. Expanded use of adaptive trial designs could help sponsors collect better, more robust data from fewer patients and in a shorter time.

Indeed, it was the FDA's willingness—and that of regulators in the United Kingdom and the European Union—to permit creative and highly flexible approaches to the clinical testing of COVID-19 treatments and preventatives that made it possible for drug manufacturers to develop, test, and secure approval for COVID vaccines in record time. Regulators should embrace such flexibility in the testing of other essential therapeutics as well.

Even before passage of the 21st Century Cures Act, the FDA had begun to welcome adaptive trial proposals and has accelerated their use over the past few years. The agency has also published several guidance documents intended to aid trial sponsors in developing them. Still, the FDA remains hyper-cautious about the possibility of statistical errors and insists that adaptive trials follow the same prespecification requirement as conventional trials.

Thus, among other things, the agency asks trial sponsors to predict what idiosyncratic results may occur during a trial and decide at the outset how they will change the trial's direction when those results occur. Such rigid constraints have prevented researchers from reaping the full benefits of various innovative methodologies. Therefore, it is imperative that the FDA develop more flexible guidelines for using adaptive trial methods and encourage drug developers to use them.

Experts: Gregory Conko, Joel Zinberg

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Technology and Telecommunications

3

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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Energy and Environment

4

REJECT THE GREEN NEW DEAL AND SIMILAR CENTRAL PLANNING SCHEMES

The Green New Deal (GND), a nonbinding resolution introduced by Rep. Alexandria Ocasio-Cortez (D-NY) and Sen. Ed Markey (D-MA) in February 2019, calls for "a new national, social, industrial, and economic mobilization on a scale not seen since World War II and the New Deal era." The GND envisions a massive expansion of federal spending and regulation to decarbonize the economy while guaranteeing health care, affordable housing, higher education, job training, family-sustaining wages, and retirement security for all. The costs required to achieve that end point are unsustainably large, vastly exceed benefits, and are not scientifically justified.

Congress should:

- Reject the Green New Deal and similar central-planning schemes.

The GND would impose unsustainable costs on the U.S. energy sector, inflate energy prices, depress gross domestic product (GDP) growth, and impoverish American households.

A March 2019 study by American Enterprise Institute economist Benjamin Zycher estimates that "meeting 100 percent of the power demand in the United States through clean, renewable, and zero-emission energy sources" would cost $490.5

billion per year, or $3,845 per household. Factoring in the budget cost of the social spending programs required to sustain the pro-GND coalition in Congress and the deadweight loss of the associated tax hikes, Zycher estimates the total annual cost of the GND would be nearly $9 trillion.

That estimate is conservative, Zycher explains, because the $9 trillion figure "excludes the costs of the massive shift away from fossil fuels in the transportation sector, the total cost of the GND's high-speed rail component, the cost of retrofitting every building in the country for 'efficiency,' and most of the economic costs of the environmental effects of the GND."

In July 2019, Heritage Foundation analysts Kevin Dayaratna and Nicolas Loris used a clone of the U.S. Energy Information Administration's National Energy Model to estimate the costs of achieving the GND goal of net-zero emissions by 2050. Dayaratna and Loris ran the model with an economy-wide, revenue-neutral carbon tax increasing at 2.5 percent annually combined with regulations and mandates targeting the manufacturing and energy sectors.

The model reveals that carbon taxes have sharply diminishing returns. A $35 carbon tax reduces carbon dioxide (CO_2) emissions by 44 percent below 2010 levels by 2050, but a $100 tax reduces emissions by only 53 percent. Even when the carbon tax exceeds $300 per ton, emissions do not decrease by more than 58 percent below 2010 levels.

Run with a $300 carbon tax and the industrial mandates, the Heritage model projects the following impacts by 2040:

- A decline of 1.2 million jobs in annual average employment levels, with a peak decline of 5.3 million fewer jobs in the fourth year of the GND program
- A reduction of $165,000 in the cumulative income of a family of four
- A reduction of $15 trillion in cumulative GDP
- An increase of 30 percent in household expenditures for electricity

Those estimates are also conservative. As noted, costs are estimated only up to the point where taxes and mandates cut emissions by 58 percent. The analysis also does not estimate the direct taxpayer costs of GND spending programs or the costs of maximizing the energy efficiency of all buildings.

A February 2020 Competitive Enterprise Institute study by Daniel Turner and Kent Lassman fills some of the gaps in previous analyses. Zycher estimated the costs of replacing fossil and nuclear generation with wind and solar power. Turner and Lassman estimate the costs of deploying additional renewable capacity to meet GND-induced increases in electric demand, such as rapid electrification of the U.S. transport sector. They also estimate costs of electrifying the shipping and logistics industry, replacing combustion-powered vehicles with electric vehicles, and retrofitting all buildings. Combining that information with previous studies, they estimate the total cost of GND energy policies for households in Alaska, Colorado, Florida, Iowa, Michigan, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, and Wisconsin.

They find that in 10 of those states, the average household cost of GND energy policies is $74,287 in the first year of implementation, $47,755 annually over the next four years, and $40,706 annually thereafter. Annual GND costs in Alaska are about $10,000 higher because of its cold climate, remoteness, and sparse population.

The authors caution that "the GND would likely drive the American economy into a steep economic depression, while putting off-limits affordable energy necessary for basic social institutions like hospitals, schools, clean water and sanitation, cargo shipments, and the production and transport of the majority of America's food supply."

The Green New Deal is also based on flawed scientific assumptions. Many GND advocates claim the world has about a decade to avert planetary ruin—an assessment attributed to the United Nations Intergovernmental Panel on Climate Change (IPCC). An October 2018 IPCC report found that global emissions must fall to 40 to 60 percent below 2010 levels by 2030 if policy makers are to hold global warming below 1.5 degrees Celsius (°C).

However, the IPCC neither states nor implies that 1.5°C is a tipping point beyond which catastrophe ensues. On the contrary, the IPCC states: "Under the no-policy baseline scenario, temperature rises by 3.66°C by 2100, resulting in a global gross domestic product (GDP) loss of 2.6%" (*Special Report on 1.5°C of Global Warming*, Chapter 3, p. 256). Although undesirable, a reduction in global GDP of 2.6 percent 80 years from now is not a catastrophe.

Indeed, as Danish analyst Bjorn Lomborg points out, of the IPCC's five main economic development scenarios, the fossil energy–intensive scenario achieves the fastest economic growth and greatest degree of income equality. In that scenario, global per capita income in 2100 reaches an astonishing $140,000 annually—more than 10 times the current level. That is after accounting for climate change damages. Thus, according to the IPCC, unchecked climate change negatively affects global GDP, but untrammeled fossil-fueled growth would offset the losses many times over.

According to standard modeling by the U.S. Environmental Protection Agency (EPA), full decarbonization of the U.S. economy by 2050 would avert only 0.173°C of warming by 2100. Recent empirical research indicates that the actual mitigation could be only 0.08°C—an undetectably small quantity. Either way, the GND would have no discernible impact on weather patterns, crop yields, polar bear populations, or any other environmental condition that people care about. In short, the GND would impose massive costs for few if any detectable climate benefits. It is a bad deal.

Experts: Marlo Lewis, Kent Lassman, Myron Ebell

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OPPOSE CARBON TAXES

Neither chamber of Congress has ever passed a carbon tax, and for good reason. A carbon tax is a market-rigging policy, not a free-market one. A carbon tax by design raises the cost of energy. Making energy less affordable diminishes economic growth, household income, and consumer purchasing power.

Many current proposals would rebate a portion of the revenues to American households, but given Washington's spending ambitions, no enacted carbon tax would be "revenue neutral," as it would not reduce other taxes by an amount equal to expected revenues. Even if it were revenue neutral, the tax would still be economically harmful. Carbon pricing would also expand federal regulation because of its inevitable pairing with a system of border taxes.

Finally, costs would far exceed benefits because even the most aggressive politically feasible tax would have no discernible impact on climate change risks.

Congress should:

- Reject legislative proposals to establish a carbon tax.

A carbon tax is not a free-market policy. Rather, it imposes prices, rather than mandates, to reduce emissions. Cap-and-trade programs and renewable energy quotas are just implicit carbon taxes. All such policies pick energy market winners and losers. As President Obama put it, the point of pricing carbon is to "finally make renewable energy the profitable kind of energy in America."

Any enacted carbon tax will not be revenue neutral. Most carbon tax bills include "fee and dividend" programs that rebate a portion of revenues to American households. However, given Washington's spending ambitions, no enacted carbon tax would ever reduce other taxes by an amount equal to expected revenues. Inevitably, substantial revenues would be used to fund "investments" in infrastructure, "green jobs," or other political priorities. Besides, returning revenues to households would not incentivize work or investment. Instead, it would empower government to play Santa Claus with new pots of tax dollars. A fee-and-dividend program is just a "share the wealth" scheme in green garb.

Even if the carbon tax were revenue neutral, it would still be economically damaging. The smaller the base on which a tax of a given size is levied, the more harmful the impacts on investment, employment, and consumer prices. For example, imposing a $100 billion tax on citrus producers would destroy many more businesses and jobs and would more adversely affect consumer welfare than would a $100 billion hike in federal income taxes.

The base for a carbon tax—a set of specific commodities and companies—is narrower than the base for income taxes. Thus, a fee-and-dividend program would still hamper economic growth. In a recent study, Capital Alpha Partners examines a carbon tax that starts at either $40 or $49 per ton and increases by 2 percent annually. The study finds that a carbon tax returning all revenues via lump-sum rebates to households results in "lost GDP equal to between $3.76 trillion and $5.92 trillion over the 22-year forecast period."

A grand bargain in which conservatives and progressives agree to tax carbon and deregulate energy at the same time is a fairy tale. Several recent carbon tax bills advocate suspending greenhouse gas (GHG) regulations under Clean Air Act sections 202, 211, 213, and 231. Those provisions deal solely with motor vehicle engines and fuels. Thus, the EPA would remain free to revive the so-called Clean Power Plan, or even to establish national ambient air quality standards for greenhouse gases.

In addition, the bills require the EPA to impose regulations in 2030 if the agency believes the suspended provisions would have achieved greater emission reductions than the carbon tax. Tellingly, the bills direct the agency to "grant a waiver under CAA section 209(b)." That is the provision under which the Obama-era EPA granted California permission to establish GHG emission standards for new motor vehicles. The Trump administration's Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule rescinded that waiver. The carbon tax bills would reinstate it. Thus, the bills do not even temporarily suspend regulation of motor vehicle GHG emissions but rather transfer that power to the California Air Resources Board. Unsurprisingly, none of the bills preempt any state-level climate policies.

Worse, enacting a carbon tax would saddle U.S. businesses with a massive new regime of intrusive regulation. To prevent carbon taxes from creating "unfair" trade advantages for foreign producers, most proposals impose "border taxes"—carbon

tariffs—on goods imported from countries lacking equivalent climate policies. That would increase costs for American businesses and consumers.

Moreover, estimating carbon price equivalencies among heterogenous policies and enforcement regimes would be a daunting, subjective, and contentious process. Many jurisdictions' climate policies do not rely chiefly on carbon taxes. Finally, variations in regional, local, and even company-specific production processes may yield different carbon intensities unrelated to differences in national policies.

The difficulties in estimating carbon intensities are compounded by international supply chains. A product imported into the U.S. may incorporate inputs and value additions from firms in several countries operating under diverse climate policies. And supply chains can change rapidly, as often happened during the COVID-19 pandemic. Thus, as American Enterprise Institute economist Benjamin Zycher observes, something like a greatly expanded—or new—Internal Revenue Service would be needed to develop, administer, and audit compliance with new rules for estimating and reporting carbon intensities, and to prosecute companies suspected of border tax evasion or underpayment.

All the economic and regulatory pain would produce no detectable effects on weather patterns, crop yields, or any other environmental condition that people care about. Even a carbon tax that eliminates all U.S. CO_2 emissions would avert only 0.137°C of global warming by 2100, according to standard EPA climate modeling. Any politically feasible carbon tax would achieve significantly less, especially over the next 30 years.

Chief Justice John Marshall famously observed, "The power to tax involves the power to destroy." That is especially true of carbon taxes, which in most proposals increase, year after year, through 2030 or even 2050. Unlike income or payroll taxes, a carbon tax is designed to tax away the base on which it is levied.

Any such premeditated assault on industries providing affordable, reliable energy to the American people is what the Competitive Enterprise Institute calls a "never needed" policy. Enacting a carbon tax now, as America struggles to reopen for business, would be exceedingly unwise.

Experts: Marlo Lewis, Myron Ebell

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END FEDERAL ENERGY TAX CREDITS

Renewable energy tax credits enrich special interests at taxpayers' expense, divert capital from self-sustaining energy projects to politically mandated projects, and divert resources and talent from innovation to cronyism and lobbying.

Congress should:

- End federal energy tax credits.

Wind and solar power are no longer "infant" industries and their advocates repeatedly claim renewable generation is fully competitive with fossil-fuel energy generation. Yet they continually lobby to extend the renewable energy production tax credit (PTC) and investment tax credit (ITC), warning of job losses, business failures, and stalled investment unless the credits are renewed. The messages conflict but serve the same purpose: keep the gravy train running.

The PTC is a tax credit for electricity generated by wind, geothermal, and other renewable technologies. Owners of "qualified facilities" receive credits for every kilowatt-hour (kWh) produced over a 10-year period. Thus, even if the PTC is not renewed in 2020 or reinstated in 2021, most current beneficiaries will continue to receive credits for years to come.

The 1992 Energy Policy Act set the maximum value of the PTC at 1.5 cents per kWh, adjusted for inflation. The current inflation-adjusted maximum is 2.5 cents per kWh. However, Congress has often modified the maximum for facilities starting construction in specific years. For example, the Taxpayer Certainty and Disaster Relief Act of 2019 set the credit for 2020 at 60 percent of the maximum rate—an increase from the 2019 rate of 40 percent. The ITC reduces a producer's tax liability by a percentage of the cost of acquiring or constructing the facility. Currently, solar energy has a permanent ITC rate of 10 percent, although a property starting construction in 2019, 2020, and 2021 receives credits of 30 percent, 26 percent, and 22 percent, respectively.

The PTC was first enacted in 1992 and was scheduled to expire on July 1, 1999. Since 1999, Congress extended the PTC five times and retroactively reinstated it seven times. Similarly, the ITC was first enacted in 1978 and was scheduled to expire on

December 31, 1982. Between 1980 and 1992, Congress renewed the ITC seven times, making the 10 percent solar ITC permanent via the 1992 Energy Policy Act. Congress increased the value of the credit and the list of qualified facilities five times via the 2005 Energy Policy Act and subsequent legislation.

Today, the PTC transfers money from future taxpayers to a relatively small number of beneficiaries. For example, the annual number of PTC claimants during 2008–2015 ranged from 180 in 2012 to 265 in 2015. The U.S. Treasury estimates the wind PTC will cost $4.3 billion in 2021 and $33.8 billion in forgone federal revenue during 2021–2029. Combined with the ITC for solar and offshore wind, the credits will cost $9.1 billion in 2021 and $66.7 billion during 2021–2029.

The alleged "climate crisis" is the principal rationale for subsidizing renewable electricity investment. However, even complete decarbonization of the U.S. economy would avert only 0.137°C of global warming by 2100, according to standard EPA modeling. The mitigation achievable by the PTC and ITC, if any, is literally undetectable.

Some proponents claim that the tax credits benefit consumers, arguing as follows. Twenty-nine states have enacted renewable portfolio standards (RPS). RPS programs require utilities to ensure that specific percentages of electricity sold in retail markets come from renewable sources. Absent the PTC and ITC, utilities would incur higher RPS compliance costs and charge customers higher rates.

That is correct as a snapshot analysis, but it ignores the tax credits' long-term political impact, which is to prop up—and thus expand—RPS programs. The PTC and ITC shift part of the current cost of RPS programs from current in-state ratepayers to future federal taxpayers. In other words, the credits hide from ratepayers the full cost of renewable energy mandates. If the PTC and ITC never existed, states would likely have fewer or less aggressive RPS programs. Indeed, renewable electricity investment typically craters when the tax credits lapse. Ending the PTC and ITC will improve the prospects for rollback or even repeal of costly renewable electricity quotas.

Deregulation would benefit consumers because RPS programs increase electricity rates. A May 2019 University of Chicago study found that "RPS programs significantly increase retail electricity prices, with prices rising by 11 percent seven years after the

policy became law and 17 percent twelve years afterwards. The cumulative effect seven years after the passage of the legislation initiating an RPS, consumers in the 29 states studied had paid $125.2 billion more for electricity than they would have in the absence of the policy."

Oregon, Texas, and Washington have aggressive RPS programs *and* low electricity prices. However, that is because those states have abundant affordable power from sources other than wind and solar—natural gas in Texas and hydropower in Oregon and Washington. Other states with aggressive RPS programs—California, Connecticut, Massachusetts, New Hampshire, New York, and Vermont—have electricity rates substantially higher than the national average. All states without RPS programs have rates below the national average.

The PTC and ITC subsidize special interests at the expense of taxpayers. They also prop up RPS programs that subsidize the same favored few at the expense of consumers. Congress should let the PTC and ITC expire—permanently.

Experts: Marlo Lewis, Ben Lieberman, Myron Ebell

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END FEDERAL EFFICIENCY STANDARDS FOR CONSUMER PRODUCTS

It is almost a truism: the private sector is more efficient than government, and consumers know their own interests better than does any central planner. Nonetheless, the federal government has gotten into the business of setting efficiency standards for a variety of energy-using consumer goods—from cars and refrigerators to light bulbs—that make those products more expensive and less reliable. It is time to pull the plug on those decades-old mandates and give consumers more choice in the products they buy and the way they use energy.

Congress should:

- Sunset all federal energy efficiency standards for consumer products.

Consider corporate average fuel economy (CAFE) standards for cars and trucks. Congress created CAFE in 1975 in response to the oil embargo by the Organization of Petroleum Exporting Countries and fears of rising dependence on foreign oil. That was an ill-advised solution to a problem that has been solved by the shale revolution and America's ascendance as the world's leading hydrocarbon energy producer. Although the decline in fuel prices since 2015 has decreased the consumer value of fuel-saving technologies, CAFE forces consumers to continually pay more for those technologies.

Worse, the National Academy of Sciences and others have documented that CAFE caused tens of thousands of occupant deaths in previous decades and continues to constrain improvements in vehicle safety. CAFE puts pressure on automakers to reduce average vehicle weight. Lighter vehicles get more miles per gallon but also have less mass to absorb collision forces.

The Obama administration exacerbated CAFE's inherent problems. Defying the Energy and Policy Act's preemption of state laws or regulations "related to" fuel economy, the Obama EPA elevated a state agency famous for its regulatory zeal—the California Air Resources Board (CARB)—from stakeholder to decision maker. Both the Obama administration and CARB aspired to be world "climate leaders," and they elevated climate change concerns as a factor determining the stringency of fuel economy standards. That meant regulators paid even less attention to the adverse impacts of fuel economy standards on auto safety and new car prices.

