# 1nc round 1

## offcase

### 1nc – ptx

#### New BBB’s likely to pass – BUT PC’s key

Cohn 12-24 (Jonathan Cohn, Senior National Correspondent at HuffPost, formerly worked at the New Republic and American Prospect, has written for the Atlantic and New York Times Magazine, has won awards from the Sidney Hillman Foundation, the Association of Health Care Journalists, World Hunger Year, and the National Women's Political Caucus, “Joe Manchin's 'Scaled-Back' Framework May Be Better Than It Sounds,” HuffPost, 12-24-2021, https://www.huffpost.com/entry/build-back-better-joe-manchin-joe-biden\_n\_61c4a435e4b04b42ab699214)

It looks like negotiations over President Joe Biden’s Build Back Better legislation are only mostly dead — which, as any fan of “The Princess Bride” knows, means they are also slightly alive.

This wasn’t so apparent last weekend, when Sen. Joe Manchin (D-W.Va.) went on Fox News to say he was a “no” on the bill that House Democrats passed last month. Shortly afterward, Manchin issued a press release reaffirming his opposition. The statements were stronger than anything he’d said previously, and drew blistering rebukes from a variety of top Democratic officials ― including White House press secretary Jen Psaki and House Progressive Caucus Chair Pramila Jayapal (D-Wash.), both of whom accused Manchin of negotiating in bad faith.

But Biden, who has since spoken directly with Manchin, vowed on Tuesday that “Sen. Manchin and I are going to get something done.” Jayapal also spoke to Manchin and asked him to be more specific about what in the House bill he could support and what he couldn’t. It was a clear attempt to lower the temperature, restart a dialogue and craft a consensus bill that can pass both houses.

That won’t be easy, given the considerable distance between Manchin and his party’s leaders. Manchin has raised a series of objections to specific initiatives, including the direct subsidy to families with parents that Manchin says could create an “entitlement society” but that Democrats see as the centerpiece of their strategy to fight child poverty.

Manchin has also said he objects to the bill’s basic structure. By funding several of the programs for only a few years with the expectation that future lawmakers will renew them, Manchin says, Democratic leaders have disguised the bill’s true cost ― which, he says, is $3 trillion over 10 years, rather than the $1.85 trillion in the official Congressional Budget Office projection.

The best hope for moving forward may lie in an alternative framework that, according to The Washington Post, Manchin gave the White House last week. It would include the bill’s climate and pre-kindergarten initiatives, along with improvements to the Affordable Care Act, funding all of them for the full 10 years of the budget window. It would leave out most of the bill’s other components.

It’s difficult to know how serious this proposal is, given that it’s not public, or whether Manchin sincerely wants to get to “yes.” Even if he does, reconstructing legislation and assembling votes for it at this late stage in the process would be difficult. Progressives in particular are likely to resist endorsing a bill that is already being described in the media as a “scaled-back” version of the House bill.

But that description is not quite right. Whatever Manchin’s motives, whatever the consistency or merits of his views, a bill that includes fewer initiatives but is funded permanently might actually be better as both politics and policy ― as a number of liberal writers and thinkers have been arguing for weeks.

In fact, it’s possible this is the type of bill that Biden and party leaders would have tried passing from the very beginning, if not for the unusual, ultimately fleeting political circumstances that prevailed in late 2020 and early 2021.

The Choices Biden And Leaders Avoided Before

The interval between the final stages of a campaign and the first weeks of a presidential term is typically when a new administration works with congressional leaders to figure out what legislation it will try to pass and when.

That is when former President Barack Obama and his allies decided to spend Obama’s first year seeking legislation on health care (which passed) and climate change (which didn’t). Likewise, it’s when former President Donald Trump and his allies decided to focus on Obamacare repeal (which failed) and tax cuts (which succeeded).

Setting priorities is never easy for a new administration, because it means postponing the push for some initiatives, neglecting the needs those initiatives address and disappointing their champions. That’s why, to this day, so many immigration reform advocates are furious with Obama and Democratic leaders over their failure to take up their cause right away. But an administration has only so much bandwidth, so much political capital and so much time at its disposal. The same goes for congressional leaders. And so in 2009, they decided to focus on a few initiatives, even though they wanted to promote them all.

That wasn’t the approach in late 2020 and early 2021, and the emergency mentality of the pandemic was a big reason why. Economic relief measures were expiring while large swaths of the population remained out of work, unable to pay for basics like food and housing. Key sectors like child care were on the verge of collapse because of closures and staff shortages, panicking families and further undermining the economy. Vaccines were finally available, but distribution was a mess and badly in need of funding.

Into this crisis stepped a new administration that hadn’t yet prioritized among its campaign promises because, until the surprise Democratic Senate victories in Georgia, it hadn’t expected its party would have control of Congress. At the same time, Biden and Democratic leaders in Congress were determined not to make the mistake of Obama’s first year, when Democrats frittered away so much time and political capital trying unsuccessfully to win Republican support for their initiatives.

Instead, before the administration was even two months old, Biden and Democratic leaders passed the American Rescue Plan through the budget reconciliation process, which requires just 50 votes in the Senate. No Senate Republicans voted for it, and Manchin was the last to sign on with what was, in the context of that legislation, a relatively modest concession: giving up on a proposed increase in the minimum wage.

Many within and outside the party began counting on Manchin’s support for the rest of the Democratic agenda, assuming a similar negotiation process would get it done. That thinking shaped the construction of Build Back Better, which included most of the major initiatives Biden had embraced as a candidate, from once-in-a-generation action to slow climate change to a new entitlement for child care. The idea was to reprise not Obama’s or Bill Clinton’s first term, but something more like Franklin Roosevelt’s.

But FDR had larger majorities that, among other things, were willing to commit a lot more government spending to launching new programs. Biden’s opening bid, which he constructed together with Democratic leaders from both houses, envisioned $3.5 trillion over 10 years. Biden’s plan was actually a preemptive compromise, well short of the $6 trillion that Senate Budget Chairman Bernie Sanders (I-Vt.) thought it would take to fund the agenda fully ― and it was still way more than Democrats like Manchin were willing to spend.

That led to a second round of downsizing ― and the decision to start limiting funding for several initiatives to only a few years, in the hopes that their popularity would compel a future Congress to extend the programs before they expire. It would be a huge gamble, all the more so because several programs depend on state officials agreeing to participate. The lack of permanent funding could convince more of them to stay out.

An example is Build Back Better’s two early childhood initiatives, one to revamp child care assistance and one to establish universal pre-kindergarten programs. Successfully implemented, the programs could save some families many thousands of dollars a year, ideally allowing kids to end up in better care and working parents to feel a lot less financial distress.

The bill envisions both initiatives as traditional federal-state partnerships, with Washington putting up most of the money in exchange for states covering the rest and arranging their programs to comply with new federal rules. In its estimate of the program’s cost, CBO assumed a third of states would turn down the child care money and 40% would turn down the pre-K funding, according to an internal document obtained by the People’s Policy Project.

CBO analysts were just guessing at this, and it’s possible more states would participate. It’s also possible fewer would. And the fewer states in the program, the easier it would be for lawmakers to let the program lapse, turning a transformational change into a temporary one.

The Choices Biden And Leaders Face Now

Unless Manchin is bluffing, the only way to get his vote and pass a bill is to pick a few plans to fund fully ― which, inevitably, would mean picking a few plans not to fund at all.

The contours of the reconfiguration would depend heavily on whether it includes an extension of those direct payments to families with kids, the child tax credit, that the American Rescue Plan increased temporarily. It’s arguably the simplest, easiest policy in Build Back Better to implement, since it’s already on the books, and it has already had dramatic effects on poverty. But with a 10-year cost of $1.65 trillion, it would soak up almost all of the money in a $1.85 trillion bill.

Democrats could opt for a smaller version of the credit that would still do a lot of good. Or, if Manchin were amenable, they could pass a one-year extension that would avoid cutting off the money next year, with the expectation that Congress would then work on a bipartisan bill to extend the cuts permanently, using a proposal from Sen. Mitt Romney (R-Utah) as its basis. (Former Democratic Senate aide Adam Jentleson sketched out such a scenario in the Post this week.)

Either option would leave room for most if not all of the climate initiatives ― which most Democrats deem essential because the warming planet is such an existential threat ― and then some combination of the programs to help families with child care and health care.

In figuring out which policies to include, Democrats would have to ponder a number of variables ― like which policies provide the most help to the people most in need, which ones are most likely to be politically sustainable, which ones would be most likely to become law on their own at some later date, and which ones have viable alternatives through executive actions that Biden could take on his own.

And no matter what the decisions, they would be painful for leaders to make ― especially given all the news illustrating the need for these programs, whether it’s natural disasters drawing attention to climate change or a shortage of care workers demonstrating why that part of the labor force needs so much new support.

But the choices at this point may be inevitable in a world where the barest of Democratic majorities depends on support from a senator who has made clear he is wary of too much government spending, who worries openly about assistance recipients using money to buy drugs and who comes from a state that voted for Trump over Biden by nearly 40 points.

And while it’s important to focus on what a reconfigured bill wouldn’t accomplish, it’s also important to think about what it could. A year ago this time, when a governing majority seemed impossible, Democrats and their supporters would have been giddy at the idea of funding even one of Build Back Better’s initiatives. Now they are looking at the possibility of funding several ― an outcome that seems disappointing primarily because, during the early months of Biden’s presidency, there was so much talk of doing so much more.

Of course, even a reconfigured bill might not be able to pass, given the work it would take to craft new legislation and then secure the necessary votes. Getting the current legislation through the House required a herculean effort by House Speaker Nancy Pelosi (D-Calif.), and doing it again might be beyond even her legendary talents, especially with so many Democrats wary of getting burned by Manchin again.

But if the choice Democratic leaders face is between trying to pass a more narrowly focused bill and passing nothing at all, this shouldn’t be a hard call. They have nothing to lose by trying, and quite a lot to gain.

#### Plan necessarily drains PC – trading off with unrelated agenda items.

Carstensen ‘21

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14. 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.

15. 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!

16. 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.

#### PC’s key to global follow-through on climate post-Glasgow summit – impact’s extinction

Chon 11-8 (Gina Chon, Columnist at Reuters Breakingviews, former US Regulatory and Enforcement Correspondent, Financial Times, BS Journalism, Northwestern University, “America’s swing senator can save or scorch planet,” Reuters, 11-8-2021, <https://www.reuters.com/breakingviews/americas-swing-senator-can-save-or-scorch-planet-2021-11-08/>)

The health of the planet hangs somewhere over West Virginia. Joe Manchin, one of the coal state’s senators, is in line to cast the deciding vote on President Joe Biden’s $1.8 trillion “Build Back Better” spending plan. He’ll indirectly be voting on Biden’s ability to influence other countries to fight climate change after the COP26 summit read more.

Biden has faced two main challenges to his spending plan, a companion to the $1 trillion infrastructure legislation Congress approved on Friday. One objection comes from lawmakers worried about the amount of money at stake. After an earlier compromise, climate change initiatives are the biggest chunk of the overall blueprint at $555 billion, more than half of which comes from tax credits for cleaner vehicles and manufacturing. Manchin is already a self-confessed budget worrier.

The other obstacle is unease around specific climate initiatives. Manchin hails from a state with less than 2 million residents, but a heavy reliance on coal. His disapproval helped squash Biden’s proposal for a Clean Electricity Performance Program that would have incentivized utilities to stop using oil, coal and gas. The goal was for 80% of electricity produced in the country to come from clean sources by 2030, compared to the current 40%.

Green-energy tax credits are still on the table and offer a bigger bang for the taxpayer’s buck than the clean electricity program, think tank Resources for the Future estimates. By 2030 they would get the United States to 69% of its electricity coming from clean sources.

Manchin has good reason to keep those tax credits alive. While West Virginia is the second-largest coal producer in the United States and top five in natural gas, according to the U.S. Energy Information Administration, it’s also one of the states most exposed to damage from climate change. More than 60% of its power stations are at risk from a so-called 100-year flood, according to the First Street Foundation.

The senator’s decision will have global repercussions. China, India read more and other countries are only likely to listen to Biden’s pleas to help fight climate change if he looks able to meet such pledges himself. For example, the president wants other countries to help cut methane emissions by 30% this decade, but would still need Manchin’s support to levy fines on U.S. methane-leakers, which is far from guaranteed. For such a small population, West Virginia has a huge responsibility.

### 1nc – estados

#### Text: The 50 states and relevant territories should

#### engage in multistate antitrust action and enforcement by including attention costs as a component of price for the purposes of antitrust enforcement

#### initiate quo warranto proceedings as a tool of last resort against any corporation found to be engaging in anticompetitive petitioning, especially in instances where State Attorneys General deem enforcement action by the Federal Trade Commission to be outside their institutional authority

#### States solve best---multistate organizations, expanded jurisdiction, and can “fill the gap”

Rauch 20 Daniel E. Rauch J.D. Yale Law School. (2020 ). ARTICLE: SHERMAN'S MISSING "SUPPLEMENT": PROSECUTORIAL CAPACITY, AGENCY INCENTIVES, AND THE FALSE DAWN OF ANTITRUST FEDERALISM. *Cleveland State Law Review*, 68, 172. <https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn:contentItem:5YDM-6NS1-FCK4-G4MV-00000-00&context=1516831>. {DK}

In 2020, as in 1890, states attorneys general have much to offer antitrust enforcement. Illegal anticompetitive conduct is often concentrated locally, rather than nationally, making state-level enforcement especially appropriate. 202Link to the text of the noteMany states have antitrust statutes (or bodies of state law) that allow for prosecutions that the federal laws do not. 203Link to the text of the noteState governments often will have better knowledge of local economic conditions than distant agencies in Washington, making them natural choices for [\*210] antitrust enforcement. 204Link to the text of the noteAnd if the federal government fails to enforce the antitrust laws, state attorneys general often have the ability and political incentives "step up" to "fill the void." 205Link to the text of the note

Yet, if the early failure of antitrust federalism holds a single lesson, it is that even such compelling political, historical, and economic imperatives are, without more, insufficient to spur state antitrust action. Unless state prosecutors have the capacity and incentives to take on the antitrust challenge, they will not act.

What does this mean for today's state antitrust enforcers? On one hand, the years since 1890 have seen several innovations that substantially mitigate the problem of prosecutorial capacity. Multistate organizations like the National Association of Attorneys General (NAAG) have allowed for coordination and information sharing between attorneys general on antitrust matters, thus reducing the costs and burden of such cases. 206Link to the text of the noteLikewise, the rise of multistate antitrust suits brought jointly by dozens of states allows for cost-and-capacity-sharing. 207Link to the text of the noteChanges in federal law, like the Hart-Scott-Rodino Act of 1976, created an economic incentive for states to pursue antitrust cases by codifying the ability of state attorneys general to sue as parens patriae and by offering states treble damages when they prevail (a strong economic incentive if ever there was one). 208Link to the text of the note

Going further, the federal government has sometimes expressly subsidized state antitrust efforts, as with the supplemental funding offered in the Crime Control Act of 1976. 209Link to the text of the noteAnd in some states, the capacity of the attorney general's office has increased to levels inconceivable at the turn of the century: New York's Attorney General, for instance, supervises over 1,800 employees, 210Link to the text of the notewhile California employs a staggering [\*211] 4,500. 211Link to the text of the notePerhaps because of these shifts, it is unsurprising that in recent times at least some state attorneys general have heeded the call to enforce state and federal antitrust laws, from local investigations of healthcare consolidation 212Link to the text of the noteto multistate actions against Silicon Valley behemoths like Apple and Amazon. 213Link to the text of the note

### 1nc – t-expand

#### Scope is when the law applies

Dernbach 21 --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute applies. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action is not addressed in the statute, the statute is not applicable. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

#### Expanding requires a reversal of legislative intent

Garubo 84 --- Angelo G. Garubo, Senior Vice President and Corporate Secretary, Commercial Credit Group, Juris Doctor, magna cum laude, from California Western School of Law, “Severing the Legislativ ering the Legislative Veto Provision: The Aftermath of Chada vision: The Aftermath of Chada”, California Western law Review, Vol 21 No 1, 1984, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1559&context=cwlr

Since a veto provision can qualify as a proviso, the rule in Davis v. Wallace 147 and Frost v. Corporation Commission 148 can be applied to show that the legislative intent test is inadequate to determine if a veto provision should be severed. In Davis and Frost, the Supreme Court ruled that a proviso could not be severed if it was originally written into the statute. 149 The Court reasoned that severing such a provision would result in an extension of the scope of the statute.' 50 Such an extension would be contrary to the legislative intent of a statute by including subject matter which the legislature expressly chose to exclude.151 The Davis and Frost analysis can be applied to the "congressional veto" because (1) the veto provision can be considered a proviso 152 and (2) severing a veto provision will expand the scope of the statute contrary to legislative intent. 5 3 By severing a veto provision the executive branch would be free to expand or limit the scope of a statute through its implementation. Such an expansion or limitation would constitute a defacto contradiction of legislative intent by altering the purview of the statute.' 54 A veto provision is a control mechanism.' 55 Its mere presence in a statute indicates the legislature's desire to restrict the scope of that statute. 5 6 By removing it, the court would affect a fundamental change in the nature of the statute, which was not accounted for when the legislature enacted the law. 157 Because a veto provision is a proviso, its excise from a statute would contradict legislative intent. A test which uses legislative intent to determine if a veto provision is severable could only find that the provision is not severable. Thus, when literally applied, the legislative intent test is not adequate to determine if a veto provision should be severed from its statutory framework.

#### Violation --- Plan only enforces an existing dictate of the statute --- vote neg for limits and ground --- allows affirmatives to defend the status quo and circumvents core neg links

Lane 92 --- Mills Lane, Judge on the Second District Court of Nevada, “STATE, GAMING COMM'N V. GNLV CORP”, https://www.casemine.com/judgement/us/5914875dadd7b049344e3895

Moreover, an administrative agency is not required to promulgate a regulation where regulatory action is taken to enforce or implement the necessary requirements of an existing statute. K-Mart Corp. v. SIIS, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985). "An administrative construction that is within the language of the statute will not readily be disturbed by the courts." Dep't of Human Res. v. UHS of The Colony, Inc., 103 Nev. 208, 211, 735 P.2d 319, 321 (1987). The Commission did not engage in ad hoc rule-making because the Commission did not expand the scope of the statute, but merely enforced the requirements of NRS 463.3715(2) in accordance with the plain dictates of the statute.

### 1nc – section 5

#### Text

1. The FTC should announce it is rescinding its creation of a new rulemaking group within the FTC’s Office of the General Counsel. The FTC should follow through with the announcement by no longer proceeding with rulemaking options and default to agency guidance as an alterative; (outlined in the 1AC Brown and Pozza ’21)
2. The FTC will issue enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA includes attention costs as a component of price for the purposes of antitrust enforcement. The FTC should release an interpretive guidance doc and data sets that reflect this and enforce accordingly;
3. Federal and Appellate Courts will not grant cert to cases challenging the legitimacy of the FTC’s authority to make this determination.

