

Designing U.S. Regulatory Institutions for the 21st Century: A View from Abroad

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George Washington Univ. & King's College London

Silicon Flatirons

Boulder, 12 February 2018

Forty-Seven Years Ago

- Graham Allison, *The Essence of Decision* (First Edition, 1971)
 - Analysis of decision making during Cuban Missile Crisis
 - Focus: Infrastructure and operations of public agency bureaucracy

Allison on Implementation

- “If analysts and operators are to increase their ability to achieve desired policy outcomes, ... we shall have to find ways of thinking harder about the problem of ‘implementation,’ that is, the path between the preferred solution and actual performance of the government.”

Allison and the Silicon Flatirons Conference: The Common Awareness

- Institutional Arrangements
 - Shape Substantive Policy Outcomes
 - Require continuous assessment and adjustment

Is US Institutional Reform *Essential*?

- Perhaps Not
 - US can pass the course with a C+/B-
- Is the System Ideal?
 - We'd design it differently from scratch
 - Yet it adapts by formal/informal means
 - Example: Do-Not-Call (2003) – FCC/FTC
- *Compare* Postal and Delivery Services

Would Upgrades in US Institutionals Improve Performance?

- Probably
 - Coherence and coordination deficiencies
- Realistic Aim
 - Closer to production possibilities frontier
- Why Care: Two Examples
 - Global norms for competition policy
 - Global norms for data protection

How to Get There?

- Examine Own Experience
 - Law and History
 - Example: FCC's economic analysis unit
 - Understanding design tradeoffs
- Study Others' Experience
 - At home
 - Abroad

Global Regulatory Reform

- Illustration: Competition Law
- Past 30 years
 - 100+ new systems
 - Makeover of older regimes: e.g., UK
- Experiments and Comparative Study
- Is the US Missing a Good Game?

Agenda

- Experience Abroad: Notable Features
- Possible US Adaptations
- Emphasis: US Federal Trade Commission
- Reflections from Sunday's Proceedings
- Caveat: Personal Views Only
- Contact: wkovacic@law.gwu.edu

Joint Work

- David Hyman
- Marianela Lopez-Galdos
- Marc Winerman

Federal Trade Commission Focus: Rationale

- Flawed and Fascinating Platform
- Uniquely Exhaustive Study
- Relevant Mandate
 - Competition
 - Consumer protection
 - Privacy

Notable Foreign Developments

- Governance
 - Priorities and case selection
 - Interagency coordination: ECN and UKCN
- Disclosure
 - Aims, plans, decisions to act/not to act
- Tools
 - UK Markets regime: BAA Illustration
- Respect for Past Achievement

US Compared

- Governance
 - Sunshine Act: planning and priorities
- Decentralization of Authority
 - Weak coherence/reluctant cooperation
- Disclosure: Intentions and Decisions
 - Example: FTC and Google
- Tools: DOJ/FTC and single-firm conduct
- Branding: Angkor Wat Model

Two Sets of Proposals

- More Difficult
 - Statutory Change
- Less Difficult
 - Soft Law (Customs/Norms)
- Note: None of It Is Easy
 - Long-term capital investments
 - Inconsistent with activity-based norm
 - *Compare* Marshall on the Marshall Plan (1947-48)

Statutory Change Required

- Adopt Variant of UK Markets Regime
- Eliminate FTC Jurisdictional Carve-Outs
- Adjust Sunshine Act

Markets Regime

- Swap Out
 - FTC Act Section 5 “unfair methods of competition authority” for
 - FTC Section 6(b) mandate that allows FTC to do studies and impose remedies that promise to improve economic performance

Assumptions

- Section 2 of the Sherman Act and Section 5 of the FTC Act Have Become a Sterile Policy Instruments
- Equilibration
- Regulatory Leveraging

Supreme Court Unilateral Conduct Jurisprudence Since *Otter Tail* (1973)

- *Matsushita*
- *Spectrum Sports*
- *Discon*
- *Brooke Group*
- *Trinko*
- *Weyerhaeuser*
- *linkLine*
- *Aspen*
- *Kodak*

Notable Features

- All Private Treble Damage Cases
- Largely Pro-Defendant
 - *Compare Aspen with Trinko*
- Doctrines Apply to US Government

How Did This Happen?



How Did This Happen?



Modern Chicago and Modern Harvard

- Two Books: 1978
- Goals: Economic Efficiency First
- Antipathy to US Private Rights
- Adjustments in
 - Procedural screens
 - Evidentiary tests and liability rules
- Modern Exposition
 - Scalia/Breyer Coalition in *Trinko*

FTC Section 5 UMC

- Last Litigated FTC Victory: 1968
- Reasons
 - Lack of limiting principles
 - Sherman Act Overhang

FTC Carve-Outs

- Eliminate the Exemptions
 - Common carriers
 - Banking
 - Not-for-profits
 - Insurance
- Preserve Concurrency

Sunshine Act

- Curtail Coverage
 - Planning
 - Priorities
 - Consultations on cases
- Improve Disclosure
 - Planning
 - Priorities
 - Decisions

Non-Statutory Reforms

- Deeper Bilateral Cooperation
 - Example: DOJ/FTC
- More Expansive Networks
 - Competition
 - Consumer Protection
 - Data Protection

Further Soft Law Step

- Greater Historical Awareness
- Causes of Success and Failure
- Appreciation for Incremental Quality of Policy Development

"SOFT LAW" & THE FUTURE OF TECHNOLOGICAL GOVERNANCE

Ryan Hagemann, Jennifer Skees & Adam Thierer



Last updated February 2018

Presentation based on
forthcoming paper...

The image shows a screenshot of a paper page on the SSRN (Social Science Research Network) website. The page has a dark blue header with the SSRN logo and navigation links: BROWSE, SUBSCRIPTIONS, RANKINGS, SUBMIT A PAPER, and BLOG. Below the header is a search bar labeled 'Search eLibrary'. The main content area features a title 'Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future' and a subtitle 'forthcoming - Colorado Technology Law Journal'. It also lists the authors: Adam D. Thierer (Mercatus Center at George Mason University), Ryan Hagemann (Niskanen Center), and Jennifer Huddleston Skees (affiliation not provided to SSRN). The date written is February 5, 2018. The abstract begins with 'For a great many emerging technologies, as well as many existing ones, we are witnessing the twilight of the traditional regulatory system...' and continues to discuss the challenges of technology evolving faster than law's ability to keep up.

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Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future

forthcoming - Colorado Technology Law Journal

94 Pages • Posted:

[Adam D. Thierer](#)
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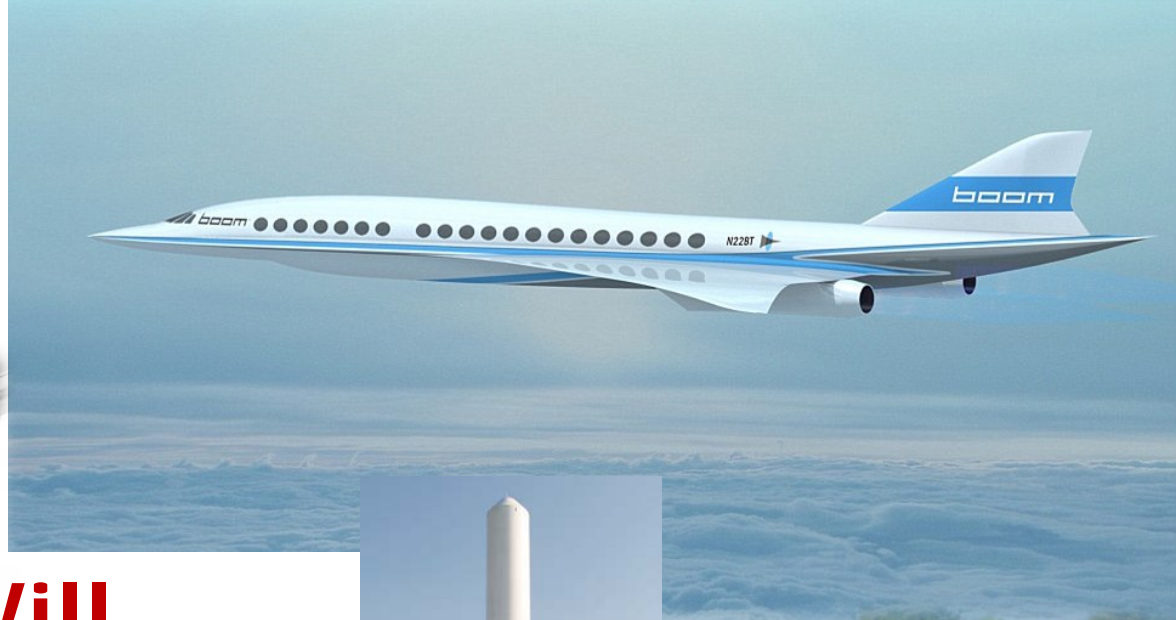
Abstract

For a great many emerging technologies, as well as many existing ones, we are witnessing the twilight of the traditional regulatory system and its gradual replacement by an amorphous and constantly-evolving set of informal “soft law” governance mechanisms. This has profound ramifications for the future of statutory law, administrative regulation, and the evolution of a wide variety of technology sectors.

