# Opensource---Round 5---NU

# 1AC

## 1AC---Worker Welfare

### Inequality---1AC

#### Advantage 1 is Inequality.

#### Labor market power causes massive inequality and wage stagnation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Soft power solves global existential risks.

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

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

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

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

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

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

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

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

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

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

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

### Modeling---1AC

#### Advantage 2 is Modeling.

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

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

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

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

Ganesh Sitaraman 18. the Co-founder and Director of Policy for the Great Democracy Initiative. He is also a professor of law at Vanderbilt University. Sitaraman served as policy director to Senator Elizabeth Warren during her Senate campaign, and then as her senior counsel in the U.S. Senate. “Taking Antitrust Away from the Courts: A Structural Approach to Reversing the Second Age of Monopoly Power”. https://ir.vanderbilt.edu/xmlui/bitstream/handle/1803/9447/Taking%20Antitrust%20Away%20from%20the%20Courts.pdf?sequence=1&isAllowed=y

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

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

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

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

#### Populism causes extinction.

Richard N. Haass and Charles A. Kupchan 21. Richard N. Haass is President of the Council on Foreign Relations, was Director of Policy Planning for the United States Department of State and a close advisor to Secretary of State Colin Powell. Charles A. Kupchan is Professor of International Affairs at Georgetown University, a Senior Fellow at the Council on Foreign Relations, and was Director for European Affairs on the National Security Council. “The New Concert of Powers”. Foreign Affairs. 3-23-21. https://www.foreignaffairs.com/articles/world/2021-03-23/new-concert-powers

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

#### Specifically, Japan models US antitrust trust policy via the consumer welfare standard but must adopt a new standard to address the expansion of the digital economy.

Marek D. Mueller 20. University of Vienna. “Antitrust Regulation in Japan and South Korea – What Influence Does Chicago School of Antitrust Exercise on Competition Policy and Digital Economy” SSRN Electronic Journal. January 2020.

One has to judge the quality of any theory by its practical applicability, and the Chicago School of antitrust has **not shown any significant advantages in this respect in relation to the digital sector.** From the preceding, Chicagoans have premised Chicago School on the fact that government intervention limits competition and subsequently economic growth. From the very beginning of its discourse in post-war America, Chicago School of antitrust sought to build a bridge between economic models and legal norms. While the Chicago School played in influence in **creating national law in South Korea and Japan** and contributed to shaping their legal system, current legal developments, in order to keep up with the speed of technology and the global, border-less force of major companies, are influenced less by the School’s traditional thought and more by national need. Further, the initial thought of the School was the cartels are naturally unstable, the few entry barriers exist, that monopoly attracts disruptive entry, and that mergers almost never produce anything except reduced costs. Based on the information presented it becomes clear that this isn’t the case, especially looking at the **cultural influence of cartels in Japan and South Korea** and the many infringement cases brought against market leaders. **Digital economy is challenging for existing antitrust enforcement** as boundaries of competition constantly redefine. South Korea and Japan have strong, well- established **antitrust laws that protect consumer welfare** on the one hand, and assure that there is competition for the market without any exclusionary conduct by firms on the other hand. However, although adapting legal provisions due to the technical innovation in digital economy are existent gradually; both **countries might not have yet enforced these to the extent of their capabilities**. It seems difficult because legal amendments are taking time in a parliamentary process while digital technology is developing fast. Therefore, one can say that self-correction of the digital market, the mindset of the School, seems very unlikely to happen if one considers the development of some firms’ market power during the last years. Moreover, the current debate of scholars in law and economics, and not only among Chicagoans, illustrates that competition regulators in any free market economy experience a challenge through **antitrust probes of digital platforms run by digital companies**. They are not occurring exclusively within the digital sector but largely, as it is through the internet and digital data, where firms try to abuse their market position. Questions therefore arise if a concentration of market power and, in consequence, **a lack of competition can be addressed with antitrust** or other public policies alone, and what are the costs and benefits of public attempts to shape the future of the digital economy as a whole. Furthermore, clever tax avoidance strategies that bolster these firms to big ‘barons’ are still one of the major problems of all economies that rely on fair competition. In Japan, authorities have so far shown themselves to be in a leading position in the field of competition protection, especially with regard to their willingness to clarify competition cases, and they are also taking this to the front, for example in exchange with the EU. Moreover, the Japanese competition authorities are keen to oppose a superior power of multinational corporations that do not want to pay taxes under national tax law. However, due to the lack of a consensus among the international community, it has not yet been possible to pass cross-national laws. South Korea’s antitrust law demonstrates the crucial importance of two aspects in the effectiveness of antitrust regulations: proactive legislation and strict compliance. The expansion of their economies affects South Korea and Japan. A lenient implementation of their monopoly regulations is a means to achieve its aims based on the way competition laws are applied in these nations. Initially, both countries **modeled their antitrust laws on those of the United States.** Regardless of criticism of the Chicago antitrust theory, it is still regarded as an useful antitrust approach in contemporary science and quite challenged in relation to the digital sector. Of course, the theoretical framework of the School comes from a time when digital platforms were future scenarios. Nevertheless, its central approach to consumer protection is an important asset, and research (by a reassessed theory) should continue to be guided by. To conclude, **digital technologies** challenge deeply the way governments regulate through competition policies. In digital economy, the traditional definition of markets becomes blurred, enforcement is challenged, and administrative boundaries both, in Japan, Korea and internationally, transcend. Because of this, antitrust enforcement for the sake of consumers **rests a crucial challenge for 21st century antitrust policies.**

#### Japanese law doesn’t go far to address the rise of digital platforms.

Daniel Leussink 21. “Japan must toughen regulation if 'joint approach' e-commerce law falls short: lawmaker” Reuters. 02-18-21. <https://www.reuters.com/article/us-japan-tech-regulations/japan-must-toughen-regulation-if-joint-approach-e-commerce-law-falls-short-lawmaker-idUSKBN2AI0U6>

TOKYO (Reuters) - Japanese policymakers must **keep open the option of toughening regulations on technology giants** if an e-commerce law introduced this month **does not work as expected**, said a lawmaker overseeing the ruling party’s deliberations on competition policy. Japan on Feb. 1 joined a global trend towards increased scrutiny of possible antitrust activity by big tech names with legislation requiring disclosure of information such as terms of contracts with business partners, how search rankings operate and reasons for suspending or refusing vendors. The law, which offers leeway in how much information companies must submit, comes as authorities in Europe, Australia and elsewhere confront the clout of global e-commerce and social media firms, concerned of their significant market dominance. “If this joint regulatory approach isn’t sufficient, **we have to make rules going a step further**,” Tatsuya Ito, a ruling Liberal Democratic Party (LDP) lawmaker, told Reuters in an interview on Wednesday. Ito, who oversees competition policy in the LDP’s powerful policy research council, described the **law as “light-touch”,** saying policymakers must assess how it is working before taking any further steps or expanding its scope. Japan’s e-commerce market was worth 19 trillion yen ($180 billion) in 2019. Its app store market reached $20.2 billion in 2020, showed data from App Annie. Amazon Inc and Rakuten Inc were the largest e-commerce operators in 2018, while the app store market was split between Apple Inc and Alphabet Inc’s Google, showed a 2019 report from the Japan Fair Trade Commission (JFTC). Under the new law, operators of shopping sites and app stores with annual Japan revenue of at least 300 billion yen and 200 billion yen respectively must submit annual reports to the Ministry of Economy, Trade and Industry. The ministry can then issue improvement orders if operators do not follow its recommendations, or refer operators to the JFTC if it suspects antitrust activity. Critics, however, said **the law lacks teeth** when compared with those planned by the European Union, under which regulators can impose fines and even break up firms. Antitrust expert Yosuke Okada, a professor at Hitotsubashi University, said the law is more of a cooperation type of regulation aimed at **gathering information on firms’ operations.** “**It isn’t a framework in which businesses are regulated in great detail**,” he said. Moreover, any imposition of fines would likely **require large-scale reform of anti-monopoly law**, Ito said.

#### Competition between digital platforms increases innovation and productivity.

Kazuhiko Fuchikawa 20. Associate Professor at Osaka City University; was a Research Associate at Keio University as well as Assistant Professor and Associate Professor at Yamaguchi University. “Regulations of Digital Platform Markets Under the Japanese Antimonopoly Act: Does the Regulation of Unfair Trade Practices Solve the Gordian Knot of Digital Markets?”. The Antitrust Bulletin Vol 65, Issue 1, 2020. 2-28-20. https://journals.sagepub.com/doi/full/10.1177/0003603X19898905

The Internet of Things and Artificial Intelligence rely on big data to drive technological innovation. The improvement of industrial productivity through such technological innovation is considered as the Fourth Industrial Revolution.[1](javascript:popRef('fn1-0003603X19898905')) In recent years, digital platform businesses, such as online malls and hotel reservation sites, are growing rapidly worldwide. A digital platform refers to a common foundation or technological base that enables transactions, information dissemination, and access among members of distinct customer groups.[2](javascript:popRef('fn2-0003603X19898905')) The tremendous amount of data obtained from the use of products exchanged via digital platforms results in the improvement of the products and leads to further data collection, as well as additional upgrading. A two-sided or multifaceted market forms a vital attribute of this virtuous circle. A two-sided or multisided market features more than two different groups of users and an indirect network effect.[3](javascript:popRef('fn3-0003603X19898905')) An indirect network effect means an impact on one side of the market affects the other sides. For instance, the greater the number of consumers who gather in one market, the greater is the number of companies that sell products on the platform being attracted to the other sides. Although the two-sided market is not a new model but has long been recognized in various industries, such as for magazines and newspapers, it connects readers and advertisers. The two-sided and multisided markets are attracting more attention currently because of the rapid expansion of businesses that employ digital platforms via the Internet, and it is considered that the indirect network effects of such a model may give rise to oligopolies.[4](javascript:popRef('fn4-0003603X19898905')) We must clarify the pros and cons of the indirect network effects in two-sided and multisided markets even as we encourage the utilization of data and promote the Fourth Industrial Revolution by addressing the following questions: Is it still sufficient to apply traditional regulations to a single-sided market? How and when does an adverse effect on competition occur? Under what circumstances does the indirect network effect in two-sided and multisided markets amplify foreclosure, may hamper new entry, and cause exclusionary outcomes against existing firms? What differences can be observed between Japan and other regions, such as the US and the EU, in terms of the regulation of digital platform markets? This article discusses these issues. In Section II, this article clarifies the characteristics of a digital platform and explains how digital platform markets are regulated by competition law. Section III examines the current framework to define markets and assess market power with respect to digital platform markets. Section IV discusses the manner in which a digital platform is regulated in Japan, both as Private Monopolization and Unfair Trade Practices (UTPs), while regulations of the latter are one of the unique characteristics of the Japanese Antimonopoly Act (AMA).[5](javascript:popRef('fn5-0003603X19898905')) The analysis in the section focuses the UTP regulation’s function to regulate digital platform markets from the standpoint of lessening competition in the relevant market. Section V examines what lessons can be learnt from the past AMA cases and offers a comparative analysis with EU and U.S. laws. Section VI summarizes the paper. As there are not many instances of anticompetitive collusion in Japanese digital platform markets, the article does not delve into this topic.[6](javascript:popRef('fn6-0003603X19898905')) II. Digital Platform Markets and Competition Laws The digital platform industry is developing rapidly with Google, Amazon, Facebook, and Apple’s (collectively known as GAFA) having emerged as the forerunners. Baidu, Alibaba, and Tencent (BAT) are also gaining power in China. GAFA and BAT compile big data by using platforms, which are becoming increasingly oligopolistic. In Japan, the digital platform industry is prevalent, which prompted the Japan Fair Trade Commission (JFTC), the Ministry of Economy, Trade and Industry (METI), and the Ministry of Internal Affairs and Communications (MIC) to establish a set of policies and rules as well as release reports such as the one of the Study Group on the Improvement of the Trade Environment Involving Digital Platform Businesses.[7](javascript:popRef('fn7-0003603X19898905')) These platforms have the potential to enhance innovation and productivity, which results in increased efficiency and benefits to consumers. Therefore, collecting big data in a two-sided or multisided market does not necessarily contravene competition law. However, indirect network effects could amplify foreclosure effects.[8](javascript:popRef('fn8-0003603X19898905')) When the users of a digital platform are locked in, it is difficult for them to switch to other service providers, too.[9](javascript:popRef('fn9-0003603X19898905')) These aspects of digital platforms necessitate the oversight of competition authorities. Unlike in the traditional business model, it is common for the digital platforms to provide free services, such as a Social Network Service (SNS) or a search engine, for consumers in one space while receiving advertisement fees from brands in another market are prevalent. In relation to the free service, the price competition is not the mode of competition; instead, a competition over quality rather than price occurs, and thus, regulators more often need to probe the impact of this phenomenon of competition over quality, as well as of price competition. Collecting varied information is not illicit in itself. However, conduct such as employing unreasonable means to collect big data or facilitating collusion could be illegal under competition law.[10](javascript:popRef('fn10-0003603X19898905')) According to the JFTC report, “Data and Competition Policy,” unreasonable means are practices such as unreasonable data collection, unreasonable data hoarding by monopolistic or oligopolistic enterprises, and the tying of data provision and analysis, as well as demanding not to trade with competitors on the condition of providing data or analysis techniques.[11](javascript:popRef('fn11-0003603X19898905')) In Germany, the Bundeskartellamt has recently prohibited Facebook from combining user data from different sources.[12](javascript:popRef('fn12-0003603X19898905')) III. Market Definition and Market Power in Digital Platform Markets We must apply special considerations to transactions of data and offers of free services in digital platform markets as follows. First, data may be transacted separately from products and services, and thus, practices related to transaction of data can be subjected to the AMA as in case of transaction of goods and services.[13](javascript:popRef('fn13-0003603X19898905')) Second, geographical markets could extend not only within Japan but also to foreign countries, as there are barely any costs incurred for the transfer of data. Note that the collection and utilization of big data are also subject to the AMA regardless of whether the business address is located in Japan as long as the effect of a company’s conduct extends to the Japanese market.[14](javascript:popRef('fn14-0003603X19898905')) Third, a two-sided market in a digital platform market often comprises a free service bouquet for users in one market and a cluster of paid services for advertisers in the other market. In such instances, market definition requires identifying two or more different target groups. Defining relevant markets by applying the Small but Significant and Non-transitory Increase in Price (SSNIP) test to two-sided and multisided markets entails difficulties where it is not realistic to turn a free market into a paid market by charging for goods and services or to where a monopolist can optimize the price structure.[15](javascript:popRef('fn15-0003603X19898905')) As pointed out in a report presented by the Competition Policy Research Centre to the JFTC, it is difficult to apply the SSNIP test to a free market to judge the substitution between products by their price increases, although it may be possible to evaluate demand substitutability according to the recognition and behavior of consumers.[16](javascript:popRef('fn16-0003603X19898905')) Alternative assessment tools include the Small but Significant and Non-transitory Decrease in Quality (SSNDQ) test, which assumes a change in quality instead of price and the Small but Significant and Non-transitory Increase in Costs (SSNIC) test, which assumes a hypothetical change in costs instead of prices. However, these yardsticks also have difficulties because the measurement of quality and cost necessarily involves substantial degree of ambiguity.[17](javascript:popRef('fn17-0003603X19898905')) IV. Regulation of Monopolies and UTPs in Digital Platform Markets in Japan It is not always easy to clearly judge anticompetitive effects and pro-competitive outcomes in uncharted waters, such as digital platform markets, which are becoming oligopolistic through foreclosure by big data while the barriers to entry are becoming significant. In this section, this paper examines the regulation of digital platforms’ monopolies by exemplifying some Japanese cases. First, merger law may operate as ex-ante regulation of monopolies. Second, the study covers moderation and control of market domination, which concerns the ex-post management of monopolies.

