# 1NC

### T Anticompetitive

#### Anticompetitive practices reduce competition and lead to higher prices

FTC No Date – Federal Trade Commission, “Anticompetitive Practices,” https://www.ftc.gov/enforcement/anticompetitive-practices

Anticompetitive Practices

The FTC takes action to stop and prevent unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or less innovation. Anticompetitive practices include activities like price fixing, group boycotts, and exclusionary exclusive dealing contracts or trade association rules, and are generally grouped into two types:

agreements between competitors, also referred to as horizontal conduct

monopolization, also referred to as single firm conduct

The FTC generally pursues anticompetitive conduct as violations of Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition” and “unfair or deceptive acts or practices.”

#### Violation – they explicitly designate new practices as competitive that go beyond price levels or reduced competition

#### Vote neg for limits and ground- any other interp allows any new practice to be classified as anticompetitive which allows bidirectoinally banning unproductive corporate behavior

### T Mergers

#### Practices are ongoing conduct---mergers violate---the merger itself is a one-off event, even if they’re evaluated because of their effects on ongoing practices.

Stanley Mosk 88, Judge, California Supreme Court, “Cal. ex rel. Van De Kamp v. Texaco,” 46 Cal. 3d 1147, Lexis [italics in original]

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent business *practice* . . . ." ( Bus. & Prof. Code, § 17200, italics added.) In so doing it effectively requires what the court variously described in the leading case of Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817], as "a 'pattern' . . . of conduct" ( id. at p. 108), "ongoing . . . conduct" ( id. at p. 111), "a pattern of behavior" ( id. at p. 113), and, "a course of conduct" (ibid.).

What the Attorney General challenges in this action is the Texaco-Getty merger. Under the Barquis court's construction of the statute, however, the merger itself cannot be characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act. That the complaint, under [\*\*\*\*156] the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger.

#### Voting issue---forcing AFFs to regulate ‘patterns of conduct’ locks in NEG defenses of ways of doing business---any other interp allows review of individual transactions and decisions which are impossible to negate.

### States CP

#### The attorney generals of 50 states and relevant territories, through the National Association of Attorneys General’s Multistate Antitrust Task Force, should adopt the integrity of the competitive process as a substantial priority of competition policy.

#### A multistate AG antitrust enforcement over state antitrust statutes solves the aff---causes federal follow-on

Artega 19 (Juan A. Arteaga is an experienced antitrust attorney and a former Deputy Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division, The Role of US State Antitrust Enforcement, Global Competition Review, 11-19, <https://www.lexology.com/library/detail.aspx%3Fg%3Dd423301d-f4d1-4550-a99c-1880869e67e7+&cd=11&hl=en&ct=clnk&gl=us>, y2k)

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition. In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions. This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage. Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process. As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States. This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations. Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices. These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints. The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’. No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications. To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices. During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC. State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general have sued to block the transaction even though the DOJ, along with seven state attorneys general, have approved the deal after securing certain structural and behavioural remedies. After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who has been leading the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’

The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees)in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.

None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support. In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.

After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.

Given that companies will increasingly have to engage with state attorneys general in a meaningful manner with respect to antitrust matters, this chapter discusses key issues related to state antitrust enforcement in the United States. Specifically, this chapter discusses:

the federal and state antitrust laws under which state enforcers operate;

the processes through which state enforcers coordinate with each other and their federal counterparts;

the opportunity for coordination and conflict between state enforcers and private counsel during litigation;

strategic and practical considerations when engaging with state attorneys general; and

certain noteworthy enforcement actions that state enforcers have recently prosecuted.

Statutory regime governing US state antitrust enforcement

Civil enforcement of federal antitrust laws

Enforcement actions on behalf of state governmental entities

Under the federal antitrust laws, state attorneys general have the express authority to bring civil actions on behalf of their state, municipalities, and governmental entities for harm suffered when directly purchasing goods or services. In bringing such actions, state attorneys general can seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees.

In actions seeking monetary relief, state attorneys general typically allege that the state plaintiffs were forced to pay higher prices by an unlawful horizontal conspiracy, such as a price-fixing or bid-rigging scheme, and seek to recover the overcharges. In some cases, state attorneys general have sought to recover damages arising out of anticompetitive unilateral conduct, such as overcharges paid by state governmental entities due to a defendant’s actual or attempted monopolisation of a specific market.

In seeking injunctive relief, state attorneys general often argue that such relief is proper because the business practice or transaction in question – in addition to harming the state plaintiffs – has or will cause injury to the state’s general economy. While general harm to a state’s economy can serve as a basis for injunctive relief, state attorneys cannot base their request for damages on such harm.

Parens patriae enforcement actions

A well-settled principle in the United States’ legal system is that ‘the States have a quasi sovereign interest in protecting their citizens from ongoing economic harm’. Consequently, the federal antitrust laws expressly authorise state attorneys general to file parens patriae actions in federal court that seek to redress the harm suffered by their citizens due to federal antitrust violations. In providing state attorneys general with parens patriae authority, the federal antitrust laws permit state antitrust enforcers to seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees. State attorneys general have been empowered to seek such broad and substantial relief on behalf of their citizens to allow them ‘to deter further economic harm and to obtain relief for the injury inflicted on their economies and their citizens’.

In exercising their parens patriae authority, state attorneys general have often sought to protect their citizens and state economies from the harm caused by anticompetitive business practices. For example, in the e-Books Litigation, 33 state attorneys general alleged that Apple, Inc and various book publishers unlawfully conspired to fix the prices of electronic books, which resulted in their citizens paying higher prices and harm to their states’ general economies. Ultimately, these state attorneys general, working alongside private class counsel, secured settlements from the defendants that provided nearly US$600 million in direct refunds to their citizens. In a pending lawsuit brought against various manufacturers of generic pharmaceuticals, 44 state attorneys general have alleged that the defendants unlawfully conspired to fix the prices for numerous generic drugs, which forced their states and citizens to pay billions of dollars in overcharges, as well as significantly harmed their states’ general economies.

State attorneys general have also invoked their parens patriae authority to protect their citizens and state economies from the harm caused by anticompetitive transactions. For instance, in their pending challenge to T-Mobile’s proposed acquisition of Sprint, nearly 20 state attorneys general have alleged that the transaction will result in their residents paying higher prices for lower quality mobile phone services as well as harm to their states’ general economies. Likewise, the state attorneys general that joined the DOJ’s successful challenges to the proposed Anthem/Cigna and Aetna/Humana mergers alleged that these mergers would have harmed their citizens and the general economies of their states by reducing the number of large health insurance providers from five to three.

There are, however, important limitations on the parens patriae authority conferred to state attorneys general under the federal antitrust laws. For instance, the monetary relief sought by state attorneys general must: (1) arise out of a Sherman Act violation; (2) have been incurred by natural persons residing in their states (i.e., the losses suffered by business organisations cannot be included in the alleged damages); (3) exclude harm suffered by indirect purchasers of the goods and/or services in question; (4) avoid the risk of multiple recoveries by excluding amounts previously awarded for the same injuries; and (5) arise out of actual financial losses rather than general harm to their state’s economy. Moreover, state attorneys general must provide their residents with adequate notice of the lawsuit and a meaningful opportunity to opt out of the litigation.

In seeking to prove the monetary harm suffered by their citizens, state attorneys general can employ many of the same methods utilised by private plaintiffs. In price-fixing cases, for example, state attorneys general can prove the claimed aggregate damages by utilising ‘statistical or sampling methods’, ‘comput[ing[ [the] illegal overcharges’, or relying on any other methodology deemed ‘reasonable’ by the court. In addition, a number of state antitrust laws authorise their state attorney general to hire private lawyers to handle parens patriae actions, which the state attorneys general challenging the T-Mobile/Sprint merger have done.

Civil enforcement of state antitrust laws

Most states have enacted state antitrust laws that are comparable to Sections 1 and 2 of the Sherman Act. In addition, some states have passed antitrust laws that are similar to Sections 3 and 7 of the Clayton Act and the Robinson-Patman Act. These state antitrust laws typically contain provisions expressly requiring that ‘they be construed in conformity with comparable [f]ederal antitrust statutes’.

State antitrust statutes typically provide state attorneys general with broad authority to investigate possible violations, including the power to ‘issue civil investigative demands compelling oral testimony, the production of documents, and responses to written interrogatories to individuals and corporations’. Like the federal antitrust laws, most state antitrust laws authorise state attorneys general to file civil lawsuits on behalf of their states and state governmental entities whenever a violation has caused them to suffer harm in their capacity as direct purchasers of goods or services, as well as parens patriae actions on behalf of their citizens.

### Worker Welfare

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

#### Prioritizing worker welfare solves the aff but also increases worker rights.

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.

#### Worker rights are key to democracy and economy

Bivens et al. 17 – Economic Policy Institute, 8-24-2017, Josh Bivens, Lora Engdahl, Elise Gould, Teresa Kroeger, Celine McNicholas, Lawrence Mishel, Zane Mokhiber, Heidi Shierholz, Marni von Wilpert, Valerie Wilson, and Ben Zipperer, "How today’s unions help working people: Giving workers the power to improve their jobs and unrig the economy," Economic Policy Institute, <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/> KKC

Conclusion: Unions are essential to a fair economy and a vibrant democracy Unions are a dynamic and ever-evolving institution of the American economy that exist to give working people a voice and leverage over their working conditions and the economic policy decisions that shape these conditions. Collective bargaining is indispensable if we want to achieve shared prosperity. But it is precisely because they are effective and necessary for shared prosperity that unions are under attack by employers who want to maintain excessive leverage over workers and by policymakers representing the interests of the top 1 percent. These attacks have succeeded in increasing the gap between the number of workers who would like to be represented by a union and the number who are represented by a union. And these threats to the freedom to join together in unions haven’t been met with a policy response sufficient to keep the playing field level between organizing workers and the employers looking to thwart them. Giving workers a real voice and leverage is essential for democracy. While unions historically have not been able to match corporate political donations dollar for dollar, working people organizing together in unions play an equalizing role because they can motivate members to give their time and effort to political causes. For example, one study found that unions are very effective at getting people to the polls—especially increasing voting among those with only a high school education.109 As this report has shown, unions—when strong—have the capacity to tackle some of the biggest problems that plague our economy, from growing economic inequality, wage stagnation, and racial and gender inequities to eroding democracy and barriers to civic participation. And unions also help to address current workforce trends that are increasing work insecurity, from the rise of part-time work and unpaid internships to the exploitation of student athletes to increasing numbers of Uber drivers and other “gig economy” workers.110 In a recent New York Times op-ed, Kashana Cauley cited some of these trends and called on her millennial peers to lead the next labor movement.111 Indeed, there is evidence that young workers are primed to do so: 55 percent of 18- to 29-year-old workers view unions favorably, compared with 46 percent of workers age 30 and older.112 And young people of both political parties are more amenable to labor unions than their older peers.113 Having entered the workforce during the last recession, these young workers have experienced a labor market with lower wages, diminishing benefits, “noncompete” clauses that make it harder for even entry-level employees to move to better jobs, and other facets of increasing insecurity, Cauley explains.114 Certainly, Americans of all ages, occupations, races, and genders have a vested interest in making sure our economy works for everyone. To promote an inclusive economy and a robust democracy, we must work together to rebuild our collective bargaining system.

#### Democracy checks global conflicts

Kasparov, Chairman of the Human Rights Foundation, 2/16/2017

Garry, “Democracy and Human Rights: The Case for U.S. Leadership” http://www.foreign.senate.gov/imo/media/doc/021617\_Kasparov\_%20Testimony.pdf

The Soviet Union was an existential threat, and this focused the attention of the world, and the American people. There existential threat today is not found on a map, but it is very real. The forces of the past are making steady progress against the modern world order. Terrorist movements in the Middle East, extremist parties across Europe, a paranoid tyrant in North Korea threatening nuclear blackmail, and, at the center of the web, an aggressive KGB dictator in Russia. They all want to turn the world back to a dark past because their survival is threatened by the values of the free world, epitomized by the United States. And they are thriving as the U.S. has retreated. The global freedom index has declined for ten consecutive years. No one like to talk about the United States as a global policeman, but this is what happens when there is no cop on the beat. American leadership begins at home, right here. America cannot lead the world on democracy and human rights if there is no unity on the meaning and importance of these things. Leadership is required to make that case clearly and powerfully. Right now, Americans are engaged in politics at a level not seen in decades. It is an opportunity for them to rediscover that making America great begins with believing America can be great. The Cold War was won on American values that were shared by both parties and nearly every American. Institutions that were created by a Democrat, Truman, were triumphant forty years later thanks to the courage of a Republican, Reagan. This bipartisan consistency created the decades of strategic stability that is the great strength of democracies. Strong institutions that outlast politicians allow for long-range planning. In contrast, dictators can operate only tactically, not strategically, because they are not constrained by the balance of powers, but cannot afford to think beyond their own survival. This is why a dictator like Putin has an advantage in chaos, the ability to move quickly. This can only be met by strategy, by long-term goals that are based on shared values, not on polls and cable news. The fear of making things worse has paralyzed the United States from trying to make things better. There will always be setbacks, but the United States cannot quit. The spread of democracy is the only proven remedy for nearly every crisis that plagues the world today. War, famine, poverty, terrorism–all are generated and exacerbated by authoritarian regimes. A policy of America First inevitably puts American security last. American leadership is required because there is no one else, and because it is good for America. There is no weapon or wall that is more powerful for security than America being envied, imitated, and admired around the world. Admired not for being perfect, but for having the exceptional courage to always try to be better. Thank you

### PTX

#### PC is key to reconciliation---plan’s distraction foils it and causes defection---it’s laser-thin

Elliot 9-16 (PHILIP ELLIOTT, Staff writer @ Times, Democrats Face a Grueling Two Weeks as Infighting Erupts Over Infrastructure, <https://time.com/6098810/house-democrats-reconciliation/>, y2k)

House Democrats yesterday finished penning a 2,600-page bill that finally outlines the specifics of their ambitious “soft” infrastructure plan that won’t attract a single Republican vote. But no one was really rushing to Schneider’s for bottles of bubbly. For a party ready to spend $3.5 trillion to fund its social policy agenda, there were plenty of glum faces on Capitol Hill.

In fact, one key piece of the legislation—a deal that would finally let Medicare negotiate lower prices with drug companies—fell apart in the Energy and Commerce Committee when three Democrats voted against it. It found resurrection a short time later when Leadership aides literally plucked it from the Energy and Commerce team and delivered it to the Ways and Means Committee for its approval instead. Even there, though, one Democrat voted against it, saying the threat it posed to pharmaceutical companies’ profits would doom it in the Senate. “Every moment we spend debating provisions that will never become law is a moment wasted and will delay much-needed assistance to the American people,” Rep. Stephanie Murphy of Florida later argued.

Put another way? Brace for some nasty politics over the next two weeks as House Speaker Nancy Pelosi tries to get this bill to a vote before the budget year ends on Sept. 30. And those 2,600 pages had better be recyclable.

Democrats can only afford three defectors if they want to usher this bill into law, and they’re perilously close to failure. So far, five centrist Democrats in the House have said they prefer a scaled-back version of the Medicare component. But if Pelosi gives the five centrists that win, she risks losing the support of progressives who are already sour that things like a punitive wealth tax and the end to tax loopholes aren’t present in the current version of the bill.

As it stands now, letting Medicare negotiate drug prices would save the government about $500 billion over the next decade. The scaled-back version doesn’t have an official cost, but a very similar version got its score in the Senate last year: roughly $100 billion in savings. Because Democrats are using a budgeting loophole to help them avoid a filibuster and pass this with bare majorities, that $400 billion gap matters a lot more than on most bills. Scaling back the Medicare savings means they would also have to scale back their overall spending on the bill—a big line in the sand for progressives who say they’ve already compromised too much.

All of this, of course, comes as President Joe Biden and his top aides in the White House have been trying to get Senate centrists onboard. Just yesterday, he met separately with Sens. Kyrsten Sinema and Joe Manchin, fellow Democrats who have expressed worries about the $3.5 trillion price tag but have been vague about what exactly they want to cut back on. With the Senate evenly divided at 50-50, and Vice President Kamala Harris in position to break the ties to Democrats’ victories, any shenanigans from those two independent thinkers scrambles the whole package.

Oh, and that other bipartisan infrastructure plan that carries $550 billion in new spending? It’s still sitting on the shelf in the House. Pelosi said she’d bring it to the floor only when the bigger—and entirely partisan—bill was ready. And there’s plenty of grumbling about that package, too.

If this is all beginning to sound like a scratched record that keeps repeating, it’s because this has become something of a pattern here in Washington. Things look pretty grim for legislation in town these days, despite Democrats controlling the House, the Senate and the White House. Their margin for error is literally zero, and so hiccups from a half-dozen centrists can forewarn a doomed agenda.

So far, Pelosi has been a master of holding the line on crucial votes and has managed to maneuver her team to victories, including on an earlier pandemic relief package that passed with only Democratic votes. Now she’s trying again, but the clock is ticking, and $3.5 trillion is an eye-popping sum of money that rivals the spending the United States unleashed to close out World War II.

#### Antitrust trades-off with Biden’s priorities

Carstensen 21 (Peter C. Carstensen, Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>, y2k)

Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Reconciliation solves climate

Sobczyk 9-15 (Nick Sobczyk, E&E News, Infrastructure Bill Could Cut Carbon Emissions By Nearly a Gigaton, <https://www.scientificamerican.com/article/infrastructure-bill-could-cut-carbon-emissions-by-nearly-a-gigaton/>, y2k)

The reconciliation bill working its way through Congress could cut U.S. greenhouse gas emissions by nearly a gigaton by 2030, according to a new report.

The analysis, released today by the Rhodium Group, an independent research firm, offers a first look at how the sprawling suite of climate policies Democrats are considering as part of their $3.5 trillion package could overhaul energy and contribute to President Biden’s Paris Agreement emissions-cutting pledge.

The bill could ultimately include dozens of different climate and energy provisions. But the report examined six of the biggest proposals currently in the mix: clean energy and electric vehicle tax credit expansions, a methane fee, funding for rural electric cooperatives, money for agriculture and forestry carbon capture programs, and the proposed Clean Electricity Performance Program (CEPP).

Those policies alone would reduce greenhouse gas emissions by 830 million to 936 million tons by 2030 compared with current trajectories, the report found. The CEPP — which would pay power providers to deploy more clean energy, with the goal of hitting 80 percent clean energy by 2030 — would account for the bulk of those reductions.

That would amount to “easily the biggest thing to pass Congress when it comes to climate,” said John Larsen, a director at the Rhodium Group and one of the report’s authors. “It's highly likely that the total impact is bigger — potentially substantially bigger — than what we found simply because we didn't count everything,” he said.

#### Extinction

David Spratt 19, Research Director for Breakthrough National Centre for Climate Restoration, Ian Dunlop, member of the Club of Rome, formerly an international oil, gas and coal industry executive, chairman of the Australian Coal Association, May 2019, “Existential climate-related security risk: A scenario approach,” https://docs.wixstatic.com/ugd/148cb0\_b2c0c79dc4344b279bcf2365336ff23b.pdf

An existential risk to civilisation is one posing permanent large negative consequences to humanity which may never be undone, either annihilating intelligent life or permanently and drastically curtailing its potential. With the commitments by nations to the 2015 Paris Agreement, the current path of warming is 3°C or more by 2100. But this figure does not include “long-term” carbon-cycle feedbacks, which are materially relevant now and in the near future due to the unprecedented rate at which human activity is perturbing the climate system. Taking these into account, the Paris path would lead to around 5°C of warming by 2100. Scientists warn that warming of 4°C is incompatible with an organised global community, is devastating to the majority of ecosystems, and has a high probability of not being stable. The World Bank says it may be “beyond adaptation”. But an existential threat may also exist for many peoples and regions at a significantly lower level of warming. In 2017, 3°C of warming was categorised as “catastrophic” with a warning that, on a path of unchecked emissions, low-probability, high-impact warming could be catastrophic by 2050. The Emeritus Director of the Potsdam Institute, Prof. Hans Joachim Schellnhuber, warns that “climate change is now reaching the end-game, where very soon humanity must choose between taking unprecedented action, or accepting that it has been left too late and bear the consequences.” He says that if we continue down the present path “there is a very big risk that we will just end our civilisation. The human species will survive somehow but we will destroy almost everything we have built up over the last two thousand years.”11 Unfortunately, conventional risk and probability analysis becomes useless in these circumstances because it excludes the full implications of outlier events and possibilities lurking at the fringes.12 Prudent risk-management means a tough, objective look at the real risks to which we are exposed, especially at those “fat-tail” events, which may have consequences that are damaging beyond quantification, and threaten the survival of human civilisation. Global warming projections display a “fat-tailed” distribution with a greater likelihood of warming that is well in excess of the average amount of warming predicted by climate models, and are of a higher probability than would be expected under typical statistical assumptions. More importantly, the risk lies disproportionately in the “fat-tail” outcomes, as illustrated in Figure 1.

### FTC

#### COVID-related enforcement is key to effective recovery---it’s a key priority

OECD 20 (The Role of Competition Policy in Promoting Economic Recovery – Note by the United States, 12-2, <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/economic_recovery_us.pdf>, y2k)

1. The Antitrust Division of the Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) (collectively the Agencies) offer this joint submission in response to the Competition Committee’s review of the role of competition policy in promoting economic recovery. In this paper, we highlight some key steps that the Agencies have taken to respond to the present COVID-19 crisis in the United States and to help promote a rapid and sustained economic recovery.

