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Mobilizing for Techno-Economic War, Part 7: Transforming Regulatory Policy

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The U.S. regulatory state has become a major headwind for national economic power industries competing against China, and incremental reforms will not be enough for America to avoid techno-economic defeat. U.S. policymakers need to adopt a national developmentalist model.

KEY TAKEAWAYS

- The U.S. regulatory system has transformed multiple times since the nation's founding. Policymakers must transform it again, this time to support the national developmentalism necessary to avoid losing the techno-economic power industry war with China.
- Congress should exert federal authority on certain issues, such as regulation of technology (e.g., AI) and industry (e.g., motor vehicles), and it should devolve regulatory authority to states in other areas, especially environmental regulations.
- Congress should embrace size-neutral regulations that do not penalize larger firms and provide regulatory reductions and carveouts for critically important projects and industries, such as a program for preapproved major industrial parks.
- Agencies need to favor automation and competitiveness, and the federal government needs an antitrust regime that supports global techno-economic power.
- Above all, America needs a shared consensus that avoiding defeat to China requires shifting from a regulatory, process-based state to a developmentalist, outcome-based one.

CONTENTS

Key Takeaways 1
Introduction 3
The History of U.S. Regulatory Transformation 4
Common Law Governance Through Negative Law: 1789–1890s 4
Governance of Abuses: 1890s–1961 5
Regulatory State Peak Development: 1961–Mid-1970s 5
The Regulatory State in Tension: Late 1970s–Present 6
Problems With the Contested Regulatory State 8
From the Regulatory State to the Developmental State 9
A New Federal-State Division of Labor: Preemption 10
Internet, E-commerce, and AI Regulatory Preemption 12
Industry Product Regulation Preemption 13
National Infrastructure 15
Simplifying Antitrust 15
Opposition to Federal Preemption 16
A New Federal-State Division of Labor: Devolution 17
Adopt Regulatory Carveouts for Key National Power Industries and Projects 19
Tilt Agency Regulation to Consider Automation, Productivity, and Competitiveness 23
End Small Business Preferentialism 24
Make Antitrust Support Techno-Economic Power 24
Embrace Innovation- and Build-Friendly Regulation 26
Barriers to Change 27
Conclusion 27
Endnotes 29

INTRODUCTION

The United States was the world's dominant techno-economic power for over 125 years. However, China has displaced American techno-economic leadership in order to make America and the West dependent on it, just like the West was dependent on OPEC (Organization of the Petroleum Exporting Countries) oil.[1]

On its current trajectory, China will, in the next decade or two, amass even greater capabilities than the United States and even its Allies combined will in national economic power industries: advanced traded-sector industries that are critical to national security and sovereignty. With those greater capabilities comes geostrategic hegemony over the West unless the United States (and its allies) forestalls that by adopting a transformative national power industry strategy that goes beyond a simple competitiveness or national innovation strategy.

However, the inherent weaknesses of the U.S. innovation and production system (e.g., cuts in government research and development, limited STEM [science, technology, engineering, and math] skills, an overly strong dollar, institutional resistance to change, corporate short-termism, an overarching focus on redistribution, etc.) coupled with a Chinese Communist Party (CCP) hyper-focused on victory suggests that, absent major structural change in U.S. policy, relative decline and loss of techno-economic competitive position and power are inevitable with the negative consequences that accompany such change.

This report is part of a series addressing America's techno-economic-trade war with China.[2] The first report in this series laid out the context of the China challenge, including what is at risk and the need for radically new approaches in a host of key policy areas.[3] Not small steps, but big ones. Not tinkering but transformation. "Bold" is the operative term. The crisis is at such a point that incrementalism will fail. Subsequent reports in the series have addressed specific policy areas, including reforming the business financing system, the science and technology system, and the workforce and education and training system.[4]

Avoiding defeat to China requires shifting from a regulatory, process-based state to a developmentalist, outcome-based one.

This report focuses on transforming the U.S. regulatory system to one that is consistent with national developmentalism is necessary to not lose the war to China. This will mean, among other things, exerting federal regulatory authority over certain issues now addressed at the state level (e.g., artificial intelligence [AI] regulation and industry-specific regulations); significantly reducing the federal regulatory burden, especially in environmental regulations; embracing size-neutral regulations that do not penalize larger firms with stricter regulatory burdens; tilting agency regulatory decision-making toward favoring automation and competitiveness; and providing regulatory carveouts for projects and industries of critical national importance. Most important, however, is building a shared consensus that structural regulatory reform is required, regulation needs to do as little as possible to not harm America's existential mission to sustain and even grow its national techno-economic power industries, and avoiding defeat to China requires shifting from a regulatory, process-based state to a developmentalist, outcome-based one.

THE HISTORY OF U.S. REGULATORY TRANSFORMATION

Even the most die-hard, free market advocates will agree that, in capitalist economies, the state must play at least some role in regulation. The questions are how much regulation, over what, and designed in what ways? These questions matter to national economic power because their answers shapes markets, firms, and industries.

Together, the combination of economic regulation (e.g., utility price regulation) and social regulation (e.g., pollution control regulation) constitutes the nation's regulatory system. A regulatory system is not a policy platform or an administration's agenda. It is a society's shared (though contested) answer to the question of what the state is for, expressed in institutional form, constitutional doctrine, and legitimation theory. Regulatory systems are sticky. They persist across administrations that nominally oppose them, and they are supposed to change when they fail to address problems they were designed to solve, or when they create other, more serious problems.

As regulatory economist John Mayo has argued, the U.S. regulatory system has gone through several evolutionary stages.[5] These stages roughly match major techno-economic transformations.[6] That makes sense because, ideally, a nation's regulatory system should be in rough sync with the dominant techno-economic system of the time. For example, the regulatory system of an agrarian, small-producer economy will naturally be different than one of an advanced-technology, large-firm economy. A regulatory system of a nation facing little international competition will naturally be different from one of a nation facing fierce competition.

The United States is now entering into a new techno-economic stage, from one characterized by U.S. dominance in advanced technology and innovation to one characterized by fierce competition with China. As such, it is time for another regulatory transition that will prioritize national economic power competition and growth more generally. While some of this will involve deregulation, it will entail more than just that. It will require a fundamental change from the 1960s-inspired strong regulatory state that gives short shrift to the consequences of delays, added costs, and limits to innovation.

Common Law Governance Through Negative Law: 1789–1890s

The Founding Fathers could not envision the industrial revolution and the societal complexity it would bring. For them, individuals were at the center of society, as farmers, shopkeepers, and craftspeople, all using hand tools. As such, the overriding focus for the state was on protecting individuals from overreach of both the state and other individuals.

In this case, the state did not primarily regulate actions, but rather enabled individuals to defend themselves against direct harm. Common law enabled liability rules that deterred harmful conduct ex post. Contract law enabled enforcement of private agreements. Constitutional law provided limits on government itself. The affirmative provision of public goods, the management of externalities, the correction of information asymmetries—none of these were a part of that system. The paradigm's coherence came from the fact that all three of its main institutions (courts, parties, and a minimalist federal executive branch) were consistent with the same underlying theory of negative liberty—and that the world to be "regulated" was relatively simple in operation.

Governance of Abuses: 1890s–1961

Despite what some conservative opponents of the progressive era may claim, the prior regulatory system became vulnerable once industrial capitalism at scale generated externalities, concentrations of power, and coordination problems that exceeded anything common law courts could handle on a case-by-case basis.[7]

The monopoly railroad problem was the paradigmatic example. Railroad rates could not be regulated through tort litigation, or in the absence of truck freight, through competition. Likewise, the prior system could not effectively address the need to protect basic workers' rights with the rise of large employers and factories. The problem was structural. The progressives understood this, even if, in some cases, they were guilty of overreach. The Depression, and the rise of the New Deal, simply made the argument undeniable, at least to most Americans.

To be sure, before FDR's New Deal, much of the regulatory action was at the state level. States such as Wisconsin and New York were in the progressive vanguard. Indeed, the "Wisconsin Idea" under Governor "Fighting Bob" La Follette, using academic experts from the University of Wisconsin to draft legislation and administer new regulatory agencies, became a model for other states to follow.