#### Digital competition overcomes Japan’s aging population and increases productivity and growth.

Samuel Arnold-Parra 21. Researcher for CoronaNet Research Project and analyst for Global Risks Insights. “Japan’s Tech Competitiveness: Why the Decline?”. Global Risks Insight. 3-7-21. https://globalriskinsights.com/2021/03/japans-tech-competitiveness-why-the-decline/

Declining Competitiveness The International Institute for Management Development (IMD) released its [2020 World Digital Competitiveness Ranking](https://www.imd.org/wcc/world-competitiveness-center-rankings/world-digital-competitiveness-rankings-2020/) that ranks the capacity of countries to utilise digital technologies for government, business and society at large. These results show that Japan lags behind other countries, dropping to 27th place from 23rd in 2019. In the Asia-Pacific region, it ranked below countries like Singapore and Malaysia. In contrast, Japan’s economic near-peers have drastically improved: South Korea went from 14th in 2018 to 8th, whereas China went from 30th to 16th. Digital competitiveness particularly matters for Japan given their ageing population. IMF statistics suggest that Japan’s labour force is set to [drop by around 24 million people between 2018 and 2050](https://www.imf.org/external/pubs/ft/fandd/2018/06/japan-labor-force-artificial-intelligence-and-robots/schneider.htm). To compensate, Japan will need to better leverage innovative technologies and further encourage digitalisation to keep up current levels of production and productivity. Boosting tech competitiveness is also likely to be important for Japan so that it can remain competitive with digitalising economies like China, India and South Korea. Why the Decline? Japan’s tech innovation efforts are hindered by its underdeveloped startup company ecosystem. Tech startups have the potential to bolster innovation and motivate the development of new technologies. Startups often have advantages over larger firms for innovation in the form of entrepreneurial flexibility, less rigid business cultures and closer team communication. Illustrating Japan’s underdeveloped ecosystem, Japan only has 3 ‘unicorn’ startups (privately held startups valued at over $1 billion) whereas the USA and China have approximately [242 and 119 respectively](https://asia.nikkei.com/Business/Startups/Unicorns-surge-to-500-in-number-as-US-and-China-account-for-70), including established companies like ByteDance and SpaceX. South Korea [has more than 10](https://seoulz.com/list-of-the-top-10-korean-startup-unicorns-as-of-2020/) unicorn startups. These figures suggest that Japan is not reaching its potential in the creation of a favourable startup ecosystem. One contributing factor is the unwillingness of Japanese investors to make large investments in young startups. In 2019, startups between 1-3 years old received on average $91,000USD in funding, while 5-7 years old startups [received over $2.5 million USD on average](https://initial.inc/articles/jpf2019-en). For young startup companies, the difficulty in securing valuable funding in their early years poses a barrier to a robust startup ecosystem in Japan. This lack of investment may be the result of a high degree of risk aversion on the part of Japanese investors; older startups, due to clearer track records, may appear to be safer investments. Moreover, the attitude of large Japanese companies to research and development (R&D) poses an obstacle to the country’s competitiveness. Japanese R&D has been described as occurring in an isolated ‘[in house](https://beaconreports.net/en/kickstarting-japanese-startups/)’ manner. This approach slows the capacity of Japanese firms to respond to emerging technologies and industries in comparison to companies like Google or Amazon that have collaborated with or acquired various startup companies. A 2018 Bank of Japan white paper substantiates this R&D attitude, which identified that Japanese R&D [focuses more on incremental improvements](https://www.boj.or.jp/en/research/wps_rev/wps_2018/data/wp18e10.pdf) as opposed to the creation of innovative products.

#### Revitalizing Japan’s economy promotes diplomacy---that solves US-China war.

Hitoshi Tanaka 21. Senior fellow at JCIE, chairman of the Institute for International Strategy at the Japan Research Institute, and formerly Japan’s deputy minister for foreign affairs. “Deepening US-Japan Strategic Cooperation on China and the Indo-Pacific”. JCIE East Asia Insights. June 2021. https://www.jcie.org/wp-content/uploads/2021/06/EAI-Jun-2021.pdf

Japan, as both a US ally and a neighbor with deep historical and cultural connections to China, can play an important role in helping facilitate deeper communication between the United States and China to ensure that tensions in the region do not escalate. In recent decades, Japan has perhaps lost some of its diplomatic confidence. A quarter of a century ago, Japan’s economy was eight times bigger than the South Korean economy and four times bigger than that of China, but today Japan’s economy is three times bigger than South Korea’s and one-third the size of China’s. This change in relative strength has given rise to nationalistic tendencies in Japan. Although there are a number of domestic challenges that Japan must address—including an aging population, high debt, and low productivity—Japan’s ability to harness its creative and diplomatic power to ease the US-China confrontation and promote shared regional peace and prosperity could go a long way in restoring national confidence. As China continues to grow in influence and to pose a number of security challenges, it is also driving global growth as a major economic partner to almost every country around the region. As the Indo-Pacific concept continues to be solidified, it is imperative from a Japanese perspective that deterrence measures to prevent unlawful behavior and aggression are coupled with an inclusive approach to regionalism, one that is grounded in engagement, diplomacy, and cooperation. Deterrence and engagement should be pursued simultaneously as two sides of the same coin, rather than as competing concepts. Attempts at decoupling, cutting off ties with China, and entrenching bloc-to-bloc rivalry are a lose-lose exercise. In managing the relationship between China and the international community, we must not lose sight of the fact that our objective should be to deny China opportunities to be an aggressor while also maintaining diplomacy and forging cooperation on areas of shared common interest.

#### US-China war goes nuclear---no constraints.

Joshua Rovner 17. John Goodwin Tower Distinguished Chair in International Politics and National Security, Southern Methodist University. “Two kinds of catastrophe: nuclear escalation and protracted war in Asia.” Journal of Strategic Studies 40(5): 696-730. Emory Libraries.

But suppose that leaders have no intention of using nuclear weapons. It is one thing to develop impressive technologies, but quite another to use them, and policymakers may blanch at the real prospect of authorizing first use. Even in these cases, there are several theoretical pathways to escalation.

The first is psychological. Cognitive biases may cause leaders to misperceive rival intentions, mistaking signals of restraint for signs of danger. Prewar expectations strongly influence how individuals interpret new information, and they will ignore or reframe dissonant information so it fits into their existing beliefs. Misperceptions intensify after the shooting starts, when information is ambiguous and incomplete. Carl von Clausewitz dwelt on the problem in the aftermath of the Napoleonic Wars, noting that intelligence reports were often contradictory and unreliable “in the thick of fighting.” Despite advances in intelligence and communications, the fog of war remains an enduring problem. Organized violence is an iterative process, and each side has incentives to hide its actions and deceive its adversary. Violence also unleashes intense emotions that obscure the material effects of battle. Commanders may not understand whether they are winning or losing, and in lieu of reliable intelligence they are likely to let passion overtake good judgment. “In short,” Clausewitz concluded, “most intelligence is false, and the effect of fear is to multiply lies and inaccuracies.” 9

Wartime leaders are prone to attribution bias, or the belief that their counterparts are inherently evil. Leaders in conflict are likely to assume the worst about their rivals or else they would not have picked a fight in the first place. Attribution bias causes them disregard the notion that their enemies have limited goals and are willing to accept partial victories. They are also prone to reject peace overtures as meaningless gestures at best, or as efforts to lull them into passivity before escalating the conflict.10 Finally, prospect theory tells us that individuals will fight harder to avoid losing a possession than they will to gain something new. If leaders equate settling with losing, then they will be tempted to risk escalation. All of these psychological pressures are exacerbated under stress and tight time constraints.11

Domestic pressures might lead to escalation if one or both governments fear that regime change will be the political penalty for battlefield failure. Escalation is also possible if the issues at stake are wrapped up in nationalism or ideologies that inflate the value of the object. Leaders will be hard pressed to accept defeat in such cases, especially if military outcome is particularly lopsided and humiliating. Leaders who depend on particularly hawkish constituencies to remain in power are especially likely to take new risks even against long odds. Rather than negotiating an end to the war, they might gamble for resurrection by escalating to the nuclear level.12 Such a move would not necessarily be irrational. Instead, resurrection succeeds by shifting the war towards the balance of interests rather than the balance of capabilities. A retreating combatant, battered in the early stages of a conflict, may still affect the enemy’s calculation by taking extraordinary risks. Escalation signals a willingness to fight to the finish and a reminder that it has powerful interests at stake. Such a strategy is admittedly risky, but it may be effective, especially if the escalating state is fighting to defend its own territory against a distant rival. Transforming a conflict into a test of resolve makes sense when a state is failing the test of arms.13

Finally, inadvertent escalation may occur when conventional attacks put the adversary’s nuclear force at risk. Under these conditions, the target state might reasonably worry that the attack is only the first phase of a larger war. There may be no way to offer credible reassurances that it is not. Fearing the destruction or incapacitation of its nuclear deterrent, the target state might face a “use it or lose it” dilemma. Inadvertent escalation is especially likely if key command and control nodes are vulnerable or if conventional and nuclear target sets are indistinguishable. The danger also increases if military organizations indulge organizational preferences for offensive action. This encourages planners to err on the side of attacking all available targets. While it might sense to allow the adversary to retain some capabilities in order to reduce the incentives for escalation, planners may bridle at the thought of consciously allowing the enemy to retain the capacity for attack.14

In recent years, China has invested heavily in capabilities that will complicate US maritime operations and threaten US bases in Japan and Guam. Equipped with a range of anti-access capabilities, China may be able to deter the United States from intervening in the case of a regional war. If it does intervene, China may attempt to damage or destroy US assets or force carrier groups to operate at prohibitively long distances from the mainland.

