# Harvard round 3---AFF Vs. MSU MM

## 1AC

### Adv----Inequality

#### Increased concentration of buyer power in labor markets drives inequality---only antitrust can address supply and demand

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A détente is especially desirable today in light of the severe stagnation in American wages. In the past thirty-five years, U.S. gross domestic product has all in all grown but the purchasing power of the average worker has barely changed.3 Labor’s share of national income declined precipitously in the 2000s, and in the five years after the Great Recession it was lower than at any point since World War II.4 Because most people get most of their income from labor, and because those who get most of their income from capital tend to be wealthy, this income shift has dramatic consequences for inequality.

Economists and policymakers have advanced numerous explanations for this troubling trend ranging from the decline of unions, to tighter monetary policy, to increased trade liberalization, and more.5 One explanation that has received attention in recent years is an apparent epidemic of market concentration and flagging competition.6 A growing body of evidence suggests that over time fewer and fewer firms have come to dominate sectors across the economy.7 One study found that from 1982 to 2012, the share of sales by the sectors’ top four firms increased in manufacturing, finance, services, utilities, retail trade, and wholesale trade.8 Average markups above cost—a manifestation of market power—rose from eighteen percent in 1980 to sixty-seven percent in 2014.9 This increase in concentration is due, in part, to a growing wave of mergers. By one count over 325,000 mergers have been announced since 1985.10 That year, around 2,000 mergers with a value of a little over $300 billion were announced.11 In 2018, 15,000 mergers occurred—valued at just under two trillion dollars.12

The ability of firms to charge prices for their products or services that exceed the competitive level harms workers in their role as consumers, and the reverberating inefficiencies have consequences for wages as well.13 Workers are harmed more directly, though by firms with buyer power in labor markets. Instead of enabling firms to charge high prices for the goods or services they sell, buyer power—also known as monopsony power—allows firms to push wages below the level workers would receive in competitive labor markets.

A recent study applied the Herfindahl-Hirschman Index (HHI), which is used to measure market concentration. The Department of Justice (DOJ) and the Federal Trade Commission (FTC) (“the agencies”) used HHI in merger review, and found that at least forty percent of job markets fell into the “highly concentrated” category, making them especially susceptible to anticompetitive behavior by employers.14 The hiring markets for the twenty-five percent most concentrated occupations in almost every commuting zone in the country have concentration levels nearly tripled the “highly concentrated” threshold.15 In commuting zones across middle America, the hiring market for nearly every occupation is highly concentrated.16 As discussed below, a concentrated labor market generally increases the buyer power of participants in that market. Recent research on labor supply elasticity, which is an indicator of vulnerability to employers’ market power, further challenges traditional assumptions of competitiveness in labor markets.17

Historically, antitrust enforcers have given far less attention to firms’ power as buyers than as sellers and have been particularly hesitant to check their power as buyers of labor. However, the tide may be beginning to change. Federal and state enforcers have begun to challenge anticompetitive labor contracts,18 and there is a small but growing body of precedent addressing increased buyer power in mergers.19 In 2016, the Obama Administration’s Council of Economic Advisors issued a report describing the problem of labor market power and encouraging greater attention to the issue by the antitrust enforcement agencies.20 Separately, then-Acting Assistant Attorney General Renata Hesse stated that antitrust enforcement efforts should not only be concerned with the welfare of consumers, but should “also benefit workers, whose wages won’t be driven down by dominant employers with the power to dictate terms of employment.”21 Nevertheless, to date, the agencies have never blocked a merger on the basis of harm to workers.

There are many reasons that may account for the dearth of enforcement, including misunderstandings of the relationship between labor and antitrust laws, the momentum of precedent focused on seller-side harms, and the resistance of some to increased antitrust enforcement as a general matter.22 In addition to these practical and ideological impediments, mistaken intuitions about the economics of buyer power create obstacles for enforcement. At first glance it would seem that if firms use their buyer power to lower their costs, downstream customers are ultimately benefitted. Therefore, the consumer welfare standard, which underpins modern antitrust enforcement, would seem to counsel against intervention contrary to buyer power. In most cases, though, this intuition is simply wrong.23 More competitive labor markets are not just good for workers; they are good for consumers too.

Clarifying the relevant interests at stake is crucial as policy reforms begin in earnest, and there is reason to believe that such reforms are on the horizon. Several politicians have recently advocated for greater antitrust scrutiny of labor markets. For example, in 2017 Senator Amy Klobuchar introduced a bill that would require the enforcement agencies to pay greater attention to buyer power in merger review.24 Senator Elizabeth Warren—who seeks more interventionist antitrust policy on many fronts25—and Senator Cory Booker—who in 2017 sent a letter to the DOJ and FTC citing concern with the failure of the agencies to address labor market power—have also taken up the cause.26

Labor market issues are also garnering increased attention from antitrust scholars.27 In an article published in 2018, C. Scott Hemphill and Nancy Rose argued for more interventionist merger policy directed at various forms of buyer market power.28 The same year, Suresh Naidu, Eric Posner and Glen Weyl published Antitrust Remedies for Labor Market Power, a sweeping analysis of the myriad options available to enforcers to promote more competitive labor markets.29 This legal analysis has been spurred by a growing body of empirical work on buyer power in labor markets.30 An array of scholars concluded that labor market power is a problem and one that antitrust institutions should do more to address.

This paper similarly argues that buyer power—and specifically buyer power in labor markets—deserves greater antitrust scrutiny and, to that end, develops a framework for systematically evaluating labor market power in merger analysis. The enthusiasm of some progressive politicians for more interventionist antitrust policy has drawn skepticism from many antitrust practitioners and scholars who worry that reforms will unmoor antitrust policy from its foundational principles and turn antitrust enforcement over to political whims.31 At least with respect to labor market power, however, economic theory and empirical evidence support increased enforcement without any reform of the basic legal framework and without deviating from substantial consensus about the proper role for antitrust in the economy.

#### Monopsony power depresses growth---results in underemployment and decreases labor productivity

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.

#### Antitrust is key---permissive guidelines enabled the rise in monopsonies---expanding the competition standard to labor markets is key to wage equality

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Of course, this is not the world in which we live. Even the corner grocery store knows it can raise its prices a little bit without losing all of its customers, which is what the standard competitive theory suggests. More and more, firms have demonstrated high and increasing levels of market power (Philippon 2019; Stiglitz 2019). At the same time, the bargaining power of workers has weakened.

It was never an equal match. An employer typically can find an alternative worker far more easily than a worker can find an alternative employer. This is especially so during slack periods in the labor market, or in places where there has been persistent unemployment. Leaving or losing a job is often greatly disruptive to workers and their families. There are mortgages to pay, children to feed, bills coming due. From the perspective of workers, jobs are not easily substitutable.

As the chapters in this volume make abundantly clear, this imbalance of market power has consequences. It enables firms to raise prices for goods and services—lowering the real incomes of workers. It enables firms to suppress wages of workers below what they would be in a competitive marketplace—contributing to the inequality crisis facing the country. This economic inequality gets translated into political inequality, especially in our money-driven politics, resulting in rules that evermore favor big corporations at the expense of workers. The growing political inequality, in turn, hampers economic performance, and ensures that most of the benefits of our anemic economic growth go to those at the very top (Stiglitz 2012).

In the middle of the 20th century, John K. Galbraith (1952) described an economy based on countervailing power—where labor institutions and government checked the power of large corporations and financial institutions. But policy choices over the past half century have upset this balance in ways that have weakened not only the workers, but also the economy and the country. This volume explores what has happened by concentrating on one understudied part of the problem: the labor market.

Explaining the Weakening of Workers’ Bargaining Power

Multiple factors have contributed to the weakening of workers’ bargaining position. This volume focuses specifically on the ways that employers have increased their market power over workers.

Employer Concentration

Permissive antitrust enforcement has promoted concentration across industries, reducing the number of employers—particularly those in rural areas (Stiglitz 2016).1 With few alternatives, workers must accept the low wages that large local employers offer. More precisely, limited competition by buyers—in this case, employers who buy labor services—gives rise to monopsony power.2 Any firm with monopsony power knows that if it hires more workers, it will drive up the wage. The marginal cost of hiring an additional worker is thus greater than the wage. The result is lower employment and lower wages than if there were a competitive labor market. The chapter by Marinescu in this volume forcefully documents the degree of monopsony in labor markets across the United States, especially in rural areas—areas where, not surprisingly, wages lag behind the rest of the country.

Collusion

Typically there is some, but limited, competition in the labor market, but it is competition that is insufficient to achieve anything approximating what would emerge in a truly competitive marketplace. But employers often do not like even this limited competition, because even some competition means that wages are higher than they would be with no competition. Thus, firms sometimes collude to not compete; and that collusion drives down wages. The incentives for firms to do this—if they can get away with it—are obvious: collusion has been a feature of capitalism from the start. As Adam Smith observed in The Wealth of Nations, “Masters are always and everywhere in a sort of tacit, but constant and uniform, combination, not to raise the wages of labour above their actual rate. . . . Masters, too, sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy” (Smith 1776, book 1, chap. 8).

Even then, Smith had observed an asymmetry not only in bargaining power, but also in capitalists’ response to workers’ attempts to redress the balance. When workers combine their forces, “the masters . . . never cease to call aloud for the assistance of the civil magistrate, and the rigorous execution of those laws which have been enacted with so much severity against the combination of servants, labourers, and journeymen” (Smith 1776, book 1, chap. 8). This stance, of course, was markedly different from capitalists’ own behavior—not only in labor markets, but elsewhere, too. As Smith put it in one of his most famous statements, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices” (book 1, chap. 10). This issue is central: to redress the natural imbalance of bargaining power, workers have to band together and engage in collective bargaining. Unions are critical. But it is precisely because unions have been somewhat successful in redressing the imbalance that employers have worked so hard to suppress them, as I comment later in this introduction.

Contracts

In multiple contexts, business enterprises have not been satisfied with the increased profits brought by greater market concentration and occasional collusion. Businesses have figured out how to sustain and amplify those profits by the clever design of contracts that are conceived to inhibit competition in the labor market. This is another method that enables them to drive down wages still further.3 The chapters by Evan Starr and Terri Gerstein (this volume) provide ample evidence of the harmful impact of the misuse of labor contracts, noting in particular that often-used ruses distort the true impact on workers. Noncompete agreements, by definition, reduce competition. There might be some justification for not allowing employees with knowledge of trade secrets to go to work for competitors, but that hardly applies to employees of fast-food chains.

Employers have also put into contracts provisions that weaken workers’ rights—and power—if a dispute arises. Inserting arbitration clauses into most contracts has moved dispute resolution out of the public domain— where it can be protected in the public interest, through transparency and basic standards—into private hands. This not only weakens workers’ position after a dispute arises, but also subtly changes the balance of power— making it easier for firms to take advantage of workers, knowing that their ability to get redress is so circumscribed. Making matters worse is a broader set of changes in legal frameworks that has hurt workers and consumers at the expense of corporations. For instance, the ability to bring class-action lawsuits, particularly in arbitration, has been greatly limited.

Asymmetric Information

The standard competitive theory assumes perfect information. Research over the past 50 years has explained how even a little information asymmetry can have a large impact. Employers have recognized this—they have figured out that such asymmetry can weaken workers’ position and lead to lower wages. They have responded by doing what they can to increase these asymmetries, sharing data with each other but insisting that workers keep their own compensation data confidential, and punishing employees who violate such confidentiality. The chapter by Harris in this volume describes the adverse effects of informational asymmetries, how firms have tried to increase these asymmetries, and what governments have done and can still do to promote transparency—and thus competition—in the labor market.

#### The plan solves inequality and wages

Eric Posner 21. Professor at the University of Chicago Law School. “You Deserve a Bigger Paycheck. Here’s How You Might Get It.” https://www.nytimes.com/2021/09/23/opinion/antitrust-workers-employers.html

The spectacle of the antitrust challenge to Big Tech has been riveting. But a far more consequential transformation in antitrust law has largely escaped notice — the movement to use antitrust law to address wage suppression and inequality caused by the power of employers in labor markets.

Economic theory says that when a pool of workers has only one potential employer, or a small number of potential employers, those workers will be paid below-market wages. Without the credible threat to quit and work for a competitor, workers lack leverage that could allow them to secure a raise and better conditions. This situation is sometimes called monopsony, and it is similar to monopoly in the market for goods. When buyers have no choice among sellers, a monopolist can charge high prices; when workers have little choice among employers, the employer can “charge” low wages.

Monopolies result in sluggish economic growth as well as high prices because in order to raise prices, monopolists make fewer goods or provide less in services. Companies that use their market power to suppress wages do something similar: They hire fewer workers, and this leads to unemployment and low growth as well. And because employers push down wages by reducing employment, they supply fewer goods, causing higher prices to consumers even though labor costs are reduced. A business might have monopoly power (over goods it sells), monopsony power (over workers), both or neither. If a small town has one newspaper, the newspaper has both a monopoly over local news and a monopsony over journalists. If the town has a single automobile manufacturing plant, that business will have a monopsony over the relevant skilled workers but not a monopoly over cars, which are sold into a national market where there are competitors.

Economists have understood these things since Adam Smith, who famously called wage-fixing by employers “the natural state of things, which nobody ever hears of.” But economists did not take this risk very seriously until recently, instead usually assuming that employers compete vigorously for workers. As a result, though the logic for using antitrust law to address market power is the same for monopsony as it is for monopoly, the legal community did not embrace the possibility that antitrust law should be brought to bear against employers, except in unusual cases.

But in recent years, thanks to the remarkable work of a diverse group of mostly young economists, this conventional wisdom was shattered. Exploiting vast data sets of employment and wages that had become available, they discovered that concentrated labor markets — that is, with one or few employers — are ubiquitous. In one paper, José Azar, Ioana Marinescu, Marshall Steinbaum and Bledi Taska found that more than 60 percent of labor markets exceeded levels of concentration that are regarded as presumptive antitrust problems by the Department of Justice. Numerous papers have made similar findings.

In highly concentrated labor markets, wages fall — as economic theory would predict. For example, Elena Prager and Matt Schmitt examined hospital mergers and found that when hospitals expand through mergers and gain significant market power, the wage growth of employees declines. Notably, this decline affected skilled health care professionals like nurses — but not administrators and unskilled staff members like cafeteria workers, who could easily find jobs outside hospitals.

The work on labor market concentration has been supplemented by growing evidence that employers collude with one another and engage in other anticompetitive practices. Evan Starr and his co-authors have found that agreements not to compete — where employers block workers from moving to competitors — are extremely common (as many as nearly 40 percent of workers have been subject to one) and are associated with lower wages. Alan B. Krueger and Orley Ashenfelter found that nearly 60 percent of major brand-name franchises — companies like McDonald’s and Jiffy Lube — subjected franchise employees to no-poaching agreements, which prevented them, even within the same franchise system, from quitting one employer to join another.

As a result, many workers, especially in rural areas and small towns — areas subject to high unemployment and economic stagnation — are squeezed by employers and underpaid. For example, when farm equipment manufacturers merge, they close dealerships, and so a mechanic who used to be able to get a good job as several dealers competed for his work must accept a less-appealing job from the single place in the area or drop out of the labor market.

Antitrust law applies to “restraint of trade,” and courts agree that when employers enter cartels to suppress wages, they violate the law. Yet until a few years ago, there were hardly any antitrust cases against employers. The major exception was a 2010 case against Big Tech after Google, Apple and other companies agreed not to solicit one another’s software engineers. This was potentially criminal behavior, but the Justice Department slapped them on the wrist. (A subsequent lawsuit secured more than $400 million in damages for the workers.)

But it was the academic research, not the tech case, that finally woke the antitrust community from its torpor. In the past year, the Justice Department has brought several criminal indictments against employers for antitrust violations (the first ever). The Federal Trade Commission is pondering a rule to restrict noncompetes. State attorneys general brought cases against franchises and other employers that used no-poaching agreements and noncompetes. Congress is holding hearings next week on antitrust and the American worker. Private litigators have joined in as discoveries of abusive wage practices have piled up. For example, “Big Chicken” companies face lawsuits not only for fixing the prices of chicken but also for fixing the wages of their workers.

If the academic research on labor markets is correct, then millions of Americans are paid thousands or even tens of thousands of dollars less than they should be paid. Labor monopsony affects people at all income levels, but it is a particular problem for lower-income workers and people living in stagnant rural and semirural parts of the country. In his recent executive order on antitrust, President Biden became the first president to commit government resources to ensure that the antitrust laws are used to help workers. Let’s hope he follows through.

#### Worker welfare is key

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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.

#### Growing inequality drives diversionary nationalism and makes war inevitable

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One of the oldest theories of nationalism is that states instill the nationalist myth in their citizens to divert their attention from great economic inequality and so forestall pervasive unrest. Because the very concept of nationalism obscures the extent of inequality and is a potent tool for delegitimizing calls for redistribution, it is a perfect diversion, and states should be expected to engage in more nationalist mythmaking when inequality increases. The evidence presented by this study supports this theory: across the countries and over time, where economic inequality is greater,t nationalist sentiments are substantially more widespread.

This result adds considerably to our understanding of nationalism. To date, many scholars have focused on the international environment as the principal source of threats that prompt states to generate nationalism; the importance of the domestic threat posed by economic inequality has been largely overlooked. However, at least in recent years, domestic inequality is a far more important stimulus for the generation of nationalist sentiments than the international context. Given that nuclear weapons—either their own or their allies’—rather than the mass army now serve as the primary defense of many countries against being overrun by their enemies, perhaps this is not surprising: nationalism-inspired mass mobilization is simply no longer as necessary for protection as it once was (see Mearsheimer 1990, 21; Posen 1993, 122–24).

Another important implication of the analyses presented above is that growing economic inequality may increase ethnic conflict. States may foment national pride to stem discontent with increasing inequality, but this pride can also lead to more hostility towards immigrants and minorities. Though pride in the nation is distinct from chauvinism and outgroup hostility, it is nevertheless closely related to these phenomena, and recent experimental research has shown that members of majority groups who express high levels of national pride can be nudged into intolerant and xenophobic responses quite easily (Li and Brewer 2004). This finding suggests that, by leading to the creation of more national pride, higher levels of inequality produce environments favorable to those who would inflame ethnic animosities.

Another and perhaps even more worrisome implication regards the likelihood of war. Nationalism is frequently suggested as a cause of war, and more national pride has been found to result in a much greater demand for national security even at the expense of civil liberties (Davis and Silver 2004, 36–37) as well as preferences for “a more militaristic foreign affairs posture and a more interventionist role in world politics” (Conover and Feldman 1987, 3). To the extent that these preferences influence policymaking, the growth in economic inequality over the last quarter century should be expected to lead to more aggressive foreign policies and more international conflict. If economic inequality prompts states to generate diversionary nationalism as the results presented above suggest, then rising inequality could make for a more dangerous world.

The results of this work also contribute to our still limited knowledge of the relationship between economic inequality and democratic politics. In particular, it helps explain the fact that, contrary to median-voter models of redistribution (e.g., Meltzer and Richard 1981), democracies with higher levels of inequality do not consistently respond with more redistribution (e.g., Bénabou 1996). Rather than allowing redistribution to be decided through the democratic process suggested by such models, this work suggests that states often respond to higher levels of inequality with more nationalism. Nationalism then works to divert attention from inequality, so many citizens neither realize the extent of inequality nor demand redistributive policies. By prompting states to promote nationalism, greater economic inequality removes the issue of redistribution from debate and therefore narrows the scope of democratic politics.

#### Labor market inequities create slow and unstable growth---COVID proves

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Why It Matters

It should be fairly obvious why these imperfections in the labor market matter so much: one of the most disturbing aspects of growth in the United States in recent decades is the growing inequality (see, e.g., Ostry, Berg, and Tsangarides 2019; Stiglitz 2012, 2019; and a rash of other books on the topic). Most of the gains in the economy have gone to the top 10 percent, the top 1 percent, and the top 0.1 percent. Some of the growing inequality has to do with increases in wage disparity—known as labor market polarization. But much of it has to do with the decreasing share of national income going to workers.8 This is where the decreasing market power of workers and the increasing market power of corporations comes in. This decreasing market power is more than just changes in technology or even globalization: it is also the broader changes in our economy, society, and politics—and especially the changes described earlier in this introduction and elsewhere in this volume—that have led to this growing imbalance of market power.

Research at the International Monetary Fund (Ostry, Berg, and Tsangarides 2014) and elsewhere (Ostry, Berg, and Tsangarides 2019) has highlighted the broader consequences of this growing inequality, even on economic performance. Economies that are more unequal are less stable and grow more slowly. In The Price of Inequality I explain the reasons that we pay such a high price for inequality.

The COVID-19 crisis has provided a dramatic illustration: inequalities in income translate into inequalities in health, especially in a society, like that of the United States, that relies on markets to dispense healthcare. The virus is not an equal opportunity virus—it appears to have the most devastating effects on people who have underlying health conditions. Our health inequalities are undoubtedly one of the reasons that the United States led the world in COVID-19 deaths.