2. The U.S. antitrust agencies have undertaken initiatives in several categories to help spur recovery from the COVID-19 crisis, including stepped-up criminal enforcement, policy guidance to health and emergency-related government agencies, and expedited review of private sector cooperative efforts. The Agencies strongly believe that competition policy has an important role to play in the COVID-19 recovery process and intend to continue to engage in partnership with domestic and international counterparts to ensure the protection of competition and consumers.

2. Deterrence of Cartel Activity, Price Gouging, and Other Harmful Activity

3. Deterrence of unlawful commercial activities has long been a key mission of the Agencies, rendered even more critical by the social and economic disruptions caused by the COVID-19 crisis.1 While most Americans have acted to help their neighbors and communities during the past year, crisis-related disruption increases the risk that some individuals will make unlawful windfall profits at the expense of public safety and the health and welfare of their fellow citizens.2

4. While hoarding and exploitation are not themselves antitrust violations, such behaviors are often accompanied by criminal antitrust collusion, price fixing, and bid rigging, and other attempts to take advantage of the public. As with other natural disasters, the COVID-19 crisis increases the risk that individuals and organizations will engage in these unlawful commercial activities, necessitating increased vigilance by the Agencies.

2.1. COVID-19 Hoarding and Price Gouging Task Force

5. To coordinate enforcement efforts, the Attorney General in March 2020 announced the creation of the COVID-19 Hoarding and Price Gouging Task Force.3 The Task Force is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities. Because health care products and markets are central in responding to the health care crisis and eventually to economic resilience and recovery, the Task Force focuses on protecting the availability of those products designated essential by the Department of Health and Human Services (HHS) under Section 102 of the Defense Production Act. The DOJ consults with HHS during this process, including advising on the antitrust implications of COVID-19 for affected markets and products.

6. The Task Force is currently being led by a coordinating U.S. Attorney, with assistance as needed from the Antitrust Division’s Criminal Program. Each United States Attorney’s Office, as well as other relevant Department components, is directed to designate an experienced attorney to serve as a member of the Task Force. The Antitrust Division’s role in the Task Force involves investigating allegations of criminal antitrust harms, such as price fixing and bid rigging, and responding to citizen complaints about collusive or anticompetitive disaster-related behavior.

2.2. Procurement Collusion Strike Force

7. The DOJ is also stepping up efforts to combat crisis-related disruption through the newly-created Procurement Collusion Strike Force (PCSF). COVID-19 recovery will require substantial investment by national, state, and local authorities, with $3.48 trillion appropriated to date.4 The size and pace of such efforts unfortunately create opportunities for fraud and collusion affecting government procurement and grant-making. Through the creation of the PCSF, DOJ is dedicating significant resources to help identify and prevent these unlawful activities.5

8. The PCSF is an interagency partnership dedicated to protecting taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Under the umbrella of the PCSF, prosecutors from the Antitrust Division’s five criminal offices and 13 U.S. Attorneys’ Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process.

9. Since its creation in 2019, over 50 federal, state, and local government agencies have already sought training and assistance from the PCSF, as well as opportunities to work with the PCSF on investigations. So far, the PCSF has led over a dozen interactive virtual training programs for approximately 2,000 criminal investigators, data scientists, and procurement officials.6 Over a third of the Antitrust Division’s current investigations relate to public procurement, and the PCSF marks an important effort to marshal enforcement resources to tackle these cases. Several grand jury investigations already have been opened as a direct result of the work of the PCSF. In addition to playing a meaningful role in COVID-19 economic recovery, the PCSF will continue to be an important resource for detecting fraud and collusion in government procurement for years to come.

2.3. Protecting Competition in Labor Markets

10. The DOJ and FTC are working to protect competition in labor markets, which have been subject to significant dislocation due to the economic impact of COVID-19. In April 2020, the Agencies issued a statement warning that antitrust enforcers are closely monitoring improper employer coordination that may disadvantage workers.7 The statement affirmed that antitrust laws with respect to hiring and employment remain fully in effect despite the crisis, and stated that “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”8

11. Given the special impact of COVID-19 on medical staffing and employment, the Agencies are focused on preventing employers, including health care staffing companies and recruiters, from engaging in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked. This announced focus continues the Agencies’ policy of devoting resources to preventing labor malpractice in critical industries, especially health care. As one example, the DOJ in April 2020 reached a significant resolution in the criminal investigation of Florida Cancer Specialists (FCS) for entering into a market allocation agreement that gave FCS a monopoly for services in a densely populated part of southwest Florida. As part of the deferred prosecution agreement reached in that case, the Division obtained a $100 million fine – the statutory maximum – and FCS agreed to waive certain non-compete provisions for current and former employees, including physicians and other healthcare professionals.9 In another important matter, early this year, the FTC investigated, and the parties abandoned a proposed tie-up between two providers of nursing staff. The proposed merger had likely anticompetitive effects in multiple localities across the country on markets both for nursing services and for private duty nursing care.10

2.4. Consumer Protection

12. The FTC has worked aggressively to address consumer protection issues arising from the COVID-19 pandemic. Since late March, as the coronavirus emerged, the FTC has received nearly 225,000 consumer complaints relating to COVID-19, including concerns about fraud related to the government’s economic impact payments.11 In addition, the FTC has been monitoring the marketplace for unsubstantiated health claims, illegal robocalls, privacy and data security concerns, online shopping fraud, and a variety of other scams related to the economic fallout from the COVID-19 pandemic.

13. Acting on this market information, the FTC has pursued a rigorous warning letter program and filed law enforcement actions for injunctive and other relief in federal courts.12 In the health claims area, for example, the FTC and the Food and Drug Administration (FDA) have, to date, issued over 90 joint warning letters to marketers regarding claims that their products will treat, cure, or prevent COVID-19.13 The FTC on its own has issued more than 225 additional warning letters to marketers.14 The letters warn recipients that their conduct is likely to be unlawful, that they could face serious legal consequences if they do not immediately stop, and require a response to the FTC within 48 hours. In nearly every instance, companies that have received FTC warning letters have taken quick steps to correct or eliminate their problematic claims. The FTC also has issued warning letters, in conjunction with the Small Business Administration, to companies making potentially misleading claims about federal loans or other temporary small business relief.15

14. The FTC has also filed court actions involving COVID-19 health claims, distribution claims, and government stimulus check claims.16 For example, the FTC filed four lawsuits in federal district courts against online merchandisers for failing to deliver on promises that they could quickly ship products like face masks, sanitizer, and other personal protective equipment (PPE) related to the coronavirus pandemic.17

15. Finally, the FTC has launched numerous consumer education campaigns, including a website on COVID-19 scams and a resource page that contains brochures, graphics, and videos in multiple languages.18

3. Guidance and Cooperation to Peer Agencies as Part of a Coordinated, GovernmentWide Response Effort

16. The FTC and DOJ also have shared their competition expertise with other international and federal agencies in order to facilitate COVID-19 response and recovery while preserving competitive markets. Among other efforts, the Agencies have been working closely with the Federal Emergency Management Agency (FEMA) to develop a Voluntary Agreement governing cooperation among industry participants seeking to respond to the pandemic.19 The purpose of the Agreement is to maximize the effectiveness of the manufacture and distribution of critical healthcare resources nationwide to respond to the pandemic. Organized under the authority granted by the Defense Production Act, participants to the Agreement receive antitrust immunity for actions taken to carry out the Agreement. Before the Agreement can become effective, however, the Attorney General must find that the purposes of the Agreement may not be achieved through a voluntary agreement having less anticompetitive effects. These efforts also have helped inform the Agencies’ responses to business review letters seeking approval for cooperation in the production of critical health care products, as discussed below.

3.1. International Advocacy

17. U.S. enforcers also have been leveraging our existing bilateral relationships and ties to multilateral organizations, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), to increase communication and cooperation.

18. In the immediate aftermath of the declaration of a state of national emergency in the United States, the Agencies played a key role in facilitating communication and cooperation among international enforcers by collecting and sharing on a regular basis rapidly developing information on how COVID-19 has impacted competition law enforcement efforts around the world. After DOJ successfully developed a regular internal process for collecting and disseminating this information, the ICN integrated this project into its ongoing work streams. In early April, as the economic impact of COVID-19 and possible enforcement challenges began to emerge, the ICN Steering Group issued a statement on key considerations related to competition law enforcement during and after the COVID-19 pandemic.20 The Agencies contributed with the FTC serving as a lead drafter of the statement recognizing the importance of competition to economies in crisis and urging agencies to remain vigilant regarding anti-competitive conduct. The statement also calls for transparency of operational and policy changes during the crisis and advocates for competition as a guiding principle for economic recovery efforts in the aftermath of the pandemic.

19. Since spring 2020, the Agencies have participated in several virtual events hosted by the ICN, the OECD, and the United Nations Conference on Trade and Development on international cooperation, investigations and competition law policy in the wake of COVID-19.21 In September 2020, the U.S. Agencies hosted the ICN 2020 Virtual Conference, which brought together enforcers from around the world to discuss antitrust developments, including how to address enforcement and policy challenges raised by COVID-19.

3.2. Doctrinal Responses

20. While procedural aspects of the Agencies’ work have changed as a result of COVID-19, the Agencies’ view of key U.S. antitrust standards has not changed. The Agencies have reiterated that the antitrust laws are flexible enough to account for changing market conditions, even during uncertain times.22

21. In particular, the Agencies continue to take the view that the failing firm defense is “narrow in scope,” and should be invoked selectively.23 The Agencies have continued to reiterate in speeches and publications that they will not relax the stringent conditions that define a genuinely “failing” firm and continue to apply the test set out in the U.S. Horizontal Merger Guidelines24 and reflected in our long-standing practice, and that they will require the same level of substantiation as was required before the COVID pandemic.25 As such, while it is possible that more firms may fail as a result of an economic crisis such as COVID-19, the view of the United States is that economic dislocation, on its own, does not provide a compelling reason why the assets of failing firms should be purchased by close competitors.

3.3. Competition Advocacy

22. The Agencies are continuing to advocate for changes to regulations that may impede competition, which may cause even greater harm in the context of the COVID-19 crisis. For example, the Agencies have submitted multiple letters to state legislatures in recent years expressing their concerns over “certificate of need” laws26 and other restrictions on the availability of health care resources.27 Given the extraordinary disruptions created by COVID-19, the United States views protecting the free functioning of health care markets as even more urgent, and the Agencies plan to continue our advocacy to remove regulatory impediments to competition in the health care sector.

23. Directly relating to the COVID-19 public health emergency, FTC staff submitted a comment to the Centers for Medicare & Medicaid Services (CMS) on its Interim Final Rule with Comment Period (IFC).28 The FTC comment supported the IFC’s provisions that reduce or eliminate restrictive Medicare payment requirements for telehealth and other communication technology-based services during the public health emergency. FTC staff noted that if telehealth practitioners’ entry is limited or reimbursement requirements are overly restrictive, consumers’ access to care and choice of practitioner might be unnecessarily restricted, especially in areas where there is a shortage of healthcare professionals. The IFC’s rule would reduce restrictions on Medicare reimbursement for telehealth services. This is especially important, not only to enhance the use of telehealth to care for Medicare beneficiaries, but also to encourage private payers to expand the use of telehealth. Reducing or eliminating restrictions on reimbursement of telehealth services could potentially enhance competition, improve access and quality, and decrease health care costs in both the public and private sectors. By connecting widely separated providers and patients, telehealth can alleviate primary care and specialty shortages.

24. The FTC continues to advocate against states issuing certificates of public advantage (COPA). For example, in September 2020 FTC staff submitted a public comment opposing issuance of a COPA to the Texas Health and Human Services Commission. FTC staff expressed concern that the proposed merger at issue would lead to significantly less competition for healthcare services in Midwest Texas.29

25. The FTC and its staff have also analyzed potential competitive concerns associated with professional regulations in the health care sector, including licensure and scope of practice.30 For example, FTC staff sent advocacy letters to the Texas Attorney General and the Texas Medical Board relating to regulations that could harm competition by impeding access to surgical and other health care services provided by certified registered nurse anesthetists.31 FTC staff recommended that Texas maintain only CRNA supervision requirements that advance patient protection and avoid adopting regulations that impede CRNA practice.

26. DOJ hosted a virtual joint workshop with the USPTO in July 2020 that included debate on the role of innovation and public-private collaboration in responding to the COVID-19 pandemic.32 The workshop, entitled “Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property,” comprised 10 sessions over two days. Panelists included leading figures from industry, government agencies, prominent research labs, the non-profit sector, academia, and the broader legal and economic community. Members of the public were also able to submit questions throughout the event.

4. Facilitation of Cooperative Public and Private-Sector Efforts to Resolve the Crisis

27. The Agencies are working together to bolster the recovery by providing guidance relating to recovery-related collaborations on an expedited basis.33 In a joint statement in April, the Agencies emphasized the potential importance of pro-competitive collaborations between private firms to bring essential goods and services to communities in need. In addition to providing high-level collaboration guidelines consistent with previous DOJ and FTC policies, the statement contained guidance specific to COVID-related business activities, including reaffirming that the Agencies will account for exigent circumstances in evaluating collaborative efforts to address the spread of COVID-19, and that medical providers’ development of suggested practice parameters to assist in clinical decisionmaking will not be challenged, absent extraordinary circumstances.34

28. The Agencies also announced an expedited business review letter program, under which all COVID-19-related requests will receive responses within seven calendar days of the Agencies receiving all necessary information. This expedited process for COVIDrelated business review letters is an outgrowth of the Agencies’ role in advising other executive branch agencies on facilitating COVID-related cooperation within the antitrust laws, and each of the letters issued through the expedited process in 2020 addresses proposed conduct that is critical to COVID-19 response. Since March 2020, DOJ has issued the following four expedited business review letters:

1. A letter approving a collaboration by McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc to expedite and increase manufacturing for the distribution of personal protective equipment (PPE) and coronavirus-treatment-related medication in a way unlikely to lessen competition;35

2. A letter approving a collaboration by AmerisourceBergen with FEMA, HHS, and other government entities to “identify global supply opportunities, ensure product, quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients;”36

3. A letter approving a collaboration by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK to “exchange limited information about the manufacture of monoclonal antibodies that may be developed to treat COVID19” in order to optimize COVID-19 vaccine production as part of Operation Warp Speed;37 and

4. A letter approving a collaboration by the National Pork Producers Council (NPPC) and the U.S. Department of Agriculture (USDA) “to address certain hardships facing hog farmers as a result of the COVID-19 pandemic.”38 29. The Agencies also pledged to expedite the processing of filings under the National Cooperative Research and Production Act, which provides flexible treatment of certain standards development organizations and joint ventures under the antitrust laws.

5. Revised Rules Regarding Merger Enforcement

30. The Agencies have adapted to changing work conditions and reallocated resources to maintain continuity of core operations and enforcement efforts. COVID-19 initially necessitated temporary changes to ensure the continuation of expeditious and thorough merger review.39 Changes made by both Agencies include (1) extending standard timing agreement provisions so that the post-compliance period runs for sixty to ninety days (instead of thirty days) for pending or proposed transactions that may be subject to a Second Request, (2) requiring all merger filings with the FTC and DOJ to be submitted via the FTC’s electronic filing system, and (3) committing to conducting all meetings and depositions by phone or video conference when possible, absent extenuating circumstances.40 For the initial period of only two weeks at the start of the COVID crisis, the Agencies also suspended the granting of early termination, which can shorten the waiting period for non-problematic mergers. The option of early termination was resumed in March, and timing of grants of early termination has returned to pre-pandemic levels.41

31. Notably, COVID-19 did not sideline other important efforts to improve the Agencies’ enforcement programs. Among other efforts, in June 2020, the Agencies for the first time issued joint Vertical Merger Guidelines.42 In September, the Division also issued a modernized Merger Remedies Manual. As an update to the 2004 edition, the new manual provides “greater transparency and predictability regarding the Division’s approach to remedying a proposed merger’s competitive harm,” including an emphasis on structural remedies and a renewed focus on enforcing consent decree obligations. The Division also has continued to follow through on its September 2018 commitment to modernize banking merger review, with the goal of expedited and efficient resolution for uncomplicated merger matters.43 Economic downturns, as often occur in the wake of disasters such as the COVID-19 crisis, may impact merger activity, which is why continuing to improve the Agencies’ approach to reviewing and remedying potentially anticompetitive mergers remains a priority.

#### Plan causes a trade-off and devastates antitrust agency effectiveness

Sacher & Yun 19 (Seth B. Sacher, Economist, & John M. Yun, Antonin Scalia Law School, George Mason University, TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT, 26 Geo. Mason L. Rev. 1491, y2k)

VII. Fallacy Seven: Not Recognizing That Their Proposals Will Strain Competition Agency Resources, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. 131As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. 133Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). 134Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own. 135

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview. 136Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 137 will require significantly more active market supervision than is currently the case. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, 138 there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

Second, many of the above proposals would require not only more staff, but also staff with differing expertise from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

#### Failed COVID recovery triggers multiple hotspots

Wright 20 (Robin Wright, a contributing writer and columnist @ The New Yorker, The Coronavirus Pandemic Is Now a Threat to National Security, 10-7, https://www.newyorker.com/news/our-columnists/america-the-infected-and-vulnerable, y2k)

The broader danger is the world’s perception now of America as inept and vulnerable, Doug Lute, a retired lieutenant general who was the director of operations for the Joint Chiefs and a deputy national-security adviser to Presidents George W. Bush and Barack Obama, told me. “There are two things that would drive our competitors—the general sense of incompetence by the executive branch and a reading that we are totally self-absorbed internally,” he said. “There’s an overlapping of the pandemic, the protests, and now the election that amplifies that image. In broad terms, those conditions internally will be viewed by external competitors as opportunities.” America faces threats from a spectrum of overseas adversaries, the retired Marine General John Allen, who is now the president of the Brookings Institution, told me. “I’m deeply concerned that there will be foreign actors, all the way from jihadists to state actors, that try to take advantage of a level of duress that we haven’t seen for a long time. It has not been lost on our adversaries, or those who would seek to gain ground, that the United States has consciously chosen to withdraw.” The sense of “sheer confusion” surrounding American politics in 2020 compounds the temptation of foreign actors to make moves, either for their own gains or to diminish America, Allen said. The most obvious perils are from the big powers, which may calculate that the White House will not counter their moves elsewhere in the world during such domestic turbulence, especially on the eve of an election, former military and Pentagon officials told me. From Russia, President Vladimir Putin could dig deeper into Ukraine, meddle in unstable Belarus, or test the strength of the Baltic states to resist. From China, President Xi Jinping could further threaten Taiwan, exert its claim to islands in the South China Sea by deploying equipment or personnel, or take more draconian actions in Hong Kong. Both countries have moved steadily to deepen their presence and influence across Asia and deep into the Middle East—with its access to the Mediterranean and the West. For Moscow and Beijing, overt challenges would be a big bet, especially with an erratic and sometimes reckless President (currently on steroids) in the White House. Yet both countries will also understand that the American public has little appetite for more trauma, the military and security officials said. “I’m sure that foreign adversaries’ intelligence services have their collection systems turned up high so that they understand exactly how disruptive this pandemic is on our national-security structure,” the former C.I.A. director John Brennan said on CNN this week. North Korea and Iran may also try to exploit the moment, although both have fewer capabilities than Russia or China. Tehran is still smarting from the U.S. assassination, in January, of General Qassem Suleimani, the head of its élite Quds Force, a wing of the Revolutionary Guards, which supports several militias that have attacked U.S. troops in Iraq and Lebanon. “I suspect Iran is not done seeking revenge for the killing of Suleimani,” Lute told me. Tehran’s strength is in the proxy forces it arms, aids, and often directs across the Middle East, particularly Lebanon, Iraq, and Yemen. Since Suleimani’s death, attacks by the Popular Mobilization Forces on U.S. troops and the American Embassy in Iraq have steadily escalated; the P.M.F., backed and sometimes directed by Iran, is the umbrella for some sixty predominantly Shiite militias that operate in separate brigades. Last month, the campaign sparked a diplomatic crisis when Secretary of State Mike Pompeo warned the Iraqi government that the United States would close its Embassy in Baghdad—one of the largest American diplomatic facilities in the world—if the government did not prevent the militias from firing on the U.S. compound and American troops based elsewhere in Iraq. “Our global deterrence at the high end—nuclear and conventional deterrence in Europe, Asia, and the Gulf—will not be tested,” Lute said. “But there may be challenges at lower levels through cyber or by proxies.”