Chinese doctrine for using these weapons has lagged behind acquisition.15 Nonetheless, the appearance of its new “anti-access/area denial” (A2AD) systems caused concern in Washington. US officials subsequently unveiled Air–Sea Battle (ASB), an operational concept for integrating naval and air assets in order to overcome the entire range of anti-access capabilities. The concept was announced in spring 2011 by the then Secretary of Defense Robert Gates, and responsibility for developing the concept fell to the Air–Sea Battle Office in the Pentagon. In January 2015, the Department of Defense changed the name of ASB to the Joint Concept for Access and Maneuver in the Global Commons, but there is no indication that the substance has changed.16 And because ASB has influenced the debate about a hypothetical US–China conflict, I will continue to use the term here.

The Air–Sea Battle Office released some information about the concept, and leaders from the Navy and Air Force wrote about it in service publications. The most comprehensive treatment, however, came in the form of a monograph from the Center for Strategic and Budgetary Assessments (CSBA). Although it may be ahead of the Department of Defense (DOD) concept, the CSBA analysis is broadly consistent with official descriptions.17

ASB envisions two broad phases in a war against countries like China with advanced anti-access capabilities. The first is a blinding attack on key facilities, including long-range weapons that could target US bases and carrier groups, as well as the radar systems needed to cue them. Kinetic and electronic attacks would also target Chinese satellites and anti-satellite weapons. According to the CSBA report, attacks on Chinese space assets, along with land-based radars and other intelligence, surveillance, and reconnaissance (ISR) and communications platforms, would “severely limit China’s space-based situational awareness.” 18 China would struggle to organize forces after such an attack. Prompt strikes on Chinese missile launchers and C2 nodes would be equally important. “Countering or thinning the PLA offensive missile threat is a principle AirSea Battle line of operation,” the report continues. Not only would the United States regain the advantage, but ASB would also deny China any chance of a rapid and decisive victory. “Success is critical in preventing China from achieving a quick ‘knock-out blow.’”19 The second phase would seek to deny a Chinese naval breakout. Because of the vast distances involved in moving forces across the Indian and Pacific Oceans, these attacks would be required to allow time for US forces to arrive in theater.20

This is an appealing conventional approach, but it has never been tested against a great power with nuclear weapons. The danger is that ASB increases the risk that China will use them.

In fact, it opens all three pathways to escalation. ASB deliberately seeks to create confusion at the start of the war, making it very hard for the adversary to understand signals of restraint and declarations of limited intent. Coercion requires not only threats but also credible assurances that the target will not be punished if it complies. There is little reason to comply absent such promises.21 In addition, all of the psychological problems described above would be activated if the United States implemented ASB. In addition to the danger of misperceptions in the confusing aftermath of a blinding attack, attribution bias would almost surely cause the Chinese leadership to suspect the worst about the United States. Prospect theory would also likely kick in because China would suddenly fear losing an object of great national value, especially if the war is fought over Taiwan and the result is independence and permanent separation from the mainland.

ASB would exacerbate the domestic problem for the Chinese Communist Party, creating political incentives to use nuclear weapons. The Communist Party of China (CCP) long ago gave up its ideological mandate, replacing communism with a combination of nationalism and economic growth. In the event of an economic slowdown, the CCP will only have nationalism to fall back on. In these circumstances, the party might become more risk-acceptant, especially if it is fighting over a core national interest like Taiwan.22 If it stands on the edge of a monumentally humiliating loss, the CCP might well escalate the war rather than risking the end of its regime. ASB promises such a loss. It is hard to imagine a more humiliating outcome than being blinded and befuddled, forced to wait as the United States slowly husbands naval power offshore.

Finally, ASB runs the risk of inadvertent escalation. China has been steadily moving towards a posture of assured retaliation. It seems to believe it can deter other powers with a relatively small number of nuclear weapons, but only if it can assure the survivability of its arsenal.23 ASB may remove that sense of security. The targets in the hypothetical first strike would include China’s ballistic missiles and launchers, as well as space- and ground-based facilities for targeting and guidance. This means that the United States would target elements of the People’s Liberation Army Rocket Force (PLARF), which oversees both nuclear armed and conventional missiles. It also means targeting China’s intelligence and C2 networks, making it harder for leaders to determine whether their nuclear force is at risk.

China has not published a detailed and authoritative statement on its nuclear doctrine, though its defense white papers offer clues. Historically, it has chosen to enhance deterrence through ambiguity and mobile launchers in place of high numbers of warheads, obscuring its capabilities to guard what it calls a “lean and effective” force. While this might plant a seed of doubt in potential attackers, it also increases the danger of mistaken targeting, and some analysts believe the line between conventional and nuclear capabilities is getting fuzzier.24 Moreover, different variants of China’s land-based DF-21 are equipped with both conventional and nuclear warheads. In the words of a recent open-source assessment of China’s arsenal, “This potentially dangerous mix of nuclear and conventional missiles increases the risk of misunderstanding, miscalculation, and mistaken nuclear escalation in a crisis.” 25

Analysts disagree about the level of overlap, however, and there is evidence that China has taken steps to separate nuclear and conventional missiles while protecting its retaliatory force from preemptive attack. A recent survey of Chinese open sources finds that the majority of missiles are not co-located. Conventional and nuclear brigades answer to separate commands, and China has invested in more secure and redundant command and control. That said, both kinds of brigades may utilize the same C2 infrastructure, and the Central Military Commission, which commands nuclear forces, can take command of conventional forces “under special circumstances.” Finally, Chinese officials may view an attack on conventional missile brigades as proof that the United States has the capacity to destroy nuclear ones.26

The expansion of US missile defense capabilities may also affect China’s beliefs about the security of its deterrent force. The United States currently fields a modest national missile defense capability, with 30 interceptors deployed against intercontinental ballistic missile attacks. This offers some protection against small nuclear powers like North Korea but not against larger ones like Russia and China. Adding more advanced interceptors might make it harder to make this distinction. China has expressed particular concern about advances that blur the line between national and theater missile defenses, thus creating additional doubt about its second-strike capability.27

Despite these concerns, some US planners might have faith that China will continue to honor its long-standing no-first-use (NFU) nuclear declaratory policy, especially if they can conspicuously avoid certain targets as a way of reassuring Chinese leaders.28 Some launch brigades only fire nuclear missiles, and US leaders could make it clear that these are off-limits.29 Avoiding China’s emerging class of ballistic missile submarines might also signal US restraint.30

The problem is that Chinese officials might not understand the signal or believe US promises. They might not have the time to assess whether the United States is carefully discriminating conventional from nuclear forces, given its stated preference for rapid strikes against key enemy installations. Moreover, because initial strikes would also deliberately target China’s C4ISR networks, Beijing would not be able to do a quick damage assessment or communicate the results to deployed forces. Under these conditions, the US emphasis on blinding attacks, which are designed to slow down enemy operations, would actually speed up the decision to go nuclear.31

#### The plan solves---US antitrust law is modeled---the stakes are huge.

David J. Gerber 13. Teaches antitrust law, comparative law and more specialized seminars such as international and comparative competition law. He has been a member of the Chicago-Kent faculty since 1982. After graduating from the University of Chicago Law School, Professor Gerber practiced law in New York City and then spent several years working in a German law firm and in several universities in Europe. “U.S. ANTITRUST: FROM SHOT IN THE DARK TO GLOBAL LEADERSHIP” Then & Now: Stories of Law and Progress. 2013.

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.

### Democracy---1AC

#### Advantage 3 is Democracy.

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

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

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

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

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

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

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

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

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

#### 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 unconstitutiona**l. 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.

#### 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 great power war.

Larry Diamond 19. PhD in Sociology, professor of Sociology and Political Science at Stanford University. “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition

In such a near future, my fellow experts would no longer talk of “democratic erosion.” We would be spiraling downward into a time of democratic despair, recalling Daniel Patrick Moynihan’s grim observation from the 1970s that liberal democracy “is where the world was, not where it is going.” 5 The world pulled out of that downward spiral—but it took new, more purposeful American leadership. The planet was not so lucky in the 1930s, when the global implosion of democracy led to a catastrophic world war, between a rising axis of emboldened dictatorships and a shaken and economically depressed collection of selfdoubting democracies. These are the stakes. Expanding democracy—with its liberal norms and constitutional commitments—is a crucial foundation for world peace and security. Knock that away, and our most basic hopes and assumptions will be imperiled. The problem is not just that the ground is slipping. It is that we are perched on a global precipice. That ledge has been gradually giving way for a decade. If the erosion continues, we may well reach a tipping point where democracy goes bankrupt suddenly—plunging the world into depths of oppression and aggression that we have not seen since the end of World War II. As a political scientist, I know that our theories and tools are not nearly good enough to tell us just how close we are getting to that point—until it happens.

### Plan---1AC

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

### Solvency---1AC

#### Contention 4 is Solvency.

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

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

Introduction

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

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

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

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

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

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

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

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

# 2AC

## Inequality Advantage

## Modelling Advanatge

## Democracy Advantage

#### It’s an impact filter---democracies are 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.

#### Decline ensures transition wars---the US could launch a pre-emptive attack or China could strike first

Min-hyung Kim 20. Department of Political Science and International Relations, Kyung Hee University, Seoul, South Korea. “A real driver of US–China trade conflict: The Sino–US competition for global hegemony and its implications for the future” Emerald Insight. 02-04-2019. <https://www.emerald.com/insight/content/doi/10.1108/ITPD-02-2019-003/full/html>

Underlying these arguments for an inevitable war between the two superpowers is PTT. PTT originally formulated by Organski (1958) posits that **war is likely** when the power of the dominant state in the international system (i.e. hegemon) is **declining** and that a dissatisfied rising challenger **substantially reduces the power gap between the hegemon and itself**. Unlike balance of power theory, PTT argues that the war is most likely when there is near power parity between a dominant state and a rising and dissatisfied challenger (Organski and Kugler, 1980, pp. 19-20)[5]. A rising power here is generally dissatisfied with the existing international order and **initiates war against a declining hegemon in order to impose orders that are more favorable to itself** (Organski 1958, pp. 364-367). Layne (2018, p. 110) put these power transition dynamics quite succinctly as follows: “Over time, however, the relative power of states changes, and eventually the international order no longer reflects the actual distribution of power between or among the leading Great Powers. When that happens, the legitimacy of the prevailing order is called into question, and it will be challenged by the rising power(s).” And when the balance of power between a dominant state and a rising challenger changes sufficiently, a new order replaces an old one typically **by a hegemonic war** (2018, p. 104). Paying close attention to the **growing Sino–US competition** over hegemony in the twenty-first century, therefore, Shirk (2007, p. 4), China specialist, argues that “History teaches us that rising powers are likely to provoke war.” On the other hand, scholars like Gilpin (1981) contend that the power transition war between great powers is likely to occur when a hegemonic state whose power is declining due to imperial overstretch[6] views “**preventive war as the most attractive means of eliminating the threat** posed by challengers” (Ned Lebow and Valentino, 2009, p. 391), although they do acknowledge that there might be some “ways to prolong the period of its power preponderance vis-à-vis the rising challenger, so that the rapidly rising power will not dare to challenge the hegemonic leadership” (Kim and Gates, 2015, p. 221). In this case, the initiator of war is a declining hegemon, rather than a rising challenger. The declining hegemon who fears a rising challenger’s overtaking its power in the near future **sees war as a better option** than other options of maintaining its hegemony such as reducing its commitments abroad and appeasing a rising challenger.

#### Biden’s foreign policy agenda massively THUMPSthe turn---proves sustianbale

William **Mauldin 2-19,** The Reporter at the Wall Street Journal; “Biden Defends Democracy at Summits With European Allies, Seeing China as ‘Stiff’ Competition”; WSJ; 2-19-2021; https://www.wsj.com/articles/biden-defends-essential-democracy-amid-chinas-rise-at-summits-with-european-allies-11613753396//SJ

WASHINGTON—President Biden defended leading democracies’ ability to unite for the good of their citizens as authoritarian China has bounced back more quickly from the Covid-19 pandemic and is increasingly asserting its economic and military might in the Indo-Pacific region.

“Competition with China is going to be stiff,” Mr. Biden said Friday at a virtual meeting of the Munich Security Conference. “We’re at an inflection point between those who argue that—given all the challenges we face from the fourth industrial revolution, through a global pandemic—that autocracy is the best way forward.”