#### The cplan solves. It also competes – the FTC interprets current authority, instead of creating new prohibitions.

Kahn 21 et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.15

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

#### Guidance is distinct from Rulemaking. We are the former and it won’t get rolled-back.

* Explains “notice-and-comment” distinction;
* It does not expressly “bind” in a legalese manner that risks Court reversal – but it functionally binds;

Seidenfeld 11 Mark Seidenfeld – Patricia A. Dore Professor of Administrative Law, Florida State University College of Law. “Substituting Substantive for Procedural Review of Guidance Documents” - 90 TEX. L. REV. 331 (2011) -#E&F - https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1004&context=articles

A. Legal Effect and the Distinction Between Legislative Rules and Guidance Documents

The first school to emerge, led by Robert Anthony, was motivated by a concern for agency abuse of guidance documents.75 When agencies adopt rules with the force of law, they are supposed to use notice-and-comment rulemaking. Often, however, agencies will adopt policy statements or interpretive rules that in practice bind regulated entities without following notice-and-comment procedures.76 Professor Anthony devoted a good part of his scholarship to advocating that courts should police such abuse by determining which purported guidance documents actually do create new, practically binding law and reversing them on grounds that they are really "spurious rules"—legislative rules issued improperly without notice-and-comment procedures.77

Anthony advocated different tests to determine whether purported policy statements, as opposed to interpretive rules, were spurious rules.78 On the one hand, a policy statement is an indication of how an agency intends to exercise discretion that it is given to implement the statutes and regulations it administers. Policies do not follow from the language of these statutes and regulations, but to qualify as a policy statement, the document must not definitively identify the manner in which the agency will apply these sources of law.79 An interpretive rule, on the other hand, is meant to explain preexisting legal obligations and relations that are embodied in the agency’s authorizing statutes and regulations.80 Hence, a document is a valid interpretive rule and needs not go through notice and comment if it follows from the language it is interpreting.

1. Statements of Policy.—For a policy statement, the “ex ante legal effect” school looks at whether the document was issued with intent to bind or otherwise had binding effect.81 Indicia of such bindingness include, most importantly, definitive language indicating the course of action the agency would take when applying relevant statutes and regulations to particular situations.82 Other factors that might indicate sufficient bindingness are whether the agency indicated a clear intent to follow the document when addressing particular cases, whether the agency published the document in the Code of Federal Regulations, and whether the agency expressly indicated that the document was meant to be a nonlegislative rule.83

A major problem for this ex ante approach is that binding legal force comes in many flavors and intensities, and it is not self-evident from the face of a policy statement how the agency will apply it in subsequent particular situations. As already noted, virtually everyone accepts that only legislative rules can have independent legal force.84 This means that a person who is alleged to have violated an agency’s regulatory law must be shown to have violated the underlying statute or legislative rule that an agency is implementing; it is not sufficient for the agency to demonstrate that the person violated a policy statement.85 But Anthony advocates that documents that are practically binding should be deemed to be legislative rules as well.86 This raises the question of what makes a rule practically binding.

Courts have ruled that a policy statement specifying precisely what a regulated entity can do to comply with agency legislative rules is binding.87 Such a statement poses a dilemma for an entity about whether to comply with the announced policy or risk prosecution and potential penalties. To the extent it induces changes in the entity’s conduct, the statement may appear sufficiently forceful to be a legislative rule that cannot be promulgated without notice and comment.

#### Framing point – the First plank of the CP alone solves ALL OF THE FTC ADV.

#### Every 1AC card assumes FTC RULEMAKING – ONLY Rulemaking risks SCOTUS review. This is NOT because of the substance of the Aff – it’s because of the Legal issues that ONLY rulemaking present for other agencies.

Okuliar 21 et al; Alexander Paul Okuliar, Co-chair of Morrison & Foerster’s Global Antitrust Law Practice Group. A seasoned litigator, and former senior Department of Justice (DOJ) and Federal Trade Commission (FTC) official, Alex draws upon two decades of mergers and enforcement experience – “FTC Lays Groundwork for Rulemakings: Are New Substantive Competition Rules Coming?” - Morrison & Foerster - 11 May 2021 - #E&F – modified for language that may offend - https://www.mofo.com/resources/insights/210511-ftc-lays-groundwork-rulemakings.html

Uncertainty Squared

The FTC's foray into rulemaking could lead to a period of uncertainty and legal challenges in those areas touched by a new agency rule. There is likely to be significant debate over the scope of the FTC's authority, the particulars of the rulemaking process, the substance of any proposed rules, and, when tested in court, the extent of Chevron deference to which the agency is entitled. Substantive FTC competition rules could also create potential divergence in enforcement policy or activity between the DOJ and FTC brought about by the new rules.

Opportunities to weigh in on the process and any proposed rules should abound. Slaughter has taken the position—backed by Khan and Chopra in their recent article—that the agency has the authority to issue substantive competition rules and can proceed with participatory notice-and-comment rulemaking in accordance with the Administrative Procedure Act (APA). Foreshadowing the FTC's likely approach, Slaughter summarized APA rulemaking as having two major steps: "[r.]he agency provides the public with notice of what rule it proposes and then carefully analyzes the public's comments before finalizing a rule."[21] Once adopted, rules could be challenged in federal court on several bases, including that the FTC failed to follow APA procedures, that the new rules exceeded the authority Congress granted the FTC, or that the new rules violate some other constitutional or statutory right.

The notice-and-comment process will draw vigorous debate on hot-button issues, including those that impact the tech sector. Already, the Open Markets Institute (in conjunction with other advocacy groups) has put two proposals before the agency. The first petitions the FTC to prohibit employers from requiring or enforcing non-compete clauses with regard to their workers, whether employees or independent contractors.[22] Under current federal antitrust law, non-competes are evaluated under the rule of reason—balancing pro-competitive and anticompetitive effects—and are typically found lawful. An FTC rulemaking on non-compete clauses could move the practice from generally allowed to definitively prohibited. The second petitions the FTC "to prohibit businesses from using exclusive dealing, exclusionary payments, and other similar practices . . . that substantially foreclose rivals from customers, distributors, or suppliers of critical inputs."[23] Again, this rule would take conduct that is currently judged case-by-case based on its effect on competition and prohibit it outright, even if there were no anticompetitive effects.

Conclusion

The FTC is ~~taking steps~~ (measures) that could result in substantive rulemaking activity, fundamentally changing the landscape of competition law enforcement in the United States. Although much of the antitrust debate likely will revolve around digital platforms and tech companies, the agency's rules could be far reaching and touch all areas of the economy.

#### Interpretive guidance doc WILL NOT EVEN CONFRONT COURT CHALLENGES. Courts won’t overturn THEM – even if they want to do so – SOLVING THE ftc ADV.

Seidenfeld 11 Mark Seidenfeld – Patricia A. Dore Professor of Administrative Law, Florida State University College of Law. “Substituting Substantive for Procedural Review of Guidance Documents” - 90 TEX. L. REV. 331 (2011) -#E&F – continues to footnote #97 - https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1004&context=articles

2. Interpretive Rules.—The picture is slightly clearer for purported interpretive rules, although the distinction between interpretive and legislative rules is still far from pellucid.97 Again, the focus is on whether the rule “carries the force and effect of law,”98 but the emphasis for evaluating an interpretive rule is whether the binding obligation is created by the rule rather than reflecting a preexisting obligation imposed by the statute or regulation the rule purports to interpret.99 Operationally, this inquiry looks at the relation between the rule and the text it interprets.100 For example, courts have stated that a rule is interpretive if it spells out a duty “fairly encompassed” within the regulation that the interpretation purports to construe.101 The basis for this test is that a rule that is fairly encompassed does not create an independent legal obligation, but rather merely clarifies one that already exists. Similarly, courts have held that a rule that is inconsistent with, or amends, a legislative rule cannot be interpretive, because such a rule would impose new rights or obligations.102 This standard, however, still leaves difficult line-drawing choices for determining whether the connection between an announced interpretation and the text being interpreted is sufficiently close to characterize the announcement as an interpretive rule. In fact, courts often deviate from the strictures of the doctrine they have created by holding that interpretations that are clearly not encompassed in the language being interpreted were, nonetheless, interpretive rules.103

97. Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Courts will often characterize guidance documents that are not clarifications of language nonetheless as interpretive, and then uphold them even though they are sufficiently definitive that a court almost certainly would reverse them were they characterized as policy statements. See John F. Manning, Nonlegislative Rules, 72 GEO. WASH. L. REV. 893, 926–27 (2004) (evaluating the D.C. Circuit’s method of identifying “procedurally invalid nonlegislative rules” and observing that “the resulting inquiry has an air of arbitrariness to it”).

#### Our planks about *clear statements* and *data sets* mean CP avoids politics and rollback.

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

Kovacic 15 et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

A. Greater Specification of Authority

One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

B. More Transparency, Including Reliance on Policy Statements and Guidelines

Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful barrier to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of complete data sets that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation.

Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, the Commission strengthened external perceptions (within the business community and within Congress) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban unfair methods of competition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, the FTC’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use section 5 of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. By issuing a policy statement before commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely increase confidence within industry and within Congress that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

### 1nc – court packing

#### Congress ought to pass a law that mandates an expansion of the Supreme Court from 8 to 14 associate justices if the United States Federal Government does not include attention costs as a component of price for the purposes of antitrust enforcement. The President ought to nominate, and the Senate ought to confirm, persons to fill any vacancies on the Supreme Court.

#### Expanding the court key to preserve democracy

Serwer 20 --- Adam Serwer, staff writer at The Atlantic, where he covers politics, “The Supreme Court Is Helping Republicans Rig Elections”, The Atlantic, Oct 20th 2020, https://www.theatlantic.com/ideas/archive/2020/10/dont-let-supreme-court-choose-its-own-electorate/616808/

In any democracy, there will be a fight over the rules, some trivial and some serious. But disenfranchisement of rival constituencies is not the same as boxing out a primary challenger or arguing over the shape of a ballot; it is an attack on democracy itself.

The Roberts Court’s eager acquiescence to the Republican Party’s political project of restricting the electorate along racial lines for partisan advantage makes the question of how Democrats should respond much more urgent. It is one thing for fortune and politics to produce a conservative majority on the Court to resolve the usual questions of law and policy in the right’s favor. It is another matter entirely for a majority of the justices to adopt the posture that it is acceptable for the party that appointed them to rig democracy on its behalf. Competing and losing is part of democracy. Voters being locked out of competition by a rival faction is not.

The conservative justices’ attack on the franchise will not resurrect Jim Crow, but it will continue to enable the Republican Party to wield power without the consent of the majority. In doing so, it will prolong the racial and religious chauvinism at the heart of Trumpism long after Trump is gone.

Mitch Mcconnell is angry that Democrats would describe filling court vacancies as “court packing.” “It is not ‘court-packing’ when the Senate confirms nominees to fill actual vacancies,” he said on October 14. “When leaders abuse language, it is because they seek to abuse power.”

That’s the McConnell of October 2020. The McConnell of May 2013, however, thundered that then President Obama was seeking “to pack the D.C. Circuit with appointees.” Texas Senator John Cornyn rallied conservatives against Obama’s efforts to “pack the D.C. Circuit” and supported shrinking the court. Iowa Senator Chuck Grassley denounced Obama’s “efforts to pack” the D.C. Circuit, while Senator Mike Lee of Utah accused Obama of trying to “pack the D.C. Circuit with unneeded judges simply in order to advance a partisan agenda.”

The term court packing was popularized during the backlash against President Franklin Roosevelt’s proposal to expand the Supreme Court after the justices ruled several aspects of the New Deal unconstitutional. But to Republicans in 2013, Democrats simply appointing judges to existing vacancies was “court packing,” a definition they now decry as an “abuse of language” and as a prelude to an “abuse of power.”

As I wrote back then, “If court packing means to artificially alter the number of judges on a court in order to enable an ideological agenda, it’s Republicans who are engaging in court packing.” But the most egregious manipulations were yet to come: In 2016, Antonin Scalia died, leaving a vacancy on the Supreme Court. Senate Republicans refused to consider Obama’s replacement nominee, Merrick Garland, a moderate who several Senate Republicans had previously publicly insisted would sail through confirmation. Rather, they held the seat open in the hope that a President Trump might fill it, arguing that the “people should decide” who should fill the vacancy. Republicans—from the right-wing Ted Cruz to the secular saint of moderation, John McCain—were vowing to prevent Hillary Clinton from filling any vacancy on the Court, had she prevailed in the 2016 election. At least court packing requires a party to gain enough popular support to control both the White House and Senate.

Then, when the Democratic appointee Ruth Bader Ginsburg died last month, Republicans rushed the confirmation of Amy Coney Barrett to replace her just weeks before an election that they fear they might lose.

I am not recounting all this because I want to denounce Mitch McConnell and the Republicans for their dastardly deeds. I do not wish to rail against their hypocrisy, rebuke their partisanship, or condemn their villainy. I am rehearsing all of these details because everything they did was completely rational and understandable, and even constitutional. Republicans want to control the courts, and they have done everything within their power, and within the rules, to make that happen. Were the situation reversed, many Democrats would want their representatives to act with the same ruthless self-interest. And they should. McConnell’s success is in no small part due to Democratic adherence to Senate rules Republicans had no intention of honoring.

There is no argument in favor of what Republicans have done in order to solidify their majority on the high court; however, that does not also apply to what Democrats now contemplate. As The New York Times’s Jamelle Bouie has written, “The same Constitution that says Republicans can confirm Barrett weeks before the election, that allows them to retroactively impose a new and novel partisan requirement (same-party control of the Senate) on judicial confirmations, also says Congress can add as many seats to the Supreme Court as it wishes.” What McConnell and the Republicans did was cold, calculating, and constitutional. So is expanding the Supreme Court.

Back when Clinton was favored to win the 2016 election, Kyle Sammin argued in the conservative publication The Federalist that Republicans should not confirm any new justices to the Court should she prevail. There is, he pointed out, precedent for manipulating the size of the Court in defense of the suffrage. Republicans temporarily shrank the Court in 1866 to prevent President Andrew Johnson, an ardent white supremacist, from making appointments, then expanded it again after he was gone. “Southern states were already enacting restrictions on former slaves’ voting and civil rights, and Republicans feared that the rapidly reassembled Union would place the erstwhile secessionists in an even stronger position than they had held before the war, while trampling on black Southerners’ new-won freedoms,” Sammin wrote. These measures, he said, presented “an unusual solution to an unusual situation, but it was also popular, constitutional, and arguably necessary for the survival of the republic.” I couldn’t agree more.

The Republican opposition to court packing, moreover, is hard to credit. The party has pursued the technique to shape state courts all over the country—using it successfully in Georgia and Arizona. Instead, their objection appears to reflect the belief that Republicans can do what they want because they are the only legitimate governing party. Their hope is that the capture of the Supreme Court will ensure for generations that they never have to answer to an electorate they have deliberately sought to disenfranchise.

The conservatives on the Court have signaled that they are eager participants in this project. If Barrett is confirmed, there will be as many Republicans who worked on Bush v. Gore on the Court as there are Democratic appointees. In that 2000 case, the Court stopped Florida from completing a recount in the presidential election, using the absurd rationale that counting votes would violate the equal protection clause of the Fourteenth Amendment. The Court infamously announced that “our consideration is limited to the present circumstances,” an inadvertent confession that the ruling was so arbitrary, it could not function as a precedent. The Court’s conservatives are happy to use the Reconstruction amendments to prevent votes from being counted, but not to ensure that voters are allowed to cast them.

Alito, Thomas, Gorsuch, and Kavanaugh have made no secret of their commitment to allowing Republicans to disenfranchise Democratic constituencies. On Monday, all four indicated their support for a GOP lawsuit seeking to overturn a Pennsylvania Supreme Court ruling allowing absentee ballots postmarked November 3 to be counted, even if they are received up to three days after the election. Roberts, in one of his rare breaks with the right wing of the Court, joined the liberals in a split 4–4 decision that allowed the original ruling to stand.

The message is clear: There is no constitutional amendment, no federal statute, no state law, no half-baked legal philosophy, and no federalist principle that will prevent the conservatives on the Court from upholding Republican efforts to sever Democratic constituencies from the franchise. Whether Trump wins or loses in November, they will pursue this agenda in earnest. And with Barrett on the Court, it is unlikely that even Roberts’s rare defections will be an obstacle to them.

The Democratic presidential nominee, Joe Biden, has refused to rule out the possibility of expanding the Court, and Republicans have responded with considerable alarm and anguish. They sacrificed their dignity, their House majority, and their principles to elevate a clownish reality star to the presidency, a would-be strongman whose disastrous tenure has seen hundreds of thousands of deaths, the collapse of the American economy, and the nadir of American global influence. Everything Republicans have done for decades has led to this moment, and the possibility of that victory becoming Pyrrhic is terrifying for them.

That’s a shame, but it does not begin to justify accepting the Supreme Court’s assault on the franchise. Certainly, one party engaging in constitutional hardball while the other adheres to a set of norms that no longer exist creates perverse incentives, as Quinta Jurecic and Susan Hennessey have written. But reaching a détente between the parties is less important than preventing the Court from foreclosing on democracy for millions of vulnerable people.

Some counter-majoritarian safeguards are necessary in a democracy. Fundamental rights like freedoms of speech or worship should not be subject to a show of hands. But the GOP is seeking to use the high court to insulate itself from a changing electorate. An expanded Court would not assure Democratic Party dominance in perpetuity, but it could force the Republican Party to reach out beyond its base to the voters it has spent years demonizing. In multiracial democracies, the members of parties that lack diversity will always come to view those unlike them as an existential threat. That once was true of southern Democrats, and now it is true of the party of Trump.

Expanding the Supreme Court will not destroy the Republican Party, nor will it usher in a one-party state controlled by the Democrats. Far from threatening the health of the republic, an expanded Court promises to restore it by protecting the franchise. Should Republicans lose one of the major counter-majoritarian levers of American democracy, they may be forced to relinquish the politics of white identity that have posed the most dire threat to liberty since the nation’s founding.

As Rick Hasen has written, conservative legal groups are already teeing up challenges to Section 2 of the Voting Right Act, which bars voting changes that have the purpose or effect of discriminating on the basis of race or language. That these same groups previously justified gutting the act’s preclearance provision by assuring the Court that Section 2 would remain as a safeguard has not deterred them.

All the protections of the Reconstruction amendments, the basis of multiracial democracy in the United States—from birthright citizenship, to barring discrimination, to the authority of the federal government to protect the vote—will be on the chopping block. The assumption that such protections are no longer needed because America has evolved into a post-racial society has been made laughable over the past four years. Americans have already seen how an unequal society emerges when the Reconstruction amendments are rendered null; there is no reason to risk it again.

Republicans appear committed to an agenda of dispossession and disenfranchisement, entrenching minoritarian rule without the consent of the electorate. Their appointees to the high court are bound to a legal ideology that would accept all but the most obvious of Jim Crow–era voting restrictions. The Democratic Party is left with only one option if it wishes to defend the most fundamental rights of its constituents and the vitality of American democracy: Pack the Court.

**Democracy solves great power war.**

Diamond 19 --- LarryDiamond, PhD in Sociology, professor of Sociology and Political Science at Stanford University. “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” 2019, Kindle Edition

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

## Tech adv

### 1nc – tech adv

**Tech innovation high --- expanding the scope of antitrust laws stifles it --- Causes China tech dominance**

**Packard 21** --- Clark Packard, Trade Policy Counsel, Finance Insurance & Trade, R-Street, “Hamstringing America’s most innovative firms is no way to compete with China”, JUN 22, 2021, https://www.rstreet.org/2021/06/22/hamstringing-americas-most-innovative-firms-is-no-way-to-compete-with-china/

The United States is locked into a **geopolitical competition with China** over the commanding heights of the 21st century economy. Much of the competition revolves around the nexus of international trade and investment and technology. **Washington has very legitimate concerns about China’s pursuit of indigenous innovation through high tech industrial policy**, but the situation warrants a smart response. At a time when policymakers are signaling their desire to outcompete China economically, **why are they also rushing to** ~~hobble~~ **[stifle] private sector American tech**nology **and innovation?**

Over the last several weeks, lawmakers have introduced five separate bills in United States House of Representatives aimed at cracking down on “Big Tech.” I’m not an antitrust scholar, but as my colleague Dr. Wayne Brough has written, the bills would, if enacted, “impose the most significant overhaul of the nation’s antitrust laws in our country’s history.” Rather than broad and durable antitrust principles that apply to all sectors of the economy, which have guided our competition policy for more than a century, the legislation under consideration is aimed squarely at large tech companies in the United States.

