# 1AC Round 6

# 1AC

## 1AC

### Inequality---1AC

#### Advantage 1 is Inequality.

#### Labor market power collapses the economy---inequality and wage stagnation.

Eric A. Posner 8/13/21. Kirkland & Ellis Distinguished Service Professor at University of Chicago. How Antitrust Failed Workers. Oxford University Press, 2021.

In the United States, and much of the Western world, economic growth has slowed, inequality has risen, and wages have stagnated. Academic research has identified several possible causes, ranging from structural shifts in the economy to public policy failure. One possible cause that has received increasing attention from economists is labor market power, the ability of employers to set wages below workers’ marginal revenue product.1 New evidence suggests that many labor markets around the country are not competitive but instead exhibit considerable market power enjoyed by employers, who use their market power to suppress wages. This phenomenon—the power of employers to suppress wages below the competitive rate—is known among economists as labor monopsony, or simply labor market power. Wage suppression enhances income inequality because it creates a wedge between the incomes of people who work in concentrated and competitive labor markets. Wage suppression also reduces the incomes of workers relative to those of people who live off capital, and the latter are almost uniformly wealthier than the former. Wage suppression also interferes with economic growth since it results in underemployment of labor and, while it may seem to raise the return on capital, actually depresses it, as capital must lie idle to take advantage of monopsony power. With wages artificially suppressed, qualified workers decline to take jobs, and workers may underinvest in skills and schooling. Many workers exit the workforce and rely on government benefits, including disability benefits that have become a hidden welfare system.2 This in turn costs the government both in lost taxes and in greater expenditures. One estimate finds that monopsony power in the U.S. economy reduces overall output and employment by 13% and labor’s share of national output by 22%.3

The claim that labor market power raises inequality and reduces growth mirrors another claim that has received attention lately—that the product market power of firms has contributed to rising inequality and faltering growth.4 A product market is a collection of products defined by frequent consumer substitution. When a small number of sellers or one seller of these products exist, we say that each seller has product market power, which enables it to charge a price higher than marginal cost, or the price that would prevail in a competitive market. When a small number of employers hire from a pool of workers of a certain skill level within the geographic area in which workers commute, the employers have labor market power.

One major source of market power in both types of markets is thus concentration, where only a few firms operate in a given market. Imagine, for example, a small town with only a few gas stations. Each gas station sets the price of gas to compete with the prices of the other gas stations. When a gas station lowers its price, it may obtain greater market share from the other gas stations—which increases profits—but it also receives less revenue per sale. If only a single gas station exists, it will maximize profits by charging a high (“monopoly”) price because the gains from buyers willing to pay the price exceed the lost revenue from buyers who stay away. If only a few gas stations exist, they might illegally enter a cartel in which they charge an above-market price and divide the profits, or they might informally coordinate, which is generally not illegal, though the social harm is the same. In contrast, if many gas stations compete, prices will be bargained down to the efficient level—the marginal cost—resulting in low prices for consumers and high aggregate output of gasoline.

Labor market concentration creates monopsony (or, if more than one employer, oligopsony, but I use these terms interchangeably) where labor market power is exercised by the buyer rather than (as in the example of gas stations) the seller. Employers are buyers of labor who operate within a labor market. A labor market is a group of jobs (e.g., computer programmers, lawyers, or unskilled workers) within a geographic area where the holders of those jobs could with relative ease switch among the jobs. The geographic area is usually defined by the commuting distance of workers. A labor market is concentrated if only one or a few employers hire from this pool of workers. For example, imagine the gas stations employ specialist maintenance workers who monitor the gas-pumping equipment. If only a few gas stations exist in that area, and no other firms (e.g., oil refineries) hire from this pool of workers, then the labor market is concentrated, and the employers have market power in the labor market. To minimize labor costs, the employers will hold wages down below what the workers would be paid in a competitive labor market—their marginal revenue product. Faced with these low wages, some people qualified to work will refuse to. But the employers gain more from wage savings than they lose in lost output because of the small workforce they employ.

Antitrust law does not distinguish monopoly and monopsony (including labor monopsony): firms that achieve monopolies or monopsonies through anticompetitive behavior violate antitrust law. But product market concentration has received a huge amount of attention by courts, researchers, and regulators, while labor market concentration has received hardly any attention at all.5 The Department of Justice (DOJ) and Federal Trade Commission’s (FTC) Horizontal Merger Guidelines, which are used to screen potential mergers for antitrust violations, provide an elaborate analytic framework for evaluating the product market effects of mergers. Yet, while the Merger Guidelines state that there is no distinction between seller and buyer power,6 they say nothing about the possible adverse labor market effects of mergers. Similarly, while there are thousands of reported cases involving allegations that firms have illegally cartelized product markets, there are few cases involving allegations of illegally cartelized labor markets.7

This historic imbalance between what I will call product market antitrust and labor market antitrust has no basis in economic theory. From an economic standpoint, the dangers to public welfare posed by product market power and labor market power are the same. As Adam Smith recognized, businesses gain in the same way by exploiting product market power and labor market power—enabling them to increase profits by raising prices (in the first case) or by lowering costs (in the second case).8 For that reason, businesses have the same incentive to obtain product market power and labor market power. Hence the need—in both cases—for an antitrust regime to prevent businesses from obtaining product and labor market power except when there are offsetting social gains.

#### Current antitrust law explains the decline in wages and rise in inequality.

Sandeep Vaheesan 18. Legal director at the Open Markets Institute. “How Contemporary Antitrust Robs Workers of Power” LPE Project. 07-19-18. <https://lpeproject.org/blog/how-contemporary-antitrust-robs-workers-of-power/>

The political economist Albert Hirschman developed the idea that members of an organization can exercise power in two ways—through exit and voice. Market activity is associated with exit: consumers unhappy with the price or quality of service of their current wireless carrier can switch to a rival carrier offering lower rates or better service. Elections exemplify voice: voters can replace a corrupt or ineffective incumbent officeholder with a challenger promising to make the government work for ordinary people. For workers, both exit (joining a new employer) and voice (making demands of a current employer) are important. Despite the pro-worker aims of the framers of the Sherman and Clayton Acts, **antitrust law** today is an **enemy of both exit and voice for workers.** For more than a generation, antitrust enforcers have permitted **labor markets to** **become highly concentrated** and have also **interfered with the efforts** of a large segment of workers to build collective power. Through their labor market actions, the Department of Justice (DOJ) and Federal Trade Commission (FTC) reinforce, rather than tame, corporate power. To create a progressive, pro-worker antitrust, legislators and policymakers must adopt a radically different vision for the field. Tens of millions of American workers **wield little or no power** in their place of work. In many parts of the country, workers lack meaningful exit. They **face concentrated local labor markets** in which only a handful of employers compete (at least theoretically) for their services. In some labor markets, employees have only one actual or prospective employer. In other words, many Americans, at least in their capacity as workers, may experience what we often think of as a relic of a bygone era—the company town. As recent studies have shown, employer-side concentration is **associated with significantly lower wages**. And other research has found that concentration at one level of a supply chain can **depress wages further upstream.** In addition to concentrated markets, approximately **30 million workers** are subject to **non-compete clauses**, which prevent them from accepting a new job or starting a business in the same line of work. Non-compete clauses, regardless of whether they are enforced, can signal to workers that their choice is **either stay at their current job or suffer extended unemployment.** Along with possessing few exit options, most workers cannot assert effective voice in the workplace. Big business’s legal and political war on labor’s power has severely weakened unions. In contrast to the 1950s when roughly a third of wage and salary workers were unionized, only a small percentage of workers are members of labor unions today—around one in ten among all workers, and one in sixteen among workers in the private sector. This decline in union density **explains a significant fraction of the forty-year stagnation in wages and increase in income inequality**. Moreover, even if wage gains had kept pace with productivity, the collapse of organized labor means that workers lost say over numerous workplace issues. While employees can speak up as individuals, this type of voice is no substitute for the collective voice that comes from a democratic union. Given that most individual workers are dispensable and replaceable for their employers, a lone voicing of grievance often can easily be ignored or even invite retaliation from an employer. And, beyond the site of employment, unorganized workers are less able to exercise voice in electoral politics and check the dominant influence of corporations. Antitrust enforcers have allowed labor markets to grow more concentrated across the country. Just as labor law has been rewritten to cripple labor organizing, the executive branch and courts have remade antitrust to be much friendlier to capital over the past four decades. Influenced by the writings of Robert Bork, the Supreme Court has held that the **antitrust laws are a “consumer welfare prescription.”** Although the Supreme Court and the antitrust agencies counterintuitively state that consumer welfare accounts for harms to workers and other sellers of services, the DOJ and the FTC focus their enforcement on mergers and practices harmful to consumers. In developing enforcement priorities, the federal antitrust agencies have relied on simplistic economic theory. Instead of directing their economists to study the structure of labor markets, the DOJ and the FTC have adopted an Econ 101 view of the world and assumed that labor markets are generally competitive on the employer side. Embracing this fiction, the agencies have never stopped a merger on labor market grounds. **Due to antitrust inaction** (and other factors), labor market **concentration has increased** since the late 1970s.

#### Inequality undermines US international engagements---it’s the biggest threat.

Kurt M.Campbell 14**.** Chairman and chief executive of the Asia Group investment and consulting firm was assistant secretary of state for East Asian and Pacific Affairs from 2009 to 2013. “How income inequality undermines U.S. power” The Washington Post. https://www.washingtonpost.com/opinions/how-income-inequality-undermines-us-power/2014/11/28/53fab4e4-74e5-11e4-9d9b-86d397daad27\_story.html?utm\_term=.40bd11b21cf7

Much has been written about the domestic consequences of growing income inequality in the United States — how **inequality depresses growth**, puts downward pressure on the middle class, accentuates wage stagnation and creates added difficulty paying for a college education and buying a home — but much less has been said about how inequality will affect America’s role in the world. How will the social science experiment of allowing wealth to settle so unequally between the top 1 percent and rest of the United States impact the foundations and contours of U.S. foreign policy? In fact, there are likely to be subtle and **direct consequences of growing inequality** both for the United States’ **international standing** and its activism. In most critical respects, the **United States has helped to create and underwrite the global operating system** since the end of World War II. This required a citizen’s sense of external responsibility and belief that the United States had **something unique** and valuable to confer to the world. Americans over these generations have regularly demonstrated in word and deed that they were prepared to bear burdens and advance ideas. Coinciding with this era was a general sense of overarching optimism that reinforced a post-World War II period of unprecedented American activism on the global scene. It is likely that as a **growing segment of the population strains just to get by**, it will increasingly view foreign policy — foreign assistance and military spending alike — as a kind of **luxury ripe for cuts** and a reduction in ambition. It is possible to see early indicators of these sentiments on the right and left, in the form of both tea party isolationism and Occupy Wall Street suspicion that corporate interests drive America’s foreign entanglements. It is also the case that other countries have long emulated aspects of the American Way in designing their own development models. Having access to higher education, **creating conditions that support innovation and allowing for greater upward mobility** have all been deeply attractive qualities to many nations. But it is the construction of a **durable U.S. middle class** that has been perhaps **most compelling** to highly stratified societies across Latin America, Asia and Africa. Now, however, the United States is moving in the other direction, toward an **unstable society divided between astronomically rich elites** and everyone else. This **undermines a critical component of U.S. soft power** and is a model for societal engineering that few would choose to emulate. It is also the case that the most recent era of U.S. exertion on the global stage has involved nearly 15 years of conflict in the Middle East and South Asia. The most important features of these largely military engagements have involved refinements in counterinsurgency technique and adaptations in military technology. A different 1 percent of the U.S. population has been primarily involved in this struggle: the U.S. military and others associated with the defense establishment. Aside from clapping when a uniformed military member greets an emotional family at an airport homecoming, the vast majority of the population has been largely unaffected by these conflicts. They neither paid for nor fought these wars. The next phase of intense global engagement is likely to demand much more from a larger share of the population. The lion’s share of 21st-century history will play out in Asia, with its thriving and **acquisitive middle classes driving innovation, nationalist competitions, military ambitions, struggles over history and identity, and simple pursuit of power.** The United States is in the midst of a **major reorientation** of its foreign policy and commercial priorities that will draw it more closely to Asia in the decades ahead. The competition for power and prestige there rests on comprehensive aspects of national power — as much to our product and service offerings, the strength of our educational system and the health and vitality of our national infrastructure as to the quality of U.S. military capabilities. Each of these efforts require **substantial and sustained longer-term investments**; all face funding shortfalls due to myriad challenges. A corresponding **consequence of growing inequality has been a reduction** in support for these building blocks for comprehensive and sustained **international engagement.** The worrisome dimensions of income inequality on the quality of domestic American life should be enough to cause us to **consider enacting remedies**. However, the potential negative implications on U.S. performance internationally can only add to the case. Ultimately, a sustained and purposeful American internationalism is inextricably linked to the health of our domestic life, to which **gaping inequality is the biggest threat.**

#### Collapsing worker welfare causes neo-isolationist nativism---recovery future-proofs internationalism.

Charles A. Kupchan and Peter L. Trubowitz May/June 21. Charles A. Kupchan is a Senior Fellow at the Council on Foreign Relations, Professor of International Affairs in the School of Foreign Service and the Government Department at Georgetown University. Peter L. Trubowitz is Professor of International Relations at the London School of Economics and Political Science and an Associate Fellow at Chatham House. “The Home Front: Why an Internationalist Foreign Policy Needs a Stronger Domestic Foundation”. https://www.foreignaffairs.com/articles/united-states/2021-04-20/foreign-policy-home-front

U.S. President Joe Biden has declared that under his leadership, “America is back” and once again “ready to lead the world.” Biden wants to return the country to its traditional role of catalyzing international cooperation and staunchly defending liberal values abroad. His challenge, however, is primarily one of politics, not policy. Despite Biden’s victory in last year’s presidential election, his internationalist vision faces a deeply skeptical American public. The political foundations of U.S. internationalism have collapsed. The domestic consensus that long supported U.S. engagement abroad has come apart in the face of mounting partisan discord and a deepening rift between urban and rural Americans. An inward turn has accompanied these growing divides. President Donald Trump’s unilateralism, neo-isolationism, protectionism, and nativism were anathema to most of the U.S. foreign policy establishment. But Trump’s approach to statecraft tapped into public misgivings about American overreach, contributing to his victory in 2016 and helping him win the backing of 74 million voters in 2020. An “America first” approach to the world sells well when many Americans experience economic insecurity and feel that they have been on the losing end of globalization. A recent survey by the Pew Research Center revealed that roughly half the U.S. public believes that the country should pay less attention to problems overseas and concentrate more on fixing problems at home. Redressing the hardships facing many working Americans is essential to inoculating the country against “America first” and Trump’s illiberal politics of grievance. That task begins with economic renewal. Restoring popular support for the country’s internationalist calling will entail sustained investment in pandemic recovery, health care, infrastructure, green technology and jobs, and other domestic programs. Those steps will require structural political reforms to ease gridlock and ensure that U.S. foreign policy serves the interests of working Americans. What Biden needs is an “inside out” approach that will link imperatives at home to objectives abroad. Much will depend on his willingness and ability to take bold action to rebuild broad popular support for internationalism from the ground up. Success would significantly reduce the chances that the president who follows Biden, even if he or she is a Republican, would return to Trump’s self-defeating foreign policy. Such future-proofing is critical to restoring international confidence in the United States. In light of the dysfunction and polarization plaguing U.S. politics, leaders and people around the world are justifiably questioning whether Biden represents a new normal or just a fleeting reprieve from “America first.”

#### Soft power solves global existential risks.

Joseph S. Nye Jr. 20. Harvard University Distinguished Service Professor, Emeritus. "COVID-19’s Painful Lesson About Strategy and Power". War on the Rocks. 3-26-2020. https://warontherocks.com/2020/03/covid-19s-painful-lesson-about-strategy-and-power/

In 2017, President Donald Trump announced a new National Security Strategy that focused on great-power competition with China and Russia. While the plans also note the role of alliances and cooperation, the implementation has not. Today, COVID-19 shows that the strategy is inadequate. Competition and an “America First” approach is not enough to protect the United States. Close cooperation with both allies and adversaries is also essential for American security.

Under the influence of the information revolution and globalization, world politics is changing dramatically. Even if the United States prevails in the traditional great-power competition, it cannot protect its security acting alone. COVID-19 is not the only example. Global financial stability is vital to U.S. prosperity, but Americans need the cooperation of others to ensure it. And while trade wars have set back economic globalization, there is no stopping the environmental globalization represented by pandemics and climate change. In a world where borders are becoming more porous to everything from drugs to infectious diseases to cyber terrorism, the United States must use its soft power of attraction to develop networks and institutions that address these new threats. For example, this administration proposed halving the U.S. contribution to the World Health Organization’s budget — now we need it more than ever.

A successful national security strategy should start with the fact that “America First” means America has to lead efforts at cooperation. A classic problem with public goods (like clean air, which all can share and from which none can be excluded) is that if the largest consumer does not take the lead, others will free-ride and the public goods will not be produced. As the technology expert Richard Danzig summarizes the problem:

Twenty-first century technologies are global not just in their distribution, but also in their consequences. Pathogens, AI systems, computer viruses, and radiation that others may accidentally release could become as much our problem as theirs. Agreed reporting systems, shared controls, common contingency plans, norms and treaties must be pursued as a means of moderating our numerous mutual risks.

Tariffs and border walls cannot solve these problems. While American leadership is essential because of the country’s global influence, success will require the cooperation of others.

On transnational issues like COVID-19 and climate change, power becomes a positive-sum game. It is not enough to think of American power over others. We must also think in terms of power to accomplish joint goals, which involves power with others. On many transnational issues, empowering others helps us to accomplish our own goals. The United States benefits if China improves its energy efficiency and emits less carbon dioxide, or improves its public health systems. In this world, institutional networks and connectedness are an important source of information and of national power, and the most connected states are the most powerful. Washington has some sixty treaty allies while China has few. Unfortunately, as Mira Rapp-Hooper recently argued, the United States is squandering that power resource.

In the past, the openness of the United States enhanced its capacity to build networks, maintain institutions, and sustain alliances. But will that openness and willingness to engage with the rest of the world prove sustainable in the current populist mood of American domestic politics? Even if the United States possesses more hard military and economic power than any other country, it may fail to convert those resources into effective influence on the global scene. Between the two world wars, America did not and the result was disastrous.

#### A worker welfare standard would protect workers and reduce labor market concentration.

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Most of the principles naturally carry over, in suitably modified form, to the analysis of merger effects on labor markets, though a few subtle issues arise. Many of the same factors that could act as efficiencies on the product side are also efficiencies on the labor side. By analogy to the “consumer welfare” standard, we believe that **mergers that trigger scrutiny by reducing** **labor market competition** should be subject to a “**worker welfare” standard**.213 The fact that the merger might raise firm profits more than it harms workers **should not be sufficient to excuse the merger**. Instead, the merger would be permitted if the merger sufficiently increases worker productivity (workers’ marginal revenue product) in a way that will not fully be absorbed by lower prices or increased employer profits. Thus, harms from reduced competition are more than fully offset, and **therefore workers’ wages, benefits, or conditions will improve because of the merger.** This is not to say that mergers that harm workers should never be approved. The losses to workers could be offset by gains elsewhere in the economy. Indeed, the merger of two firms that operate in a frictionless labor market should not greatly harm workers even if it does result in significant layoffs, because in a competitive labor market **the laid-off workers can easily find equally good jobs.**214 In contrast, a merger that does create competitive concern should not be excused simply on the basis that it **allows the firm to cut costs by destroying jobs**. In such cases, antitrust doctrine does not allow efficiency gains in other markets to offset losses in one market.215 Thus, typically, **the worker-surplus implications of a merger will indicate its competitive effects**, just as in product markets consumer surplus is a strong but not perfect proxy for competitive effects. In some cases, a merger may **prove overall competitively harmful in labor markets** (thus **reducing worker welfare**) and beneficial in product markets (thus increasing consumer welfare). Such cases should be treated roughly like ones where competitive harm occurs in one product market but there are competitive benefits in another product market. To the extent possible, antitrust authorities should try to find remedies that address the competitive harms while preserving the benefits, such as requiring the spinning off of critical units that would allow an increase in market power. However, **the frequency of such cases should not be exaggerated**; mergers that increase labor market power and thus raise effective costs will not usually bring lower prices to consumers, and mergers increasing product market power and thus reducing sales will not typically create great jobs. As we noted in section I.A.3, enforcers should **not believe** the canard that the monopsonist’s lower labor costs are **passed on to consumers as lower prices**.216 Monopsony power raises the effective marginal cost a firm faces and thus should almost always lead to increased prices. Similar analysis applies to the merger-specificity of the efficiency gains: productivity gains that could be achieved absent the anticompetitive effects of the merger should not play a role in merger analysis.

#### Prioritizing worker welfare solves inequality.

Eugene K. Kim 20. J.D. 2020; Yale College, B.A. 2016. “Labor’s Antitrust Problem: A Case for Worker Welfare” The Yale Law Journal. 2020. https://www.yalelawjournal.org/pdf/130.2Kim\_q1s8bt8t.pdf

In this Note, I show that the union exemption should be read to encompass a broader concern for the welfare of workers. In other words, **antitrust law** should be seen **not merely as protecting consumers from producers, but also labor from capital.** My primary justification is drawn from welfare economics and the “theory of the second best,” which suggests that when a certain market distortion cannot be removed, it may be economically optimal (i.e., the next best option) to **introduce a countervailing distortion.**21 An ideal competitive labor market would have no market power on either the supply side or demand side, but some degree of rent-extracting market power on the demand side (i.e., firms) is inevitable due to the limited resources of enforcement agencies and labor-market frictions. If concentration is inevitable among employers, permitting concentration among workers is the next best way to (1) counteract abuse and rent-extractive behavior from employers and (2) **move income from capitalists to workers**, who by virtue of their relatively low income may receive higher marginal utility from income.22 Further justification can be found in the **legislative history of the major antitrust statutes.** During congressional debate over the antitrust laws, key legislators expressed their intent not only to preserve the organizing power of labor, but also to support affirmatively the accumulation of labor power to contest concentrations of capital.23 Thus, legislative intent provides **justification for worker welfare beyond a strictly economic reading of the antitrust laws.** Even when labor organizing may not be the most “efficient” economic choice,24 it may still comport with the drafters’ goal of **protecting individuals from the economic power of corporations.**

### Modeling---1AC

#### Advantage 2 is Modeling.

#### Competition standards around the world focus on consumer welfare.

Marianela Lopez-Galdos 17. “Antitrust in 60 Seconds: Is the Consumer Welfare Standard Appropriate?” Disruptive Competition Project. 11-17-17. https://www.project-disco.org/competition/111717-antitrust-in-60-seconds-is-the-consumer-welfare-standard-appropriate/

In the rest of the world, including the European Union, most competition systems were put in place in the post-war periods. As such, the pursuit of pluralistic goals guided by public interest concerns through the competition system was a method by which these toddling democracies sought to boost and defend their nascent democratic process. That being said, competition systems have evolved, and mature ones have **narrowed the antitrust analysis to focus on consumer welfare.** In this context, it is noteworthy that the UN and OECD have **separately concluded** that many competition systems **pursue consumer welfare as the primary competition goal.** In 1995, UNCTAD concluded that “There has in fact been an increasing convergence in the provisions or the application of competition laws over the laws two decades. Competition systems in many countries are now placing relatively greater emphasis upon the protection of competition, as well as **upon efficiency and competitiveness criteria**, rather than upon other public interest goals”.

#### Replacing the federal consumer welfare standard prevents global fascism.

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After World War II, the United States engaged in a historic effort to rebuild Europe and Japan through the Marshall Plan. While the story of the Marshall Plan is well known, what is less commonly understood is that the United States exported aggressive antitrust laws to Europe during those post-war years. The Marshall Plan antitrust advisors believed that the massive consolidation in the German economy facilitated and sustained fascism, and they argued that a democratic society required a democratic economy.26 Today, in the context of increasing concentration, rising authoritarianism, and foreign governments commingling state and markets through state-owned enterprises and state capitalism, promoting economic democracy abroad should be an essential foreign policy objective. And yet, the text of the Trans-Pacific Partnership, a trade agreement designed by the Obama Administration, established the objectives of competition policy as “economic efficiency and consumer welfare,” a narrowly drawn and ideological conception of the purposes of antitrust law that has no basis in U.S. statutory law.27 Presidents and their administrations should abandon these cramped views of antitrust and instead encourage the adoption of more aggressive antitrust laws abroad.

#### Global use of the consumer welfare standard fuels populism.

Frederic Jenny 19. ESSEC Business School and OECD Competition Committee. “POPULISM, FAIRNESS AND COMPETITION: SHOULD WE CARE AND WHAT COULD WE DO?” The Japanese Economic Review. Vol. 70, No. 3, September 2019. https://onlinelibrary.wiley.com/doi/full/10.1111/jere.12232

Other competition legal scholars have called attention to the fact **the socioeconomic social contract is breaking down.** For example, Gal (2019) argues that: A growing number of citizens believe that the promises of the competition based market system, which form an important part of the implicit social contract, are not fulfilled and that capitalistic markets are no longer working in their favour. Indeed, statistics indicate that social mobility is low; that wealth is aggregated disproportionately in the hands of the already well-off; that **wealth inequality keeps rising**; that several large firms dominate the digital economy, thereby blocking at least some of the promises that technological changes were thought to bring about; that technological changes such as robotics create significant disruption effects and have negative implications on the labor market; or that education and social security **do not create viable solutions** for workers in order to ensure that wide geographic areas or demographic groups are not significantly and irreparably harmed. If one recognises the fact that the unfairness of the result of competition may be one of the **sources of populism** and that a **rebalancing of the benefits of the competitive process** is in order to make economic competition tolerable, the question is how to achieve it. Because the redistributive tools we have **do not seem to be adequate**, some of the hotly debated issues are whether we should be more cautious about entering into trade agreements with countries having widely different social and economic environments or rules and, at the domestic level, whether **antitrust** or competition law enforcement should **concern itself with the fairness of the competitive process.** Concerning antitrust or competition law enforcement three main arguments have been put forward against the inclusion of fairness considerations in the enforcement of anti- trust and competition law. First, the concept of fairness is vague; second, taking into consideration fairness would entail a social cost in terms of efficiency; and third, competition authorities are not equipped to trade fairness against efficiency considerations. Trebilcock and Ducci (2017) consider the vagueness of the notion of fairness and the necessity to specify the notions of fairness which could be relevant for competition. They usefully distinguish different notions of fairness that are pertinent to domestic markets: vertical fairness (between producers and consumers); horizontal fairness on the demand side (between consumers); horizontal fairness on the supply side (between producers); and procedural fairness (due process and private enforcement). One can **easily show** that antitrust is congruent with fairness with respect to horizontal fairness among suppliers in the sense that competition or antitrust law enforcement aims at **eliminating the barriers to entry or to development**, which prevent competitors from entering new markets or competing on the merits with established firms. This dimension of competition does not seem particularly problematic from the standpoint of fairness. One can also mention the fact that competition law, to the extent that it aims at eliminating discriminatory practices (as in the European competition law where article 102 prohibits firms with market power from directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, or from applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage), goes some way toward meeting the horizontal fairness condition for consumers. The question of whether the way in which competition laws are implemented meet vertical fairness criteria is more complex. Some, like Trebilcock and Ducci, argue that **the goal of protecting consumer welfare assigned in most countries** to competition law is a somewhat **clumsy attempt to bring into competition law fairness issues** which are alien to what which competition law should be concerned with. For example, they write: Despite being usually justified by a distributive justice rationale, we believe that the consumer welfare standard **does not vindicate distributional equity concerns for consumers** vis-a-vis producers, and we believe that such choice of welfare standard does not represent an optimal tool for redistributive goals. On the contrary, we view the consumer welfare standard as resulting from a mix of poorly defined distributive concerns and more political economy-oriented explanations. Under the latter perspective, the ascendance of the consumer welfare standard may be interpreted as a political bargain between self-interested groups of producers (primarily large firms defending the efficiency benefits of economies of scale) and consumers (including final consumers, small buyers, farmers), where the concept of ‘consumer welfare’ can be seen as a more acceptable form of welfare standard for non-specialist audiences, which would politically allow the advancement of economic goals in the competition policy domain.