In his remarks, which came after he also addressed a virtual meeting of the Group of Seven leading industrialized nations, Mr. Biden criticized China and Russia directly but didn’t lay out a detailed plan for how the U.S. and its democratic partners in Europe and the Asia-Pacific region could work together during his term.

China’s economy, the world’s second largest, expanded by 2.3% in 2020 to become the only major world economy to grow in a year ravaged by the pandemic. Beijing has also laid claim to disputed islands in the South and East China seas, staged shows of force against Taiwan, which it considers a breakaway Chinese territory, and moved to crack down on Hong Kong’s political autonomy and civil liberties.

In the Asia-Pacific region, the new administration has backed the Philippines and Japan in their island claims against China and voiced support for Taiwan’s defense and its links to international organizations.

While Mr. Trump, a Republican, emphasized an “America First” approach at international gatherings and urged other countries to put their people first, too, the Democratic Mr. Biden on Friday urged addressing world problems collectively in a way that is “not transactional.” He also repeatedly affirmed the preeminence of the transatlantic alliance between the U.S. and Europe.

The president’s message to the world is simple, said Richard Haas, president of the Council on Foreign Relations: “We believe in multilateralism, we believe in American leadership, we believe in alliances,” he said, characterizing Mr. Biden’s focus on democracy and human rights as a contrast to his predecessor’s approach.

Before the G-7 meeting, Beijing warned against efforts to divide China from other leading economies. “We oppose the imposition of rules made by several countries on the international community under the pretext of multilateralism,” Chinese foreign ministry spokeswoman Hua Chunying said. “We also oppose the practice of ideologizing multilateralism to form values-based allies targeting specific countries.”

Mr. Biden broadcast his message to a divided Europe—the host of the Munich conference and home of the most G-7 nations—since many business leaders and politicians want to preserve close links to China’s fast-growing economy and persuade Beijing to shift toward international trade rules and norms.

The European Union tentatively agreed on an investment pact with Beijing on the eve of Mr. Biden’s presidency, drawing concerns from a top Biden official. A majority in every European country in a survey by the European Council on Foreign Relations said they would prefer their country remain neutral in a conflict between the U.S. and Russia or China.

Some foreign officials have questioned Washington’s leadership role after the U.S. has struggled to address the coronavirus pandemic, its wavering attitude toward international partners in recent years, and even the fallout from the deadly Jan. 6 attack on the Capitol and disputes about the November election.

“In so many places, including in Europe and the United States, democratic progress is under assault,” Mr. Biden said. “We must demonstrate that democracies can still deliver for our people.”

A day after Defense Secretary Lloyd Austin addressed a meeting of the North Atlantic Treaty Organization, Mr. Biden said the U.S. is fully committed to NATO and to defending all members from attack.

Russian President Vladimir Putin “seeks to weaken the European project and our NATO alliance,” Mr. Biden said.

Russia was ejected from the club of nations then called the Group of Eight after it annexed Crimea and backed the war in Ukraine. Mr. Trump proposed bringing Russia back into the G-7, but relations between Moscow and European powers have deteriorated.

Mr. Putin, who raised eyebrows in 2007 with a speech critical of the U.S. at the Munich Security Conference, didn’t attend the event this year. His absence comes amid tensions with Germany, where Russian opposition activist Alexei Navalny recovered from a near-fatal poisoning attack last summer. The leading Kremlin critic was recently jailed after returning to Russia amid widespread antigovernment protests.

## T Prohibit

#### w/m--- the plan prohibits activity.

Leon B. Greenfield, et al. 20. Perry A. Lange & Nicole Callan, Antitrust Populism and theConsumer Welfare Standard: What Are We Actually Debating?, 83 Antitrust L.J. 393(2020).

1. Public Interest Considerations in Merger Review

Under a "public interest" standard, mergers could be prohibited for reasons going beyond competitive harm, such as reduced wages, job cuts, or harm to small business. Critics of a public interest test argue that it would unconstructively inject social and political concerns into enforcement. For example, Di-ana Moss of the American Antitrust Institute (which generally advocates for aggressive antitrust enforcement) has warned that a public interest standard would introduce uncertainty into the antitrust laws and "could include every-thing that is affected by a merger or abusive conduct: employment, health and safety, and even environmental concerns."168

#### We meet---the aff is an antitrust prohibition of anticompetitive practices.

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

Antitrust law helps workers and increases output by penalizing firms that use anticompetitive methods—above all, firms that concentrate labor markets by merging and firms that collude with each other by entering no-poaching agreements and the like. The law thus raises residual supply elasticity—or, in other words, competition—which forces employers to bid up wages toward the competitive level. Antitrust law does not directly regulate wages, of course; wages increase as a result of the penalizing of anticompetitive behavior. Nor does antitrust law offset the distortions introduced into labor markets by labor monopsony—in the way that certain fiscal and related policies can, as we will see. Let us now turn to other policy tools that can be used to counter labor monopsony.

#### c/i---Prohibitions are any proscribed conduct in antitrust.

Margaret V. Sachs 01. Robert Cotten Alston Professor of Law, University of Georgia School of Law. A.B. 1973, Harvard University; J.D. 1977, Harvard Law School. “Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of The Securities Exchange Act Of 1934”. https://www.illinoislawreview.org/wp-content/uploads/2001/06/Sachs.pdf

Many federal regulatory statutes are hybrid statutes—their prohibitions1 are enforceable in criminal actions as well as in private or govern- mental civil actions (or both).2 Leading examples include the Sherman Antitrust Act,3 the Clean Water Act,4 the Truth in Lending Act,5 the False Claims Act,6 the Racketeer Influenced Corrupt Organizations Act,7 the Federal Food, Drug and Cosmetic Act,8 and the Securities Exchange Act of 1934.9 Hybrid statutes present an important question that has divided courts but received virtually no attention from legal scholars—can the same prohibition mean different things in different enforcement contexts?10

---FOOTNOTE 1 STARTS---

1. For purposes of this article, the term “prohibition” refers to the part of the statute that identifies proscribed conduct. The plaintiff must prove that the defendant engaged in this conduct in order to establish a prima facie case.

---FOOTNOTE 1 ENDS---

## States CP

#### State labor actions get pre-empted under the NLRA---thousands of empirics.

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.

#### Courts preempt the counterplan.

Richard A. Samp 14. Chief Counsel, Washington Legal Foundation. The Role of State Antitrust Law in the Aftermath of Actavis. 15 MINN. J.L. SCI. & TECH. 149 (2014). https://scholarship.law.umn.edu/mjlst/vol15/iss1/14

On the other hand, state antitrust laws—like all state laws—are subject to the restrictions imposed by the Supremacy Clause of the U.S. Constitution,15 and are impliedly preempted to the extent that they conflict with federal law.16 Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility,”17 or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”18 On a number of occasions, the Supreme Court has concluded that state antitrust law is preempted because it conflicts with a federal statute other than federal antitrust law.19

The Court has been particularly quick to find preemption when state antitrust law has an impact on labor law, an area in which federal law is pervasive.20 Indeed, on at least one occasion, the Court found that a claim arising under state antitrust law was preempted by federal labor law even though the Court concluded that the conduct that gave rise to the state claim could proceed as a claim under federal antitrust law.21 The Court explained that “Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.”22 The Court said that state antitrust laws “generally have not been subjected to this process of accommodation” and thus that “[t]he use of state antitrust law . . . [must] be pre-empted because it creates a substantial risk of conflict with policies central to federal labor law.”23

#### Feds ignore the states

Dr. Justin Gollob 11, PhD in Political Science from Temple University, Professor of Political Science at Colorado Mesa University, and Dr. J. Wesley Leckrone, Associate Professor of Political Science at Widener University, “The Effectiveness of Intergovernmental Lobbying Mechanisms in the American Federal System”, Fédéralisme Régionalisme, February 2011, <https://popups.uliege.be/1374-3864/index.php?id=1143> //EM

Memorials have received little attention in the literature so we will explore their use and effectiveness in more detail than the other mechanisms of intergovernmental influence. Memorials to Congress are used frequently by state legislatures, with 4119 submitted from 1987-2006 39. Our survey shows that 51% of the respondents introduced at least one memorial during a two year legislative session with an average of more than three memorials over the same period. However, from the data discussed above, we can see that memorials are viewed as being largely ineffective. The survey showed that state legislators believe they have little effect because politicians and bureaucrats in Washington DC pay little attention to them. If memorials are ineffective, why are they so numerous? Our data suggests two reasons. First, memorials are important in that they give state legislators a vehicle to transmit their preferences to Congress. The text of the memorials is then entered into the daily Congressional Record, which serves as the official record of the proceedings of the United States Congress. As one state legislator noted, memorials are “the only tool we have to get the federal government’s attention.” Another legislator said that memorials provide Congress with “insight into what the impact will be on a state level.”

## Adv CP

#### The plan’s legal standard is key to collective worker action---not the other way around

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

4. The competition-solidarity conflict in light of labour exploitation theory: moving from consumer to citizen welfare

Economic models from opposing ends of the political spectrum perceive labour as a special and different production factor with idiosyncratic qualities, which makes it particularly open to exploitation. Labour's particular likelihood for exploitation is all the more worrying because labour power is attached to and cannot be separated from the worker. Additionally in the case of labour, unlike other production factors, there is not a zero-sum dynamic between the value attached to the production factor and consumer welfare. This is because, as exemplified in Marx's labour fetish theory, most consumers are also workers. As a result, when wages increase this benefits consumers in their economic role as workers even though they might have to pay a higher price for products and services.

As a result, economic theory suggests that, unlike commodities and other production factors, conflicts involving labour cannot be solved using simple economic cost–benefit analyses without any substantial adjustment. Similarly, worker solidarity and collective action need protection as common goods when they come into conflict with the principle of competition not only because this would be socially just but also because it would be economically sound.

As the analysis in the previous section illustrates, competition rules in the EU and the US are applied with a strict consumer welfare standard in mind, which overlooks the idiosyncratic characteristics of labour, and as a result, competition rules become a disciplining mechanism against collective worker action. Consequently, when dealing with the competition–solidarity conflict, courts and competition authorities need to follow a more inclusive legal standard that better reflects the characteristics of labour as a production factor. For this purpose, this paper suggests a citizen (rather than consumer) welfare standard that takes into consideration the economic effects of anti-competitive behaviour on consumers as well as workers. The citizen welfare standard could also be applied in other cases where competition rules and principles come into conflict with public interest or other policy objectives, such as cases involving industrial policy, environmental policy or other social objectives in which competition authorities and courts are yet to produce a consistent approach.102 As a result, in these cases, competition authorities and courts would be able to look at how the specific behaviour in question affects citizens in their entirety as a holistic group, rather than focusing on the interests of the narrow category of consumers.

Another significant advantage of following this approach is that this would not require a change in the law but only a change in the approach and the legal tests employed by courts and competition authorities when they deal with the competition–solidarity conflict.

In light of the citizen welfare standard, collective worker action would be shielded from competition law attack under labour exemption, because even though collective worker action could result in increased prices in the product market due to higher labour costs and decreased consumer welfare, it would also increase the welfare of workers, who will benefit from increased wages and better working conditions. An exemption standard that is based on an inclusive welfare approach will also save courts and competition authorities from disentangling who qualifies as an undertaking (in the EU) and whether or not worker organisations acted jointly with third parties (in the US), both of which result in imprecise and limited judicial exemptions that do not provide a secure harbour for collective worker action and render it particularly precarious for workers in casualised flexible arrangements to take collective action against their working conditions.

Similarly, in light of the citizen welfare standard, even if the effect of collusive employer behaviour on prices in the product market cannot be proven, a reduction in the welfare of workers in the production process, such as reduced wages, will be considered sufficient for the collusion in question to qualify as anti-competitive. Collusion between employers suppressing wages and other working conditions does not necessarily affect consumer welfare. Suppression of wages might even result in reduced prices and increased consumer welfare due to reduced labour costs in the short run but this comes at the cost of a negative effect on worker welfare.

This does not mean that courts should engage in a balancing analysis between consumer and worker welfare and investigate whether the effect on consumer or worker welfare is larger. In the light of the labour fetish theory, consumers and workers belong to the same group of people and an increase/decrease in consumer welfare with the resulting decrease/increase in worker welfare is most likely to be a transfer. Under the citizen welfare standard, an increase in worker welfare would be considered sufficient for the labour exemption to protect collective worker action from antitrust attack and a decrease in worker welfare would be considered sufficient for the employer collusion in question to be considered anti-competitive.

