# Wiki Doc

# 1AC

### Plan

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

### Adv 1---Inequality

#### Advantage 1 is Inequality---

#### Labor market concentration is increasing---focusing antitrust on workers is key.

Brian Callaci 9/28. Chief Economist, Open Markets Institute. Testimony Before the Committee on the Judiciary, Subcommitee on Antitrust, Commercial, and Administrative Law United States House of Representatives. September 28, 2021. Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker. https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-Wstate-CallaciB-20210928.pdf

However, over the past few decades, while attacks on unions and the declining value of the minimum wage have removed key countervailing forces to monopsony power, antitrust jurisprudence and policy have taken us a step backwards towards the conditions that so outraged Adam Smith centuries ago. In particular, antitrust has:

• Looked the other way as large corporations have consolidated buyer, or monopsony, power over both local labor markets and entire supply chains;

• Allowed employers to supercharge their power over employees through restrictive contracts like noncompete clauses, mandatory arbitration, and no-poaching agreements; and

• Facilitated large corporations’ efforts to deny their workers employment rights, by sanctioning the use of restrictive contracts to dominate non-employee independent contractors and small business owners, subjecting them to tight corporate control virtually equivalent to that of employees. This has led to the creation of a so-called “gig economy” of workers without rights, and of “fissured workplaces” where workers have some rights, but not against the company that really pulls the strings controlling their working conditions.

To return balance to the economy, Congress should act to make it harder for corporations to merge and abuse their dominant position, ban coercive contracts like noncompetes, expand the antitrust labor exemption to independent contractors, and close the loopholes allowing corporations avoid labor and employment obligations by substituting restrictive contracts for employment relationships.

1. Monopsony

Labor market concentration has increased since 1977. 3 The majority of US labor markets are currently highly concentrated according to traditional antitrust criteria. The government’s Horizontal Merger Guidelines assess market concentration according to a number called the Herfindahl-Hirschman Index (HHI), calculated as the sum of the squares of the market shares of each firm in the market. According to the guidelines, a market is “moderately concentrated” if the HHI is above 1,500, and “highly concentrated” if above 2,500. Recent research has found that the average labor market HHI in the US is 3,953, equivalent to just 2.5 firms hiring at equal market shares. Rural areas are especially likely to have highly concentrated labor markets.4

High concentration is associated with lower wages for job postings and lower job quality. On average, a 10 percent increase in concentration is associated with a 0.3 percent to 1.3 percent decrease in wages.5 Labor market concentration is also associated with violations of labor rights.6 Unfortunately, antitrust enforcement has all but ignored the effects of decreases in competition on workers. No court has ever blocked a merger because of its effects on labor markets.

It’s not just direct employees who are affected by increasing concentration. Since 1981, concentration across economic sectors has increased.7 Horizontal concentration has increased the power of large buyers, like Walmart and Amazon, over supply chains.8 Buyer power not only squeezes the profits of small businesses upstream from the large buyer, 9 it also reduces the wages of workers at upstream suppliers.10

In many instances monopsonistic wage suppression is associated with lower output and higher prices, and would be condemned under a consumer welfare standard. However, that is not always the case. In some cases monopsony leads to a reduction in labor’s share without shrinking the size of the overall pie. Antitrust enforcement should expand its focus beyond harm to consumers or output, to take into account effects on workers and suppliers as well. 11

2. Coercive Contracts Imposed on Employees

Not content with increased monopsony power over workers through concentration, or with decreased worker bargaining power through deunionization and the declining value of the minimum wage, employers have gone further and imposed restrictive contracts on workers that restrict their mobility, creating artificial monopsony power.

A particularly egregious example of these restrictive contracts is what is known as a noncompete clause. These contracts prevent workers from leaving their job for another employer in the same industry. In 2016, eighteen percent of workers were bound by noncompete clauses, and forty percent had been bound by one at some point in their careers. Only ten percent of employees actually negotiated over their noncompete, and one-third were presented with their noncompete after having already accepted their job offer.12

These contracts suppress wages. A recent study found that an Oregon law making noncompetes unenforceable for hourly workers raised wages for all hourly workers—not just those subject to noncompetes—by two to three percent.13 Another, more comprehensive study found that stricter enforceability reduced earnings for female and for non-white workers by twice as much as for white male workers.14 The Open Markets Institute, along with over sixty signatories, has petitioned the Federal Trade Commission to ban these restrictive contracts.15

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

Eric A. Posner 8/13. 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.

#### 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 and international coop solve extinction

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

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

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

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

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

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

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

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

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

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

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

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

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

### Adv 2---Modelling

#### Advantage 2 is Modelling---

#### Replacing the federal consumer welfare standard is modeled.

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.

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

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.

#### Specifically, the Philippines mirrors the US consumer welfare standard---considering the Aff’s standard promotes development.

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

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

#### The current standard results in economic injury.

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

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

#### Equitable growth in the Philippines prevents piracy.

Kenneth Yeo Yaoren et al 21. Kenneth Yeo Yaoren is a Research Analyst with the International Centre for Political Violence and Terrorism Research (ICPVTR) of the S. Rajaratnam School of International Studies at the Nanyang Technological University. Rueben Ananthan Santhana Dass is a Research Analyst with ICPVTR. Jasminder Singh is a Senior Analyst with ICPVTR. “Maritime Malice in Malaysia, Indonesia and the Philippines: The Asymmetric Maritime Threat at the Tri-Border Area”. International Centre for Counter-Terrorism – The Hague. April 2021. https://icct.nl/app/uploads/2021/04/maritime-terrorism-southeast-asia-policy-brief.pdf