While the federal government was for the most part not establishing major regulatory agencies during this time, it was legislating. The Elkins Act (1903) prohibited railroad rebates to favored shippers while the Hepburn Act (1906) gave the ICC real rate-setting authority and expanded its jurisdiction to pipelines and sleeping cars. The Mann-Elkins Act (1910) extended International Criminal Court (ICC) jurisdiction to telephone and telegraph companies. The Sherman Act (1890), the Clayton Act (1914), and the establishment of the Federal Trade Commission Act (1914) sought to address unfair competition and monopoly. The Pure Food and Drug Act (1906) prohibited the adulteration and mislabeling of food and drugs in interstate commerce. The Federal Reserve Act (1913) created the Federal Reserve System with 12 regional banks and a Board of Governors, establishing the first central bank since President Andrew Jackson killed the Second Bank in 1836. A variety of labor laws were passed from 1898 to 1916.

The pattern of what political scientist Stephen Skowronek calls "patchwork" is state building: each statute addresses a specific visible failure (railroad rebates, meat contamination, bank panics, child labor) without constituting a coherent administrative system.[8] By 1920, the federal government had accumulated significant regulatory authority in many domains, albeit through separate statutory regimes, separate agencies with separate mandates, no unified administrative law framework (that came later with the Administrative Procedure Act in 1946), and a constitutional jurisprudence still hostile to broad federal economic intervention.

The New Deal's task was not to invent federal regulation but to rationalize and vastly expand it—and in so doing, create the administrative, regulatory state that exists today. That system was perfected by President Franklin D. Roosevelt and maintained by Presidents Truman and Eisenhower, even though the latter was a Republican who faced a mostly Democratic Congress.

Regulatory State Peak Development: 1961–Mid-1970s

With the election of President John F. Kennedy and then the administration of President Lyndon B. Johnson, the regulatory state that exists today was built. Overall, this paradigm is best understood as the institutionalization of the market failure model. Its intellectual core is the

proposition that unregulated markets systematically fail—in the provision of public goods, in the presence of externalities, in conditions of monopoly or oligopoly, in the face of information asymmetries—and that an expert administrative state can identify these failures and correct them. The paradigm's institutional form follows logically from this theory: If market failures are varied and technical, then government needs specialized expert agencies with broad mandated authority.

Two challenges drove the emergence of the regulatory state: societal concerns, especially about race and poverty, and environmental concerns. Johnson's Great Society programs, including the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC), were based on a theory of intervention of rights-based equity. And the period of 1969–1977 amounted to a transformation in environmental regulations with the passage of the National Environmental Policy Act (NEPA) (1969), the Clean Air Act (1970) and its 1977 amendments, the Clean Water Act (1972), the Endangered Species Act (1973), and the Resource Conservation and Recovery Act (RCRA) (1976). These regulatory statutes were all passed at a time of U.S. dominance in international competitiveness—when policymakers simply did not consider the need to ensure that regulation would not impose harm on U.S. traded industries—and they have been built upon and expanded over the years.

The Regulatory State in Tension: Late 1970s–Present

By the mid-1970s, the regulatory state's problems had begun to emerge (or, as some would argue, had become more noticeable). The stagflation of the early and mid-1970s called the system into question, as did the emergence for the first time of serious international economic competition. By 1990, the U.S. international competitiveness position had weakened, especially in the face of the challenges from countries such as Germany and Japan. This, on top of the rise of a more antiregulatory Republican movement throughout the 1980s, muted the ability of the environmental lobby to make as rapid gains as they had before, but still they succeeded in passing significant new legislation and building on existing laws, including through the Clean Air Act amendments of 1990, the Hazardous and Solid Waste Amendments (HSWA) of 1984, the Superfund Amendments and Reauthorization Act (SARA) in 1986, and Clean Water Act amendments in the 1987 Water Quality Act, and the Energy Policy Act of 1992. But much of their progress came from using the courts to stop or limit projects.

The visible failures of regulatory capture created political traction in the 1970s and early 80s for the Chicago School's critique of microeconomic regulation—namely, its argument that regulating prices, market entry, and output usually harms consumers instead of helping them. On top of that, the rise of neoclassical economics and its greater insights into the actual workings of markets in the same period called into question many regulatory assumptions, particularly in the area of economic regulation.

The first phase began in the Carter administration, led by economist Alfred Kahn, with its deregulation of airlines, freight rail, trucking, gas pipelines, areas of financial services, and communications. Carter also put in place an executive order to implement cost-benefit analysis. In 1980, Congress passed the Paperwork Reduction Act, which, among other things, created the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).[9]

These reform and rollback efforts were expanded on in the Reagan administration, which brought with it a deep commitment to rolling back the regulatory state. Reagan's contribution was to successfully shift the default assumption from market failure to government failure. This era was one that questioned the regulatory state, even if it did not dismantle it due to vested interests and, at least until 2000, a partially Democratically controlled federal government—and, of course, the 60-vote requirement in the Senate to break a filibuster made dismantling, much less seriously reforming, the regulatory state extremely difficult.

While the Clinton administration was generally skeptical of overregulation, the Democratic party began to more firmly resist what it termed "neo-liberalism," especially once Obama entered office. The result is that, today, most progressive Democrats want to radically expand the regulatory state, especially in areas of race, environmental regulation (particularly climate), antitrust, technology and privacy, financial services, and workers' rights. They see an even more active regulatory state as a key protection against the overreaches of neoliberalism and a necessary containment of runaway corporate power, but more fundamentally as achieving a more progressive, in fact, social democratic system. Indeed, they are largely unified on rebuilding and expanding "democratic state capacity," a codeword for an activist regulatory state to address a wide range of progressive goals: climate and environmental protections; suppression of conservative speech; income redistribution; reducing the size and market power of large companies; cheaper housing, education, and other goods; better access to low-cost financial services; and advancing civil rights and antidiscrimination protections.[10] For them, in an era of massive budget deficits, regulation has taken on the lion's share of the load of policy work.

The United States now has a deeply contested regulatory system. Both parties want to dramatically overhaul it, but one wants less regulation and the other wants more.

At the same time, many Republicans have become even more fervent advocates of radical deregulation. The Heritage Foundation's Project 2025 report called for eliminating at least some regulatory agencies, and shrinking most others.[11] The U.S. Department of Government Efficiency (DOGE) under Elon Musk was just one example of that slashing vision in action, and it was halted only due to mismanagement and resultant public opposition.

So, the United States now has a deeply contested regulatory system. Both parties want to dramatically overhaul it, but one wants less regulation and the other wants more. Moreover, with some exceptions, the courts have played a conservative role in preserving the current regulatory system, as has a vast network of well-funded liberal advocacy groups. And even with deep ideological divisions between the parties, the regulatory state had continued to incrementally grow, at least until the current Trump administration.[12]

The pattern has been deregulation through executive orders for four years when a Republican is in office, and reregulation through executive orders for the next four years when a Democrat is in office. On top of this, there are deep conflicts over regulatory federalism. On some issues, such as climate regulation, Democrats favor national laws; on others, such as Internet privacy, they favor state laws. Republicans largely favor the opposite.

Problems With the Contested Regulatory State

The whipsaw shifts back and forth are, to say the least, detrimental to national development. Moreover, by and large, the debates over the regulatory system are not informed or inspired by the need for national developmentalism or, more specifically, the techno-economic war against China. This is not informing the debate for most Republicans who see the issue as freedom and constraining an overweening regulatory state. Nor is it for Democrats who see the issue as equity and societal protection against a predatory capitalist system.

Moreover, even if it were uncontested, the current system still would be based on a number of assumptions that are no longer valid.

First is the assumption that the United States is not really in serious international competition and that, to the extent it is, regulations play a de minimis roll in that competition or are even helpful to winning that competition.[13] Neither is true.

The second is that corporations are suspect and that bad behavior, even if inadvertent, should be punished severely. Republicans might want to punish the bad actors with tort; the Democrats with the state. The societal costs of that in the form of reduced innovation and competitiveness are largely ignored.

The third dynamic is between corporations and consumers, or corporations and workers. The widespread assumption is that "what's good for GM is definitely bad for America," and workers and consumers. This leads to a bias in favor of regulation. But, in many cases, what might be good for workers is bad for both companies and consumers, such as when unions resist automation and prices go up. In other cases, what appears to be good for consumers is actually bad for consumers, companies, and society as a whole, as in the case of overly strict limitations on the use of data.[14] And of course, in this framing, rich corporate shareholders pay the price of regulation, not workers with lower wages, consumers with higher prices, or society as a whole.

The debates over the regulatory system are not informed or inspired by the need for national developmentalism or more specifically the current techno-economic war against China.

