BRIEFLY NOTED

No, DACA Doesn't Harm Americans

BY IKE BRANNON AND M. KEVIN McGEE

In October 2021, the Department of Homeland Security issued a notice of proposed rulemaking that would essentially codify President Barack Obama's 2012 executive order allowing the children of immigrants who arrived in the country illegally to obtain legal status. That, in turn, would permit them to work and attend school here.

Obama's order for Deferred Action for Childhood Arrivals (DACA) proved to be highly contentious. President Donald Trump moved to repeal it in 2018, prompting a lawsuit to stop the repeal. The Supreme Court ruled that the repeal itself was invalid but indicated that it could be possible for an administration to legally repeal DACA in the future. The Trump administration tried again to do so, but that effort ended in January 2021. The Biden administration now intends to make DACA's future more secure.

In July of 2021, Texas Federal District Court Judge Andrew Hanen ruled that DACA must stop taking new entrants, in recognition of a 2018 lawsuit filed by the attorneys general of Texas and several other states. They argued that the 2012 rule caused the states irreparable harm because of the additional costs of providing this cohort health care, education, and law enforcement protection.

The plaintiffs' argument was grounded on a false claim that DACA imposes costs on state or local governments or their residents. Over the last five years, we have published a series of research papers analyzing the economic effects of DACA on the U.S. economy. Our work finds that the program increases the education, employment, and wages of DACA recipients while also boosting tax revenue and economic output. What's more, we not only find no evidence that DACA hurts low-wage American-citizen workers, but it appears to boost the wages and employment of this cohort.

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Immigrants wanted / DACA opponents have argued that the rule in its current form hurts American-born workers by reducing their employment opportunities. This argument is wrong on two counts.

First, the opponents often assume that if DACA were ended, its beneficiaries would leave the United States. Because nearly all DACA-eligibles have spent most of their lives in the country, and many do not even speak the language of their native country, voluntary self-deportation is extremely unlikely. Instead of leaving the United States, these people would disappear into the shadows of the gray and black economy.

Equally unlikely is the prospect that these young immigrants would—or could—all be deported to their countries of origin. Logistically, this would be a massive undertaking for a government immigration system that is already stretched by the ongoing influx of refugees from Haiti and Central America. Politically, the likelihood of a massive deportation of DACAs is also extremely unlikely. Polls consistently show that 70%–85% of Americans support a right to residency for DACA-eligibles; any attempt to systematically deport these young people would be met by protests, resistance, and political repercussions.

From an economic perspective, it would make no sense whatsoever to deport hundreds of thousands of young workers, over half of whom have some post-secondary education and about one-fourth of whom have college degrees. The United States is currently facing a worker shortage, and demographic trends suggest that this will worsen over the coming decade.

The worker shortage is particularly severe in nursing, teaching, software development, physical and occupational therapy, and many similar occupations that require either a college degree or at least some modicum of post-secondary education. Terminating DACA would exacerbate these shortages even if it did not result in massive deportations because the immigrants' legal status would keep them from filling these roles.

The data also suggest that DACA recipients—and foreign-born legal U.S. residents in general—are more amenable to relocating to pursue economic opportunities in another community. Given that geographic mobility for native-born Americans has declined since the 1950s, having a cohort with the ability and inclination to locate where jobs are plentiful helps to slow the increasing geographic stratification of jobs and career opportunities that has occurred in the 21st century.

Higher skills / Another problem with the argument that DACA hurts American-born workers and taxpayers is that it completely ignores DACA's effect on educational incentives. An undocumented worker has relatively little incentive to pursue an education. If the only jobs open to that person consist of being a roofer, a prep cook, a waiter, a housekeeper, or a home aide, a high school diploma provides little to no advantages. In contrast, granting this cohort legal status opens up thousands of job possibilities. DACA, both by requiring a high school diploma (or equivalent) to qualify and by dramatically increasing the usefulness of and access to a post-secondary education, has incentivized millions of young immigrants to expand their job skills and increase their productivity.

In our most recent study, we estimate that DACA has increased the high school graduation rate among the eligible population by about 10.7% and increased the

rates of post-secondary enrollment and college graduation in this cohort by 86%. Because of DACA's requirements, the 1.3 million people currently under its protection, ranging in age from 14 to 39, all are either currently enrolled in school or have diplomas, and a substantial fraction—around one-fourth—have college degrees. Since 2012, DACA has allowed hundreds of thousands of immigrants to become doctors and nurses, teachers and accountants, machinists and welders, medical technicians and firefighters, business owners and chemical engineers.