The standards were scheduled to increase in stringency by 5 percent annually during the 2021–2025 model years. The Obama-era EPA conceded that the standards could increase sticker prices by nearly $3,000 during 2016–2025, while some outside experts estimated larger price increases. CAFE continues to cause occupant deaths not only by limiting vehicle mass, but also by diverting research and development from safety to fuel efficiency enhancements.

Any consumer who wants to buy a highly efficient or alternatively fueled vehicle is free to do so, with or without CAFE. The program's biggest "achievement" now is to restrict the number of new vehicles offered for sale that middle-income households can afford.

Fortunately, the Trump administration recognized CAFE's growing problems. The EPA and National Highway Traffic Safety Administration's Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule reduces the stringency of model year 2021–2026 CAFE standards. It also rescinds California's power to regulate fuel economy. Even better would be sunsetting the program entirely.

Consumers face similar problems with a range of home appliances, which are subject to other dubious standards—part of the same obsolete 1975 law that gave us CAFE. Since then, just about everything that plugs in or fires up around the house has been subjected to federal efficiency standards, in some cases up to five rounds of successively tighter mandates. Even the Department of Energy, which sets the standards, admits that in some cases the resulting increase in the price of appliances may exceed the projected energy savings. Appliance quality suffers as well, through reduced reliability and inferior performance. Perhaps worst of all are the dishwasher standards that have greatly extended the time it takes to do a load. There is nothing efficient about wasting people's time.

There is no reason for the federal government to dictate consumer choices for cars or any other products. The buyers of those products are perfectly capable of balancing energy use—for which federally required labels provide all the needed information—against purchase price and other attributes. Federal energy efficiency mandates should be repealed.

Experts: Sam Kazman, Ben Lieberman, Marlo Lewis, Devin Watkins

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PROHIBIT USE OF THE SOCIAL COST OF CARBON TO JUSTIFY REGULATION OR INFLUENCE PROJECT REVIEWS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

The social cost of carbon (SCC)—the cumulative damage over centuries supposedly caused by an incremental ton of carbon dioxide emitted in a specific year—is not an objective magnitude like the boiling point of water at sea level. Rather, carbon's social cost is a range of estimates generated by computer programs that combine speculative climatology with speculative economics, known as "integrated assessment models" (IAMs). The estimates are too subjective to justify regulations.

Moreover, the hypothetical climate impacts of even the largest infrastructure project are too small ever to be detected or verified. Thus, SCC estimation should not inform agency reviews of infrastructure projects under the National Environmental Policy Act (NEPA).

Congress should:

- Prohibit agencies from using social-cost-of-carbon analysis to justify regulatory decisions or to influence project reviews under the National Environmental Policy Act.

By fiddling with non-validated climate parameters, made-up damage functions, and below-market discount rates, SCC modelers can make "climate action" look like a bargain at any price and make fossil fuels look unaffordable no matter how cheap. In addition, by multiplying the presumed SCC by some estimate of an infrastructure project's direct and indirect CO_2 emissions over the next 280 years, opponents can plausibly claim that the project's social costs, although unverifiable, outweigh its manifest economic benefits.

Because many IAM inputs and assumptions are speculative, SCC modelers can "obtain almost any result one desires," cautions MIT professor Robert Pindyck. What climate campaigners and their agency allies typically desire is to sustain the "worse than we thought" narrative. Unsurprisingly, the central SCC estimates in the Obama administration's 2013 SCC technical support document (TSD) were about 60 percent

higher than those in the administration's 2010 TSD. That is tantamount to saying that in four short years, cumulative climate change damages between 2000 and 2003 increased by 60 percent.

Both TSDs inflated SCC estimates by using below-market discount rates to calculate the present value of future climate damages. In addition, both inflated the perceived benefit–cost ratios of administration climate policies by comparing U.S. compliance costs with the supposed global benefits of greenhouse gas emission reductions rather than with the putative (and smaller) domestic benefits.

In 2017, the Office of Management and Budget put a stop to those accounting gimmicks, but other major biases remain uncorrected. Federal agencies still rely on an obsolete climate sensitivity study (Roe and Baker 2007) that likely overestimates how much warming results from a doubling of atmospheric CO_2 concentrations.

Worse, two of the three IAMs used by federal agencies—known as DICE (Dynamic Integrated Climate-Economy model) and PAGE (Policy Analysis of the Greenhouse Effect)—ignore the abundantly documented agricultural and ecological benefits of CO2 emissions. Those models are structurally biased. The other model—known as FUND (Climate Framework for Uncertainty, Negotiation and Distribution) —does estimate CO2 fertilization benefits but on the basis of studies conducted in the 1990s.

More important, even if such biases are removed, SCC analysis would still be too conjectural to serve as a basis for regulatory justification or NEPA project reviews, for the following reasons:

- IAMs estimate cumulative damages over long stretches of time—typically from the year of an emission's release until 2300. No one can forecast the baseline emission trajectory of the global economy over the next 280 years.
- Scientists do not know the relative strength of the positive and negative feedbacks that amplify or constrain the climate's response to rising CO_2 concentrations, which means there is still no "consensus" about the key variable: climate sensitivity.
- IAMs make non-validated assumptions about how rising temperatures will affect weather patterns, ice-sheet dynamics, and other natural phenomena and how such

physical changes will affect agriculture, other climate-sensitive industries, and consumption absent adaptive responses.

- Nothing is harder to forecast than long-term technological change. Yet IAM "damage functions"—projections of how climate change will affect the GDP and the public health—depend on assumptions about how adaptive technologies develop as the world warms.

In 2020, researchers updated the FUND model with recent empirical findings about CO_2 fertilization and climate sensitivity. They found that the SCC is likely to be negative through the mid-21st century. A negative cost is another way of saying a net benefit.

Experts: Marlo Lewis, Patrick Michaels, Myron Ebell

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RECLAIM CONGRESS' AUTHORITY TO DETERMINE CLIMATE POLICY

In *Massachusetts v. EPA* (2007), the U.S. Supreme Court ruled that the 1970 Clean Air Act (CAA)—enacted years before Congress' first climate change hearing—gives the Environmental Protection Agency "unambiguous" authority to regulate greenhouse gases. Under the Obama administration, the EPA interpreted that decision as a license to steamroll congressional opposition to its climate policies. The most egregious example was the so-called Clean Power Plan, which impermissibly imposed emission "performance" standards on existing (already built) coal and gas power plants that no new facility could meet.

Congress should:

- Amend the Clean Air Act to clarify that it never delegated to the Environmental Protection Agency the authority to make climate policy.

In *Massachusetts v. EPA*, the Supreme Court ruled that the EPA must regulate greenhouse gas emissions from new motor vehicles under section 202 of the Clean Air Act if the agency determines that such emissions may be reasonably anticipated to endanger the public health or welfare. The Court reasoned that greenhouse gases fit the Act's "capacious definition" of "air pollutant" and that regulating GHG emissions from new motor vehicles would not lead to "extreme measures."

However, neither the EPA nor the petitioners informed the Court what would happen once the agency established GHG emission standards for new motor vehicles. Under the EPA's longstanding interpretation, regulating any air pollutant under any part of the CAA automatically triggers regulation of "major" stationary sources under the Act's preconstruction and operating permit programs.

The Court unwittingly set the stage for an era of extreme measures. Carbon dioxide is emitted in much larger quantities and by vastly more sources than the air pollutants the Clean Air Act was designed to regulate. Consequently, the EPA and its state counterparts faced the absurd prospect of each year applying the Act's preconstruction permits program to some 80,000 previously unregulated nonindustrial sources and the Title V operating permits program to 6.1 million such sources. Agency workloads

would expand far beyond administrative capabilities, sabotaging both environmental enforcement and economic development.

To avoid administrative chaos, the EPA adopted a rule to "tailor" (amend) the Act's clear numerical definition of "major" stationary sources so that only the largest GHG emitters would be subject to the permitting programs. In *Utility Air Regulatory Group v. EPA* (2014), the Supreme Court overturned the EPA's so-called Tailoring Rule for the simple reason that agencies have no power to amend statutes. But to prevent *Massachusetts v. EPA* from spawning an administrative debacle, the Court had to engage in tailoring of its own.

Without any textual support, and ignoring the fact that none of the hundreds of climate bills introduced since the 101st Congress had even proposed to apply CAA permits to greenhouse gases, the Court ruled that the EPA may include greenhouse gases in the permitting programs for sources that are otherwise subject to such regulation but not for small sources that are currently exempt.

As noted, in *Massachusetts v. EPA*, the Court claimed that the 1970 CAA authorizes the EPA to regulate greenhouse gases. However, the terms "carbon dioxide," "greenhouse gas," and "global warming" appear nowhere in the Act. The 1990 CAA mentions "carbon dioxide" and "global warming" appear only once, and only in nonregulatory provisions that admonish the EPA not to infer authority for "pollution control requirements" or "additional regulation" under the CAA.

The Court construed section 302(g) of the CAA to define "air pollutant" as any substance emitted into the ambient air. Since automobiles emit $CO_{2,}$ the Court concluded that the EPA may regulate CO2 as an air pollutant. However, CAA section 302(g) does not assert that anything emitted is per se an air pollutant. The provision is only two sentences long.

Rather than try to give effect to every word, the Court ignored a key term in the first sentence and the entire second sentence.

The first sentence defines air pollutant as any "air pollution agent" emitted into the ambient air. An air pollution "agent" is something that causes or contributes to air pollution. It is far from obvious that CO2 fits the bill. Unlike other pollutants

regulated under the CAA, reducing CO_2 concentrations does not make the air cleaner, more healthful to breathe, or less harmful to plant life. Indeed, a CO_2-free atmosphere would be fatal to food crops, trees, and green plants generally.

According to the second sentence, precursors of substances already classified as air pollutants are also air pollutants. That sentence would not be necessary if, as the Court opined, anything emitted is automatically an air pollutant, because precursors only form other pollutants after being emitted.

The strike-throughs in the following paragraph show the text ignored by the Court when it decided that CAA section 302(g) authorizes the EPA to embark on a vast new regulatory agenda undreamed of by Congress in 1970 and deliberately rejected by Congress in 1990:

> The term "air pollutant" means any ~~air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material)~~ substance or matter which is emitted into or otherwise enters the ambient air. ~~Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.~~

Definitional disputation aside, the Court ignored the big picture. The CAA contains numerous detailed provisions both authorizing and constraining the EPA's power to regulate specific types of pollutants. That structure is a hallmark of the CAA and indispensable for understanding congressional intent. The potential economic and political impacts of GHG regulation far exceed those of any pollution controls expressly required or authorized by the Act. The idea that Congress signed off on a national decarbonization agenda when it defined "air pollutant" in 1970 is preposterous.

Massachusetts v. EPA continues to undermine the separation of powers. Congress has often considered and rejected GHG cap-and-trade legislation, and a bill authorizing the EPA to restructure state electric power sectors would be dead on arrival. Yet the EPA's so-called Clean Power Plan pressured states to adopt cap-and-trade programs to restructure their power sectors.

The Clean Power Plan had egregious legal flaws beyond the Court's errors in *Massachusetts v. EPA*, and the EPA repealed and replaced it in 2019. Nonetheless, *Massachusetts v. EPA* is a standing pretext for executive usurpations of legislative power. Congress should curb the EPA's ability to overreach by clarifying that it has no power under the CAA to determine national climate policy.

Experts: Marlo Lewis, Myron Ebell

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REJECT THE KIGALI AMENDMENT TO THE MONTREAL PROTOCOL OR ITS LEGISLATIVE EQUIVALENT

Beginning in the 1970s, concerns that refrigerants used in most air conditioners and refrigerators were leaking into the air and depleting Earth's ozone layer led to the negotiation and signing of the Montreal Protocol, a 1987 United Nations treaty that phases out the use of those chemicals. Since then, a number of ozone-safe substitutes have been developed and are now used in most residential and vehicle air conditioners and residential and commercial refrigerators.

However, governments and environmental advocacy groups are now targeting those substitutes for phaseout because of their alleged contribution to global warming. In 2016, in Kigali, Rwanda, the parties to the Montreal Protocol agreed to an amendment to the treaty, known as the Kigali Amendment, that restricts production of those second-generation refrigerants. U.S. ratification of the Kigali Amendment requires a two-thirds vote in the Senate. Bills introduced in both the House and Senate would also seek to restrict those refrigerants.

Congress should:

- Oppose the Kigali Amendment or similar legislative measures that would drive up the cost of air conditioning and refrigeration.

The Kigali Amendment, or its legislative equivalent, would raise the cost of air conditioning and refrigeration across the board. Some manufacturers of Kigali-compliant refrigerants and equipment stand to benefit from the amendment. They have joined forces with environmental activists to lobby for the Kigali Amendment's ratification and have made a number of far-fetched claims that such government interference in air conditioning and refrigeration will actually create jobs and bring down costs. In truth, such measures are very likely to kill jobs, particularly for the millions of businesses that rely on that equipment—such as grocery stores and restaurants—and will have to shoulder the increased expense. Home and vehicle air conditioning will also be adversely affected.

Those measures would be particularly damaging as America recovers from the COVID-19 pandemic. Air conditioning can help protect against the indoor spread of that or any future virus, especially if redesigned to increase rates of ventilation and

filtration. But the Kigali Amendment would require costly changes to air-conditioning systems that do nothing to improve virus protection.

Expert: Ben Lieberman

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SUNSET THE RENEWABLE FUEL STANDARD

In 2005, Congress created the Renewable Fuel Standard (RFS) and expanded it in 2007. The impact of the COVID-19 crisis is just the latest surprise. Proponents of the RFS promised it would help enhance energy security, boost the economy, and bring environmental benefits, but the program has failed to deliver on any of those promises.

Congress should:

- Set an end date for the Renewable Fuel Standard.

The RFS requires corn ethanol and other biofuels to be added to the nation's gasoline and diesel supply. It contains emergency waiver provisions to avoid severe economic hardship. Five governors have asked the Environmental Protection Agency for waivers because of the coronavirus-induced drop in fuel demand and prices. Granting the waivers would be a good start toward reining in this counterproductive program and may help boost economic recovery. Even better, Congress should sunset the program, especially since it could get worse after 2022, when the EPA will have wide latitude to make it more stringent.

Most of the surprises since the program was last revised in 2007 have undercut the already problematic rationale for mandating the use of biofuels. At the time, demand for gasoline was rising, while domestic oil output was falling and import dependence was growing. Stretching the fuel supply with—presumably—domestic biofuels seemed like a good idea to many in Congress. But soon after 2007, those trends unexpectedly reversed. Gasoline demand started falling as the shale revolution led to a rebirth of American oil production and a sharp decline in imports.

At the same time the energy independence rationale for the RFS was eroding, the economic rationale was not doing much better. The costs of compliance never came down enough for the RFS to become economical, especially in the high volumes mandated. That is especially true of the biodiesel portion of the RFS. In addition, the promised big breakthroughs in "next generation" cellulosic biofuels never materialized.

With or without the RFS, a good deal of ethanol would still be added to the gasoline supply because of its benefit in raising octane levels, as even refiners critical of the

program admit. But it is the last billion or so gallons of the de facto annual mandate of 15 billion gallons that cause problems, by potentially increasing the percentage in gasoline to levels that may cause engine damage.

Another major change since 2007 is the program's declining standing with environmentalists. Several green groups that originally supported or at least acquiesced to the RFS have since soured on the program. For example, the Sierra Club won a lawsuit last year forcing the EPA to review the RFS' environmental impacts. That review may include research findings that corn ethanol has led to higher GHG emissions than would result from an equivalent volume of petroleum-derived gasoline. Beyond comparative emissions, environmental activists also see the RFS and its overwhelming focus on liquid fuels as being out of step with their preference for electrification of the transportation sector.

Now, as a result of the nationwide lockdowns and substantial reductions in gasoline demand, the governors of Louisiana, Oklahoma, Texas, Utah, and Wyoming have asked the EPA to waive the program's requirements. The problem is not adverse consumer impacts—gasoline is cheaper today than it has been in years—but the ability of refiners to remain in operation. Many are struggling with sharply reduced demand and low prices. Thus, the high cost of complying with the RFS may be enough to force some to shut down. Shuttered refineries will cost jobs and hamper post-coronavirus economic recovery.

The Trump administration tried, in vain, to find the middle ground between the agricultural interests that benefit from the RFS and refiners who are critical of it. It granted ethanol producers a regulatory change that allowed the use of 15 percent ethanol to gasoline rather than just 10 percent, while giving more small refineries exemptions from the program. Neither side was happy and both have sued. The recent decision on small-refinery exemptions also factors into the governors' waiver requests, as it greatly increased compliance costs for refiners by prompting a jump in the price of renewable identification numbers, or RINs, the compliance credits refiners must either generate or buy.

Granting waiver requests would provide some near-term relief, but a legislative sunset of the program is what is really needed. After 2022, the EPA will have greater latitude in setting the mandated volumes of biofuels under the RFS, and could decide to

make the program even more stringent and costly. Congress should take away that possibility by replacing those provisions with a clear end date for the RFS.

Experts: Ben Lieberman, Marlo Lewis, Mario Loyola

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STREAMLINE THE FEDERAL PERMITTING PROCESS FOR INFRASTRUCTURE PROJECTS

Many infrastructure projects like new highways and pipelines get bogged down by federal red tape and delays. The National Environmental Policy Act (NEPA) alone imposes permitting requirements that take major projects an average of 4.5 years to get initial approval, often followed up by litigation by environmental advocacy groups and thus even more delays.

Things have gotten worse over the past decade as climate change activists have employed such tactics to delay or stop the extraction, transport, and use of coal, oil, and natural gas. Along with NEPA, statutes like the Clean Water Act have been misused to stop fossil-fuel-related projects, such as natural gas pipelines and coal export terminals—even when no legitimate water quality concerns exist.

Those projects are important for America to stay competitive globally while providing consumers with the infrastructure and affordable energy they need. In addition, the high-paying jobs they create would help the national economy recover from the coronavirus pandemic. But in many instances, the delays are so extensive that project developers are forced to give up.

The Trump administration focused on project permit streamlining. Executive orders advanced useful reforms like One Federal Decision, which improves interagency coordination and speeds up the approval process. It also enacted a number of regulatory reforms to NEPA and the Clean Water Act, especially on the misuse of those statutes to block fossil-fuel-related projects.

Congress should:

- Codify in legislation the Trump administration's executive orders and regulations that streamline the federal permitting process for major projects.

Executive orders can be ignored or overridden by future administrations, and regulatory reforms have been challenged in federal court. For those reasons, Congress should consider codification of the most important reforms to the permitting process,

particularly those that prevent unnecessary delays related to improving domestic energy supplies and infrastructure.

Experts: Ben Lieberman, Marlo Lewis, Mario Loyola, Myron Ebell

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ADDRESS UNACCOUNTABLE ENVIRONMENTAL RESEARCH PROGRAMS

A number of "nonregulatory" environmental research programs have both regulatory and market impacts. Those programs enable the Environmental Protection Agency to act with little accountability, and even run afoul of basic principles of scientific integrity. Two such problematic programs include the EPA's Integrated Risk Information System (IRIS) and its Safer Choice program.