It is worth considering the **geopolitical and international economic ramifications of such a radical departure from existing law.**

In 2018, the United States released a report documenting China’s predatory commercial practices, which served as an indictment of sorts. The overarching theme of the report is that Beijing uses a number of unfair and pernicious methods to acquire American technology with the ultimate goal of supplanting the United States as the global leader in high tech innovation. Specifically, the report alleges that China pressures American firms into transferring technology to Chinese joint-venture partners as the cost of doing business—reaching the 1.4 billion potential consumers—in the country; China abuses intellectual property; engages in targeted foreign investment to acquire strategic American firms and assets; and with pervasive state support, hacks into commercial networks to steal trade secrets. On top of that, China provides massive subsidies to its leading technology firms to pursue research and development in critical areas. **These are very serious problems**, and demand a thoughtful and targeted response.

Instead, the United States has flailed at China. The Trump administration imposed tariffs, which triggered predictable retaliation against American exporters, imposed significant costs onto American consumers—both families and firms—and will almost certainly fail to change Beijing’s predatory commercial practices. It is estimated that the tariffs cost about 300,000 American jobs and lowered market capitalization by about $1.7 trillion through diminished investment, according to the New York Federal Reserve. In other words, the tariffs made the United States weaker and less competitive. Now, some in Congress want to pursue misguided antitrust policies that will unintentionally undermine the United States’ global competitiveness.

The firms targeted by the proposed legislation are among America’s **most globally competitive and innovative.** They drive **significant investment in cutting-edge tech**nologies like robotics and artificial intelligence, the types of research China is pursuing through its Made in China 2025 indigenous innovation industrial policy. A recent report from the Progressive Policy Institute (PPI) highlights how many of the largest American tech firms—Amazon, Alphabet (Google’s parent company), Intel, Facebook, Microsoft and Apple—were among the top 15 nonfinancial firms driving U.S. capital expenditures in 2020. Together, PPI estimates that these six firms made nearly $90 billion worth of private investment in 2020—up 6 percent from 2019, which is remarkable considering that the U.S. economy was lagging in 2020 due to the outbreak of COVID-19. Cracking down on these firms will mean less investment in research and development.

These American firms already must compete with heavily subsidized foreign competitors and face discriminatory foreign practices, particularly in China. Despite these hurdles, the American tech industry pushes the envelope on exactly the type of research and development that policymakers in the United States should welcome. These firms lead the world in current and next-generation technologies. Instead of embracing this type of American global commercial and technological leadership, or at least staying neutral toward it, the legislation under consideration would **favor foreign competitors** by [stifling] ~~kneecapping~~ our domestic technology firms with **heavy-handed regulation**, which will almost certainly benefit their foreign competitors.

The American tech industry is the envy of the world. That’s why China, the European Union and others are trying to mimic it through subsidies and discriminatory practices against foreign competition. Yet those policies are no match for a relatively free and dynamic economy fostered by existing competition policies. It simply **belies common sense** that the way to outcompete Beijing is by making the United States **weaker, less efficient and less dynamic through misguided efforts to single out** our most **globally competitive and successful firms**.

#### The plan gets circumvented

1. **Courts**

**Crane 21** – Frederick Paul Furth Sr. Professor of Law at UMich (Daniel, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital. Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.6 This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that. Inquiring into the nature and implications of antitrust antitextualism is particularly salient at the present when, for the first time in a generation, there is widespread dissatisfaction with antitrust enforcement and impetus for potential reform legislation.7 As was true at each of the prior moments of reformist sentiment, the call is for statutory reforms to curb the power of big business.8 We have seen this play before, and also its sequel. In the play, Congress announces that the antitrust laws are too weak and that reforms are necessary to protect the nation from the power of big capital. In the sequel, the courts (often abetted by the antitrust agencies and other antitrust elites) read down the statutes to accomplish less than their texts suggest or Congress meant. Will anything be different this time around, or are the legislative reforms currently on the table predestined to a similar fate?

#### Multiple standards creates confusion --- Rolls back the aff

LOPEZ-GALDOS 17 --- MARIANELA LOPEZ-GALDOS, Global Competition Counsel at the Computer & Communications Industry Association (CCIA), where she represents and advises the association on competition policy issues as well as domestic and international regulatory policy matters, “Antitrust in 60 Seconds: Is the Consumer Welfare Standard Appropriate?”, NOVEMBER 17, 2017, https://www.project-disco.org/competition/111717-antitrust-in-60-seconds-is-the-consumer-welfare-standard-appropriate/

In 2003 the OECD recognized that the inclusion of conflicting objectives, including public interest considerations beyond consumer welfare, would undermine the public good. It stated that rooting antitrust in multiple competing policy rationales:

“increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and in a relatively minor way, compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency.”

In the United States, the increasing uncertainty created by antitrust enforcement actions and decisions empowered the voices in favor of limiting and eventually eliminating the political dimension to the enforcement of antitrust norms. In fact, some argue that the exclusion of political factors from antitrust enforcement restored intellectual coherence to the antitrust framework.

#### 3-Plan creates CONFLICTING OBJECTIVES --- causes underenforcement, regulatory capture, and collapses innovation

MELAMED 20 --- A. DOUGLAS MELAMED, Professor of the Practice of Law, Stanford Law School, [FORTHCOMING IN 83 ANTITRUST L.J. (2020), https://lisboncouncil.net/wp-content/uploads/2020/11/MELAMED-Antitrust-Law-and-Its-Critics.pdf

Perhaps more important, the institutions of antitrust law are not well suited to address multiple and often conflicting objectives. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighting inequality or political power, on the one hand, against economic welfare, on the other.86 There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary.

That would have three serious costs. First, if antitrust decisions are perceived as arbitrary, the widespread legitimacy of antitrust law would erode. The antitrust laws were first passed in 1890, and the most important statutory provisions are more than one hundred years old. It is not an accident that populist critics have expressed their concerns largely in antitrust terms. The perpetuation of that legitimacy cannot be taken for granted.

Second, if antitrust decisions are perceived as being arbitrary, they will be more easily subject to regulatory capture because there will not be seemingly principled bases to cabin antitrust decision making. The beneficiaries of a regime susceptible to capture are likely to be the powerful, not the powerless. Ironically, therefore, adding equality and dispersion of economic and political power to the objectives of the antitrust laws could prove detrimental to those very objectives.

The third and perhaps most important cost is rooted in the general application and decentralized enforcement of antitrust law. 87 Antitrust law applies to almost all businesses, and it can be enforced by at least 52 government entities and any entity that has been harmed by an antitrust violation. Antitrust law thus has a widespread effect on business conduct throughout the economy. Its principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiencyenhancing actions that are not deterred by an overbroad or ambiguous antitrust law.

If antitrust law is perceived as being arbitrary, it will provide a far less certain guide to business conduct. The effect might be disregard of antitrust law in circumstances in which it seems unpredictable. More likely, the effect will be excessive caution by businesses uncertain about the consequences of aggressive or novel forms of competition. The effectiveness of antitrust law in promoting competition and economic welfare will be seriously impaired.

**4-No risk of US – China war –** diplomatic ties, economic interdependence, geography, nuclear postures, balancing powers, no ideological conflict **–** any crisis won’t escalate

**Shifrinson, 19** – Joshua Shifrinson (Assistant professor of international relations at Boston University, “The ‘new Cold War’ with China is way overblown. Here’s why,” <https://www.washingtonpost.com/news/monkey-cage/wp/2019/02/08/there-isnt-a-new-cold-war-with-china-for-these-4-reasons/?noredirect=on&utm_term=.2f92e43bb9f3>)

Is a new Cold War looming — or already present — between the United States and China? Many analysts argue that a combination of geopolitics, ideology and competing visions of “global order” are driving the two countries toward emulating the Soviet-U.S. rivalry that dominated world politics from 1947 through 1990. But such concerns are **overblown**. Here are four big reasons why. 1. The historical backdrops of the two relationships are very different When the Cold War began, the U.S.-Soviet relationship was fragile and tenuous. Bilateral diplomatic relations were barely a decade old, U.S. intervention in the Russian Revolution was a recent memory, and the Soviet Union had called for the overthrow of capitalist governments into the 1940s. Despite their Grand Alliance against Nazi Germany, the two countries shared few meaningful diplomatic, economic or institutional links. In 2019, the situation between the **U**nited **S**tates and China is very different. Since the 1970s, **diplomatic interactions**, **institutional ties** and **economic flows** have all **exploded**. Although each side has criticized the other for domestic interference (such as U.S. demands for journalist access to Tibet and China’s espionage against U.S. corporations), these issues did not prevent cooperation on a host of other issues. Yes, there were tensions over the past decade, but these occurred against **a generally cooperative backdrop**. 2. **Geography** and powers’ **nuclear postures** suggest East Asia is **more stable** than Cold War-era Europe The Cold War was shaped by an intense arms race, nuclear posturing and crises, especially in continental Europe. Given Europe’s political geography, the United States feared a “bolt from the blue” attack would allow the Soviet Union to conquer the continent. Accordingly, the United States prepared to defend Europe with conventional forces, and to deter Soviet aggrandizement using nuclear weapons. Unsurprisingly, the Soviet Union also feared that the United States might attack and wanted to deter U.S. adventurism. Concerns that the other superpower might use force and that crises could quickly escalate colored Cold War politics. Today, the **U**nited **S**tates and China spend proportionally far less on their militaries than the United States and the Soviet Union did. Though an arms race may be emerging, U.S. and Chinese nuclear postures are **not nearly as large or threatening**: Arsenals remain far **below the size and scope** witnessed in the Cold War, and are kept at **a lower state of alert**. As for geography, East Asia is not primed for tensions akin to those in Cold War Europe. China can threaten to coerce its neighbors, but the water barriers separating China from most of Asia’s strategically important states make outright conquest significantly harder. Of course, as scholars such as Caitlin Talmadge and Avery Goldstein note, crises may still erupt, and each side may face pressures to escalate. Unlike the Cold War, however, U.S.-Chinese confrontations occur at sea with relatively **limited forces** and **without clear territorial boundaries**. This suggests there are **countervailing factors** that may give the two sides **room to negotiate** — and **limit the speed** with which a crisis unfolds. 3. The Cold War had just two major powers The Cold War took place in a bipolar system, with the United States and Soviet Union uniquely powerful, compared with other nations. This dynamic often pushed the United States and the U.S.S.R. toward confrontation and contributed to more or less fixed alliances; moreover, it encouraged efforts to suppress prospective great powers, such as Germany. In 2019, it’s not at all clear we are back to bipolarity. Analysts remain divided over whether the U.S. unipolar era is waning (or is already over) — and, if so, whether we are heading for a new period of bipolarity, modern-day multipolarity or something else. Regardless, most analysts accept that other countries will play a central role in East Asian security affairs. **Russia**, for example, still benefits from legacy military investments, **India** is developing economically and militarily, and **Japan** is beginning to build highly capable military forces to complement its still-significant economic might. Even if these nations aren’t as powerful as the United States or China, their presence makes for **more fluid diplomatic arrangements** and more diffuse security concerns than during the U.S.-Soviet competition. The resulting security dynamics are therefore likely to look very different. 4. Ideology plays less of a role in U.S.-Chinese relations Many people see the Cold War as an ideological contest between U.S.-backed liberalism and Soviet-backed communism. But that’s not the whole story. The early 20th century saw liberalism, communism and fascism vie for ideological preeminence. With fascism defeated alongside Nazi Germany, the postwar stage was set for a struggle between communism and liberalism to reinforce the U.S.-Soviet contest. That each ideology claimed universal scope ensured that the ideologies served as rallying cries for Third World conflicts, which were subsequently associated with the U.S.-Soviet struggle. The respective “ideologies” of the United States and China do not favor this type of contest today. Indeed, analysts calling for a hard-line stance against China have faced difficulties even identifying a coherent Chinese ideological alternative. And while some researchers claim that a nascent ideological contest pitting an “autocratic” China against the “liberal” **U**nited **S**tates is emerging, this narrative ignores the political contests that shape Chinese politics (and have parallels in U.S. politics). Autocracies and democracies often cooperate. And on one important ideological issue — how they organize their economic lives — China and the **U**nited **S**tates have both embraced economic growth via trade, the private sector and semi-free markets. Likewise, while a clearer Chinese ideological “brand” may eventually emerge, it is unclear whether the ideology would claim universal applicability. This is not to deny that there are tensions between the United States and China. What we are seeing, however, is **not a new cold war** but a reversion to a pre-1945 form of great power politics. What changed? Put simply, the United States no longer enjoys preeminence as the only superpower, as it did in the immediate post-Cold War era. The ideological, historical and geopolitical differences between today and the Cold War years far outweigh the similarities. As David Edelstein notes, at times it’s hard to understand what the United States and China are competing over. If that’s true, then there’s reason to believe there are more nuanced ways of understanding the tensions — and options for **managing great power politics** — than a Cold War reboot.

#### They can’t solve inequality – tons of alt causes and it’s inevitable

**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)

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.

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

## FTC adv

### 1nc – independence turn

#### FTC independence in the US key to *global norms* that support agency independence. Vital for *free trade* and *GLO*.

* United States’ FTC practices are modeled *by several nations* – including South Korea – and *will continue to be modeled* by nations that are still amid transitions towards industrialization;
* Global attentiveness to the United States’ FTC practices *remains ongoing* and - “*to this day*” - are a *central obstacle* to aspired free trade norms;
* The root of the loss of the global public’s confidence in free trade stems from the success of zero-sum strategies. *The root of that* is an interpretation of the FTCA that permits politicized intervention;
* Ambiguity in the United States’ FTCA permit the Act to be exercised *EITHER with a great deal of agency discretion* – *OR* alternatively, *with the perceived influence of external political branches*;
* Current US FTC practices lean away agency independence – and that’s *a central obstacle* to international agencies countering the growth of protectionist mercantilist norms
* More broadly, this hampers *general support for internationalism/GLO*

Nam ‘18

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – No text omitted – but the Table of Contents – which comes after the Abstract - was not included – modified for language that may offend - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

ABSTRACT:

The Federal Trade Commission Act of 1914 (“FTC Act”), a model for many other countries that set up their own competition agencies, combines the control afforded by presidential appointment and removal powers over FTC commissioners with an exceedingly discretionary mandate. This Article contends that the FTC Act’s outmoded openness to strong presidential direction, where adapted abroad, has helped detract from antitrust regulator independence. Even advanced players in the liberal international economic order such as South Korea have made use of the United States’ original blueprint for unitary executive-stamped antitrust enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

Strong executive direction in antitrust enforcement is particularly suited to capitalist economies helmed by administrations with mercantilist policies, given their belief that the state and big business must cooperate in the face of zero-sum international competition. South Korean President Lee MyungBak’s term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces preventing global convergence in antitrust enforcement, and of their roots.

We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. —President Woodrow Wilson, September 1916

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let’s take just a half step forward to move beyond the pace of change in the global economy. —South Korean President Lee Myung-bak, March 2008

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions. —Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further nonantitrust goals. —The U.S. Department of Justice and the Federal Trade Commission, April 1995

INTRODUCTION

The International Competition Network’s founding in October 2001, with the aim of “formulat[ing] proposals for procedural and substantive convergence” among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that “consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else,” many countries (turned) ~~looked~~ to the U.S. as a role model while developing their competition regimes.6 It is ironic, then, that to this day a central obstacle to the aspired international “culture of competition” can be found in none other than the influence of the U.S.’s own FTC Act.7

American antitrust priorities around the time of the legislation’s passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that would reemerge abroad in many later-developing countries.

The deepening global retreat from internationalism *and* free market principles in the present day, with the specter of trade wars looming, is exacerbated by nationalist competition regimes that are derivative of a U.S. model predating the modern world economy. Domestic critics of open markets often overlook the U.S.’s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8

#### Global free trade reversals will cause *multiple existential impacts*.

* Arctic conflict
* Space conflict;
* Global nuclear prolif;
* Structural wars;
* Climate;
* Geo-engineering;

Langan-Riekhof ‘21

et al; Maria Langan-Riekhof is the Lead Author and is the new Director of the Strategic Futures Group at the National Intelligence Council, leading the Intelligence Community’s assessment of global dynamics and charged with producing the quadrennial Global Trends product for the incoming or returning administration. She has spent more than 27 years in the intelligence community as both a senior analyst and manager, serving at the CIA and on the NIC. She brings a background in Middle East studies and has spent more than half her career analyzing regional dynamics. Her leadership roles include: Chief of the CIA’s Red Cell, founder and director of the CIA’s Strategic Insight Department, and research director for the Middle East. She was one of the DNI’s Exceptional Analysts in 2008-09 and the Agency’s fellow at the Brookings Institution in 2016-17. She is a member of the Senior Analytic Service and the Senior Intelligence Service and hold degrees from the University of Chicago and the University of Denver - National Intelligence Council - Global Trends 2040 – Form the section: “Scenario Four – Separate Silos” - MARCH 2021 - #E&F - https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

With the trade and financial connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to develop nuclear weapons, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like the Arctic and space. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, conflicts became endemic, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address climate changes, little was done to slow greenhouse gas emissions, and some states experimented with geoengineering with disastrous consequences.

*Note to students*: this ev appears to advance a cemented future – but it is an ebook report by the National Intelligence Council outlining possible futures \*if\* certain premises were to take place. Perhaps this is best explained by an except from the opening of this report: “Welcome to the 7th edition of the National Intelligence Council’s Global Trends report. Published every four years since 1997, Global Trends assesses the key trends and uncertainties that will shape the strategic environment for the United States during the next two decades. Global Trends is designed to provide an analytic framework for policymakers early in each administration as they craft national security strategy and navigate an uncertain future. The goal is not to offer a specific prediction of the world in 2040; instead, our intent is to help policymakers and citizens see (aware of) what may lie beyond the horizon and prepare for an array of possible futures”.

### 1nc – rulemaking/nondel

#### FTC rulemaking inevitable

Kadish & Thomas 12-22 --- Julia K. Kadish Liisa M. Thomas Sheppard, Mullin, Richter & Hampton LLP, “FTC 2022 Regulatory Priorities to Include Privacy and Security”, National Law Review, December 22, 2021, https://www.natlawreview.com/article/ftc-2022-regulatory-priorities-to-include-privacy-and-security

As we look to 2022, a question on many companies’ minds is what actions we will see from the FTC. Two recent developments are important on that front.

First, the FTC recently signaled its intent to initiate rulemaking on issues of privacy and security. The Commission indicated that it wants to curb lax security practices and limit privacy abuses. It is also interested in making sure that algorithmic decision-making does not result in unlawful discrimination. The FTC signaled this intent through an Advanced Notice of Proposed Rulemaking, which has a deadline of February 2022. At that time, interested parties can respond to the proposed rulemaking and provide suggestions or alternative methods for achieving the objectives. The FTC may then decide to begin its rulemaking process.