#### Antitrust law failure harms workers.

Brishen Rogers 18. An Associate Professor at Temple University's Beasley School of Law, and a Fellow at the Roosevelt Institute. “The Limits of Antitrust Enforcement” Boston Review. 04-30-18. http://bostonreview.net/class-inequality/brishen-rogers-limits-antitrust-enforcement

Just a few years ago, the mainstream economic and legal opinions held that labor markets basically tended to “clear,” and that employers’ market power did not have a significant impact on wages or other terms of employment. Today, however, the issue of economic power, especially in the labor market, has made a startling reversal. A number of economists and legal scholars have recently argued that **declining antitrust enforcement has harmed not just consumers, but also workers.** Employers’ use of non-compete agreements and compulsory arbitration have also come under public scrutiny: non-competes because they **limit workers’ ability to leave their employment**, and arbitration because it **prevents workers from protesting unfair treatment** and enforcing their own legal rights. Unchecked corporate power is cancerous. **The workplace, too often, is authoritarian**. The remedy lies in democratic control.

#### Judicial activism undermines rule of law and democratic principles.

Thomas B. Griffith 21. former federal judge of the United States Court of Appeals for the District of Columbia Circuit. “How judicial activism on the right and left is threatening the Constitution”. Deseret News. 2-1-21. [https://www.deseret.com/indepth/2021/2/1/21564497/thomas-griffith-judicial-activism-[…]-left-conservative-liberal-constitution-supreme-court-politic](https://www.deseret.com/indepth/2021/2/1/21564497/thomas-griffith-judicial-activism-right-left-conservative-liberal-constitution-supreme-court-politic)

The United States could have created a monarchy. Just imagine the portraits of George Washington holding a scepter. Or the framers could have created an oligarchy of philosopher-kings, or even a theocracy with clergy creating laws. But they didn’t. They framed a Constitution instead, outlining a remarkable — albeit intricate — process for rule-making. The laws of the land wouldn’t come from a king or a priest, but from “We the People” through duly elected representatives. Strikingly, judges played no role in this lawmaking process. This wasn’t an oversight, but rather a central element of the design. Judges don’t make laws. They resolve disputes by applying the rules created by “We the People.” Supreme Court Justice Elena Kagan got it just right when, at her own confirmation hearing in 2010, she flatly rejected a senator’s suggestion that there could be some cases in which the judge might rely on her heart. It’s “law all the way down,” she insisted. So, when political leaders, judges or pundits treat the judiciary as simply another legislative body but with funny-looking robes, they do the republic great harm. Call it judicial activism, legislating from the bench or just plain bias — all of it undercuts the nation’s faith in the rule of law. [During her confirmation hearing](https://www.deseret.com/indepth/2020/10/11/21509711/supreme-court-barrett-ginsburg-republican-democrat-election-religious-liberty-abortion-biden-trump), Justice Amy Coney Barrett was criticized for refusing to share her personal views on hot-button topics such as abortion, immigration and the Affordable Care Act. Many assumed she was simply hiding a controversial right-wing agenda. These assumptions are not only cynical, but they also display a fundamental misunderstanding of a federal judge’s role. During my own confirmation proceeding in 2005 to the United States Court of Appeals for the District of Columbia Circuit, I received plenty of advice on being a judge. One suggestion came from a colleague who served as a law clerk on both the court I was set to join and the Supreme Court. If anyone knew what it took to be a good judge, I thought, it was surely this friend. On his first day as a clerk, the judge for whom my friend was working explained how he decided cases. “First,” the judge said, “I learn the facts of the case as best as I can.” People deserve to have a judge who knows their circumstances. “Next,” the judge went on, “I think long and hard about the just result, the fair outcome. Once I’ve figured that out,” he declared, “I look for law that will support my decision.” That’s how a judge should go about his work, my friend concluded. I thanked him for his counsel, but as I hung up the phone, I vowed to do my best to follow the first part of his advice and completely reject the second part. As the late professor Herbert Wechsler of Harvard observed, “the deepest problem of our constitutionalism” is when courts function as a “naked power organ.” That happens when judges decide cases based on their own personal politics. This undermines what Yale’s Akhil Amar dubs one of our fundamental liberties: the people’s right to determine the laws by which they’re governed. This is an important point lost in our current discourse on the role of judges. In 2018, Chief Justice John Roberts took the unusual step of responding to President Donald Trump’s disparagement of a judge’s ruling because he was appointed by his predecessor. “We do not have Obama judges or Trump judges, Bush judges or Clinton judges,” the chief justice [said at the time](https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html). “What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.” The chief justice’s rebuke could have just as easily been directed at the Democratic senators who tried to make Barrett’s confirmation into a hearing about the wisdom of the Affordable Care Act. A [recent survey](https://apnews.com/article/183222a6a29440f1bf6b35cb351d823b) found that nearly two-thirds of Americans believe that Supreme Court justices base their decisions primarily on the law, not on politics. Those who persist in describing judges in partisan terms undermine public confidence in “government of laws and not of men.” Even in the best of times, confidence in the rule of law is fragile. In these times, there’s no question that our political leaders and commentariat must do better — and so must we.

## Cap K

#### Growth is sustainable---pollution, cap and trade, biodiversity, resources, and tech

Andrew McAfee 20, principal research scientist at MIT, codirector of the MIT Initiative on the Digital Economy at the MIT Sloan School of Management, Doctorate from Harvard Business School, two Master of Science and two Bachelor of Science degrees from MIT, "Don't Misunderstand Earth Day's Successes," Wired, 4-22-2020, https://www.wired.com/story/opinion-dont-misunderstand-earth-days-successes/

We should all be intensely grateful to the people who took to the streets exactly 50 years ago on the first Earth Day. The modern environmental movement that crystallized then has given us a cleaner, better planet. The pressure applied to governments and businesses on April 22, 1970, has not let up since, and it has yielded two huge victories.

The first is massive reductions in the amount of pollution we and our ecosystems have to endure. In the world’s richest countries, which are the ones where environmentalism has most taken hold, the air, land, and water are all much cleaner than they were 50 years ago. This is not because these countries have simply offshored degradation to poor nations. Germany, for example, has the world’s largest trade surplus, yet has seen steady reductions in air pollution in recent decades.

If globalization is not the reason rich countries are much cleaner now than they were half a century ago, then what is? Effective regulation. The United States established the EPA and greatly strengthened the Clean Air Act in 1970, added the Clean Water Act in 1972, and kept taking steps over the years to bring down all kinds of pollution.

Some of the most innovative and helpful of these steps are cap-and-trade systems that create markets for pollution. Companies can trade with each other for the right to pollute, but the overall total is set by the government and declines over time. Over the past 30 years cap-and-trade has proved to be both relatively cheap and highly effective; a triumph of smart environmentalism.

The other great triumph is the improved health of species and ecosystems that we had pushed to the brink. Throughout the 20th century, relentless hunting almost wiped out whales. A nearly global moratorium was finally passed 1982, thanks in part to the “Save the Whales” movement that started in the mid-1970s (no doubt helped by folk superstar Judy Collins’ 1970 hit “Farewell to Tarwathie,” which introduced many people to whales’ haunting songs).

Many other species, including wolves, bears, beavers, and deer, have also come back after being near extinction in America. They rebounded in large part because we limited when, where, and how they could be hunted, and we limited trade in wild animal products. It’s generally illegal, for example, to sell hunted meat in the US. For the past 50 years, the environmental movement has carried on the laudable traditions of conservationism, which got its start early in the 20th century as Americans reacted in shock and horror to the extinction of the passenger pigeon and near elimination of the bison and other iconic animals.

Paradoxically, the great victories over pollution and extinction highlight environmentalism’s greatest weakness: a continued hostility to economic growth. The “degrowth” movement, which started in the early 1970s, stressed that human populations and economies simply couldn’t continue to grow as they had in the decades leading up to Earth Day. As philosopher André Gorz put it in 1975, “Even at zero growth, the continued consumption of scarce resources will inevitably result in exhausting them completely. The point is not to refrain from consuming more and more, but to consume less and less—there is no other way of conserving the available reserves for future generations.”

This seemed like an obvious truth to many in the 1970s, especially when they saw that the use of many natural resources—fossil fuels, metals and minerals, fertilizer, and so on—had been increasing in lockstep with the size of the overall economy. Since these resources were finite, and since their consumption went hand-in-hand with growth, growth apparently had to stop.

Yet around the world, it didn’t. The pace has slowed down a bit since the inaugural Earth Day, but this is mainly because the years between 1945 and 1970 saw exceptionally fast growth as we rebuilt our societies after two world wars. Except for that 25-year stretch, economic growth since 1970 is the fastest the world has ever seen.

So how are natural resource stocks doing? Oil is a great indicator of the overall story (its recent pandemic-induced demand free fall notwithstanding). At present we have about 50 years of oil left, given projected consumption and known reserves. That sounds dire, until you realize that 40 years ago, we only had 30 years of oil left. How can this be? It’s certainly not because we’ve cut way back on oil demand; we consume almost 40 percent more oil now than we did in 1980.

It’s because we kept finding more supplies. The same is true for every other economically important natural resource. Proven reserves—the amount of the resource we know we can access—have increased as we keep developing better technologies for finding and accessing them. And because the supply-demand balance keeps getting more favorable, resource affordability increases. The world’s average worker can, with an hour of their labor, purchase a greater quantity of every important resource than was the case just a few decades ago.

We live on a finite planet, but an incredibly abundant one. It contains enough of everything we need for as long as we’ll be around. Especially since, in the decades and centuries to come, we clever humans will almost certainly figure out nuclear fusion or some other technology that gives us limitless clean energy and lets us ignore fossil fuels. In short, there’s no need to slam the brakes on our growth. This happy fact is deeply counterintuitive, and it trips a lot of people up. But the evidence is clear: Degrowth is unnecessary.

In fact, it’s a terrible idea. Recall that the countries that have cleaned up their environments the most since Earth Day are the richest ones. This is not a coincidence, as Indira Gandhi knew in 1972. In a speech given in Stockholm, she said “Are not poverty and need the greatest polluters?... The environment cannot be improved in conditions of poverty.” Prosperous people and societies can afford, in every sense of the word, to care about the state of the planet we all live on, and to improve it.

Economic growth does not irreversibly degrade and deplete the planet. Instead, economic growth yields more prosperous people, who demand to live in a better world—a world with less pollution and more healthy ecosystems. The 50 years since Earth Day have largely shown that they get what they want.

The Covid-19 recession has given us much cleaner air in cities around the world, but at a terrible cost. We don’t need to endure such hardship to reduce emissions from car traffic. If we just made pollution more expensive and energy and transport innovation cheaper (via subsidies or research funding), we’d get the same clean skies without any economic devastation at all.

We face no shortage of environmental challenges over the next 50 years. We continue to overhunt, overfish, and raze ecosystems in many parts of the world. More extinctions loom. And of course we have to reduce the greenhouse gas pollution that’s causing global warming. The good news is that, in the decades since Earth Day, we’ve put together an effective playbook for meeting these challenges. I hope the environmentalists of the coming half-century will study this playbook, and realize that it shuns degrowth rather than advocating it.

#### Past the tipping point and the alt is dictatorship and genocide---only tech can solve environmental collapse.

Eric Levitz 5/17/21. Senior Writer at New York Magazine. MA Johns Hopkins. "We’ll Innovate Our Way Out of the Climate Crisis or Die Trying". Intelligencer. 5-17-2021. https://nymag.com/intelligencer/2021/05/climate-biden-green-tech-innovation.html

Today’s best-case ecological scenario was a horror story just three decades ago. In 1993, Bill Clinton declared that global warming presented such a profound threat to civilization that the U.S. would have to bring its “emissions of greenhouse gases to their 1990 levels by the year 2000.” Instead, we waited until 2020 to do so; in the interim, humanity burned more carbon than it had since the advent of agriculture. Now, it will take a historically unprecedented, worldwide economic transformation to freeze warming at “only” 2 degrees — a level of temperature rise that will turn “once in a century” storms into annual events, drown entire island nations, and render major cities in the Middle East uninhabitable in summertime (at least for those whose lifestyles involve “walking outdoors without dying of heatstroke”). This is what passes for a utopian vision in 2021. If we confine ourselves to mere optimism — and assume that every Paris Agreement signatory meets its current pledged target for decarbonization — then warming will hit 2.4 degrees by century’s end.

The reality of our ecological predicament invites denial of our political one. Put simply, it is hard to reconcile the scale of the climate crisis with the limits of contemporary American politics. Delusions rush in to fill the gap. Among these is the fantasy of national autonomy; the notion that the United States can save the planet or destroy it, depending on the precise timeline of its domestic decarbonization. A rapid energy transition in the U.S. is a vital cause, not least for its potential to expedite similar transformations abroad. But the battle for a sustainable planet will be won or lost in the developing world. Although American consumption played a central role in the history of the climate crisis, it is peripheral to the planet’s future: Over the coming century, U.S. emissions are expected to account for only 5 percent of the global total.