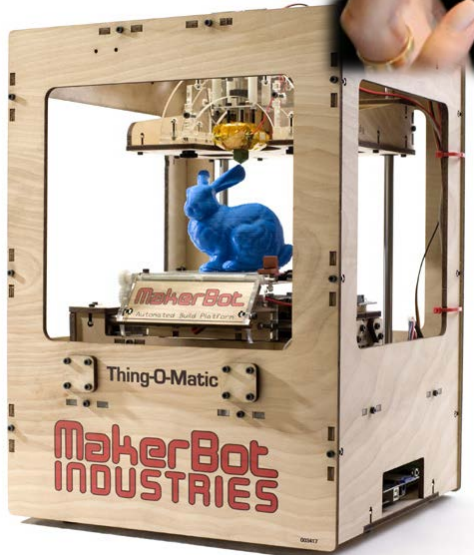
This paper explores the causes of this development. The underlying drivers of the modern computing and Internet revolution—microprocessors, software, sensors, networked technologies, wireless geolocation, and other digital devices and applications—are invading numerous precincts of the economy and upending the way business is done in a wide variety of sectors. These new technological capabilities are accelerating the well-known “pacing problem” of technology evolving faster than law’s ability to keep up. As a result, these new and rapidly-evolving technologies and sectors will present formidable challenges to traditional regulatory regimes and will necessitate the formulation of new governance processes.

Outline

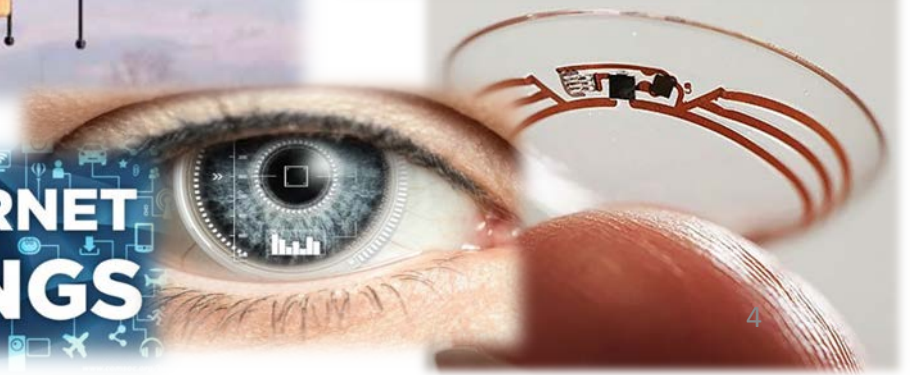
- I. Major emerging tech issues
- II. Trends shaping the future of tech policy
- III. Why hard law is on the decline
- IV. Growth of soft law for emerging tech
- V. Advantages & disadvantages
- VI. Deference issues
- VII. Other reform options

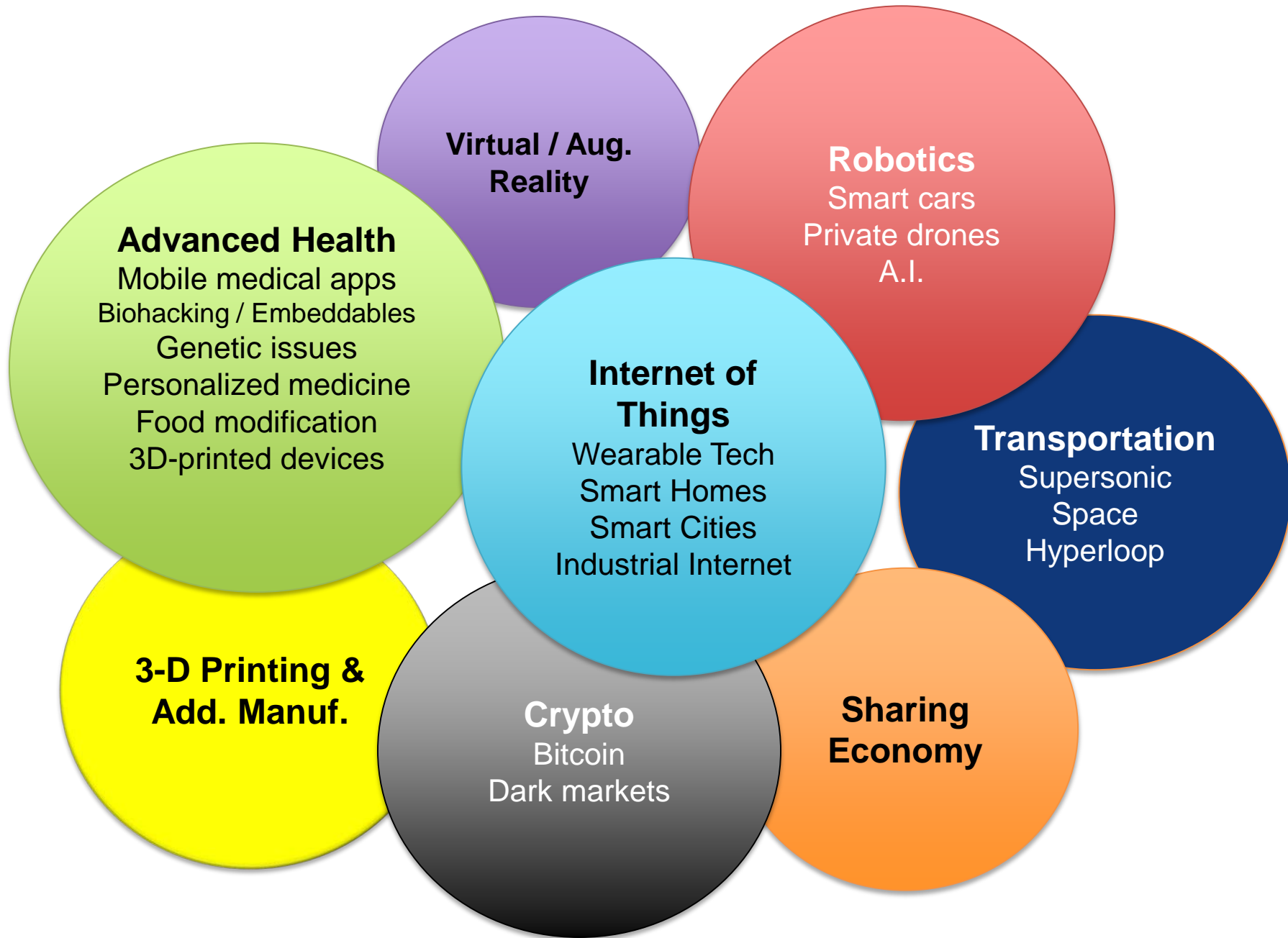


How Will Emerging Tech Be Governed?



THE INTERNET OF THINGS





5 Trends Shaping the Future of Tech Policy

1. The ever-accelerating “pacing problem”
2. Rise of evasive entrepreneurship / “technological civil disobedience”
3. Increasing ease of “global innovation arbitrage”
4. Widening “level playing field” problems
5. “Demosclerosis” & decline of hard law



Trend 1:
The Pacing Problem & the “Collingridge
Dilemma”

“Software Is Eating the World”

- Marc Andreessen



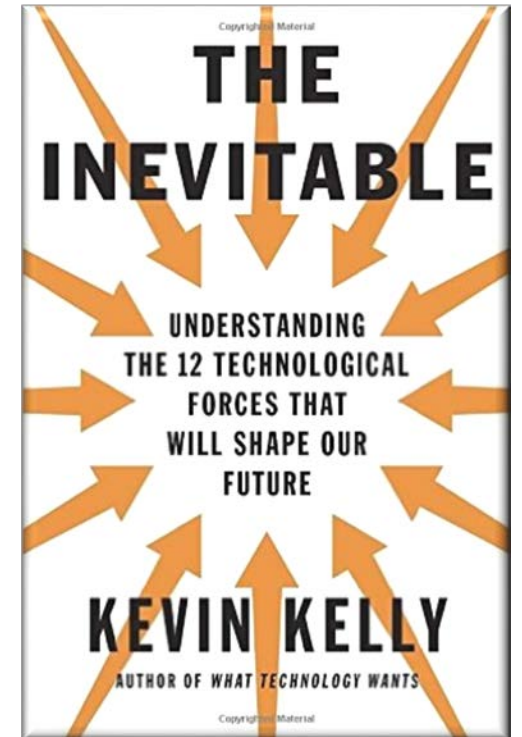
My own theory is that we are in the middle of a dramatic and broad technological and economic shift in which software companies are poised to take over large swathes of the economy

