FREE *to* PROSPER

A Pro-Growth Agenda for the 118th Congress

COMPETITIVE ENTERPRISE INSTITUTE

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Free to Prosper

A Pro-Growth Agenda for the 118th Congress

Edited by Ivan Osorio

Competitive Enterprise Institute

Competitive Enterprise Institute
1310 L Street NW, 7th Floor
Washington, DC 20005
Phone: 202-331-1010
Fax: 202-331-0640
cei.org

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Introduction

by Kent Lassman
President, Competitive Enterprise Institute

If you have the privilege to work on Capitol Hill, you know you're there for a reason. You came to Washington to do good for the people back home—to achieve major reforms that can help Americans prosper and improve their lives. It might seem thankless. Nevertheless, pollsters at Gallup find that, among all the negative feelings about Washington and major institutions, people still believe that Congress can accomplish its basic functions.

Yes, it's difficult work, but it's worth doing. So where to start?

We know that more reform ideas are presented to each new Congress than could possibly be absorbed, much less implemented. Eventually, many of the good ideas settle out of sight, at the bottom of the agenda, and if they are even in the conversation they are no longer seriously considered. Others continue to swirl around the halls of Congress in various forms. But only the reform ideas that can be recast to address urgent concerns have a real chance of making it through the process.

Meanwhile, regulatory agencies are busy doing their own kind of lawmaking. In the first session of the 117th Congress, there were 23 final rules from regulatory agencies for every law passed by Congress. As we regulate more and legislate less, governing power shifts toward executive branch agencies led by unelected officials. More regulatory costs are automatically piled on without corresponding benefits.

Today, too much of America is governed through back-door rules, as agencies issue thousands of rules every year, along with uncounted circulars, memoranda, and guidance of all kinds. Too many agencies have overextended their authority and claimed quasi-legislative powers.

Self-government rooted in a rule of law—our democratic experiment—requires Congress to pass laws of general applicability. For this reason, regulators' lack of political accountability—along with challenges to rules being limited to those who can hire armies of lawyers and lobbyists—should trouble lawmakers conscientious about good government.

This is not just an esoteric problem confined to the halls of Congress or law school seminars; it is a national problem that carries major consequences and imposes enormous costs on everyone.

Consider how the permitting morass that now governs every new infrastructure project encourages serial litigation and endless reviews that stop new gas pipelines and new wind farms alike. Meanwhile the un- and under-banked find it ever more difficult to access the financial system thanks to burdensome regulations enacted supposedly for their own good. The story repeats itself with technology services, telecommunications, transportation, labor, and environmental protection.

Given all this, is it possible to build voters' confidence in Congress? I say yes. In an era when expectations are low, big gains are achievable by taking small steps.

As I noted above, at the Competitive Enterprise Institute, we know that people come to Washington to get things done, to leave a mark, to contribute to the governance of the most enduring experiment in self-government the world has known. We can help. We're ready to help.

The notion that America is a place for dynamism is nearly universally held. As such, the American experiment is an evolving one—forever changing in pursuit of a more perfect union. From the vantage point of Capitol Hill, that requires legislation with the aim of unleashing the creative and entrepreneurial spirit of the American people. It requires ideas—and a buzzing, thriving community of lawmakers and their staffers who hail from every nook and cranny of this great and varied nation, willing to engage with ideas.

While lawmakers have remained focused on the details of legislation, federal officials now reach into an ever-expanding number of areas of everyday life. Regulation, with costs approaching $15,000 per household—as it hinders job creation, new business starts, and the availability of capital—is a target-rich environment for reform.

At a time when consensus on anything seems elusive, ideas that bring us together toward the common purposes of a freer, healthier, and more prosperous nation are crucial.

With that in mind, I am happy to share the 2022 edition of *Free to Prosper: A Pro-Growth Agenda for the 118th Congress.* It is a recipe book for practical, ready-made ideas to get your colleagues talking, and more importantly, generate their own momentum by attracting support—even from colleagues who don't typically engage with your office, your delegation, or your party.

Just as politics is the art of the possible, this is a guidebook for reforms that are doable. It does not include every proposal under the sun. It's not ideological or partisan. It does not promise utopian results or purport to solve all problems. Rather, it is designed for the serious legislator.

There are, however, some big ideas like regulatory budgets and ways to steer Congress toward better information to improve future decisions. We know—especially in the wake of COVID—that crisis-driven legislation happens and produces massive negative unintended consequences. There are practical steps available today to mitigate the next crisis that pay dividends to all Americans, regardless of their political preferences.

We also present more narrowly tailored ideas such as how to improve regulation for a wide array of areas crucial to America's long-term prosperity, including technology, finance, trade, monetary policy, transportation, energy, competition, online speech, and private property protections.

Many of the ideas are novel, originating or significantly developed by CEI experts. Most have a bipartisan pedigree. Most importantly, all could reasonably be moved through regular order and attract support if presented in both chambers. Finally, each would begin to pay dividends immediately.

These are practical, achievable, and timely recommendations that don't require supermajority support. They do demand legislative champions. We hope you can join us in this effort.

With this Agenda, you can move toward three important national goals.

First, rebuild the American people's confidence that Congress is trustworthy and can do its job.

Second, safeguard your Constitutional prerogatives as the first branch of government, while improving the delivery of government services, by setting meaningful boundaries for the regulatory state.

Finally, with this agenda you can begin the process of reforming the regulatory state that is largely out of reach from basic accountability. Some regulation is necessary and you don't have to reform it all at once, but beginning on a path of regulatory reform today can lead to substantial dividends in government accountability, economic freedom, and prosperity well into the future.

After more than 90 years of growing and mutating, it is time to overhaul the regulatory state and make room for dynamism. That reform, beginning now, will leave an America Free to Prosper for our posterity.

Inflation

1

In 2022, inflation reached its highest levels in 40 years and became a hot-button economic issue. Confusion surrounding the causes of inflation has resulted in confusing responses from both parties. Inflation is exclusively a monetary phenomenon. When the money supply grows faster than real economic output, inflation results. The larger the gap, the faster the inflation rate. If it's not monetary, it's not inflation. Price increases due to supply shocks, foreign wars, or other factors are not inflation. That doesn't mean those issues don't deserve policy makers' attention. It just means they are not inflation and should not be confused as such.

In the United States, the Federal Reserve controls monetary policy, which means the bulk of responsibility for inflation is on the Fed.

That is inconvenient for Republicans, who want to blame President Biden for inflation. It is equally inconvenient for Democrats, many of whom want to blame corporate greed for inflation. Both should instead look toward the Fed. There are things Congress can do to address inflation in addition to setting up the Fed for success.

Less Spending

In the short to medium term, Congress can help fight inflation by spending less. Deficit spending increases the amount of money circulating in the economy, but often without increasing economic output. New spending projects don't create new output, but redirect it from other uses. Politically directed activity tends to create less value

Congress should:

- Spend less and work to lower the budget deficit.
- Ensure the Fed's independence.
- Oppose efforts to expand the Fed's dual mandate to include non-economic issues such as climate and social justice.

than entrepreneurial activity, so many government spending projects actually decrease economic output compared to the government doing nothing. The result is a double whammy for inflation—more money chasing less output.

That said, fiscal policy has a much smaller effect on inflation than monetary policy, so it is important not to overstate the inflationary effects of deficit spending, which are modest. Congress' multiple trillion-dollar COVID-19 spending bills together will likely add roughly a percentage point to inflation for the next several years. As of this writing, inflation is 8.2 percent.

Still, adding a percentage point to inflation makes the Fed's job harder than it needs to be. When inflation is at a 40-year high and people are feeling the pain, Congress should at least do no harm.

Rule-Based Monetary Policy

In the long run, Congress should help the Fed commit to a rule-based monetary policy. During the Great Moderation that lasted from the early 1990s to 2007, inflation remained low and stable—usually approximately 2 percent. A major reason was that the Fed informally committed itself to a predetermined policy rule: If inflation reaches a certain level, the Fed automatically adjusts the money supply by a matching amount determined by the rule.

When Fed policy makers take a more discretionary approach, the result is often higher and more volatile inflation, with all the economic harm that implies. That was the case during most of the 1960s and 1970s, when inflation was all over the map and peaked at nearly 15 percent.

During most of the Great Moderation, the Fed followed a "Taylor rule," which focuses on interest rates. There are other possible rules the Fed could adopt that would also work well. The Fed could directly target the money supply or focus on nominal gross

domestic product (NGDP). The rule that is chosen is less important than choosing a rule in the first place and committing to it.

Credibly committing to a rule has two major benefits.

One is predictability, which is good for long-term planning and investment. When there is a recession or crisis, policy makers are tempted to use emergency measures and other forms of discretion. That often makes things worse in the short term.

In the long term, it can discourage investment because people become reluctant to make lengthy commitments if they don't know what the monetary environment will look like the next time a recession hits. Expectations can influence inflation rates. Companies will set prices based on where they think inflation is headed. If they expect inflation to be high, they will increase their prices early and often. A credible Fed policy rule would keep inflation expectations low and stable—and accordingly influence the way companies adjust their prices.

Another benefit of rules is that they help to safeguard the Fed against political interference. President Lyndon Johnson physically intimidated then-Fed Chairman William McChesney Martin at his Texas ranch to convince him to boost inflation to stimulate the economy leading up to the 1968 election. President Richard Nixon made threats against then-Chairman Arthur Burns for similar reasons during his tenure. More recently, Presidents Trump and Biden have also made unsubtle hints about what they would like the Fed to do.

Those tactics worked because the Fed had the discretion to enact those policies. If the Fed was bound by a monetary rule, Fed chairs can simply tell politicians that they do not have the authority to do what they are being asked.

A monetary rule is one way to preserve the Fed's independence while adding predictability that entrepreneurs and investors can plan around. Congress should help the Fed enact such a rule, whether that rule targets interest rates, the money supply, or NGDP.

The Federal Reserve's Mission

Congress should oppose expanding the Fed's mission to include environmental and social policy considerations. The Fed already has a self-contradictory dual mandate:

Keep inflation low and employment high. In the short run, the Fed can boost employment by boosting inflation, or vice versa. It can achieve one of its goals but not both. That tension limits the Fed's effectiveness because it requires Fed policy makers to use discretion as to which plank to prioritize at a given time. More discretion means less predictability, which makes long-term investments and other decisions more difficult throughout the economy, as explained above.

This status quo is bad enough. If Congress were to require the Fed to also factor climate change, economic inequality, and social justice issues into its monetary policy decisions, the results would be even less predictable.

In the long run, an incoherent mission can threaten the Fed's independence. If the Fed is given a quadruple or even quintuple mandate, some parts of it will be impossible to fulfill. That will probably anger some members of Congress, who will propose taking control of some aspect of the Fed's mandate, which politicians have forced it to neglect, until the Fed is no longer independent. As countries from Argentina to Zimbabwe can attest, central bank independence is fundamental to preventing runaway inflation.

Instead, the Fed should have a single mandate of keeping inflation low. There are better ways to pursue other policy objectives, and they will be more effective in pursuing those goals when inflation is stable and low.

Expert: Ryan Young

For Further Reading

Ryan Young, "What Inflation Is and What It Isn't," Open Market, Competitive Enterprise Institute, May 17, 2021, https://cei.org/blog/what-inflation-is-and-what-it-isnt/.

Ryan Young, "Supply Shocks Are Not Inflation," *National Review*, March 15, 2022, https://cei.org/opeds_articles/supply-shocks-are-not-inflation/.

Trade

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Trade policy took a turn for the worse during the Trump administration, and the Biden administration has committed largely to the same course. Tariffs have doubled over the last five years. Non-tariff barriers are also increasing, such as labor, regulatory, environmental, and intellectual property provisions in international trade agreements that keep out various foreign goods. Such trade-unrelated provisions are now standard fare in new trade agreements, including the United States-Mexico-Canada Agreement (USMCA). Notice that the USMCA, which replaced the North American Free Trade Agreement, or NAFTA, has neither "free" nor "trade" in its name.

Although neither party is enthusiastic about liberalizing trade, both parties have at least some free trade advocates. If they work together on trade, while agreeing to disagree on other issues, they can make positive changes. Such cooperation would result in more resilient supply networks and lower prices during a time of high monetary inflation and serve America's foreign policy interests at a time when countering Russia's and China's influence is becoming more important.