The Sulu-Celebes Sea is one of the major shipping routes of Southeast Asia.64 Annually, US$40 billion worth of goods pass through the Sulu-Celebes Sea, creating great economic opportunities for inhabitants of the region in logistics management, ship maintenance, and other complementary sectors.65 Moreover, its marine biodiversity66 generates economic opportunities for eco-tourism67, fish farming, and reef-sourced biomedical products.68 However, the threats arising from crime, piracy and terrorism have significantly impacted investors’ confidence in that region. Notwithstanding these opportunities, the labour force participation rate of the Bangsamoro Autonomous Region of Muslim Mindanao (BARMM) is only 62.3 percent for individuals who are above 15 years old, signalling a high unemployment figure despite the reported 3.8 percent unemployment rate. 69 More critically, low levels of formal education in the BARMM have led to limits on workforce development.70 Non-Governmental Organisations have identified coastal **poverty71** **and relative economic depression72** as the **key factors** that may induce grievances and lead to a sense of relative deprivation and injustice for which affected individuals feel the need to rebel against. This then drives **individuals into engaging in illicit activities and political violence.**73 While comprehensive data on the youth unemployment rates in the region is unavailable, the high intensity of conflict and low formal education attainment reduces economic opportunities among youth. Based on the youth bulge theory, spaces with high youth population and high youth unemployment are more prone to civil conflict.74 The poor economic outlook, coupled with existing political grievances, facilitates the continuous recruitment of disgruntled youth **into militancy**.75 The coasts of the Sulu-Celebes Seas has observed high proportion of youth participating in Abu Sayyaf activities. This includes the infamous Ajang Ajang unit, which comprised sons of deceased Abu Sayyaf members. Much of the Abu Sayyaf militant strength is derived from its youth. Notable leaders like Isnilon Hapilon (49 years old when killed), leader of the Islamic State’s East Asian Wilayah, participated in militancy since he was 17.76 Amin Baco (35 years old when killed), who was touted to succeed Hapilon, participated in Islamist insurgencies since he was 16.77 Nonetheless, more research onto this topic is required to investigate the relationship between the high youth recruitment and economic deprivation at the region. The COVID-19 pandemic has decimated the economies of the TCA member states. Youth unemployment for the Philippines, Indonesia, and Malaysia has risen significantly as a result of measures to curtail the spread of the virus.78 This trend **worsens the existing socio-political grievances** of the population, thereby **increasing** youth **participation in regional militancy**.79 Ultimately, governments must adopt both hard and soft power to build lasting peace in the region.

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

Abhijit Singh 18. A former naval officer, Senior Fellow, heads the Maritime Policy Initiative at ORF. A maritime professional with specialist and command experience in front-line Indian naval ships, he has been involved the writing of India's maritime strategy (2007). “Maritime terrorism in Asia: An assessment” https://www.orfonline.org/research/maritime-terrorism-in-asia-an-assessment-56581/

The terrorism-piracy nexus and port security

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

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

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

ISPS code and littoral security

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

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

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

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

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

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

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

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

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

A next terrorist attack: Gauging the odds

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

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

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

#### And, Japan models US antitrust trust policy and must adopt a new standard to address 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 drives the Fourth Industrial Revolution.

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.

#### That solves disease – Japan is uniquely positioned to promote developments.

Forbes 18. Forbes Japan Contributor. “The Next Industrial Revolution Is Rising In Japan”. 5-21-18. https://www.forbes.com/sites/japan/2018/05/21/the-next-industrial-revolution-is-rising-in-japan/

Japan’s leadership in precision medicine How can Japan lead the way in directing the Fourth Industrial Revolution to bring us a better future? Among the many important contributions the WEF expects from Japan, advancing autonomous driving technology and precision medicine have drawn considerable attention. While Japan is already a leader in automotive technology, its prowess in precision medicine has received is less known. Precision medicine became widely known when former U.S. president Barack Obama mentioned the Precision Medicine Initiative in his 2015 State of the Union Address. The initiative describes precision medicine as "an emerging approach for disease treatment and prevention that takes into account individual variability in genes, environment, and lifestyle for each person." Precision medicine is focused on identifying approaches that are effective based on patients’ genetic, environmental, and lifestyle factors. Compared to today’s one-size-fits-all medicine, the new approach will allow us to predict more accurately which disease treatment and prevention strategies will work in which patient groups. Precision medicine has been used in non-communicable diseases (NCDs), such as obesity, as they become more common globally. These illnesses are thought to be caused by the complex interaction between genetics and the environment. To understand this, researchers are focused on biomarkers, which are substances in the blood that play a fundamental role in precision medicine. Based on big data analysis, researchers can identify biomarkers and estimate patient risk for disease. Thus, precision medicine requires data in both quantity and quality. Japan is expected to develop this ahead of other countries. Japan has been actively advancing precision medicine as seen in projects such as the National Cancer Center’s use of big data from cancer studies to find new biomarkers for clinical applications and the New Energy and Industrial Technology Development Organization’s (NEDO) efforts to develop biomarkers for stroke and kidney failure. One reason such projects have been quickly moving forward in Japan is its aging population and shrinking workforce. The aging society and increasing incidence of NCDs are giving Japanese researchers as well as corporations a big opportunity to apply precision medicine in a transformative manner.

#### Disease causes extinction---the risk is categorically underestimated.

Dennis Pamlin & Stuart Armstrong 15. \*Executive Project Manager Global Risks, Global Challenges Foundation. \*\*James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. February 2015, “Global Challenges: 12 Risks that threaten human civilization: The case for a new risk category,” Global Challenges Foundation, p.30-93. https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

A pandemic (from Greek πᾶν, pan, “all”, and δῆμος demos, “people”) is an epidemic of infectious disease that has spread through human populations across a large region; for instance several continents, or even worldwide. Here only worldwide events are included. A widespread endemic disease that is stable in terms of how many people become sick from it is not a pandemic. 260 84 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 3.1 Current risks 3.1.4.1 Expected impact disaggregation 3.1.4.2 Probability Influenza subtypes266 Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261 These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic. Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267 There are other grounds for suspecting that such a highimpact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme. Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275 Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade). Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics). Five important factors in estimating the probabilities and impacts of the challenge: 1. What the true probability distribution for pandemics is, especially at the tail. 2. The capacity of modern international health systems to deal with an extreme pandemic. 3. How fast medical research can proceed in an emergency. 4. How mobility of goods and people, as well as population density, will affect pandemic transmission. 5. Whether humans can develop novel and effective anti-pandemic solutions.

#### The next pandemic will be worse---action now is key.

Andy Plump 21. President for research and development at Takeda Pharmaceuticals and a cofounder of the Covid R&D Alliance. “Luck is not a strategy: The world needs to start preparing now for the next pandemic” 05-18-21. https://www.statnews.com/2021/05/18/luck-is-not-a-strategy-the-world-needs-to-start-preparing-now-for-the-next-pandemic/

As countries grapple with the worst global pandemic in a century, it’s hard to think about preparing for the next one. But if we don’t, it could be worse than Covid-19. Over the last 30 years, infectious disease outbreaks have emerged with alarming regularity. The World Health Organization lists an influenza pandemic and other high-threat viral diseases such as Ebola and dengue among the top 10 biggest threats to public health. The rate of animal-to-human transmission of viruses has been increasing, with the U.S. Centers for Disease Control and Prevention estimating that 75% of new infectious diseases in humans come from animals. These zoonotic infections can have profound effects on human life. The overall infection fatality rate is around 10% for severe acute respiratory syndrome (SARS), between 40% and 75% for Nipah virus, and as high as 88% for Ebola. While the infection fatality rate for Covid-19 is lower — likely less than 1% — the overall burden of death has been significantly higher since it has affected so many people, more than 160 million people as I write this. Luck is not a pandemic strategy Although the Covid-19 pandemic has been a human and health care disaster, by scientific measures the world was lucky this time. Covid-19 was far less lethal than its predecessors, less contagious than previous pandemic viruses, and we were able to quickly develop a cadre of effective vaccines. But luck is not a strategy. The same way the U.S. invests in and prepares for national defense, it must also prepare for another pandemic. Though the next viral outbreak cannot be prevented, the next pandemic can — but only with better preparation.