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Helping citizens / As a result, DACA has had two substantial positive effects on low-wage American-citizen workers. First, it has reduced the number of immigrant job competitors they face. A DACA recipient with, say, a nursing degree—filling a job slot in an occupation with chronic worker shortages—is no longer competing for an opening as a home health aide. A DACA recipient trained as a machinist—also filling a job slot with chronic worker shortages—is no longer driving an Uber. Thus, DACA has reduced the supply of unskilled workers, boosting the employment prospects of those who remain in this category—and their wages.

Secondly, DACA has increased the demand for low-wage workers. A DACA recipient employed as a teacher is more likely to dine at a local restaurant that employs lower-wage cooks and waiters. A DACA recipient who is an engineer is more likely to employ a home health aide to look after an aging parent. Economic research strongly supports the view that high-skill and low-skill jobs are complements, not substitutes: having more high-wage workers in a region increases the work opportunities for that region's low-skill workers.

To fully appreciate the effects of DACA, it helps to consider what would happen if the program were to end. If we assume that this entire cohort would be deported *en masse*, the economies of Texas and the other states that filed the lawsuit would be worse off. Total economic output would be lower, worker shortages in a vast array of high-wage occupations would increase, demand for the services provided by low-wage workers would decline, and tax revenue would fall.

If, instead of leaving the country, we assume that DACA beneficiaries would remain and seek employment in the cash economy, then the states would also be worse off. The wages of low-income workers would fall, employment in skilled positions would decline, and tax revenues would also fall—while the government would still be providing essentially the same services to its population of legal and illegal workers that it does now. But in this scenario, the DACA recipients would contribute far fewer tax dollars to pay for it.

Thus, ending DACA would provide no benefits whatsoever to low-wage American-citizen workers. That should not be surprising; after all, eliminating DACA would, in effect, throw away the large amount of human capital that DACA recipients have amassed over the last decade. How does society benefit by trashing its capital investments and making itself less productive?

Instead of terminating DACA or merely looking to preserve it in its current form, policymakers should broaden its scope to include those who arrived as children between 2007 and 2017. Providing these young people with the same opportunity to make themselves more productive would contribute both to our nation's economic output and our government's fiscal balances through the increased tax revenues their greater productivity would generate. *R*

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BRIEFLY NOTED

Why Punish the Drug Industry That's Combating COVID?

BY THOMAS GRENNES

COVID has been a huge and unpredictable shock to the world. In the United States alone, it has killed more people than the 1918 flu pandemic and the American Civil War. Losses of life and economic output would have been even greater without the rapid development of vaccines against the SARS-CoV2 virus. Timing was crucial, and new research by economists at the Federal Reserve Board of Governors estimates the substantial gains in lives saved and increased economic activity realized by "fast vaccinator" nations.

Small Pharma / Much criticism of the U.S. and global drug industries is targeted at the major drugmakers, often derisively called "Big Pharma." Yet, the first two vaccines to receive approval for distribution in the United States were developed by startup firms that would be labeled "Small Pharma." In both cases, the firms had been looking for opportunities to exploit novel mRNA technology, and their vaccines employ that innovation to induce immune system response to the spike-like feature of the virus.

BioNTech, based in Mainz, Germany, was started by husband-and-wife scientists Ugur Sahin and Ozlem Tureci, whose families migrated from Turkey to Germany. Once BioNTech had developed its vaccine, it partnered with pharmaceutical giant Pfizer to manufacture and distribute the medicine as well as manage the government approval process. Moderna, based in Cambridge, MA, was founded to commercialize the research of Harvard stem cell biologist Derrick Rossi. It partnered with the U.S. National Institute of Allergy and Infectious Diseases and the Biomedical Advanced Research and Development Authority to bring its vaccine to market. Neither firm had been profitable nor taken a product to market before the pandemic.

This technological response to COVID has been bottom-up, rather than top-down. The two startups were too obscure to borrow from banks or issue stock or bonds. They had to rely on venture capitalists for financing. Venture capital for BioNTech was provided by German brothers Thomas and Andreas Struengmann, and Moderna obtained funds from Noubar Afeyan, a Lebanese-born Canadian/American investor. Their investments have yielded a tremendous return for humanity.

Populist threats / Populist forces have often decried the profits of successful drug innovator firms as excessive and have pushed policy proposals to curtail those profits.

One such push is being championed by the head of the World Health Organization, Tedros Adhanom Ghebreyesus, who has called for suspending the intellectual property rights of the COVID vaccine-makers in hopes of allocating more of the vaccines to low-income countries. Among the supporters of this idea are the governments of India and South Africa as well as President Joe Biden.

A different push is coming from a group of Democratic congressmen, including House Speaker Nancy Pelosi. They propose that the U.S. Government stipulate the price it will pay for pharmaceuticals for participants in government-operated health care programs, and if drugmakers decline that price then they would be subjected to heavy taxes.