Short-sighted employers did not provide sick leave and government did not require it—even when Congress seemed to recognize that workers without sick leave, who live paycheck to paycheck with virtually no money in the bank, would go to work even when they were sick. They had to work in order to survive, but that meant they helped to spread the disease. After lobbying by the large corporations, Congress decided that employers with more than 500 employees—almost half of the private labor force— were exempt from providing sick leave. With so few workers unionized, employees simply did not have the bargaining power to demand paid sick leave, personal protective equipment, or COVID-19 tests. Government should have required all these things, of course, and it had the power to do so under OSHA, but chose not to. Workers were desperate for the protection, but lacked the bargaining power to get it.

#### Monopsonies are key---inequality hollows out economic resilience---shocks are inevitable, only worker stability makes recovery possible

Kate Bahn 21. Washington Center for Equitable Growth Testimony before the Joint Economic Committee, "Kate Bahn testimony before the Joint Economic Committee on monopsony, workers, and corporate power". Equitable Growth. 7-14-2021. https://equitablegrowth.org/kate-bahn-testimony-before-the-joint-economic-committee-on-monopsony-workers-and-corporate-power/

Thank you Chair Beyer, Ranking Member Lee, and members of the Joint Economic Committee for inviting me to testify today. My name is Kate Bahn and I am the Director of Labor Market Policy and the interim Chief Economist at the Washington Center for Equitable Growth. We seek to advance evidence-backed ideas and policies that promote strong, stable and broad-based growth. Core to this mission is understanding the ways in which inequality has distorted, subverted and obstructed economic growth in recent decades.

Mounting evidence, which I will review today, demonstrates how the rising concentration of corporate power has increased economic inequality and made the U.S. economy less efficient. Reversing the trends that have led to a “second gilded age” is critical to encouraging a resilient economic recovery following the pandemic-induced economic crisis of 2020 and encouraging a healthy, competitive economy for the future.

Introduction

The United States boasts one of the wealthiest economies in the world, but decades of increasing income inequality, job polarization, and stagnant wages for most Americans has plagued our labor market and demonstrated that a rising tide does not lift all boats. Furthermore, economic evidence demonstrates how inequality results in an inefficient allocation of talent and resources while increasing corporate concentration that enriches the few while holding back the entire economy from its potential. Understanding the causes and consequences of the concentration of corporate power will guide policymaking in order to ensure that the economic recovery in the next phase of the pandemic will be broadly shared and ensure a more resilient economy.

“Monopsony” is a key economic concept to understand in this discussion. Monopsony is the labor market equivalent of the better-known phenomenon of “monopoly,” but instead of having only one producer of a good or service, there is effectively only one buyer of a good or service, such as only one employer hiring people’s labor in a company town. Like in monopoly, this phenomenon is not limited to when a firm is strictly the only buyer of labor. Today I will explain the circumstances and effects of employers having significant monopsony power over the market and over workers.

When employers have outsized power in employment relationships, they are able to set wages for their workers, rather than wages being determined by competitive market forces. Given this monopsony power, employers undercut workers. This means paying them less than the value they contribute to production. One recent survey of all the economic research on monopsony finds that, on average across studies, employers have the power to keep wages over one-third less than they would be in a perfectly competitive market. Put another way, in a theoretical competitive market, if an employer cut wages then all workers would quit. But in reality, these estimates are the equivalent of a firm cutting wages by 5 percent yet only losing 10 percent to 20 percent of their workers, thus growing their profits without significantly impacting their business.

It is not only important for workers to earn a fair share so they can support themselves and their families, but also critical to ensure that our economy rebuilds to be stronger and more resilient. Prior to the current public health crisis and resulting recession, earnings inequality had been growing since at least the 1980s while the labor share of national income has been declining in same period. This is cause for concern as recent evidence suggests that the labor share of income has a positive impact on GDP growth in the long-run.

The unprecedented economic shock caused by the coronavirus pandemic revealed how economic inequality leads to a fragile economy, where those with the least are hit the hardest, amplifying recessions since lower-income workers typically spend more of their income in the economy. But the crisis also demonstrated how economic policy targeted toward workers and families can provide a foundation for growth. This is because workers are the economy, and pushing back against the concentration corporate power by providing resources to workers is the foundation for strong, stable and broadly shared growth.

The Causes of Monopsony

The concept of monopsony was initially developed by the early 20th century economist Joan Robinson, who examined how lack of competition led to unfair and inefficient economic outcomes. The prototypical example of monopsony is a company town, where there is one very dominant employer and workers have no choice but to accept low wages since they have no outside options. This is the most extreme case, but it is important to note that firms have monopsony power in any circumstance where workers aren’t moving between jobs seamlessly in search of the highest wages they can get.

Firms can use monopsony power to lower workers’ wages any time workers:

* Have few potential employers
* Face job mobility constraints
* Can only gather imperfect information about employers and jobs
* Have divergent preferences for job attributes
* Lack the ability to bargain over those offers

I will go through each of these factors in turn and demonstrate how labor markets are unique compared to other markets in dealing with competitive forces.

While concentrated labor markets are not the norm, they are pervasive across the United States, especially within certain sectors or locations. When markets are very concentrated, employers can give workers smaller yearly raises or make working conditions worse, knowing that their workers have nowhere to go to find a better job with better pay. (See Figure 1.)

A study published in the journal Labour Economics by economists Jose Azar, Ioana Marinescu, and Marshall Steinbaum finds that 60 percent of U.S. local labor markets are highly concentrated as defined by U.S. antitrust authorities’ 2010 horizontal merger guidelines. This accounts for 20 percent of employment in the United States. Research by economists Gregor Schubert, Anna Stansbury, and Bledi Tsaka goes further by estimating workers’ outside options, or the likelihood a worker is able to change into a different occupation or industry. This study finds that even with a more expansive definition of job opportunities more than 10 percent of the U.S. workforce is in local labor markets where pay is being suppressed by employer concentration by at least 2 percent, and a significant proportion of these workers facing few outside options are facing pay suppression of 5 percent or more. As study co-author Anna Stansbury noted, “for a typical full-time workers making $50,000 a year, a 2 percent pay reduction is equivalent to losing $1,000 per year and a 5 percent pay reduction is equivalent to losing $2,500 per year.”

Certain sectors are now very concentrated, such as the healthcare industry. In a paper by the economists Elena Prager and Matt Schmitt, they find that hospital mergers led to negative wage growth among skilled workers such as nurses or pharmacy workers. Consolidation and outsized employer power, alongside other phenomenon such as the fissuring of the workplace, may have broader impacts on the structure of the U.S. labor market when it affects the overall structure of the labor market, including the hollowing out of middle class jobs that have historically been a pathway for upward mobility.

#### It’s the key internal link to growth---wage depression constrains worker supply, constrains output, and decreases investment

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Intuitively, it seems likely that less expensive inputs or lower wages would mean savings for firms to pass on to the consumers. But it turns out that inefficiencies and lack of competition in upstream markets have ripple effects that can harm everyone. In a competitive market, employers pay the market wage; when there are vacancies, a marginal increase in pay will follow so employers can fill those vacancies. Labor monopsonists have different incentives. If they raise pay to fill a marginal vacancy, they might also have to raise pay for their existing employees. The small increase in pay needed to attract one more worker could mean a massive swing in overall labor cost (Krueger 2017). So even if growth would generally be good for the company, they might not be able to add the workers they need specifically because of the special dynamics of controlling too much of the market.

This is an extreme example, but the same general principle applies when employers have the market power to depress wages below competitive levels. When the marginal cost of filling vacancies and growing one’s business to efficient levels diverges from the firm’s individual incentives for doing so, firms are constricted and leave jobs unfilled. Constraining inputs like labor leads to constrained outputs, and if firms are producing less of the products that consumers want, then prices for those products go up. After all, supply constraints and price increases are two sides of the same coin, economically. Fewer workers ultimately means fewer goods, and fewer goods means higher prices for the limited amount of goods available.4 Over time, this problem is magnified because fewer workers are incentivized to enter the field at all. The supply of qualified workers will go down, further reducing the firm’s ultimate output below efficient levels. In the end, everyone suffers except the firm with market power, which captures outsized profits.

Think: Why does America have a chronic undersupply of nurses or teachers, as well as stagnant wages (Council of Economic Advisers 2016)? In a competitive market, undersupply would lead to higher wages and increased entry to the field. If wages are inefficiently underpriced, we end up without enough nurses and ballooning healthcare costs. (Not to mention that, in the case of nurses, we end up with worse health outcomes for consumers!) This is part of the reason it is so problematic to interpret the consumer welfare standard to mean that short-term consumer prices are increased: presumed price effects could be irrelevant or misleading as to the overall effect on consumers.

Antitrust enforcement is supposed to be dynamic and to be able to keep up with the state of economic theory.5 But this cross-pollination is not in evidence. For example, even though inefficiency anywhere in the supply chain leads to worse outcomes for consumers, product market cases outnumber labor market cases by a factor of nearly 15, and in mergers by closer to 35. Moreover, no recent merger has been blocked on the basis of labor market effects alone (Levi 1948, 540, fn10). A quick foray into how antitrust law has developed follows.

#### Only antitrust is adaptive to market conditions

Howard Shelanski 21. Professor of Law, Georgetown University; Partner, Davis Polk & Wardwell LLP. “Antitrust and Deregulation.” *Yale Law Journal* (127): 1951-1953. <https://www.yalelawjournal.org/pdf/Shelanski_kcn6n4k3.pdf>.

A longstanding debate examines the comparative advantages of antitrust and regulation. The late Cornell economist Alfred Kahn, the architect of airline deregulation in the Carter Administration, wrote that “society’s choices are always between or among imperfect systems, but that, wherever it seems likely to be effective, even very imperfect competition is preferable to regulation.”117 Kahn does not address antitrust in that quotation, but it suggests that he would find antitrust law’s more targeted, case-by-case approach to governing competition to be preferable to regulation. Indeed, Kahn elsewhere wrote, while expressing his “belief in vigorous enforcement of the antitrust laws,” that “the antitrust laws are not just another form of regulation but an alternative to it—indeed, its very opposite.”118 Then-Judge Stephen Breyer has similarly stated that “antitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative.”119

The comparisons that Breyer and Kahn made were, in context, mostly between antitrust and rate regulation, where the agency was trying to protect consumers from monopoly pricing.120 But some of these criticisms, including “high cost; ineffectiveness and waste; procedural unfairness, complexity, and delay; unresponsiveness to democratic control; and the inherent unpredictability of the end result,” apply to most kinds of regulation.121 Regulation might well be worthwhile despite those potential drawbacks, but certain attributes—ex post and case-by-case enforcement, judicial oversight with the government bearing the burden of proof—make antitrust enforcement less vulnerable to those critiques.

Regulation can also be comparatively slow to adapt to new market conditions, and that delay can affect an entire regulated industry.122 Antitrust authorities also might fail to foresee relevant market changes, but their actions typically affect only one discrete case and they generally have flexibility, as conditions change, to modify relevant consent decrees and decline to pursue similar investigations or sanctions.123 It is harder for government agencies to make changes to established regulatory programs,124 making regulation more likely than antitrust to outlast the problems it was implemented to solve. Regulation’s delayed adaptation to changing conditions can be costly,125 especially as markets transition to more competitive structures.126 As Michael Boudin, a former DOJ antitrust official (and later federal judge) put it, “regulation almost always will be very difficult to dislodge, even if it proves mistaken. Almost any regulatory regime will develop a constituency, armed with congressmen and self-interested bureaucrats . . . [and] become[] the foundation on which private arrangements are constructed, arrangements that cannot easily be discarded.”127

#### Slow growth collapses the liberal order AND causes global hotspot escalation---extinction

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Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president.7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically proTrump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19

Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end. Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the preWorld War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war.

We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars.

In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

Multipolarity

We can define multipolarity as a wide distribution of power among multiple independent states. Exact equivalence of material power is not implied. What is required is the possession by several states of the capacity to coerce others to act in ways they would otherwise not, through kinetic or other means (economic sanctions, political manipulation, denial of access to essential resources, etc.). Such a distribution of power presents inherently graver challenges to peace and stability than do unipolar or bipolar power configurations,22 though of course none are safe or permanent. In brief, the greater the number of consequential actors, the greater the challenge of coordinating actions to avoid, manage, or de-escalate conflicts. Multipolarity also entails a greater potential for sudden changes in the balance of power, as one state may defect to another coalition or opt out, and as a result, the greater the degree of uncertainty experienced by all states, and the greater the plausibility of downside assumptions about the intentions and capabilities of one’s adversaries. This psychology, always present in international politics but particularly powerful in multipolarity, heightens the potential for escalation of minor conflicts, and of states launching preventive or preemptive wars. In multipolarity, states are always on edge, entertaining worst-case scenarios about actual and potential enemies, and acting on these fears—expanding their armies, introducing new weapon systems, altering doctrine to relax constraints on the use of force—in ways that reinforce the worst fears of others.

The risks inherent in multipolarity are heightened by the attendant weakening of global institutions. Even in a state-centric system, such institutions can facilitate communication and transparency, helping states to manage conflicts by reducing the potential for misperception and escalation toward war. But, as Waheguru Pal Singh Sidhu argues in his chapter on the United Nations, the influence of multilateral institutions as agent and actor is clearly in decline, a result of bottom-up populist/nationalist pressures experienced in many countries, as well as the coordination problems that increase in a system of multiple great powers. As conflict resolution institutions atrophy, great powers will find themselves in “security dilemmas”23 in which verification of a rival’s intentions is unavailable, and worst-case assumptions fill the gap created by uncertainty. And the supply of conflicts will expand as a result of growing nationalism and populism, which are premised on hostility, paranoia, and isolation, with governments seeking political legitimacy through external conflict, producing a siege mentality that deliberately cuts off communication with other states.

Finally, the transition from unipolarity (roughly 1989–2007) to multipolarity is unregulated and hazardous, as the existing superpower fears and resists challenges to its primacy from a rising power or powers, while the rising power entertains new ambitions as entitlements now within its reach. Such a “power transition” and its dangers were identified by Thucydides in explaining the Peloponnesian Wars,24 by Organski (the “rear-end collision”)25 during the Cold War, and recently repopularized and brought up to date by Graham Allison in predicting conflict between the US and China.26

A useful, and consequential illustration of the inherent challenge of conflict management during a power transition toward multipolarity, is the weakening of the arms control regime negotiated by the US and the Soviet Union during the Cold War. Despite the existential, global conflict between two nuclear armed superpowers embracing diametrically opposed world views and operating in economic isolation from each other, the two managed to avoid worst-case outcomes. They accomplished this in part by institutionalizing verifiable limits on testing and deployment of both strategic and intermediate-range nuclear missiles. Yet as diplomatically and technically challenging as these achievements were, the introduction of a third great power, China, into this twocountry calculus has proven to be a deal breaker. Unconstrained by these bilateral agreements, China has been free to build up its capability, and has taken full advantage in ramping up production and deployment of intermediate-range ground-launched cruise missiles, thus challenging the US ability to credibly guarantee the security of its allies in Asia, and greatly increasing the costs of maintaining its Asian regional hegemony. As a result, the Intermediate Nuclear Force treaty is effectively dead, and the New Start Treaty, covering strategic missiles, is due to expire next year, with no indication of any US–Russian consensus to extend it. The US has with logic indicated its interest in making these agreements trilateral; but China, with its growing power and ambition, has also logically rejected these overtures. Thus, all three great powers are entering a period of nuclear weapons competition unconstrained by the major Cold War arms control regimes. In a period of rapid advances in technology and worsening great power relations, the nuclear competition will be a defining characteristic of the next decade and beyond. This dynamic will also complicate nuclear nonproliferation efforts, as both the demand for nuclear weapons (a consequence of rising regional and global insecurity), and supply of nuclear materials and technology (a result of the weakening of the nonproliferation regime and deteriorating great power relations) will increase.

Will deterrence prevent war in a world of several nuclear weapons states, (the current nuclear powers plus South Korea, Iran, Saudi Arabia, Japan, Turkey), as it helped to do during the bipolar Cold War? Some neorealist observers view nuclear weapons proliferation as stabilizing, extending the balance of terror, and the imperative of restraint, to new nuclear weapons states with much to fight over (Saudi Arabia and Iran, for example).27 Others,28 examining issues of command and control of nuclear weapons deployment and use by newly acquiring states, asymmetries in doctrines, force structures, and capabilities between rivals, the perils of variable rates in transition to weapons deployment, problems of communication between states with deep mutual grievances, the heightened risk of transfer of such weapons to non-state actors, have grave doubts about the safety of a multipolar, nuclear-armed world.29 We can at least conclude that prudence dictates heightened efforts to slow the pace of proliferation, while realism requires that we face a proliferated future with eyes wide open.

The current distribution of power is not perfectly multipolar. The US still commands the world’s largest economy, and its military power is unrivaled by any state or combination of states. Its population is still growing, despite a recent decline in birth rates. It enjoys extraordinary geographic advantages over its rivals, who are distant and live in far worse neighborhoods. Its economy is less dependent on foreign markets or resources. Its political system has proven—up to now—to be resilient and adaptable. Its global alliance system greatly extends its capacity to defend itself and shape the world to its liking and is still intact, despite growing doubts about America’s reliability as a security guarantor. Based on these mostly material and historical criteria, continued American primacy would seem to be a good bet, if it chooses to use its power in this way.30

So why multipolarity? The clearest and most frequently cited evidence for a widening distribution of global power away from American unipolarity is the narrowing gap in GDP between the US and China. The IMF’s World Economic Outlook forecasts a $0.9 trillion increase in US GDP for 2019–2020, and a $1.3 trillion increase for China in the same period.31 Many who support the American primacy case argue that GDP is an imperfect measure of power, that Chinese GDP data is inflated, that its growth rates are in decline while Chinese debt is rapidly increasing, and that China does poorly on other factors that contribute to power—its low per capita GDP, its political succession challenges, its environmental crisis, its absence of any external alliance system. Yet GDP is a good place to start, as the single most useful measure and long-term predictor of power. It is from the overall economy that states extract and apply material power to leverage desired behavior from other states. It is true that robust future Chinese growth is not guaranteed, nor is its capacity to convert its wealth to power, which is a function of how well its political system works over time. But this is equally the case for the US, and considering recent political developments is not a given for either country.

As an alternative to measuring inputs—economic size, political legitimacy, technological innovation, population growth—in assessing relative power and the nature of global power distribution, we should consider outputs: what are states doing with their power? The input measures are useful, possibly predictive, but are usually deployed in the course of making a foreign policy argument, sometimes on behalf of a reassertion of American primacy, sometimes on behalf of retrenchment. As such, their objectivity (despite their generous deployment of “data”) is open to question. What is undeniable, to any clear-eyed observer, is a real decline in American influence in the world, and a rise in the influence of other powers, which predates the Trump administration but has accelerated into America’s free fall over the last four years. This has produced a de facto multipolarity, whether explainable in the various measures of power—actual and latent—or not. This decline results in part from policy mistakes: a reckless squandering of material power and legitimacy in Iraq, an overabundance of caution in Syria, and now pure impulsivity. But more fundamentally, it is a product of relative decline in American capacity—political and economic—to which American leadership is adjusting haphazardly, but in the direction of retrenchment/restraint. It is highly revealing that the last two American presidents, polar opposites in intellect, temperament and values, agreed on one fundamental point: the US is overextended, and needs to retrench. The fact that neither Obama nor Trump (up to this point in his presidency) believed they had the power at their disposal to do anything else, tells us far more about the future of American power and policy—and about the emerging shape of international relations—than the power measures and comparisons made by foreign policy advocates.

Observation of recent trends in US versus Russian relative influence prompts another question: do we understand the emerging characteristics of power? Rigorously measuring and comparing the wrong parameters will get us nowhere at best and mislead us into misguided policies at worst. How often have we heard, with puzzlement, that Putin punches far above his weight? Could it be that we misunderstand what constitutes “weight” in the contemporary and emerging world? Putin may be on a high wire, and bound to come crashing down; but the fact is that Russian influence, leveraging sophisticated communications/social media/influence operations, a strong military, an agile (Putin-dominated) decision process, and taking advantage of the egregious mistakes by the West, has been advancing for over a decade, shows no sign of slowing down, and has created additional opportunities for itself in the Middle East, Europe, Asia, Latin America, the Arctic. It has done this with an economy roughly the size of Italy’s. There are few signs of a domestic political challenge to Putin. His external opponents are in disarray, and Russia’s main adversary is politically disabled from confronting the problem. He has established Russia as the Middle East power broker. He has reached into the internal politics of his Western adversaries and influenced their leadership choices. He has invaded and absorbed the territory of neighboring states. His actions have produced deep divisions within NATO. Again, simple observation suggests multipolarity in fact, and a full explanation for this power shift awaiting future historians able to look with more objectivity at twenty-first-century elements of power.

When that history is written, surely it will emphasize the extraordinary polarization in American politics. Was multipolarity a case of others finding leverage in new sources of power, or the US underutilizing its own? The material measures suggest sufficient capacity for sustained American primacy, but with this latent capacity unavailable (as perceived, I believe correctly, by political leadership) by virtue of weakening institutions: two major parties in separate universes; a winnertake-all political mentality; deep polarization between the parties’ popular bases of support; divided government, with the Presidency and the Congress often in separate and antagonistic hands; diminishing trust in the permanent government, and in the knowledge it brings to important decisions, and deepening distrust between the intelligence community and policymakers; and, in Trump’s case, a chaotic policy process that lacks any strategic reference points, mis-communicates the Administration’s intentions, and has proven incapable of sustained, coherent diplomacy on behalf of any explicit and consistent set of policy goals.