### Adv 3---FTC

#### Advantage 3 is the FTC---

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

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

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

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

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

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

How the FTC can tackle antitrust

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

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

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

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

How Congress can tackle antitrust

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

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

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

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

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

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

The best thing Khan can do? Nothing.

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

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

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

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

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

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

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

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

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

But the FTC’s levers are limited.

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

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

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

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

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

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

The FTC’s Rulemaking Authority

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

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

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

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

The Future of the FTC

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

#### Scamming causes extinction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Michael Spiro 20. JD from the University of Washington School of Law, an L.L.M. in Innovation and Technology Law from Seattle University School of Law. Corporate counsel at Smartsheet Inc. “The FTC and AI Governance: A Regulatory Proposal.” Seattle Journal of Seattle Journal of Technology Environmental & Innovation Law. Volume 10 Issue 1 Article 2. 12-19-2020. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1001&context=sjteil

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

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

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

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

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

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

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

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

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

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

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

Anders Sandberg et al. 08. Anders Sandberg is a James Martin Research Fellow at the Future of Humanity Institute at Oxford University. Jason G. Matheny is a PhD candidate in Health Policy and Management at Johns Hopkins Bloomberg School of Public Health. Milan M. Ćirković is senior research associate at the Astronomical Observatory of Belgrade. "How can we reduce the risk of human extinction?". Bulletin of the Atomic Scientists. 9-9-2008. https://thebulletin.org/2008/09/how-can-we-reduce-the-risk-of-human-extinction/

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

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

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

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

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

### Solvency

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

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

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

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

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

Introduction

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

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

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

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

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

#### Prioritizing worker welfare solves inequality

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

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

# 2AC

## FTC

### AT: 1NC 1

#### FTC ramping up antitrust enforcement now---vertical mergers.

Brent Kendall 9/15/21. Legal affairs reporter in the Washington bureau of The Wall Street Journal. “FTC Moves Toward Stricter Antitrust Scrutiny of Vertical Mergers.” https://www.wsj.com/articles/ftc-moves-toward-stricter-antitrust-scrutiny-of-vertical-mergers-11631741589

WASHINGTON—A divided Federal Trade Commission on Wednesday withdrew guidelines adopted just last year on how the government reviews so-called vertical mergers of companies that don’t directly compete with one another, the latest signal the agency is looking to escalate antitrust scrutiny of deal making.

FTC Chairwoman Lina Khan, during a virtual public meeting, said she was concerned that the recent Trump-era guidelines gave too much credit to business efficiencies and other potential upsides of vertical mergers while not fully recognizing the harms that some of those deals could create in the marketplace.

“I’m worried that the 2020 guidelines’ misguided discussion of the purported pro-competitive benefits of vertical mergers could become difficult to correct if relied on by courts,” Ms. Khan said.

Horizontal mergers that seek to combine direct rivals have long been considered potentially problematic, especially in concentrated markets. Vertical mergers integrate complementary companies, allowing the combined firm to expand into new or related businesses elsewhere in the supply chain. Those deals have often been viewed with far less skepticism, though the antitrust enforcement tide already had begun to turn even before appointees of President Biden took office.

During the Trump administration, the Justice Department sought to challenge a major vertical deal— AT&T Inc.’s acquisition of Time Warner—but lost in court.

The FTC this year voted unanimously to sue to block a vertical deal in which biotech company Illumina Inc. is acquiring Grail Inc., a company developing an early-detection blood test for cancer. Illumina has completed the deal but legal proceedings are continuing.

The FTC’s vote to withdraw the vertical-merger guidelines came on a 3-2 vote along partisan lines, with Democrats in the majority.

In dissent, Republican Commissioner Noah Phillips said the move was the latest of several examples where the FTC under new Democratic leadership was abandoning policies but not replacing them with anything new, providing less guidance for business and “knocking over guardrails that are intended to keep us from politicizing antitrust.”

The FTC shares antitrust enforcement authority with the Justice Department, and Wednesday’s move could, at least in the short term, create the impression of a diverging approach at the two agencies. The Justice Department didn’t join in the withdrawal but in a statement said it was conducting a careful review of the policy, had identified some areas of concern, and would collaborate with the FTC.

The commission in Ms. Khan’s early tenure—she was confirmed in June—already has sent several signals that it intends to crack down on more mergers. The FTC, for example, has begun warning some merging companies that if they join forces after a legally mandated waiting period, they “do so at their own risk,” raising the threat that the commission could continue to investigate their deals and potentially challenge them after they close.

#### Losers lose---defeats crush authority and demoralize staff.

David Mclaughlin 21. Reporter @ Bloomberg "Antitrust Crusader Lina Khan Faces a Big Obstacle: The Courts". Bloomberg. 6-23-2021. https://www.bloomberg.com/news/articles/2021-06-23/tech-antitrust-lina-khan-faces-courts-as-challenge-to-ftc-s-progressive-agenda

Once considered on the fringes of antitrust thinking, Khan and her acolytes—often dubbed the New Brandeis School, after Supreme Court Justice Louis Brandeis—are now firmly mainstream with Khan’s appointment as FTC chairwoman.

The FTC has suffered some stinging defeats recently. Last year, the agency lost a major monopoly case filed against chipmaker Qualcomm. In April, a unanimous Supreme Court eliminated a tool used by the FTC to recover money for defrauded consumers. Later this month, a federal judge in Washington is expected to rule on whether the agency’s monopoly lawsuit against Facebook can proceed.

Still, there’s widespread agreement that the status quo is no longer tenable. Over the last two decades, concentration has risen in industries across the economy. Some economists say dominant companies can use their market power to suppress wages, for example, exacerbating inequality. The worries are bipartisan. Republicans and Democrats alike are pushing for antitrust reforms to rein in the biggest tech platforms, and Khan was confirmed by the Senate with significant Republican support.

Big losses in the courts would eventually hurt Khan’s authority and demoralize her staff, says William Kovacic, a former FTC chairman who now teaches at George Washington University Law School. “You become like a sports team that is known to its opponents as unable to win,” he says. But defeats also could provide the foundation for the kind of sweeping antitrust legislation that Khan and her supporters want.

## States CP

### States CP---Core---2AC [S]

#### CP’s preempted---the NLRA forbids state labor action.

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.