### Enforce Squo

#### The United States federal government should increase anti-trust enforcement.

#### Increase enforcement works - and it’s a prerequisite, reliance on market corrections undermine the plan

Morton et. al 18 (Jonathan B. Baker, Jonathan Sallet & Fiona Scott Morton, “Unlocking Antitrust Enforcement”, https://www.yalelawjournal.org/feature/introduction-unlocking-antitrust-enforcement)

There is no antitrust law without antitrust law enforcement. Legal action turns economic and jurisprudential theory into litigation, remedy, prohibition, deterrence, and precedent that advance competition. This Collection, Unlocking Antitrust Enforcement, demonstrates that tools to advance antitrust enforcement already exist, and they are well-suited to confront today’s U.S. antitrust challenges. The Features arrive at a critical moment, when economic forces mirror the industrial concentration and economic inequality of the turn of the twentieth century. Recall that the impetus for the creation of U.S. antitrust laws was the growing power of Industrial Age trusts, combinations of holdings within and across industries that dominated important economic sec- tors like oil, steel, and tobacco. Trusts exercised what reformers saw as outsized political power, and they were blamed for the rise of economic inequality in the early years of the twentieth century. Public outrage at their economic dominance spurred the passage of the Sherman Act in 1890,1 and, fueled by a decade of mer- ger mania, the Clayton2 and Federal Trade Commission Acts3 in 1914. One lead- ing proponent of antitrust reform captured the prevailing mood when he warned of the “gross inequality in the distribution of wealth and income which giant corporations have fostered.”4 Today, we see similar economic trends. The United States has a market power problem; one that may well extend beyond individual markets to slow 1. 15 U.S.C. §§ 1-7 (2012). 2. 15 U.S.C. § 12-27 (2012). 3. 15 U.S.C. § 41-58 (2012). 4. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 570 (1933) (Brandeis, J., dissenting). unlocking antitrust enforcement 1917 economic growth and widen economic inequality.5 But there is also an arsenal of antitrust-enforcement actions that can be used to preserve and garner the bene- fits of competition. The nine Features in this Collection primarily focus on the efforts that can be undertaken by the federal antitrust agencies: the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). To- gether, these Features lay the foundation for an overarching enforcement agenda, one written in the long, but receding, shadow of the Chicago School, which brought economic analysis to the forefront of antitrust but failed to fully capture the realities of competition and the private actions that can curb it. This agenda can be implemented immediately, relying on the “dynamic potential” of the antitrust laws, 6 which “evolve[] as circumstances change and learning grows.”7 Key to that learning is the discipline of economics. Each Feature includes an economist author. Economic analysis lies at the center of antitrust analysis as an indispensable tool for establishing harm or benefit from firms’ actions. Though the Chicago School relied on economics to criticize the antitrust rules of an ear- lier era, economic analysis should not be considered as synonymous with oppo- sition to enforcement. The discipline of economics has developed many tools that identify and measure anticompetitive conduct. Theories of collusion and exclusion have developed in sophistication and variety since the founding of the Chicago School. And advances in empirical methods since that time have al- lowed for careful and rigorous measurement of anticompetitive strategies. Eco- nomic tools are powerful and neutral and can be used for assessment of proposed remedies and enforcement policies. When applied to anticompetitive acts, eco- nomic analysis will demonstrate the need for enforcement and indicate solu- tions. To that end, the authors in this Collection rely upon the modern economic tools of game theory, empirical estimation, bargaining theory, and other tech- niques that can help courts determine where, and if, there is harm to competi- tion. And, in so doing, this Collection illustrates three larger themes important to the future of antitrust. 8 5. Jonathan B. Baker, Market Power in the U.S. Economy Today, WASH. CTR. EQUITABLE GROWTH (Mar. 20, 2017), http://equitablegrowth.org/research-analysis/market-power-in -the-u-s-economy-today [http://perma.cc/722A-ZZW7]. 6. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”); accord Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888 (2007). 7. Frank H. Easterbrook, Is There a Ratchet in Antitrust Law?, 60 TEX. L. REV. 705, 706 (1982). 8. Although Unlocking Antitrust Enforcement states an overall point of view, no author necessarily supports the views expressed in any other Feature. the yale law journal 127:1916 2018 1918 First, competitive harm today may arise from business arrangements far more diverse than horizontal agreements reached between powerful, competing sellers. Horizontal agreements have been too-often treated as the ground zero of antitrust. In fact, competitive harms and exclusionary conduct can result from any number of corporate arrangements, and this Collection contains several Fea- tures that illustrate the potential for such enforcement. The antitrust laws can be applied to reach horizontal shareholding in a concentrated product market, as demonstrated by Herbert Hovenkamp and Fiona Scott Morton,9 as well as rules adopted by standards-setting organizations that are ineffective in preventing the owners of standard-essential patents from exploiting the monopoly power they gain from the creation of a standard that employs their patents, as explained by Douglas Melamed and Carl Shapiro.10 Danger to competition may come, we are told by Scott Hemphill and Nancy Rose, from buyers as well as sellers,11 and from vertical contractual arrangements of the kind analyzed by Jonathan Baker and Fiona Scott Morton12 and vertical mergers, which are discussed by Steven Salop.13 Second, we believe that the common-law approach to antitrust must always reflect current economic theory and the facts at hand, even requiring a rethinking of skeptical Supreme Court dicta. Scott Hemphill and Phillip Weiser show that careful application of precedent would allow modern predation cases to escape Brooke’s Group’s incredulity about the likelihood of predatory pricing, 14 and Howard Shelanksi urges reexamination of Trinko’s doubt about the ability of the judiciary to fashion effective antitrust remedies in cases that present very differ- ent fact patterns from Trinko itself.15 At the same time, examination of new eco- nomic trends and business models reinvigorates, rather than deemphasizes, the importance of treating market concentration as a critical starting point in anti- trust analysis,16 the issue on which Carl Shapiro and Herbert Hovenkamp focus, while also reminding enforcers and courts alike that the customers in each 9. Fiona Scott Morton & Herbert Hovenkamp, Horizontal Shareholding and Antitrust Policy, 127 YALE L.J. 2026 (2018). 10. A. Douglas Melamed & Carl Shapiro, How Antitrust Law Can Make FRAND Commitments More Effective, 127 YALE L.J. 2110 (2018). 11. C. Scott Hemphill & Nancy L. Rose, Mergers that Harm Sellers, 127 YALE L.J. 2078 (2018). 12. Jonathan B. Baker & Fiona Scott Morton, Antitrust Enforcement Against Platform MFNs, 127 YALE L.J. 2176 (2018). 13. Steven C. Salop, Invigorating Vertical Merger Enforcement, 127 YALE L.J. 1962 (2018). 14. C. Scott Hemphill & Philip J. Weiser, Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing, 127 YALE L.J. 2048 (2018). 15. Howard Shelanski, Antitrust and Deregulation, 127 YALE L.J. 1922 (2018). 16. Herbert Hovenkamp & Carl Shapiro, Horizontal Mergers, Market Structure, and Burdens of Proof, 127 YALE L.J. 1996 (2018). unlocking antitrust enforcement 1919 properly-defined antitrust market deserve protection, a principle discussed by Michael Katz and Jonathan Sallet.17 Third, we call on antitrust enforcers to recognize that underenforcement will not inevitably be corrected by the market. It is mistaken, for example, to expect that a new firm will always enter to attack monopoly profits.18 A dominant in- cumbent can use its profits to buy up small entrants, build entry barriers, or en- list a regulator’s support to suppress rivalry. Concerns about the potential for under-enforcement are growing.19 It is therefore time—indeed past time—for a reassessment of the assumption that markets will always, and in a timely way, self-correct. For this reason, enforcers must be vigilant in their protection of the competitive process. The Features in this Collection demonstrate several actions by which enforcers could act against current forms of anticompetitive behavior that have, in some cases, existed for many years without any self-correction through the actions of private firms. \*\*\* Concern that antitrust enforcement must be curbed today to avoid inevitable over-enforcement ignores the practical threat of under-enforcement. As veterans of antitrust agencies know, practical considerations influence how and which cases are brought. Antitrust agencies must investigate and prosecute an enforce- ment action against a defendant that will counter the government’s case by un- dermining the government’s view of the law, economics, and evidence. The agency must be confident both in its evidence and the match with relevant prec- edents to bring a case. To write a complaint that will be argued before a federal judge entails a deep contemplation of what knowledge is needed to demonstrate the necessity of enforcement and the nature of harm. Antitrust actions must be defended in court as well as to the public, and given that the enforcer might lose, enforcement is risky. This risk may discourage enforcers from bringing some meritorious cases, and forces them to devote a substantial (and perhaps socially Sound competition policy would tolerate some false positives—blocking mergers involving targets, only to find that they do not grow to challenge the incumbent—in order to avoid some false negatives—allowing mer- gers that eliminate targets that would indeed have grown to challenge the dominant incum- bent.”). excessive) fraction of their limited resources to strengthening the cases they do bring. And yet there is no symmetric reminder of the risk of inaction; no judge that scolds antitrust enforcement authorities after a cleared merger causes higher prices or less innovation; and no court that chastises the government for declin- ing to challenge exclusionary conduct harming competition. This inherent im- balance in risks motivates this Collection: without persistent and comprehensive analysis of anticompetitive conduct in the economy, followed by action, enforce- ment will tend to be inadequate. In this Collection, we offer tools for enforce- ment that include detailed economic analysis, that are informed by experience, new technologies, and data, that advance the sound evolution of the law, and that are always anchored to the competitive realities of a controversy. Antitrust has long been described as a common-law discipline;20 this Collection’s ambition is to demonstrate that antitrust enforcement can become more effective while working with the core tenets of common-law logic and experience.21

#### Enforcement solves their aff – the FTC can pursue cases now circumvents the need for larger reform – Harvard/Tufts reads green

Kristen Tam & Olivia Bielskis 21, Kristen Tam, Team Lead at the UCLA Institute of Environmental Sustainability, Olivia Bielskis, Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement, https://escholarship.org/uc/item/0m16g2r5

C. Consolidation Threatens the Growth of Regenerative Farming I. Regenerative Farming is Reducing Emissions, Bolstering Biodiversity, and Increasing Food Security, a Critical Practice to create a Climate Resilient Future The United Nations IPCC report calls for a rapid greenhouse gas reduction to limit temperature rise to 1.5 degrees celsius by 2050.33 Given that agriculture and forestry accounted for 10.5 percent of greenhouse gas emissions in 2018,34 farming practices can play a crucial role in meeting these goals. Farming the land in ways that build healthy soil, maintain biodiversity, and sequester carbon dioxide are critical measures that will help America cultivate a sustainable food system, protect the land for generations to come, and meet greenhouse gas emission reduction goals. Currently, the practices that dominate the American agricultural landscape often till the soil, plant only one to two crops at a time, and input large sums of fertilizer, herbicides, pesticides, and other chemicals to streamline production. Industrialized agriculture values efficiency, maximizing yield, and decreasing labor input. In contrast, regenerative agriculture practices maintain soil health for long term benefit by applying compost as fertilizer, planting cover crops, implementing diverse crop rotation, rotating livestock grazing, limiting fertilizer and pesticide use, and eliminating tillage practices.35 Although opponents highlight that regenerative practices yield less products per acre and require more labor input, they neglect the significance of their energy input being 30-60 percent less than traditional methods because they do not use machines, fertilizer, and herbicides.36 This practice ultimately increases the long term productivity and stability of food production because it doesn’t rely on the continuous purchasing and application of chemicals into the soil. Instead, it builds soil health by increasing nutrient and water retention, both of which increases land productivity.37 II. Small Farms are More Likely to Implement Regenerative Fertilization Practices One of the defining regenerative agriculture practices is applying compost and manure as fertilizer. There are three different types of fertilization methods that the USDA measures every few years, manure, organic, and commercial that help replenish soil nutrients. Manure is the application of animal bio excretions,38 organic fertilizer is the use of organic matter, compost, animal manures or green manures and does not include any chemical fertilizers,39 and commercial fertilizer is the application of chemically derived fertilizers such as nitrogen, phosphate and potash.40 For these figures, manure and organic fertilizers are categorized as “regenerative fertilizers” because they represent methods that replenish soils with naturally derived as opposed to chemically manufactured nutrients. Small farms, 10.0 to 49.9 acres, are more likely to implement regenerative fertilizer methods than medium sized, 260 to 499 acres, and large sized, 1,000 to 1,999 acre farms. In 2017, 32.74 percent of small farms used regenerative fertilizer, compared to 27.27 percent of medium and 21.63 percent of large farms.41 Small farms are also transitioning away from commercial fertilizer to regenerative fertilizer methods at a faster rate than medium and large farms. From 2012 to 2017, small farms had the greatest percent decrease in number of farms using commercial fertilizers, 6.50 percent, and the largest percent increase for regenerative practices, 6.47 percent. Medium farms experienced a 2.28 percent decrease in the number of farms implementing commercial fertilizers, while a 2.57 percent increase in regenerative fertilizers. Large farms experienced a 2.31 percent decrease in the number of farming implementing commercial fertilizers, while a 2.32 percent increase in regenerative fertilizers.42 This demonstrates that smaller farms are more willing and better suited to implement regenerative practices. Industrial agriculture firms, on the other hand, highly prioritize efficiencies and maximizing profit, thus, are less likely to invest the time and money into learning about and switching to regenerative fertilization practices. While small farms are making the most rapid transition to regenerative fertilization practices that would benefit the market and planet in the long run, the increased market and resource dominance of the largest farms, which have the slowest rates of transition to regenerative fertilization practices, is ultimately hindering the growth of regenerative agriculture in the United States. D. Consolidation Negatively Affects Farmers This disproportionate market power gained by a few agriculture conglomerates allows them to reduce prices in order to drive out competition.43 While large farms lack the will to invest in more regenerative farming techniques, small farms that do not employ regenerative practices are primarily hindered by their lack of economic means to do so. As previously stated, individual farmers make less than 15 cents per dollar and, according to a study conducted by the USDA in 2001, 71 percent of poultry growers live below the poverty line.44 Such subpar circumstances are not conducive to having the freedom to invest time and money into switching practices to plant cover crops, not till, and use animal fertilizer. E. Consolidation Negatively Affects Consumers In addition to harming farmers, agricultural consolidation has also resulted in increased food prices for consumers, largely disproving the claims of Bork’s “consumer welfare standard.” In 2014, economist John Kwoka published a book Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy where he analyzed 200 mergers from 1976 to 2006 and found that post-merger prices on average increased by 4.3 percent.45 In addition, evidence has shown that market self-correction has not occurred as a result of antitrust underenforcement.46 II. Prong One: “Antitrust Injury” Should Include the Threat of Loss of Profits due to Possible Price Competition The negative effects of agriculture consolidation have transpired largely due to the lack of antitrust enforcement from the Courts and the DOJ and FTC. The Supreme Court’s ruling on Cargill v. Monfort, which allowed two meatpacking corporations to merge even though the plaintiff, a competing firm, claimed the merge would cause a “threat of loss of profits.” This showcases how this perspective on antitrust laws has failed to err on the side of precaution and subsequently allows mergers that decrease competition in the marketplace to arise. This section outlines the intended purpose of antitrust laws, provides an overview of the case, then argues why showing the threat of loss of profits due to possible price competition following a merger does constitute antitrust injury. Further, this ruling has created an unreasonable threshold for private entities to bring potential mergers to court and has created precedent for later filings to be dismissed on the basis that they did not prove sufficient “antitrust injury.” A. Origins of Antitrust Law The term “antitrust” came about in the late 1800s because many companies were transferring their stock to a board of “trustees” who controlled the output and prices for entire industries.47 With this in mind, antitrust laws were designed to ensure that a few corporations do not hold substantial economic power that could “be exerted to oppress individuals and injure the public generally.”48 Not only do they intend to prevent monopolization of markets, but they aim to maintain competitive markets, increase consumer surplus, increase the quantity and quality of the product consumed, reduce deadweight loss, and improve efficiency in resource allocation as well.49 Congress created three major Federal antitrust laws to maintain competition in the marketplace: The Sherman Antitrust Act, the Clayton Antitrust Act and the Federal Trade Commission Act.50 The first of the antitrust laws, The Sherman Antitrust Act was enacted in 1890 with the purpose of protecting interstate and foreign trade by outlawing contracts, combinations, conspiracies, and anticompetitive conduct that unreasonably restrained trade.51 The Act is not violated when one firm’s vigorous competition and lower prices take sales from its less efficient competitors; in this case, the Courts state that competition is working properly.52 While the Sherman Act imposes a more onerous burden of proving actual unreasonable restraints, Congress created the Clayton Act to require proof only of potential anticompetitive effect.53 The Act intends to prevent practices that suppress competition and give large businesses undue advantages over small businesses, as well as to prohibit mergers and acquisitions that are likely to lessen competition.54 There are three key elements that help uphold United States antitrust laws and affect the level of enforcement. The first is jurisprudential doctrines that the courts develop.55 Judicial decisions may limit or expand the reach of antitrust laws by setting precedents that alter the government’s ability to challenge certain types of cases. The second is the prosecutorial discretion that enforcers, the DOJ, the FTC, and the state attorneys general, employ.56 Because these agencies determine what does and does not violate antitrust laws, a change in the enforcement discretion or philosophy of enforcers may affect the intensity of regulation. The third is the fiscal resources provided to the enforcers.57 Judicial rules that increase or decrease the cost and barrier to entry to pursue cases can affect the number of antitrust cases brought to trial. B. Jurisprudential Doctrines are Largely Influenced by Lenient Interpretations by the Courts Until the late 1970s, the courts strictly ruled against many mergers and in favor of protecting competition. However, this changed when Robert Bork published a book in the 1980s arguing that the government must only focus on changes in consumer prices when assessing anticompetitive harm, a perspective known as the “consumer welfare standard.”58 His framework prioritized economic efficiency over small businesses, arguing that big business should be allowed to consolidate because its efficiency benefited the economy.59 Concurring with Bork, the Chicago School principles claim that underenforcement of antitrust laws was better than overenforcement because market self-correction will provide sufficient safeguards to competition.60 Because of these new priorities, the Supreme Court, FTC, and DOJ adopted this philosophy in 1979 ushering in what is known as the Chicago Era.61 They prioritized the efficiencies and lower prices that larger firms created, thus rolling back their antitrust enforcement on larger firms to create more consolidated industries.62 Although consolidated industries may positively affect consumers by decreasing prices, the Court neglected to take into account the negative effect that consolidation in agricultural purchasing and distribution had on suppliers such as farmers. When there are less buyers, distributors, or packers who compete for the supplier’s good, the buyers are able to control and drive down the price they pay to the suppliers; they create what is known as monopsony power. C. Cargill v. Monfort Cargill v. Montfort exemplifies a decision invoking a diluted enforcement of the Clayton Act that leads to the creation of monopsony power. In this case, the Supreme Court overruled the Circuit and District Court rulings and decided that the plaintiff, Monfort, did not establish sufficient antitrust injury under Section 16 of the Clayton Act by claiming a threat of loss of profits to sue Excel. Monfort, the fifth largest beef packing corporation in the United States, was contesting the merging of Excel and Spencer, the second and third largest beef packing corporations in the United States. Excel is a wholly owned subsidiary of Cargill, Inc., which owns more than 150 subsidiaries in over 35 countries.63 The merger would still leave Excel as the second largest packer, but its market share would almost equal the largest packer, IBP, Inc.64 The case was first brought to the Tenth Circuit Court, where they agreed that the plaintiff proved antitrust standing and was able to seek injunction under Section 16 of the Clayton Act, which allows for a party to sue for injunctive relief due to “threatened loss or damage by a violation of the antitrust laws.”65 This conclusion was reached because Montfort’s viability in the market would be injured by (1) a threat of loss of profits from the possibility that Excel would lower its prices to a level at or only slightly above its costs, and (2) a threat of being driven out of business by the possibility that Excel would lower its prices to a level below its costs, which would violate Section 7 of the Clayton Act.66 Section 7 intends to prohibit actions that substantially lessen competition or tend to create monopolies.67 These injuries would be met on the premise that Excel would injure Monfort by enacting a “price-cost squeeze.” A price-cost squeeze would involve Excel increasing the bidding price it would pay for cattle while lowering the price it sells the end product, boxed beef, to a level at or only slightly above its production costs.68 In effect, this would require Monfort to also lower its prices in order to remain competitive, causing them to suffer profit losses.69 Excel’s large financial resources endowed by its owner, Cargill, would allow it to accept far lower profit margins than firms like Monfort, which would eliminate competitors in the short run and reduce competition in the long run.7071 This inevitability violates the Clayton Act by creating a “threatened loss or damage”72 by a pricecost squeeze, which would “substantially… lessen competition”73 and create a dynamic in which Excel can control the market to maximize their own benefit.74 The District Court agreed that Monfort’s allegations and proof of anticompetitive effect were sufficient given that Excel, being the second largest producer, could create an acquisition that realistically threatens Monfort’s position as a strong competitor in the marketplace.75 The Court of Appeals also affirmed this ruling and held that the respondent’s allegation of a “pricecost squeeze” was not just harm from competition, but constituted a claim of injury as a form of predatory pricing because Excel would drive other companies out of the market.76 D. The Supreme Court’s Ruling on Cargill v. Monfort Undermines the Clayton Act In response to the District and Circuit Court rulings, the Supreme Court’s first argument was that the showing of loss or damage merely due to increased competition does not constitute antitrust injury to seek relief under Section 16.77 The Supreme Court looked back to its rulings on Brunswick orp. V. Pueblo Bowl-O-Mat, Inc., where they held that “antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws.”78 Here, the Court found that the competition that Monfort alleged, competition for increased market share, was simply vigorous competition, and not actively forbidden by antitrust laws.79 The Court suggests that if antitrust laws protected competitors from the loss of profits due to this price competition, any decision by a firm to cut prices in order to increase market share would be rendered illegal.80 However, showing loss or damage due to increased competition does constitute antitrust injury. Antitrust injury results from predatory pricing, an anticompetitive practice forbidden by antitrust laws where a corporation intentionally lowers prices below normal competitive prices in order to monopolize part of the market.81 Monfort demonstrated that this injury is at play because they proved high likelihood that Excel would engage in a price-cost squeeze. A price cost squeeze may be viewed as “simply vigorous competition” in the short run. However, if the practice continues, it will greatly reduce competition in the long run. Furthermore, antitrust laws focus on protecting competition in the long run rather than treating these matters as mere short term price wars. In this case, the Court focused on the postmerger conduct and opted to deny relief unless the plaintiff could prove a violation of the Sherman Act. Instead, the Court should focus its attention on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market, focusing on the probable threat of harm rather than actual harm.82 This aligns with the purpose of Section 7 in the Clayton Act to prevent mergers that “may substantially lessen competition, or tend to create a monopoly” without requiring initial proof of ongoing, established harm to the plaintiff.83 Section 16 of the Clayton Act is not being properly enforced to protect competition if it does not grant plaintiffs antitrust injury on the basis that there is a threat of loss of profits due to possible price competition following a merger. The Supreme Court’s second argument is that the respondent neither raised nor proved any claim of predatory pricing before the District Court. This is because Monfort did not allege that Excel’s engaging in a price-cost squeeze was included in predatory activities.84 Although Monfort may only have four passing references that claim that Excel would be able to and would probably engage in predatory pricing, it should not need to claim this, rather, the evidence of a price-cost squeeze likely occurring is enough to satisfy antitrust injury. The Court's ruling on Cargill v. Monfort did not, however, set a per se rule, which would have unequivocally “denied competitors standing to challenge acquisitions on the basis of predatory pricing theories.”85 Therefore, competitors can still challenge acquisitions on the basis of predatory pricing. However, because the Court ruled that showing loss of damage merely due to increased competition, or the threat of loss of profits due to possible price competition following a merger does not constitute antitrust injury to give injunctive relief under Section 16,86 if following competitors try to bring up this reason for antitrust injury, they will most likely be denied standing as the Court will refer back to this case. This language has been inscribed into this section’s jurisprudence doctrines and has not been overturned or amended since, as more recently cited in the definition of antitrust standing in Glen Holly Entm’t, Inc. v. Tektronix Inc case in 2003.87 The subsequent adverse impacts of consolidation on the market demonstrate that showing loss of damage due merely to increased competition, or the threat of loss of profits due to possible price competition following a merger does constitute antitrust injury and should be struck down. III. Prong Two: The DOJ and FTC have Significantly Decreased the Number of Agriculture and Meatpacking Merger Acquisitions that they Block A. Power in the Hands of the Antitrust Division and Federal Trade Commission to determine Harmful Merges The second institutional aspect affecting antitrust enforcement is observed in federal agencies. The DOJ and FTC are the federal agencies that evaluate if corporate merges valued at more than $94 million can occur.8889 Since the 1980s, regulation by the FTC and DOJ has significantly decreased. Every year the FTC and DOJ review over a thousand merger filings, and it was found that between 2000 and 2005, 95 percent of merger filings presented no competitive issues.90 For mergers that “may… substantially… lessen competition, or tend to create a monopoly,”91 the FTC conducts more in-depth investigations using their Merger Best Practices guidelines.92 Oftentimes, competitive issues with these mergers are solved by consent agreement with the parties. In the few cases where the agency and parties cannot agree on a way to fix the competitive problems, the agency may bring the merger on administrative trial to federal court.93 These agencies base their determination on if a merge is likely to create or increase market power.94 Market power is the ability of a seller or a group of sellers to profitably maintain prices above competitive levels for a significant period of time or the ability of a buyer or coordinating group of buyers to depress prices below competitive levels.95 When a merger is brought before them, such as the acquisition of Cargill by Continental, the Division conducts extensive research. In this case, they worked with over 20 attorneys, economists and paralegals who reviewed over 400 documents and consulted with officials from the USDA, FTC and state attorneys general offices. They interviewed over 100 farmers, farm organization officials, agricultural economists, grain company executives, and other individuals. In conducting their analysis, the Division determines the size and shape of the product and geographic markets, how recent buying and selling patterns would be affected by the merge, analyzes the size of the firms’ market shares, and looks at the pre- and post-merger levels of concentration in the market.9697 From this, the Division decides if the effect of the merger may substantially lessen competition in the relevant market, which determines whether or not to allow the merger to exist.98 In Philadelphia National Bank, the Supreme Court set forth an additional test that said if mergers control an undue percentage share of the relevant market and which results in a significant increase in the concentration of firms in the market inherently likely to lessen competition, then they violate Section 7 of the Clayton Act.99 After the Division follows these steps, they can prevent the merger from existing or allow the merger to proceed if they follow restructuring recommendations. For Cargill, they concluded that the merger would prevent competition and options for farmers to sell their products to. Thus, the Division suggested multiple divestitures in Cargill and Continental facilities throughout the Midwest, West and Texas Gulf. The Division did this because they wanted to ensure that farmers in the affected markets would have alternative buyers to sell their grain and soybeans to.100 This case exemplifies that the DOJ and FTC have the capacity to determine how much evidence is needed to prove injury, what constitutes control of an “undue percentage share of the relevant market,” and what “a significant increase in the concentration of firms in the market” is.101 Although the investigation in Cargill and Continental resulted in an adequate enforcement of antitrust guidelines, the majority of cases do not face comparable evaluation. B. Regulation by the DOJ has Significantly Decreased Decreased regulation by the DOJ and FTC is not adequately protecting competition. From 2010 to 2019, despite a 79.16 percent increase in the number of pre-merger submissions to the DOJ and FTC, from 1,166 to 2,089, the percentage of mergers that these agencies conducted a second request for decreased by 0.5 percent and 0.3 percent respectively for the DOJ and FTC.102 Despite a clear increase in the number of merger requests, the DOJ and FTC have not proportionally increased the usage of their enforcement mechanisms. Examining enforcement in 2013, there were 1,326 merger transactions reported, 217 of which raised questions for further inquiry based solely on information reported. From this, 47 second requests were issued from the FTC and DOJ to collect data from the businesses. After receiving this information, the DOJ and FTC brought 38 merger enforcement actions which in the majority included settlement agreements with the parties involving asset divestiture to prevent post-merger harm. This resulted in only 6 merger cases filed in court seeking injunction rather than settlement.103 Seeing as enforcement trends have shifted to such a great extent to allow over 95 percent of merger transactions form every year, the DOJ and FTC have clearly demonstrated a propensity to decrease regulation of mergers, which generally favors furthering the dominance of large corporations. The Cargill case epitomizes the Court’s lenient attitude specifically against enforcement of Section 7 of the Clayton Act where the federal agencies also need to increase enforcement to uphold the goals of the statute. Under Section 7 in the Clayton Act, the number of merger cases investigated by the DOJ have decreased in each decade following the Bork era: 125.3 merger cases per year in the pre-Bork era from 1970 to 1979,104 95.1 cases per year in the post-Bork era from 1980 to 1989,105 and most recently, only 69.8 cases per year from 2010 to 2019.106 Merger cases have experienced drastic decreases in the number of cases for which the DOJ conducts a second request, finds violation of antitrust laws, and bars a merger from proceeding from the 1970s to our current age. For agriculture enforcement specifically, since 1969 the DOJ has only filed 10 cases against company mergers for fluid milk manufacturing and dairy products, while meat packing firms have only faced 7 cases cumulatively.107 The DOJ’s decreasing regulation of mergers that substantially harms competition has caused the agriculture market to become more consolidated; therefore, it must reinvigorate its deference to its statutory duties to uphold the Clayton Act and strike down on mergers that it foresees will and currently are, threatening competition on the marketplace. From 2008 to 2011, the FTC challenged nearly all mergers that would result in three or fewer significant competitors, most that would result in four or fewer significant competitors, and none that would leave five or more competitors.108 This practice closely resembles Robert Bork’s philosophy arguing that mergers resulting in four or more competitors should be presumptively lawful.109 Although the FTC was diligent in challenging mergers that would result in three or fewer significant competitors, having five large competitors on the market still constitutes a substantially consolidated market, further decreasing competition and preventing smaller businesses from surviving and profiting. IV. Recommendations In order to uphold competition in the marketplace, the Courts and federal regulation agencies must take deliberate action against mergers that will inevitably have profound effects on long-term competition. In order to address prong one, where the Courts have not erred on the side of precaution and have not granted antitrust injury to parties that claim “the threat of loss of profits due to possible price competition,” the Courts should interpret American antitrust laws with Congress’s intent to protect competition, rather than through the lens of consumer welfare, a strategy that has failed to uphold empirical integrity, seeing as consumer prices have risen.110 Specifically, they should interpret Section 16 of the Clayton Act to allow for antitrust injury to include the threat of loss of profits due to possible price competition following a merger. Not only will this rightfully decrease the barrier to bringing forth an antitrust injury, but it will bring precedent back into alignment with the purpose and intention of the Clayton Act and prevent further consolidation in the agriculture marketplace. In order to address prong two, where the DOJ and FTC have largely allowed consolidation in the marketplace to transpire with limited regulation, the DOJ and FTC must increase the number of agriculture and meatpacking merger acquisitions that they block by holistically analyzing the scope of the merger’s market power. Additionally, they must reinvestigate current corporations in the market that have unruly market power, such as Tyson, and require divestiture. Tyson is sued on average 2.7 times every month, however, it still holds a substantially large percentage of the meat processing and packing industry.111 By implementing both of these recommendations, the federal government can truly fulfill their regulatory responsibilities by laying the groundwork for increasing competition by maintaining or increasing the number of farms, distributors and meatpacking businesses. CONCLUSION The growing consolidation of America’s agriculture industry is alarming and poses a continuous threat to the expansion and transition to regenerative farming practices. The DOJ, FTC and the Courts have embraced Robert Bork’s “consumer welfare standard” philosophy and employ stricter standards to prove antitrust injury, allowing more consolidation to occur in the agriculture industry. These conglomerates have increased market prices,112 and in the long run, are implementing farming practices that are destroying the soil and security of America to produce its own food. There are more small and medium sized farms that implement regenerative practices such as applying manure and organic fertilizers. In order to expand the implementation of regenerative practices, large operations need to be broken down and further prevented from forming. Ultimately, allowing merges to occur and limiting regulation on the current marketplace by the Courts and federal agencies is harming consumers, farmers, and the government. The principles of fairness and equal opportunity in the United States economy are threatened if we allow the few consolidated corporations to exist in the marketplace. The government, consumers, and farmers rely on these few firms as key suppliers and buyers; such dominance by a handful of corporations gives way to their disproportionate influence on regulatory and political processes meant to hold them accountable. The DOJ, FTC and Courts must utilize their statutory responsibilities to break down this corrupt system and create a more competitive marketplace. This will allow more firms to implement regenerative practices and protect our food systems and environment for generations to come. A failure to act constitutes a dereliction of duty to the people, the planet, and the purpose behind antitrust laws intended to uphold fair and ethical business practices.