Fourth, there is an assumption among supporters of the regulatory state that the goals to be attained are absolutes, and to the extent they involve tradeoffs, regulatory results should trump costs. If 10 parts per million of a chemical in water is okay, then 5 ppm would be even better, even if removing those additional 5 ppm would be incredibly costly. But the reality is that most of what goes on in society involves trade-offs, many of which are painful. Society could significantly reduce traffic deaths, but the costs in terms of the price of automobiles would go up significantly. America could dramatically reduce its carbon emissions, but it would cost at least $100 billion a year for the next 25 years. That means $100 billion a year less on things such as education, health care, and social services.[15]

Fifth, there is an assumption that public goods are more important than private goods. If policymakers have to raise the price of products by 5 percent to get cleaner water, then it is clearly worth it because cleaner water is intrinsically more worthwhile than producing more consumer goods. In fact, there is an explicit assumption among most on the Left that consumerism is somehow morally suspect, especially in relation to collectively shared public

goods.[16] Related to this is the view that companies do not produce public goods, only private profit. When this is the view, regulation is not just without a cost, it is an outright moral and economic good. However, having a strong and competitive Boeing, Intel, Google, and Ford is a public good. So, regulations that inhibit their ability to innovate and compete in global markets do indeed come at a steep cost.

FROM THE REGULATORY STATE TO THE DEVELOPMENTAL STATE

Even with the sharp disagreements over the ideal nature of the U.S. regulatory state, there are areas of generalized consensus.

The first is that the government's role is primarily to set rules, ensure competition, and correct market failures, including from externalities. The regulatory state stays neutral on industrial outcomes. It is a state that is fundamentally a process-oriented, and it has been since the Founders established a government focused on upholding individual freedom and property rights. When it comes to regulation, the system is based on a set of legally binding processes which everyone, including government, must follow. There is little or no room for governmental discretion or picking winners that are all or in part exempt from some regulatory requirements. Republicans want less regulation, but they generally are suspect of state discretion, seeing at as the door to crony capitalism. Liberals want more regulation, and also are suspect of state discretion because they worry that a Republican administration will dismantle regulation.

This is very different than a national development state that actively steers economic development, picks strategic sectors, and uses state capacity to accelerate industrialization and competitive advantage. In national developmentalism, regulations are not procedural straightjackets. Achieving key national goals can take precedence over achieving process integrity. Developmentalist states address these issues differently. The state selects key industries and projects as strategically important and is able to impose regulatory flexibility.

Second, there is consensus in the United States that the process should be adversarial and legalistic. For the Left, government getting too close to regulated companies creates regulatory capture. For the Right, it leads to crony capitalism. It is better to have the parties engage in adversarial, arms-length relations, and be guided by formal law and processes such as the Administrative Procedure Act. Out of that supposedly comes the best outcome, or at least the outcome each side intends.

A regulatory system that does not prioritize national power cannot win in a world in which another power is intently striving for global hegemony. A process-oriented system is ultimately too utopian. It would only work if the United States were completely autarkic—cut off from the rest of the world.

Third, there is consensus on universal application. Rules apply the same way to a highway as to a semiconductor fab as to a solar farm. The state takes no view on whether the project is strategically desirable and deserves different regulatory treatment. In contrast, many other nations differentiate depending on how critical a project is to the nation. In Taiwan, for example, semiconductor fabs enjoy streamlined review and dedicated industrial zones with precleared environmental status, effectively building the regulatory accommodation into the zoning system

rather than project-by-project litigation. Taiwan does this because it sees its semiconductor industry as key to national competitiveness.

Fourth, the legalistic regulatory system allows antidevelopment advocates to manipulate the system to prevent development. For example, NEPA's biggest practical impact isn't the environmental impact statement itself—although that can and often is quite burdensome—it's that it creates a procedural handle for litigation that can delay projects for years regardless of actual environmental merit. Opposition groups, which are much more powerful and organized than they were 25 years ago, use environmental law to stop projects they oppose for unrelated reasons (NIMBYism, economic competition, ideological opposition to fossil fuels or nuclear power, socialism, antigrowth, etc.).

In contrast, developmentalist states limit standing so that those empowered to erect roadblocks are limited. They also require courts to defer to agency judgment, set hard timelines on legal challenges, or simply designate projects as beyond judicial review. As in other policy areas, the goal is not procedural integrity; it is results that benefit the nation.

A regulatory system that does not prioritize national power cannot win in a world in which another power is intently striving for global hegemony. A process-oriented system is ultimately too utopian. It would only work if the United States were completely autarkic—cut off from the rest of the world—because while the regulatory morass would raise costs, it wouldn't lead to techno-economic dependency on adversaries.

America's the deep resistance to developmentalism means that it is not likely to transform into an East-Asian-style development state. But that does not mean that there are not important changes that can be made to the U.S. regulatory system. The following section lists several key changes.

A New Federal-State Division of Labor: Preemption

Too much of what should be regulated by the federal government is currently regulated at the state and local levels, and too much of what is currently regulated at the national level should be regulated at the state and local levels. It is time for a new bargain over federalism and what states and local governments should regulate versus what the federal government should regulate. The division of labor when it comes to regulation today is a hodgepodge that depends more on where the two political parties hold power than on a logical framework for what belongs at the local level and what belongs at the national level.

It is time for a new bargain over federalism and what states and local governments should regulate versus what the federal government should regulate.

Under the simplest and most logical framework, **issues that are inherently national in scope—particularly issues with implications for innovation, productivity, and national power competitiveness—should be regulated at the national level.** And in some cases, those issues might need little or no regulation.

With the rise of a more integrated national economy that is enabled by information technology and the Internet, many issues that in the past were regulated at the local or state level now need to be regulated at the national level.[17] Before the rise of cross-border e-commerce, many

economic regulatory frameworks for industries could be handled at the state level with little national disruption. But as more and more industries that were once local are now national, state-by-state regulations raise compliance costs, reduce entry, and protect brick-and-motor incumbents. Indeed, regulatory capture at the state and local levels limits the ability of more innovative disruptive entrants.

To address this problem, Congress will need to preempt many areas now addressed either principally or secondarily by the states. Some Republicans will reflexively respond that doing so violates federalism and states rights. But the Commerce Clause of the Constitution should make it clear that the Founders intended inherently interstate issues to be addressed by the national government. Federal preemption isn't new or exotic. Congress does this all the time for things that obviously require national consistency: airline safety, food labeling, aviation rules, interstate trucking, and more. The public doesn't want planes to be regulated differently depending on which state they happen to fly over, nor would it want AI rules to swing wildly at every state border. That's not federal overreach—it's common sense.

In the old economy when the U.S. exerted dominance in national economic power industries, it didn't matter much if certain states put in place regulations that hurt the overall industry competitiveness, or created special regulations that required producers to balkanize production and make multiple versions of the same product or service.

That matters now. The United States is just too weak to afford the corrosive effects of state regulatory impositions that harm national power industry competitiveness. Case in point is the various state government regulations on automobiles. Similarly, the California Law Revision Commission ("Commission") has proposed changing its antitrust law related to single-firm conduct as well as new legislation that would effectively ban large technology companies from engaging in commonly procompetitive conduct such as self-preferencing, and the effect would be to limit needed innovation.[18] Other states have copied the EU's abuse of dominance rules.

Letting 50 states write 50 conflicting rulebooks doesn't protect Americans—it fragments markets, crushes innovation, and hands global leadership to China.

Some states, such as California, require companies to report climate emissions, even if most of the emissions are outside the state. Various state data privacy laws, such as Illinois's biometric law, as well as a proposed slew of AI laws will not only limit innovation and U.S. competitiveness, but also create a patchwork of different, and potentially conflicting, rules U.S. firms must deal with. Many states enact laws restricting e-commerce sales that favor local producers over national.

The key in all these areas is preemption, including prohibiting states from enacting stronger laws. Federal preemption forces everyone to come to the table and have a real debate. Let's be honest: the groups aggressively pushing state bills aren't doing it because they think "states know best"—they're forum-shopping for the friendliest legislature to pass the most extreme version of their agenda. Preemption puts an end to that workaround by moving the discussion to the national stage, where it belongs. Without preemption, there's zero incentive to negotiate a reasonable compromise in Congress, because advocates can always skip the hard work and run to whichever state already agrees with them.

The bottom line is that letting 50 states write 50 conflicting rulebooks doesn't protect Americans—it fragments markets, crushes innovation, and hands global leadership to China, which regulates the technology, but doesn't tie its own industry in knots with conflicting sets of rules.