#### Fails absent the aff---the DOJ and FTC undermine states.

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

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

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

## FTC CP

### CWS Key---2AC

#### Eliminating the CWS is key.

Open Market 19. “The FTC’s Crisis of Legitimacy: Comment from the Open Markets Institute on the FTC’s 3-2 clearance of the Staples-Essendant Merger”. https://www.openmarketsinstitute.org/publications/ftcs-crisis-legitimacy-comment-open-markets-institute-ftcs-3-2-clearance-staples-essendant-merger

The Open Markets Institute encourages the commission to follow the consequences of the merger in the office supply market, and to take remedial actions if necessary to ensure that competition can thrive. We have little hope that the FTC can restore its legitimacy as an enforcement or regulatory body until it gives up the highly politicized, unreliable, and dangerous pro-monopoly philosophy entrenched by Bork.

The FTC must return to its roots as the policeman of fair markets, not the government sword useful to the giant monopolist.

## Infrastructure

### AT: Kessler 10-12

#### Won’t pass---progressives want additional money but Sinema and Manchin block---AND even if it does pass, it’ll be super small---Emory reads blue.

1NC Kessler 10—12—(staff writer). 12 October 2021. Recharge News. “Joe Biden's climate credibility hangs by a thread as the clock ticks to Glasgow”. <https://www.rechargenews.com/energy-transition/cop26-joe-bidens-climate-credibility-hangs-by-a-thread-as-the-clock-ticks-to-glasgow/2-1-1079730>. Accessed 10/14/21.

President Joe Biden is racing the clock to win passage of two bills in Congress that would fund most of his ambitious climate agenda and allow him to present a concrete and credible package of legally-binding US energy transition plans at the fast-approaching COP26 conference.

Failure to do so would likely undermine Biden’s ability to keep a pledge that the US will lead again on climate after four years of Donald Trump, but also public confidence in his central argument that democratic governments are best placed to lead the fight against global heating.

With his prestige on the line at home and overseas, Biden is struggling to unite fractious Democrats behind the Senate-approved bipartisan $1 trn Infrastructure Investment and Jobs Act and Build Back Better – his even more expansive partisan $3.5 trn spending package for climate and other domestic priorities.

“We really need Congress to get its act together and pull through to pass these major investments. It would bring us into Glasgow on a very firm footing as a leader,” said Mike Williams, a senior fellow at the Center for American Progress, a prominent left-leaning public policy think tank in Washington, DC.

If fully funded and implemented, the bills’ policies and processes would slash US greenhouse gas emissions 45% from 2005 levels by 2030 – within striking distance of Biden’s 50-52% goal, which is consistent with the Paris agreement, according to an analysis by the staff of Senate Majority Leader Charles Schumer, a New York Democrat.

“With regulatory actions the administration could take, not to say easily as there is a lot of work to get there, we could meet that commitment,” said Williams, citing as examples tougher energy efficiency standards and a crackdown on emissions of methane, a powerful planet warming gas, at oil industry wellheads. State policies will also continue to play a key role.

Biden contends that the two pieces of legislation would set the US on a firm path toward his other headline climate-related targets: 30GW of offshore wind by 2030, a carbon-free electric grid by 2035 and net-zero emissions by 2050.

Democrats divided

However, the ascendent Democratic left in the House of Representatives so far won’t vote for the infrastructure bill even though it funds an unprecedented number of initiatives tied to carbon removal, clean energy development and grid upgrades, and will overhaul slow-moving federal permitting processes for transmission development.

Won't vote for it, that is, until Congress first passes elements of Build Back Better that they champion. These include hundreds of billions of additional dollars for climate action, and to develop US clean energy manufacturing capability to compete with China, as well as a historic expansion of federal programmes for public education, health, and social services.

The progressives largely represent safe Democratic districts and have held firm in their strategy to hold the infrastructure bill hostage. Party moderates from swing districts, however, face stiff challenges from Republicans in November 2022 mid-term elections. For that reason, they are anxious to showcase their support for legislation that promises to create numerous jobs and fuel economic development.

The moderates do have a key card to play – numbers. Given that Democrats have razor-thin majorities in the House and Senate, neither bill can pass without their support. No more than 20 Republicans are expected to vote for infrastructure, and they oppose Build Back Better in the belief that additional spending will add to record federal budget deficits and stoke inflation, now at the highest level in 30 years.

With the two sides deadlocked and publicly sniping at each other, the impasse threatens to also torpedo Biden’s domestic agenda when he badly needs a big political win given his already low national approval ratings.

“Everybody is frustrated. That’s part of government, being frustrated,” said Biden referring to the lack of tangible results thus far in the House legislative process. He sought to project confidence that it will eventually bear fruit.

“It doesn’t matter whether it’s in six minutes, six days, or in six weeks. We’re going to get it done,” he said, without referring to the start of COP26 on 31 October. “There is no reason why both these bills couldn’t pass independently except that there are not the votes to do it that way. It’s a simple proposition. I support both, and I think we can get them both done.”

After dithering with the nation watching, Biden sided with the party’s left flank and embraced its dual-track approach, calling it “just reality.” However, in a concession to moderate Democrats, he told progressives they will need to trim the larger bill from $3.5trn to reportedly between $1.9trn and $2.3trn.

Even those lower numbers are too high for Senators Kyrsten Sinema (Arizona) and Joe Manchin (West Virginia), who will determine the fate of Build Back Better in the upper chamber. Biden remains hopeful the harder-line Manchin will accept spending more than $1.5trn that he earlier proposed. “Sure sounds like he’s moving. I hope that’s the case,” he said.

Finding the hard middle ground

As Biden looks to broker a compromise, his challenge with climate is to protect as much funding as possible to retain credibility on the issue in Glasgow. How this will play out is unclear. For starters, infrastructure is off-limits. He spent a lot of political capital this summer winning passage in the Senate and the bill is popular with most Americans.

### AT: PC Solves Sinema/Manchin---2AC

#### Biden can’t and won’t use PC to move Sinema or Manchin

Alexander Bolton 10/15/21. The Hill "Biden's soft touch with Manchin, Sinema frustrates Democrats". TheHill. 10-15-2021. https://thehill.com/homenews/senate/576861-bidens-soft-touch-with-manchin-sinema-frustrates-democrats

A growing number of Senate Democrats are getting impatient with President Biden’s kid-glove approach to negotiating with Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.).

Biden’s approach has involved a lot of facetime and personal attention, but little in the way of public concessions or discernible movement.

After talks on the scale and scope of the Democrats’ $3.5 trillion reconciliation spending bill stalled in September, Democratic senators expressed hope that Biden’s personal involvement would yield a breakthrough.

Yet after several one-on-one meetings between the president, Manchin and Sinema, Democrats don’t seem any closer to agreeing on a framework than a month ago.

This is fueling frustration among senators who see this Congress as a once-in-a-generation opportunity to pass bold reforms as the House and possibly the Senate are in danger of flipping to Republicans in the 2022 midterm election.

“Both of them have left the president hanging,” grumbled one Democratic senator who requested anonymity to vent about the lack of progress since Biden reached out personally to Manchin and Sinema.

