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### Adv---Inequality

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

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

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

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

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

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

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

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

#### Antitrust law permits labor market concentration---that fuels inequality

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

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

#### Inequality undermines US soft power

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

#### And causes neo-isolationist nativism---undermines global coop

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

#### Soft power and international coop solve extinction

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

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

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

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

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

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

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

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

#### Prioritizing worker welfare solves inequality

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

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

### Adv---Modeling

#### Global competition standards use consumer welfare

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

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

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

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

#### Global consumer welfare standard fuels populism

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

#### Extinction

Alex de Waal 16. Executive Director of the World Peace Foundation at the Fletcher School at Tufts University. 12-5-2016. “Garrison America and the Threat of Global War.” http://bostonreview.net/war-security-politics-global-justice/alex-de-waal-garrison-america-and-threat-global-war

Trump’s promises have been so vague that it will be hard for him to disappoint. Nonetheless, many of his supporters will wake up to the fact that they have been duped, or realize the futility of voting for a wrecker out of a sense of alienated desperation. The progressives’ silver lining to the 2016 election is that, had Clinton won, the Trump constituency would have been back in four years’ time, probably with a more ruthless and ideological candidate. Better for plutocratic populism to fail early. But the damage inflicted in the interim could be terrible—even irredeemable if it were to include swinging a wrecking ball at the Paris Climate Agreement out of simple ignorant malice.

Polanyi recounts how economic and financial crisis led to global calamity. Something similar could happen today. In fact we are already in a steady unpicking of the liberal peace that glowed at the turn of the millennium. Since approximately 2008, the historic decline in the number and lethality of wars appears to have been reversed. Today’s wars are not like World War I, with formal declarations of war, clear war zones, rules of engagement, and definite endings. But they are wars nonetheless.

What does a world in global, generalized war look like? We have an unwinnable “war on terror” that is metastasizing with every escalation, and which has blurred the boundaries between war and everything else. We have deep states—built on a new oligarchy of generals, spies, and private-sector suppliers—that are strangling liberalism. We have emboldened middle powers (such as Saudi Arabia) and revanchist powers (such as Russia) rearming and taking unilateral military action across borders (Ukraine and Syria). We have massive profiteering from conflicts by the arms industry, as well as through the corruption and organized crime that follow in their wake (Afghanistan). We have impoverishment and starvation through economic warfare, the worst case being Yemen. We have “peacekeeping” forces fighting wars (Somalia). We have regional rivals threatening one another, some with nuclear weapons (India and Pakistan) and others with possibilities of acquiring them (Saudi Arabia and Iran).

Above all, today’s generalized war is a conflict of destabilization, with big powers intervening in the domestic politics of others, buying influence in their security establishments, bribing their way to big commercial contracts and thereby corroding respect for government, and manipulating public opinion through the media. Washington, D.C., and Moscow each does this in its own way. Put the pieces together and a global political market of rival plutocracies comes into view. Add virulent reactionary populism to the mix and it resembles a war on democracy.

What more might we see? Economic liberalism is a creed of optimism and abundance; reactionary protectionism feeds on pessimistic scarcity. If we see punitive trade wars and national leaders taking preemptive action to secure strategic resources within the walls of their garrison states, then old-fashioned territorial disputes along with accelerated state-commercial grabbing of land and minerals are in prospect. We could see mobilization against immigrants and minorities as a way of enflaming and rewarding a constituency that can police borders, enforce the new political rightness, and even become electoral vigilantes.

Liberal multilateralism is a system of seeking common wins through peaceful negotiation; case-by-case power dealing is a zero-sum calculus. We may see regional arms races, nuclear proliferation, and opportunistic power coalitions to exploit the weak. In such a global political marketplace, we would see middle-ranking and junior states rewarded for the toughness of their bargaining, and foreign policy and security strategy delegated to the CEOs of oil companies, defense contractors, bankers, and real estate magnates.

The United Nations system appeals to leaders to live up to the highest standards. The fact that they so often conceal their transgressions is the tribute that vice pays to virtue. A cabal of plutocratic populists would revel in the opposite: applauding one another’s readiness to tear up cosmopolitan liberalism and pursue a latter-day mercantilist naked self-interest. Garrison America could opportunistically collude with similarly constituted political-military business regimes in Russia, China, Turkey, and elsewhere for a new realpolitik global concert, redolent of the early nineteenth-century era of the Congress of Vienna, bringing a façade of stability for as long as they collude—and war when they fall out.

And there is a danger that, in response to a terrorist outrage or an international political crisis, President Trump will do something stupid, just as Europe’s leaders so unthinkingly strolled into World War I. The multilateral security system is in poor health and may not be able to cope.

Underpinning this is a simple truth: the plutocratic populist order is a future that does not work. If illustration were needed of the logic of hiding under the blanket rather than facing difficult realities, look no further than Trump’s readiness to deny climate change.

We have been here before, more or less, and from history we can gather important lessons about what we must do now. The importance of defending civility with democratic deliberation, respecting human rights and values, and maintaining a commitment to public goods and the global commons—including the future of the planet—remain evergreen. We need to find our way to a new 1945—and the global political settlement for a tamed and humane capitalism—without having to suffer the catastrophic traumas of trying everything else first.

#### Specifically, the Philippines mirrors the US consumer welfare standard

Jose Maria L. Marella 18. J.D., University of the Philippines (UP) College of Law. “ADMINISTRATIVE WILL TO POWER: ARTICULATING THE GOALS OF ANTITRUST AND PROPOSING THEREFOR A REGULATORY FRAMEWORK” Philippine Law Journal. Vol. 91. 2018.

The complexities of modern government have often led Congress- whether by actual or perceived necessity-to legislate broad policy goals and general statutory standards, leaving the specific policy options to the discretion of an administrative body. 2 In this regard, the Philippine Competition Commission ("PCC")-the administrative body mandated to implement the Philippine Competition Act -has taken great strides in advancing the policy objectives of economic efficiency and consumer welfare. That the two policy objectives figure greatly in the exercise of the PCC's mandate is evident from its regulatory issuances and participation in relevant proceedings. A. Regulatory Issuances In its Implementing Rules and Regulations ("IRR"), the PCC adopts the "substantial lessening of competition" ("SLC") test,4 a Jurisprudential standard crafted and developed by foreign jurisdictions to weigh the anticompetitive effects of certain transactions. By assessing market indicators such as firm rivalry, prices, quality, and availability of goods and services, the SLC test filters out agreements that reduce competitive pressure among firms and disincentivize them from becoming more efficient and innovative.5 The IRR also allows the PCC to forbear-or desist from applying the provisions of the PCA-when, among other considerations, forbearance is consistent with the benefit and welfare of the consumers. 6 Economic efficiency and consumer welfare also take center stage in the PCC's Rules on Enforcement Procedure ("Enforcement Rules"), the rules and regulations governing hearings, investigation, and other proceedings on anti-competitive agreements, abuse of dominant market position, and other violations of the PCA.7 Preliminary inquiries-the PCC proceedings that parallel the prosecutor's preliminary investigation in criminal cases-are to be conducted with due regard to consumer welfare.8 Interim measures may be issued against entities when their acts would result in a material and adverse effect on consumers or competition in the market.9 Upon termination of enforcement proceedings, the PCC will determine the propriety of imposing conclusive remedies with the aim of maintaining, enhancing, or restoring competition in the market.10 Similar to the IRR, the PCC's Rules on Merger Procedure ("Merger Rules") employs the SLC test in determining whether a proposed merger or acquisition will, post-transaction, reduce economic efficiency or impair consumer welfare; in determining the appropriateness of imposing interim measures; 12 or in considering whether, before clearing a merger or acquisition, the parties must abide by certain conditions to remedy, prevent, or mitigate competitive harm. 13 In addition, pursuant to its market surveillance function, the PCC is empowered to motu proprio conduct a review of mergers that are reasonably foreseen to breach the SLC test. 14 Intervening by way of an amicus curiae brief, the PCC apprised the Supreme Court of the competition issue intertwined with the legal question in a pending case that assailed, as an ultra vires expansion of statutory language, the regulation issued by the Philippine Contractors Accreditation Board that created a nationality restriction that was unsupported by the governing statutory text.15 The PCC supported striking down the regulation, arguing that, on the basis of economic literature and empirical data, the nationality restriction constituted a regulatory barrier to entry that unduly favored domestic contractors to the detriment of foreign contractors. In its argument that the regulation inordinately restricts market competition, the PCC enunciated the following principles: Consumer welfare, which in this case refers to the welfare of both households and other businesses, is maximized when competition allows consumers to access and choose the most efficient producers, regardless of the service provider's nationality. Indeed, it is a settled principle in economics that if there are many players in the market, healthy competition will ensue. The competitors will try to outdo each other in terms of quality and price in order to survive and profit. Competition therefore results in better quality products and competitive prices, which redound to the benefit of the public.16 In its recent bid to take its legal scuffle with Globe and PLDT17 to the Supreme Court,18 the PCC donned its mantle "to level the playing field across all markets; to review the competitive implications of large transactions; and to actively investigate, prosecute, and sanction cases of cartelistic behaviors that prevent, restrict, or lessen market competition." 19 These mandates would be carried out to "[encourage] innovation among market players, [reward] their efficient and productive use of resources, and ultimately [redound] to the benefit of consumers by lowering prices and enhancing their right of choice over goods and services offered in the market. 20 Significantly, the general public has acquiesced to the perception that the PCC champions economic efficiency and consumer welfare. News reports have consistently adverted to the PCA as a landmark piece of legislation that will enhance and promote these two policy objectives. Even lawmakers have acknowledged the PCC's critical role in improving market competition. Senator Juan Miguel Zubiri, addressing PCC's representative, Commissioner Johannes Bernabe, in a legislative hearing concerning the telecommunications sector, stated: "I'm really one with you [...] So you guys have to help us out [...] We are fighting giants. But as I said, the least that can happen is [that they] shape up and give us better service[,] or the best is that more players can come in and give us the best service[.]"21 But are such policy objectives all there is to the PCA? Or does the statutory text, alone or in conjunction with related legal materials, admit of other governing principles? Addressing such questions is crucial as the PCA may also cover other goals that have not been explicitly recognized. The law, after all, admits of different interpretations. 22 This then requires stakeholders and other government bodies to defer to the "sound discretion of the government agency entrusted with the regulation of activities coming under [its] special and technical training and knowledge[.]" 23 In such case, the PCC might be undercutting its own potential to make even greater strides in other aspects of national development. Recognizing these other objectives will greatly influence the PCC's exercise of its mandate and, more importantly, could translate to better gains in national development. By no means does this Note claim that the PCC is severely limiting the exercise of its functions-whether consciously or subconsciously. Rather, it simply articulates other equally important antitrust considerations which can be construed from the statutory text-considerations which the PCC must also devote attention to, and which the public, considering the incipient but technical field of competition law, 24 must appreciate.

#### Antitrust is key to combat weakened growth and rising income inequality

Jose Maria L. Marella 18. J.D., University of the Philippines (UP) College of Law. “ADMINISTRATIVE WILL TO POWER: ARTICULATING THE GOALS OF ANTITRUST AND PROPOSING THEREFOR A REGULATORY FRAMEWORK” Philippine Law Journal. Vol. 91. 2018.

2. Income Inequality in the Philjopines Philippine economic literature establishes that market concentration, and conversely, weak market competition, **lead to limited growth and productivity.** The interplay of behavioral, regulatory, and structural constraints fosters within numerous industries the rise of an exclusive circle of dominant players.1 47 Antitrust analysis relies on economic indicators such as the price- cost margin ("PCM") and the Herfindahl-Hirschman Index ("HHI), a ratio used to determine industrial concentration, to compare the monopolistic price markup and competitive prices. "In the presence of market power, the firms will be able to set prices above those prevailing under competitive conditions, leading to excessive economic profits or 'rents'." 148 These measures **directly affect the distribution of wealth**. A high HHI means that the industry is concentrated; only a few firms deliver the bulk of industry output and reap the profits therein. On the other hand, a high PCM means that firms are effectively denying to consumers what they could have enjoyed under competitive conditions. Using such economic tools in conjunction with industry analysis, one study found that: (i) deliberate government coddling led to concentration in telecommunications, power, manufacturing, textiles, and cement; (ii) cartel-like behavior persists in flour milling, cement, and inter-island shipping; (iii) entry barriers led to comparatively high domestic prices when compared to border prices; and (iv) entry barriers **sustained the operation of inefficient firms and allowed them to generate monopoly rents.** 149 The flipside of the issue is that more inclusive industries lead to lower figures of the HHI and PCM. One of the Philippines' best chronicled "success stories" on the matter relates to the airline industry. Owing to the various trade liberalization measures implemented during the 1990s-among them the deregulation of aviation-PCMs declined from 67% to 48%. The entry of new firms served to depress monopolistic prices and disperse the 150 profits enjoyed by a previous monopoly. The income inequality concern becomes **even more alarming** when one considers the interests of those within the poorest income strata in the Philippines. Latest statistics indicate that poverty incidence 51 **is at 21.6%.** This figure expresses that, as a fraction of the total number of individuals in the Philippines, around one-fifth live below the poverty threshold. The hardest-hit sectors are the farmers, fisher folk, and children, with poverty incidences at 3 4 .3 %, 3 4 .0%, and 3 1. 4 %, respectively. 152 Moreover, total family expenditure is broken down into food at 42.8%; housing, water, 945 electricity, and other fuels at 1 .1%; and education at . %. Such **figures spell destitution, especially considering that basic commodities are prone to cartelization** while electricity and fuels industries are lorded over by oligopolies. Thus, the stage is **set for antitrust and competition policy to step in.** In order to include redistributive justice as among its "final causes," 154 the law's advocates must identify the specific mechanisms through which economic wealth can be equitably distributed.

**That’s key to prevent terrorism**

**Reuters 17**. “Uneven growth could spark extremism, instability in Southeast Asia – Malaysian PM.” Asian Correspondent. April 28. <https://asiancorrespondent.com/2017/04/uneven-growth-spark-extremism-instability-southeast-asia-malaysian-pm/#XXlMKJU7B9ixeQdP.97>

MALAYSIAN Prime Minister Najib Razak on Friday warned that Southeast Asian countries needed to ensure their economic growth was inclusive, or risk marginalised populations turning to violent extremism or even overturning political systems. Speaking at an event for entrepreneurs during the Association of South East Asian Nations (Asean) summit in Manila, Najib said the region was posting strong growth that could see Asean become the world’s fourth-largest economy, but that growth needed to be equitable. “We do not want our citizens to be marginalised in the age of extremism and radicalisation,” he said. “We know that those who see no hope in their own societies are more prone to the siren calls of terrorists who can and exploit their vulnerability and fill them with their lies.” Islamist extremism is expected to be high on the agenda during this week’s meetings, with fears for Indonesia, Malaysia and the Philippines about piracy and the rising threat of Islamic State. Of particular concern is the ease in which militants can acquire weapons, seek refuge with existing rebel groups and move between the many islands between the three countries.