Second, the FTC recently published its annual Statement of Regulatory Priorities. This statement provided updates on a number of different priorities, including several relating to privacy and security. Topics included issues relating to the collection of information from children, health care privacy, and privacy and data security for those in the financial services space. Each are summarized below:

Children’s Online Privacy Protection Act (COPPA). FTC staff are reviewing public comments submitted in response to the agency’s 2019 request for comment to its COPPA Rule. The FTC had requested comment on all major provisions of the COPPA Rule. For example, definitions and the notice and parental-consent requirement. This also includes exceptions to verifiable parental consent and the safe-harbor provision.

Health Breach Notification Rule (HBNR). The Commission initiated a periodic review of the HBNR in May 2020. The comment period then closed in August 2020. The staff intends to submit a recommendation to the Commission by January 2022. In light of some of the controversial and new interpretations to this rule released in 2021, additional clarity about the scope of the rule will be welcomed by industry.

Identity Theft Rules. FTC staff is reviewing the public comments to the Identity Theft Rules and anticipates sending a recommendation by January 2022. The Identity Theft Rules includes the Red Flags Rule and Card Issuer Rule.

Safeguards Rules. In October 2021, the Commission updated the GLBA Safeguards Rule, providing additional requirements for security programs. It also announced the issuance of a Supplemental Notice of Proposed Rulemaking. That notice sought comment on whether financial institutions should be required to report certain data breaches and other security events to the Commission.

Fair Credit Reporting Act Rules (FCRA). On September 8, the FTC approved final revisions that would bring several rules implementing parts of the FCRA in line with the Dodd-Frank Act.

The Commission’s plan to take up additional privacy rulemaking in the new year is unsurprising in light of its vote earlier in the summer to streamline the rulemaking process under Section 18 of the FTC Act. Those changes included giving the FTC chair oversight authority and removing some of the public comment periods

Putting it into Practice. These rulemaking initiatives may add further complexity in 2022, especially as companies begin to prepare for forthcoming laws in Colorado, Virginia, and updates in California.

#### Non-delegation inevitable

Parenteau 20 --- Patrick Parenteau is a professor of law at Vermont Law School, “The Trump court and the erosion of environmental law”, The Hill, 11/01/20, https://thehill.com/opinion/energy-environment/523839-the-trump-court-and-the-erosion-of-environmental-law

The court has become a political institution. It has already been packed with three of Donald Trump’s appointees who are smart, conservative and most importantly, young. These appointments have been selected from the list approved by the Federalist Society. Their confirmation has been engineered by Sen. Mitch McConnell (R-Ky.) and his Republican colleagues, with no pretense of bipartisanship or adherence to Senate traditions. The result is a tectonic shift in the nation’s highest court, with **profound implications** for protection of public health, conservation of natural resources and, most importantly, confronting the **existential threat** of climate disruption.

There are four specific areas where the doctrinaire conservative viewpoint could have a major impact. First is the Commerce Clause. Virtually all the nation’s environmental laws are grounded on Congress’s authority to regulate activities that affect interstate commerce. Basic things like protection of air and water, preservation of endangered species, regulation of hazardous wastes and pesticides, protection of historic and cultural treasures, and many more.

The Commerce Clause is what Congress used to pass the Affordable Care Act (ACA) with its health insurance mandate. In a 2003 law review article Barrett argued that the ACA is an unconstitutional exercise of Congress’s Commerce Clause authority; and she has been very critical of Roberts’s decision upholding the law on the ground that the penalty for not complying with the mandate is a tax and Congress has broad taxing power.

Limiting Congress’s Commerce Clause power is a high priority for conservative groups like the Federalist Society, Cato Institute and the Chamber of Commerce. It has been at the center of attempts to invalidate the Endangered Species Act and reduce the scope of the Clean Water Act. Up to now those efforts have been rebuffed by the courts often by close margins. The Pacific Legal Foundation, which is a frequent plaintiff in these cases, must be licking their chops.

The second is access to the courts. Barrett is likely to follow the lead of her mentor, the late Justice Antonin Scalia, or whom I referred to as **the Darth Vader of environmental standing**. In Lujan v. Defenders of Wildlife, Scalia set the bar very high for environmental plaintiffs challenging weak regulations as opposed to industry plaintiffs challenging strict regulations. In his dissent in Lujan, Justice Harry Blackmun characterized Scalia’s approach as a “slash-and-burn expedition through the law of environmental standing.” Ironically, it was Justice Ruth Bader Ginsburg, whom Barrett is replacing, who put a stop to this expedition in the Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. case, which held that plaintiffs need not prove actual injury to the environment as long they had a reasonable concern that the river they were swimming in was not being polluted by an industrial discharge.

Standing is a particularly difficult hurdle for plaintiffs in climate cases because it impacts everyone and makes it hard to show the kind of particularized harm to an individual plaintiff that would satisfy Scalia. Even more problematic is the requirement that the relief sought must prevent or at least ameliorate the injury. This is where the separation of powers doctrine comes into play. A self-professed strict constructionist and originalist like Barrett is not going to entertain remedies that cross the line into policy making that is the province of the other branches of government — even when they are AWOL when it comes to addressing climate change.

Next comes revival of moribund doctrines like “nondelegation,” which is a vestige of the Franklin D. Roosevelt era and his efforts, including court-packing, to get his sweeping New Deal legislation passed and upheld by the court. Nondelegation means Congress cannot delegate legislative authority to agencies. It posits that the legislation must contain an “intelligible principle” to place a limit on agency authority. In Whitman v. American Trucking Associations, Inc., a unanimous court ruled, in an opinion authored by none other than Scalia, that the delegation of authority to the Environmental Protection Agency (EPA) to protect public health under the Clean Air Act provided the requisite intelligible principle.

More recently however, Justice Neil Gorsuch in a dissent joined by Roberts and Justice Clarence Thomas in Gundy v United States, strongly suggested that the "intelligible principle" test was too “forgiving” and strayed from "the original meaning of the Constitution." And that "the Constitution does not permit judges to look the other way" when "constitutional lines are crossed." In her article Nondelegation on Stilts, Professor Lisa Heinzerling describes how five of the current justices — the Roberts as well as Samuel Alito, Gorsuch, Kavanaugh and Thomas have already signaled an interest in resurrecting the nondelegation doctrine, though exactly how they would do so is unclear.

### 1nc – warming

#### Not existential AND their models fail.

Piper 19---Kelsey Piper, citing John Halstead climate change mitigation researcher at the Founders Pledge. [Is climate change an "existential threat" — or just a catastrophic one? 6-28-2019, https://www.vox.com/future-perfect/2019/6/13/18660548/climate-change-human-civilization-existential-risk]

I also talked to some researchers who study existential risks, like John Halstead, who studies climate change mitigation at the philanthropic advising group Founders Pledge, and who has a detailed online analysis of all the (strikingly few) climate change papers that address existential risk (his analysis has not been peer-reviewed yet).

Halstead looks into the models of potential temperature increases that Breakthrough’s report highlights. The models show a surprisingly large chance of extreme degrees of warming. Halstead points out that in many papers, this is the result of the simplistic form of statistical modeling used. Other papers have made a convincing case that this form of statistical modeling is an irresponsible way to reason about climate change, and that the dire projections rest on a statistical method that is widely understood to be a bad approach for that question.

Further, “the carbon effects don’t seem to pose an existential risk,” he told me. “People use 10 degrees as an illustrative example” — of a nightmare scenario where climate change goes much, much worse than expected in every respect — “and looking at it, even 10 degrees would not really cause the collapse of industrial civilization,” though the effects would still be pretty horrifying. (On the question of whether an increase of 10 degrees would be survivable, there is much debate.)

Does it matter if climate change is an existential risk or just a really bad one?

That last distinction Halstead draws — of climate change as being awful but not quite an existential threat — is a controversial one.

That’s where a difference in worldviews looms large: Existential risk researchers are extremely concerned with the difference between the annihilation of humanity and mass casualties that humanity can survive. To everyone else, those two outcomes seem pretty similar.

To academics in philosophy and public policy who study the future of humankind, an existential risk is a very specific thing: a disaster that destroys all future human potential and ensures that no generations of humans will ever leave Earth and explore our universe. The death of 7 billion people is, of course, an unimaginable tragedy. But researchers who study existential risks argue that the annihilation of humanity is actually much, much worse than that. Not only do we lose existing people, but we lose all the people who could otherwise have had the chance to exist.

In this worldview, 7 billion humans dying is not just seven times as bad as 1 billion humans dying — it’s much worse. This style of thinking seems plausible enough when you think about past tragedies; the Black Death, which killed at least a tenth of all humans alive at the time, was not one-tenth as bad as a hypothetical plague that wiped us all out.

Most people don’t think about existential risks much. Many analyses of climate change — including the report Vice based its article on — treat the deaths of a billion people and the extinction of humanity as pretty similar outcomes, interchangeably using descriptions of catastrophes that would kill hundreds of millions and catastrophes that’d kill us all. And the existential risk conversation can come across as tone-deaf and off-puttingly academic, as if it’s no big deal if merely hundreds of millions of people will die due to climate change.

Obviously, and this needs to be stressed, climate change is a big deal either way. But there are differences between catastrophe and extinction. If the models tell us that all humans are going to die, then extreme solutions — which might save us, or might have unprecedented, catastrophic negative consequences — might be worth trying. Think of plans to release aerosols into the atmosphere to reflect sunlight and cool the planet back down in the manner that volcanic explosions do. It’d be an enormous endeavor with significant potential downsides (we don’t even yet know all the risks it might pose), but if the alternative is extinction then those risks would be worth taking.

But if the models tell us that climate change is devastating but survivable, as most models show, then those last-ditch solutions should perhaps stay in the toolkit for now.

Then there’s the morale argument. Defenders of overstating the risks of climate change point out that, well, understating them isn’t working. The IPCC may have chosen to maintain optimism about containing warming to 2 degrees Celsius in the hopes that it’d spur people to action, but if so, it hasn’t really worked. Maybe alarmism will achieve what optimism couldn’t.

That’s how Spratt sees it. “Alarmism?” he said to me. “Should we be alarmed about where we’re going? Of course we should be.”

Swedish teenager Greta Thunberg has taken an arguably alarmist bent in her advocacy for climate solutions in the EU, saying, “Our house is on fire. I don’t want your hope. ... I want you to panic.” She’s gotten strong reactions from politicians, suggesting that at least sometimes a relentless focus on the severity of the emergency can get results.

So where does this all leave us? It’s worthwhile to look into the worst-case scenarios, and even to highlight and emphasize them. But it’s important to accurately represent current climate consensus along the way. It’s hard to see how we solve a problem we have widespread misapprehensions about in either direction, and when a warning is overstated or inaccurate, it may sow more confusion than inspiration.

Climate change won’t kill us all. That matters. Yet it’s one of the biggest challenges ahead of us, and the results of our failure to act will be devastating. That message — the most accurate message we’ve got — will have to stand on its own.

# 2NC

## Section 5

### 2NC OV

**Our planks about *policy statements* and *data sets* mean CP avoids politics and rollback.**

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

**Kovacic ‘15**

et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

A. Greater Specification of Authority

One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

B. More Transparency, Including Reliance on Policy Statements and Guidelines

Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful **barrier** to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of **complete data sets** that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation.

Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, **the Commission strengthened external perceptions** (within the business community and **within Congress**) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban **u**nfair **m**ethods of **c**ompetition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, **the FTC**’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use **section 5** of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. **By issuing a policy statement before** commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely **increase confidence** within industry and **within Congress** that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

### 2NC v PDCP

#### We compete on four phrases:

* **“Law v. Reg”** – (POGO ev – below - CP expands and enforcement Agency’s Regs/Rules – not external “Law”)
* **“increase prohibitions”** (selectively under-enforced v. more enforcement)
* **“expand scope”** (“agency interp” vs. “a larger legal scope than presently exists on paper”)
* **“core laws”** (FTCA vs Sherman and Clayton)

#### First, Aff severs *“Law”*

#### We aren’t prohibiting or expanding anything (below);

#### But *if we were*, it’s NOT an expansion of the LAW:

P.O.G.O. ‘15

Project On Government Oversight *- Internally quoting Chief Justice Roberts’ Majority Opinion in US Supreme Court’s 7-2 decision in Department of Homeland Security v. MacLean* (2015) - which dealt largely with statutory interpretation. The Project On Government Oversight (POGO). POGO’s investigators are experts in working with whistleblowers and other sources inside the government who come forward with information that we then verify using the Freedom of Information Act, interviews, and other fact-finding strategies. We publish these findings and release them to the media, Members of Congress and their constituents, executive branch agencies and offices, public interest groups, and our supporters. In addition to quoting the Majority Opinion from the Chief Justice, this article was authored by POGO’s Phillip Shaverdian – who is currently a Judicial Law Clerk within the U.S. District Court System and, at the time of the writing, was an intern within and correspondent on behalf of the Project On Government Oversight - “Agency Rules and Regulations Are Not Laws” - FEBRUARY 10, 2015 - #E&F – modified for language that may offend - https://www.pogo.org/analysis/2015/02/agency-rules-and-regulations-are-not-laws/

Agency Rules and Regulations Are Not Laws

In January, in one of the most riveting cases of the current session, the Supreme Court ruled 7-2 in favor of Transportation Security Administration (TSA) whistleblower Robert MacLean, holding that agency rules and regulations do not equate to laws. Chief Justice John Roberts wrote the majority opinion for the Court. And now that we’ve had time to celebrate the victory for MacLean, it’s time to turn our focus to what Department of Homeland Security v. MacLean may mean for whistleblowers in general.

Current federal whistleblower protection law—the Whistleblower Protection Act (WPA)—protects individuals against backlash from employers for disclosing information about “any violation of any law, rule or regulation” or “a substantial and specific danger to public health or safety” by a federal agency. However, in the same statute there exists an exception for disclosures that are “specifically prohibited by *law*.”

The question the Court sought to answer was whether MacLean’s disclosures were “specifically prohibited by *law*.”

The Homeland Security Act of 2002 states that the TSA’s “Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security” if they decide that the disclosure of that information would “be detrimental to the security of transportation.” The resultant regulations thus prohibit the disclosure of “sensitive security information” (SSI) without the proper authorization. Among the various types of information that could be designated SSI is “information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.”

The government argued that MacLean’s disclosures were “specifically prohibited by law” and that the WPA did not offer protection for two reasons: 1) the disclosure was prohibited by specific TSA regulations on SSI; and 2) the Homeland Security Act authorizes the TSA to promulgate the regulations.

The Court addressed and subsequently rejected both arguments, affirming the judgment in favor of MacLean by the U.S. Court of Appeals for the Federal Circuit.

The Court rejected the government’s argument that a disclosure that is prohibited by regulation is also “specifically prohibited by law,” as prescribed by federal whistleblower statute.

The Court elaborates that in the WPA Congress repeatedly used the phrase “law, rule, or regulation,” but did not use the same phrase in the statutory language at question in this case. Instead, Congress used the word “law” alone, suggesting that it meant to exclude rules and regulations from the specific stipulation. Congress’s omission of “rule, or regulation” must be ~~viewed~~ (considered) as deliberate because of the use of “law” and “law, rule, or regulation” in the same sentence, as well as the frequent use of the latter phrase throughout the statute. These “two aspects of the whistleblower statute make Congress’s choice to use the narrower word “law” seem quite deliberate,” opined the Court.

After creating an exception for disclosures “specifically prohibited by law,” the WPA also creates a second exception for information “specifically required by Executive order to be kept secret.” The second exception is limited to actions taken by the President, and thus suggests that the first exception and the use of “law” is limited to actions by Congress.

The Court also reasons that “If ‘law’ included agency rules and regulations, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that ‘specifically prohibited’ whistleblowing.” Instead, “Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.” The Court concluded that “it is unlikely that Congress meant to include rules and regulations within the word ‘law’” and that the specificity of the phrase “specifically prohibited by law” was meant to deliberately exclude rules and regulations.

#### Second is *“Increase prohibition*”;

#### The underlying conduct’s *already prohibited* – albeit in vague terms which beg questions of enforcement and interpretation. That’s Khan – we’re re-including for clarity, but 1NC read all this:

**NOTE**: All highlighted portions (green and blue) of this card were read in the 1NC. The 1NC card made solvency and competition claims – and, to offer context, we’ve used blue highlighting to outline the parts of the ev that augment our perm/competition claims.

Kahn ‘21

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.15

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

### A2: Kovacic

#### Their historical examples of rollback GO NEG.

#### Yes, there was rollback – and all of it occurred vs. Section 5 actions that lacked the bows-and-whistles WE’VE thrown into the CP to minimize adverse judicial review.

#### This isn’t contrived- the FTC is learning how to minimize rollback. Aff examples won’t contextualize to a more contemporary deployments of the Cplan.

Dagen ‘10

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

It is generally conceded that Section 2 does not cover all potential anticompetitive conduct.124 Caselaw and legislative history support the use of Section 5 to fill these gaps.125 Nonetheless, many in the antitrust bar have criticized the FTC’s use of Section 5 beyond the Sherman Act. One well-known antitrust practitioner opined: “Section 5 enforcement is unnecessary. Section 5 enforcement is dangerous. Section 5 enforcement is highly likely to be harmful to the American economy.”126 I recently moderated a Commission hearing on Section 5’s history and future where even the former FTC Chairman – who presided over a revival of Section 5 at the FTC – urged caution in this area.127 Similarly, then-Chairman Kovacic expressed some concern about the FTC’s likelihood of success under Section 5.128

The critics maintain that the intent of the “framers” of the FTC Act should be disregarded because today’s world is very different from the world of 1914. Foremost among these changes is the incorporation of more economic analysis into Sherman Act cases, and a rejection of populism. Thus, some would say, Section 5 should similarly evolve, and so construed, there is no reasonable basis for use of Section 5 outside the Sherman Act.

The critics think that no sound economic and policy reasons can justify extending Section 5 beyond the Sherman Act. They point to the trilogy of Section 5 cases that the FTC lost on appeal during the 1980s.129 They also note that the Court’s recent Section 2 cases warn about the dangers of overinclusive antitrust enforcement. For these and other reasons, the critics maintain that the FTC should not venture down the Section 5 road again.

The criticism is provocative but ultimately without foundation. Caution is always prudent in antitrust, but probably less applicable to Section 5 than to Section 2.130 Section 2 is amorphous. In Microsoft, a Section 2 case, the D.C. Circuit observed that “the means of illicit exclusion, like the means of legitimate competition, are myriad.”131 And different tests govern different conduct: tying, exclusive dealing, predation, bundling, sham litigation, and other conduct can all violate Section 2, but the analytical frameworks for each type of conduct, like the means of illicit exclusion, are myriad.

Despite the vagaries of monopolization law, the bipartisan Antitrust Modernization Commission, created in 2004 to analyze the state of U.S. antitrust jurisprudence, “judge[d] the state of the U.S. antitrust laws as ‘sound’” and concluded that Section 2 standards are “appropriate.”132 Breadth and vagueness, then, are not sufficient grounds on which to criticize Section 5 as worse than Section 2.133 Neither Section 2 nor Section 5 is a model of clarity. As Professor Crane noted at the FTC’s Section 5 Workshop: “Unfair methods of competition, just like restraint of trade or monopolization, is not a textually determinant set of words. We’re not going to get anywhere by talking about what the words mean on paper.”134

The critics are right that Section 5 should be based on sound economics, but wrong to believe that the Sherman Act will catch all – or “enough” – economically sound prosecutions. The Section 5 cases of the 1980s may have overreached, but the lesson of these cases is not that Section 5 has no role beyond the Sherman Act. The critics correctly note that the Supreme Court has recognized that an overly broad application of Sections 1 or 2 can discourage competition, but they incorrectly assert that Section 5 prosecutions will, almost by necessity, overreach. Section 5 can be based on sound economic principles without being subject to the criticisms heaped upon the FTC in the 1980s or even today. After all, if a standard can be crafted from the Sherman Act’s rudderless “no agreement in restraint of trade” and “do not monopolize” phrases, a proper standard can be drawn from Section 5’s prohibition of “unfair methods of competition.”135

#### Previous overrules related FTC *pricing restrictions*. That’s a narrow example afforded far more protection than the Aff.