Internet, E-commerce, and AI Regulatory Preemption

Congress should start by preempting the growing patchwork of state AI, privacy, and children's online safety legislation, which already pose significant threats to American competitiveness by imposing complex and conflicting rules on businesses, diverting resources away from innovation and toward compliance. While these three issues represent the largest threat to American innovation, there are a host of other Internet governance issues Congress should also act on to establish a consistent national approach, including digital taxes, right to repair, data breach notification, right of publicity, e-commerce, digital identification, content moderation, and net neutrality.[19]

First and most urgently, **Congress should pass comprehensive data privacy legislation that preempts state privacy and data breach notification laws,** including both comprehensive state privacy laws and sectoral privacy laws that target biometric data, such as Illinois's Biometric Information Privacy Act (BIPA), or data collection and use for AI. In the absence of a federal privacy law, state privacy laws could impose out-of-state costs of between $98 billion and $112 billion annually. Over a 10-year period, these costs would exceed $1 trillion.[20]

BIPA is a particularly egregious example. The law regulates the collection of biometric data by companies operating in Illinois or whose products reach consumers in Illinois, and includes a private right of action that allows both consumer class action lawsuits and employer lawsuits. Although BIPA passed into law in 2008, the number of lawsuits exploded after courts ruled in 2019 that plaintiffs are not required to show harm.[21] Between 2008 and 2018, there were 163 BIPA class action lawsuits, while in 2019 alone, there were over 300, and recent BIPA lawsuits have included several high-profile cases with individual settlements reaching up to $650 million.[22] This has led companies to pull out of Illinois or limit the technology available to Illinois consumers.[23]

Congress should impose a five-year moratorium on state AI and children's online safety laws as it works toward passing a national AI framework and children's online safety legislation that addresses online harms to children. It should establish a federal right of publicity that gives individuals the right to control the commercial use of their identity while allowing fair use.

Lawmakers should pass net neutrality legislation that does not regulate broadband Internet as a telecommunications common carrier under Title II of the Communications Act and instead codifies widely agreed-upon Internet protections and gives the Federal Communications Commission (FCC) reasonable jurisdiction to enforce open Internet rules.[24]

Congress also should pass the Improving Digital Identity Act to create a framework for deploying a digital ID system at the federal, state, and local levels.[25]

At the same time, Congress should ensure that industries that are now national—if not global—because of e-commerce have regulatory frameworks at the national level that enable them to easily do business in all 50 states. Case in point: Over 25 years, state governments have erected

protectionist laws on behalf of optometrists to limit the ability of contact lens consumers to buy their lenses online or at retail stores such as Walmart even if they have a prescription. States are able to do this because of the significant political power of the optometry lobby in their states. Congress took the right action in passing the Prescriptions Lens Contact Release Act of 2002. As the Information Technology and Innovation Foundation (ITIF) has written, states have continued to try to undermine this legislation and harm consumer rights in the intervening years.[26] The Federal Trade Commission (FTC) has generally been working on the side of consumers. Absent federal preemption to protect consumer rights, these sorts of industry rent-seeking efforts will continue and grow. As such, **the House and Senate Commerce Committees should be constantly on the alert for these kinds of rent-seeking protectionist actions at the state level,** whether they come from car dealers, real estate agents, liquor wholesalers, banks, taxi industries, etc. E-commerce companies need the ability to operate under one set of rules that enable them to compete fairly and not be harmed by incumbent protectionism.

More specifically, **Congress should update the Permanent Internet Tax Freedom Act** to ban both taxes on wireless services and discriminatory taxes on digital goods and services that do not have a physical component. It should **pass legislation instructing the Alcohol and Tobacco Products Tax and Trade Bureau, FTC, and Food and Drug Administration to establish uniform regulations for age-restricted or medical products purchased online,** which should include streamlined rules for shipping alcoholic beverages directly to consumers, a federal requirement for eye doctors to include patients' pupillary distance on prescriptions, and a federal requirement for veterinarians to provide prescriptions upon request without extra fees. It should **update the Uniform Electronic Transactions Act and Electronic Signatures in Global and National Commerce Act** to require states to recognize the legality and enforceability of records, signatures, and contracts secured over a blockchain. Finally, it should **preempt state right-to-repair laws with a consistent right-to-repair standard for electronics at the federal level.**

Industry Product Regulation Preemption

Congress needs to make sure that states repeal industry-specific regulations that balkanize national markets. A key factor in winning the competition with China is to ensure that U.S. producers do not face excess costs, particularly from having to produce multiple different kinds of products for different states to respond to different state regulatory regimes. The best example of this is the California rules on auto emissions that essentially balkanized the national industry and force automakers to produce two kinds of cards. Congress actually allowed that when it passed the Clean Air Act. In a hypercompetitive global economy, there is simply no justification for allowing states to regulate industries and products that are already regulated nationally. Congress should immediately step in and force California to repeal its separate laws regulating automobile emissions. And it should do the same for other industries that states have balkanized with patchwork regulations.

For example, California has adopted its own efficiency standards under Section 177 of the Clean Air Act Section 177 (and other states have followed suit) to regulate appliances such as refrigerators, washing machines, water heaters, pool pumps, and even ceiling fans. As a result, manufacturers often end up with both California-compliant and non-California-compliant product lines, which increases production costs.

In addition, the Environmental Protection Agency (EPA) allows states to mandate unique fuel blends for air quality, resulting in roughly 18 distinct gasoline "boutique fuel" blends across the country. This fragments refinery logistics, prevents fuel from being shipped across state lines during shortages (e.g., after hurricanes), and inflates regional price spikes.

Building codes are another example. California's Title 24 building energy code is substantially more stringent than the International Energy Conservation Code used elsewhere. Manufacturers of windows, insulation, HVAC systems, and lighting increasingly produce California-specific product lines. This has ripple effects on supply chains nationally, which is increasingly important if the goal is to dramatically increase construction productivity through automation and new technology. Companies that want to deploy 3D printing construction processes should only have to face one national building code—same with companies producing manufactured housing.

Congress needs to make sure that states repeal industry-specific regulations that balkanize national markets.

Another area is in financial services products. New York effectively regulates insurance and financial products for the national market in ways analogous to California's auto role. The state's Department of Financial Services imposes requirements on life insurance reserve standards, cybersecurity rules (the NYDFS Cybersecurity Regulation), and cryptocurrency licensing (BitLicense) that either force companies to maintain separate New York-compliant products or exit the market. Many insurers write separate New York policy forms.

New York and California have both passed their own net neutrality laws following the FCC's 2017 federal rollback. California's SB 822 is the most comprehensive. Broadband providers operating nationally have to either comply with the most stringent state standard or geofence their network management practices by state—neither is technically straightforward. Similar fragmentation exists around robocall rules and data retention requirements for telecoms.

California's Prop 65 effectively imposes national labeling and formulation decisions because manufacturers rarely want to maintain two chemical formulations. The result is that California's toxics list drives reformulation decisions for products sold nationwide—everything from furniture foam to food packaging to personal care products. This is a case wherein California exports its regulation nationally rather than creating a two-market split, because reformulation is cheaper than bifurcation.

Several states (including California and Colorado) have passed drug pricing transparency or importation laws. If these develop further, they could force pharmaceutical companies into state-specific pricing or distribution arrangements. In addition, each state has both its own generic substitution rules governing when pharmacists can substitute generics for brand-name prescriptions and crucially, different rules around substituting biosimilars for biologics. This creates state-specific pharmacy compliance burdens and can affect which biosimilars manufacturers bother seeking state formulary inclusion for.

California requires that all eggs sold in California come from hens in cage-free or enriched housing—including eggs produced out of state. The Supreme Court upheld this in *National Pork Producers Council v. Ross* (2023), validating California's ability to impose production standards

on out-of-state producers as a condition of market access. This has profound implications and opens the door to more extraterritorial regulation.

Colorado passed a right-to-repair law for agricultural equipment; California passed a broader electronics repair law. Minnesota passed one covering virtually all product categories. Manufacturers that design products with repair restrictions now face a growing set of state-specific obligations around parts availability, diagnostic tools, and documentation—though most are responding by adjusting nationally rather than maintaining state variants.

Congress needs to stop this industry product/services regulatory balkanization. **States that choose to impose their own product and service standards above federal standards should receive fewer federal funds.**

National Infrastructure

At the same time, **Congress needs to ensure that key interstate infrastructure is truly interested in nature and not allow states to restrict that.** Case in point would be penalizing states that ban or significantly limit the development of AI data centers. These centers are a national resource that provide benefits to the entire nation. And individual states should not be in a position, from NIMBY ("not in my backyard") protectionism or anticorporate animus to stop, slow, or limit their development. Another example would be the electric grid. While it is an extremely complex policy area, there clearly needs to be more national control and influence over the grid. As it stands now, states have limited incentives to ensure the country has a truly effective national grid.