#### Goes nuclear---terrorist-piracy nexus guarantees escalation

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The terrorism-piracy nexus and port security

In assessing the nature of maritime terrorist activity in Asia, it is important to study the terrorism-piracy nexus – not least because pirates have in the past financed terrorist activity.[59]Evidence of a linkage between the terrorists and pirates first emerged in May 2003, when the M/V Pen rider, a Malaysian-registered oil tanker, was attacked off the coast of Malaysia, and three crew members were taken hostage.[60] After ship owners paid $100,000 to free the crew, it emerged that the attackers were associated with the Free Aceh Movement, an insurgent group operating in Indonesia. The receipt of a ransom of $1.2 million by the Somali pirates to free a Spanish fishing vessel and 26 hostages in 2008 provided more proof of a possible link between terrorists and pirates; reportedly, the Al-Shabaab had received a five-percent cut. A year later, when the terror group hired pirates to smuggle in members of Al Qaeda to Somalia, the terror-piracy linkage seemed virtually certain.[61]

In recent years, terrorists and pirates have appeared to draw closer, even if the exact nature of their collaboration is not clear. Somali pirates and terrorists are said to have worked together in arms trafficking, and Al-Shabaab is said to have even have trained pirates for ‘duties’ at sea.[62]An investigation by the United Nations (UN) in 2017 found evidence of collusion between pirates and the Al Shabaab, including the possibility that pirates helped the latter smuggle weapons and ammunition into Somalia.[63] As discussed earlier, in Southeast Asia, the Abu Sayaff’s turn to piracy has resulted in millions earned via ransom payments.[64] Its cadres have used the revenue earned for pirate activity to expand the radical organisation’s presence in Southeast Asia.

The terror-piracy linkage is important because it highlights the causal mechanism behind rising violence at sea. The task of maritime security agencies becomes harder, however, when the lines between terrorism and piracy begin blurring, particularly in Southeast Asia, where the Abu Sayyaf has alternated between piracy and terrorism. Today’s pirates are trained fighters onboard speedboats, armed not only with automatic weapons, hand-held missiles and grenades but also and global positioning systems; professional mercenaries that loop effortlessly between rent-seeking and violent acts. Their objectives are as much ideological, as they are material.

ISPS code and littoral security

While most discussions around maritime terrorism presume a threat to sea-borne assets, port security constitutes the bigger challenge. Terrorists have long had seaports on their crosshairs, because of the latter’s role in trade and economic development. In recent years, there has been a significant increase in freight traffic, with key ports in Asia transformed into global trading hubs. In keeping with the growing importance of port-enabled trade, regional governments have taken better measures to protect ships and onshore facilities. In many ports, authorities have increased guards, gates, and security cameras, even introducing identification card programs to screen those with access to critical port infrastructure. The installation of radiation detectors has been particularly helpful in screening critical cargo and identifying suspicious shipments.

Yet, not even the best ports in Asia are able to track and monitor large containers comprehensively. With a rising quantum of cargo to be handled every day, port authorities find it impractical to scan each and every container being offloaded from cargo ships.[65]Container scanning in many ports is in fact a largely random exercise, with authorities insisting that shippers provide manifests of what is contained in cargo bins.[66]

The lack of effective checks on ports brings up the possibility of the use of containers as weapons to smuggle in arms, explosive materials or the terrorists themselves. While terrorists would not possibly target cargo ships directly, the latter could be used to transport weapons or to sabotage commercial operations. A dirty-bomb in an illicit cargo container of a cargo ship could cause a port shutdown and huge commercial disruption.[67] Even a failed attempt to smuggle a device into a major transshipment hub would significantly impact port operations.

After the 9/11 incident in the United States, the International Maritime Organization (IMO) had established the International Ship and Port Facility Security (ISPS) Code—a set of maritime regulations designed to help detect and deter threats to international shipping. The code subjects ships to a system of survey, verification, certification and control to ensure that the security measures prescribed by the IMO are implemented by member countries. It also provides a standardised, consistent framework for evaluating risk and gauging vulnerabilities of ships and ports facilities, laying down principles and guidelines for governments, port authorities and shipping companies, making compliance mandatory.[68]

The code, however, has not been effective in a way originally intended.[69]Firstly, the code is based on the experience of 9/11 and early piracy activity off Somalia. No amendments or revisions have been made with regard to new types of security threats encountered in recent years. The exclusion of vessels less than 500 tonnes, and all fishing vessels regardless of their size, is a further impediment in the code’s implementation, as terrorists have sought to use smaller boats to smuggle weapons and ammunition rarely subject to regulation.[70]

Another shortcoming is that the code does not include official monitoring procedures for security matters. Unlike the International Safety Management Code (ISM) that prescribes office audits by internal and external sources, the ISPS enumerates general guidelines and precautions—a standardised template for evaluating risks on many different types, sizes and categories of vessels and facilities.[71] The code also does not specify ways to strengthen capability to protect against new forms of terrorism, such as drone attacks.[72] With no legal obligation to implement regulations, port authorities are unwilling to make necessary investments in security measures.

The lack of national legislation/guidelines is another hurdle in the code’s implementation. Regional governments have neither enacted necessary domestic legislation to fight terrorists nor allotted resources to implement security measures.[73] In India, for instance, there is no comprehensive maritime security policy for protection of the commercial maritime infrastructure and supply chains.[74]A new Merchant Shipping Bill[75] in 2016 improved transparency and effective delivery of services, but has failed to address security concerns.

Given the complicated mix of variables contributing to port security, a study of security measures adopted by the civil aviation industry might offer some useful pointers. The latter’s efforts to prevent hijackings of commercial aircraft over the past four decades has been widely hailed as a success. Developed in the late 1960s, the international legal regime governing civilian flight operations was significantly upgraded after the attacks of 11 September 2001. The United States’ efforts to bring in legislation to regulate foreign airlines and flights from foreign airports have been particularly helpful. In concert with other international conventions drafted by the UN International Civil Aviation Organization (ICAO), the regulatory regime has deterred terrorists and criminals from targeting aircraft.[76]

This may hold important lessons for port security; in particular, approaches used in the international legal regime governing civil aviation to eliminate safe havens for pirates and terrorists by ensuring legal accountability. A study of security in the aviation sector could offer important tips on how port security systems could be mobilised to encourage best management practices; the importance of freezing assets of those who fund piracy enterprises; and the utility of enhancing communication and coordination among the various stakeholders relevant to the fight against piracy and terrorism.[77]

A next terrorist attack: Gauging the odds

To design policies that help combat maritime terrorism it is important to assess the likely nature of future attacks and their probable targets. Future terrorist attacks could be directed against four kinds of targets: warships, supertankers, passenger ships and port facilities. The most vulnerable and attractive targets remain tankers out at sea. The recent attacks on tankers in the Persian Gulf revealed that the threat is evolving and could now include unmanned vehicles.[78] More damaging would be the seizure and sinking of an oil-carrying tanker in a congested space, crippling the flow of maritime traffic. To get a sense of the extent of damage such an attack would cause, the Limburg incident in 2002 caused a massive spillage of oil (almost 90,000 tonnes) that took many weeks to clear.[79]

Another kind of attack could be on cruise ships out at sea. Big cruise ships are a lucrative target since they are lightly defended and relatively easily accessible.[80]An enquiry into the Achille Lauro incident in October 1984 highlighted fundamental deficiencies in safety procedures. Apparently, checks on passengers in the run-up to that fateful incident had not been foolproof. Despite acting nervously and even displaying anti-social behaviour, the Palestinian hijackers did not arouse the suspicions of passengers and crew.[81] While safety procedures have since improved, security procedures at ports and aboard cruise ships (with certain exceptions) are far from immaculate. During the Super Ferry incident in the Philippines in 2004, Abu Sayyaf operatives disguised as tourists smuggled 20 sticks of explosives that were stored inside an emptied out TV set.[82] There is some evidence that cruise shipping companies in Asia and Africa continue with the same lax approach that enabled that devastating attack.

The most likely venue of a future terrorist strike, however, might be inside a port facility, and it could possibly involve a ‘lone wolf’ with a loose affiliation to a bigger terrorist group. Ports are an attractive target because many of the tactical problems that terrorists face in orchestrating attacks on ships in the high seas do not apply to harbors, ports, or shore-based maritime facilities. Terrorists realise that the containerised supply chain is complex, and creates many opportunities for isolated acts of terrorism. An ineffective point of check, for instance, could allow a jihadi inside a container to detonate a vast quantity of explosives or a low-grade nuclear device; inadequate surveillance in a vessel could lead a jihadi diver to plant an explosives improvised explosive device (IED). While many ports have installed radiation detectors to combat the threat of IED, the pace of installation has been slow, and smaller ports remain vulnerable.

#### Extinction.

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

#### The plan solves---US antitrust law is modeled

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The “shot in the dark” that was the U.S. antitrust law system is today no longer solely a domestic field of law. It is now also a critically important component of global economic policy! The system that U.S. judges had evolved to deal with purely domestic problems and that relied on little more than confidence in the capacity of courts to develop reasonable responses to conflicts has been transformed into the central player in efforts to respond effectively to economic and other forms of globalization. It is now a U.S. export product, and the stakes are enormous. What directions and forms will the rules of competition take? Treatment of these issues will be a factor in the future of many countries, including the U.S., and for more than two decades Chicago-Kent has brought transnational competition law to our students, and Chicago-Kent faculty have contributed to the international discussion of these issues. A. Foreign Interactions and Perceptions U.S. antitrust now plays on a global stage, and much will depend on how foreign experts, lawyers, government officials and business leaders see U.S. antitrust. They will make decisions about what to do in their own countries and on the international level. This means that their perspectives on the U.S. system are critical to its roles both at home and abroad, and foreign images of U.S. antitrust have changed radically. Prior to the Second World War, those in Europe who knew anything about U.S. antitrust law (and they were few) generally considered it a mistake. They tended to see it as a failure that actually created more harm than good by forcing companies to merge rather than cooperate. This view predominated in large measure until after the Second World War. The Europeans were developing a different concept of competition law that emphasized administrative control of dominant firms. This conception of competition was spreading rapidly in Europe in the 1920s, but depression and war led to its virtual abandonment. After that war ended, however, U.S. antitrust law became associated with U.S. economic dominance in the “free world.” The real and imagined connections between economic concentration and military expansion in both Germany and Japan convinced many that U.S.-style antitrust law should be used to combat such concentrations. U.S. occupation forces in Germany and Japan imposed U.S. antitrust ideas during the occupation period, and the U.S. insisted that both countries either enact or maintain competition law after the occupation. This increased awareness of these ideas abroad. Perhaps more important, however, was the perception that antitrust was a source of strength for the U.S. economy and thus a potential spur to growth that other countries could employ. U.S.-style antitrust did not, however, always fit well with European legal traditions and institutions, and in most European countries skepticism toward the U.S. model limited progress in protecting competition. In Germany, however, a separate set of ideas about how to protect competition developed in the 1930s and 1940s in the underground, and after the war it became the basis for German antitrust law. From here it spread to the European level and became part of the process of Euro- pean integration. The basic idea of U.S. antitrust law—i.e., protecting the competitive process from restraints—was part of this model of competition law, but the model itself was conceptually and institutionally quite distinct. European scholars and officials in these areas often looked to U.S. antitrust for comparisons and insights into problems, but there was relatively little interaction between U.S. and European forms of competition law until the 1990s. In the 1990s these relationships became far closer and more important for both the U.S. and Europeans. Moreover, the fall of the Soviet Union precipitated widespread interest in market-based approaches around the world and revived the messianic tenor of the U.S. antitrust law community. Many countries that had socialist or other command-based approaches to the organization of economic activity now introduced antitrust laws or significantly increased their investment in the enforcement of such laws. Often they looked to U.S. antitrust officials, lawyers and scholars for help in implementing or evaluating their new activities.

### Adv---Democracy

#### Congressional inaction in antitrust shifts power to less democratic institutions

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

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

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

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

#### That collapses court legitimacy and constitutional SOP

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

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

#### Judicial activism collapses democracy.

James Muffett 14. Founder & President of Student Statesmanship Institute and President of Citizens for Traditional Values. “The Danger Of Judicial Activism”. Michigan All Rise. 9-8-14. <https://michiganallrise.org/resources/the-danger-of-judicial-activism/>

There is a battle in our nation between those who believe that judges should follow the law as intended by the legislature, and those who think judges have latitude to interpret the law according to their view of what the law ought to be. The latter are referred to as, “activist judges.” When judges insert their own personal bias, they usurp the role of the legislators whom the citizens elect to represent them in deciding disputed, difficult policy issues. Thus, judicial activism undermines the very basis of our representative democracy. It can be argued that activist judges have done more damage to traditional, Judeo-Christian values than the other branches of government combined. The areas of greatest damage include free enterprise, human life, marriage, personal freedoms, property rights and religious liberty. Judges who usurp the authority of the people are not merely incorrect; they are themselves unconstitutional. And they are unjust. In fact, Justice White in his Roe v. Wade dissent opinion, wrote that the court had acted “not in constitutional interpretation, but in the unrestrained imposition of its own, extra-constitutional value preferences.” In addition to short-circuiting the democratic process, this judicial approach creates an environment of unpredictability which ultimately leads to destabilization and more litigation. When judges exercising the power of judicial review are guided by the text, logic, structure, and original understanding of the Constitution and the law, they deserve our respect and gratitude. By operating with this type of judicial oversight, they are playing their part to make constitutional republican government a reality. But where judges usurp democratic legislative authority by imposing on the people their moral and political preferences, under the guise of fairness or empathy, they should be severely criticized and resolutely opposed. It is time for all citizens to wake up to this crisis and work to elect “Rule of Law” judges who exercise constitutional authority only to enforce the law as written and ensure that laws apply to everyone equally.