#### Populism causes extinction.

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The international system is at a **historical inflection point.** As Asia continues its economic ascent, two centuries of Western domination of the world, first under Pax Britannica and then under Pax Americana, are coming to an end. The West is losing not only its material dominance but also its ideological sway. Around the world, democracies are **falling prey** to illiberalism and **populist dissension** while a rising China, assisted by a pugnacious Russia, seeks to challenge the West’s authority and republican approaches to both domestic and international governance. U.S. President Joe Biden is committed to refurbishing American democracy, restoring U.S. leadership in the world, and taming a pandemic that has had devastating human and economic consequences. But Biden’s victory was a close call;on neither side of the Atlantic will **angry populism or illiberal temptations readily abate**. Moreover, even if Western democracies overcome polarization, beat back illiberalism, and pull off an economic rebound, they will not forestall the arrival of a world that is both multipolar and ideologically diverse. History makes clear that such **periods of tumultuous** **change** come with **great peril**. Indeed, **great-power** **contests** over hierarchy and ideology regularly lead to **major wars**. Averting this outcome requires soberly acknowledging that the Western-led liberal order that emerged after World War II cannot anchor global stability in the twenty-first century. The search is on for a viable and effective way forward. The best vehicle for promoting stability in the twenty-first century is a global concert of major powers. As the history of the nineteenth-century Concert of Europe demonstrated—its members were the United Kingdom, France, Russia, Prussia, and Austria—a steering group of leading countries can curb the geopolitical and ideological competition that usually accompanies multipolarity. Concerts have two characteristics that make them well suited to the emerging global landscape: political inclusivity and procedural informality. A concert’s inclusivity means that it puts at the table the geopolitically influential and powerful states that need to be there, regardless of their regime type. In so doing, it largely separates ideological differences over domestic governance from matters of international cooperation. A concert’s informality means that it eschews binding and enforceable procedures and agreements, clearly distinguishing it from the UN Security Council. The UNSC serves too often as a public forum for grandstanding and is regularly paralyzed by disputes among its veto-wielding permanent members. In contrast, a concert offers a private venue that combines consensus building with cajoling and jockeying—a must since major powers will have both common and competing interests. By providing a vehicle for genuine and sustained strategic dialogue, a global concert can realistically mute and manage inescapable geopolitical and ideological differences. A global concert would be a consultative, not a decision-making, body. It would address emerging crises yet ensure that urgent issues would not crowd out important ones, and it would deliberate on reforms to existing norms and institutions. This steering group would help fashion new rules of the road and build support for collective initiatives but leave operational matters, such as deploying peacekeeping missions, delivering pandemic relief, and concluding new climate deals, to the UN and other existing bodies. The concert would thus tee up decisions that could then be taken and implemented elsewhere. It would sit atop and backstop, not supplant, the current international architecture by maintaining a dialogue that does not now exist. The UN is too big, too bureaucratic, and too formalistic. Fly-in, fly-out G-7 or G-20 summits can be useful but even at their best are woefully inadequate, in part because so much effort goes toward haggling over detailed, but often anodyne, communiqués. Phone calls between heads of state, foreign ministers, and national security advisers are too episodic and often narrow in scope. Fashioning major-power consensus on the international norms that guide statecraft, accepting both liberal and illiberal governments as legitimate and authoritative, advancing shared approaches to crises—the Concert of Europe relied on these important innovations to preserve peace in a multipolar world. By drawing on lessons from its nineteenth-century forebearer, a twenty-first-century global concert can do the same. Concerts do lack the certitude, predictability, and enforceability of alliances and other formalized pacts. But in designing mechanisms to preserve peace amid geopolitical flux, policymakers should strive for the workable and the attainable, not the desirable but impossible. A GLOBAL CONCERT FOR THE TWENTY-FIRST CENTURY A global concert would have six members: China, the European Union, India, Japan, Russia, and the United States. Democracies and nondemocracies would have equal standing, and inclusion would be a function of power and influence, not values or regime type. The concert’s members would collectively represent roughly 70 percent of both global GDP and global military spending. Including these six heavyweights in the concert’s ranks would give it geopolitical clout while preventing it from becoming an unwieldy talk shop. Members would send permanent representatives of the highest diplomatic rank to the global concert’s standing headquarters. Although they would not be formal members of the concert, four regional organizations—the African Union, Arab League, Association of Southeast Asian Nations (ASEAN), and Organization of American States (OAS)—would maintain permanent delegations at the concert’s headquarters. These organizations would provide their regions with representation and the ability to help shape the concert’s agenda. When discussing issues affecting these regions, concert members would invite delegates from these bodies as well as select member states to join meetings. For example, were concert members to address a dispute in the Middle East, they could request the participation of the Arab League, its relevant members, and other involved parties, such as Iran, Israel, and Turkey. A global concert would shun codified rules, instead relying on dialogue to build consensus. Like the Concert of Europe, it would privilege the territorial status quo and a view of sovereignty that precludes, except in the case of international consensus, using military force or other coercive tools to alter existing borders or topple regimes. This relatively conservative baseline would encourage buy-in from all members. At the same time, the concert would provide an ideal venue for discussing globalization’s impact on sovereignty and the potential need to deny sovereign immunity to nations that engage in certain egregious activities. Those activities might include committing genocide, harboring or sponsoring terrorists, or severely exacerbating climate change by destroying rainforests. Policymakers should strive for the workable and the attainable, not the desirable but impossible. A global concert would thus put a premium on dialogue and consensus. The steering group would also acknowledge, however, that great powers in a multipolar world will be driven by realist concerns about hierarchy, security, and regime continuity, making discord inescapable. Members would reserve the right to take unilateral action, alone or through coalitions, when they deem their vital interests to be at stake. Direct strategic dialogue would, though, make surprise moves less common and, ideally, unilateral action less frequent. Regular and open consultation between Moscow and Washington, for example, might have produced less friction over NATO enlargement. China and the United States are better off directly communicating with each other over Taiwan than sidestepping the issue and risking a military mishap in the Taiwan Strait or provocations that could escalate tensions. A global concert could also make unilateral moves less disruptive. Conflicts of interest would hardly disappear, but a new vehicle devoted exclusively to great-power diplomacy would help make those conflicts more manageable. Although members would, in principle, endorse a norm-governed international order, they would also embrace realistic expectations about the limits of cooperation and compartmentalize their differences. During the nineteenth-century concert, its members frequently confronted stubborn disagreements over, for instance, how to respond to liberal revolts in Greece, Naples, and Spain. But they kept their differences at bay through dialogue and compromise, returning to the battlefield in the Crimean War in 1853 only after the revolutions of 1848 spawned destabilizing currents of nationalism. A global concert would give its members wide leeway when it comes to domestic governance. They would effectively agree to disagree on questions of democracy and political rights, ensuring that such differences do not hinder international cooperation. The United States and its democratic allies would not cease criticizing illiberalism in China, Russia, or anywhere else, and neither would they abandon their effort to spread democratic values and practices. On the contrary, they would continue to raise their voices and wield their influence to defend universal political and human rights. At the same time, China and Russia would be free to criticize the domestic policies of the concert’s democratic members and publicly promote their own vision of governance. But the concert would also work toward a shared understanding of what constitutes unacceptable interference in other countries’ domestic affairs and, as a result, are to be avoided. OUR BEST HOPE Establishing a global concert would admittedly constitute a setback to the liberalizing project launched by the world’s democracies after World War II. The proposed steering group’s aspirations set a modest bar compared with the West’s long-standing aim of spreading republican governance and globalizing a liberal international order. Nonetheless, this scaling back of expectations is unavoidable given the twenty-first century’s geopolitical realities. The international system, for one, will exhibit characteristics of both bipolarity and multipolarity. There will be two peer competitors—the United States and China. Unlike during the Cold War, however, ideological and geopolitical competition between them will not encompass the world. On the contrary, the EU, Russia, and India, as well as other large states such as Brazil, Indonesia, Nigeria, Turkey, and South Africa, will likely play the two superpowers off each other and seek to preserve a significant measure of autonomy. Both China and the United States will also likely limit their involvement in unstable zones of less strategic interest, leaving it to others—or no one—to manage potential conflicts. China has long been smart enough to keep its political distance from far-off conflict zones, while the United States, which is currently pulling back from the Middle East and Africa, has learned that the hard way. The international system of the twenty-first century will therefore resemble that of nineteenth-century Europe, which had two major powers—the United Kingdom and Russia—and three powers of lesser rank—France, Prussia, and Austria. The Concert of Europe’s primary objective was to preserve peace among its members through a mutual commitment to upholding the territorial settlement reached at the Congress of Vienna in 1815. The pact rested on good faith and a shared sense of obligation, not contractual agreement. Any actions required to enforce their mutual commitments, according to a British memorandum, “have been deliberately left to arise out of the circumstances of the time and of the case.” Concert members recognized their competing interests, especially when it came to Europe’s periphery, but sought to manage their differences and prevent them from jeopardizing group solidarity. The United Kingdom, for example, opposed Austria’s proposed intervention to reverse a liberal revolt that took place in Naples in 1820. Nonetheless, British Foreign Secretary Lord Castlereagh eventually assented to Austria’s plans provided that “they were ready to give every reasonable assurance that their views were not directed to purposes of aggrandizement subversive of the Territorial System of Europe.” A global concert would give its members wide leeway when it comes to domestic governance. A global concert, like the Concert of Europe, is well suited to promoting stability amid multipolarity. Concerts limit their membership to a manageable size. Their informality allows them to adapt to changing circumstances and prevents them from scaring off powers averse to binding commitments. Under conditions of rising populism and nationalism, widespread during the nineteenth century and again today, powerful countries prefer looser groupings and diplomatic flexibility to fixed formats and obligations. It is no accident that major states have already been turning to concert-like groupings or so-called contact groups to tackle tough challenges; examples include the six-party talks that addressed North Korea’s nuclear program, the P5+1 coalition that negotiated the 2015 Iran nuclear deal, and the Normandy grouping that has been seeking a diplomatic resolution to the conflict in eastern Ukraine. The concert can be understood as a standing contact group with a global purview. Separately, the twenty-first century will be politically and ideologically diverse. Depending on the trajectory of the populist revolts afflicting the West, liberal democracies may well be able to hold their own. But so too will illiberal regimes. Moscow and Beijing are tightening their grip at home, not opening up. Stable democracy is **hard to find** in the Middle East and Africa. Indeed, **democracy is receding,** not advancing, worldwide—a trend that could well continue. The international order that comes next must make room for ideological diversity. A concert has the necessary informality and flexibility to do so; it separates issues of domestic rule from those of international teamwork. During the nineteenth century, it was precisely this hands-off approach to regime type that enabled two liberalizing powers—the United Kingdom and France—to work with Russia, Prussia, and Austria, three countries determined to defend absolute monarchy. Finally, the inadequacies of the current international architecture underscore the need for a global concert. The rivalry between the United States and China is heating up fast, the **world is suffering** through a devastating pandemic, climate change is advancing, and the evolution of cyberspace poses new threats. These and other challenges mean that clinging to the status quo and banking on existing international norms and institutions would be dangerously naive. The Concert of Europe was formed in 1815 owing to the years of devastation wrought by the Napoleonic Wars. But the lack of great-power war today should not be cause for complacency. And even though the world has passed through previous eras of multipolarity, the advance of globalization increases the demand for and importance of new approaches to global governance. Globalization unfolded during Pax Britannica, with London overseeing it until World War I. After a dark interwar hiatus, the United States took up the mantle of global leadership from World War II into the twenty-first century. But Pax Americana is now running on fumes. The United States and its traditional democratic partners have neither the capability nor the will to anchor an interdependent international system and universalize the liberal order that they erected after World War II. The absence of U.S. leadership during the COVID-19 crisis was striking; each country was on its own. President Biden is guiding the United States back to being a team player, but the nation’s pressing domestic priorities and the onset of multipolarity will deny Washington the outsize influence it once enjoyed. Allowing the world to slide toward regional blocs or a two-bloc structure similar to that of the Cold War is a nonstarter. The United States, China, and the rest of the globe cannot fully uncouple when national economies, financial markets, and supply chains are irreversibly tethered together. A great-power steering group is the best option for managing an integrated world no longer overseen by a hegemon. A global concert fits the bill.

#### Specifically, India relies on the consumer welfare standard---lack of regulation in the labor market has increased the exploitation of workers.

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In spite of the overwhelming impact on ‘labour welfare’ due to regulatory intervention, as is clear from this case, the competition authorities globally have largely ignored the importance of antitrust regulation in labour markets. There are more than one reason for this inattention. The inception of antitrust laws focussed on ‘consumer welfare’. Regulators restricted the primary application of antitrust laws to reach this end. The first clear statute expanding the ambit of the antitrust regime to labour markets was the Clayton Act, 1914. Twelve years after this enactment, the Supreme Court of the United States held2 that Section 63 of the Act, unequivocally applied to ‘Wage-Fixing Conspiracies’. Even thereafter, consumer welfare and labour welfare could never get the same attention of the authorities. Conservative scholars like Stutz (2018) in the United States believed that labour and antitrust policy are conceptually different and cater to competing values. Moreover, higher wages resulting from antitrust intervention process can harm downstream product-market competition by raising marginal costs and reducing output. The inverse correlation between these two values could be a reason for giving preference to the consumers placed at the end of the downstream market over a factor relevant in the supply chain. Additionally, most countries adopted their own labour laws. To some extent, these statutes or other non-statute exemptions may combine to shield collusive behaviour on both sides of labour negotiations (Jerry and Knebel, 1984). Another reason that may have created the impression that consumer welfare in the product and service market(s) is more significant is the negligible antitrust litigations against employers, across the globe. The absence of antitrust litigations in the employment sector also leads to the perception of non-application of antitrust laws in labour markets. However, there are various reasons for the limited antitrust litigations in the labour market. Unlike the product market litigations, which are either initiated by competitors, large companies, etc., with the resources and incentives to bear the high costs of complex antitrust litigations, aggrieved workers may not always have the resources or incentives (Weil, 2017). The straightforward analysis based on the rise in prices is inapplicable in labour market antitrust litigations. Class action suits also become tough as workers would usually have diverse interests and be at different positions in life and employment. The small number of successful antitrust litigations in the labour markets have taken place in highly specialised settings like sports leagues, fashion models market, doctors and nurses. These litigations will be discussed in the following sections. These cases show that so far litigations have been brought forward by sophisticated and high earning workers (Naidu, Posner and Weyl, 2018). However, in the recent past, competition law and labour market issues have been addressed by various antitrust agencies globally. In 2016, the U.S. Department of Justice (DoJ) even announced its intention to initiate criminal prosecution in anti-competitive agreements affecting the labour market.4 Similarly, the Hong Kong Competition Commission (HKCC) also released an advisory bulletin5 indicating that it has encountered several situations where businesses have engaged in employment-related practices which may give rise to competition concerns. In 2018, the Japan Fair Trade Commission (JFTC) released a report with discussions on the application of the Antimonopoly Act on human resources.6 The Organisation for Economic Cooperation and Development (OECD) also held a session in June 2019 to discuss antitrust concerns in the labour markets with a focus on the factors contributing in the creation of monopsony powers. Another follow up session was held in February 2020.7 In India, though concerns have been raised in the sports industry, this issue largely remains unattended by all stakeholders. Macroeconomists began to use models of monopolistic competition to explain how small costs of adjusting prices could give rise to business fluctuations (Akerlof and Yellen, 1985). This trend has started influencing labour economics with the argument that employers also have market power in the setting of wages (Bhaskar, Manning and To, 2002). The imbalances prevailing in the labour market have been compared to the traditional buyer power in a product market by Scheelings and Wright (2006). Criminal liability for anti-competitive agreements in employment is logical and prudent due to the economic effects of these practices; the justification for this was given by Davis (2018). Naidu, Posner and Weyl (2018) recommended the most suited antitrust remedies for labour market power. The restraints in the labour market and the evolving antitrust treatment in the United States were discussed by Stutz (2018). The extension of antitrust practices against workers in the gig-economy space has been brought forward by Steinbaum (2019). These discussions have primarily focussed on the situation in the United States. However, the challenges faced by the antitrust authorities in the employment sector worldwide still require extensive discussion. Through the analysis of different labour market conditions in India and other jurisdictions, this research aims to understand the application of competition law in employment in India and the need for all the stakeholders including the Competition Commission of India to be versed with its implications. A qualitative research methodology is adopted to examine the challenges faced in enforcing competition in the labour market through traditional tools and the measures to overcome these challenges. The anti-competitive practices resorted to by employers in the labour market have been divided into the following three parts for reaching a considerate conclusion: 1) Predatory Hiring 2) Anti-Poaching Agreements 3) Unilateral Conduct 2. Labour Markets It is important to understand the difference between traditional product/ service markets and labour markets. Factors relevant to both these markets are different. In economics, labour falls under the category of ‘factor market’. Also known as the input market, it refers to the factors of production or resources that companies require to produce their goods and services. In products markets, consumers are the buyers and businesses are the sellers; whereas in factor markets, businesses are the buyers. Anything relevant for making the final product like labour, raw material, capital, land, etc., is part of the factor market. Economic relationship of demand and supply is also different (Bhaskar, Manning and To, 2002). In a product market, high demand leads to an increase in the number of goods produced until the demand is met. However, this is not the case in the labour market where labour cannot be manufactured. Increase in wages will not automatically cause an increase in labour supply. From a competition law perspective, the same rules should apply for the procurement of goods and services as well as the acquisition of labour. Firms that compete for hiring or retaining the same labourers are competitors in the labour markets, regardless of whether these firms also offer goods and services that are in competition with each other (Yüksel and Salan, 2019). The factors which may be relevant in delineating a relevant labour market comprise skill, education, experience, wages, relocation, mobility costs, working conditions and other non-price factors. In several industries like Information Technology, Legal, Medical, specific skills are required, and the employees need to clear several stages for gaining qualifications and licences. A labour market can be defined as a group of jobs, between which workers can switch with relative ease, located within a geographic area usually defined by the commuting distance of these workers. Buyer Power Buyer power plays a particular role with regard to creation or strengthening of a dominant position. It can create a dominant position directly in the procurement market concerned. The monopsony model has established itself as the standard instrument for examining buyer power. It is based on the assumption that one powerful buyer comes across many suppliers (Burdett and Mortensen, 1998). In such a situation, the buyer can reduce his demand to cause a reduction in the procurement price. This simplistic model may fail in situations where both sides of the market are concentrated to a certain extent. The bargaining model applies in such situations, where bilateral negotiations determine the terms of the contract. Any gap between the strength enjoyed by the buyer and seller can allow the buyer to dictate the terms. In procurement markets like the labour markets, buyer power is less often expressed in the classical sense as market power affecting the opposite market side as a whole but more often in the form of bargaining power exercised bilaterally vis-à-vis individual suppliers. It is also suggested that only a player who can influence both sides of the market can be a dominant player in these markets. Dominant position on one side of the market has also been used to prove the dominance on the other side. The European Commission (EC)8 and Bundeskartellamt9 have relied upon this theory in the past. In one case, dominance in procurement markets was used to prove the existence of dominance in sales markets (and vice versa). Thus, one major source of market power in all types of markets is ‘concentration’, where only a few firms operate in a given market. Buyer concentration in the labour market creates monopsony or oligopsony in favour of employers. Traditional monopsony is clearly unrealistic since employers obviously compete with one another to some extent. ‘Oligopsony’ or ‘monopsonistic competition’ are the more accurate descriptions of such labour markets (Akerlof and Yellen, 1985). These can exist when only one or a few employers hire from a pool of workers. Once market power is gained by the employers, the perils of exploitation tend to creep in. As Adam Smith recognised, businesses gain in the same way by exploiting product market power and labour market power, enabling them to increase profits by raising prices in the products market or by lowering costs in the labour market (Smith, 1776). This exploitation is akin to the treatment of workers denounced by Karl Marx. He argued that workers were underpaid and subjected to poor working conditions (Marx, 1867). This treatment was possible to the ‘reserve army’ of the unemployed, replacement remained available at will for the employers. The extraction of the surplus derived by the employers by paying low wages was called exploitation. Anti-competitive practices are just more sophisticated forms of these exploitations. 3. Predatory Hiring In competition parlance, ‘employees’ are equivalent to assets of an organisation. One of the many ways in which a competitor can disrupt the functioning of an organisation is by inducing the employees including the key-managerial employees to terminate their relationships with their employer and join him. Antitrust concerns arise when this inducement is done with the purpose of harming rivals and attempting to monopolise. In the Indian context, if a competitor only hires the employees of its competitors to ensure that the competitor is unable to survive in the market such a practice would be ‘Abuse of Dominance’ as per Section 4 of the Competition Act, 2002. Predatory Hiring has been held to be anti-competitive as per Section 210 of the Sherman Act, 1890. The meaning of predatory hiring as defined in Universal Analytics, Inc. v. MacNeal-Schwendler Corp11 is still applied. As per this ruling predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor. In this case, Universal Analytics, Inc., filed a claim alleging that Macneal Schwendler Corp. hired five of its key technical personnel only to cause harm to them. They relied upon a memo from the executive vice-president of Macneal which read “by hiring UAI employees, we wound UAI again”. The Court while adjudicating held though it appeared that one of the reasons for hiring these employees was to harm the plaintiff, however, due to the fact that these employees were sufficiently used by the hiring company ensured that no case of predatory hiring was made out. Two prong test was laid down by the Court which required the plaintiff to establish that (i) the hiring was made with predatory intent, (ii) clear non-use in fact. The test laid down in Universal Analytics continues to be applied, though in some cases the Courts have deviated on the reasoning that as per the Sherman Act, even an attempt to monopolise is enough for its breach. In West Penn Allegheny Health System, Inc. v. UPMC12, the Court held that UPMC being the dominant hospital in Pittsburgh attempted to monopolise the market for hospital services when it hired key physicians from the plaintiff. Court noticed that the salaries offered were well above the market rates and the finances available with the defendant were insufficient to pay these salaries without suffering losses. Resultantly, the Court held it to be a clear attempt to drive out the second largest hospital system out of the market. Critics like Page (2017) have even argued that a new “bona fide intent to use” test should be adopted in dealing with such allegations. Even before the enactment of the Competition Act, 2002, such a dispute arose between two leading beverage companies, namely ‘PepsiCo’ and ‘Coca-Cola’. The global rivalry between the two extended to India also in the early 1990s. PepsiCo alleged that Coca-Cola was unlawfully inducing its groups of key marketing and other strategic employees to breach and/ or terminate their employment contracts with PepsiCo and enter into employment contracts with Coca-Cola. The relief of injunction sought by PepsiCo was eventually not allowed by the Delhi High Court13 on the reasoning that ‘In a free market economy, everyone concerned, must learn that the only way to retain their employees is to provide them attractive salaries and better service conditions. The employees cannot be retained in the employment perpetually or by a Court injunction’. The matter before the Delhi High Court was agitated under the laws of Contract and the relief sought was under the law of Torts. The findings of the Court, as such should only be read in those contexts. The unfair practice of inducing employees of PepsiCo to drive the competitor out of the market could have been agitated under the Competition Act, 2002, if applicable, and may have led to different reasoning and conclusion by the Court. Other aspects of such a hiring would have become relevant under the Antitrust laws. Interestingly, there has been no case in the Indian context, wherein an enterprise has been found to be infringing the provisions of the Competition Act by indulging in predatory hiring. In 2016, Air India had approached the Competition Commission of India alleging that one of its rival airlines Indigo had indulged in predatory hiring by poaching its pilots. This case14 was closed under Section 26(2)15 of the Competition Act, 2002, holding it to be an employment issue raising no competition concern. When this case was heard in appeal16 by the erstwhile Competition Appellate Tribunal, the principle of predatory hiring was discussed in light of Sections 4(2) and 3(3)(b) and (c) of the Competition Act, 2002, however, the Appellate Authority was of the opinion that there was not enough data/information to establish predatory hiring. The appellants were given the liberty to approach the Commission once again, provided they could gather enough material to substantiate their claim. The jurisprudence on predatory hiring has not evolved in India thereafter. 4. Anti-Poaching Agreements On 20th October 2016, the Department of Justice (DoJ) of the United States released a guidance note for ‘Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation.’17 Similarly, the Hong Kong Competition Commission and the Japan Fair Trade Commission have also released advisories18 indicating that they have encountered a number of situations where businesses have engaged in employmentrelated practices which may give rise to competition concerns. These advisories frown upon any agreement between competing firms which restricts employment from rival firms, sharing of remuneration details, fixing wages to lessen competition by stagnating transfers. Employees have been treated as consumers in the labour market and any agreement between firms to restrict movement of labour has been held to be causing an adverse effect on the employees by restricting their choice, salaries and other benefits. In September 2010, the Antitrust Division of the US DoJ filed a complaint19 against Google, Apple, Adobe, Intel, Pixar and Intuit before a district court in San Jose, California, alleging that their agreements not to solicit/ hire each other’s employees through ‘cold calling’ violated antitrust law. Cold calling is any solicitation for employment (by phone, email, letter or otherwise) directed to an employee who has not applied for an open position. Companies executing these agreements agree to notify each other when making offers to each other’s employees. The top executives of these companies were alleged to be involved in this conspiracy. The DoJ held that these agreements eliminated a significant form of competition to attract skilled employees, distorting the labour market and causing employees to lose opportunities for better jobs and higher pay. The companies agreed to pay US$ 415 million (Rs. 2,755 crore) claims in the class action lawsuit. Consequently, Apple and Google’s board of directors were hit with a shareholder derivative lawsuit for breach of fiduciary duty and harming the company by engaging in illegal anti-poaching agreements (Choukse, 2016). Some of the recent updates issued20 by the US DoJ show how nopoaching agreements are addressed by the US Antitrust Agency. On 3rd April 2018, the Antitrust Division filed a civil antitrust lawsuit against Knorr-Bremse AG21 and Westinghouse Air Brake Technologies Corporation (Wabtec). As per the complaint, these companies along with a third company Faiveley entered into no-poach agreements in 2009 and continued till 2015. These agreements were stated to be in violation of Section 122 of the Sherman Act. Private lawsuits were also filed by current and former employees of the companies. The defendants also moved a motion to dismiss the complaint and argued that no-poach agreements should be assessed under the rule of reason. This motion was dismissed23 and the defendants agreed to pay US$ 48.95 million in settlement.24 The DoJ has even extended the applicability of no-poach agreements to franchisor-franchisee agreements25, where the franchisor restrains the franchisee from poaching employees from the other franchisee of the same franchisor. DoJ maintains that a franchisor and franchisee are not automatically deemed to be a single entity and can be separate entities capable of conspiring within the meaning of Section 1 and such naked, horizontal no-poach agreements between rival employers within a franchise system are subject to the per se rule. The decision in this case is still awaited. The principle of no-poaching is not limited to an agreement to not hire from competing firms but it also extends to ‘wage-fixing’. Akin to a cartel which decides the prices or supply, in a ‘wage-fixing’ agreement the competitors try to reduce their costs by deciding upon the salaries and perks payable to their employees. Most recently, on 31st July 2018, the Federal Trade Commission (FTC) and the Texas Attorney General charged Your Therapy Source, a Dallas-Fort Worth26 company that provides therapist staffing services to home health agencies, with unlawfully colluding to limit pay for therapists and inviting other competitors to do the same. The European Union Member States have also been averse to nopoaching and wage-fixing agreements. Undue restrictions placed on anaesthesiologists by 15 hospitals in the Netherlands through a non-solicitation agreement were held to be in violation of the Dutch Competition law. The hospitals agreed not to poach each other’s trained anaesthesiologists with an additional restriction on employing any anaesthesiologist for a period of 12 months after his/her leaving a hospital part of the agreement.27 In 2010, in Spain, eight transportation companies were penalised for implementing co-ordinated strategies which included conditions on hiring employees.28 They were held liable under Article 1 of the Competition Act of Spain and Article 101 of the Treaty on the Functioning of the European Union. In yet another case of wage-fixing, arising from the same cause of action in 2016, modelling agencies were fined by both Italian and British Competition Authorities.29 No-poach agreements also surreptitiously get a nod from the antitrust agencies at the time of approval for mergers. In most mergers notified pursuant to an agreement between the parties, there is usually a nonsolicitation clause. This non-solicitation is used to restrain the acquired party from dealing with past clients and at the same time used to restrain the acquired party from poaching employees transferred to the acquirer. Such clauses may seem to be non-ancillary to the combination notified but a deeper look into such agreements may warrant scrutiny of the antitrust authorities. The European Commission permits non-solicitation clauses if they are directly related and necessary for the implementation of a merger.30 In Kingfisher/Großlabor31 merger, the sale-purchase agreement was supplemented with non-solicitation restrictions on two managers of GroBlabor. The EC accepted the reasoning provided by the parties to hold that such restrictions were necessary and in line with the objectives of the deal. Likewise, in the Imperial Chemical Industries/Williams32 merger for the acquisition of the home improvements division of Williams, the EC allowed the restriction on soliciting certain employees of Williams for a period of two years after the closing of the deal. At present, the Competition Commission of India also analyses the noncompete clauses forming part of the proposed combination. Such nonsolicitation clauses are part of the non-compete agreements and depending upon the scope of restrictions, the Commission may approve such clauses. The rationale is to allow the acquirer to derive the maximum benefits arising out of the combination. Due consideration is provided to the scope of these restrictions based on the time span and the geographic area for such restrictions. As per the guidance note33 published by the Commission, usually, the time period should not exceed 3 years and the scope should be limited to the current activities and the area covered by the acquired party. The Commission also initiated a consultation to decide if non-compete obligations should even be assessed at the time of competition assessment. The applicable law on the assessment of non-compete obligations in merger notifications may even change in the future. India hasn’t witnessed any case wherein two rivals have entered into a nopoaching agreement independent of a combination as contemplated under Section 5 of the Competition Act. 5. Unilateral Conduct The power of enterprises to control the activities of their employees/ affiliates gives rise to unilateral anti-competitive conduct in employment. Sports authorities which usually have a monopoly over the administration of a particular sport have been found to be on the wrong side of the competition law, both in India and globally. On 12th July 2018, the Competition Commission of India penalised the All India Chess Federation (AICF) for banning four registered players due to their participating in an unapproved tournament.34 The chess federation was affiliated to the World Chess Federation and solely responsible for all chess activities in India. The players were always subservient to the federation as the ratings and selections were controlled by the AICF. This order in itself was sufficient to caution all sporting bodies against unilateral control over player participation in independent tournaments. Internationally also, such restriction on players from participating in sporting events is frowned upon and penalised by antitrust authorities. In December 2017, the European Commission came down heavily on the International Skating Union (ISU) for imposing severe penalties up to a lifetime ban on athletes participating in speed skating competitions that are not authorised by the ISU.35 It was held that these rules that are in place since 1998 restricted the commercial freedom of athletes and potentially foreclosed the market for competing organisers. This action was brought up by two Dutch ice skaters who were threatened by the ISU with a life ban on participating in a league in Dubai. The ISU was directed to stop its illegal conduct within 90 days or pay up to 5 per cent of its average daily worldwide turnover in case of non-compliance.36 Following this in January 2019, another leading world sporting body the Fédération Internationale de Natation (FINA) allowed its swimmers to participate in race meetings organised by independent organisers.37 FINA, recognised by the International Olympic Committee (IOC) for administering international competition in water sports, was under pressure after independent suits were filed against it by the threatened swimmers and the independent league organisers for violating antitrust law. Blocking any new competitive league from entering into the market by not allowing premium players from participating was again the cause of action. The Board of Control for Cricket in India (BCCI) has also indulged in unilateral conduct to restrain its players from participating in rival cricket leagues or in cricket tournaments deemed to be unapproved as per the guidelines of the International Cricket Council. In 2007, when Zee Entertainment Enterprise attempted to foray into the world of cricket by organising a domestic league tournament named the Indian Cricket League (ICL), the BCCI took swift action and banned all players who participated in the league. State members were not allowed to provide grounds for matches and broadcasters who showed allegiance to this competing league were not allowed to participate in its own telecast rights bidding. The effects of abuse of dominant position by the BCCI were felt in real and the Indian Cricket League could not survive with such restrictions in the market. The league was ultimately disbanded in 2009. The BCCI was ultimately penalised by the Competition Commission of India and was directed to pay Rs. 522.4 million for abusing its dominant position for imposing restrictions that denied access to the market for ‘Organisation of Professional Domestic Cricket League/ Events’.38 However, the interest of the players was never the consideration for the decision of the Commission in this case. Consequently, even though the Order was passed and the appeal is pending, the BCCI did not hesitate in banning, in May 2019, a first-class cricketer Rinku Singh for participating in a T-20 tournament in Abu Dhabi without the prior permission of the BCCI.39 The cases in the sports industry signify that unilateral conduct is possible when employers possess some labour market power that allows them to dictate terms. Labour market power in many ways is similar to a product market power. In the case of product market power, one seller or very few sellers having the product can determine the price of the product. Similarly, in case of employment which is governed by only one or few employers, it allows the employers to exert some pressure on the employees. Another situation where unilateral conduct harms the employee more may arise in sectors governed by the Government. Independent workers could be dictated when their employment is dependent. The farming sector in India is a prime example of such a situation. As per the Agricultural Produce Market Committee (APMC) regulation, farmers could only sell their crop to buyers who were licensed by the State Government. This restricted the free flow of the farmer’s crop as well as his will to engage with different traders. Consequently, buyers could exert pressure and decide the terms. In September 2020, the Parliament of India enacted two Acts, which allow the farmers to sell their produce directly to anyone in the country without an intermediary. Though the actual effects of these legislations are yet to be recognised, they have significantly increased their options and removed the adverse buyer power that was prevalent in favour of the traders. It is interesting to note that these legislations have faced agitation by the farmers themselves, mainly on the issue of continuity of Minimum Support Price (MSP). Labour Issues in Gig Economy In addition to these traditional setups, anti-competitive practices are also applicable in gig economies. It is often defined as labour that provides organisations or individuals access via online platforms to pool of workers willing to carry out paid tasks (Valenduc and Vendramin, 2016). This normally takes the form of fragmented micro-tasks provided through platforms that connect online-based workers with hiring firms. A platform is a business which creates interactions between producers and consumers and provides an open participative infrastructure that facilitates the exchange of goods and services (Parker, Alstyne and Jiang, 2016). As such, it can be considered an online labour-brokerage that acts to coordinate the market of a worker with a requester (Collier, Dubal and Carter, 2017). The process, therefore, enables independent workers to provide services through online platforms rather than traditional employment. Independent contractors seem to be hired under the garb of freedom and independence. Online business platforms like Uber, Swiggy, Ola, Zomato, Amazon, Urban Company, etc., employ independent workers without any protection derived from labour laws. At the same time, they may be entirely controlled by employers/customers. The ability of these platform owners to dictate the terms of the transaction and review the relationship based on subjective ratings given by the customers allows unprecedented power to the employers. Independent workers cannot even avail the benefits of collective bargaining. In a United States case in 2016, an Uber customer initiated antitrust suit40 against the company alleging price and wage-fixing conspiracy with its drivers. It was claimed that Uber decides the price of the ride, the share of the driver and the allocation of customers to each driver. Cartelisation through the hub and spoke arrangement was the alleged modus operandi of the company. Uber refuted these allegations by contending that it is only a software company that provides its platform for customers and independent drivers to connect. That they neither provided transportation services to the customers nor employed the drivers. The case never proceeded to trial due to the arbitration clause, however, Uber commissioned two economics papers to suggest that the control exercised over the drivers benefits ‘consumer welfare’. Like the traditional markets, consumer welfare appears to have gained importance over labour welfare and used as a defence. These platforms are looked upon as providing services that make lives convenient. Antitrust agencies are also hesitant in intervening by suggesting that these markets are at nascent stages and the actual scope is yet to be realised.41 Interestingly, even in the gig economy space, the antitrust cases have been brought by customers with allegations of cartelisation and not by the workers dealing with unilateral conduct by the companies. The discussion in the introduction on the lack of employee-initiated antitrust litigation is relevant here also. India witnessed strikes42 and protests against unfair treatment by cab ride apps but no antitrust litigation was initiated by the drivers. Again the lack of resources and ignorance regarding the applicability may be the reasons. One antitrust litigation against an online platform that has received some attention from the Competition Commission of India in the e-commerce sector is against ‘Make My Trip’. In two separate information(s) filed by the Federation of Hotel & Restaurant Associations of India and Treebo Hotels, the Commission ordered43 detailed investigation after observing that the exclusionary practices adopted by the platform prima facie appear to be anti-competitive and abuse of dominance. The informants in these cases are also hotel owners and hotel management companies. The antitrust investigation initiated against Amazon and Flipkart by the Commission on the complaint filed by Delhi Vyapar Mahasangh44 comes closest to resembling an employment-related antitrust litigation. The members of the informant society comprise many Micro, Small and Medium Enterprises (MSMEs) traders who rely on the trade of smartphones and related accessories. These traders alleged discrimination in favour of the preferred sellers of Amazon and Flipkart. Though not employment in the traditional sense, the relationship between the traders and the platform for connecting with the buyers is akin to the labour market in the gig economy. All the above situations arise in cases where the market is concentrated allowing the concentrated player more power to unilaterally decide the terms and conditions. 6. Conclusion Importance of competition in employment has not been fully appreciated by the regulators. Whilst the authorities have focussed on the traditional factors influencing competition, labour market power and its consequences have largely been ignored. Unlike the new challenges posed by technology, labour market power has existed from the times when antitrust laws were coined to break big trusts in the United States. Those big trusts like the e-commerce giants in the modern era exerted similar pressures in the employment sector. Disintegrating the highly concentrated trusts may have even indirectly had an impact on the free flow of labour without stringent terms and conditions in the past. However, the recent cases of anti-competitive practices in the labour market require a course correction. Imbalance in labour market power is also against the principle of equality and can have far-reaching consequences like political conflicts. A recent tragedy in the Indian Film Industry has even raised questions on the onerous terms of a contract45 on the mental health of individuals. Impact on the economy is akin to the impact caused by product power imbalances. The modern economic landscape dominated by e-commerce does not allow the employers the benefits of the traditional labour laws. Collective bargaining as a remedy has also failed.46 The onus is upon the antitrust regulators to share the burden and in combating the adverse effects of power imbalance in the labour market. The relation between labour antitrust claims and consumer welfare needs an immediate focus of the regulators. The current competition framework seems adequate to address any anti-competitive conduct in the employment sector. It is primarily the focus which needs to be stretched towards this matter in addition to the traditional topics of antitrust discussions. Recent trends have shown the inclination of several jurisdictions to venture into the systematic scrutiny of competition issues in employment. The world is witnessing convergence of economies allowing unprecedented movement of both skilled and unskilled workers. The antitrust regulators have the opportunity to play an instrumental role in ensuring that the balance is maintained in the labour market and anticompetitive practices in employment are not excused behind the veil of economic growth.