Rising Nationalism/Populism/Authoritarianism

The evidence for these trends is clear. Freedom House, the go-to authority on the state of global democracy, just published its annual assessment for 2020, and recorded the fourteenth consecutive year of global democratic decline and advancing authoritarianism. This dramatic deterioration includes both a weakening in democratic practice within states still deemed on balance democratic, and a shift from weak democracies to authoritarianism in others. Commitment to democratic norms and practices—freedom of speech and of the press, independent judiciaries, protection of minority rights—is in decline. The decline is evident across the global system and encompasses all major powers, from India and China, to Europe, to the US. Right-wing populist parties have assumed power, or constitute a politically significant minority, in a lengthening list of democratic states, including both new (Hungary, Poland) and established (India, the US, the UK) democracies. Nationalism, frequently dismissed by liberal globalization advocates as a weak force when confronted by market democracies’ presumed inherent superiority, has experienced a resurgence in Russia, China, the Middle East, and at home. Given the breadth and depth of right-wing populism, the raw power that promotes it—mainly Russian and American—and the disarray of its liberal opponents, this factor will weigh heavily on the future.

The major factors contributing to right-wing populism and its global spread is the subject of much discussion.32 The most straightforward explanation is rising inequality and diminished intergenerational mobility, particularly in developed countries whose labor-intensive manufacturing has been hit hardest by the globalization of capital combined with the immobility of labor. Jobs, wages, economic security, a reasonable hope that one’s offspring has a shot at a better life than one’s own, the erosion of social capital within economically marginalized communities, government failure to provide a decent safety net and job retraining for those battered by globalization: all have contributed to a sense of desperation and raw anger in the hollowed-out communities of formerly prosperous industrial areas. The declining life expectancy numbers33 tell a story of immiseration: drug addition, suicide, poor health care, and gun violence. The political expression of such conditions of life should not be surprising. Simple, extremist “solutions” become irresistible. Sectarian, racial, regional divides are strengthened, and exclusive identities are sharpened. Political entrepreneurs offering to blow up the system blamed for such conditions become credible. Those who are perceived as having benefited from the corrupt system—long-standing institutions of government, foreign countries and populations, immigrants, minorities getting a “free ride,” elites—become targets of recrimination and violence. The simple solutions of course, don’t work, deepening the underlying crisis, but in the process politics is poisoned. If this sounds like the US, it should, but it also describes major European countries (the UK, France, Italy, Germany, Poland, Hungary, the Czech Republic), and could be an indication of things to come for non-Western democracies like India.

We have emphasized throughout this chapter the interaction of four structural forces in shaping the future, and this interaction is evident here as well. Is it merely coincidence that the period of democratic decline documented by Freedom House, coincides precisely with the global financial and economic crisis? Lower growth, increasing joblessness, wage stagnation, superimposed on longer-term widening of inequality and declining mobility, constitute a forbidding stress test for democratic systems, and many continue to fail. And if we are correct about secular stagnation, the stress will continue, and authoritarianism’s fourteen-year run will not be over for some time. The antidemocratic trend will gain additional impetus from the illiberal direction of globalization, with its growth suppressing protectionism, weaponization of global economic exchange, and weakening global economic institutions. Multipolarity also contributes, in several ways. The former hegemon and author of globalization’s liberal structure has lost its appetite, and arguably its capacity, for leadership, and indeed has become part of the problem, succumbing to and promoting the global right-wing populist surge. It is suffering an unprecedented decline in life expectancy, and recently a decline in the birth rate, signaling a degree of rot commonly associated with a collapsing Soviet Union. While American politics may once again cohere around its liberal values and interests, the time when American leadership had the self-confidence to shape the global system in its liberal image is gone. It may build coalitions of the like-minded to launch liberal projects, but there will be too much power outside these coalitions to permit liberal globalization of the sort imagined at the end of the Cold War. In multipolarity, the values around which global politics revolve will reflect the diversity of major powers, their interests, and the norms they embrace. Convergence of norms, practices, policies is out of the question. Global collective action, even in the face of global crises, will be a long shot. To expect anything else is fantasy

Unbrave New World and Future Challenges

At the outset of this chapter we described these structural forces as interacting to produce more conflict and diminished prosperity. We also predicted a world with shrinking collective capacity to address new challenges as they arise. What specifically will such a world look like? We address below three principal challenges to global problem solving over the next decade.

Interstate Conflict

In the world experienced by most readers of this volume, conflict is observed within weak states, sometimes promoted by regional competitors, by terrorist groups, or by great powers, acting through surrogates or by indirect means. Sometimes, as in Syria, this conflict spills over to contiguous states and contributes to regional instability, and challenges other regions to respond effectively, a challenge that Europe has not met. Much of this will continue, but the global significance of such local conflicts will be greatly magnified by increasing great power conflict, which will feed—rather than manage or resolve—local instabilities and will in turn be exacerbated by them. Great powers will jockey for advantage, support their local partners, escalate preemptively. Conflicts initially confined to failing states or unstable regions will be redefined by great powers as global in scope and significance.

This tendency of states to view local conflicts in the context of a zero-sum, global struggle for power is familiar to students of the Cold War, but now with the additional challenges to collective action, expanded uncertainty and worst-case thinking associated with the power transition to multipolarity. We can easily observe increased conflict in US–China relations, as we will in US–Russia relations as future US administrations try to make up for ground lost during the Trump presidency, especially in the Middle East. We can observe it among powerful states with mutual historical grievances, now with a weakening presence of the hegemonic security guarantor and having to consider the renationalization of their defense: Japan-South Korea, Germany-France. We can observe it among historical rivals operating in rapidly changing security landscapes: India-China. We can observe it within the Middle East, as internal rivalries are appropriated by regional powers in a contest for regional dominance. We can observe it clearly in Syria, where the regime’s violent suppression of Arab Spring resistance led to all-out civil war, attracted outside support to proxy forces by aspiring regional hegemons Saudi Arabia and Iran, enabled the rise of ISIS, and eventually to great power intervention, principally by Russia. In a world of effective great power collaboration or American primacy, the Syrian civil war might have been settled through power sharing or partition, or if not, contained within Syria. The collapse of Yugoslavia, occurring during a period of US “unipolarity” and managed effectively, demonstrates the possibilities. Instead, with the US retrenching, Middle East rivals unconstrained by great powers, and great power competition rising, the Syria civil war was fed by outside powers, then metastasized into the region, and—in the form of refugee flows—into Europe, fundamentally altering European politics. Libya may be at the early stages of this scenario.

This is not the end of the Syria story. Russia has established itself as a major player in Syria and the Middle East’s power broker, the indispensable country with leverage throughout the region. China is poised to reap the financial and power benefits of Syrian reconstruction. The US has just demonstrated, in its act of war against the Iranian regime, its willingness, without consultation, to put its allies’ security in further jeopardy, accentuating the risks of security ties with Washington and generating added opportunities for Russia and China. The purpose here is not to critique US policy, but to point out the dramatically shifting power balance in a critical region, toward multipolarity. The dangers of such a shift will become apparent as some future US president attempts to reassert US influence in the region and finds a crowded playing field.

Can a multipolar distribution of power among several states whose interests, values, and political practices are divergent, all experiencing bottom-up nationalist pressures, all seeking advantages in the oversupply of regional instability, be made to work? I think not. Will this more dangerous world descend into direct military confrontation between great powers, and could such confrontation lead to use of nuclear weapons? Here the question becomes, what will this more dangerous world actually look like; what instruments of coercion will be available to states as technology change accelerates; how will states employ these instruments; how will deterrence work (if at all) among several states with large but unequal levels of destructive capacity, weak command, and control, disparate— or opaque—strategies and simmering rivalries; can conflict management work in a world of weak institutions? The collapse of the Cold War era nuclear arms control regime, the threat to the Non-Proliferation Treaty represented by the demise of the JCPOA, and multiple indications of an accelerating nuclear arms race among the three principle powers, augurs badly. Given the structural forces at play, and without predicting the worst, we are indeed entering perilous times.

Global Poverty and Inequality

Despite the challenges of volatility and disruptive change inherent in globalization, the world under American liberal leadership has managed a dramatic reduction of extreme poverty. According to World Bank estimates, in 2015, 10 percent of the world’s population lived on less than $1.90 a day, down from nearly 36 percent in 1990.34 In fact, as of September 2018, half the world is now middle class or wealthier.35 The uneven success of the UN Millennium Development Goals (MDGs) exemplifies this achievement, and demonstrates what is possible when open markets are managed through strong global institutions, effective leadership and interstate collaboration. What this liberal hegemonic system did not achieve, however, was a fair distribution of the gains from globalization within states, and among those states that for various reasons were not full participants in this system.

This record of partial achievement leaves us with a full agenda for the next fifteen years, but without the hegemonic leadership, strong institutions, ascendant liberalism or robust global growth that enabled previous gains. There are powerful reasons to question the sustainability of these poverty reduction gains, leading to doubts about the realization of the Sustainable Development Goals, which have replaced the MDGs as global development targets.36 (See Jens Rudbeck’s chapter and Sidhu’s UN chapter for SDGs). Skeptics have pointed to slowing global growth, specifically in China, whose demand for imported commodities was a major factor in developing country growth and job creation; growing protectionism in developed country markets, fueled by bottom-up forces of nationalism, and from top-down by a weakened global trading regime and increased geopolitical rivalry; the effects of accelerating climate change on agriculture, migration and communal conflict in poor countries; and the growth burst among poor countries from the rapid transition to more efficient use of resources, a transition that is now slowing down.37

Perhaps the greatest concern in this scenario is a general deterioration in the developing country foreign investment climate. Foreign direct investment (FDI) has been a major contributor to growth, job creation, and poverty alleviation among poor countries. It has incentivized growthfriendly policies, reduced corruption, introduced technology and effective management practices, and linked poor countries to foreign markets through global supply chains.38 It has stimulated growth of indigenous manufacturing and service companies to supply new foreign investments.

It has been the major cause of economic convergence between rich and poor countries. From 2000 to 2009, developing economies’ growth rates were more than four percentage points higher than those of rich countries, pushing their share of global output from just over a third to nearly half.39 However, FDI flows into poor countries are imperiled by the structural forces discussed here. Political instability arising from slower growth and environmental stress will increase investors’ perception of higher risk, reinforcing their developed country bias. Protectionism among developed countries will threaten the global market access upon which manufacturing investment in developing countries is premised, causing firms to pare back their global supply chains. As companies retrench from direct investment in poor countries, the appeal to those countries of Chinese debt financed infrastructure projects, under the Belt-Road Initiative with little or no conditionality, but at the risk of “debt traps,” will increase.

Global Warming

The question posed at the beginning of this section is whether the international system, evolving toward multipolarity and rising nationalism, will find the collective political capital to confront challenges as they arise. Global warming is the mother of all challenges, and the weakness in the system’s capacity to respond is clear. With the two major political/economic powers and greenhouse gas emitters locked in deepening geopolitical conflict (and with one of them locked in climate change denial, possibly through 2024), the chances of significantly slowing global warming or even ameliorating its effects are very slim. We are reduced to the default option, nation-specific adaptation to climate change, which will impose rising human, political and economic costs on all, and will widen the gap between rich countries with adaptive capacity (of varying degrees), and the poor, who will suffer deteriorating economic, political, and social conditions. (For a contrary, optimistic view see Michael Shank’s chapter, which credits new actors—like cities—as playing a more constructive role in climate mitigation.) This would bring to a close liberal globalization’s greatest achievement; the raising of 1.1 billion people out of extreme poverty since 1990,40 with all its associated gains in quality of life (in the WHO Africa region, for example, life expectancy rose by 10.3 years between 2000 and 2016, driven mainly by improvements in child survival and expanded access to antiretrovirals for treatment of HIV).41

Several forces are at work here. The problem itself is graver—in magnitude and in rate of worsening—than predicted by climate scientists. The UN Intergovernmental Panel on Climate Change (IPCC), the major source of information on global warming, has consistently underpredicted the rate of climate deterioration. This holds true even for its “worst-case scenarios,” meaning that what was meant as a wake-up call has in fact reinforced complacency.42 (see Michael Shank’s chapter for further discussion of climate change). The IPCC, in its 2019 report, has tried to undo the damage by emphasizing the acceleration in the rate of warming and its effects, the only partially understood dynamic of climate change, and—given wide uncertainty—the possibility of unpleasant surprises yet to come. This strengthens the scientific case for urgency—to both severely limit greenhouse gas emissions, and to increase investment in ameliorating the effects.

Unfortunately, the crisis comes at a moment when the climate for collective action is ice cold. Geopolitical competition incentivizes states to out produce each other, regardless of the environmental effects. Multipolarity complicates collective action. Economic stagnation mandates job creation, making regulation politically toxic. Bottom-up nationalism/populism causes states to pursue “relative gains,” meaning that if the nation is seen as gaining in a no-holds-barred economic competition with others, the negative environmental effects can be tolerated. A post-Trump presidency would help, with the US rejoining the Paris Agreement, and lending its weight to tighter regulation, increased R and D, and stronger economic incentives to reduce carbon emissions. Keep in mind, however, that President Obama was fully behind such efforts, but in a deeply polarized America was unable to implement measures needed to fulfill the Paris obligations through legislation, and his executive orders to do this were swiftly overturned by Trump.

Conclusion

It may be tempting to hope that post-Trump, the US can regain its global leadership and exert its considerable power in a liberal direction, but with enough self-awareness of its relative decline to share responsibility with others. This was, I believe, the broad direction of the Obama strategy, evidenced by the JCPOA and the Trans-Pacific Partnership: liberal, collective solutions to global problems, as US dominance receded.

This would constitute an optimistic scenario, and it confronts two major problems: can US internal politics support it (can, for example, the country legislate controls on carbon, essential for the global credibility and durability of such commitments); and is the world ready to reengage with American leadership, given the damage to its reputation and the structural forces discussed in this chapter?

My educated guess is no, on both counts. The rot within is extensive, the concrete evidence clear in the economic inequality/immobility numbers, the life expectancy numbers, the deep political polarization, between the two major parties, between regions, between cities and rural areas. We are in fact a long way from fitness for global leadership, and the recognition of this by others will accelerate the decline of American influence. The rest of the world is well on its way toward adjusting to post-American hegemony, some by renationalizing their defense, or by cutting deals with adversaries, by building new alliances or by seizing new opportunities for influence in the vacuum left by American retrenchment. The evidence for this will accumulate. Observe the current and emerging Middle East, where all these post-hegemonic strategies are visible.

#### Decline overcomes traditional barriers to conflict

Jomo Kwame Sundaram & Vladimir Popov 19. Former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin “Economic Crisis Can Trigger World War.” <http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/>.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

More worryingly, in the current political landscape, prolonged economic crisis, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could easily spin out of control and ‘morph’ into military conflict, and worse, world war.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to unconventional monetary measures, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address underlying economic weaknesses, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the unprecedented liquidity central banks injected into economies has not been well allocated to stimulate resurgence of the real economy.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered likely. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to foment unrest, conflict, even war as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended. Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

They patently ignored Thucydides’ warning, in chronicling the Peloponnesian wars over two millennia before, when the rise of Athens threatened the established dominance of Sparta!

Anticipating and addressing such possibilities may well serve to help avoid otherwise imminent disasters by undertaking pre-emptive collective action, as difficult as that may be.

### Adv---FTC Credibility

#### FTC promised labor protection now---they’ll lose but the plan lets 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.

#### Khan is advocating for the plan but constrained by the existing body of antitrust law---only adopting a new standard solves

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In a September 22, 2021, memorandum to staff, Federal Trade Commission (FTC) Chair Lina Khan formally laid out her “Vision and Priorities for the FTC,” reaffirming her calls for broad antitrust enforcement organized around three key policy priorities: merger enforcement, dominant intermediaries and restrictive contract terms. The memo further describes her vision for the agency’s strategic approach and operational objectives to support those priorities. Like her prior calls for antitrust reform and aggressive enforcement,1 the policy priorities outlined by Chair Khan are somewhat abstract and do not specify concrete actions the agency will take to achieve them. However, a close review of these high-level priorities, approach and objectives reveals some practical obstacles to implementation, including limitations imposed by resource constraints and the existing body of antitrust law**.** Policy Priorities: Merger Enforcement, Dominant Intermediaries and Restrictive Contract Terms Chair Khan listed three policy priorities for the agency going forward. First, she identified a need to strengthen the agency’s merger enforcement work to combat what she described as rampant consolidation and the market dominance she believes that consolidation has enabled. In particular, she expressed a concern that markets “will only become more consolidated” absent FTC vigilance and assertive action. She noted that revising the merger guidelines will be important to achieve merger reform, characterizing prior iterations of the guidelines as a “somewhat narrow and outdated framework for assessing mergers.” She also highlighted a need to find ways to deter unlawful transactions, including “facially illegal deals.” Second, Ms. Khan indicated her desire to focus enforcement on “dominant intermediaries and extractive business models.” After suggesting that market power is an increasingly systemic problem in the economy, and that the FTC should devote resources to regulating the most significant actors — with “next-generation technologies, innovations, and nascent industries” requiring particular vigilance, she focused specifically on the market position of “gatekeeper” companies and “dominant middlemen.” Such entities, according to Chair Khan, have been able to “hike fees, dictate terms, and protect and extend their market power.” She also posited that the involvement of private equity and other investment vehicles may strip such businesses of productive capacity and harm consumers. In discussing the agency’s strategic approach to address these issues, Chair Khan noted her intention to “focus[] on structural incentives that enable unlawful conduct,” and to “look[] upstream at the firms that are enabling and profiting from this conduct.” Third, Ms. Khan discussed certain contract terms, including noncompete provisions, repair restrictions and exclusionary clauses, that she believes could constitute unfair methods of competition or unfair or deceptive trade practices. She also advocated for a “holistic” approach to identifying harms to account for effects on workers and independent businesses. Describing this holistic approach in broad terms, she indicated that the agency would focus on “power asymmetries and the unlawful practices those imbalances enable,” and the effects such conduct has, for example, on marginalized communities. In sharing her hopes to “further democratize the agency,” Chair Khan similarly expressed that the FTC’s work should help “shape[] the distribution of power and opportunity across our economy.” More generally, the memo identifies areas of investment for the agency to help achieve these priorities. This includes incorporating a greater range of analytical tools and skillsets into the agency’s work, and expanding the agency’s regional footprint to grow its ranks, including by hiring additional technologists, data analysts, financial analysts and experts from outside disciplines. Chair Khan also announced that she will name Holly Vedova and Samuel Levine, both career FTC staff (as opposed to political appointees), as the director of the Bureau of Competition and the director of the Bureau of Consumer Protection, respectively. Practical Limitations on Implementation of Chair Khan’s Policy Priorities Chair Khan describes the antitrust agenda outlined in her memorandum as “robust,” and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will face substantial practical challenges**.** Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the conduct in question is unlawful. Chair Khan’s memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms beyond the traditional focus on consumer welfare and price effects. However, courts have — and will likely continue to — rely on existing standards developed in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. Absent legislative change, then, a practical gap will persist between Chair Khan’s vision of refocused and more assertive antitrust enforcement, on the one hand, and the law that would apply to any FTC enforcement action, on the other.2

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

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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.

#### 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

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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.”

### Plan

#### The United States federal government should prohibit private sector business practices that violate an antitrust worker welfare standard.

### Solvency

#### 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.

#### 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.

#### Worker welfare can easily be assessed by the courts

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

Just as consumer welfare can be measured through economic factors like price, output, quality, and innovation, courts and economic experts can assess worker welfare through a set of analogous factors**:** wages and benefits, hours, working conditions,65 and training. One major tension between these two standards is that workers benefit from higher wages while consumers benefit from lower prices, but these factors capture similar characteristics of equilibria in both markets.66 Wages and hours are the labor-market analogs of price and quantity, and benefits can be considered along with wages as a type of compensation. Working conditions reflect heterogeneity within a single type of employment, just as quality reflects heterogeneity within a single type of product. And training reflects how labor markets can be dynamic, just as innovation reflects how product markets can be dynamic: that is, labor productivity can improve over time, just as firm productivity can improve over time. As in product-market analysis, courts and economic experts can assess how a contested activity (e.g., a merger) affects these factors and estimate the net effect on worker welfare**.** A worker welfare standard would be similar to a consumer welfare standard in that much of its application would fall on economic experts, whose work would be assessed and weighed by courts. Of course, some cases will be clearer and may be amenable to per se analysis, like an agreement between firms to fix wages. But, as in product markets, other cases will be subtle, and economics will have a role to play. Just as economic models are used to forecast the effects of certain market events on price and quantity, and aggregate those effects to estimate net effects on consumer welfare,67 economics will also be instrumental in forecasting the effects of market events on wages and hours, and aggregating those effects to estimate net effects on worker welfare. Antitrust analysis is highly technical in the status quo,68 and a worker welfare standard would not be any different in its reliance on economics. The main difference is that a worker welfare standard focuses attention on the interests of workers, who are often neglected despite their vulnerability to rent-extractive firm behavior, and recognizes that advancing the interests of workers may require more than advancing the interests of consumers**.**

## 2AC

### Adv----Inequality

### Adv---FTC Credibility

#### Big Tech isn’t innovative, it’s replacing innovative startups.

Alexis C. Madrigal 20. a contributing writer at The Atlantic, a co-founder of the COVID Tracking Project. "Silicon Valley Abandons the Culture That Made It the Envy of the World." Atlantic. 1-15-2020. https://www.theatlantic.com/technology/archive/2020/01/why-silicon-valley-and-big-tech-dont-innovate-anymore/604969/

But there’s a more troubling possibility. Maybe something has changed about the nature of innovation, at least in software.