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

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

3. Implications for Interpretation

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

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

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

#### Congressional action key to democracy---alternative cedes power.

Harry First and Spencer Weber Waller 13. Harry First, New York University School of Law. Spencer Weber Waller, Loyola University Chicago School of Law. “Antitrust’s Democracy Deficit”. Fordham Law Review, Volume 81 Issue 5 Article 13. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4890&context=flr

The recommendation that Congress shift its focus to major issues is particularly critical to reinvigorating Congress’s role in antitrust policy. It is simply more important to probe whether merger enforcement has now been virtually limited to mergers to monopoly than to hold hearings into whether a particular merger in a particular industry is a good idea. Similarly, reasonable people can differ over whether a particular antitrust provision should be enforced more vigorously, less vigorously, or simply repealed, but we doubt any Congress since the passage of the Sherman Act would simply say, “We don’t care, do whatever you want.” We may not like the results of what Congress says on any particular issue, but it remains the only directly democratically accountable branch of government and the one most clearly charged with setting the broad parameters of fundamental public policy. It should speak, as it does in most other areas of our complex economy, and not have its silence used as an excuse for self-interested actors to shift power in their favor when the legislature chooses to turn to other pressing issues of the day

#### Democratic backsliding in the US spills over.

Larry Diamond 21. Senior Fellow at the Hoover Institution and the Freeman Spogli Institute for International Studies at Stanford University. "A World Without American Democracy?". Foreign Affairs. 7-2-2021. https://www.foreignaffairs.com/articles/americas/2021-07-02/world-without-american-democracy?utm\_medium=referral&utm\_source=www-foreignaffairs-com.cdn.ampproject.org&utm\_campaign=amp\_kickers

Aprolonged global democratic recession has, in recent years, morphed into something even more troubling: the “third reverse wave” of democratic breakdowns that the political scientist Samuel Huntington warned could follow the remarkable burst of “third wave” democratic progress in the 1980s and the 1990s. Every year for the past 15 years, according to Freedom House, significantly more countries have seen declines in political rights and civil liberties than have seen gains. But since 2015, that already ominous trend has turned sharply worse: 2015–19 was the first five-year period since the beginning of the third wave in 1974 when more countries abandoned democracy—twelve—than transitioned to it—seven. And the trend continues. Illiberal populist leaders are degrading democracy in countries including Brazil, India, Mexico, and Poland, and creeping authoritarianism has already moved Hungary, the Philippines, Turkey, and Venezuela out of the category of democracies altogether. In Georgia, the dominance of the Georgian Dream Party has led to the steady decline of electoral processes and a breakdown in the rule of law. In Myanmar, the military overthrew the elected government of Aung San Suu Kyi, ending an experiment in partial democracy. In El Salvador, president Nayib Bukele staged an executive coup by removing the attorney general and Supreme Court justices who were obstacles to his consolidation of power. In Peru, democracy hangs from a thread as the right-wing autocrat Keiko Fujimori advances vague claims of election fraud in a bid to overturn her narrow electoral defeat to left-wing opponent Pedro Castillo. What is especially striking about this last case is that Fujimori’s gambit bears a grim resemblance to the lie perpetuated by former U.S. President Donald Trump and his followers about the 2020 presidential election. This is no coincidence. As the journalist and historian Anne Applebaum has observed, fictitious claims of fraud and “stop the steal” tactics are becoming a common means by which autocratic populists try to obstruct democracy. Such tactics have long been a source of instability in countries struggling to develop democracy. But the fact that the most recent iteration of the antidemocrat’s playbook draws heavily on precedents in the world’s most important and powerful democracy marks the start of a dangerous new era. Today, the United States confronts a growing antidemocratic movement, not just from the ranks of fringe extremists but also from a substantial group of officeholders—a movement that is challenging the very foundations of electoral democracy. Should this effort succeed, the United States could become the first ever advanced industrial democracy to fail—that is, to no longer meet the minimum conditions for free and fair elections as political scientists and other scholars of democracy define them. The failure of American democracy would be catastrophic not only for the United States; it would also have profound global consequences at a time when freedom and democracy are already under siege. As Huntington noted, the diffusion of democratic movements and ideas from one country to another has helped drive positive democratic change. Antidemocratic norms and practices can spread in a similar fashion—especially when they emanate from powerful countries. That is why the acceleration of a democratic recession into a democratic depression happened largely on Trump’s watch. And it is why no development would more gravely damage the global democratic cause than the democratic backsliding of its most important champion.

#### Democracy solves every impact---it’s comparatively more stable than autocracies

Kroenig 20 Matt. 4/3. Professor of government and foreign service at Georgetown University – you know who he is. “Why the U.S. Will Outcompete China” <https://www.theatlantic.com/ideas/archive/2020/04/why-china-ill-equipped-great-power-rivalry/609364/>) 1/20/2021

National-security analysts see China as one of the greatest threats facing the United States and its allies. According to an emerging conventional wisdom, China has the leg up on the U.S. in part because its authoritarian government can strategically plan for the long term, unencumbered by competing branches of government, regular elections, and public opinion. Yet this faith in autocratic ascendance and democratic decline is contrary to historical fact. China may be able to put forth big, bold plans—the kinds of projects that analysts think of as long term—but the visionary projects of autocrats don’t usually pan out. Watch White Noise, the inside story of the alt-right The Atlantic’s first feature documentary ventures into the underbelly of the far-right movement to explore the seductive power of extremism. Stream Now Yes, democratic governments are obligated to answer to their citizens on regular intervals and are sensitive to public opinion—that’s actually democracies’ greatest source of strength. Democratic leaders have a harder time advancing big, bold agendas, but the upside of that difficulty is that the plans that do make it through the system have been carefully considered and enjoy domestic support. Historically speaking, once a democracy comes up with a successful strategy, it sticks with the plan, even through a succession of leadership. Washington has arguably followed the same basic, three-step geopolitical plan since 1945. First, the United States built the current, rules-based international system by providing security in important geopolitical regions, constructing international institutions, and promoting free markets and democratic politics within its sphere of influence. Second, it welcomed into the club any country that played by the rules, even former adversaries, like Germany and Japan. And, third, the U.S. worked with its allies to defend the system from those countries or groups that would challenge it, including competitors such as Russia and China, rogue states such as Iran and North Korea, and terrorist networks. America can pursue long-term strategy in part because it enjoys domestic political stability. While new politicians seek to improve on their predecessor’s policies, the United States is unlikely to see the drastic shifts in strategy that come from the fall of one political system and the rise of another. Democratic elections may be messy, but they’re not as messy as coups or civil wars. Daniel Blumenthal: The Unpredictable Rise of China Open societies have many other advantages as well. They facilitate innovation, trust in financial markets, and economic growth. Because democracies tend to be more reliable partners, they are typically skillful alliance builders, and they can accumulate resources without frightening their neighbors. They tend to make thoughtful, informed decisions on matters of war and peace, and to focus their security forces on external enemies, not their own populations. Autocratic systems simply cannot match this impressive array of economic, diplomatic, and military attributes. David Leonhardt recently wrote in The New York Times, “Chinese leaders stretching back to Deng Xiaoping have often thought in terms of decades.” Commonly cited examples of that long-term thinking include the Belt and Road Initiative, a program that invests in infrastructure overseas; Made in China 2025, an effort to subsidize China’s giant tech companies to become world leaders in 21st-century technologies, such as artificial intelligence; and Beijing’s promise to be a global superpower by 2049. Since putting in place sound economic reforms in the 1970s, China has seen its economy expand at eye-popping rates, to become the world’s second largest. Many economists predict that China could even surpass the United States within the decade, and some have suggested that China’s model of state-led capitalism will prove more successful, in terms of economic growth, than the U.S. template of free markets and open politics. I doubt these predictions. Because autocratic leaders are unconstrained and do not have to contend with a legislature or courts, they have an easier time taking their countries in new and radically different directions. Then, when the dictator changes his mind, he can do it again. Mao’s autocratic China ricocheted from one failed policy to another: the Great Leap Forward, then the Hundred Flowers Campaign, then the Cultural Revolution. Mao aligned with the Soviet Union in 1950 only to nearly fight a nuclear war with Moscow in the next decade. Beginning in the time of Deng Xiaoping, China pursued a fairly constant strategy of liberalizing its economy at home and “hiding its capabilities and biding its time” abroad. But President Xi Jinping abandoned these dictums when he took over. As the most powerful leader since Mao—he has changed China’s constitution to set himself up as dictator for life—he could once again jerk China in several new directions, according to his whims, and back again. According to the Asia Society, he has stalled or reversed course on eight of 10 categories of economic reform promised by the Chinese Communist Party (CCP) itself. Moreover, Xi is baring China’s teeth militarily, taking contested territory from neighbors in the South China Sea and conducting military exercises with Russia in Europe. The problem for Beijing is that stalled reforms will stymie its economic potential and its confrontational policies are provoking an international coalition to contain them. The 2017 U.S. National Security Strategy declared great-power competition with China the foremost security threat to the U.S.; the European Union labeled China a “systemic rival”; and Japan, Australia, India, and the United States have formed a new “quad” of powers to balance China in the Pacific. Furthermore, the plans often cited as evidence of China’s farsighted vision, the Belt and Road Initiative and Made in China 2025, were announced by Xi only in 2013 and 2015, respectively. Both are way too recent to be celebrated as brilliant examples of successful, long-term strategic planning. A certain level of domestic political stability is a prerequisite for charting a steady strategic course in foreign and domestic affairs. But autocratic regimes are notoriously brittle. While institutionalized political successions in democracies typically lead to changes of policy, political successions in autocracies are likely to result in regime collapse and war. China’s “5,000 years of history” were pockmarked by rebellion, revolution, and new dynasties. Fearing internal threats to domestic political stability—consider the protests this year in Hong Kong and Xinjiang—the CCP spends more on domestic security than on its national defense. If you follow the money, the CCP is demonstrating that the government is more afraid of its own people than of the Pentagon. This domestic fragility will frustrate China’s efforts to design and execute farsighted plans. If threats to Chinese domestic stability were to materialize and the CCP were to collapse tomorrow, for example, Chinese grand strategy could undergo another seismic shift, including possibly opting out of competition with the United States altogether. Shadi Hamid: China Is Avoiding Blame by Trolling the World Autocracies have other vulnerabilities as well. State-led planning has never produced high rates of economic growth over the long term. Autocrats are poor alliance builders who fight with their supposed allies more than with their enemies. And the highest priority of autocratic security forces is repressing their own people, not defending the country. The world has undergone drastic changes in just the past few years, but these enduring patterns of international affairs have not. Some fear that Trump’s nationalist tendencies will erode the U.S. position, but the momentum of America’s successful grand strategy has kept the country on a fairly steady course. Despite Trump’s criticism of NATO, for example, two new countries have joined the alliance on his watch, including North Macedonia this week. The coronavirus has upended a sense of security in the U.S., leading many people into the familiar trap of lauding autocratic China’s firm response in contrast to the halting and patchwork measures in the United States. But there is good reason to believe that this assessment will be updated in America’s favor with the benefit of hindsight. Already we are seeing evidence that conditions are much worse in China than CCP officials are letting on and that China’s attempts at international “disaster diplomacy” are backfiring. It has been revealed that the CCP has continually misrepresented the numbers of COVID-19 infections and deaths in China, and European nations have rejected and returned faulty Chinese coronavirus testing kits.

### Plan

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

### Solvency

#### The plan is key to reverse erroneous court judgement that distorted the purpose of antitrust law.

Daniel Hanley 21. A policy analyst at the Open Markets Institute. "Slate - How Antitrust Lost Its Bite" Open Markets Institute. 4-21-2021. https://www.openmarketsinstitute.org/publications/slate-how-antitrust-lost-its-bite

Antitrust is about determining and allocating the rights, privileges, and duties of all economic actors. When Congress originally enacted the Sherman Act, the law was intended to protect consumers, workers, and democracy from excessive concentrations of corporate power. Because of this reality, it is an inherently political area of law. The shift toward rooting it in economics, and making its application substantially more obscure than a bright-line rule, is effectively a means by the judiciary to strip the historical foundations of antitrust from the record and instead substitute its own judgment on what the priorities are for the economy and how it should be structured.

When combined with the rule of reason, the judiciary’s consumer welfare framework effectively erases Congress’ intent for the antitrust laws to operate as a “comprehensive charter of economic liberty” that “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.” Such values are best determined by members of the elected legislature rather than unelected judges, a point ironically acknowledged by the Supreme Court in 1972.

Lower federal courts today continue to push the consumer welfare standard even further by, in violation of controlling Supreme Court precedent, weighing the competitive harms of a dominant firm’s conduct against one group to the benefits provided to another group. In ongoing litigation against the NCAA that was heard by the Supreme Court last week, the district court judge ruled that the NCAA’s compact with universities to set a ceiling on the amount of compensation that student-athletes can receive is legal because of the reputed benefit consumers derive from watching athletes knowing there is a cap on their compensation. The court employed the rule of reason to arrive at this result. In an alternative enforcement regime, the NCAA would be a per se illegal employer cartel that is suppressing workers’ wages.

Comprehensive empirical analysis has revealed that the rule of reason has been a rubber stamp for even the most egregious antitrust conduct. A 2009 analysis revealed that 97 percent of cases analyzed under the rule of reason result in victories for defendants. That means corporations are effectively shielded from most antitrust violations.

Part of the reason for such a skewed result in favor of antitrust defendants is that dominant firms have access to high-salaried economists that are able to manipulate analyses to mask the corporation’s conduct to look like it is operationally efficient instead of engaging in predatory practices. Such a situation also deters antitrust litigation because a plaintiff will also have to incur the cost of an economist—which can cost several thousand dollars and, in some cases, several hundred thousand dollars. Thus, the battle over the legality of a business tactic under a consumer welfare framework and rule of reason legal analysis depends on access to immense financial capital and judicial appeasement of policies that favor corporate integration rather than common notions of fairness, equity, and deconcentrated markets—which was the original purpose of the antitrust laws.

Despite controlling Supreme Court precedent prohibiting the use of economics in certain antitrust violations, courts now routinely use it to justify corporate consolidation. For example, in the context of merger analysis, the economization of antitrust has led courts to believe and depend on theoretical assumptions on how mergers are beneficial for society and consumers. In the case of AT&T and its pursuit of acquiring Time Warner in 2018, the corporation stated its merger would produce efficiencies and save customers money. District Court Judge Richard Leon was persuaded by AT&T’s statements holding that vertical integration is able to shrink its costs and will “lead to lower prices for consumers.” But such assumptions have been categorically repudiated by researchers. In one example, the economist John Kwoka found that 80 percent of studied mergers led to high prices and even reduced output. Other studies have found equivalent results. In the context of AT&T, subsequent evidence showed that AT&T did raise prices on consumers.