#### The plan is key to India’s economy.

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India emerged as the world’s [fifth largest economy](https://www.weforum.org/agenda/2020/02/india-gdp-economy-growth-uk-france/) by nominal GDP last year, leapfrogging France and the United Kingdom, according to the [International Monetary Fund](https://www.imf.org/external/datamapper/datasets/WEO). PricewaterhouseCoopers’ “[The World in 2050](https://www.pwc.com/gx/en/issues/economy/the-world-in-2050.html)” report forecasts India’s GDP will rise to second worldwide within 30 years. However, the authors also state that emerging economies like India will have to strengthen their institutions and infrastructure to enable them to actualize a promising growth trajectory. India’s archaic labor laws are not considered industry friendly and have been holding back its economy from growing at its full potential. India’s labor laws reflect a mindset of the state exercising negative control over business enterprises. The poor pace of its notoriously rigid labor reforms has surely been a dampener on attracting more foreign direct investment (FDI) from the United States and other developed countries. Even domestic investments have suffered on this account. Covid-19-related labor disruptions could worsen the situation and limit the political space for the much-needed economic reforms. Despite its GDP growth, India had witnessed its highest unemployment rate in the last 45 years, according to the latest Government of India’s [Periodic Labour Force Survey](https://www.indianeconomy.net/tag/periodic-labour-force-survey-plfs-of-the-nsso/) (PLFS) and corroborated by the [Centre for Monitoring Indian Economy’s 2019 data](https://www.thehindu.com/business/Economy/india-unemployment-rate-3-year-high-cmie-data/article29855098.ece). Now, with the contraction in its economy due to Covid-19, India’s unemployment rate has soared. The country’s labor force participation rate has also fallen, according to the PLFS report. The absolute size of India’s labor force has been the subject of debate and stood somewhere between 470 to 520 million before the lockdown. During April and May 2020, India saw a large-scale contraction in its labor force, hopefully a transient phenomenon that will lessen with the easing of the lockdown. In any case, such an unprecedented economic downturn in one of the world’s largest economies, coupled with daunting challenges in the midst of a global pandemic, will lead to its own set of ripple effects. It is likely to have an impact on economic and trade relations with the rest of the world, as exemplified by a recent provision for India-made defense goods and import restrictions. A Variegated and Informal Labor Market India’s labor and employment data architecture is not fully reliable due to crucial information gaps. As a result, most policymakers rely on estimates extrapolated from somewhat questionable data. Despite these limitations, it is evident that almost 44 percent of India’s labor force works in agriculture, a sector that contributes [a mere 15.4 percent to the country’s GDP](http://statisticstimes.com/economy/sectorwise-gdp-contribution-of-india.php). Similarly, 24 percent of the workforce is engaged in industry (including the manufacturing sector), which accounts for 23.1 percent of India’s GDP. The service sector employs 32 percent of the labor force yet accords as much as 61.5 percent to the country’s GDP. This sectoral differentiation also gets reflected in their earnings and well-being, or lack thereof. Since agriculture is the least remunerative segment with unstable growth, its workers have been endeavoring to enter other sectors but with limited success because of a lack of opportunities. It is a bit simplistic to think that the complex web of India’s federal and state labor legislations have been useful in protecting the interests of workers, especially since such stringent laws have primarily been [responsible for 93 percent of the country’s workforce remaining in the informal and unorganized sector](https://www.businesstoday.in/sectors/jobs/labour-law-reforms-no-one-knows-actual-size-india-informal-workforce-not-even-govt/story/364361.html), as per India’s Economic Survey of 2018-19. This engenders poor adherence to minimum wages and severely inadequate access to social security. Such a large-scale informalization of labor is unique to India. It temporarily helps industry but results in many in the workforce leading lives of almost unimaginable deprivation. Indian industry has found workarounds to avoid problems emanating from its labor laws. Over the last few decades, companies have resorted to large-scale temporary hires, contract labor, daily wagers, jobbing work, outsourcing, and even artificially splitting business enterprises into smaller entities to avoid applicability of such laws. Some labor sector experts suggested that after the introduction of the Goods and Services Tax in 2017 and the demonetization of high-denomination currency in 2016, the situation would improve since businesses would have new incentives to become part of the formal economy. On the contrary, however, the informalization of labor in India seems to have [increased](https://www.oxfamindia.org/sites/default/files/2019-03/Full%20Report%20-%20Low-Res%20Version%20%28Single%20Pages%29.pdf) as there has been little respite from the clutches of outdated labor laws. Investor-Friendly Labor Reforms The Industrial Disputes Act of 1947 has been a big roadblock for the closure of industrial units and the layoff of workers if a business employs more than 100 workers. Given the uncertainties with most businesses, only some aggressive investors from the United States or other developed countries have been willing to tolerate a situation that, in the event of the enterprise collapsing, would require the investor to remain straddled with workers for whom exit options are either closed or cumbersome. Labor laws remain an important factor for risk-averse investors considering India as a production hub. Recent months have seen some movement on this front that may eventually mean that only those firms employing more than 300 workers would require the government’s concurrence prior to retrenching their workers in the future. There are many such pain points related to labor laws. The Contract Labor Act and the Industrial Employment Act have several elements of rigidity. The Small Factories (Regulation of Employment and Conditions of Services) Bill planned a few years ago, under which factories with a labor force of 40 workers or less were to be brought under a simpler regulatory regime with a waiver on the applicability of 14 federal labor laws, has been a non-starter. This idea should be revived with an increased labor threshold and tracked to closure. NITI Aayog, the government’s think tank, has been [advocating extensive labor reforms](https://thewire.in/labour/niti-aayog-pitches-for-labour-reforms-higher-female-participation)—both at the federal and state level. However, a sweeping withdrawal of most labor laws by states almost overnight during the recent lockdown and for a limited duration appears far too drastic. Well-thought-out and liberal labor laws would go a long way in ensuring workers’ welfare as well as in soliciting FDI into India. Labor is a subject on the Indian Constitution’s concurrent list, so both the federal and state governments must work in tandem on reforms. The federal government should make good on its commitment to rationalize and simplify the 44 central laws into four codes: salary and wages, social security, industrial relations, and health and occupational safety. The [Industrial Relations Code](https://www.prsindia.org/billtrack/industrial-relations-code-2019) was introduced in the Indian Parliament in November 2019 but is now lying with the Standing Committee. Work on all these four codes has progressed but should be speedily taken to its logical end as the post-Covid-19 economy creates jobs in tandem with expected economic growth. Many labor laws are under the state domain. Based on the recent work on labor reforms undertaken by the Government of India, there is a lack of clarity if federal laws would become more paramount and if state powers on labor issues would diminish. Whether states would retain the jurisdiction to tweak the laws based on their local requirements remains ambiguous. If the role of states in labor laws remains unchanged, then the Government of India should draft a unified model labor law for states, replacing many archaic laws for time-bound adoption by the state governments. Once these are enacted, several investors who dread the unfriendly Indian labor laws would be incentivized to invest, which should create large-scale employment, especially in labor-intensive industries. In addition, India could attract a significant component of investments and create jobs emanating from growing anti-China sentiment worldwide. The velocity of action on this front would make or mar India’s case to become the next workshop of the world. Recent State-Level Rollback of Labor Laws Ostensibly as a response to the Covid-19-triggered societal lockdown, the Indian states of Uttar Pradesh, Madhya Pradesh, Gujarat, Rajasthan, Maharashtra, Odisha, Punjab, and Goa have [amended some of their labor laws](https://www.financialexpress.com/economy/labour-reforms-laws-rules-change-uttar-pradesh-up-madhya-pradesh-rajasthan-himachal-pradesh-punjab-kerala-coronavirus-reforms/1952023/) by changing provisions or suspending some. These include states ruled by the Bhartiya Janata Party (BJP) as well as the Indian National Congress, the national opposition. In Uttar Pradesh, Rajasthan, Gujarat, and Himachal Pradesh, industrial units were allowed to deploy workers for 72 hours a week, a 24-hour increase from the earlier norm of 48 hours. Experts argue this is [not in keeping with the International Labor Organization’s convention](https://www.business-standard.com/article/economy-policy/labour-law-changes-in-india-should-adhere-to-global-standards-ilo-120051301663_1.html). In a few states, there is a lack of clarity as to whether industry necessarily has to pay overtime for the incremental work. India’s most populous state, Uttar Pradesh, has suspended most labor regulations for three years, subject to presidential assent. While Indian industry has generally welcomed these changes, they have not been received well by most labor unions, including the [Bharatiya Mazdoor Sangh](https://www.hindustantimes.com/india-news/rss-backed-bharatiya-mazdoor-sangh-protests-against-changes-to-labour-laws-petitions-president/story-8DEdU1VUlFvSjNg4Eg3iWI.html), which is supported by the BJP’s primary ideologue, the Rashtriya Swayamsevak Sangh (RSS). Observers and experts have argued that [such retrograde measures are unconstitutional](https://www.businesstoday.in/bt-buzz/news/bt-buzz-why-uttar-pradesh-labour-law-ordinance-is-unconstitutional/story/403509.html) and may possibly even take India back to the slavery and barbarism of medieval times. The complete removal of labor regulations could trigger a backlash against even modest, helpful changes in the future. Further, while these sweeping rollbacks of labor laws by some Indian states may be framed as business friendly, they also signal a general environment of policy instability and recklessness, which may dampen investor sentiment. Investors tend to respond positively to comprehensive and well-thought-out legislative changes and unfavorably to unpredictability. Sustainable long-term foreign investors are unlikely to imperil their business strategy, perceiving flip-flops in labor regulation as an untenable risk and an impediment to continuity, especially given India’s onerous laws that make it difficult for firms to exit in the event of failure. Key to fostering industry’s trust is to solicit and give value to their inputs even when governments need to respond to unique and dynamic circumstances. Businesses would much rather operate in a predictable and sensibly liberalized regulatory environment than be shortsighted enough to assume that the Wild West of suspended labor laws would remain indefinitely. This is especially the case since even a preliminary analysis of the political economy of Indian labor unions, given their [often symbiotic linkages](https://www.jstor.org/stable/2645356?seq=1#metadata_info_tab_contents) with their parent political outfits, would suggest they have enough influence to effectively advocate for a restoration of the revoked legislation. Moreover, both organized and unorganized labor may emerge as more reactionary and combative in the future if labor laws are harshly withdrawn, harming the long-term interests of industry in achieving policy and legislative change in the event the government is strong-armed into restoring en masse the very labor laws that were revoked. Vulnerability of Migrant Workers The lockdown has made clear one of the dangerous manifestations of the informalization of labor in India—the [challenges migrant labor face](https://counterview.org/2020/05/20/migrant-workers-amidst-covid-19-pandemic-and-lockdown-myriad-misery-desperate-exodus/). Migrant workers are often ignored by planners and policymakers. Large-scale reverse migration triggered by the Covid-19 slowdown has accentuated their difficulties in receiving public services. Migrant labor is seen in large numbers in industrial clusters, construction sites, and infrastructure projects. They keep the wheels of industry running, build highways, and create infrastructure. However, migrant labor remains marginalized in India’s political economy despite their cardinal role in nation-building. Having experienced challenges, and with meager prospects in the urban economy, a significant proportion of migrant laborers have returned to their ancestral homes, often hundreds or even thousands of miles away. It appears that some of them are [unlikely](https://theprint.in/india/more-than-half-of-migrant-workers-ready-to-come-back-to-work-finds-iim-survey/423238/) to return to metropolitan areas, industrial clusters, or infrastructure sites soon. Indian industry, of all sizes, would therefore have to reconcile with a delay in the resumption of full-scale industrial operations. A Case for Fairness and Equity Labor regulation should balance the interests of both industry and workers in an equitable manner. Basic social security measures to take care of sickness, accidents, old age, and unemployment need to be extended to India’s informal workforce as well. India should seriously explore instituting unemployment insurance and the statutory minimum wage at the national level to cover all categories of workers. Reform is also required to ensure safe working conditions for Indian workers. Livelihood opportunities in India’s gig economy have [grown the fastest in last few years](https://www.investindia.gov.in/team-india-blogs/gig-economy-shaping-future-work). While most gig economy workers may not strictly be classified as employees in the legal sense, laws should provide for at least a basic social security measures to be funded by the companies. India’s low-skilled labor force is physically on the move while governments at every level are dramatically altering labor regulations. These two simultaneous shifts could dramatically impact India’s overall reform program and economic prospects. While there is no denying that industry-friendly labor laws are an absolute necessity in India, the post-reform labor laws should not just be seen as paving way to an easier “hire-and-fire” policy. Fostering trust through transparent and frank multi-stakeholder dialogue is critical. It is a tough balancing act between wantonly implementing the minimalist and simpler laws advocated by overseas investors and ensuring an appropriate safety net for workers. The government should convince workers that their constituency is being addressed first through these reforms, which would benefit them as India eventually gets into a high-growth trajectory, creating many more jobs in the employment-starved economy.

#### Indian economic strength deters China along the India-China border---military buildup and signal of resolve diffuses conflict.

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India’s decision to move [50,000](https://www.bloomberg.com/news/articles/2021-06-27/india-shifts-50-000-troops-to-china-border-in-historic-defense-shift) additional troops to its border with China bolsters its ability to protect itself against Chinese aggression. It is a belated response to China’s actions [last year](https://www.bbc.com/news/world-asia-57234024), when the Chinese army [surprised](https://www.reuters.com/article/us-india-china-military-families-insight-idUSKBN2460YB) ill-prepared Indian soldiers and occupied several square miles of Indian territory in the Ladakh region to build roads and fortify military encampments. The hope of some Indian policymakers to resolve the matter diplomatically has not so far been fulfilled. Several rounds of military and diplomatic negotiations since April 2020, when the Chinese incursions started, have yielded little result. Any willingness on India’s part to deal forcefully with China would be welcomed in the U.S., where successive administrations have sought to integrate India into America’s Indo-Pacific strategy. Several years of an India-U.S. entente cordiale has been premised on India standing up to China. After all, with a population of more than one billion, India is the only country with enough manpower to match that of China. China sees India as a potential rival and covets parts of Indian territory. China [occupied](https://www.reuters.com/article/idINIndia-43780820091108) 15,000 miles of Indian territory in the Aksai Chin section of Ladakh after war in 1962. China’s desire for influence in South Asia and the Indian Ocean Region challenges India in its backyard, setting off [competition](https://www.tandfonline.com/doi/abs/10.1080/09700160801886314) for the same sphere of influence. But China’s phenomenal economic growth, coupled with India’s inability to keep pace, has hampered India’s ability to respond to China strategically. Even now the moving of troops to Ladakh is a tactical maneuver not backed by a clear strategic plan. On [four](https://www.washingtonpost.com/business/why-chinese-and-indian-troops-are-clashing-again/2020/09/11/c5939466-f402-11ea-8025-5d3489768ac8_story.html) occasions since 2012, China has indulged in salami-slicing along the largely un-demarcated India-China border. India’s response each time has been limited to diplomatic negotiations with limited military pushback. There is a co-relation between relative economic strength and China’s willingness to flex its muscle. Between 1988, when India and China signed a series of agreements to restore relations, and 2012, the border between India and China remained by and large quiet. During that period, the size of the two countries’ economies was not huge. In 1990, India’s GDP stood at $320 billion and China’s GDP at $413 billion. By 2012, China’s GDP had grown to $8.5 trillion, seven times larger than India’s $1.2 trillion economy. The [change](https://timesofindia.indiatimes.com/home/sunday-times/all-that-matters/chinas-rising-support-for-pakistan-and-their-collusion-may-affect-our-interests-says-former-nsa-shiv-shankar-menon/articleshow/82234601.cms) in China’s policy after 2012, encouraging its troops to use force against India along the border, coincided with the rise in China’s military and economic power and its impact on the relative balance of power with India. Like many in the West, India during the 1990s had bought into the view that deeper economic and diplomatic engagement with communist China would help maintain peace between the two Asian giants. But the India-China border dispute could not remain on the back burner as China became more aggressive in the wake of growing economic and military power. India can no longer rely solely on diplomacy to deal with China. It will soon have to build and deploy hard power to deter the Chinese. The recent deployment along the Ladakh border could mark the beginning of that process. With the latest addition, 200,000 of India’s more than a million strong army now face China along the 2,167-mile border. By way of comparison, 600,000 Indian troops are positioned along the 2,065-mile, fully fenced and fully demarcated border with Pakistan. It is inconceivable that any attempt by Pakistan to take territory would go unretaliated by India. While India’s attempts over the last year have been to convince China, primarily through diplomatic engagements, to return the border to status quo ante, most [military](https://www.orfonline.org/research/eastern-ladakh-the-longer-perspective/) and [strategic](https://www.lowyinstitute.org/publications/crisis-after-crisis-how-ladakh-will-shape-india-s-competition-china) experts argue that China has no interest in resolving the border dispute with India. India has for far too long acquiesced to Chinese aggression without sufficient retaliatory military action. India may not seek to provoke China into an all-out war, but it needs to find a sweet spot between ignoring and provoking. The United States and its allies, too, would like India to act like a major power in not taking Chinese provocations lightly. Western democracies and Japan have viewed India as an ideal partner and future ally in Asia and the Indo-Pacific. India has consistently been a democracy, shares pluralist values with the United States, and its embrace of free market reforms since 1992 have created an opening for expanded economic ties. India also shares America’s concerns about China’s rising power. In developing a pivot to Asia or an Indo-Pacific policy, successive U.S. administrations have assumed that a shared concern about China makes India a natural American ally. India-U.S. relations were referred to as the “[defining](https://www.google.com/search?q=obama+india+defining+partnership+of+21st+century&rlz=1C1GGRV_enUS751US751&oq=obama+india+defining+partnership+of+21st+century&aqs=chrome..69i57j33i160j33i299.7702j0j7&sourceid=chrome&ie=UTF-8) partnership of the 21st century” under President Obama. The Trump administration’s [2017](https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf) National Security Strategy spoke of India as a “leading global power” and a strong “strategic and defense partner.” The Biden administration’s [March](https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/03/interim-national-security-strategic-guidance/) 2021 “Interim National Security guidance” has described the “deepening partnership” with India as being critical to America’s “vital national interests.” But the Indo-Pacific policies of both the Trump and Biden administrations have focused on maritime security, ignoring India’s challenge from China on the continental landmass. China views India as an inward-looking democracy that has yet to focus on economic growth or military prowess. Only an expansion in India’s economy and military capability would convince China’s leaders to view it differently. Moreover, the two decades of celebrating convergence of democratic values and voicing of strategic concerns by Washington and Delhi now needs to be followed up with specific steps to counter Chinese hard power with Indian muscle.

#### That escalates.

Jeffrey Gettleman et al 20. Jeffrey Gettleman is The Times’s South Asia bureau chief. Hari Kumar is a reporter in the New Delhi bureau of The New York Times. Sameer Yasir is a reporter for The New York Times. “Worst Clash in Decades on Disputed India-China Border Kills 20 Indian Troops”. The New York Times. 6-16-20. https://www.nytimes.com/2020/06/16/world/asia/indian-china-border-clash.html

NEW DELHI — The worst [border clash between India and China](https://www.nytimes.com/2020/06/17/world/asia/india-china-border-clashes.html) in more than 40 years left 20 Indian soldiers dead and dozens believed captured, Indian officials said on Tuesday, raising tensions between nuclear-armed rivals who have increasingly been flexing their diplomatic and military muscle. For the past several weeks, after [a series of brawls](https://www.nytimes.com/2020/05/30/world/asia/india-china-border.html) along their disputed border, China and India have been building up their forces in the remote Galwan Valley, high up in the Himalayas. As they dug into opposing positions, adding tinder to a long-smoldering conflict, China took an especially muscular posture, sending in artillery, armored personnel carriers, dump trucks and excavators. On Monday night, a huge fight broke out between Chinese and Indian troops in roughly the same barren area where these two nations, the world’s most populous, had fought a war in 1962. Military and political analysts say the two countries do not want a further escalation — particularly India, where military forces are nowhere near as powerful as China’s — but they may struggle to find a way out of the conflict that does not hint at backing down. Both countries and their nationalist leaders, President Xi Jinping of China and Prime Minister [Narendra Modi](https://www.nytimes.com/2020/06/17/world/asia/india-china-border-clashes.html) of India, have taken increasingly assertive postures that pose real risks of the conflict spinning out of control. “Neither PM Modi or President Xi want a war, but neither can relinquish their territorial claims either,” said [Ashley J. Tellis,](https://carnegieendowment.org/experts/198) a senior fellow at the Carnegie Endowment for International Peace in Washington. What’s happening along the Himalayan border is an unusual kind of warfare. As in the brawls last month, Chinese and Indian soldiers fought fiercely without firing a shot — at least that’s what officials on both sides contend. They say the soldiers followed their de facto border code not to use firearms and went at each other with fists, rocks and wooden clubs, some possibly studded with nails or wrapped in barbed wire. At first, India’s military said only three Indian troops had been killed in the clash, where the Ladakh region of India abuts Aksai Chin, an area controlled by China but claimed by both countries. But late Tuesday night, a military spokesman said that 17 other Indian soldiers had succumbed to injuries sustained in the clash, bringing the total dead to 20. An Indian commander said dozens of soldiers were missing, apparently captured by the Chinese. Indian television channels reported that several Chinese soldiers had been killed, as well, citing high-level Indian government sources. Chinese officials did not comment on that. It’s not clear what India can do now. Mr. Modi and his Hindu nationalist party have pursued a forceful foreign policy that emphasizes India’s growing role in the world and last year, after a devastating suicide attack that India blamed on a Pakistani terror group, Mr. Modi ordered airstrikes on [Pakistan](https://www.nytimes.com/2020/06/29/world/asia/pakistan-stock-exchange-shooting.html), bringing the two countries to the brink of war. But India is in no shape to risk a war against China — especially now, as it slips deeper into the economic and health crisis caused by the coronavirus, which has cost the country more than 100 million jobs. “Whatever India might want to do it’s not in a position to do,” said Bharat Karnad, a professor of security studies at the Center for Policy Research at New Delhi. “The Modi government is in a difficult position,” he said. “This is bound to escalate.” And, he added, “we are not prepared for this kind of escalation.” Mr. Xi has been doubling [down on China’s territorial claims across Asia](https://www.nytimes.com/2020/05/24/world/asia/china-hong-kong-taiwan.html), backing up arguments with the threat of force or sometimes even the use of force. In recent weeks, the Chinese have tightened their grip on the semiautonomous region of Hong Kong; menaced Taiwan; and sunk a Vietnamese fishing boat in the South China Sea.

### FTC---1AC

#### Advantage 3 is FTC Credibility.

#### FTC promised labor protection now---they’ll lose now but the plan makes them win.

Nicolás Rivero 21. NU Graduate. "Biden’s antitrust crusaders can’t crusade without Congress". Quartz. 3-11-2021. https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/amp/

US president Joe Biden is poised to promote two of the country’s most prominent anti-monopoly crusaders to top jobs in his administration. The moves signal that Biden is serious about cracking down on dominant companies that include Facebook, Google, Amazon, and Apple. But for the president’s trustbusting champions to make a real impact, they’ll need support from Congress.

Biden appointed Columbia law professor Tim Wu to the National Economic Council (NEC) as his top advisor on technology and competition on March 5. Politico reports that Biden will soon follow up by nominating Lina Khan, also a Columbia law professor, to the Federal Trade Commission (FTC). (Before she can take her seat as one of the antitrust agency’s five commissioners, Khan must be confirmed by the Senate.)

Khan and Wu are two of the leading voices in a new movement of legal thought that argues the US should fundamentally overhaul the way it approaches antitrust. The crux of their argument is that courts should broaden the values they consider when deciding whether to block a merger or break up a dominant company. Rather than focus narrowly on the impact a company has on consumer prices, they argue that judges should also think about a company’s impact on small businesses, labor rights, and the health of democracy.

Khan and Wu have already secured a win for their cause just by being appointed—essentially a White House stamp of approval on their viewpoints. But despite much handwringing from industry groups, neither appointee will be able to single-handedly remake American antitrust in their image.

How the FTC can tackle antitrust

To be sure, Wu can advocate loudly for his preferred policies from his perch at the NEC, which advises the president on economic policy. And if Khan makes it to the FTC, which is the top US antitrust enforcement agency, she’ll have direct influence over which investigations the agency prioritizes, which lawsuits it brings, and whether its prosecutors will ask judges to impose fines, break up dominant firms, or require them to change their business practices.

But there are clear limits to their power. The most the FTC can do is bring more antitrust cases that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

A larger caseload would also require Congress to approve more funding for the cash-strapped agency, which is already struggling to pay for its current docket. “The agencies have been asked on many occasions to do a lot with relatively little…but it’s not for free,” says former FTC chair and George Washington University law professor Bill Kovacic. If the FTC wants to pursue more large cases without a bigger budget, “they’ll have to make choices, and those choices will involve backing off of other areas of enforcement.”

The FTC could also decide to dust off its rarely used rule-making power and declare certain anticompetitive business practices illegal. But any new rule would almost certainly trigger legal challenges, which would spark a long, expensive court battle in front of judges who aren’t likely to be sympathetic. Kovacic estimates the process could take four or five years—and in the end, judges might just strike the rule down.

How Congress can tackle antitrust

The best hope for stricter antitrust enforcement lies in Congress. Lawmakers could pass bills, like one recently proposed by Minnesota senator Amy Klobuchar, that would make it easier for enforcement agencies to challenge mergers and acquisitions. They could even go a step further and draft an updated set of antitrust laws, perhaps following the blueprint laid out in last year’s antitrust report from the House of Representatives (which was co-authored by Khan). Armed with new laws clearly banning specific behaviors, prosecutors at the Department of Justice and the FTC would stand a better chance winning cases against well-funded adversaries like Facebook and Google.

Those steps wouldn’t hinge on heroics from antitrust hardliners like Khan and Wu. Instead, their success would depend on the whims of Senate centrists like West Virginia’s Joe Manchin, who has lately been flexing his power to derail the chamber’s democratic majority in opposition to left-wing priorities like a $15 minimum wage.

Ultimately, Congress should be the body that sets US antitrust policy. It has the clearest authority to ban the bullying business tactics for which Big Tech firms have been criticized. Legislative fixes are likely to be quicker and less vulnerable to court challenges—not to mention more democratic—than changing FTC rules. And it has traditionally been Congress’s prerogative to keep the country’s antitrust policy up to date: Legislators updated the monopoly laws every two decades or so between 1890 and 1950 to respond to new threats. They’ve just neglected that tradition for the past 70 years.