Dagen ‘10

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

The Commission’s Section 5 defeats in the 1980s involved conduct that resembled essential elements of the competitive process. Thus, for example, in Ethyl Corp., the Commission challenged (1) advance notice of prices; (2) base point pricing; and (3) most favored nation (“MFN”) clauses.140 Boise Cascade Corp. v. FTC, like Ethyl, involved base point pricing.141 The Commission found that these unilaterally-adopted practices would likely lead to anticompetitive effects by reducing uncertainty regarding rival pricing strategies and facilitating supracompetitive pricing. The Commission concluded that these unilateral practices violated Section 5 and therefore issued a cease-and-desist order.

At the most general level, each of these challenged practices involves pricing and is therefore subject to the highest degree of solicitude. One could question whether base point pricing and most favored customer clauses are transactional necessities or otherwise necessary components of competition,142 but they do facially involve unilateral pricing decisions.

While reversing the Commission’s finding of liability, the Second Circuit in Ethyl recognized (albeit in dicta) that certain trade practices of companies can amount to unfair methods of competition in violation of Section 5 even though those same practices do not violate antitrust law.143 The Second Circuit first suggested what it believed to be non-controversial: the Commission could attack “conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful.”144 On the other hand, where the Commission “seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review.”145

Thus, the court appeared to take as given that Rambus-type deceitful conduct, which is by no means “legitimate,” can be prohibited as an unfair method of competition.146 Further, the court explained that the FTC may even condemn conduct outside this enumerated list of forbidden conduct: “Section 5 is aimed at conduct, not at the result of such conduct, even though the latter is usually a relevant factor in determining whether the challenged conduct is ‘unfair.’”147

Nonetheless the court reversed in Ethyl because the Commission did not announce a standard whereby “businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.”148 The court further stated that

before business conduct in an oligopolistic industry may be labeled ‘unfair’ within the meaning of § 5[,] a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of a independent legitimate business reason for its conduct.149

The FTC also lost in Official Airline Guides, Inc. v. FTC, in which the FTC questioned a publisher’s choice of which airlines to include in its guide.150 The FTC charged that the publisher arbitrarily refused to provide information about commuter airlines’ connecting flights, while providing connecting flight information for major carriers.151 This choice of reporting format did not affect the respondent’s own business or profitability, but the Commission alleged that the omission did tend to lessen competition in the adjacent market for air transportation.152 The court found that Section 5 could not reach that conduct.153 The publisher’s conduct related to choosing with whom to do business, and the court would not lightly permit government review of such a core unilateral business decision.154 The court added that granting a cease and desist order would allow the FTC to delve into “‘social, political, or personal reasons’ for a monopolist’s refusal to deal.”155

In all of these cases, the courts did not question the proposition that the FTC’s Section 5 authority exceeded the Sherman Act’s reach. In fact, in each case, the courts, at a minimum, recited prior Supreme Court authority endorsing the Commission’s broad latitude. Finally, the fact that the Commission had a losing streak should not be determinative. After all, the agency lost seven straight hospital merger challenges but the FTC has continued forward.156

### Guidance

#### Miss our distinction about guidance docs – the Cplan actually boosts resources for enforcement.

Raso ‘10

CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F – modified for language that may offend - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

Critics also frequently ~~overlook~~ (ignore) the benefits of guidance. In many cases, guidance helps regulated entities comply with complicated regulations without being forced to pay for costly legal advice. Indeed, Congress has actually required agencies to issue guidance to reduce compliance costs for regulated parties.1 72 Moreover, appropriate use of guidance documents allows agencies to avoid devoting scarce time and resources to unnecessary rulemaking. Such time could instead be used for either policy development or enforcement of existing rules. 73 Agencies can also issue guidance more quickly than legislative rules, reducing the time that regulated parties are uncertain about their legal obligations.

#### Turns predictability

Khan ‘20

et al; At the time of this writing, Lina Khan was an Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; and former Legal Fellow, Federal Trade Commission. Now, Lina Khan serves as the head of the FTC. The co-author for this piece is Rohit Chopra, who was previously The Assistant Director of the Consumer Financial Protection Bureau and currently sits on the FTC. “The Case for “Unfair Methods of Competition” Rulemaking”, 87 U. CHI. L. REV. 357, 359-63 - #E&F – 2020 - https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\_Rulemaking\_87UCLR357.pdf

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the “rule of reason” standard. The “rule of reason” involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for “speculative, possibly labyrinthine, and unnecessary” analysis and appears to exceed the abilities of even the most capable institutional actors.1 Generalist judges struggle to identify anticompetitive behavior2 and to apply complex economic criteria in consistent ways.3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.4 And if a standard isn’t administrable, it won’t yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions.5 Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication “may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies.”7 Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades.8

## Tech ADV

### 2NC – Circumvention

**The plan gets circumvented – the 2ac did not respond to 1nc warrants – durable fiat can’t solve because each deficit has to do with the enforcement or response to the plan, not the plan’s passage itself**

**I will go through each of our warrants:**

1. **Courts will read the plan down to benefit industry – empirics prove – not one text has been faithfully interpreted – that’s Crane**

#### Judicial nullification wrecks solvency

Crane 20 [Daniel A. Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, 3-1-2020 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3561870]

Judges and scholars frequently describe antitrust as a common law system predicated on open-textured statutes, but that description fails to capture a historically persistent phenomenon; judicial disregard of the plain meaning of the statutory texts and manifest purposes of Congress. This pattern of judicial nullification is not evenly distributed: When the courts have deviated from the plain meaning or Congressional purpose, they have uniformly done so to limit the reach of antitrust liability or curtail the labor exemption to the benefit of industrial interests. This phenomenon cannot be explained solely or even primarily as a tug-of-war between a progressive Congress and conservative courts. The judges responsible for these decisions were far from uniformly conservative, Congress has not mobilized to overturn the judicial precedents, nor, despite opportunities to do so, have the courts constitutionalized their holdings to prevent Congressional overriding. Antitrust antitextualism is best understood as an implicit political arrangement in which Congress writes broad statutes expressing anti-bigness republican idealism, and then the courts read down the statutes pragmatically to accommodate competing demands for efficiency and industrial progress.

#### Eviscerates enforcement

Baer 20 [Bill Baer former visiting fellow in governance studies at The Brookings Institution and assistant attorney general of the Antitrust Division and as the acting associate attorney general of the U.S. Department of Justice, 11-19-2020 https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true]

The meaning of the antitrust laws rests first with Congress, as does their importance, which is reflected in yearly appropriations. Judicial interpretations have eviscerated competition enforcement. Courts have failed to appreciate the benefits of competition and have underestimated the harm of anticompetitive conduct. They have overestimated the ability of markets to correct themselves without proper antitrust enforcement. And they have even praised the benefits of monopoly.5 Too often, the resulting legal standards allow anticompetitive conduct to escape condemnation. At the same time that the courts have made it harder for antitrust enforcers to win meritorious antitrust cases, Congress has provided the enforcers fewer resources to do their jobs.

1. **The plan creates an arbitrary new standard that conflicts with enforcement and dooms efforts to sue anticompetitive practices – that’s Lopez-Galdos**

#### Plan causes inconsistent application --- crushes enforcement and innovation

Khemani 99 --- R. S. Khemani, editor, Advisor, Competition Policy, in the Financial & Private Sector Development Vice-Presidency of the World Bank Group, Washington D.C, “A Framework for the Design and Implementation of Competition Law and Policy”, 1999 https://www.oecd.org/daf/competition/prosecutionandlawenforcement/27122227.pdf

Attempts to take into account multiple objectives in the administration of competition policy may give rise to conflicts and inconsistent results. For instance, protecting small businesses and maintaining employment could conflict with attaining economic efficiency. With the small business objective, competitors rather than competition may be protected. In addition, such concerns as community breakdown, fairness, equity; and pluralism cannot be quantified easily or even defined acceptably. Attempts to incorporate them could result in inconsistent application and interpretation of competition policy. Clear standards would be unlikely to emerge, thereby leading to uncertainty and distortions in the marketplace and the undermining of the competitive process.

#### Wealth does not have a statistically significant correlation with political control

Branham et al 17 J. ALEXANDER BRANHAMSTUART N. SOROKACHRISTOPHER WLEZIENA MAJOR THEORETICAL JU STIFIC ATION for representative democracy is that it puts power in the hands of the people. Political scientists have tested whether this actually is true by assessing the degree to which policy reflects citizens’ preferences. Recent work finds that public policy is frequently responsive to the will of the people, but that there is significant variation across policy domains.1There may be variation in responsiveness to different people as well. Indeed, recent work suggests that policy is responsive primarily, or even solely, to the richest Americans, at the expense of the middle class and poor.2J. ALEXANDER BRANHAM is a PhD candidate at the University of Texas at Austin. His research interests include public opinion, partisanship, and public policy. STUART N.SOROKA is Michael W. Traugott Collegiate Professor of Communication Studies and Political Science, and Faculty Associate in the Center for Political Studies in the Institute for Social Research, at the University of Michigan. His work focuses on relationships between mass media, public opinion and policy. CHRISTOPHER WLEZIEN is Hogg Professor of Government at the University of Texas at Austin and a scholar of political behavior, public opinion, and public policy. “When Do the Rich Win?” POLITICAL SCIENCE QUARTERLY | Volume 132 Number 1 2017 | 2017 Academy of Political Science DOI: 10.1002/polq.12577 pp. 49-52 {DK}

Figure 2 illustrates the way in which we narrow the data set. The 1,594 policies on which the middle and rich agree cannot provide any leverage on questions about who wins—these polices are shown here as light gray circles. The remaining 185 policies—instances in which a majority of one group support the policy while a majority of the other do not—can offer more direct information. As we have seen, there are 78 cases in which the middle favor the policy but the rich oppose it. These are the cases below the dashed line, illustrated as black squares for policies that passed and gray squares for policies that failed. Above the dashed line there are the 107 cases, illustrated in the same way, in which a majority of the rich favor the bill while a majority of the middle oppose it. Based on these numbers, **when preferences differ**, it is more often the case that the rich favor passage and the middle prefer the status quo. What happens when preferences differ? Just how often do the rich win? We can see in Figure 2 that the rich do not always win: there is a mix of gray and black on both sides of the dashed line. A win for the rich over the middle can occur in two ways. The first is when a majority of the rich support the policy and the policy passes. These are the black squares above the line in Figure 2. The second is when a majority of the rich oppose the policy and the policy fails. These instances are indicated by the gray squares below the line in Figure 2. This sort of negative power can be quite powerful in the political arena. Our analysis must focus, then, on a combination of these positive and negative wins. Table 2 rearranges our cases in a way that clarifies how often—and how—each group wins. The first two columns show the number of policies favored by the middle (first column) and rich (second column). Rows split these policies according to whether the middle or rich won. There are 20 policies that received majority support from middle-income respondents (and majority opposition from the rich) and passed. By contrast, there are 58 policies that were favored by the middle (and opposed by the rich) and did not pass. In the former cases, the middle won; in the latter, the rich won. Taking into account the first and second columns, the third column reports the total number of wins for each group. For **the middle**, there are 87 **win**s (**47 percent** of all cases); for **the rich**, there are 98 **win**s (**53 percent** of all cases). This small gap in win rates is not significantly different from 50 percent (p ¼ .41).Results differ only a little when we further restrict our analysis to cases in which there is a clear gap between preferences of the middle and rich. For instance, for the 101 cases for which preferences differ by at least 10 percentage points—the same cutoff Gilens uses in some of his analyses24—the number of middle wins is 45 of 101; for the rich it is 56 of 101. Again, **this difference is not statistically significant** (p ¼ .86).It is well known that it is harder to pass legislation in the United States than to block it, and it is important to consider how this matters. When doing so, the rich do slightly better. If a majority of the rich favor a policy and a majority of the middle oppose it, the policy is adopted 37 percent of the time; by contrast, when the middle favor a policy and the rich are opposed, the policy is adopted 26 percent of the time. The difference also is statistically significant (p ¼ .05). Although the rich do slightly better here, they clearly do not dominate the middle. **Over the 22-year period of the study, the rich won just 11 times more than the middle; this is equivalent to the rich netting one bill every other year**.25Admittedly, this does not include all policy decisions taken, but it should include those salient, seemingly important ones—these are the policies about which survey organizations ask, after all.26 These results thus do not provide evidence of high-income dominance of American politics. The rich are systematically overrepresented, it seems, but not by much. Of course, small differences in the number of policies can make a difference, particularly as they accumulate over time.27This is more difficult to measure. We can, however, gain some sense of the accumulating policy impact by assessing the ideological orientation of the policies on which the middle and rich win.

#### No impact to populism – their ev is hype.

Strobaek ’17 (Michael; 6/5/17; Chief Investment Officer, free-lance journalist, and political analyst for CNBC; CNBC, “From the cacophony of populism, is a stronger middle emerging?” <http://www.cnbc.com/2017/07/05/from-the-cacophony-of-populism-is-a-stronger-middle-emerging.html)>

One would presume that anger breeds irrationality, radicalism and political as well as economic instability. But it need not. Anger – or let us call it, less dramatically, dissatisfaction with current affairs – can also lead to **renewal and progress**. Indeed, this year's elections in **Europe** suggest that voters are rather heading in that direction, i.e. seeking greater stability as well as reform while rejecting angry populism which has no real solutions to offer for today's major issues. With this in mind, it should thus come as no surprise that the radical **right was soundly defeated** in **Austria**, the **Netherlands** and **France**, and that the AfD (Alternative for Germany) is in rapid decline in **Germany**. In Finland, the radical right has just split into two, pragmatists and "purists." In Italy, too, recent local elections suggest that populist promises alone do not convince the electorate. Similarly, the **setbacks for the Conservatives** in the U.K. election in part represented a rejection of simplistic chauvinistic slogans. Leftist populism in demise? Conversely, we see few signs that the radical left is benefiting from this trend. Those who believe that the gains of the Labour party in the U.K. – headed by a rather dogmatic old-style socialist – suggest that leftist populists stand a good chance to govern are likely to be disappointed. Quite to the contrary, even in countries that have suffered deep crises – Spain and Greece come to mind – voters have **become disillusioned** with their recipes. Bernie Sanders would not, we believe, have won the U.S. election had he been the Democratic opponent of Donald Trump. Returning to what looks like a detail of the U.K. election, the very strong performance of the Conservative leader in Scotland, Ruth Davidson, an avowed "(EU) remainer" and opponent of the Scottish National Party suggests that separatism, another form of "anger," may also be **on the way out**. The outcome of the Catalan vote in the fall, should it take place, will be a further test of this thesis. Finally, beyond Europe, recent **political shifts** in Argentina and the upheaval in Brazil also suggest that leftist populism is in demise. Let us hope that Venezuela will soon be able to rid itself of one of its more extreme forms. Return to the center Putting these observations together suggests to me that voters have in fact started to head away from the extremes back to the center. Emmanuel Macron won the French election on an **openly centrist** platform. The state elections in Germany recently boosted Angela Merkel's centrist CDU, but even if the SPD and Martin Schulz were to win in September, this would hardly signal a turn of the electorate in a radical direction. Voters seem to be seeking politicians who offer pragmatic solutions to the complex problems of the day rather than simplistic recipes. The next U.S. president, I dare predict, is quite likely to be an avowed centrist as well. Maybe the **disillusionment with radicalism** – in this case of a truly brutal nature – will even strengthen forces of compromise in the Middle East at some point in the not-too-distant future. All in all, fears of significant political destabilization and systemic disruptions thus seem **overdone**, which may be one reason why markets, equities in particular, have been so **stable and calm** until recently despite rather stretched valuations. Does this mean that we will, after all, experience the unabashed victory of economic and political liberalism that Francis Fukuyama proclaimed? This remains rather unlikely, in my view, for three reasons: First, our multipolar world suggests that national and regional interests will take precedence over those promoting free markets and unfettered globalization. Second, distrust of market solutions has not been overcome, not least due to the "misdeeds" during the financial crisis.

## FTC Adv

### Turn

**2NC – OV**

**geoengineering overcompensates – fails and causes extinction.**

**Baum ‘13**

Et al; Dr. Seth Baum is an American researcher involved in the field of risk research. He is the executive director of the Global Catastrophic Risk Institute (GCRI), a think tank focused on existential risk. He is also affiliated with the Blue Marble Space Institute of Science and the Columbia University Center for Research on Environmental Decisions. He holds a PhD in Geography and authored his dissertation on climate change policy: “Double catastrophe: intermittent stratospheric geoengineering induced by societal collapse” - Source: Environment Systems & Decisions - vol.33, no.1 pp. 168-180 - #E&F – available via: https://pubag.nal.usda.gov/catalog/122717

Perceived failure to reduce greenhouse gas emissions has prompted interest in avoiding the harms of climate change via geoengineering, that is, **the intentional manipulation of Earth system processes**. Perhaps the most promising geoengineering technique is **stratospheric aerosol injection** (**SAI**), which reflects incoming solar radiation, thereby lowering surface temperatures. This paper analyzes a scenario in which SAI brings great harm on its own. The scenario is based on the issue of SAI intermittency, in which aerosol injection is halted, sending temperatures rapidly back toward where they would have been without SAI. The rapid temperature increase could be quite damaging, which in turn creates a strong incentive to avoid intermittency. In the scenario, a catastrophic societal collapse eliminates society’s ability to continue SAI, **despite the incentive**. The collapse could be caused by a pandemic, nuclear war, or other global catastrophe. The ensuing intermittency hits a population that is already vulnerable from the initial collapse, making for a **double catastrophe**. While the outcomes of the double catastrophe are difficult to predict, **plausible** worst-case scenarios include **human extinction.** The decision to implement SAI is found to depend on whether global catastrophe is more likely from double catastrophe or from climate change alone. The SAI double catastrophe scenario also strengthens arguments for greenhouse gas emissions reductions and against SAI, as well as for building communities that could be self-sufficient during global catastrophes. Finally, the paper demonstrates the value of integrative, systems-based global catastrophic risk analysis.

### Ext --- Non-Del Inevitable

#### Plan not key --- a host of cases challenge delegation and this court is keen to rule against it

McCann 21 --- Pamela Clouser McCann and Charles R. Shipan , Wash Post, Oct 29th 2021, “The Supreme Court just took a case on the EPA’s authority. Its decision could undo most major federal laws.”, https://www.washingtonpost.com/politics/2021/10/29/supreme-court-just-took-case-epas-authority-its-decision-could-undo-most-major-federal-laws/

What percentage of major laws delegate? The answer is: more than 99 percent of them — so basically all of them. Only four of the 443 laws we examined do not delegate any authority to government agencies — and one of those, the Partial-Birth Abortion Ban Act, delegates policymaking power to the states. Furthermore, most of the laws delegate to several agencies. Nearly half delegate to between two and five agencies, and another third delegate to more than five. And the number of agencies delegated power per law has been growing over time.

In other words, when Congress legislates, it delegates — which brings us back to the nondelegation doctrine. As we explained, challengers are using it to dismantle policies ranging from the vaccine mandate to the eviction moratorium to the ACA. It’s starting to appear in judicial actions centered on other policies, too, probably because several Supreme Court justices are open to reinvigorating this doctrine.