As Congress considers enacting new legislation, it must start by reclaiming control over antitrust by enacting laws with clear rules that could deter exclusionary conduct and greatly simplify the litigation process for plaintiffs. Moreover, instead of just restoring many of the historical bright-line rules that the judiciary has eroded over the last 60 years, new laws should go further to ensure that markets remain deconcentrated and to promote economic fairness. For example, Congress could enact strict prohibitions on firms entering certain lines of business, such as AT&T being prohibited from entering the computer industry in 1956, or ban the use of specific competitive practices outright, such as noncompetes that restrict the mobility of workers. Rules like these ensure the markets are structured by publicly accountable institutions to incentivize socially beneficial corporate conduct, such as investments in research and development and product quality.

Importantly, rules-based laws would also ensure the judiciary is adhering to Congress’ directive to keep markets deconcentrated and acknowledge that the judiciary is not a reliable safeguard for smaller independent firms and workers who often do not have access to significant amounts of capital to litigate an antitrust lawsuit. In fact, in commonly applied rules for how judges interpret Congress’ laws, the judiciary views ambiguity as an opportunity to fill any legal gaps with its interpretation and ideology.

History has consistently shown that only bright-line rules will lead to an effective and vigorous enforcement environment, as they do in other areas of law, and prevent the judiciary from favoring dominant economic enterprises and distorting the antitrust laws to preference increased concentration. The Supreme Court’s original development of the rule of reason and its subsequent gutting of the enforcement of the Clayton Act in the 1930s is particularly illustrative of why bright-line rules are necessary.

#### 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.

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

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

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

#### 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

### T---expand the scope

#### w/m----cx said we’re most likely Sherman.

Eric A. 1AC 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

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#### Counter-interp---expand the scope includes banning any practice.

Paolo Buccirossi et al. 09. LEAR. Lorenzo Ciari, Lear and EUI. Tomaso Duso, Humboldt University Berlin and WZB. Giancarlo Spagnolo, University of Rome Tor Vergata, SITE, EIEF, CEPR. Cristiana Vitale, LEAR. “Measuring the deterrence properties of competition policy: the Competition Policy Indexes”. https://www.ssoar.info/ssoar/bitstream/handle/document/25822/ssoar-2009-buccirossi\_et\_al-measuring\_the\_deterrence\_properties\_of.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2009-buccirossi\_et\_al-measuring\_the\_deterrence\_properties\_of.pdf

Also Hilton and Deng have tried to provide a quantitative summary measure of competition law. Their objective has been to gauge the size of the overall “competition law net” by collecting information on the breadth of the law and on its penalty and defence provisions in 102 countries over the time period January 2001 to December 2004.47 Their scope index differs from the CPI in that it tries to provide a summary description of the areas covered by competition law rather than an evaluation of its quality. Indeed, the scope index does not attempt to measure how the law is effectively enforced, nor the degree of independence of the CA or the quality of the law. 48

---FOOTNOTE 48 STARTS---

48 The information collected concerns the geographical scope of competition law, the remedies it allows, the type of private enforcement available to the damaged parties, the merger notification and assessment procedure, and the type of abuses of dominance and restrictive trade practices prohibited.

---FOOTNOTE 48 ENDS---

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

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

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

### CP---states

#### State labor actions get pre-empted.

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

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

#### The DOJ and FTC undermine states.

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

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

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

#### FTC is key to modelling.

Garza et. al. 07. Chair of the Antitrust Modernization Commission, a bi-partisan blue ribbon commission created by Congress to advise Congress and the President on the state of U.S. Antitrust law enforcement and former DOJ Antitrust Deputy Assistant Attorney General for Regulatory Affairs. “Antitrust Modernization Commission: Report and Recommendations: Chapter 2,” p. 216-217. Antitrust Modernization Commission. 2/4/2007. https://govinfo.library.unt.edu/amc/report\_recommendation/chapter2.pdf

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have made extensive efforts to improve cooperation between the United States and other nations’ antitrust enforcers.26 Both U.S. antitrust agencies “enjoy [a] strong cooperative relationship[] with a large and increasing number of foreign enforcement agencies, enabling close cooperation on cases, coordination on international antitrust policy, and provision of technical assistance to new agencies around the world.”27 Whereas U.S. requests for cooperation previously took up to a year to be processed,28 today antitrust agencies worldwide have a “pick up the phone” approach toward sharing information and assisting each other in their antitrust enforcement efforts.29 This high degree of cooperation has facilitated convergence of both procedural and substantive aspects of antitrust law.

The efforts of the U.S. antitrust agencies have been advanced in part through their participation in two organizations, the OECD and the ICN.30 The OECD was created in 1961 to expand free trade and improve development in member countries.31 As part of these efforts, it created a Competition Law and Policy Committee that provides a variety of means for countries to share their best practices regarding antitrust and competition policy.32 The ICN, in comparison, is relatively new, but has a more broad-based membership. It was created after ICPAC called for the creation of a “Global Competition Initiative” to address antitrust enforcement in a growing globalized economy.33 Membership in the ICN has increased from fourteen jurisdictions when it began in 200134 to ninety-seven members from eighty-five jurisdictions in 2007.35

The ICN and OECD have promulgated “best practices” on merger reviews and cartel investigations and continue to work on convergence of substantive and procedural law.36 For example, the ICN is currently undertaking a study of unilateral conduct standards with the goal of developing a consensus on the objectives and legal and economic bases of enforcement regarding unilateral conduct.37 The ICN in the past has developed principles of best practices regarding merger notification regimes, with the objective of highlighting the importance of transparency and clarity in each jurisdiction’s rules regarding filing requirements and review.38 Overall, through their efforts, these institutions have had a meaningful influence in “promoting convergence in antitrust enforcement”39 and have contributed to the “significant recent progress in reducing conflicts by increasing cooperation, information sharing, and networking.”40 Indeed, their successes are reflected at least in part by the fact that the vast majority of international investigations are conducted without incident.41

#### Minimum wage doesn’t solve inequality.

Christos Makridis 16. Ph.D. Candidate in Macroeconomics and Public Finance at Stanford University. “Raising the Minimum Wage Won’t Reduce Inequality” The New Republic. 02-05-16. <https://newrepublic.com/article/129286/raising-minimum-wage-wont-reduce-inequality>

How minimum wages affect inequality, however, remains controversial. Detecting it with **standard statistical methods is very challenging** because their full effects are constantly changing and require data on both individuals and companies. Back in 1999, Princeton economist David Lee used the Consumer Population Survey (CPS) from 1979 to 1989 to argue that the declining purchasing power of the minimum wage largely explains why inequality surged in the 1980s. Other new research, however, has put that conclusion in doubt. Perhaps the **most conclusive reassessment** comes from economists David Autor, Alan Manning, and Christopher Smith earlier this year. Using many more **years of microdata from the CPS**, as well as a different statistical approach, they found that the minimum wage explains **at most 30 percent** to 40 percent of the rise in wage inequality among the lowest earners. Since economists had thought that changes in the minimum wage could explain as much as 90 percent of the shift in inequality, these **new estimates are important.** How wages affect worker behavior While the extent is still uncertain, it’s clear that the minimum wage and other wage-setting forces such as tax rates and union bargaining power do in fact affect inequality and the labor market. My own ongoing research, which focuses on the link between such wage-setting mechanisms and company behavior, suggests labor-market distortions like raising the minimum wage can have other **negative effects on workers, businesses and inequality** beyond the overall impact on employment. The first adverse effect concerns how much people work. If, for example, worker wages rise due to a government mandate, the employer may reduce the number of hours staff work, leading to lower paychecks even after the raise. That’s part of the reason why we’ve seen companies like McDonald’s increasingly try to automate tasks that were once held by people. In addition, my research suggests one of the major ways people acquire new skills is by spending more time at work. Thus policies that lead to fewer hours could lower employees’ ability to improve their long-run earnings potential. The second is an indirect effect on the way businesses invest in workers and design compensation and organizational policies. When companies are forced to pay higher wages, they may offset the cost by reducing how much they invest in workers. There is **evidence that minimum wage laws have this effect.** This can result in weaker compensation contracts (e.g., purely salary-based), which provide employees with fewer incentives to accumulate skills. As a result, workers paid fixed wages suffer greater long-run earnings volatility than those receiving performance-based pay. Put simply, if a recession comes and an individual loses his or her job, having more skills makes it easier to find a new position and return to the previous income level. Minimal impact on inequality Even setting aside all the plausible economic arguments against the minimum wage, under the best case scenario, what does it really achieve? If the average full-time employee works 1,700 hours per year, then moving from $7.25 an hour to $9 an hour produces **only about $2,975 in additional annual earnings**. While some may argue that something is better than nothing, this would be **at best a marginal solution to inequality.** Taking a look at the most recent 2015 Current Population Survey data and restrict the sample to full-time earners with over $10,000 earnings per year, Americans at the 90th income percentile (they earn more than 90 percent of their compatriots, or $80,000 a year) make 5.6 times as much, on average, as those at the 10th percentile ($14,200). Increasing the minimum wage to $9 an hour would put the ratio around 4.65. In other words, **even in the best of worlds**—where the minimum wage has no unintended side effects—it appears to only **marginally reduce inequality.**

#### UBI doesn’t solve inequality.

Anna Coote 19. Principal fellow at the New Economics Foundation and and co-author of Universal Basic Income: A Union Perspective. “Universal basic income doesn’t work. Let’s boost the public realm instead” The Guardian. 05-06-19. https://www.theguardian.com/commentisfree/2019/may/06/universal-basic-income-public-realm-poverty-inequality

A study published this week **sheds doubt on ambitious claims made for universal basic income** (UBI), the scheme that would give everyone regular, unconditional cash payments that are enough to live on. Its advocates claim it would help to reduce poverty, narrow inequalities and tackle the effects of automation on jobs and income. Research conducted for Public Services International, a global trade union federation, reviewed for the first time **16 practical projects** that have tested different ways of distributing regular cash payments to individuals across a range of poor, middle-income and rich countries, as well as copious literature on the topic. It could find **no evidence** to suggest that such a scheme could be **sustained for all individuals** in **any country** in the short, medium or longer term – or that this approach could achieve lasting improvements in wellbeing or equality. The research confirms the importance of generous, non-stigmatising income support, but everything turns on how much money is paid, under what conditions and with what consequences for the welfare system as a whole. From Kenya and southern India to Alaska and Finland, cash payment schemes have been claimed to show that UBI “works”. In fact, what’s been tested in practice is almost infinitely varied, with cash paid at different levels and intervals, usually well below the poverty line and mainly to individuals selected because they are severely disadvantaged, with funds provided by charities, corporations and development agencies more often than by governments. Experiments in India and Kenya have been funded, respectively, by Unicef and Give Directly, a US charity supported by Google. They give money to people on very low incomes in selected villages for fixed periods of time. Giving small amounts of cash to people who have next to nothing is **bound to make a difference** – and indeed, these schemes have helped to improve recipients’ health and livelihoods. But nothing is revealed about their **longer-term viability**, or how they could be **scaled up to serve whole populations.** And there is a democratic deficit: people who get their basic income from charities or aid agencies have no control over how payments are made, to whom, at what level or over what period of time. The Alaska Permanent Fund, built from the state’s oil revenues, pays all adults and children a dividend each year – in 2018, it was $1,600 (£1,230). The scheme is popular and enduring; it has been found to produce some positive impacts on rural indigenous groups, but it makes no claim to sufficiency and **has done nothing to reduce child poverty or to prevent widening income inequalities.** Helsinki city centre Finland undertook a two-year trial, from January 2017 to December 2018, of modest monthly payments of €560 (£477) to 2,000 unemployed people – but the government has refused to fund further expansion. It told us little about UBI except that, when push comes to shove, elected politicians may balk at paying for a universal scheme. The cost of a sufficient UBI scheme would be **extremely high** according to the International Labour Office, which estimates average costs equivalent to 20-30% of GDP in most countries. Costs can be reduced – and have been in most trials – by paying smaller amounts to fewer individuals. But there is no evidence to suggest that a partial or conditional UBI scheme could do anything to mitigate, let alone reverse, current trends towards worsening poverty, inequality and labour insecurity. **Costs may be offset by raising taxes** or shifting expenditure from other kinds of public expenditure, but either way there are huge and risky trade-offs. Money spent on cash payments cannot be invested elsewhere. The more generous the payments, the wider the range of recipients, the longer the scheme continues, the less money will be left to build the structures and systems that are needed to realise UBI’s progressive goals. As this week’s report observes, “If cash payments are allowed to take precedence, there’s a serious risk of **crowding out efforts** to build collaborative, sustainable services and infrastructure – and setting a pattern for future development that promotes commodification rather than emancipation.” This may help to explain why UBI has attracted support from Silicon Valley tycoons, who are more interested in **defending consumer capitalism than in tackling poverty and inequality.**

### DA---Infrastructure

#### Won’t pass---assumes PC

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---social spending thumps and negotiations fail

Sam Brodey, Scott Bixby, & Matt Fuller 9/30. \*\*The congressional reporter for The Daily Beast. \*\*The White House reporter for The Daily Beast. \*\*Senior politics editor at The Daily Beast. “The outcome is a victory for the progressive caucus, whose leaders warned throughout Thursday they had the votes to sink $1 trillion infrastructure bill.” 9/30/21. https://www.thedailybeast.com/highway-to-disarray-pelosi-delays-vote-amid-dem-chaos

With internal tensions near a breaking point, House Democrats backed down from a promised Thursday vote to advance a $1 trillion bipartisan infrastructure bill after it became clear it was going to crash and burn.

Hours before, at a press conference on Thursday morning, Speaker Nancy Pelosi (D-CA) publicly expressed confidence that the legislation would succeed. “So far, so good for today,” she said. And supporters of the legislation echoed her, repeatedly projecting victory by the end of the day.

But it turned out the more prescient assessment came from Majority Leader Steny Hoyer (D-MD). When asked if he felt confident Democrats had enough support to pass the bill, he replied: “Nope.”

Despite a marathon day of negotiating and backchanneling, Pelosi never called the vote. In a letter to members sent at nine o’clock at night, the Speaker deemed it a “day of progress” and said that “discussions continue.” A subsequent notice from Hoyer’s office said the House would “complete consideration” of the bill on Friday.

The outcome is a victory for progressives, whose promises to block the infrastructure bill forced Pelosi to delay the vote. While they’d like to see that legislation pass, dozens of members of the Congressional Progressive Caucus held it up due to a lack of progress on the other plank of Democrats’ agenda—a much broader social policy package that contains many of their long-desired goals, like expanding Medicaid benefits and tackling climate change.