Congress should:

- Move responsibilities of the Integrated Risk Information System to program offices that implement environmental laws, such as the chemicals office that implements the Toxic Substances Control Act (TSCA), and require those offices to rely on the best available science for developing chemical assessments.
- Eliminate the EPA's hazard-based Safer Choice program and use the funds to reduce federal spending.

IRIS is a nonregulatory research program that assesses chemical toxicity that EPA program offices use to develop regulations under federal laws, such as the Safe Drinking Water Act, Clean Air Act, Superfund, and other laws. However, IRIS operates outside the regulatory framework, so limited systems exist to ensure the scientific integrity of its assessments. Many of its findings have tended toward excessive caution based on questionable and incomplete science. That approach has helped advance counterproductive regulations that impose needless regulatory burdens. For example, IRIS' assessment of ethylene oxide (EtO), a chemical used to sterilize medical equipment, led to unwarranted health scares that led to the shutdown of several medical sterilization plants, which has contributed to medical supply shortages during the COVID-19 crisis.

The Government Accountability Office raised concerns about IRIS' procedures more than a decade ago. Since then, IRIS reform has continued to be the subject of GAO reports, an Inspector General report, and congressional hearings. A 2011 National Academy of Sciences report on IRIS' formaldehyde assessment criticized the agency for "recurring methodologic problems," including repeated failures to provide "clarity and transparency of the methods." The report included suggestions on how IRIS could improve its science.

The Trump administration proposed significant budget cuts for the EPA's Office of Research and Development. Yet Congress has continued to fund IRIS, while the agency has shifted some of the IRIS funding and responsibilities toward implementation of the Toxic Substances Control Act.

The Improving Science in Chemical Assessments Act (H.R. 89) would move most IRIS functions to the program offices, including the office implementing TSCA. In June 2019, the bill's sponsor, Rep. Andy Biggs (R–AZ) offered an amendment to the omnibus appropriations bill for 2020 that would have preempted the EPA's spending any funds on IRIS, but it failed.

Rep. Bigg's proposal to demand that chemical assessments be conducted under congressionally mandated guidelines outlined in federal statutes, particularly the reformed Toxic Substances Control Act, makes sense. The reformed TSCA law, which passed with broad bipartisan support in 2016, requires the EPA to rely on the "best available science," rather than on outdated approaches that misrepresent actual risks. Accordingly, there are good reasons to believe that TSCA's approach would prove superior to that of IRIS. All IRIS program functions could easily be transferred to the TSCA program.

Another program operating outside the regulatory process with little accountability is the EPA's Safer Choice program, formerly called Design for the Environment. The program calls on companies to eliminate certain chemicals from their products voluntarily, largely based on hazard classifications rather than actual risk assessments. Yet hazard alone is inadequate for making decisions about chemicals, because it fails to consider actual risks related to real-life exposures or to weigh benefits against the risks. Congress should eliminate Safer Choice, since it falls outside the scope of the EPA's mandate to implement laws passed by Congress.

Expert: Angela Logomasini

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IMPROVE THE QUALITY OF GOVERNMENT-FUNDED RESEARCH

We would all like to believe that researchers' motives are unbiased and pure, but in reality, incentives and personal opinions can have a huge impact on study design and results. When researcher bias is joined with political agendas, it can incentivize researchers to pursue political objectives rather than provide valid information. Unfortunately, politically active researchers are also adept at lobbying for government funding.

Congress should:

- Mandate that research funded by federal agencies meet basic transparency guidelines and enable others to access and replicate underlying data to see if results can be reproduced.
- Mandate that government-funded studies comply with good laboratory practices (GLPs) whenever applicable.
- Cut funding for programs that have a long history of pushing junk science and political activism rather than independent research.

If government is going to fund chemical safety research, the research should meet some basic standards to improve the quality of results. Increased transparency would greatly help improve the science. Positive associations can occur by mere chance, which makes it important that data be available so others can try to validate findings by reproducing the results. The Trump administration's transparency rule was finalized on January 5, 2021, and then vacated by a federal judge on February 1, 2021, indicating that it lacked legal basis. Congress could give transparency requirements the legal basis necessary and set stronger provisions to ensure transparent science while protecting the privacy of study participants.

In addition, government grants should require private research recipients to employ good laboratory practices, or GLPs, when applicable. GLPs have become an internationally recognized method of ensuring data quality control. As a result, it is common worldwide for industry to apply GLPs when conducting research for submission to regulatory bodies. GLPs were originally established by the Food and Drug Administration (FDA) in 1978 to address fraudulently produced results submitted by industry to government agencies for drug approvals. In 1992, the Organization for Economic Cooperation and Development issued its own GLP

guidelines and other world bodies and government agencies, including the U.S. EPA, followed suit. The World Health Organization's *Handbook: Good Laboratory Practice* (2009) explains that GLPs help ensure "the quality, reliability and integrity of studies, the reporting of verifiable conclusions and the traceability of data."

Congress should also defund questionable research funded by the National Institute of Environmental Health Sciences (NIEHS). Housed at the National Institutes of Health, the NIEHS has funded some egregious instances of government-funded activist science. Consider the NIEHS research program related to the chemical bisphenol A (BPA), which is used to make hard clear plastics and the resins that line metal food containers. Environmental activist campaigns against BPA have been fueled by taxpayer-funded research of questionable value, producing dozens of studies that report weak associations between BPA and adverse health effects.

The FDA and numerous government agencies around the world have not found these studies compelling or conclusive, and instead have relied on weighing the evidence and on higher-quality studies to determine that BPA is safe at current exposure levels. Yet activists use those government-funded studies to push bans and regulations on BPA. Such bans could undermine food safety because BPA lines metal containers to help prevent the development of deadly pathogens, such as E. coli.

Similarly, Congress should eliminate funding for the NIESH's grant programs, which fund a network of university-based children's environmental health centers. For more than a decade, it has doled out millions of dollars to fund junk science and political activism at those centers under the guise of "children's environmental health." Rather than produce unbiased research, many simply peddle junk science to promote environmental activism.

Since 1997, the U.S. EPA and the NIESH each provided half of the federal funds for those centers, but the EPA announced in May 2019 that it would cut its half of the funding. Congress should cut the other half that comes from the NIESH. Taxpayers should not be forced to fund agenda-driven science. If the government is going to fund health-related research, it should focus on such things as finding cures and treatments for cancers, heart disease, and other serious illnesses.

Expert: Angela Logomasini

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ELIMINATE U.S. FUNDING FOR THE INTERNATIONAL AGENCY FOR RESEARCH ON CANCER

Congress should direct the National Institutes of Health to stop sending U.S. grants to the World Health Organization's International Agency for Research on Cancer (IARC). Those grants waste taxpayer dollars that could be better spent on taxpayer relief or on efforts to meet the many serious public health concerns facing our nation today.

IARC is supposed to be a scientific program that classifies chemicals according to carcinogenic risks, but its process has proved highly flawed and susceptible to political, rather than merely scientific, concerns. IARC's faulty conclusions can create serious problems, including bans on useful products, market deselection of such products, and public confusion about cancer risks.

Congress should:

- Eliminate all U.S. funding of the International Agency for Research on Cancer.
- Cut funds to the National Institutes of Health that support IARC research.
- Prohibit any grants or other funding to IARC from any U.S. governmental entity.

Launched in 1965, IARC receives funding from member states and has a two-year budget. During 2018–2019, IARC reported a budget of €44.1 million ($51.94 million), of which the United States was assessed to pay more than €3.3 million ($3.89 million). For 2020–2021, the projected numbers are similar, with the United States again providing €3.3 million, the highest amount assessed for all nations listed on the IARC website, other than Japan, which was assessed the same amount. U.S. funding comes in the form of grants issued by the National Institute of Environmental Health Sciences, which is part of the U.S. National Institutes of Health.

IARC focuses on assessing cancer risks associated with environmental risks, which include any nongenetic causes of cancer. IARC indicates in its mission statement that its classifications are supposed to inform lawmakers and regulators to help them promote policies that will reduce cancer risks. But IARC's classification is faulty for one fundamental reason: IARC does not actually assess risk. IARC focuses on determining whether a chemical or activity poses a "hazard," which is just the first step in risk assessment. A hazard assessment simply considers whether a substance might pose a risk

at some exposure level and under some circumstances. The next steps consider dose and exposure, and whether actual human exposures are significant enough to matter.

Classifying chemicals based on hazard alone makes no sense because everything in life poses a hazard. Even water can make your brain swell and kill you if you drink excessive amounts. But we do not classify water as "dangerous" because most people do not guzzle gallons at a time.

IARC's hazard-based approach makes its classifications meaningless and nonsensical. Consider that IARC lists smoking tobacco and plutonium in the same carcinogenic category with wood dust, house paint, salty fish (Chinese style), and processed meat. Yet you cannot seriously compare the theoretical risks associated with eating bologna sandwiches and the actual risks associated with smoking cigarettes, which produces nearly half a million fatalities annually in the United States.

IARC's faulty process is compounded by the fact that its decisions appear to be tainted by anti-chemical agendas and conflicts of interest. IARC's decision in 2015 to classify the weed killer glyphosate as "probably carcinogenic" offers a clear example. Anti-pesticide activists have targeted glyphosate, the active ingredient of Monstanto's Roundup brand, for elimination, claiming it causes cancer. Yet the science does not warrant such concerns, and IARC's conclusion is at odds with all other major scientific reviews, including reviews done by the U.S. Environmental Protection Agency (2017 draft risk assessment), the European Food Safety Authority (2015), Health Canada (2017), the U.N. Food and Agriculture Organization (2016), and others.

Absent a scientific basis, IARC's decision appears to have been influenced by anti-pesticide activism. For example, the IARC panel enlisted Christopher Portier of the Environmental Defense Fund to serve as an "adviser," which itself seems inappropriate. Portier also appears to have serious financial conflicts of interest. Within days of the classification, Portier became a highly paid witness and consultant to trial lawyers who were planning to use the IARC classification as a basis for suing Monsanto. Since then, nearly 100,000 lawsuits have been filed against Bayer AG, which purchased Monsanto in 2018.

While maintaining that its products are safe, Bayer AG has agreed to pay more than $10 billion to settle more than 100,000 lawsuits. Unfortunately, not only may

more lawsuits arise in the future, Bayer now has that much less to invest in new life-enhancing products to help farmers produce a stable food supply and increase employment within their industry.

It is clear that IARC's process is so fundamentally flawed that its monographs program is doing far more harm than good. The potential that politics may have tainted the IARC process provides even greater reason to eliminate its U.S. funding.

Expert: Angela Logomasini

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ALLOW FREE MARKETS IN WASTE DISPOSAL FROM RECYCLING TO LANDFILLING AND INCINERATION

For the past several decades, policy makers have been trying to manage one contrived trash disposal "crisis" after another, to no avail. During the 1990s, it was a "landfill crisis"—based on the claim that the United States would run out of landfill space, which never happened. After that, we had the "e-waste crisis." Now policy makers, environmental activists, and other supposed "stakeholders" want to address the "plastics crisis" and the related "recycling crisis." Their proposals include government subsidies and plastics bans, which will not solve anything.

Market pricing and open competition—between recycling, incineration, and landfilling—would produce the best and most environmentally and economically efficient mix of disposal solutions. With well-functioning waste disposal markets, consumers should be free to choose single-use plastics or reusable products, which can then be disposed of properly with minimal environmental impact.

Congress should:

- Recognize that waste disposal is a local concern and avoid legislation that would meddle within local economies.
- Halt all federal subsidies and programs that attempt to manage waste disposal markets.
- Pass resolutions urging states and localities to reverse bans and allow free markets for waste disposal to operate.

Interest in federal action to address the so-called recycling crisis has grown since China announced it would reduce imports of U.S. recyclables starting in early 2018. With a reduced export market, states and localities across the nation have collected plastics and other recyclables for which they have no markets. Supposedly, federal recycling subsidies and resolutions to promote plastics recycling will help create markets for these recyclable plastics.

One underlying assumption behind those policies is that plastics recycling will prevent single-use plastics from entering the environment and the oceans, and therefore reduce public pressure for plastics bans. The desire to reduce the impetus for plastics bans is positive because bans often prove counterproductive. Yet government

policies to promote recycling will do more harm than good, while market-driven proper disposal offers a better solution.

China's authoritarian regime has helped make its waste disposal system unresponsive to public needs and dysfunctional; however, its policy to limit recyclables makes some sense. As the *Financial Times* reported on October 25, 2018, China's standard for imported recyclables set "such a high bar for the cleanliness of the materials that can be imported that most people in the industry refer to it as a 'ban.'" Recyclables that are dirty and contaminated with food waste and other substances are not only dangerous to sort and clean, but are often not recyclable and must go to a landfill anyway. In China, those landfills may include open dumps from which waste can migrate into the ocean, which poses a serious pollution problem. In fact, most consumer plastics waste in the ocean appears to come from China and other developing nations. In comparison, the U.S. contribution is relatively minor thanks to good waste disposal practices. Waste disposal in U.S. sanitary landfills is carried out according to practices designed to yield minimal environmental impacts. Although many states have exported waste to China supposedly for recycling, it is unclear how much of it has been recycled rather than dumped.

Nonetheless, rather than allow markets to operate, U.S. policy makers' responses to the Chinese government's decision has involved more meddling via spending and regulations. In November 2019, the Environmental Protection Agency published its *National Framework for Advancing the U.S. Recycling System*, a report on how the agency is working with various stakeholders to "identify specific actions to take in addressing the challenges and opportunities facing the U.S. recycling system." According to the report's conclusions, recycling education and government grants will help create recycling markets even when they are economically unsustainable.

Members of Congress have also stepped up with misguided bills and resolutions on recycling. For example, last year the Senate passed Senate Resolution 422 to recognize November 15, 2019, as America Recycles Day, with the hope that increased awareness and education will create markets. Later that month, Sen. Rob Portman (R-OH) introduced the Recycling Enhancements to Collection and Yield through Consumer Learning and Education Act of 2019 (RECYCLE) Act (S. 2941). It would authorize spending $75 million over five years for the EPA to provide states with community recycling grants and for the agency to develop "model recycling program toolkits"

for states and procurement policies to buy products made with recyclable materials. Rep. Dean Phillips (D-MN) introduced the House companion version, H.R. 5906, in February 2020.

Many states and localities have recycling programs in place, mandated in many cases, and some have aggressively pushed plastics bans and taxes on single-use plastics, particularly single-use plastic grocery bags. However, many such bans were reversed temporarily during the COVID-19 crisis because of concerns that reusable grocery bags could carry the coronavirus. The possibility that COVID-19 could be transmitted via grocery bags seemed plausible at the time, but the extent of the risk is unclear. However, it is clear that reusable bags do harbor dangerous bacteria and have transmitted disease—as documented in a case of a bag that transmitted norovirus among players on a soccer team—so there are risks if the bags are not washed after every use.

Neither recycling and subsidies nor bans will solve anything because this "crisis," like many others, has been created by failed government intrusion into the waste disposal marketplace. For decades, the federal government has encouraged states and local governments to develop five- to 30-year plans for solid waste management. Those state and local waste management plans attempt to estimate how much waste a city might produce over decades, as well as the kinds of wastes (paper, plastic, glass, etc.) and the percentages of each. Then, officials make decisions on how much they will recycle, landfill, or burn in a waste-to-energy plant. Those plans fail because public officials simply do not have enough information about future waste streams, nor can they envision future disposal technologies. They eventually make poor decisions, invest in the wrong technologies, and choose inefficient disposal options that end up costing taxpayers dearly.

In addition, some recyclable waste is recycled in ways that are more environmentally damaging than landfilling. Although market-driven recycling does save resources, government subsidies or forced recycling can use more energy and water and can emit more pollution than other disposal options. And because such programs can become an expensive drain on government coffers, many cities, in a vicious cycle, stop them only to restart them a few years later because of political pressure.

It is high time for policy makers to stop pretending that government planning for waste disposal could ever be more efficient than market pricing and open

competition. Political management generates "crises" that lead public officials to waste local tax dollars on unworkable programs, while doling out millions of federal dollars to "educate" people on how to comply with those wasteful programs. Markets, on the other hand, respond to changing conditions, solve problems, and drive disposal to the most economic and environmentally sound options.

Expert: Angela Logomasini

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DEPLOY RATIONAL SCIENCE-BASED POLICIES FOR MEDICAL PLANT STERILIZATION

Several medical supply sterilization plants have shut down recently because of unwarranted fearmongering about ethylene oxide, or EtO, a gas used to sterilize medical equipment and which has no viable alternative. EtO became an issue after the U.S. Environmental Protection Agency's Integrated Risk Information System published a faulty analysis that vastly overstated the risks associated with EtO. Another EPA office, the National Air Toxics Assessment (NATA), used the faulty data to produce models wrongly indicating that there were significant risks in communities that include facilities that use EtO to sterilize medical supplies. The misleading NATA report led several states and localities to shut down some medical equipment sterilization plants, which contributed to supply shortages during the COVID-19 crisis.

Some of those plants have reopened to help generate supplies necessary to fight the coronavirus, but Congress should ensure that those facilities remain open well into the future and that the policies and programs that created the unwarranted health scare are reversed.

Congress should:

- Defund the EPA's Integrated Risk Information System program and shift its risk assessment functions to the Office of Pollution Prevention and Toxics (see earlier section titled "Address Unaccountable Environmental Research Programs").
- Require the EPA to rescind its IRIS assessment and conduct a new one within the Office of Chemical Safety and Pollution Prevention, the agency that implements the Toxic Substances Control Act.
- Defund the EPA's National Air Toxics Assessment, which has a history of spreading misinformation about air quality risks and promoting counterproductive policies.
- Preempt state efforts to shut down medical sterilization facilities that already meet agency emission standards.

Ethylene oxide is a clear gas produced naturally inside the human body. It is also naturally produced and released into the air by combustion, vegetation, manure, volcanic eruptions, waterlogged soil, and other sources. It has many valuable

commercial applications, such as in the manufacture of shampoo, cleaners, antifreeze, and more.

Less than 1 percent of commercially produced EtO is used to sterilize more than 20 billion medical products—more than half of all sterile medical products in the United States. The U.S. Food and Drug Administration notes that "ethylene oxide may be the only method that effectively sterilizes and does not damage the device." As then-acting FDA Commissioner of Food and Drugs Norman E. Sharpless explained in October 2019, "this method is critical to our health care system and to the continued availability of safe, effective, and high-quality medical devices."

EtO has been safely used for decades, and the tiny traces released from medical sterilization plants were long understood to be inconsequential to human health. But, as noted, the perception of the risk changed after the EPA's Integrated Risk Information System released its flawed assessment of EtO risks. In 2016, IRIS released a controversial "reference concentration"—an agency-determined safe level for people who continuously inhale the gas—for EtO at 0.1 parts per trillion, or 0.0000001 parts per million. By comparison, the Occupational Safety and Health Administration's safety standard is one part per *million* for workers exposed five days a week, eight hours a day, for decades.

According to toxicologist Gail Charnley, IRIS' reference dose is nearly 20,000 times lower than the amount produced naturally in the human body, 5,000 times lower than levels normally found in suburban air, and more than "5 million times more stringent than the scientific judgments underlying all other regulatory limits on ethylene oxide in the United States and worldwide."