## 2nd adv

#### There are no definable metrics under the EU model, which makes it impossible to translate

Geoffrey A. Manne 18—President and founder of the International Center for Law and Economics, distinguished fellow at Northwestern Law School’s Searle Center on Law, Regulation, & Economic Growth. ("Why US Antitrust Law Should Not Emulate European Competition Policy," December 19, 2018, from ICLE, https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf)

It is striking that firms can infringe Article 102 with practices that are either “unfair,” prejudice consumers, place trading partners at a disadvantage, or impose obligations that depend on the behavior of other, non-contracting parties. Not only are these broad categories sometimes mutually exclusive (a firm could very well prejudice consumers by not disadvantaging some of its trading partners) but, more importantly, many of these concepts are almost impossible to translate into economic thinking.

Although the tersely worded Sherman Act, with its prohibitions on any contract “in restraint of trade”19 or attempts to “monopolize”,20 is notoriously ambiguous, over the course of more than a century the Supreme Court has developed jurisprudence to limit these provisions to certain practices that restrict consumer welfare. It thereby grounded American antitrust enforcement in a requirement of rigorous economic analysis.

This is not all merely an academic question: there are real and damaging consequences that can follow from the antitrust prescriptions based on the EU model. As I discuss below, by endorsing open-ended enforcement, the EU courts have ultimately exposed EU competition law to increased politicization. Because EU regulators can call upon a large list of justifications for their enforcement decisions, they are free to pursue cases that best fit within a political agenda, rather than focusing on the limited practices that are most injurious to consumers. In other words, there is largely no definable set of metrics to distinguish strong cases from weak ones under the EU model; what stands in its place is political discretion.

#### Internet Openness resilient

Jason Pielemeier 18, policy director of the Global Network Initiative, 7-9-2018, "Reports of the Death of Internet Freedom Are Greatly Exaggerated," Council on Foreign Relations, https://www.cfr.org/blog/reports-death-internet-freedom-are-greatly-exaggerated

In just under a decade, the narrative about the internet has shifted dramatically. What was once seen as a tool that would inevitably cripple corruption, topple dictators, and liberate minorities, the internet is now seen as a technology that enables surveillance, amplifies hate speech, and displaces labor. While the challenges are real and grave, it is worth carefully examining this fatalistic assessment, which obscures how much freedom remains online, and risks inviting steps that could imperil the internet’s enduring potential. Digital Policy Censorship and Freedom of Expression The internet evolved as an anomaly—government-funded research and development led to technology that found a perfect petri dish in which to flourish among tinkerers who wanted to share information. Eventually, commercial initiatives came along and expanded the audience by building out infrastructure, professionalizing services, and generating revenue. The internet’s commercial growth in the 1990s coincided with and was accelerated by an era of global deregulatory zeal, surplus capital, and geopolitical hubris. As a result, the internet became inexorably associated with the optimism of that moment in history. The mutually-reinforcing orthodoxies of free markets and free speech underlie the concept of “internet freedom,” which is often conflated with the U.S. government’s lauded and derided strategy of the same name. Today’s internet with rampant data collection, surveillance, and censorship may indeed seem grim when viewed from the idealistic perch of the 1990s. But from the perspective of today’s authoritarian regimes and information monopolists, the internet continues to present an ever-expanding threat surface. Bloggers continue to expose uncomfortable truths, journalists use encrypted apps to communicate with whistleblowers, entrepreneurs find ways to leapfrog legacy technology, and vulnerable minorities work around firewalls to seek and receive support across borders. While China presents an important counterpoint, the amount of resources and effort consistently invested by the Chinese Communist Party is unlikely to be feasible for most countries. One of the reasons internet freedom seems so imperiled is because it has been measured using an unrealistic baseline. Freedom House’s excellent, annual Freedom of the Net assessment is the most comprehensive yardstick. Using a broad set of indicators, it has repeatedly reported declining metrics for much of the world since 2011. But inherent in this methodology is an unrealistic assumption that it is feasible to return to the halcyon days of the early internet. A better baseline from which to assess freedom online is the relevant amount of freedom that is afforded online. From this perspective, what is remarkable is not how much freedom has been curtailed, but rather how much still remains. For example, comparing Freedom House’s internet freedom assessment to its similar Freedom of the Press Index reveals that twenty-one of the sixty-five countries in the former are assessed as “more free” online than they are on press freedom. Furthermore, no country is ranked less free on the internet index as they are in the press freedom one, indicating that countries assessed are freer online than they are in the press. The internet continues to provide opportunities for expression, access to information, and truth telling that simply do not exist offline in places like Angola, Kenya, and Malaysia. Furthermore, the steps governments take to protect or restrict rights online only tell part of the story. Companies also play important roles by enhancing or restricting access, pushing back on or facilitating government restrictions, and addressing or enabling harassment and other threats to users. Standard-setting bodies are underappreciated actors in this space, often operating with surprising degrees of autonomy from state actors and wielding enormous, if subtle, influence. Civil society educates users and organizes initiatives to address challenges, in addition to exposing and advocating against rights infringements. Looking across the landscape, tools like the Global Network Initiative’s Country Legal Frameworks, which document and allow comparison of relevant laws, complement Freedom of the Net, which assesses enforcement of those laws. Recent efforts to facilitate and bring rigor to such cross-indicator analysis, like UNESCO’s Internet Universality Indicators and Mozilla’s Internet Health Report, will allows activists, businesses and governments piece together a more holistic assessment of the state of internet freedom. There is a fine-line between complacency and fatalism. During the first two-decades of the internet’s growth, too much faith was put in the technology itself. Not enough was done to address challenges such as the spread of surveillance technologies, abuse of online platforms, and the general undermining of trust. As the United States, Europe, and platforms now work to devise solutions to these problems, they run a risk of unintentionally joining ranks with the malign forces who have been clamoring to stifle freedom online. Instead, they should work with NGOs and academics to establish better baselines and metrics to assess the internet’s true impact, as well as the kinds of actions that enable the good and mitigate the bad. Meanwhile, advocates for the open internet should acknowledge that regulation can help, while remaining vigilant to unintended consequences. Finally, all of these stakeholders should continue to forge coalitions like the Global Network Initiative that work across borders in support of flexible, focused, and rights-compliant efforts to improve freedom online.

#### No impact to power transition

Christopher **Fettweis 17**. Associate Professor of Political Science at Tulane University. “Unipolarity, Hegemony, and the New Peace,” Security Studies, 26:3, 423-451, 5-8-2017, http://dx.doi.org/10.1080/09636412.2017.1306394

Conflict and Hegemony by Region Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The United States has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic-stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear. Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist across regions. If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1. These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace. In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day. The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

#### The plan devastates American industry and innovation, undermining the entire financial system

Gary Shapiro 7/23—J.D. from the Georgetown University Law Center, sits on the State Department's Advisory Committee on International Communications and Information Policy, the No Labels Executive Council, the USO of Metropolitan Washington-Baltimore Board of Directors and the American Enterprise Institute Global Internet Strategy Advisory Board. ("Radical antitrust bills would be disastrous for consumers and innovation – Press Telegram," July 23, 2021, https://californianewstimes.com/radical-antitrust-bills-would-be-disastrous-for-consumers-and-innovation-press-telegram/452107/)

Consumers win when they can determine winners and losers so that Uber and Lyft can challenge the taxi monopoly. AirBnB provides an alternative to hotels, allowing working parents to save time and take advantage of next-day delivery from Amazon.

Innovation is built on innovation. I used to have a rotating phone, so I have an iPhone. I once had a Model T, so I have a self-driving car (Note: these were all invented in the United States).

The House of Representatives antitrust bill claims to protect the welfare of consumers, but in reality it is anti-consumer and anti-innovative. Initially, it meant that Amazon Prime’s free shipping, the pre-installed Find My iPhone app, and searching for YouTube videos in Google search results would end.

Aside from the clear and unavoidable consumer backlash, who knows what other inventions will get in the way in the future? Why are our parliamentarians trying to dismantle the products and services that Americans love? Why don’t these policy makers allow businesses to create more?

The bill targets “Big Tech,” but it actually hurt consumers, small businesses, and start-ups. Arbitrary rules contained in the drafted bill, such as merger and acquisition restrictions, will end opportunities for business growth. Today, SMEs looking to grow are usually considering two options. Either it’s bought by a big company and you get a lot of money, or you’re pursuing an IPO (which is much more difficult). What incentives or means do companies need to grow with these bills?

Similarly, venture capitalists and investors hesitate to invest in new and promising businesses. Challenges to the entire system of our financial opportunities and the status quo of old businesses are restrained. What happens to the American dream if it gets bigger, hires more people, invests in more startups, and can’t get the money back into the economy? The spillover effect is devastating.

If the bill is signed, the bill will also bring the United States a competitive disadvantage to China and other countries. The bill imposes obligations and restrictions on US companies and provides ammunition to the EU and other regulators targeting US companies.

What does that mean for the average American? Loss of work for Americans. Little investment in American companies. The price of technology is high. The product you purchase will be less transparent. As soon as China becomes a technology superpower, it will also become a political superpower. As the Atlantic wrote in 2020, “China will not be a pacifist force.” “Export value” with the product.

Finally, these bills are a threat to our cybersecurity. By requiring companies to expose the platform to all parties, this proposal eliminates the ability of services to monitor the site against hackers, terrorists, foreign governments, and other malicious individuals.

These bills do not take into account the views of people across the country, especially consumers and small business owners, who will be most affected by them. To make matters worse, these bills are being tracked quickly throughout the process without hearing or testimony.

We urge Congress to step out of the accelerator and take these complex issues into account. Thoughtful and careful. We work with innovators and consumers to protect America’s world-leading economy and those who are constantly striving to support it.

Out of the most challenging years of the century, we don’t need any more disciplinary law. Instead, we need lawmakers to prioritize growth and success.

#### That outweighs the aff – china war

Jeanne Suchodolski et al. 20—Attorney with the United States Navy Office of General Counsel where she currently serves as Patent and Intellectual Property Counsel for the Naval Undersea Warfare Center Division Keyport; Suzanne Harrison, Founder of Percipience, LLC, a board-level advisory firm focused on intellectual property strategy, management, and quantifying and mitigating intellectual property risk; Bowman Heiden, co-director of the Center for Intellectual Property, visiting professor at University of California, Berkeley. ("Innovation Warfare," December 2020, from North Carolina Journal of Law and Technology, Volume 22, Issue 2, Article 4, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1416&context=ncjolt)

Innovation, in particular, technology-based innovation, is the key driver for both economic competitiveness and national security. Other nations, with interests adverse to the United States, recognize this fact. In an increasingly interconnected world, nation states seek to accumulate innovation prowess, and hence economic strength, as a key element of their geopolitical power. Especially savvy nation states also pursue such ends as a mechanism to influence or diminish the national security and geopolitical power of the United States. There is no need to inflict upon the world the carnage of war if one’s geopolitical aims can be achieved via alternative competitive means.