A possible third push is the aggressive antitrust policy of Lina Khan, the new chair of the Federal Trade Commission, and others in the Biden administration. Khan has expressed her opposition to big and powerful firms such as Amazon, regardless of their benefit to consumers.

SOLARSEVEN / GETTY IMAGES

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It is an open question whether she would consider the arrangement between BioNTech and Pfizer to be an unlawful vertical monopoly.

Stifling innovation / A problem with these proposals is that they overlook the important incentive that potential high profits provide to a high-risk innovator industry. As already noted, neither BioNTech nor Moderna were profitable until their COVID vaccines reached the market. Industry observers have said that Moderna would not have attracted venture capital if the House drug pricing proposal had been U.S. law for the past decade.

If any of these proposals are implemented, the result would be less drug research and fewer innovations. (See "Why Are (Some) U.S. Drug Prices So High?" p. 18.) This would be especially costly today, as evolving viruses require changing vaccines. Recent research by Tomas Philipson, former chair of the President's Council of Economic Advisers, finds medical innovation to be especially sensitive to profitability. Loss of medical innovation will result in more lives lost, more severe long-term health problems, and more forgone economic output. Blocking productive medical investments is myopic. Extracting profits from innovators today will result in avoidable deaths and suffering in the future.

Contributions of firms and governments / Pfizer/BioNTech and Moderna are currently increasing their productive capacity. For instance, Pfizer and BioNTech have partnered with 13 companies—including industry heavyweights Merck, Novartis, and Sanofi—to produce and distribute their vaccine under license. Moderna likewise is partnering with Lonza, Catalent, Rovi, and others.

Scaling up production of such novel drugs is difficult. Europe's Astra Zeneca and China's Sinopharm and Sinovac experienced quality control issues when they ramped up production of their COVID vaccines. The Pfizer/BioNTech vaccine must be stored at extremely cold temperatures, which places quality-control requirements not just on the drug's manufacture but also its distribution. Diminishing innovator profits will not help overcome such challenges.

Other governments can provide incentives for research by opposing the Biden administration's call to suspend drugmaker intellectual property rights. They can also contribute to an efficient global system of discovery, production, and distribution of vaccines by refraining from vaccine nationalism, including not restricting exports.

Incentives are important for all medical research. BioNTech was already studying how to use its mRNA technology to combat cancer when the pandemic arose. Punishing pharmaceutical companies after their impressive response to COVID would be especially short-sighted and costly in terms of future lives and economic prosperity. *R*

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Is a Green New Deal Even Necessary?

BY JODY LIPFORD AND BRUCE YANDLE

A little over a decade ago, we published a short article in these pages reporting the results of our analysis of carbon emissions and real gross domestic product per capita for a group of developed and developing countries. (See "Not the Time to Cap and Trade," Winter, 2009–2010.) We examined data from 1950 to 2004 for the Group of Eight (G-8) countries (Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States) and the rising industrial powers of Brazil, China, India, Mexico, and South Africa. Those countries, then and now, account for about two-thirds of global carbon emissions. We argued then that, based on our analysis, proposals to reduce emissions through cap-and-trade policies were very costly, perhaps enough to outweigh public concerns about carbon, especially during that time's housing-bust economic downturn. We argued instead that technological advances held hope for lower emissions and that government policies could and should provide incentives for developing those technologies.

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We recently revisited that study in light of continued concerns about climate change and increasing calls in the United States for sweeping policies to reduce carbon emissions, including the so-called "Green New Deal" that would, among other goals, aim for 100% clean energy by the year 2030. Our updated study adds 15 years of data to our prior analysis, enabling us to see what has taken place in the same 13 countries. (Russia is no longer a member of the G-8, now G-7, but it remains one of the world's major carbon emitters and so we kept it in our sample.)

An update / Since 2004, world carbon emissions have risen from over 28 billion metric tons to over 36 billion metric tons. In 2006, China surpassed the United States as the world's largest emitter, and in 2019

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it accounted for about 28% of total global emissions. The United States is now second largest, accounting for 14.5% of the total.

Figure 1 shows the relationship between annual carbon emissions and real per-capita GDP for the United States. Whereas our earlier study found that reducing emissions would entail substantial costs to the U.S. economy, our more recent study finds the country's carbon emissions are falling even as income rises. In effect, the United States has passed "peak carbon." This is not unique to America; the same is happening in France, Italy, Japan, and the United Kingdom, and Canada should reach its peak after just a bit more income growth. Although our estimates for Germany show some evidence of a slight uptick in emissions with income, we would need a few more years of income growth to have confidence in this trend.