There is also the delusion of “de-growth’s” viability. The fact that there is no plausible path for global economic expansion that won’t entail climate-induced death and displacement has led some environmentalists to insist on global stagnation. Yet there is neither a mass constituency for this project, nor any reason to believe that there will be any time soon. Freeze the status-quo economy in amber, and you’ll condemn nearly half of humanity to permanent poverty. Divide existing GDP into perfectly even slices, and every person on the planet will live on about $5,500 a year. American voters may express a generalized concern about the climate in surveys, but they don’t seem willing to accept even a modest rise in gas prices — let alone a total collapse in living standards — to address the issue. Meanwhile, any Chinese or Indian leader who attempted to stymy income growth in the name of sustainability would be ousted in short order. It’s conceivable that one could radically reorder advanced economies in a manner that enabled living standards to rise even as GDP fell; Americans might well find themselves happier and more secure in an ultra-low-carbon communal economy in which individual car ownership is heavily restricted, and housing, healthcare, and myriad low-carbon leisure activities are social rights. But nothing short of an absolute dictatorship could affect such a transformation at the necessary speed. And the specter of eco-Bolshevism does not haunt the Global North. Humanity is going to find a way to get rich sustainably, or die trying.

Thus, the chasm between the ecologically necessary and the politically possible can only be bridged by technological advance. And on that front, the U.S. actually has the resources to make a decisive contribution to global decarbonization — and some political will to leverage those resources. Unfortunately, due to some combination of fiscal superstitions and misplaced priorities, the Biden administration’s proposed investments in green innovation remain paltry. An American Jobs Plan with much higher funding for green R&D is both imminently winnable and environmentally imperative. U.S. climate hawks should make securing such legislation a top priority.

The choice before us is techno-optimism or barbarism.

If governments are forced to choose between increasing income growth in the present, and mitigating temperature rise in the future, they are going to pick the former. We’ll get cheap, lab-grown Kobe beef before we get a U.S. Senate willing to tax meat, and steel plants powered by “green hydrogen” before we get anarcho-primitivism with Chinese characteristics.

The question is whether we’ll get such breakthroughs before it’s too late.

Techno-optimism has its hazards, but the progress we’ve made toward decarbonization has come largely through technological innovation. When India canceled plans to construct 14 gigawatts of new coal-fired power stations in 2019, it did not do so in deference to international pressure or domestic environmental movements, but rather to the cost-competitiveness of solar energy. The same story holds across Asia’s developing countries: Thanks to a ninefold reduction in the cost of solar energy over the past decade, the number of new coal plants slated for construction in the region has fallen by 80 percent. Meanwhile, the road to an electric-car revolution was cleared by a collapse in the cost of lithium batteries, the challenge of powering cities with solar energy on cloudy days was eased by a 70 percent drop in the price of utility-scale batteries, and wind power grew 40 percent cheaper. Our species remains lackluster at solidarity and self-government, but we’ve got a real knack for building cool shit.

The technological progress of the past decade was not sufficient to compensate for tepid climate policy. But real techno-utopianism has never been tried: As of 2019, global spending on clean energy R&D totaled $22 billion a year, or 3 percent of the Pentagon’s annual budget. Increasing spending on such research — while expediting cost-reductions in existing technologies by deploying them en masse — should be twin priorities of American climate policy.

The preconditions for green industrialization can be made in America.

The United States has more fiscal capacity and better-financed research universities than any nation on the planet. And, for all the pathologies of our politics, public investment in green tech inspires far weaker opposition than many less-indispensable climate policies. In fact, late last year, with Republicans controlling the Senate and Donald Trump in the White House, the U.S. increased funding for zero-emission technology R&D by $35 billion. America does not have sovereignty over enough humans to save the planet by slashing our domestic emissions. But we just might have the resources and political economy necessary to help the developing world save us all.

Although progress on renewables has exceeded optimistic expectations, the technical obstacles to global decarbonization remain immense. In the most optimistic scenario, scaling up existing, cost-competitive technologies can get us about 16 percent of the emissions reductions necessary for achieving net-zero by 2050, according to the International Energy Agency. Driving down the price of tech we already have will get us another 39 percent. The rest must come from technologies that have yet to be fully developed. We need electrified cement, hydrogen-powered steel plants, and evaporative cooling. We need utility-scale energy storage, electric airplanes, and ultra-high voltage transmission lines. And we’d be remiss to not toss a bit of our collective wealth at game-changing hail marys like nuclear fusion.

## Infra

#### 2. Won’t pass- no progressive support, policy disagreements

BURGESS EVERETT and HEATHER CAYGLE, 9-12-2021, "Dems hurtle toward a new fiscal cliff," POLITICO, https://www.politico.com/news/2021/09/12/dems-toil-to-avoid-default-shutdown-in-pivotal-fall-511158

Progressives have vowed not to support the Senate's infrastructure bill during an expected vote on Sept. 27 unless the much larger social policy legislation is also teed up for a vote.

Democrats publicly insist they’re on track to vote for the up to $3.5 trillion bill in the House later this month. But senior Democratic aides are already privately predicting that timeline is likely to slip several weeks as House leaders continue to face off with Senate Democrats and the White House over major policy disagreements.

And, as they face those internal challenges, a major partisan confrontation with Republicans awaits on the debt.

#### 3. Debt ceiling thumps

Victor Reklaitis, 9-11-2021, "Debt limit, social spending, infrastructure battles loom in ‘uniquely frenetic period’ for Congress," MarketWatch, https://www.marketwatch.com/story/debt-limit-social-spending-infrastructure-battles-loom-in-uniquely-frenetic-period-for-congress-11631045095

“The debt ceiling always gets raised, but this time will be nerve-wracking, amid threats of a government shut-down,” he added. “Can massive infrastructure bills win passage in this climate? A major haircut will be required, which could force angry House progressives to oppose infrastructure spending rather than accept pared-back bills.”

#### 4. PC not key- Manchin won’t listen to Biden

Nick Arama, 9-12-2021, "Manchin Bombards the Networks to Send a Message to Joe Biden: You're Not Getting What You Want," redstate, https://redstate.com/nick-arama/2021/09/12/manchin-bombards-the-networks-to-send-a-message-to-joe-biden-youre-not-getting-what-you-want-n441898

Manchin also made clear that his priority was the infrastructure plan, and that that was the bill that needed urgency. He said he was going to support moving on the bipartisan infrastructure bill first and by itself, that he wasn’t going to go along with the effort by progressives to tie that to the $3.5 trillion plan. That essentially would kill the Democrats’ effort, if they don’t have his support on that.

So right now, it looks like, despite Biden’s pushing, Manchin is going to continue to lock it up. Meanwhile, the progressives could end up killing the infrastructure bill in order to try — and fail — to get their pie in the sky wish list of far-left agenda items to maximize Democratic control.

#### 5. Biden already spending PC- XO

Lindsey Vaala, 7-16-2021, "Labor, Defense, and Rail Services Among Top Competition Concerns Targeted in President Biden’s Executive Order," https://www.velaw.com/insights/labor-defense-and-rail-services-among-top-competition-concerns-targeted-in-president-bidens-executive-order/

The EO seeks to harness the coordinated power of the full federal government, emphasizing “that a whole-of-government approach is necessary to address” competition concerns in the U.S. economy.2 To that end, the Order establishes a White House Competition Council, to be led by the Director of the National Economic Council (“NEC”).3 An integral part of the Office of White House Policy, the general bailiwick of the NEC is to advise the president on economic policy matters. By embedding the new council within the White House, President Biden is sending the strong message that competition is a focus area over which he intends to keep close tabs and invest his personal political capital.

#### 6. Biden passing tough bills expands his political capital

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

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

#### Most climate initiatives didn’t make the bipart bill- just some minor EV investments

Michelle Lewis, 8-2-2021, "Here's what is (and isn't) in the new bipartisan infrastructure bill for EVs," Electrek, <https://electrek.co/2021/08/02/heres-what-is-and-isnt-in-the-new-bipartisan-infrastructure-bill-for-evs/> all ellipses in original

After months of horse trading, a bipartisan group of US senators unveiled the legislative text of a 2,700-page, $1 trillion infrastructure bill last night. Here’s what’s in it for all things electric vehicle and clean energy – and what got the chop.

What’s included in the infrastructure bill

Electric vehicle charging stations: $7.5 billion for electric vehicle charging stations, with a focus on highways and routes that connect rural and disadvantaged communities. The good news? It’s the first-ever US investment in EV chargers. The bad news is it’s only half of what President Joe Biden wanted in order to build a national network of 500,000 charging stations.

Electric grid: $73 billion to build a more robust electric grid. That means money for “thousands of miles of new, resilient transmission lines to facilitate the expansion of renewable energy, including through a new Grid Authority,” according to a June 24 White House Fact Sheet.

Electric buses and ferries: $7.5 billion for zero- and low-emission buses and ferries.

Passenger and freight rail: $66 billion for passenger and freight rail – but Biden originally wanted $80 million in the infrastructure bill. The White House website posted on July 28:

The deal invests $66 billion in rail to eliminate the Amtrak maintenance backlog, modernize the Northeast Corridor, and bring world-class rail service to areas outside the northeast and mid-Atlantic. Within these totals, $22 billion would be provided as grants to Amtrak, $24 billion as federal-state partnership grants for Northeast Corridor modernization, $12 billion for partnership grants for intercity rail service, including high-speed rail, $5 billion for rail improvement and safety grants, and $3 billion for grade crossing safety improvements.

The specifics on exactly what is going to be decarbonized in the rail sector are unclear at present.

Roads and bridges: $110 million. “This investment will repair and rebuild our roads and bridges with a focus on climate change mitigation, resilience, equity, and safety for all users, including cyclists and pedestrians,” according to the July 28 White House Fact Sheet.

Environmental remediation: $21 billion to clean up Superfund – polluted locations in the US requiring a long-term response to clean up hazardous material contaminations – and brownfield sites, reclaim abandoned mine land, and cap orphaned gas wells.

What’s not included on the EV front

Electric vehicle tax credits: Biden has called for $100 billion in government subsidies for electric vehicles, and that issue is expected to be addressed in a larger separate funding bill (see below).

“In May, a Senate panel advanced legislation to boost electric vehicle tax credits to as much as $12,500 for EVs that are assembled by union workers in the United States,” reports Reuters.

Electric vehicle charging stations, part 2: Funding to back a further $7.5 billion in low-cost government loans for charging stations through an infrastructure bank was dropped during negotiations.

Electric school buses: American Lung Association national president and CEO Harold P. Wimmer expressed disappointment in a statement emailed to Electrek in the $2.5 billion for zero-emissions school buses, when $20 billion was originally proposed by President Joe Biden:

It is… discouraging to see that the proposal includes funding to perpetuate the use of combustion fuels for new school buses.

The funding included in the bill… would only be able to transition a small fraction of the country’s diesel school bus fleet to zero-emission electric buses. In order to create healthier and safer environments for all our students, Congress needs to significantly increase this investment. A $20 billion investment will transition one-fifth of the country’s school bus fleet to zero-emission buses, providing critical health and climate benefits.

[A]n overwhelming majority (68%) of American voters— across all major demographic groups — support Congress investing $20 billion in zero-emission electric school buses for children nationwide.

## FTC DA

#### Plan key to legitimacy and funding.

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

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

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

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

The FTC’s Rulemaking Authority

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

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

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

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

The Future of the FTC

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

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

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

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

#### Merger Guideline updates thump---bellweather for harsh enforcement.

Joseph Miller 21. Co-chair, Mintz Antitrust Practice. “More Antitrust News, Still None of it Good.” *The National Law Review*. July 10th, 2021. <https://www.natlawreview.com/article/more-antitrust-news-still-none-it-good>.

In a joint press release, the FTC and Antitrust Division announced they are launching a review of the Merger Guidelines so the agencies "review mergers with the skepticism the law demands" in order to "determine if they are too permissive." Richard Powers, the Acting Assistant Attorney General for Antitrust is a criminal lawyer by background and has no significant merger experience so it's fair to assume this initiative is being promoted by FTC Chair Lina Khan.

Merger Guidelines are often cited by courts for their persuasive authority but do not carry the force of law. They are influential because they reflect a fair view of current economic learning, reduced to an administrable set of principles to guide agency merger staffs and businesses alike. The current horizontal merger guidelines were published in 2010 so perhaps it is time for an update. What we see in the press release, however, is a strong signal that the agencies will not incorporate the latest economic literature, but rather take a hyper-aggressive enforcement posture based on a literal reading of a very old statute.