— *Marc Andreessen* —

AZ QUOTES

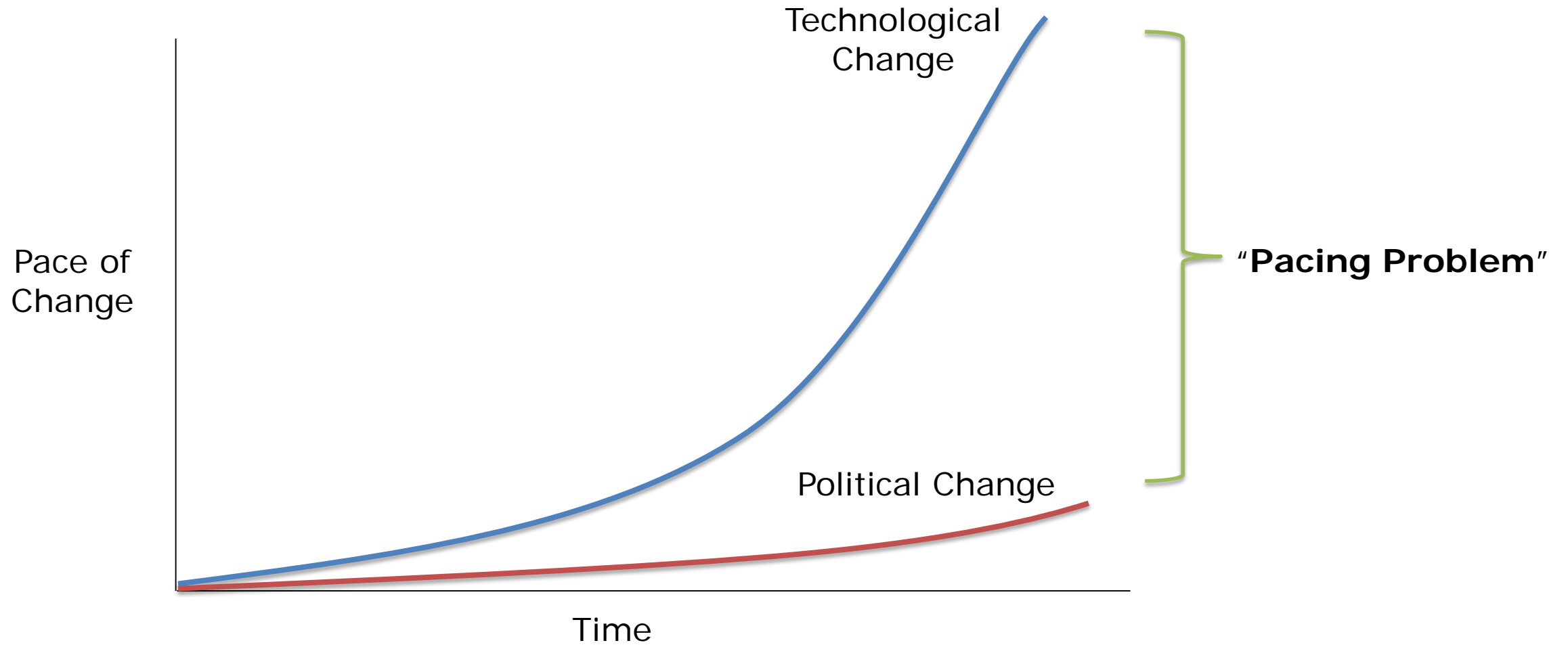
Drivers of Modern Tech Disruption Spreading

- ✓ the **digitization** of all data
- ✓ massive increases in **processing power**
- ✓ exploding **storage capacity**
- ✓ ubiquitous **networking capabilities**
- ✓ steady **miniaturization** of everything
- ✓ increasing **sensorization** of the world
- ✓ falling **cost** of almost everything



“The Law of Disruption” That Governs Modern Life

Technology changes *exponentially*; Political systems change *incrementally*.



The “Collingridge Dilemma”

- It’s hard to put the proverbial genie back in the bottle once a given technology has reached a certain inflection point.
 - “The social consequences of a technology cannot be predicted early in the life of the technology. By the time undesirable consequences are discovered, however, the technology is often so much part of the whole economics and social fabric that its control is extremely difficult.” - David Collingridge, *The Social Control of Technology* (1980)
- Collingridge referred to this as the “dilemma of control.”
 - “When change is easy, the need for it cannot be foreseen; when the need for change is apparent, change has become expensive, difficult and time-consuming.”
- Philosophers of technology are OBSESSED with this problem. It has become part of ongoing debate about “technological determinism.”





Trend 2:
Evasive Entrepreneurship
(Technological Civil Disobedience)

Technological Civil Disobedience or Evasive Entrepreneurialism

- The refusal of innovators (individuals, groups, or even corporations) or consumers to obey technology-specific laws or regulations because they find them offensive, confusing, time-consuming, expensive, or perhaps just annoying and irrelevant.
- Examples:
 - Uber, AirBnB, Rover (sharing economy)
 - 3D printing of medical devices
 - Smartphone applications
 - Drones





Trend 3:
Global Innovation Arbitrage

Innovation Arbitrage

- Getting easier for innovators to relocate to jurisdictions that provide legal and regulatory environment more hospitable to entrepreneurial activity.
- What happened with capital flows now happening with innovative activities.
- Happening at both global and domestic scale.
 - innovators playing state and local governments off each other in search of some sort of competitive advantage

Global Innovation Arbitrage in Action

- Digital commerce generally over last two decades
- Drones in Australia & Canada
- Fintech in U.K.
- 23andme in U.K.
- Driverless cars in Singapore & elsewhere as well as in competition between U.S. states and cities



Trend 4:
The “Level Playing Problem” Gets
Worse

Technologies That are “Born Free” Will Have an Easier Time than Those “Born in Regulatory Captivity”

“Born Free”

(no law / no agencies)

- Most online services
- Smartphone apps
- Social networks
- 3D Printing
- Virtual Reality / AR
- General robotics
- Artificial intelligence

“Born Captive”

(lots of law / existing agencies)

- Driverless cars (DOT)
- Medical tech / genetics (FDA)
- Food tech (FDA, Ag.)
- Commercial drones (FAA)
- Supersonic & Space (FAA)
- Financial services

But, a Few “Born in Captivity” Broke Free

- The Internet (defied FCC + state & global regs)
- Sharing economy (defied state & local regs)
- Wearable health devices & Smartphone apps (defied FDA regs)
- 3D-printed prosthetics (defied FDA regs)

How'd that happen?

- enlightened policy choices?
- an end-run around regulation?
- technological civil disobedience?
- global innovation arbitrage?

Trend 5: "Demosclerosis"



“Demosclerosis” Necessitates New Solutions

- legislative and executive efforts to craft policy also undermined by chronic “demosclerosis”
- = **growing government dysfunctionality brought on by the inability of public institutions to adapt to changes**
 - Causes: regulatory accumulation, bureaucratic bloat, special interest rent-seeking, etc.
- we shouldn’t expect federal lawmakers to play as much of a role in technological governance as they did in past decades.

The Net Combined Effect of All 5 Trends

- Combination of pacing problem + evasive entrepreneurialism + global innovation arbitrage + unlevel playing fields + demosclerosis = **gradual decline of “hard law”**
- Corresponding rise of “spontaneous private deregulation”
 - the *de facto* rather than the *de jure* elimination of traditional laws and regulations
 - no laws have been altered; no formal deregulation has occurred and yet liberalization has occurred

But governments are evolving, too...