Biden met one-on-one with Sinema on the morning of Sept. 15 and then with Manchin later that day. He also held separate meetings with the two senators on Sept. 28.

Little news came out of any of the meetings other than a report that Sinema issued an ultimatum to Biden, warning him she wouldn’t back the reconciliation bill if the $1 trillion bipartisan infrastructure bill was delayed or failed in the House.

“If [Biden] had been able to walk away and say, 'I have a commitment to $2 trillion from both [senators] and now we’re working on the details,' it would have been like a sense of momentum. ‘The president’s magic of the Oval Office comes in once again.’ But instead it was like, ‘There’s no magic in the Oval Office right now,’” the senator who spoke to The Hill said of the meetings.

Some Democratic senators think Biden’s deference to Manchin and Sinema has only emboldened them to dig in their heels even more.

## Protectionism

### Extraterritoriality---Core---2AC

#### 1. No link---antitrust laws don’t create protectionism – boslter international trade

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

4. The U.S. Agencies require relief sufficient to eliminate identified anticompetitive harm that has the requisite connection to U.S. commerce and consumers, even if this means reaching assets or conduct in a foreign jurisdiction.7 For example, in the merger context, a company may be required to divest a manufacturing plant outside of the U.S. in order to help preserve competition in the U.S. At the same time, Section 5.1.5 of the International Guidelines sets out a balanced standard for the Agencies’ reliance on extraterritorial remedies that “limits overly broad extraterritorial reach, while recognizing and allowing for effective enforcement.” 8 To this end, the International Guidelines provide that: The Agencies seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts. An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency’s international comity analysis.9 5. This statement sets out a number of important guiding principles. First, the Agencies always look first to resolve anticompetitive concerns through domestic remedies. 6. Second, the Agencies will seek an extraterritorial remedy only when: (1) the extraterritorial remedy is needed to address harm or threatened harm to U.S. commerce and consumers, and (2) such a remedy is consistent with the Agency’s comity analysis. Thus, the Agencies’ general practice is to seek an effective remedy that is restricted to the United States, which the Agencies believe is the best approach. Only when a domestic remedy cannot effectively redress the harm or threatened harm to U.S. commerce or consumers will the Agencies consider broader remedies that have extraterritorial effect. 7. The International Guidelines explain that comity can be a consideration in the Agencies’ remedy determinations. Comity “reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining ‘the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.’”10 The U.S. Supreme Court has held that no conflict exists for purposes of international comity analysis if a person subject to regulation by two nations can comply with the laws of both.11 In addition, even where there is no direct conflict, “the Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law.” 12 Comity has not been a significant factor in the Agencies’ remedy determinations involving more than one sovereign because of the high degree of international convergence in competition law and policy. Convergence has reduced the number of direct conflicts, including on remedies. 8. Third, the Agencies seek to avoid conflicts with remedies contemplated by their foreign counterparts, notably through cooperation. The International Guidelines specifically provide that the Agencies “may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting remedies.”13 Cooperation “can improve substantive analyses and ensure that investigations and remedies are as consistent and predictable as possible, which improves outcomes, and reduces uncertainty and expense to firms doing business across borders.”14 Divergent remedies have the potential to impair firms’ abilities to compete globally and can undermine competition enforcement efforts. In many cases, particularly those involving extraterritorial remedies, cooperation and coordination are important to an effective outcome and improve understanding of each of the cooperating authorities’ needs and proposed decisions. 15 Information exchange among enforcers investigating the same conduct enables the Agencies to understand each other’s decisions in a case and any impact on U.S. commerce. 16 Cooperation has also facilitated informal and practical approaches to limiting duplication, including by one authority’s closing of its investigation without remedies after taking another authority’s remedy into account. 17 9. Consequently, if an extraterritorial remedy is contemplated in a particular case, these principles, as provided in the International Guidelines, allow the Agencies to ensure that the remedy is appropriately tailored to address the identified competitive harm to U.S. commerce and consumers without unnecessarily conflicting with the laws, policies, or remedies of foreign jurisdictions. 10. Specific examples of Agency cooperation on remedies are discussed at Part VI.

#### 2. OR decades of antitrust thump.

Virginia del Aguila 05. “Establishing Global Competition Standards: Achievable Mission or Utopia?” Centro de Estudios Economicos de Regulacion. Universidad Argentina de la Empresa. Working Paper N 20. April 2005. <https://www.uade.edu.ar/DocsDownload/Publicaciones/4_228_1634_WPS020_2005.pdf>

The competition authorities in the US have had **little compunction** about enforcing their antitrust laws against overseas companies. In this sense, they have in some occasions demanded that commercial documents located abroad should be handed over, and the **Courts have even issued final orders** requiring that foreign companies should **change their commercial practices or restructure their industry**41. Nonetheless, it should be noted that the 1994 International Antitrust Enforcement Assistance Act (IAEAA)42 is intended to improve the ability of the US enforcement agencies to obtain evidence located abroad by providing for reciprocal agreements to be entered between the US and other countries to facilitate the exchange of information, including confidential information. Notwithstanding, due to the fact that certain antitrust offences are criminal under US law and, thus, it is possible for individuals to be sentenced to terms of imprisonment, for the moment only an agreement between the US and Australia was concluded under the IAEAA.

#### 4. no nation fears overuse of antitrust ---it combats international anti-competitive conduct.

Brendan Sweeney 07. BCom, LLB (Melbourne); PhD (Monash); Barrister and Solicitor of the Supreme Court of Victoria; Senior Lecturer, Department of Business Law and Taxation, Faculty of Business and Economics, Monash University. "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?" [2007] MelbJlIntLaw 2; (2007) 8(1) Melbourne Journal of International Law 35. http://www.austlii.edu.au/au/journals/MelbJIL/2007/2.html#fn1

Extraterritorialism, however, **can have benefits** **even where applied in an uncooperative environment.** Extraterritorialism may produce **beneficial spill-over effects** upon which other states, often not in a position to act themselves, are **able to take a free ride.** Extraterritorialism also largely **negates what incentives exist** for a regulatory race to the bottom, although the danger of such a race should not be overstated. For those states able to act extraterritorially, applying domestic laws to foreign conduct enables the state to impose competition laws **tailored to its own needs.** As long as there is no global competition agreement, extraterritorialism will continue to remain an important mechanism in **combating international anti-competitive conduct.** However, it has to be recognised that extraterritorialism is, and will remain, controversial, and that it is not a panacea for global competition problems.

# 1AR

## FTC

### FTC Tradeoff---UQ---1AR

#### The FTC’s ramping up antitrust enforcement now beyond the scope of existing antitrust law

Caitlin Styrsky 8/17/21. Staff writer at Ballotpedia. “Checks and Balances: FTC expands interpretation of its antitrust enforcement authority.” https://news.ballotpedia.org/2021/08/17/checks-and-balances-ftc-expands-interpretation-of-its-antitrust-enforcement-authority/

The Federal Trade Commission (FTC) on July 1 voted 3-2 to broaden its interpretation of the commission’s Section 5 authority, which authorizes the FTC to investigate and challenge what it deems “unfair methods of competition in or affecting commerce.” The change could allow the agency to expand enforcement proceedings against companies that don’t expressly violate federal antitrust statutes.