Congress should:

- Support tariff relief and work to reassert its tariff authority, which has long been unduly delegated to the executive branch.
- Rebuild and strengthen the World Trade Organization (WTO) and its rules-based trade dispute resolution system.
- Repeal, or at least reform, the Jones Act.

Tariffs

In the short to medium term, Congress should reform trade laws to facilitate tariff relief. Lifting the Trump-Biden tariffs alone would lower consumer prices on hundreds of billions of dollars' worth of goods, including cars, construction materials, groceries, clothing, smartphones, and semiconductors needed for a wide variety of manufactured products.

Congress should pass legislation ending the tariffs. President Biden has the authority to unilaterally repeal most of them. But those actions would treat only the symptom, not the root problem, which is an unbalanced separation of powers.

Taxing authority belongs to Congress, yet the Trump-Biden tariffs were mostly enacted by the White House, without congressional involvement. In the 1960s and 1970s, Congress delegated some of its tariff-making powers to the president to prevent ongoing tariff relief efforts from being watered down by pork barrel spending projects, vote trading, and special-interest giveaways. That strategy has been coopted by protectionists. The time has come for Congress to reclaim its proper taxing authority from the executive branch.

To that end, Congress should repeal Section 232 of the Trade Expansion Act of 1962, which President Trump used to enact steel and aluminum tariffs—against allies—on dubious national security grounds. Congress should also repeal Sections 201 and 301 of the Trade Act of 1974, which Trump used to enact tariffs against China, Europe, and other countries.

Industrial policy is often protectionism under another name, and Congress should resist its temptations. The Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act, which was passed in the last Congress, is intended to make America's semiconductor policy more competitive with China's. It will instead copy China's state-centered economic approach, which has kept Chinese chip producers a decade behind the rest of the world.

Domestic producers did not need the help, despite a chip shortage. Production was increasing and new facilities were under construction well before the CHIPS Act was proposed. The CHIPS Act's precedent will encourage other industries to look to Washington, rather than the marketplace, for profits. Industrial policy can

create trade conflicts with allies as well as rivals and hinder American economic and foreign policy goals.

Industrial policy and corporate welfare make industries soft, dependent, and fragile. Liberalization would force industries to be accountable, competitive, and adaptable to changes.

Rules-Based International Trading System

In the long term, Congress should work to restore the rules-based international trading system, which has been under considerable stress in recent years. The General Agreement on Tariffs and Trade and its successor, the World Trade Organization, slowly but steadily reduced global trade barriers over a 75-year period, lowering prices and helping millions of people rise out of poverty. The United States alone had a roughly 85 percent success rate in cases it brought to the WTO's dispute resolution system.

This system is currently unable to operate due to a lack of judges for its appellate system and might be abandoned in favor of bilateral and regional agreements. The United States is in the early stages of negotiating trade agreements with the United Kingdom, European Union, and other countries. Although these agreements tend to add complexity and bureaucracy due to increasing trade-unrelated provisions, they still tend to liberalize trade on net and are worth pursuing.

If the WTO continues to struggle, the United States could spearhead an effort to create a WTO-like organization, with membership restricted to democracies, and including an analog to the WTO's valuable dispute resolution system. Meanwhile, authoritarian governments such as those in Russia and China would be unable to gum up the works of an organization of which they are not members. Protectionists who temporarily gain power in liberal countries would have their most destructive impulses thwarted due to the difficulty of finding enemies to rail against in an organization almost exclusively composed of allies.

In the meantime, Congress should commit America to rejoining the Trans-Pacific Partnership, which would provide an important economic and diplomatic counterweight to China. President Trump pulled out of the agreement early in his term, and President Biden has made no effort to rejoin it. It is carrying on without

American involvement as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Congress can direct the president to do so as part of a compromise fast-track trade authority delegation that would also direct the president to pursue further trade liberalization agreements.

That delegation should also instruct the president to use his best efforts to restart the stalled Doha round of WTO negotiations, which has the potential to boost trade and global wealth to unprecedented levels.

Jones Act

Congress should repeal the Jones Act of 1920, a Buy American bill for maritime shipping that forbids foreign-flagged vessels from shipping goods between U.S. ports. They may carry goods to and from the United States but not from one U.S. port to another.

Domestic shippers, legally insulated from competition, often charge triple the rates of foreign shippers on comparable routes. The Jones Act's price differential is so out of whack with world markets that oil refineries, especially near the East Coast, often find it cheaper to ship in oil from places such as Russia than from Houston or New Orleans. The diplomatic and national security implications are obvious.

Furthermore, the Jones Act has nearly destroyed the U.S. shipbuilding industry. Only 92 oceangoing vessels remain in the Jones Act fleet, and, as of 2019, the few shipyards that can build commercial oceangoing vessels are being kept afloat only by defense contracts. American shippers are forced to use aging, inefficient ships that would be unacceptable in a competitive market. It is a matter of routine to temporarily waive the Jones Act whenever a natural disaster strikes the United States or a U.S. territory, such as Puerto Rico or Guam. It is well past time to repeal it.

Experts: Ryan Young, Iain Murray, Mario Loyola

For Further Reading

Iain Murray and Ryan Young, "Traders of the Lost Ark: Rediscovering a Moral and Economic Case for Free Trade," *Profiles in Capitalism* No. 4, Competitive Enterprise Institute, August 2018, https://cei.org/studies/traders-of-the-lost-ark/.

Iain Murray and Kent Lassman, "Isolating China through Decoupling Would Be a Mistake," *The Hill*, July 25, 2022, https://thehill.com/opinion/national-security/3569559-isolating-china-through-decoupling-would-be-a-mistake/.
Mario Loyola, "America Last: The Grim Reality of the Jones Act," *Issue Analysis* No. 5, Competitive Enterprise Institute, June 2020, https://cei.org/studies/america-last/.

Banking and Finance

3

Access to safe and reliable financial services is fundamental to Americans' prosperity. However, since the passage of the Sarbanes-Oxley Act in 2002, regulators have used their expanded authority to impose burdensome rules that interfere in Americans' financial decisions and hinder access to financial services for consumers and businesses.

Furthermore, the subsequent increased politicization of financial services as a public policy tool has eroded public confidence in financial institutions and their regulators and led to the growth of alternative forms of financial services and instruments—most notably cryptocurrency—which are now attracting politicians' and regulators' attention.

Instead of giving financial regulators even more authority, Congress should work to depoliticize financial services, reduce political interference in private capital formation, and tell regulators to keep their hands off cryptocurrency. The policies outlined below will help start that process.

SAFE Banking Act

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 such businesses to conduct transactions in cash.

Congress should:

- Allow banks and credit unions to serve legal marijuana businesses by passing the Secure and Fair Enforcement (SAFE) Banking Act (H.R. 1996, S. 910, 117th Congress) to provide safe-harbor protections for financial services firms serving legal marijuana businesses and provide the same protections to ancillary businesses.
- Phase out the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac and do not replace them.
- Until Fannie and Freddie are phased out, end the Third Amendment profit sweep that puts taxpayers at risk and violates shareholders' rights, ensure that Fannie and Freddie maintain adequate capital, and compensate private-sector shareholders for earnings seized under the Third Amendment "sweep" of the GSEs' profits.
- Prevent the Federal Reserve from issuing a central bank digital currency (CBDC) by passing a version of H.R. 6415 from the 117th Congress to prevent the Fed from issuing digital currency to individuals.

This situation raises public safety concerns because 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 forego offering any services to marijuana-related businesses for fear of federal penalties.

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. As a result, 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 legal marijuana businesses. Given the often risk-averse nature of banks, many are hesitant to serve those businesses to avoid possible federal persecution. Legislation such as 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. It passed the House in the 116th and 117th Congress with strong bipartisan support.

Fannie Mae and Freddie Mac

The government-sponsored housing enterprises Fannie Mae and Freddie Mac are arguably the most systemically important financial entities, given their role in fomenting the financial crisis. However, they have been allowed, until recently, 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 GSE for mortgages any more than there should be for other types of credit, such as car loans. This phaseout can be done through the method laid out in the Protecting American Taxpayers and Homeowners (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 also 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's and Freddie's private shareholders and is currently being challenged in several lawsuits as unconstitutional. It 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 it being brought back looms as long as Fannie and Freddie remain in conservatorship because federal officials will always be tempted to use the GSEs as an ATM for new spending.

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 required any profits made by the GSEs to be used for rebuilding capital levels to help prevent future taxpayer bailouts.

In November 2020, the FHFA director finalized a regulatory capital framework to (a) require Fannie and Freddie to have specified levels of capital and (b) 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 GSEs' shareholders have never been compensated, although the Supreme Court left a narrow pathway open for them to recover damages in the 2021 case *Collins v. Mnuchin*. As a result, shareholder litigation is ongoing. As long as this arbitrary confiscation is allowed to stand or be brought back, a large amount of private capital will be scared off from the mortgage market, leaving government-backed mortgages as the only alternative for prospective home buyers.

Central Bank Digital Currency

In an effort to coopt the cryptocurrency revolution, governments across the world are implementing or contemplating a CBDC. President Biden's March 2022 Executive Order, "Ensuring Responsible Development of Digital Assets," calls for the "highest urgency on research and development efforts into the potential design and deployment options of a United States CBDC." Yet it pays scant attention to numerous downsides of government-run cryptocurrency, such as massive risks to privacy and financial stability.

If the Federal Reserve, rather than the private sector, were to issue its own cryptocurrency, the U.S. government would have direct access to the digital ledger that records financial transactions for individuals using that currency. Know Your Customer rules governing banking will empower the federal government to track and identify nearly every CBDC transaction. Even with safeguards, the information on individual purchase and investment decisions that the Fed would store would be vulnerable to hacking and abuse. Recent hacking incidents at the Internal Revenue Service and the Office of Personnel Management and selective illegal leaks of tax returns demonstrate the abuses that could occur if the government were to directly hold more data on millions of consumer financial transactions.

Furthermore, a CBDC could threaten the availability of business and consumer credit by causing a reduction of deposits at private banks as individuals transfer their savings directly to the Fed. Shrinking deposits at private banks would leave them with much less money with which to fund loans. The Fed would become a direct, politically pressured, unfairly advantaged competitor to private banks that could crowd out private-sector innovation in development of new cryptocurrencies and the emerging financial technology known as FinTech.

CBDCs are a solution in search of a problem because private-sector cryptocurrency products such as stablecoins are already advancing financial inclusion. For this reason, Congress should not introduce unneeded risk with direct government involvement.

Experts: John Berlau, Iain Murray

For Further Reading

John Berlau and Joshua Rutzick, "The 20-Year Experiment Holding America Back," *Wall Street Journal*, July 20, 2022, https://www.wsj.com/articles/the-20-year-experiment-holding-the-u-s-back-sarbanes-oxley-corporate-reform-bush-entrepreneurs-investors-fraud-business-11659044813.

John Berlau, "Yes, Cannabis Banking Liberalization—SAFE Banking Act—Would Indeed Make U.S. More Competitive," *Forbes*, March 18, 2011, https://www.forbes.com/sites/johnberlau/2022/03/18/yes-cannabis-banking-liberalization---safe-banking-act---would-indeed-make-us-more-competitive/?sh=40b0605449c4.

John Berlau, "The Fed's Dismal Digital-Dollar Idea," *Wall Street Journal*, October 8, 2021, https://www.wsj.com/articles/federal-reserve-digital-dollar-currency-crypto-stablecoin-fed-11633645978?page=1.

4

Transportation

Mobility for both people and goods is one of a modern economy's most important needs. The COVID-19 pandemic changed our transportation patterns considerably and put significant stress on existing transportation networks. Passenger transit usage crashed, putting those systems under financial strain. Commuting patterns changed, raising questions about whether there would ever be a return to "normal." Consumer demand increased, leading to unprecedented pressure on supply chains in peacetime—since compounded by war in Europe.

Congress should:

- Remove barriers to easier transportation of goods by raising the weight limit for interstate trucking to at least 91,000 lb., starting with an opt-in multistate pilot program.
- Help ensure that the long-term upkeep of highways is proportionate with their use by shifting all transportation revenue and expenditure programs toward funding mechanisms, such as mileage-based user fees, that reflect the user-pays–user-benefits principle.
- Oppose reflexive bailouts or handouts to transit agencies.
- Reexamine assumptions regarding passenger transport that may need to be changed.