#### Hopes are pinned on Khan---FTC will fail unless Congress rewrites the CWS.

Bhaskar Chakravorti 7/7/21. Dean of global business at Tufts University’s Fletcher School of Law and Diplomacy. "Lina Khan Has Her Own Antitrust Paradox". Foreign Policy. 7-7-2021. https://foreignpolicy.com/2021/07/07/ftc-lina-khan-regulate-tech-congress/

A poisoned chalice is not the most welcoming of gifts for a new chair of a major federal agency. But that is what legal scholar Lina Khan has been handed as she arrives at her office at the Federal Trade Commission (FTC), with media coverage more befitting a rock star than a regulator. She is breathlessly described as a legal wunderkind and her “Amazon’s Antitrust Paradox” may already be the most widely talked about note in the history of the Yale Law Journal. Even Sen. Ted Cruz said he looks forward to working with her—and you know that puts her in an extremely select club. The clock is ticking on her very first assignment—to refile an antitrust complaint against Facebook and convince a federal judge to reconsider a complaint he so expeditiously threw out. Khan has under 30 days.

The best thing Khan can do? Nothing.

Congress ought to make the next move and do the responsible thing by getting its act together and reaching an agreement over a slate of bills it has been bickering over, creating a modern regulatory infrastructure for today’s tech. U.S. lawmakers ought to stop cheering Khan from the sidelines and egging her into a legal skirmish. Instead, they need to do the hard work of taking the longer view—bringing antitrust law to the digital age before refiling another complaint. Unless our lawmakers create the right framework and agency responsible for regulating the digital industry, Khan’s FTC—and U.S. consumers—will be drawn into near-term battles while the actual war rages on.

Here is the plot so far and what must be done.

The Facebook antitrust rewrite Khan is being pushed into is fraught with problems. The FTC, under the previous administration, rushed through a lawsuit against Facebook in December 2020, alleging the company’s acquisitions of Instagram and WhatsApp were anti-competitive. Regardless of the merits or demerits of Facebook’s purchases, a federal judge did not buy it. He did offer a 30-day period for revising and refiling.

To be sure, antitrust lawsuits must meet high hurdles and take their time to wind through courts, but the speed of this rejection was stunning. Unsurprisingly, hopes are now pinned on Khan being precisely the person to take on the challenge—and advice is pouring in on how to go back for round two. Some have argued the agency just needs to be more explicit about its definition of the market and the data it is relying on.

It is useful to recall that, as the judge threw out the complaint, he also ruled that “the FTC’s inability to offer any indication of the metric(s) or method(s) it used to calculate Facebook’s market share renders its vague ‘60%-plus’ assertion too speculative and conclusory to go forward.” Defining the “market” and “market share” as well as putting data against these are not straightforward in Facebook’s case.

Since access to the social media platform is free to users, figuring out the “market” might mean considering the advertising customers who actually pay for space there see. Here, Facebook’s share is as low as across all U.S. online advertising. The share climbs to 60 percent when limited to U.S. social media advertising but then drops away when the social media advertising market is considered globally. Moreover, “social networking” itself is a fluid category. A Facebook commissioned study found that 90 percent of the people who use one of Facebook’s apps also use YouTube and 25 percent also use Twitter. To complicate matters further, in Apple’s App Store, Facebook is classified as “social networking,” but YouTube is “video, music, and live streaming” and Twitter is “news.” Other metrics, such as time spent on the apps or total user interactions, are not regularly reported. No matter how the FTC reframes the market and market share (and even if it is accepted by the judge), the definitions will be open to numerous challenges, which will surely lengthen the legal process, giving the defendant the upper hand.

One might argue the conventional metrics for proving monopoly power—“market share” and related measures—are outmoded and a different approach is needed. The FTC might, instead, frame the complaint against Facebook differently: The company used its dominance to play fast and loose with user data. For such an argument to hold though, it needs to be linked to implications for consumer welfare—the prevailing standard for antitrust that has been applied since the 1960s. But how does one prove consumers are harmed by the fact that Facebook is collecting their data? Clearly, part of the data being collected gives users services tailored to their interests that many users find beneficial. This begs more questions: Are users being asked for more data than is strictly necessary? Is the information being collected in intrusive or abusive ways? Ultimately, the FTC and the courts would have decide if customers are getting a good value in exchange for their data.

Regardless of how one discusses consumer welfare, Khan, especially, ought to resist being forced into this straightjacket; after all, she has argued that antitrust standards based on consumer welfare are unfit to gauge competitiveness in the digital economy. To put her ideas into practice, she ought to have the freedom to bring a case that rests on the argument that a company’s impact on the market structure inhibits competition.

Since Khan has written forcefully about revisiting antitrust standards, it is natural to expect this case would be her chance to rewrite not only the charge against Facebook but to change those standards more broadly. There is little doubt this is where her mind is. The FTC under her leadership voted to revoke a 2015 policy statement that limited the agency’s reach, giving it room to frame cases beyond the two foundational boundaries of antitrust in the United States: the Sherman Antitrust Act and the Clayton Antitrust Act.

But the FTC’s levers are limited.

Although Khan can reframe the fundamentals of the antitrust complaint, without adequate regulatory infrastructure—something only Congress can provide—there are likely to be unsurmountable obstacles as the chess game between the law and Facebook unfolds. No matter how brilliantly Khan’s FTC rewrites the case against Facebook, the agency’s powers, budget, and resources are still limited. Ad hoc adjustments to the FTC’s budget, as envisioned in one of the bills in Congress, and stopgap measures to expand its powers do not get around the fundamental fact that the FTC was not set up to pursue the breadth of novel issues and policy trade-offs that digital industries create.

#### That decimates the FTC---losses threaten the institution.

Marianela Lopez-Galdos 7/28/21. Global Competition Counsel at the Computer& Communications Industry Association, previously served as Director of Competition & Regulatory Policy, and is a professor at George Washington University Competition Law Center and at the University of Melbourne Law School. “Policy Decisions of Antitrust Institutions Series: The Future of the FTC and Its Perils”. Disruptive Competition Project. https://www.project-disco.org/competition/072821-policy-decisions-of-antitrust-institutions-series-the-future-of-the-ftc-and-its-perils/

But the current FTC leadership seems to have overlooked the agency’s history. As such, it has already promised to produce different policy outcomes and noted that the Section 5 Policy Guidelines were shortsighted. As a result, the current FTC has decided, with the support of the other two Democratic Commissioners, to rescind the Policy Guidelines.

It is unknown whether the current FTC will try to adopt different guidelines or whether it will start opening more cases under Section 5 of the FTC Act. Furthermore, it is less clear whether the new FTC leadership currently counts with the sufficient and aligned Neo-Brandeisian human talent to bring solid cases that are not based on the consumer welfare standard or to litigate before judges that support the Neo-Brandeisian vision of antitrust.

What seems clear is that the new agency’s leader might find it hard to bring all Commissioners to an agreement with respect to what the agency can do with Section 5 of the FTC Act, and this situation, in and of itself, puts the agency in peril.

The FTC’s Rulemaking Authority

Another important policy change that may be detrimental to the FTC is its expressed willingness to expand the agency’s rulemaking authority under, e.g., Section 18 of the FTC Act. It is well known that in addition to its authority to investigate law violations by individuals and businesses, the FTC also has federal rulemaking authority to issue industry-wide regulations.

However, the agency’s rulemaking authority has been self-limited since the 80s in an effort to ensure the institution doesn’t overuse its capacity to adopt industry-wide regulations and raise concerns with those policy makers that are against the legislature deferring its core mandate to an independent agency that doesn’t represent the people.

Traditionally the legislature has the constitutional mandate to create laws affecting different sectors of the economy. Whereas it is legally accepted to design independent agencies with constrained mandates to adopt regulations, such powers are not necessarily understood to construe independent agencies as substitutes for the legislature’s powers. It is a basic tenet of administrative law, that agencies are constrained by the enabling statute that gives them authority to promulgate regulations in the first place.

Against this background, it seems risky for the new leadership to engage in broad rulemaking endeavors that might raise concerns from an institution legitimacy perspective. In the long term, it is predictable that many policymakers might not be supportive of an agency that implements its rulemaking authority in its broadest sense. As a result, some degree of political backlash against the agency might not help the agency’s lifecycle, especially if the agency is not granted with specific legislative guidance in the form of new legislation.

The Future of the FTC

One of the most challenging matters to tackle when it comes to leadership of antitrust authorities, or administrative agency for that matter, is legacy and the impact for the future of the agency. To put it simply, while antitrust leaders leave agencies, the side effects of leadership’s successes and failures condition the future of the agencies. Their leadership has consequences and sets precedent which will bind the agency well into the future.

Under the current political context, it would not be surprising if the current Neo-Brandeisian FTC enjoyed political support and success with its decision to bring big cases, especially against leading tech companies. In the short term, if the FTC makes headlines for opening cases against “Big Tech”, policymakers pushing for antitrust reforms will surely applaud the new changes as they would reflect a commitment to enhanced enforcement outcomes notwithstanding the strength of the cases.

However, in the mid-and long-term, if the FTC loses the big cases, the commitment to policy outcomes won’t be met. And then, it is unlikely that the question would be whether the antitrust norms are fit for today’s economy, but rather if the agency is capable of executing its mandate effectively. The recent decision in the FTC v. Facebook case is a good example of this paradigm, where the Judge expressed that the FTC had not carried out a sufficiently robust analysis supported by evidence, and therefore dismissed the case.

Eventually, the agency’s short-term reputational gains could quickly turn into a debacle for the institution itself with the caveat that by then, most probably, Neo-Brandeisian leadership will be long gone. Unfortunately then, the U.S. antitrust system — which is the only one to keep two federal antitrust agencies, bringing about positive outcomes for consumers — might be at risk. Political support to merge these two institutions could gain even more support, as has happened in the past, to the detriment of consumers.

#### Trust solves scams and privacy violation---it’s a prerequisite to all reforms.

Testimony of Ted Mermin 21. Executive Director Center for Consumer Law & Economic Justice UC Berkeley School of Law. Before the United States House of Representatives Committee on Energy & Commerce Subcommittee on Consumer Protection and Commerce Hearing on “The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers”. https://docs.house.gov/meetings/IF/IF17/20210427/112501/HHRG-117-IF17-Wstate-MerminT-20210427.pdf

10. Trust the FTC. This final step informs all the others. There can be no doubt that there is more work to do protecting consumers than the FTC currently has the tools or resources to accomplish. There is also no doubt that the FTC has been trammeled in ways that its sister agencies, federal and state, have not. Whatever the reason, it is high time to retire the “zombie ideas” about the FTC – that the Commission is unnecessary, or overreaching, or heavy-handed, or inefficient.23 It is time, as one commissioner stated in Senate testimony last week, to “turn the page on the FTC’s perceived powerlessness.”24

For an American public eager for greater – not lesser – protection from increasingly sophisticated scam artists, deceptive advertisers, and privacy violating tech companies, building an effective FTC is an easy decision. It can and should be for this committee as well.

IV. Conclusion

This subcommittee meets at a remarkable historical moment, when the COVID-19 pandemic has revealed the profound need for a robust Federal Trade Commission just days after the Supreme Court made action by Congress an absolute necessity. This is a perilous time, with the chief protector of American consumers rendered nearly powerless just when those consumers are experiencing a heightened threat resulting from a once-in-a-century pandemic. The Consumer Protection and Recovery Act provides a critical first step toward restoring authority and effectiveness to the nation’s leading consumer protection agency.

Swift action to restore the FTC’s traditional 13(b) authority means that when constituents contact your office, and tell your staff that they have lost their life’s savings to a work-at-home scam, or their identity has been stolen and someone has opened accounts in their name, or they just spent their stimulus payment on a supposed cure for COVID for their grandmother who’s on a respirator – there will still be an agency to refer them to. No one wants that staffer to have to add: “Well, we could send you to the FTC, but they don’t actually have the power to get you your money back.”

Inaction or delay will mean no recovery for millions of wronged American consumers. The time to pass the Consumer Protection and Recovery Act is now.

#### Scamming causes extinction.

Casey Newton 20. Verge contributing editor. "The massive Twitter hack could be a global security crisis". Verge. 7-15-2020. https://www.theverge.com/interface/2020/7/15/21325708/twitter-hack-global-security-crisis-nuclear-war-bitcoin-scam

Beginning in the spring of 2018, scammers began to impersonate noted cryptocurrency enthusiast Elon Musk. They would use his profile photo, select a user name similar to his, and tweet out an offer that was effective despite being too good to be true: send him a little cryptocurrency, and he’ll send you a lot back. Sometimes the scammer would reply to a connected, verified account — Musk-owned SpaceX, for example — giving it additional legitimacy. Scammers would also amplify the fake tweet via bot networks, for the same purpose.

The events of 2018 showed us three things. One, at least some people fell for the scam, every single time — certainly enough to incentivize further attempts. Two, Twitter was slow to respond to the threat, which persisted well beyond the company’s initial comments that it was taking the issue seriously. And three, the demand from scammers coupled with Twitter’s initial measures to fight back set up a cat-and-mouse game that incentivized bad actors to take more drastic measures to wreak havoc.

That brings us to today. The story picks up with Nick Statt in The Verge:

The Twitter accounts of major companies and individuals have been compromised in one of the most widespread and confounding hacks the platform has ever seen, all in service of promoting a bitcoin scam that appears to be earning its creator quite a bit of money.

We don’t know how it’s happened or even to what extent Twitter’s own systems may have been compromised. The hack appears to have subsided, but new scam tweets were posting to verified accounts on a regular basis starting shortly after 4PM ET and lasting more than two hours. Twitter acknowledged the situation after more than an hour of silence, writing on its support account at 5:45PM ET, “We are aware of a security incident impacting accounts on Twitter. We are investigating and taking steps to fix it. We will update everyone shortly.”

Among the hacked accounts were President Barack Obama, Joe Biden, Amazon CEO Jeff Bezos, Bill Gates, the Apple and Uber corporate accounts, and pop star Kanye West.

But they came later. The first prominent individual account to be compromised? Elon Musk, of course.

Within the first hours of the attack, people were duped into sending more than $118,000 to the hackers. It also seems possible that a great number of sensitive direct messages could have been accessed by the attackers. Of even greater concern, though, is the speed and scale at which the attack unfolded — and the national security concerns it raises, which are profound.

The first and most obvious question is, of course, who did this and how? And at press time, we don’t know. At Vice, Joseph Cox, one of the best security reporters I know, reported that members of the underground hacking community are sharing screenshots suggesting someone gained access to an internal Twitter tool used for account management. Cox writes:

Two sources close to or inside the underground hacking community provided Motherboard with screenshots of an internal panel they claim is used by Twitter workers to interact with user accounts. One source said the Twitter panel was also used to change ownership of some so-called OG accounts—accounts that have a handle consisting of only one or two characters—as well as facilitating the tweeting of the cryptocurrency scams from the high profile accounts.

Twitter has been deleting screenshots of the panel and has suspended users who have tweeted the screenshots, claiming that the tweets violate its rules.

To speculate much further would be irresponsible, but Cox’s reporting suggests that this is not a garden-variety hack in which a bunch of people reused their passwords, or a hacker used social engineering to convince AT&T to swap a SIM card. One possibility is that hackers accessed internal Twitter tools; another that Cox raises is that a Twitter employee was involved in the incident — which, if true, would make this the second inside job revealed at Twitter this year.

In any case, Twitter’s response to the incident offered further cause for distress. The company’s initial tweet on the subject said almost nothing, and two hours later it had followed only to say what many users were forced to discover for themselves: that Twitter had disabled the ability of many verified users to tweet or reset their passwords while it worked to resolve the hack’s underlying cause.

The near-silencing of politicians, celebrities, and the national press corps led to much merriment on the service — see this, along with Those good tweets below, for some fun — but the move had other, darker implications. Twitter is, for better and worse, one of the world’s most important communications systems, and among its users are accounts linked to emergency medical services. The National Weather Service in Lincoln, IL, for example, had just tweeted a tornado warning before suddenly going dark. To the extent that anyone was relying on that account for further information about those tornadoes, they were out of luck.

Of course, Twitter’s move to stop verified accounts from tweeting represents a difficult balancing on equities. You would probably rather the National Weather Service not tweet than a hacker sell the account to a bad actor who logs in and falsely suggests that tornadoes are sweeping through every city in America. But the ham-fisted approach to resolving the issue — banning a huge portion of 359,000 verified accounts — reflects the staggering scale of the breach. This is as close to pulling the plug on Twitter as Twitter itself has ever come.

And that makes you wonder what contingencies the company has put into place in the event that it is someday taken over not by greedy Bitcoin con artists, but state-level actors or psychopaths. After today it is no longer unthinkable, if it ever truly was, that someone take over the account of a world leader and attempt to start a nuclear war. (A report on that subject from King’s College London came out just last week.)

It is in such a world that I find myself in the unusual position of agreeing with Sen. Josh Hawley, the Missouri Republican who among other things wants to end content moderation. He wrote a letter to Twitter CEO Jack Dorsey, and I found myself agreeing with all of it:

“I am concerned that this event may represent not merely a coordinated set of separate hacking incidents but rather a successful attack on the security of Twitter itself. As you know, millions of your users rely on your service not just to tweet publicly but also to communicate privately through your direct message service. A successful attack on your system’s servers represents a threat to all of your users’ privacy and data security.”

And yet even Hawley doesn’t go far enough. The threat here is not simply user privacy and data security, though those threats are real and substantial. It is about the striking potential of Twitter to incite real-world chaos through impersonation and fraud. As of today, that potential has been realized. And I can only worry about how, with a presidential election now less than four months away, it might be realized further.

Twitter will likely spend the next several days investigating how this incident took place. A criminal investigation seems likely, during which the company may not be able to fully describe Wednesday’s events to our satisfaction. But it is vital that as soon as possible, Twitter share as much about what happened today as it can — and, just as importantly, what it will do to ensure that it never happens again.

After Wednesday’s catastrophe, it hardly seems like hyperbole to suggest that our world could hang in the balance.

#### AND fraud funds terrorists.

Frank S. Perri 10. Frank S. Perri, J.D., CFE, CPA. "The Fraud-Terror Link:". No Publication. xx-xx-xxxx. https://www.fraud-magazine.com/article.aspx?id=4294967888

The threat of terrorism has become the principal security concern in the United States since 9/11. Some might perceive that fraud isn’t linked to terrorism because white-collar crime issues are more the province of organized crime, but that perception is misguided. Terrorists derive funding from a variety of criminal activities ranging in scale and sophistication – from low-level crime to organized narcotics smuggling and fraud. CFEs need to know the latest links between fraud and terror.

Credit card fraud, wire fraud, mortgage fraud, charitable donation fraud, insurance fraud, identity theft, money laundering, immigration fraud, and tax evasion are just some of the types of fraud commonly used to fund terrorist cells. Such groups will also use shell companies to receive and distribute illicit funds. On the surface, these companies might engage in legitimate activities to establish a positive reputation in the business community.

Financing is required not just to fund specific terrorist operations but to meet the broader organizational costs of developing and maintaining a terrorist organization and to create an enabling environment necessary to sustain their activities. The direct costs of mounting individual attacks have been relatively low considering the damage they can yield.

“Part of the problem is that it takes so little to finance an operation,” said Gary LaFree, director of the University of Maryland’s National Consortium for the Study of Terrorism and Responses to Terrorism.2 For example, the 2005 London bombings cost about $15,600.3 The 2000 bombing of the USS Cole is estimated to have cost between $5,000 and $10,000.4 Al-Qaida’s entire 9/11 operation cost between $400,000 and $500,000, according to the final report of the National Commission on Terrorist Attacks Upon the United States.5

Terrorist groups require significant funds to create and maintain an infrastructure of organizational support, sustain an ideology of terrorism through propaganda, and finance the ostensibly legitimate activities needed to provide a veil of legitimacy for their shell companies.6 However, don’t think that only large operations are needed for terrorists to carry out attacks; small semi-autonomous cells in many countries are often just as capable of conducting disruptive activities without extensive outside financial help – they just conduct smaller-scale frauds.7

Even though the nexus between fraud and terrorism is undisputed, there’s concern at state and local levels that law enforcement professionals lack specialized knowledge on how to detect the fraud-terror link because they’re more apt to investigate and prosecute violent crimes.8

A critical lack of awareness about terrorists’ links to fraud schemes is undermining the fight against terrorism. Fraud analysis must be central, not peripheral, in understanding the patterns of terrorist behavior.9

#### Causes extinction---nuclear escalation.

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The escalating threats between North Korea and the United States make it easy to forget the “nuclear nightmare,” as former US Secretary of Defense William J. Perry put it, that could result even from the use of just a single terrorist nuclear bomb in the heart of a major city. At the risk of repeating the vast literature on the tragedies of Hiroshima and Nagasaki—and the substantial literature surrounding nuclear tests and simulations since then—we attempt to spell out here the likely consequences of the explosion of a single terrorist nuclear bomb on a major city, and its subsequent ripple effects on the rest of the planet. Depending on where and when it was detonated, the blast, fire, initial radiation, and long-term radioactive fallout from such a bomb could leave the heart of a major city a smoldering radioactive ruin, killing tens or hundreds of thousands of people and wounding hundreds of thousands more. Vast areas would have to be evacuated and might be uninhabitable for years. Economic, political, and social aftershocks would ripple throughout the world. A single terrorist nuclear bomb would change history. The country attacked—and the world—would never be the same. The idea of terrorists accomplishing such a thing is, unfortunately, not out of the question; it is far easier to make a crude, unsafe, unreliable nuclear explosive that might fit in the back of a truck than it is to make a safe, reliable weapon of known yield that can be delivered by missile or combat aircraft. Numerous government studies have concluded that it is plausible that a sophisticated terrorist group could make a crude bomb if they got the needed nuclear material. And in the last quarter century, there have been some 20 seizures of stolen, weapons-usable nuclear material, and at least two terrorist groups have made significant efforts to acquire nuclear bombs. Terrorist use of an actual nuclear bomb is a low-probability event—but the immensity of the consequences means that even a small chance is enough to justify an intensive effort to reduce the risk. Fortunately, since the early 1990s, countries around the world have significantly reduced the danger—but it remains very real, and there is more to do to ensure this nightmare never becomes reality. Brighter than a thousand suns. Imagine a crude terrorist nuclear bomb—containing a chunk of highly enriched uranium just under the size of a regulation bowling ball, or a much smaller chunk of plutonium—suddenly detonating inside a delivery van parked in the heart of a major city. Such a terrorist bomb would release as much as 10 kilotons of explosive energy, or the equivalent of 10,000 tons of conventional explosives, a volume of explosives large enough to fill all the cars of a mile-long train. In a millionth of a second, all of that energy would be released inside that small ball of nuclear material, creating temperatures and pressures as high as those at the center of the sun. That furious energy would explode outward, releasing its energy in three main ways: a powerful blast wave; intense heat; and deadly radiation. The ball would expand almost instantly into a fireball the width of four football fields, incinerating essentially everything and everyone within. The heated fireball would rise, sucking in air from below and expanding above, creating the mushroom cloud that has become the symbol of the terror of the nuclear age. The ionized plasma in the fireball would create a localized electromagnetic pulse more powerful than lightning, shorting out communications and electronics nearby—though most would be destroyed by the bomb’s other effects in any case. (Estimates of heat, blast, and radiation effects in this article are drawn primarily from Alex Wellerstein’s “Nukemap,” which itself comes from declassified US government data, such as the 660-page government textbook The Effects of Nuclear Weapons.) At the instant of its detonation, the bomb would also release an intense burst of gamma and neutron radiation which would be lethal for nearly everyone directly exposed within about two-thirds of a mile from the center of the blast. (Those who happened to be shielded by being inside, or having buildings between them and the bomb, would be partly protected—in some cases, reducing their doses by ten times or more.) The nuclear flash from the heat of the fireball would radiate in both visible light and the infrared; it would be “brighter than a thousand suns,” in the words of the title of a book describing the development of nuclear weapons—adapting a phrase from the Hindu epic the Bhagavad-Gita. Anyone who looked directly at the blast would be blinded. The heat from the fireball would ignite fires and horribly burn everyone exposed outside at distances of nearly a mile away. (In the Nagasaki Atomic Bomb Museum, visitors gaze in horror at the bones of a human hand embedded in glass melted by the bomb.) No one has burned a city on that scale in the decades since World War II, so it is difficult to predict the full extent of the fire damage that would occur from the explosion of a nuclear bomb in one of today’s cities. Modern glass, steel, and concrete buildings would presumably be less flammable than the wood-and-rice-paper housing of Hiroshima or Nagasaki in the 1940s—but many questions remain, including exactly how thousands of broken gas lines might contribute to fire damage (as they did in Dresden during World War II). On 9/11, the buildings of the World Trade Center proved to be much more vulnerable to fire damage than had been expected. Ultimately, even a crude terrorist nuclear bomb would carry the possibility that the countless fires touched off by the explosion would coalesce into a devastating firestorm, as occurred at Hiroshima. In a firestorm, the rising column of hot air from the massive fire sucks in the air from all around, creating hurricane-force winds; everything flammable and everything alive within the firestorm would be consumed. The fires and the dust from the blast would make it extremely difficult for either rescuers or survivors to see. The explosion would create a powerful blast wave rushing out in every direction. For more than a quarter-mile all around the blast, the pulse of pressure would be over 20 pounds per square inch above atmospheric pressure (known as “overpressure”), destroying or severely damaging even sturdy buildings. The combination of blast, heat, and radiation would kill virtually everyone in this zone. The blast would be accompanied by winds of many hundreds of miles per hour. The damage from the explosion would extend far beyond this inner zone of almost total death. Out to more than half a mile, the blast would be strong enough to collapse most residential buildings and create a serious danger that office buildings would topple over, killing those inside and those in the path of the rubble. (On the other hand, the office towers of a modern city would tend to block the blast wave in some areas, providing partial protection from the blast, as well as from the heat and radiation.) In that zone, almost anything made of wood would be destroyed: Roofs would cave in, windows would shatter, gas lines would rupture. Telephone poles, street lamps, and utility lines would be severely damaged. Many roads would be blocked by mountains of wreckage. In this zone, many people would be killed or injured in building collapses, or trapped under the rubble; many more would be burned, blinded, or injured by flying debris. In many cases, their charred skin would become ragged and fall off in sheets. The effects of the detonation would act in deadly synergy. The smashed materials of buildings broken by the blast would be far easier for the fires to ignite than intact structures. The effects of radiation would make it far more difficult for burned and injured people to recover. The combination of burns, radiation, and physical injuries would cause far more death and suffering than any one of them would alone. The silent killer. The bomb’s immediate effects would be followed by a slow, lingering killer: radioactive fallout. A bomb detonated at ground level would dig a huge crater, hurling tons of earth and debris thousands of feet into the sky. Sucked into the rising fireball, these particles would mix with the radioactive remainders of the bomb, and over the next few hours or days, the debris would rain down for miles downwind. Depending on weather and wind patterns, the fallout could actually be deadlier and make a far larger area unusable than the blast itself. Acute radiation sickness from the initial radiation pulse and the fallout would likely affect tens of thousands of people. Depending on the dose, they might suffer from vomiting, watery diarrhea, fever, sores, loss of hair, and bone marrow depletion. Some would survive; some would die within days; some would take months to die. Cancer rates among the survivors would rise. Women would be more vulnerable than men—children and infants especially so. Much of the radiation from a nuclear blast is short-lived; radiation levels even a few days after the blast would be far below those in the first hours. For those not killed or terribly wounded by the initial explosion, the best advice would be to take shelter in a basement for at least several days. But many would be too terrified to stay. Thousands of panic-stricken people might receive deadly doses of radiation as they fled from their homes. Some of the radiation will be longer-lived; areas most severely affected would have to be abandoned for many years after the attack. The combination of radioactive fallout and the devastation of nearly all life-sustaining infrastructure over a vast area would mean that hundreds of thousands of people would have to evacuate. Ambulances to nowhere. The explosion would also destroy much of the city’s ability to respond. Hospitals would be leveled, doctors and nurses killed and wounded, ambulances destroyed. (In Hiroshima, 42 of 45 hospitals were destroyed or severely damaged, and 270 of 300 doctors were killed.) Resources that survived outside the zone of destruction would be utterly overwhelmed. Hospitals have no ability to cope with tens or hundreds of thousands of terribly burned and injured people all at once; the United States, for example, has 1,760 burn beds in hospitals nationwide, of which a third are available on any given day. And the problem would not be limited to hospitals; firefighters, for example, would have little ability to cope with thousands of fires raging out of control at once. Fire stations and equipment would be destroyed in the affected area, and firemen killed, along with police and other emergency responders. Some of the first responders may become casualties themselves, from radioactive fallout, fire, and collapsing buildings. Over much of the affected area, communications would be destroyed, by both the physical effects and the electromagnetic pulse from the explosion. Better preparation for such a disaster could save thousands of lives—but ultimately, there is no way any city can genuinely be prepared for a catastrophe on such a historic scale, occurring in a flash, with zero warning. Rescue and recovery attempts would be impeded by the destruction of most of the needed personnel and equipment, and by fire, debris, radiation, fear, lack of communications, and the immense scale of the disaster. The US military and the national guard could provide critically important capabilities—but federal plans assume that “no significant federal response” would be available for 24-to-72 hours. Many of those burned and injured would wait in vain for help, food, or water, perhaps for days. The scale of death and suffering. How many would die in such an event, and how many would be terribly wounded, would depend on where and when the bomb was detonated, what the weather conditions were at the time, how successful the response was in helping the wounded survivors, and more. Many estimates of casualties are based on census data, which reflect where people sleep at night; if the attack occurred in the middle of a workday, the numbers of people crowded into the office towers at the heart of many modern cities would be far higher. The daytime population of Manhattan, for example, is roughly twice its nighttime population; in Midtown on a typical workday, there are an estimated 980,000 people per square mile. A 10-kiloton weapon detonated there might well kill half a million people—not counting those who might die of radiation sickness from the fallout. (These effects were analyzed in great detail in the Rand Corporation’s Considering the Effects of a Catastrophic Terrorist Attack and the British Medical Journal’s “Nuclear terrorism.”) On a typical day, the wind would blow the fallout north, seriously contaminating virtually all of Manhattan above Gramercy Park; people living as far away as Stamford, Connecticut would likely have to evacuate. Seriously injured survivors would greatly outnumber the dead, their suffering magnified by the complete inadequacy of available help. The psychological and social effects—overwhelming sadness, depression, post-traumatic stress disorder, myriad forms of anxiety—would be profound and long-lasting. The scenario we have been describing is a groundburst. An airburst—such as might occur, for example, if terrorists put their bomb in a small aircraft they had purchased or rented—would extend the blast and fire effects over a wider area, killing and injuring even larger numbers of people immediately. But an airburst would not have the same lingering effects from fallout as a groundburst, because the rock and dirt would not be sucked up into the fireball and contaminated. The 10-kiloton blast we have been discussing is likely toward the high end of what terrorists could plausibly achieve with a crude, improvised bomb, but even a 1-kiloton blast would be a catastrophic event, having a deadly radius between one-third and one-half that of a 10-kiloton blast. These hundreds of thousands of people would not be mere statistics, but countless individual stories of loss—parents, children, entire families; all religions; rich and poor alike—killed or horribly mutilated. Human suffering and tragedy on this scale does not have to be imagined; it can be remembered through the stories of the survivors of the US atomic bombings of Hiroshima and Nagasaki, the only times in history when nuclear weapons have been used intentionally against human beings. The pain and suffering caused by those bombings are almost beyond human comprehension; the eloquent testimony of the Hibakusha—the survivors who passed through the atomic fire—should stand as an eternal reminder of the need to prevent nuclear weapons from ever being used in anger again. Global economic disaster. The economic impact of such an attack would be enormous. The effects would reverberate for so far and so long that they are difficult to estimate in all their complexity. Hundreds of thousands of people would be too injured or sick to work for weeks or months. Hundreds of thousands more would evacuate to locations far from their jobs. Many places of employment would have to be abandoned because of the radioactive fallout. Insurance companies would reel under the losses; but at the same time, many insurance policies exclude the effects of nuclear attacks—an item insurers considered beyond their ability to cover—so the owners of thousands of buildings would not have the insurance payments needed to cover the cost of fixing them, thousands of companies would go bankrupt, and banks would be left holding an immense number of mortgages that would never be repaid. Consumer and investor confidence would likely be dramatically affected, as worried people slowed their spending. Enormous new homeland security and military investments would be very likely. If the bomb had come in a shipping container, the targeted country—and possibly others—might stop all containers from entering until it could devise a system for ensuring they could never again be used for such a purpose, throwing a wrench into the gears of global trade for an extended period. (And this might well occur even if a shipping container had not been the means of delivery.) Even the far smaller 9/11 attacks are estimated to have caused economic aftershocks costing almost $1 trillion even excluding the multi-trillion-dollar costs of the wars that ensued. The cost of a terrorist nuclear attack in a major city would likely be many times higher. The most severe effects would be local, but the effects of trade disruptions, reduced economic activity, and more would reverberate around the world. Consequently, while some countries may feel that nuclear terrorism is only a concern for the countries most likely to be targeted—such as the United States—in reality it is a threat to everyone, everywhere. In 2005, then-UN Secretary-General Kofi Annan warned that these global effects would push “tens of millions of people into dire poverty,” creating “a second death toll throughout the developing world.” One recent estimate suggested that a nuclear attack in an urban area would cause a global recession, cutting global Gross Domestic Product by some two percent, and pushing an additional 30 million people in the developing world into extreme poverty. Desperate dilemmas. In short, an act of nuclear terrorism could rip the heart out of a major city, and cause ripple effects throughout the world. The government of the country attacked would face desperate decisions: How to help the city attacked? How to prevent further attacks? How to respond or retaliate? Terrorists—either those who committed the attack or others—would probably claim they had more bombs already hidden in other cities (whether they did or not), and threaten to detonate them unless their demands were met. The fear that this might be true could lead people to flee major cities in a large-scale, uncontrolled evacuation. There is very little ability to support the population of major cities in the surrounding countryside. The potential for widespread havoc and economic chaos is very real. If the detonation took place in the capital of the nation attacked, much of the government might be destroyed. A bomb in Washington, D.C., for example, might kill the President, the Vice President, and many of the members of Congress and the Supreme Court. (Having some plausible national leader survive is a key reason why one cabinet member is always elsewhere on the night of the State of the Union address.) Elaborate, classified plans for “continuity of government” have already been drawn up in a number of countries, but the potential for chaos and confusion—if almost all of a country’s top leaders were killed—would still be enormous. Who, for example, could address the public on what the government would do, and what the public should do, to respond? Could anyone honestly assure the public there would be no further attacks? If they did, who would believe them? In the United States, given the practical impossibility of passing major legislation with Congress in ruins and most of its members dead or seriously injured, some have argued for passing legislation in advance giving the government emergency powers to act—and creating procedures, for example, for legitimately replacing most of the House of Representatives. But to date, no such legislative preparations have been made. In what would inevitably be a desperate effort to prevent further attacks, traditional standards of civil liberties might be jettisoned, at least for a time—particularly when people realized that the fuel for the bomb that had done such damage would easily have fit in a suitcase. Old rules limiting search and surveillance could be among the first to go. The government might well impose martial law as it sought to control the situation, hunt for the perpetrators, and find any additional weapons or nuclear materials they might have. Even the far smaller attacks of 9/11 saw the US government authorizing torture of prisoners and mass electronic surveillance. And what standards of international order and law would still hold sway? The country attacked might well lash out militarily at whatever countries it thought might bear a portion of responsibility. (A terrifying description of the kinds of discussions that might occur appeared in Brian Jenkins’ book, Will Terrorists Go Nuclear?) With the nuclear threshold already crossed in this scenario—at least by terrorists—it is conceivable that some of the resulting conflicts might escalate to nuclear use. International politics could become more brutish and violent, with powerful states taking unilateral action, by force if necessary, in an effort to ensure their security. After 9/11, the United States led the invasions of two sovereign nations, in wars that have since cost hundreds of thousands of lives and trillions of dollars, while plunging a region into chaos. Would the reaction after a far more devastating nuclear attack be any less?