The Future of Technological Governance: Soft law & “Entrepreneurial Administration”

Soft Law: Hard to Define, But Dominant

- **“Instruments or arrangements that create substantive expectations that are not directly enforceable, unlike ‘hard law’ requirements such as treaties and statutes.”** (Marchant and Allenby)
- *Informal, collaborative, and constantly evolving* governance mechanisms
- Soft law already the dominate governance model for today for technology such as: driverless cars, mobile medical applications, the Internet of Things, biometrics, nanotech, biotech, 3D printing, bitcoin, online advertising, and more

Soft Law Mechanisms for Emerging Tech

- Guidance documents
- “Sandboxes” (informal consultations) & soft nudges
- Multistakeholder processes
- Agency workshops & reports
- Best practices & codes of conduct
- Industry self-regulation, co-regulation & other collaborative efforts

Soft law has become the dominant *modus operandi* for modern technological governance, at least in the United States

Examples of Pre-Digital Era Soft Law

- Food Inspection Decision 44 (Bureau of Chemistry, 1906)
 - “... many persons suppose that the answers to inquiries addressed to this Department, either in letters or in published decisions, have the force and effect of the rules and regulations for the enforcement of the food and drugs act of June 30, 1906 . . . It seems highly desirable that an erroneous opinion of this kind should be corrected. **The opinions or decisions of this Department do not add anything to the rules and regulations nor take anything away from them.** They therefore are not to be considered in the light of rules and regulations. ... **They are therefore issued more in an advisory than in a mandatory spirit.**” (emphasis added)
- Bureau of Chemistry → Food and Drug Administration
 - FDA is the most prolific agency promulgator of soft law releasing over 100 guidances every year
 - Reliance is so significant “that a Government Accountability Office report from 2015 noted that, ‘certain provisions of the OMB Bulletin [on “Good Guidance Practices”] were informed by written FDA practices for the initiation, development, issuance, and use of their guidance documents.’”

Examples of Modern Soft Law

- NHTSA
 - **Policy guidance** on autonomous vehicles
 - **Proactive principles** for vehicular cybersecurity
- NTIA
 - **Best practices** for commercial facial recognition technology
 - **Privacy best practices** and **multistakeholder process** for commercial unmanned aircraft systems
 - **Voluntary frameworks** and **multistakeholder process** on IoT security upgradability
- OSTP
 - **White papers** and **reports** on AI and big data
- FDA
 - **Guidance for industry** on clinical trial best practices, “medical” smart phone apps, and 3D-printed medical devices
- FTC
 - **Staff reports** and **guidance documents** on the IoT
- FAA
 - **Advisory circulars** on small unmanned aircraft systems

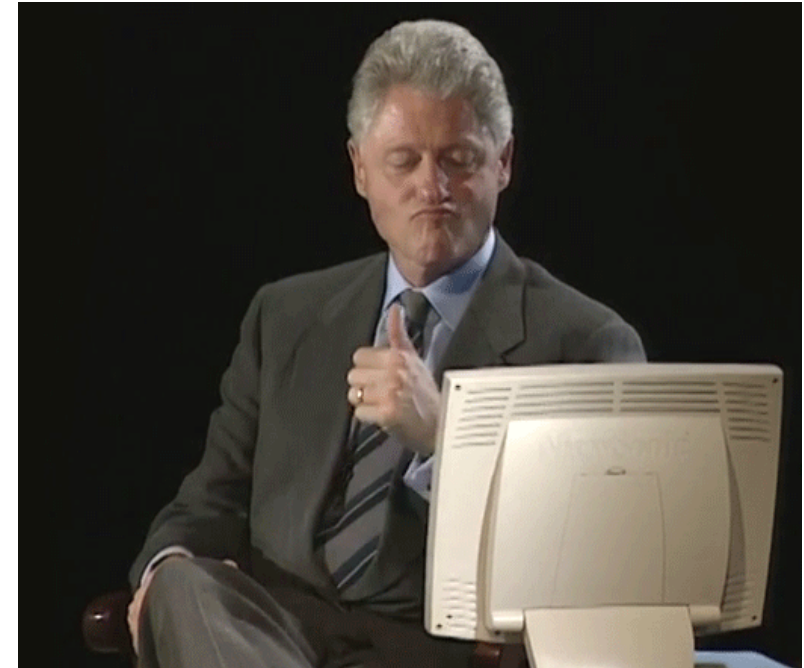
It All Started With ...

The Framework for Global Electronic Commerce

1997 Clinton administration policy guidance on the Internet

5 Basic Principles:

1. "The private sector should lead."
2. "Governments should avoid undue restrictions on electronic commerce."
3. "Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce."
4. "Governments should recognize the unique qualities of the Internet."
5. "Electronic Commerce over the Internet should be facilitated on a global basis."



Advantages and Disadvantages of Soft Law Mechanisms

Advantages	Disadvantages
<ul style="list-style-type: none">• Trust developed between agencies, industry, and consumers for both the products produced and the agency's ability to address issues• Certainty regarding possible agency actions• Faster, more flexible, and more adaptable to new industries and technologies• Clarity and precision due to the ability to more narrowly tailor• Greater transparency for actions at a more accessible level	<ul style="list-style-type: none">• Techno-populism (“Net Neutrality” debate)• Lack of Congressional oversight and difficulty using typical checks in balances• Participant transparency• Potential issues regarding how to challenge such actions• Uncertainty about enforceability and continuation of the actions



Making Sure Soft Law Doesn't Become "Soft Despotism"

- Moratorium on new regulations (1 in 2 out type rule)
- Requirements of annual regulatory transparency reports
- Additional resources for and accountability to OIRA
- Inclusion of guidance under OIRA review
- Increased legislative oversight
- Legislative accountability through budget actions for agencies that abuse power
- Presidential or internal administrative actions
- Reform of deference standards

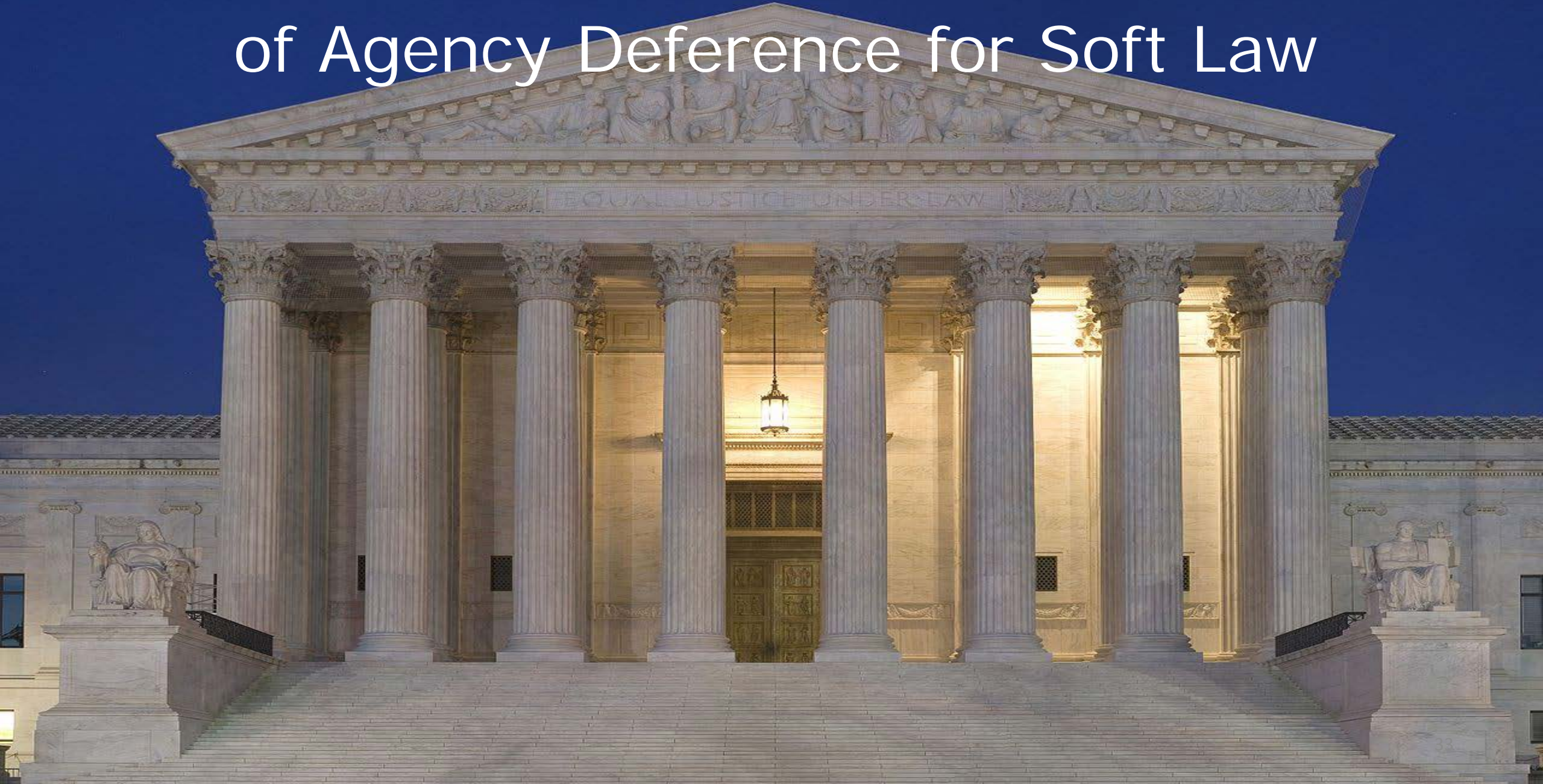
Our (Somewhat Reluctant) Conclusions

- The era of “hard law” governance appears to be fading and the age of “soft law” is firmly underway.
- Nothing likely to reverse that trend for emerging tech governance. If anything, it will accelerate, regardless of legitimacy concerns.
- But soft law / entrepreneurial administration have some real advantages over old regimes.
 - More adaptive than old governance regimes
 - Responsive to policy concerns without being overly precautionary
 - Builds trust among stakeholders
 - Creates more innovation opportunities