Interstate Trucking

Current federal limits for interstate truck gross vehicle weight (GVW) are set at 80,000 lb. with a maximum of five axles. However, all 50 states allow higher GVW trucks to transport goods within their borders, mostly via state or local roads. The lower interstate limit increases:

- The number of trucks needed to carry goods
- Demand for drivers in a tight labor market
- Emissions
- Traffic congestion

All of these factors lower the trucking industry's competitiveness against freight rail. Many current trucks are capable of hauling higher weights but instead run only partly full for part of the routes, a fact that underscores the inefficiency of the current weight limits.

To alleviate this, Congress should authorize an opt-in pilot program for states to test the effects of increasing the federal GVW to at least 91,000 lb. on six axles. The pilot program would enable the federal government and the states to assess the safety implications of higher GVW, although a 10-year pilot program in Idaho found no evidence of decreased safety. Moreover, several European countries allow 44-metric ton (97,000 lb.) trucks with no appreciable safety concerns. In fact, the European Union, which is well known for a precautionary approach, is considering increasing its current 40-metric ton weight limit to 44 metric tons across the continent.

The pilot program would immediately reduce strain on the supply chain, lessen the need for more truck drivers, and reduce congestion. According to the Rocky Mountain Institute, which places a considerable premium on emissions reduction, it will also significantly reduce carbon emissions. As such, it represents a "no regrets" emissions policy—one that reduces emissions but is worth doing even if emissions do not present a threat.

As for infrastructure concerns, studies have found that the addition of a sixth axle reduces wear and tear on road surfaces by 37 percent. The current federal bridge standard is already compliant with a 91,000 lb. weight limit.

The opt-in pilot program should accommodate as many states that show willingness to participate in order to maximize the collection of useful data.

Highway Funding

The starting point for sound transportation policy should be adherence to the user-pays–user-benefits 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 transportation network's users.

Compared with general revenue funding of government-owned infrastructure and services, user-pays 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 of 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 user-pays principle. In those cases, the programs should be reformed to meet the user-pays principle through methods such as tolling. If that proves not to be possible, it suggests that the program has high costs and low value and should be eliminated.

This principle is particularly important as Congress considers what to do about the federal gas tax and the Federal Highway Trust Fund for which it provides revenue. As more and more drivers turn to electric vehicles, the gas tax will be paid disproportionately by owners of older vehicles who are likely to be less affluent. In order to ensure that the Trust Fund has a consistent source of revenue and to ensure fairness for all road users, a replacement will need to be found.

Mileage-based user fees (MBUFs) are in many ways a direct replacement for the gas tax, reflecting the same user-pays–user-benefits principles. Congress should expand existing pilot programs to better assess the feasibility of this mechanism and to address drivers' privacy concerns. Congress should be wary of attempts to impose

MBUFs *in addition to* the gas tax. The fees are unlikely to be seen as acceptable if they simply increase the cost of travel.

Transit

During the COVID-19 pandemic, transit ridership fell across the board. It is still unclear whether transit will ever regain its pre-pandemic ridership levels. That will likely lead to calls for bailouts from financially struggling transit agencies. Congress should oppose reflexively granting those requests. The pandemic appears to have permanently changed patterns in travel for work. According to the 2017 National Household Travel Survey, transit accounted for a tiny percentage of personal travel trips even before the pandemic. The latest survey of transportation trends, the 2021 Commuting in America Survey from the American Association of State Highway and Transportation Officials, suggests that the proportion of workers with flexible work arrangements has now increased to 42 percent. This includes the pre-pandemic proportion of workers with the ability to telecommute (14 percent) and workers who normally work from home (12 percent.) Both of these populations have grown considerably, with a substantial number of those increases likely to be permanent. This suggests that the already weak case for public funding of transit has likely worsened considerably.

Nor is there likely to be any case for investment to attract the remaining workers onto transit. As mobility policy expert Steven Polzin of the University of South Florida has shown, the "field of dreams" case for transit—"If you build it, they will come"—has repeatedly failed to materialize. Transit supply has increased much more steadily and consistently than transit demand since the 1980s. In other words, there is already enough transit available to meet even a strong resurgence in demand. If anything, Washington and state and local governments could trim transit agencies' budgets to meet actual demand rather than spend more taxpayer money on new projects that are unlikely to see much use.

That is not to say that all transit is wasteful. Certain areas require a functioning mass transit system. For instance, 40 percent of all transit trips nationwide take place in the New York City metropolitan area. However, Congress should require any request for extra funds for transit to be backed by a rigorous and audited cost-benefit analysis, backed up by critical hearings at which agency heads' claims can be properly scrutinized.

Expert: Iain Murray

For Further Reading

Iain Murray, "All Levels of Government Need a Top-to-Bottom Review of Transportation Policy," *Open Market,* Competitive Enterprise Institute, September 2, 2020, https://cei.org/blog/all-levels-of-government-need-a-top-to-bottom-review-of-transportation-policy/.

Steven Polzin, "Public Transportation Ridership: Three Steps Forward, Two Steps Back?" Planetizen, April 12, 2016, https://www.planetizen.com/node/85595/public-transportation-ridership-three-steps-forward-two-steps-back.

5

Civil Asset Forfeiture

Civil asset forfeiture is a controversial tool used by federal, state, and local law enforcement agencies to seize cash, vehicles, houses, or other property that is believed to be connected to a crime. Law enforcement agencies can seize property even when the property's owner has no knowledge of, or has not been charged with, any crime. Under state and federal forfeiture laws, law enforcement agencies can then sell seized assets—or, in the case of cash, directly absorb the money—and use the proceeds to fund and expand agency budgets.

The civil forfeiture regime is in dire need of reform. Because civil forfeitures are not criminal actions, owners of seized assets are not afforded fundamental protections, including the right to legal representation, which makes it more likely that the owners will be permanently deprived of their property without ever having their day in court.

Congress should:

- Pass the Fifth Amendment Integrity Restoration (FAIR) Act (H.R. 2857, 117th Congress) to reform the forfeiture system to make it more equitable.
- Work to curtail civil asset forfeiture at the federal level, ideally by ending the federal two-track process by which civil forfeitures procedures place a lower burden of proof on the government before it is allowed to seize property.

Civil forfeiture proceedings create significant disadvantages for owners who attempt to challenge the seizure and recover their property. Unlike criminal defendants, they must pay for their own litigation expenses, including attorneys' fees. In court, property owners lack the protections that criminal defendants customarily have. In criminal proceedings, guilt is determined by the demanding constitutional standard of "beyond a reasonable doubt." In civil forfeiture proceedings, the government merely needs to show that the property is connected to a crime by a "preponderance of evidence"—that is, the majority of the weight of the evidence. In some states, law enforcement officials need only to satisfy an even lower standard—probable cause—in order for government agencies to keep the property.

Although some jurisdictions have passed reforms that protect property owners from the overuse or misuse of civil forfeiture, federal equitable sharing programs allow state and local law enforcement to circumvent state-level reforms that limit their ability to seize assets from people who have not been charged with crimes. The institution of civil forfeiture encourages law enforcement officials to pursue revenue that can increase their own office budgets, thus diverting them from efforts to advance public safety and control crime. Furthermore, civil forfeiture often creates a perverse dynamic in which property owners who are subjected to it may be forced into acquiescing to the seizure of their property without any remedy, essentially because attorneys' fees outweigh the expected value of the property they seek to recover.

In the near term, Congress should pass the Fifth Amendment Integrity Restoration Act. Previous versions of the Act have contained provisions to accomplish the following:

- **End the federal equitable sharing program**. This program allows state law and local enforcement officials to seize property and transfer the title to the government in a manner that resists state-created property protections. Under equitable sharing, state and local police typically can turn over seized property to federal officials in exchange for 80 percent of the proceeds. This both circumvents state-level reforms and creates perverse incentives for law enforcement to seize as much property as possible.
- **Create a more demanding burden of proof for owner liability**. The FAIR Act would require the government to prove its case for civil forfeiture by meeting a higher standard of "clear and convincing" proof rather than the current preponderance of evidence standard. The test of "clear and convincing" proof

requires significantly weightier evidence than the current "preponderance of evidence" test; "clear and convincing" is best understood as a middle ground between "preponderance of evidence" and "proof beyond a reasonable doubt."

- **Restore the principle of innocent until proven guilty**. Under current law, innocent property owners face the prospect of seizure even if they have not been charged with wrongdoing. In the event of seizure, the FAIR Act places a burden on the government to show, by clear and convincing evidence, that a property owner either had knowledge of the property's relation to wrongdoing or was willfully blind to the property's use.
- **Protect the right to counsel**. Under current law, property owners can receive appointed counsel due to indigency only if (a) they request it and (b) their home has been seized. The FAIR Act would ensure that owners have the opportunity to receive representation in all civil forfeiture proceedings.
- **Remove the profit incentive for law enforcement**. Law enforcement should be motivated by public safety, not financial rewards. The FAIR Act would restore the rule in which the proceeds of forfeiture go to the Treasury's General Fund, where Congress could exercise its constitutional authority to assign those proceeds as it sees fit.
- **Enact transparency requirements**. Under the FAIR Act, the Department of Justice (DOJ) would be required to compile and report the percentage of its seizures that were subjected to civil and criminal asset forfeiture.
- **Award multiple damages to successful plaintiffs**. Currently, the prospect of recovery of forfeited property is often not worth the cost of litigation. The FAIR Act's proposal of treble damages in the event of a courtroom victory would discourage weakly supported seizures and encourage victims of forfeiture to pursue their rights.

The current version of the FAIR Act has bipartisan support, with 36 sponsors or cosponsors.

In the long term, Congress should curtail civil asset forfeiture at the federal level more generally, ideally by ending the federal two-track process of separate criminal prosecutions of individuals and civil forfeitures of their property. A streamlined process that encompasses one single court action covering both prosecution and forfeiture would be more equitable to the parties involved.

Expert: Dan Greenberg

For Further Reading

Dan Greenberg, "They're Taking My Stuff: What You Need to Know about Seizure and Forfeiture," *Issue Analysis* No. 1, Competitive Enterprise Institute, September 2021, https://cei.org/studies/theyre-taking-my-stuff/.

Dan Greenberg, "Five Myths of Civil Forfeiture," *Issue Analysis* No. 4, Competitive Enterprise Institute, April 2022, https://cei.org/studies/five-myths-of-civil-forfeiture/.

Environment, Energy, and Climate

6

President Biden campaigned on a promise to "end fossil fuel." Some dismissed it at the time as rhetorical bluster. We now know he was serious. He reentered the Paris Agreement and canceled the Keystone XL pipeline on his first day in office; issued a moratorium on all oil and gas leasing in the Alaska National Arctic Wildlife Refuge; suspended oil and gas leasing on federal lands; pledged to reduce U.S. greenhouse gas emissions—chiefly carbon dioxide (CO_2) from fossil-fuel combustion—by 50 to 52 percent below 2005 levels by 2030; pledged to achieve a net-zero electricity sector by 2035; directed the Securities and Exchange Commission, the Department of the Treasury, and other agencies to channel capital flows toward "climate-aligned investments;" and championed hundreds of billions in new subsidies for wind and solar power.

The results have been disastrous. With government threatening their existence, U.S. fossil-fuel producers are reluctant to invest in major new capital projects, and the expectation that demand will increasingly exceed supply in the future has bid up present energy prices. High-cost energy harms lower-income households, contributes to inflation, and puts a drag on the economy. America's energy sector, the world's leading hydrocarbon producer in recent years, is once again ceding global market share to Russia and the Organization of the Petroleum Exporting Countries, or OPEC.

At the same time, climate provisions in the Inflation Reduction Act are increasing demand for energy transition minerals much faster than new mines can be opened

and processing infrastructure can be built in the United States, largely because of the decades-long permitting delays built into the National Environmental Policy Act. That also contributes to inflation and increases the likelihood of future energy price shocks. Far from being a transition from fossil fuels to renewables, the net-zero agenda looks more like a transition from abundant and affordable energy to scarce high-cost energy.