Simplifying Antitrust

As a policy matter, extensive state and federal antitrust legislation is a clear redundancy within the American system that poses the risks of creating both substantial overdeterrence and legal costs for businesses. The traditional rationale for having both state and federal enforcement systems was that state antitrust laws were to deal with intrastate commerce, whereas the federal antitrust laws were to deal with interstate commerce. However, with the expansion of the scope of the interstate commerce clause and greater integration of the American economy over the 20th century, separate state antitrust regimes clearly provide little benefits in terms of policing anticompetitive conduct.[27]

To be sure, the right of states to have and enforce their own antitrust regimes is longstanding and unlikely to change. Moreover, the Supreme Court has upheld the right of states to enforce their antitrust laws in ways that go beyond federal law.[28] That being said, there is an option that should be considered to rein in state antitrust enforcers and ensure consistency within America's antitrust regime as a whole: Express preemption by Congress. **Specifically, Congress should pass a law making clear that federal antitrust laws set the outer bounds of liability for state antitrust laws.** Doing so both preserves the rights of states to enforce their antitrust laws and mitigates the problem of overdeterrence and increasingly overly aggressive actions by states—both of which can chill procompetitive behavior and innovation.

Simplification of the American antitrust regime should not ignore redundancies at the federal level. That is, in addition to an overlapping web of state enforcement regimes, the United States is also unique in having two federal antitrust agencies, the FTC and the U.S. Department of Justice's (DOJ's) Antitrust Division, which have substantial overlaps and inefficiencies when it comes to antitrust enforcement. This is especially true in the area of merger enforcement, with

deals assigned to the FTC in theory facing more hurdles given the lower burdens the FTC faces in getting a preliminary injunction in federal court, as well as its ability to challenge a transaction in its internal administrative litigation—and unilateral conduct cases—where the FTC conceptually has broad authority under Section 5 to challenge if not regulate behavior that is lawful under the Sherman Act.

For decades, the bipartisan consumer welfare approach helped create a status quo wherein these differences were without much of a difference practically speaking. For example, the FTC did not challenge mergers in its own administrative process when it was denied a preliminary injunction in federal court (known informally as the "Pitofsky Rule"). Moreover, the FTC not only ceased to issue competition rulemakings under Section 5, but also took a narrow view of the statute's "standalone authority" (i.e., condemning behavior that is not unlawful under the Sherman Act) that was largely limited to invitations to collude and other unilateral collusive conduct, with courts also often placing a high bar for the FTC to prevail on these claims.[29]

However, with the return of antitrust populism—and in particular the neo-Brandeisian movement's takeover of the Biden administration—it became clear just how easily the FTC could run off the rails. In the merger space, Chair Khan challenged two major innovation-industry mergers that faced scrutiny in other jurisdictions solely using the FTC's administrative litigation.[30] And, with respect to its unfair methods of competition authority, the Biden FTC issued a new policy statement claiming broad authority to police behavior not unlawful under the Sherman Act, as well as issued a competition rulemaking banning approximately 30 million noncompete agreements (subsequently blocked by the courts and abandoned by the new Trump administration), which often have legitimate procompetitive purposes.[31]

To prevent a repeat of these abuses by the FTC in a future administration, **Congress can and should take several important steps. One simple action, in the area of mergers, is to pass the SMARTER Act,** which would require the FTC to litigate merger cases in federal court, rather than its own administrative process, as well as satisfy the same preliminary injunction standards as DOJ.[32] Another option, especially given the potential damage the FTC can do in non-merger cases using its unfair methods of competition authority, is for Congress to **pass the One Agency Act and merge all antitrust enforcement into DOJ.**[33] Doing so effectively eliminates the FTC's unfair methods of competition authority, and thus here again both ensures that the Sherman Act sets the bounds of antitrust liability and relegates the agency to solely consumer protection matters.

Opposition to Federal Preemption

The challenge is that both the Left and the Right are biased in favor of federalism. The Left used to favor national preemption as a general matter, in part to address racial segregation in the South and then later to enable national environmental laws. But as Washington has become more gridlocked and more states are becoming deep "blue," progressives increasingly see the states as the best vehicle for achieving their goals, with the hope that if large states such as California pass a stringent rule, it will become the de facto rule companies follow nationally. Likewise, conservatives, long suspicious of an overreaching federal leviathan, have looked to the states, often "red" ones, as the last bastion of freedom and liberty. After all, people can always move to Texas or Florida to get small government.

At one level, such geographic diversity is a good thing. Some people like larger government and are happy to pay higher taxes for more services, such as smaller class size, cheaper college

tuition, more state parks, better health care services, etc. Others prefer the opposite. And for at least two decades, people have been voting with their feet.

But when it comes to state actions that affect the entire nation, and in this case the vitality of the nation's economic power industries, state regulatory impacts are not confined to state borders. It is time for Congress to step in, either by passing bans or temporary moratoriums on certain regulations, or, in cases where that is not possible, by tying federal aid to certain actions.

To be clear, congressional action on issues related to national economic power industries would not prevent states from regulating issues that don't pertain to interstate commerce. As an example, if a state wanted to ban the use of cameras on school buses, it could. What it could not do is ban the sale of school buses in the state with cameras installed on them, as doing so would create a balkanized national market. This is an important distinction for AI, as there is a difference between regulating AI models and developers and passing laws governing the use of AI in public schools or by local law enforcement. The former should be done through federal legislation to create a consistent national framework, whereas in the latter, states can determine frameworks on their own with little spillover effect on other states.

There will be considerable pushback against this framework for national versus state authority. Some will argue it will lead to weaker standards, especially compared to what more interventionist states would do. Maybe the federal standard ends up stronger, maybe not—but federal policymaking incorporates views on national security, economic competitiveness, and international leadership. States do not. A rule that seems "tough" from one state's perspective may be disastrous for national competitiveness or for U.S. leadership relative to China. Congress has to balance these tradeoffs. States don't.

Others will argue that this framework will limit needed regulatory innovations, or undermine laboratories of democracy. But while "laboratories of democracy" are great for policy experiments in schools, housing, transportation, or public health, they are counterproductive when the "experiment" is forcing every nationally distributed AI model to comply with 50 conflicting design rules. States should not experiment with policies that put the rest of the country at risk, such as dictating rules that undermine the development and use of AI in other states.

And, of course, states will complain accurately that their authorities are being stripped. The Constitution gives Congress the power to regulate interstate commerce—and delivering AI services on the Internet is a clear example of such activity, bringing it squarely within Congress's authority to regulate. Preemption isn't a federal takeover of city hall; it's Congress doing the job the Commerce Clause explicitly assigns it. Federal preemption is neither antidemocratic nor anticonsumer. It's just the common-sense way to regulate activities that span state lines.

A New Federal-State Division of Labor: Devolution

In contrast, many other regulatory matters in which the impacts are mostly local and regional should be devolved to lower levels of government, in part to enable laboratories of democracy, but also to reflect the increasingly divergent political ideologies and goals of different parts of the country. In this environment with much less unanimity and consensus, fighting over many issues at the national level becomes untenable, and it's better to just enable states through the democratic process to decide these issues themselves, even if doing so leads to a national

regulatory patchwork. As long as the patchwork effects are localized, the impact on national power industry competitiveness should be minimal.

Consider the National Environmental Protection Act (NEPA). The evidence of its negative impacts on economic development are overwhelming—from massive delays breaking ground on new projects to incredibly expensive and detailed environmental impact statement (EIS) requirements and overly long reporting requirements.[34] In fact, the White House Council of Environmental Quality found that in 2020, the average length of a final EIS was 661 pages, with the appendix coming in at another 1,042 pages.[35]

For example, a currently pending EIS for a project to widen an eight-mile highway entirely inside the borders of Pennsylvania required an EIS that was more than 7,000 pages long with 47 appendixes![36] In another example, the Air Force wants to build up to seven telescopes that would be enclosed in domes on less than an acre of land that was previously disturbed. And yet it had to file a 516-page EIS.[37] Even worse, for Micron to build a CHIPS-Act-funded semiconductor fab in the Syracuse area, it first had to file an over 27,000-page EIS on land that has been farmed for centuries.

And in most cases, the impacts of development projects do not cross state lines—and where they do, the states involved can regulate the projects themselves. Indeed, NEPA review delays are primarily a problem for state and local infrastructure (highways, transit, water systems, ports) where the federal nexus is often just a funding hook or a minor permit—or in the case of the CHIPS Act projects, a federal grant.