The Supreme Court’s 2021 docket includes a host of cases about delegation, including American Hospital Association v. Becerra, which challenges the Department of Health and Human Service’s authority to set hospital reimbursement rates, and Federal Bureau of Investigation v. Fazaga, which takes on federal power to conduct surveillance. In other words, the high court will have numerous opportunities to examine — and potentially strike down — delegation during this term. And of course, other prominent cases, including the vaccine mandate and Kelley v. Becerra, will be winding their way to the court.

#### Court will inevitably make a non-del decision

Saksa 20 --- Jim Saksa, “Barrett, with Scalia as model, may be a moderate on regulation”, October 8, 2020, https://www.rollcall.com/2020/10/08/barrett-with-scalia-as-model-may-be-a-moderate-on-regulation/

Non-delegation doctrine

The five Republican appointees on the court have indicated a willingness to revisit non-delegation doctrine, although a majority hasn’t come together yet in a single given case.

The court will probably invoke non-delegation sometime soon, regardless of Barrett's confirmation — even though it has only been used twice, both in 1935, to invalidate a law — but she could affect how far it’s willing to restrict Congress from granting agencies broad discretion in executing statutes.

#### Nondelegation inevitable

Davis 21 --- Dalton Davis , Helms School of Government Undergraduate Law Review , “The Return of a Judicial Artifact? How the Supreme Court Could Examine the Question of the Nondelegation Doctrine’s Place in Future Cases “, Spring 2021, https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1001&context=helmsundergraduatelawreview

In conclusion, although the nondelegation doctrine has been largely set aside by the Court for almost eighty-five years, Gundy and other recent cases indicate that the ongoing debate over the doctrine’s future in America’s administrative law system could result in the Court revitalizing the nondelegation doctrine. In light of this debate, the Court has been presented with an opportunity, with the confirmation of a tiebreaking fifth vote in either Justice Kavanaugh or Justice Barrett, to address this important question in a future case: will the Court require strict statutory interpretation and reinstitute the nondelegation doctrine? If the nine current Justices maintain their previously expressed views on deference doctrines and the nondelegation doctrine, then the Supreme Court could soon hand down a majority ruling in favor of the nondelegation doctrine in a future decision. If the Court issues such a decision, then the structure and influence of the administrative state’s rulemaking authority would be fundamentally lessened. Overall, based on the Court’s recent treatment of judicial deference and the nondelegation doctrine, further attention should be given to the potential reemergence of the nondelegation doctrine due to the major ramifications such a ruling would have upon Congress’s ability to delegate through statutes to federal agencies.

**1nr round 1**

**Ptx**

**Disad outweighs – prefer scope and reversibility – failure to pass BBB dooms foreign follow-through on commitments post-Glasgow conference – existentially scorches the planet – that’s Chon and Cohn**

**Prefer scientific consensus – now’s the last chance before countless catastrophic impacts become irreversible – encompasses all other impacts, making it try or die to avoid the disad**

**Åberg et al 10-5** (Anna Åberg, research analyst in the Environment and Society Programme of Chatham House, formerly served as desk officer at the Swedish Ministry for Foreign Affairs, MSc Development Studies, London School of Economics and Political Science, BSc Business and Economics, and Politics and Economics, Lund University; Antony Froggatt, deputy director and senior research fellow in the Environment and Society Programme of Chatham House; and Rebecca Peters, Queen Elizabeth II Academy Fellow in the Environment and Society Programme of Chatham House, doctoral candidate at the University of Oxford with the UK Foreign, Commonwealth and Development Office REACH Water Security programme, MSc Development Economics, MSc Water Science and Policy, Marshall Scholar; “Raising climate ambition at COP26,” Chatham House (the Royal Institute of International Affairs, London) Research Paper, October 2021, https://www.chathamhouse.org/sites/default/files/2021-10/2021-10-05-raising-climate-ambition-at-cop26-aberg-et-al-pdf.pdf)

01

Introduction

COP26 is the most important climate summit since COP21 in Paris in 2015. Over the past year, the **global politics** of **climate change** have shifted, with the election of President Joe **Biden** and the announcement of **China’s carbon neutrality target**.

Addressing climate change is the defining challenge of our time. Around the globe – and across the suite of UN organizations – there is **widespread recognition of the urgency** to reduce greenhouse gas (GHG) emissions and to prepare for a world that is, and will continue to be, severely impacted by climate change.

The foundational treaty of the international climate change regime – the United Nations Framework Convention on Climate Change (UNFCCC) – was adopted at the Rio Earth Summit in 1992.1 Its signatories agreed to ‘achieve… stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.2 The states that have ratified the UNFCCC meet annually at the ‘Conference of the Parties’ (COP) to assess and review the implementation of the convention.3 The COP has negotiated two separate treaties since the formation of the UNFCCC: the Kyoto Protocol in 1997, and the Paris Agreement in 2015.4

The Paris Agreement was adopted by 196 parties at COP21 in 2015 and entered into force less than a year later.5 The goals of the treaty are to keep the rise in the global average temperature to ‘well below 2°C above pre-industrial levels’, ideally 1.5°C; enhance the ability to adapt to climate change and build resilience; and make ‘finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development’.6 The agreement adopts a ‘bottom-up’ and non-standardized approach, where parties themselves set their national emission reduction targets and communicate these to the UNFCCC in the form of nationally determined contributions (NDCs).7

As things stand, the targets8 that were submitted in the run-up to COP21 are not sufficient, even if fully implemented, to limit global warming to 2°C, much less 1.5°C.9 The Paris Agreement was designed, however, to generate increased ambition over time via two components: a collective ‘global stocktake’ during which progress towards Paris Agreement goals is assessed based on country reporting,10 and the ‘ratchet mechanism’, which encourages countries to communicate new or updated NDCs every five years, with the expectation that ambition will increase over time.11 The results of the stocktake are scheduled to be released two years before NDC revisions are made.12 This sequencing is designed to allow national plans to account for the global context of the climate assessment. The first global stocktake is to be conducted between 2021 and 2023, and will be repeated every five years thereafter.13 The results of the first stocktake are due to be published around COP28.

We really are **out of time**. We **must act now** to prevent further **irreversible damage**. COP26 this November must mark that turning point.14 UN Secretary-General António Guterres, 16 September 2021

The 26th Session of the Conference of the Parties (COP26) to the UNFCCC is to be hosted by the UK, in partnership with Italy. After a year-long delay, the conference is now scheduled to take place in Glasgow, Scotland, between 31 October and 12 November 2021.15 Organizing an in-person event during a pandemic presents a substantial challenge. The UK government is providing vaccines to accredited delegations, but doses only started to be delivered at the beginning of September 2021 and restrictions, such as quarantine requirements,16 pose further obstacles to participation.17 An alliance of 1,500 civil society organizations are among those calling for a second postponement of the COP, citing concerns about a lack of plans to enable safe and inclusive participation of delegates from, not least, the Global South.18 The UK government is, however, adamant that it will proceed with the conference as planned.19

The pandemic has changed understandings of global risks, the interconnected nature of economies and the role of governments in preparing for and responding to existential threats. This may provide impetus for accelerated climate action. The postponement of COP26 itself has been of considerable significance. Over the past year, the global politics of climate change have shifted, with the election of President Joe Biden and the announcement of China’s climate neutrality target being particularly important. Moreover, the economic recovery packages that are being rolled out to counter the economic consequences of the pandemic present an opportunity to accelerate the green transition.20 To date, however, the members of the G20 have prioritized investments in fossil fuels above those in clean energy,21 and only 10 per cent of the global expenditure is estimated to have been allocated to projects with a net positive effect on the environment.22

**COP26** is the **most important climate summit** since COP21 in Paris, and it differs from earlier COPs in several ways: it is the first **test of the ambition-raising ratchet mechanism** and marks a **shift from negotiation to implementation**. An ambitious outcome at COP26 **requires** substantial **action to be taken before the summit** – and outside the remits of the UNFCCC process – as well as at the actual conference.

Human activity has already caused the global average temperature to rise by around 1.1°C above pre-industrial levels, and every additional increase in warming raises the risks for people, communities and ecosystems. To **avoid the most catastrophic climate change impacts**, **it is essential** world leaders make every effort to **limit warming to 1.5°C**. Working group I of the Sixth Assessment Report of the **IPCC** shows it is **still possible** to keep warming to this critical threshold, **but** that unprecedented **action must be taken now**.23 As John Kerry, special presidential envoy for climate, stated, ‘[t]his test is now as acute and as **existential** as any previous one’.24

**COP26** has a **critical role** in getting the world **on track for a 1.5°C pathway**, and in supporting those most affected by climate change impacts. It also constitutes a **key test** for the **credibility** of the **Paris Agreement** and the **UNFCCC process overall**. But what can and should the Glasgow summit achieve more specifically? The objective of this paper is to discuss what a positive outcome at COP26 would entail, with the dual aims of encouraging increased ambition and contributing to an informed public debate. The main argument put forth is that substantial progress must be made in three main areas, namely on increasing the ambition of NDCs; enhancing support to and addressing concerns of climate-vulnerable developing countries; and advancing the Paris Rulebook to help operationalize the Paris Agreement.

COP26 is undoubtedly hugely significant and national government pledges in the run-up to Glasgow will contribute to shaping the level of future GHG emissions. However, the event is not only critical in terms of reaching an ambitious outcome on climate, it is also an important opportunity to judge the level of confidence in the international process and the UNFCCC.

02

Increasing the ambition of the NDCs

A key element of COP26 will be the level of ambition of the revised NDCs put forward by governments to the UNFCCC and the extent to which these keep the 1.5°C global warming target agreed in Paris within reach.

According to the United Nations Environment Programme (UNEP), greenhouse gases (GHGs) in 2019 totalled 52.4 gigatonnes of CO₂ equivalent (GtCO₂e)25 of which the majority was CO₂ (38 Gt), then methane (9.8 Gt), nitrous oxide (2.8 Gt) and F-gases (1.7 Gt).26 The same year, GHG emissions were approximately 59 per cent higher than in 1990 and 44 per cent higher than in 2000.The six largest emitters – together accounting for 62 per cent of the global total – were China (26.7 per cent), the US (13 per cent), the EU (8 per cent), India (7 per cent), Russia (5 per cent) and Japan (3 per cent) (see Figure 1).27

**[FIGURE 1 OMITTED]**

According to UNEP, the implementation of the first round of NDCs would result in an average global temperature increase of 3°C above pre-industrial levels by the end of the century, with further warming taking place thereafter. If these NDC’s were fully implemented, emission levels are expected to be in the range of 56 GtCO2e (with unconditional NDCs) to 53 GtCO₂e (with conditional NDCs) by 2030.28 To align with a 2°C pathway, the ambition of the second round of NDCs would need to triple relative to the original targets, leading to emissions levels of around 41 GtCO₂e in 2030. Alignment with the 1.5°C target would require a fivefold increase in ambition, leading to emission levels around 25 CO₂e in 2030 (see Figure 2).29

**[FIGURE 2 OMITTED]**

The Paris Agreement states that parties shall communicate an NDC every five years,30 and that each submission shall constitute a progression in terms of ambition.31 Parties conveyed their first round of targets prior to COP21, and were due to submit new or updated plans in 2020.32 COP26, originally scheduled for November 2020, would then take stock of the collective level of ambition of these plans vis-à-vis the temperature targets of the Paris Agreement. The postponement of the COP by one year has in practice (albeit not formally) extended the deadline for submitting NDCs to ‘ahead of COP26’.

Where do we stand?

The delay of COP26 has given countries more time to put forward NDCs and longer-term decarbonization targets. This effort gained significant traction when China pledged to achieve carbon neutrality by 2060 and peak its emissions before 2030, during the general debate of the 75th Session of the UN General Assembly (UNGA) in September 2020.33 Then, in November 2020, the UK submitted its NDC, pledging a 68 per cent reduction in emissions by 2030 (based on 1990 levels)34 and later added a 2035 target of 78 per cent.35 The EU has, moreover, put forward a 55 per cent reduction target relative to 1990 levels,36 with some countries within the bloc going even further, including Germany, which agreed on a 65 per cent reduction target.37

The election of President **Biden** has **fundamentally changed the US’s position** on climate change, leading to, among other things, the country re-joining the Paris Agreement.38 At a specially convened Leaders Summit on Climate – hosted by the US – the **Biden** administration presented an **NDC** with an **emission reduction target of 50**–52 **per cent**39 (based on 2005 levels, which is equivalent to 40–43 per cent below 1990 levels40). During the summit, countries including Canada, Japan and others pledged more ambitious NDC targets.41

While there is more pressure on governments to act on climate change, due to its increasingly devastating impacts, there are also more opportunities for carbon mitigation through available alternative technologies and systems, as well as falling renewable energy costs (see Box 2).

Table 1 details the NDC targets put forward by G20 countries prior to COP21 in Paris and the extent to which these have since been revised. The updated NDCs have been assessed by the independent body, Climate Action Tracker, which has analysed to what extent the NDCs align with the 1.5°C pathway. The analysis also looks at domestic policies and actions, which are important as they provide an indication of whether governments are following through on their promises.

**[TABLE 1 OMITTED]**

As of September 2021, 85 countries and the EU27 had submitted new or updated NDCs, covering around half of global GHG emissions. Some parties, like China and Japan, have proposed new targets but not yet submitted them formally while around 70 parties – including G20 countries like India, Saudi Arabia and Turkey – have neither proposed nor communicated a revised NDC target. Several parties have, moreover, submitted new NDCs without increasing ambition. These include Australia, Brazil, Indonesia, Mexico, New Zealand, Russia, Singapore, Switzerland and Vietnam.42 In some of these cases, adjustments in baselines mean that ambition has de facto decreased (Brazil and Mexico).43 Analysis published by Climate Action Tracker in September 2021 shows that the NDC updates only narrow the gap to 1.5°C by, at best, 15 per cent (4 GtCO₂e). This leaves a large gap of 20–23 GtCO₂e.44

Similar analysis from the UN underscores the need for further NDC enhancements.45 If all current NDCs are implemented, total GHG emissions (not including emissions associated with land use) in 2030 are projected to be 16.3 per cent higher than in 2010, and 5 per cent higher than in 2019. The emissions of the parties that have submitted new or updated NDCs are, however, expected to fall by around 12 per cent by the end of the decade, compared to 2010 levels. The UN report also highlights the importance of providing support to developing countries, as many of these have submitted NDCs that are – at least in part – conditional on the receipt of additional financial resources, capacity-building support, and technology transfer, among other things. If such support is forthcoming, global emissions could peak before 2030, with emission levels at the end of this decade being 1.4 per cent lower than in 2019. However, even the full implementation of both the unconditional and conditional elements of the NDCs would lead to an overshoot of the targets of the Paris Agreement – as alignment with 1.5°C and 2°C require cuts of 45 per cent and 25 per cent, respectively, by 2030 (relative to 2010 levels).46

A large number of countries are also making more long-term net zero emissions or carbon neutrality pledges. As of September 2021, just over 130 countries had made such commitments, but not all of them have formally presented them to the UNFCCC.47 Examples include large economies like China, Japan, Brazil, the US, South Africa, South Korea, and the EU, as well as climate-vulnerable developing countries like the Marshall Islands, Barbados, Kiribati and Bangladesh.48 Climate Action Tracker estimates that if these long-term targets – and the NDCs – are fully implemented, global warming could be limited to 2°C.49 Most of the net zero pledges are, however, formulated in vague terms that are not consistent with good practice. The long-term targets are, moreover, only credible if they are backed up by ambitious and robust 2030 NDCs,50 given that substantial cuts in emissions must occur this decade. An additional concern that has been raised when it comes to net zero pledges is that they may encourage reliance on negative emissions technologies, such as bioenergy with carbon capture and storage (BECCS), which have still to be tested at scale to assess land requirement, efficiency and economic viability.51

**[BOX 1 OMITTED]**

The challenge of closing the gap

Bridging the gap between current NDCs and targets that would keep warming to 1.5°C is a defining challenge for governments ahead of COP26. As mentioned, UNEP estimates that the ambition of 2030 targets would need to be enhanced fivefold vis-à-vis pledges made in 2015 to align with a 1.5°C pathway.53 Several large emitters – including the US and the EU – have now submitted their new or updated NDCs. According to Climate Action Tracker, the UK’s target is considered to be compatible with a 1.5°C pathway, while those of the US, EU, Japan and Canada are classified as ‘almost sufficient’.54

It is critical that all countries that have not yet submitted a new or updated NDC do so, and that these pledges are aligned with 1.5°C. It is equally important that countries that have submitted unambitious NDCs revisit their targets. The Paris Agreement states that parties may revise existing NDCs at any time, if the purpose is to enhance ambition.55 The G20 countries have a particularly important role to play. In July 2021, the Italian G20 presidency hosted the first ever G20 Climate and Energy Ministerial meeting. In the final communique the countries in the G20 stated that they ‘intend to update or communicate ambitious NDCs by COP26’.56 The importance of action from all members of the G20 is clear, as they collectively account for 80 per cent of global emissions and as UN Secretary-General António Guterres said, ‘there is no pathway to this [1.5°C] goal without the leadership of the G20’.57

With only a few weeks to go it is, however, unlikely that the 20–23 GtCO₂e gap in targets will be closed by COP26. At the UK-hosted COP26 ministerial in July, a number of ministers stressed that parties would need to respond to any gap remaining by the Glasgow conference. Some suggested that such a response could include a ‘clear political commitment’ to keep 1.5°C within reach, a recognition of the gap, and a plan to bridge it. More specific proposals of actions that could be taken, as part of the response, to keep the 1.5°C pathway alive were also discussed. Suggestions included, but were not limited to, encouraging countries whose NDCs are not consistent with 1.5°C to bring their 2030 targets in line before 2025 (when the third round of NDCs are due); calling for parties to submit concrete long-term strategies for reaching net zero; and/or sending clear signals to markets through actions like phasing out unabated coal, carbon pricing, fossil fuel subsidy reform, nature-based solutions, and decarbonizing transport.58

Achieving a positive COP26 outcome

The **ultimate benchmark** for a high ambition outcome at COP26 is whether the new or **updated NDCs** are ambitious enough to **align with a 1.5°C pathway**. For many communities and ecosystems, the threat of **different climate impacts** between **1.5**°C and **2°**C – not to mention 3°C, 4°C or 5°C – is **existential**. **Each increment of warming** is anticipated to **drive increasingly devastating and costly impacts**, including **extreme heatwaves**, rising **sea levels**, **biod**iversity **loss**, reductions in **crop yields**, and **widespread ecosystems damage** including to **coral reefs** and **fisheries**.59

Keeping the goal of 1.5°C within reach will require substantial action this decade. **Long-term targets** to achieve **net zero emissions** or **carbon neutrality** have the potential to be **powerful drivers of decarbonization** but **need to be supported by ambitious NDCs** as well as **concrete policies** and **sufficient investment**.

Should we reach COP26 without sufficient ambition on NDCs, parties would need to present a plan for how ambition will be raised in the early 2020s. This could include a COP decision or a political statement underscoring the need to keep warming to 1.5°C and inviting parties to revisit their NDCs earlier than the Paris timetable dictates (for instance in 2023 instead of 2025).60 To support more ambitious action, countries should look to **expand international collaboration and accelerate decarbonization** in key sectors. At COP26, parties can help **boost the credibility of their pledges** by **showcasing policies**, measures and sector initiatives that will accelerate decarbonization, including on the phase out of unabated coal and the increased use of electric vehicles (see Box 3).