#### FTC’s enforcement reputation solves global emerging tech---leadership and legitimacy are key.

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Despite these limitations, the FTC has a formidable reputation as an enforcement authority, and commercial entities, and their lawyers, pay close attention to its orders and decisions.248 For example, when the FTC issues a complaint, it is published on the FTC’s website, which often generates significant attention in the privacy community.249 One reason for this is the fear firms have of the FTC’s auditing process, which not only is “exhaustive and demanding,” but can last for as long as 20 years.250 As such, the FTC settles most of the enforcement actions it initiates.251 Firms are motivated to settle with the FTC because they can avoid having to admit any wrongdoing in exchange for taking remedial measures, and thus they also avoid the costs to their reputation from apologizing.252

Though done by necessity, the rule-making process the FTC engages in with its consent orders and settlement agreements can be of benefit when regulating emerging technologies. 253 For one, it allows the flexibility needed to adapt to new and rapidly changing situations.254 Further, the FTC can wait and see if an industry consensus develops around a particular standard before codifying that rule through its enforcement actions.255 As with the common law, which has long demonstrated the ability to adjust to technological changes iteratively, the FTC’s incremental case-bycase approach can help minimize the risks of producing incorrect or inappropriate regulatory policy outcomes.256

In addition to its use of consent orders and settlement agreements, the FTC has created a type of “soft law” by issuing guidelines, press releases, workshops, and white papers.257 Unlike in enforcement actions, where the FTC looks at a company’s conduct and sees how its behavior compares to industry standards, the FTC arrives at the best practices it develops for guidance purposes through a “deep and ongoing engagement with all stakeholders.”258 As such, not only is the FTC’s authority broad enough to regulate the use of emerging technologies such as AI in commerce, but the FTC’s enforcement actions also constitute a body of jurisprudence the FTC can rely on to address the real and potential harms that stem from the deployment of consumeroriented AI.259

Given its broad grant of authority, the regulatory tools at its disposal, and its experience dealing with emerging technologies, the FTC is currently in the best position to take the lead in regulating AI. The FTC’s leadership is sorely needed to fill in the remaining – and quite large – gaps in those few sectoral laws that specifically address AI and algorithmic decision-making.260 Several factors make the FTC the ideal agency for this role. First, the FTC can use its broad Section 5 powers to respond rapidly and nimbly to the types of unanticipated regulatory issues AI is likely to create.261

Second, the FTC has an established history of approaching emerging technologies with “a light regulatory touch” during their beginning stages, waiting to increase its regulatory efforts only once the technology has become more established.262 This approach provides the innovative space needed for new technologies such as AI to develop to their full potential. Thus, as it has in the past, the FTC would focus on disclosure requirements rather than conduct prohibition, and take a case-by-case approach rather than rely on rulemaking.263 Also, as it has traditionally done, the FTC can hold public events on consumer-related AI and issue reports and white papers to guide industry.264

In other words, the FTC has long taken a co-regulatory approach to regulation, which it can and should proceed to do with AI. As in other emerging technology areas, this will help industry continue to grow and innovate, while allowing for the calibration among all relevant stakeholders of the “appropriate expectations” concerning the use and deployment of AI decision-making systems.265 At the same time, the FTC should use its regulatory powers to nudge, and when necessary, push companies to refrain from engaging in unfair and deceptive trade practices in the design and deployment of AI systems.266 The FTC should also place the onus on firms that design and implement those systems to ensure misplaced or unrealistic consumer expectations about AI are corrected.267

By nudging (or pushing) firms in this way, the FTC can “gradually impose a set of sticky default practices that companies can only deviate from if they very explicitly notify consumers.”268 In terms of disclosure requirements, as it has done in other contexts, the FTC can develop rules and guidelines for “when and how a company must disclose information to avoid deception and protect a consumer from harm,” which can include requiring firms to adopt the equivalent of a privacy policy. 269 Given the black box like nature of most algorithmic decision-making processes, there is much that AI developers might have to disclose to prevent those processes from being deemed unfair or deceptive.270

In addition, given its broad authority under Section 5, the FTC is able to address small, nuanced changes in AI design that could adversely affect consumers, but that other areas of law, such as tort, may not be able to adequately handle.271 Again, this is important because AI and algorithmic decision-making can pose profound and systemic risks of harm, even though the actual harm to individual consumers may be small or hard to quantify. And as it has done in the area of privacy, the FTC can become the de facto federal agency authority charged with protecting consumers from harms caused by AI systems and other algorithmic decisionmaking processes.272

The FTC also can, and should, seek to work with other agencies to address AI-related harms, given that the regulatory efforts of other agencies will still occur and be needed in specific sectors or industries, which would impact and be relevant to the FTC’s efforts as well.273 Agency cooperation is essential to ensuring regulatory consistency, accuracy, and efficiency in the type of complex, varied technological landscape that AI presents.274 This should not be a problem as the FTC’s Section 5 authority overlaps regularly with the authority of other agencies, and the FTC itself has a history of cooperating with those agencies.275 Further, the FTC can use its experience working with other agencies to build standards and policy consensus within the regulatory community and among stakeholders. 276

The overarching role the FTC has played in protecting consumer privacy within the United States also has given it legitimacy within the wider privacy community. The FTC has been pivotal over time in promoting international confidence in the United States’ ability to regulate privacy by for example acting as the essential mechanism for enforcing the Safe Harbor Agreement with the European Union.277 As it takes on a similar overarching regulatory role for AI and algorithmic decision-making processes in this country, the FTC should gain a similar level of legitimacy internationally. This is important given the increasingly cross border nature of AI research and development.

#### Unregulated emerging tech cause extinction---outweighs nuclear war.

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The risks from anthropogenic hazards appear at present larger than those from natural ones. Although great progress has been made in reducing the number of nuclear weapons in the world, humanity is still threatened by the possibility of a global thermonuclear war and a resulting nuclear winter. We may face even greater risks from emerging technologies. Advances in synthetic biology might make it possible to engineer pathogens capable of extinction-level pandemics. The knowledge, equipment, and materials needed to engineer pathogens are more accessible than those needed to build nuclear weapons. And unlike other weapons, pathogens are self-replicating, allowing a small arsenal to become exponentially destructive. Pathogens have been implicated in the extinctions of many wild species. Although most pandemics “fade out” by reducing the density of susceptible populations, pathogens with wide host ranges in multiple species can reach even isolated individuals. The intentional or unintentional release of engineered pathogens with high transmissibility, latency, and lethality might be capable of causing human extinction. While such an event seems unlikely today, the likelihood may increase as biotechnologies continue to improve at a rate rivaling Moore’s Law.

Farther out in time are technologies that remain theoretical but might be developed this century. Molecular nanotechnology could allow the creation of self-replicating machines capable of destroying the ecosystem. And advances in neuroscience and computation might enable improvements in cognition that accelerate the invention of new weapons. A survey at the Oxford conference found that concerns about human extinction were dominated by fears that new technologies would be misused. These emerging threats are especially challenging as they could become dangerous more quickly than past technologies, outpacing society’s ability to control them. As H.G. Wells noted, “Human history becomes more and more a race between education and catastrophe.”

Such remote risks may seem academic in a world plagued by immediate problems, such as global poverty, HIV, and climate change. But as intimidating as these problems are, they do not threaten human existence. In discussing the risk of nuclear winter, Carl Sagan emphasized the astronomical toll of human extinction:

A nuclear war imperils all of our descendants, for as long as there will be humans. Even if the population remains static, with an average lifetime of the order of 100 years, over a typical time period for the biological evolution of a successful species (roughly ten million years), we are talking about some 500 trillion people yet to come. By this criterion, the stakes are one million times greater for extinction than for the more modest nuclear wars that kill “only” hundreds of millions of people. There are many other possible measures of the potential loss–including culture and science, the evolutionary history of the planet, and the significance of the lives of all of our ancestors who contributed to the future of their descendants. Extinction is the undoing of the human enterprise.

There is a discontinuity between risks that threaten 10 percent or even 99 percent of humanity and those that threaten 100 percent. For disasters killing less than all humanity, there is a good chance that the species could recover. If we value future human generations, then reducing extinction risks should dominate our considerations. Fortunately, most measures to reduce these risks also improve global security against a range of lesser catastrophes, and thus deserve support regardless of how much one worries about extinction. These measures include:

### Plan---1AC

#### The United States federal government should substantially increase prohibitions on private sector business practices that violate an antitrust worker welfare standard.

### Solvency---1AC

#### Contention 4 is Solvency.

#### Replacing consumer welfare with worker considerations lets labor win---alternatives legalize exploitation and ban collective bargaining.

Firat Cengiz 20. School of Law and Social Justice, University of Liverpool. "The conflict between market competition and worker solidarity: moving from consumer to a citizen welfare standard in competition law". Cambridge Core. 10-8-2020. https://www.cambridge.org/core/journals/legal-studies/article/conflict-between-market-competition-and-worker-solidarity-moving-from-consumer-to-a-citizen-welfare-standard-in-competition-law/6E783D1FC4BAB5605DFABCD17FBE3F35

Introduction

This paper offers a critical investigation of the law and economics of competition law enforcement in conflicts between workers and employers in the European Union (hereinafter EU) and the US. In such cases competition law comes into direct conflict with the principle of worker solidarity: according to the principle of market competition individuals are expected to take independent economic decisions and actions, whereas workers need to take collective economic actions and decisions to protect their interests. This conflict is particularly obvious in the context of the so-called gig economy,1 in which employers keep casualised workers at legal arms’ length to reduce labour and regulatory costs.2 If gig workers take collective action against their working conditions, they might face attack from competition law, because legally they might be considered independent service providers, rather than workers.3

The legal conundrum facing gig workers has become an increasingly popular subject in the law and economics literature.4 Nevertheless, the more fundamental question of how the enforcement of competition rules affects the overall position of workers beyond the limited case of the gig economy remains largely unexplored. This paper aims to investigate this broader and more fundamental question. In order to provide a sufficiently global answer, the paper focuses on the legal positions of the EU and US, as the leading competition law jurisdictions and primary competition policy exporters.5 The EU–US comparison shows that despite the slightly different legal tests applied in these polities, competition rules constitute nearly equally disciplining mechanisms against collective worker action on either side of the Atlantic.

This paper also makes an original contribution to the emerging debate on whether and how competition law can contribute to wealth equality between citizens in the post-2008 crisis economy. The existing debate on the competition law–equality relationship takes the ‘consumer welfare’ standard as its main reference point: it focuses exclusively on the distribution of wealth between consumers and producers; as a result, it overlooks the production process that takes place before consumers meet products and services, and the position of workers within it.6 This is a natural result of competition law's reliance on a limited area of neoclassical economics called ‘equilibrium economics’ that understands efficiency exclusively as a market mechanism in which the price manifests itself where supply meets demand.7 Departing from the mainstream competition law and economics methodology, this paper builds its investigation on a holistic theoretical foundation, looking beyond equilibrium economics at labour exploitation theory as established in neoclassical as well as Marxian models. This analysis shows that despite standing at opposing ends of the political spectrum and whilst having some fundamental differences, Marxist and neoclassical models agree that collective worker action is economically beneficial and socially necessary. As a result, a critical analysis of the current legal situation on both sides of the Atlantic in light of this holistic framework illustrates how competition law's hostility towards collective worker action is not only unjust but also economically unsound.

This paper demonstrates that the key problem in competition law's treatment of labour stems from the application of the consumer welfare standard in cases involving the competition–solidarity conflict without paying any attention to the idiosyncratic qualities of labour that render it naturally open to exploitation. Similarly, the consumer welfare standard overlooks the fact that consumers and workers are essentially the same group of people and one's welfare cannot be increased or decreased without affecting the other's.8 Even if worker exploitation could result in reduced labour costs and decreased prices, this cannot be deemed efficient as it reduces the workers’ welfare and results in broader negative socio-economic effects. Similarly, collective worker action resulting in higher labour costs and potentially higher prices cannot automatically be deemed inefficient, because although this might increase the prices consumers pay, they benefit from higher wages and better working conditions in their position as workers. As a result of this critical analysis, the paper proposes an original and more inclusive ‘citizen welfare’ standard that takes into account the economic effects of anti-competitive behaviour on workers as well as consumers. The citizen welfare standard could also potentially be applied in other contexts to solve long-standing conflicts between competition and other policy objectives, such as industrial, environmental and social policy objectives,9 although this paper primarily focuses on the application of citizen welfare to the competition–solidarity conflict.

The structure of the paper is as follows: the next section provides an opening discussion of competition law, consumer welfare and equality. This is followed by a discussion of the economic theory of labour exploitation. Then, the paper investigates how competition law approaches the competition–solidarity conflict in the EU and the US. The fourth section critically discusses the EU and US legal positions in light of economic theory. This section also develops the citizen welfare approach as an alternative to consumer welfare for the resolution of the competition–solidarity conflict. This is finally followed with conclusions. Regarding terminology, this paper uses the term ‘worker’ (rather than employee) as a non-legal, generic term encompassing all individuals who make a living by providing labour power as a production factor in the production process of goods and services. Similarly, the term ‘labour’ is used to refer to the contribution of the workers to the production process as an abstract human factor. However, if the courts or authorities in question use a different term (such as employee) in a specific case, the paper uses the same term in the discussion of that specific case.

#### Antitrust law must prioritize worker welfare---workers suffer a greater loss than consumers.

Clayton J. Masterman 16. 2019 graduate of the Vanderbilt University Ph.D. Program in Law & Economics. “The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law” Vol. Vanderbilt Law Review. 69:5:1387. 2016. <https://law.vanderbilt.edu/phd/students/The-Customer-Is-Not-Always-Right-Balancing-Worker-and-Customer-Welfare-in-Antitrust-Law.pdf>

As this Note has already stated, the purpose of antitrust law is to protect competition, but the **meaning of competition is nebulous**.136 Regardless of whether total welfare or the consumer welfare standard is the appropriate measure of net competitive effect,137 a body of law that protects competition should **not allow firms to engage in conduct that restricts trade severely** in one part of the supply chain merely because it prioritizes end customer benefits.138 As a class of consumers, **workers also deserve protection from anticompetitive employer agreements.** Congressional intent **supports prioritizing the interests of workers** over customers when analyzing anticompetitive restraints in labor markets. Unions are inherently anticompetitive; a union is a combination of workers jointly setting wages and other work conditions, just as a cartel is a combination of firms setting prices together.139 As a result, the existence of unions increases the wages that firms pay their workers, which in turn results in price increases for customers.140 Nonetheless, labor law staunchly defends the ability of workers to create unions. When antitrust restrictions would deter union conduct, Congress has decided that **labor law carries more weight.**141 Thus, the labor exceptions to antitrust law142 demonstrate a congressional decision that the welfare gains to workers from increased wages and other improved terms of employment outweigh the costs to customers in the output market from the resulting increased prices. Given that Congress protects workers in one class of anticompetitive conduct, it is reasonable to **structure antitrust law to protect workers from conduct with parallel effects**. Restraints of trade in labor markets are the converse of unions, trading lower wages for lower prices. However, it is possible that Congressional intent extends only to weighing the interests of workers over customers in the special case of union activity. Even though unions engage in political activies, the aims of unions are primarily economic.143 Thus, Congress supports the economic mission of unions (advancing the welfare of workers despite the potential economic effects on firms and customers) by favoring them in antitrust law. Unions are only special in antitrust because Congress has expressed a legislative preference for workers over other economic actors. It is thus **appropriate for courts to weigh workers over other actors** when firms engage in conduct that affects workers at the expense of other groups. Further, the welfare economics of restricting competition in employment markets supports worker protection. Economists generally agree that individuals exhibit diminishing marginal utilities of wealth—that is, each additional dollar an individual receives makes them a little less well off than the previous dollar did.144 **Diminishing marginal utility of wealth** thus implies that when two individuals lose equivalent amounts of money, the individual for whom the loss was a greater portion of his or her wealth **suffers a greater loss**.145 Generally, the wages that workers lose as a result of anticompetitive conduct will be larger than the price cuts for customers.146 Where the monopsonist also has market power in the output market, the price decrease passed on to customers will be even smaller than in a competitive output market.147 Because wages likely represent a larger portion of workers’ wealth than the additional wealth consumers gain from lower prices, workers lose more welfare than customers gain. Moreover, behavioral economics suggest that the losses to workers from wage reductions will **hurt workers more** than the gains that customers will receive from lower prices.148 Behavioral economists have recognized that individual utility is relative to a reference point like the status quo; losses relative to that reference point **cause a welfare loss about twice the size of the welfare gain** from an equivalent gain.149 Put simply, losses hurt more than equivalent gains feel good. Because monopsonistic conduct results in losses for workers and gains for customers relative to the competitive equilibrium, the **total net effect on welfare that consumers experience is even more likely to be negative.** To be sure, behavioral economics has not been universally welcomed in antitrust law.150 But courts have entertained behavioral economics arguments in antitrust before, generally in cases where neoclassical economic analysis would sharply diverge from what the court believes a “real” customer would do.151 Here, it is unlikely that customers weigh price decreases in the same way that workers weigh wage increases because wages are the primary source of most workers’ incomes; as a result, equivalent economic losses to workers likely outweigh the gain.152

#### The plan’s codification is key to certainty.

Eric A. Posner 8/13/21. Kirkland & Ellis Distinguished Service Professor at University of Chicago. How Antitrust Failed Workers. Oxford University Press, 2021.

Anticompetitive behavior. Plaintiffs would be able to base their case on any of the following anticompetitive acts: mergers in highly concentrated markets; use of noncompete and related clauses; restrictions on employees’ freedom to disclose wage and benefit information; unfair labor practices under the National Labor Relations Act;38 misclassification of employees as independent contractors; no-poaching, wage-fixing, and related agreements that are also presumptively illegal under Section 1; and prohibitions on class actions. Of course, current law gives employees the theoretical right to allege these types of anticompetitive behavior, but the cases show a pattern of judicial skepticism, as noted earlier. Codification would help employees by compelling courts to take these claims seriously. Employers would be allowed to rebut a prima facie case of anticompetitive behavior by showing that the act in question would likely lead to an increase in wages.

This reform would strengthen and extend Section 2 actions against labor monopsonists by standardizing a list of anticompetitive acts. While not all of these acts are invariably anticompetitive, the employer would be able to defend itself by citing a business justification. For example, a noncompete could be justified because it protects an employer’s investment in training. If so, an employer could avoid antitrust liability by showing that its use of noncompetes benefits workers, who obtain higher wages as a result of their training.39

These reforms would strengthen Section 2 claims against labor monopsonies but would also preserve the doctrinal structure of Section 2. They would not generate significant legal uncertainty or require a revision in the way that we think about antitrust law.

# 2AC Round 6

## FTC Advantage

## Inequality Advantage

## Modeling Advantage

## T Of

#### The scope is what antitrust law deals with.

Macmillan dictionary. "SCOPE (noun) American English definition and synonyms". https://www.macmillandictionary.com/us/dictionary/american/scope\_1

DEFINITIONS2

1the things that a particular activity, organization, subject, etc. deals with

in scope: The new law is limited in scope.

beyond/outside the scope of someone/something: These issues are beyond the scope of this book.

within the scope of someone/something: Responsibility for office services is not within the scope of the department.

#### “Expand the scope of antitrust” includes axing consumer welfare.

Diana L. Moss 17. "Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers". American Antitrust Institute. 4-25-2017. https://www.antitrustinstitute.org/work-product/antitrust-and-inequality-what-antitrust-can-and-should-do-to-protect-workers/

How much of the burden for solving the labor and inequality problem should antitrust shoulder? Some propose wholesale changes to the standard underlying the laws in order to make antitrust go further and faster. They would swap out the existing “consumer welfare” standard for a new “public interest” one. A public interest standard would expand the scope of antitrust to directly consider the effects of anticompetitive activities on employment. Scrapping the existing standard in the name of combatting inequality would be shortsighted, for a couple of reasons.

#### Of means related to.

Merriam Webster ND. "Definition of OF," No Publication, https://www.merriam-webster.com/dictionary/of

of

[preposition](https://www.merriam-webster.com/dictionary/preposition)

[Save Word](https://www.merriam-webster.com/saved-words) \ əv, *before consonants also*ə; ˈəv  , ˈäv \**Definition of *of* (Entry 1 of 3) 1**—used as a function word to indicate a point of reckoningnorth *of* the lake **2a**—used as a function word to indicate origin or derivationa man *of* noble birth **b**—used as a function word to indicate the cause, motive, or reasondied *of* flu **c:**[BY](https://www.merriam-webster.com/dictionary/by)plays *of* Shakespeare **d:**on the part ofvery kind *of* you **e:**occurring ina fish *of* the western Atlantic **3**—used as a function word to indicate the component material, parts, or elements or the contentsthrone *of* goldcup *of* water **4a**—used as a function word to indicate the whole that includes the part denoted by the preceding wordmost *of* the army **b**—used as a function word to indicate a whole or quantity from which a part is removed or expendedgave *of* his time

5a: relating to : [ABOUT](https://www.merriam-webster.com/dictionary/about) stories of her travels

b: in respect to slow of speech

## States CP/Federalism DA

#### If the kick the preemption plank, there can’t solve---pre-emption.

Moshe Marvit 17. attorney and fellow at the Century Foundation, and co-author with Richard D. Kahlenberg of Why Labor Organizing Should Be a Civil Right: Rebuilding a Middle-Class Democracy by Enhancing Worker Voice. “The Way Forward for Labor Is Through the States.” The American Prospect. 9/1/2017. <https://prospect.org/labor/way-forward-labor-states/>

While reforms to federal law have been blocked by Congress, states and cities have faced a different hurdle: the courts. Starting in 1959, **the Supreme Court has written into the National Labor Relations Act (NLRA) a continually expanding preemption doctrine that prevents states and cities from passing laws that touch upon anything related to labor**, involve the interpretation of a collective bargaining agreement, or even involve issues that the courts believe Congress intended to leave to the free play of market forces. Congress can, and often does, expressly preempt states from passing laws that fall within a defined scope. Neither the NLRA nor its extensive legislative history, however, contains any mention of preemption: Congress did not expressly preempt states from acting. **In instances where Congress has not expressly preempted states from acting, state laws that actually conflict with federal laws are still preempted**. However, neither the NLRA nor its legislative history show any consensus that Congress meant to push states and cities from making laws that advanced, and do not conflict with, the pro-collective-bargaining policies of the NLRA. And yet, as Harvard Law Professor Ben Sachs has pointed out, the Supreme Court has not employed the typical typologies of preemption at all when dealing with labor law. Rather, it has created a preemption doctrine [that] is among the broadest and most robust in federal law. In most other areas of worker protection, from minimum wage to antidiscrimination laws, the federal government has set the floor under which states and cities may not go, but they can and often do raise the ceiling by increasing state or local minimum wage or including additional protected categories such as sexual orientation to existing protections. Indeed, the evolution of many of the nation's employment and civil rights protections began at the state level and trickled up to the federal government. It is only in the area of workers' labor rights that states and cities are powerless to act and that, solely as the result of judicial decisions. The Supreme Court's preemption doctrine started with the 1959 case, San Diego Building Trades v. Garmon, where the employer got a state court injunction against the union for picketing. The Supreme Court should have held that the picketing that the union was engaged in was a protected right under federal labor law, and therefore the state could not pass a law that conflicts with that right. Instead, the Court went further and held that Congress gave the National Labor Relations Board primary agency jurisdiction, and so when something is arguably protected or prohibited by the NLRA, then only the Board can act. Furthermore, only the Board can answer the initial question of whether conduct is arguably under the Board’s jurisdiction. The Supreme Court then doubled down on its preemption doctrine in the 1976 case, Machinists v. Wisconsin Employment Relations Commission. In the Machinist case, an employer brought an unfair labor practice charge against union workers who engaged in concerted refusal to work overtime during contract negotiations. The NLRB dismissed the charge because it held that the work refusal was not prohibited under the NLRA, so the employer brought a state court action against the union. In response, the Supreme Court expanded its earlier Garmon preemption to hold that Congress intended that certain conduct be left unregulated and left to be controlled by the free play of economic forces. Though the union in the Machinists case benefitted from the Court’s expansion of federal preemption, the decision has led to states and cities being almost absolutely prohibited from passing laws that promote unionization and collective bargaining. These Court decisions, and **thousands of lower court decisions that have followed the precedent in overturning state and local laws,** rely on three types of specious and archaic reasons that deserve challenge and reconsideration. First, the Court has repeatedly shown a strong reliance on the state of the economy and labor force during the time when these decisions were issued. In the Machinists case, the Court described how it experimented with various types of preemption before settling on the broad form begun by Garmon, stating, as it was, in short, experience, not pure logic, which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations. The experience the Court referred to was that of the late 1940s and 1950s, when union membership was at its peak. Whatever balance between labor and management that may have existed then has since eroded. Second, the Court has long interpreted the statute to require a uniform labor law across the country, and yet, labor law has become in many ways a crazy quilt, varying from region to region, from state to state, and from one president to the next. The NLRB has become a highly politicized agency, with its decisions swinging wildly every time a new president appoints new members and a general counsel. Cases that proceed through the National Labor Relations Board are often appealed to federal courts, and different federal circuits often come to opposite conclusions, meaning that the laws in different states effectively differ though it is the courts, not state or local governments, that create those differences. Further, the expansion of state right to work laws, as well as a variety of state public sector labor laws have also undermined any goal of national uniformity in labor law. Lastly, the Court's determination that Congress intended to leave a wide variety of conduct to the free play of economic forces has, in the words of NYU Law Professor Cynthia Estlund, done what Congress did not do in the NLRA, or even with the Taft-Hartley Act: It has granted to employers a federal right to use their economic power against unions. The Congress that passed the NLRA may have intended to ensure a balance between employer and union power, but there is no indication that it intended employers to be able to use the Act to evade any regulation in broad areas through a laissez faire argument. The result of this judicially created broad preemption has been to limit state and local experimentation in line with what Justice Brandeis described as laboratories of democracy with labor laws that advance the stated purpose of federal labor law. However, since states and cities cannot act in the field of labor law, all discussions of federal labor law reform are purely theoretical and lack any empirical basis for their possible effects. Numerous labor law scholars have written critically over the years of the rationale for such broad preemption, as well as the effects it has had on workers' ability to organize. Recently, Lewis & Clark Law Professor Henry Drummonds came up with a list of ten potential reforms that would advance the pro-collective bargaining mission of the NLRA if states could be able to pass such reforms under normal preemption rules. These include allowing states to: increase damages for violating workers' labor rights so the penalties are in line with those for other forms of workplace discrimination; experiment with restrictions on permanent replacement of striking workers and on the use of employer lockouts; experiment with â€œcard checkâ€ recognition of the union; provide equal access to union advocates as well as employers during a campaign for unions; and require arbitration if an impasse arises in the bargaining over a first contract. **The one and only major state labor reform since** the **1935** enactment of the NLRA has had a profound effect on the division of wealth and power in the United States. That, of course, **was the provision of the 1947 Taft-Hartley Act enabling states to pass right to work laws.** Allowing states and cities to create local rules that promote unionization and collective bargaining that are tailored to local needs and local industries could prove just as significant in the opposite direction.