Several authors suggest China’s long-term ambitions include unseating the United States as the world’s economic and political leader.1 More compelling than opinions, several United States (“U.S.”) government and private studies document a systematic and coordinated effort by China to achieve technical and economic dominance through misappropriation of U.S. technology.2 These efforts are additionally supported by a companion effort to weaken international economic institutions and norms designed to protect U.S. intellectual property and free trade.3 The Chinese tactics include illegal means, and sophisticated use of legal means, to misappropriate U.S. technology and weaken the U.S. innovation infrastructure including: a) Leveraging the open university and laboratory ecosystem via direct sponsorship and engagement of Chinese nationals;4 b) Devaluing U.S. positions in patents and technology platforms;5 and c) Accessing private sector U.S. technology through acquisitions and ownership stakes in existing firms, funding of high-tech start-ups, and forced joint ventures and other contractual agreements as a prerequisite for entering the Chinese market.6

This particular form of competitive strategy targeting the innovation ecosystem in the United States is labeled by the Authors as “Innovation Warfare,”7 and it is defined as an executable competitive strategy: a) Reflecting an innovation, intellectual property, and technology strategy articulated and executed by the state (e.g. China); b) Using illegal means, political means, and legal economic activities—of the type previously residing solely in the province of commercial enterprise, to achieve the state’s objectives; c) Employing these economic and innovation activities to achieve both economic geopolitical power and to enhance military capabilities; and d) Functioning as a military, national security, and defense doctrine not solely as a reflection of the state’s economic policy goals nor commercial competition in the ordinary course.

Innovation Warfare does not just threaten American jobs and economic prosperity. By simultaneously co-opting and weakening the innovation capabilities of the United States, China seeks to advance its rise to world power. China’s prosecution of Innovation Warfare not only encompasses a rejection of a rules-based international order, but also poses an existential threat. A world where China dominates the technology landscape is not just about who earns the profits or prevails in an abstract geopolitical fight. According to the National Security Strategy of the United States of America (“National Security Strategy”), China pursues a world in which economies are less free, less fair, and less likely to respect human dignity and freedoms.8 China’s Innovation Warfare activities risk the type of economic and geopolitical aggressions that were a root cause of two World Wars.

## 1st Adv

#### Wages high and rising

Patti Domm 21—CNBC Markets Editor. (“Workers’ wages are rising at the fastest pace in years. Companies’ profits could take a hit,” May 22, 2021, from CNBC, https://www.cnbc.com/2021/05/22/wages-rise-at-the-fastest-pace-in-years-firms-profits-could-take-a-hit.html)

Workers are getting higher wages, but at some point that could bite into companies’ profits.

As the economy reopens, costs are climbing for everything from packaging and raw materials to shipping. In addition to these expenses, companies are also paying more to get workers to come in the door.

But the disparity between labor costs and profits has been so wide for so long, that employers should be able to increase pay if they can raise prices for goods and services or improve productivity.

McDonald’s said last week that it was boosting wages for the 36,500 hourly workers at company-owned stores by 10%, and Chipotle announced it will raise wages to an average of $15 an hour by the end of June. Bank of America said it would raise minimum wages for its hourly workers to $25 an hour, from the current $20, by 2025.

Sports equipment company Under Armour also announced it would boost the minimum hourly wage for its retail and distribution workers to $15 from $10.

“It’s some of the strongest wage growth we’ve seen in a quarter century,” said Mark Zandi, Moody’s Analytics chief economist. He said the 3% wage growth for private workers in the first quarter was the strongest since the 1990s and productivity has picked up at the same time.

“All the anecdotes we were getting in the last few months would suggest it’s continuing,” he said.

#### No empirical or statistical evidence that antitrust decreases inequality

Jonathan Klick et al. 19—University of Pennsylvania Law School, Erasmus School of Law; Elyse Dorsey, Adjunct Professor at Antonin Scalia Law School; Joshua D. Wright, Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission; Jan Rybnicek, Freshfields Bruckhaus Deringer LLP. ("Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," January 9, 2019, from George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3249524)

To unpack these results, Table 5 presents the effect of investigations on real average consumption expenditures for the 1st and 5th quintile households by income. For brevity, we only present the specifications with 2 lags and the time trend.

Table

Description automatically generated

On the whole, the relationship between the enforcement metrics and consumption is comparable for the households in both the first and fifth income quintiles. There is not much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality. And certainly not evidence significant enough to justify the aggressive policy proposals recently injected into discussion of competition policy.

Stepping away from this aggregate analysis for a moment, it is interesting to note that the new(-old) focus on “big is bad” when it comes to inequality ignores an impressive literature on the effects of one of the biggest players in the US in recent decades – Walmart. Work by Jerry Hausman and Ephraim Leibtag shows that when Walmart Supercenters enter a market, food prices paid by consumers in the market drop by about 3 percent, and because they have detailed longitudinal data on household expenditures, they are able to estimate household welfare effects due to this price decrease. They find that the welfare effects are substantial and they are most pronounced for those at the lower end of the socio-economic spectrum.158 In addition to this price effect, David Matsa shows that Wal-Mart’s entry into a market induces competitor supermarkets to improve the quality of their service so as to avoid losing even more business to Wal-Mart and its lower prices.159 Thus, in the posterchild case for big is bad, the behemoth Wal-Mart would appear to improve inequality by its very existence.

Although we believe consumption is the most relevant measure for assessing the welfare effects (in absolute or, as here, in relative terms) of antitrust policy, we provide similar analyses of income and wealth. Using Census data,160 in Table 6, we again provide estimates from an AR(1) distributed lag model examining the effects of DOJ investigations, both merger specific and total, on the income shares received by those individuals in the first quintile and the fifth quintile, while also controlling for a background linear trend.

Table

Description automatically generated

As with consumption measures, there is generally no statistically significant effect (individually or jointly) of current or past investigations (regardless of whether we focus on merger-specific or total investigations) on the income shares of those at the bottom or the top of the income distribution. Putting aside statistical significance, while past investigations are associated with increases in the income share received by those at the bottom of the distribution, current investigations have the opposite effect. Further, many of the investigation coefficients are positive for the fifth quintile income share as well. If we examine combined ratios of the shares as we did with the consumption data, we still find no support for the assumption that an increase in antitrust enforcement has any systematic effect on inequality.16

#### No impact to technology monoculture theory---existing innovations solve cyber security

Bergmayer 9 (John Bergmayer is a law student at the University of Colorado, Legal Director at Public Knowledge, specializing in telecommunications, media, internet, and intellectual property issues @ Public Knowledge, DON'T SEND A LAWYER TO DO AN ENGINEER'S JOB: HOW ADVANCING TECHNOLOGY CHANGES THE SOFTWARE MONOCULTURE DEBATE, 7 J. on Telecomm. & High Tech. L. 393, 418-423, y2k)

III. Technology Has Proven Sufficient to Deal With Most Computer Security Issues

As noted above, discussions of the negative security consequences of software monocultures are generally focused on the problems of a Microsoft monoculture particularly. While any software monoculture can be threatened by the rapid exploitation of a software vulnerability (and, as demonstrated by the Internet Worm, non-Microsoft monocultures have been), in the case of Microsoft, the monoculture effect is seen as a "force multiplier" that greatly increased the effects that are ultimately caused by flawed software in the first place. Therefore, my analysis of the proper policy response to a software monoculture will be based primarily on an analysis of the factors that have led to Microsoft's products being widely viewed as insecure, and on the responses that Microsoft has deployed in order to deal with this problem. It is also informed by an understanding that government interventions in markets often have unintended consequences. As Hahn and Layne-Farrar write,

From an economist's perspective, before the government decides to intervene to impose software security, it must be reasonably certain that private parties are unable to do so on their own. In other words, it must be clear that the market failed in some way. Otherwise, interventions run the risk of interfering with properly functioning [\*419] markets and, therefore, of introducing inefficiencies where none existed before-what could be termed a "government failure" as opposed to a market failure.

After a comprehensive review of the marketplace for computer security, those authors remain skeptical that government intervention is needed. They even point out that seemingly benign reforms, such as a "lemon law" for software, could have negative consequences.

Because, as discussed below, technological solutions to many fundamental computer security issues (including the problem of monoculture itself) appear to be making progress, in order to avoid potential negative consequences, the government should not regulate to increase software diversity.

Geer's analysis of the problematic nature of Microsoft's software engineering principles is sound. However, it bears keeping in mind that Microsoft is a software company that became successful in a time before ubiquitous, always-on computer networking. Indeed, broadband adoption is not yet complete: in 2007, 23% of Internet users still used dial-up connections. Microsoft's design strategies may have always been bad from a software engineering standpoint. But most computer worms, virus and trojans today spread over the Internet. In the days where the primary vector of computer malware transmission was the floppy disk or BBS downloads, many computer vulnerabilities would simply not be exploited. The penalty throughout the 1980s and 1990s for insecure software design was not as severe as it is today. It is reasonable to assume that even without any policy action, Microsoft's software engineering strategies will change to reflect the new, networked reality.

In fact, Microsoft's approach to software engineering has changed in the past several years. The year before Geer's paper, Microsoft issued its "Trustworthy Computing" whitepaper. This paper called for a fundamental reengineering of computers, down to the level of the [\*420] microprocessors, with the aim of increasing security and preventing unauthorized code from running. Many, including Geer himself, have criticized that paper's proposals, arguing that the proposal for a Next Generation Secure Computing Base, commonly referred to as "Palladium," threatened to put too much control of what software can run on a computer into too few hands and to exacerbate the risk of vendor lock-in. Microsoft has since abandoned the most ambitious of its "trusted computing" plans. Although overly ambitious and perhaps misguided, the Trusted Computing whitepaper did at least demonstrate an increased awareness of security issues.

Several other initiatives have had more of a practical impact. In 2002, Microsoft undertook a two-month hiatus in the development of its software in order to focus on security concerns. It has shown itself to be more nimble in its response to problems as they are uncovered. Its research arm has begun to look for long-term security solutions that, unlike secure computing, do not rely on changes to hardware. However, Microsoft's improved dedication to security issues can most clearly be seen on a practical level by looking at a few of the security-related improvements found in the most recent version of the Windows operating system, Vista.

One longstanding weakness in Windows had been that it possessed a "file permissions system" that did not adequately prevent untrained users or rogue programs from making damaging changes to the operating system. Vista addresses this by introducing a more robust, Unix-style permissions system whereby even computer administrators need to supply a password before certain settings or files can be changed. Under Vista, Internet Explorer now runs in a "sandbox" that makes it so neither it, nor any programs it spawns (such as malware from a web site) can do much damage to the underlying system. Vista also contains security features designed to prevent a user's computer from becoming part of a botnet, and the most notorious current worm, Storm, which makes [\*421] computers it infects part of the Storm botnet, currently does not infect Windows Vista.

These examples show that there are often technological solutions to problems created by technology-solutions that make a policy response unnecessary. One technological change in particular, however, has the potential to alleviate many of the negative externalities caused by software monocultures. This technology, Address Space Layout Randomization (ASLR), uses software techniques to produce a kind of virtual diversity, limiting the vectors by which malware can spread. Elements of software traditionally load into a particular part of a computer's memory. Malware can take advantage of this fact to more easily spread from one computer to another. ASLR reduces the ability of malware to spread from one computer to another by randomly changing the memory location software loads into. As Ollie Whitehouse writes,

ASLR is a prophylactic security technology that strengthens system security by increasing the diversity of attack targets. Rather than increasing security by removing vulnerabilities from the system, ASLR makes it more difficult to exploit existing vulnerabilities… . By randomizing the memory layout of an executing program, ASLR decreases the predictability of that layout and reduces the probability that an individual exploit attempt will succeed.

Although ASLR is not a new technology, its inclusion in Windows Vista shows technological methods taken by Microsoft can lessen the effects of software monoculture. It is the flexible nature of software that gives it the ability to create virtual diversity of this sort-it is difficult to imagine an analogous solution to the problem of, for example, agricultural monoculture. The impressive number of technological solutions Microsoft has brought to bear in Vista in order to address software security should at least argue in favor of giving technology, rather than law and policy, the chance to solve problems in computer security.

Fourth, as computing moves into the cloud and as apps, documents, and protocols become more browser based, the differences between the various vendor products will lessen, and again, hackers will focus their attacks on the common links. Will the future attacks be against OSes, applications, data formats, and protocols, or will they leverage the inherent vulnerabilities in the cloud fabric itself?

I'm sure many readers are still discounting all my previous arguments. Suppose the world does move toward a more diverse computing environment. Is it really that hard for an attacker to attack 20 apps or OSes than one? Yes, of course, but maybe it's not the high hurdle most people think it is.

Crimeware pays

My fifth rebuttal point is that today's attackers are professional criminals. Make a point defense and they will get around it. Coding for 20 OSes or applications doesn't take that much more effort in real life than coding for one exploit. Look at all of the malware programs today that already use multiple attack vectors. Ten years ago, most malware programs attacked one exploit. Today, it's common for a single malware program to make use of 5, 10, or even 20 or more attack vectors. Conficker, anyone?

If we all ended up with 20 different apps and 20 different OSes, the attackers would simply begin exploiting more of them at once. All of the most popular apps and OSes are exploited pretty regularly. Attackers would learn to separate their entry exploit vectors and post-exploitation code into two separate but coordinated routines. The Metasploit project has been making this easy for more than half a decade. Are we to assume that rich, professional malware attackers will just give up and go home?

The idea of multiple attack vectors married with multiple post-exploit mechanisms in a malware program isn't even a new idea. Plenty of worms are already doing this, but it isn't mainstream because the attackers don't need the additional code and sophistication -- yet. If they use it sooner than they need it, it results in wasted computing cycles, slower malicious code, and easier detection. They'll also broadcast their new offensive techniques to the enemy (i.e., the anti-malware industry and the global community of good).

Lastly, and this is the biggest argument, we can't ignore the fact that most malware programs today (99.99 percent) don't rely upon software security vulnerabilities at all. They just trick the end-user into running malicious code. This attack vector will work for any OS and any application. This point alone should put the monoculture argument to bed. You can change the application, but until we change the end-user thought process, the biggest problem remains.

#### Cyberattack won’t shut down the grid – resiliency measures check

Craig, analyst @ Fox Business, citing the senior manager of industrial control systems at Mandiant, 16

(Victoria, “The U.S. Power Grid is 'Vulnerable,' But Don't Panic Just Yet”, http://www.foxbusiness.com/features/2016/02/02/u-s-power-grid-is-vulnerable-but-dont-panic-just-yet.html)

The idea of the nation's power grids becoming the next battleground for cyber warriors could make hacking into consumers’ credit card accounts and personal information seem like child’s play. While U.S. power companies are likely targeted by foreign governments and others in increasingly sophisticated breaches, actually shutting off the lights and causing chaos is far more complicated than many pundits make it seem. Dan Scali, senior manager of industrial control systems at Mandiant, a cybersecurity consulting arm of FireEye ([FEYE](http://www.foxbusiness.com/quote.html?stockTicker=FEYE)), explained that while cyber criminals may gain access to power and utility data systems, it doesn’t necessarily mean the result will be a power outage and a total takedown of power grid control systems. In other words, the power grid is controlled by more than just a panel of digital buttons. “Losing the control system is bad from the perspective that it takes you out of your normal mode of operations of being able to control everything from one command center, but it doesn’t mean you’ve lost control or all the lights go out [in the city],” Scali explained. While many of the systems have been modernized to include digitized control panels, if a hacker were to infiltrate the system, a utility worker could still have the ability to manually control the machines by flipping a switch, pushing a button, or tripping a breaker. As the world saw with the recent attack in Ukraine, which caused a blackout for 80,000 customers of the nation’s western utility, the biggest problem may be ensuring the power grid’s control systems are not vulnerable to cyber break ins. The January attack in Ukraine was likely caused by a corrupted Microsoft Word attachment that allowed remote control over the computer, according to the U.S. Department of Homeland Security. Scali said there was no evidence from the incident in Ukraine that the hacker’s malware was able to physically shut down the power. “It wiped out machines, deleted all the files. Kill disk malware made it impossible to remotely control things. It caused chaos on the business network, and the area where control system operations sat. But the attacker, we believe, would have had to actually used the control system to cause load shedding, which caused the power to go out, or trip breakers to cause the actual problem. Malware itself didn’t turn the power out,” Scali said. He said what most likely happened in that incident was the hacker stole user credentials and logged into the system remotely. The bottom line: Yes, a similar event could happen in the U.S. And corporate America is concerned. A recent survey released in January on the state of information security, conducted by consulting firm Pricewaterhouse Coopers, showed cybersecurity as one of the biggest concerns among the top brass at U.S. power and utilities firms. Part of the problem, Brad Bauch, security and cyber sector leader at PwC said, is the interconnectedness of the industry’s tools. “Utilities want to be able to get information out of [their] systems to more efficiently operate them, and also share that information with customers so they have more real-time information into their usage,” he explained. While allowing access to their own consumption data allows the companies to give their customers more of what they want, it also opens up a host of access points for hackers, making the systems more vulnerable than they otherwise would be. But to say that the power grid is susceptible to cyber hackers is a bit of an oversimplification.

# 2NC

## PIC

#### Here’s comparative evidence that their standard doesn’t solve our impact

Hiba Hafiz 2020. Assistant Professor of Law, Boston College Law School. “Labor's Antitrust Paradox” <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2286&context=lsfp>

**D. Limitations of New Labor-Antitrust Scholarship** In sum, workers seeking to use antitrust law to challenge employer buyer power in the new era of labor antitrust will face difficulties. **At the same time, they will expose themselves to potential antitrust liability if they seek to coordinate** to counter that power. Each of these challenges stems from the courts’ inevitable reckoning with the consumer welfare standard. With employer competitors increasingly aware of crackdowns on naked wagefixing and successfully focusing courts’ attention on downstream effects by categorizing labor-market restraints as ancillary, the relevance of the per se rule to labor market restraints will likely recede further over time. And **current proposals to jettison the consumer welfare standard in labor antitrust fail to overcome labor antitrust’s paradox**. **The proposed effective competition standard—**while placing the burden in merger reviews on the merging parties to prove their transaction will not harm competition and mandating antitrust enforcers to peruse upstream harms110—**does not resolve the question of how to weigh harms to workers and consumers if they conflict**. The “protection of competition” standard fares no better. While it may draw courts’ and enforcers’ attention to “protecting the competitive process, as opposed to trying to achieve welfare outcomes that judges and enforcers are ill-equipped to measure,” **it does not resolve the question of how to handle harms to labor market competition** **that do not result in harm to competition downstream**.111 This is particularly tricky in fissured workplaces where employer wage discrimination may or may not harm the competitive process—far from “suppress[ing] or even destroy[ing] competition” in labor markets, **fissured employment may make labor markets more competitive while** **nevertheless harming workers**.112 These intractable challenges suggest an alternative solution to protecting workers while maintaining the coherence and integrity of antitrust law: regulatory sharing. Regulatory sharing would supplement existing labor law by creating an additional system of substantive presumptions and affirmative defenses workers can deploy under labor law when employer buyer power or anticompetitive conduct is demonstrated in antitrust investigations, enforcement actions, or private litigation. Such a solution is necessary to concentrate antitrust enforcement on consumer harm from employers’ labor-market restraints while also strengthening labor-law protections and the role of administrative agencies and expertise in enforcing them. Regulatory sharing would prevent arbitrage between regulatory regimes that employers exploit to avoid liability and establish a firm role for labor agencies in merger review.

#### Certainty is key

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

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

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

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

#### More ev – anything else leads to circumvention

Derrian Smith 19. J.D., 2019, Indiana University Maurer School of Law; B.A., 2016, Indiana University - Indianapolis. "Taming Sherman's Wilderness." Indiana Law Journal, vol. 94, no. 3, Summer 2019, p. 1223-1246. HeinOnline.

CONCLUSION

The Sherman Act, by its vague and sweeping language, is a broad delegation of authority to the Supreme Court. Congress sent us into the wilderness-law students and generalist judges alike. In light of swelling desire for the antitrust laws to be more effective against modern-day competition foes, Congress should update the Sherman Act. The common-law approach has not achieved the stability one would expect of a statute levying hefty criminal sanctions, and the Court appears to approximate agency rulemaking on an increasingly frequent basis. Delegating rulemaking authority to an antitrust agency may be a viable solution. But there are some draw backs-namely constitutional objections to which the Sherman Act may be vulnerable, especially if an agency delegation were not accompanied by some level of additional statutory clarity. Even if the agency solution proves unworkable, Congress should address head-on the growing need for clarity, predictability, and stability, which the Sherman Act significantly fails to provide.

#### A vague standard directly means employers will rely on labor laws

Hiba Hafiz 2020. Assistant Professor of Law, Boston College Law School. “Labor's Antitrust Paradox” <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2286&context=lsfp>

B. **Regulatory Sharing Between Antitrust and Labor Law** Regulatory sharing between antitrust and labor law **is necessary to ensure against employer arbitrage** **enabled by antitrust law’s ambiguous welfare standards** **and the judiciary’s historical favoring of consumer welfare over worker welfare**. Establishing a network of labor antitrust triggers for labor rights enforcement, shared merger enforcement between the antitrust and labor agencies, and substantive law presumptions and affirmative defenses under labor law generated by labor-antitrust findings avoids the pitfalls of underenforcement in labor-market regulation.