AERIALPERSPECTIVE WORKS / GETTY IMAGES

The same cannot be said of China, as shown in Figure 2. Its carbon emissions continue to rise and seem nowhere near a peak. Our estimates indicate that its real GDP per capita needs to rise by about 50% before reaching a point where emissions might decline. China is not alone in this, among developing nations. Emissions in Brazil, India, Mexico, and South Africa are also on the rise, and each country is some distance from reaching its peak. Further, when we evaluate the relationship between tons of carbon emissions and real GDP per capita, we find that a $1 gain results in 56,000 fewer metric tons of carbon in the atmosphere for the United States, while a $1 gain for China is associated with an increase in carbon of 394,000 metric tons.

Similar analyses hold for most of the other developed and developing countries. But in those countries where emissions are decreasing, what may be driving the new-found reductions? Apparently, income-driven demand for environmental improvement is generating significant institutional change.

Market forces and policy changes / Since 2005, cleaner-burning and cheaper natural gas, extracted using advances in fracking technology, has increasingly replaced coal as the fuel of choice for generating electricity in the United States and other countries. Also, the falling cost of solar production technologies has, at the margin, reduced the amount of carbon emitted per unit of GDP.

In China, starting in 2009, the government began subsidizing the production of electric automobiles. In 2016, it decreed that by 2030 some 40% of its new fleet will be electric. In 2019, it established a limited cap-and-trade carbon control market that focuses exclusively on the power generating industry, with other industries destined to be included later.

The United States is employing similar policies on automobiles. First, tax credits and other incentives were introduced in 2009 to encourage the purchase of low- or zero-emission vehicles. Then, this past year, the Biden administration issued an executive order that 40% of the new U.S.-produced fleet will be electric by 2030.

We note that in 2016 the G-8 countries met in Paris and unanimously agreed to individually institute carbon emissions cutbacks so that by 2020 real GDP growth would become carbon neutral. For several of those countries, little substantive policy change has resulted, while the United States withdrew from the agreement. Yet, because of market forces, the United States became a leader in cutting emissions, and other G-8 nations have eclipsed peak carbon.

While high-profile market and political actions have been at play, less visible market forces have affected carbon emissions reductions in substantial ways. Consider the rise of "Green" investment funds that enable environmentally concerned investors to put their money where their hearts and minds are. Known as "ESG" funds (for "environmental, social, governance"; see "'ESG' Disclosure and Securities Regulation," Fall 2021) and accounting for just 1.1% of all mutual funds, ESG asset flows grew 72% in 2020 and amounted to 25% of all mutual fund inflows. As dollars flow into these funds, enterprise managers may pursue emissions reductions to reduce their cost of capital. BlackRock, the world's largest fund manager, for example, now reports some $7 trillion in various environmentally sensitive holdings. The firm recently

Figure 1
Annual U.S. Carbon Emissions and Per-Capita Output

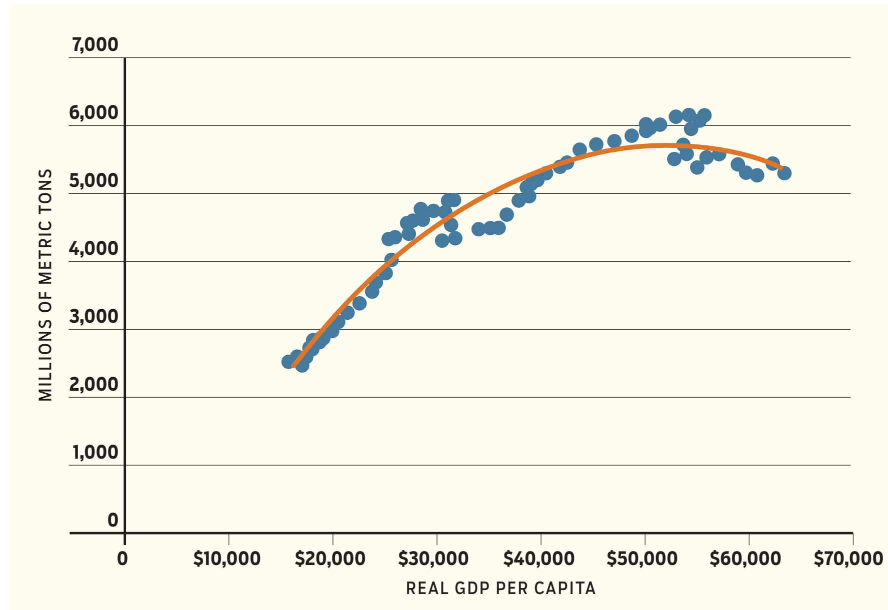
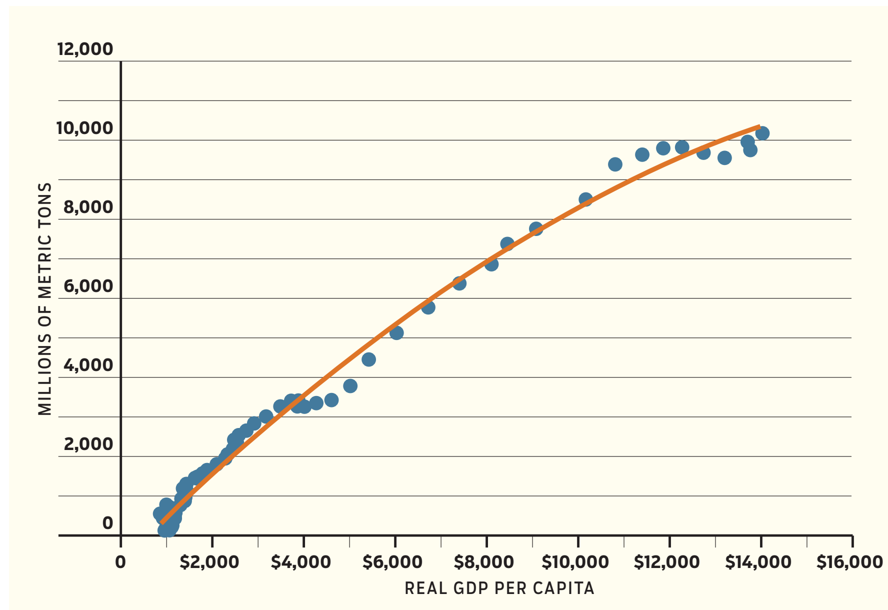