#### Only the plan can solve antitrust leadership.

Ryan Heath 21. The author of Global Translations, POLITICO’s global newsletter and podcast, and previously authored POLITICO’s U.N. Playbook, Brussels Playbook, and Davos Playbook. “The coming antitrust revolution” POLITICO. 06-28-21. https://www.politico.com/newsletters/global-translations/2021/06/28/the-coming-antitrust-revolution-493398

If tech’s effects are global — doesn’t the policy response need to be? Do we need global antitrust adjudication and enforcement via a reformed World Trade Organization? That’s the proposition on the table Wednesday at a Information Technology and Innovation Foundation webinar. A global system would be difficult to implement: competition enforcement today is **based on national law** (or in Europe’s case, EU law) not a global treaty or even bilateral treaties. The U.S. has a highly developed system for private lawsuits, many other jurisdictions do not. But the U.S. opportunity to at least **reassert global leadership is increasingly clear**. The EU’s competition commissioner Margrethe Vestager has suffered a **string of recent court defeats**, after the bloc led the global antitrust charge for two decades. Johannes Caspar, Germany’s feared privacy regulator, steps down today, after a decade of blunting Big Tech’s power, including by delivering Germans the right to opt out of appearing on Google Street View and limiting data-sharing between WhatsApp and Facebook. **U.S. enforcers have catching up to do**: the George W. Bush administration eased up on enforcement in general, the tech-optimist Obama administration eased up on tech, and the **Trump administration exacerbated those trends**, despite the president’s occasional rants against Silicon Valley. The Lina Khan-led Federal Trade Commission and Congress are moving quickly. Khan said she will hold open public hearings on key cases, and the FTC is in line for a 20 percent budget increase. Meanwhile, the Department of Justice antitrust budget may rise by 33 percent; those changes were contained in six antitrust bills the Judiciary Committee passed last week. **The real proof of change will be in blocked mergers, broken-up companies and new lawsuits** — not in appointments and bills, but we haven’t seen this much antitrust action anywhere **in a generation**.

#### Can’t solve---devolving federal labor authority means states classify more workers as independent contractors---that’s horrible for labor rights.

Marilyn Yousif 19. Juris Doctor Candidate, May 2019, Wayne State University Law School. “The [Mis]Classification Issue: Should Federal Laws Preempt State Statutes that clarify gig economy workers as independent contractors?” Journal of Law in Society, 19(1-2), 141-162.

In today's competitive business environment, employment relationships have transformed from long-term stable relationships between workers and their respective firms to ones in which workers are free agents operating in a "boundaryless" workplace. Industries are increasingly employing workers as "independent contractors" and often times intentionally to reduce labor costs.2 This intentional or improper misclassification of workers deprives individuals of benefits and protections that would otherwise be afforded to them if they were properly classified as "employees."3

Particularly, this new business environment poses a conundrum for Michigan's working poor. In some Michigan cities, such as Detroit, "low-wage jobs, especially those in the service sector, are increasingly shifting away from traditional full-time employment with benefits towards part-time, on-demand or contingent employment with fluctuating hours and few benefits."4 Given that Michigan's labor pool is already dominated by low-wage jobs, Michigan's working poor, specifically those in Detroit, are more vulnerable than ever before to financial and job instability.

Unfortunately, this problem expands to more individuals when national policies that were designed to ensure that workers receive decent wages and benefits no longer apply to those who are classified as "independent contractors." Several state legislatures have enacted statutes formulating their own versions of "pronged tests" to determine whether a worker is an "employee" or an "independent contractor."5 Though enacted for purposes of preventing willful misclassification of workers, these statutes come into direct conflict with federal law.6 As a result, Congress and courts have expanded their roles in governing the workplace through control tests, with a primary intent to determine the employment relationship between worker and employer and to reduce the number of misclassified workers.7 This "existence of an employment relationship triggers rights and duties under numerous federal, state, and local statutes,"8 and therefore, it is important to address when a federal law should preempt a conflicting state statute.

This Note analyzes Michigan's 2017 "Limousine, Taxicab, and Transportation Network Company Act" and its effect on employment relationships between workers and employers in the gig economy. Specifically, the focus is on Section 37 of the Act, which labels Transportation Network Company (TNC) drivers as "independent contractors." The background section of this Note dives into the history and development of the National Relations Labor Act (NLRA) and the Fair Labor Standards Act (FLSA). It then explains the role of rideshare companies, such as Uber and Lyft, within the gig economy. More specifically, it addresses how workers in the gig economy are classified as "independent contractors" and thus have lost their protections under the FLSA and NRLA. The background section ends with a detailed overview of Michigan's "Limousine, Taxicab, and Transportation Network Company Act," also known as Michigan's TNC Statute, explaining that state legislatures have taken it upon themselves to classify workers' employment status by use of mandatory legislative provisions. The overview of Michigan's TNC statute sets up for the argument that such action on the part of state legislatures is impermissible and preempted by federal law.

The analysis section of this Note begins with an overview of the Supremacy Clause and identifies well established and federally implemented control tests used to determine employment relationships between employers and their workers. The argument that follows is that, when it is impossible to comply with both state and federal requirements, federal laws like the NLRA and FLSA preempt state laws, such as Michigan's TNC statute. The analysis section demonstrates that worker misclassification is so heavily contested that employers have taken stances both against and for federal preemption through the use of case law. This portion further clarifies that, while there is no bright-line rule to addressing the issue of worker misclassification, there are judicially enforced control tests to ensure workers are afforded their federal rights and protections. Finally, this Note concludes that the Michigan "Limousine, Taxicab, and Transportation Network Act," which enforces a mandatory "independent contractor" provision, is preempted by such control tests established under federal law. In short, this paper seeks to enforce workers' federal protections by arguing that federal statutes, such as the NRLA and FLSA, already have their own statutory sections and judicial interpretations of what classifies a worker as an "employee," and therefore a state statute that purports to override them should be preempted.

#### Agencies will undermine states.

The Open Markets Institute and Service Employees International Union 19. “How the Antitrust Agencies Can Help—Instead of Hurt—Workers”. https://www.justice.gov/atr/page/file/1217856/download

The DOJ and the FTC have largely failed American workers today by allowing a concentration crisis in scores of industries to weaken competition for labor. Instead of actively policing mergers for harms to workers, they have let employer-side concentration reach very high levels. Troublingly, when the FTC and DOJ have acted against practices in labor markets, the two agencies often have used antitrust laws to either undermine efforts by employees and states to challenge abusive behavior by employers or actually targeted efforts by workers or professional to work together. The FTC, for instance, has filed numerous complaints against workers for engaging in collective bargaining and other joint action. Furthermore, the FTC has campaigned against state and local occupational licensing rules that can enhance the bargaining power and earnings of workers, professionals, and independent entrepreneurs. The DOJ meanwhile has endorsed legal standards that would empower franchisees to collude against workers.

The DOJ’s and FTC’s general inactivity against employers and activity against workers reinforce and deepen inequality between the individual and the corporation. The agencies should reorient their enforcement priorities and focus on protecting workers from employers rather than on interfering with the basic rights of workers, professionals, and independent entrepreneurs to organize.2

#### Even with fiat, states lack enforcement mechanisms and administrative infrastructures to protect workers’ rights.

Bourree Lam 17. former staff writer at The Atlantic. She was previously the editor of Freakonomics.com. “Will States Take Up the Mantle of Worker Protection?” The Atlantic. 1/17/2017. <https://www.theatlantic.com/business/archive/2017/01/worker-protection-schneiderman/513182/>

But it’s not as though states took a backseat during the Obama administration. Some states took on an increased role in handling wage and labor practices, with a growing number of have passed their own minimum wage and paid-leave laws. Seven states—California, Connecticut, Massachusetts, Oregon, Vermont, and most recently Arizona and Washington—now have laws requiring paid sick leave. Minimum wage went up in 21 states and 22 cities at the start of this year. For labor advocates, the concern about this approach is what happens to people in states that are less adamant about enforcement. While workers in states that have been active on these issues in the past—such as California, Connecticut, Illinois, and Massachusetts to name a few—will likely continue to be protected by their state agencies, states without established resources in place will **have a harder time stepping up in the same way**. In Georgia, for example, there is no state-level enforcement process, and wage claims are **filed directly to the Department of Labor**. “It’s far from ideal, if this ends up happening,” says Tsedeye Gebreselassie, an attorney at the National Employment Law Project. “The way that this should be done is that the federal Department of Labor remains an effective recourse for workers whose rights have been violated, not just on minimum wage but all the federal laws that the Department of Labor enforces. But then you also have states there too as another avenue through which workers can recover their unpaid wages.” Additionally, though states can play a key role on some employment issues, there are workplace issues that **require federal enforcement**. "States can play a tremendously important role in combating wage theft, but in other critical areas, like workplace safety and health or workers' right to organize, states may have a harder time filling in the gap because they are often preempted by federal law from directly enforcing these laws," says Gerstein. “To me, there’s no question that it’s federalism from below,” says Janice Fine, an associate professor and labor expert at Rutgers University’s School of Management and Labor Relations. Fine has been studying how states and localities think about enforcement, and while she’s concerned about states with less enforcement, she’s found that there can be see creative solutions. She cites the example of the Fair Food Standards Council in Florida, a labor group which won over companies on fair work conditions and now acts as a private enforcement agency to protect farmers on health, safety and wage issues, as well as the work of the Workers Defense Project in Texas, which has notably pushed through a bill that makes it easier for police departments across Texas to arrest employers engaging in wage theft. A state-by-state approach means that worker protection becomes less an American project, and more a feature of the particular place one lives. And for workers who don’t live in the states that will fill in where the federal government leaves off, that could mean many American workers not getting paid what they’re owed.

#### Trump thumps federalism.

Tom McCarthy 20. National affairs correspondent for Guardian US. "Trump v the states: how the president is remaking the government in his image." The Guardian. 4-1-2020. https://www.theguardian.com/us-news/2020/apr/11/trump-states-governors-clashes

Clashes between presidents and states are nothing new. But according to government theorists, public affairs experts and political analysts, Trump’s rattling of the federalist compact, by which the 50 states are both autonomous and bound in a national union, is unprecedented in modern times.

“You’ve redefined the role of state governors,” said David Super, a professor at Georgetown Law. “Governors must grovel to the president. Governor [Gavin] Newsom [of California], Governor Andrew Cuomo [of New York] have understood that, and they’re doing it. Governor [Gretchen] Whitmer has largely refused, and Michigan is going through hell as a result.

“These governors are more like provincial chiefs under this system, and if we want to restore federalism in this country we will have to make some very dramatic changes after this is over. If we don’t, federalism is dead.”

Experts voice concern that the fight between states over medical equipment that has broken out in the vacuum of federal leadership could make it harder for states to reach agreement later about how to reopen the economy. They warn that patchwork state plans for absentee voting and voting by mail in November could undermine the legitimacy of the presidential election.

In some cases they question what it will mean, once the coronavirus crisis has passed, to call the states autonomous, or for that matter to call them “united”.

If Trump tears up the parts of the federalist system he does not like, said political analyst Lincoln Mitchell, other parts that conservatives like a lot, such as the electoral college and the US Senate, could grow harder to defend.

That could be especially true, Mitchell, said, if the conservative majority on the US supreme court repeats its intervention of last week, when it blocked extended voting in Wisconsin in spite of the pandemic. Likewise if the presumptive Democratic presidential nominee, Joe Biden, like Hillary Clinton before him, wins the popular vote but loses in the electoral college.

“It is not inconceivable that Joe Biden could win this election by seven points in the popular vote and still lose the electoral college,” Mitchell said. “If that happens for the second time in a row, that is a crisis of governance – not a crisis of democracy, because it’s not a democratic system really – but a crisis of governance and a crisis of legitimacy.”

Super has coined the term “flippant federalism” to characterize how the White House is treating the governors. He referred to reports of incidents in which the federal government has intercepted ventilators and other equipment acquired by the states, which Trump appears to be handing out on a political patronage basis.

“On the one hand, they’re telling the states they’re on their own,” said Super. “On the other, they’re seizing the supplies that the states get on their own.”

Martin O’Malley, a former governor of Maryland and presidential candidate, has coined a different term: “Darwinian federalism”.

“His [Trump’s] behavior is not in keeping with the office of president,” O’Malley told the Guardian in an email. “The notion that governors have to bow down and praise him in order for their citizens to receive federal disaster assistance is contrary to the very nature of a republic.”

But Keith Whittington, a professor of politics at Princeton University specializing in constitutional theory, said Trump was correct in his assertion that states have traditionally been responsible for handling public health crises.

“It looks unusual relative to other countries that we are relying so heavily on state and local officials,” he said, “but that has been the American tradition.”

A national public health crisis is a rare occurrence, Whittington said, adding that statements by Trump and Jared Kushner were “really strange”.

In his sole public appearance during the crisis, the presidential son-in-law said: “The notion of the federal stockpile was, it’s supposed to be our stockpile. It’s not supposed to be states’ stockpiles that they then use.”

Whittington replied: “The national stockpiles are designed precisely in order to make them available to those who need them in moments of crisis. The attitude of this administration, and certainly Jared Kushner’s particular remarks on this, are pretty surprising and ultimately not very helpful.”

‘Lip service to federalism’

The story of the United States is a long one. Elasticity is built into the system. Looking ahead, everyone sees something different.

“I’d be surprised if what we’re seeing now results in a substantial permanent change in the relationship between the states and the federal government,” Whittington said.

Super said a drainage of power from the states, if it comes to that, would produce a more empowered federal government.

“The old argument against so-called big government is that states could do it,” Super said. “We’re here proving that they can’t.

“We’re also proving that whatever people once believed about the importance of states, they don’t believe it any more, and that federal politicians will pay lip service to federalism but show states no respect at all when it matters the most.”

#### Federalism fails---it’s an eighteenth-century political doctrine that’s insufficient to solve twenty-first century crises.

Noah Feldman 21. Felix Frankfurter Professor of Law at Harvard Law School and chairman of the Society of Fellows at Harvard University. “Federalism failing to meet 21st century needs.” The Day. 2/28/2021. https://www.theday.com/article/20210228/op03/210229511

There wasn't much President Joe Biden could have done about this month's Texas energy disaster. Ditto the slow-moving vaccine rollout. The reason is the same: federalism, a system dating to the 1780s and only seriously overhauled once.

Although federalism still has some benefits, its obsolescence is increasingly obvious when the U.S. faces crises that, like climate change and COVID-19, don't respect state boundaries. Energy and health care are only two of the crucial infrastructure systems that remain state-regulated or state-run. And many of those systems are in need of updating everywhere − not piecemeal, as federalism tends to support.

Federalism was, in important ways, an American invention, the brainchild of James Madison. It was a product of political necessity for 13 states that had been separately administered as British colonies and that had already tried and failed to function as a loose confederation between 1776 and 1787.

Unifying into a single nation would have been practical for the early United States. At the Philadelphia constitutional convention, big-state representatives, including Madison, favored a heavily national model of government to replace the failing decentralized system created by the Articles of Confederation.

But local elites in the small states did not want to give up power. They staged a walkout, returning only once they were assured of permanent protections for their states, including equal representation in the Senate.

The core idea of federalism was that states would retain sovereignty over their citizens, while the federal government would in parallel exercise its own sovereignty over the same people. The founders thus "split the atom of sovereignty," as Justice Anthony Kennedy once grandly put it: Instead of a single sovereign government, the U.S. would have a federal semi-sovereign government operating alongside the semi-sovereign states.

The devil was in the details. Which government controlled which powers became a challenge. The Civil War was fought in part over the question of whether states or the federal government would have control over the existence of slavery.

Recognizably modern national regulatory legislation began to emerge gradually in the Progressive Era. In 1887, a century after the Philadelphia convention, the Interstate Commerce Commission was created by Congress to regulate railroads, the most important interstate infrastructure of the day.

But it took the Great Depression and the resultant New Deal for Congress to pass vast national legislation and to create a raft of federal agencies to perform coordinating tasks that had previously been unthinkable.

New Deal federalism was itself continuing the compromise between the federal government and the states. Core issues of national competency were moved to the federal level. Yet states retained a tremendous amount of regulatory capacity, including in areas that overlapped with federal regulatory control.

Thus, to take the example of energy, both the federal government and the states regulate different aspects of the power grid. In this respect, today's federalism isn't radically different from the federalism of the New Deal. Texas actually made a conscious choice not to connect its power grid to that of other states, partly to retain state regulatory control.

Under the Constitution, as it has been interpreted since the New Deal, Congress would have the power to pass laws that impose regulatory controls even on in-state power grids. If Congress wanted to, it could enact laws empowering federal regulators to require state-based power plants to be capable of functioning even in very cold temperatures, thereby reducing the risk of the kind of temperature-based breakdowns that caused the recent Texas power disaster.

Similarly, Congress has the authority to do much more than it does to control or regulate health care at the state level. Even a nationalized health-care system would be within the constitutional reach of Congress.

Education is yet another area where states exercise near total authority, even though the issue is of obvious national importance.

The problem, therefore, doesn't lie in the Constitution, at least not primarily. It lies in the deeply established political norms and customs that still confer enormous power on states, even regarding national infrastructure problems that span state boundaries.

Those customs and norms continue to shape the distribution of power and responsibility as between the states and the federal government. True, the constitutional design of the Senate, as well as the continued sovereign existence of the states, help shape the ongoing political reality. But as the New Deal federalism overhaul shows, those structural features of our federal system can be overcome when crisis demands it.

Will the crises regarding climate change and COVID-19 generate support for overhauling federalism again? If failures continue to pile up over time, the public will demand change. To meet that need, Congress and the president may see fit to regulate more extensively. As infrastructure in the United States continues to degrade, the need for such federal initiatives is likely to grow.

Until it does, the U.S. will remain stuck with the legacy of an 18th-century Constitution that, despite its many virtues, doesn't always meet the needs of the moment.

#### Federalism doesn’t solve war---if anything it only increases the credibility of secession.

Patrick Regan & Peter Wallensteen 13. Professor of Political Science and Peace Studies at University of Notre Dame; Senior Professor in Peace and Conflict Research at Uppsala University. “Federal Institutions, Declarations of Independence and Civil War.” *Civil Wars*, 15:3, 261-280. 2013.

However, evidence suggests that societies transitioning from autocracy toward more democratic institutions are less likely to engage in armed combat, even though they might reside in the risky middle range of regime characteristics, but societies that are democratic and move back toward the middle – backsliding on democracy – are more likely to experience rebellion and civil war.5 Put differently, political institutional structures appear to be instrumental in our understanding of civil war, but relatively scant attention has focused on the degree that institutional autonomy plays in the willingness or ability of independence seeking groups to press their claims via warfare.6 The role of regime type (democracy vs. autocracy) may mask the critical influence that institutional arrangements within any particular typology may play in onset or characteristics of civil wars.

Bednar7 provides one of the more comprehensive studies of federalism, with the objective of developing the theoretical underpinnings of successful federal systems. She articulates three necessary conditions for fully federal systems: (1) geopolitical divisions, (2) independent bases of authority between the central government and the states and (3) direct governance by each political entity with each sovereign in at least one policy realm. The complex pressures over the distribution of the public good require incentives to participate and sanctions for not doing so. The institutions themselves have to provide both the incentives and the sanctions. In the ideal federal system, equilibrium will be maintained through competing incentives and the ability of the system to adapt to changing environments. One implication of Bednar’s argument is that in a well-designed system longevity works to the benefit of stability within the system. That is, the system becomes robust because it is resilient to challenge and adaptable to changes. This would suggest that federal systems are, on average, stability-generating political arrangements that would experience relatively little armed rebellion and civil war.

Federal systems of government can but need not be associated with democratic rule, even though the foundations of federalism involves dispersing political authority to units that are by definition smaller than that of the national state.8 Stepan,9 moreover, posits that federal systems are most often associated with multinational democracies. Weingast10 argues that the limitations on government associated with federal systems increases economic development by sufficiently ensuring property rights while limiting the ability of the state to confiscate property. Federalism is often viewed as the antidote to internal conflict, providing a way to protect discriminated minorities from the potential tyranny of the majority, and to distribute resources in accordance with group participation.11 One way to think about federalism is that it provides a form of democracy, even if not electorally based, and therefore evidence linking democracy to a lower probability of civil war should hold when comparing federal to unitary systems.

Roeder12 and with Rothchild13 make the case that the institutional arrangements of federal systems can put in place both the demand for concessions by the federal units and the capability to press those demand to the point of armed conflict if necessary. This puts disproportional weight on the federal unit over central authorities, which can be held hostage to excessive demands under the threat of secession. At some point, ‘second generation’ actors can use their influence and threats based on power sharing arrangements negotiated at an earlier period to push demands that increase their internal influence.

Christin and Hug present empirical models that test whether the type of federal system is related to the onset of civil war, concluding that minority dominated federal units have a higher frequency of rebellion. This result is consistent with a cautionary note by Stepan14 that the conditions associated with federal units can also provide the mobilization and grievance mechanisms associated with intrastate conflict. Filippov et al.15 argue that federal divisions can break along the distribution of ethnic groups within a country, providing the grievance and mobilization vehicles to which Stephan cautioned and Christin and Hug demonstrate. Hale,16 furthermore, argues that ethnofederalism can lead to institutional collapse if the federal regions contain core ethnic constituencies. That is, tightly tying the federal structures to the distribution of ethnic groups can be problematic.

Examples abound of federal systems alternatively providing stability or facilitating the breakdown of the national state. The USA, Yugoslavia and the Soviet Union each experienced stability and war as a result of their federal system. In short, from a cursory examination of known cases, there seems to be no simple pattern by which federal institutional arrangements necessarily provide for representation and distribution commensurate with peaceful coexistence,17 something that Christin and Hug confirm through cross-national statistical evidence.18

Those few scholars who systematically study the role of federal representation in the onset of civil war19 tend to disaggregate the federal demarcations along the lines of cultural identity. The underlying assumption tends to be that the identity differences that generate political resources may be more unstable than some other form of representation at the regional level. Bakke and Wibbels demonstrate that the distribution of economic and political resources enhance the prospects for peace, but rarely, as far as we can tell, have scholars examined the opportunities provided by the federal structure. The study, in effect, posits that the form of the grievance that generates demands can be attenuated by the mechanics of federal arrangements. What is left unexplored is that the line between a regional state in a federal system and an independent state divorced from its central authority may be one of perception and recognition. If a regional state declares independence – and has the material capability to enforce its separation – this compels the central government to fight to maintain unity or to let the breakaway region depart on somewhat amicable terms. A corollary in the study of contemporary civil wars is provided by the distinction among types of war, with secessionist and irredentist wars reflecting the notion of the preferences of a breakaway region seeking independence, while ideological wars seek to change a government but keep viable the entire political entity. Not all secessionist conflicts take place in a federal system, but the breakup of federal systems into independent countries as an outcome of war is secessionist.

The right of secession in international law is a topic that generates considerable debate.20 One of the critical aspects of secession and the ultimate acceptance of that new state into the international community turns on whether secession is determined by declaration or recognition. If declaratory criteria apply, then any group that declares independence has successfully seceded from their union, regardless of how much international support prevails. It is subsequently a decision by the central government to permit or deny this separation; denying it may require war. Alternatively, if recognition is the requirement, then only groups who declare and generate external recognition could be considered to have seceded from the central authority. According to the Montevideo Convention of 1933, the criterion for statehood demanded (1) a permanent population, (2) defined territory, (3) effective government control over territory independent of any other authority and (4) the capacity to enter into relations with other states.21 Moreover, ‘failure [of secessionist movements] is evidenced by the absence of recognition on the part of a sufficient number of states’ in the international system.22

If international recognition is a requirement for successful separation from the central authority, and territory, population and effective control are necessary components for statehood, then the ability to declare independence and have a reasonable hope of having that declaration be recognized would require institutional structures that facilitate a political entity meeting the requirements of the Montevideo Convention. Those institutional structures are embedded in a federal political arrangement. Federal political institutions do not require a declaration of independence to resolve political disagreement with the central authority, but the federal institutional arrangements do make more credible the threat to secede if demands are not sufficiently addressed. Presumably, the threat to secede is used as a lever to pry open concessions from the central authority, but it is a threat that if unsuccessful in motivating concessions can lead to a war, potentially on terms relatively favorable to the breakaway region. In this sense, the interaction of a federal system and a declaration of independence by a breakaway group provide a condition potentially sufficient to generate a large scale civil war.

In the USA, the start of the civil war was temporally coincident with the declaration of secession by the coalition of southern states. In December 1990, the people of the republic of Slovenia voted overwhelmingly to declare independence from Yugoslavia; in March, the Yugoslav military declared that it will not permit the breakup of the country. This was followed closely by the declaration of independence by Croatia, which appeared to be one critical precursor to the widespread and destructive warfare that would follow. In each case, the South seceded from the North in the USA, Slovenia and Croatia seceded from Yugoslavia and the central governments responded by waging war to maintain unity of the state. Germany and the European Union quickly recognized the newly proclaimed independence of Slovenia and Croatia, and a March 1992 declaration by Bosnia was quickly recognized by the international community in an attempt to foster a peaceful outcome to the unfolding conflict. The war to prevent their independence turned into a period of human carnage and ultimately charges of war crimes against Yugoslav and Serb political and military officers. Similarly, Biafra declared independence from the Nigerian state in 1967 and by the end of the war three years later, more than two million people had died and the rebellion was defeated. Our argument is that part of what made the declarations of independence a viable threat to unity was the institutional infrastructure permitted by the federalist political structures.

Opposition groups in a non-federal system are less likely to have the administrative infrastructure to be able to declare independence from the state with a credible chance of defending their declared independence, nor with much of a hope of meeting the conditions for statehood articulated in the Montevideo Convention. Under these conditions, a group seeking independence first has to fight for the ‘right’ to secede, and only after victory in the war, declare independence. Federal units not only have the infrastructure for self government in place, but they often have an organized militia, political legitimacy and citizen loyalty with which to confront the central government. And by most interpretations of international law, it proscribes support for breakaway regions, siding overwhelmingly with the notion of the viability of the central state and their ability to prevent – by force of arms if necessary – the breakup of their country. It was partly this early recognition of the breakaway Yugoslav republics that some see as the cause of the horrific carnage that was to follow.23 A federal state that declares independence from its central government, and has the political infrastructure befitting an independent country, is potentially more likely to attract external recognition. The Union institutions in the USA feared the political recognition of the Confederacy, while the Confederacy sought recognition as an independent country.24

The political, social and institutional infrastructure commensurate with federal status may be used to extract resources from the central government under the threat of rebellion. Put differently, by granting federal authority to regional entities, the central government provides the degree of autonomy that can facilitate cooperation, but at the same time it can increase the relative influence of disgruntled states and compel the central authorities to grant concessions to the states rather than risk the dissolution of the country.25 Part of the infrastructure that can contribute to the ability to pressure central authorities is the development of some form of internal mobilization and enforcement mechanisms. But the institutions go further than this to include mechanisms of extraction – either taxes or people – and the institutions of distribution. The difference between a rebel group commandeering equipment and people through attacks, finances from robbing banks or via kin networks as was found in many conflict zones, and the institutional capabilities to levy a tax, recruit soldiers and provide for welfare is large. This is further exacerbated when considering the viability of not only a future state but the extent of a threat posed to the central government.

## Lochnerism DA

#### Congressional inaction shifts power to less democratic institutions.

Spencer Weber Waller 19. John Paul Stevens Chair in Competition Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. "Antitrust and Democracy " Florida State University Law Review. 2019. https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1658&context=facpubs

It is disappointing that the U.S. Congress has more often focused on the minutiae of competition law and policy or conducted hearings on high profile mergers that, by design, cannot affect the eventual enforcement actions of the agencies. 160 There have been no major amendments of the antitrust laws since the 1970s. 16 1 Criminal penalties have been increased, but the private treble damage remedies as a whole have been largely left unchanged. 162 Exemptions and immunities have been expanded and contracted at the margins. 16 3 Budgets have been increased and lowered depending on the era and the overall political zeitgeist.

Unfortunately, much of Congressional attention to competition law has involved minor issues and outright petty matters. For example, Congress effectively killed a proposal that would have rationalized cooperation between the Antitrust Division and the FTC because it affected which Congressional committee had "jurisdiction" over the work of these agencies. 164 Even more petty was the unsuccessful effort of one Congressman to force the FTC to vacate its headquarters for an expansion of the national art museum.165

The opportunity costs for each hearing on such marginal issues, for example, whether professional baseball should continue to enjoy a partial exemption from the antitrust laws or grandstanding for constituents over the fate of a particular merger with a pronounced local effect, is high. Congress sacrifices time, money, and attention better used to study more important, broader issues of competition law and policy. Stated enforcement policy over unilateral conduct and merger policy have changed substantially between administrations and over time. Important guidelines and stated enforcement priorities have changed as well with little substantive Congressional involvement. 16 6 Critical decisions by the United States Supreme Court have changed the law in dramatic and subtle ways without significant Congressional input either before or after the decisions. 167

Perhaps Congress simply does not care about, or actually approves of, the continued evolution of United States antitrust law and policy in all its complexity. However, this silence or indifference has important consequences. It shifts power from the most democratic elected institutions to the more distant, less democratic institutions of agencies and courts to craft fundamental economic policy free from all but the most macro-level interventions or corrections.

#### That collapses court legitimacy and constitutional separation of powers.

David P. Ramsey 10. Associate Professor of Government at the University of West Florida. “The Role of the Supreme Court in Antitrust Enforcement”. May 2010. https://baylor-ir.tdl.org/bitstream/handle/2104/7960/david\_ramsey\_phd.pdf?sequence=3

White’s announcement of the rule of reason was not without its critics on the Court. Justice John Marshall Harlan, author of the Court’s opinion in the Northern Securities case, delivered a passionate dissent which, in the period immediately following announcement of the Court’s ruling in the Standard Oil case, was more widely covered in the press than White’s majority opinion. For Harlan, the real issue of the case was whether or not the Court would resist the temptation to amend the Sherman Act by a process of judicial legislation.28 Harlan places the decision in the context of the failed arguments of defendants in the Trans-Missouri and Joint Traffic arguments, who twice attempted to persuade the Court to amend or interpret the text of Sherman §1 prohibition of all agreements in restraint of trade to read all agreements ‘in unreasonable restraint of trade,’ and twice failed to do so.29 Given such precedents, Harlan found White’s decision now to incorporate the standard of reasonableness into the Court’s interpretation of the statute troubling not only because this would seem to **raise constitutional concerns** about judicial legislation, but also because it seemed to show such **blatant disregard** for stare decisis, and would thus help to **weaken** an important source of **institutional power** for the judiciary over time. 30 Finally, Harlan explained that he was worried that White’s adoption of a rule of reason would have **profound constitutional implications in future generations**, particularly the danger of judicial encroachment on the legislative power, and the danger that the Court, by something so small as inserting the word ‘reasonable’ into the Sherman Act’s prohibition of restraints of trade, might eventually come to **erect itself into a superlegislature**, just as Brutus and the Anti-Federalists had feared. Emphasizing the three “separate, equal and coordinate departments” erected by the Constitution, Harlan stresses the danger posed to our institutions should any one branch of the federal government begin to usurp the powers of another, and that this danger was all the more **prevalent and pernicious** in cases involving attempts to transcend constitutional powers in the name of the common good. Harlan closes with a passionate exhortation to resist this temptation to pursue the public good or further the legislative intent of Congress by surpassing the powers granted the Court in Article III. After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done until the People of the United States—the source of all National power—shall, in their own time, upon reflection and through the legislative department of the Government, require a change of that policy.31 Though Harlan’s warning tends to be lightly dismissed by later critics, it must be remembered that at the time, federal involvement in regulation of the economy was minimal, and therefore the Court tended to defer to the political branches. Harlan’s reluctance to accept a court-made rule of reason was in part, then, an attempt to protect the Court from the political backlash that would likely result from being positioned at the vanguard of Progressive reforms. The Sherman Act was controversial enough as a statement of national economic policy without the Court adding to it an additional layer of discretionary power for the judiciary.