#### A unitary system is key

Hiba Hafiz 2020. Assistant Professor of Law, Boston College Law School. “Labor's Antitrust Paradox” <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2286&context=lsfp>

2. Substantive law integration: antitrust and labor law. While worker welfare cannot be a coherent goal of antitrust when it conflicts with consumer welfare, Congress has mandated worker protections under other laws. And labor law should be deeply informed by labor-antitrust enforcement: to tailor rights and remedies to the structural realities of labor markets; to deter unlawful employer monopsony and collusion; and to reinforce the remedial effects of labor-antitrust enforcement. Thus, as a supplement to existing work-law enforcement, this Section outlines a system of legal presumptions and affirmative defenses that could be integrated into work law cases based on labor-antitrust investigations and enforcement**. A single system can prevent regulatory arbitrage and limit the creation of buyer power in the first instance**. This is a tremendous benefit over ex post regulation when considering enforcement costs and the costs of employer buyer power in labor markets and the larger economy.128 **A more unified approach to labor-market regulation could allow for crosspollination** between substantive rules and adapt remedies to coordinate achievement of regulatory goals. As discussed above, “red flags” punctuating developments in labor-antitrust investigations and enforcement would trigger substantive presumptions and affirmative defenses under the NLRA that would supplement existing labor-law protections. Because organized workers are a countervailing power to monopsonistic employers,129 when a court finds employers either have monopsony power to artificially suppress wages or have reached agreements restraining labor-market inputs, workers would be entitled to these presumptions and defenses. First, when such findings are made, workers should be entitled to a default rule of union bargaining,130 or if a union is in place, a Board order to mandate collective bargaining under NLRB v Gissel Packing Co.131 If workers have formed a union and their employers refuse to bargain in good faith, workers should also be entitled to a Gissel bargaining order and protections to engage in concerted activity under the NLRA.132 Analysis of whether an employer is bargaining in good faith could be informed by the employer’s buyer power and social-scientific data on industry-specific, productivity-maximizing wages. Similarly, analysis of, and remedial options for, whether employers commit unfair labor practices that infringe workers’ right to organize, bargain collectively, and strike could be informed by monopsony-power determinations and the scope of worker’s outside options

#### 2. The aff applies to ANY distortions

Warren Grimes 20, Irving D. & Florence Rosenberg Professor of Law, Southwestern Law School, Adam Smith, the Competitive Process, and the Flawed Consumer Welfare Standard, GRUR International, 69(1), 2020, 3–13 DOI: 10.1093/grurint/ikz020

A symmetric welfare standard looks to distortions in the competitive process at any level. Once a distortion is found, the inquiry is at an end. As the U.S. Supreme Court wrote in 1972, courts applying the Sherman Antitrust Act should not inquire whether to ‘sacrifice competition in one portion of the economy for greater competition in another portion.’53 Such a rule serves administrative simplicity in enforcing competition laws, but serves another even more important goal. Once a substantial distortion in competition is demonstrated, its impact on upstream or downstream allocation decisions cannot correct for that distortion. At that point, the goal of achieving society’s most preferred allocation is corrupted. For example, if an exercise of buyer power results in lower prices for consumers, that outcome cannot be claimed as a true efficiency. In the absence of the buyer power abuse, consumers might pay higher prices, but those prices would be a true embodiment of the preferred allocation that the competition process protects.

#### 3. Topic education—the core anti-trust debate is about different solutions to consumer welfare. Vote neg

Jacobson 15 ( Jonathan Jacobson is a partner with Wilson Sonsini Goodrich & Ros Another Take on the Relevant Welfare Standard for Antitrt”,https://www.wsgr.com/PDFSearch/jacobson-0815.pdf)

The Supreme Court has never articulated a specific welfare standard. But several different ones have been proposed. In most antitrust cases, the choice of welfare standard really does not matter, as the same results will hold regardless of the standard applied. The instances in which the selection matters, however, can be quite important, and the standard chosen invariably says much about the decision maker’s basic philosophy of antitrust. The most significant include the following: Total Welfare. “Total” welfare looks to measure the effect of a practice or transaction on the economic welfare of all participants in a market, including both producers and consumers. Put differently, it “refers to the aggregate value that an economy produces, without regard for ways that gains or losses are distributed.”3 Among the many proponents of the total welfare standard are Professors Roger Blair and Daniel Sokol 4 and senior government economist Kenneth Heyer Most observers also have understood Judge Bork’s references to “consumer welfare” to refer to a total welfare standard, 6 but his approach is better understood somewhat differently as a standard under which the goal is allocative efficiency to the extent it does not interfere significantly with productive efficiency. 7 Consumer Welfare. The consumer welfare standard equates with consumers’ surplus in economic terms—technically, the difference between what consumers actually pay and what they would be willing to pay. To illustrate the principle, consider a merger of rival firms that both reduces their costs and gives them market power. 8 If costs are reduced but prices to consumers still rise, the merger is viewed as benign under a total welfare standard if the cost reduction is greater than the price increase. But the same merger will fail the consumer welfare standard unless the cost decrease is such that prices to consumers remain the same or fall. The gains to the merging producers do not count; only the effect on consumer prices is relevant. This consumer welfare standard is the standard understood to be employed in practice by the federal enforcement agencies, 9 and is supported by many observers including, most preeminently, Professor Steven Salop. 10 Consumer Choice. The relatively new “consumer choice” standard is based on the idea that the “range of options [available to consumers should not] be significantly impaired or distorted by anticompetitive practices.”11 The standard is not based on any specified number of options, and does not forbid all reductions in choice, but focuses instead on “conduct that artificially limits the natural range of choices in the marketplace.”12 Multiple Goals. For much of the first century of U.S. antitrust enforcement, the courts made clear that at least one purpose of the antitrust laws was the protection of small business—the “small dealers and worthy men” praised in Trans-Missouri 13 and the “small, locally owned businesses” of Brown Shoe. 14 Following these precedents, many observers concluded that antitrust’s goals included preserving a deconcentrated industry structure, dispersing economic power, pro moting fairness in economic dealings, and providing competitive market structures to reduce the need for governmental control. 15 Competitive Process. A fifth option is the competitive process standard articulated by Gregory Werden and others. 16 Under this approach, practices and transactions that interfere with competition as a process would be prohibited, focusing only on economic effect, but without focusing on any particular welfare standard. Practices that do not impair the competitive process would not be prohibited, even if there is some negative impact on consumer surplus. Assessing the Alternatives In the years following the passage of the Sherman Act, the protection of small business and related non-economic goals were at the forefront of antitrust enforcement. This was consistent with the original intent of the Sherman and Clayton Acts, later efforts to rewrite that history notwithstanding. 17 But starting with Sylvania18 and Brunswick 19 in 1977, only economic goals have mattered, and no one expects that to change. The question today is what the standard should be in assessing the economic consequences of a practice or transaction. As mentioned, the Supreme Court has never articulated an answer. And Gregory Werden has demonstrated ably that efforts to tease a particular welfare standard out of the Supreme Court’s opinions invariably fail. 20 The Court’s references to a “consumer welfare prescription” in Reiter 21 and NCAA22 represent neither an endorsement of the total welfare approach thought to have been urged by the phrase’s creator, Judge Bork, nor a reference to the current understanding of the phrase as consumers’ surplus. Reiter simply upheld a ruling authorizing consumers to sue to recover overcharges. NCAA condemned restrictions on price and ouput that would be prohibited under any standard. The Court has never addressed the standard in a context where it truly mattered; and so, as a matter of general jurisprudence, the welfare standard question must still be viewed as open.

#### Antitrust must prioritize workers---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

**Consumer welfare key to worker rights**

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.

## States

#### They’re perceived internationally as the USFG

Blasé 3¶ Phd-Government-UT Austin, http://www.lib.utexas.edu/etd/d/2003/blasejm039/blasejm039.pdf

Although what the states and cities are doing may not rise to the level of federal law, many of these policy initiatives are in harmony with domestic policy goals. Collectively, it can be argued, **they serve to** shape the foreign relations **of the nation as a whole.** Ivo Duchacek sees no difference in relations **conducted by federal actors and by subnational actors**. “If by diplomatic negotiation we mean processes by which governments relate their conflicting interest to the common ones, there is, conceptually, no real difference between the goals of paradiplomacy and traditional diplomacy: the aim is to negotiate and implement an agreement based on conditional mutuality.”45Brian Hocking objects to treating the foreign relations of subnational governments as if they were something distinct from the federal level. Hocking studies what happens in federal systems when foreign policy issues become local concerns. He sets his approach apart from the complex interdependence crowd, such as Duchacek, saying that ideas such as “paradiplomacy” places subnational activities outside of traditional diplomatic patterns. Hocking sees non-central governments **as integrated into a dense web of diplomatic interactions**, in which **they serve more as “allies and agents” in pursuit of national objectives** **rather than as flies in the ointment.** “The nature of contemporary public policy with its dual domestic- international features, **creates a mutual dependency** between the levels of government and an interest in **devising cooperative mechanisms** and strategies to promote the interests of each level.”46 Rather than separating the activities of non-central governments from those of central governments, Hocking’s goal is to “locate” subnational governments in the traditional diplomatic and foreign policy processes initiated and carried through by the federal government.

#### Multistate suits solve

Flexner 94 (Mr. Flexner attended New York University Law School and graduated in 1964. He is the former Deputy Assistant Attorney General of the United States for the Antitrust Division of the Department of Justice, and is now the senior antitrust partner in the Washington, D.C. law firm, Crowell & Moring, I. MERGER CONTROL AND STATE AIDS PANEL: STATE AND FEDERAL ANTITRUST ENFORCEMENT IN THE UNITED STATES: COLLISION OR HARMONY?, 9 Conn. J. Int'l L. 501, y2k)

3. State Enforcement in Cases of National and International Significance

Just as the states have not shied away from challenging transactions and conduct that the federal enforcers find unobjectionable, neither have they refrained from flexing their muscle in cases which have effects and significance reaching far beyond their borders. Indeed, a former head of the NAAG Task Force specifically rebuffed the notion that the "states

[\*530] should leave the prosecution of national cases to federal authorities and should concentrate their efforts on local conspiracies." And more recently, a subsequent Task Force chief stated that the states would not hesitate to challenge even those mergers which are international in scope.

In 1990, for instance, New York and thirteen other states brought suit against VISA and MasterCard seeking the termination of a joint venture to own and control a "point-of-sale" debit card system. The venture at issue was national, and possibly international in dimension, joining interstate banking, lending, automatic teller, retail, and communications institutions to provide a convenient service for consumers across the country. The complaint charged that the venture represented an attempt by the companies to obtain a monopoly. The defendants settled, promising to seek state approval for any future attempt to jointly own or control such a card system.

#### States can make labor laws DESPITE pre-emption

Sachs 11 (Benjamin, “DESPITE PREEMPTION: MAKING LABOR LAW IN CITIES AND STATES”, Benjamin Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 Harv. L. Rev. 1153 (2011).)

The preemption regime grounded in the National Labor Relations Act (NLRA) is understood to preclude state and local innovation in the field of labor law. Yet preemption doctrine has not put an end to state and local labor lawmaking. While preemption has eliminated traditional forms of labor law in cities and states, it has not prevented state and local reconstruction of the NLRA’s rules through what this Article terms “tripartite lawmaking.” The dynamic of tripartite lawmaking occurs when government actions in areas of law unrelated to labor — but of significant interest to employers — are exchanged for private agreements through which unions and employers reorder the rules of union organizing and bargaining. These tripartite political exchanges produce organizing and bargaining rules that are markedly different from the ones the federal statute provides but that are nonetheless fully enforceable as a matter of federal law.

By describing the phenomenon of tripartite lawmaking, this Article allows for a more complete understanding of the local role in contemporary labor law. But the existence of tripartite lawmaking also reveals important characteristics of federal preemption more generally. In particular, the potential for tripartite lawmaking within the confines of formally preemptive regulatory regimes points to the limits of preemption’s ability to allocate regulatory authority among different levels of government and deliver a uniform, national system of law. State and local lawmaking that occurs through the tripartite dynamic also has a number of distinctive features that become visible once we recognize the existence of this form of lawmaking. As this Article suggests, moreover, tripartite lawmaking is likely not limited to the labor context but may occur wherever federal preemption coexists with the possibility for private ordering.

#### No labor law preemption

Robin Feldman 15, Professor of Law and Director of the Institute for Innovation Law, University of California Hastings College of the Law. "Federalism, First Amendment & Patents: The Fraud Fallacy", 17 Colum. Sci. & Tech. L. Rev. 30https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2427&context=faculty\_scholarship

The final case, Bill Johnson’s Restaurants v. NLRB, 95 operated as a vindication of the importance of state interests, particularly a state’s ability to provide a civil remedy for conduct touching on issues deeply rooted in local sentiment. The case involved an attempt by the National Labor Relations Board (NLRB) to enjoin a suit by an employer in state court. The NLRB argued that filing the state court suit was an act of retaliation for protected labor activities. The Justices allowed the state lawsuit to go forward, ruling that “a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff’s desire to retaliate against the defendant for exercising rights protected by the Act.”96 Delving deeply into the Labor Act and the Court’s accompanying jurisprudence, the Justices stressed that in light of the “recognition of the States’ compelling interest in the maintenance of domestic peace,” the Court had “repeatedly construed the Act as not preempting the States from providing a civil remedy for conduct touching interests ‘deeply rooted in local feeling and responsibility.’”97 Thus, in Bill Johnson’s Restaurant, the Supreme Court did not allow a federal scheme to enjoin recourse to the courts, showing particular concern for a state’s ability to respond to behavior that implicates local concerns.

#### No commerce clause challenges

Hildabrand 14 (Clark L. Hildabrand, Assistant Solicitor General, Tennessee Attorney General's Office, Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now, 16 Transactions: TENN. J. Bus. L. 67, y2k)

On one hand, some critics of state antitrust enforcement focus on the interstate character and impact of state antitrust litigation. 28 Due to the nationalization and increased interconnectivity of the country's economy, a broader reading of the Interstate Commerce Clause and other federal antitrust laws, that at one time simply precluded state enforcement of activities with interstate effects, would, today, effectively render state antitrust laws useless.29 However, the U.S. Supreme Court has consistently held that federal antitrust laws do not preclude or preempt application of similar or more far-reaching state antitrust statutes.30 As long as the state law or policy in question reflects a legitimate state public interest and is not excessively discriminatory or protectionist, state antitrust enforcement does not run afoul of the Dormant Commerce Clause. 31 State antitrust enforcement thus overcomes one potential barrier for situations in which the regulated activity has interstate effects

#### 3---Real world---50 states action is real!

Hubbard & Yoon 5 (Robert Hubbard is Director of Litigation and James Yoon is an Assistant Attorney General in the Antitrust Bureau of the New York Attorney General's office, FEATURE ARTICLE: HOW THE ANTITRUST MODERNIZATION COMMISSION SHOULD VIEW STATE ANTITRUST ENFORCEMENT. Loyola Consumer Law Review, 17, 497, y2k)

C. States Both Lead and Initiate Antitrust Litigation

Contrary to being free riders, states are often the first and only plaintiff in antitrust matters. Acting alone, states have initiated matters or extended matters into new areas or for new claimants. The cases cited in the footnote illustrates these points for all fifty states.

**(Footnote 127 starts)**

The following cases are illustrative of states' initiatives in antitrust matters:

Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 311 (5th Cir. 1978) (Alabama and local educational authorities sued manufacturers and distributors of school bus bodies, claiming defendants conspired to fix prices and restrain trade);

Alaska v. Chevron Chem. Co., 669 F.2d 1299, 1300-01 (9th Cir. 1982) (Alaska sued manufacturers of agricultural fertilizer for fixing prices and allocating markets);

Arizona v. Maricopa County Med. Soc'y., 457 U.S. 332, 336-37 (1982) (Arizona sued medical societies for price-fixing through agreements among competing member physicians who agreed to set the fee amounts they could collect for their services);

Arkansas v. Chicago, Rock Island & Pac. Ry., Co., 128 S.W. 555, 55-56 (Ark. 1910) (Arkansas sued a railroad corporation for fixing the rates to be charged for freight and passenger service);

California v. Am. Stores Co., 495 U.S. 271, 275-76 (1990) (California sued for an injunction after the fourth largest grocery chain acquired all of the outstanding stock of the largest grocery chain in California, alleging the merger constituted an anti-competitive acquisition);

Colorado v. Goodell Bros., Inc., Civ. A No. 84-A-803, 1987, at \*1 (D. Colo. July 7, 1987) (Colorado sued contractors alleging a conspiracy to restrain trade in the highway construction industry by bid-rigging on various highway construction projects);

Connecticut v. Am. Med. Response, Inc., No. Cv-99-589962 (Conn. Super. Ct. June 3, 1999) (Connecticut sued to prohibit acquisition of major competing ambulance service providers in Connecticut);

Delaware v. Mid-Atlantic Paving Co., C.A. No. 7197, 1983 WL 14930, at \*1 (Del. Ch. June 24, 1983) (Delaware sued a construction company for price-fixing the sale of liquid asphalt);

District of Columbia v. CVS Corp., Civ. No. 03-4431 (D.C. Sup. Ct. May 30, 2003) (District of Columbia sued to challenge the acquisition of a pharmacy);

Florida v. Abbott Labs., 1993-1 Trade Cas.(CCH) P 70,241 (N.D. Fla. 1993) (Florida sued and settled with infant formula manufacturers for a conspiracy among competitors regarding pricing and marketing of infant formula products);

Georgia v. Pennsylvania R. Co., 324 U.S. 439, 443-44 (1945) (Georgia sued defendant railroads for conspiring to fix rates charged for transportation of freight);

Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 253 (1972) (Hawaii sued defendants for conspiracy to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products and for monopolization of the market);

Idaho v. Daicel Chem. Indus., Ltd., 106 P.3d 428, 430 (D.C. Sup. Ct. May 30, 2003) (Idaho sued chemical manufacturers for an illegal conspiracy to fix prices in the commercial sorbates industry);

Illinois v. Sangamo Constr. Co., 657 F.2d 855, 857 (7th Cir. 1981) (Illinois sued construction companies for engaging in a conspiracy to allocate highway construction projects put out for public bids);

Indiana v. The Home Brewing Co. of Indianapolis, 105 N.E. 909, 910 ( Ind. 1914) (Indiana sued a corporation for monopolizing the business of selling beer and other intoxicating liquors);

Iowa v. Scott & Fetzer Co., Civil No. 81-362- E, 1982 WL 1874, at \*1 (S.D. Iowa July 8, 1982) (Iowa sued defendants for antitrust violations, in a case testing the state attorney general's ability to sue under the parens patriae provision of the Clayton Act);

Kansas v. Am. Oil Co., 446 P.2d 754, 755 (Kan. 1968) (Kansas sued corporations engaged in the supply of liquid asphalt for bid-rigging asphalt sales and allocating sales territory);

Kentucky v. Plain view Farms Dev. Corp., No. 234010, 1977 WL 18405 (Ky. Cir. Ct. Sept. 6, 1977) (Kentucky sued a real estate developer for an unlawful tying arrangement which conditioned the purchase of a residential condominium or unit upon the purchase of use of a recreational facility);

Louisiana v. Seifert, 524 So. 2d 160, 161 (La. Ct. App. 1988) (Louisiana sued three defendants for monopolization and attempted monopolization of the film industry);

Maine v. Connors Bros. Ltd., 2000-1 Trade Cas. (CCH) P 72,937 (Me. Super. Ct. 2000) (Maine, in a consent agreement, permitted a Canadian sardine processing company to a acquire the assets of a Maine-based competitor);

Maryland v. Blue Cross & Blue Shield Ass'n, 620 F. Supp. 907, 909 (D. Md. 1985) (Maryland sued health insurers for price fixing and allocating markets, customers, and contracts by submitting non-competitive and collusive bids);

Massachusetts v. William Bayley, Ltd., 1983 WL 14914, (Mass. Super. Ct. Jan. 21, 1983) (Massachusetts sued defendant for exclusive dealing by requiring bid specifications for public construction and renovation projects specify exclusive use of the products of a certain manufacturer of security windows);

Michigan v. McDonald Dairy Co., 905 F. Supp. 447, 450 (W.D. Mich. 1995) (Michigan sued dairy companies on behalf of public schools for bid-rigging on contracts to supply milk to area school districts);

Minnesota v. Nat'l Beauty Supply Co., No. 736778, 1977 WL 18389 (D. Minn. June 9, 1977) (Minnesota sued five beauty supply wholesalers for price-fixing and eliminating discounts from wholesale prices of beauty supplies);

Mississippi v. Jackson Cotton Oil Co., 48 So. 300, 300 (Miss. 1909) (Mississippi sued two competing cotton seed oil manufacturers for a price-fixing conspiracy to limit the price of a commodity);

Missouri v. Poplar Bluff Physicians Group, Inc., No. CV195-393-CC, 1995 WL 788087 (Mo. Cir. Ct. Apr. 12, 1995) (Missouri sued a group of physicians who operated a medical clinic -partnership for conspiracy and attempted monopolization for the sale of prescription drugs and durable medical equipment to patients, nursing homes and residential care facilities);

Montana v. SuperAmerica, 559 F. Supp. 298, 299-300 (D. Mont. 1983) (Montana sued an oil company for a conspiring with its competitors to fix prices for gasoline);

Nebraska v. Associated Grocers, 332 N.W.2d 690, 691 (Neb. 1983) (Nebraska sued dairy product wholesalers, a retail grocer and individuals for price-fixing the sale of milk);

Nevada v. Merkley & Hankins, Inc., No. 20644, 1988 WL 247972 (D. Nev. July 6, 1988) (Nevada sued a gasoline and petroleum product wholesaler for fixing the resale prices of gasoline);