Nonetheless, in a 2018 report on air quality, the EPA's National Air Toxics Assessment ran some models to estimate where air concentrations of the chemical might exceed IRIS' 2016 reference concentration. The NATA report set off a panic in communities located near medical equipment sterilization plants, which led states and localities to close some plants. Since then, the EPA has collected data on the levels found outside those facilities. Despite much hype, the levels are not alarming. Charnley explains: "The most important truth being, there is no cancer threat from the tiny amounts of ethylene oxide released from these sterilization plants."

Faced with the COVID-19 emergency, the FDA asked those companies to reopen plants to help deal with severe medical supply shortages—and threatened legal action against one local government to make it happen. Unfortunately, those facilities' operations could be undermined in the future because of continued efforts to misinform the public about the risks.

If COVID-19 teaches us anything, it is that we need to remain prepared for emergencies. Shutting down critical operations such as medical supply sterilization plants, without justification, is dangerous.

Expert: Angela Logomasini

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5

Banking and Finance

Access to capital, credit, and financial services are fundamental to the operation of a free society. They allow for the formation, expansion, and smooth running of the enterprises that make up the private economy. They also provide room for the experimentation that allows innovation in product and service delivery. A well-functioning financial system helps match investors with enterprises for their mutual benefit, as well as the benefit of their employees and customers. When too many restrictions are placed on such a system, the economy slows both in its general flows and in innovation.

That is particularly true when a free society is strained under a crisis such as a pandemic. "Never needed" red tape that has lingered for years and sometimes decades can hinder the ability of entrepreneurs to raise funds to finance the discovery or delivery of vaccines, drugs, and medical devices. It also makes it harder for businesses to adopt new payment technologies, including cryptocurrency, or to offer new services to respond to challenging times.

In the modern global economy, access to capital generally occurs through the banking system as credit, through loans or credit cards. Once enterprises have reached a certain size, they can access capital markets, such as stock markets and debt offerings. Thanks to technological innovation, recent years have seen an explosion of alternative means of accessing capital—peer-to-peer lending, cryptocurrency, and crowdfunding prominent among them. At the household level, a variety of companies offer small-

dollar loans that often help individual consumers pay the bills and keep the lights on in times of need.

The smooth running of this system was disrupted by the financial crisis. A variety of government interventions—such as the Community Reinvestment Act and the actions of the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac—led lenders to overextend themselves by extending credit to a variety of borrowers who were unlikely to pay it back. Political convenience replaced sound economic judgment in capital provision decisions. A multitude of other factors added to the problem, including the following:

- The moral hazard of deposit insurance
- Zoning restrictions that fueled unsustainable housing price rises
- Problems with bank modeling of risk
- International regulation, such as the Basel Accords on the risk weighting of capital assets, that inaccurately weighted the risk faced by debt holders

When the banks that had extended the most problematic credit began to fail, the federal government's reaction was to prop them up with taxpayer bailouts, thereby socializing their losses and undermining the incentives for avoiding such problems.

The Dodd-Frank Act of 2010 was meant to help solve the financial crisis, but it did nothing to change the situation and made many of the problems that led to the crisis worse. Instead, it doubled down on a bank regulatory regime that failed to prevent the financial crisis. Moreover, Dodd-Frank regulates extraneous matters that had nothing to do with the crisis, such as debit card interchange fees, arbitration agreements in credit card contracts, and accounting for conflict minerals.

Dodd-Frank was sold as addressing the problem of "too big to fail," but failed to do so. It took aim at Wall Street, but it hit Main Street the hardest. The big banks are more dominant than before the crisis. The vastly increased regulatory burden imposed on smaller banks has led many of them to merge to create bigger banks able to withstand the increased regulatory costs. Some banks have closed. Worse, banking regulators have abused their authority to crack down on legal businesses that regulators find distasteful.

Such overregulation has made banks wary of lending to people without perfect credit or to small businesses and startups. Those parties have turned to a burgeoning industry of alternative funds, but are finding those attacked by regulators as well.

Worse, Dodd-Frank created a much too powerful regulator, the Consumer Financial Protection Bureau (CFPB), supposedly to protect the consumer from "faulty" financial products, much like the Consumer Product Safety Commission (CPSC) purportedly protects consumers from faulty household products. However, Dodd-Frank set up the CFPB to operate free from the traditional checks and balances of an independent agency. The recent Supreme Court ruling in *Seila Law LLC v. Consumer Financial Protection Bureau* declared the structure of the bureau to be unconstitutional under the Appointments Clause, which allows the president to replace executive branch agency heads, while Dodd-Frank allowed removal of a bureau director only "for cause." However, the agency remains unaccountable to Congress' power of the purse, since its budget comes automatically from the Federal Reserve.

In 2018, the 115th Congress passed and the president signed the Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155), a significant financial reform bill that rolled back some of the Dodd-Frank Act. Despite that, however, a majority of the Dodd-Frank regulatory framework remains intact.

Lawmakers need to do more to allow for the emergence of a competitive, safe, and sound financial system. Congress should further rein in overreaching regulatory agencies and work to rectify the mistakes of Dodd-Frank. Provisions of the Financial CHOICE Act (Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs), which passed the House in 2017, will go a long way toward addressing many of the problems arising from Dodd-Frank, which are even more burdensome in a troubled economy hit by a pandemic.

The Financial CHOICE Act, which passed the House in 2017, would:

- Assist in capital formation by allowing banks to swap less stringent regulation for holding more capital.
- Reduce the regulatory burden by repealing several provisions of Dodd-Frank, such as the mandate for publicly traded companies to disclose whether their products contain "conflict minerals" from certain areas of the Congo, and the Volcker Rule,

which bars banks from engaging in broadly defined "proprietary trading." Those provisions add substantial compliance costs for community banks and small and midsize public companies, while offering little to no benefit for the safety and soundness of the financial system.

- Make the Federal Reserve more accountable by subjecting its full operations to Government Accountability Office audits, given that the Fed's monetary policy decisions affecting the economy are currently off-limits to GAO oversight.

Further reforms will be needed, including legislation to allow financial technology (FinTech) firms to pursue innovation in financial services without having to deal with the regulatory burdens that banks have to face. The JOBS and Investor Confidence Act, which passed the House in 2018, and other pieces of legislation described in detail in this section could achieve that outcome.

BRING ACCOUNTABILITY TO THE UNACCOUNTABLE CONSUMER FINANCIAL PROTECTION BUREAU

The Dodd-Frank Act of 2010 created the Consumer Financial Protection Bureau ostensibly to protect the consumer from "faulty" financial products, much like the Consumer Product Safety Commission purportedly protects consumers from faulty household products. However, Dodd-Frank gave the CFPB far more power than the CPSC has ever had. In fact, Dodd-Frank set up the CFPB to operate free from the traditional checks and balances of an independent agency by making its director removable by the president only "for cause." The recent Supreme Court ruling in *Seila Law* declared the structure of the bureau to be unconstitutional under the Appointments Clause and struck the for-cause removal protection that covered the bureau's director. However, the agency remains unaccountable to Congress, since its budget comes automatically from the Federal Reserve.

Congress should:

- Make the Consumer Financial Protection Bureau accountable to Congress by subjecting it to the constitutional congressional appropriations process.
- Require the CFPB to submit adequate justification for its rules to the Office of Management and Budget, and to Congress for higher cost rules.
- Enact, separately or as a package, provisions of the Financial CHOICE Act to restructure the CFPB. Specifically, it should:
  - Change the agency's mandate to provide for both consumer protection and competitive markets.
  - Ratify the *Seila Law* decision to make the director removable by the president.
  - Require the CFPB to conduct comprehensive cost–benefit analyses before adopting regulations.
  - Require congressional approval of significant agency-issued regulations before they take effect.

Congress exercises no power of the purse over the CFPB, because the agency's budget—administered essentially by one person, its director—comes from a fixed amount of Federal Reserve revenues set by Dodd-Frank. That sum amounts to approximately $600 million that Congress cannot touch. Furthermore, judicial review of the CFPB's actions is limited, because Dodd-Frank requires the courts to give extra deference to the CFPB's legal interpretations.

The Financial CHOICE Act (Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs, H.R. 10, 115th Congress) provides a template for how to get rid of burdensome mandates from Dodd-Frank and other legislation, some of which are only tangentially related to financial safety and soundness. It repealed the Volcker Rule, a Dodd-Frank provision that banned banks' proprietary trading, which involves banks using their own capital to trade in securities. The provision was sold as constraining the power of big Wall Street banks, but hit small and midsize banks hard almost immediately after it went into effect by halting the limited trading they had done for decades to hedge risks from making loans. Although some exemptions from the Volcker Rule made it into the bipartisan legislation that President Trump signed in 2018, the provision is still hindering banks and capital markets from providing desperately needed financing to Main Street businesses.

The Financial CHOICE Act also repealed the provision of Dodd-Frank requiring disclosure of "conflict minerals" from the war zones of the Congo used in manufacturing by public companies. However noble its motivation, the mandate had nothing to do with the safety or soundness of the financial system and had harmful unintended effects. Because it is nearly impossible to source many minerals used in manufacturing to their countries of origin, many manufacturers have told their suppliers to avoid *all* regions of the Congo and *all* nearby countries, which has hurt economically the very regions of Africa supporters of the mandate intended to help. And now, that provision may threaten the U.S. medical device supply chain in the wake of the pandemic. As the medical device trade association AdvaMed has written, "Given the wide variety of medical devices, it is unavoidable that conflict minerals will be used as part of US FDA approved medical devices."

Experts: John Berlau, Iain Murray, Matthew Adams

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OPPOSE REGULATORY OVERREACH IN FINANCIAL SERVICES

Since the passage of the Dodd-Frank Act in 2010, banking regulators have gone into overdrive. Community and regional banks have been affected so badly that their rate of closure and merger has doubled since the Act was passed. Only a dozen new banks have been authorized since the financial crisis. Jelena McWilliams, the current director of the Federal Deposit Insurance Corporation, has worked to clear away red tape and made approval of new banks a priority, but years of red tape from the statute and regulations persist. The result is a lack of choice for consumers and a loss of the personal connection between banker and customer.

In the 115th Congress, Congress passed and President Trump signed the bipartisan Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155), which lowered the regulatory burden for hundreds of community and regional banks across the country. Unfortunately, Congress has done little since then. The vast majority of Dodd-Frank's regulatory structure remains, strengthening the biggest banks and hampering small and newly formed firms, such as financial technology companies (known colloquially as FinTech).

Congress should:

- Pass the Modernizing Credit Opportunities Act (H.R. 4439, 115th Congress), which would codify the FinTech–bank partnership model.
- Pass the Protecting Consumers' Access to Credit Act (H.R. 3299, S. 1642, 115th Congress), which would codify into law the "valid when made" doctrine, which holds that loans that are considered valid in the state where they are made are not to be considered usurious when sold to out-of-state parties.
- Pass the Financial Services Innovation Act (H.R. 4767, 116th Congress), to create a "regulatory sandbox," to give new innovative firms a period of relaxed regulation.
- Repeal the Durbin Amendment to Dodd-Frank, which put price controls on what banks and credit unions can charge retailers for processing debit cards, and resist attempts to expand that provision to credit cards.

In July 2020, Varo Money, Inc. became the first FinTech company to be granted a federal bank charter. However, not all firms are able to navigate the regulatory maze required to obtain a federal bank charter. And efforts by the Office of the Comptroller of the Currency to create a special-purpose national FinTech charter have been met with

litigation from state regulatory authorities—including the Conference of State Bank Supervisors and the New York State Department of Financial Services—and are at a standstill. Therefore, nonbank FinTech financial service providers must face a patchwork of conflicting federal and state regulations. As result, FinTech providers generally cannot export the interest rates of the states where they are incorporated to customers in other states, as federally chartered banks can, and may be subject to the interest rate caps of every state. That severely limits consumer choices, including the choice to get a loan or cash advance at an interest rate lower than that of a federally chartered bank, but higher than the interest rate cap set by the borrower's particular state.

In addition, the centuries-old "valid when made" doctrine—under which loans considered valid in the state in which they were made could not be considered usurious when sold to an out-of-state party—has recently come under attack. In *Madden vs. Midland*, the Second Circuit Court of Appeals reversed a century of "valid when made" precedent, when it decided that a New York state usury cap could be applied to a loan that a debt collector had bought from North Carolina–based Bank of America. That ruling created massive uncertainty in the lending market that could devastate FinTech innovations, such as peer-to-peer lending. In 2015, when the case was decided, the number of loans made to less creditworthy borrowers in the Second Circuit declined by 52 percent from the previous year, while increasing by 124 percent outside it during the same period. Congressional legislation codifying "valid when made" into law could boost borrowers' and investors' opportunities everywhere.

Finally, the Dodd-Frank Act gave the Federal Reserve the power to impose a price cap on interchange fees, which banks charge merchants when a customer uses the bank's debit card to make a purchase. Interchange fees had nothing to do with the financial crisis, but the cap was included in the Act at the last minute in a provision known as the Durbin Amendment, named after its sponsor, Sen. Dick Durbin (D-IL). The rationale was that merchants would pass along the cost savings to customers, but research shows that those cost savings never materialized, while banks passed along the loss of revenue to all customers in the form of higher fees. The result of the Federal Reserve's price controls has been a reduction in the number of free checking accounts available, an end to debit card rewards programs, and higher costs at the margin of bank service availability that may have pushed up to 1 million people out of the banking system altogether and are putting the banking system out of reach for many young adults starting out as financial consumers.

Extending that measure to cover credit cards—as retail trade associations have opportunistically urged Congress to do when restaurants were hit by the pandemic—would exacerbate the Durbin Amendment's negative effects on consumers and ultimately hurt merchants as well by reducing investment in payment innovations.

Experts: Iain Murray, John Berlau, Matthew Adams

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ALLOW FINANCIAL SERVICE PROVIDERS TO OFFER CONSUMERS INNOVATIVE NEW SERVICES THROUGH THE GROWTH OF FINTECH, CROWDFUNDING, BLOCKCHAIN, AND CRYPTOCURRENCY

The rise of sharing economy platforms, such as Uber and Airbnb, has vastly improved transportation and lodging options for consumers. Financial services are starting to undergo a similar revolution. But just as Uber and Airbnb had to fight outdated taxi and hotel regulations to gain a foothold, so do new financial service providers face a number of antiquated rules that keep their innovations from growing or even getting off the ground.

Congress should:

- Build on the Jumpstart our Business Startups (JOBS) Act by expanding the amount that can be raised through equity crowdfunding from $1 million to $5 million and the contribution level from ordinary investors from $1,000 to $5,000. Those provisions were contained in the original Fix Crowdfunding Act in 2016. Unfortunately, they were dropped in order for the bill to get bipartisan support in the House of Representatives. In 2020, the SEC expanded the amount that could be raised to $5 million and created a formula to increase the amount investors could contribute based on their income or net worth. Congress should codify this rule and increase the raise and contribution level even further.
- Allow special-purpose acquisition companies, known as SPACs, in which lead investors negotiate on behalf of others, to use crowdfunding for ordinary investors. That is a preferred investing method among angel investors and venture capitalists, and would likely bring benefits to ordinary investors as well. That provision was part of the JOBS and Investor Confidence Act, which the House of Representatives passed overwhelmingly in 2018, and the policy was promulgated through regulation in 2020. Congress should codify this policy to help promote access to capital for entrepreneurs and access to wealth building for middle-class investors.
- Expand the "accredited investor" definition beyond the wealth threshold to include those who have proved their sophistication in other ways, such as by passing exams for financial advisers and brokers. That change would be accomplished by the Fair Investment Opportunities for Professional Experts Act, which passed the House with strong bipartisan support in 2016 and 2017, and was included as part of the JOBS and Investor Confidence Act in 2018. In 2020, the Securities and Exchange Commission (SEC) promulgated that policy through regulation, but Congress should still codify this rule and open up "accredited investing" to even more non-wealthy investors.

- Strip the SEC of the power to regulate peer-to-peer loans as securities. This action has bipartisan support, and passed a Democratic-controlled House as a provision of Dodd-Frank in 2010, but was cut from the Senate version of the bill.
- Protect cryptocurrency from overregulation, particularly from the SEC. Pass legislation to make it clear that neither cryptocurrency nor offerings of it are "securities" and should not be regulated by the SEC. Ensure that government has the tools to punish crypto fraud, through traditional anti-fraud agencies, such as the Federal Trade Commission, but otherwise preserve the culture of "permissionless innovation" responsible for the dynamic growth of the Internet and other technologies.
- Repeal the Durbin Amendment. Short of that, ensure that its price controls apply only to physical debit cards and not to electronic methods of payment, and resist efforts to extend the price controls to credit cards.

Crowdfunding—which allows filmmakers, artists, and entrepreneurs to raise funds online from millions of fans on sites like Kickstarter and Indiegogo—is becoming the next frontier in investing across the world. Entrepreneurs are using portals to find investors, without need for intermediaries like brokers and stock exchanges. But in the United States, even individuals raising small amounts have been barred from equity crowdfunding from investors.

The JOBS Act attempted to change that. It has had some success in allowing entrepreneurs more freedom to solicit and advertise to accredited investors—those who meet the Securities and Exchange Commission's threshold of $1 million in assets or $200,000 a year in earnings. The growth of portals that match entrepreneurs with those wealthy investors, such as CircleUp and Israel-based OurCrowd, has exploded.

Unfortunately, after much delay, the JOBS Act provisions implemented by the SEC in 2015 to allow equity crowdfunding from ordinary investors fell woefully short of their stated goal. Although the rules exempt small public companies from some of the more onerous mandates of the Sarbanes-Oxley and Dodd-Frank financial regulation laws, they contain their own thicket of new red tape. The limits on the amount that can be raised that way are so low that they do not justify the compliance costs for many small firms.

Increasingly, crowdfunding has come to rely on offerings of new cryptocurrency—sometimes called "initial coin offerings"—to fund new business ventures. In reward-based crowdfunding, funders receive products like T-shirts or a sample of the product produced. In equity-based crowdfunding, by contrast, the funders are investors who receive a share in the business or a note with a promised rate of return.

Even though digital coins may grow in value more than T-shirts, which are often the rewards for crowdfunding offerings for movies and recordings, those offerings fall into the "rewards-based" rather than equity crowdfunding, as they do not offer funders either a share of the company or a promised return on investment. Yet the SEC, without congressional authority, has sought to claim jurisdiction by labeling digital currency products as "securities."

Such overreach from the SEC, and the threat of overregulation from other agencies, could chill innovation in this sector and related development in improving the blockchain's distributed-ledger technology, which holds promise in everything from health care to land titling. Cryptocurrency creators could become subject to the thickets of red tape facing public companies, such as the mandates of Sarbanes-Oxley and Dodd-Frank. Securities registration rules could also prove highly impractical for blockchain technology if, for instance, now-anonymous individuals who maintain the blockchain have to register as investors or securities issuers.

Peer-to-peer lending has expanded credit options for consumers and small businesses, but its growth has been limited by the SEC's interpretation of 1930s-era securities laws. The SEC treats peer-to-peer loans as "securities" that must be subject to much of the same red tape as a stock or bond offering. As a result, two large companies, Prosper and LendingClub, have a virtual duopoly on peer-to-peer lending for consumers. And unlike in other countries, there is almost no peer-to-peer lending by ordinary investors to small businesses.