The start-up tradition traces back to Hewlett-Packard, the original company-in-a-garage, in 1937, and later to the Fairchildren of the 1960s, a tangle of semiconductor companies that successively spun out of larger companies, one after the other. The go-your-own-way ethos infused later cohorts of entrepreneurs across the spectrum of technologies, all the way up through the 20th century. The best thing you could be in Silicon Valley was a founder, and the best thing a founder could do was supercede those who came before.

The newest generation of companies has not been able to fulfill the latter half of that prophecy. It’s more difficult to dislodge the elder companies, which have grown ever more entrenched and valuable. CB Insights, a research firm, recently added up the (likely inflated) value of all 439 “unicorns”—start-ups that investors have valued at more than $1 billion—in the world. It got roughly $1.3 trillion, or about one Apple’s worth of market value. Remember, that figure accounts for hardly tech companies, such as Juul; so-far dubious technologies, such as augmented-reality headsets from Magic Leap (valued at $6.3 billion on this list); and all the Chinese and Indian players.

For start-ups not on the unicorn list—and even for many that are—the chance that they will have an initial public offering and remain independent is small. That means the only way their investors will get their money out will be via an acquisition by one of the large companies. Google, Facebook, and their ilk “have become enormous by swallowing small companies, so the network is no longer the network but the octopus,” Margaret O’Mara, a historian at the University of Washington, told me.

This could alter the course of technological development, not just corporate structures. Quantitative research suggests that big companies do different kinds of R&D than their more modest counterparts. Instead of coming up with new products, they come up with process improvements. “If the nature of innovation is distorted toward selling to an incumbent, you’re going to get more feature-driven innovation rather than systemic disruption,” Federal Trade Commissioner Rohit Chopra told me. As an example, O’Mara told me a story famous in Silicon Valley about how Xerox had a personal computer in its hands in the 1970s (thanks, Alan Kay!) but declined to commercialize it. “You get to a certain degree of bigness, and you’re making so much darn money on copy machines, why on Earth would you work on a PC and bring it to market?” O’Mara said. Apple, a start-up at the time, would famously popularize PCs instead.

Even though small firms have been responsible for many of the Valley’s most successful products and services, large firms have deep roots there too. As O’Mara points out in her book The Code, Lockheed Missiles and Space (later a unit of Lockheed Martin) was the largest Silicon Valley employer from the 1950s into the 1980s. The government supported the development of computing and networking in myriad ways. During the Cold War, the U.S. government pushed research dollars through a select few major research universities such as Stanford. Local companies directly benefited from this largesse, in terms of both the funding and concentration of talent around Palo Alto. It wasn’t until the 1970s that the military-industrial beginnings of the technology industry gave way to a different understanding of how to make change in the world.

“The story the Valley told about itself has been very much a small-is-beautiful story since the 1970s,” O’Mara told me. “It has a politics—this Vietnam-era rejection of the military-industrial complex, rejection of the mainframe, Big Business, Big Government, big universities.”

This led people to take risks and launch new projects and firms. Entrepreneurs from all over the world migrated to a place where people understood why they wanted to start companies. And the idea even embedded itself right near the heart of the Valley, at Google. The company’s slogan, “Don’t be evil”, had a particular meaning when it was adopted around the millennium. In the classic Valley mind-set, “evil is bigness of all kinds,” O’Mara said.

Now, of course, “the mainframe” has been replaced by the cloud, and companies such as Facebook have openly called for government regulation around key platform issues. The biggest companies moved closer and closer to Washington, D.C., during the Obama era, and despite some teeth-gnashing, stayed close after Donald Trump’s election.

#### Increasing worker welfare strengthens innovation.

Yu Wei et al. 20. School of Finance, Yunnan University of Finance and Economics, Kunming, China. \*Haoxi Nan School of Economics and Management, Southwest Jiaotong University, Chengdu, China. \*Guiwu Wei School of Business, Sichuan Normal University, Chengdu, China. "The impact of employee welfare on innovation performance: Evidence from China's manufacturing corporations." Science Direct. October 2020. https://www.sciencedirect.com/science/article/pii/S0925527320301389

As innovation requires the active participation of every employee in the corporation (Dougherty, 1992; Van de Ven, 1986), it is important to increase employee participation in innovation activities. Implementing a series of employee-friendly policies, such as improving employee compensation (Mas, 2006), providing employees with a more comfortable working environment (Faleye and Trahan, 2011), and offering work-family benefits (Meyer et al., 2001), can alleviate employees’ worries, improve their recognition by the corporation, reduce the employee turnover rate and help retain outstanding talents. Therefore, employee welfare may enhance corporate innovation by helping the corporation to retain outstanding talents.

Taylor (1911) points out that if employees are regarded as unskilled labor without special status, then employee welfare is a wasteful expenditure. However, with the development of technology and the corporations, the role of employees has also undergone tremendous changes. Highly competitive business environment and human capital-intensive corporation form force corporations to pay more attention to innovation capability (Edmans, 2011). At the same time, technological progress has also increased the demand for highly motivated and well-educated labors to meet the requirements of new technologies. Therefore, it is becoming more and more important to rely on a series of employee welfare policies, such as improving the working environment and enhancing employee treatment, to retain employees and stimulate their enthusiasm and creativity. As we all know, innovation is characterized by long-term and high risks (Holmstrom, 1989), which requires the long-term and stable participation of talented employees. The corporations can increase employee loyalty and productivity by improving employee benefits, such as generous salary, comfortable and safe working environment, good employee care and protection, and attractive retirement protection (Bloom et al., 2011), so as to retain talents for the corporation and attract excellent employees to join (Chen et al., 2016a). At the same time, employees who have solved their worries can increase their risk tolerance and be more willing to improve efficiency (Tian and Wang, 2011; Chen et al., 2016b). Therefore, employee welfare may enhance corporate innovation by improving the inventor efficiency.

Innovation requires not only the long-term investment of corporates and the active participation of employees, but also a good external ecological environment. The attention and active publicity of news media will also have a significant impact on the innovation investment of corporates. Corporates with good employee welfare often enjoy good social reputation, which can attract more and better talents to join in and promote innovation efficiency. At the same time, they can also get more positive reports from the media (Ben-Nasr and Ghouma, 2018), creating a relaxed and harmonious external environment for corporates, leading to the improvement of corporates innovation level.

### T---Per se

#### C/i---Prohibition includes per se and rule of reason.

Anu Bradford and Adam S. Chilton 18. Anu Bradford Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton. Assistant Professor of Law and Walter Mander Research Scholar.

Before discussing our data and the coding of the CLI, it is important to recognize that there are limitations to any index that attempts to quantify competition regulation. This is because it is difficult to produce a single metric that tells the comprehensive story of country’s competition regime. For example, if a specific type of conduct is prohibited, is it prohibited always (per se) or sometimes (rule of reason)? This seems like a relevant distinction to code, but it turns out to be difficult to capture systematically in many jurisdictions. For instance, Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) seems to regulate anticompetitive agreements under the rule of reason standard in the European Union, but, in practice, cartels are per se prohibited. This highlights the challenge of coding even just the law in books, let alone accounting for all the nuances of a country’s competition policies.20

#### Anticompetitive business practices include rule of reason.

Charlotte Wezi Mesikano-Malonda 16. Executive director. "Global Competition Review". No Publication. 7-22-2016. https://globalcompetitionreview.com/review/the-european-middle-eastern-and-african-antitrust-review/the-european-middle-eastern-and-african-antitrust-review-2017/article/malawi-competition-and-fair-trading-commission

Anticompetitive business practices are generally defined as the category of agreements, decisions and concerted practices that result in the prevention, restriction or distortion of either actual or potential competition. Abuse of dominance and market power is an example of anticompetitive business practices and hence falls within the purview of the CFTA.3 Anticompetitive business practices are either illegal per se or illegal by rule of reason. A conduct is illegal per se if, regardless of its objective and effect or any justifications of the conduct, there is a presumption of harm on competition.

#### No bright line---rule of reason is a prohibition---they function synonymously.

Light 19, Sarah E. Light Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania., The Law of the Corporation as Environmental Law, 71 Stan. L. Rev. 137, 2019, Lexis/Nexis

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive. As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition. The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199 Associations of firms have adopted numerous mechanisms of private environmental governance to address the management of common pool resources like fisheries, forests, and the global climate. 200 Examples include the Sustainable Apparel Coalition's Higg Index 201 and the American Chemistry Council's Responsible Care program. 202 But private industry standards raise special antitrust concerns. An agreement among competitors with respect to product or process specifications may exclude competitors who fail to meet such standards, raising the specter that such industry collaborations really constitute output limitations or efforts to limit competition. 203 While the U.S. Supreme Court has scrutinized private standard-setting associations carefully, 204 it has noted that if associations "promulgate … standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition … , those private standards can have significant procompetitive advantages." 205 In the absence of price fixing or a boycott, a rule of reason analysis generally applies to product standard setting by private associations. 206 The uncertain outcome [\*179] inherent in the application of antitrust law in this context could therefore serve as a potential disincentive to the adoption of private industry standards. 207 The challenge of course is that some form of explicit sanctions on noncompliant industry members may be necessary for private industry standards to be effective. In the context of private reputational mechanisms like the New York Diamond Dealers Club, 208 Barak Richman has pointed out that the Club's use of reputational sanctions and voluntary refusals to deal with actors who flout industry norms, while welfare enhancing, could nonetheless amount to violations of antitrust law. 209 This echoes the concern raised by Andrew King and Michael Lenox in their extensive empirical analysis of the Responsible Care program created by the Chemical Manufacturers Association (now the American Chemistry Council). 210 King and Lenox concluded that the absence of explicit sanctions on members who failed to meet the standards set by the program left the program vulnerable to "opportunism." 211 While they suggested that industry associations could look to third parties to enforce the rules, 212 an alternative way to facilitate the long-term environmental benefits of stronger sanctions would be to interpret antitrust law in conformity with the environmental priority principle presented below. 213 [\*180] In some instances, the conflict between the values of promoting competition and conserving environmental resources can be stark. 214 Jonathan Adler, for example, has identified this conflict in the context of fisheries - a tragedy of the commons situation in which some form of collective action is required to avoid overfishing. 215 He cites as an example Manaka v. Monterey Sardine Industries, Inc., in which a fisherman was excluded from a local fishing cooperative. 216 The fisherman sued the cooperative under the Sherman Act, and the court found an antitrust violation in his exclusion. 217 While the fishing cooperative's policies were no doubt exclusionary, Adler contends that they also promoted conservation by restricting catch. 218 The fishery collapsed by the 1950s, a collapse Adler hypothesizes might have been "inevitable" but that perhaps might not have occurred in the absence of the antitrust suit. 219 While a court performing a rule of reason analysis must consider whether a restraint on trade suppresses or destroys competition, Adler points out that courts may also "consider offsetting efficiencies from otherwise anticompetitive arrangements." 220 It is not clear, however, that the courts have consistently taken these factors into account. 221 Among other potential remedies, Adler argues that to resolve this tension between antitrust law, on the one hand, and private collective action to conserve environmental resources, on the other, courts should more actively consider the "ancillary conservation benefits of otherwise anticompetitive conduct." 222 Recognizing the long-term health of a fishery would be consistent with antitrust law's purpose of ensuring viable markets exist in the future, and consistent with the environmental priority principle introduced below. 223

#### Grammar---prohibition modifies anticompetitive practices---that requires effect.

Don R. Willett 15. Justice in the Supreme Court of Texas. “In RE Memorial Hermann Hospital System; Memorial Hermann Physician Network; Michael Macris, m.d.; Michael Macris, m.d., p.a.; and Keith Alexander, Relators”. http://www.txcourts.gov/media/981611/140171.pdf

The trial court found that the documents at issue “are relevant to an anticompetitive action.” Before we can resolve the parties’ dispute regarding the correctness of this finding, we must first determine the meaning of the statutory phrase “relevant to an anticompetitive action.”35 Statutory construction is a question of law we review de novo.36 Our objective is to determine and give effect to the Legislature’s intent, 37 and “the truest manifestation of what lawmakers intended is what they enacted.”

38 Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation.39 “[C]ourts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone.”40 “We presume that the Legislature chooses a statute’s language with care,” and we will not ignore the statute’s use of a term that carries a “particular meaning.”41 “Privileges are not favored in the law and are strictly construed.”42

Neither section 160.007 nor any other peer review committee privilege that incorporates the phrase “anticompetitive action” defines the term.43 Black’s Law Dictionary defines “anticompetitive” as “[h]aving a tendency to reduce or eliminate competition” in contrast to the term procompetitive.44 Procompetitive is in turn defined as “[i]ncreasing, encouraging, or preserving competition.”45 Competition itself is defined as “[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties.”46 The dictionary also notes that the term anticompetitive “describes the type of conduct or circumstances generally targeted by antitrust laws,”47 although the statement is “not purely definitional.”48

This framework accurately maps out the meaning afforded the term “anticompetitive” in court decisions in the antitrust context. As noted by the Supreme Court of the United States, to restrain competition is the “very essence” of every agreement and regulation of trade.49 Therefore, regarding restraints of trade, “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”50 As such, an “abbreviated or ‘quick-look’ analysis” is appropriate only when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”51 The goal of judicial scrutiny of restraints on trade is to “distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”52

Judicial scrutiny in other areas of antitrust law confirms that the antitrust laws were designed as a “consumer welfare prescription” that requires consideration of both anticompetitive and procompetitive effects.53 Thus, proof that a firm’s dominant position is the “consequence of a superior product, business acumen, or historic accident”—circumstances that either benefit the consumer or are outside the firm’s control—will defeat a claim of monopoly.54 Claims of attempted monopolization require the further showing that the defendant “pose[s] a danger of monopolization,” because judging unilateral conduct absent actual potential to achieve a monopoly would “risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.”55 Similarly, in scrutinizing a proposed merger, the “economic efficiencies produced by the merger must be weighed against anticompetitive consequences in the final determination whether the net effect on competition is substantially adverse.”56 Ultimately, the “use of the word ‘competition’ [is] a shorthand for the invocation of the benefits of a competitive market,” 57 and antitrust law acknowledges that “it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects.”58

We have no trouble holding that the Legislature intended the term “anticompetitive” in section 160.007 to denote an overall substantially adverse effect on competition, rather than the existence of some negative effects. However, we reject Memorial Hermann’s characterization of the term “anticompetitive action” as synonymous with “antitrust action.” Although we agree that the term anticompetitive “describes the type of conduct or circumstances generally targeted by antitrust laws,”59 the term itself is broader because the law of antitrust does not encompass all conduct that could substantially lessen competition in a particular market. For example, certain conduct—regardless of its overall impact on competition—is immune from antitrust law under the state action doctrine,60 the exemption for political activity,61 or the exemptions, both implicit and explicit, for labor unions.62 The terms anticompetitive and antitrust are therefore not inherently coextensive, and we cannot ignore the Legislature’s use of the broader term, particularly in juxtaposition to section 160.007(b)’s specificity regarding its application to civil rights proceedings.63

#### “By” means we only have to expand the scope.

Crown Academy of English 18, (Andrew, Fully qualified English teacher with TESOL (Teaching English to Speakers of Other Languages) qualification. “Preposition BY – Meaning and use”, https://www.crownacademyenglish.com/preposition-by-meaning-use/)

by + ING form of verb

This describes how to do something. It describes the method for achieving a a particular result.

### CP---Con Con

#### FTC---Congressional direction is key---all FTC action is criticized as arbitrary without it.

Washington Post 21. Editorial Board. "Don’t want the FTC to act on antitrust? Tell Congress to get moving". Washington Post. 7-11-2021. https://www.washingtonpost.com/opinions/2021/07/11/dont-want-ftc-act-antitrust-tell-congress-get-moving/

The Federal Trade Commission was frequently criticized in recent years for doing too little to rein in technology and other companies as they gallop across the economy unconcerned about any rivals they trample along the way. Now it appears that for the next few years at least, the FTC will be criticized for doing too much.

Newly minted agency chair Lina Khan has wasted no time in acting on the principle she articulated in her pre-appointment career as an academic: Modern competition law as interpreted by the courts is inadequate to address modern markets. The most controversial of the reconfigured FTC’s early moves was a 3-to-2 vote this month along party lines to rescind a 2015 policy statement limiting the commission’s ability to go after unfair conduct not in clear violation of existing antitrust legislation. The change itself is minor — but it could signal a major shift to come.

There was never a statutory limit on the FTC’s ability to pursue these types of cases. By repealing its self-constraining guidance, however, the agency is making it clear that we’re about to see a lot more of them. The idea is that the past decades’ precedent on the Sherman Antitrust Act has made it nigh impossible for enforcers to win cases without proving harm to consumers, usually through price increases — a poor fit for the free services that have come to dominate our daily lives. The surest way, then, for the FTC to strike at anticompetitive conduct by monopolistic firms is to rely on the authority Congress granted the agency at its inception to go beyond what the law lays out.

Ms. Khan and her Democratic co-commissioners have a point. These companies benefit from network effects that make their services more valuable the more people use them; users benefit, too. Trying to reduce these firms’ power by breaking them up is a dubious proposition, but trying to ensure they don’t abuse that power is essential. Gatekeeper businesses with the greatest ability to box out any competitors that do emerge, or to leverage control in one market to gain control in another, require close scrutiny. Some behavior should indeed be off-limits — from predatory pricing to some forms of self-preferencing.

The problem is, precisely what behavior the FTC considers off-limits remains unclear. This leaves businesses liable to be punished for conduct they didn’t know was punishable, and it also leaves the FTC able to institute standards that are unreasonably restrictive. President Biden, in a sweeping executive order signed on Friday intended to promote competition across the U.S. economy, directs the FTC to establish rules clarifying exactly this question. That’s good, and those rules should take care not to stifle even the biggest businesses’ legitimate right to compete. Even better than the FTC mapping out verboten conduct that federal law allows, however, would be for federal law to stop allowing it.

Bipartisan antitrust bills remain in legislative limbo in the House of Representatives. Anyone concerned that an overzealous group of unelected officials are wrongly taking matters into their hands should also want Congress to stop sitting on its own.

#### Amendments that overrule the courts destroy SOP

Joan Schaffner 5, Associate Professor of Law, George Washington University Law School. 54 Am. U.L. Rev. 1487. Lexis)

[\*1525] Through amendment, the legislative branch has the power to enact laws that establish societal standards only so long as the laws enacted do not violate the constitutional rights of individuals. 222 The legislature is not empowered to draft laws to enshrine illegitimate prejudices of the majority. Allowing the legislature, with the endorsement of the executive, to amend the Constitution to expressly overrule a decision of the judiciary, which acted consistently with democratic principles by protecting the rights of a minority of the people, destroys the delicate balance of power among the branches.

#### nuclear war

Ray Forrester 89, Professor, Hastings College of the Law, University of California. 57 Geo. Wash. L. Rev. 1636. Lexis)

On the basis of this report, the startling fact is that one [man] [person] alone has the ability to start a nuclear war.

A basic theory--if not the basic theory of our Constitution--is that concentration of power in any one person, or one group, is dangerous to mankind. The Constitution, therefore, contains a strong system of checks and balances, starting with the separation of powers between the President, Congress, and the Supreme Court. The message is that no one of them is safe with unchecked power. Yet, in what is probably the most dangerous governmental power ever possessed, we find the potential for world destruction lodged in the discretion of one person.

#### Perm—do the plan when the counterplan’s amendment is ratified—it’ll take a few years, which means delay solves the net benefit

**Chism 5** [Chism, National Archives education specialist, 2005, The constitutional amendment process.(teaching content). Kahlil Social Education 69.7 (Nov-Dec 2005): p373(9)]

Even though the steps can be described briefly, actual ratification can take much longer. Some amendments, such as the 27th (Congressional pay increases), took many years to complete the ratification process. It was proposed by James Madison in 1789, but not ratified until 203 years later. This amendment required that any change in the salary of members of Congress only take effect after the next general election (so lawmakers were not voting to increase their own salaries). Congress ratified other amendments in short order, such as the 18th (Prohibition), which took little more than a year. The length of time depends upon the gravity of the issue the amendment is intended to address, the intensity of public sentiment concerning the issue, and whether or not a time limit for ratification was written into the amendment during the proposal stage.

### CP---FTC rulemaking

#### The FTC lacks any ability to issue sanctions for non-compliance, and courts gut the counterplan.

Alden Abbott & Andrew Mercado 21. \*\*Senior research fellow at the Mercatus Center at George Mason University. \*\*Research assistant at the Mercatus Center at George Mason University. September 28 2021. https://www.mercatus.org/publications/antitrust-and-competition/ftc-rulemaking-noncompete-agreements

Two years after National Petroleum Refiners Ass’n was decided, Congress granted the FTC specific consumer-protection rulemaking authority through section 202 of the M-M Warranty Act. This act added section 18 to the Federal Trade Commission Act, imposing strict, adjudicatory hearings and other formal procedures on the FTC. Though the section 18 process is stricter than the informal process under section 6(g), the FTC may seek civil penalties for violation of M-M rules. This remedy is notably absent from section 6(g) rulemaking authority.