Not only is that legislation—dubbed the Build Back Better Act—not ready, centrists like Sens. Joe Manchin (D-W.V.) and Kyrsten Sinema (D-AZ) have balked at the $3.5 trillion price tag, the finer points of tax raises and health-care policy and, sometimes, the rationale behind the legislation altogether.

Discussions between Democratic leadership, the White House, and Manchin went late Thursday, but the West Virginia senator all but put the promise of an immediate vote on ice when he said he remains unconvinced to support a bill larger than $1.5 trillion.

Against that backdrop, progressives didn’t see any point in relinquishing an infrastructure bill they saw as their main leverage. Leaving a meeting with Pelosi on Thursday afternoon, Rep. Jared Huffman (D-CA), a Progressive Caucus member, told reporters that “it has been understood that you need a high level of certainty that we get the things we need to have in the Build Back Better Act, and it is hard to imagine that coming together today.”

The caucus’ chair, Rep. Pramila Jayapal (D-WA), had said for days that the vote would fail, and lawmakers associated with the group told The Daily Beast that as many as 50 were prepared to oppose it on the floor. Another lawmaker familiar with the whip count said the same thing. And with just a four-seat cushion in the House—and little GOP help expected—even a few defections could have doomed the bill.

Pelosi’s delay is a clear defeat for moderate Democrats, who used their own leverage to force a vote on the bipartisan deal by the end of September. Rep. Josh Gottheimer (D-NJ), the de facto leader of that bloc, predicted he’d be sipping champagne by Thursday night.

On Thursday afternoon, Gottheimer wasn’t even willing to entertain the idea that Pelosi would delay the vote. Asked by The Daily Beast what it would signify if the Speaker delayed the vote, Gottheimer said on Thursday afternoon it’d “signify nothing. It’s gonna happen.” Later, he went as far to declare on CNN that he was “1,000 percent” sure the vote would happen that night.

But Gottheimer’s attempt at manifesting the outcome through positive thinking was unsuccessful, and as the hours ticked away the inevitable happened.

It’s unclear how the delay will ultimately affect the passage of President Joe Biden’s agenda. While the vote didn’t happen Thursday, moderates seem to be holding out hope that the dynamic will change over the coming days and weeks. However, it’s now clear that moderates won’t be able to just jam progressives by passing the infrastructure bill and leaving the broader bill in a filing cabinet.

While Pelosi was meeting with Jayapal and other progressive lawmakers, Gottheimer and other moderates were in another room within the Speaker’s chambers while Pelosi shuttled between the two groups in what one lawmaker involved in the meetings described as high-stakes “speed dating.”

This lawmaker, who was in the meeting with progressives, felt Pelosi wasn’t actually trying to whip them to vote for the infrastructure bill. Instead, there seemed to be some posturing—potentially for the benefit of moderates who have wanted to feel that leadership was trying to win progressive votes.

Broadly, trust between factions of the party is at an abysmal low, and many lawmakers fear that delaying the vote would further poison the well—and make it that much harder to keep the party’s disparate and delicate majorities together long enough to pass major legislation.

#### Self-inflicted wounds sapped Biden’s PC

Don Purdum, 9-26-2021, political analyst "Independents Erode Biden’s Political Capital," No Publication, https://www.unitedvoice.com/independents-erode-bidens-political-capital/

Biden’s problem spot isn’t the GOP; it’s independents. Biden’s highest approval among them was 61%. Independents now approve of the president’s job performance at an abysmal 37% among this critical group of voters. Gallup added that two-thirds of the slide occurred in the past three months.

Unfortunately, the poll didn’t get into the specifics of why the president is losing faith with independents. At this point, it’s probably not just the Afghanistan issue giving Biden fits among voters. The administration largely moved away from the fiasco three weeks ago as it pivoted to trying to pass Biden’s signature two-track infrastructure plan, which at the moment may fall apart soon if the far-Left and Center don’t start compromising. That’s unlikely.

As Biden’s self-inflicted failures continue to grow into gaping wounds, the president’s political capital may be fading into the sunset. A president’s approval rating often correlates to upcoming midterm elections. If this trend holds, the chances of the Democrats successfully defending their razor-thin margins aren’t good.

#### Biden’s green infrastructure is *too weak* to solve warming and *increases emissions*

Aronoff, 21 (Kate Aronoff is a staff writer at The New Republic, She is the co-author of A Planet To Win: Why We Need A Green New Deal, a fellow at the Type Media Center and a contributing writer to the Intercept, January 26 2021 “The Fossil Fuel Industry Thinks It Will Have a Good Year Under Biden” The New Republic, <https://newrepublic.com/article/161048/fossil-fuel-oil-biden-stimulus>) MULCH

But the business press and industry analysts have presented a rather different story. Oilfield services companies are cautiously optimistic, after a rash of bankruptcies last year. The combined prospects of an economic stimulus and infrastructure package—both of which will boost fossil fuel demand—spell a more prosperous 2021 and 2022 for the world’s biggest polluters. Even Biden’s aspirations to “Build Back Better” with green jobs, Oslo-based energy consultancy Rystad Energy predicted last week, may well be welcome news to oil and gas producers. “Any ‘green’ focus of the infrastructure bill,” a company press release read, “will be mostly additive to overall short-term oil products demand due to construction activity, with risks mostly limited to medium-term oil demand, depending on the scope and success of the projects.” Stimulus measures, in other words, will increase energy demand in general. At least for now, that means more demand for fossil fuels. They call it the “Biden boost,” predicting an extra 350,000 barrels per day (bpd) for 2021 and 900,000 bpd for 2022, should he follow through on his promises. They do also note that new environmental rules, if carried out, could cause oil demand to start to fall toward the end of the 2020s. This may seem counterintuitive given Biden’s campaign promises. The mechanism isn’t complicated, though: There’s a stubborn link between growth in gross domestic product and greenhouse gas emissions. Even the greenest of recoveries is likely to boost both growth and emissions in the near term by putting people back to work and boosting consumer spending. Unless economic recovery policy includes sweeping, rapid changes to electrify and decarbonize the country and actively curtail fossil fuel production, even a stimulus that’s green on many other fronts could help emissions climb for years to come. Savvy U.S. polluters, of course, could still flourish even with new regulations. Federal lands—on which Biden has issued his two-month pause on new drilling leases and permits, allowing a select few Department of Interior officials to approve exceptions—are now home to just 14 percent of active land rigs. A recently released analysis by Morgan Stanley expects that large, diversified companies can simply reallocate all of their new drilling and planned investment to nonfederal land. While the bank predicts political pressure will put any permanent ban on leasing off the table, it projects tighter rules on everything from methane emissions to environmental reviews going forward. For many companies, that wouldn’t be a bad thing. “In effect,” Oil & Gas Journal writes of the bank’s findings, a Biden administration placing more climate-focused policy constraints on the industry “is constructive for the oil and gas macro—constraining supply and putting upward pressure on the marginal cost of shale production without impacting short-term demand.” Smaller firms that do a lot of business on federal land face big risks, of course. Yet larger and more integrated U.S. oil majors like Chevron are well insulated against even sweeping restrictions and “could benefit to the extent President Biden’s policies tighten the supply/demand balance for global oil & gas markets.”

#### Climate doesn’t cause extinction.

Kerr et al. 19 – Dr. Amber Kerr, Energy and Resources PhD at the University of California-Berkeley, known agroecologist, former coordinator of the USDA California Climate Hub. Dr. Daniel Swain, Climate Science PhD at UCLA, climate scientist, a research fellow at the National Center for Atmospheric Research. Dr. Andrew King, Earth Sciences PhD, Climate Extremes Research Fellow at the University of Melbourne. Dr. Peter Kalmus, Physics PhD at the University of Colombia, climate scientist at NASA’s Jet Propulsion Lab. Professor Richard Betts, Chair in Climate Impacts at the University of Exeter, a lead author on the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) in Working Group 1. Dr. William Huiskamp, Paleoclimatology PhD at the Climate Change Research Center, climate scientist at the Potsdam Institute for Climate Impact Research. [Claim that human civilization could end in 30 years is speculative, not supported with evidence, 6-4-2019, https://climatefeedback.org/evaluation/iflscience-story-on-speculative-report-provides-little-scientific-context-james-felton/]

There is no scientific basis to suggest that climate breakdown will “annihilate intelligent life” (by which I assume the report authors mean human extinction) by 2050. However, climate breakdown does pose a grave threat to civilization as we know it, and the potential for mass suffering on a scale perhaps never before encountered by humankind. This should be enough reason for action without any need for exaggeration or misrepresentation! A “Hothouse Earth” scenario plays out that sees Earth’s temperatures doomed to rise by a further 1°C (1.8°F) even if we stopped emissions immediately. Peter Kalmus, Data Scientist, Jet Propulsion Laboratory: This word choice perhaps reveals a bias on the part of the author of the article. A temperature can’t be doomed. And while I certainly do not encourage false optimism, assuming that humanity is doomed is lazy and counterproductive. Fifty-five percent of the global population are subject to more than 20 days a year of lethal heat conditions beyond that which humans can survive Richard Betts, Professor, Met Office Hadley Centre & University of Exeter: This is clearly from Mora et al (2017) although the report does not include a citation of the paper as the source of that statement. The way it is written here (and in the report) is misleading because it gives the impression that everyone dies in those conditions. That is not actually how Mora et al define “deadly heat” – they merely looked for heatwaves when somebody died (not everybody) and then used that as the definition of a “deadly” heatwave. North America suffers extreme weather events including wildfires, drought, and heatwaves. Monsoons in China fail, the great rivers of Asia virtually dry up, and rainfall in central America falls by half. Andrew King, Research fellow, University of Melbourne: Projections of extreme events such as these are very difficult to make and vary greatly between different climate models. Deadly heat conditions across West Africa persist for over 100 days a year Peter Kalmus, Data Scientist, Jet Propulsion Laboratory: The deadly heat projections (this, and the one from the previous paragraph) come from Mora et al (2017)1. It should be clarified that “deadly heat” here means heat and humidity beyond a two-dimension threshold where at least one person in the region subject to that heat and humidity dies (i.e., not everyone instantly dies). That said, in my opinion, the projections in Mora et al are conservative and the methods of Mora et al are sound. I did not check the claims in this report against Mora et al but I have no reason to think they are in error. 1- Mora et al (2017) Global risk of deadly heat, Nature Climate Change The knock-on consequences affect national security, as the scale of the challenges involved, such as pandemic disease outbreaks, are overwhelming. Armed conflicts over resources may become a reality, and have the potential to escalate into nuclear war. In the worst case scenario, a scale of destruction the authors say is beyond their capacity to model, there is a ‘high likelihood of human civilization coming to an end’. Willem Huiskamp, Postdoctoral research fellow, Potsdam Institute for Climate Impact Research: This is a highly questionable conclusion. The reference provided in the report is for the “Global Catastrophic Risks 2018” report from the “Global Challenges Foundation” and not peer-reviewed literature. (It is worth noting that this latter report also provides no peer-reviewed evidence to support this claim). Furthermore, if it is apparently beyond our capability to model these impacts, how can they assign a ‘high likelihood’ to this outcome? While it is true that warming of this magnitude would be catastrophic, making claims such as this without evidence serves only to undermine the trust the public will have in the science. Daniel Swain, Researcher, UCLA, and Research Fellow, National Center for Atmospheric Research: It seems that the eye-catching headline-level claims in the report stem almost entirely from these knock-on effects, which the authors themselves admit are “beyond their capacity to model.” Thus, from a scientific perspective, the purported “high likelihood of civilization coming to an end by 2050” is essentially personal speculation on the part of the report’s authors, rather than a clear conclusion drawn from rigorous assessment of the available evidence.

#### Manchin won’t let anything pass that targets fossil fuels

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

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

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

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

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

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

#### Infrastructure is on hold until reconciliation passes

Emily Cochrane, et al, 10-1-2021, Luke Broadwater and Jonathan Weisman "Live Updates: Biden Meets With Feuding Democrats and Expresses Confidence a Deal Can Be Reached," No Publication, https://www.nytimes.com/live/2021/10/01/us/infrastructure-bill-house

President Biden, facing an intraparty battle over his domestic agenda, put his own $1 trillion infrastructure bill on hold on Friday, telling Democrats that a vote on the popular measure must wait until Democrats pass his far more ambitious social policy and climate change package.

It was largely a bid to mediate the impasse that has stalled a planned vote on the bipartisan infrastructure bill, which progressives refuse to support until they see action on the remainder of Mr. Biden’s agenda in a major budget bill to expand health care, education, climate change initiatives and paid leave.

#### Vote postponed indefinitely

Emily Cochrane, et al, 10-1-2021, Luke Broadwater and Jonathan Weisman "Live Updates: Biden Meets With Feuding Democrats and Expresses Confidence a Deal Can Be Reached," No Publication, https://www.nytimes.com/live/2021/10/01/us/infrastructure-bill-house

On Friday evening, Ms. Pelosi indefinitely postponed a planned vote on the infrastructure bill, which she had promised to moderates who had publicly pushed for a stand-alone vote, writing in a letter to colleagues that “clearly, the bipartisan infrastructure bill will pass once we have agreement on the reconciliation bill.”

#### Biden’s PC won’t work with progressives

Sam Brodey & Scott Bixby, 9-27-2021, "Biden Built Back Better Relations With the Left—Now He Faces the Ultimate Test," Daily Beast, https://www.thedailybeast.com/joe-biden-built-back-better-relations-with-the-left-now-he-faces-the-ultimate-test

With so much still in flux, some progressives feel like they may inevitably get stiffed because, unlike moderates, all of them would prefer passing something instead of nothing, even if they were enthusiastic about the final product.

Indeed, many on the left have seen this particular movie before. But others are insisting this time is different—and they say that the flattery and care from the White House won’t shake their resolve.

“Progressives don’t feel like the attention from the White House is like, ‘We’ll just screw progressives in the end and they’ll eat the shit sandwich we give them,’” said a progressive strategist. “They’ve saved up their political capital for a moment like this.”

#### Threading the needle is impossible

Stephen Collinson, 10-1-2021, "Analysis: The left defies Pelosi as Biden's big hopes are in limbo," CNN, https://www.cnn.com/2021/10/01/politics/pelosi-progressives-infrastructure-biden-agenda/index.html

What now for Biden's agenda?

But an exhausting day also left questions for progressives. On the one hand, their decision to stand firm and demand they take up the $3.5 trillion spending bill could maximize the chances of the package remaining somewhat intact. But by further delaying passage of at least one big part of Biden's program, they are increasing the risk that it could all fall apart in what would be a disaster for Democrats.