This section discusses several policy options that can help America's energy sector unleash prosperity, lower consumer energy costs, and restore U.S. leadership in global energy markets. Other shortcomings in environmental policies predate the Biden administration. We offer alternatives and improvements in several areas, including, most importantly, the Endangered Species Act (ESA).

Congress should:

- Schedule a debate and vote on whether President Biden should submit articles of ratification to the Senate to make the Paris Agreement an official treaty of the United States.
- Begin oversight of energy, climate, and environmental spending in the Inflation Reduction Act and conduct investigations and hearings of how the funds appropriated are being spent by the various departments and agencies.
- Rein in federal efficiency standards for consumer appliances.
    - Use the Congressional Review Act to pass resolutions of disapproval of all new Department of Energy (DOE) appliance standards that risk harm to consumers.
    - Implement reforms to the statute, including clarifying that climate change cannot be a consideration in the DOE appliance standards-setting process.
    - Repeal the DOE's regulatory authority over appliances.
- Prohibit agencies' use of social cost of carbon (SCC) estimates as a factor in regulatory decisions and net benefits calculations for agency rules.
- Sunset the Renewable Fuel Standard (RFS).
    - Require the Environmental Protection Agency (EPA) to use the waiver authority under the RFS to free up more corn for food use.
    - Set an end date for the program.
    - End all subsidies and favorable tax treatment for biofuels.
- Reform the Endangered Species Act.
    - Undertake a comprehensive historical review through hearings on the effectiveness of the ESA in preserving endangered wildlife by conserving habitat and the impacts on private landowners of the Act's regulatory powers. It can begin by reviewing the hearings conducted in the 104th Congress by the House Natural Resources Committee.

- Enact legislation to reform the ESA by replacing its heavy-handed regulatory structure with a non-regulatory program of voluntary incentives. The model for this major reform should be the Endangered Species Recovery and Conservation Incentive Act, introduced as H.R. 2364 in the 104th Congress.

- Reject proposals to establish a carbon tax.
- Refuse to fund or authorize the president's unauthorized climate programs.
  - Direct every committee of jurisdiction to use its oversight powers to identify all climate-related programs, initiatives, offices, or task forces not authorized by Congress.
  - Refuse to authorize through legislation any of the identified unauthorized programs.
  - Direct the House and Senate appropriations committees to prohibit all funding of any of the unauthorized programs in the FY 2024 and FY 2025 House and Senate appropriations bills.
- Refuse to ratify the Kigali Amendment.
  - Withdraw from the Montreal Protocol on Substances that Deplete the Ozone Layer now that its original goals have been achieved.
  - Consider revisions to the American Innovation and Manufacturing (AIM) Act to reduce compliance costs for manufacturers of air conditioning and refrigeration equipment.

Environmental Treaty Making

The Paris Agreement has three main political functions:

1. Lock the United States into a path of "deep decarbonization" of the economy.
2. Mobilize pressure on future U.S. leaders to honor "America's" (President Obama's and now President Biden's) climate policy pledges.
3. Improve the prospects for anti-fossil-fuel litigation under the national laws of the United States and other parties to the agreement.

To accomplish this, the agreement features a combination of legally binding reporting requirements and "politically binding" emission-reduction and climate finance "commitments" on the part of signatories.

The Paris Agreement was the capstone of President Obama's climate policy agenda. President Trump withdrew the United States from it. However, he did so with the stroke of a pen—the same method by which Obama joined. That allowed President Biden to unilaterally rejoin the Paris Agreement on Inauguration Day 2021.

President Obama called the Paris Agreement the "most ambitious climate change agreement in history." Indeed, it is. The agreement aims to control the Earth's climate, transform global energy infrastructure, and mobilize trillions of dollars in climate finance for developing countries.

Yet Obama refused to submit the Paris Agreement to the Senate for its advice and consent, as required by the Treaty Clause of the U.S. Constitution. Instead, he purported to join it based on his sole authority as chief executive—as if it were of no greater consequence to the United States than the bilateral executive agreements signed by President George W. Bush to promote environmental education in Ethiopia, Niger, and the Republic of Congo.

The Paris Agreement is a treaty—a pact subject to the Senate's advice and consent—by virtue of its costs and risks to the nation as a whole, dependence on subsequent legislation by Congress, potential to affect state laws, past U.S. practice regarding similar agreements, and other common-sense criteria set forth in the State Department's Circular 175 procedure.

U.S. leadership in producing abundant, affordable, reliable energy strengthens the economy, reduces the cost of living, and enhances U.S. geopolitical security. The Paris Agreement is incompatible with U.S. leadership in fossil fuels because it sets up a global framework for pressuring U.S. policy makers and companies to achieve net-zero emissions by 2050.

The Senate should schedule a debate and vote on whether President Biden should submit articles of ratification to make the Paris Agreement an official treaty of the United States. If fewer than two-thirds of the senators present vote in favor of ratification, Senate leaders should declare that the United States is not a party to the Paris Agreement and never has been.

New Energy, Climate, and Environmental Spending in the Inflation Reduction Act

The inaptly titled Inflation Reduction Act, enacted in August 2022, includes an estimated $369 billion in new spending over the next decade through various handouts to special interests. The actual expenditures in the open-ended tax subsidies for various types of green energy technologies—such as wind, solar, carbon capture

and storage, and electric vehicles—could actually be much higher than the estimates. The potential for fraud, corruption, and waste in many of these programs is high. Rather than investigating after the fact, as with the Solyndra scandal, the 118th Congress should take a proactive approach to oversight.

Areas especially susceptible to fraud, corruption, and waste include the following:

- Approximately $60 billion in mandatory funding for Environmental Justice programs, much of it at the EPA
- An expansion in the Department of Energy's loan authority to commercially unviable energy projects of up to $350 billion
- $35 billion for rural, agriculture, and conservation programs
- Credits and programs to increase residential and commercial building energy efficiency

Efficiency Standards for Consumer Appliances

It is hardly news that the private sector is more efficient than government and that consumers know their own interests better than any central planner. Nevertheless, the federal government has gotten into the business of setting efficiency standards for a variety of energy- and water-using appliances—from dishwashers to water heaters 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 purchase and use.

The 1975 Energy Policy and Conservation Act authorized the Department of Energy to set and periodically tighten energy- and water-efficiency standards for home appliances. By now, many home appliances have been subject to four or more rounds of successively tighter standards. In some cases, these regulations raise the up-front cost of appliances more than is likely to be earned back via energy or water savings.

Worse, some standards have adversely impacted appliance performance, although the law expressly forbids the DOE from putting efficiency above consumer utility. This included a standard for dishwashers that resulted in compliant models taking two or more hours to clean a load of dishes rather than one hour or less in older models.

CEI was at the forefront of pushing back against such regulatory overreach, and we succeeded in convincing the Trump administration DOE to take some deregulatory actions on dishwashers, shower heads, and light bulbs. Unfortunately, the Biden administration has reversed most of these measures while adding costly new ones.

Now the DOE has threatened to include climate change as a rationale for even tighter standards. The agency is also using the regulatory process to discourage natural gas appliances in favor of electric versions.

Social Cost of Carbon

The social cost of carbon is an estimate in dollars of the present value of the cumulative climate-related damages caused by an incremental ton of carbon dioxide emitted in a particular year. It is also an estimate of the climate-related benefits of avoiding or reducing one ton of CO_2 emissions in a given year. Federal agencies increasingly use SCC analysis to promote bureaucratic power grabs, political agendas, and market-rigging regulations in the name of science.

The executive branch's Interagency Working Group (IWG) uses three integrated assessment models (IAMs) to calculate SCC values. IAMs "integrate" a climate model, which projects the physical impacts of CO_2 emissions, with an economic model, which projects the dollar value of climate change effects on global GDP.

SCC guestimates are only as good as the assumptions on which they are based. Many key inputs are speculative or subjective, enabling modelers to get almost any result they desire. Raise SCC estimates high enough, and modelers can make fossil fuels look unaffordable, no matter how cheap, and climate regulations look like a bargain at any price.

Although purportedly evidence based, the IWG process is egregiously biased:

- The IWG runs its three IAMs with below-market discount rates—a practice that massively inflates the estimated SCC.
- The IWG runs the IAMs with climate sensitivities derived from ocean-atmosphere models that repeatedly overshoot observed warming in the bulk tropical atmosphere by more than double.

- The IWG runs the IAMs with baseline emission scenarios that implausibly assume coal consumption rapidly scales up to dominate global energy supply during the 21st century and beyond.
- Two IAMs unscientifically ignore the immense agricultural benefits of atmospheric CO2 fertilization and longer growing seasons.
- One IAM unreasonably assumes human ingenuity will be powerless to limit climate-related damages once 21st-century warming and sea-level rise exceed 1°C and 10 inches, respectively.

Substituting reasonable alternative assumptions about emission baselines, climate sensitivity, CO_2 fertilization, and human adaptive capabilities reduces the SCC to very small numbers. In fact, there are high probabilities of negative SCC values, which means that the agricultural benefits of each incremental ton of CO_2 exceed the climate-related damages.

Whatever value SCC analysis may have as an academic discipline, it is too speculative and prone to user manipulation to inform policy decisions or net benefits calculations for agency rules. Therefore, Congress should pass legislation stipulating that SCC estimates may not be used to inform regulatory decisions and net benefit calculations for agency rules.

Renewable Fuel Standard

Congress established the Renewable Fuel Standard in 2005 and greatly expanded it in 2007. At the time of the RFS' enactment, its proponents claimed that 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. It is, however, contributing to higher food prices.

The RFS requires a specified amount of corn ethanol and other biofuels to be added to the nation's gasoline and diesel supply. This mandate is added to the subsidies and favorable tax treatment already available to the biofuels industry.

Events since 2007 have undercut the 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, as the shale revolution led to a rebirth of American oil production and a sharp decline in oil imports.

At the same time as 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. Even refiners critical of the program agree that inclusion of biofuels makes economic sense up to a point—just not at the levels mandated by the federal government.

Also, attempts to produce cellulosic biofuels from non-fuel feedstocks have failed, so the program still impinges heavily on the food supply. Most notably, nearly 40 percent of America's corn supply now goes to RFS compliance rather than use as food or feed. Given that Ukraine is a major grain producer but will not have much of a crop in 2022 due to the Russian invasion, the risk of already high prices skyrocketing further is worsened by the demands of the RFS.

Endangered Species Act

The Endangered Species Act often has bad consequences for endangered wildlife because it violates private property rights. Under the Act, landowners constantly face the threat of seeing their land declared off-limits to human use if it is found to contain critical habitat or potential critical habitat for listed species. That creates perverse incentives to destroy or eliminate the habitat before it can be regulated by the Fish and Wildlife Service.

On federal lands, the Act has been employed in litigation by environmental advocacy groups to overturn federal agency land management plans. The effect has often been to thwart sound environmental management practices and thereby lead to the degradation of critical habitat.

Carbon Taxes

The environmental rationales for a carbon tax fall apart upon inspection. A carbon tax would not be revenue neutral or displace greenhouse gas regulations. Even if the tax were revenue neutral, it would still be economically harmful. Any enacted carbon tax would have negligible climate effects.

A carbon tax is intended to drive investment into renewable energy sources, not by lowering their cost or improving their performance, but by handicapping competing technologies.

A carbon tax would further increase energy prices, potentially inflicting substantial losses on GDP, job creation, and household income. Even the most aggressive politically feasible carbon tax would have negligible climate effects, and its costs would far exceed any benefits.

Neither the "social cost" of carbon nor the alleged "climate crisis" justifies imposing new taxes on fuels that supply 80 percent of U.S. energy. As noted, the social cost of carbon is too speculative and easily manipulated a measure to justify either taxes or regulations imposing large costs on the economy.

No enacted carbon tax would be "revenue neutral." The carbon fee-and-dividend policies advocated by certain business lobbyists are just tax-and-spend programs in green garb that would not repeal or lower the rates of any existing taxes.

Even if every dollar of carbon tax revenue were to be used to cut other taxes by the same amount, the policy would still be unwise. The tax base for a carbon tax is much narrower than those for most other taxes. That is a problem because the smaller the base on which a tax is levied, the greater its power to destroy businesses, jobs, and local economies. For example, cutting income or Federal Insurance Contributions Act (FICA) taxes by $100 billion would not come close to offsetting the economic losses from a new $100 billion tax on fossil-fuel companies or their products.