Figure 2
Annual Chinese Carbon Emissions and Per-Capita Output



announced that it will impose much stricter environmental and social standards on corporations whose shares it might consider owning. It's also vacating investments in firms that produce coal or have large carbon footprints and expanding holdings in firms committed to fighting climate change and other social challenges.

Evidence of this incentive is seen in news reports that half of the *Fortune* 500 are auditing and reporting compliance with self-imposed carbon emissions reduction goals. With reporting standards still in a state of flux, U.S. regulators are moving to develop more accountable reporting requirements. Treasury Secretary Janet Yellen is pushing for net-zero emissions from U.S. electricity producers by 2035 and has called for American firms to report climate change risks to investors. The Federal Reserve and the Securities and Exchange Commission are pushing similar regulations.

Finally, we should consider the rapid growth of carbon emissions markets that are now at work globally. According to news reports, the total value of the carbon emissions market rose 23% to $283 billion last year. Although the United States has not established a national cap-and-trade market, the United Kingdom, European Union, and multiple other jurisdictions have. Firms participating in these markets can produce transferable rights when they find lower-cost ways to reduce their own carbon emissions. For example, over the last two years, BP has earned as much as $100 million annually by trading carbon emissions. Such earnings should encourage firms like BP, Eni, Shell, and Total, which have set net-zero emissions goals for 2050, supported by investors representing $10.4 trillion in assets. Other evidence of industrial efforts to reduce carbon emissions is seen in an alliance between Mercedes and Swedish carbon-free steel producer H2 Green Steel for implementing a new steelmaking technology and in Chevron's expanded investment in hydrogen production and carbon capture technologies.

Final thoughts / Given all this, there are at least three practical implications for U.S. carbon policy.

First and most obviously, U.S. carbon emissions are declining without grand initiatives like the Green New Deal. Since peaking in 2005 at 6,132 million metric tons, U.S. emissions have fallen by nearly 14% to 5,285 million metric tons. If the emissions–GDP trend continues and the United States manages 2% real growth in GDP per capita till 2030, emissions will fall to 3,931 million metric tons, according to our forecast. It isn't the net- zero emissions goal that the Green New Deal targets, but it is substantial progress—and much more realistic.

Second, the problem is global. Whatever the United States or other developed coun-

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tries do, our estimates suggest that carbon emissions from China specifically and the developing world in general will continue to rise. Further, countries' Nationally Determined Contributions (NDCs) of carbon, according to the Paris Climate Accord, are not binding or enforceable, and Climate Action Tracker rates China's NDCs as "highly insufficient" because of its reliance on coal.

Last, U.S. environmental policy has always been a "political football." In recent years, carbon policy has shifted from the Obama administration's Clean Power Plan to the Trump administration's Affordable Clean Energy Rule, and will soon move to some version of the Green New Deal or whatever policies the Biden administration chooses to pursue. Who knows what future policy will be? Meanwhile, the free market works to the benefit of the environment—and the humans who inhabit it. R

Facebook: Like Corporation, Like Whistleblower

BY PIERRE LEMIEUX

This fall, President Joe Biden's Justice Department (following through on threats made by previous president Donald Trump) threatened antitrust action to break up the social networking company Facebook. The threat came at a curious time, as Facebook is facing growing competition and internal issues, and may be on the wane. On October 4, for instance, it sustained an unusually long blackout because of a configuration error.