Washington Rep. Pramila Jayapal, who leads the Congressional Progressive Caucus and has emerged as a powerful figure in recent weeks, urged her colleagues to "stick to the plan. Pass both bills, together."

"We won't let massive corporations, billionaires, and a few conservative Democrats stand in the way of delivering transformational progress for millions of working people," Jayapal wrote on Twitter.

Still, the progressives are playing a risky game. Manchin in particular appears to have little time for pressure from left-wing lawmakers in the House.

During one of his several huddles with reporters during Thursday's drama, he said that if progressives want a bigger bill they should "elect more liberals." The comment reflected the fact that Manchin, who represents a state ex-President Donald Trump won twice, has extraordinary power in a 50-50 Senate since Democrats were unable to do better in congressional elections in 2020.

His moment and Pelosi's struggles on Thursday also raised another question: Are Biden and congressional leaders trying to thread an impossible legislative needle since they are trying to enact one of the most ambitious Democratic programs in generations with no votes to spare in the Senate and when Pelosi can lose only three members of her own caucus in the House?

#### Manchin’s means testing demands reopen healthcare fights

ALICE MIRANDA OLLSTEIN, 10-1-2021, "Limiting Medicare benefits deepens rift among Hill Democrats," https://www.politico.com/news/2021/10/01/medicare-benefits-hill-democrats-514946

Means-testing Medicare, a long-running controversy in health policy debates, is re-emerging as a major source of tension for Democrats seeking a path forward on their stalled social spending package.

Centrist lawmakers are demanding that an expansion of the program to cover dental, vision and hearing care be limited to the poorest Americans, to pare the projected cost by as much as half.

But progressive lawmakers and powerful outside groups like AARP are pushing back, saying the move would fundamentally alter the social insurance program and jeopardize Democrats’ slim margins in the House and Senate by alienating wealthy senior citizens.

“People won’t feel that there is any buy-in for them. You create real divisions,” said House Appropriations Chair Rosa DeLauro (D-Conn.).

The idea of means-testing resurfaced this week in a set of demands Sen. Joe Manchin made to Senate Majority Leader Chuck Schumer, in which he outlined his criteria for a $1.5 trillion package. While many Democrats reject the idea, health industry groups like the American Dental Association argue that limiting the scope of the coverage expansion frees up funds for the party's other health priorities.

“If you have scarce federal dollars, this is where you want to put your money,” said Michael Graham, the dental group’s senior vice president of government affairs, who is pushing Congress to offer the new dental benefit only to people with incomes below 300 percent of the federal poverty line — or around $39,000 a year.

Because traditional Medicare would pay dentists far less for services than private insurance, the group’s members would lose money if Democrats make tens of millions of seniors eligible for a government-sponsored plan.

Medicare premiums already are tied to incomes, with wealthier seniors paying more for Part B and Part D coverage. But critics of Manchin’s approach argue that imposing more income thresholds adds burdens for the middle class and affects more beneficiaries each year. Lawmakers are weighing other cost controls, like funding the new benefits for only a few years or phasing in their rollout.

Loren Adler, associate director of the USC-Brookings Initiative for Health Policy, said while there are valid arguments for not subsidizing wealthier people, means-testing could wind up limiting the new benefit to older, sicker patients — worsening the risk pool and creating new financial stresses on the program. There’s also the added administrative burden of verifying the incomes of seniors each year to determine their eligibility, and the likelihood that some lower-income people may not be aware or able to prove that they’re eligible.

“There’s a simplicity element to just offering the benefit to everyone,” he said. “In retirement your income fluctuates even more than when you’re working, and distributions from retirement accounts can be one-time windfalls. If you kick people out of the program and then allow them to reapply the next year, the amount of money you save could be so low that it wouldn’t outweigh the added complexity.”

The means-testing debate is playing out as Democrats struggle to squeeze a bevy of health care priorities into the social spending bill, H.R. 5376 (117). With the overall cost likely to drop as low as $1.5 trillion over a decade, the centrists' arguments are getting louder.

“Let’s have a targeted program for those who really need it,” said Rep. Kurt Schrader (D-Ore.), one of several House lawmakers allied with Manchin. “We can’t afford to, and it’s not sensible to, give money to people earning $400,000 or $500,000 bucks a year.”

A means test for Medicare was considered several times during fiscal clashes between former President Barack Obama and GOP congressional leaders, but ultimately rejected. Indeed, no one in the program's 56 years has ever been excluded from any benefits based on wealth.

Senate Finance Chair Ron Wyden (D-Ore.) confirmed, in the wake of Manchin's demands, that there's an active debate among Democrats in the upper chamber who have yet to finalize their own version of the package.

“We’ve got colleagues offering a variety of opinions

on when [the dental, vision and hearing benefits] should start, who is covered and the extent of it,” he said.

The American Dental Association is aiming to have a leading role influencing the outcome, buying digital ads, sending tens of thousands of emails to Capitol Hill and holding Zoom meetings with lawmakers and staff.

“We understand where the progressives are, and we’re not likely to move them,” Graham said. “We also understand where the Republicans are: they’re going to vote against [the social spending bill] no matter what. So our focus is the moderate Democrats. They’re telling us our plan makes sense, but they’re also waiting to see what the Senate does.”

Adler compared the dentists’ current fight to the American Medical Association’s failed attempts to block the creation of Medicare more than half a century ago.

“Once a program exists long-term, it becomes part of the status quo,” he said. “This is the same basic premise. If this becomes a popular product for seniors, it will become difficult for dentists to not take Medicare patients.”

Progressive lawmakers who've already scaled back their ambitions for the spending bill argue that means testing Medicare would be worse than some of the other cost-cutting ideas under consideration, including phasing in the benefit over several years and requiring seniors to pay a higher percentage of the cost of major dental procedures.

“None of them are good,” said Melissa Burroughs with the advocacy group Families USA. “The program starting later is not ideal, and the cost sharing could be better. But we’re better able to live with that than a terrible precedent of means testing.”

#### Presidential popularity doesn’t help the agenda.

Ruth Marcus, 1-29-2021, "Presidential honeymoons aren’t what they used to be," Washington Post, https://www.washingtonpost.com/opinions/presidential-honeymoons-arent-what-they-used-to-be/2021/01/29/d6eb90c6-625f-11eb-9061-07abcc1f9229\_story.html

If Biden’s popularity and job approval are in a healthy range, the other half of the equation is sobering. As Bloomberg’s Jonathan Bernstein observed, Biden enters office with a higher level of disapproval (in the mid-30s) than any president but Trump in the modern polling era.

This reflects the broader polarization among voters and suggests that Biden’s popularity may have limited legislative consequences. His congressional majorities are microscopic. In theory, his heightened popularity would increase pressure on some moderate Republicans in swing districts or purplish states to be more cooperative. But such lawmakers are few and far between, and they have primaries to worry about.

#### Tech lobby already fights Dems over the budget, FTC

Tony Romm & Cat Zakrzewski , 9-9-2021, "Democrats eye new $1 billion effort to crack down on Big Tech in sprawling economic package," Washington Post, https://www.washingtonpost.com/us-policy/2021/09/09/democrats-tech-reconciliation/

While much of the proposal remains unsettled, the process for now has opened the door for Democratic lawmakers to seek to advance some of their long-stalled policy priorities — including their repeated commitments to take aim at Big Tech.

Democrats for years have criticized Amazon, Apple, Facebook and Google, arguing that some of the country’s most profitable companies have become too powerful — sometimes at the expense of their users. On Capitol Hill, Democrats have spearheaded sprawling antitrust investigations into the tech giants and called on top federal agencies to take a more aggressive stance against the industry.

### DA---FTC

#### Non-unique---COVID cost-cutting, Facebook case, and record-high cases thump

Leah Nylen 20. Covers antitrust and investigations for POLITICO Pro, spent eight years covering antitrust at MLex. “FTC suffering a cash crunch as it prepares to battle Facebook.” 12/10/20. https://www.politico.com/news/2020/12/10/ftc-cash-facebook-lawsuit-444468

The agency that just launched a landmark antitrust suit to break up Facebook is so strapped for cash that its leaders have discussed shrinking their staff and warned against taking on more cases.

In a series of emails to all Federal Trade Commission staff, obtained by POLITICO, Executive Director David Robbins said the agency would face a period of “belt tightening” to cut costs — and that filing fewer cases and trimming litigation expenses must be on the table.

“[W]e will either need to bring fewer expert intensive cases or significantly decrease our litigation costs (e.g. experts, transcripts, litigation support contractors, etc.),” Robbins said in an Oct. 29 email.

The emails offer an increasingly dire portrait of the money woes facing the FTC, which has launched a record amount of litigation in the past year even as the pandemic has caused a sharp reduction in the corporate merger filing fees that normally supply about half its budget. The crunch also raises the possibility that the FTC may not have the cash it needs to win its case against Facebook, which is gearing up for an expensive fight, or to take on additional companies like Amazon.

#### The FTC has other priorities.

Andrew C. Finch et al. 21. co-chair of the Antitrust Practice Group and a partner in the Litigation Department. \*Charles F. (Rick) Rule. \*Aidan Synnott is a partner in the Litigation Department and co-chair of the Antitrust Practice Group. \*Brette Tannenbaum is a partner in the Litigation Department. \*Jared Nagley is a counsel in the Antitrust Group. "Recent FTC Announcements Shed Light on Competition Enforcement Agenda." Lexology. Paul, Weiss, Rifkind, Wharton & Garrison Llp. 9-27-2021. https://www.lexology.com/library/detail.aspx?g=6150ea1d-5532-4a7d-bca3-92989e136d1a

Dominant-Firm Conduct and Market Power Abuses

Chair Khan also outlined a focus on conduct by “dominant” firms and “power asymmetries and the unlawful practices those imbalances enable.” While she did not posit a metric to determine if a firm is “dominant,” the memo did suggest a focus on firms acting as “gatekeepers.” In particular, Chair Khan wrote, “gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power.” She also wrote that “[b]usiness models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse.”

She wrote that the FTC should be “especially attentive to next-generation technologies, innovations, and nascent industries across sectors,” and that “[t]imely intervention—be it checking anticompetitive conduct that would lead markets to tip, or targeting unfair practices before they become widely adopted—can help us tackle problems at their inception, both limiting harms and saving resources over the long term.” Chair Khan also urged “taking aim at the ways in which certain contract terms, particularly those that are imposed in take-it-or-leave-it contracts, constitute unfair methods of competition or unfair or deceptive practices” and that “market power abuses and consumer protection concerns can emerge when one-sided contract provisions are imposed by dominant firms.” She specifically pointed to “non-competes, repair restrictions, and exclusionary clauses.”

Relatedly, the FTC has broadly authorized Staff to “investigate whether any persons, partnerships, corporations, or others have monopolized or are monopolizing, have attempted to monopolize or are attempting to monopolize, or have conspired or are conspiring to monopolize.” According to the FTC, “digital markets” will be a focus. The FTC also authorized staff to investigate “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices . . . relating to abuse of intellectual property.” The press release accompanying this resolution specifically mentioned the effect of alleged “abuse of intellectual property rights” on competition in “pharmaceuticals, technology and gasoline refining.”

Private Equity

In her memo, Chair Khan also wrote about what she termed “extractive business models.” She asserted that “the growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations,” and that “[e]vidence suggests that many of these abuses target marginalized communities, and combatting practices that prey on these communities will be a key priority.”

In addition to Chair Khan, others at the FTC have taken a skeptical view of private equity. For example, Commissioner Chopra – who may soon leave the Commission to become head of the Consumer Financial Protection Bureau – dissented from the FTC’s acceptance of a proposed consent order which involved, among other things, a divestiture to a private equity sponsored purchaser. He wrote that he believed there are “special considerations with financial buyers” and that “private equity participation is . . . associated with . . . firm behavior that can reduce long-term competition, including opportunistic asset sales.”

This view of private equity can be seen to contrast with a view taken by the DOJ in the prior administration that private equity may support competition in certain instances, for example by funding a divestiture buyer in a merger remedy. In September 2020, the DOJ published a Mergers Remedy Manual which recognized that “in some cases a private equity purchaser may be [a] preferred” purchaser of divestiture assets. At the very least, according to the manual, the DOJ Antitrust Division “will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms.”

Common Ownership and Interlocking Directorates

In its recent set of resolutions, the FTC authorized staff to investigate “whether any persons, partnerships, corporations, or others simultaneously have served, or are serving, as an officer or director of two or more competing corporations or partnerships or simultaneously have had, or have, financial interests of any kind in two or more competing corporations or partnerships.”

With respect to interlocking directorates, Section 8 of the Clayton Act, 15 USC §19, states that, if the corporations are above a certain size, “[n]o person shall, at the same time, serve as a director or [board-appointed] officer in any two corporations . . . that are . . . by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.” The law has certain safe harbor exceptions based on the magnitude of the “competitive sales” of the corporations – i.e., “all products and services sold by one corporation in competition with the other.” Section 8 does not prohibit interlocking directorates below these thresholds. Section 8 has been interpreted to cover both “direct” interlocks – i.e., when the same individual serves as a director or officer of competing corporations – and on occasion “indirect” interlocks – i.e., where different individuals serve as directors or officers of competing corporations, but both have been “deputized” to act on behalf of the same third entity (e.g., a private equity fund).

#### Enforcement fails---limited reach and states.

Elsa Pearson 21. a senior policy analyst at Boston University School of Public Health. "Hospital mergers need more oversight from federal, state officials." STAT. 9-2-2021. https://www.statnews.com/2021/09/02/hospital-mergers-more-oversight-federal-state-officials/

The reality is that the FTC’s reach is limited when it comes to nonprofits, which most hospitals are. While the FTC can oppose anticompetitive mergers involving nonprofits, it cannot enforce action against them for anticompetitive behavior. So if a merger goes through, the FTC has limited authority to ensure the new entity plays fairly.

What’s more, the FTC has acknowledged it can’t keep up with its workload this year. It modified its antitrust review process to accommodate an increasing number of requests and its stagnant capacity. In July, the Biden administration issued an executive order about economic competition that explicitly acknowledges the negative impact of health care consolidation on U.S. communities. This is encouraging, signaling that the government is taking mergers seriously. Yet it’s unclear if the executive order will give the FTC more capacity, which is essential if it is to actually enforce antitrust laws.

At the state level, most of the antitrust power lies with the attorney general, who ultimately approves or challenges all mergers. Despite this authority, questionable mergers still go through.