Merger guidelines will need to be backed by sound law and economics in order to persuade the federal courts. If this initiative reflects nothing more than ideologically driven hostility towards efficient transactions we will see a burst of enforcement activity, followed by legal sophistry about textualism, Brown Shoe, Von's, and other bad but not explicitly overturned precedent, followed by a well-deserved thrashing in the courts of appeal.

I guess antitrust lawyers should settle in for the best of times/worst of times period, lots of activity but also hard for counselors and clients to plan transactions if enforcement decisions are untethered to the consumer welfare standard, without which enforcement decisions will necessarily be driven by broader policy goals or raw political calculations. I may be reading too much into a short press release and I hope I'm wrong about how bad this will get in the short term. I'm also grateful that the FTC has staggered terms for commissioners so Christine Wilson and Noah Feldman can continue to articulate sound, traditional enforcement principles, and priorities.

#### No nuke terror NOR retal

---Technical barriers, op costs, organizational schisms, deterrence

Christopher **McIntosh &** Ian **Storey 18**. McIntosh is visiting assistant professor of political studies at Bard College; Storey is a fellow at the Hannah Arendt Center for Politics and Humanities at Bard College. 06/01/2018. “Between Acquisition and Use: Assessing the Likelihood of Nuclear Terrorism.” International Studies Quarterly, vol. 62, no. 2, pp. 289–300.

When looked at in isolation, each of the three areas of potential loss presents significant disincentives for immediate attack. In combination—as they would be considered in practice—the higher strategic value of available alternatives appears decisive. In other words, even if one reads our analysis as affirming the importance of nuclear acquisition, when considering competing options and the dangers that attach to any detonation attempt, nuclear attack is highly unlikely. Strategic Opportunity Costs Future opportunities available for “using” a nuclear weapon are effectively foreclosed depending on the aggressiveness of the option a group chooses. The two-by-two matrix of nuclear strategies in Figure 1 is only a rough guide encompassing many possible permutations in the nuclear sphere. The organization always retains non-nuclear options, even once they acquire nuclear weapons. As evidenced by the Cold War and in Kargil, the stability-instability paradox holds empirical weight. Nuclear acquisition by two opposing actors does not necessarily foreclose conventional and/or asymmetric attacks (Cohen 2013; Kapur 2005). Given the unique relationship between a state and terrorist organization, we can expect similar and even exacerbated levels of instability. This can expand even beyond aggression. Remaining options range all the way from the pacific—pursuing negotiations, cooption, entrance into the legitimate political arena (for example, Sinn Fein)—to heightened conventional attacks and the usage of non-nuclear forms of WMDs. This last point is worth emphasizing. Even in the remote case where an actor successfully acquires a nuclear weapon and primarily seeks raw numbers of casualties—whether due to outbidding or audience costs—other forms of WMDs are likely to be more appealing. As Aum Shinrikyo indicates, this is particularly the case for the group that overcomes the inevitable political and technological hurdles (Nehorayoff et al. 2016, 36–37). For these groups, chemical, biological, and radiological weapons (CBRW) are considerably easier to acquire, use, and stockpile. This is especially true when considered over time, rather than a single operation.18 While there are certainly downsides to CBRWs vis-à-vis nuclear weapons (delivery may paradoxically be easier and the maintenance risks comparatively smaller), they are undoubtedly easier to procure and produce (Zanders 1999). More importantly, CBRWs are perceived as easier to produce and thus likely to be viewed by targets as iterable. Unlike a nuclear attack, CBRW threats are more credible because a single CBRW attack can likely precipitate an indefinite number of follow-ups. In addition to the problem of iterability, a terrorist organization must always worry about the possible ratchet effect of an attack—a problem Neumann and Smith (2005, 588– 90) refer to as the “escalation trap.” A terrorist organization is different than a state at war because it manipulates other actors primarily through punishment. Campaigns are a communicative activity designed to convince the public and the leaders that the status quo is unsustainable. The message is that the costs of continuing the target state’s policy (such as the United States in Lebanon, France in Algeria, or the United Kingdom in Northern Ireland) will eventually outweigh the benefits. Once an organization conducts a nuclear attack, it lacks options for an encore. Not even the most nightmarish scenarios involve an indefinite supply of weapons. If a single attack plus the threat of one or two others does not induce capitulation, the organization might unwittingly harden the target state’s resolve. The attack could raise the bar such that any future non-nuclear attack constitutes a lessening of costs vis-à-vis the status quo. There are also heavy opportunity costs involved in pursuing, developing, and maintaining a nuclear capacity, let alone actually deploying and delivering it. As Weiss puts it, “even if a terror group were to achieve technical nuclear proficiency, the time, money, and infrastructure needed to build nuclear weapons creates significant risks of discovery

that would put the group at risk of attack. Given the ease of obtaining conventional explosives and the ability to deploy them, a terrorist group is unlikely to exchange a big part of its operational program to engage in a risky nuclear development effort with such doubtful prospects” (Weiss 2015, 82). Organizational Survival Terrorist organizations are not monolithic entities, nor are they wholly self-sufficient actors. Historically speaking, these groups consider the public reception of their attacks in a complex manner. As Al Qaeda, the Palestine Liberation Organization (PLO) of the 1970s, the IRA, and anarchist groups of the nineteenth and twentieth centuries all demonstrate, these groups’ thinking about public reception is nuanced and complex, regardless of time or place. We focus on two types of audiences that would be affected by decisions to attack: those internal to the group itself, and their own broader public. While many claim that terrorists are undeterrable, the argument misconstrues the relational dynamics between a terrorist organization, target state, international community, and the internal dynamics of the organization itself (Talmadge 2007). It is undoubtedly the case that deterring a terrorist organization in the traditional sense is difficult (Whiteneck 2005; Mearsheimer and Walt 2003). Many lack a recognized territorial base, work on the fringes of the global economy, and are internally structured to be difficult to combat directly. Nearly all possess some permutation of these factors. Combined with the symbolic importance of even relatively small terror attacks—especially given the role of international media—physically denying a group the ability to conduct attacks is uniquely challenging. It is minimally a vastly different proposition than precluding a state’s ability to successfully invade its neighbor or conduct ongoing missile strikes.19 Despite these concerns, there are important reasons deterrence can and empirically does work in the case of terrorist organizations. This is especially possible when the state-terrorist relationship is not zero-sum and the target retains some influence over the realization of the group’s eventual goals (e.g., by denying the group access to territory or withholding international recognition) (Trager and Zagorcheva 2006, 88–89). Nuclear attack presents two significant threats to the organization’s continued existence: internal threats of disintegration and external threats to their continued operations and survival. Terrorist organizations are not unitary, homogenous organizations. This is especially true for groups possessing the size and competence likely necessary for operational nuclear capacity. As many have noted, the terrorist organizations of the present are vastly different from those Marxist- Leninist groups that terrorized Europe and the United States in the 1970s and early 1980s. There is a well theorized psychological value of the organization to individual terrorists themselves (Post 1998), but there is more to the organizational valuation of survival than captured in this atomistic picture. Modern, large-scale terrorist organizations are typically heavily intertwined with the social fabric of the groups from which they originate (Cronin 2006; Hoffman 2013). Beyond significant networks of financial connections, accounts, and moguls (Hamas, for example, draws funding from a massive international system of mosque-centered charities, while the IRA’s extensive connections to the Irish diaspora in the United States were well documented), many terrorist organizations build extensive networks of sub-organizations that tie them to the communities in which they are based. Hezbollah, like the IRA, is internally divided between a military arm and a political arm and has run an extensive network of community schools, medical care centers, and religious outreach groups. Together they are designed to embed the organization in the social life of (predominantly southern) Lebanon’s Muslim population and provide Hezbollah with fresh recruits (Parkinson 2013). The group’s persistence as a dominant political force in southern Lebanon nearly two decades after the initial Israeli decision to withdraw demonstrates terrorist organizations grow to exceed their initial military objectives. The spread of Al Qaeda and its affiliates has followed a similar path. Maintaining the continued support of these multiple audiences is therefore a crucial consideration for these organizations. While these audiences could conceivably be more casualty-acceptant than the individuals deciding the group’s operations, the broader public will usually moderate extreme behavior. The literature assessing so-called “radical- ization” and violence by individual actors emphasizes that there isn’t a one-to-one relationship between ideological extremism and acceptance of extraordinary violence in pursuit of those goals (McCauley and Moskalenko 2014; Jurecic and Wittes 2016). It is important to resist the assumption that a politically extreme ideology automatically corresponds to shared assumptions regarding casualty-acceptance. Some argue that the move toward “mass-casualty” terrorism obviates these concerns. Aside from the fact that the trend line is either flat or receding in terms of the death toll of individual attacks (even if campaigns themselves might be becoming deadlier), there is an orders of magnitude distinction in casualties between a nuclear attack and even the 2001 attack in the United States. While the psychological restraints on nuclear use among states do not translate precisely to this context, there is good reason to believe that transgressing the longstanding nuclear taboo would have dramatic and negative effects on broader public support. In an urban environment, the media would inevitably capture the attack and its gruesome after-effects in photography or video. This imagery would be inconceivable, ubiquitous, and inescapable. Even if supporters accept a highly retributive mentality, or as Hamid (2015) argues about the Islamic State, actively accept the potential of death, this would pose a severe problem for all but the most extreme supporters.20 Beyond these supporters, a nuclear attack affects the internal dynamics of the terrorist organization in multiple ways. There could be divisiveness regarding the most effective use of the weapon. This would be magnified by the scale of the opportunities and perceived opportunity costs. Such debates have the potential to splinter the organization as a whole (Cronin 2009, 100–02). Factional conflict in terrorist organizations appears frequently over questions of goals and tactics (Crenshaw 1981; Chai 1993). A decision to attack with a nuclear weapon risks considerable internal alienation over a variety of issues—targeting decisions, method of attack, campaign goals, potential deaths of supporters, and the domestic and international response (Mathew and Shambaugh 2005, 621–22). Finally, a nuclear attack would exponentially raise the threat to each individual who composes the extended organization. Post-nuclear attack, the greatest strengths of a terrorist organization—its lack of material territory, economy, or overt institutions and reliance on individuals—could turn into its greatest weaknesses (Eilstrup-Sangiovanni and Jones 2008). Currently, a wealthy financier found to have ties to a terrorist group would be monitored for intelligence, arrested, and brought up on criminal charges. Post-nuclear attack, the consequences would be immediate and rather worse. Externally, in a world post-nuclear attack, international cooperation would be instant and deep. One of the only international treaties to even define a terrorist in international law post-2001 has been the Nuclear Terrorism Convention (Edwards 2005). A nuclear attack would be far outside the norm of international politics. It would disrupt the dominance of state-actors and likely stimulate unparalleled cooperation to apprehend the responsible parties to prevent future attacks. Moreover, many large terrorist organizations require (some) tacit acquiescence by a host state. Even those with hostile host states have territory where they remain relatively unaffected by local governments (Korteweg 2008). Post-nuclear attack, these host states face an enormous incentive to find the actors responsible before the target state does. After an attack, regimes would find it difficult to claim that they “didn’t know” or “couldn’t stop them.” Claims of corruption or ineffective institutions would be unlikely to find much sympathy. Faced with potential organizational extinction itself, a host state/government will likely be much less committed to the survival of the terrorist group. This is likely to vary significantly from how they might otherwise behave after a more conventional attack. For these states, there would be a real fear of “Talibanization” and ruthless attempts at regime change post-attack. From the perspective of the group, it would know that it could be facing a unified international community and the removal of tacit state support. It would take a particularly confident leadership to presume it could continue to function post-attack without massive disruptions. Most strategic actors are risk-averse when facing the potential of complete elimination. There is little reason to believe terrorist groups would act any differently.

# 1AR

## States CP

#### Seattle proves---Congress has intent.

NFIB 18. “Federal Court Rules that Seattle’s “Uber Ordinance” Violates Federal Antitrust Law” NFIB. 05-22-<https://www.nfib.com/content/legal-blog/economy/federal-court-rules-that-seattles-uber-ordinance-violates-federal-antitrust-law/>

In 2015, Seattle enacted an ordinance that authorized independent contractors in the transportation industry to unionize. This ordinance – directed at gig economy leaders like Uber – turned labor law on its head since historically only employees had the right to unionize. The U.S. Chamber of Commerce, representing members like Uber and other transportation companies that rely on independent contractor drivers, challenged the ordinance. In May 2018, the U.S. Court of Appeals for the Ninth Circuit held that Seattle’s ordinance **violates federal antitrust laws.** Unfortunately, however, the court rejected the plaintiffs’ and NFIB’s key argument that the National Labor Relations Act preempts state and local regulation thereby opening the door to independent contractors ultimately gaining collective bargaining rights. When it enacted the NLRA, **Congress intentionally chose to deny collective bargaining rights to independent contractors** because they are engaged in their own business ventures. For this reason, NFIB filed an amicus brief in the Ninth Circuit arguing that the **NLRA preempts state and local regulation purporting to authorize collective bargaining for independent contractors**. In addition, we raised antitrust arguments because there can be nothing more anti-competitive than independent businesses working in concert to fix their prices. And **the good news is that the Ninth Circuit embraced our arguments on that issue.**

#### Their ev says antitrust law doesn’t preempt states---our ev assumes that and says state antitrust laws can still be preempted.