A whistleblower and former employee named Frances Haugen leaked several Facebook internal documents to the media. She appeared before a Senate committee where moral-sounding politicians eagerly concurred on the ugliness of the former high-tech darling. Citing the leaked documents, the *Wall Street Journal* reported that Facebook had insufficiently controlled the speech of vaccination skeptics despite company president Mark Zuckerberg's explicit instructions to do so.

Facebook looked like a big, uncontrollable organization. From the viewpoint of economics, this is an example of the principal–agent problem: what the corporate owners want is not necessarily what gets done by the agents at the bottom of the chain of command. The problems facing the company are made worse by its attempting to censor discussions among its users.

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Censorship / Can we use the term "censor"? The *Oxford English Dictionary* describes a censor as "an official in some countries whose duty it is to inspect all books, journals, dramatic pieces, etc., before publication, to secure that they shall contain nothing immoral, heretical, or offensive to the government." Secondary definitions extend the concept to "officious" or religious censorship or to some private activities or functions.

There is obviously a big difference between government censorship and private "censorship" of the sort that Facebook exercises on its own network and any individual or private group does on its own property. The difference is that a censoring government can fine, jail, or kill a non-compliant subject; a private "censor" cannot do that. For this reason, I will put scare quotes around "censor" and "censorship" when applied to Facebook or other private contexts.

It must be admitted that a lot of opinions propagandized by Facebook users, on the left and the right, are at best biased or confused and at worst crazy. But that is as much a part of social media nowadays as it is of public debate in general. Because the low cost of using social networks encourages uninformed opinions that sidestep private intermediaries (editors, publishers, and such), social media may be particularly dangerous, especially in this time of anti-Enlightenment irrationality. But we know from history that control of speech by governments presents even greater danger.

We also know from theory that free speech is a necessary condition for finding what is true and what is false. As John Stuart Mill argued in his 1859 book *On Liberty*, when free speech is repressed by censorship and the market for ideas is restrained, it is much more difficult to determine if an opinion is valid.

Zuckerberg, who had previously expressed opposition to Facebook becoming an arbiter of truth, now favors "censorship" on his network. Facebook (as well as Twitter) has banned Trump and a host of lesser figures and has been pushing back on claims it deems false or otherwise unacceptable. Haugen, the Facebook whistleblower, wants Facebook to engage in even more of that.

There are good reasons to defend Facebook's freedom to "censor" speech on its own property, even if we disagree with how it exercises that freedom.

There are good reasons to defend Facebook's freedom to "censor" speech on its own property, even if we disagree with how it exercises that freedom. Without private property rights, there is no way to protect one's life from the tyranny of the majority. Only because of private property can an

individual stop propaganda at the door of his home. If owners of social media lose their property rights, who will next lose theirs? The dismissive answer that private property has been undermined in America for quite a long time, especially when we take into account that property rights were, by definition, denied to the slaves—won't do: it only emphasizes the danger of letting the drift continue.

Like corporation, like whistleblower / There are also good reasons to criticize Facebook's "censorship." Zuckerberg and his managers claim to do good, but they are obviously confused about what "good" is. A large proportion of the company's own customers do not agree with their supplier's conception of the good. The more a social media organization expands—and Facebook's clientele extends to about one-fourth of mankind—the more difficult it becomes to discriminate against the diversified opinions of its clients. This adds to management problems.

Interestingly, Facebook now largely agrees with Haugen's goal of having the company control its customers' speech. Reacting to her campaign, a Facebook spokesman said:

> Every day our teams have to balance protecting the right of billions of people to express themselves openly with the need to keep our platform a safe and positive place. We continue to make significant improvements to tackle the spread of misinformation and harmful content.

This balancing act between different opinions—for that is what it amounts to—is precisely what Facebook cannot realistically do and should not try to do. In practice, the censorship will end up being done by the government, which is what Haugen is demanding. The government deciding directly or indirectly what is true and false is not the way to truth.

"I don't hate Facebook," Haugen wrote in an internal message to her former colleagues: "I love Facebook. I want to save it." The new Facebook "censor" and Haugen are two types of harmful busybodies wanting to protect some people from themselves or from others whose opinions are thus discriminated against. Facebook and Haugen seem to envision majoritarian democracy or politicians' control as the only moral value. Haugen's charge of "moral bankruptcy" against Facebook looks like moral emptiness at best.

She—and many others—justify their demands as necessary to protect "our children." But children will ultimately be harmed much more by the continuous erosion of individual liberty and private property rights than they could ever be by Facebook. Besides, children have parents, don't they? They are not our collective property.