There are, however, concerns over the statutory basis for section 6(g) rulemaking. According to the Antitrust Law Section of the American Bar Association,

[T]he Commission’s [section 6(g)] rulemaking authority is buried within an enumerated list of investigative powers, such as the power to require reports from corporations and partnerships, for example. Furthermore, the [Federal Trade Commission] Act fails to provide any sanctions for violating any rule adopted pursuant to Section 6(g). These two features strongly suggest that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act.

In other words, the structure of the Federal Trade Commission Act indicates that section 6(g) rulemaking is best understood as a tool to aid the FTC’s investigative and procedural authority, not standalone substantive rulemaking authority in and of itself. Though it is true that National Petroleum Refiners Ass'n defended the substantive rulemaking interpretation, the decision came at a time of substantial deference to agency activism from the courts, and such an interpretation may no longer hold.

Evidence pointing in this direction comes from a recent Supreme Court decision in AMG Capital Management, where the court unanimously held that the FTC’s authority to seek a permanent injunction under section 13(b) of the Federal Trade Commission Act does not authorize the FTC to seek monetary damages. The FTC argued that the historical understanding of a permanent injunction includes monetary relief, but the Supreme Court rejected such a reading on the basis of the statutory language of section 13(b). The court noted that the permanent injunction language was “buried” within a provision that discusses injunctive, not monetary, relief. Section 6(g) rulemaking authority is similarly buried in a section discussing other topics.

Moreover, as previously noted, just two years after National Petroleum Refiners Ass’n, Congress added section 18 to the Federal Trade Commission Act, enumerating detailed, substantive rulemaking provisions, and leaving section 6(g) unchanged. This preservation of section 6(g), in the face of significant additions to the FTC’s substantive rulemaking authority under section 18, leaves informal rulemaking on shaky ground. Informal rulemaking under section 6(g) is anything but settled law, and the FTC may face significant legal challenges by choosing to use this authority.

Furthermore, even if there are no challenges to the FTC’s authority to undertake wholesale rulemaking under section 6(g), there still may be challenges to any specific rule that the FTC proposes. First, “unfair methods of competition” rulemaking may prove particularly difficult to survive legal scrutiny because of the nondelegation doctrine. Under that doctrine, if a court determines that the Federal Trade Commission Act’s general—and arguably vague—reference to “unfair methods of competition” does not include an “intelligible principle” guiding the FTC’s discretion in making competition rules, then that court may not uphold competition rulemaking.

Second, a court may strike down an individual proposed rule as “arbitrary and capricious,” should the court find that the FTC did not sufficiently consider procompetitive justifications for the condemned practice.

#### Can’t adapt to market dynamics---that’s key to preserve worker welfare.

Alden Abbott 21. Senior Research Fellow at the Mercatus Center at George Mason University. “FTC Competition Regulation: A Cost-Benefit Appraisal.” 6/28/2021. https://www.mercatus.org/publications/antitrust-and-competition/ftc-competition-regulation-cost-benefit-appraisal

Competition rules, however, inherently would be overbroad and would suffer from a very high rate of false positives. By characterizing certain practices as inherently anticompetitive without allowing for consideration of case-specific facts bearing on actual competitive effects, findings of rule violations inevitably would condemn some (perhaps many) efficient arrangements. Furthermore, because rules by their nature are fixed in stone (at least until they are amended or repealed), they “frequently fail to account for market dynamic, new sources of competition, and consumer preferences.” Thus, they lack case law adjudication’s feature of analytic improvement (reflected in periodically updated federal antitrust guidelines) based on changing market conditions and improved economic analysis.

In sum, competition rules are a far more blunt and inflexible tool than adjudication and, as such, are less conducive to welfare-enhancing competition policy outcomes.

#### Creates separate standards---locks in uncertainty

Maureen K. Ohlhausen & James Rill 21. \*\*Former Commissioner of the Federal Trade Commission, Chair of Baker Botts LLC’s Global Antitrust and Competition practice. \*\*Served as Assistant Attorney General in charge of the U.S. Department of Justice’s Antitrust Division, issued the first joint FTC and DOJ Horizontal Merger Guidelines, and Senior Counsel at Baker Botts LLC. “Pushing the Limits? A primer on FTC Competition Rulemaking.” 8/12/2021. https://www.uschamber.com/sites/default/files/ftc\_rulemaking\_white\_paper\_aug12.pdf

In addition to these substantive concerns, UMC rulemaking by FTC would also create institutional conflicts between the FTC and DOJ and lead to divergence between the legal standards applicable to the FTC Act on the one hand and the Sherman and Clayton Acts on the other. At present, courts have interpreted the FTC Act to be generally coextensive with the prohibitions on unlawful mergers and anticompetitive conduct under the Sherman and Clayton Act, with the limited exception of invitations to collude. But because the FTC alone has the authority to enforce the FTC Act, and rulemaking by FTC would be limited to interpretations of that Act (and could not directly affect or repeal caselaw interpreting the Sherman and Clayton Acts), it would create two separate standards of liability. Given that the FTC and DOJ historically have divided enforcement between the agencies based on the industry at issue, this could result in different rules of conduct depending on the industry involved.77 Types of conduct that have the potential for anticompetitive effects under certain circumstances but generally pass a rule-of-reason analysis could nonetheless be banned outright if the industry is subject to FTC oversight. Dissonance between the two federal enforcement agencies would be even more difficult for companies not falling firmly within either agency’s purview; those entities would lack certainty as to which guidelines to follow: rule-of-reason precedent or FTC rules. In a further whipsaw, the agencies have of late opened competing investigations of the same conduct by the same company, which leads to additional legal dissonance and burden on the subject of the investigation. It could also create an uneven playing field between competitors who are overseen by different agencies, such as common carriers or banks (overseen solely by DOJ due to exemptions in the FTC Act) and non-common carrier communication providers or non-bank financial institutions, who may be subject to FTC oversight.

#### Perm do the counterplan---the FTC expands antitrust laws.

Michael Gleason et al 7-15-21. Gleason is a member of the American Bar Association's Section of Antitrust Law, serves as a vice chair of the ABA Section of Antitrust Law's Mergers & Acquisitions Committee, and is a partner at Jones Day. Lin Kahn is a partner at Jones Day and served as lead litigation and trial counsel at the FTC. J. Bruce McDonald is a partner at Jones Day, served as deputy assistant attorney general with the United States Department of Justice, served as chair of the State Bar of Texas' Antitrust & Business Litigation Section, as chair of the ABA Antitrust Section's Transportation & Energy Committee, and chair of the Houston Bar Association's Antitrust Section, and as adjunct professor at the University of Houston Law Center. Craig Waldman co-chairs Jones Day's global Antitrust & Competition Law Practice, served as an attorney in the Federal Trade Commission's Mergers I division, served as an adjunct professor at both Berkeley and Hastings Law Schools, has lectured at Stanford Business School, has served in numerous roles within ABA Antitrust Leadership, and has served on the board of directors of Global Strategies. “FTC Signals Aggressive Antitrust Policy as Part of Government Pro-Enforcement Agenda”. JD Supra. https://www.jdsupra.com/legalnews/ftc-signals-aggressive-antitrust-policy-7983021/

The Result: A majority of the Commission, along party lines, voted to expand its interpretation of the agency's power to combat anticompetitive conduct and, at the same time, contract procedural safeguards. Specifically, the FTC voted to rescind a policy that defined limits to challenge "unfair competition" violations under FTC Act Section 5. The FTC also voted to remove certain restrictions on its rulemaking and to empower individual Commissioners to serve subpoenas in certain industries, enabling a single Commissioner, rather than a majority of the Commission, to launch an industrywide investigation. Looking Ahead: The measures can be expected to result in increased FTC activity in the form of more rulemaking, investigations, and enforcement. The changes are consistent with recent proposals by the administration, legislators, and other policymakers to expand the U.S. antitrust laws to target perceived problems with industry concentration and dominant companies. Nevertheless, the goal of increased enforcement may be hindered by the well-established framework for antitrust analysis adopted by federal courts, the agency's current merger guidelines, and career staff.

#### Links to error rates---Section 5 is comparatively worse.

Alden Abbott & Andrew Mercado 21. \*\*Senior research fellow at the Mercatus Center at George Mason University. \*\*Research assistant at the Mercatus Center at George Mason University. September 28 2021. https://www.mercatus.org/publications/antitrust-and-competition/ftc-rulemaking-noncompete-agreements

Finally, from an economic perspective, rulemaking has the potential to raise concerns about both error costs and economic welfare. Any cost-benefit calculation of FTC competition rulemaking should consider these economic policy concerns.

First, competition rulemaking has the potential to generate higher error costs than adjudications. An adjudication under the antitrust “rule of reason” minimizes error costs by undertaking a case-specific analysis that weighs the potential benefits of the conduct against the harms. A rulemaking, however, seeks to paint with a broad brush, almost certainly condemning practices that have some procompetitive benefits. By classifying a class of conduct as per se anticompetitive, a rulemaking will allow specific examples of such conduct that would have been procompetitive to be found to violate the rules.

Second, economic welfare could be reduced owing to asymmetric enforcement, given that an FTC rule would be confined to only one of the two federal antitrust enforcement agencies. Because the US Department of Justice also has jurisdiction over competition policy, but FTC rules would be enforced by only the FTC, businesses would be placed into a sort of competition policy limbo. Under a competition rule, conduct that would be deemed perfectly legal by the Department of Justice after an investigation might nevertheless be banned by the FTC. Such an inequality in treatment could engender uncertainty and lead to wasteful efforts focused on ensuring review of conduct by the Department of Justice rather than FTC. That would undermine the rule of law.

### DA---Infrastructure

#### PC can’t get infrastructure done.

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.

#### Won’t pass---Biden not pushing, distrust, VA election

Heather Caygle et al 10-29-2021, with SARAH FERRIS and OLIVIA BEAVERS "Weary Dems keep reliving Infrastructure Week," POLITICO, https://www.politico.com/news/2021/10/29/democrats-infrastructure-week-517487

House liberals left the Capitol triumphant on Thursday night after once again scuttling a major vote. Every other Democrat was fuming.

For the second time in less than a month, Speaker Nancy Pelosi and her leadership team had to delay a vote on Senate-passed infrastructure bill amid progressive opposition, denying President Joe Biden a much-need win as Democrats’ bigger, $1.75 trillion social spending plan also remains in limbo.

“I think it’s wholly apparent that today was not a success,” said Virginia Rep. Abigail Spanberger, whose state has a high-stakes gubernatorial showdown Tuesday that Democrats were hoping to boost with the infrastructure vote.

“Because people choose to be obstructionists, we’re not delivering these things to my state or to the rest of the country,” the swing-district Democrat added. “I guess we’ll just wait because apparently failing roads and bridges can just wait in the minds of some people.”

Democrats slunk out of the House chamber embarrassed — furious at the liberals who dug in and a White House that refused to pressure them to relent — and openly fretting about the long-term repercussions, given the tough climb they face in the midterms. Progressive leaders are predicting the party will work out its differences and pass both bills in the House within days. But it’s a far cry from what top Democrats had hoped to deliver ahead of a critical week for the party.

“If I'm going to be honest, yeah, I’m worried about it,” said Rep. Gregory Meeks (D-N.Y.). “There’s a lot on the line here — a lot on the line. … We fill our cup up by getting stuff done. It’s not over.”

The party started with a clear plan for this week: send a $550 billion infrastructure bill to Biden’s desk that would start his foreign trip with a marketable victory and offer a much-needed boost to Virginia Democratic candidate Terry McAuliffe ahead of a nail-biter gubernatorial election Tuesday.

Instead Democrats are going home with nothing to show but a short-term extension of highway and transit programs and promises to reconvene next week and try again. Senior party members insist they had good reason to believe this week would be different from late September, when another wall of liberal opposition forced Pelosi to punt an infrastructure vote.

This time they had a Biden-blessed deal, a chunk of legislative text and a full-throttle whipping operation.

They still couldn’t overcome the trust gap between the party’s liberals and their moderate colleagues across the Capitol: Sens. Kyrsten Sinema (D-Ariz.) and Joe Manchin (D-W.Va.).

“All they need to do is one simple thing, which is to affirm they are in agreement with the framework. They just need to publicly announce it. Clearly they aren’t willing to do that, which is saying a lot,” said Rep. Ruben Gallego (D-Ariz.), who has not ruled out a primary challenge to Sinema.

The House’s departure Thursday night virtually guaranteed there would be no major vote on Biden’s agenda ahead of McAuliffe’s election on Tuesday. If he loses, many Democrats worry that could spell doom for their already-teetering domestic agenda as the party’s two wings continue to bicker over the contours of their $1.75 trillion spending package.

“Our whole argument as Democrats is premised on the idea that we're going to make things better in real life. As opposed to the other side, which just constantly lies and seems to live in a world of misinformation and fantasy,” said Rep. Conor Lamb (D-Pa.).

“But if we're going to win that argument," he added, "we actually have to do the things we said we're going to do.”

While the rest of the caucus seethed, progressives defended their refusal to support the infrastructure bill amid lingering uncertainty about Sinema and Manchin's commitment to the social spending framework Biden unveiled Thursday morning.

“I told anybody that would listen that we did not have the votes for [an infrastructure] vote tonight,” said Congressional Progressive Caucus Chair Rep. Pramila Jayapal (D-Wash.).

Jayapal went on to say that Biden did not explicitly ask for a vote on the infrastructure bill when he visited the Hill Thursday morning — which many on the left took as a tacit green light to continue opposing Democratic leadership’s push for a vote until they were ready. Biden’s lack of a clear demand for a Thursday vote may have had the unintended effect of emboldening liberals, giving them political cover to tank an infrastructure bill that Pelosi and other leaders were whipping.

“The speaker did, but the president did not” ask for Democrats' infrastructure vote, Jayapal said. “The president said he wants us to pass both bills and that this coming week was going to be critical for that. We will deliver both these bills to him, from the House, next week.”

Senior Democrats were privately frustrated at Biden’s lack of direct call to action, and some sought to convince the White House to further clarify his position throughout the day, with no success.

“Had the president led us down that hallway to the House floor this morning ... I think it would have been close,” said Rep. Dean Phillips (D-Minn.). “If the vote was kept open a long time, I think with Republican votes it would have passed.”

#### No progress and Biden and Pelosi lack leverage

Niall Stanage, 10-29-2021, "The Memo: Democrats stall out on brink of victory," TheHill, https://thehill.com/homenews/administration/579042-the-memo-democrats-stall-out-on-brink-of-victory

But even if that proves true, it doesn’t change the fact that the party’s roiling internal tensions are causing serious problems here and now.

Speaker Nancy Pelosi (D-Calif.) early Thursday evening delayed a vote on a separate $1 trillion infrastructure measure, despite having pushed hard to pass the measure earlier in the day.

The delay — the second postponement for the bill — was a rare exhibition of weakness from the Speaker, who prides herself on both her vote-counting abilities and her capacity to sway recalcitrant members of her caucus.

The reasons for the impasse are numerous, but none of them are good for Democrats.

Progressives are dismayed by the scale of the cuts to the social spending bill, which have seen cherished objectives like paid family leave, tuition-free community college and a clean electricity program stricken.

At the same time, the two Democratic senators who have extracted concessions in scaling back the original proposal — Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) — are still vague about whether they are committed to supporting the framework that Biden has outlined.

Anger from more progressive Democrats has been simmering at Manchin and Sinema throughout the process, with some on the left openly accusing them of bad faith.

The left is not about to extend the benefit of the doubt to the duo now.

The upshot is that progressives were in no mood to back down from their position that they would not vote on the infrastructure package until they got more concrete assurances on the social spending bill.

Rep. Pramila Jayapal (D-Wash.), the head of the Congressional Progressive Caucus, reiterated in a Thursday afternoon statement that members of her group would not back one bill without the other.

Rep. Rashida Tlaib (D-Mich.), a member of the so-called "squad," told reporters she was “a ‘hell no’” to advancing infrastructure without certainty on the social spending bill.

Another "squad" member, Rep. Ayanna Pressley (D-Mass.), tweeted: “A deal is a deal. These bills move together.”

The vote delay amounted to another moral victory for the left.

But it also came as unwelcome news to Biden, who had wanted to shepherd a confirmed agreement home before departing for a transatlantic trip that will include a meeting with Pope Francis, a Group of 20 summit in Rome and a climate change conference in Glasgow, Scotland. Biden will not return to Washington until next Wednesday.

Pelosi was reported to have earlier told her caucus not to “embarrass” the president by rejecting the infrastructure bill. But the delay of the vote affirms that progressives were willing to do just that.

Biden himself had reportedly told Democrats on Capitol Hill that it was not “hyperbole to say that the House and Senate majorities, and my presidency, will be determined by what happens in the next week.”

Given the stakes involved, the lack of action is frustrating to many in the Democratic Party — even as they acknowledge the misgivings about the cuts to the big bill.

“The biggest obstacle that Democrats are facing right now is the lack of progress,” said Tad Devine, a strategist who held a senior role on Sen. Bernie Sanders’s (I-Vt.) 2016 presidential bid. “If they make progress, they can begin to tell a story. The Republicans have a well-developed story, and the Democrats are negotiating something that nobody seems to understand. That’s a loser.”

#### Congress has proposed the plan---there’s support.

Tirza J Angerhofer and Roger D Blair 21. Tirza J Angerhofer, Doctoral Fellow, Department of Economics. \*\*Roger D Blair, Professor, Department of Economics and Affiliate Faculty of Law, University of Florida. “Considerations of Buyer Power in Merger Review” Journal of Antitrust Enforcement. 10-18-21. <https://academic.oup.com/antitrust/advance-article/doi/10.1093/jaenfo/jnab015/6400043?searchresult=1>

Recently, there has been **increasing recognition** of the adverse welfare effects of buyer power in various jurisdictions around the world.2 First, a firm that has monopsony power can reduce the quantity that it buys in order to depress the price that it pays for inputs which leads to a social welfare loss. Secondly, a firm with bargaining power can use the threat of walking away from the negotiations to extract surplus from suppliers. Mergers have the potential to increase buyer power and thereby cause substantial . anticompetitive harm. But this harm has traditionally been ignored in merger review. Our improved understanding of the relationship between mergers and buying power has led to **requests by Congress and policymakers** that the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) **pay closer attention to threats of monopsony when conducting their merger reviews.** In the USA, at least, policymakers have focused their efforts on monopsony power due to its clear social welfare impact and its relevance to labour markets. Congress and policymakers have **proposed bills** that would encourage the Agencies to **consider monopsony in merger review** and would help them to do this by increasing their budget.3 In both the House and Senate, a **proposed bill would amend section 7 of the Clayton Act** by explicitly including monopsony in the statutory language in order to strengthen the emphasis on monopsony in merger review.4 As we will show in this Article, both the economic theory and the empirical evidence provide support for considering the potential effects of monopsony in merger review. This evidence is particularly clear in labour markets but is also relevant to other input markets.

#### Glasgow fails- commitments don’t translate into emissions cuts

Debra Kahn, 10-27-2021, "Schwarzenegger: 'Nothing is getting done' at U.N. climate summits," Politico PRO, https://www.politico.com/states/california/whiteboard/2021/10/27/schwarzenegger-nothing-is-getting-done-at-un-climate-summits-1392090

Former California Gov. Arnold Schwarzenegger on Wednesday criticized the upcoming U.N. climate talks, saying they promote countries' empty promises on emissions reductions and funding.

What happened: Speaking at an environmental justice conference put on by the South Coast Air Quality Management District, Schwarzenegger — who signed California's first economywide greenhouse gas mandate in 2006 — said the international climate process was largely an exercise in futility.

"What does a promise and a pledge mean in the end?" he asked. "Nothing. Over and over, year after year, they make these pledges and they come out to declare victory, but then nothing is getting done."

Schwarzenegger said he wanted the international community and environmentalists to take a different approach than the annual Conference of Parties, which is taking place next week in Glasgow, Scotland. California Gov. Gavin Newsom and 15 lawmakers are planning to attend.

"I think it's set up the wrong way," Schwarzenegger said. "Every time you meet and you meet and you meet, and now decades later, you have the same problems as you have had decades before, you ask yourself, 'How much longer do you want to go and do the same thing?' Remember what Einstein said, 'The definition of insanity is to do the same thing over and over again and expect different results.' You're not going to get different results."

He said the basic U.N. model of having national leaders make commitments was flawed, pointing to President Bill Clinton's signing of the Kyoto Protocol and the Senate's subsequent refusal to ratify it.

#### Biden can’t wield PC- acts like a senator not a president

Henry Olsen, 10-22-2021, "Why Biden, a Senate success, is a White House mess," Washington Post, https://www.washingtonpost.com/opinions/2021/10/22/why-biden-senate-success-is-white-house-mess/

President Biden’s 36 years in the Senate define his political style. That’s a plus when it comes to the inside-baseball negotiating that produces legislation. It’s a huge minus, however, when it comes to displaying the consistent, public leadership that defines successful presidencies. It’s increasingly obvious that Biden does not possess that crucial skill.