No carbon tax likely to be enacted would be deregulatory. The Clean Air Act exemptions in a handful of carbon tax bills introduced in the 116th and 117th Congresses are mostly minor, revocable, or ineffectual. Worse, the carbon tariffs—"border taxes"—that U.S. firms would demand as protection from cheaper non-taxed

foreign imports would require an IRS-style agency to develop, administer, and audit compliance with complex new trade rules.

Enacting a carbon tax would be perceived as validating the climate crisis narrative, so it would strengthen rather than tamp down demands for more radical policies. Pro-growth legislators who endorse carbon taxes risk destroying a prime political asset—the pro-energy, low-tax policies that millions of Americans support.

Unauthorized climate programs

President Biden, on his first day in office, announced that the United States would rejoin the Paris Climate Agreement and signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." On January 27, 2021, he announced a "whole-of-government approach to the climate crisis" and signed Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," which orders the creation of numerous new programs, initiatives, task forces, and offices throughout the federal government. And on April 22, 2021, he made a second-round commitment under the Paris Agreement to reduce U.S. greenhouse gas emissions by 50 to 52 percent below 2005 levels by 2030. The president has not sought congressional authorization for these actions.

Neither the Paris Agreement nor the second-round commitment has been ratified by the Senate. Similarly, few of the new programs, initiatives, task forces, and offices created by E.O.s 13990 and 14008 have ever been authorized by Congress. Several notable examples include the following:

- The first sentence of the United Nations Framework Convention on Climate Change's web page on the Paris Agreement (https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement) states: "The Paris Agreement is a *legally binding international treaty on climate change*." [Emphasis in original] Yet President Biden intends to implement the Paris treaty without the required two-thirds Senate vote for ratification.
- The Thirty by Thirty (30×30) Initiative in E.O. 14008 to preserve 30 percent of the nation's lands and waters by 2030 has never had a congressional hearing. The only bill regarding 30×30 introduced in the 117th Congress would prohibit its implementation.

- The administration has charged the Interagency Working Group on the Social Cost of Greenhouse Gases with publishing a guidance document and advising on its wide use in the regulatory process. Congress has never directed the use of any such guidance document in any regulatory proceeding.

Kigali Amendment

Beginning in the 1970s, concerns that refrigerants used in most air conditioners and refrigerators were leaking into the air and depleting the Earth's ozone layer led to the negotiation and signing of the Montreal Protocol on Substances that Deplete the Ozone Layer, 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 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.

Unfortunately, domestic restrictions on these refrigerants were enacted in December 2020 as part of the American Innovation and Manufacturing Act. The EPA began implementing these measures in 2022, and they are already having an adverse impact on the cost of air conditioning and refrigeration.

These measures were supported by manufacturers of Kigali-compliant refrigerants that stand to benefit by gaining a captive market for those products. They have joined forces with environmental activists to lobby for the AIM Act and now for the Kigali Amendment.

Those companies claim that such government interference in air conditioning and refrigeration will 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 such equipment, such as grocery stores and restaurants, and manufacturers that use

industrial process refrigeration and will have to shoulder the increased expense. Home and vehicle air conditioning will also be adversely affected.

Proponents have also asserted that the Kigali Amendment levels the playing field among nations, but in truth, China and other industrial competitors of the United States get far more favorable treatment under the treaty.

As it is, Congress could revisit the AIM Act and consider revisions in the likely event that costs prove high, but such mid-course corrections would be nearly impossible if the Kigali Amendment were to be ratified and the United Nations placed in charge.

Experts: Myron Ebell, Marlo Lewis, Ben Lieberman

For Further Reading

Christopher Horner and Marlo Lewis, "The Legal and Economic Case Against the Paris Climate Treaty," *Issue Analysis* No. 6, Competitive Enterprise Institute, May 2017, https://cei.org/studies/the-legal-and-economic-case-against-the-paris-climate-treaty/.

Marlo Lewis, "A Citizen's Guide to Climate Change," *OnPoint* No. 255, June 11, 2019, https://cei.org/studies/a-citizens-guide-to-climate-change/.

Marlo Lewis, "No, Democrats' Climate Law Does Not Overturn *West Virginia v. EPA,*" *Real Clear Energy*, August 30, 2022, https://www.realclearenergy.org/articles/2022/08/30/no_democrats_climate_law_does_not_overturn_west_virginia_v_epa_850881.html.

Ben Lieberman, "A Regulatory Burden for Every Room of Your House," *Wall Street Journal*, January 20, 2022, https://www.wsj.com/articles/a-regulatory-burden-for-every-room-of-your-house-energy-efficiency-standards-household-dishwasher-furnace-natural-gas-11642719043.

Marlo Lewis, "Why Carbon Taxes Are Anti-Growth, Anti-Consumer, and Politically Dangerous for Conservatives," *OnPoint* No. 275, December 1, 2021, https://cei.org/studies/why-carbon-taxes-are-anti-growth-anti-consumer-and-politically-dangerous-for-conservatives/.

Antitrust

7

Efforts to expand the scope and enforcement of antitrust law are playing out on a global scale and, so far, have mostly targeted large technology companies. In the United States, the fight is being waged in the states, at federal agencies, and in Congress.

Expanding antitrust regulation is unnecessary and would harm consumers and the U.S. economy. Instead, policy makers should seek to narrow the scope and applicability of antitrust regulation to allow for greater private-sector innovation, economic growth, and technological progress. At the very least, policy makers should preserve the consumer welfare standard, which prioritizes the interest of consumers rather than those of companies.

Congress should:

- Place antitrust enforcement in one agency, the Department of Justice and remove antitrust authority from the Federal Trade Commission (FTC).
- Shrink the scope of antitrust policy in general.
- Oppose efforts to expand antitrust policy.

Sole Antitrust Authority at the Department of Justice

Placing antitrust authority solely at the Department of Justice will help reduce opportunities for politically motivated investigations and ensure fairness for defendants. DOJ lawyers must convince a federal court of the merits of a case. This

is in stark contrast to the Federal Trade Commission, which acts as both prosecutor and judge through internal "trial-type" proceedings that can lead to biased decisions and cause uncertainty in markets. The One Agency Act, draft legislation introduced by Sens. Mike Lee (R-Utah) and Thom Tillis (R–N.C.) in the 117th Congress, would accomplish this.

Antitrust regulation is subject to politicization and often comes at the cost of economic liberty and progress. Consider the views expressed by some of the current appointees to the FTC. Chair Lina Kahn made a name for herself in academia by advocating for a vastly expanded role for antitrust regulation and a rejection of the consumer welfare standard. As FTC chair, she has undertaken these reforms in an atmosphere largely devoid of transparency and input from the public.

Taking antitrust authority away from the FTC would guard against much of the regulatory capture, excessive deference to agencies by Congress, and distortion of antitrust law away from consumer benefit.

Regulatory capture occurs when a regulated industry influences its regulators' actions for its own benefit. It is rampant in antitrust. Most antitrust cases are brought by companies seeking to hobble competitors. In cases brought by the government, competitors of the targeted firm often help antitrust enforcers behind the scenes, as Oracle did during the Justice Department's case against Microsoft in the 1990s, to the point of paying a pro-Microsoft group's janitors to hand over that group's office trash.

If the FTC's current case against Facebook parent company Meta reaches a settlement, Meta might welcome the onerous new rules on privacy and content moderation it might impose because smaller competitors might find it much more difficult to comply with those rules. In that way, antitrust could lock in Meta's dominance and make the market in which it operates less competitive.

Congress has given the DOJ and the FTC too long of a leash, and both agencies have abused that lack of oversight. Existing antitrust statutes are vague, especially in that they do not define key terms such as "monopoly" or "unfair or deceptive acts and practices." Much of antitrust law is based on case law rather than statutes, so agencies are free to change legal definitions and enforcement thresholds and expand their missions without congressional input. The FTC has been particularly bold in this

regard and is now seeking to move antitrust enforcement away from the consumer welfare standard.

Under the consumer welfare standard, big is not automatically bad. Bigness is bad only if it results in harm to consumers, usually by some combination of restricting supply and raising prices. The FTC's current leadership instead wants to move to a "Big is bad" standard, such as prevailed during the Progressive Era, and to expand antitrust to address unrelated issues, such as democracy, inequality, environmental, and social justice concerns.

An agency can usually pursue one mission reasonably well or many missions poorly. Congress should remove the FTC's antitrust authority or, at the very least, set clear boundaries limiting it.

Scope of Antitrust Regulation

The creative destruction, competitive pressure, and price signals of the free market are much more responsive and efficient at promoting prosperity and consumer welfare than antitrust regulation. The rule of law, property rights, and voluntary exchange have produced more societal good, raised more people out of poverty, and empowered more individuals than any other economic arrangement in history. Antitrust regulation consistently lags behind market conditions, mistakes competitor harm for consumer harm, and invites political corruption and rent seeking.

One antitrust case against IBM filed by the Department of Justice in 1969 lasted for 13 years and still never reached a verdict. The product at issue, mainframe computers, were going extinct due to the rise of personal computers, so the DOJ dropped the case in 1982. The current case against Meta may follow a similar path because the company has been losing users and market share to competitors such as TikTok—before a court date has even been set. Meta is also responding to competitive threats by changing its products to keep up with the times.

Antitrust enforcement is supposed to protect the competitive process, not individual competitors. It doesn't work that way in practice. Companies can become big simply by being good at what they do. And greater size allows for economies of scale that make it easier for companies to offer better products to consumers at lower prices.

Antitrust is also becoming increasingly politicized. The Republican Trump administration put pressure on companies that the former president personally disliked. That included Amazon, which found itself in "a very antitrust situation" mostly because its founder, Jeff Bezos, owns *The Washington Post*, which featured coverage that was often critical of Trump. Some Republican politicians have targeted social media companies over perceived anti-conservative bias.

The Democratic Biden administration has also politicized antitrust policy, with potentially favorable media coverage influencing its decisions to bring cases, as with its recent threats to oil companies over rising gas prices. It has also sought to expand the government's antitrust authority to go after not just tech companies, but other industries ranging from health care to live events. Incumbent businesses and their lobbyists might welcome these cases, provided the settlements put up barriers to entry to potential competitors.

Consumers and competition would both best be served by repealing antitrust regulations in a variety of areas. These include restraint of trade and monopolization, horizontal and vertical mergers, collusion such as price fixing and market division, predatory pricing, strategic predatory behavior, price discrimination, minimum resale prices, exclusive dealing, tying and bundling, and technological lock-in.

The Sherman Act of 1890 prohibits restraint of trade and monopolization but does not define these terms. This has led agencies and courts to try to define these terms on their own, so the definitions have repeatedly changed over time and have been vulnerable to politicization. Either repealing these legal concepts or defining them narrowly would prevent them from being used to advance political agendas while giving companies needed stability.

The Federal Trade Commission is in the process of updating its merger guidelines as of this writing. These would affect both horizontal mergers, which are between two direct competitors in a given market, such as Ford and General Motors, and vertical mergers, which are between companies up and down the supply chain, such as an automaker and one of its parts suppliers.

The new guidelines would expand horizontal merger prosecutions beyond the current consumer welfare standard. Vertical mergers have long been largely exempted from

review because they usually involve attempts to reduce transaction costs. Companies can choose to make something in-house or buy it from a supplier and will go with whichever option is cheaper. Those savings then get passed along to consumers.

Congress should block expanded merger enforcement and require the DOJ and FTC to stick to the consumer welfare standard in their enforcement decisions. Better yet, it can avoid these problems by removing Washington from the merger business altogether.

Collusion is another common antitrust allegation that does not require enforcement action, because monopolization attempts plant the seeds of their own destruction. When several companies enter into a cartel arrangement and agree to restrict supply or keep prices high, some of the cartel participants are always tempted to cheat. One of the colluding parties almost inevitably defects by selling more than its agreed-upon quota or selling at a lower price. And if someone doesn't defect, artificially high prices or restricted supplies create opportunities for new competitors to enter the market and undercut the cartel's monopoly price.