Of course, real crimes such as murder, theft, and child abuse must be punished. But if the government cannot satisfactorily combat those criminal acts, why should we expect it to succeed at directly or indirectly controlling social media? Using the Facebook network to commit real crimes is apparently a serious issue in underdeveloped and corrupt countries, but further undermining individual liberty in America won't solve this problem—probably just the contrary.

A practical piece of advice for Facebook, if it is not too late, would be to hire more libertarians, who are much less likely to fall into collectivist shibboleths and the philosopher-king mentality.

And a thought for the illiberal left and right: If you think that Facebook is bad, just imagine what it would be like if it were run by the White House, Congress, the World Health Organization, OPEC, or the United Nations. What if it were run by flesh-and-blood politicians like Trump or Rep. Alexandria Ocasio-Cortez? *R*

The APA Gets No Respect

BY ARTHUR G. SAPPER

The Administrative Procedure Act was supposed to be, according to a chief sponsor, "a bill of rights" for those regulated by federal agencies. But a bill of rights is worthless if ignored, and in many cases important provisions of the APA are ignored, not just by lawyers and scholars but by courts.

Perhaps the most spectacular example of this is the Supreme Court's creation of "*Chevron* deference" in its 1984 decision in *Chevron v. Natural Resources Defense Council.* The Court held that federal agencies' interpretations of the statutes they administer prevail if "reasonable," even if a court thinks that they are wrong. Law professor Kenneth Culp Davis, often referred to as the dean of administrative law scholars and a drafter of the APA, wrote that *Chevron* "ignored and violated the [APA's] entirely clear provision" on judicial review.

Other examples of courts ignoring the APA include (1) crafting a doctrine of "exhaustion" of administrative remedies—that is, requiring one to go through all levels of administrative appeal before going to court—that contradicts the APA exhaustion provision, (2) using a judge-made "clear error" standard rather than the APA's "substantial evidence" standard when challenging a federal grant of patent or trademark, and (3) interposing a judge-made "prudential ripeness" doctrine—that is, declining to review an agency ruling until the court thinks that the proper time for review has arrived—in place of the more liberal APA provisions on when aggrieved persons may seek judicial review.

Can the accused challenge? / This writer was recently involved in another instance

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of the courts ignoring an APA provision, this time by the D.C. Circuit. For many decades, courts have wrestled with the following question: If a statutory provision says that one may seek, within a certain number of days, pre-enforcement review of the validity of a regulation, is that period exclusive? Or may one wait to challenge the regulation until one is accused of violating it?

Courts have been all over the map on this question, struggling to weigh various factors. The D.C. Circuit, for example, invented this doctrine, later crystallized in its 1994 decision in *JEM Broadcasting v. FCC*: Where the opportunity provided by a statute for pre-enforcement review of a regulation's validity is "adequate," that period is exclusive as to "procedural" invalidity arguments but not exclusive as to "substantive" invalidity arguments.

But in all the decades that appellate courts have wrestled with this question, never once have they recognized that a provision of the APA speaks directly to it, and in a manner inconsistent with their judge-made doctrines. The third sentence of APA § 703 states: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." The provision means, in essence, that when one is accused of violating an agency regulation, one may challenge its validity unless the pre-enforcement challenge avenue is not only "adequate" but "exclusive." *JEM Broadcasting*, in contrast, does not require that the pre-enforcement provision state that it is exclusive.

One would think that courts, of all institutions, would assiduously pay attention to such a statute if it were cited prominently to them and adjust their doctrines accordingly. A recent case indicates that not all courts will. In an Occupational Safety and Health Administration case in which this writer was counsel, an invalidity question came before the D.C. Circuit. The court requested supplemental briefs on whether *JEM Broadcasting* had foreclosed it. The defendant, an employer, responded that, among other things, APA § 703 "directly addresses this issue" and that, unlike *JEM Broadcasting*, the mere adequacy of a pre-enforcement challenge provision "cannot alone prove that it is 'exclusive'—or 'exclusive' would … be effectively read out of the statute." The employer acknowledged that its argument "treads a different path than the doctrine developed" in circuit precedents but observed that they had "not indicate[d] … that this Court [had] examined this matter in light of APA section 703."

Although the court stated that it was resolving the issue in favor of the employer on the basis of clear legislative history in the Occupational Safety and Health Act, the court indicated that its holding might not apply to all OSHA standards. That indicator directly contradicts APA § 703's third sentence, which despite its prominent mention by the employer, the court never cited.