#### Antitrust is key to democratic legitimacy---sets a precedent.

Daniel A. Crane 21. Frederick Paul Furth, Sr. Professor of Law, University of Michigan. "Antitrust Antitextualism " Notre Dame Law Review. 1-28-2021. https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr

3. Implications for Interpretation

The phenomenon of antitrust antitextualism is important for understanding the U.S. antitrust system, its history, and the possibilities for its reform, but it also has significance for more general understandings of how statutes are written and how their interpretation functions or should function. Scholars have argued that Congress sometimes means statutory language to be purely expressive, indeed that it means for the courts not to give that language legal effect.262 But the story of antitrust antitextualism goes far beyond judicial excision of stray words or phrases from the antitrust statutes. In important instances, particularly with respect to the FTC and Robinson-Patman Acts, the courts have entirely rewritten the textual meaning and legislative purpose of the statute.263 Through a chronic cycle of legislative enactment, judicial disregard, and implicit legislative acquiescence, Congress and the courts have constituted the common-law system that judges and scholars across the political spectrum now consider normalized and perhaps even inevitable.

This pattern of judicial/legislative engagement (with the executive playing an enabling role) raises both analytical and normative questions for the jurisprudence of statutory interpretation. Analytically and descriptively, is antitrust law sui generis, or do other statutory domains exhibit a similar, but perhaps unrecognized, dynamic? Do the antitrust laws idiosyncratically operate in a space of equipoise between Jeffersonian idealism and Hamiltonian pragmatism, with Congress implicitly assigning itself the role of idealist orator while acquiescing as the courts provide pragmatic counterbalance? Or is this yin and yang phenomenon, disguised in the interpretive rhetoric of broad delegations and common-law method, a more general one, in maybe unappreciated ways? Once a pattern is observed in one legal domain, it tends to be observed soon in others as well. Finding a recurrence of the antitrust pattern elsewhere could provide new insights on statutory interpretation, separation of powers, and the de facto institutional roles of the legislative and judicial branches.

Normatively, there is much to question about the democratic legitimacy of the implicit system of legislative declaration and judicial reformation described in this Article. There seems little in it that either a committed textualist or a committed purposivist could defend, since the system entails the courts honoring neither what Congress wrote nor what it meant. To rehabilitate the system’s democratic legitimacy, a subtle purposivist might say that what Congress actually meant—in a deep sense—must be gathered from the norms of the system itself rather than from conventional evidence such as floor statements by members of Congress, committee reports, or other contemporaneous sources of public meaning. Perhaps members of Congress legislate against a backdrop of expectation that the courts will continue to read down new statutes to accommodate pragmatic efficiency interests, and consenting to this implicit system, the members feel liberated to express more in the statute than they actually mean as prescriptive. But if that is wholesome democratic practice, that case is yet to be made.

#### No uniqueness---Big tech enforcement coming now---new DOJ confirmation.

Nihal Krishan 9/24. Technology reporter for the Washington Examiner, antitrust reporter for Yahoo news. “Biden pick for DOJ antitrust post has powerful backers — and Big Tech in his sights.” 9/24/21. https://news.yahoo.com/biden-pick-doj-antitrust-post-173000426.html

President Joe Biden's nominee to head up the Department of Justice's antitrust division is expected to take aim at the tech industry if confirmed by the Senate, where he appears to be a shoo-in.

Jonathan Kanter, who has had the backing of predecessors from every administration dating back to President Gerald Ford, is seen as a hawk on illegal monopolies and anti-competitive mergers, particularly within the tech industry.

"In short, we believe Mr. Kanter is right for this important position," a group of attorneys who previously held the post wrote in a letter to Senate leaders Thursday.

The former top government lawyers who voiced their support included Democrats who worked under Presidents Jimmy Carter, Bill Clinton, and Barack Obama, as well as Republicans who worked under Ford and Presidents Ronald Reagan, George W. Bush, and Donald Trump.

"I like Jonathan. I actually think he'll be a great leader for the antitrust division and move antitrust enforcement forward," Makan Delrahim, Trump's assistant attorney general of DOJ's Antitrust Division, told the Washington Examiner when Kanter was first nominated by Biden in July.

"Both his private sector and government experience will help him run the division successfully. He's a good guy who has been active in the pro-enforcement wing of antitrust lawyers," Delrahim added.

The Federal Trade Commission and the Justice Department are responsible for antitrust enforcement, primarily through investigations, lawsuits, penalties, and fines. Antitrust laws are meant to protect consumers from anti-competitive mergers and business practices.

Kanter's nomination signals a blow for Silicon Valley companies, such as Facebook, Google, Apple, and Amazon, which are under intense bipartisan scrutiny from the government for accusations of monopolistic behavior.

#### Four big tech cases thump---most aggressive set of antitrust actions in decades.

Emily **Birnbaum 20**. Emily Birnbaum is a tech policy reporter with Protocol. Her coverage focuses on the U.S. government's attempts to regulate one of the most powerful industries in the world, with a focus on antitrust, privacy and politics. Previously, she worked as a tech policy reporter with The Hill after spending several months as a breaking news reporter. She is a Bethesda, Maryland native and proud Kenyon College alumna.” Which of the Big Tech antitrust lawsuits has the best chance of winning?” Protocol. 12/17/20. https://www.protocol.com/big-tech-antitrust-case-ranking

For the first time ever, there's a real chance that Facebook and Google could be broken up. It's going to be a tough, years-long battle. But the companies are facing existential legal threats as government regulators and state attorneys bring five separate antitrust cases against them: two against Facebook and three against Google. None of the cases will be easy to prove. This is the most aggressive set of antitrust actions by the government in decades, and courts are more skeptical than ever. But the cases make a new era in antitrust enforcement, and anything is possible. Protocol ranked the lawsuits in order of least to most likely to succeed. 4. Texas-led case against Google Legal experts have expressed the most skepticism around the antitrust lawsuit against Google's ad stack dominance from the Texas-led coalition of 10 attorneys general. Some of the complaint's central claims, including alleged collusion between Facebook and Google, are enticing — but it's unclear if the coalition has the goods to back them up. "The Texas case could be a killer case," said Chris Sagers, an antitrust professor at Cleveland-Marshall College of Law. If the states are able to prove a horizontal conspiracy between Google and Facebook to rig the ad tech market, it would amount to a clear violation of Section 1 of the Sherman Act, which prohibits agreements that restrict trade. But Sagers said it's all in the details, and the some of the allegations "seem more ambiguous and subject to interpretation." It's difficult to analyze because so much of the complaint is redacted, particularly the sections about what Google admitted to in internal communications. And Google has already shot down a separate allegation in the suit, which claimed Google gained access to encrypted WhatsApp messages. On the other hand, a court likely won't struggle with the concept that Google has outsized power over all levels of the ad stack, and there's significant public evidence that it engaged in plenty of manipulative behaviors to maintain that control. It's also yet to be seen if any Democrats will join the Texas suit, which will struggle with credibility issues as Texas Attorney General Ken Paxton continues to face allegations of corruption and an ongoing FBI investigation. 3. Colorado- and Nebraska-led case against Google The complaint from the coalition of 35 attorneys general led by Colorado and Nebraska is sweeping and ambitious, with sections detailing Google's exclusionary conduct in search, its efforts to limit the visibility of specialized search engines and its growing dominance in emerging technologies like voice assistants. It's a serious case with broad bipartisan support, and its focus on Google's current efforts to muscle into voice assistants might appeal to a judge looking for ongoing anticompetitive behavior in a dynamic market. "Part of what I suspect these companies are going to argue is, 'What do you mean durable monopoly power? This is a dynamic setting and the moment you slow down, the rest of the world passes you by,'" said William Kovacic, former FTC chairman. "The Colorado complaint is saying, 'It is very competitive and you are using every bit of skill you have to anticipate what those new threats are and to squash them.'" But it's an open question whether antitrust is the best mechanism to rein in self-preferencing, one of the central allegations of the Colorado case. Hal Singer, a managing director at antitrust firm Econ One, has argued that self-preferencing "does not fit into any well-received antitrust paradigm." And even if the laws could be "stretched" to accommodate this type of exclusion, the pace of antitrust litigation is likely far too slow to remedy the harms to innovation, he wrote. It's yet to be seen how a court responds to allegations of self-preferencing as an antitrust violation. The states are arguing that Google restricts the way specialized sites like Yelp and Tripadvisor can advertise, harming their business and giving consumers fewer options. The Nebraska and Colorado-led coalition is planning to consolidate its case with the DOJ's, and a judge will have to consider each allegation on its own. "This lawsuit seeks to redesign search in ways that would deprive Americans of helpful information and hurt businesses' ability to connect directly with customers," Google said in a statement. "We look forward to making that case in court, while remaining focused on delivering a high-quality search experience for our users." 2. The FTC and state attorneys general bring cases against Facebook The cases against Facebook from the coalition of 48 state attorneys general and the FTC read like a wish list from progressive antitrust activists. The FTC is calling for Facebook to spin off WhatsApp and Instagram while alleging the company has destroyed privacy protections and elbowed out potential competitors in the battle to maintain its position as the biggest social network in the world. What's amazing about the twin cases is that the government could plausibly win, although it will be a steep uphill battle. "You have a monopoly that is acquiring nascent competitive threats," said Maurice Stucke, a former DOJ prosecutor and professor of law at the University of Tennessee. "You have anticompetitive intent, anticompetitive design and internal documents to show how these acquisitions further that anticompetitive design." The FTC and state cases are extremely similar and will likely be consolidated in federal court in Washington, D.C. They both focus on whether Facebook's acquisitions of Instagram and WhatsApp were anticompetitive and whether Facebook has leveraged the power of its APIs to kneecap potential rivals. But the government will likely have to surmount deep skepticism of its market definition: "personal social networking." They'll have to work hard to prove that Facebook exists in its very own marketplace that excludes social media sites like TikTok and YouTube. "If I had shown up at a meeting and announced that Facebook didn't compete with Google, Apple or TikTok, I would have been laughed out of the room," wrote Matt Perault, formerly Facebook's director of public policy, in an op-ed on Thursday. And the court will demand extensive evidence proving that Instagram and WhatsApp could have grown without Facebook's acquisition, a hypothetical situation that might be difficult to substantiate. "Could Instagram have developed without the investment of money and know-how from Facebook?" said Kristen Limarzi, a partner at Gibson, Dunn & Crutcher and former DOJ antitrust official. "I think that's unclear, but that's what the FTC will have to prove." 1. DOJ's case against Google The DOJ's case against Google, which was filed in October alongside a coalition of 11 Republican attorneys general, likely has the best shot at winning simply because it is the least ambitious. The complaint hews as closely to the 1990s Microsoft case as possible — a case that the government won even though it did not ultimately result in Microsoft's breakup. Paralleling the Microsoft case, the DOJ's complaint narrowly targets Google's "exclusionary contracts" with other companies, most prominently its more than $12 billion deal to keep Google as Apple's default search engine. So far, under the Trump administration, the case does not get into broader questions about Google's dominance in search or advertising technology. Legal experts said the DOJ's case alleges clear-cut violations of Section 2 of the Sherman Act, as long as it's able to substantiate its core claims. "It's a plausible Section 2 argument that is pretty well-substantiated, with plausible reasoning and citations to what looks like real evidence," Sagers said. Google has called the case "deeply flawed." "People use Google because they choose to, not because they're forced to," Google's chief legal officer, Kent Walker, said. But the DOJ will try to prove that users hardly have a choice in the matter. The case could benefit from the well-resourced lawyers working against Google, including attorneys with Oracle, AT&T, Microsoft and other top firms, and the open-minded judge it's been assigned to, Amit Mehta. It's still one of the most ambitious antitrust lawsuits to come from the U.S. government in decades, and it will face serious hurdles. Mehta could be skeptical of the DOJ's definition of the relevant market: "general search," which excludes specialized search engines like Amazon or Expedia. And it will be highly fact-specific, meaning the government has to provide extensive evidence proving its allegations.

## Reconciliation DA

#### Warming’s not existential---framing it as such undermines solvency.

Zeke Hausfather & Glen P. Peters 20. \*Director of climate and energy at the Breakthrough Institute in Oakland, California. \*\*Research director at the CICERO Center for International Climate Research in Oslo, Norway. "Emissions – the ‘business as usual’ story is misleading". Nature. 1-29-2020. https://www.nature.com/articles/d41586-020-00177-3

In the lead-up to the 2014 IPCC Fifth Assessment Report (AR5), researchers developed four scenarios for what might happen to greenhouse-gas emissions and climate warming by 2100. They gave these scenarios a catchy title: Representative Concentration Pathways (RCPs)1. One describes a world in which global warming is kept well below 2 °C relative to pre-industrial temperatures (as nations later pledged to do under the Paris climate agreement in 2015); it is called RCP2.6. Another paints a dystopian future that is fossil-fuel intensive and excludes any climate mitigation policies, leading to nearly 5 °C of warming by the end of the century2,3. That one is named RCP8.5.

RCP8.5 was intended to explore an unlikely high-risk future2. But it has been widely used by some experts, policymakers and the media as something else entirely: as a likely ‘business as usual’ outcome. A sizeable portion of the literature on climate impacts refers to RCP8.5 as business as usual, implying that it is probable in the absence of stringent climate mitigation. The media then often amplifies this message, sometimes without communicating the nuances. This results in further confusion regarding probable emissions outcomes, because many climate researchers are not familiar with the details of these scenarios in the energy-modelling literature.

This is particularly problematic when the worst-case scenario is contrasted with the most optimistic one, especially in high-profile scholarly work. This includes studies by the IPCC, such as AR5 and last year’s special report on the impact of climate change on the ocean and cryosphere4. The focus becomes the extremes, rather than the multitude of more likely pathways in between.

Happily — and that’s a word we climatologists rarely get to use — the world imagined in RCP8.5 is one that, in our view, becomes increasingly implausible with every passing year5. Emission pathways to get to RCP8.5 generally require an unprecedented fivefold increase in coal use by the end of the century, an amount larger than some estimates of recoverable coal reserves6. It is thought that global coal use peaked in 2013, and although increases are still possible, many energy forecasts expect it to flatline over the next few decades7. Furthermore, the falling cost of clean energy sources is a trend that is unlikely to reverse, even in the absence of new climate policies7.

Assessment of current policies suggests that the world is on course for around 3 °C of warming above pre-industrial levels by the end of the century — still a catastrophic outcome, but a long way from 5 °C7,8. We cannot settle for 3 °C; nor should we dismiss progress.

Plan for progress

Some researchers argue that RCP8.5 could be more likely than was originally proposed. This is because some important feedback effects — such as the release of greenhouse gases from thawing permafrost9,10 — might be much larger than has been estimated by current climate models. These researchers point out that current emissions are in line with such a worst-case scenario11. Yet, in our view, reports of emissions over the past decade suggest that they are actually closer to those in the median scenarios7. We contend that these critics are looking at the extremes and assuming that all the dice are loaded with the worst outcomes.

Asking ‘what’s the worst that could happen?’ is a helpful exercise. It flags potential risks that emerge only at the extremes. RCP8.5 was a useful way to benchmark climate models over an extended period of time, by keeping future scenarios consistent. Perhaps it is for these reasons that the climate-modelling community suggested RCP8.5 “should be considered the highest priority”12.

We must all — from physical scientists and climate-impact modellers to communicators and policymakers — stop presenting the worst-case scenario as the most likely one. Overstating the likelihood of extreme climate impacts can make mitigation seem harder than it actually is. This could lead to defeatism, because the problem is perceived as being out of control and unsolvable. Pressingly, it might result in poor planning, whereas a more realistic range of baseline scenarios will strengthen the assessment of climate risk.

#### We’re past the tipping point and Biden’s agenda doesn’t solve warming.

Bordoff ‘20Jason, March 27, 2020, former senior director on the staff of the U.S. National Security Council and special assistant to President Barack Obama, is a professor of professional practice in international and public affairs and the founding director of the Center on Global Energy Policy at Columbia University’s School of International and Public Affairs.

"Sorry, but the Virus Shows Why There Won't Be Global Action on Climate Change," Foreign Policy, <https://foreignpolicy.com/2020/03/27/coronavirus-pandemic-shows-why-no-global-progress-on-climate-change/>

In reality, COVID-19 reveals three reasons why fighting climate change is so hard. First, stopping the spread of this highly contagious disease requires that we all upend our daily lives in dramatic ways—and often do so for the benefit of others. Saving lives and sparing our medical system from becoming overwhelmed requires slowing the pace of the disease’s spread. Doing that, in turn, requires a range of public health measures including avoiding contact with others, especially since those carrying the virus may not even know they have it. Many young and healthy people should be able to recover from COVID-19, but “social distancing” is necessary to help others avoid contracting the disease, particularly the elderly or those with underlying medical conditions. In other words, “flattening the curve” of the pandemic is a classic collective action problem. Some people will choose to self-isolate to be responsible and help others, but if most others don’t do the same, there will be little benefit from that sacrifice to slow the disease’s spread. On the other hand, if everyone else self-isolates, a low-risk individual might choose to “free ride” on those sacrifices by continuing to live life as normal. Indeed, this behavior has been pervasive during the pandemic, undermining efforts to slow the spread. Despite the public health warnings, bars and restaurants remained full in major cities like [New York](https://ny.eater.com/2020/3/15/21180368/coronavirus-nyc-restaurant-bar-shutdown-pressure), beaches in Florida remained [crowded](https://www.nbcnews.com/news/us-news/florida-governor-refuses-shut-down-beaches-amid-spread-coronavirus-n1162226), and [revelers](https://time.com/5804089/us-coronavirus-social-distancing-party/) in many other places around the world continued to ignore official orders to avoid congregating. “If I get corona, I get corona,” as one spring break student in Miami nonchalantly [put](https://twitter.com/CBSNews/status/1240371160078000128?s=20) it. Like COVID-19, climate change is the ultimate collective action problem. Each ton of greenhouse gas contributes equally to the problem, no matter where in the world it is produced. The United States contributes 15 percent of emissions each year; Europe, a meager 9 percent. Lawmakers in Brussels may choose to impose an economic cost on Europeans by ratcheting up the pace of decarbonization, but there will be little benefit in avoided climate impacts unless others around the world do the same. The global nature of climate change should rally nations to do even more to address it because they want others to follow. When the Obama administration was developing an estimate for the harm to society from carbon emissions, for example, it [chose](https://blogs.wsj.com/experts/2017/11/15/trump-vs-obama-on-the-social-cost-of-carbon-and-why-it-matters/) to use the global rather than domestic estimate of damage precisely for this reason. Because carbon dioxide impacts are global, and every ton of CO2 contributes equally to climate change, if all nations looked only at the impact of a ton of CO2 on their own nations, the collective response would be vastly inadequate to address the true damage from climate change. Unfortunately, too often the need for collective action is an excuse for inaction. House Republicans often [argue](https://www.popsci.com/china-us-climate-greenhouse-emissions/) that if China won’t commit to major emissions reductions, neither should the United States. As U.S. Sen. Lamar Alexander recently [put](https://www.alexander.senate.gov/public/index.cfm/2019/3/alexander-offers-one-republican-s-response-to-climate-change) it, “When it comes to climate change, China, India, and developing countries are the problem.” To slow the spread of COVID-19, governments are clamping down to force collective action when individuals fail to follow guidelines. Cities across the world are shutting down businesses and events, at great cost. Yet the effectiveness of any one government’s action is limited if there are weak links in the global effort to curb the pandemic—such as from states with conflict or poor governance—even if the world is in agreement that eradicating a pandemic is in every country’s best interest. Climate change is even harder to solve because it results from the sum of all greenhouse gas emissions and thus requires aggregate effort, a problem particularly vulnerable to free-riding, as my Columbia University colleague Scott Barrett explains in his excellent [book](https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199211890.001.0001/acprof-9780199211890) Why Cooperate? The Incentive to Supply Global Public Goods. And whereas governments can force people to stay home, there is no global institution with the enforcement power to require that nations curb emissions. Even if the young and healthy are unpersuaded by appeals to the greater good, they should still avoid crowded beaches and bars because of the high degree of uncertainty about COVID-19, which may [impact](https://www.washingtonpost.com/health/2020/03/19/younger-adults-are-large-percentage-coronavirus-hospitalizations-united-states-according-new-cdc-data/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most) young people more than previously thought. Practicing social distancing not only helps others but is a risk mitigation strategy for oneself. Similarly, taking climate change action, even by countries less at risk than others, is a risk mitigation strategy because of the high degree of [uncertainty](https://www.nytimes.com/2013/10/11/opinion/inconvenient-uncertainties.html) over how severe the impacts of climate change will end up being—the so-called “of climate risk. The second sobering lesson from COVID-19 for climate change efforts is the importance of public buy-in and education. The problems of collective action described above are less acute when the public broadly understands the gravity of the threat. After suffering from failed responses to previous disease outbreaks, several Asian countries learned their lessons and have responded to COVID-19 far more rapidly than the United States and those in Europe. Residents of Hong Kong, for example, which suffered during the SARS epidemic, [canceled](https://www.washingtonpost.com/world/asia_pacific/how-the-us-can-defeat-coronavirus-heed-asias-lessons-from-epidemics-past/2020/03/18/9aa7916a-67a5-11ea-b199-3a9799c54512_story.html) gatherings and practiced social distancing before the government even ordered it because they understood the risks. While public concern with climate change is rising, there remains a long way to go. Only [half](https://www.nytimes.com/interactive/2020/02/20/climate/climate-change-polls.html) of Americans believe climate change should be a top priority for the federal government, and the figure is far lower on the Republican side of the aisle. Indeed, COVID-19 itself may actually erode public support for stronger climate action, as the pace of climate ambition wanes during times of economic hardship. Historically, there is an inverse [relationship](https://www.p-plus.nl/resources/articlefiles/geloofopwarming.pdf) in the United States and Europe between public concern about the environment and worries about economic conditions. Similarly, concern about economic growth has often caused China to ratchet back its environmental ambitions. Just last week, China was [reportedly](https://www.bloomberg.com/news/articles/2020-03-18/china-may-help-struggling-carmakers-by-relaxing-emission-curbs?sref=uFaJcogC) considering relaxing emissions standards to help struggling automakers. The third reason COVID-19 should give pause to expectations about climate change action is because of what it reveals about the strong link between carbon emissions and economic activity. For decades, the energy intensity, and thus carbon intensity, of economic growth has declined, as economies become more energy-efficient. Each unit of economic growth contributes less to carbon emissions than it previously did. From 2014 to 2016, global greenhouse gas emissions did not rise at all, leading many to celebrate that emissions and economic growth had decoupled. Yet there remained a strong relationship between growth and energy use. As Harvard’s Robert Stavins [pointed](https://www.pbs.org/newshour/economy/column-dont-be-fooled-co2-emissions-still-tied-to-economic-growth) out, the rate of gross domestic product growth still very much affects emissions, as slower growth would have led emissions to fall. As COVID-19 brings the global economy to a standstill, economists [worry](https://www.reuters.com/article/uk-health-coronavirus-stocks-economy-usa/d-word-rears-head-as-coronavirus-hit-markets-brace-for-recession-idUSKBN2140IA) about not just a recession, but even a global depression. In the United States alone, a record 3.3 million workers filed for unemployment benefits last week, a number likely to rise sharply. On the stock market, the Dow Jones index [wiped](https://thehill.com/policy/488231-dow-erases-all-gains-under-trump) out all the gains of Donald Trump’s presidency before rebounding on reports the U.S. Congress would pass a stimulus bill. As air travel and other transport is ratcheted back globally, oil demand has fallen by around 20 percent, and analysts estimate it will be down by at least 5 percent in all of 2020 compared to last year. A huge hit to economic growth would likely mean carbon emissions will fall in 2020 for the first time since the Great Recession of 2008. That may seem like good news, but it is not. First of all, economic contractions are not a desirable or sustainable way to curb emissions; emissions rebounded sharply after 2009. More importantly, the fact that it takes severe economic slowdowns like the Great Recession or COVID-19 to bring emissions down serves as a reminder of just how strongly tied emissions remain to economic growth—and thus how hard it is to lower them. That is why energy from renewable sources can grow as rapidly as it has over the past decade and yet fossil fuel use can keep rising at the same time as total energy use rises around the world, especially in fast-growing economies like China and India. As one example, Marianne Kah, an economist at the Center on Global Energy Policy, deconstructed a range of projections of oil demand growth to understand why analysts differ on when oil demand will peak and [found](https://energypolicy.columbia.edu/research/report/electric-vehicle-penetration-and-its-impact-global-oil-demand-survey-2019-forecast-trends) that assumptions about economic growth are as important as assumptions about the penetration of electric vehicles. Policymakers have spent trillions of dollars and passed countless regulations, standards, and mandates to spur clean energy. That it takes a pandemic-induced economic standstill to actually bring emissions down should be a sobering reminder of just how hard addressing climate change will as living standards, fortunately, continue to rise in emerging markets. COVID-19 may deliver some short-term climate benefits by curbing energy use, or even longer-term benefits if economic stimulus is [linked](https://www.eenews.net/stories/1062581379) to climate goals—or if people get used to [telecommuting](https://www.cfr.org/blog/concerns-over-coronavirus-spread-oil-industry) and thus use less oil in the future. Yet any climate benefits from the COVID-19 crisis are likely to be fleeting and negligible. Rather, the pandemic is a reminder of just how wicked a problem climate change is because it requires collective action, public understanding and buy-in, and decarbonizing the energy mix while supporting economic growth and energy use around the world.

#### If it does pass, it doesn’t solve warming.

Jonathan Weisman & Emily Cochrane, 9-30-2021, "House Delays Vote on Infrastructure Bill as Democrats Feud," New York Times, https://www.nytimes.com/2021/09/30/us/politics/infrastructure-democrats-pelosi.html

Conservative-leaning Democrats made it even clearer on Thursday that they could never support a package anywhere near as large as Mr. Biden had proposed. Senator Joe Manchin III of West Virginia told reporters that he wanted a bill that spent no more than $1.5 trillion, less than half the size of the package that Democrats envisioned in their budget blueprint.

“I’m trying to make sure they understand that I’m at 1.5 trillion,” Mr. Manchin told reporters late Thursday night, emerging from the office of Senator Chuck Schumer, Democrat of New York and the majority leader, where he had been meeting with White House officials. “I don’t see a deal tonight — I really don’t.”

Shortly afterward, House leaders put out word that plans for the infrastructure vote, which Ms. Pelosi had insisted all day was still on track, would wait.

Mr. Manchin spoke out about his position after a memo detailing it was published in Politico on Thursday.

The document was instructive in ways well beyond the spending total. His bottom-line demands included means-testing any new social programs to keep them targeted at the poor; a major initiative on the treatment of opioid addictions that have ravaged his state; control of shaping a clean energy provision that, by definition, was aimed at coal, a mainstay of West Virginia; and assurances that nothing in the bill would eliminate the production and burning of fossil fuels — a demand sure to enrage advocates of combating climate change.

#### Biden has no PC, his agenda is shot, other issues overwhelm, and Afghanistan outweighs.

Rick Klein et al 9/29. Staff Writer at ABC News. “Biden takes credibility hit at critical time for agenda: The Note.” <https://abcnews.go.com/Politics/biden-takes-credibility-hit-critical-time-agenda-note/story?id=80285075>.

So much of the standoff over the Biden agenda is about Democrats' trust and lack thereof -- among and between progressives and moderates, leaders and rank-and-file members, outside groups and inside caucuses and between virtually everyone and the White House. That makes this an inconvenient time for President Joe Biden's credibility to come into question. Top military advisers' testimony in the Senate Tuesday, with more to come in the House Wednesday, appears to contradict the president's previous assertions about the kind of advice he got before ordering the troop withdrawal from Afghanistan. The White House is pushing back on any notion that the president hasn't been truthful about what he last month called a "split" in the advice he was getting. And Biden aides would like to separate Afghanistan from the domestic agenda entirely. A new ABC News/Ipsos poll published Wednesday shows how hard that might be, though. Biden's approval rating is down across a range of issues compared to a month ago. People are unhappy about his handling of the COVID-19 pandemic, immigration, the economy, gun violence, crime and, yes, even infrastructure. The sagging numbers come after months of stability and relative popularity for the president. The figures started to drop right around the disastrous Afghanistan exit, and so far, they haven't shown signs of recovering. With huge deadlines looming, it's notable not just how many Democrats are implicitly defying the White House, but how many are doing so while suggesting they know what Biden's agenda is better than he is. Sen. Bernie Sanders' urging of House progressives to sink the bipartisan infrastructure bill unless the far larger social-spending package also moves along is a case in point. Republican opposition to Biden has long been unquestioned, but Democrats' commitment to him now very much is.

#### Winner’s win---Biden passing tough bills expands his political capital.

Stankiewicz 1/20/21 (Kevin - associate reporter for *CNBC.com*, “Sen. Chris Coons says Biden has ‘practical’ bent, hopes for cooperation in Congress,” https://www.cnbc.com/2021/01/20/biden-inauguration-day-live-updates-stream.html)

Democratic Sen. Chris Coons told CNBC he is hopeful President Joe Biden’s plans to address the Covid-19 crisis could set the tone for bipartisan cooperation in Washington. “I think it’s possible for Joe Biden, by responding to this pandemic in a competent and caring way, to actually build his political capital, to surprise the American people by showing that he and [GOP Sen.] Mitch McConnell, that the leaders in the House and the Senate, can actually work together to solve problems,” said Coons, a close ally to Biden and his fellow Delawarean. In an interview on “Power Lunch,” Coons said most Americans are fed up by inaction and partisan bickering from Congress. “Joe is someone who has never forgotten where he’s from, who has a practical, common-sense bent and who sees the suffering of the American people.” “He’s going to give us a chance to move forward, boldly, together, and I pray that the Congress takes him up on it,” Coons said.