For Micron to build a CHIPS-Act-funded semiconductor fab in the Syracuse area, it first had to file an over 27,000-page EIS on land that has been farmed for centuries.

States have incentive to internalize environmental costs since they receive the project benefits and bear the local impacts. Federal review adds process without adding much substantive environmental protection, particularly since NEPA doesn't actually require the environmentally superior outcome—just documentation. In addition, several states, such as California, Washington, and New York, have their own NEPA-equivalent statutes (the California Environmental Quality Act [CEQA], State Environmental Policy Act [SEPA], and State Environmental Quality Review Act [SEQRA], respectively) that are often more stringent than federal review. The duplication is pure waste. As such, the federal government should repeal NEPA, except perhaps for projects on federally owned lands.

Another area for devolution is wetlands permitting (Section 404 of the Clean Water Act). The *Sackett v. EPA* (2023) decision already moved in this direction by narrowing "waters of the US," but the broader 404 permitting program remains a federal function for what are often purely intrastate wetlands with no meaningful interstate nexus. States already run their own wetlands programs; federal duplication adds years to permit processes. The Section 404(g) Tribal and State Assumption Program allows states to take over permitting, but only two states have done so (Michigan and New Jersey), largely because EPA makes the assumption process so procedurally onerous it isn't worth it. Again, **Congress should repeal Section 404.**

Another area for devolution is non-interstate surface transportation. The Interstate Highway System has an obvious federal rationale. But local transit, bike infrastructure, and non-interstate road and bridge construction funded through federal-aid highway programs comes with an enormous compliance apparatus—Buy America, Davis-Bacon, Americans with Disabilities Act (ADA) design standards, Title VI, environmental review. In Switzerland and Germany, there are better outcomes. There, the federal government sets standards for intercity and interstate infrastructure, but local governments finance and design local networks. The United States should adopt a similar model: **Congress should allocate approximately 80 percent of Highway Trust Fund revenues to states as formula grants based on states' contributions, with no strings attached. The remaining 20 percent should be for interstate projects of national significance.**

The federal government should repeal NEPA. except perhaps for projects on federally owned lands.

Adopt Regulatory Carveouts for Key National Power Industries and Projects

As discussed, the U.S. regulatory system is processed-based, not goal-oriented. A key assumption in the current system is that regulating water quality from a dry cleaner is no different than from a semiconductor plant. This would be true if America weren't in strategic power industry competition with an adversary. But alas, it is. So, government needs to adopt a regulatory system that allows projects of national importance to have regulatory streamlining and reduction. This can be done through congressional authorization for a system in which the administration identifies key projects. (See box 1.) In addition, Congress should establish federally designated industrial readiness zones that are largely exempt from federal and state regulations. (See box 2.)

Box 1: Clean Air Act NOX Regulations as Anti-Developmentalist

As enacted and implemented, the U.S. Clean Air Act harms U.S. national economic power industry revitalization.

The 1970 Clean Air Act Amendments directed EPA to set National Ambient Air Quality Standards for several "criteria" air pollutants. EPA operates air quality monitors in many U.S. counties. If readings from a monitor violate these standards, the county is declared to be in "nonattainment," and polluting firms face stricter regulation. Most major U.S. metropolitan areas are now nonattainment areas.

Companies that seek to build factories in nonattainment areas must offset their emissions by buying offset credits from other area polluters in the same or neighboring counties that have reduced their relevant emissions below their regulatory limits. And each new ton of emissions must be offset by more than a ton.

A case in point is TSMC building six major fabs in the Phoenix metropolitan area. These fabs are critical to U.S. techno-economic security, especially given the near-term vulnerability of Taiwan to People's Republic of China (PRC) invasion. Yet, the lack of credits is holding up bringing fabs 3 through 6 online. TSMC was able to obtain permission to "build the box" of the fab before getting the offset credits, but it cannot install machines without the credits, even if those credits would be insufficient to "turn the factory on." Perversely, deindustrialization in Phoenix would create more credits for firms such as TSMC to buy.

The problem is that these emission credits can be expensive and, more importantly, very hard to obtain, with significant time delays. Indeed, NOx (nitrogen oxides) credit markets in many regions are extremely thin. There simply aren't enough legacy polluters shutting down to generate sufficient credits for a large new fab, which can require thousands of tons of NOx offsets. Intel's Ohio fab, TSMC's Arizona fab, and Samsung's Texas facility have all run into this. The United States is in a position where a new industrial birth depends on an offsetting industrial death.

Because the market for offsets is thin, prices are highly volatile and subject to speculation and hoarding, including for competitive purposes (to prevent competitors from opening new fabs). As one recent academic study using Census Bureau data finds, "Dispersion of offset prices within a market year, and the prevalence of brokers and comments from market participants, suggest the presence of search frictions. Offset prices are rapidly rising in real terms."[38]

Offsets must generally come from the same nonattainment area (or in some cases, the same airshed). This means a company can't use a credit from a plant that shut down in St. Louis to offset a fab in Phoenix. The geographic constraint further constricts the supply, even if nationally there might be ample reductions occurring.

Securing offsets can take years. A firm has to identify local sellers, negotiate, get state certification, and survive legal challenges. For projects such as CHIPS Act fabs where the whole point is speed—to reshore capacity before geopolitical risk materializes—this is particularly damaging. The permitting timeline for air quality alone can rival the construction timeline.

The offset requirement was designed for routine industrial growth in a world of many mid-sized polluters. It was never designed for a situation in which national security considerations require building large investments.

Moreover, the impacts may be quite small compared with the overall delay costs. For example, a chip fab in Arizona emitting NOx is, at the margin, a rounding error in the region's ozone nonattainment picture. Maricopa County's baseline Nox is in the range of 75,000–90,000 tons/year. For the eventual six-fab TSMC complex, there will be an estimated 400–700 tons/year. In other words, they represent a roughly 0.5–0.8 percent increase in county NOx emissions.

None of this would be a problem if the offsets were easy and quick to obtain, but they are not. On top of this, the law is biased against large point-source polluters. If ozone is a real problem in the Phoenix area, why doesn't EPA impose a population cap on the region? Or ban the sales of internal combustion engine vehicles? Because that would generate major backlash among voters, whereas imposing significant restrictions on national power industry firms raises hardly a peep.

The result is a situation wherein the U.S. government is spending $50+ billion to incentivize semiconductor reshoring while a 1970s-era air permitting regime—designed for a completely different industrial and geopolitical context—delays the very projects that that money is meant to catalyze.

There are several solutions to this problem. One is to make the program more flexible. This could include reducing the offset ratios to 1:1; allowing the creation of a national permit market, and allowing cross-pollutant trading (e.g., volatile organic compound [VOC] reductions substituting for NOx in certain circumstances).

In addition, firms should be able to create offsets from other sources. For example, all highway vehicles in the United States combined emit about 1.7 million tons of NOx per year.[39] Electric vehicles (EVs) emit essentially zero tailpipe NOx. This means that offsetting the entire TSMC GIGAFAB complex requires converting about 10 percent of passenger vehicles to EVs. Given the

growth of EVs, the natural fleet turnover toward them will almost certainly offset the entire TSMC complex's NOx footprint within several years of normal market activity.

All these changes would help, but a more important solution would be to be exempt projects that meet a national security or critical supply chain threshold from these requirements. The facilities would still have to comply with Clean Air Act rules regarding installation of Best Available Control Technologies, but they wouldn't have to find offsets that raise costs and impose delays. Moreover, we have made great progress on NOx reduction. The decline in NOx emissions nationally was 3 percent from 2023 to 2024.[40] Assuming the same reduction took place in the Phoenix area, allowing these added emissions from the fabs would mean going back to levels three months earlier.

Many other nations already do this because they recognize the importance of building key strategic industries and facilities. France's *déclaration d'utilité publique* (public utility declaration) is instructive. A project designated as serving the public interest gets a streamlined legal status that significantly limits judicial challenges. The state makes an upfront political determination that the project should happen, then environmental review becomes a process of *how* to build it, not *whether* to build it. This is the inverse of the NEPA logic, wherein the review is supposed to be genuinely open to a "no-build" outcome.

America needs a regulatory system that allows projects of national importance to have regulatory streamlining and reduction.

Germany combines strong environmental standards (often stricter than those in the United States) with faster permitting for designated projects. The *Planfeststellungsverfahren* (plan approval procedure) consolidates all permits into a single proceeding with a defined timeline and limited grounds for appeal. Environmental protection is substantive, not just procedural—projects can be stopped for actual harm, not just inadequate paperwork—but the process is unified and time bounded.