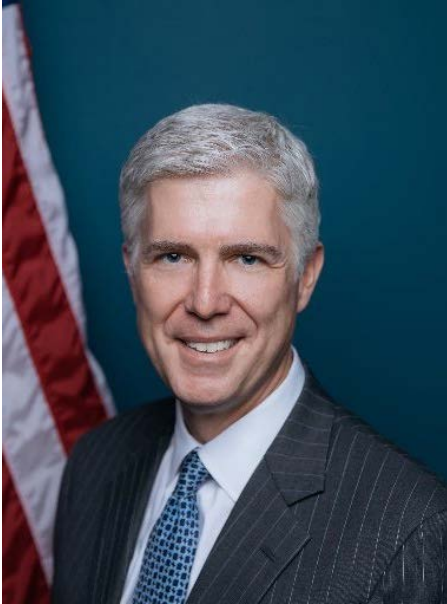
>> to paraphrase Churchill, it may be the case that **soft law represents the worst form of technological governance except for all those others that have been tried before.**



The Role of the Courts and the Question of Agency Deference for Soft Law



Changing Views of *Chevron* deference?



“There’s an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth. . . .”

- Honorable Neil Gorsuch, *Gutierrez-Brizuela v. Lynch*

“[T]he danger posed by the growing power of the administrative state cannot be dismissed.”

- Chief Justice John Roberts, *FCC v. City of Arlington*



Overview of Judicial Deference

Judicial Standard	Level of Deference to Administrative Agency	When It Applies
<i>Chevron</i>	Deference to agency interpretation unless unreasonable	Ambiguity in a statutory grant to an agency concerning the issue; agency has acted through formal or informal rulemaking
<i>Skidmore</i>	Deference accorded assuming thoroughness, validity, consistency, and persuasiveness of action	Agency interpretations and statements that “lack the force of law”
<i>Auer</i>	Controlling unless clearly erroneous	Agency interpretations of its own regulations

OTHER POLICY REFORMS



Before We Get to Soft Law, Consider Other Reforms

- **The Innovator's Presumption:** *Any person or party (including a regulatory authority) who opposes a new technology or service shall have the burden to demonstrate that such proposal is inconsistent with the public interest.*
- **The Sunsetting Imperative:** *Any existing or newly imposed technology regulation should include a provision sunseting the law or regulation within two years.*
- **The Parity Provision:** *Any operator offering a similarly situated product or service should be regulated no more stringently than its least regulated competitor.*

For more information, see ...

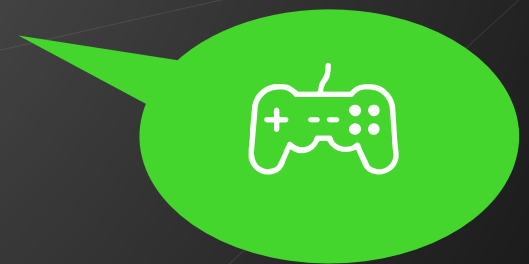
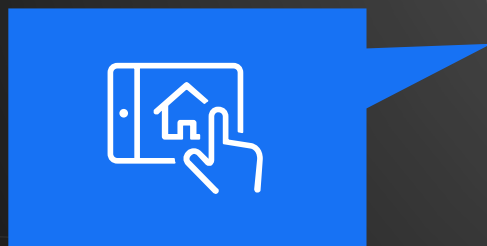
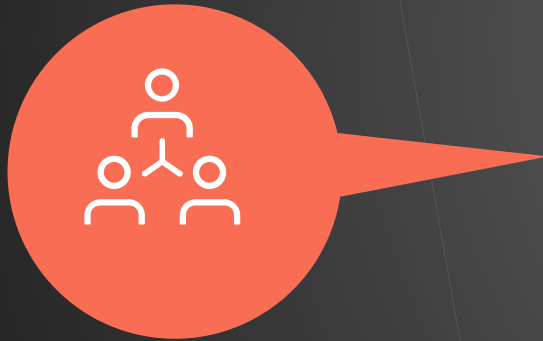
“Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future”