New Hampshire v. New Hampshire Grocers Ass'n, Inc., 348 A.2d 360, 360-61 (N.H. 1975) (New Hampshire sued a retail grocers association for attempts to coerce manufacturers and distributors to refrain from offering fresh baked goods to discount bakery stores);

New Jersey v. Morton Salt Co., 387 F.2d 94, 95 (3d Cir. 1967) (New Jersey filed suit in district court against seven corporations, seeking treble damages for violations of Sections 1 and 2 of the Sherman Act);

New Mexico v. Scott & Fetzer Co., Civil No. 81-054- JB. 1981 WL 2167 (D. N.M. Dec. 22, 1981) (New Mexico sued defendants for antitrust violations, in a case testing the state attorneys general ability to sue under the parens patriae provision of the Clayton Act);

New York v. St. Francis Hosp., 94 F. Supp. 2d 399, 402-03 (S.D.N.Y. 2000) (New York sued two New York hospitals for engaging in illegal price-fixing and market allocation through joint negotiations);

North Carolina v. P.I.A. Asheville, Inc., 740 F.2d 274, 276 (4th Cir. 1984) (North Carolina sued the owner of psychiatric facilities alleging that acquisition of particular facility violated the antitrust laws);

Ohio v. Louis Trauth Dairy, Inc., 925 F. Supp. 1247, 1248-49 (S.D. Ohio 1996) (Ohio sued several dairies, alleging conspiracy to set prices and allocate territories in sale of milk to school districts);

Oklahoma v. Allied Materials Corp., 312 F. Supp. 130, 131 (W.D. Okla. 1968) (Oklahoma sued corporations for conspiring to rig bids for liquid asphalt sales);

Oregon v. Fields & Endsley, Inc., No. 151873, 1984 WL 15669 (Or. Cir. Ct. Oct. 4, 1984) (Oregon sued defendants for price-fixing wholesale and retail gasoline);

Pennsylvania v. Providence Health Sys., Inc., Civ. A. No. 4: CV-94-772, 1994 WL 374424 (D. Pa. May 26, 1994) (Pennsylvania charged that three competing hospitals combining to manage the provision of health care would result in an anti-competitive concentration of market power);

Puerto Rico v. Wal-mart Puerto Rico, Inc., 238 F. Supp. 2d 395, 409 (D.P.R. 2002) (Puerto Rico sued to obtain a preliminary injunction to enjoin a retail chain from buying a chain of grocery stores);

Rhode Island v. Neptune Int'l Corp., Civil Action No. 80-4503, 1980 WL 4688 (R.I. Super. Ct. Dec. 30, 1980) (Rhode Island sued a manufacturer-wholesaler and retailer of furniture products for price-fixing and implementing exclusive dealing and refusal to deal agreements);

Loftis v. South Carolina Elec. & Gas Co., 604 S.E.2d 714, 715 (S.C. Ct. App. 2004) (South Carolina instituted an UTPA (consumer protection) action against SCE&G for routinely overcharging municipal franchise fees to a portion of its population);

South Dakota v. Cent. Lumber Co., 123 N.W. 504, 506 (S.D. 1909), aff'd, 226 U.S. 157 (1912) (South Dakota sued a lumber company for criminal and civil antitrust violations by forming a combination to restrain trade);

Tennessee v. Joe Stewart Body Shop, 1992-1 Trade Cas. (CCH) P 69,748 (W.D. Tenn. 1992) (Tennessee sued auto body repair shop for attempting to fix the prices of repair services);

Texas v. Zeneca, Inc., No. 3-97 CV 1526-D, 1997 WL 570975, at \*1 (N.D. Tex. June 27, 1997) (Texas led a multistate case against a pesticide manufacturer for conspiring with its distributors to fix resale prices);

Utah v. Univ. of Utah, 1994-1 Trade Cas. (CCH) P 70,550 (D. Utah 1994) (Utah sued a state university hospital for exchanging wage information with other health care facilities concerning compensation paid to nurses, fixing prospective compensation, and discouraging others from negotiating with other third-party payers);

Vermont v. Densmore Brick Co., Inc., Civil Action File No. 78-297, 1980 WL 1846, at \*1 (D. Vt. Apr. 10, 1980) (Vermont brought a state parens patriae action against a manufacturer of wood burning stoves for price-fixing);

Virginia v. Buckley Moss, Inc., Civil Action No. G-8998-2, 1983 WL 14948, at \*1 (Va. Cir. Ct. Apr. 5, 1983) (Virginia sued a seller of decorative artwork for price-fixing the resale prices of its dealers);

Washington v. Larson, No. 39916-1- I, 1998 WL 141935 (Wash. Ct. App. Mar. 30, 1998) (Washington sued two pharmacy owners for price-fixing the prices that would be paid by insurers, third-party payers, or consumers for drugs);

West Virginia v. Meadow Gold Dairies, 875 F. Supp. 340, 343 (D. W. Va. 1994) (Action against two dairies alleging conspiracy to illegally and artificially raise price of milk supplied to school boards);

Wisconsin v. Marigold Foods, Inc., 1980 WL 4676, at \* 1-2 (Wis. Cir. Ct. Sept. 3, 1980) (Wisconsin sued a milk products firm for resale price-fixing selected dairy products).

**(Footnote ends)**

As the parentheticals in the footnote specify, many of these cases are local and involve local activity such as groceries, dairies, construction firms, and a varied list of manufacturers and retailers. The majority of the litigations assert claims for price-fixing and bid-rigging, but include other antitrust claims such as tying, monopolization, and exclusive dealing.

#### Specifically, multistate suits are a real thing!

Dishman 20 (Elysa M. Dishman is an Associate Professor at BYU Law School, CLASS ACTION SQUARED: MULTISTATE ACTIONS AND AGENCY DILEMMAS, 96 Notre Dame L. Rev. 291, y2k)

Multistate actions often involve many states, sometimes with almost every state in the country participating in the action. For example, the National Mortgage Settlement had forty-nine participating states, the Target multistate [\*306] settlement had forty-seven participating states, the Western Union multistate settlement had fifty participating states, and the Master Settlement Agreement had forty-six states. Since each AG represents a large number of state residents, the interests of many states and people are represented in multistate actions.

## 2nd Adv

### 2NC – No Solvency

#### Plan doesn’t solve competition

Geoffrey A. Manne 18—President and founder of the International Center for Law and Economics, distinguished fellow at Northwestern Law School’s Searle Center on Law, Regulation, & Economic Growth. ("Why US Antitrust Law Should Not Emulate European Competition Policy," December 19, 2018, from ICLE, https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf)

Despite asserting that EU competition law is “better” than that of the US, and that emulating the EU will improve economic conditions in the US, references to the likely outcome — positive or negative — of the expanded antitrust experiment in the EU are not provided. Moreover, as noted below, to the extent the European experience is assessed at all, these assessments are manifestly unreliable. Unfortunately for proponents of this expanded approach to antitrust, the European experience is anything but an unmitigated success. The European Union has not outperformed the United States since the turn of the century. Quite the opposite. Between the years 2000 and 2017, GDP per capita grew from $34,916 to $40,088 in the Euro area (14.81%), and from $45,055 to $53,128 in the United States (17.92%).24 Although economic growth is a multivariate phenomenon in which antitrust policy plays only a part, these numbers should at the very least dispel the myth that reforming antitrust law would somehow alleviate all of the ills that allegedly dog the American economy.25

#### The plan’s vagueness turns the whole case

Geoffrey A. Manne 18—President and founder of the International Center for Law and Economics, distinguished fellow at Northwestern Law School’s Searle Center on Law, Regulation, & Economic Growth. ("Why US Antitrust Law Should Not Emulate European Competition Policy," December 19, 2018, from ICLE, https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf)

One of the key concerns with a more overtly politicized competition policy is precisely that: its politicization. By imbuing antitrust with an ill-defined set of vague political objectives, antitrust becomes a sort of “meta-legislation.”73 As a result, the return on influencing a handful of government appointments with authority over antitrust becomes huge increasing the ability and the incentive to do so. As Baumol and Ordover observe, antitrust law is inherently prone to rent-seeking, especially protectionism.74 This leads to numerous harms, including the misallocation of resources, less efficient firms, and a diversion of firms’ energies towards less productive ends (rent-seeking). Adding a political dimension to antitrust law exacerbates these inherent flaws. A political antitrust regime is inherently prone to be captured by rivals who seek to ride populist waves of protectionism.

And finally, if the underlying basis for antitrust enforcement is extended beyond economic welfare effects, how long can we expect to resist calls to restrain enforcement precisely to further those goals? All of a sudden the effort and ability to get exemptions will be massively increased as the persuasiveness of the claimed justifications for those exemptions, which already encompass non-economic goals,76 will be greatly enhanced. We might even find that we end up with even more concentration because the exceptions could subsume the rules.

#### Grimes’ proposal is so uncertain that judges have endless authority

Kuenzler 20 (Adrian Kuenzler, Assistant Professor University of Zurich, Faculty of Law, Promoting Access over Ownership: Realigning Antitrust and Intellectual Property Law to

Usher in an Era of Collaborative Consumption, 19 Vanderbilt Journal of Entertainment and Technology Law 473, y2k)

Exclusionary conduct, therefore, often is much more difficult to detect because such conduct commonly assists consumers in the short term. Such an analysis falls short, however, of the long-term implications of such a strategy for consumers, competitors, and the economy. While courts typically are capable of arriving at a determinate answer as to the overall welfare effects of allegedly anticompetitive conduct in ordinary cases, 18 4 a balancing of pro- and anticompetitive effects where exclusionary conduct and cumulative innovation is involved often is deemed to be almost impossible given difficulties in weighing short and long term effects on the consumer.185 As this subsection attempts to show, both formulations of assessing anticompetitive restraints in American antitrust and intellectual property law seem destined to result in a fair amount of uncertainty in application. In light of such vagaries, courts giving precedence to market access may do so simply because they do not believe that the output/profitability test provides a clearly preferable alternative. After all, the market access doctrine asks a largely factual question regarding the extent of new innovation that consumers expect a particular commodity to provide.186 The output/profitability test, on the other hand, contemplates a multi-factored analysis of competing commodities followed by an instrumentalist query that at times appears fundamentally inconsistent with the normative intuitions and cognitive thought processes of wide segments of the population, including many judges.187

[Footnote 187]

187. Another element of uncertainty plagues the output/profitability test. The elimination of intratype competition through denying access is often accompanied by new costs generated by the exclusive protection of intertype competition. See Grimes, Dynamic Analysis, supra note 48, at 105; Grimes, Brand Marketing, supra note 48, at 111-19. However, this type of 'cost-cost' analysis is extremely expensive and difficult to conduct. In order to analyze alternative scenarios in which markets spur innovation, factfinders must be prepared to consider not only the costs that may be posed by intratype competition, but also the many other secondary effects that the exclusive protection of intertype competition may produce, including, for example, costs that arise other than those that specifically affect the incumbent market actor such as costs stemming from decreased functional advantages of similar goods, changes in the desirability of new commodities, commodities of competitors, and so forth. A comprehensive analysis of this sort is not only dauntingly complex to conduct, but also is subject to considerable manipulation by parties who strategically highlight only those ancillary effects that support their preferred outcome

[Footnote ends]

Given such a choice of second-best doctrines, some courts may simply give priority to one brand of uncertainty over another.

## 1st adv

#### All the important stuff is offline

Kee, General Manager for GlobalSign's North and South American operations, 16

(Lila, “Why Haven't We Seen a Disastrous Electric Power Grid Attack Yet?”, https://www.globalsign.com/en/blog/large-scale-electric-power-grid-attack/)

If you based everything off what major news outlets are saying, you’d think our Critical National Infrastructure, particularly the energy sector, is riddled with weaknesses and ripe for a catastrophic cyber-attack. But the reality is, we haven’t experienced one yet (thankfully). Putting aside larger political reasons (fear of retaliation, widespread economic effects, etc.), is it possible that we haven’t seen one because these vulnerabilities have been overstated or the likelihood has been exaggerated? Below are some of my personal thoughts on the matter. Note: To be clear, I do not mean to imply we are “in the clear” and don’t need to worry about cybersecurity for the energy grid. On the contrary, continual efforts on best practices development, standards creation, regulation and vertical-specific technologies is of the utmost importance, especially as energy systems are brought online. I’m merely trying to see through the FUD and showcase the efforts that have helped keep the grid safe so far. Major Systems Have Been Offline and New Smart Systems Will Be Secured from the Start Grid providers are being hacked every day (303 incidents were reported to the Industrial Control Systems Cyber Emergency Response Team [ICS-CERT] in 2015), but most of those hacks were unsuccessful due to major systems that could cause devastation being either off-line or accessible only by private networks (i.e. not run over the internet). Vulnerabilities to older systems are being addressed through retrofits, but again most of these systems are offline. The good news is the next generation of smart grid systems are being designed with security in mind from day one. One good example is the Open Field Message Bus (OpenFMB) framework that provides a specification for intelligent power systems field devices to leverage a nonproprietary and standards-based reference architecture, which consists of internet protocol (IP) networking and Internet of Things (IoT) messaging. OpenFMB is one of Smart Grid Interoperability Panel’s (SGIP) Energy IoT initiative projects, developed to accelerate IoT innovation within the energy industry. As seen in other industries such as automotive, manufacturing and smart cities, the value added services around energy grid IoT innovation are virtually limitless. However, just like other industries, security concerns are top of mind. That’s where the North American Energy Standards Board’s (NAESB) role really proves vital. OpenFMB has smartly teamed with NAESB to develop a complementary set of standards for utility providers to follow. Given NAESB’s track record of standards development and tight relationship with NERC and FERC, a set of standards to accompany OpenFMB’s specification is more likely to gather industry participation and accelerate adoption.

# 1NR

## ptx

#### Disruption cascades.

Steven **Ferrey 14**, Professor of Law at Suffolk University Law School and served as a Visiting Professor of Law at Harvard Law School in 2003, has been a primary legal consultant to the World Bank and the U.N. Development Program on their renewable energy and climate control policies in developing countries, having worked extensively in Asia, Africa, and Latin America, holds a Bachelor of Arts in Economics, a Juris Doctor, a Master's Degree in Regional Planning, and between his two graduate degrees, was a post-doctoral Fulbright Fellow at the University of London, “ARTICLE: BROKEN AT BOTH ENDS: THE NEED TO RECONNECT ENERGY AND ENVIRONMENT,” 65 Syracuse L. Rev. 53, Lexis

Reliable electricity supply requires a constant, second-by-second simultaneous balancing of power generation supply to meet demand on the utility grid. 3 The United States electric grid will collapse within approximately four seconds if sufficient generation of power is not constantly supplied to meet fluctuating consumer demand. 4 Either too [\*55] much or too little power causes system instability, 5 and a loss of power would disrupt communication, transportation, heating and water supplies, hospitals, and emergency rooms. 6 According to Kirchoff's Law, 7 power moves almost at the speed of light on an energized grid. 8 If power supply does not constantly balance instantaneous demand, the grid can blackout large areas, 9 as happened to the Northeast United States population on August 14, 2003, 10 and subsequently with rolling blackouts in Texas. 11 The 2003 blackout affected fifty million people and caused a loss of six billion dollars. 12 During this blackout, production was lost at approximately half of the Chrysler plants, a Ford plant was lost for a week of repairs, oil refineries shut down, one chain of 237 drugstores in New York City was forced to close, major urban airports closed causing more than a thousand flights to be cancelled, and frozen and perishable foods were lost. 13

#### Destroys everything.

Alice **Friedemann 16**, Transportation expert, founder of EnergySkeptic.com and author of “When Trucks Stop Running, Energy and the Future of Transportation,” worked at American Presidential Lines for 22 years, where she developed computer systems to coordinate the transit of cargo between ships, rail, trucks, and consumers, “Electromagnetic pulse threat to infrastructure (U.S. House hearings)”, Energy Skeptic, http://energyskeptic.com/2016/the-scariest-u-s-house-session-ever-electromagnetic-pulse-and-the-fall-of-civilization/

Modern civilization cannot exist for a protracted period without electricity. Within days of a blackout across the U.S., a blackout that could encompass the entire planet, emergency generators would run out of fuel, telecommunications would cease as would transportation due to gridlock, and eventually no fuel. Cities would have no running water and soon, within a few days, exhaust their food supplies. Police, Fire, Emergency Services and hospitals cannot long operate in a blackout. Government and Industry also need electricity in order to operate. The EMP Commission warns that a natural or nuclear EMP event, given current unpreparedness, would likely result in societal collapse.

#### Grid collapse comes far faster than inequality

#### The bill is the last, best chance to prevent catastrophic warming –

Ella Nilsen 9/14—Climate reporter at CNN. ("Biden's spending bill could be Democrats' last hope of achieving meaningful climate action as crisis worsens," September 14, 2021, from CNN, https://www.cnn.com/2021/09/14/politics/biden-budget-congress-climate-action/index.html)

After decades of inaction from the United States on climate, President Joe Biden and congressional Democrats face a reckoning.

Biden has big climate ambitions, vowing in April to cut greenhouse gas emissions in half by 2030. The world is watching closely to see whether the US will deliver on that promise, as the President's climate envoy, John Kerry, prepares to meet with global leaders in November for the United Nations climate summit.

Jonathan Pershing, one of Kerry's senior advisers, recently told lawmakers the US needs to "walk the talk" to regain its climate credibility on the world stage. What's not clear is whether the President has the votes in Congress — even within his own party — to get it done.

As the drought and extreme weather intensify, Democrats view the massive budget bill and its significant climate provisions as their last, best hope to achieve something meaningful on climate as the crisis worsens. In August, global scientists reported the planet is quickly approaching the critical warming threshold of 1.5 degrees Celsius above pre-industrial levels, below which they say the planet must stay in order to avoid the worst consequences.

Within the US, pressure is mounting after a series of climate disasters this summer, including record-breaking wildfires, deadly heat, water shortages and a disastrous hurricane that's expected to cost the US economy billions.

"Scientists have been warning us for years that extreme weather is gonna get more extreme. We're living it in real time now," Biden said Monday as he toured wildfire damage in California.

Touting the budget and infrastructure bills, the President urged people to "think big."

"Thinking small is a prescription for disaster," Biden said. "We're gonna get this done, this nation's gonna come together and we are going to beat this climate change."

Congressional leaders have set an end-of-September deadline in the House to pass their massive budget bill alongside a separate bipartisan infrastructure bill. Together, the packages contain hundreds of billions of new climate investments, which Senate Majority Leader Chuck Schumer argued will get the US most of the way to hitting Biden's fossil-fuel emissions target of 50-52% below 2005 levels by 2030.

With a razor-thin majority in both the House and Senate, this is Democrats' only shot at passing a substantial climate bill before world leaders meet in November. But there's at least one prominent Senate Democrat who could thwart those plans.

Sen. Joe Manchin of West Virginia, Senate Democrats' key swing vote, wants to pare down the overall size of the bill, and he has said he has concerns about what the climate provisions could mean for a fossil-fuel producing state like West Virginia. As chair of the Senate Energy and Natural Resources Committee, the senator will have a large hand in shaping Democrats clean electricity program.

Sen. Sheldon Whitehouse of Rhode Island told CNN negotiations with Manchin are ongoing — but he was optimistic the West Virginia senator would understand the gravity of a fast-warming climate and its impacts.

"At the end of the day, we're all answerable to the future to get the job done right," Whitehouse said. "I don't think [Manchin] wants to be on the wrong side of that future."

How the bill would tackle the climate crisis

After years of inaction in the White House and Congress, Biden's budget bill represents decades worth of policy in a single bill. Experts told CNN it represents a paradigm shift in how to tackle climate change — moving the entire economy away from fossil fuels and toward clean energy.

"Moving the US economy is equivalent of changing the direction of an enormous ocean liner," Josh Freed, founder of the Climate and Energy Program at the center-left think tank Third Way, told CNN. "It takes time to do but once you have it going in the right direction it can pick up steam and get going quickly."

After re-entering the US into the Paris Climate Accord in January, Biden announced a target to reduce greenhouse gas emissions by 50% to 52% relative to 2005 levels by 2030.

That target could be met in part through federal regulations restricting emissions from vehicles and power plants. A White House spokesperson told CNN the Biden administration sees its climate actions coming both from Congress and executive action.

"We also believe that there exists a number of paths to meeting our emission goals and targets," the spokesperson said. "The Biden climate agenda doesn't hinge on reconciliation or the infrastructure package alone. Rather, it is integrated throughout both — and it is a key part of everything we do in the whole of government effort launched on day one."

But experts told CNN that Biden needs Congress to pass massive investments in renewable energy, electric vehicles and other green programs to truly make a dent in US carbon emissions.

A clean electricity program is Democrats' cornerstone climate initiative in the massive budget bill. It would promote a transition away from fossil fuels by paying electric utilities who increase the amount of renewables and other forms of clean power and penalizing those who don't meet clean targets.

Generating electricity from non-fossil fuel sources like wind, solar and nuclear is a critical to Democrats' climate strategy.

"I see the [clean electricity program] as the lynchpin or the foundation piece for this bold action on climate," Democratic Sen. Tina Smith, who is a lead proponent of the provision, told CNN.

The bill also contains measures to create a job-generating Civilian Climate Corps; tax credits and grants for clean energy, renewables and electric vehicles; new polluter fees for methane and carbon; and consumer rebates to electrify and weatherize homes. What is yet to be finalized is how much funding each program gets.