The most successful presidents have a few things in common. They build their public careers around a core idea, such as Thomas Jefferson’s vision of agrarian republicanism or Franklin D. Roosevelt’s belief in a strong, compassionate national government. They use rhetoric to rally the public behind them so that there’s no mistake what electing them will bring. Their earliest legislative proposals flow from that core, and they are consistent in pursuing their aims even if the final details are subject to negotiation. Look at the presidents who changed the country — Jefferson, Abraham Lincoln, Roosevelt, Ronald Reagan — and each displays the same characteristics.

Biden is nothing like these men. He has been in the national eye for nearly 50 years, and one simply cannot identify a single, defining core principle. Biden instead shifts with the tides — he was a moderate Democrat opposed to abortion rights when that was the center of Delaware public opinion, and a mild progressive opposed to any abortion regulations when that’s what the national party desired. He is a political Zelig, able to materialize in whatever image Democrats want to project.

This is a good skill to have in the Senate. Staying relevant to political debates means you’re positioned to help craft solutions. The clashing factions in a debate trust you to some degree, enabling someone such as Biden to broker compromises that excite none but satisfy all. It’s the type of skill set that Senate Minority Leader Mitch McConnell (R-Ky.) uses to devastating effect on his caucus’s behalf. Every party needs people like Biden.

The gap between the roles of senator and president is why Biden is so ineffectual — and why his agenda is on life support. He did not campaign on an overarching goal or core idea. Instead, he presented himself as the return of stability and normalcy after four tumultuous years of Donald Trump.

Americans knew in 1932 that they were voting for someone who believed that the need for emergency action outweighed old constitutional nostrums, just as they knew in 1980 that Reagan wanted lower taxes and bigger defense budgets. Biden’s massive multitrillion-dollar domestic spending proposals thus have shocked the crucial set of moderate independents who backed him.

Biden’s attempts at displaying presidential leadership also betray his senatorial roots. He has not mounted a sustained public effort to mobilize public opinion behind his plans. Instead, he has played the inside game he’s comfortable with, meeting with progressives and moderates to try to broker compromises. This makes him appear to be a captive to events and personalities outside of his control, which is not what Americans want from their presidents.

He is prone to pandering to all sides in these debates, offering loud public statements of support for a particular group’s concerns when they demand one, but then doing nothing to back those words up with deeds.

He panders to progressives by giving a speech on voting legislation when their cherished bill appeared stalled. He panders to moderates when he falsely says his domestic spending bill will cost “nothing,” when he really just means it won’t add to the deficit.

Biden has long backed moderates in their desire not to change the Senate filibuster rules, but Thursday night reversed course without warning by saying on a CNN town hall that he could support such changes for election-related legislation and “maybe more.” This, despite repeated comments by Sens. Joe Manchin III (D-W.Va.) and Kyrsten Sinema (D-Ariz.) that they will not support changing the filibuster rules one iota, leaving Biden committed to change that he has no leverage to push.

That’s flailing, not leadership. Such feckless irresolution has its costs. Biden is increasingly viewed negatively by independents, which in turn is leading internal Democratic polls to show the entire party is in potential trouble for next year’s midterms.

In politics, weakness begets weakness: Savvy pols know when a ship is sinking and how not to get caught on board when it goes under. Biden could help himself by showing decisive, bold leadership, but that requires taking rhetorical risks, and pushing and punishing rather than cajoling. Instead, the shifting Biden sands leave even potential enforcers such as House Speaker Nancy Pelosi (D-Calif.) hung out to dry, as with his vacillation on passing a stand-alone bipartisan infrastructure bill. No Democrats will stick their neck out for Biden, knowing he might cut it off without notice.

### DA---Error rates

#### No impacts to false positives---Monopsony power doesn’t benefit the economy.

Suresh Naidu et al 18. \*Suresh Naidu is an Associate Professor of International and Public Affairs and Economics, Columbia University. \*\*Eric Posner is a Kirkland & Ellis Distinguished Service Professor of Law, University of Chicago Law School. \*\*\*E. Glen Weyl is a Principal Researcher, Microsoft Research New England and Visiting Senior Research Scholar, Yale University Department of Economics and Law School “Antitrust Remedies for Labor Market Power” University of Chicago Law School. 2018. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13776&context=journal\_articles

Fourth, and precisely for this reason, monopsony power also **reinforces and exacerbates monopoly power.** In fact, both can be seen at a high level as just two ways for the owners of capital to squeeze workers, thereby reducing the **returns to productive work and the output of the economy.** The **markdown on wages** caused by monopsony and the markup on prices caused by monopoly are akin to taxes — payments that ordinary people must pay in order to go about their daily lives as producers and consumers. However, the payments do not go to governments to fund programs, but to firms and, **ultimately, investors**. And the payments **do not spur investment or raise economic growth** because they depend in the first place on the willingness of managers to **leave capital idle** to obtain market power, while **driving workers out of the workforce and onto taxpayer-financed relief programs.**

#### Tons of FTC enforcement thumps.

BRIAN BURKE et al. 10/29/21. Partner in Baker McKenzie’s Antitrust Practice Group, with JOHN FEDELE, TEISHA JOHNSON AND CREIGHTON MACY, “United States: Federal Trade Commission continues to signal heightened scrutiny for mergers.” https://www.globalcompliancenews.com/2021/10/29/united-states-federal-trade-commission-continues-to-signal-heightened-scrutiny-for-mergers-19102021/

In recent months, following the Biden Executive Order that set antitrust law enforcement priorities for the Federal Trade Commission (FTC) and the Department of Justice (DOJ) (among other federal agencies), the FTC has made a number of changes to its long-standing merger review policies and processes. In announcing those changes, the FTC has cited the “surge in merger filings” and the need to ensure that merger reviews are more “comprehensive and analytically rigorous.” We highlight below the most significant of these recent changes announced by the FTC and expect the DOJ’s Antitrust Division to adopt similar (if not identical) stances on these and related enforcement issues.

In more detail

Change in HSR threshold calculation

When calculating the acquisition price under the HSR Act, the calculation must now include the full or partial retirement of debt that is “part of the consideration of the deal” if selling shareholders benefit from the retirement of that debt. That represents a reversal of the position outlined in prior informal interpretations of the HSR Act regulations by the FTC’s Premerger Notification Office. Though the FTC acknowledged that not all debt retired as part of a proposed transaction is consideration, the agency offered no clear guidance on when the retirement of debt can be properly excluded because it does not benefit the selling shareholders.

In a blog post announcing the change, the FTC expressed concern that some merging parties have structured deals in ways they believe fall outside of the filing requirements, and that “(t)arget companies may be incentivized to take on debt just before an acquisition, so that the acquiring company can retire the debt as part of the deal,” leading to the deal not being reported to the antitrust authorities.

Withdrawal of the Vertical Merger Guidelines

The Vertical Merger Guidelines (VMGs), which the FTC adopted (jointly with the DOJ) in June 2020, describe the analytical framework and enforcement policies used by the agencies when reviewing non-horizontal mergers. Barely one year later, on 15 September 2021, the FTC voted along party lines to withdraw the VMGs. Specifically, the majority commented that the VMGs “had improperly contravened the Clayton Act’s language with its approach to efficiencies, which are not recognized by the statute as a defense to an unlawful merger.” The FTC’s withdrawal of the VMGs is consistent with the Majority Commissioners’ prior criticism that the VMGs overly credit claimed pro-competitive benefits of vertical mergers and undercounted a number of alleged harms. Moving forward, it is likely that the FTC, and perhaps the DOJ (which has not yet withdrawn the VMGs), will seek to provide new guidance. The FTC majority noted certain considerations to expect in future guidance, including information regarding (1) the characteristics of transactions that are likely unlawful, (2) “ineffective remedies” based on assessment of past settlements, and (3) an expanded list of harms specifically in digital and labor markets.

Issuance of warning letters

The FTC recently announced the use of “Pre-Consummation Warning Letters.” For deals that the FTC cannot fully investigate within the requisite review period set forth in the HSR Act (typically 30 days), the FTC will send letters stating that its “investigation remains open and ongoing” even though the HSR waiting period expired. At this time, it seems this practice is idiosyncratic to the FTC and has not been expanded to the DOJ’s review process. Notably, the warning letters do not prohibit the parties from closing and do not extend any gun-jumping concerns after the transaction has been cleared under the HSR Act.

Changes to second request process

On 28 September 2021, the FTC announced that it would make several changes to how it investigates mergers and acquisitions, including assessing the scope of its second requests and amending the manner in which it engages with parties subject to second requests. “Second requests” are issued in order to extend the initial waiting period under the HSR Act and to provide the DOJ or FTC with additional time to investigate a proposed transaction. Specifically:

The scope of second requests is likely to broaden. The FTC will consider additional areas that have not been involved in merger reviews — e.g., how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete. Such additional factors, the FTC contends, may help them better identify and challenge potentially illegal transactions.

Second request modifications will be considered only after information about the business and relevant personnel has been provided. Before the FTC will consider modifying the scope of a second request (which is typically expansive), each party under investigation must identify and describe the business responsibilities of employees and agents responsible for the relevant lines of business, along with those employees responsible for negotiating, analyzing, or recommending the transaction. The parties will also need to provide more information about how data is stored.

The FTC will seek additional information about the use of e-discovery tools. A company under investigation will be required to provide information about how it intends to use e-discovery tools before it applies those tools to identify responsive materials. Here, the FTC claims that the change will more closely align its model second request with that of the DOJ.

The option to submit partial privilege logs is discontinued. The FTC second request will no longer give parties the option to submit partial privilege logs, but will align with the DOJ’s practice with respect to privilege logs. The FTC asserted, however, that staff will remain open to modifications in appropriate circumstances.

Focus on Section 8/Interlocking directorates

The FTC accepted recommendations from its Bureau of Consumer Protection and Bureau of Competition regarding eight new compulsory process resolutions, one relating to Interlocking Directors & Officers and Common Ownership. The resolution directed use of all compulsory processes to investigate whether ownership stakes in competing companies may be anticompetitive, and whether interlocking directorates may violate Section 8 of the Clayton Act. “Interlocking directorates” occur when a person serves simultaneously as an officer or director of competing companies. The FTC noted that interlocking directorates and common ownership continue to raise significant competitive concerns.

Setting FTC merger review priorities

On 22 September 2021, FTC Chair Lina Khan issued an internal memo to staff regarding the FTC’s vision and enforcement priorities. The memo stressed that the FTC will strengthen its merger enforcement work notwithstanding what Chair Khan characterized as the “huge demands” being imposed on FTC staff as a result of current deal volume and filings. (As a reminder the consideration of requests for “early termination” of the applicable HSR waiting period remains suspended.)

Revising the merger guidelines. Chair Khan believes that current merger guidelines represent a “narrow and outdated framework” for assessing mergers and requires revision. Under her leadership, the FTC will take a more “holistic approach to identifying harms.” According to Khan, revising the guidelines is an opportunity to close gaps between theory and practice, which will set the foundation for more effective and empirically grounded enforcement work. Revision of the merger guidelines will be done in conjunction with the DOJ.

Additional approaches to reduce resources needed for merger reviews. The FTC chair noted that agency resources are heavily strained, compromising the FTCs ability to investigate significant mergers. The FTC will look to identify ways to “reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers.”

These varied and numerous developments are consistent with the decidedly “pro-enforcement” posture that the new leadership at the FTC has assumed, and signal a heightened level of scrutiny for strategic transactions as well as longer substantive investigations. Parties to such transactions should involve antitrust counsel early in the process and allow sufficient flexibility in the transaction schedule to accommodate this scrutiny.

### K---Economic rationality

#### Regulated capitalism solves war, environment, and quality of life---alternatives increase degradation and poverty. Prefer empirical and measurable indicators.

Mark Budolfson 21. PhD in Philosophy. Assistant Professor in the Department of Environmental and Occupational Health and Justice at the Rutgers School of Public Health and Center for Population–Level Bioethics "Arguments for Well-Regulated Capitalism, and Implications for Global Ethics, Food, Environment, Climate Change, and Beyond". Cambridge Core. 5-7-2021. https://www-cambridge-org.proxy.library.emory.edu/core/journals/ethics-and-international-affairs/article/arguments-for-wellregulated-capitalism-and-implications-for-global-ethics-food-environment-climate-change-and-beyond/96F422D04E171EECDEF77312266AE9DD

Discourse on food ethics often advocates the anti-capitalist idea that we need less capitalism, less growth, and less globalization if we want to make the world a better and more equitable place, with arguments focused on applications to food, globalization, and a just society. For example, arguments for this anti-capitalist view are at the core of some chapters in nearly every handbook and edited volume in the rapidly expanding subdiscipline of food ethics. None of these volumes (or any article published in this subdiscipline broadly construed) focuses on a defense of globalized capitalism.1

More generally, discourse on global ethics, environment, and political theory in much of academia—and in society—increasingly features this anti-capitalist idea as well.2 The idea is especially prominent in discourse surrounding the environment, climate, and global poverty, where we face a nexus of problems of which capitalism is a key driver, including climate change, air and water pollution, the challenge of feeding the world, ensuring sustainable development for the world's poorest, and other interrelated challenges.

It is therefore important to ask whether this anti-capitalist idea is justified by reason and evidence that is as strong as the degree of confidence placed in it by activists and many commentators on food ethics, global ethics, and political theory, more generally.

In fact, many experts argue that this anti-capitalist idea is not supported by reason and argument and is actually wrong. The main contribution of this essay is to explain the structure of the leading arguments against the anti-capitalist idea, and in favor of the opposite conclusion. I begin by focusing on the general argument in favor of well-regulated globalized capitalism as the key to a just, flourishing, and environmentally healthy world. This is the most important of all of the arguments in terms of its consequences for health, wellbeing, and justice, and it is endorsed by experts in the empirically minded disciplines best placed to analyze the issue, including experts in long-run global development, human health, wellbeing, economics, law, public policy, and other related disciplines. On the basis of the arguments outlined below, well-regulated capitalism has been endorsed by recent Democratic presidents of the United States such as Barack Obama, and by progressive Nobel laureates who have devoted their lives to human development and more equitable societies, as well as by a wide range of experts in government and leading nongovernmental organizations.

The goal of this essay is to make the structure and importance of these arguments clear, and thereby highlight that discourse on global ethics and political theory should engage carefully with them. The goal is not to endorse them as necessarily sound and correct. The essay will begin by examining general arguments for and against capitalism, and then turn to implications for food, the environment, climate change, and beyond.

Arguments for and against Forms of Capitalism

The Argument against Capitalism

Capitalism is often argued to be a key driver of many of society's ills: inequalities, pollution, land use changes, and incentives that cause people to live differently than in their ideal dreams. Capitalism can sometimes deepen injustices. These negative consequences are easy to see—resting, as they do, at the center of many of society's greatest challenges.3

And at the same time, it is often difficult to see the positive consequences of capitalism.4 What are the positive consequences of allowing private interests to clear-cut forests and plant crops, especially if those private interests are rich multinational corporations and the forests are in poor, developing countries whose citizens do not receive the profits from deforestation? Why give private companies the right to exploit resources at all, since exploitation almost always has some negative consequences such as those listed above? These are the right questions to ask, and they highlight genuine challenges to capitalism. And in light of these challenges, it is reasonable to consider the possibility that perhaps a different economic system altogether would be more equitable and beneficial to the global population.

The Argument for Well-Regulated Capitalism

However, things are more complicated than the arguments above would suggest, and the benefits of capitalism, especially for the world's poorest and most vulnerable people, are in fact myriad and significant. In addition, as we will see in this section, many experts argue that capitalism is not the fundamental cause of the previously described problems but rather an essential component of the best solutions to them and of the best methods for promoting our goals of health, well-being, and justice.

To see where the defenders of capitalism are coming from, consider an analogy involving a response to a pandemic: if a country administered a rushed and untested vaccine to its population that ended up killing people, we would not say that vaccines were the problem. Instead, the problem would be the flawed and sloppy policies of vaccine implementation. Vaccines might easily remain absolutely essential to the correct response to such a pandemic and could also be essential to promoting health and flourishing, more generally.

The argument is similar with capitalism according to the leading mainstream arguments in favor of it: Capitalism is an essential part of the best society we could have, just like vaccines are an essential part of the best response to a pandemic such as COVID-19. But of course both capitalism and vaccines can be implemented poorly, and can even do harm, especially when combined with other incorrect policy decisions. But that does not mean that we should turn against them—quite the opposite. Instead, we should embrace them as essential to the best and most just outcomes for society, and educate ourselves and others on their importance and on how they must be properly designed and implemented with other policies in order to best help us all. In fact, the argument in favor of capitalism is even more dramatic because it claims that much more is at stake than even what is at stake in response to a global pandemic—what is at stake with capitalism is nothing less than whether the world's poorest and most vulnerable billion people will remain in conditions of poverty and oppression, or if they will instead finally gain access to what is minimally necessary for basic health and wellbeing and become increasingly affluent and empowered. The argument in favor of capitalism proceeds as follows:

Premise 1. Development and the past. Over the course of recorded human history, the majority of historical increases in health, wellbeing, and justice have occurred in the last two centuries, largely as a result of societies adopting or moving toward capitalism. Capitalism is a relevant cause of these improvements, in the sense that they could not have happened to such a degree if it were not for capitalism and would not have happened to the same degree under any alternative noncapitalist approach to structuring society. The argument in support of this premise relies on observed relationships across societies and centuries between indicators of degree of capitalism, wealth, investments in public goods, and outcomes for health, wellbeing, and justice, together with econometric analysis in support of the conclusion that the best explanation of these correlations and the underlying mechanism is that large increases in health, wellbeing, and justice are largely driven by increasing investments in public goods. The scale of increased wealth necessary to maximize these investments requires capitalism. Thus, as capitalist societies have become dramatically wealthier over the past hundred years (and wealthier than societies with alternative systems), this has allowed larger investments in public goods, which simply has not been possible in a sustained way in societies without the greater wealth that capitalism makes possible. Important investments in public goods include investments in basic medical knowledge, in health and nutrition programs, and in the institutional capacity and know-how to regulate society and capitalism itself. As a result, capitalism is a primary driver of positive outcomes in health and wellbeing (such as increased life expectancy, lowered child and maternal mortality, adequate calories per day, minimized infectious disease rates, a lower percentage and number of people in poverty, and more reported happiness);5 and in justice (such as reduced deaths from war and homicide; higher rankings in human rights indices; the reduced prevalence of racist, sexist, homophobic opinions in surveys; and higher literacy rates).6 These quantifiable positive consequences of global capitalism dramatically outweigh the negative consequences (such as deaths from pollution in the course of development), with the result that the net benefits from capitalism in terms of health, wellbeing, and justice have been greater than they would have been under any known noncapitalist approach to structuring society.7

Premise 2. Economics, ethics, and policy. Although capitalism has often been ill-regulated and therefore failed to maximize net benefits for health, wellbeing, and justice, it can become well-regulated so that it maximizes these societal goals, by including mechanisms identified by economists and other policy experts that do the following:

* optimally8 regulate negative effects such as pollution and monopoly power, and invest in public goods such as education, basic healthcare, and fundamental research including biomedical knowledge (more generally, policies that correct the failures of free markets that economists have long recognized will arise from “externalities” in the absence of regulation);9
* ensure equity and distributive justice (for example, via wealth redistribution);10
* ensure basic rights, justice, and the rule of law independent of the market (for example, by an independent judiciary, bill of rights, property rights, and redistribution and other legislation to correct historical injustices due to colonialism, racism, and correct current and historical distortions that have prevented markets from being fair);11 and
* ensure that there is no alternative way of structuring society that is more efficient or better promotes the equity, justice, and fairness goals outlined above (by allowing free exchange given the regulations mentioned).12

To summarize the implication of the first two premises, well-regulated capitalism is essential to best achieving our ethical goals—which is true even though capitalism has certainly not always been well regulated historically. Society can still do much better and remove the large deficits in terms of health, wellbeing, and justice that exist under the current inferior and imperfect versions of capitalism.

Premise 3. Development and the future. If the global spread of capitalism is allowed to continue, desperate poverty can be essentially eliminated in our lifetimes. Furthermore, this can be accomplished faster and in a more just way via well-regulated global capitalism than by any alternatives. If we instead opt for less capitalism, less growth, and less globalization, then desperate poverty will continue to exist for a significant portion of the world's population into the further future, and the world will be a worse and less equitable place than it would have been with more capitalism. For example, in a world with less capitalism, there would be more overpopulation, food insecurity, air pollution, ill health, injustice, and other problems. In part, this is because of the factors identified by premise 1, which connect a turn away from capitalism with a turn away from continuing improvements in health, wellbeing, and justice, especially for the developing world. In addition, fertility declines are also a consequence of increased wealth, and the size of the population is a primary determinant of food demand and other environmental stressors.13 Finally, as discussed at length in the next section of the essay, capitalism can be naturally combined with optimal environmental regulations.14 Even bracketing anything like optimal regulation, it remains true that sufficiently wealthy nations reduce environmental degradation as they become wealthier, whereas developing nations that are nearing peak degradation will remain stuck at the worst levels of degradation if we stall growth, rather than allowing them to transition to less and less degradation in the future via capitalism and economic growth.15 In contrast, well-regulated capitalism is a key part of the best way of coping with these problems, as well as a key part of dealing with climate change, global food production, and other specific challenges, as argued at length in the next section. Here it is important to stress that we should favor well-regulated capitalism that includes correct investments in public goods over other capitalist systems such as the neoliberalism of the recent past that promoted inadequately regulated capitalism with inadequate concern for externalities, equity, and background distortions and injustices.16

Conclusion. Therefore, we should be in favor of capitalism over noncapitalism, and we should especially favor well-regulated capitalism, which is the ethically optimal economic system and is essential to any just basic structure for society.