Predatory pricing occurs when a company intentionally sells a product at a loss in order to drive out competitors. Once it has the market to itself, it then raises the price of the product and reaps extra-high profits. This scheme never works in practice. The longer a company sells at a loss, the longer it has to keep an artificially high price later in order to make up its previous losses—giving competitors an opening to undercut them. As the Supreme Court pointed out in the 1986 case *Matsushita v. Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, no evidence of predatory pricing had ever been found in an antitrust case, and antitrust authorities should stop wasting time searching for it. Until now, they have restrained themselves. Congress should see to it that they maintain that restraint.

Similar arguments apply to other forms of alleged strategic predatory behavior.

Price discrimination is the practice of selling the same product to different customers at different prices. Examples of price discrimination include bulk discounts, seasonal and clearance sales, retailer coupons, discounts for seniors and veterans, and other common business practices that have long been familiar to consumers. These and other forms of price discrimination give companies an incentive to boost supplies,

which puts downward pressure on prices. They also allow more consumers to buy products they want at terms they voluntarily accept.

Manufacturers often require retailers to sell their products at some minimum price. Because retailers cannot compete with each other on price with these products, they often compete in other areas, such as informative sales demonstrations, marketing, and prominent shelf placement. If the minimum price guarantees a high profit margin, some of it will go toward those other competitive practices, and the rest gives the retailer an incentive to sell as much as it can, benefiting the manufacturer. Meanwhile, consumers benefit from a product they might have not heard of otherwise.

Exclusive dealing is the practice of a manufacturer requiring a retailer selling its products to also agree not to sell its competitors' products. For example, most restaurants sell either Coca-Cola or Pepsi products, but not both.

Tying and bundling are related concepts. If a consumer buys one product, he must also buy another product. In antitrust cases, this often comes down to a word game, as it did in the Microsoft case. The controversy was over whether Internet Explorer was part of the Windows operating system or a separate product that was tied to it. Either way, Internet Explorer lost market share because consumers chose other web browsers—and then some newer and better browsers over those. Remember Netscape?

Technological lock-in is a valid concern, although antitrust enforcement is often a cause, not a remedy. The threat of enforcement can have a chilling effect on cost-cutting measures, such as mergers, new pricing models, and product innovations. Similar to cartels, locked-in technologies are always vulnerable to someone new entering the market with something better, as Microsoft learned the hard way with Internet Explorer. And if it stays on top, as QWERTY keyboards have, it is typically because consumers prefer them.

As the economy becomes more high-tech, specialized, and global, antitrust policies formulated in the smokestack era are becoming progressively less relevant. Aggressive antitrust enforcement can create considerable economic uncertainty, which can have a chilling effect on long-term investment and innovation in both products and business practices that can benefit consumers.

More antitrust enforcement means more business for lobbyists, as companies look for ways to avoid finding themselves in antitrust enforcers' crosshairs on the one hand, while lobbying for various types of corporate welfare on the other.

Antitrust regulation's biggest costs are hard to quantify because they are unseen, as they arise from the future innovation and attendant consumer benefit it prevents from occurring. Legislation to micromanage the business decisions of tech platforms, to apply antitrust regulations inconsistently based on market cap, and to do away with the consumer welfare standard will make American consumers worse off.

Bills such as the Online Innovation and Choice Act (H.R. 7030, S. 2992, 117th Congress), Open App Markets Act (H.R 7030, S. 2710, 117th Congress), and Prohibiting Anticompetitive Mergers Act all substitute the judgment of politicians, bureaucrats, and lawyers for what should remain private business decisions. Government officials do not have superior knowledge of markets, a crystal ball to see into the future, or a special enlightened impartial character that makes their judgment superior to those with skin in the game.

Antitrust law allows lawmakers to target private companies for reasons outside the proper scope of regulation, such as size or ideology. That is evident in recent proposals, such as the American Innovation and Choice Online Act (H.R. 3816, S. 2992, 117th Congress), that outlaw business activities only for companies of a certain type and above a certain market valuation. Regulations should apply broadly, not just to certain politically convenient targets. The American Innovation and Choice Online Act would, among other things, ban Amazon from self-preferencing its self-branded products, while allowing its brick-and-mortar competitors, such as Target, Walmart, and grocery stores, to continue self-preferencing their own self-branded products. The casualties of such proposals also include consumers and the rule of law. Such proposals do nothing to advance consumer welfare, but they allow politicians to score political points.

The consumer welfare standard has greatly improved the antitrust policy environment for U.S. businesses and consumers over the past four decades. It is the product of a long intellectual history dating back to the 1960s and most famously expressed in Robert Bork's influential 1978 book *The Antitrust Paradox*. In short, the consumer welfare standard holds that antitrust authorities should prioritize consumer welfare

over other considerations, such as firm size or degree of market concentration, when evaluating whether to approve specific mergers or any other kind of business arrangement.

By the early 1980s, courts began applying the consumer welfare standard in their antitrust decisions, and it has largely guided antirust regulation ever since. Before the consumer welfare standard, enforcement was incoherent, uncertain, and vulnerable to changing direction with each change of administration or new intellectual fad.

Regulators' efforts to benefit less successful competitors often harm consumers. Worse, they often exacerbate the problems they were intended to solve, all while inviting political mischief. The current bipartisan movement to end the consumer welfare standard would harm U.S. consumers, businesses, and the country's global competitiveness and quickly move well beyond its current big-tech targets.

Experts: Jessica Melugin, Ryan Young, Alex Reinauer,
Iain Murray, Mario Loyola, Wayne Crews

For Further Reading

Ryan Young, "New Antitrust Merger Bill Is Fatally Flawed," *Open Market*, Competitive Enterprise Institute, March 17, 2022, https://cei.org/blog/new-antitrust-merger-bill-is-fatally-flawed/.

Jessica Melugin, "With Inflation Rising, Why Punish Companies Seeking to Lower Prices?" *National Review*, February 2, 2022, https://www.nationalreview.com/2022/02/with-inflation-rising-why-punish-companies-seeking-to-lower-prices/.

Ryan Young and Wayne Crews, "The Case against Antitrust Law," *Issue Analysis* No. 1, Competitive Enterprise Institute, April 2019, https://cei.org/studies/the-case-against-antitrust-law/.

Mario Loyola, "The State Antitrust Paradox," *Issue Analysis* No. 2, Competitive Enterprise Institute, February 2022, https://cei.org/studies/the-state-antitrust-paradox/.

Online Speech and Section 230

8

Section 230 of the Telecommunications Decency Act of 1996 governs liability online. It clarifies that the creator of speech, not its carrier, bears legal responsibility for it. The statute was intended to allow websites to create their own content moderation and curation rules. The coauthor of the statute, former Rep. Chris Cox (R-Calif.), has described Section 230's approach as "allowing a thousand flowers to bloom" because it replaced the incentives for information service providers—anyone who hosts third-party speech digitally—to take a hands-off approach to curating their forums.

This online liability regime has allowed the Internet to develop as a thriving marketplace of ideas, but now it faces criticism from both sides of the political aisle. Claims from the right of anti-conservative political bias by tech companies have led to calls for declaring social media platforms and other online services as "common carriers" in order to curtail their ability to remove content. From the left, claims of "harmful misinformation" have led to calls to curtail or repeal Section 230. Any of those policies would have harmful, unintended consequences and would likely short-circuit the market response to solving content moderation problems.

Congress should:

- Oppose efforts to limit online platforms' ability to offer strong encryption.
- Leave Section 230 in place as is.
- Oppose classifying social media platforms as common carriers for regulatory purposes.
- Oppose efforts to repeal Section 230.

Allow for Strong Encryption

The next generation of social media will likely include decentralized platforms. That is a fundamentally different structure from the dominant social media platforms of today. It may hold the key to new entrants displacing current market leaders and moving content moderation decisions away from the centralized control of platform owners and into the hands of users.

Blockchain-based decentralized social media provides end-to-end encryption, so regulatory action that discourages encryption technology could be detrimental to the emergence of the next wave of platforms.

An example of this risk is the Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act (H.R. 6544, S. 3538, 117th Congress). Its noble goal is to fight online child sexual exploitation, but it would inadvertently make it dangerous for platforms to provide encryption to users by making it a trigger for liability and prosecution. By creating legal incentives against offering strong end-to-end encryption to users, lawmakers may short-circuit the evolution and development of market solutions to address current content moderation problems. The more consumers seek new content moderation options, the greater the incentive and reward for entrepreneurs to provide an alternative.

Keep Section 230 in Place

There are several bills aimed at repealing or limiting Section 230, sponsored by members of Congress from both parties. Their goals fall into four broad categories:

- Repeal Section 230.
- Limit the scope of Section 230's liability protections.

- Impose new obligations on hosts in order to earn Section 230's liability protections.
- Alter the "Good Samaritan" portion of the statute in order to address political bias complaints.

The approaches and details of these bills differ, but they all carry potential perils. Asking politicians to define what does and does not constitute unacceptable speech is to invite abuse and politicize a fundamental right.

A repeal of Section 230 would cripple the existing legal ecosystem that protects carriers of third-party online speech from liability for that speech. Today's market leaders may be able to absorb the legal costs of defending against liability claims over some user-generated content, but smaller companies that cannot afford that burden will simply stop hosting third-party speech. That will lock in the big guys' dominance and reduce the total amount of speech by users online.

The only time Congress limited the scope of Section 230's liability shield there were unintended and harmful consequences. The House bill, the Fight Online Sex Trafficking Act (FOSTA), and its Senate companion, the Stop Enabling Sex Traffickers Act (SESTA), were well-intentioned attempts to curb sex-trafficking activities online. But in practice, removing the liability shield for hosts if posters were found guilty of posting ads for prostitution led to the wholesale removal of content that did not involve prostitution but posed too great of a legal risk if it was not policed perfectly. The carveout proved to take in too much content and resulted in less total speech being hosted online. In addition, advocates for sex workers claim that the law made conditions less safe because what once could be done online now takes place in person, with physical risk introduced earlier on in the process. Good intentions aside, curtailing Section 230 has likely done more harm than good both online and offline.

Bills that create tests or government oversight for hosts to earn Section 230 are also problematic. The idea of turning unelected bureaucrats at the Federal Trade Commission into the speech police should worry Americans of any political inclination.

The dangers are similar with proposals to alter the "Good Samaritan" portion of Section 230, which provides protection for moderating content in addition to that afforded by the First Amendment.

All of the above bills carry the inherent costs and risks of changing the rules in midstream. All of the proposed changes will disrupt innovation and lead to harmful unintended consequences. Furthermore, even the most carefully crafted surgical strike at Section 230 is unlikely to make it cleanly out of the legislative process. It would be better to leave the status quo, however imperfect, and let the market innovate to address those shortcomings.

Do Not Regulate Social Media Platforms or Other Online Services as Common Carriers

Some on the political right worry about conservative content being removed and have suggested regulating large social media platforms as common carriers—similar to how public utilities are regulated—in order to diminish their First Amendment right to not carry speech they do not wish to host. That is a misguided idea that tramples private property rights and may result in a great deal of lawful, but nonetheless awful, content remaining online.

The practical consequences of thwarting social media platforms' ability to remove unwanted content is not one that many conservatives will not like. Large platforms constantly remove enormous amounts of spam, pornography, racist, anti-Semitic, and violent third-party content from their sites. To create difficulties or disincentives for them to do so will result in a degraded user experience online, especially for children and other vulnerable populations.

Social media platforms are not like the common carriers of the past. They do not hold themselves out to everyone and do not have explicit terms of service that disqualify some from using their services. Content moderation decisions constitute a form of speech in that they create an online environment that distinguishes one platform from another. That raises the bar for overcoming First Amendment protections compared to regulating trains or delivery services.

The First Amendment protects every American against government interference with free expression. It does not imply the commandeering of private property, such as social media platforms, to facilitate someone else's speech. Calls to regulate social media platforms as common carriers, which would essentially transform them into public utilities, are based on that misconception.

Thanks to the social media revolution of user-generated content, speech has never been so easy for so many. The benefits from those technological advances rest on the protection of speech and property. Those legal protections deserve preservation if citizens and consumers want continued progress, innovation, and improvement. Moreover, the owners of social media platforms have inherent incentives to satisfy the choices and interests of their users. Lawmakers overlook the moral, intellectual, and artistic rights of free expression—which the creators and administrators of social media applications have relied on for years—at our peril.