The SEC is one of several regulatory agencies vying—or being pushed—to regulate Bitcoin, Ether, XRP, and dozens of other new cryptocurrencies, which offer benefits from currency hedging to faster payments. The subsets of cryptocurrency known as "stablecoins," such as Tether and the Facebook-developed Libra, have the potential to move money faster and reduce transaction costs by tracking a single currency or multiple national currencies. But overregulation threatens to strangle those beneficial innovations before they can become widely adopted and used.

New payment technologies may also be stifled by Dodd-Frank's Durbin Amendment, which puts price controls on what debit card issuers can charge retailers for whom they process payments. According to George Mason University Law Professor Todd Zywicki and other researchers, the Durbin Amendment may have already caused as many as 1 million consumers to lose access to banking services, as the price controls

shifted debit card costs from the nation's biggest retailers to its poorest consumers. If regulators treat new payment methods such as Apple Pay as electronic "debit cards," innovation that could benefit consumers and retailers will be stifled.

Even with the advent of financial technology, or FinTech, some consumers and providers will always value personalized service. Whether to use automated or personal service should be a choice, not a mandate. The Obama Department of Labor's (DOL) fiduciary rule mandated that financial professionals serve savers' "best interests"—as defined by DOL. That rule threatened to impose so many costly mandates on brokers and insurance agents that it would have made it cost-prohibitive for them to work with middle- and low-income savers, who would have been stuck with "robo-advice" instead. Fortunately, in 2018, the Fifth Circuit Court of Appeals threw out the DOL rule as "arbitrary and capricious," and the Trump administration declined to appeal. Congress should make sure that the Department of Labor and other bodies, such as the SEC, do not promulgate new rules that similarly raise costs and reduce choices for middle-class investors.

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ADDRESS "TOO BIG TO FAIL"

The 2010 Dodd-Frank financial regulation law was intended to protect taxpayers against the prospect of future bailouts by ending the phenomenon of "too big to fail" financial institutions. Yet many of its provisions actually enshrine "too big to fail" and the potential bailouts for such large financial institutions.

Most prominently, the federal government can designate certain financial firms as "systemically important financial institutions" (SIFIs) that cannot be allowed to fail through the normal bankruptcy or receivership process. The government also has the authority to make creditors of those SIFIs whole, which gives them a competitive advantage in obtaining credit. It is always harmful for the government to pick winners and losers by designating certain firms for additional protection or regulation.

Congress should:

- End the Financial Stability Oversight Council's (FSOC) exemption from the Freedom of Information Act and require it to open its meetings to the public.
- Repeal the FSOC's power to declare firms as too-big-to-fail SIFIs under Dodd-Frank. The Financial CHOICE Act would accomplish this. Short of that, grant both designated firms and their competitors expedited avenues to challenge a SIFI designation in court.
- Phase out the government-sponsored enterprises Fannie Mae and Freddie Mac and do not replace them.
- Until Fannie and Freddie are phased out, end permanently through legislation the Third Amendment profit sweep and ensure that Fannie and Freddie maintain adequate capital.
- Phase out federal deposit insurance. Short of that, bring down the maximum amount insured per deposit from $250,000 to $100,000, the limit that existed for two decades before the financial crisis.
- Shift the burden of proof to bank regulatory agencies when processing applications for new bank entrants. Require those agencies to give specific reasons why a new bank would harm the safety and soundness of the financial system before rejecting its application. Make denial of an application challengeable in court.

The Financial Stability Oversight Council, a secretive bureaucracy created by Dodd-Frank, designates firms as "systemically important financial institutions" through an arbitrary process that lacks rules for designating the firms and that is closed to the public. Some firms embrace the SIFI designation, while others fight it because of the

added regulation it entails. MetLife has successfully challenged its SIFI designation in federal court, while AIG was de-designated as a SIFI in late 2017.

In spite of all that, the government-sponsored enterprises Fannie Mae and Freddie Mac—arguably the most "systemically important" financial entities, given their role in fomenting the financial crisis—have been allowed to operate with virtually no capital buffer. The government's conservatorship of Fannie and Freddie—which began in 2008, when it bailed out the GSEs in exchange for a 79.9 percent ownership stake in each of them—has increased the hazard they pose to taxpayers.

Fannie and Freddie should be phased out and not replaced. There should be no government-sponsored enterprise for mortgages any more than there should be for other types of credit, such as car loans. That phaseout can be done through the method laid out in the Protect American Homeowners and Taxpayers (PATH) Act (H.R. 2767, 113th Congress), which passed the House Financial Services Committee in 2013. Under the PATH Act, the GSEs sell off parts of their portfolios every year until they are completely liquidated. It can also be done by breaking up the GSEs and ending their line of credit with the U.S. Treasury. Any plan must uphold the rule of law by granting shareholders fair compensation for the value of their shares.

Under the Third Amendment, implemented by the Obama administration in 2012, the government confiscated any profit the GSEs made—even after they had paid the government back. That left the GSEs with no capital reserves, which made them vulnerable to even the slightest hiccup in the economy. The Third Amendment "sweep" was an unjust taking from Fannie and Freddie's private shareholders, and is currently being challenged in several lawsuits as unconstitutional. Fortunately, the sweep was halted temporarily by the Treasury Department and the GSEs' regulator, the Federal Housing Finance Agency (FHFA), in 2019 to allow the GSEs to build capital, and then effectively ended permanently in January 2021 when the Third Amendment was replaced by new amendments agreed to by the FHFA and the Treasury Department. However, the threat of bringing it back looms as long as Fannie and Freddie remain in conservatorship, as those running the federal government will always be tempted to use the GSEs as a piggy bank for big-spending programs.

Both shareholders and taxpayers suffered from the Third Amendment's raid of all the GSEs' profits for the U.S. Treasury. Shareholders saw their assets taken without

government compensation and the taking of that capital left the GSEs less financially stable and more prone to a potential bailout. The Housing Finance Restructuring Act of 2016 (H.R. 4913, 114th Congress) would have been an important step in requiring that any profits made by the GSEs be used for rebuilding capital levels to help prevent future taxpayer bailouts. In November 2020, Federal Housing Finance Agency Director Mark Calabria finalized a regulatory capital framework to require Fannie and Freddie to have specified levels of capital and prevent government takeovers of that capital that would bring the GSEs below the prescribed level. Congress should codify that rule into law.

In addition, the GSE's shareholders have never been compensated, although that may change when the Supreme Court rules on the constitutionality of the "sweep" in the upcoming case *Collins v. Mnuchin*. As long as this arbitrary confiscation is allowed to stand or be brought back, a great amount of private capital will be scared off from the mortgage market, leaving government-backed mortgages as the only alternative for prospective home buyers.

To end "too big to fail," Congress must minimize the damage to the financial system of any one bank failing by limiting deposit insurance and allowing more competition. Deposit insurance creates moral hazard, as banks know they can get bailed out if they take too many risks. Meanwhile, depositors lack incentives to monitor the level of risk to which their banks are exposed. The private sector can create more responsive mechanisms of insurance.

Innovative new entrants in the financial services industry should be allowed to compete. Regulators have rebuffed well-managed non-financial firms, such as Walmart and Berkshire Hathaway, in their attempts to open affiliated banks to serve consumers. Virtually no other developed country has such restrictions to entry for the financial services industry. For example, in Great Britain, the retail giant Tesco runs one of the country's largest banks. Keeping banking as an "old boys' club" with few new entrants makes the financial system less competitive and less safe.

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ALLOW BANKS AND CREDIT UNIONS TO SERVE LEGAL MARIJUANA BUSINESSES

The legal marijuana industry currently stands at $13.8 billion and is projected to grow at a compounded annual rate of 23.9 percent—reaching $66.3 billion by 2025. However, only 30 percent of marijuana-related businesses can use a bank or similar depository institution, leaving most to conduct their dealings in cash. This situation raises public safety concerns, as those businesses become prime targets for robbery. In fact, the Wharton School of Business Public Policy Initiative has found that one in every two marijuana dispensaries has been robbed. Much of that crime is due to the incongruity between state and federal law over the legality of marijuana, which has forced many banks to forgo offering any services to marijuana-related businesses out of fear of federal penalties.

Congress should:

- Pass the Secure and Fair Enforcement (SAFE) Banking Act (H.R. 1595, S. 1200, 116th Congress) to provide safe-harbor protections for financial services firms doing business with the legal marijuana industry, and to provide the same protections to ancillary businesses.

Although a majority of states have legalized marijuana, to varying extents, the federal government still classifies marijuana as a Schedule I drug, the same as heroin. Because of that, banks and credit unions can run afoul of criminal statutes, such as aiding, abetting, or acting as an accessory to crime, if they offer services to businesses in the legal marijuana industry. Given the often risk-averse nature of banks, many are hesitant to offer services to those businesses to avoid possible federal persecution.

Legislation like the SAFE Banking Act would remedy this public safety issue, respect states' sovereignty, and protect the ability of banks and private businesses to engage in free exchange with one another.

Experts: Matthew Adams, John Berlau, Iain Murray

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Food, Drugs, and Consumer Freedom

6

Few matters are as important to individuals as the foods they eat, how they pursue personal health, and how they choose to spend their time and money. Fortunately, the number of choices for consumers has never been greater. Additionally, the quality and accessibility of many consumer goods have only increased. Nevertheless, self-appointed advocates continue to pressure governments to control, restrict, or even ban products and services consumers want. Rarely do such restrictions result in better options or health for consumers. On the contrary, they typically raise the cost of living for those least able to afford it, while causing other perverse and potentially hazardous consequences.

Consumers have exacting demands that, free from interference, private businesses have proved capable and willing to meet. Government regulation of food, drugs, and other consumer products is generally intended to protect consumers, but one-size-fits-all regulation is often poorly suited for ensuring safety for a wide range of consumers with highly individualized needs. Some rules are intended to reduce choices or to discourage consumers from choosing particular goods or services. Whatever the intent, government regulation necessarily imposes costs on producers and consumers, reduces choice, and alters consumer behavior—not always for the better.

Legislators and regulators respond to political pressures. Often, rules are not based on basic principles of science, but on activist agendas and the belief that controlling consumers' choices is "for their own good." In such cases, governments myopically

focus on regulating or prohibiting controversial or novel products without considering how they fit into the range of options and alternatives consumers have. Government may attempt to restrict the use of products and technologies that activists consider risky, but that are nevertheless safer than the alternatives. When that happens, genuine safety can be compromised as consumers pursue riskier alternatives. The result of such politically driven regulation is not a safer, more secure, and more prosperous world, but one that is poorer, less fair, and often more dangerous. Consumers are best helped not by heavy-handed restrictions, but by producers competing with one another to supply consumer demands and needs.

It is essential that government regulation of consumer choices be limited to policing the marketplace to ensure that consumers are not misled by false claims or exposed to adulterated products. Product safety and labeling regulations should be designed with maximum flexibility to allow producers to offer the products and use the production methods that best meet their customers' demands. Where safety restrictions are truly needed to protect consumers or the environment, quality standards should be based on the best available scientific data, while allowing producers and consumers the widest possible range of choice.

PROTECT CONSUMERS' ACCESS TO TOBACCO SUBSTITUTES AND VAPING PRODUCTS

After more than a decade of intense research, there is no doubt that noncombustible tobacco products are a valuable tool in reducing the harms associated with smoking. Although not harmless, the evidence incontrovertibly demonstrates that they are vastly safer than combustible tobacco and are effective in helping smokers quit their deadly habit. The availability of affordable and satisfying noncombustible alternatives to smoking would be beneficial to public health—a fact tacitly endorsed by the U.S. Food and Drug Administration (FDA) when it granted Swedish Match the right to market snus (a smokeless tobacco powder) as a "modified risk" product in 2019 and Philip Morris International to market its IQOS (which heats, but doesn't burn tobacco) as a "modified exposure" product in 2020. Yet the continued existence of products that are arguably even more beneficial for adult smokers—nicotine vapor—is threatened by FDA regulation.

Although many health experts now recognize that using nicotine vapor, or "vaping," is a safer alternative to smoking and some nations now promote those products for smoking cessation, anti-smoking activists in the United States have persuaded many that vapor products are no different than combustible tobacco. They scored a major victory in 2014 by convincing the FDA to "deem" e-cigarettes as tobacco products and issue regulations that, despite e-cigarettes' different risks and purposes, treat nicotine vapor as functionally no different from combustible cigarettes. In fact, because traditional tobacco cigarettes are grandfathered in and not required to submit premarket tobacco applications (PMTAs) with the FDA, the rules are now *more* onerous for e-cigarette manufacturers than for traditional tobacco. Without immediate action, consumers will lose access to this potentially life-saving technology and many will return to smoking, a habit that kills hundreds of thousands of Americans every year.

Congress should:

- Amend the Tobacco Control Act (TCA) to direct the Food and Drug Administration to create a streamlined approval process for lower-risk tobacco products that can be reasonably assumed to have a net positive effect on public health.
- Amend the TCA to allow less harmful nicotine products to be advertised as such. Despite the mountains of evidence, consumers remain largely unaware

that noncombustible tobacco poses fewer risks than combustible cigarettes. Allowing the makers of lower-risk alternatives to communicate honestly with consumers will provide smokers with accurate information about alternatives and may convince more smokers to switch.

- Modify the TCA's "predicate" date (the grandfather date) to 2018 so that products currently available to consumers can remain on the market. In the 114th Congress, Reps. Tom Cole (R-OK) and Sanford Bishop (D-GA) introduced an amendment to the agriculture appropriations bill to change the predicate date to August 2016, which could serve as a model.

As of September 9, 2020, manufacturers of all vaping products and components—including every flavor and nicotine concentration level—are required to file premarket tobacco applications with the FDA. In addition to receiving approval to stay on the market, manufacturers will also have to conform to new labeling requirements and adhere to restrictions on sales and advertising. Together, those rules will cost the makers of vapor products millions of dollars, which only the largest manufacturers will be able to afford. By the agency's own admission, that process will result in the near-total elimination of the nicotine vapor industry, leaving just 1 percent of the currently available products on the market. With fewer options, the nicotine vapor products left available for consumers will be more expensive, less attractive, and less satisfying for adult smokers' individual tastes. As a result, fewer smokers will switch to those products and many who have switched will return to smoking, increasing the burden of death and disease caused by smoking—unless Congress intervenes.

Amend the Tobacco Control Act

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, which vested the U.S. Food and Drug Administration with the authority to regulate the manufacture, sale, and advertising of tobacco products (Pub. L. No. 111-31, 114th Congress). In 2014, without direction from Congress, the FDA announced it would begin regulating all nicotine products as tobacco products under the TCA. That "deeming rule" essentially lumped all nicotine products under the same onerous rules as traditional tobacco cigarettes—rules designed to reduce and ultimately eliminate the use of traditional cigarettes—without accounting for relative risks or benefits of the various product categories.

The premarket tobacco applications that companies must now file for every product will cost upward of $1 million each. For the vast majority of companies, those

compliance costs will force them to either exit the market or drastically reduce their product lines. Most likely, only big tobacco companies will be able to successfully move their products through the FDA's PMTA process, leading one public health expert to deem the rule "the Cigarette Protection Act of 2015."

For any vapor product that does receive FDA approval, companies will also have to comply with sales and advertising restrictions and feature new warning labels. Because of the huge compliance costs and reduced competition, products that remain on the market likely will be much more expensive and less attractive to adult smokers, causing many to simply continue smoking and some to return to smoking.

The effects of these new rules were not what Congress intended when it enacted the Tobacco Control Act. In addition to giving the FDA oversight of tobacco products, the TCA instructed the agency to promote cessation in order to "reduce disease risk and the social costs associated with tobacco-related diseases." Nicotine vapor products have proved to be exactly the type of technology capable of reducing the disease burden, but the FDA's onerous, one-size-fits-all approach to regulating this novel market will effectively eliminate access to these safer alternatives.

Base Regulations on the Relative Risk of Products

Putting the same regulatory burden on nicotine vapor as the FDA applies to cigarettes—regulations intended to reduce tobacco use—runs contrary to the agency's mission of protecting public health. In its May 10, 2016, final rule deeming e-cigarettes to be tobacco products, the FDA insisted that no long-term studies yet existed to support claims that "vaping" would have a net benefit on public health. Since then, however, the research—including long-term studies—has inconvertibly confirmed that fact. Nicotine vapor products have far fewer harmful and potentially harmful chemicals and significantly improve the health of smokers who switch to these noncombustible products.

Initially, there were fears that e-cigarettes would "renormalize" smoking and lead to increases in adolescent and adult smoking. However, that has not happened. Only a negligible percentage of nonsmokers habitually use nicotine vapor products, and the smoking rate for both youths and adults has reached historic lows every year since they entered the market. In contrast, many smokers attest—and studies confirm—that e-cigarettes are popular and effective for smoking cessation. One randomized

controlled trial from 2019, published in the *New England Journal of Medicine*, confirmed that e-cigarettes were twice as effective for long-term smoking cessation than other nicotine replacement therapies.

Allow Noncombustible Products to Advertise Reduced Harm

Not only are e-cigarettes now required to acquire FDA sanction, but also manufacturers are prohibited from telling customers that their products are less risky than cigarettes, contain fewer toxins than cigarettes, contain no tobacco, and produce no smoke—all of which are true.

The Tobacco Control Act's subsection 911—which prevents one tobacco product from advertising its relative safety compared with others—was intended to stop dishonest cigarette marketing using such terms as "light" or "low tar" to mislead consumers into thinking they were safer. But that same subsection now also bars nicotine vapor companies from communicating accurate information to consumers, like the fact that e-cigarettes contain fewer toxins than combustible cigarettes. The reason is that the TCA explicitly prohibits companies from claiming that their products are "free" of a certain ingredient or have "less" of a particular ingredient, even if that is true.

Thus, in addition to being more expensive, less customizable, and less appealing, the nicotine vapor market may not even attempt to attract adult smokers away from cigarettes by *truthfully* advertising their products as less harmful.

Move the "Grandfather" Date to 2018

When Congress enacted the Tobacco Control Act in 2009, it included a "predicate date," which grandfathered in products on the market before February 15, 2007 (a date left over from a previous version of the TCA). Grandfathered products and new products that are substantially equivalent to those already grandfathered in do not have to submit premarket tobacco applications. But because e-cigarettes entered the U.S. market after that date, all nicotine vapor products must go through the PMTA process, making the regulation more onerous for safer nicotine vapor products than it is for traditional combustible cigarettes. Congress can ameliorate the disproportionate effects of the regulation by changing that predicate date to 2016 or 2018—when the law went into full effect—thereby reducing the number of products eliminated from the market.

However, that solution is far from perfect. Grandfathering in many of the products on the market will bring innovation in this market to a screeching halt, preventing the competition and improvements that might make them even safer and more effective for adult smokers. But at least it will not throw innovation back by nearly a decade.