Courts are not the only institutions to have ignored APA § 703's third sentence. Scholars and even the Administrative Conference of the United States (ACUS) have been guilty of this, too. In 1982, ACUS adopted a recommendation on the subject of exclusivity of pre-enforcement challenge provisions that failed to mention APA § 703's third sentence. The recommendation was based on a study by a prominent administrative law scholar that briefly mentioned the provision but inaccurately: it stated that APA § 703 "specifically recognizes … that enforcement review can be deemed precluded if an adequate opportunity for pre-enforcement review is presented." That is inaccurate because it ignores § 703's other key criterion: exclusivity.

Despite these decisions, counsel has the responsibility to continue urging courts to apply the rights provided by the APA. Hence, counsel must be familiar with the APA and cite it prominently, lest the rights provided by the APA fall into desuetude. *R*

Congress's Anti-Innovation, Anti-Consumer Big Tech Antitrust Proposals

BY THOMAS M. LENARD

Antitrust in the United States has evolved over time as we learn from cases and research. Reforms should enhance competition to make our economy stronger and consumers better off. Unfortunately, a package of bills approved by the House Judiciary Committee earlier this year, along with companion bills introduced more recently by Sens. Amy Klobuchar (D–MN) and Chuck Grassley (R–IA) and by Klobuchar and Tom Cotton (R–AR), would do exactly the opposite.

If these bills become law, consumers would almost certainly lose access to many popular and routinely used online services, while others would become less useful. For example, if you like being able to buy both independent retailer and Amazon products on Amazon's platform, you might be out of luck. Amazon might have to choose between its third-party platform business and its Amazon-branded business. Either way, prices would be higher, choices fewer, and consumers would lose. So, likely, would many small companies that built their businesses on the Amazon platform.

The legislation could also prevent Google from offering Gmail and Google Maps, and Microsoft and Apple from

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offering competing services. Apple might not be able to put any apps on its iPhones. Amazon, Google, and Microsoft might no longer be able to operate their cloud services, which compete vigorously with each other and support thousands of small businesses.

The proposals would make it unlawful for a platform to "discriminate among similarly situated businesses." What would this imply for a search engine, which, by definition, must make choices if it is to provide useful information to users? Consider, for example, a search for restaurant reviews. Without some algorithm for sorting the many businesses offering reviews—such as the review sites Yelp and Gayot, as well as reviews in newspapers, Facebook, Google, and more—it becomes impossible for those sites to provide useful search results.

One legislative proposal would bar an acquisition unless the acquiring company shows the acquisition wouldn't enhance its "market position." But *the point* of an acquisition is to enhance the business's market position in some way, so the law would seem to effectively bar all acquisitions. The law would prevent dominant businesses from blocking competition via acquisition, but it would also effectively eliminate perhaps the most important reason entrepreneurs enter markets in the first place: most startups say their most achievable goal is to be acquired.

From individual review to blanket prohibition / To be sure, there are legitimate antitrust complaints regarding product or firm discrimination and acquisitions. And, in fact, such cases have been filed under current law. But these behaviors can also bring—and have brought—enormous benefits. That is why, under current law, they are examined on a case-by-case basis, not banned outright, as the new legislation would do.

The proposed laws also make institutional changes that would hamper innovation by turning the Federal Trade Commission into a digital regulator that must grant platforms permission to change how competitors can access data. The "technical committees" envisioned by the legislation would almost certainly slow the pace of platform development, as every proposed change could be challenged by competing firms and perhaps also by the government.

Finally, the criteria for whether the rules apply to a given firm are not based on any apparent reasoning except to make sure they apply to Google, Amazon, Apple, Facebook, and possibly Microsoft. The bills define "covered platforms" as any firm that:

- has at least 50 million U.S.-based monthly active users, or 100,000 U.S.-based monthly active business users;
- has net annual sales or a market capitalization greater than $600 billion; and
- "is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform."

Notably, the first two criteria are unrelated to antitrust. Size alone says almost nothing about whether a given behavior is anticompetitive. The third, at least, is related to antitrust arguments, but could be part of a challenge under existing laws.

Rather than reforming antitrust, the congressional proposals can more accurately be described as creating a new regulatory regime. Before taking such a step, Congress should consider the lessons from previous regulation, including of network industries. Communications regulation slowed innovation and the introduction of new services, such as mobile telephony, at great cost to consumers. Most regulation of surface transportation and airlines was dismantled in the 1970s, with bipartisan support, when evidence showed that regulation largely served to protect incumbents at the expense of consumers and slowed the pace of change and innovation in those industries. It is naïve to think the results would be different now. At a minimum, Congress should seek evidence that new rules will produce the intended benefits.

Even if one agrees with the widespread sentiment that "big tech" is too big and powerful, the congressional proposals are not the answer. Had such laws been in place for the past 20 years, consumers and businesses wouldn't know what they were missing. And the United States would not be the world leader in technological innovation. *R*