The United Kingdom has established its Nationally Significant Infrastructure Projects initiative (NSIPs). Projects above defined thresholds (energy, transport, water, waste) are automatically classified as NSIPs and removed from the normal local planning system entirely. They are decided by the Planning Inspectorate under national policy statements that Parliament preapproves, so the policy debate happens democratically upfront, and individual projects are judged against already-settled policy. A defined examination period is a of maximum 6 months, followed by a recommendation within 3 months, and a decision within 3 months, roughly 12 months total from application to decision. Legal challenges are limited to a six-week window after the decision and only on points of law, not merits.

The Netherlands, one of the world's most densely regulated countries on environmental matters, has developed explicit fast-track mechanisms after a series of infrastructure crises. For major transport infrastructure, a single national route decision integrates all permits—environmental, spatial planning, water management—into one coordinated procedure with defined timelines. The national government overrides municipal and provincial objections for projects of national significance. Its Crisis & Recovery Act (2010), later made permanent as Environment and Planning Act 2024, created a list of designated national projects that get expedited treatment;

pilot projects allowed to deviate from existing environmental rules to test new approaches; and consolidated environmental permitting under a single "Environment Permit."

South Korea has established its Industrial Complex Designation. When the South Korean government designates land as a national industrial complex, it preclears environmental, agricultural land conversion, and spatial planning approvals in a single consolidated process upfront and streamlines individual factory/facility permits within the complex to administrative registration rather than full permitting. This allows the Ministry of Trade, Industry and Energy to override local government objections for nationally designated complexes. South Korea explicitly treats permitting speed as an economic competitiveness metric. The government publishes permitting timelines and has set statutory targets for reducing them. And agency heads can be sanctioned for delays on nationally designated projects.

Countries with fast permitting invariably have one agency that can bind others, convene interagency coordination, and be held responsible for timelines. Fragmented authority with independent veto powers produces delay regardless of procedural reforms.

For these nations, pre-resolution of policy questions is the single most powerful lever. When the question of whether a type of project is nationally desirable is settled in advance, individual project review collapses to how, not whether. In contrast, the U.S. system relitigates at every stage.

In addition, countries with fast permitting invariably have one agency that can bind others, convene interagency coordination, and be held responsible for timelines. Fragmented authority with independent veto powers produces delay regardless of procedural reforms.

These nations also limit litigation to points of law, not merits. Most countries allow judicial review of planning decisions, but confine it to whether an agency followed its legal mandate—not whether an agency reached the right substantive conclusion.

In addition, in some nations, administrators face penalties for delay. In the United States, administrators face penalties for not dotting all the "i's" and crossing all the "t's."

To fix this, **Congress should pass legislation providing the Department of Commerce with the authority to identify up to 100 projects a year as national economic power importance that qualify for streamlined regulatory approval, limited legal challenges, and reduced compliance burdens.**

Box 2: Establish Federally Designated Industrial Readiness Zones Largely Exempt From Federal and State Regulations

There are many regulatory challenges with building factories and related national economic power industry facilities in the United States (e.g., data centers), including speed and uncertainty.

To do this, **Congress should charge the Commerce Department with designating a set of preapproved very large industrial sites—say 50–100 nationally that are each at least 3,000 acres in size—where comprehensive environmental and permitting review has already been completed and utilities are guaranteed.**

DOC would establish a competition whereby states and localities could bid for designation. Initial planning grants would allow a certain number of applicants to conduct a one-time comprehensive EIS for the zone as a whole, covering air, water, soil, traffic, wetlands, etc. Once approved, individual projects within the zone would get a categorical exclusion or streamlined Tier 2 review capped at something like 60–90 days.

DOC could provide funding of up to half the costs of site development and permit approval, with the state and locality providing the other half.

Congress would need to legislatively establish that the zone-level EIS satisfies project-level review obligations, eliminating duplicative site-specific NEPA for conforming uses. In addition, the site owners would renegotiate emissions budgets for the zone; individual facilities would draw from the budget rather than triggering full PSD/NSR permitting (Prevention of Significant Deterioration under the EPA's New Source Review program). Areas should be able to receive certain emissions allocations. In addition, under Section 404 of the Clean Water Act, there would be precleared wetland impacts within zone boundaries via programmatic permit, and mitigation banking would be built in. Endangered Species Act provisions would not apply to the sites. To qualify, states would need to guarantee their own and local regulatory waivers. In addition, all other federal regulatory requirements, such as Davis-Bacon, would be waived.

Finally, Congress would need to exempt the zones from NEPA challenges and prohibit injunctive relief that halts construction. This would require strong standing limitations to prevent environmental groups from relitigating at the project stage what was already decided at the zoning stage.

Tilt Agency Regulation to Consider Automation, Productivity, and Competitiveness

Regulatory agencies see their principal job as reducing type 1 errors: concluding that a problem exists when it doesn't. If they underregulate and a problem occurs, they get significant blame. But if they overregulate and innovation, productivity, competitiveness, or all three are harmed, no one notices. The result is that regulators have a bias toward minimizing the impact of their actions on productivity, innovation, and competitiveness. A good example of this is with the Federal Railway Administration, which has resisted enabling one-person train operations out of concern for the risk of potential accidents, even though automated training technology has improved dramatically and would lower transportation costs.

There needs to be a process in regulatory guidance wherein an arm of government weighs in to defend innovation, productivity, and competitiveness. The U.S. government already has something similar with regard to the Small Business Administration's (SBA's) Office of Advocacy, which intervenes in agency regulatory proceedings to defend the interests of small business—even though, as discussed in the next section, there is really no need for lighter-touch regulation of small businesses just because they're small. By contrast, there is a need for regulators to at least be required to consider in a more structured and serious way the impacts of their actions on innovation, productivity, and competitiveness. So, Congress should direct the administration to create an entity in government that weighs in on regulatory decisions to defend the interests of national power industries (and by extension national interests overall)—and, more broadly, the interests of industries in which regulation can reduce innovation.

It's not entirely clear where this body should be housed. A forthcoming report will discuss the institutional frameworks needed to formulate and implement a national economic power industry strategy.

End Small Business Preferentialism

New manufacturing production technology, coupled with improvements in transportation and communications, enabled the rise of the mass production corporation in the late 1800s, and with it transformed the American economy into the world's richest and most powerful. But small business and its political allies fought a rear-guard action to roll back its competitors through the Sherman and Clayton antitrust statutes and measures such as the Robinson Patman Act, the latter of which was a clear instance of regulatory capture.[41]

But by the end of WWII, it was clear to most in Washington that these attacks were quixotic and could not hold back the tide of bigness. But for political reasons, Washington felt that it had to favor small business. As a result, the policy shifted from attacking the big opponents to favoring small companies. The establishment of SBA in 1953 was emblematic of this. SBA helps small businesses by providing discounted financing and by working to exempt them from rules and regulations applied to large businesses. The legislation creating SBA was based on the notion that America was the dominant economy in the world and that its large corporations, such as GM, GE, and U.S. Steel were invulnerable. And to "buy off" small business owners, Congress decided that in virtually all policy, from tax to regulation to government procurement, small businesses would be favored. America can no longer afford skew the playing field like this.

As such, it is time to consign that approach to the dustbin of history. Given the importance of large companies in the national economic power industry war with China, a small business policy fit for a national power industry strategy abandons all business preferences based on size. ITIF proposes that, instead, **policymakers should embrace firm size neutrality and abolish small business preferences, including government procurement preferences, regulatory exemptions, small business financing programs, and tax benefits that favor small firms.**[42]

Democrats like small business favoritism because it makes it easier to enact higher taxes and regulations on large business, as, in many cases, small businesses are exempt. Republicans like small business favoritism because at least someone is not subject to the heavy hand of government. But in a techno-economic war with China, wherein large American companies are at the front line, small business favoritism serves to weaken these companies.

Given the importance of large companies in the national economic power industry war with China, a small business policy fit for a national power industry strategy abandons all preferences based on size.

Make Antitrust Support Techno-Economic Power

At present, U.S. antitrust policy and doctrine almost completely ignores concerns of international competitiveness and power. If anything, due to a renewal of "big is bad" within U.S. antitrust policy during the Biden administration, the focus is to reduce the power of American firms competing in global markets. Indeed, the U.S. government has a long history of using antitrust to

go after strong U.S. firms, usually with deleterious results. Cases including Western Electric, RCA, AT&T, Xerox, IBM, Kodak, and most recently most U.S. "big tech" firms.[43]

For much of its history, U.S. antitrust laws were enforced with a concern to prevent large-scale industrial consolidation, which became extensive in the FDR administration in which antitrust was weaponized against bigness. However, the United States was becoming so dominant globally that most ignored competitiveness damage. And, at least until the mid-1970s, these latter interests were sometimes represented by other parts of government, which helped mitigate the damage. For example, from the 1930s to the 1970s, DOD and the Commerce Department successfully advised the White House to overrule DOJ and not break up AT&T.