In 2018, for example, two competing hospital systems in rural Tennessee merged to become Ballad Health and the only source of care for about 1.2 million residents. The deal was opposed by the FTC, which deemed it to be a monopoly. Despite the concerns, the state attorney general and Department of Health dismissed the FTC’s concerns and approved the merger via a Certificate of Public Advantage. (This is the same legal mechanism the Rhode Island hospitals hope to employ should the FTC oppose their merger.) As expected, Ballad Health then consolidated the services offered at its facilities and increased the fees on patient bills.

#### Mergers reduce healthcare costs.

Victoria Bailey 21. "Updated Study From AHA Shows Hospital Mergers Saving Millions." RevCycleIntelligence. 8-31-2021. https://revcycleintelligence.com/news/updated-study-from-aha-shows-hospital-mergers-saving-millions

The American Hospital Association (AHA) reaffirmed its previous findings that hospital mergers and acquisitions result in reduced healthcare costs and improve care quality.

In 2019, the AHA published its analysis of hospital mergers and noted the benefits that accompany them. The organization has recently updated its analysis to include data from 2018 and 2019, which includes 144 additional hospital mergers and acquisitions. The revisited study also allowed the AHA to look at past hospital mergers and analyze the effects over a longer period of time.

The overall analysis included 3,000 short-term acute care hospitals, 755 of which experienced an acquisition between 2009 and 2019.

The original report revealed that hospital mergers and acquisitions were associated with a 2.3 percent reduction in annual operating expenses per admission. The revisited results showed a 3.3 percent reduction in operating expenses.

The average annual operating expenses of the hospitals included in the data was around $292 million, meaning the average savings for acquired hospitals would amount to $9.5 million each year.

The report linked hospital mergers to a 3.7 percent decrease in revenue per admission, which equals $10.7 million saved per year. The updated results reaffirm the original findings of a 3.5 percent revenue decline.

The AHA report also associated hospital mergers and acquisitions with improved patient outcomes and care quality. Compared to non-acquired hospitals, acquired hospitals had a statistically significant reduction in inpatient readmission rates. The composite outcome measure of quality which incorporates readmission and mortality rates also showed an improvement in care quality.

#### The new Antitrust Division focus on labor markets thumps.

Diane Bartz 10-1. Have covered antitrust and patent litigation for Reuters since 2007. “U.S. antitrust official says competition in labor markets a top concern” Reuters. 10-1-2021. https://www.reuters.com/world/us/us-antitrust-official-says-competition-labor-markets-top-concern-2021-10-01/

WASHINGTON, Oct 1 (Reuters) - The U.S. Justice Department's acting head of its Antitrust Division said on Friday that labor markets were a top priority for enforcement efforts, indicating a shift toward issues set by the White House's executive order on competition.

While antitrust enforcers have brought labor antitrust cases in the past, and the Trump Administration's Justice Department brought one against a no-poach agreement between rail equipment suppliers in 2018, they are rare.

"The division has become increasingly alert to and concerned by business conduct and transactions that harm competition for working people," said Richard Powers, acting head of the division, in a conference in New York.

Powers added that the coronavirus pandemic made the focus on labor even more critical. "If it was important for enforcers to protect competition in labor markets decades ago, and I believe that it was, it is essential now," he said.

He called any violation of antitrust law to hold down wages "just as irredeemable as agreements to fix product prices and allocate markets, conduct that the division has prosecuted for over 100 years." Powers added that the division was investing "substantial time and resources" in labor markets.

Two of the most common targets of criticism in labor markets are no-poach agreements, in which companies agree not to hire each others' workers,

## 1AR

### Adv---Inequality

### Adv---Modelling

### Adv---Democracy

### CP---States

#### Ignoring preemption supercharges the democracy deficit---it collapses the rule of law.

Aziz Huq & Tom Ginsburg 18. \*\*Law professor at the University of Chicago Law School. \*\*Law professor at the University of Chicago Law School. “

How to Lose a Constitutional Democracy.” 2018. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13666&context=journal\_articles

The United States has one institutional characteristic that is sometimes thought to be a distinctive safeguard against centralizing tyranny: the constitutional diffusion of governmental authority between the national government and the several states, or federalism.368 Federalism is both anointed as democracy’s savior,369 and also condemned as a handmaiden of local tyrannies.370 The North Carolina election law, for example, provides some cause for the latter concern.37

The existence of subnational entities wielding substantial regulatory authority and possessing considerable regulatory capacity means that states and certain localities will almost certainly play a necessary role in any process of constitutional retrogression—or in the narrative of a failed attempt at such backsliding—at least in terms of the negotiations they force from the federal government.372 But we think it is uncertain ex ante how federalism (or localism) will influence the trajectory of retrogression. It is possible that states will serve as salutary platforms for alternative, antiauthoritarian politicians and coalitions in the manner that Heather Gerken has suggested.373 For many policy areas, states and cities have the power to slow implementation and even nullify federal law.374

Alternatively, it is also possible that a concatenation of state electoral results and policy actions in the voting rights domain in particular will entrench an antidemocratic coalition, and render it nationally unassailable. Patterns of diffusion, whereby policies and institutions adopted in one state can spread to others, need not differentiate between pro and antidemocratic content. One can imagine institutional innovations such as those adopted in North Carolina spreading around the country, creating a series of one-party states. If a sufficient number of states fall into that category, national electoral competition would be severely limited.

It is not, in short, that federalism is irrelevant. Far from it. It is rather that before the fact it is very hard to know whether devolution will accelerate or retard the advent of an authoritarian or quasi-authoritarian regime at the national level. As in so many other areas, the Constitution provides less certain protection than one might have expected.

#### No follow on---agencies fight it---labor is distinct from their examples.

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

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

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

#### Technical assistance.

Garza et. al. 07. Chair of the Antitrust Modernization Commission, a bi-partisan blue ribbon commission created by Congress to advise Congress and the President on the state of U.S. Antitrust law enforcement and former DOJ Antitrust Deputy Assistant Attorney General for Regulatory Affairs. “Antitrust Modernization Commission: Report and Recommendations: Chapter 2,” p. 219. Antitrust Modernization Commission. 2/4/2007. https://govinfo.library.unt.edu/amc/report\_recommendation/chapter2.pdf

The DOJ and the FTC provide extensive technical assistance to nascent competition law regimes.61 The agencies use a variety of means—such as supplying on-site, long-term advisors and conducting workshops involving personnel from agencies in several countries— to provide assistance and training.62 Such training assists other countries in the development of their enforcement institutions as well as in their understanding of the appropriate economic and legal underpinnings of sound competition policy.63 It provides assistance in “the development of framework laws,” and in the “training of personnel in the substantive legal principles, analytical framework, and investigative techniques . . . .”64 Taken together, these services will foster greater cooperation and convergence on sound antitrust law principles.65

#### Matvit goes aff—the first half says YES preemption, and the second half says preemption SHOULD be challenged, not that those suits would be successful, and the counterplan IGNORING preemption is not a CHALLENGE, which means they don’t access the argument about bringing new lawsuits—we read blue

Marvit, 17

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

Each January, as the Bureau of Labor Statistics (BLS) releases its annual data on union membership rates, labor braces itself to see how steeply the chart dips. This past year, the share of unionized workers declined 0.4 percent, to just 10.7 percent of wage and salary workers overall and a bare 6.4 percent of private-sector workers. As has been the case for many years now, the annual release represents the lowest year on record for unions. Even though it has been the long-stated policy of the federal government, as codified in the National Labor Relations Act, to encourage collective bargaining, federal labor law has proven unable to adequately protect workers in the exercise of their rights, and Congress has proven unwilling to pass even tepid reforms that would help them. As a result, the law does little to protect workers who face increasingly hostile and sophisticated employers who often threaten, fire, and surveil employees in order to crush organizing efforts. While reforms to federal law have been blocked by Congress, states and cities have faced a different hurdle: the courts. Starting in 1959, the Supreme Court has written into the National Labor Relations Act (NLRA) a continually expanding preemption doctrine that prevents states and cities from passing laws that touch upon anything related to labor, involve the interpretation of a collective bargaining agreement, or even involve issues that the courts believe Congress intended to leave to the free play of market forces. Congress can, and often does, expressly preempt states from passing laws that fall within a defined scope. Neither the NLRA nor its extensive legislative history, however, contains any mention of preemption: Congress did not expressly preempt states from acting. In instances where Congress has not expressly preempted states from acting, state laws that actually conflict with federal laws are still preempted. However, neither the NLRA nor its legislative history show any consensus that Congress meant to push states and cities from making laws that advanced, and do not conflict with, the pro-collective-bargaining policies of the NLRA. And yet, as Harvard Law Professor Ben Sachs has pointed out, the Supreme Court has not employed the typical typologies of preemption at all when dealing with labor law. Rather, it has created a “preemption doctrine [that] is among the broadest and most robust in federal law.” In most other areas of worker protection—from minimum wage to antidiscrimination laws—the federal government has set the floor under which states and cities may not go, but they can and often do raise the ceiling by increasing state or local minimum wage or including additional protected categories such as sexual orientation to existing protections. Indeed, the evolution of many of the nation's employment and civil rights protections began at the state level and trickled up to the federal government. It is only in the area of workers' labor rights that states and cities are powerless to act—and that, solely as the result of judicial decisions. The Supreme Court's preemption doctrine started with the 1959 case, San Diego Building Trades v. Garmon, where the employer got a state court injunction against the union for picketing. The Supreme Court should have held that the picketing that the union was engaged in was a protected right under federal labor law, and therefore the state could not pass a law that conflicts with that right. Instead, the Court went further and held that Congress gave the National Labor Relations Board primary agency jurisdiction, and so when something is “arguably” protected or prohibited by the NLRA, then only the Board can act. Furthermore, only the Board can answer the initial question of whether conduct is “arguably” under the Board’s jurisdiction. The Supreme Court then doubled down on its preemption doctrine in the 1976 case, Machinists v. Wisconsin Employment Relations Commission. In the Machinist case, an employer brought an unfair labor practice charge against union workers who engaged in concerted refusal to work overtime during contract negotiations. The NLRB dismissed the charge because it held that the work refusal was not prohibited under the NLRA, so the employer brought a state court action against the union. In response, the Supreme Court expanded its earlier Garmon preemption to hold that Congress intended that certain conduct be left unregulated and left “to be controlled by the free play of economic forces.” Though the union in the Machinists case benefitted from the Court’s expansion of federal preemption, the decision has led to states and cities being almost absolutely prohibited from passing laws that promote unionization and collective bargaining. These Court decisions, and thousands of lower court decisions that have followed the precedent in overturning state and local laws, rely on three types of specious and archaic reasons that deserve challenge and reconsideration. First, the Court has repeatedly shown a strong reliance on the state of the economy and labor force during the time when these decisions were issued. In the Machinists case, the Court described how it experimented with various types of preemption before settling on the broad form begun by Garmon, stating, “it was, in short, experience, not pure logic, which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations.” The experience the Court referred to was that of the late 1940s and 1950s, when union membership was at its peak. Whatever balance between labor and management that may have existed then has since eroded. Second, the Court has long interpreted the statute to require a uniform labor law across the country—and yet, labor law has become in many ways a crazy quilt, varying from region to region, from state to state, and from one president to the next. The NLRB has become a highly politicized agency, with its decisions swinging wildly every time a new president appoints new members and a general counsel. Cases that proceed through the National Labor Relations Board are often appealed to federal courts, and different federal circuits often come to opposite conclusions, meaning that the laws in different states effectively differ—though it is the courts, not state or local governments, that create those differences. Further, the expansion of state “right to work” laws, as well as a variety of state public sector labor laws have also undermined any goal of national uniformity in labor law. Lastly, the Court's determination that Congress intended to leave a wide variety of conduct to the free play of economic forces has, in the words of NYU Law Professor Cynthia Estlund, “done what Congress did not do in the NLRA, or even with the Taft-Hartley Act: It has granted to employers a federal ‘right' to use their economic power against unions.” The Congress that passed the NLRA may have intended to ensure a balance between employer and union power, but there is no indication that it intended employers to be able to use the Act to evade any regulation in broad areas through a laissez faire argument. The result of this judicially created broad preemption has been to limit state and local experimentation—in line with what Justice Brandeis described as “laboratories of democracy”—with labor laws that advance the stated purpose of federal labor law. However, since states and cities cannot act in the field of labor law, all discussions of federal labor law reform are purely theoretical and lack any empirical basis for their possible effects. Numerous labor law scholars have written critically over the years of the rationale for such broad preemption, as well as the effects it has had on workers' ability to organize. Recently, Lewis & Clark Law Professor Henry Drummonds came up with a list of ten potential reforms that would advance the pro-collective bargaining mission of the NLRA—if states could be able to pass such reforms under normal preemption rules. These include allowing states to: increase damages for violating workers' labor rights so the penalties are in line with those for other forms of workplace discrimination; experiment with restrictions on permanent replacement of striking workers and on the use of employer lockouts; experiment with “card check” recognition of the union; provide “equal access” to union advocates as well as employers during a campaign for unions; and require arbitration if an impasse arises in the bargaining over a first contract. The one and only major state labor reform since the 1935 enactment of the NLRA has had a profound effect on the division of wealth and power in the United States. That, of course, was the provision of the 1947 Taft-Hartley Act enabling states to pass “right to work” laws. Allowing states and cities to create local rules that promote unionization and collective bargaining that are tailored to local needs and local industries could prove just as significant in the opposite direction. After eight years of the Republicans using a strategy of non-cooperation with President Obama, and now President Trump's open contempt for federal regulation and enforcement, many on the left have begun to push for a “progressive federalism” that relies more on state and local action on issues from climate change to minimum wage to immigration. Labor law should be included on their federalist bill of particulars, and broad federal preemption of labor law should also be challenged. Doing so would free states and cities to experiment with a variety of policies that would protect workers and more adequately allow them to exercise their rights of free association and collective bargaining at work. These experiments could then provide empirical data for national labor law reform, should the day ever come when Congress regains a taste for cooperation and compromise. To create the ground for such experiments cities, states and unions should begin challenging the Supreme Court to reconsider the preemption doctrine that it wrote into the NLRA. Challenging preemption may lead to unlikely alliances that are not grouped easily into liberal and conservative camps. Even though the results of such a challenge would benefit labor, the promotion of federalist and strict statutory construction arguments are core principles of conservative legal thought. Getting the Supreme Court to overturn its past precedent is always an uphill battle, but it is not impossible. Though the overall labor figures released by the Bureau of Labor Statistics show a movement in decline, labor's density and power is quite uneven. Labor is still a force in northern cities across the country, as well as major states such as California, New York, Washington, Oregon, Alaska, Hawaii, Pennsylvania, and throughout the Midwest. In many of these states and cities, laws could be passed that advance the original purpose of the NLRA—provided their hands were unbound. It is time for those concerned with workers' rights and with the future of labor in America to challenge the Supreme Court's misreading of the law.