(forthcoming) *Colorado Technology Law Journal*

by Ryan Hagemann, Jennifer Skees & Adam Thierer

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118539

Silicon Flatirons: Designing Twenty First Century Regulatory Institutions



McKinsey's No Ordinary Disruption

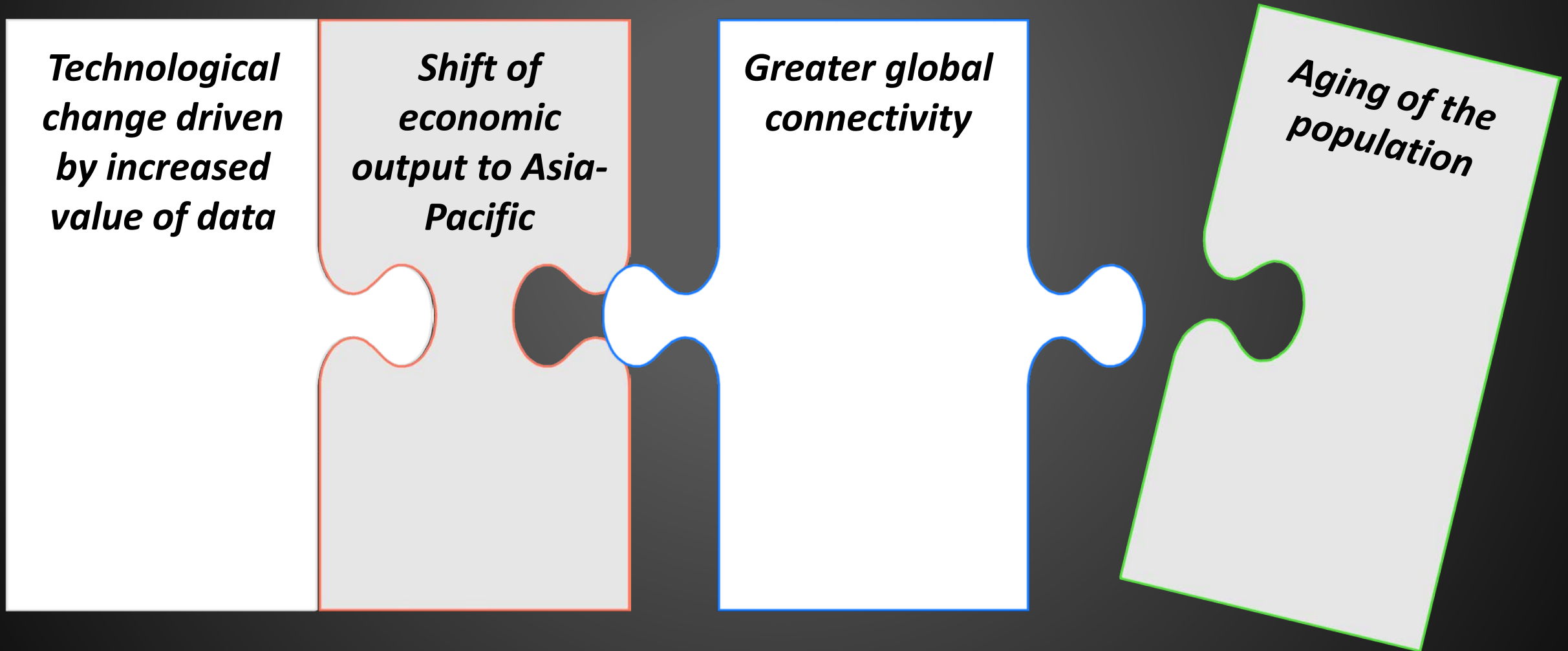
The Four Forces Breaking All the Trends

***Technological
change driven
by increased
value of data***

***Shift of
economic
output to Asia-
Pacific***

***Greater global
connectivity***

***Aging of the
population***



Areas Impacted by Digital Transformation

**Platforms,
social media
and
algorithms**

**Business
model
changes**

**Rising
role of
IoT**

**Data
analytics**

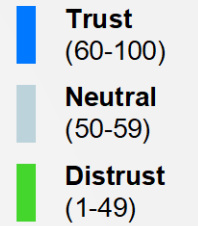
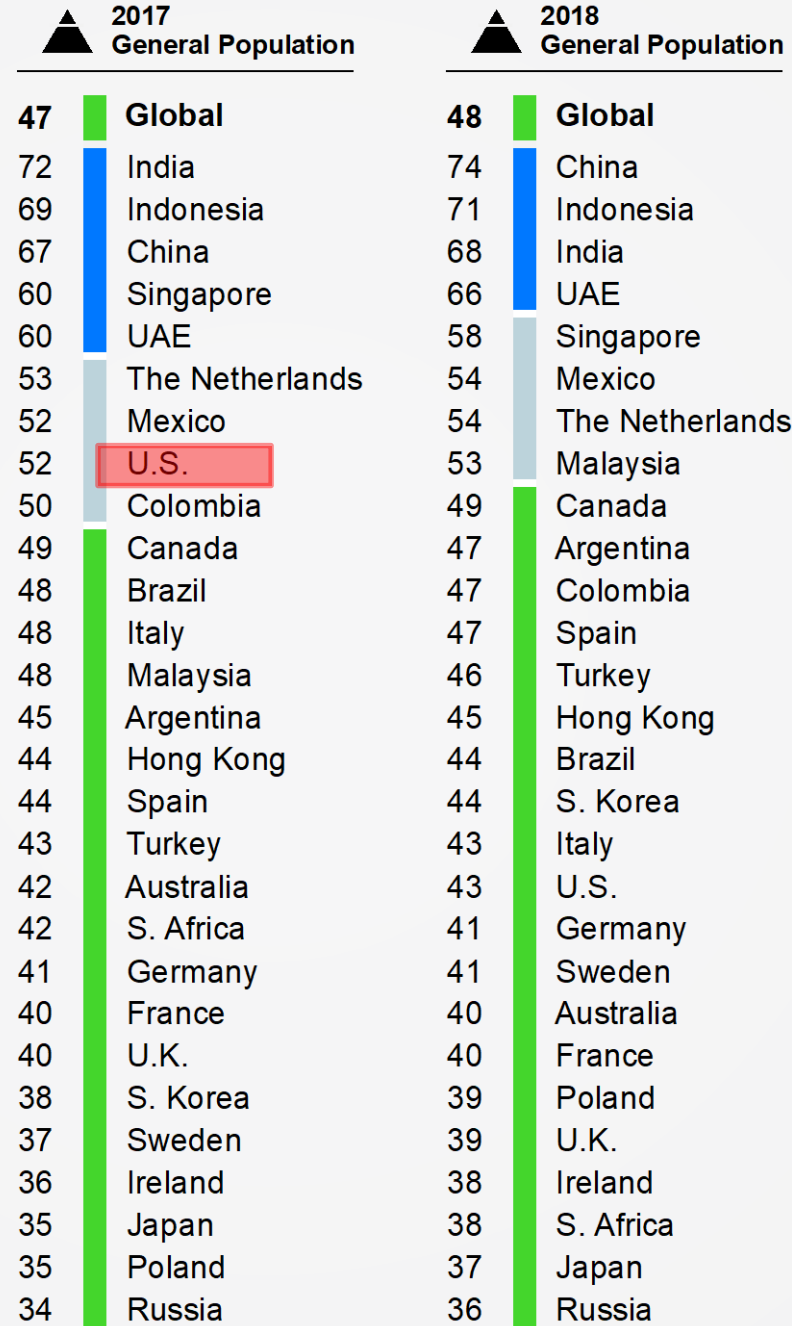
Trust Index A World of Distrust

Average trust in institutions,
general population, 2017 vs. 2018

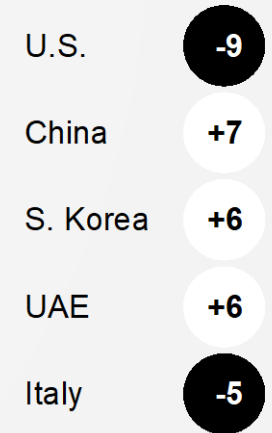
Global Trust Index remains at distruster level

20 of 28 countries are distrusters, up 1 from 2017

Source: 2018 Edelman Trust Barometer.
The Trust Index is an average of a country's trust in the institutions
of government, business, media and NGOs. General population,
28-country global total.



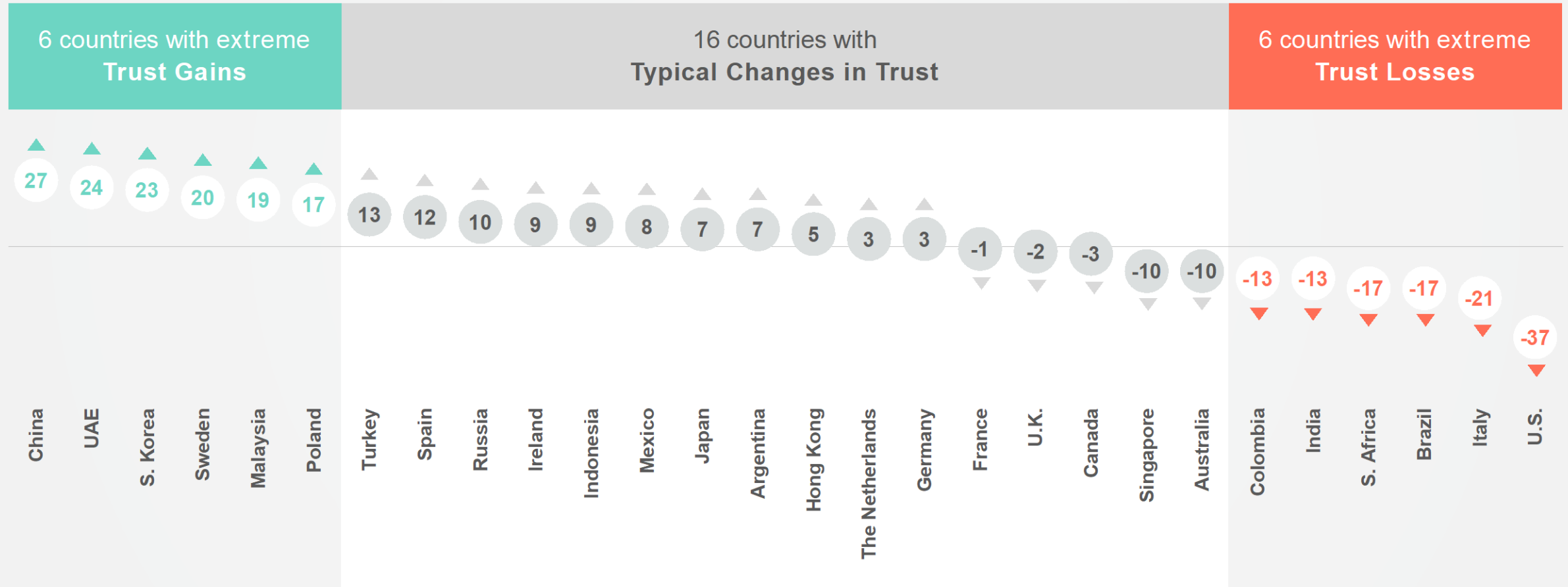
Biggest changes in



Trust decline in the U.S. is
the steepest ever measured

The Polarization of Trust

Aggregate percentage point change in trust in the four institutions, and change from 2017 to 2018