This argument is impressive because, as stated earlier in the essay, it is based on evidence that is so striking that it leads a bipartisan range of open-minded thinkers and activists to endorse well-regulated capitalism, including many of those who were not initially attracted to the view because of a reasonable concern for the societal ills with which we began. To better understand why such a range of thinkers could agree that well-regulated capitalism is best, it may help to clarify some things that are not assumed or implied by the argument for it, which could be invoked by other bad arguments for capitalism.

One thing the argument above does not assume is that health, wellbeing, or justice are the same thing as wealth, because, in fact, they are not. Instead, the argument above relies on well-accepted, measurable indicators of health and wellbeing, such as increased lifespan; decreased early childhood mortality; adequate nutrition; and other empirically measurable leading indicators of health, wellbeing, and justice.17 Similarly, the argument that capitalism promotes justice, peace, freedom, human rights, and tolerance relies on empirical metrics for each of these.18

Furthermore, the argument does not assume that because these indicators of health, wellbeing, and justice are highly correlated with high degrees of capitalism, that therefore capitalism is the direct cause of these good outcomes. Rather, the analyses suggest instead that something other than capitalism is the direct cause of societal improvements (such as improvements in knowledge and technology, public infrastructure, and good governance), and that capitalism is simply a necessary condition for these improvements to happen.19 In other words, the richer a society is, the more it is able to invest in all of these and other things that are the direct causes of health, wellbeing, and justice. But, to maximize investment in these things societies need well-regulated capitalism.

As part of these analyses, it is often stressed that current forms of capitalism around the world are highly defective and must be reformed in the direction of well-regulated capitalism because they lack investments in public goods, such as basic knowledge, healthcare, nutrition, other safety nets, and good governance.20 In this way, an argument for a particular kind of progressive reformism is an essential part of the analyses that lead many to endorse the more general argument for well-regulated capitalism.

Although these analyses are nuanced, and appropriately so, it remains the case that the things that directly lead to health, wellbeing, and justice require resources, and the best path toward generating those resources is well-regulated capitalism. And on the flip side, according to the analyses behind premise 1 described above, an anti-capitalist system would not produce the resources that are needed, and would thus be a disaster, especially for the poorest billion people who are most desperately in need of the resources that capitalism can create and direct, to escape from extreme poverty.21

#### Economics is improving with instantaneous information---imperfections are DAs to central planning not rules-based antitrust.

The Economist 10/23/21. "A real-time revolution will up-end the practice of macroeconomics". Economist. https://www.economist.com/leaders/2021/10/23/a-real-time-revolution-will-up-end-the-practice-of-macroeconomics?utm\_campaign=the-economist-this-week&utm\_medium=newsletter&utm\_source=salesforce-marketing-cloud&utm\_term=2021-10-21&utm\_content=ed-picks-article-link-1&etear=nl\_weekly\_1

Yet, as we report this week, the age of bewilderment is starting to give way to greater enlightenment. The world is on the brink of a real-time revolution in economics, as the quality and timeliness of information are transformed. Big firms from Amazon to Netflix already use instant data to monitor grocery deliveries and how many people are glued to “Squid Game”. The pandemic has led governments and central banks to experiment, from monitoring restaurant bookings to tracking card payments. The results are still rudimentary, but as digital devices, sensors and fast payments become ubiquitous, the ability to observe the economy accurately and speedily will improve. That holds open the promise of better public-sector decision-making—as well as the temptation for governments to meddle.

The desire for better economic data is hardly new. America’s gnp estimates date to 1934 and initially came with a 13-month time lag. In the 1950s a young Alan Greenspan monitored freight-car traffic to arrive at early estimates of steel production. Ever since Walmart pioneered supply-chain management in the 1980s private-sector bosses have seen timely data as a source of competitive advantage. But the public sector has been slow to reform how it works. The official figures that economists track—think of gdp or employment—come with lags of weeks or months and are often revised dramatically. Productivity takes years to calculate accurately. It is only a slight exaggeration to say that central banks are flying blind.

Bad and late data can lead to policy errors that cost millions of jobs and trillions of dollars in lost output. The financial crisis would have been a lot less harmful had the Federal Reserve cut interest rates to near zero in December 2007, when America entered recession, rather than in December 2008, when economists at last saw it in the numbers. Patchy data about a vast informal economy and rotten banks have made it harder for India’s policymakers to end their country’s lost decade of low growth. The European Central Bank wrongly raised interest rates in 2011 amid a temporary burst of inflation, sending the euro area back into recession. The Bank of England may be about to make a similar mistake today.

The pandemic has, however, become a catalyst for change. Without the time to wait for official surveys to reveal the effects of the virus or lockdowns, governments and central banks have experimented, tracking mobile phones, contactless payments and the real-time use of aircraft engines. Instead of locking themselves in their studies for years writing the next “General Theory”, today’s star economists, such as Raj Chetty at Harvard University, run well-staffed labs that crunch numbers. Firms such as JPMorgan Chase have opened up treasure chests of data on bank balances and credit-card bills, helping reveal whether people are spending cash or hoarding it.

These trends will intensify as technology permeates the economy. A larger share of spending is shifting online and transactions are being processed faster. Real-time payments grew by 41% in 2020, according to McKinsey, a consultancy (India registered 25.6bn such transactions). More machines and objects are being fitted with sensors, including individual shipping containers that could make sense of supply-chain blockages. Govcoins, or central-bank digital currencies (cbdcs), which China is already piloting and over 50 other countries are considering, might soon provide a goldmine of real-time detail about how the economy works.

Timely data would cut the risk of policy cock-ups—it would be easier to judge, say, if a dip in activity was becoming a slump. And the levers governments can pull will improve, too. Central bankers reckon it takes 18 months or more for a change in interest rates to take full effect. But Hong Kong is trying out cash handouts in digital wallets that expire if they are not spent quickly. cbdcs might allow interest rates to fall deeply negative. Good data during crises could let support be precisely targeted; imagine loans only for firms with robust balance-sheets but a temporary liquidity problem. Instead of wasteful universal welfare payments made through social-security bureaucracies, the poor could enjoy instant income top-ups if they lost their job, paid into digital wallets without any paperwork.

The real-time revolution promises to make economic decisions more accurate, transparent and rules-based. But it also brings dangers. New indicators may be misinterpreted: is a global recession starting or is Uber just losing market share? They are not as representative or free from bias as the painstaking surveys by statistical agencies. Big firms could hoard data, giving them an undue advantage. Private firms such as Facebook, which launched a digital wallet this week, may one day have more insight into consumer spending than the Fed does.

Know thyself

The biggest danger is hubris. With a panopticon of the economy, it will be tempting for politicians and officials to imagine they can see far into the future, or to mould society according to their preferences and favour particular groups. This is the dream of the Chinese Communist Party, which seeks to engage in a form of digital central planning.

In fact no amount of data can reliably predict the future. Unfathomably complex, dynamic economies rely not on Big Brother but on the spontaneous behaviour of millions of independent firms and consumers. Instant economics isn’t about clairvoyance or omniscience. Instead its promise is prosaic but transformative: better, timelier and more rational decision-making. ■

#### No biopower argument---growth solves it.

Kelsey Piper 8/3/21. Staff Writer @ Vox. "Can we save the planet by shrinking the economy?". Vox. 8-3-2021. https://www.vox.com/future-perfect/22408556/save-planet-shrink-economy-degrowth

The things degrowthers care about — leisure time, health care, life expectancy — are strongly correlated with societal wealth. The generosity of a welfare state and the availability of transfers to a state’s poorest people are also strongly correlated with societal wealth. Innovation, discovery, invention, and medical technology improvements are also strongly correlated with societal wealth.

[GRAPH OMITTED]

The strong correlation between child mortality and GDP per capita is apparent on the above graph. There are some outliers — some countries outperform or underperform their GDP somewhat, in terms of preventing child deaths — but in general, wealth strongly predicts child survival. No single, simple medical intervention causes the difference. Wealthier societies on average get better health outcomes across the board.

[GRAPH OMITTED]

This graph looks at child mortality not just by comparing rich countries to poor ones but also by comparing countries over time, as they get richer: Getting richer improves outcomes for children.

[GRAPH OMITTED]

Leisure time, too, has increased — and hours worked have declined — as the world has gotten wealthier.

It might be possible in principle to do better — to decouple, if you will, health and well-being from access to material resources, so that everyone is well-off with many fewer resources.

But the examples degrowthers point to remain speculative ones; if we ought to be skeptical, as degrowthers argue we should be, about the decoupling of wealth from ecological impact, we ought to be at least as skeptical about the prospects of decoupling wealth from living standards.

“In the end, economic growth is about the production of stuff that people need and then the consumption of those things by the people who need it,” Max Roser at Our World in Data, a research institute focused on finding, visualizing, and communicating historical economic and health data, told me. He added:

The money aspect, and the abstract concept of GDP, distract us and make it less obvious what it’s actually about. People want to have enough food, they need to go to the doctor, they need childcare, they want a good education. People need lots of stuff, and one thing that people care about are goods and services, and they need to be produced, and economic growth is about an increase in the quality and quantity of the goods and services that people need.

## 1AR

### Adv----Inequality

### Adv---FTC Credibility

### CP---FTC rulemaking

#### Past precedent is irrelevant---most recent rulings go against the counterplan

Nicholas R. Parrillo 19. William K. Townsend Professor of Law at Yale, with a secondary appointment as Professor of History. "Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries," Yale Journal on Regulation 36, no. 1 (Winter 2019): 165-272.

The consumer protection wing of the Federal Trade Commission (FTC) operates by bringing federal court suits and intra-agency complaints against violators of the consumer protection statutes and of the FTC's own legislative rules. David Vladeck, the former director of the FTC Consumer Protection Bureau, expressed the view that FTC guidance is very limited as a means to change behavior of regulated parties. On this point, he drew a distinction between truly noncompliant businesses (like debt-settlement scammers) and reputable ones (like major advertising agencies or retailers). As to the debt-settlement scammers, he said, changing their behavior en masse was not possible for the FTC without legislative rulemaking. Even if the FTC issued guidance in the area, actual enforcement required violations to be proven individually in each particular proceeding. Prior to completing a rulemaking on the matter, the FTC brought enforcement suits against about twenty-five debt-settlement scammers, but these suits were "slogs," because of the need for individualized proof that the conduct violated the act. Some of the biggest scammers were enjoined, but the chances of getting caught were "pretty low"; therefore, many other scams continued. Only once it finished the rulemaking-defining what conduct violated the act in a manner that would bind the courts-could the FTC bring "quick" enforcement actions, raising the probability of liability. The rulemaking and the capacity for quick enforcement "turned the tide," forcing the scammers to abandon their schemes.

As to the major advertising agencies and retailers, said Vladeck, guidance was still ineffective as a means of "mov[ing] the goal posts" and actually changing industry norms, since individual enforcement actions (the means through which a norm change called for by guidance would have to be enforced) tended to be winnable only against deviants who fell below an already accepted industry norm. Such suits did not suffice for doing "something aspirational." To be aspirational, you generally need legislative rulemaking, not guidance. (Vladeck did observe an exceptional context in which FTC guidance did alter the behavior of reputable firms: the 2009 guidance on claims about products appearing in endorsements, especially through social media. But he noted that there, the guidance was only restoring a pre-existing norm that had been temporarily disrupted by the onset of product endorsements on social media. It was not creating aspirational new norms that were unfamiliar to industry.)2 63

#### Courts hear appealed internal FTC cases

Despina Pachnou 19. Competition Expert at the OECD and manager of the OECD Working Party. "The standard of review by courts in competition cases - Background Note." OECD. 06-04-2019. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/standard\_of\_review\_us-oecd.pdf

4. Procedures Applicable to FTC Administrative Process

13.The FTC can and frequently does enter the federal court system as a civil litigant, in much the same way as the DOJ. Congress also has entrusted the FTC, an independent administrative agency, with an additional, internal adjudicative process. In brief, this procedure brings the initial investigation, adjudication and enforcement functions under the control of the agency, subject to a number of due process safeguards and the right to appeal to the federal circuit courts.

14.When the FTC determines that it has “reason to believe” (a legal standard lower than that for ultimate liability) an antitrust violation has occurred, it can vote to issue an administrative complaint. That complaint is normally referred to an administrative law judge (“ALJ”). The ALJ cannot be removed absent malfeasance, and enjoys other statutory protections designed to ensure impartiality. The vote to issue an administrative complaint also triggers an internal firewall between the Commission and the attorneys charged with prosecuting the dispute. The matter is prosecuted from this point forward by agency staff, with no further involvement of the Commissioners.

15.The administrative litigation that follows closely resembles a trial in federal district court, with the ALJ performing many of the same functions as a federal court judge. In brief, the ALJ oversees discovery, makes evidentiary rulings, conducts a trial, renders an initial decision, and drafts a written opinion containing the factual and legal basis for the decision.

16.From that initial decision, either side may appeal to the Federal Trade Commission itself, which acts in an adjudicative capacity. Proceedings at this stage are very much like the appellate process in the federal circuit courts, with written briefings and oral argument in front of the Commissioners, and a liability standard of preponderance of the evidence (more than 50% probability of illegality). However, there is one key, substantive difference between proceedings before the FTC and those before a federal circuit court. The Commission is not required to give deference to the ALJ’s factual determinations; it reviews both the legal and factual issues de novo. The Commission then issues a final decision with a written reasoned opinion either finding liability and, typically, issuing an order to cease and desist, or dismissing the complaint.

17.That opinion is directly appealable by the defendant (but not by FTC staff if the Commission dismisses the complaint) to any federal circuit court in whose jurisdictional region the defendant does business. The case then proceeds from that point along the same path as cases originally filed in the district courts. Just as a case coming up for appellate review from a federal district court receives some deference from the appellate court, so too does a final Commission decision. Specifically, the appellate court reviews questions of law de novo but will not disturb factual determinations of the Commission that are supported by substantial evidence.

#### Rulemaking can’t adapt---impact is 1AC Shelanski

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Legislative rulemaking would replace this quintessential fact-based process with one-size fits-all bright-line rules. Competition rules would function as per se-like prohibitions, but based on notice-and-comment procedures rather than the broad and longstanding legal and economic consensus usually required for per se condemnation under the Sherman Act. Past experience with similar regulatory regimes should give reason for pause here: the Interstate Commerce Commission, for example, failed to efficiently regulate the railroad industry before being abolished with bipartisan consensus in 1996, by some estimates costing consumers as much as several billion (in today’s dollars) per year in lost competitive benefits.74 As FTC Commissioner Christine Wilson observes, regulatory rules “frequently stifle innovation, raise prices, and lower output and quality without producing concomitant health, safety, and other benefits for consumers.”75 By sacrificing the precision of case-by-case adjudication, rulemaking advocates are also losing one of the best tools we have to account for “market dynamics, new sources of competition, and consumer preferences.”76

### DA---Infrastructure

#### No commitments from holdouts

Jim Tankersley & Zolan Kanno-Youngs, 10-28-2021, Here’s what’s in Biden’s $1.85 trillion plan. New York Times, https://www.nytimes.com/live/2021/10/28/us/biden-spending-bill-deal#budget-deal

President Biden met with lawmakers on Thursday morning to lay out a framework on a $1.85 trillion effort to spend heavily on climate change, child care and a wide range of other economic programs, paid for by an estimated $2 trillion in tax increases on corporations and high earners, though it was not immediately clear if it has the votes to pass.

White House officials refused to say if all holdout Democrats in Congress had expressed support for the framework, which still may change.

#### Their ev agrees---Manchin and Sinema aren’t on board, PC isn’t key, and tons of other alt causes to passage that doom the bill—Emory reads yellow.

1NR Sargent 10-29 (Greg Sargent, columnist covering national politics at The Washington Post, former political analyst at Talking Points Memo, New York Magazine and the New York Observer, BA English, Hunter College, “Opinion: Inside Biden’s surprising confidence that he’s on the cusp of a big victory,” The Washington Post, 10-29-2021, https://www.washingtonpost.com/opinions/2021/10/29/biden-framework-reconciliation-pathway/)

Looked at in one way, the failure of the House to pass the bipartisan infrastructure bill on Thursday was a major setback for President Biden. It means he heads into the international climate conference without being able to say the United States took a big leap toward delivering on its climate agenda, which could complicate his ability to lead.

That is obviously something we’d hoped to avoid. And let’s be clear: It’s still very uncertain whether Biden’s agenda will ultimately succeed or implode.

But the White House seems strangely, eerily confident about what’s happening right now. If you read between the lines of the doomscrolling coverage, what emerges is this: Improbably, Biden and his advisers seem to think the latest events have placed them on the brink of securing his agenda.

This is despite the fact that this week, in some ways, things went badly awry. When Biden introduced his framework for the Build Back Better reconciliation bill Thursday, Sens. Joe Manchin III (D-W.Va.) and Kyrsten Sinema (D-Ariz.) conspicuously failed to endorse it. That raised questions about whether the White House seriously miscalculated.

Then, when House Speaker Nancy Pelosi (D-Calif.) tried to hold a vote on the bipartisan infrastructure bill that already passed the Senate — to deliver Biden a victory before going abroad — progressives refused to support it, fearing Manchin and Sinema would ultimately renege on the reconciliation bill. Then everyone left to regroup, raising more questions about who’s running the show.

That looks like a big legislative mess and a spectacular failure at managing the Democratic coalition, right? Well, the White House sees it differently. Punchbowl News explains why:

Administration officials argue that no one will care in the end that the infrastructure bill got pushed back again. They say they are closer than ever to passing two transformative pieces of legislation. That’s mostly true.

That’s mostly true, and it’s pretty important!

Let’s also note that something big happened because of the release of this framework. It made it official that major progressive priorities — such as paid leave, the billionaires’ tax, the Medicare expansion to dental and vision — will be jettisoned. Yet the Congressional Progressive Caucus overwhelmingly and strongly endorsed it, anyway.

That locks in the left’s willingness to accept those concessions while enthusiastically backing the package. As Politico Playbook correctly noted, Rep. Pramila Jayapal (D-Wash.) provided the key quote revealing this: “We wanted a $3.5 trillion package, but we understand the reality of the situation.”

And don’t overlook this: Putting out the framework was the hook for numerous progressive and environmental groups to put out statements hailing its transformative potential, which further shores up the left flank behind it.

The trouble here is that highly visible speed bumps and glitches — like Manchin and Sinema not yet endorsing the framework — get magnified in day-to-day coverage into the latest sign of doom. That’s because everyone is training microscopes on every detail to divine where things are going.

Indeed, when various factions and players make such feints to increase leverage or realize some other goal — such as not wanting to appear jammed to preserve the aura of independence — it might magnify the impression of messiness and chaos. But as Jonathan Bernstein points out, this is how the legislative process works: Legislating inherently involves reconciling a lot of complicated moving parts. That’s messy and chaotic.

Which is why, from the White House perspective, the fact that the progressive caucus and a range of liberal groups are rallying behind the package shows that we’re seeing big general movement in the right direction. The left is one of those big moving parts — and it moved pretty dramatically.

“Every corner of the Democratic Party is coalescing around a vision that would be transformative and overwhelmingly popular right now,” one White House official tells me. “And it’s within reach.”

In fact, all that movement should focus our attention on the fact that there’s really one big missing piece left: getting Manchin and Sinema publicly on board behind the framework.

To be clear, that is a very big missing piece. We still don’t know whether Sinema supports some of its various revenue raisers, such as the surtax on income over $10 million. We don’t know whether Manchin will support things like the expanded child tax credit in its current form. The Senate is currently debating text and may allow changes to such things.

But regardless, here’s how all this would now have to unfold. Sinema and Manchin would have to indicate their support for the framework in a persuasive enough public way to get progressives in the House to pass the two bills. After that, the Senate could pass the reconciliation one.

Another way this might work out is via private talks among Manchin and Sinema on one hand, and House progressives on the other. If a solid enough understanding is reached, that could allow the House to pass both bills, and Senate action might follow.

All this might still collapse. Manchin and Sinema might pull the plug on the reconciliation framework. Or progressives might insist that the Senate go first on the reconciliation bill, and Manchin and Sinema might balk at that. Or lingering disagreements among House Democrats over things like prescription drug pricing and state and local tax deductions could upend matters.

But the key point here is that the final missing piece is within view: Getting Manchin and Sinema to yes on a concrete framework that the rest of the party has endorsed. We were not at this point 24 hours ago.

So if you squint, you can see a path to success. And it’s not crazy for the White House to think that in the end, this just might all work out.

#### Progressives won’t back it

Laura Barron-Lopez, et al, 10-28-2021, with CHRISTOPHER CADELAGO and NATASHA KORECKI "Biden tries, stumbles, selling his domestic agenda into existence," POLITICO, https://www.politico.com/news/2021/10/28/joe-biden-agenda-sales-pitch-517479

Progressive lawmakers and outside activists, however, stressed that the time for bargaining had not actually ended. The votes would not be there for either the infrastructure or social spending bill, liberals warned, unless some measures were added back in or assurances were made by centrist holdouts in the Senate.