Platforms managed and controlled by private decision makers have led us into a new world of interpersonal and international communication that was unimaginable a generation ago. Today's platforms are not monopolies, and consumers are enjoying increasing alternatives to the current market leaders. If regulation advocates achieve their goal of turning platforms into common carriers, they will only succeed in hobbling the social coordination, advancement, and innovation that these platforms have made possible.

Experts: Jessica Melugin, Dan Greenberg, Iain Murray, Wayne Crews

For Further Reading

Dan Greenberg and Jessica Melugin, "Don't Confuse the Platforms with the Train," *Issue Analysis* No. 3, Competitive Enterprise Institute, March 2022, https://cei.org/studies/dont-confuse-the-platform-with-the-train/.

Jessica Melugin, "Don't EARN IT," *Open Market*, Competitive Enterprise Institute, February 9, 2022, https://cei.org/blog/dont-earn-it/.

Iain Murray, "The Answer to Our Big Tech Problem Is Decentralization," *National Review*, March 16, 2021, https://www.nationalreview.com/2021/03/the-answer-to-our-big-tech-problem-is-decentralization/.

Broadband Connectivity

9

Improved Internet connectivity is essential to reduce socioeconomic inequality at home and to improve America's global economic competitiveness abroad. Recent increases in broadband investment and connectivity improvements suggest that the private sector could greatly expand broadband access without taxpayer assistance. Thanks to growing competition and technological innovation, Americans' Internet access will likely continue to improve without substantial intervention from Congress. Instead of providing wasteful subsidies, policy makers should work to remove regulatory barriers to entry to encourage broadband competition.

Congress should:

- Refrain from providing additional broadband funding in light of recent subsidies.
- Hold the Federal Communications Commission (FCC) accountable for meeting its statutory objectives.
- End the Universal Service Fund (USF) surcharge and fund the program via congressional appropriations instead.

Congress can take steps to ensure that newly allocated broadband funding is used effectively to promote connectivity while reducing long-term costs to American taxpayers.

First, given the recent authorization of funds through the American Rescue Plan and the Infrastructure Investment and Jobs Act, Congress should instruct the Federal Communications Commission to reconsider the future of its Universal Service Fund programs, which are intended to increase Internet connectivity to underserved areas, and evaluate which programs are necessary to achieve the Commission's statutory objectives.

Second, Congress should ensure that the FCC uses such funding effectively to meet the FCC's statutory objectives.

Third, Congress should create a legal framework to eliminate the USF surcharge and provide for congressional appropriations to fund future USF programs. Eliminating the surcharge will make broadband more affordable for lower-income households. Direct appropriations will allow Congress to set a hard limit on the amount of USF assistance, thereby encouraging more efficient usage of such funds.

Broadband Funding

Congress should not provide any additional funding for broadband connectivity. The recent dramatic increase in federal funding means that the FCC has more than enough resources for the capital expenditures required to ensure universal broadband connectivity. A 2017 FCC report found that it would cost approximately $40 billion in capital expenditures to ensure that broadband services reach 98 percent of households and small and medium-sized businesses. However, the FCC has already spent more than $43 billion since 2017. Most recently, the American Rescue Plan provided $350 billion to states and counties to improve infrastructure, including broadband. The Infrastructure Investment and Jobs Act provided more than $60 billion for broadband.

Universal Service Fund

Congress should direct the FCC to reconsider the extent to which its Universal Service Fund programs continue to serve their original intended purpose. For example, the FCC should consider phasing out its high-cost program, also known as the Connect America Fund. The USF's most expensive component, with an annual budget of $4.5 billion, the high-cost program provides subsidies to Internet service providers (ISPs) for connectivity in rural, sparsely populated areas. However, as

noted, the Commission already has more than enough resources to achieve universal service without additional support through the high-cost program.

Furthermore, as private-sector investment has expanded broadband investment in rural areas, the lack of affordability—rather than connectivity—is now the more significant barrier to achieving universal Internet access.

Congress should ask the FCC to examine the extent to which the different USF components have been effective and to provide a rationale for continuing any existing programs, such as the E-Rate program for public schools and libraries. A comprehensive audit today will help ensure that taxpayer funding is used effectively in the future.

To ensure fiscal transparency, Congress should also instruct the FCC to provide a detailed timeline of when and how it plans to use the existing broadband funding to achieve universal Internet access throughout the country.

Universal Service Fund Surcharge

In the long run, any remaining broadband subsidy programs should be subject to congressional oversight. To that end, Congress should shift the USF's funding from the current surcharge to direct congressional appropriations. The FCC imposes the surcharge on telecommunications companies, which generally pass it on to consumers in their broadband bill. The surcharge was only 3 percent in 1998, but it has steadily increased to reach 33.4 percent as of the second quarter of 2021—even though broadband subscription fees declined by 26 percent between 2008 and 2020.

The USF surcharge's regressive nature means that consumers pay the same percentage regardless of their income level, which undermines the program's purpose of promoting broadband access for lower-income households.

Congressional appropriations will have three advantages over the USF surcharge funding mechanism.

1. Removing the surcharge will make broadband subscriptions more affordable at the point of purchase.

2. Appropriations can help Congress hold the FCC accountable for how funds are used. According to the Government Accountability Office, USF programs are plagued by inefficiency and the lack of internal controls, and other sources have also criticized the misuse of funds.
3. Appropriations will allow Congress to set a hard limit on the amount of USF assistance, encouraging more efficient usage of such funds. To that end, Congress should consider annual reviews of different USF programs' effectiveness at meeting their intended targets. Such reviews can enable evidence-based decision making about which programs should continue to be funded and how much funding should be allocated.

In the long run, there is no alternative to market competition to expand broadband access. With that in mind, the FCC should seek to reduce regulatory barriers to private broadband investment and to promote competition between different types of ISPs, such as cable, fiber, and satellite. Creating a market-friendly regulatory environment is crucial to reducing broadband subscription prices and ensuring universal Internet access while lowering costs to taxpayers.

Experts: Ryan Nabil, Jessica Melugin

For Further Reading

Ryan Nabil, Comments before the Federal Communications Commission on the Future of the Universal Service Fund, Competitive Enterprise Institute, March 17, 2022, https://cei.org/regulatory_comments/cei-comments-to-the-fcc-fcc-21-127/.

Ryan Nabil, "Promote Competition Between 5G and Satellite Internet Providers," *Real Clear Policy*, May 10, 2021, https://www.realclearpolicy.com/2021/05/10/promote_competition_between_5g_and_satellite_internet_providers_776392.html.

Ryan Nabil, "How to Expand Broadband Access without Spending $100 Billion," *Real Clear Policy*, April 13, 2021, https://www.realclearpolicy.com/articles/2021/04/13/how_to_expand_broadband_access_without_spending_100_billion_772426.html.

Labor and Employment

10

With employers struggling to fill open positions and supply chains still playing catchup, federal employment policy needs to adapt to new economic realities rather than try to force emerging industries to conform to outdated laws. The recent supply chain crisis shows the damage to the broader economy when that flexibility and adaptability is lost. Shortages of truckers caused by federal regulations and antiquated ports resulted in freight backlogs that have rippled throughout the economy. Meanwhile, workers across the economy are opting for new work models such as gig economy jobs and contact work. Congress should focus on policies that protect individual workers and maximize their ability to sell their labor on an open market.

Congress should:

- Amend the Fair Labor Standards Act (FLSA) to allow workers to register with the Department of Labor (DOL) as freelancers.
- Pass the Employee Rights Act.
- Oppose reclassification of contract workers as traditional employees.

Fair Labor Standards Act

The Fair Labor Standards Act currently does not have an official category for "self-employed." Congress should add one and allow workers to register with the Department of Labor as a freelancers. This could be done electronically through the main DOL website. Workers would get a freelancer ID number to provide when applying for contract work. This would clarify their employment status, exempting them from the

FLSA's requirements, such as allowing the employer to set regular work hours. Workers would be assured the opportunity to do short-term contract work on their own time and schedule. The amendment would override state laws like California's AB5 but only in instances in which a worker affirmatively seeks freelancer status.

Employee Rights Act

The Employee Rights Act (H.R. 7194, S. 3889, 117th Congress) would amend the National Labor Relations Act and related laws to provide certainty that the unions directly represent workers by requiring secret ballot elections, actual majority support to gain recognition, and outlawing coercive actions by the unions during elections. It would do nothing to limit the power of unions when they represent the collective voice of workers. It would also require unions to get members' authorization to spend their dues money on non-representation activities, such as political spending and activism.

Reclassification of contract workers as traditional employees

The Biden administration has already attempted to roll back the prior administration's updated definition of an employer-employee relationship and has supported limiting contract work in general, arguing that the practice is abusive toward workers. Other regulatory and legislative efforts to force employers to treat workers as traditional employees, regardless of the nature of the work, ignore the changing nature of work and the growing desire of individuals to be able to work in a time and manner of their choosing.

The Biden administration has sought to reinstate an Obama-era policy expanding the definition of "joint employment." Joint employment refers to when a company is legally responsible for workplace violations at another business. Traditionally, this applies only when one business has "direct control" over some aspect of the second company's work, such as in the case of a contractor-subcontractor relationship. Direct control places responsibility for workplace conditions on those who are actually responsible. The Biden administration wants joint employer status to extend to cases in which a business has "indirect control" over another company, a vague standard that could theoretically allow regulators to sanction companies for violations in which they had no role. Congress should reject this and instead amend the National Labor Relations Act to codify the direct control standard.

Expert: Sean Higgins

For Further Reading

Sean Higgins, “With PRO Act, Congress Readies National Version of California’s AB5 Fiasco,” *Open Market*, Competitive Enterprise Institute, July 22, 2021, https://cei.org/blog/with-pro-act-congress-readies-national-version-of-californias-ab5-fiasco/.

Corporate Governance

11

Retirement Security

Congress passed the Employee Retirement Income Security Act (ERISA), which governs private pensions, in 1974, in response to widespread concerns at the time that both private employers and union officials were mismanaging pension funds and that American workers were being shortchanged on retirement benefits that they had been promised. ERISA requires pension fund managers "to act solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants." However, in recent years, politically motivated pension managers have sought to direct capital toward other, unrelated "non-pecuniary" goals, including those associated with environmental, social, and governance (ESG) theory.

In November 2020 the Department of Labor published a final rule, "Financial Factors in Selecting Plan Investments," to protect pension plan beneficiaries from having the value of their retirement assets eroded by this trend. Then in December 2020, the Department published a related rule, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," modifying the expectations for proxy voting by pension fund managers with respect to ESG considerations. This rule, as with the previous one, had the goal of protecting retirees' assets from politically motivated mismanagement.

However, in March 2021 the Biden administration's Department of Labor announced that it would not enforce these recently enacted rules and intended to "revisit" them. This was, in part, an effort to comply with President Biden's executive order 13990,

"Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which directed federal agencies to review existing regulations promulgated under the previous administration that may be inconsistent with the current administration's policies on climate change. The new rule on ESG and pension management from the Department of Labor, overturning the two previous rules from the Trump administration, was published in November 2022.

Congress should:

- End the back-and-forth rulemakings at the Department of Labor by amending Title I of ERISA to clarify that pension fiduciaries must pursue *only* pecuniary benefits for beneficiaries, as was the standard expectation during most of the time since the law was passed.

That process of revisiting the 2020 rules resulted in a new rule proposed in October 2021, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," which has now effectively repealed both of the previous rules.

That new rule cites the language of executive order 13990 as justification, but omits the section of the order that calls for it to be "implemented in a manner consistent with applicable law." Overriding the investment security of pension fund beneficiaries in pursuit of climate goals is not consistent with the requirements of current law, and therefore the new rule should not be considered valid. ERISA requires pension funds and the people who administer them to direct investment decisions solely toward funding the retirements of workers. There is no mention of climate change, gender diversity, or denying capital to firms that are not considered to be "socially responsible."

The two Trump-era rules restated that expectation and warned against the increasingly frequent practice of using ESG factors, rather than traditional return calculations, to select investments and guide their proxy voting. Managers who did choose to include ESG factors in their investment decisions were expected to demonstrate that these political considerations were not resulting in lower profits, but were only being used as a tiebreaker among options with otherwise identical expected returns.