The new interpretation departs from the commission’s 2015 precedent, established through internal guidance, that relied on the consumer welfare standard to determine what constitutes antitrust activity. According to the consumer welfare standard, only companies that artificially raise prices qualify as monopolies for the purposes of FTC enforcement. The FTC did not pursue companies via this standard if enforcement through the Sherman Act or the Clayton Act could address the competitive harm.

Under the FTC’s broadened interpretation of its authority, the commission can issue civil penalties to challenge what it deems to be anti-competitive behavior regardless of whether the behavior violates federal antitrust statutes. The change could allow the FTC to bring enforcement proceedings against tech companies that do not qualify as monopolies but that, in the opinion of FTC Chair Lina Khan, have been alleged to have exhibited anti-competitive practices.

“Withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today’s markets,” wrote Khan in a statement. “Section 5 is one of the Commission’s core statutory authorities in competition cases; it is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition.”

## States

### Preemption---1AR

#### 2. Courts---they strike it down under the Supremacy Clause.

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

#### 3. Congress---otherwise states run with it to gain strategic advantages which creates a confusing patchwork of regulations.

Justin W. Aimonetti & Christian Talley 19. \*\*Judicial Law Clerk at U.S. Courts of Appeals with a JD from the University of Virginia School of Law, 2020. \*\*JD from the University of Virginia School of Law, 2020. “Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes.” Stanford Law Review Online, Volume 72, 28-41.

H. The Federal Solution: Proposals and Their Benefits A federal law preempting state experimentation would circumvent potential problems arising from the piecemeal state law approach.4s The principal problem of the state-by-state approach is each state's ability to gain a competitive edge over its sister-states. For instance, a state with a premier sporting university could pass even more favorable compensation laws attracting the best athletes to its collegiate teams. Thus, the first benefit of preemption is that a "federal law would set the rules for all states.'46 Nationwide legislation solves the potentially chaotic state-by-state approach as it compels all states to "play by the same set of rules,"47 preventing any one state from gaining a strategic advantage. Given that many states are ready to enact similar, albeit not identical, laws to California's Act,48 federal preemption is likely critical to ensure national uniformity. A second, crucial benefit of federal legislation is its ability to sidestep the purview of federal antitrust law. Section 1 of the Sherman Antitrust Act outlaws any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."49 Unlike federal law, the NCAA's rules, including the prohibition on student- athlete compensation, are not immune from antitrust scrutiny.so As one commentator has aptly put it, the NCAA's "concerted effort to destroy the free market for recruiting student-athletes is subject to scrutiny under section 1 of the Sherman Act."si In fact, the NCAA has violated antitrust law a number of times-including one high-profile case before the Supreme Court.52 And in recent years, the Ninth Circuit has grappled with student-athlete litigation in the antitrust context as well.53 Indeed, some observers believe the NCAA rules that "fix"student-athletes' compensation "at the cost of attendance ... amount to a restraint on competition in violation of the Sherman Antitrust Act."54 One commentator has even claimed that "the NCAA's principle of amateurism likely violates section 1 of the Sherman Act by artificially prohibiting student-athlete pay and by eliminating from the college sports marketplace those colleges that wish to recruit top student-athletes."ss From that perspective, "the NCAA has a choice-it can either proactively rewrite its rulebook in a manner that complies with the spirit of U.S. antitrust law, or it can wait until a court mandates such changes." 56 Yet the most sensible solution may be a third option-for Congress to pass a federal law that addresses this messy issue. Pending federal legislation promises to do just that. In March 2019, Congressman Mark Walter introduced H.R. 1804, entitled the "Student- Athlete Equity Act," a terse bill that merely allows college athletes to profit off their "name, image, or likeness."57 Even in light of the NCAA's announcement to consider a rule change, congressional sponsors of the Student Athlete-Equity Act plan to forge ahead. In the words of one sponsor, "[t]he NCAA is on the clock, and while they are, we're going to keep working towards the passage of the Student-Athlete Equity Act to make sure their words are forced into action."s8 This perceived need for immediate reform has generated rare bipartisan support. Congressman Matt Gaetz, a Florida Republican, recently tweeted, "[t]he @NCAA has devised a system where predominantly young, black adult student-athletes create value at huge cost to their bodies. Then, predominantly old, white administrators see the benefit. BS!"59 Likewise, Senator Chris Murphy, a Democrat from Connecticut, agreed that athletes should be able to commercialize their talents when he argued in a recent publication that the "current system does more to advance the financial interests of broadcasters, apparel companies, and athletic departments than it does for the student- athletes who provide the product from which everyone else profits."6o After a meeting with Senator Murphy, Senator Marco Rubio also threw his weight behind national reform. He opined that there is a need for "a standard across the country" because "50 individual state laws would make it a chaotic mess and endanger college athletics."61 Given the consensus that national reform is necessary, the remaining question is precisely which reforms are most sensible. The solutions currently proposed by legal scholars, sports analysts, and the press are legion. They include (1) allowing student-athletes to sign endorsement deals,62 (2) receiving payment for offseason play,63 (3) permitting student-athletes to "hire an agent or business manager,"64 (4) requiring that student athletes receive a "minimum salary" of "325,000 per player in each sport,"65 and (5) providing a medicine-specific fund for student-athletes "to pay for health care after their careers in college athletics are over."66 Each proposal purports to balance the two key interests at stake-equity, on the one hand, and the preservation of amateurism, on the other. But in our view, most of these proposals miss the mark. Endorsement deals naturally would concentrate remuneration to a few marquee players in football and basketball, leaving behind students competing either in less noteworthy positions or in less lucrative sports. A minimum salary would abandon the pretense of amateurism, and it is difficult to see how most athletes could generate significant funds by playing in the offseason. And funds accessible only years later would fail to satisfy student-athletes' immediate financial needs.67 For our part, we would suggest-at minimum-a two-tiered system to protect the broadest base of athletes. First, athletes would be eligible for a tax- exempt,68 means-tested cost-of-living stipend disbursed on a biweekly or monthly basis, with the aim ofensuring that no athlete is unable to pay for basic essentials.69 Such a stipend would be largely self-funding, derived from the overall revenues colleges and universities receive from their athletic programs. The more lucrative sports would subsidize the less lucrative ones, promoting a minimum social safety net for student-athletes across various sports.70 Second, athletes would be entitled to establish a trust they could access after graduating or exhausting their eligibility, in which they could deposit the proceeds from what they might earn off their name, image, or likeness.71 Though marquee players would be the primary beneficiaries of the trust system, a stipend would ensure minimum fairness, while the possibility of trusts would prevent the inequity of everyone but athletes profiting off their name, image, and likeness. And the trust system would better preserve the spirit of amateurism, preventing athletes from receiving compensation directly tied to their athletic performance as they completed their academic studies. This two-tiered system, in our view, balances amateurism and equity, ensuring student-athletes' ability to afford minimum essentials while permitting marquee players to realize the rewards of their athletic gifts. Though we are mindful that the specific content of a congressional solution will ultimately be determined by the deliberative give-and-take of the lawmaking process, one thing remains certain: For Congress's bill to create truly uniform, national standards, it must preempt competing state statutes. Our strong recommendation is that federal legislation contain an express preemption clause, clearly and "explicitly withdrawing ... from the states"72 the power to enact regulations on student-athlete compensation. Although Congress presumptively has the power to regulate such compensation under the Commerce Clause,73 the tandem concern of preemption "remains a notorious doctrinal labyrinth."74 Accordingly, Part III explains how Congress should communicate its preemptive intent.