The FDA's mission is to protect and enhance consumer health. The agency asserts the new regulations on vapes will "improve public health and protect future generations from the dangers of tobacco use," but nothing could be further from the truth. The wide variety of flavors, styles, levels of nicotine, and customizability provided by the current nicotine vapor market are what make e-cigarettes so popular and effective. Almost any smoker can find a device, flavor, and nicotine concentration to satisfy his or her needs and preferences. That makes switching from cigarettes easier, cheaper, and more likely to result in permanent smoking cessation. The current state of FDA regulation will eliminate this vibrant and beneficial market. At the very least, it will eliminate consumers' ability to acquire those products *legally*.

Already, states that have banned, heavily taxed, and restricted e-cigarette products are discovering that simply passing laws does not eliminate products. Reports of large-scale bootlegging, illicit manufacturing, and overseas purchasing of banned nicotine vapor products are widespread. Cities that banned products and flavor options in an attempt to reduce youth vaping, like San Francisco, are also reporting increases in youth *smoking*. Whatever risks may be associated with e-cigarettes, it is hard to argue that they would be worse than the harms lurking in the unregulated black market or the harms associated with smoking.

It is long past time for both Congress and the FDA to recognize that nicotine vapor products are not cigarettes. They have different ingredients, risks, and purposes. Regulation should be tailored accordingly, based on the scientific evidence and the needs of consumers—adults and adolescents—not exaggerated media stories, unfounded fears, and wishful thinking.

Expert: Michelle Minton

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STRENGTHEN COOPERATIVE FEDERALISM BY REMOVING CANNABIS FROM THE CONTROLLED SUBSTANCES ACT

The year 2020 marks the 83rd anniversary of Congress' prohibition on the sale and possession of *Cannabis sativa*. Since 1937, however, public opinion on the subject has changed dramatically. Polls in 2019 show that 91 percent of American adults now believe that cannabis should be legal for recreational or medical use—or both. Only 32 percent of Americans now oppose legalization. But while the public's views have shifted, the federal stance on cannabis has remained largely unchanged since the Great Depression. Under federal law, the possession or sale of cannabis, whether for medical or recreational purposes, is punishable by fines of up to $1 million and as much as life in prison, even if the parties charged are in full compliance with the laws of their state.

To date, only eight states continue to fully criminalize cannabis, with all other states and Washington, D.C., democratically enacting laws to legalize the sale and possession of medical or recreational marijuana. Legalization across the states is the result of changing attitudes and the will of voters, which Congress ought to respect.

Congress has been slow to respond to the public will. On the other hand, the federal government has generally and appropriately taken a stance of noninterference regarding that conflict between state and federal cannabis laws. However, recent actions within the executive branch demonstrate that this entente is tenuous.

In January 2018, the Department of Justice ended the decades-long hands-off position taken by both Congress and the executive branch. In addition to the difficulties that already exist for legal state-based marijuana businesses and consumers because cannabis is federally criminalized, the DOJ's stance put them at even greater risk for legal consequences.

Congress should:

- Protect the principle of cooperative federalism, voters' rights, and consumer safety by removing cannabis from the Controlled Substances Act.
- At the very least, amend the Act to decriminalize the business of selling or the act of using cannabis (preferably both) in states where such activity is legal.

In April 2019, a bipartisan group of lawmakers introduced the Strengthening the Tenth Amendment through Entrusting States (STATES) Act (S. 1028, H.R. 2093, 116th Congress). Sponsored in the Senate by Sens. Cory Gardner (R-CO) and Elizabeth Warren (D-MA) and in the House by Reps. Earl Blumenauer (D-OR) and David Joyce (R-OH), the STATES Act is a modest amendment to the Controlled Substances Act (21 U.S.C. 801 *et seq*.). Rather than remove cannabis from the federal drug law, the legislation would make the Controlled Substances Act inapplicable to any person acting in compliance with state law related to the substance. At its heart, the Act does not require Congress to legalize cannabis. Rather, it merely affirms that state legislatures are the government units best equipped to decide whether and how cannabis ought to be regulated in their states.

Our Constitution wisely limits federal power and leaves most issues of law enforcement to the individual states. Given that we are a nation of diverse populations and opinions, state legislatures and local law enforcement must be free to decide how best to use their limited resources to protect public health and safety and direct resources toward those priorities. What works for Colorado may not be appropriate for Alabama, and vice versa. The STATES Act would not prevent the federal government from enforcing federal laws criminalizing the sale or use of marijuana. It merely requires the federal government to enforce those laws in a way that respects states' authority to legislate in this area.

The STATES Act can serve as a model for a modernized approach to marijuana regulation. Perhaps more than any other issue in Congress, it has true bipartisan support, with cosponsors evenly distributed between Democratic and Republican members. Clearly, America is ready to see an end to the longstanding and untenable conflict between state and federal drug policy. All that remains is for Congress to act.

Experts: Michelle Minton

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Labor and Employment

7

Increases in productivity, not artificial increases in labor prices, are the key to economic growth and rising wages. For most of its history, America has enjoyed strong economic growth thanks to the flourishing of dynamic and flexible labor markets. Individuals and businesses in the United States have benefited greatly from the freedom to adapt to changing market conditions. Ensuring individual worker freedom is especially important as new business models and industries emerge. Workers' most valuable asset is their own labor and they must be allowed to market and profit from it.

The old adversarial master–servant model of labor relations has little to offer the 21st century workforce, which is characterized by horizontal corporate structures, significant job mobility, and instant, constant communications. However, obsolete New Deal–era labor laws and regulations have yet to adapt to a changing economy. Worse, many seem intent on bending new business models to those old rules. Congress needs to revisit the whole of U.S. labor law—including the roles of the two key federal labor regulators, the National Labor Relations Board (NLRB) and the Department of Labor (DOL)—to free up the creative energies of the American labor force.

REFORM THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) is the primary law governing wage and hour mandates across the country, including full- and part-time private-sector workers and local, state, and federal employees. It sets minimum wage and overtime eligibility, record-keeping requirements, and exemptions to those requirements. Through the FLSA, Congress delegated broad authority to the secretary of labor to issue regulations regarding conditions that employees must meet to achieve exempt status from the statute's wage and hour requirements, including for minimum wage and maximum hours. Those exemptions are displayed in the FLSA's section 213.

The labor secretary can exercise broad authority to interfere with millions of private employer–employee relationships across the country. Overreach of that power was displayed under the Obama administration. For example, in 2016, the Department of Labor dramatically raised the salary threshold for employees to be exempt from overtime pay from $23,660 to $47,476—an over 100 percent increase. As former Wage and Hour Administrator Tammy McCutchen pointed out in congressional testimony, such an increase is out of line with historical raises in the salary threshold. Such massive changes to the rules of the game burden employers with significant costs and create new compliance issues.

Congress should:

- Reclaim authority over changes to the Fair Labor Standards Act that affect millions of workers. Legislation should require that when the Department of Labor proposes a regulatory change to an exemption from wage and hour requirements, it should have to pass both houses of Congress with a simple majority before finalization of the rule.
- Pass legislation to clearly define the parameters of exempt workers in a way that enables employers to offer innovative compensation packages and to allow for flexible schedules without fear of running afoul of the law under some technicality.

The FLSA was enacted in 1938 and needs modernization. In addition to the broad authority it gives to the secretary of labor, many of the FLSA's current definitions of employment categories are unclear and outdated. For example, the FLSA requires that an employee must earn more than the salary threshold and primarily perform "bona fide executive, administrative, or professional" activity to fall within wage and hour

exempt status. However, determining whether an employee meets the requirement of "executive, administrative, or professional" employee has become increasingly difficult.

In today's economy, it is more difficult to clearly define employees as either management or rank-and-file workers. With an ever-changing regulatory landscape, the Depression-era wage and hour statute's requirements are ill-suited to govern today's modern workplace, and create confusion and uncertainty that present challenges to employers' ability to comply with the law.

Expert: Sean Higgins

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HARMONIZE THE DEFINITION OF "EMPLOYEE" ACROSS GOVERNMENT

Determining the proper legal classification for an individual worker is not a simple task. A major reason for that difficulty is a patchwork of federal and state laws that define the terms "employee" and "independent contractor" differently. Causing further confusion, courts and regulatory agencies approach the question of whether an individual is an employee or independent contractor inconsistently. More than 10 different tests are applied among federal agencies and courts for defining the term "employee." For example, the test to determine independent contractor status is different under statutes governing the Internal Revenue Service and the Fair Labor Standards Act.

This patchwork of laws and tests creates uncertainties for employers, independent contractors, and their clients. It increases the odds of companies misclassifying workers, which can result in severe consequences for employers. Statutes define the term "employee" differently and apply separate tests to determine an individual's status. Therefore, a company may properly classify a worker as an independent contractor under one federal statute while simultaneously misclassifying that same worker under state law or another federal law.

For example, the two primary labor and employment statutes—the National Labor Relations Act and the Fair Labor Standards Act—apply different tests to determine whether an individual is an employee or an independent contractor. The Fair Labor Standards Act uses the economic realities test, which determines a worker's status primarily based on the worker's level of economic dependence on an employer. In contrast, the common-law test determines an individual's status based on how much control an employer exerts over a worker.

Misclassifying employees is a costly mistake that can result in owed back pay, tax consequences, and even criminal penalties. A company may seek to avoid exposure to such risks by refusing to hire independent contractors, which diminishes both economic opportunities for independent workers and cost savings for the company. The Labor Department has issued a rulemaking on the matter, but that does not obviate the need for Congress to codify clear rules that harmonize the definition of "employee" across federal statutes.

Congress should:

- Pass legislation along the lines of the Harmonization of Coverage Act (H.R. 3825, 115th Congress), which would bring the definition of the term "employee" in the Fair Labor Standards Act in line with other statutes.

Government policy should not discourage individuals from engaging in independent entrepreneurship, which provides significant contributions to the economy. Forty-two million Americans engage in some form of independent work to start businesses, earn income, improve skills, or take on passion projects, according to a 2018 survey by MBO Partners, a consulting firm that specializes in connecting businesses with independent workers. Of the total number of independent workers, 3.3 million earn over $100,000. In addition, satisfaction among independent workers is high.

Contrary to popular belief, contingent workers can earn as much, or more, than full-time employees, according to a survey commissioned by Upwork, a freelance work-referral firm, and the Freelancers Union. A 2017 study by the American Action Forum and the Aspen Institute found that independent contractors greatly contributed to the economic recovery. The report found: "Between 2010 and 2014, independent contractors grew 11.1 percent (2.1 million workers) and represented 29.2 percent of all jobs added during that time period." Work as an independent contractor also offers critical opportunity and earnings for the unemployed while they search for new work, according to a 2016 McKinsey Global Institute study.

Many individuals value the flexibility inherent in independent contract work. Unfortunately, current laws and regulations incentivize employers to hire employees as opposed to independent contractors, even when the latter may be more efficient or cost-effective.

Experts: Sean Higgins, Iain Murray

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REFORM THE WORKER CLASSIFICATION PROCESS

The Fair Labor Standards Act is the primary law governing wage and hour mandates across the country, including full- and part-time private-sector workers and local, state, and federal employees. It sets the minimum wage and overtime eligibility, record-keeping requirements, and exemptions to those requirements. The definitions of whether an employee is exempt from FLSA minimum wage and maximum hour requirements are antiquated and complicated. They need to be modernized to take today's workplace practices into account.

For example, the FLSA demands that an employee must earn more than a salary threshold, currently set at $23,660, and primarily perform "bona fide executive, administrative, or professional" activities to qualify for wage and hour exempt status. However, in today's economy—characterized by horizontal corporate structures, significant job mobility, and flexible work arrangements—it is more difficult than in the past to clearly define employees as either management or rank-and-file workers.

Another area where the FLSA falls short is in clearly differentiating between employees and independent contractors. The FLSA uses a "suffer or permit to work" standard of employee, one of the most broad and far-reaching definitions of "employee" under U.S. law.

Congress should:

- Pass legislation to enable individuals who prefer the flexibility that comes from contractor status to choose that form of work instead of an employment relationship.

Worker misclassification happens primarily in one of two ways:

- An employee is inappropriately labeled as exempt from minimum wage and maximum hour requirements.
- An employee is classified as an independent contractor when he or she meets the FLSA's employee test.

Overwhelmingly, workers choose to take independent contractor positions because they value independence instead of being directed by an employer. Yet current laws

greatly reduce an individual's ability to undertake work as an independent contractor. Eliminating a form of work is poor policy at any time.

Temporary workers and independent contractors serve important business functions. Many businesses, such as building contractors, have peak seasons when they need extra workers to complete projects for a short duration. For example, using independent contractors allows residential builders to scale up and perform more jobs during the summer, without having to take on permanent staff that they will be unable to afford during the winter.

During the past five years, investigations by the Labor Department's Wage and Hour Division resulted in $1.4 billion in back wages. Certainly, there are some bad actors who will attempt to short workers on pay, but the DOL's Depression-era wage and hour laws defining who is an employee do not match up with the modern workplace and often lead to penalties based on technicalities. In January, the Labor Department announced a final rule to update the Fair Labor Standards Act's rules for determining whether a worker is an employee or a contractor. Congress should codify the department's updates.

Expert: Sean Higgins

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PROVIDE EMPLOYEES FREEDOM TO CHOOSE AMONG DIFFERENT TYPES OF COMPENSATION

The Fair Labor Standards Act determines how employers may compensate employees. For every hour per week worked over 40 hours, employees are paid time and a half their regular wage rate unless they fall under one of several exemptions outlined in the FLSA. Employers and employees are prohibited from voluntarily negotiating other forms of compensation for hours worked over 40 per week other than time-and-a-half pay.

Many employees likely prefer receiving extra pay from working overtime. However, that should not foreclose other compensation options that fit some individuals' unique needs and circumstances. Individuals with children or caregivers to the elderly sometimes need extra time off work to take care of loved ones or tend to life's other demands and goals.

Congress should:

- Pass legislation to let employers offer their employees paid leave for working overtime instead of time-and-a-half wages.

Survey results show that flexible workplace rules rank highly on why a worker chooses a particular job over another. A 2017 Gallup poll of office workers found that 54 percent would change jobs to have "flexible work time." A survey conducted by Deloitte on millennials finds that when you take pay out of the equation, work–life balance and flexible work schedules stand out when evaluating a new job opportunity. Similarly, an Ernst & Young survey found that millennials would change jobs and location to work at an employer that offers "flexibility and [the ability to] better manage work and family life."

The Working Families Flexibility Act of 2020 (H.R. 5656, 116th Congress) sought to amend the FLSA to allow, but not require, employers to offer employees the choice between compensatory ("comp") time and overtime pay. Both employer and employee would have to agree on the arrangement; employers could not coerce employees to accept the alternative compensation. Both overtime wages and comp time would accrue at one-and-a-half times overtime hours worked. In addition, if an employee does not use all the comp time he or she has accrued, it can be cashed out at the end of the year.

Workers deserve greater choice in their employment terms. The Working Families Flexibility Act provides employees options on how they are compensated and greater workplace flexibility. Amending the FLSA to permit comp time puts private-sector employees on par with federal employees who have had the option of accruing comp time since 1985.

Expert: Sean Higgins

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REFORM THE NATIONAL LABOR RELATIONS ACT AND NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Act (NLRA) is the primary federal statute that governs private-sector labor relations. It establishes the process that employees may use to organize and workers' right to refrain from doing so. The Act outlines "unfair labor practices," which are activities employers and unions are prohibited from undertaking vis-à-vis one another. The Act created the National Labor Relations Board, an independent agency now comprising five members, in charge of enforcing the NLRA and overseeing union representation elections.

In 1935, Congress established the National Labor Relations Board as a body made up solely of "three impartial Government members" to represent the public interest in labor disputes under the National Labor Relations Act. However, during the NLRB's 80 years in operation, almost all NLRB members have come from either a business or union background. That has meant that most of the board's members have a predisposition to favor one side or the other. With nearly all board members having a bias, the NLRB has been unable to act in an impartial manner, as it was created to do.

Congress should:

- Pass legislation to strip the National Labor Relations Board of its adjudication and rulemaking authority in order to avoid uncertainty surrounding national labor policy.
- Short of stripping the NLRB of its decision-making authority, pass legislation to add a sixth member. That modification would greatly reduce constant change in NLRB precedent and bring a greater level of stability to labor relations.
- Eliminate exclusive representation.
- Enact the Employee Rights Act to:
  - Protect secret ballots in union organizing elections.
  - Enable workers at unionized workplaces to periodically vote on whether they want to retain a union as their bargaining representative.
  - Prohibit unions from penalizing workers who wish to decertify.
  - Protect workers and employers from union violence.

The NLRB is composed of five members, traditionally two Democrats, two Republicans, and a chair from the president's party, who determines the partisan balance. As a result, NLRB policy swings like a pendulum. The board's case precedent flip-flops in favor of organized labor or management, depending on whether a

Democrat or Republican holds the presidency. Worse, even though changes in precedent are made in partisan fashion, federal courts routinely give judicial deference to the NLRB on the basis of the board members' "expertise." Constantly changing NLRB policy creates immense uncertainty for all stakeholders—employees, employers, and unions.

The National Labor Relations Act sets the rules for union representation elections and unfair labor practices. However, much of the Act is outdated and needs reform. The Employee Rights Act (H.R. 1855, 116th Congress), a comprehensive reform measure introduced in the past two sessions of Congress, would go a long way toward protecting workers' freedom to choose whether to join a union and increasing union accountability.

The Employee Rights Act would:

- Amend the National Labor Relations Act to require all union elections to be conducted via secret ballot. That would ensure that workers are able to participate in union elections anonymously, thus reducing the opportunity for unions or employers to intimidate or coerce workers on their decision.
- Require a recertification election via secret ballot to take place when more than 50 percent of the collective-bargaining unit has turned over since the previous election. A majority of workers, having never voted on union representation, inherited the union that currently represents them.
- Impose penalties on labor unions that penalize workers who file for union decertification.

Currently, unions may organize a group of workers in two ways: by secret-ballot election or through a process known as "card check." A secret-ballot election allows workers to cast their votes in private and free from coercion. Card check involves union organizers asking individual workers to sign authorization cards that function as their vote for the union. Pressured to sign, workers are deprived of time to hear the pros and cons of unionization and to reflect on whether they want to unionize, which leaves workers open to union intimidation tactics.

Employers must agree to card-check elections in place of NLRB-supervised secret-ballot elections, which incentivizes unions to use a strategy known as a "corporate

campaign" to pressure employers into agreeing to card-check organizing. Corporate campaigns are aggressive public relations campaigns designed to damage an employer's reputation until it accedes to union demands.

Decertification is an arduous and difficult process. Under the National Labor Relations Act, once a union wins representation over a group of workers, it remains those workers' representative in perpetuity unless the workers vote to decertify the union. That practice has led to a number of "inherited unions." Recent research by the Mackinac Center shows that only 7 percent of current union members actually voted for the union that represents them. That means that a vast majority of workers never had a voice in choosing their workplace representative.

Currently, many union constitutions contain provisions that punish workers who seek to decertify their union, including through steep fines and even termination of employment. Rightly, the NLRA makes it an unfair labor practice by an employer to interfere with workers' right to organize. The same should be true for unions that attempt to restrain workers' right to decertify an unwanted union.