#### Senate antitrust bill thumps.

Benjamin Din, 8-12-2021, "Senators set stage for antitrust fight," POLITICO, https://www.politico.com/newsletters/morning-tech/2021/08/12/senators-set-stage-for-antitrust-fight-797122

SENATE SHARPENS ITS ANTITRUST FOCUS — The Senate is moving on its antitrust response, following the House Judiciary Committee’s approval of its own antitrust package. But senators are taking a more targeted approach that could make their bill easier to actually get to Biden’s desk.

Sen. Richard Blumenthal (D-Conn.) on Wednesday introduced the Open App Markets Act, as Leah reported for Pros. The new bill would target Apple and Google's "gatekeeper power" over the smartphone market, forcing the tech giants to allow developers to use alternative app stores and to tell consumers about where they can purchase software for a cheaper price online. Sens. Marsha Blackburn (R-Tenn.) and Klobuchar, who chairs the Senate Judiciary antitrust subcommittee, are cosponsors of the legislation.

— Not quite a companion bill: The Senate bill does have some overlap with a House bill introduced by Rep. David Cicilline (D-R.I.), who chairs the House Judiciary antitrust panel. However, Cicilline’s legislation is broader, applying to everything from app stores to advertising to logistics, and would ban companies from prioritizing their own products over their competitors’.

Companion legislation from the House is currently in the works. Senators are still working on companions for the House’s proposals, but those bills aren’t expected until later in the fall.

#### Negotiations fail---vote is delayed.

Kathryn Watson & Jack Turman 10/1. “House delays infrastructure vote as negotiations among Democrats stall.” <https://www.cbsnews.com/news/infrastructure-bill-house-vote-delayed/>.

Washington — The House delayed its planned vote on a bipartisan infrastructure bill late Thursday night, while negotiations continued over another measure — a larger social safety net — but failed to result in an agreement.

As Speaker Nancy Pelosi left the Capitol in the early hours of Friday morning, she continued to say there would be a vote "today." She also told reporters that progressives and moderates, who have been arguing about the cost of the social safety net spending, are "not trillions of dollars apart."

The House had intended to take up the $1.2 trillion infrastructure measure Thursday, but a majority of progressives threatened to vote against the legislation without a deal on the larger $3.5 trillion package, and they may have enough votes in the narrowly divided House to tank the bill. The infrastructure bill, known as the Bipartisan Infrastructure Framework, would make the biggest investment in the nation's roads, bridges, railways and ports in decades, and it also contains some funds for modern infrastructure, like electric vehicle charging stations and broadband.

#### CR and debt limit thump---infrastructure won’t pass.

Fence Post 9/28. “CR, infrastructure, reconciliation, debt limit come to a head.” <https://www.thefencepost.com/news/cr-infrastructure-reconciliation-debt-limit-come-to-a-head/>.

Congressional action around a continuing resolution to fund the government, the bipartisan infrastructure bill, the budget reconciliation bill and the debt limit appears to be coming into focus as the government’s fiscal year ends at midnight Thursday.

All of these issues have implications for agriculture. If the government shuts down, Agriculture Department offices in Washington and around the country would have to close. The bipartisan infrastructure bill officially known as the Infrastructure Investment and Jobs Act includes provisions to repair roads, bridges and ports and to provide Internet service to sections of rural America that don’t have broadband. The budget reconciliation bill as written contains an array of programs that would also increase the baseline of spending available for the next farm bill and tax increases that would affect some farmers. If the government’s ability to issue debt is not increased, it could affect government payments to farmers and also roil credit markets.

After Senate Republicans blocked a House-passed bill that would have funded the government into December and raised the government’s borrowing ability, House Appropriations Committee Chairwoman Rosa DeLauro, D-Conn., said she would prepare a continuing resolution funding the government without a debt limit increase so that it could be passed by Thursday, averting a government shutdown.

House Speaker Nancy Pelosi, D-Calif., has told her fellow Democrats that she will bring the bipartisan infrastructure bill up for a floor vote on Thursday even if the budget reconciliation bill with social programs is not ready. Pelosi said the vote is necessary because authorization for transportation spending will end at midnight Thursday.

Whether Pelosi can convince a majority of Democrats to vote for the infrastructure bill is uncertain. If she doesn’t have the votes, Pelosi, as in the past, may not allow it to come up.

Treasury Secretary Janet Yellen told Congress today that the government will run out of money to pay its bills on Oct. 18.

House Majority Leader Steny Hoyer, D-Md., and 63 Democrats, all of whom voted to suspend the debt limit under President Trump, sent Senate Minority Leader Mitch McConnell, R-Ky., a letter urging him to work with Democrats to address the debt limit.

But the Republicans’ unwillingness to vote for raising the debt means that Democrats will probably have to use budget reconciliation to increase the debt limit with only Democratic votes.

Meanwhile, Sens. Joe Manchin, D-W.Va., and Kyrsten Sinema, D-Ariz., who have said they would not vote for a $3.5 trillion budget reconciliation bill, are meeting with President Biden today to discuss what size of bill they would vote for.

Democrats need all 50 Senate Democrats and Vice President Harris to vote for the reconciliation bill to pass the Senate, since no Republican is expected to vote for it.

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## States CP

#### 3. FTC intervenes and helps corporations overcome the CO.

American Economic Liberties Project 21. “THE COURAGE TO LEARN: A RETROSPECTIVE ON ANTITRUST AND COMPETITION POLICY DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW, STRUCTURALIST APPROACH”. American Economic Liberties Project. January 2021. https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn-Final.pdf

UNDERMINING STATE AND LOCAL EFFORTS TO PROMOTE COLLECTIVE BARGAINING One path to strengthen labor rights is for cities and states to establish market standards that promote safety and raise wages. Such a public role for cities and states was especially important in the early 2010s, as Uber, Lyft, and other “gig economy” companies sought to undermine public rules using aggressive tactics to acquire market power and underpay drivers. The FTC, led by Republican FTC Commissioner Maureen Ohlhausen with support from her Democratic colleagues and staff, sought to aid these corporations in their efforts to avoid city and state rules under the rhetoric of preventing excessive regulation. In a 2016 speech, Ohlhausen praised Uber and Lyft, which she lauded as part of the “sharing economy,” and expressed hostility to state action to regulate them.268 Ohlhausen highlighted the FTC’s advocacy work to aid Uber and Lyft, citing letters to the Anchorage, Colorado, Chicago, and D.C. governments in 2013 and 2014.269 In testimony before the House that same year, FTC official Andrew Gavil lamented state rules that “likely impede competition,” while acknowledging that such rules “can protect consumers from actual health and safety risks and support other valuable public policy goals.”270 What happened after the Obama administration perhaps illustrates the bipartisan continuity of this hostility to goals other than consumer prices. Ohlhausen, then FTC acting chairwoman under the Trump administration, and Commissioner Terrell McSweeny, an Obama-appointed Democrat, joined the Trump Justice Department in filing a legal brief explicitly backing the U.S. Chamber of Commerce in opposing a Seattle law that empowered Uber and Lyft drivers to bargain collectively for higher wages. McSweeny’s position is especially notable, since hers was the deciding vote on an FTC that had only two commissioners at the time.271 Another way in which the Obama administration prevented workers from organizing for better wages and working conditions was through its opposition to occupational licensing, which is the crafting of requirements that workers achieve a certain level of education or sector-specific training before entering a profession. Much like barriers in other professional industries, these requirements support higher incomes for their members. As the FTC filed a series of complaints against worker organizing and occupational licensing rules in 2015, Obama Council of Economic Advisers Chairman Jason Furman gave a speech warning about licensing’s ostensible dangers.272 The White House also issued a report studying licensing. Announcing the report’s release, National Economic Council Director Jeffrey Zients and Council of Economic Advisers member Betsey Stevenson cautioned that higher wages for workers might raise prices for consumers.273 Occupational licensing rules are important tools for local communities to ensure a living wage to workers, high-quality services to consumers, and a decent overall community to their citizens. By excluding easy entry into some work, occupational licensing rules might increase consumer prices, but low consumer prices are not the sole goal of policy. There are health and safety mandates, or even mandates against indentured servitude, all of which might increase consumer prices—but policymakers do not argue for OSHA deregulation or reimplementation of forced labor. Indeed, occupational licensing requirements also help ensure that consumers benefit from new workers committing to the field. Those workers should arguably also be encouraged to invest in skills, or what economists call “human capital.”274 Licensing also provides other benefits. One study noted that it can help mitigate racial and gender wage gaps.275 Another finds evidence that licensure can facilitate more egalitarian entry into jobs.276 Another study found that—contrary to frequently asserted speculation that licensing can restrict entry into occupations—licensing can “ease access into occupations for immigrants, particularly for vulnerable immigrant labor groups.”277 As unionization rates decline, occupational licensing serves as a counterbalance to provide workers with economic stability.278 And ultimately, local communities should be able to shape their local economies by crafting rules that aim to create baseline conditions for workers. Myriad other changes in law and policy also contributed to weakened worker power and wage stagnation. But the ultimate consequence of the FTC’s initiatives was to weaken collective worker action and legitimize the rise of more exploitative business models.

## Politics

#### No transformational change---small majority means programs will be scaled back to pass.

Carl Hulse, 10-2-2021, "Biden’s Big Vision Collides With His Small Majorities," New York Times, https://www.nytimes.com/2021/10/02/us/biden-democrats-progressives-moderates-congress.html

When President Biden took office, he made the case that a pandemic that had touched off a national crisis could foster a new consensus in Washington, softening partisan divisions and allowing for the kind of transformational change that would meet a devastating and dangerous moment for the country.

Pushing past obvious rifts within his own party, he proposed the biggest social agenda in a generation — a huge public works initiative to repair dilapidated infrastructure and create jobs, a cradle-to-grave social safety net plan, ambitious programs to curb climate change, and tax cuts on the rich to pay for it all.

He trusted his own negotiating skills as a 36-year veteran of the Senate, his long experience dealing with balky Republican leaders and the power of his personality and office to push it through at a time of deep political polarization.

But as his agenda hung in the balance in Congress this week, it was painfully clear that his assumptions had run headlong into the political realities of governing.

While some Republicans did get behind the infrastructure plan that would let them celebrate at groundbreakings back home, they adamantly refused to embrace the reweaving of the social safety net that Mr. Biden and many Democrats envisioned. And while the president’s proposals are widely popular with the public and have strong support among the great majority of Democrats in Congress, they did not have the unequivocal support of everyone in his party.

That has made for a very bumpy path for the president’s agenda in a Congress in which Democrats have very few votes to spare in the House and a 50-50 Senate with absolutely no room for error.

The turbulence encountered by Mr. Biden and his proposals showed that without larger majorities in Congress — the kind that Democrats currently lack — transformational change is hard to come by. And with absolutely no leeway for defections, party divisions of the kind that have flared up in Democratic ranks can be fatal — or, at minimum, lead to a significant narrowing of expectations.

It is a point that Republicans have been making repeatedly, and it was archly driven home again by Senator Joe Manchin III, Democrat of West Virginia, as he detailed his opposition to Mr. Biden’s plan and demanded that it be cut back by as much as $2 trillion before he would provide his own essential support.

“For them to get theirs, elect more liberals,” Mr. Manchin declared on Capitol Hill, saying that he feared the reach of the program being pursued by Democrats would “basically change our whole society to an entitlement mentality.”

Previous presidents who were able to carry out agendas as ambitious as Mr. Biden’s enjoyed far greater latitude on Capitol Hill, a point Mr. Biden made himself on Friday as he met privately with House Democrats at a unity rally. Lyndon B. Johnson had supermajorities in both chambers of Congress when he maneuvered Medicare into law in 1965. Even then, the process was a difficult one, requiring intensive lobbying by Mr. Johnson, himself a longtime denizen of the Senate.

Enactment of the Affordable Care Act during the Obama administration was also accomplished with much larger Democratic majorities, including a brief window in which the party held a supermajority of 60 votes in the Senate. Even then, the path to enactment was treacherous and circuitous, forcing adjustments in the legislation that hindered its rollout and have complicated coverage under the law to this day.

Then as now, it fell to Speaker Nancy Pelosi, who specializes in navigating legislation through impossibly tight political squeezes, to muscle the measure through to enactment. But in 2010, she had much more leeway; despite 34 House Democrats opposing the health care bill, she still had enough votes to pass it.

Securing Mr. Biden’s ambitious agenda, by contrast, will require the support of every single one of the 50 votes Democrats control in the Senate, and nearly every one that they control in the House.

While Mr. Manchin has been the most outspoken member of Congress in his pushback against Mr. Biden’s program, he has been allied with Senator Kyrsten Sinema, Democrat of Arizona, who has her own set of objections to the sweeping social program and has also not been willing to commit to voting for the legislation.

Other moderates in the House and Senate have more quietly expressed some unease about the scope and cost of the Democratic plan, Many of them are enthusiastic supporters of the infrastructure bill, which they see as much more palatable and an easier to sell to constituents given its support from Republicans in both the House and Senate.

It was moderates’ preference for the infrastructure measure that drove progressive Democrats in the House to threaten to bring down the $1 trillion public works legislation. Their fear was that those more centrist House and Senate Democrats would not rally behind the safety net and environmental programs if they had already won much of what they wanted in the public works bill.

Progressives said they had to be sure the rest of the Biden agenda would be enacted once the infrastructure measure was signed and saw their ability to hold up the measure as leverage.

In the middle has been Mr. Biden, who considers himself a savvy bipartisan deal maker, but whose skill at courting compromise has not translated into an ability to forge a quick agreement among the warring factions within his party. In the absence of that agreement, Ms. Pelosi on Friday pulled back from a vote on the infrastructure bill. The move, which angered moderates who fumed that she had gone back on a promise, bought those involved in the negotiations more time to find some kind of consensus and get both the public works bill and social policy measure to Mr. Biden’s desk.

#### 2. Negotiations fail.

Caroline Vakil, 10-2-2021, "Sinema slams delay of infrastructure vote: 'Inexcusable'," TheHill, https://thehill.com/homenews/senate/575026-sinema-slams-delay-of-infrastructure-vote-inexcusable

Sen. Kyrsten Sinema (D-Ariz.) on Saturday slammed the decision to delay a vote this week on the bipartisan infrastructure deal that she helped negotiate, calling it “inexcusable.” Good-faith negotiations, the Arizona centrist argued, "require trust." "Over the course of this year, Democratic leaders have made conflicting promises that could not all be kept — and have, at times, pretended that differences of opinion within our party did not exist, even when those disagreements were repeatedly made clear directly and publicly," Sinema said in a statement. “Canceling the infrastructure vote further erodes that trust. More importantly, it betrays the trust the American people have placed in their elected leaders and denies our country crucial investments to expand economic opportunities,” Sinema continued. In August, the $1.2 trillion bipartisan infrastructure bill passed through the Senate in a 69-30 vote. The bill sought to provide funding for "traditional" infrastructure such as repairing bridges and roads. The bill was negotiated by President Biden as well as Senate moderates from both sides of the aisle. The bipartisan bill was slated for a vote in the lower chamber this week. However, those chances were foiled when progressives signaled that they would tank the bill if a larger reconciliation bill with Democratic priorities was not passed. The vote, which was first anticipated to come up Monday, over time got dragged out until Friday, when Biden broke the news to moderate Democrats on Capitol Hill that a vote would not occur during a 40-minute session with his caucus behind closed doors. Following the meeting, Biden was adamant that both bills would get passed, but said that there was no rush to pass his economic agenda. "It doesn’t matter when. It doesn’t matter whether it’s six minutes, six days or six weeks. We’re gonna get it done," he said. The announcement from the president signaled efforts by Democratic leadership to walk a fine line between the centrist and progressive flanks of the party and try to marry their interests on the bills. “Arizonans, and all everyday Americans, expect their lawmakers to consider legislation on the merits — rather than obstruct new jobs and critical infrastructure investments for no substantive reason. What Americans have seen instead is an ineffective stunt to gain leverage over a separate proposal,” Sinema added in her biting statement. “My vote belongs to Arizona, and I do not trade my vote for political favors — I vote based only on what is best for my state and the country. I have never, and would never, agree to any bargain that would hold one piece of legislation hostage to another,” she continued. The delay has also drawn the ire of several other Democrats — Reps. Josh Gottheimer (D-N.J.) and Stephanie Murphy (D-Fla.) — who criticized the move on Friday not to bring the bipartisan infrastructure legislation for a vote. “Along with a group of members, I’ve been working around-the-clock to pass the bipartisan bill, legislation we held craft back in April with my senate colleagues,” Gottheimer said in a statement. “But a small far-left faction of the House of Representatives undermined that agreement and blocked a critical vote on the president’s historic bipartisan infrastructure bill.”

#### 3. Collapsing now.

Caroline Vakil, 10-2-2021, "Sinema slams delay of infrastructure vote: 'Inexcusable'," TheHill, https://thehill.com/homenews/senate/575026-sinema-slams-delay-of-infrastructure-vote-inexcusable

Sen. Kyrsten Sinema (D-Ariz.) on Saturday slammed the decision to delay a vote this week on the bipartisan infrastructure deal that she helped negotiate, calling it “inexcusable.” Good-faith negotiations, the Arizona centrist argued, "require trust." "Over the course of this year, Democratic leaders have made conflicting promises that could not all be kept — and have, at times, pretended that differences of opinion within our party did not exist, even when those disagreements were repeatedly made clear directly and publicly," Sinema said in a statement. “Canceling the infrastructure vote further erodes that trust. More importantly, it betrays the trust the American people have placed in their elected leaders and denies our country crucial investments to expand economic opportunities,” Sinema continued. In August, the $1.2 trillion bipartisan infrastructure bill passed through the Senate in a 69-30 vote. The bill sought to provide funding for "traditional" infrastructure such as repairing bridges and roads. The bill was negotiated by President Biden as well as Senate moderates from both sides of the aisle. The bipartisan bill was slated for a vote in the lower chamber this week. However, those chances were foiled when progressives signaled that they would tank the bill if a larger reconciliation bill with Democratic priorities was not passed. The vote, which was first anticipated to come up Monday, over time got dragged out until Friday, when Biden broke the news to moderate Democrats on Capitol Hill that a vote would not occur during a 40-minute session with his caucus behind closed doors. Following the meeting, Biden was adamant that both bills would get passed, but said that there was no rush to pass his economic agenda. "It doesn’t matter when. It doesn’t matter whether it’s six minutes, six days or six weeks. We’re gonna get it done," he said. The announcement from the president signaled efforts by Democratic leadership to walk a fine line between the centrist and progressive flanks of the party and try to marry their interests on the bills. “Arizonans, and all everyday Americans, expect their lawmakers to consider legislation on the merits — rather than obstruct new jobs and critical infrastructure investments for no substantive reason. What Americans have seen instead is an ineffective stunt to gain leverage over a separate proposal,” Sinema added in her biting statement. “My vote belongs to Arizona, and I do not trade my vote for political favors — I vote based only on what is best for my state and the country. I have never, and would never, agree to any bargain that would hold one piece of legislation hostage to another,” she continued. The delay has also drawn the ire of several other Democrats — Reps. Josh Gottheimer (D-N.J.) and Stephanie Murphy (D-Fla.) — who criticized the move on Friday not to bring the bipartisan infrastructure legislation for a vote. “Along with a group of members, I’ve been working around-the-clock to pass the bipartisan bill, legislation we held craft back in April with my senate colleagues,” Gottheimer said in a statement. “But a small far-left faction of the House of Representatives undermined that agreement and blocked a critical vote on the president’s historic bipartisan infrastructure bill.”

#### 4. Can’t negotiate with Sinema-no demands,

Maureen Dowd, 10-2-2021, "Sinema Stars in Her Own Film" New York Times, https://www.nytimes.com/2021/10/02/opinion/kyrsten-sinema-congress.html

Just like the original Sphinx, the Phoenix Sphinx is blocking the way until those who would move ahead solve her riddle:

What does Kyrsten Sinema want? And why doesn’t she stick around to explain it?

Somehow, we have gotten ourselves in a perverse situation where Sinema and Joe Manchin rule the world, and it’s confounding that these two people have this much sway. As Hemingway wondered in “The Snows of Kilimanjaro,” what are those leopards doing at this altitude?

Sinema and Manchin are now directing what Joe Biden gets to do and deciding how his presidency will be defined. Some Democrats even worry that the recalcitrant pair could be helping Donald Trump vault back into the White House.

The duo has created such havoc on the Hill — with the fate of the whole country riding on what mood they’re in — that congressional reporters have come up with Bennifer-style nicknames for them, including Manchinema and Sinemanch.

Democrats were irritated at Sinema — again — on Friday. Even as Biden traipsed up to Capitol Hill to try to rescue his F.D.R. dreams, Sinema flew back to Phoenix in the middle of nail-biting negotiations on the scope of Biden’s social policy bill.

Her spokesman said that she had a doctor’s appointment for a foot injury, but The Times reported that she was also slated to play footsie with donors at her political action committee’s dinner at a fancy resort.

The Times’s Jonathan Weisman got hold of an invitation to another fund-raiser for Sinema this past week with five business lobbying groups, many of which are fighting against the social policy bill.

“People who want to think they can understand her or get to her, let me tell you, you can’t,” one politico in her circle told me. “It doesn’t work that way with her. She doesn’t think in a linear process, like ‘OK, will this impact my re-election?’ She just beats her own drum. When she leaves in the middle of something and says, ‘I got stuff to do,’ it’s because she has plans. Sometimes, she’s just more interested in training for an Ironman. More power to her, man. It’s like watching a movie.”

#### 5. Compromise won’t pass.

Lincoln Mitchell, 10-1-2021, "Opinion: Manchin and Sinema are hurting their party more than any Republican ever could," CNN, https://www.cnn.com/2021/10/01/opinions/congressional-democrats-manchin-sinema-infrastructure-mitchell/index.html

After a failed, all-day scramble to get the $1.2 trillion infrastructure bill passed on Thursday, President Joe Biden's legislative agenda is in jeopardy for the moment. Not so much because of the unavoidable strong Republican opposition but because of a few congressional Democrats who refuse to support the legislation unless it is adjusted to their precise liking. Now, it's been reported that there is a new $2.1 trillion compromise being floated around in Washington, but the division is so clear that the new figure may not be enough to get the needed votes.

#### 1. PC priced in.

Susan B. Glasser, 10-1-2021, "The Democratic Civil War Has a Winner: Donald Trump," New Yorker, https://www.newyorker.com/news/letter-from-bidens-washington/the-democratic-civil-war-has-a-winner-donald-trump

Then again, not shutting down the government because you managed to pass and sign a bill pushing the problem off until early December is hardly an accomplishment for the ages. President Biden and Speaker Nancy Pelosi have promised—and not yet delivered—a House vote on the bipartisan infrastructure bill that passed the Senate this summer. That vote was blocked by members of their own party, which cannot agree on the size and specifics of the three-and-a-half-trillion-dollar budget-reconciliation-and-everything-else bill that Biden has proposed as the centerpiece of his Presidency. The long-predicted Democratic civil war between progressives and moderates has begun.

The two leaders threw all the political capital they had at reaching a deal by their own self-imposed deadline, and couldn’t get there. Biden personally involved himself in hours of talks with the feuding Democratic factions, and gave extraordinary time to a lone senator, Kyrsten Sinema, of Arizona, who never publicly explained her position. A surprise Presidential visit to the annual Congressional Baseball Game did not close the deal, nor did an absolute insistence on a Thursday vote that never took place. Pelosi, relentless and ever optimistic, was adamant that there would be a vote and that she would win it, until long after even fellow Democratic leaders had given up this line. But, at the end of a long week of the Speaker not getting her way, one Washington axiom still applies: it’s never a good idea to bet against Nancy Pelosi. If and when she closes a deal on the budget-reconciliation measure, whose price tag of three and a half trillion dollars was never going to last, and brings the infrastructure bill to the floor—a roughly trillion-dollar measure that got the votes of nineteen Senate Republicans as well as those of all of that chamber’s Democrats—the week’s many delays will be forgotten.

Harder to forget will be the intensifying divisions revealed by this week’s haggling: the House-Senate divide, the progressive-moderate divide, the everyone-versus-Joe-Manchin-and-Kyrsten-Sinema divide. (“Biden Bets It All on Unlocking the Manchinema Puzzle,” as one headline put it. Punchbowl News prefers “Sinemanchin.”) It’s sure to get nastier before the deal gets done. Representative Steve Cohen, of Tennessee, a Democratic moderate, said, on CNN, that his car was older than some of the progressives holding up the vote on the infrastructure bill. The progressives, meanwhile, were not in an accommodating mood. “We’re pushing back and saying, ‘Hell, no,’ ” Jamaal Bowman, a first-year congressman from New York, said. At the end of it all, Democrats were still negotiating with themselves. Fighting with themselves. Getting mad at one another. It’s as if they never really accepted until this week the idea that a fifty-fifty Senate means that any one Democratic senator—or two, in this case—can have extraordinary power to dictate the outcome of legislation.

#### 2. Biden’s PC fails for infrastructure.

Jonathan Martin & Jonathan Weisman, 10-2-2021, "Biden Throws In With Left, Leaving His Agenda in Doubt," New York Times, https://www.nytimes.com/2021/10/02/us/politics/biden-progressives-moderates-agenda.html

For well over a year now, President Biden’s vaunted negotiating style largely boiled down to this: I’m with you.

After he vanquished Senator Bernie Sanders of Vermont in the Democratic primary, he brought the liberal icon’s ardent supporters into the fold by embracing much of the senator’s platform even as he ran on unifying the country. When moderate Democrats came to call, he used the tones of centrism to assure them of his conciliatory bona fides.

But when Mr. Biden ventured to the Capitol on Friday to help House Democrats out of their thicket, he had to choose sides. He effectively chose the left.

“The way he is governing doesn’t reflect the skills I know he must have from his years as a legislator,” said Representative Stephanie Murphy of Florida, who had been one of the moderate Democrats demanding an immediate vote on a trillion-dollar infrastructure bill, convinced that was what the president wanted — or at least needed. She called Mr. Biden’s refusal to push harder for legislation he had embraced “disappointing and frustrating.”

Since the president claimed his party’s nomination last year, he has nurtured the fragile peace between his party’s fractious center and left by convincing both sides he is their ally. Unified first by their shared disdain for former President Donald J. Trump, and then by Mr. Biden’s adoption of an expansive platform, the two factions remained in harmony into this year. They responded to the pandemic by passing a sweeping stimulus package in the spring.

Now, the two factions are at loggerheads — one flexing its power but as yet empty-handed, the other feeling betrayed, both claiming they have the president on their side — and the outcome of their battle over Mr. Biden’s proposals could determine Democrats’ fate in the midterms and the success of his presidency.

That agenda consists of two sweeping domestic proposals resembling a modern Great Society: the “American Jobs Plan,” spending $1 trillion over 10 years on traditional infrastructure like roads, bridges and tunnels, and a bigger and more controversial “American Family Plan,” which the Democrats labeled “soft infrastructure” — including universal prekindergarten and community college, paid family and medical leave, child care and elder care support, and an expansion of Medicare.

But liberals feared that moderate Democrats would vote for the infrastructure bill, claim victory, and peel away from the social policy measure, so they refused to support the smaller infrastructure bill until the larger social-policy package had been passed.

Heading into last week, both the moderates and the progressives felt as if they had ironclad promises: the moderates, that a vote on infrastructure would happen before October; the liberals, that the bill, a crucial part of the president’s domestic agenda, was inextricably twinned with their higher priority, the more expansive measure addressing climate change and the frayed social safety net.

The liberals, however, used their larger numbers to blockade the infrastructure bill — and they said they did it for Mr. Biden. Representative Ilhan Omar, a left-wing Democrat from Minnesota and one of the leaders of the blockade, stood before reporters last week and said the blockaders were the ones “trying to make sure that the president has a success.”

“If we pass the infrastructure bill alone, we are not even accomplishing 10 percent of his agenda,” said Ms. Omar, the vote-counter in the Congressional Progressive Caucus, a bloc of Democrats nearly 100-strong, who showed their cohesion in last week’s showdown.

This enraged both the nine centrist lawmakers who had forced Speaker Nancy Pelosi to promise an infrastructure vote by the end of September, and a larger, quieter group of backbench House Democrats, many from swing districts, who were eager for the president to sign the public works bill and start trumpeting the funding for roads, bridges and broadband in their districts, at a time when Mr. Biden’s approval ratings were sagging.

“I don’t think it’s good for the Joe Biden administration, and I don’t think it’s good for Democrats,” said Representative Henry Cuellar, Democrat of Texas, suggesting that Mr. Biden was effectively siding with the left by not lobbying for passage of the infrastructure package.

In part, that anger stemmed from Mr. Biden’s go-along-to-get-along style.

“You got the feeling that Uncle Joe is for everybody, he likes everybody,” said Representative Emanuel Cleaver of Missouri.

Members of the moderate wing were explicit on Friday, blaming the liberals but also insisting that they themselves were Mr. Biden’s true torch bearers. Representative Josh Gottheimer, Democrat of New Jersey, denounced a “small faction on the far left” that he said had employed “Freedom Caucus tactics” to “destroy the president’s agenda” — a reference to the hard-right faction of the House that bedeviled Republican leaders when they were in charge.

“We were elected to achieve reasonable, common-sense solutions for the American people — not to obstruct from the far wings,” Mr. Gottheimer fumed in a statement released late on Friday night. “This far-left faction is willing to put the president’s entire agenda, including this historic bipartisan infrastructure package, at risk. They’ve put civility and bipartisan governing at risk.”

Given the range of the party’s suburbanites-to-socialists coalition, it may have been inevitable that Mr. Biden would eventually anger one wing of his party. What was striking, and perhaps equally surprising to both blocs, was that he alienated the moderates who had propelled him to the nomination while delighting the progressives who vociferously opposed him in the primary.

The president is not backing off the public works measure so treasured by the moderates.

But as he told House Democrats on Friday, he believes it’s “just reality” that the infrastructure legislation will not pass without assurances from the centrist Senators Joe Manchin III of West Virginia and Kyrsten Sinema of Arizona that they will support the more wide-ranging bill.

Though, as Mr. Biden conceded in the Capitol, that won’t happen until the more expansive bill is pared back to meet the two senators’ approval.

Representative Pramila Jayapal, Democrat of Washington and the head of the Congressional Progressive Caucus, said her bloc wants to move forward as does 96 percent of the Democratic Caucus. It is the 4 percent — especially Mr. Manchin and Ms. Sinema — that are the problem.

“We understand that we don’t always get to vote on things that we’d like 100 percent. It’s the other folks, the 4 percent that are blocking the president’s agenda, the Democratic agenda that we ran on, who need to recognize that.”

The decision to keep the fate of each bill tied to the other amounts to a gamble. Infrastructure was the bird in hand; it passed the Senate with bipartisan bonhomie in August with 69 votes.

Together, they are in trouble, which deepens with every new demand by Mr. Manchin and Ms. Sinema that pulls the social policy bill further from the liberals’ vision. If the two factions cannot agree on that measure, Mr. Biden might end up with nothing — a catastrophic blow for his party and its leader.

Delaying the infrastructure bill is not, as Representative Dean Phillips of Minnesota put it, “the linear and expeditious path to which most of us would aspire.”

Mr. Phillips, a well-liked moderate who captured a Republican district in 2018, expressed hope earlier in the week that Mr. Biden could serve as a bridge between the party’s factions. But he acknowledged on Friday that those chances had “been sadly diminished” in light of what he called the president’s “nothing-burger” of a visit to the Capitol.