### DA---Infrastructure

**Nuke war outweighs and turns warming**

**Starr 14** {Steven, Senior Scientist for Physicians for Social Responsibility, Director of the Clinical Laboratory Science Program (Missouri), commentator in the Bulletin of the Atomic Scientists and the Strategic Arms Reduction, Associate member of the Nuclear Age Peace Foundation, “The Lethality of Nuclear Weapons: Nuclear War has No Winner,” Global Research: Centre for Research on Globalization, 6/5, http://www.globalresearch.ca/the-lethality-of-nuclear-weapons-nuclear-war-has-no-winner/5385611}

Nuclear war **has no winner**. Beginning in 2006, several of the world’s **leading climatologists** (at Rutgers, UCLA, John Hopkins University, and the University of Colorado-Boulder) published a series of studies that evaluated the long-term environmental consequences of a nuclear war, including baseline scenarios fought with **merely 1%** of the explosive power in the US and/or Russian launch-ready nuclear arsenals. They concluded that the consequences of even a “small” nuclear war would include **catastrophic disruptions** of global climate[i] and **massive destruction** of Earth’s protective ozone layer[ii]. These **and more recent studies** predict that global agriculture would be so negatively affected by such a war, a global famine would result, which would cause up to **2 billion people to starve to death**. [iii]¶ These **peer-reviewed** studies – which were analyzed by the **best scientists in the world** and found to be without error – also predict that a war fought with less than half of US or Russian strategic nuclear weapons would **destroy the human race**.[iv] In other words, a US-Russian nuclear war would create such extreme long-term damage to the global environment that it would leave the Earth **uninhabitable** for humans and most animal forms of life.¶ A recent article in the Bulletin of the Atomic Scientists, “Self-assured destruction: The climate impacts of nuclear war”,[v] begins by stating:¶ “A nuclear war between Russia and the United States, even after the arsenal reductions planned under New START, could produce a nuclear winter. Hence, an attack by either side could be **suicidal**, resulting in self-assured destruction.”¶ In 2009, I wrote an article[vi] for the International Commission on Nuclear Non-proliferation and Disarmament that summarizes the findings of these studies. It explains that nuclear firestorms would produce millions of tons of smoke, which would rise above cloud level and form a global stratospheric smoke layer that would **rapidly encircle the Earth**. The smoke layer would remain for at least a **decade**, and it would act to destroy the protective ozone layer (vastly increasing the UV-B reaching Earth[vii]) as well as block warming sunlight, thus creating Ice Age weather conditions that would last **10 years** or longer.¶ Following a US-Russian nuclear war, temperatures in the central US and Eurasia would fall below freezing every day for one to three years; the intense cold would **completely eliminate growing seasons for a decade** or longer. No crops could be grown, leading to a famine that would **kill most humans and large animal populations**.¶ Electromagnetic pulse from high-altitude nuclear detonations would destroy the integrated circuits in all modern electronic devices[viii], including those in commercial nuclear power plants. Every nuclear reactor would almost **instantly** meltdown; every nuclear spent fuel pool (which contain many times more radioactivity than found in the reactors) would boil-off, releasing vast amounts of **long-lived** radioactivity. The fallout would make most of the US and Europe **uninhabitable**. Of course, the survivors of the nuclear war would be **starving to death anyway.** Once nuclear weapons were introduced into a US-Russian conflict, there would be little chance that a nuclear holocaust could be avoided. Theories of “limited nuclear war” and “nuclear de-escalation” are **unrealistic**.[ix] In 2002 the Bush administration modified US strategic doctrine from a retaliatory role to permit preemptive nuclear attack; in 2010, the Obama administration made only incremental and miniscule changes to this doctrine, leaving it essentially unchanged. Furthermore, Counterforce doctrine – used by both the US and Russian military – emphasizes the need for preemptive strikes once nuclear war begins. Both sides would be under immense pressure to launch a preemptive nuclear first-strike once military hostilities had commenced, especially if nuclear weapons had already been used on the battlefield.

### DA---FTC

#### Absolutely no chance of extinction from disease

Adalja 16 [Amesh Adalja, infectious disease physician at the University of Pittsburgh] “Why Hasn't Disease Wiped out the Human Race?” June 17, 2016 (http://www.theatlantic.com/health/archive/2016/06/infectious-diseases-extinction/487514/) - MZhu

But when people ask me if I’m worried about infectious diseases, they’re often not asking about the threat to human lives; they’re asking about the threat to human life. With each outbreak of a headline-grabbing emerging infectious disease comes a fear of extinction itself. The fear envisions a large proportion of humans succumbing to infection, leaving no survivors or so few that the species can’t be sustained. I’m not afraid of this apocalyptic scenario, but I do understand the impulse. Worry about the end is a quintessentially human trait. Thankfully, so is our resilience. For most of mankind’s history, infectious diseases were the existential threat to humanity—and for good reason. They were quite successful at killing people: The 6th century’s Plague of Justinian knocked out an estimated 17 percent of the world’s population; the 14th century Black Death decimated a third of Europe; the 1918 influenza pandemic killed 5 percent of the world; malaria is estimated to have killed half of all humans who have ever lived. Any yet, of course, humanity continued to flourish. Our species’ recent explosion in lifespan is almost exclusively the result of the control of infectious diseases through sanitation, vaccination, and antimicrobial therapies. Only in the modern era, in which many infectious diseases have been tamed in the industrial world, do people have the luxury of death from cancer, heart disease, or stroke in the 8th decade of life. Childhoods are free from watching siblings and friends die from outbreaks of typhoid, scarlet fever, smallpox, measles, and the like. So what would it take for a disease to wipe out humanity now? In Michael Crichton’s The Andromeda Strain, the canonical book in the disease-outbreak genre, an alien microbe threatens the human race with extinction, and humanity’s best minds are marshaled to combat the enemy organism. Fortunately, outside of fiction, there’s no reason to expect alien pathogens to wage war on the human race any time soon, and my analysis suggests that any real-life domestic microbe reaching an extinction level of threat probably is just as unlikely. Any apocalyptic pathogen would need to possess a very special combination of two attributes. First, it would have to be so unfamiliar that no existing therapy or vaccine could be applied to it. Second, it would need to have a high and surreptitious transmissibility before symptoms occur. The first is essential because any microbe from a known class of pathogens would, by definition, have family members that could serve as models for containment and countermeasures. The second would allow the hypothetical disease to spread without being detected by even the most astute clinicians. The three infectious diseases most likely to be considered extinction-level threats in the world today—influenza, HIV, and Ebola—don’t meet these two requirements. Influenza, for instance, despite its well-established ability to kill on a large scale, its contagiousness, and its unrivaled ability to shift and drift away from our vaccines, is still what I would call a “known unknown.” While there are many mysteries about how new flu strains emerge, from at least the time of Hippocrates, humans have been attuned to its risk. And in the modern era, a full-fledged industry of influenza preparedness exists, with effective vaccine strategies and antiviral therapies. HIV, which has killed 39 million people over several decades, is similarly limited due to several factors. Most importantly, HIV’s dependency on blood and body fluid for transmission (similar to Ebola) requires intimate human-to-human contact, which limits contagion. Highly potent antiviral therapy allows most people to live normally with the disease, and a substantial group of the population has genetic mutations that render them impervious to infection in the first place. Lastly, simple prevention strategies such as needle exchange for injection drug users and barrier contraceptives—when available—can curtail transmission risk. Ebola, for many of the same reasons as HIV as well as several others, also falls short of the mark. This is especially due to the fact that it spreads almost exclusively through people with easily recognizable symptoms, plus the taming of its once unfathomable 90 percent mortality rate by simple supportive care. Beyond those three, every other known disease falls short of what seems required to wipe out humans—which is, of course, why we’re still here. And it’s not that diseases are ineffective. On the contrary, diseases’ failure to knock us out is a testament to just how resilient humans are. Part of our evolutionary heritage is our immune system, one of the most complex on the planet, even without the benefit of vaccines or the helping hand of antimicrobial drugs. This system, when viewed at a species level, can adapt to almost any enemy imaginable. Coupled to genetic variations amongst humans—which open up the possibility for a range of advantages, from imperviousness to infection to a tendency for mild symptoms—this adaptability ensures that almost any infectious disease onslaught will leave a large proportion of the population alive to rebuild, in contrast to the fictional Hollywood versions. While the immune system’s role can never be understated, an even more powerful protector is the faculty of consciousness. Humans are not the most prolific, quickly evolving, or strongest organisms on the planet, but as Aristotle identified, humans are the rational animals—and it is this fundamental distinguishing characteristic that allows humans to form abstractions, think in principles, and plan long-range. These capacities, in turn, allow humans to modify, alter, and improve themselves and their environments. Consciousness equips us, at an individual and a species level, to make nature safe for the species through such technological marvels as antibiotics, antivirals, vaccines, and sanitation. When humans began to focus their minds on the problems posed by infectious disease, human life ceased being nasty, brutish, and short. In many ways, human consciousness became infectious diseases’ worthiest adversary.

#### Takes out the DA.

Evan Miller 9/7/21. Senior Associate at Vinson & Elkins “FTC Letter Signals Increased Scrutiny of Oil & Gas M&A Activity.” https://www.jdsupra.com/legalnews/ftc-letter-signals-increased-scrutiny-2957307/

In a recent exchange of letters with the White House, the chair of the Federal Trade Commission (“FTC”) signaled her intent to ramp up antitrust enforcement in the oil and gas industry. The move comes as part of a broader shift in priorities at the FTC in evaluating mergers and is in line with the Biden administration’s recent efforts to increase antitrust enforcement across industries (about which V&E has previously written). While calls for FTC action to combat high gas prices are fairly common from new administrations and Congress, the agency’s recent response includes specific action items that suggest deviations from past policy. These changes could have significant effects on the regulatory environment for energy companies, especially for the retail fuels sector. Indeed, practitioners who regularly represent oil and gas companies before the FTC have noted that they are already receiving inquiries in line with the chair’s letter.

#### FTC can’t keep up with its workload now.

Elsa Pearson 9/2/21. Senior policy analyst at Boston University School of Public Health. “Hospital mergers and acquisitions are a bad deal for patients. Why aren’t they being stopped?” https://www.statnews.com/2021/09/02/hospital-mergers-more-oversight-federal-state-officials/

What’s more, the FTC has acknowledged it can’t keep up with its workload this year. It modified its antitrust review process to accommodate an increasing number of requests and its stagnant capacity. In July, the Biden administration issued an executive order about economic competition that explicitly acknowledges the negative impact of health care consolidation on U.S. communities. This is encouraging, signaling that the government is taking mergers seriously. Yet it’s unclear if the executive order will give the FTC more capacity, which is essential if it is to actually enforce antitrust laws.

#### Khan’s agenda is packed.

Aaron Schaffer 21. A researcher for Technology 202 and Cybersecurity 202 at The Washington Post. "Lina Khan’s daily schedule as FTC chair hints at priorities.” Washington Post. 9-20-2021. https://www.washingtonpost.com/politics/2021/09/20/lina-khans-daily-schedule-ftc-chair-hints-priorities/

Despite calling for a new era of transparency, Federal Trade Commission Chair Lina Khan has been relatively opaque in her first months on the job about her strategy for implementing an aggressive agenda.

But calendars of Khan's first seven weeks at the commission, obtained by The Technology 202, show meetings with friends and foes, as well as experts in civil rights and Section 230 policy. While it's not clear whether every call and meeting took place as planned, taken as a whole, the schedule offers insight into Khan's priorities as she settles into her role, and it provides hints about the agency’s potential future targets. The FTC declined to comment.

In all, Khan scheduled meetings and calls with more than a dozen lawmakers — seven Democrats and six Republicans — in her first 45 days.

Khan’s meetings outside of government included confabs with Color of Change President Rashad Robinson — a civil rights activist and frequent critic of the ways technology companies’ policies on misinformation and hate speech impact communities of color — and Olivier Sylvain, a communication law scholar at the Fordham University School of Law.

Sylvain is an expert on the Section 230 liability shield, which gives Internet platforms protection from liability for what their users say online.

Section 230 has hampered the commission’s ability to oversee the technology sector, FTC Commissioner Rohit Chopra said at a July hearing, just two days before Khan’s scheduled meeting with Sylvain. Color of Change and Sylvain did not respond to requests for comment.

Foes and allies

Critics of the tech industry heralded Khan’s ascent as the start of a new era of antitrust enforcement, while technology trade groups criticized the nomination. They weren’t alone.

Sen. Mike Lee (R-Utah), a Libertarian-leaning Republican who is Khan’s most vocal opponent, told her in a July 27 letter that recent developments at the commission under her leadership amounted to a “progressive putsch.”

Khan and Lee were scheduled to speak by phone just two days later, according to the calendars. Lee’s office did not respond to a request for comment.

#### Enforcement fails for healthcare, that’s Pearson---Philadelphia proves

Samantha Liss 20. A senior reporter at Healthcare Dive. "FTC loses bid to stop Philadelphia hospital merger." Healthcare Dive. 12-9-2020. https://www.healthcaredive.com/news/ftc-loses-bid-stop-philadelphia-hospital-merger-jefferson-einstein/591854/

The challenge to Jefferson Health's bid for Albert Einstein was the first action to block a provider deal in years for the FTC. Now, it's hit a hurdle in the courts, though the agency could still appeal after this dismissal.

"The Court's ruling is disappointing, and we our considering our options," an FTC spokesperson said.

FTC has argued that both Jefferson and Einstein compete in acute care and rehab services and vie for inclusion in insurers' networks.

Pappert's ruling Monday, and the examples he used, essentially argued that given the number of competitors in the region, insurers could walk away from potential price increases the merged entity may impose by opting to redirect their members to other facilities.

Because there are so many systems, "no insurer can credibly assert that there would be 'no network' without a combined Jefferson and Einstein — something the insurers could say when Hershey and Pinnacle, the two largest Harrisburg area hospitals ... attempted to merge," Pappert wrote. He frequently cited the Hershey-Pinnacle case, which also was denied a preliminary injunction in district court but went on to win one in a federal appeals court.

Pappert also noted that no employers testified that they would have difficulty marketing a health plan to employees that excluded Jefferson and Einstein. In fact, the one employer that did weigh in, a school district, said it would be fine without the two.

The court also takes issue with whether the FTC properly defined the relevant markets in the lawsuit, an important hurdle in any case seeking to block a merger.