Schumer's office recently put out an analysis showing the bipartisan infrastructure bill and $3.5 trillion budget bill combined could meet the majority of Biden's target to slash emissions by the end of the decade — putting the US on track to reduce its greenhouse gas emissions by approximately 45% below 2005 levels by 2030.

"When you add administrative actions being planned by the Biden Administration and many states — like New York, California, and Hawaii — we will hit our 50% target by 2030," Schumer wrote in a letter accompanying the analysis.

**PC is key to climate change provisions even in a smaller bill**

**Liptak 9/18** (Kevin Liptak, Jeff Zeleny and Phil Mattingly, CNN, How Biden hopes to recapture his momentum after a week of unexpected setbacks, Updated 11:11 AM ET, Sat September 18, 2021https://www.cnn.com/2021/09/18/politics/joe-biden-political-momentum/index.html)

The unrelated events illustrated Biden's predicament as he seeks to recalibrate around his massive economic proposals: a $3.5 trillion budget bill and $1.2 trillion bipartisan infrastructure bill. Officials told CNN that Biden hopes to recapture momentum lost over a calamitous August, but the series of events Friday afternoon underscored the difficulty for any President to completely move past the outside events that often come to define a presidency. Biden's weekend trip to Rehoboth Beach, Delaware -- rescheduled after repeatedly being postponed during a chaotic August -- had been slated to include a heavy focus with his senior advisers on the critical weeks ahead: on his agenda, but also on looming, and equally high-stakes, battles to fund the government and raise the debt ceiling to avoid a catastrophic default, according to two officials. Yet even before he departed the White House, it was evident the economic agenda wouldn't be the only matter at hand. He was briefed before he left Friday morning on the Pentagon investigation into the drone strike that killed 10 civilians. After he'd arrived on the Delaware coast, officials updated him on the FDA decision and the irate announcement from Paris that the French envoy was returning home. Biden did not weigh in on any of the developments himself, leaving the response to aides. He still hopes **the coming weeks will provide an opportunity to move on**. Acutely aware of the stakes, Biden has begun more directly **involving himself** in the strategy to see his priorities passed this autumn. **He plans to put himself more at the center of the legislative process**, a place the longtime Delaware senator feels very comfortable. He meets daily in the Oval Office with senior advisers for updates on legislative process and messaging strategy, repeatedly asking them to find ways to better explain the complicated and wide-ranging proposals in ways Americans can understand. In recent weeks, **the President has seized opportunities**, like a series of natural disasters, to **make the case for sweeping climate change provisions in his pending legislation**. He is planning to invite lawmakers to the White House next week to press on the economic package, according to a person familiar with the matter. "Let's not squander this moment," Biden implored during a speech from the White House. Now at the lowest approval rating of his nearly eight-month term -- putting him, according to some polls, above only former Presidents Donald Trump and Gerald Ford at similar points in their tenures -- Biden is pressing Democrats to put aside their ideological differences and pass what could become his lasting legislative legacy and a political lifeline. The bills have the potential to overhaul the nation's physical infrastructure and the American social safety net for decades to come and would likely make Biden one of the most consequential Democratic presidents in decades. The summertime slide in his popularity among Americans has frustrated the President and his team, who believe he is receiving little credit for a rapidly improving economy. Despite setbacks related to the Delta variant surge, the unemployment rate is down, wages are up and retail sales are improving -- tied, in part, to the emergency measures Biden pushed through at the start of his term. Yet the pandemic is still simmering, delaying a full return to workplaces and complicating the start of the school year for children. A CNN poll conducted by SSRS found 62% of Americans say economic conditions in the US are poor, up from 45% in April and nearly as high as the pandemic-era peak of 65% reached in May 2020. Biden, based on advice from his health team, had predicted a vaccine booster rollout for all adults starting next week. But the FDA decision Friday threw the plan into flux. Biden's attention turns toward Capitol Hill As a part of his recalibration to his domestic agenda, Biden has spent much more time speaking with Democrats on the other end of Pennsylvania Avenue, both on the phone and in person. He spoke by telephone Thursday with House Speaker Nancy Pelosi and Senate Majority Leader Chuck Schumer to confer on a path forward on his massive legislative agenda. "The three are in regular touch and engaging daily on bringing Build Back Better to the finish line," the White House said afterward. In conversations with other Democrats during periodic "congressional call time" blocked off on his daily schedule, Biden has repeatedly stressed the importance of keeping intact the tangible benefits in the bills that can be easily sold to the American people, according to people familiar with the talks. He has stressed that items like free community college and subsidized child care are clear political winners he says Democrats can campaign on for months or years to come. **Polling and messaging memos sent to congressional Democrats and outside allies have sought to double down on this point, while also pushing lawmakers to focus on a bigger -- and more populist -- picture**, rather than get bogged down in the policy disputes that are raging on both sides of the Capitol. "**He's been actively engaged** over the last couple of months **in helping members of Congress** who are more centrists or who are progressive understand and embrace his agenda," said Sen. Chris Coons, a Delaware Democrat who is close to the President. "**President Biden is very persuasive**," Coons said, "and I think **he's making the case and making it wel**l." Implicit in Biden's message, as well as those coming from his senior team, is also the clear reality of the moment, according to people familiar with the discussions: For Democrats, there is no alternative path at this point. The specific policy proposals may shift or shrink in scale or duration, but there is no turning back or a broad shift in course in the cards. **If Democrats** -- **particularly those who are skittish about the political repercussions of enacting such significant changes to the role of government in the US economy --** **can't unify** **now**, **they will likely be left with nothing.** White House tries to keep a level head It is impossible to know whether Biden's current political predicament will last, and some of his **aides are confident that improvements in the pandemic and distance from the chaotic Afghanistan withdrawal will help reverse the fall in approval**. They note it is still more than a year before the 2022 midterm elections, when historically the sitting President's party suffers. A positive result for California's Democratic Gov. Gavin Newsom, for whom Biden campaigned on the eve of his recall vote this week, has also led to renewed confidence in the administration's fights over mask-wearing, vaccines and more. "California won't end the Covid debate," a White House adviser told CNN, "but it could be a tremendous boost for what Democrats are trying to do." Biden's team, during last year's presidential campaign, prided itself on avoiding overly reactive steps when negative polls emerged. Officials stress there is no sense of panic in the West Wing, largely pointing to clear opportunities in the high-stakes weeks ahead as clear and tangible opportunities to shift the dynamics that overtook Biden's first summer in office. But like any political operation, advisers remain highly attuned to shifts in public sentiment, studying focus groups and surveys from top Democratic pollsters who work on behalf of the White House and the Democratic Party. To be sure, any comparisons in approval ratings between Biden and his predecessors are filled with caveats, given the acrid political climate and the remarkable changes in the presidency over the decades. The chaos that surrounded the Afghanistan withdrawal has led some advisers to recognize there is less room for error going forward. The drop in Biden's approval ratings has prompted what one adviser called a "hardening" of the President's mission to see his agenda passed. **The White House softens on** a $3.5 trillion **price tag** This week, before leaving for his vacation home in Rehoboth Beach, **Biden began meeting in-person with moderate** Democratic Sens. Kyrsten **Sinema** of Arizona **and** Joe **Manchin** of West Virginia, **hearing out their concerns about the amount of spending**. With Manchin, he listened patiently to a proposal that would more than halve the size of the final bill. Biden has not endorsed that plan, but also hasn't yet had luck in convincing the skeptical Democrat to come along with his. In public, Biden has begun signaling the final bill could come in below $3.5 trillion, the figure proposed in an initial blueprint. White House officials acknowledge that's a near certainty at this point in order to secure the votes of Manchin and Sinema. The ever-present balancing act between moderates and progressives has become even more acute as a result. **But Biden is pressuring Democrats to avoid stripping out what he believes will prove to be the bill's most salient selling points.**

#### Framing issues:

#### 1---Even if there’s opposition, PC really does solve

Everett 9-16 (Burgess Everett, staff reporter @ Politico, Dems call in big gun as they face huge Hill tests, <https://www.politico.com/news/2021/09/16/biden-influence-capitol-democrats-511952>, y2k)

Senate Majority Whip Dick Durbin said that Biden, “more than anyone,” maintains sway over his caucus’s 50 members: “There is no comparable political force to a president, and specifically Joe Biden at this moment.”

Biden appears to be answering the call. The president is getting increasingly involved in Congress’ chaotic fall session as he battles sagging approval ratings, heightened concerns around the pandemic and some internal criticism over his withdrawal from Afghanistan. On Thursday, he'll speak to Senate Majority Leader Chuck Schumer and Speaker Nancy Pelosi ahead of a critical week for funding the government and lifting the debt ceiling.

Rebounding as the midterms draw nearer will depend on whether his big social spending ambitions are realized and if his party can dodge a government shutdown and credit default. But even if he has success on those fronts, he still needs to maintain momentum on Democrats’ elections legislation, which Republicans look certain to torpedo.

“I have full faith and confidence in Joe Biden in all of this,” said House Majority Whip Jim Clyburn, who's pressed Biden to endorse a filibuster carve out for voting rights legislation. “He is working this … and that’s how it should be.”

Biden met with two key Democratic holdouts on his domestic spending agenda on Wednesday, part of a sustained push to keep Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) on board with his legislative program. Biden’s met with Sinema four times this year, in addition to telephone calls made between the two, and has spoken to Manchin a similar number of times.

“Now is the time” for Biden to jump full-force into the reconciliation conversation, said Sen. Tim Kaine (D-Va.). And the White House made clear that Biden is diving into the series of tricky issues.

Andrew Bates, a spokesperson for Biden, said that Biden and his administration "are in frequent touch with Congress about each key priority: protecting the sacred right to vote, ensuring our economy delivers for the middle class and not just those at the top, and preventing needless damage to the recovery from the second-worst economic downturn in American history.”

To help corral all 50 Senate Democrats for the social spending bill, the president and his party need to create an “echo chamber” around its substance, said Celinda Lake, a pollster on Biden’s campaign. But that won't be easy. Manchin has told colleagues he’s worried about whether the bill’s safety net, climate action and tax reforms will be popular in his state, according to one Senate Democrat. He's also said he won't support a measure at the current spending level: $3.5 trillion.

If Biden can hammer home the popular aspects of the spending plan, it may help assuage Manchin and improve his whip count in Congress. Underscoring the degree to which he's become the face of the multi-trillion dollar reconciliation bill, a Democratic aide said the party is increasingly seeking to frame it as Biden’s agenda, not that of Sen. Bernie Sanders (I-Vt.) or any single Democrat.

#### 2---Prefer predictive uniqueness---despite challenges, it will eventually pass

Jaacobson 9-10 (Louiis Jacobson, correspondent @ Politifact, The Democrats’ reconciliation bill: What you need to know, <https://www.politifact.com/article/2021/sep/10/democrats-reconciliation-bill-what-you-need-know/>, y2k)

How serious are the centrists and progressives about derailing the process if they don’t get their way?

Experts said it’s certainly possible that either centrists or progressives would tank the bill if they can’t get everything they want, though such a course would be risky since the Democrats are at risk of losing their slim majorities in the 2022 midterm elections.

"It may be too early to be talking about a snowball’s chance in Hades, but the intraparty heat in the Democratic caucuses has already set off the pre-melt warning sirens," Wolfensberger said.

Goldwein said that while the factions’ positioning is deeply felt, he added that there’s a good chance that Democrats want to get to yes. "I think the leadership and the administration will lead them to a deal," he said.

#### 3---Aff evidence is all rhetoric

Greve 9-7 (Joan E Greve, Guardian staff, Joe Biden to referee Democrats in brewing battle over $3.5tn budget bill, <https://www.theguardian.com/us-news/2021/sep/07/biden-democrats-brewing-battle-budget-bill>, y2k)

With his entire economic agenda hanging in the balance, Biden will need to convince the two fractious wings of his party to come together and pass a comprehensive spending package. And given Democrats’ extremely narrow majorities in both the House and the Senate, there is virtually no room for error.

Despite warning signs of intra-party friction over the cost of the budget bill, congresswoman Suzan DelBene, who chairs the centrist New Democrat Coalition, said the House’s focus right now should still be on the content of the legislation.

“I think discussion of a number is more distracting when the focus really needs to be on, what is the substance going to be of this legislation?” DelBene told the Guardian. “If we have strong legislation the people support, I think we can find the path forward.”

Over in the Senate, majority leader Chuck Schumer is attempting to advance the bill using reconciliation, meaning Democrats do not need any Republican support to pass the legislation. But the 50-50 split in the upper chamber means that every single Democratic senator must be on board to get the bill approved.

Schumer has been clear-eyed about the challenges ahead for the legislation. Shortly after the Senate approved the blueprint for the bill in a party-line vote last month, Schumer told reporters, “We’ve labored for months and months to reach this point, and we have no illusions – maybe the hardest work is yet to come.”

Manchin proved Schumer’s point last Thursday, when he wrote a Wall Street Journal op-ed calling for a “strategic pause” in advancing the spending package.

“While some have suggested this reconciliation legislation must be passed now, I believe that making budgetary decisions under artificial political deadlines never leads to good policy or sound decisions,” Manchin said in the op-ed. “I, for one, won’t support a $3.5tn bill, or anywhere near that level of additional spending, without greater clarity about why Congress chooses to ignore the serious effects inflation and debt have on existing government programs.”

Bernie Sanders, the leftwing chairman of the Senate budget committee, responded to Manchin’s warning in kind, threatening to torpedo the bipartisan infrastructure bill if the spending package is not approved.

“Rebuilding our crumbling physical infrastructure – roads, bridges, water systems – is important,” Sanders said on Twitter. “Rebuilding our crumbling human infrastructure – healthcare, education, climate change – is more important. No infrastructure bill without the $3.5tn reconciliation bill.”

Progressive groups have echoed Sanders’s argument, insisting that every component of the $3.5tn legislation is vital. Sanders had initially called for spending $6tn on the budget bill, so progressives already view the current price tag as a concession.

“We’re in a moment of crisis. Is this really the time for the Senate to press pause?” Ellen Sciales, the communications director of the climate group Sunrise Movement, said in a statement.

She added: “If the Senate can’t pass an incredibly popular climate and jobs plan during a summer of unprecedented, fatal climate disasters, and an economy reeling from a global pandemic, we must abolish the Senate. $3.5tn was the compromise.”

Natalia Salgado, the director of federal affairs for the Working Families Party, noted that some progressive economists have suggested the US needs to spend $10tn over 10 years to meet its obligations in the Paris Climate Agreement.

“We’re going to come nowhere near that,” Salgado said. “So we can’t afford to lose a single cent in this $3.5tn. Every single penny will count.”

Despite the war of words between moderates and progressives, the White House has continued to express confidence that Congress will ultimately reach an agreement on the legislation.

“The president and his whole team are proud of and fighting for the substance of his Build Back Better agenda,” a White House official said in a statement. “These are complex processes, but as recent weeks have demonstrated, leaders in Congress and the President know how to move them forward.”

#### 4---Biden is super confident

Bose 9-16 (Nandita Bose, Biden expects Congress to approve spending, infrastructure bills, <https://www.reuters.com/world/us/biden-says-he-expects-congress-deliver-spending-infrastructure-bills-2021-09-16/>, y2k)

U.S. President Joe Biden on Thursday expressed confidence that Congress will pass both a bill funding infrastructure investments and a supplementary spending bill as Democrats seek to infuse trillions of dollars into the U.S. economy.

#### PC solves spending concerns---democrats can entertain proposals like taxing stock buybacks---it fully offsets the bill and makes it difficult for the centrists to backlash

Sargent 9-7 (Greg Sargent, columnist @ Washington Post, Opinion: How Democrats can make it harder for centrists to downsize Biden’s agenda, <https://www.washingtonpost.com/opinions/2021/09/07/manchin-sinema-spending-stock-buybacks/>, y2k)

When Sen. Joe Manchin III shook up Democrats by demanding a “pause” on President Biden’s $3.5 trillion “human infrastructure” package, he took refuge behind platitudes about limiting its spending to what America “can afford and needs to spend.”

The West Virginia Democrat did not specify what he views as the amount that we truly can “afford” and “need” to spend. Similarly, Sen. Kyrsten Sinema (D-Ariz.) has said she won’t support that level of spending, without saying what the right amount should be.

But such arguments should get a lot harder to sustain, once the political world starts focusing seriously on the details of the corporate tax hikes in the package.

Case in point: Two progressive senators are set to unveil a new plan to tax stock buybacks, in which corporations purchase back shares in themselves as a way to channel additional money to shareholders.

The details of the plan are as yet unknown, but the office of Sen. Sherrod Brown (D-Ohio) confirms to me that it will be revealed this week. Brown will champion the plan with Sen. Ron Wyden (D-Ore.), who as chairman of the Finance Committee is assembling the corporate tax increases for the $3.5 trillion bill, which Democrats hope to pass by the simple-majority “reconciliation” process.

The plan to tax stock buybacks is one of numerous proposals Democrats are considering to offset the reconciliation bill’s spending, Bloomberg News reports. These proposals are expected to include an increase in the corporate tax rate, an effort to capture more revenue from multinational corporations that shelter profits abroad, taxing capital gains like regular income, and more.

If and when this proposal gets debated, it will be harder for centrist Democrats to hide behind platitudinous objections to spending. That’s because specific proposals can both generate revenue and have policy value of their own, and centrists will have to say which of these they oppose and why.

Stock buybacks occur when companies purchase back stocks, which transfers money to wealthy shareholders and in the short term might raise the price of stocks still on the market, enriching shareholder value more.

Many tax experts see these as problematic. Some say they decrease the amount available for productive investments, including wage increases to workers. Others argue they are not taxed the way shareholder dividends are, costing us revenue and starving public investment.

The new proposal from Democrats will address these things. It’s not clear how yet — they will either seek to apply an excise tax on buybacks, or treat them as taxable dividends to shareholders — but that’s the general goal.

In a statement sent to me, Brown said the fundamental goal is to tax corporations when they “transfer wealth to Wall Street” by using accounting trickery unavailable to working people. As he put it: “Corporate greed is fundamental to the Wall Street business model.”

With stock buybacks soaring, this would be another way to bring in revenue to offset the spending in the reconciliation package, which will include investments in child care, family supports, education and combating climate change, among many other things.

“The fact that we can raise billions through a small tax on share buybacks just goes to show that there’s no excuse for congressional Democrats to shortchange the critical investments in the reconciliation bill,” Seth Hanlon, a senior fellow at the Center for American Progress, told me. He estimates this could raise as much as $150 billion or more over 10 years.

The key point here is that when proposals like this one start to get debated in earnest, it will be much harder to oppose the reconciliation bill’s spending levels in an abstract way.

#### Lobbying by large firms guarantees political backlash

Jones 20 (Alison Jones, Professor of Law, King's College London, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, 3-20, The Antitrust Bulletin. 2020;65(2):227-255. doi:10.1177/0003603X20912884, y2k)

E. Opposition to Legislative Reform

Although statutory reform might at first sight appear to be a direct, effective solution to some of the impediments (such as entrenched judicial resistance to intervention), there are good reasons to expect that powerful business interests will also stoutly oppose any proposals for legislation to expand the reach of the antitrust laws or to create a new digital regulator.128 One can envisage the formidable financial and political resources of the affected firms will amass to stymie far-reaching legislative reforms. Legislative steps that threaten the structure, operations, and profitability of the Tech Giants and other leading firms are fraught with political risk. These risks are surmountable, but only by means of a clever strategy that anticipates and blunts political pressure. One element of such a strategy is to mobilize countervailing support from consumer and business interests to sustain an enabling political environment to enact ambitious new laws.

#### The trade-off with infrastructure is 1:1---so specific

McNamee 21 (Roger McNamee, the founding partner of the venture capital firm Elevation Partners, America Can't Wait for Legislators to Rein in Big Tech. The Biden Administration Must Focus on Antitrust, https://time.com/5952229/biden-big-tech-antitrust/&hl=en&gl=us&strip=1&vwsrc=0, y2k)

President Biden faces challenges greater than any president since FDR. The country is struggling with a deadly pandemic that has shaken the economy and exposed its structural flaws. His political opponents refuse to engage with those challenges, choosing instead to focus their efforts on undermining democracy. Powerful business interests in technology, health care, finance, energy, and agriculture are pursuing agendas that make President Biden’s job all the more difficult. But perhaps the most uniquely destabilizing force in America today is the major internet platforms. Their business models fundamentally reduce human agency, and, in some cases, threaten democracy and public health, as we have seen during the COVID-19 pandemic.

Even if Republicans were willing to cooperate, there would not be enough time in the congressional calendar to address all of these issues through legislation. As things stand, the legislative calendar prior to the 2022 midterms is likely to be dominated by infrastructure and voting rights. Fortunately, there is much that the executive branch can do. Given the scope and novelty of the challenges, President Biden will be best served by appointees who share his bold vision and are willing to embrace new approaches to large and difficult problems.

#### Antitrust has been de-prioritized to push other items

Ward 9-15 (MYAH WARD, politico staff, Klobuchar confident Congress can pass legislation targeting tech giants, https://www.politico.com/news/2021/09/15/klobuchar-legislation-tech-511966, y2k)

The hurdles: Progress on antitrust legislation has slowed as lawmakers tackle other pressing priorities. The House Judiciary Committee moved forward with six bills aimed at the tech giants in late June, but they have yet to get floor time in the chamber and have drawn attacks from some top Republicans. Congress has also yet to move forward with comprehensive privacy legislation.