Safeguarding the retirement security of working Americans is a vital societal goal, and a key element of the American dream. Men and women who have worked and saved

for decades, especially when they have no ability to take their pension benefits into an individualized plan, should not have their financial future determined by the political and social whims of fund investment managers.

Securities and Exchange Commission

The popularity of environmental, social, and governance theory in the business world has fueled an enthusiasm in recent years for integrating such factors into both individual firm management and portfolio selection. This generally takes one of two major forms:

- As a purely profit-driven way of avoiding business risks associated with things like climate change; or
- Via a semi-concessionary altruistic method in which investors accept the likelihood of lower investment returns through divestment from firms that are legal, but considered ethically problematic, such as fossil-fuel, tobacco, and firearms producers.

ESG integration and investing is often defended as a mainstream, non-ideological approach to financial management, but critics insist that it is part of an ideologically driven effort to introduce controversial policy positions into management practice, industry standards, and regulatory policy. In the last few years, conservative, centrist, and even left-leaning critiques of ESG have multiplied, as have legislative and regulatory efforts to stop or reverse government policy that encourages this trend.

One of the most significant instances of this overreach is the climate disclosure rule proposed by the Securities and Exchange Commission in March 2022. This proposal will effectively require firms to prioritize an array of politically motivated "stakeholder" groups ahead of the legal owners of corporations, their shareholders. The proposal is legally unjustified, not needed to cover legitimate climate concerns, misapplies the concept of materiality, will not lead to consistent data reporting, and ignores significant compliance costs.

Congress should:

- Amend the Securities Act of 1933 and the Securities and Exchange Act of 1934 to reestablish and permanently define the traditional understanding of "materiality" and limit the SEC's ability to establish disclosure requirements and prescribe other behavior by registrant firms in ways that are consistent with that definition. This would stop future commissions from engaging in further mission creep into the non-finance realms of environmental and social policy. There is nothing stopping any future Congress from legislating separately on those issues, if future majorities decide that federal action is necessary. But the SEC should not, on its own, be allowed to independently redefine its mission, especially when that redefinition involves massively increasing its purview over topics that Congress did not grant it authority over, and in some cases explicitly refused to legislate on.

Other future rules that SEC commissioners have hinted at, including ones regarding management of "human capital," will suffer from many of the same flaws that accompany all central planning schemes. Even if the federal government were to create a quantitative method for measuring all of the relevant data categories in question, no prescriptive rule can replace the discernment of corporate managers, board members, and voting shareholders when it comes to the relative costs and benefits of engaging with these topics. Different firms will be exposed to climate and workforce management risks to differing degrees and the calculus for what policies to adopt and what data to disclose will vary by firm. This is what the SEC's longstanding "principles-based" materiality standard is built around.

Furthermore, the SEC seems to be acting on flimsy legal authority in this regard. Former SEC Deputy General Counsel Andrew Vollmer argues that the agency does not have the authority to issue the kind of climate disclosure rule it has proposed. He writes in an August 2021 study that "even if climate-change information is material to investors, the SEC does not currently have statutory authority to make rules requiring companies to disclose it."

Moreover, the kind of disclosures that the SEC seeks to require would be subjective and inherently disparaging in the context of an administration policy explicitly seeking to choke off access to capital by energy-intensive firms. This would put the legality of the rule in significant peril in light of the precedent in *National Association*

of Manufacturers v. SEC, which partially invalidated the Dodd-Frank conflict-minerals disclosure requirement on compelled-speech grounds.

Corporate Chartering

From the earliest days of general-purpose financial corporations in the United States, companies have been chartered and regulated at the state level, with each state having its own particular process and demands. This diversity of legal approaches to incorporation and governance has yielded significant benefits. States with the most practical and efficient legal regimes have prospered, while corporate founders have been able to steer their firms toward the best-governed systems. Combined with the freedom of corporations to do business across the entire country with a single state charter, this means that legally necessary governance and liability issues are handled with the least amount of red tape and bureaucratic hoop-jumping for firm managers and shareholders.

We can see the value of this federalist approach in the fact that the popularity of corporate chartering in various states is highly uneven. Delaware, with its Chancery Court for resolving business disputes, is famously the most popular state for U.S. corporations. If the varying corporate governance statues across the 50 states were equally advantageous, we would likely see little difference in rates of incorporation among states, relative to their total amount of economic activity. That the reality is extremely lopsided tells us that some legal frameworks work significantly better than others, and that the competition between the states is the most important factor in shaping those better regimes.

Unfortunately, some policy advocates would prefer to replace this federalist system of corporate chartering with a federal takeover of corporate governance. Federal agencies like the Securities and Exchange Commission already regulate public companies, but those regulations govern matters such as when firms go public and their equity shares are traded, not whether and how they can come into existence at all. Moreover, the SEC's mission is to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation." The expansion of federal chartering to U.S. corporations would actually endanger those goals.

Congress should:

- Reject any corporate governance legislation that would federalize corporate chartering, require employee approval of board members, or otherwise undermine the property rights of shareholders.

The clearest example of this threat in recent years is the Accountable Capitalism Act (S. 3215, 117th Congress), most recently introduced by Sen. Elizabeth Warren (D-MA), which would require corporations with over $1 billion in annual revenue to obtain a charter from a newly created office within the Department of Commerce. It would also require such firms to reject the traditional obligation—backed by longstanding legal precedent—to maximize value for shareholders and instead embrace a "stakeholder" model that requires company directors to consider the interests of "all corporate stakeholders."

The new Office of United States Corporations would have the authority to punish any company deemed insufficiently solicitous to said stakeholder interests. The legislation further invites politically motivated state attorneys general to petition the director of the Office of Corporations to revoke specific corporate charters. The director would have it in his or her power to do so, giving the company in question one year until its ability to operate expires. The only apparent escape from such a verdict would be a direct appeal to Congress, which would be required to pass a sort of reverse bill of attainder to save the corporation in question from legal oblivion.

Legislation like the Accountable Capitalism Act would put the continued existence of every large corporation in the country in the hands of a single sub-cabinet-level political appointee, empowered to determine whether a firm's "misconduct" had "caused significant harm" to customers, employees, shareholders, or business partners.

The last category is especially problematic, as any company unhappy with the current state of competition could attempt to undercut its industry peers by lobbying to have them hauled before the Office of Corporations. Even if unsuccessful, such a review could torpedo the share price of the targeted company. Such vague standards adjudicating disputes in which billions, and even trillions, of dollars of economic value are at stake would invite the very worst abuses of power. No procedure close to

this level of gravity should be decided administratively rather than through the due process provided by an Article III court.

The Accountable Capitalism Act would also require a major change to board composition. One, frequently promoted by Sen. Bernie Sanders (I-VT), would require 40 percent of a firm's board of directors to be elected by employees. This would turn the definition of stock ownership on its head and give individuals who have not supplied the firm with any capital and bear no liability for its debts a massive amount of control over its operations. Shareholders who hold large stakes in a corporation, and have foregone other investment opportunities to continue holding their shares, would see the value of their investment massively diluted in favor of whoever happens to be on the payroll the week such legislation comes into effect.

There is nothing wrong with a company's employees having a voice in management decisions and even participating in board elections. Many corporations have long included employee stock purchase and reward plans as part of their compensation packages. Such programs give employees more say in corporate affairs and a share of profits via dividend payments. But those programs, approved by each firm's management, do not simply hand over control of a corporation to employees regardless of their tenure, level of responsibility, and contributions to the firm. A corporation should no more be required to let all employees vote for its board members than home repair contractors should be given an ownership share in every private house they renovate or build.

Corporations can bind themselves voluntarily to such requirements, if their management sees the value of doing so, but it would be counterproductive and unjust for Congress to override the rights of shareholders in the interest of some vague notion of "social responsibility."

Expert: Richard Morrison

For Further Reading

Richard Morrison, "Comment on Proposed Rule 'Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,'" Competitive Enterprise Institute, December 10, 2021, https://cei.org/regulatory_comments/comment-on-proposed-rule-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights/.

Richard Morrison, "Comment on Employee Benefits Security Administration Proposed Rule 'Financial Factors in Selecting Plan Investments,'" Competitive Enterprise Institute, July 29, 2020, https://cei.org/regulatory_comments/comment-on-employee-benefits-security-administration-proposed-rule-financial-factors-in-selecting-plan-investments/.

Richard Morrison, "When 'Voluntary' Becomes Obligatory—Regulatory Creep and the SEC," *National Review*, May 12, 2021, https://www.nationalreview.com/2021/05/when-voluntary-becomes-obligatory-regulatory-creep-and-the-sec/.

Richard Morrison, "Environmental, Social, and Governance Theory: Defusing a Major Threat to Shareholder Rights," *Profiles in Capitalism* No. 6, Competitive Enterprise Institute, May 2021, https://cei.org/studies/environmental-social-and-governance-theory.

Hester Peirce, "We are Not the Securities and Environment Commission—At Least Not Yet," Securities and Exchange Commission, March 21, 2022, https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

Andrew N. Vollmer, "Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?," Mercatus Center, August 19, 2021, https://www.mercatus.org/publications/financial-regulation/does-sec-have-legal-authority-adopt-climate-change-disclosure.

Stephen Bainbridge, "A Critique of Senator Elizabeth Warren's 'Accountable Capitalism Act,'" ProfessorBainbridge.com, August 15, 2018, https://www.professorbainbridge.com/professorbainbridgecom/2018/08/a-critique-of-senator-elizabeth-warrens-accountable-capitalism-act-introduction.html.

Denise Kuprionis, "Will Warren's Accountable Capitalism Act Help? The Answer is No.," *Harvard Law School Forum on Corporate Governance*, September 10, 2018, https://corpgov.law.harvard.edu/2018/09/10/will-warrens-accountable-capitalism-act-help-the-answer-is-no/.

Infrastructure Permitting Reform

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In the midst of an economic crisis that has seen American families squeezed at the pump and in their home electricity bills, America needs to unleash its energy abundance more than ever. The most urgent task is to enact comprehensive, sweeping reforms of the federal system for permitting energy infrastructure. Efforts like Sen. Joe Manchin's (D-WV) permitting reform proposals respond to special interest groups but do little that will help all Americans. Congress needs to stop tinkering at the margins and solve this problem.

Multiple administrations have tried to streamline the permitting process, but the executive branch has little leeway, given the laws that Congress has enacted on agency permitting and environmental reviews under the National Environmental Policy Act (NEPA). The costs, delays, and uncertainty in the permitting process are problems that only Congress can fix.

Congress should:

- **Make the timing predictable.** Agency officials drag their feet at every step of the way, leaving developers in limbo and driving up projects' costs. If developers had more control over project timetables, it would save enormous amounts of capital and time. Instead of allowing only officials to assemble environmental documents, developers should be allowed to prepare the materials for agency certification. If agencies take too long to issue a permit or denial, developers should be given provisional permits to start construction subject to monitoring and mitigation.
- **Create a unified process.** Every major infrastructure project requires permits from a half dozen federal agencies all using different, uncoordinated processes. There should be a uniform, centralized process that gives priority to projects of national importance.
- **Reduce litigation risk.** Important projects are held up by lawsuits over minor omissions in environmental studies. Tightening the statute of limitations is not enough. Agencies should be held to a substantial-compliance standard, so that if reports are mostly right, a project can still go forward. Congress should tighten the rules on standing so that activists cannot hold up safe infrastructure projects over minor issues.
- **Establish programmatic and general permits.** Major categories of infrastructure projects with similar environmental profiles should be subject to expedited programmatic or general permits, with mitigation and monitoring requirements.

Expert: Mario Loyola

For Further Reading

Mario Loyola, "Unleashing America's Energy Abundance," *OnPoint* No. 283, Competitive Enterprise Institute, September 27, 2022, https://cei.org/studies/unleashing-americas-energy-abundance/.

Mario Loyola, "Renewable Energy? Where's Your Permit?" *Wall Street Journal*, August 31, 2022, https://www.wsj.com/articles/clean-power-wheres-your-permit-infrastructure-energy-electricity-regulation-application-nuclear-plants-solar-windmills-11661971460.

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1310 L Street NW, 7th Floor

Washington, DC 20005

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