### Interstate Enforcement---1AR

#### State-based enforcement lets interstate effects slide.

Michael S. Greve 05. Professor at the George Mason University School of Law. “Cartel Federalism - Antitrust Enforcement by State Attorneys General.” University of Chicago Law Review, vol. 72, no. 1, Winter 2005, p. 104-105.

In contrast, when anticompetitive conduct has been officially sanctioned by another state, state antitrust enforcers have consistently failed to act. Consider the Parker scenario, where one state's anticompetitive regulatory regime imposes costs on consumers and producers in other states: do state antitrust enforcers complain? I cross-checked the Posner-DeBow list against reported cases that rely on or discuss Parker or California Retail Liquor Dealers Association v Midcal Aluminum, Inc," the basic modern formulation of Parker immunity. I assume that an antitrust defendant with a plausible state action defense will assert it and, moreover, that a court, in accepting or rejecting the defense, will cite to either Parker or Midcal. Not a single case on the Parker list, and only two cases on the Midcal list of 241 cases, can be found in the Posner-DeBow list. Those two cases were brought against purely in-state defendants.2 With one arguable exception," I could not find a parens patriae case in which out-of-state defendants could assert a colorable state action defense. Thus, although states liberally enforce antitrust laws against out-of-state producers, they fail to do so when out-of-state producers act (arguably) with another state's official permission.n5

## Politics

### AT: Reconciliation---Won’t Pass---1AR

#### No deal or PC not key

Jeff Stein, 10-9-2021, "Biden faces shrinking timetable to salvage his agenda," Washington Post, https://www.washingtonpost.com/us-policy/2021/10/09/biden-faces-shrinking-timetable-salvage-his-agenda/

As they battle over the size of the legislation, Democrats are also debating how to structure the benefit programs so they fit under the final cap.

Manchin argues forcefully that Democrats should impose income limits on programs like the child tax credit, so that wealthier households do not receive benefits they may not need. But if the child tax credit is adjusted that way, it could violate Biden’s pledge not to raise taxes on households earning less than $400,000 per year, while adding administrative complications to a program still in its infancy.

Some liberal lawmakers, in turn, have floated the idea of funding some new programs only for a set number of years, which in theory would lower their costs. The liberals hope, however, that the programs will prove so popular that Congress would be forced to extend them later. But some centrist lawmakers are balking at that accounting strategy.

Biden’s challenge is that both wings of the Democratic Party believe they have already been forced to yield too much. Centrists complain that the president has taken the liberals’ side by tying the infrastructure package to the far more liberal safety net bill.

“If Biden thinks he’s adopted a middle course that should leave people equally happy, he has misjudged the situation,” said Bill Galston, a former domestic policy official in President Bill Clinton’s administration. “The prevailing view of the centrists is the president has tilted decisively in the other direction. There’s not a lot of joy in Mudville.”

Liberals are rankled that, after they agreed to cut the size of the safety net package significantly, to $3.5 trillion, they are now being told they must reduce it much more.

“There is nothing superfluous in the agenda. Every dollar is needed to deliver millions of good-paying jobs, affordable child care and health care, and a clean energy future,” said Lindsay Owens, executive director of Groundwork Collaborative, a left-leaning group.

If Biden has one weapon in his arsenal, it’s the recognition by many Democrats that if his agenda collapses, it could be devastating for the party in the 2022 midterm elections and beyond.

Democrats, above all else, are trying desperately to avoid what happened with President Donald Trump’s pledge to repeal the Affordable Care Act in 2017. That effort bogged down the congressional Republican majority for months, and when then-Senate Majority Leader Mitch McConnell (R-Ky.) finally brought a repeal provision to the floor for a vote, it was defeated in a major embarrassment.

#### Infrastructure bill doesn’t go far enough

Cat Zakrzewski, 8-14-2021, "The Senate’s $1 trillion infrastructure bill includes funding to secure Americans’ water systems and power grids from cyberattacks," https://www.washingtonpost.com/technology/2021/08/14/cybersecurity-infrastructure-senate-legislation/

Yet least one House lawmaker has raised concerns that the measures in the Senate infrastructure package don’t go far enough. He thinks that there should be tougher cybersecurity requirements for entities that take infrastructure funding.

“The cybersecurity funding in the Senate infrastructure bill is a good start, but we’ve got a long ways to go in our battle to secure our nation against the full range of cyberthreats we face,” said Rep. Jim Langevin (D-R.I.), co-chair of the Congressional Cybersecurity Caucus. “I’d like to see broad requirements that all technology procured using these federal funds meet minimum security requirements and that money be set aside for security monitoring after it’s installed. Connected infrastructure is going to help the economy and our environment, but only if we can secure it.”

Public works officials welcomed the cybersecurity provisions of the Senate bill, noting they often struggle to balance defending their systems against cyber attacks with the daily demands of keeping Americans’ lights on and faucets flowing.

“Public works makes normal happen, and cybersecurity is woven into that in every different respect,” said Mark Ray, the director of public works and city engineer for Crystal, Minn., who also represents the American Public Works Association on the National Homeland Security Consortium, which convenes public and company officials to discuss emergency responses.

Ray said his 26-person public works staff doesn’t have the time or expertise to dig into every potential cyber risk, and they look to outside experts and the federal government for direction. “The more that we understand that, the more that we understand the connection and work to improve and secure everything, it will just benefit everybody across the board,” he said.

Others warned that making more money available to address cybersecurity is just a first step, and its efficacy will hinge on how government agencies implement the funding.

“Just because we made money eligible doesn’t mean the problem is solved,” said Shailen Bhatt, the president and chief executive of ITS America, a trade group representing transportation companies. “It’s sort of the beginning of the new frontier of this battle.”