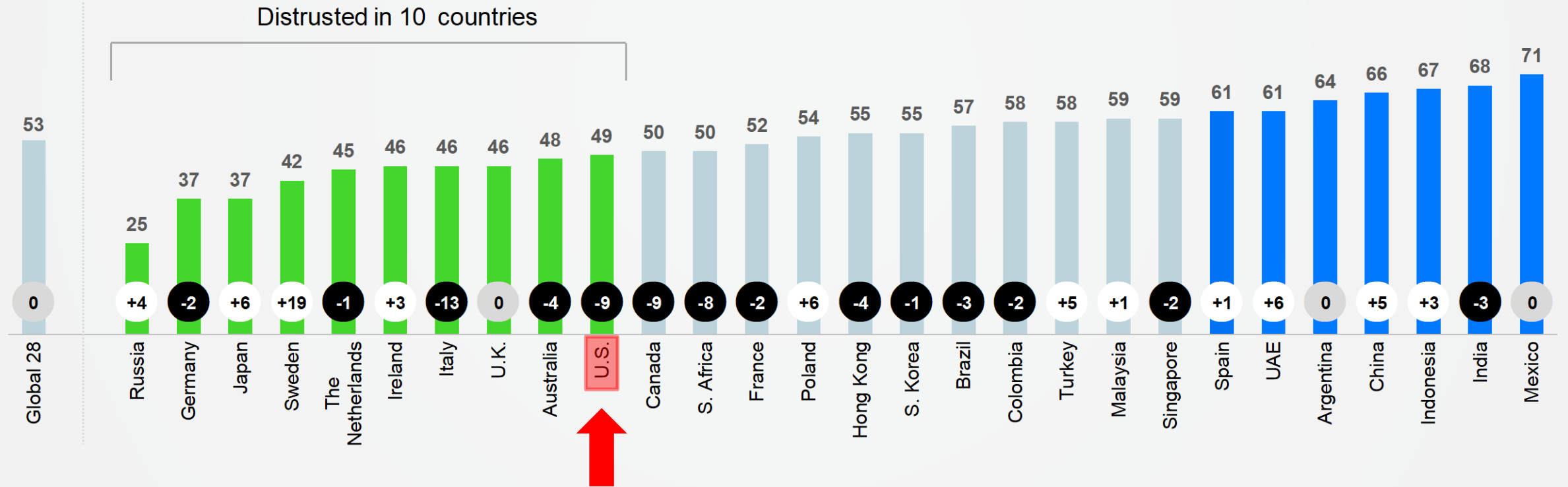
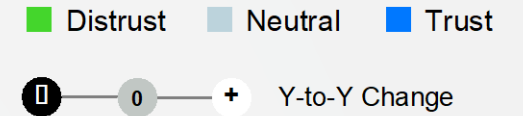


Source: 2018 Edelman Trust Barometer. Trust Volatility Measure. The net year-over-year (2017-2018) percentage point change across the four institutions (TRU_INS). General population, 28-country global total. For more details on how the Trust Volatility Measure was calculated, please refer to the Technical Appendix.

Trust in NGOs

Declines in 14 of 28 Countries

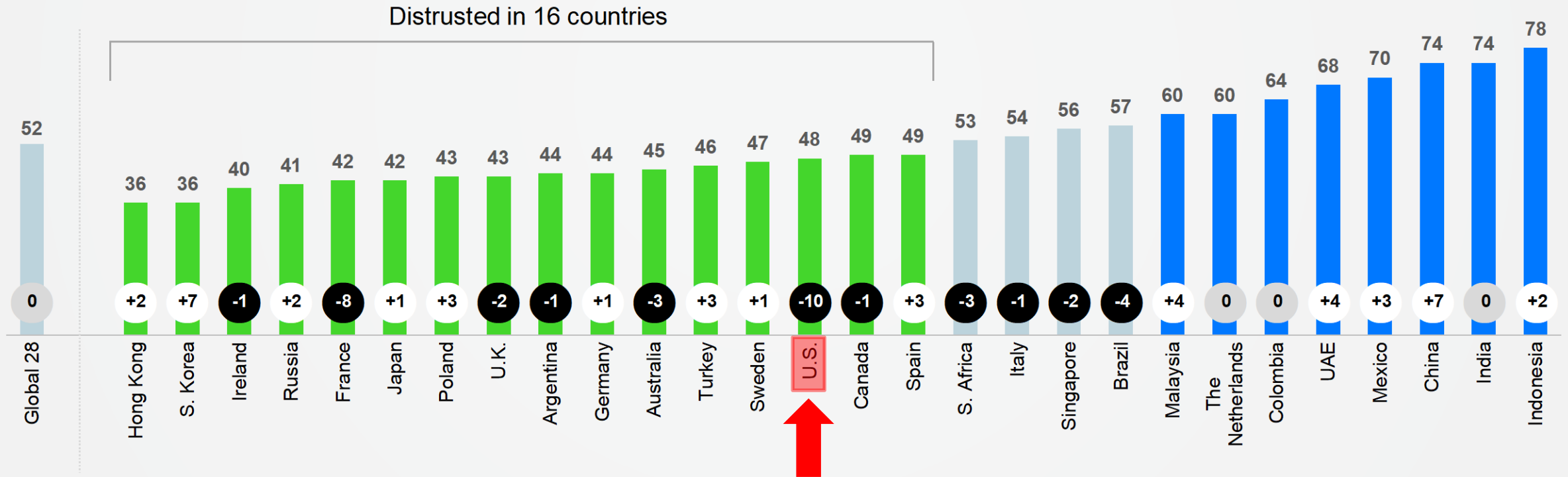
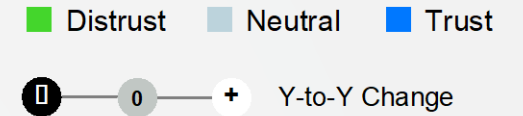
Percent trust in NGOs, and change from 2017 to 2018



Source: 2018 Edelman Trust Barometer. TRU_INS. [NGOs IN GENERAL] Below is a list of institutions. For each one, please indicate how much you trust that institution to do what is right using a nine-point scale where one means that you “do not trust them at all” and nine means that you “trust them a great deal.” (Top 4 Box, Trust) General Population, 28-country global total.

Trust in Business Increases in 14 of 28 Countries

Percent trust in business, and change from 2017 to 2018

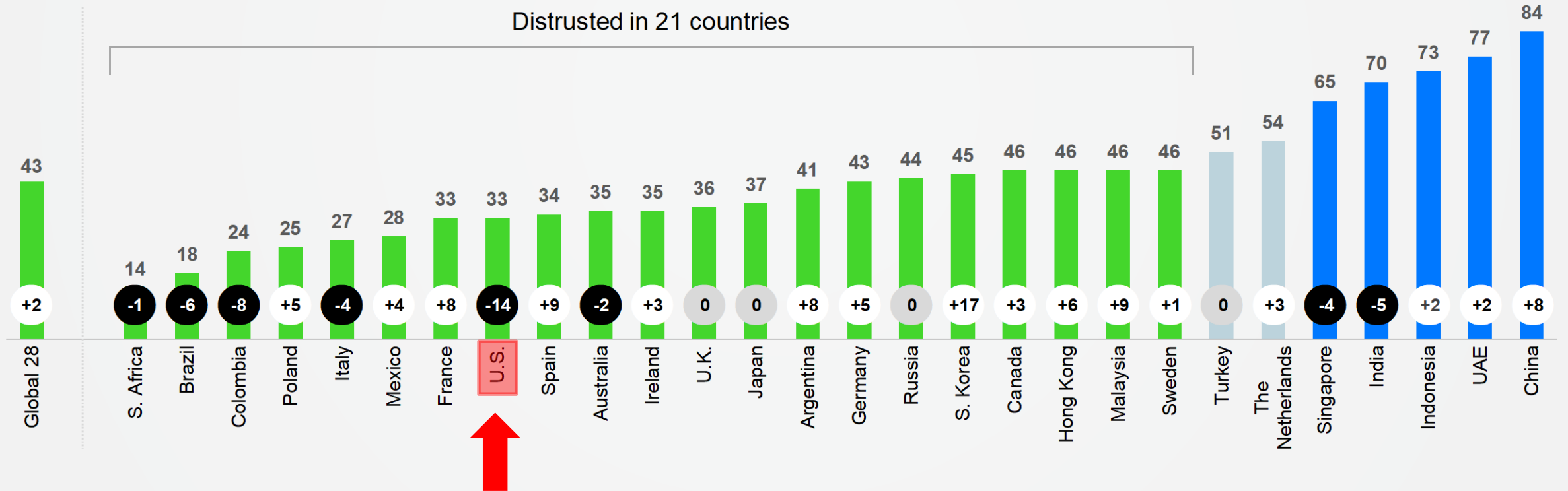
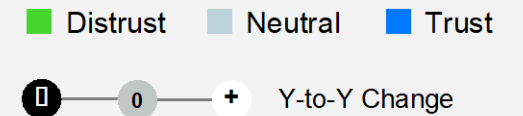