**[BOX 2 OMITTED]**

**[FIGURE 3 OMITTED]**

In the run-up to COP26, the UK government is mobilizing its counterparts and non-state actors to drive accelerated action on phasing out the use of unabated coal,65 accelerating the deployment of electric vehicles,66 protecting and restoring nature (nature-based solutions67), and aligning financial flows with the goals of the Paris Agreement.68 The role of the private sector is crucial in the transition to net zero economies and is recognized within the framework of the UNFCCC, as they can deliver funding, innovation and technology deployment at a pace and scale beyond that of most governments (see Box 1). It is hoped that some of these initiatives will lead to plurilateral agreements at or ahead of COP26, which could enhance the credibility of mitigation pledges and help keep the 1.5°C target within reach. **Being able to showcase** a package consisting of **ambitious NDCs**, plurilateral deals, and **national policies** at **COP26** could **generate positive momentum** and **create a sense of inevitability** around the **transition to net zero** societies.

**[BOX 3 OMITTED]**

03

Support to climate-vulnerable developing countries

**Increased action on climate finance**, adaptation, and loss and damage is **critical** for **supporting climate-vulnerable developing countries**, **strengthening trust** and **raising ambition on mitigation**.

The year 2020 was one of the warmest on record.80 As COVID-19 ravaged the world, extreme weather events continued to cause severe devastation. In Bangladesh, torrential rains submerged a quarter of the country,81 resulting in hundreds of deaths, mass displacement and damage to more than a million homes.82 Record-breaking floods in Sudan83 and Uganda84 also displaced hundreds of thousands, while super cyclone Amphan raged across South Asia.85 Extreme weather events were also a defining feature of the summer of 2021.

An unprecedented heatwave may have killed almost 500 people in British Columbia,86 as well as a billion marine animals along the Canadian coastline.87 In the Chinese province of Henan people drowned in the subway after a year’s worth of rain fell in just three days.88 Germany and Belgium also experienced death and destruction as a result of severe flooding,89 while villages in Greece burned.90

The impacts of climate change are striking even harder than many anticipated,91 and as temperatures continue to rise extreme weather events are increasing in both frequency and intensity. Limiting global warming to 1.5°C is key to avoiding the most catastrophic events, but substantial measures must also be undertaken to adapt to climate change impacts and build resilience. As the summer of 2021 shows, no country is spared. It is, however, those who have emitted the least that are most at risk,92 and in many countries that are disproportionately affected by climate change – such as the least developed countries (LDCs)93 – financial constraints impede their ability to invest in adaptation, build resilience and deal with loss and damage.94 COVID-19 has aggravated this challenge: while industrialized countries have implemented unprecedented stimulus measures to support their economies – and vaccinated large parts of their populations – many developing countries remain in the midst of a health and economic catastrophe.

**Scaled up action on climate finance**, adaptation and loss and damage are – in addition to increased ambition on mitigation – **key priorities for climate-vulnerable nations** ahead of COP26. Raised ambition and **concrete delivery** in these areas are critical for supporting those at the frontline of climate change, key to **building trust**, and could encourage some parties to **raise the ambition of their NDC pledges**. The **implementation of many NDCs is**, in addition, at least partly **conditional upon receiving increased levels of finance**, as well as other types of support.95

Honouring the $100 billion goal

In 2009, developed countries committed to mobilizing $100 billion per year by 2020 for climate mitigation and adaptation in developing countries.96 This pledge was subsequently formalized in the Cancun Agreements in 201097 and reaffirmed in the Paris Agreement in 2015. The resources provided were to be ‘new and additional’98 and come from a variety of public and private sources.99 The $100 billion goal is a core element of the bargain underpinning the Paris Agreement.100 While achieving the mitigation and adaptation goals of the agreement will require trillions of dollars in investment – of which most will need to come from the private sector – the delivery of the $100 billion is critical to building trust between developed and developing countries,101 and is important for raising ambition on mitigation.102

The OECD estimates that $79.6 billion was mobilized in 2019, which is the most recent year for which official figures are available.103 In 2018, the figure was $78.9 billion, and in 2017 it was $71.2 billion.104 Though the verified figures for 2020 will not be available until 2022, it is clear the target was missed.105

Developed countries have, moreover, not yet been able to show that the pledge will be honoured in 2021, nor demonstrate conclusively how it will be met in the 2022–24 period.106

The pledge by developed nations to mobilize $100 billion to developing nations by 2020 is a commitment made in the UNFCCC process more than a decade ago. It’s time to deliver. How can we expect nations to make more ambitious climate commitments for tomorrow if today’s have not yet been met?107

Patricia Espinosa, 23 July 2021

How the goal is achieved matters. Only around one-fifth of bilateral climate finance is allocated to the LDCs,108 and locally led projects receive low priority.109 There are also concerns related to overreporting and lack of additionality. Oxfam estimates, for instance, that 80 per cent of public climate finance provided over the 2017–18 period took the form of loans or other non-grant instruments, and that the actual grant equivalent only accounted for around half of the total amount of finance reported.110 Furthermore, the Center for Global Development has found that almost half of the climate finance reported between 2009 and 2019 cannot be considered ‘new and additional’.111 There is, finally, an urgent need to close the adaptation finance gap (see next section),112 and facilitate access to finance.113

It is widely recognized that honouring the $100 billion goal is a **prerequisite for success at COP26**.114 The hitherto failure of developed countries to provide clarity on the issue is creating mistrust between countries,115 with the director of the International Centre for Climate Change and Development (who is also an adviser to the climate-vulnerable countries) conveying that, ‘if the money is not delivered before November, then there is little point in climate-vulnerable nations showing up in Glasgow to do business with governments that break their promises’.116 The chair of the LDC Group has also made it clear that, ‘[t]here will be no COP26 deal without a finance deal’. 117

The G7 countries play a critical role in mobilizing the $100 billion,118 and there was a hope that G7 leaders would increase their bilateral commitments substantially – and provide clarity on the $100 billion119 – when they convened in Cornwall in June 2021. Some new pledges were made. Canada, for instance, committed to doubling its climate finance through to 2025 (to CAD $5.3 billion), and Germany pledged to increase its annual commitments from €4 billion to €6 billion by 2025 at the latest.120 The G7 members collectively also committed to ‘each increase and improve’ their public climate finance contributions, and announced they would develop a new international initiative – ‘Build Back Better for the World’121 – the details of which have yet to be fleshed out. However, many developing country officials – and many observers worldwide – expressed disappointment with the summit outcome, with the climate minister of Pakistan describing the G7 commitments as ‘peanuts’.122

Several announcements on climate finance were also made during the 76th Session of the UNGA in September 2021. Most importantly, President Joe **Biden pledged to double US climate finance** (again) from the previously committed $5.7 billion to $11.4 billion per year by 2024. **Actual delivery is, however, contingent on congressional approval**.123 The EU – which already contributes around $25 billion in climate finance per year – also stepped up, announcing an additional €4 billion until 2027,124 while Italian Prime Minister Mario Draghi conveyed that Italy would shortly be announcing a new climate finance commitment.125 Though the **US pledge in particular** has been described as a **critical step forward that ‘puts the $100 billion within reach’**,126 more will need to be done.127

$100 billion is a bare minimum. But the agreement has not been kept. A clear plan to fulfil this pledge is **not just about the economics of climate change**; it is **about establishing trust in the multilateral system**.128

António Guterres, 9 July 2021

**AND, expectations of resource conflict alone makes nuclear war inevitable in the short term**

Dr. Michael T. **Klare 20**, Five Colleges Professor of Peace and World Security Studies at Hampshire College, Ph.D. from the Graduate School of the Union Institute, BA and MA from Columbia University, Member of the Board of Director at the Arms Control Association, Defense Correspondent for The Nation, “How Rising Temperatures Increase the Likelihood of Nuclear War”, The Nation, 1/13/2020, https://www.thenation.com/article/archive/nuclear-defense-climate-change/

Climbing world **temperatures** and rising **sea levels** will diminish the supply of **food** and **water** in many **resource-deprived areas**, increasing the risk of widespread **starvation**, social **unrest**, and **human flight**. Global **corn production**, for example, is projected to fall by as much as **14 percent** in a 2°C warmer world, according to research cited in a 2018 special report by the UN’s Intergovernmental Panel on Climate Change (IPCC). **Food scarcity** and **crop failures** risk **pushing hundreds of millions** of people into **overcrowded cities**, where the likelihood of **pandemics**, ethnic **strife**, and severe **storm damage** is bound to increase. All of this will impose an immense burden on human institutions. Some **states may collapse** or break up into a **collection of warring chiefdoms**—all fighting over sources of water and other vital resources.

A **similar momentum** is now evident in the emerging **nuclear arms race**, with all three major powers—**China, Russia, and the U**nited **S**tates—rushing to deploy a **host of new munitions**. This dangerous process commenced a decade ago, when Russian and Chinese leaders sought improvements to their nuclear arsenals and President Barack Obama, in order to secure Senate approval of the New Strategic Arms Reduction Treaty of 2010, agreed to initial funding for the modernization of all three legs of America’s strategic triad, which encompasses submarines, intercontinental ballistic missiles, and bombers. (New START, which mandated significant reductions in US and Russian arsenals, will expire in February 2021 unless renewed by the two countries.) Although Obama initiated the modernization of the nuclear triad, the Trump administration has sought funds to proceed with their full-scale production, at an estimated initial installment of $500 billion over 10 years.

Even during the initial modernization program of the Obama era, Russian and Chinese leaders were sufficiently alarmed to hasten their own nuclear acquisitions. Both countries were already in the process of modernizing their stockpiles—Russia to replace Cold War–era systems that had become unreliable, China to provide its relatively small arsenal with enhanced capabilities. Trump’s decision to acquire a whole new suite of ICBMs, nuclear-armed submarines, and bombers has added momentum to these efforts. And with all three major powers upgrading their arsenals, the other nuclear-weapon states—led by India, Pakistan, and North Korea—have been expanding their stockpiles as well. Moreover, with Trump’s recent decision to abandon the Intermediate-Range Nuclear Forces (INF) Treaty, all major powers are developing missile delivery systems for a regional **nuclear war** such as might erupt in **Europe**, **South Asia**, or the **western Pacific**.

**solve rogue geoengineering**

**Jayaram 20** (Dhanasree Jayaram, Assistant Professor, Department of Geopolitics and International Relations and Co-coordinator, Centre for Climate Studies, Manipal Academy of Higher Education (MAHE), India; and Research Fellow, Earth System Governance, “Without Attention, Geoengineering Could Upend Foreign Policy,” Wilson Center, 9-30-2020, https://www.wilsoncenter.org/article/without-attention-geoengineering-could-upend-foreign-policy)

In the present situation the uncertainties have multiplied, with the COVID-19 pandemic, geopolitical tensions, and climate change complicating existing challenges. With the pandemic, although there are never-ending calls for a “green recovery”—"to **b**uild **b**ack **b**etter”— some speculate that many renewable energy projects are likely to be delayed. In such a scenario, countries will be more ambitious about pushing ahead with geoengineering projects to achieve their climate objectives. Richer countries may set aside ethical concerns with regard to developing countries and pursue a technocratic solution to climate change. In this context, the need for better governance mechanisms and tools, and the role of foreign policy stakeholders, especially those who engage in climate diplomacy, will be paramount, including in regions such as South Asia.

**T/C – Protectionism + Populism**

**Turns the trade wars advantage AND the populism scenario on the other advantage – BBB failure causes hard protectionism to fill-in AND populist backlash**

**Hubbard 21** (R. Glenn Hubbard, Russell L. Carson Professor of Finance and Economics at Columbia Business School and professor of economics at Columbia University, former chair of the Council of Economic Advisers, “How Do We ‘Build Back Better’?” National Review, Capital Matters, 3-17-2021, https://www.nationalreview.com/2021/03/how-do-we-build-back-better/)

The **pandemic** has intensified a long-standing **divergence in economic outcomes** for **higher- and lower-skilled workers**. Globalization, and especially technological improvements, have made America richer and more dynamic, and have propelled many people forward. But these forces have also inflicted a body blow on our less-educated and less-trained citizens.

A “building” agenda focused on **walls to protect** these **workers** — both literally (against immigrants) and metaphorically (**against imports**) will fail. Yet such an approach is an understandable **political response** to the **lack of action** by neoliberal economists and policy-makers over the years. Pieties about the wonders of markets haven’t meant much to struggling communities in, say, Youngstown, Ohio, and elsewhere.

Now that the American Rescue Plan Act has been signed into law, the **Biden** administration ought to make a push for more Americans to participate in our dynamic economy. We need bridges that prepare and reconnect people to work in the aftermath of those structural forces. Bridges are the counterpart to walls, and they have a long history of success in the United States. From compulsory schooling to land-grant colleges to Social Security to the G.I. Bill, and now to public-private partnerships for economic inclusion: To build a bridge is to “**b**uild **b**ack **b**etter.”

Mass Flourishing as a Moral and Economic Imperative

Policy-makers are often impatient with the extended time it takes for bridges to make a difference. If a community is hurting because of imports or technology, why not just put in temporary **tariffs** or other protections (e.g., a wall)? Very simply, because to do so would be to postpone the inevitable work that all communities must do in order to participate in a dynamic economy.

More important, walls are almost always inequitable. Tariffs on steel might temporarily help a few steelmaking towns, but they ultimately operate at the cost of many more manufacturing towns with falling revenue because of higher prices for a key input. Protections usually favor well-connected groups at the expense of underprivileged communities trying to make it the usual way.

Adam Smith, the father of modern economics, understood this dynamic as well as anyone did. In his day, mercantilist thinkers thought that the wealth of nations consisted of stocks of gold or silver. They wanted to increase those stocks, the better to fund wars and explorations. They convinced kings to intervene in markets to limit competition at home and abroad for favored activities. Trade surpluses were good, trade deficits bad, and state-sanctioned monopolies generated more revenue for the crown.

For Smith, the wealth of a nation lay in its potential for consumption by the great mass of ordinary people. He wanted to make the economic pie as large as possible. The consumer, not the crown or court, was Smith’s economic king.

To expand this wealth, Smith promoted free markets and competition guided by the invisible hand. These forces reconciled self-interest with the expanding pie for everyone. He wanted everyone, even those without connections, to be able to compete, so he encouraged education and other kinds of preparation. Mass flourishing was his goal.

Today’s economy is more complex and disruptive than that of Smith’s day, but we still need broad participation. That’s the only way to keep raising living standards for more people, and bring economic justice to formerly marginalized groups.

Participation is also good for its own sake. Think of mass flourishing as being “in the groove” of the dynamic economy, akin to psychologists’ concept of flow. Like flow, flourishing requires individuals who can raise their game to keep up with wherever the economy goes. People feel a sense of belonging in the economy when they work in open markets.

They don’t get that sense when we try to protect them with walls. Well-connected workers will get those protected jobs, while other people will remain stuck. It’s far better to let consumers’ tastes and incomes shape the opportunities for firms and the employment patterns that follow. And once you start a bit of tinkering in the economy, everyone wants favors, and pretty soon you’ve smothered the economy’s dynamism inside a series of well-intentioned walls.

What It Takes to Build Bridges

To be fair, the federal government has tried to build bridges. Congress passed the Trade Adjustment Assistance Act back in 1962, to funnel resources to communities dislocated by foreign competition. It provided two-thirds of a worker’s wages for up to a year, along with education and training subsidies. It was positive in theory, but the follow-through was almost nonexistent — few workers actually received aid. We’d see a flurry of activity only when an administration wanted to pass NAFTA or other free-trade programs.

This intended preparation is all the more important as the economy reallocates jobs across economic sectors in the aftermath of the pandemic. The best delivery mechanisms are community colleges, public training programs, and companies themselves. We need public-policy changes to advance all three, set within a flexible skills-training system to meet the diverse situations of adults.

Community colleges are the logical workhorses of skill development, and their presence in local economies makes them attractive partners for employers. Economists have found that associate degrees or even high-quality certification programs are enough to boost wages substantially — no bachelor’s degrees necessary. Community colleges also work with local employers to develop certificate programs for training — companies are the best ones to decide what skills are really needed. Too many federal and state job-training programs have failed to target the needs of local employers. Yet community colleges have seen their state-level public support wither.

Many states are now experimenting with eliminating tuition charges, which does boost the demand for higher learning. But numerous studies show that institutional funding on the supply side is essential for students to actually gain skills and complete a degree. Free tuition means little if your institution lacks the services to support your education.

Accordingly, Amy Ganz, Austan Goolsbee, Melissa Kearney, and I recently proposed a supply-side program of federal grants to strengthen community colleges — contingent on improved degree-completion rates and labor-market outcomes. In contrast to calls for demand-side support (i.e., free tuition), the proposal centers on supply-side resources for community colleges in their skill-development mission.

Inspired by the 1863 Morrill Land-Grant program, we set the ambitious goal by 2030 of raising community-college-completion rates (or transfer to four-year colleges) to 60 percent, which is the current graduation rate for students seeking bachelor’s degrees. It also aims at increasing the share of Americans aged 25–64 with post-secondary credentials from 47 percent to 65 percent, the level projected to meet the economy’s skill needs by 2030.

These grants would cost $20 billion annually. That’s substantial, but still small relative to outlays in Biden’s first go at boosting the economy during the coronavirus pandemic. And these grants are an investment in our future, so they will pay off in a more productive economy for many years to come. As with the land-grant colleges, federal funding would work through a block grant so that states could adjust as needed to the local context.

Another bridge can help dislocated workers: temporary income to encourage them to invest in skills rather than in a desperation chase for whatever work they can find. Current unemployment insurance is aimed at people suffering from cyclical layoffs, not the structural disruptions that can last for years. For the latter, a better approach would be personal reemployment accounts (cash to support training periods), and substantially expanding the earned-income tax credit, particularly for younger, childless workers. For the hardest-hit communities, we should also consider place-based aid with extra subsidies for employment.

These bridges aren’t cheap. Timothy Bartik of the Upjohn Institute calculates that a robust series of training and income programs would cost about $30 billion annually. But he estimates that support for local communities would bring employment rates in the bottom quartile by area to the median. The cost raises the stakes in evaluating the relative desirability of the massive costs of the American Rescue Plan Act.

Bridges Require Intentional Business and Government Action

Companies have essential roles to play in building back better with bridges. Especially for dislocated communities, governments alone can’t lead the way in restoring the economy to dynamism. Historically, both the Massachusetts Miracle (from textiles to electronics) and the Pittsburgh Renaissance (from steel to “meds and eds”) demonstrate that future-oriented local business leadership — supported by local and national government — make the difference in local flourishing.

Companies can help reduce frictions in the economy that discourage workers from moving to areas of greater opportunity. State and local governments across the country have erected many kinds of barriers to mobility, from occupational licensing (which disproportionately hurts minority groups) to zoning restrictions (which can legislate existing privileges) to various other regulations and subsidies that favor established businesses. Collectively, the business community must offer its strong voice in defense of competition — just as Adam Smith did in railing against the cronyism of 18th-century Britain.

Indeed, business’s role in bridge building has another, more macro objective: to bolster public support for the dynamic market economy. Corporate indifference to the damage from dynamism will only increase populist rage against capitalism and support for walls. One helpful step here would involve companies devoting a section of each annual report to what they’ve done to build bridges for less-skilled workers.

Returning to Team Biden, the policy process matters in addition to ideas, leadership, and framing. A cabinet-level U.S. task force on economic engagement could deliver all-of-government advice and coordination for the White House. An annual report along with regular congressional testimony would engage the public broadly. Building from local experiences across the United States, business and university leaders could be called upon to serve on an advisory council with the task force.