Richard A. Samp 14. Chief Counsel, Washington Legal Foundation. The Role of State Antitrust Law in the Aftermath of Actavis. 15 MINN. J.L. SCI. & TECH. 149 (2014). https://scholarship.law.umn.edu/mjlst/vol15/iss1/14

Part I of this paper summarizes federal preemption law as it has been applied to state antitrust actions. It explains that the U.S. Supreme Court has never interpreted federal antitrust law as imposing a limit on states’ authority to regulate business practices deemed by states to have anticompetitive effects. Nonetheless, federal courts have not hesitated to rule that state antitrust law is preempted by federal law when they determine that state law comes into conflict with some other federal statute. In this instance, the relevant “other federal statute” is federal patent law.

#### State action is preempted.

Sanjukta M. Paul 20. Assistant Professor of Law and Romano Stancroff Research Scholar at Wayne State University, fellow of the Thurman Arnold Project at Yale, David J. Epstein Fellow at UCLA School of Law. “The Enduring Ambiguities of Antitrust Liability for Worker Collective Action”. 47 Loy. U. Chi. L. J. 969 (2020). https://lawecommons.luc.edu/luclj/vol47/iss3/8/

Part I.B, supra, discussed antitrust liability for unilateral worker collective action. In addition, any regulatory scheme that aims to address collective action by such workers in anything but a purely punitive manner, or aims to provide for minimum working standards, will also come up against the outer limits imposed by antitrust. As the organizing efforts of freelancers, independent contractors, and gig economy workers continue to gain momentum, we can expect to see such proposed schemes. Members of the New York City Council have recently stated that they are currently developing this type of regulatory scheme, prompted by the efforts of the Freelancers Union and other organizing groups.72 The City of Seattle recently enacted an ordinance granting collective bargaining rights to drivers for taxicab, limo, and “transportation network companies” (encompassing Uber, Lyft and other companies in the on-demand sector) who are classified as independent contractors rather than employees.73 Local regulation, as such schemes are likely to be, will probably face federal preemption lawsuits not only under the “NLRA,”74 but also under antitrust.75

#### CW profit standards force federal action---only the plan solves.

Ramsi A. Woodcock 20. Assistant Professor, University of Kentucky Rosenberg College of Law, Secondary Appointment, University of Kentucky Gatton College of Business and Economics. “The Antitrust Case for Consumer Primacy in Corporate Governance”. 10 U.C. IRVINE L. REV. 1395 (2020). https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1458&context=ucilr

My proposed antitrust duty to minimize profits would be grounded in section 2 of the Sherman Act, which prohibits monopolization.259 As federal antitrust law, the duty would preempt any duty of the board under state corporate law to maximize profits for the benefit of shareholders, because the Supremacy Clause of the U.S. Constitution preempts state law that conflicts with federal law.260 The courts have applied preemption sparingly in the antitrust context, preempting state law only when the conduct authorized by the particular state law in question always violates federal antitrust law.261 But any state corporate law grant of authority to boards to maximize profits or pay profits to anyone other than consumers would meet that preemption standard were courts to read a duty to minimize profits into antitrust law, because profit maximization necessarily always violates a rule requiring profit minimization.

#### Lanham Act too.

Hiba Hafiz 20. Assistant Professor of Law at Boston College Law School, previous David W. Leebron Human Rights Fellow at the International Rights Advocates, clerked for Judge Juan R. Torruella of the U.S. Court of Appeals for the First Circuit and Judge José L. Linares of the U.S. District Court for the District of New Jersey, practiced law in the Antitrust Practice Group at Cohen Milstein Sellers & Toll PLLC, and was a Harry A. Bigelow Teaching Fellow and Lecturer in Law at the University of Chicago Law School. “The Brand Defense”. Berkeley Journal of Employment and Labor Law, Vol. 43, No. 1, 2022, Boston College Law School Legal Studies Research Paper No. 548. 11-17-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3732395

While the high-stakes battle over the NLRA’s joint-employer standard almost revolutionized upstream firms’ obligations to downstream franchisee employees, franchisors have raised Lanham Act brand defenses to other federal and state work law obligations. Franchisors like Jimmy John’s have successfully asserted such defenses in FLSA wage-and hour litigation to immunize themselves from joint-employer liability.258 Under both state and federal anti-discrimination law, franchisors like Domino’s Pizza and Buffalo Wild Wings have successfully asserted such brand defenses to immunize upstream franchisors from jointemployer liability.259 And most recently, the IFA has claimed that the Lanham Act preempts even state law expansions of “employee” and “employer” status, 260 a significant new step because it threatens to derail innovative state law efforts to expand worker protections above federal baselines.261

#### the CP entrenches national antidemocratic coalitions

Aziz Huq and Tom Ginsberg 18. Professors of Law, University of Chicago Law School. “How to Lose a Constitutional Democracy”. 65 UCLA L. Rev. 78 (2018). <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13666&context=journal_articles> ableist language [modified].

6. Federalism

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.371

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~~ [slow] 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.

## Infrastructure DA

#### Reconciliation blocks infrastructure- won’t be ready in time

Sahil Kapur, 9-13-2021, "Senate back to jampacked to-do list in key stretch for Biden agenda," NBC News, https://www.nbcnews.com/politics/congress/senate-returns-jampacked-do-list-biden-s-agenda-faces-crucial-n1279000

House Democrats have set a soft deadline of Sept. 27 to vote on the Senate-passed infrastructure bill, but its prospects of passage may hinge on the larger bill's readiness, because progressives have threatened to vote it down otherwise.

House committees are racing to mark up their parts of the bill. But they may not be done in time.

"There's no way we can get this done by the 27th if we do our job. There's so much differences that we have here," Sen. Joe Manchin, D-W.Va., a vital swing vote on the multitrillion-dollar bill, said Sunday on CNN's "State of the Union."

#### Won’t pass- pharma fights kill the whole thing

David Dayen, 9-15-2021, "How Kathleen Rice Is Threatening the Biden Agenda," American Prospect, https://prospect.org/politics/how-kathleen-rice-is-threatening-the-biden-agenda/

The standoff does not mean that drug price reform is finished. The Budget Committee can always fit it back in with a “manager’s amendment,” and because it provides at least $700 billion in budget savings for the overall bill, the committee almost certainly will. But it’s a show of force from pro-pharma members in a Democratic caucus that only has three votes to spare to pass the reconciliation package out of the House.

No agreement on drug prices threatens the entire bill and the Biden agenda, because of its importance in offsetting spending.

#### Will fail when it goes back to the Senate- GOP wants to make dems fight

Jessica Lombardo, 9-14-2021, associate editor, "When it Comes to Infrastructure Funding: "There is No Plan B"," For Construction Pros, https://www.forconstructionpros.com/infrastructure/article/21710743/when-it-comes-to-infrastructure-funding-there-is-no-plan-b

Strong Forces Oppose IIJA

Still, if the bill passes in the House, it will need to pass again in the Senate before it can be signed by Biden. In the Senate where the bipartisan legislation was crafted, support for the bill is also waning due to Democratic tactics.

"Progressive Democrats in the House have said they will not support the infrastructure bill unless the Senate passes the broader infrastructure initiative," Jay Hansen, executive vice president of advocacy at the National Asphalt Pavement Association said during a member briefing. "This gives Republicans the argument of, well, if we support the Infrastructure Investment and Jobs Act, then we're clearing the way for this $3.5 trillion bill,"

#### Manchin and House progressives fighting over reconciliation- blocks infrastructure

Andrew Solender, 9-12-2021, "Tensions Erupt As Manchin Slams AOC, Warns ‘America Will Recoil’ At Progressives’ Infrastructure Threats," Forbes, https://www.forbes.com/sites/andrewsolender/2021/09/12/tensions-erupt-as-manchin-slams-aoc-warns-america-will-recoil-at-progressives-infrastructure-threats/?sh=1692bd83b7fb

Sen. Joe Manchin (D-W.Va.) on Sunday tore into progressives amid an ongoing conflict over various spending bills, warning of political backlash against House progressives if they sink a bipartisan infrastructure bill and labeling allegations from Rep. Alexandria Ocasio-Cortez (D-N.Y.) about his ties with oil lobbyists as “totally false.”

Manchin warned in a CNN interview that if progressives kill the $1.2 trillion infrastructure bill, they will have to tell constituents, “I don’t care about the roads and bridges, you don’t need it,” adding, “If they play politics with the needs of America… America will recoil.”

The moderate West Virginia senator repeatedly said in the interview he opposes $3.5 trillion in social spending as part of Democrats’ budget reconciliation bill, a key demand of progressives in the House who say they are willing to vote down the infrastructure bill.

Manchin refused to give an alternative figure, but floated $1 trillion or $1.5 trillion as possible viable alternatives, figures that would be unlikely to satiate the dozens of progressives demanding “robust” reconciliation spending.

#### Infrastructure alone won’t solve climate

Alexander Sammon, 7-26-2021, "How Joe Biden Defanged the Left," American Prospect, https://prospect.org/politics/how-joe-biden-defanged-the-left/

Across those paramount concerns, Biden’s bipartisan infrastructure proposal left out the entirety of the care proposal, offered nothing on immigration, and featured startlingly little on climate; a reconciliation bill was still almost two months out. And yet the reception featured no four-letter words and no accusations of cowardice. According to sources who were in the meeting, Sheyman was particularly obliging, raising his hand to personally congratulate the administration on the deal.

“This is the meeting for progressives and progressive advocacy organizations,” said one adviser close to the White House. “The bill doesn’t include a single one of his priorities, and yet the tone is incredibly civil, nobody is even saber-rattling.” Biden, meanwhile, was soon pledging not to veto the bipartisan package if it came to his desk without a reconciliation bill full of other Democratic climate priorities, threatening the absence of major environmental spending to come.

#### Insufficient without renewables- takes decades

Saheli Roy Choudhury, 7-26-2021, “Are electric cars ‘green’? The answer is yes, but it’s complicated,” CNBC, https://www.cnbc.com/2021/07/26/lifetime-emissions-of-evs-are-lower-than-gasoline-cars-experts-say.html

Paltsev explained that the full benefits of EVs will be realized only after the electricity sources become renewable, and it might take several decades for that to happen.

“Currently, the electric vehicle in the U.S., on average, would emit about 200 grams of CO2 per mile,” he said. “We are projecting that with cleaning up the grid, we can reduce emissions from electric vehicles by 75%, from about 200 (grams) today to about 50 grams of CO2 per mile in 2050.”

Similarly, Paltsev said MIT research showed non-plug-in hybrid cars with internal combustion engines currently emit about 275 grams of CO2 per mile. In 2050, their projected emissions are expected to be between 160 to 205 grams of CO2 per mile — the range is wider than EVs, because fuel standards vary from place to place.

#### Won’t solve climate- scaled back for Manchin approval

Steven Mufson and Tony Romm, 9-13-2021, "As the largest-ever U.S. climate bill inches forward, a lobbying frenzy ensues," https://www.washingtonpost.com/climate-environment/2021/09/13/budget-reconciliation-bill-climate/

The budget bill’s most ambitious climate spending plans still face major hurdles within the president’s own party, including from Sen. Joe Manchin III (W.Va.), a pivotal vote from a state with a flagging coal industry. This month, Manchin said he would not support a $3.5 trillion spending bill, and he has privately signaled to his Democratic peers that he may support only half as much in spending and tax increases.

Opposition from Manchin, who chairs the Senate Energy and Natural Resources Committee, would set up a conflict with the Democrats’ more liberal wing and could force the party to make significant cuts to the package’s climate provisions.

#### Parliamentarian can strip climate measures

Steven Mufson and Tony Romm, 9-13-2021, "As the largest-ever U.S. climate bill inches forward, a lobbying frenzy ensues," https://www.washingtonpost.com/climate-environment/2021/09/13/budget-reconciliation-bill-climate/

But the moderates may not be Democrats’ sole obstacle, since the Senate parliamentarian might rule part of the budget bill out of order on procedural grounds. The clean energy plan for utilities is particularly vulnerable.