The bill also could have gone further in addressing some of the cybersecurity concerns regarding the water supply, said Mark Montgomery, the executive director of the Cyberspace Solarium Commission, which is tasked with developing a strategic approach to defending the United States from cyberattacks. He said the legislation should have included grants specifically for cybersecurity, rather than broad grants that can also be used to shore up the systems against weather events and other risks.

He said the legislation also should have done more to get the U.S. Environmental Protection Agency more focused on managing cybersecurity risks.

“I think it falls short,” Montgomery said in an interview.

### No Cyberattacks---2NC

#### No cyber impact---every scenario is empirically denied.

James Andrew Lewis 18 senior vice president at the Center for Strategic and International Studies, Ph.D. from the University of Chicago, January 2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/180108_Lewis_ReconsideringCybersecurity_Web.pdf>, p. 7-11

The most dangerous and damaging attacks required resources and engineering knowledge that are **beyond the capabilities of nonstate actors**, and those who possess such capabilities consider their use in the context of some larger strategy to achieve national goals. Precision and predictability—always desirable in offensive operations in order to provide assured effect and economy of force—suggest that the risk of collateral damage is smaller than we assume, and with this, so is the risk of indiscriminate or mass effect. State Use of Cyber Attack Is Consistent with Larger Strategic Aims Based on a review of state actions to date, cyber operations give countries a new way to implement existing policies rather than leading them to adopt new policy or strategies. State opponents use cyber techniques in ways consistent with their national strategies and objectives. But for now, cyber may be best explained as an addition to the existing portfolio of tools available to nations. Cyber operations are ideal for achieving the strategic effect our opponents seek in this new environment. How nations use cyber techniques will be determined by their larger needs and interests, by their strategies, experience, and institutions, and by their tolerance for risk. Cyber operations provide unparalleled access to targets, and the only constraint on attackers is the **risk of retaliation**—a risk they manage by **avoiding actions that would provoke** a damaging response. This is done by staying below an implicit threshold on what can be considered the use of force in cyberspace. **The reality of cyber attack differs greatly from our fears**. Analysts place a range of hypothetical threats, often accompanied by extreme consequences, before the public without considering the probability of occurrence or the likelihood that opponents will choose a course of action that does not advance their strategic aims and creates grave risk of damaging escalation. Our opponents' goals are not to carry out a cyber 9/11. While there have been many opponent probes of critical infrastructure facilities in numerous countries, the number of malicious cyber actions that caused physical damage can be **counted on one hand**. While opponents have probed critical infrastructure networks, there is no indication that they are for the purposes of the kind of crippling strategic attacks against critical infrastructure that dominated planning in the Second World War or the Cold War. Similarly, the popular idea that opponents use cyber techniques to inflict cumulative economic harm is not supported by evidence. Economic warfare has always been part of conflict, but there are no examples of a country seeking to imperceptibly harm the economy of an opponent. The United States engaged in economic warfare during the Cold War, and still uses sanctions as a tool of foreign power, but few if any other nations do the same. The intent of cyber espionage is to gain market or technological advantage. Coercive actions against government agencies or companies are intended to intimidate. **Terrorists do not seek to inflict economic damage**.

The difficulty of wreaking real harm on large, interconnected economies is usually ignored. Economic warfare in cyberspace is ascribed to China, but China's cyber doctrine has three elements: control of cyberspace to preserve party rule and political stability, espionage (both commercial and military), and preparation for disruptive acts to damage an opponent's weapons, military information systems, and command and control. "Strategic" uses, such as striking civilian infrastructure in the opponent's homeland, appear to be a lower priority and are an adjunct to nuclear strikes as part of China's strategic deterrence. Chinese officials seem more concerned about accelerating China's growth rather than some long-term effort to undermine the American economy.6 The 2015 agreement with the United States served Chinese interests by centralizing tasking authority in Beijing and ending People's Liberation Army (PLA) "freelancing" against commercial targets. The Russians specialize in coercion, financial crime, and creating harmful cognitive effect—the ability to manipulate emotions and decisionmaking. Under their 2010 military doctrine on disruptive information operations (part of what they call "New Generation Warfare"). **Russians want confusion, not physical damage**. Iran and **No**rth **Ko**rea use cyber actions against American banks or entertainment companies like Sony or the Sands Casino, but their goal is political coercion, not destruction. None of these countries talk about death by 1000 cuts or attacking critical infrastructure to produce a cyber Pearl Harbor or any of the other scenarios that dominate the media. The few disruptive attacks on critical infrastructure have focused almost exclusively on the energy sector. Major financial institutions face a high degree of risk but in most cases, the attackers' intent is to extract money. There have been cases of service disruption and data erasure, but these have been **limited** in scope. Denial-of-service attacks against banks impede services and may be costly to the targeted bank, but **do not have a major effect on the national economy**. In all of these actions, **there is a line that countries have been unwilling to cross.** When our opponents decided to challenge American "hegemony," they developed strategies to circumvent the risks of retaliation or escalation by ensuring that their actions stayed below the use-of-force threshold—an imprecise threshold, roughly defined by international law, but usually considered to involve actions that produce destruction or casualties. **Almost all cyber attacks fall below this threshold, including, crime, espionage, and politically coercive acts**. This explains why the decades-long quest to rebuild Cold War deterrence in cyberspace has been fruitless. It also explains why we have not seen the dreaded cyber Pearl Harbor or other predicted catastrophes. Opponents are keenly aware that launching catastrophe brings with it immense risk of receiving catastrophe in return. States are the only actors who can carry out catastrophic cyber attacks and they are **very unlikely** to do so in a strategic environment that seeks to gain advantage without engaging in armed conflict. Decisions on targets and attack make sense only when embedded in their larger strategic calculations regarding how best to fight with the United States. There have been thousands of incidents of cybercrime and cyber espionage, but only a **handful** of true attacks, where the intent was not to extract information or money, but to disrupt and, in a few cases, destroy. From these incidents, we can extract a more accurate picture of risk. The salient incidents are the cyber operations against Iran's nuclear weapons facility (Stuxnet), Iran's actions against Aramco and leading American banks, North Korean interference with Sony and with South Korean banks and television stations, and Russian actions against Estonia, Ukrainian power facilities, Canal 5 (television network in France), and the 2016 U S. presidential elections. **Cyber attacks are not random**. All of these incidents have been part of larger geopolitical conflicts involving Iran, Korea, and the Ukraine, or Russia's contest with the United States and NATO. There are commonalities in each attack. All were undertaken by state actors or proxy forces to achieve the attacking state's policy objectives. **Only two caused tangible damage**; the rest created coercive effect, intended to create confusion and psychological pressure through fear, uncertainty, and embarrassment. **In no instance were there deaths or casualties**. **In two decades of cyber attacks, there has never been a single casualty**. This alone should give pause to the doomsayers. **Nor has there been widespread collateral damage**.