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Trust in Government

Increases in 16 of 26 Countries

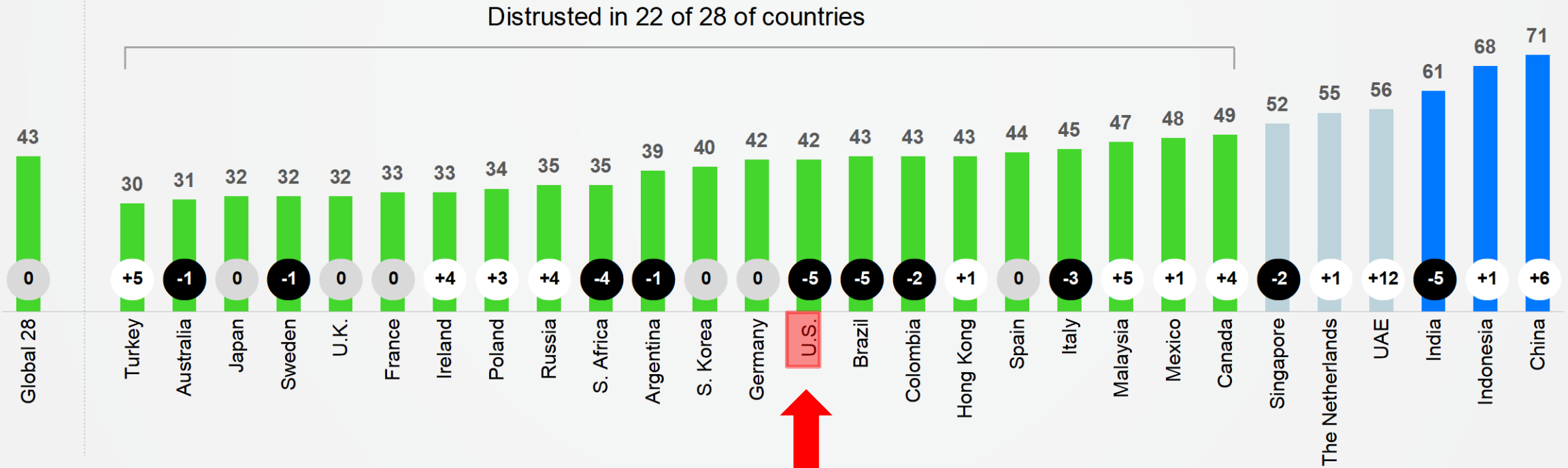
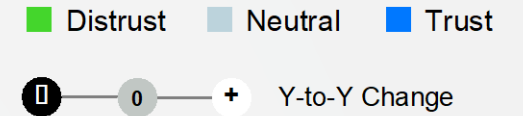
Percent trust in government, and change from 2017 to 2018



Source: 2018 Edelman Trust Barometer. TRU_INS. [GOVERNMENT IN GENERAL] Below is a list of institutions. For each one, please indicate how much you trust that institution to do what is right using a nine-point scale where one means that you "do not trust them at all" and nine means that you "trust them a great deal." (Top 4 Box, Trust) General Population, 28-country global total.

Media Now Least Trusted Institution

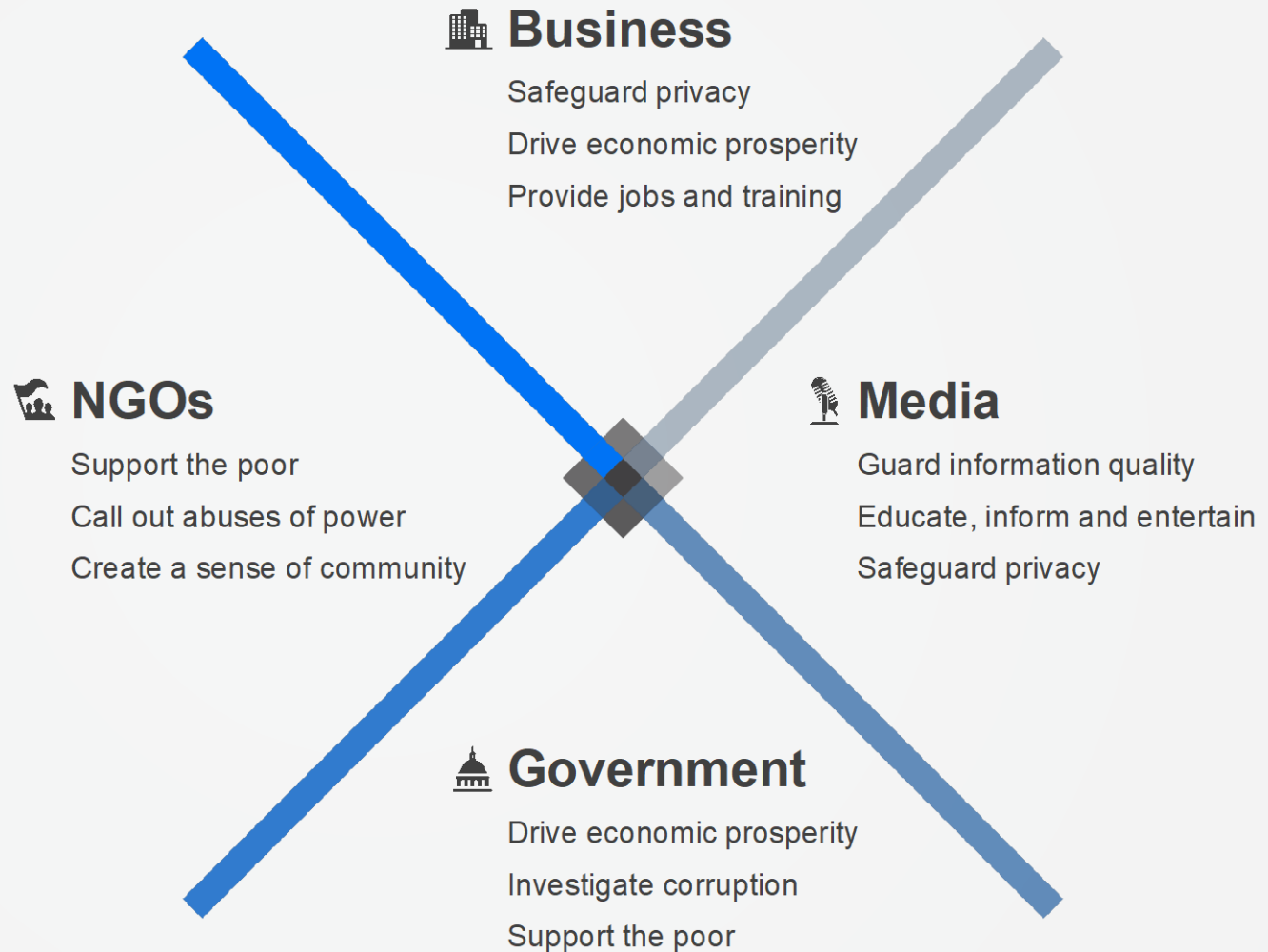
Percent trust in media, and change from 2017 to 2018



Source: 2018 Edelman Trust Barometer. TRU_INS. [MEDIA IN GENERAL] Below is a list of institutions. For each one, please indicate how much you trust that institution to do what is right using a nine-point scale where one means that you "do not trust them at all" and nine means that you "trust them a great deal." (Top 4 Box, Trust) General population, 28-country global total.

Each Institution Must Play its Role

Top trust-building mandates for
each institution

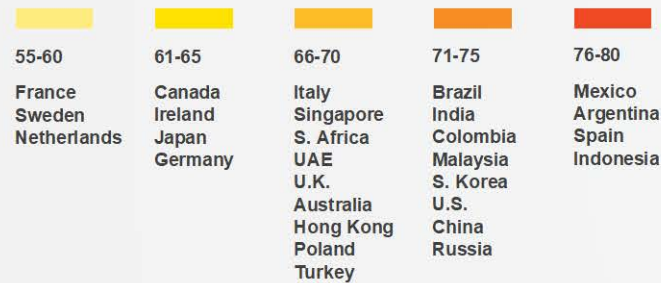


Source: 2018 Edelman Trust Barometer. Trust-Building Mandates Analysis. The most effective trust building mandates for each institution. INS_EXP_GOV; INS_EXP_MED; INS_EXP_BUS; and INS_EXP_NGO. Below is a list of potential expectations or responsibilities that a social institution might have. Thinking about [insert institution] in general, how would you characterize each using the following three-point scale. General population, 28-country global total. For more details on the Trust Mandates Analysis, please refer to the Technical Appendix.



World Worried About Fake News as a Weapon

Percent who worry about false information or fake news being used as a weapon



Nearly
7 in 10
worry about false information or fake news being used as a weapon

Germany passes a law that fines social media companies for failing to delete fake news

Canadian Conservative leader's campaign manager roots out enemies using fake news

Pope criticizes spread of fake news

Singapore announces plans to introduce laws designed to fight fake news

Fake news disrupts elections in South Africa

Source: 2018 Edelman Trust Barometer. ATT_MED_AGR. Below is a list of statements. For each one, please rate how much you agree or disagree with that statement using a nine-point scale where one means "strongly disagree" and nine means "strongly agree". (Top 4 Box, Agree), question asked of half of the sample. General population, 28-country global total.