Workers should have every right to organize and unions have every right to try to attract workers to join. However, there must be some limits on the kinds of activities that are allowed toward that goal. One such restriction should be outlawing union violence. Unfortunately, in its 1973 decision in *U.S. v. Enmons*, the U.S. Supreme Court created a loophole that exempts violence committed by a union in the course of promoting union goals from prosecution under the Hobbs Act, a major federal anti-extortion law.

Expert: Sean Higgins

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CLARIFY THE DEFINITION OF "JOINT EMPLOYMENT"

In August 2015, the National Labor Relations Board unilaterally changed the definition of "joint employment" from when a company has "direct control" over employees at another company to "indirect control." The Department of Labor quickly adopted the same definition. That change exposed tens of thousands of businesses across the United States to increased costs and liability if they merely did business with a company that violated workplace laws. The underlying motive of both agencies' actions was to make union organizing easier. In early 2020, both the NLRB and DOL issued new rules that restored the earlier "direct control" standard, but the Biden administration has pledged to re-include "indirect control." The Protecting the Right to Organize Act of 2019 (H.R. 2474) would also allow the "indirect control" standard."

Congress should:

- Pass legislation along the lines of the Save Local Business Act (H.R. 3441, 115th Congress), which would have codified the traditional joint employer standard. It amends the National Labor Relations Act to clarify that a joint employer relationship is established when an employer exercises "actual, direct, and immediate" control over employees.

Traditionally, joint employer liability was established when one company, normally the larger one, exercises *direct* and *immediate* control over a smaller company's employees. Under the new standard, a company may be held liable for labor violations by other employers with whom they contract, merely by exercising *indirect* control or possessing *unexercised potential* control over the other company's employees.

As a result of the increased liability it imposed on employers, the NLRB's new joint employer standard put a wide swath of proven, established business models at risk, including franchising, contracting out a business' noncore functions, and using temporary staffing agencies. Those industries create thousands of jobs annually and generate opportunity for entrepreneurs to start new businesses.

Expert: Sean Higgins

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ENABLE VOLUNTARY UNION MEMBERSHIP

A foundation of current private- and public-sector labor relations law conflicts with individuals' right to freedom of association. It is possible, under the National Labor Relations Act and the Civil Service Reform Act of 1978, for a minority of workers to impose a union on the rest of their colleagues. A flaw in labor relations policy allows a union to be certified as the exclusive representative of a bargaining unit by receiving only a majority of votes in an election, not a majority of votes from all employees in a workplace. In some states, employees must pay fees to a union for representation they may not want. Congress should amend federal labor relations law so that unions only represent workers who voluntarily join and pay dues.

Congress should:

- Pass legislation modeled after New Zealand's Employment Relations Act, which ensures that any association between a worker and a union is mutually voluntary. In New Zealand, all membership in a union is voluntary and unions only represent workers who voluntarily join and pay dues.

The NLRA restricts a worker's freedom to choose how he or she is represented in the workplace. Section 9(a) of the NLRA imposes the principle of "exclusive representation" on workers and employers. When a union wins an election, it is certified as the exclusive representative of a bargaining unit at a workplace. That policy grants the union a monopoly over workers in the bargaining unit.

An exclusive representative union represents all workers in a bargaining unit. That means the union represents workers who voted in its favor, workers who voted for another union, and workers who voted against any union representation. Laws that grant exclusive representation status to unions prohibit employers from negotiating work conditions directly with employees or another employee representative. In states without right-to-work laws, nonunion workers must pay agency fees to cover the costs of such compulsory union representation.

The Civil Service Reform Act of 1978, which governs labor relations in the federal government, also grants unions the privilege to act as workers' exclusive representative. Section 7111 of the Act grants a labor union exclusive representation

status when a majority of employees voting in an election cast ballots in favor of a union.

Workers who do not want union representation should be free to independently negotiate their own terms and conditions of employment with their employer. Congress should enact legislation that frees workers from forced representation and dues. When a union represents a workplace, employees should be free to choose whether they want to work under a collective-bargaining agreement, receive union services, and pay dues.

Unions complain that the duty of exclusive representation can create a "free rider" problem for them, since nonmembers can get the economic benefits derived from collective bargaining without having to pay dues. That is a fair criticism. Unions should not be obligated to provide representation for nonmembers, so long as those nonmembers are not prohibited from representing their own interests before their employer.

Expert: Sean Higgins

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REIN IN STATE OCCUPATIONAL LICENSING LAWS

Laws and regulations that require workers to be licensed to practice certain occupations have proliferated in recent decades. In 1950, only about 5 percent of jobs required workers to have some form of license. By 2017, that share had risen to more than 25 percent. Initially, most forms of licensing involved professions like medicine, in which safety could be an issue. However, in the name of consumer protection, licensing requirements have proliferated in fields, such as cosmetology, where no clear need exists for such requirements. Such regulations effectively protect established practitioners from new competition. The cost and complexity of licensing hurt Americans looking for employment, especially lower-income workers. Many people are also prevented from moving to another state because many licenses do not carry over from one jurisdiction to another.

A 2015 Brookings Institution study found that there were "far more cases" in which licensing reduced employment than where it improved the quality and safety of services. The restrictions have resulted in 2.8 million fewer jobs nationally and raised consumer costs by $203 billion annually, Brookings found.

Congress should:

- Consider proposals to use authority under the Commerce Clause of the Constitution to reform licensing requirements, such as by allowing licenses to be portable across states.

Expert: Sean Higgins

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REFORM THE CARES ACT'S "LABOR NEUTRALITY" PROVISION

Buried in the $2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act is a section that says that to qualify for a loan or loan guarantee from the Treasury Department, a business must "remain neutral in any union organizing effort for the term of the loan." In the context of labor organizing, "remain neutral" refers to management agreeing not to interfere with a union's bid to represent its workers. However, the term has no strict legal definition, which means unions can sue employers for any perceived non-neutral activity and put their CARES Act loans in jeopardy.

It is hard to see what purpose that provision serves in helping businesses survive the COVID-19 pandemic, especially since the neutrality requirement exists for the term of the loan. It is an invitation for unions to file lawsuits against businesses they are trying to organize, many of which are struggling to survive.

Moreover, avoiding burdening businesses with more regulations, and removing some existing overly burdensome ones, make for a sounder economic stimulus strategy than spending even more taxpayer dollars on fiscal stimulus, further increasing the already bloated federal debt.

Congress should:

- Amend the CARES Act to eliminate the "remain neutral" provision.

Expert: Sean Higgins

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END GOVERNMENT-SUBSIDIZED UNION ACTIVITY

Section 7131 of the Civil Service Reform Act of 1978, also known as the Federal Service Labor-Management Relations Statute, permits a practice known as union official time, which allows federal employees to take paid time off from their government duties to conduct union business. Official time represents a massive taxpayer-funded subsidy to federal employee unions. In fiscal year 2016, official time cost $176 million, with federal employees spending 3.6 million hours conducting union business, according to recent data from the Office of Personnel Management. Official time is a misuse of taxpayer funds and should be eliminated. Federal employees should exclusively perform the activities they are hired to perform.

Congress should:

- Pass legislation to amend section 7131 of Title 5 of the Civil Service Reform Act to eliminate the use of official time by federal employees.
- At a minimum, pass legislation that requires federal agencies to monitor, record, and publish the cost, hours, and activity performed on official time.

In 2018, President Trump issued Executive Order 13837, which directs federal agencies to significantly curtail union official time. The order also directs agencies to carefully monitor official time to prevent unlawful uses and improves agency reporting requirements to enhance public disclosure of this union subsidy. However, those gains will be short-lived if Congress does not pass legislation codifying limits on the use of official time.

The Civil Service Reform Act of 1978 grants official time to federal employee unions during collective-bargaining negotiations and grievance procedures. Otherwise, official time is only permitted if the activity is deemed by the public employer and union to be "reasonable, necessary, and in the public interest."

Any activities performed by an employee relating to the business of a labor organization—including solicitation of membership, elections of labor organization officials, dues collection, collective bargaining, filing of grievances, lobbying, or any activity previously permitted under official time—shall be performed while off duty.

Several Government Accountability Office reports have found that federal employees use official time without authorization, public employers are unaware of what activity federal employees engage in on official time, and the cost and hours of official time use are unknown because of poor accounting practices.

Expert: Sean Higgins

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8

Trade

The new Congress has two urgent tasks on trade policy. First, it needs to help heal the damage from President Trump's trade war by repealing his tariffs and rebuilding the World Trade Organization (WTO). Second, it needs to resume progress on several difficult issues. Those include addressing China's illiberal economic, political, and human rights policies; rebuilding alliances; and finalizing several trade agreements. Renewing Trade Promotion Authority will be a key congressional contribution to that process. Congress should also repeal the Jones Act of 1920, which has nearly eliminated the U.S. domestic shipbuilding industry, and makes domestic shipping artificially expensive, and uncompetitive internationally.

The Trump tariffs cost the average American household more than $1,200 per year, above and beyond existing tariffs. They made a difficult pandemic even harder for millions of people. They will continue to bear that cost until Congress repeals the tariffs. Doing so would have three political benefits. First, it would provide an immediate economic stimulus that does not require new spending. Second, Republicans would get a tax cut they can tout to their constituencies. Third, Democrats would get a clean break from the Trump era they can tout to their constituencies—something that might also benefit some GOP members. To guarantee against a future president's abusing tariff authority, Congress should repeal Section 232 of the Trade Expansion Act of 1962, and Sections 201 and 301 of the Trade Act of 1974, which were President Trump's unilateral tariff-making tools.

It is especially important for Congress to act on removing the Trump tariffs since President Biden has indicated he is unlikely to reverse the tariffs unilaterally.

The United States also needs to reengage with the World Trade Organization. The WTO's dispute resolution system is one of the most effective weapons the United States has in dealing with unfair trading practices. The United States wins more than 85 percent of the cases it brings. The Trump administration let the terms of all seven judges expire, essentially dismantling the entire system. Congress and President Biden need to work with allies to revive that important tool for trade liberalization and diplomatic strength.

The Phase One agreement will make a formal bilateral agreement with China more difficult. Although Phase One prevented further tariff increases, it did not decrease them to previous levels. It also tightened government management on both sides of U.S.-China trade. For instance, the Chinese government agreed to buy specified amounts of U.S. crops as negotiated by the U.S. government. In market economies, buyers and sellers make those decisions.

But the United States can build stronger economic and diplomatic relationships with other Asian countries that can provide a counterweight to China by rejoining the Trans-Pacific Partnership. Trade agreements with the European Union and United Kingdom will add to the China counterweight while ensuring against protectionist policies from important trading partners. Congress should renew Trade Promotion Authority to expedite those negotiations. Doing so would also make it easier to pursue other bilateral and multilateral agreements in regions such as Africa and South America that would prefer to do business with the United States rather than China, all else being equal.

DO NOT NORMALIZE THE TRUMP TARIFFS AND WORK TO FREE TRADE, NOT MANAGE IT

Economists have spent the past two and a half centuries arguing that free trade is sound policy. The Trump administration spent the past four years proving them right. The new Congress has two important jobs on trade policy. First, it needs to make sure that the Trump tariffs do not become the new normal. President Trump roughly doubled tariffs, costing the economy about a half percentage point of growth over the past few years and harming U.S. foreign policy priorities with a number of countries. That was bad enough during good economic times, but it has been disastrous to COVID-19 recovery efforts. Inertia is one of strongest forces in all of politics. Letting the Trump tariffs become normalized can cause great harm, especially as the country recovers from COVID-19 and the economic shock it caused.

Second, as policy makers pursue new trade agreements with China, the United Kingdom, the European Union, and others, and reevaluate America's role in international bodies like the World Trade Organization, Congress should remember that the point of those agreements is to free trade, not to manage it.

Although the United States–Mexico–Canada Agreement's (USMCA) impact on North American trade relations was small, even skeptics saw value in the agreement as damage control against further tariff increases from the United States against two of its closest allies. That turned out to be a false hope. Barely a month after the USMCA came into effect in July 2020, President Trump reinstated aluminum tariffs against Canada. Weeks later, he threatened new tariffs against Mexican produce.

Congress should:

- Move away from Trump administration trade policy as an aberration, not enshrine it as the new normal.
- Ensure that upcoming trade agreements and engagement with the World Trade Organization work to free trade, not manage it.
- Avoid disguised protectionist tariffs, such as carbon border adjustments.

Congress should act immediately on tariffs. This is especially important since President Biden has indicated he is unlikely to remove the Trump tariffs unilaterally. Removing the Trump tariffs is a good start, but more is needed. Congress should reestablish systemic safeguards to ensure that no future president can repeat the damage the Trump

administration's trade policy has caused to the economy and to America's foreign policy. It is bad enough to engage in a trade war during an economic boom; it is positively disastrous to do so during a pandemic and a tough economic recovery.

Besides tariffs, the other major trade policy initiatives in the coming years will center on trade agreements and multilateral organizations. In those areas, inertia is already pulling policy makers to an ethos of managed, rather than free, trade.

That is the opposite of what free trade agreements have traditionally emphasized, from the post–World War II General Agreement on Tariffs and Trade up through the early days of its successor organization, the World Trade Organization. Slowly but surely, bilateral and multilateral trade agreements began to include more and more trade-unrelated provisions on matters such as intellectual property and regulatory, labor, and environmental policy.

In particular, Congress should not agree to any tariffs disguised as "carbon border adjustments" or other similar ruses ostensibly designed to punish countries with less restrictive environmental policies. Those act as protectionist measures as much as the Trump tariffs, but they are also likely to hit the poorest countries hardest.

Experts: Iain Murray, Ryan Young, Mario Loyola

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RECLAIM CONGRESS' TARIFF AUTHORITY

Article I, Section 8 of the United States Constitution gives all taxing and spending power to Congress. It gives none to the president. For tariffs, that changed in the aftermath of the Smoot-Hawley Act of 1930. That bill's passage involved a mess of special-interest favors, vote trading, and mutual back-scratching by members of Congress. It caused enormous economic damage that exacerbated the Great Depression. Congress realized how dysfunctional its handling of trade policy had become, and thus delegated some of its tariff-making authority to President Franklin Roosevelt in 1934. The lawmakers' thinking was that the president represented the country as a whole, rather than a narrow constituency, and was thus less prone to being influenced by special interests.

Since then, especially after World War II, the United States slowly but steadily reduced its tariffs and other trade barriers while playing a leading role in the General Agreement on Tariffs and Trade and its successor organization, the World Trade Organization. That trajectory held for roughly 75 years, until the Trump administration took office in 2017.

Unlike past presidents from both parties, who more or less wielded their delegated power responsibly (even if inconsistently), Trump repeatedly and haphazardly raised tariffs, often on weak justifications. His trade policies harmed America's economic and political interests. The time has come for Congress to reclaim the power it delegated to the president. It can accomplish that by repealing three clauses from two pieces of legislation.

Congress should:

- Repeal Section 232 of the Trade Expansion Act of 1962.
- Repeal Sections 201 and 301 of the Trade Act of 1974.

Section 232 of the Trade Act of 1962 empowers the president to impose tariffs on national security grounds. This makes some intuitive sense. It is important to have viable domestic industries in steel and energy, for example, so that if the United States is cut off from supplies during a war, it will not harm military readiness.

However, that national security argument does not hold up under scrutiny. In a world market, a country simply cannot be cut off from a commodity. If a hostile country refuses to sell steel or oil to the United States, then somebody else will be more than happy to either supply that commodity directly or act as an intermediary and sell the "blockaded" commodity to the United States at a profit.

Worries about imports are also misguided. Foreign steel imports, for example, accounted for roughly 30 percent of U.S. steel consumption, pre-COVID. That means 70 percent is made domestically. The U.S. military, the world's largest by a wide margin, uses roughly 3 percent of America's total steel supply, or less than $1/20^{th}$ of domestic output alone. If a complete steel blockade were enacted tomorrow and somehow succeeded, it would have no impact on military capabilities.

Protected industries that are shielded from competition tend to hold on to obsolete technologies, have inferior quality control, and charge higher prices. Those predictable consequences hurt military readiness, especially in the long run. And to the extent that tariffs slow both innovation and economic growth, a protectionist country will have fewer resources to devote to national security than it would under a policy of free trade.

Domestic industries do not need government help to be globally competitive. U.S. manufacturing output reached an all-time high in 2018. Though dented a bit by the Trump tariffs and the retaliatory tariffs they prompted, output remained near record levels until COVID-19 hit. Industry fundamentals remain strong, so as effective COVID vaccines and treatments allow the economy to open up, manufacturing should resume its previous healthy course.

A coalition of steel-using industries brought a case against the tariffs that made it all the way to the Supreme Court. The tariffs raised steel-using industries' costs, did not help most of the steel industry, and served no national security purpose. Unfortunately, the Supreme Court declined to hear the case.

The plaintiffs' hope was that the United States–Mexico–Canada trade agreement would prevent President Trump from enacting Section 232 tariffs against Mexico and Canada. Those hopes lasted for about a month. Trump retracted the 25 percent tariffs against Mexican and Canadian steel, and the 10 percent tariffs against Mexican and

Canadian aluminum. But barely a month after the USMCA went into effect on July 1, 2020, Trump reinstated the Section 230 aluminum tariff against Canada. This time, the White House did not even pretend the tariffs were about national security.

Section 201 of the Trade Act of 1974 gives the president the power to offer relief to businesses affected by increased competition from imports. President Trump considered Section 201 actions against Mexican produce growers in order to assist American farmers. That policy is practically an open invitation to abuse. Restricting food supply during a pandemic is never good policy. In this case, the president clearly attempted to court favor with a key voting bloc by increasing consumer prices and restricting supply.

Section 301 of the Trade Act of 1974 gives the president authority to enact tariffs against countries that violate treaties they have signed with the United States. President Trump abused that grant of power beyond recognition, especially against China. There are many valid grievances against other countries' trade practices, from arbitrary anti-dumping duties and import quotas to subsidies for exporters. The proper venues for resolving such disputes is the WTO's dispute resolution process and similar mechanisms under bilateral and multilateral agreements to which the United States is a party. Congress should repeal Section 301 and work with the president on trade disputes in the proper venues.

Experts: Iain Murray, Ryan Young

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REENGAGE THE WORLD TRADE ORGANIZATION

The World Trade Organization is a valuable venue for getting bad actors to improve their behavior. The United States has won roughly 85 percent of the cases it has brought to the WTO's dispute resolution system. The Trump administration's de facto dismantling of that important policy tool was one of its biggest trade policy mistakes, and it could have long-lasting negative effects on America's economic and diplomatic interests.

Congress should:

- Assist in refilling all seven vacancies on the World Trade Organization's dispute resolution board with judges who are credibly committed to trade liberalization and a rules-based trading system.
- Commit the executive branch to reengage with the WTO and use its dispute resolution system, where the U.S. success rate is better than 85 percent.

Experts: Iain Murray, Ryan Young

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REPEAL OR REFORM THE JONES ACT

The National Defense Authorization Act expresses the sense of Congress that "United States coastwise trade laws promote a strong domestic trade maritime industry, which supports the national security and economic vitality of the United States and the efficient operation of the United States transportation system." In fact, the nation's main coastwise trade law—known as the Jones Act—does none of those things.