To be sure, starting in the mid-1970s, the focus of antitrust became on consumer welfare and the "big is bad" approach to antitrust was abandoned, which helped facilitate the techno-economic dominance America was able to achieve in the following decades. However, there still was little to no focus on international industry competitiveness. Indeed, given the background of the consumer welfare standard in neo-classical economics, antitrust became, in some ways, less open to competitiveness given the focus on solely economic welfare.

As a result, a troubling reality has emerged. On the Right are conservatives and libertarians wedded to a strict consumer welfare approach who dismiss any competitiveness concerns as "noneconomic" or "political." On the Left are liberals and progressives who are not wedded to a consumer welfare approach but replace it with a politics of "big is bad" and hostility to large corporations, including leading tech firms, as evidenced by the decision in the Biden administration to block the acquisition of iRobot by Amazon, with the result of the former's bankruptcy and proposed sale to a Chinese company.[44]

Without question, the iRobot case is emblematic of everything that is wrong with U.S. antitrust doctrine and policy. CCP officials, by contrast, don't think this way. Rather than want to protect small firms in order to facilitate greater product market competition, they do not want excess competition, as it lowers margins and makes it harder for Chinese firms to dominate global markets.[45] To compete with China, what is needed, therefore, is an antitrust policy fit for an NPIS—which, among other things, would treat power industries differently than non-power industries and recognize the importance of scale and at least some market power.

The iRobot case is emblematic of everything that is wrong with U.S. antitrust doctrine and policy.

There are several strategies that an NPIS antitrust policy should adopt. The first, and most important, comes in the area of remedies. As distinct from the consumer welfare standard, DOJ consent decrees are reviewed under the Tunney Act using a public interest standard, which is arguably broad enough to include competitiveness concerns or, amidst other proposals to amend the Tunney Act by progressives, could be changed to be so.[46] For example, in a case involving a company in a national power industry in which a breakup or a behavioral remedy arguably would be equally effective options to solve competition concerns, national competitiveness considerations might counsel against a breakup being in the public interest to ensure that a leading player in the industry retains sufficient scale to compete globally. **Antitrust agencies should use the flexibility in the Tunney Act to consider the effects of their actions on U.S. industrial**

competitiveness. In addition, when considering divestiture remedies, agencies should assess the likelihood that splitting up firm would result in its divisions being purchased by PRC firms.

To be sure, concerns about competitiveness should not modify substantive antitrust standards—antitrust must remain focused on protecting competition, innovation, and consumers. However, in several respects, antitrust law can be far more flexible than it currently is in ensuring that enforcement does not come at the expense of competitiveness. As scholars have noted, agencies should be wary of using the hypothetical monopolist test (also called the SSNIP test), or other qualitative assessments, to define geographic markets too narrowly by excluding foreign competitors, because in many cases should be included in the market as rapid entrants at the very least.[47] For example, a merger between three of the four largest American firms in a national power industry may be seen as anticompetitive if the geographic market is national, but it is unlikely to result in competitive concerns if the market is expanded to include two or three rapidly growing Chinese firms that could soon offer alternative solutions.

Finally, **U.S. antitrust enforcers can and should factor national competitiveness consequences as part of their prosecutorial discretion in deciding whether to bring cases.** As a general matter, the antitrust agencies have limited resources and should focus on those cases that best further the public interest, which should not ignore concerns about competitiveness and national security. For example, if DOJ is deciding whether to allocate resources to challenging a 4-to-3 merger in a non-national power industry versus challenging a 4-to-3 merger in a national power industry wherein DOD has expressed national security or competitiveness concerns with an antitrust case, DOJ should ceteris paribus focus its resources on challenging the merger in the non-national power industry and allow the 4-to-3 merger in the national power industry to go through.

Embrace Innovation- and Build-Friendly Regulation

At the end of the day, policymakers have to decide whether they value regulatory protection more than innovation and getting things built. While sometimes regulation can be consistent with, and even supportive of, these goals, the reality—despite what defenders of the precautionary principle will say—in most cases, they are in conflict. A 1992 report for the Congress Office of Technology Assessment found that to be the case, and it is likely even more true today as competitiveness has become a much more critical factor in national success.[48]

If America is to get back on track, it needs to start treating builders as heroes, not villains, while limiting the opposition forces of NIMBYs and environmentalists.

So, federal regulatory policy should tilt toward, not against, innovation, productivity, and competitiveness. This also entails recognizing the costs to all three when considering new regulations or reviewing existing regulations. As such, the White House should do the following:

Create a unit within OMB's Office of Innovation Policy Review (OIRA) to systematically consider how proposed agency regulations impact innovation and competitiveness.[49] While OIRA is tasked with reviewing major regulations from a cost-benefit perspective, it does not explicitly review regulations for impacts on longer-term dynamic effects on innovation or competitiveness. The Trump administration should establish within ORIA a branch to serve as an "innovation and competitiveness champion" in the regulatory process. The office should have authority to push

agencies to either affirmatively promote innovation, productivity, and competitiveness or achieve a particular regulatory objective in a manner least damaging to all three.

The nation also needs to craft a broadly shared narrative about the importance of building things. In 1930, it took one year and 45 days to build the Empire State Building, and it came in under budget. In 2008, California started a high-speed rail project that is nowhere close to completion and is billions of dollars over budget. Back then, people such as Robert Moses, a key public sector builder in New York City and state, was hailed as a hero. Today, he is vilified as a destroyer. If America is to get back on track, it needs to start treating builders as heroes, not villains, while limiting the opposition forces of NIMBYs and environmentalists.

BARRIERS TO CHANGE

These changes will not be easy. The chorus of pro-regulation advocacy groups and philanthropies is large, well-funded, and powerful. They will portray the changes proposed here as only benefiting corporate bottom lines at the expense of everyday Americans—and they will frame opposition to a national developmentalist agenda as the people taking on the powerful. But in that good-versus-evil narrative opponents of national developmentalism would lose sight of what they are actually opposing and what is at stake in America's techno-economic war with China. Some will simply deny the existence of the techno-economic war. Others will argue, wrongly, that to the extent there is such a war, regulation can help America win it.[50]

While free market advocates will generally support reduced regulation, their preference is to reduce it across the board for all industries. As such, they may oppose an approach which targets regulatory relief at national economic power industries.

At the same time, other vested interest groups—including citizens opposed to any and all change, and businesses worried about competition—will continue to defend the status quo. They too, will employ the "people versus the powerful" narrative to gain public support. Alongside them, the vast array of lawyers and consultants that companies must pay to navigate the miasma of the regulatory system also will resist. Finally, the regulatory state itself will resist, as regulatory agencies justify their existence by promulgating more regulations.

For too long, advocates and regulators assumed that little or no balance was required between techno-economic power goals and other social and economic goals. The United States was rich enough and powerful enough to regulate with impunity.

At the end of the day, the core question for regulatory policy, as it is for all the other areas of policy that ITIF is analyzing in this series, comes down to whether policymakers and other elites will decide that avoiding defeat in the techno-economic war against China is central to the future of America.[51] If it's not, then the status quo, perhaps with minor reforms, will be fine. But the result that will lead to is clear: national defeat to China.

CONCLUSION

It is a libertarian fantasy that the United States can or should eliminate most regulations. But that does not mean that U.S. policymakers cannot and should not craft a new regulatory system that balances national techno-economic power goals with other social and economic goals. For

too long, advocates and regulators have assumed that little or no balance is required. The United States used to be rich enough and powerful enough to regulate with impunity. It could afford to take on the added costs. Moreover, the dominance of neoclassical economics, which held that the trade deficit didn't matter and that computers chips were no different than potato chips, meant that it really didn't matter if regulation reduced domestic production in key industries—because there were no key industries. As long as the economy was growing, all was well.

If America keeps on this path, it will only accelerate its national economic power industry decline. Alternatively, if policymakers do not want that outcome, then bipartisan, pragmatic transformation of the regulatory system is needed. Not inaction. Not piecemeal change. To wit, government must begin to shift from a regulatory state to a developmentalist one that prioritizes innovation, productivity, and competitiveness.

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