“It's a huge start. It is not yet a deal,” said Rahna Epting, executive director of MoveOn. “We don't think we should be rushing the [bipartisan infrastructure] vote until a deal is struck. We need to maintain the two-track process.”

Though progressive outside groups urged lawmakers to stand firm against voting for the infrastructure bill unless centrist Democratic senators explicitly back the social spending framework, they also saw a net positive in Biden’s attempt to solidify parameters of a deal.

#### Biden’s push failed

Sarah Ferris et al, 10-28-2021, with NICHOLAS WU, HEATHER CAYGLE and EUGENE DANIELS. "Fractious Dems struggle to unite around $1.75T megabill," https://www.politico.com/news/2021/10/28/biden-house-democrats-517416

Joe Biden and Nancy Pelosi revved their party toward a House vote as soon as Thursday on a $550 billion Senate-passed infrastructure bill, even as progressives aren't sold yet on taking what one called "a leap of faith in the president."

Soon after the White House outlined a framework for a $1.75 trillion deal on social spending, Biden made a high-stakes appearance on Capitol Hill to sell Pelosi's caucus on it. While some liberal priorities were included in the package of climate, health care and other social policy investments, others were scrapped — and multiple House progressives said they're not prepared to vote yes on infrastructure given their uncertainty about the framework's Senate future.

The Congressional Progressive Caucus held its own meeting after Biden left, as its chair Rep. Pramila Jayapal (D-Wash.) signaled her group still had significant concerns after the president’s pitch for its votes. One of her members, Rep. Cori Bush (D-Mo.), said simply "no" when asked if she would vote for the infrastructure bill after the president's push. Another, Rep. Rashida Tlaib (D-Mich.) answered "hell no" on the infrastructure question.

“There are too many no votes" in the progressive camp, Jayapal told reporters Thursday afternoon, to pass the infrastructure bill on Thursday.

#### Distrust outweighs PC

Mike Lillis, 10-28-2021, "Lack of trust mangles Democratic efforts to reach deal," TheHill, https://thehill.com/homenews/house/578844-lack-of-trust-mangles-democratic-efforts-to-reach-deal?amp

As Democratic leaders race to advance President Biden's agenda this week, the highest barrier to a quick infrastructure victory is not one of policy or politics, but distrust.

House liberals have blocked a $1.2 trillion bipartisan infrastructure bill, not to protest the substance, but because they simply don't have faith in party moderates to keep their commitment to a larger "family" benefits bill if it's left hanging in limbo after infrastructure moves to Biden's desk.

The progressive critics are targeting two moderates in particular - Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) - who have emerged as the face of centrist opposition to key parts of Biden's spending plan.

"Sinema and Manchin have proven that they can't be trusted," Rep. Jimmy Gomez (D-Calif.), a member of the Congressional Progressive Caucus (CPC), said bluntly

Liberals are accusing the centrist pair of moving the goal posts as the talks have evolved. Manchin, for example, has endorsed the notion of hiking taxes on the wealthy, but is now pushing back against a newly proposed billionaire tax.

The flipflopping has infuriated Senate liberals like Bernie Sanders (I-Vt.), who lamented Wednesday that every proposed revenue stream "seems to be destroyed" by the moderate holdouts. And it hasn't been overlooked in the House, where progressives are pointing to Manchin's revolving position on tax hikes as further reason for their growing distrust.

"Manchin and Sinema keep raising different issues late in the game, which they could have done a while back," Gomez said. "It erodes people's trust that they're actually serious about getting anything done."

Gomez is hardly alone. Rep. Jamaal Bowman (D-N.Y.) also took aim at the centrist senators, calling them out of step with voters who back Biden's agenda.

"Manchin and Sinema aren't using common sense and moving in the direction of the country," said Bowman. "They don't seem to be moving with the country; they seem to be moving with their own special interests."

Bowman noted that the Senate had approved a $3.5 trillion budget bill - the same figure favored by Biden - only to have Manchin and Sinema oppose new spending at that level.

"So how can we trust them?" Bowman asked.

The tensions have arrived at an inopportune time for Democratic leaders, who are racing to bridge the internal divisions surrounding Biden's agenda in the next 24 hours.

Moderate lawmakers, backed by leadership, want an immediate vote on the Senate-passed bipartisan infrastructure bill - a centerpiece of Biden's economic plan - that would lend the president a big win before he heads overseas Thursday for a high-stakes global climate summit. Yet House liberals are threatening to sink that proposal if it hits the floor before there's a solid, detailed agreement - if not a vote - on the larger but less popular social benefits package, the second piece of Biden's domestic agenda.

The impasse has heightened the likelihood that Biden will be forced to head to Europe on Thursday without an infrastructure win under his belt.

Speaker Nancy Pelosi (D-Calif.) has sought to break the deadlock by urging those progressives to accept a "framework" deal on the social spending legislation in exchange for their infrastructure votes. In a letter to Democrats on Wednesday, Pelosi acknowledged the erosion of trust between the groups, but called on all sides to have "trust and confidence in an agreement for the Build Back Better Act" for the sake of enacting the infrastructure bill more quickly.

"[W]e are close to agreement on the priorities and the topline of the legislation, which can and must pass the House and Senate," Pelosi wrote.

The trouble is the relationship between the feuding factions has grown so toxic over the course of the months-long debate that liberals say they've lost all faith in the centrists to honor their commitments. And they're digging in despite Pelosi's appeals.

#### Lobbying link is thumped

Trevor Hunnicutt and Richard Cowan 10/28. Political reporters for Reuters. “Biden, pushing $1.75 trillion spending bill, dealt setback on infrastructure.” October 28 2021. https://www.reuters.com/world/us/biden-give-update-democrats-spending-plans-before-europe-trip-source-2021-10-28/

Many groups including labor unions welcomed the plan. "The reconciliation framework is a pro-worker victory: child care, home care, clean energy jobs, health care, tax fairness, immigration improvements and support for worker organizing," said AFL-CIO President Liz Shuler.

But the plan does not include paid family leave or a tax on billionaires. Some influential lobby groups and constituencies were angered by the absence of key Biden administration pledges.

#### Targets too small, no fast changes, factionalism

Economist, 10-23-2021, "Broken promises, energy shortages and covid-19 will hamper COP26," https://www.economist.com/international/2021/10/23/broken-promises-energy-shortages-and-covid-19-will-hamper-cop26?utm\_campaign=the-economist-today&utm\_medium=newsletter&utm\_source=salesforce-marketing-cloud&utm\_term=2021-10-25&utm\_content=article-link-5&etear=nl\_today\_5

A lot of hot air

Australia is an outlier among rich countries. Its original ndc was not particularly ambitious. Nor is its new one. Meanwhile many emerging economies have set lax targets. Russia and Indonesia are promising no new effort. By employing some creative carbon accounting, Mexico and Brazil have produced new strategies that are less ambitious than their original plans.

India, which is responsible for 7% of carbon-dioxide emissions, has not yet published a fresh climate strategy. Nor has China, which accounts for 28%. Last year it said that it planned to make its emissions peak “before” 2030, having previously said only that it would reach this milestone “around” that time. Many would like it to bring this date forward, but Li Shuo of Greenpeace thinks that is unlikely to happen soon. He says there is more chance China might strengthen its pledge by declaring an absolute figure above which its annual emissions will not rise.

Taken together, the new targets underwhelm. Promises made by the middle of this year give a 50% chance of keeping warming below 2.1°C but only a 5% chance of keeping it under 1.5°C, according to the International Energy Agency (iea), a forecaster (see chart). And this assumes that all the pledges are honoured, which is far from guaranteed.

On the tail of these lacklustre announcements is a failure relating to funding for developing countries. In 2009 rich countries vowed that by 2020 they would be providing poor ones with $100bn in climate finance each year. Roughly equal amounts were to go towards adaptation and to reducing emissions. The figure is a fraction of the $2trn annual investment that the iea believes developing countries need. But the promise is supposed to signal the willingness of richer countries to make sacrifices for the good of the planet.

In 2019 only $80bn was provided, according to the oecd, a club of rich countries. This year a last-minute whip-round could perhaps see the total rise above $100bn before the conference. But poor countries are miffed. The original deadline was 2020—when, because of the pandemic, the total was probably lower even than in 2019. And only about 25% of the cash is financing ways of adapting to climate change, instead of the 50% promised.

All these disappointments will cause hand-wringing at the summit. Rich countries may re-emphasise their willingness to lend. They may offer an aggregate figure over several years, such as $500bn between 2020 and 2025. But no country is likely to swiftly adjust its new ndc. Designing them takes months of work and co-ordination across government departments.

Instead, progress in Glasgow will probably have to come from agreements struck in narrower debates, the outcomes of which will help countries implement their existing climate strategies, and make them more likely to increase their ambitions in the future. One job is to agree on rules for international carbon markets, such as what double-counting means when it comes to carbon credits.

A second debate is about “loss and damage”, meaning how far countries that will suffer most from climate change should receive compensation. The topic is taboo among rich countries. In Paris they eventually allowed the concept to be mentioned in the agreement, but resisted language that might actually lead to something being done. Poor countries hope to move it up the agenda and to lay the groundwork for more concrete discussions in the future.

Third comes the effort to get governments to sign up to sector-level pledges, such as to stop burning coal, ban the sale of internal-combustion engines and halt deforestation. The Global Methane Pledge, a promising new pact, calls for cutting global methane emissions by at least 30% from 2020 levels by 2030. Its backers include America and the eu. Measured over 20 years, a tonne of methane causes 86 times more warming than a tonne of carbon dioxide but the gas is naturally removed from the atmosphere much faster than CO2. The Climate and Clean Air Coalition, made up of governments and lobby groups, says cutting human-made methane emissions in half by 2050 could lower temperatures by about 0.2°C.

The fourth topic is what Helen Mountford of the World Resources Institute, a think-tank, calls “keeping 1.5°C alive”. Green groups and some governments want countries to acknowledge that the world is failing to slow global warming, and to state explicitly that they wish to keep the increase under 1.5°C. China and India refused to back a similar statement at the g20 summit in July. They feel that if the temperature targets are revised the same should happen to the climate-finance goals.

A global energy shortage provides an unfortunate backdrop to the discussions. In Asia coal shortages are forcing factories to curb output. European gas and power prices have gone berserk. Governments are watching Joe Biden try to get legislation containing support for clean-energy firms through Congress. The wrangling is a reminder of the difficulties democratic countries face when they seek to enact big climate reforms.

Covid-19 has increased the costs and risks of getting negotiators to the summit. Poor countries, in particular, may send fewer than usual. Even in normal times they are at a disadvantage to rich places, which can send hordes of technocrats. The fact that many rich countries appear to be past the worst of the pandemic, while poor ones are still struggling through it, will only make such inequalities rankle more.

Block parties

All this could deepen the usual factionalism. Delegations attending the cop typically form three blocks. Poor countries ask rich ones for more ambition and more money. Rich countries try to convince emerging ones, which account for the lion’s share of the growth in emissions, to pollute less. And emerging economies try to tell rich countries that they are in fact part of the poor and vulnerable group, while also reminding rich countries that they got where they are today by polluting.

Yet there are some signs that these old alliances are loosening. Emerging economies have less excuse for inaction than they did when Donald Trump was in the White House, says Laurence Tubiana of the European Climate Foundation, a lobby group (Mr Trump pulled America out of the Paris agreement; it rejoined in February). Some, such as South Africa, are becoming more ambitious. In September China said it would no longer finance new coal-fired power stations outside its borders. Natural disasters in rich countries, such as floods in Germany that killed almost 200 people, may bring a new sense of urgency.

Any progress made at cop26 will probably be incremental, not a “big leap” of the sort John Kerry, America’s climate envoy, has promised. That will enrage grassroots activists. And it hardly matches the scale of the challenge. Two years from now a “Global Stocktake” scheduled under the Paris agreement will examine how well governments are implementing their climate plans. If their most recent climate promises are any indication, the stocktake could reveal a rather bare cupboard

#### NDCs are screwed

Sachs '20 [Noah; 5/5/20; Professor of Law and Director of the Law School's Robert R. Merhige, Jr. Center for Environmental Studies at the University of Richmond, JD from Stanford Law School; "The Paris Agreement in the 2020s: Breakdown or Breakup?" Ecology Law Quarterly, Vol. 46, Issue 3, p. 865-910/]

The Agreement requires, as a binding treaty obligation, that each party submit an NDC and report on its progress.27 However, at the insistence of the Obama Administration, which cited the need to avoid Senate ratification, there is no legally binding requirement to actually achieve the goals set forth in an NDC.28 It is up to each party to implement policies to achieve its NDC, and there is no sanction for failing to reach the target. The nonbinding nature of NDCs has several consequences that make the Paris Agreement fragile and prone to defections. States cannot compel other states to submit an ambitious NDC or punish states for falling short. There is nothing in the Agreement, moreover, that requires a party to justify its NDC in relationship to reaching the treaty’s overall two-degree goal. No provision requires a party to show, for example, that its pledge, in coordination with other nations making a similar level of effort, would achieve this temperature goal. The treaty allows governments to set pledges solely on the basis of domestic convenience and capability. Seen in this light, as Anne-Marie Slaughter has noted, the Agreement is mainly a “statement of good intentions.”29 The parties opted for this voluntary approach because a “tougher” agreement with binding targets and enforceable sanctions would not have attracted the participation of major emitters, including the United States.30 Many proponents of the Agreement contend that it was the best that could have been achieved in 2015, after years of fruitless negotiation on legally binding targets and timetables.31 The voluntary structure was also the natural evolution of negotiations since 2009 that centered on a pledge-and-review approach.32 The Agreement’s lack of bindingness has been lauded on the grounds that states’ GHG-reduction pledges are likely to be more ambitious than commitments states would submit under an alternative, legally binding regime with tough sanctions.33 As the IPCC has explained, “states may prefer [that] legally binding agreements . . . embody less ambitious commitments, and [states] may be willing to accept more ambitious commitments when they are less legally binding.”34 Voluntary pledges could be more effective in the long run than mandatory, legally binding commitments of lesser magnitude. The problem with relying on voluntary pledges, however, is that if the aggregate emissions reductions expected under the NDCs are insufficient to keep warming within tolerable levels, there is no stick to force states to commit to greater reductions. We now have a short window of time to slash global GHG emissions, but the Agreement offers no mechanism to force emissions reductions on parties or even to allocate effort among the parties. It rests on the vicissitudes of voluntary action, with each party deciding how much effort it is willing to make. The emissions gap—the shortfall in the sufficiency of the voluntary pledges—was obvious at the Paris conference. Analysts quickly predicted that if all the NDCs submitted under the Agreement in 2015-2016 were fully implemented by 2030 (which is highly unlikely), global temperatures would increase 2.7 to 3.5 degrees Celsius beyond preindustrial levels,35 a catastrophic level of warming. Negotiators knew that the voluntary pledges were nowhere near sufficient to achieve the ultimate goal of the treaty: keeping global warming to “well below” 2 degrees Celsius compared to preindustrial temperatures and “pursuing efforts” to limit the temperature increase to 1.5 degrees Celsius.36 The parties took what they could get in 2015, fully aware of this emissions gap, and hoped the Agreement would spur collective progress over time. The long-term success of the Agreement therefore depends on the optimistic vision of what I call an “upward spiral,” where early-stage cooperation at Paris will result in parties making progressively more ambitious commitments in the future. As parties work toward reasonably achievable NDCs and continue to build trust, they may be willing to make deep cuts in emissions, secure in the knowledge that other parties are making similar sacrifices. This vision of an upward spiral in turn depends on two assumptions: first, that the so-called “ratchet mechanism” of the Agreement will operate as intended, and second, that pressure from other parties to aim higher in the ambition of NDCs, which I call the “peer pressure proposition,” will be sustained over several decades. Both of these assumptions are attractive, widely held, and wrong. A. The Paris Agreement’s Ratchet Mechanism The ratchet mechanism refers to the provisions of the Paris Agreement that require parties to submit progressively more “ambitious” NDCs over time. “Ambitious” in this context means NDCs that commit a state to progressively deeper GHG emissions cuts or, for many developing states, NDCs that allow an increase in expected emissions, but at a slower rate than current projections. The ratchet mechanism is crucial to slowing climate disruption. It is the only internationally adopted legal text that encourages parties to reduce their GHG emissions over a multidecade timespan. The ratchet mechanism is not spelled out in any single article of the Agreement. Rather, the “ratchet” results from a collection of scattered provisions, including the following: • Each Party shall “prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.”37 • Each Party’s successive NDCs “will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition . . . .”38 • Each Party shall regularly provide information on national inventories and information “necessary to track progress made in implementing and achieving” its NDC.39 • A Party may at any time “adjust” its NDC “with a view to enhancing its level of ambition.”40 • Beginning in 2023 and every five years thereafter, the parties shall “take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of [the] Agreement and its long-term goals . . . .”41 • Parties will then submit successive NDCs “informed by the outcomes of the global stocktake[s] . . . .”42 These provisions, though skeletal, suggest how the parties expect an upward spiral to unfold. They create a detailed timeline in which the parties will submit NDCs, prepare emissions inventories at least every two years, take stock every five years of progress under the Agreement (2023, 2028, etc.), and submit pledges that “represent a progression beyond the Party’s then current [NDC]” in 2020, 2025, 2030, and so on.43 Some scholars believe that parties will follow the ratchet mechanism quite literally, even if domestic circumstances are unfavorable. Christina Voigt, for example, has argued that even if a party were in a “financial, political or economic crisis,” there would be no grounds for “a decrease in what can be considered its ‘highest possible ambition’ compared to the level contained in the previous NDC.”44 According to Voigt, each submission of an NDC sets a “floor” for the next NDC.45 Every party is required to go above and beyond its previous NDC with each new submittal.46 Voigt suggests that the Agreement somehow locks in an upward spiral of progressively more ambitious commitments. But this optimism is misplaced. The text of the ratchet is not self-executing. Given the lack of penalties for failing to achieve NDCs, parties still face strong incentives to defect or free ride under the Agreement, to pledge only minimal action, or to appear to take action while actually imposing few costs on their domestic interest groups. Many states— especially those in “financial, political, or economic crisis”—will prioritize the needs of their domestic constituencies over their voluntary, nonbinding Agreement pledges. In short, the ratchet mechanism is a necessary but not sufficient condition for a consistent, upward trajectory of NDCs. Parties must somehow be incentivized to stick with it. B. The Peer Pressure Proposition and Its Fallibility According to many scholars, peer pressure will be the glue that holds the Agreement together.47 Under the pledge-and-review system, parties will feel pressure from other parties to submit and achieve progressively more ambitious NDCs. Additionally, the ratchet mechanism could be sustained if parties fear reputational costs for noncooperative behavior, such as failing to achieve their own NDCs. If parties perceive that others are making progress toward their respective NDCs at each review conference, they will be more willing to undertake progressively deeper cuts themselves.48 In this view, the five-year “stocktake” review conferences—a collective “show and tell” on the international stage49—will be the key fora for exercising peer pressure under the Agreement. I refer to these arguments about disclosure, reciprocity, and reputation as the “peer pressure proposition.” The peer pressure proposition holds that positive peer pressure or perceived reputational costs will encourage parties to make and achieve progressively more ambitious commitments under the Agreement.50 There is reason to question whether the peer pressure proposition can consistently work to support the Paris Agreement over several decades, especially through global political and economic upheavals. The peer pressure proposition needs to be critically scrutinized, rather than merely assumed. Below, I challenge some key assumptions of the peer pressure proposition, arguing that skepticism is warranted for three main reasons: states will prioritize domestic interests over international reputation, “naming and shaming” strategies are not likely to be effective, and it is not assured that states will find it easier to make deep emissions cuts in the near future. 1. Domestic interests will likely outweigh perceived international reputational concerns. One reason for skepticism is that the peer pressure proposition excessively emphasizes the role of international reputation. Reputation surely matters in international law. As Ian Johnstone has argued, “states care about collective judgment of their conduct because they have an interest in reciprocal compliance by and future cooperation with others . . . .”51 International reputation is but one consideration for states, however. A more nuanced account would acknowledge that states make a cost-benefit calculus on the stringency of their international climate commitments, and their calculus gives substantial weight to domestic interests. These domestic interests include the immediate pressures of electoral politics, the expected impact of deep emissions cuts on domestic industries, and prioritization of national economic growth over global emissions reductions. In each party’s cost-benefit calculus, powerful domestic economic interests will undoubtedly weigh as much or more than concerns about international reputation, particularly because any reputational “hit” under the Agreement is tied to a nonbinding climate pledge. NDCs are legally unenforceable pledges, so the reputation costs of failing to achieve them are diluted.52 Even if many governments were to perceive that net benefits outweigh net costs in committing to ambitious NDCs, the distribution of costs on powerful domestic actors might act as a drag on national ambition. For example, if veto players in the oil, coal, or palm oil industries retain their political influence with the governments of major emitters (for example, Russia, Saudi Arabia, South Africa, Indonesia), which seems likely, these governments might perceive international pressure to submit more ambitious NDCs, combined with intense domestic pressure to do less. As a consequence, these important states might continue to submit weak NDCs throughout the 2020s. Russia is emblematic of this group. It is the fourth largest GHG emitter, yet it held off on ratifying the Paris Agreement until 2019, and its NDC is so weak that Russia is already achieving its 2030 target.53