The Jones Act requires any ship traveling between two U.S. points to be U.S.-manufactured, U.S-owned, U.S.-flagged, and U.S.-crewed. That protectionist measure was enacted in 1920 with the stated purpose of ensuring a strong merchant marine to support America's commerce and the nation's preparedness for war and national emergency. However, as 100 years of experience with the Jones Act have shown, the law does the opposite. It has ruined the U.S. maritime industry, does nothing to support national security, and favors foreign commerce over domestic trade.

The Jones Act is a classic government-created cartel, which entails reduced output, reduced competitiveness, reduced innovation, and higher prices for the shipbuilding industry, shipping services, and all who rely on them—all for the benefit of a handful of domestic shippers.

Congress should:

- Repeal the Jones Act. Short of that, Congress should reform the Jones Act by doing the following:
  - Exempt American-owned oceangoing vessels of all flags and origins—of which there are almost 1,000—from the Jones Act so they can sail between American ports. This would essentially repeal the American-built requirement of the Jones Act, leaving the rest of it in place.
  - Exempt all energy shipments from the Jones Act, to allow American energy producers to ship directly to American consumers.
  - Exempt shipping between U.S. ports and ports in Alaska, Hawaii, and Puerto Rico from the Jones Act.

The Jones Act has proved to be a counterproductive and costly failure, particularly with respect to maritime transport. Its flaws are an inevitable result of its cartel structure. It undermines its stated purposes: a strong merchant marine, support for America's commerce, and support for the nation's preparedness for war and national

emergency. Its effects on the energy sector and on Puerto Rico are particularly severe and indefensible. A number of promising reforms have been proposed, but the Jones Act lobby continues to block them all.

The law's supporters argue that because its costs are difficult to quantify, it is not clear that it costs anything. That argument is misleading. The law is designed precisely to restrict the supply of domestic shipping so that American shippers can charge higher prices. But imports and exports are not subject to those restrictions. As a result, domestic coastwise trade has to pay a massive penalty compared with maritime exports and imports, which is how the Jones Act favors America's foreign competitors.

Today, the Jones Act mostly covers about 30,000 tugs and barges plying America's inland waterways, and its punitive restrictions mainly benefit railways and trucking companies. As for America's once-mighty oceangoing merchant marine, the law has protected it to death. Barely 99 oceangoing vessels remain in the Jones Act fleet, half of which serve Alaska on routes that are themselves protected from competition by other laws.

To understand how self-destructive the Jones Act has been, imagine that all the parts in an American car or smartphone had to be made in America. A Ford would cost more than a Mercedes. An iPhone would cost as much as a car. Nobody in the world would want one.

That is what has happened to the U.S. shipbuilding industry. Under the law's supposed protection, no maritime shipyards are left in America today that are not sustained by Defense Department contracts. The Jones Act was designed to protect commercial shipbuilding, but its effect has been to shut down all shipyards in America that make only commercial oceangoing vessels.

The Jones Act's proponents are fervent supporters of "Buy American," but the law unintentionally favors foreign sellers over domestic ones. Shipping rates on Jones Act routes are typically several times more expensive than rates in the competitive international market, especially with regard to cost per nautical mile traveled for a standard container. For instance, the same shipping companies that charge nearly $3,000 to ship a container from Jacksonville, Florida, to Puerto Rico charge half as much to ship that same container to nearby Dominican Republic.

The law has also failed its national security mission. The Defense Department prefers foreign transport ships because of their much lower cost, and the vast majority of the vessels chartered for sealift during the Gulf and Iraq Wars were foreign. Even if U.S. commercial ships were affordable and available for military use, their military utility is fading fast: 21st-century warfare requires transport ships that are fast and flexible, whereas the global maritime industry is heading in the other direction, with transport ships that are increasingly slower, bigger, and less maneuverable. As for national emergencies, every time one requires sealift, the Jones Act needs to be waived so victims can get the relief they need from ships that are actually available.

The impact of the Jones Act on American energy is difficult to justify in today's world of globally dominant North American oil production and falling prices. East Coast refineries are forced to import oil and gas from foreign countries, while America's own Gulf Coast suppliers drown in an ocean of cheap oil and gas, desperate for markets. If not for the Jones Act, America might be able to cut its imports of crude oil by half.

According to one study, the Jones Act is equivalent to a 64.6 percent tariff on domestic seaborne trade. Alaska, Hawaii, and Puerto Rico can import whatever they want from America's trading partners virtually tariff-free—but if they import anything from the mainland United States, they must pay a significant penalty. In some cases, the penalty is prohibitive: Puerto Rico is forced to get its energy from countries like Venezuela and Trinidad and Tobago instead of from the United States.

For 100 years, the Jones Act has poisoned America's maritime industry while imposing hidden costs on U.S. consumers. Its chief beneficiaries are foreign shippers, which the law in effect protects from American competition. Its only American beneficiaries are a small number of decrepit shipyards and shipping companies that depend entirely on the slow poison of its cartel restrictions, and the government officials who find short-term political benefit in subordinating the public interest to those special interests.

Expert: Mario Loyola

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AVOID, OR AT LEAST MINIMIZE, TRADE-UNRELATED PROVISIONS IN TRADE AGREEMENTS

Congress is unlikely to revisit the United States–Mexico–Canada Agreement, which replaced the 1994 North American Free Trade Agreement in 2020. Its passage was a major struggle, and yielded few significant policy changes for all the effort. But the USMCA will still be a live issue in the current Congress, if indirectly. Its inclusion of significant trade-unrelated provisions set a major precedent that will influence upcoming trade agreements.

Environmental, labor, intellectual property, and regulatory policies have no place in trade agreements. They are separate issues that should be treated separately.

Congress should:

- Learn from the mistakes of the United States–Mexico–Canada Agreement negotiations and, to the extent possible, keep trade-unrelated provisions out of future trade agreements.
- Where possible, and within the bounds of its authority, liberalize and loosen trade barriers and managed-trade policies.
- Work to remove from existing trade agreements—and negotiate them separately if it wishes—provisions addressing:
  - Environmental policy.
  - Labor policy.
  - Intellectual property protection.
  - Harmonized regulation.

The United States has one of the world's most expensive regulatory compliance regimes. Many countries would be happy to follow their own, less expensive domestic policies instead. All sides would benefit from removing trade-unrelated provisions from trade agreements, and treating separate issues separately.

The USMCA's long-term impact was unhealthy from the start, and the Competitive Enterprise Institute opposed it for that reason. The USMCA's predecessor, the North American Free Trade Agreement, was the first major trade deal to include significant trade-unrelated provisions in a side agreement. Those covered nontrade issues, such as labor, environmental, and regulatory policy. The USMCA built on that precedent by including those and other trade-unrelated provisions in the main agreement affecting industries from automobiles to agriculture. And it did so with the greater goal of

managing trade, rather than freeing it. For example, the USMCA's rules for Mexican minimum wage regulations were explicitly designed to favor U.S. labor unions and auto parts manufacturers by artificially raising wages in Mexico, which makes manufacturing there costlier and less competitive internationally.

Although those and other policy changes in the USMCA are small, the precedent they set is large. The United States is set to negotiate major trade agreements with the United Kingdom, the European Union, and China, among others. Politicians, rent-seekers, and ideological activists now see the inclusion of trade-unrelated provisions in new trade deals as standard operating procedure. Since many of those provisions are potentially very lucrative for certain industries, each one represents an opportunity for rent-seeking—trying to use government policy to gain over competitors an advantage that would not exist in a free market. They also represent potential stumbling blocks that could scuttle negotiations to reduce trade barriers, from lowering tariffs to adopting mutual recognition of trading partners' regulatory standards.

Experts: Iain Murray, Ryan Young, Mario Loyola

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PROMOTE LIBERALIZATION IN CHINA THROUGH CONSTRUCTIVE DIRECT AND MULTILATERAL ENGAGEMENT

China presents a multifaceted policy problem for U.S. policy makers. The Chinese government has long imposed press censorship and violated its population's civil and political rights. At this writing, it may be conducting a genocidal campaign of repression against its Uighur population. It still maintains a Soviet-style gulag system, called the laogai. It is also often a bad-faith actor on economic issues. Products of forced labor, possibly including human hair for wigs, sometimes make their way to the market. Beijing insists on state ownership, or at least state control, of many enterprises. Expropriation is still a risk for foreign investors. Intellectual property theft is common enough to be a condition of doing business in the country for some enterprises.

The Trump administration chose to deal with all of those diverse issues with just one policy tool: tariffs. The time has come for a more realistic approach to China policy.

Congress should:

- Rejoin the Trans-Pacific Partnership.
- Encourage the executive branch to use the World Trade Organization's dispute resolution process to improve Beijing's behavior in a visible way.
- Repeal all tariffs against China, along with Section 301 of the Trade Act of 1974, which made it possible for the president to impose them unilaterally.
- Work with the executive branch and foreign allies in applying consistent multilateral diplomatic pressure on China to reform its human rights abuses and its illiberal economic policies.

The tariff strategy clearly failed. China retaliated through several rounds of back-and-forth tariffs on hundreds of billions of dollars of goods. And for all that, China changed none of its repressive policies.

The Phase One trade agreement was also a failure. Although it prevented further tariff increases, it did not decrease them to previous levels. Tariffs in both countries remained higher than they were just three years earlier. Phase One also tightened government management on both sides of U.S.-China trade. For instance, the Chinese government agreed to buy specified amounts of U.S. crops as negotiated by the U.S. government. In market economies, buyers and sellers make those decisions.

Moreover, the U.S. government's demands were apparently made with President Trump's reelection prospects in mind, increasing China's negotiating leverage. The COVID-19 pandemic rendered China unable to honor its side of the agreement, meaning Phase One provided an additional, and avoidable, source of tension in U.S.-China relations. Those fatal problems will likely require a lasting U.S.-China trade agreement to be renegotiated from scratch.

The time has come for a more mature China policy. Multiple rounds of tariffs have failed to convince China to enact needed reforms. We know the strategy does not work. Instead, the U.S government should pursue a combination of trade liberalization, cultural and intellectual exchange, and consistent multilateral diplomatic pressure.

Experts: Iain Murray, Ryan Young

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PASS A UNITED STATES–UNITED KINGDOM TRADE AGREEMENT

Since the United Kingdom left the European Union early in 2020, negotiations have been ongoing between the United States and the United Kingdom to conclude a free trade agreement that reflects the closeness of their legal systems and shared cultural understandings of the value of commerce. Such an agreement should ideally reduce tariffs to virtual nonexistence in both goods and services.

Ideally, the negotiations present an opportunity to develop a new form of trade agreement based on mutual recognition of regulatory systems. By acknowledging that each party's regulatory system has broadly similar goals and effects, such an agreement could sweep away regulatory nontariff barriers between the countries. That would spur regulatory competition, as problems with one party's system that stood in the way of trade would be laid bare.

Congress should:

- Urge the incoming administration to conclude a U.S.-U.K. agreement without delay.
- Pass any such agreement quickly.
- Restrict its consideration of the agreement to trade-related matters.

Further enhancements could be made by enacting provisions that promote regulatory coherence—review of new regulations for their trade effects, mutually agreed standards for cost–benefit analysis, and other similar mechanisms. They would have the effect of reforming regulatory practices that have resisted reform efforts. Sector-specific agreements in areas like financial services could help spur competitive solutions to problems that have so far been tackled mainly by government regulation, such as the problem of "too big to fail" financial institutions.

An agreement on regulatory coherence would represent a form of mutual recognition of regulations that avoids the vast costs of regulatory harmonization. Allowing for different regulations in such matters as length of electrical cords, for instance, should be acceptable to both parties if they are assured that the differing regulations were made with the same standards of scrutiny.

Finally, such an agreement could be drawn up to allow accession by other parties. It is likely that the agreement would be attractive to other common-law nations like Australia, Canada, and New Zealand, as well as to other parties to the Trans-Pacific Partnership, such as Chile, Malaysia, and Singapore. That could form the basis of a new trading alliance founded on shared principles of economic freedom.

If the negotiations are not concluded by the time the president's Trade Promotion Authority expires in July 2021, Congress should include instructions to that end in any reauthorization of Trade Promotion Authority.

Finally, Congress should restrict its consideration of any U.S.-U.K. trade agreement to its trade implications. Issues such as the nature of the border between the United Kingdom and the Republic of Ireland have no bearing on U.S.-U.K. trade and should not be used as a pretext to undermine or alter the deal or as leverage in the negotiations or broader U.S.-U.K. relations.

Expert: Iain Murray

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PASS A UNITED STATES–EUROPEAN UNION TRADE AGREEMENT

Since President Trump halted negotiations over the Trans-Atlantic Trade and Investment Partnership, trade negotiations between the United States and the European Union have proceeded in a piecemeal fashion. Small victories, such as the agreement to reduce tariffs on lobsters, were more than offset by large-scale disagreements, such as the dispute over digital services taxes, which France is threatening to impose on U.S.-based tech companies that do business in France.

Congress should:

- Use the reauthorization of Trade Promotion Authority in 2021 to instruct the Biden administration to negotiate a comprehensive trade deal with the European Union aimed at reducing all tariffs between the two entities to zero. The instructions should direct the administration to:
  - Restrict the negotiations to trade matters, leaving such issues as environmental and labor policy to separate agreements.
  - Negotiate based on the goal of mutual regulatory recognition rather than harmonization of regulation, which is both expensive and bureaucratic.
  - Pursue genuine free trade rather than sectoral agreements that amount to managed trade.
  - Reengage with the World Trade Organization to challenge the European Union's dominance of that body.

Done properly, a U.S.-EU trade agreement will be the most important bilateral trade deal ever negotiated, creating the world's largest free trade area. It has the potential to reinvigorate free trade around the world and to reverse the setbacks of recent years.

Expert: Iain Murray

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9 Transportation

Mobility is one of our most important needs, one we often take for granted until it is threatened or lost. The COVID-19 pandemic presents such a threat. The potential of exposure to the coronavirus on public transit contributed to government and employer mandates to work from home, especially in big cities, where transit was the main mode of commuting. In March 2020, transit ridership crashed nationwide.

As lockdowns lifted, transit ridership was slow to rebound because scientific evidence indicated a need to avoid crowded spaces. Many employers have maintained work-from-home policies as a result. For instance, the Washington, D.C. Metro transit system carried 626,000 passengers per day before the pandemic. By the beginning of September 2020, it carried a mere 77,000 passengers.

If this situation continues, transit agencies will likely face a funding crisis. If municipal, state, and federal governments respond with bailouts, agencies may stave off disaster, but important questions remain as to whether the money will be spent wisely.

Even as life begins to return to "normal" thanks to the COVID vaccines and effective treatments, commuting patterns nevertheless have changed forever as a result of so many employers changing their working conditions to allow employees to work from home.

Intracity travel may change as well. Employees who are in the office may go to fewer meetings outside the workplace, and may still be wary of mass transit. In that respect,

cities may want to encourage innovative solutions, such as bike or scooter sharing. Federal law should not get in the way of such solutions.

Ridesharing is more difficult, given the presence of a stranger in the car, but is still preferable to transit. That means that regulations that make ridesharing more expensive, however well-intended, are a bad idea in such circumstances. For instance, California's AB5 law, which classifies rideshare drivers—who work as independent contractors—as employees, has resulted in freelancers across a wide array of occupations being unable to work from home.

That statute suggests that the mass transit model adopted by many American cities may no longer be sustainable. Therefore, policies that encourage the adoption of mass transit by other cities, often for environmental reasons, are inappropriate for this changed environment.

The ramifications for highway transportation remain to be seen. If and when they resume commuting, Americans will feel safer commuting to work in their cars rather than using mass transit. Such a modal shift could lead to much greater congestion, and its attendant problems, if sufficient people were to return to the office that way. There are signs that may already be happening. Therefore, policies aimed at alleviating congestion by encouraging a shift to transit may prove ineffective.

For the preceding reasons, municipal, state, and federal authorities need to consider other options. A telework tax, for example, will likely prove disastrous, driving employers out of a city for good while creating a moral hazard by encouraging employers to avoid paying it by requiring in-office attendance.

That suggests that federal transportation policy—at least in so far as it relates to commuting and transit use—requires a thorough and comprehensive review.

Congress should:

- Hold hearings and appoint a commission tasked with reviewing and recommending changes to the body of federal transportation law that aims to promote mass transit use and discourage car use. Such a commission could be modeled after the proposal in Chapter 1 of this volume for a regulatory reduction commission, with the same incentives for depoliticization of the issue.

Such a review should pay special attention to the value of automobility. Automobility—the use of a personal vehicle—not only protects against the spread of viruses but comes with certain intrinsic benefits that have received little value in recent federal transportation policy. They include personal choice, a value of liberty that is often overlooked in these debates; and privacy, which is of great concern in many other issue areas but gets short shrift in the debate over transportation policy.

Even in more normal times, transportation networks vary greatly in quality, financing, and management. For instance, roads are generally paid for out of user-tax or property-tax revenues, whereas freight rail is privately financed and operated.

One important lesson is that the private sector is generally better than government in financing and operating high-quality transportation systems at lower costs. New technologies and management practices present serious challenges going forward, particularly for those networks that exist largely as government monopolies.

Even if privatization of existing networks were to prove politically unattainable, the starting point for sound transportation policy should be adherence to the users-pay-users-benefit principle. Transportation infrastructure and operations should be paid for by the users who directly benefit from them. Despite some spillover effects, the vast majority of benefits accrue to the network users. Compared with general revenue funding of government-owned infrastructure and services, users-pay offers the following advantages:

- **Transparency.** Unlike tax dollars that wind through convoluted bureaucracies, charges "follow" users.
- **Fairness.** Users pay and benefit directly from improvements generated from their payments; users who use the systems more pay more.
- **Signaling investment.** Operating revenues generally track use, and popular systems can be identified for targeted improvements.

Unfortunately, many federal transportation programs do not adhere to the users-pay principle. In those cases, the programs should be reformed to meet the users-pay principle through methods such as tolling. If that proves to not be possible, it suggests the program has high costs and low value, and should be eliminated.

The history of economic regulation of transportation systems in the United States shows that competitive markets benefit consumers more than top-down planning and control. In the late 1970s and early 1980s, airlines, motor carriers, and freight rail were partially deregulated, leading to lower prices and improved service.

Today, rules aimed at promoting safety dominate many discussions of transportation regulation. However, although safety regulation is well intended, many of the resulting measures provide few, if any, benefits at very high costs. For example, laws relating to auto headlamps mean that oncoming drivers are often blinded, decreasing road safety. Automakers have access to technology that is safely used in other countries to reduce that problem, but are forbidden from doing so in the United States. In a number of cases, safety regulation has become a way to impose backdoor economic regulation.

On aviation policy, Congress should continue to examine air traffic control and airport funding and financing reform proposals that were debated in previous sessions, especially (a) shifting to an air traffic control governance model based on Canada's successful corporatization and (b) lifting the federal cap on the local airport user fee, known as the passenger facility charge. The latter would have the added benefit of making airports more attractive privatization prospects, which would enable municipalities to use proceeds to fill funding gaps caused by the pandemic.

Expert: Iain Murray

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