**at: tobacco moment**

**1) this is about republicans who will literally never vote for BBB and doesn’t say it causes vote switching – msu = green**

**2ac Levine et al 10/5** (ALEXANDRA S. LEVINE, CLAIRE RAFFORD, JULIA ARCIGA, EMILY BIRNBAUM and BENJAMIN DIN, *Politico*, “Whistleblower to Senate: Don't trust Facebook,” October 5, 2021, https://www.politico.com/news/2021/10/05/facebook-whistleblower-testifies-congress-515083)

**Republican Sen**. John Thune said he believes it's time for Congress to look at **overhauling antitrust laws** to rein in the power of Silicon Valley — his strongest remarks on the issue to date. Thune (S.D.), the No. 2 Republican in the Senate, told reporters on the sidelines that the company has an "enormous amount of market power" and a "monopoly status." "Transparency and accountability are a big part of this, and then looking at the broader issue of antitrust is also something that Congress needs to examine thoroughly and see if change is needed there, if we need to **break companies up**," Thune said. "If you own Instagram and Facebook among other social media platforms … that’s an enormous amount of market power, it’s monopoly status, and I think that’s also something Congress needs to get on top of," Thune added. Thune, a key member of the Senate Commerce Committee, pointed out that the Senate Judiciary Committee is the primary panel with jurisidction over antitrust. While Thune has spoken out about the need for tech reform, he has not previously emphasized **antitrust as a** potential **solution** to his concerns about the social media companies. **A bipartisan group of senators is negotiating** over companion legislation to a House antitrust package that passed the House Judiciary Committee earlier this year. Klobuchar is discussing the legislation directly with Senate Judiciary Committee ranking member Chuck **Grassley (R-Iowa**). Thune's support could significantly accelerate the process to come up with bipartisan antitrust tweaks. However, when asked about whether Thune intends to support that effort, **he demurred**. He said he's aware of Klobuchar's efforts on **antitrust** and said he's open to learning more about it. Blumenthal: 'Facebook and big tech are facing a big tobacco moment' Blumenthal drew on what he called a "striking" parallel between Facebook and big tobacco companies, saying that the **social media** company **is facing "a moment of reckoning."** "They valued their profit more than the pain that they caused to children and their families," he said. He also praised Haugen in for what he called her courage and strength in courage in coming forward. "You have a compelling, credible voice, which we've heard already, but you are not here alone," he said. "You're armed with documents and evidence. And you speak volumes as they do about how Facebook has put profits ahead of people." Markey echoed that sentiment, telling Haugen: "You are a 21st century American hero."

**Bipartisanship over Big Tech fails to mobilize action---political divisions, lobbying, and different motives wreck the chance of passage.**

**Smith 19** (David Smith, Guardian's Washington DC bureau chief, “A new antitrust frontier – the issue closing partisan divides in the name of policing big tech,” 02-03-19, The Guardian, <https://www.theguardian.com/us-news/2019/feb/02/a-new-antitrust-frontier-the-issue-closing-partisan-divides-in-the-name-of-policing-big-tech>, TM)

Trump himself has weighed in (“We are looking at [antitrust] very seriously,” he told Axios on HBO last year), though many believe his critique of Amazon is fuelled by animus towards founder Jeff Bezos, owner of the Washington Post.

Indeed, the **unwieldy coalition** of political motivations – such as conservatives’ complaint that online platforms show a leftwing bias – could lead to a **lack of clarity** that the **tech giants** might **exploit**.

Scott Cleland, former deputy coordinator for communications and information policy in the George HW Bush administration, said: “While they are getting **a lot of opposition**, it’s **not focused** enough. They’re **in a castle** and **no one’s organised the catapults** or which ramparts to target or found the weaknesses.”

Congress bared its teeth last year when it passed bipartisan legislation to strengthen the policing of sex trafficking on websites such as Backpage.com. Despite opposition from many internet companies, it passed 97-2 in the Senate and was signed into law by Trump.

But big tech, which spends millions of dollars on lobbying, would be a far tougher proposition. The companies do not fit the traditional definition of monopolies that push up prices and inflict consumer suffering and it is not clear that existing antitrust laws could be applied. When the FTC previously investigated Google over how it displayed its search results, it concluded there was no antitrust violation and did not break it up. To force Google to part with YouTube and DoubleClick, or Facebook to get rid of Instagram and WhatsApp, would be a radical step that requires a cast iron legal argument.

Kristian Stout, associate director of the International Center for Law & Economics, said: “I’m very sceptical as to whether you would call them ‘too big’ in the classical sense because it’s an ill-defined criterion.

“There’s always been a contingent of the Democratic party that’s sceptical of big business in one form or another. Republicans are getting more interested because they say conservative speech is being suppressed, but using antitrust laws is absolutely the wrong way to deal with that.”

The most famous antitrust case against a tech giant in recent times broke Microsoft’s monopoly of the internet browser market. It was 1998, the year of Bill Clinton’s impeachment, hardly a time of bipartisan harmony. In 2019, as a partial government drags on and **partisan divisions** run **deeper than ever**, big tech seems be the one issue that Washington can agree on. But these are **unchartered waters**.

Historian Niall Ferguson, a senior fellow at the Hoover Institution at Stanford University in Palo Alto, California, said: “The difficulty here is that there are some quite different motivations behind going after big tech. Keeping everybody on the same page is **difficult** enough and there are these **different options**: do you do antitrust, do you do you tougher regulation or do you go down the Section 230 road?”

**at: manchin turn**

**Big Tech will crush support for the plan.**

**Jones and Kovacic 20** (Alison Jones, Professor of Law, King’s College London; and William E. Kovacic, Global Competition Professor of Law and Policy, Professor of Law, and Director of the Competition Law Center, at George Washington University Law School, former General Counsel, Commissioner, and Chairman of the Federal Trade Commission; “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, 65(2), 3-20-2020, DOI: 10.1177/0003603X20912884)

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.

Even if successful, “[l]egislative relief from existing jurisprudential structures might **take years to accomplish**”;129 **acts taken under new legislation**—**even with** the establishment of **presumptions that improve the litigation position** of government plaintiffs—may **still** be relatively complex and **difficult to prosecute**. **Rulemaking** is an alternative to litigation, but it is **no easy way out** of the problem. On the contrary, promulgation and defense, in litigation, of a major trade regulation rule is liable to take as long as the prosecution of a Section 2 case. It can also be anticipated that a judiciary populated with many regulation skeptics will subject new rules or related measures to demanding scrutiny.

**Their ev and link turns are mostly about consumer protecton which is distinct – Antitrust reform necessarily *burns Biden’s PC* and trades-off with other legislative priorities.**

* Bipart link turn wrong – general consensus loses-out to details like what will be included, excluded, etc.

**Folio 21** et al; Joe Folio – Counsel at Morrison-Foerster- Before joining the firm, Joe most recently served as Chief Counsel for the U.S. Senate Committee on Homeland Security & Governmental Affairs, where he advised on all issues falling within the committee’s broad jurisdiction, including cybersecurity, border security, domestic terrorism, election security, supply chain security (including 5G policy), and reforming the National Emergencies Act. “Antitrust Update: Up and Down the Avenue” - Morrison-Foerster- 22 Mar 2021 - #E&F – ellipses in original - <https://www.mofo.com/resources/insights/210322-atr-update.html>

**Meanwhile, on Capitol Hill …**

Down the avenue, Congress is debating whether to provide the agencies with additional tools and resources. But how realistic are the prospects for legislative reform ?

In short, although the prospects for sweeping legislative reform of the antitrust laws **are dim**, targeted reforms appear increasingly likely, especially increased funding for the agencies. In October 2020, the House antitrust subcommittee concluded a year-long bipartisan investigation into these issues, and the House Democrats published a lengthy report detailing their findings and making recommendations for reform. Notably, the House Republican response identified several areas of agreement, including “providing antitrust enforcement agencies with the necessary resources.” [3] House Republicans also made it clear that they too are concerned about tech companies “using ‘killer acquisitions’ to remove up-and-coming competitors from the marketplace,” and that the burdens of proof for mergers and predatory pricing cases need to be reevaluated.[4] On March 18, 2021, however, the Republican ranking member on the committee reiterated a shared interest in reforming the evidentiary burden of proof in merger cases, which he described as having become “essentially insurmountable” and “a grant of near total immunity to big tech companies.” Although a path to agreement on more substantive issues typically has many obstacles, reforming the burden of proof in certain instances may be emerging as the most likely candidate for significant legislative action.

In the Senate, on February 4, 2021, newly installed antitrust subcommittee chair Senator Amy Klobuchar (D-MN) introduced a bill that would overhaul existing antitrust laws. Among other reforms, it would lower the government’s burden of proof to block a merger, shift the burden of proof in certain cases and require the merging parties to justify the deal, and increase funding for both the DOJ Antitrust Division and the FTC. At the subcommittee’s March 11, 2021 hearing related to the bill, subcommittee ranking member Senator Mike Lee (R-UT) (who promptly released a statement noting his opposition to Ms. Khan’s nomination) made it clear that he firmly opposes “a sweeping transformation of the antitrust laws.” Throughout the hearing, however, there appeared to be bipartisan support for taking some sort of action to address these issues, and at the very least to provide increased funding to the DOJ and FTC. Even Senator Lee, who recently introduced a bill that would combine the DOJ and FTC to avoid inefficiencies in antitrust enforcement, acknowledged that agency leaders need the resources that are necessary to vigorously enforce antitrust laws.

So, what does it all mean?

In these circumstances, the most likely outcome appears to be antitrust officials creatively using their existing tools to enhance enforcement while not so quietly pressing Congress for additional assistance. On March 16, 2020, acting FTC Chair Rebecca Slaughter advocated for increased scrutiny of mergers between pharmaceutical companies. She also told the House antitrust subcommittee that the agencies “should consider withdrawing” the guidance for “vertical” mergers issued during the last administration to allow for more aggressive enforcement.[5] But at the same time, FTC Commissioner Noah Phillips explained that the agency would not be able to challenge certain deals without more funding. The Biden administration and the agencies will need to determine how to square those positions. Also, even assuming Congress could provide the agencies with additional funding quickly (on top of the additional $20 million Congress provided to the FTC in December 2020), using that funding to hire additional attorneys will take time.

The path for meaningful legislative reform remains **extremely complicated.** The prospect for reform depends **significantly** on whether members of Congress, congressional leadership, and the Biden administration are willing to expend the time and **p**olitical **c**apital **necessary** to pass a reform bill (which also assumes the relevant parties **can agree** on what should be included—**or**, **perhaps more importantly**, **excluded**—from that bill). In light of **competing priorities,** the absence of key personnel, and the already narrowing congressional calendar (**major** non-appropriations **legislation typically will not move after July in an election year** (2022)), **those prospects appear** to be **slim.** In the meantime, we expect that Congress will continue to focus attention on these issues with more hearings and new legislative proposals, but it remains to be seen when attention will become action.

**at: manchin no stance**

**the plan forces his hand, which triggers our “Manchin vote” link – msu = green**

**2ac Scholtes et al 12/19**

(JENNIFER SCHOLTES, XIMENA BUSTILLO and MATTHEW CHOI, Politico, “How 14 policies could survive — or die — after Manchin’s ‘no’,” https://www.politico.com/news/2021/12/19/14-policies-manchin-social-spending-525681)

What’s in it: A $1 billion boost for antitrust enforcement, split evenly between the Justice Department and Federal Trade Commission, that could help the cash-strapped agencies continue waging major cases against Google and Facebook or launch potential suits against Apple and Amazon. The bill would also give the FTC $500 million to create a bureau to police data privacy, a move Democrats say is long overdue after a cascade of massive data breaches and questions surrounding the tech giants’ efforts to track their users’ online behavior. The FTC would also gain the ability to fine companies that deceive consumers by lying about their privacy or data security practices. **Manchin’s** take: Manchin has supported privacy legislation but has **not specified what kinds of money or authority he would grant the FTC. He also has not stated a position on** the **antitrust** proposals. Republicans and the U.S. Chamber of Commerce have objected to expanding the FTC’s power to intrude into private businesses, especially given the aggressive antitrust agenda of the agency’s Biden-appointed chair.

**at: winners win**

**Popular policies don’t generate further support. *Biden can only go down---not up.***

Perry **Bacon** Jr.3/2/**21**, a senior writer for FiveThirtyEight, “Why Republicans Don’t Fear An Electoral Backlash For Opposing Really Popular Parts Of Biden’s Agenda,” <https://fivethirtyeight.com/features/why-republicans-dont-fear-an-electoral-backlash-for-opposing-really-popular-parts-of-bidens-agenda/>

Republicans in the U.S. House last week **unanimously opposed** President Biden’s economic stimulus bill, even though polls show that the legislation is **popular** with the public. The U.S. Senate will consider the bill soon — and it looks like the overwhelming majority of Republicans in that chamber will oppose it as well. **And it’s not just the stimulus**. House Republicans also last week overwhelmingly opposed a bill to **ban discrimination** on the basis of sexual orientation and gender identity. And the GOP seems poised to oppose upcoming Democratic bills to make it **easier to vote** and spend hundreds of billions to improve the nation’s infrastructure. **All of those ideas are popular** with the public, too. “Duh,” you might say. Of course, the party out of power opposes the agenda of the party in power. Democrats did that during former President Donald Trump’s four years. Republicans did it during former President Barack Obama’s two terms. The parties just disagree on a lot of major issues. You’ve seen this movie before, right? This sequel is a little different, actually. Obama’s health care bill was only hovering around majority support as it moved through Congress. Trump’s proposals to repeal Obamacare and cut corporate taxes were downright unpopular. In contrast, Biden and the major elements of his agenda are popular. And the Republican Party isn’t, which helps explain why it was swept out of power in the 2018 and 2020 elections. So if an **unpopular party** uniformly **opposes popular policies** in the run-up to 2022 and 2024, is it buying itself a ticket further into the political wilderness? **No**t necessarily. There are several reasons to think that opposing popular policies **won’t hurt Republicans electorally**, and conversely, that implementing a popular agenda won’t necessarily boost Biden that much. The first reason that congressional Republicans can afford to oppose popular ideas is one that you have probably read a lot about over the last several years: The GOP has several big **structural advantages** in America’s electoral system. Because of the Electoral College, Trump would have won the presidency with around 257,000 more votes in Michigan, Pennsylvania and Wisconsin, even though he lost nationally by more than 7 million votes. The Senate gives equal weight to sparsely populated states like Wyoming and huge ones like California, so the chamber’s 50 Democratic senators effectively represent about 185 million Americans, while its 50 Republican senators represent about 143 million, as Vox’s Ian Millhiser recently calculated. Gerrymandering by Republicans, as well as the weakness of Democrats in rural areas, makes it harder for Democrats to win and keep control of the House even when most voters back Democratic House candidates. That’s what happened in 2020. Put all that together, and congressional Republicans are somewhat **insulated from the public will**. In turn, the advantage for Biden and congressional Democrats of being closer to the public’s opinions is blunted. Second, electoral politics and policy are increasingly disconnected. More and more Americans **vote along party lines** and are unlikely to break from their side no matter what it does. Some scholars argue that voters’ attachments to the parties are not that closely linked to the parties’ policy platforms but rather more akin to loyalty to a **team** or **brand**. And partisanship and voting are increasingly linked to racial attitudes, as opposed to policy. So GOP-leaning voters may support some Democratic policies but still vote for Republican politicians who oppose those policies. Third, the last several midterm elections have all been defined by backlashes against the incumbent president. You could argue that there’s nothing inevitable about this, and that former President George W. Bush (Social Security reform, Iraq War), Obama (Obamacare in 2010 and its flawed rollout in 2014) and Trump (Obamacare repeal) all did or proposed controversial things that irritated voters. Maybe if Biden sticks to popular stuff he’ll buck the trend. But it could instead be the case that voters from the president’s party tend to be kind of fat and happy in midterms, while the opposition is inspired to turn out. So even if Biden does popular things, GOP voters could be more motivated to vote in November 2022. Fourth, voters may like a president’s policies in the abstract but still think he isn’t doing a good job or that his policies aren’t that effective if those policies aren’t bipartisan. Think of this as the Mitch McConnell theory. Early in Obama’s first term, the last time Democrats had control of the House, Senate and the presidency, the Kentucky senator and others in the GOP leadership came up with a strategy of trying to get as few congressional Republicans as possible to back then-President Obama’s ideas. As McConnell said publicly back then, he viewed voters as **not especially attuned** to the day-to-day happenings in Washington. Instead, he said, they evaluate a president in part based on whether his agenda seems **divisive**, particularly a president who campaigns on **unifying the country** (as both Obama and Biden did). That allows the opposition party to create the perception of division simply by voting against the president’s agenda. Put another way: The opposition party can **guarantee a lack of bipartisan support** — and then **criticize the president for lacking bipartisan support.**

**AT: PC Fails**

**PC can’t swing Manchin misses the point – it failed NOT because Biden lacks influence, BUT because he ignored the nuances of Manchin’s ask and tried to bulldoze him with policy changes that were too liberal for his constituents – the new framework will preserve Manchin’s balancing act – only the plan overreaches – that’s Cohn and Workman**

**Manchin and Sinema are NOT immune**

**Sirota 21** (David Sirota, award-winning journalist at The Guardian, editor and founder of The Daily Poster, editor for Jacobin, former speechwriter for the 2020 Sanders presidential campaign and former aide to then-Congressman Bernie Sanders in the 1990s before launching a career as an investigative journalist, “Joe Biden says his hands are tied on a $15 minimum wage. That's not true,” The Guardian, 3-1-2021, <https://www.theguardian.com/commentisfree/2021/mar/01/joe-biden-minimum-wage-democrats/>)

When a Republican is president, Democratic politicians, pundits and activists will tell you that the presidency is an all-powerful office that can do anything it wants. When a Democrat is president, these same politicians, pundits and activists will tell you that the presidency has no power to do anything. In fact, they will tell you a Democratic president cannot even use the bully pulpit and other forms of pressure to try to shift the votes of senators in his own party.

A tale from **history proves** this latter **myth** is **complete garbage** – and that tale is newly relevant in today’s supercharged debate over a $15 minimum wage.

In that debate so far, we have seen Democratic senators prepare to surrender the $15 minimum wage their party promised by insisting they are powerless in the face of a non-binding advisory opinion of a parliamentarian they can ignore or fire.

That explanation is patently ridiculous and factually false, so Democratic apologists are starting to further justify the surrender by suggesting that even if the party kept a $15 minimum wage in the Covid relief bill, conservative Democrats such as Joe **Manchin** and Kyrsten **Sinema** would block it anyway.

The White House itself is now falling back on the idea that it doesn’t have the votes to do much of anything, insinuating that Joe **Biden** – who occupies the world’s most powerful office – somehow has no **power to try to change the legislative dynamic**. And this **spin** is being predictably **amplified across** social **media**.

To be sure, there is no guarantee that Manchin or Sinema could be moved. Maybe they couldn’t, but maybe they could, considering they have both previously supported bills to increase the minimum wage. And **we know** they may be **sensitive to pressure**. After all, Manchin recently freaked out and whined that “no one called me” when Vice-President Kamala Harris dared to do one straightforward interview with a West Virginia television station.

Whether such pressure ultimately works, the point is indisputable: it is laughable and preposterous to argue that a newly elected president has zero power to even try to shift the dynamic.

And yet, whether you call this all deliberate deception or learned helplessness, this fantastical myth of the Powerless President will inevitably be used to shield Biden from criticism for abandoning his pledge to fight for a $15 minimum wage.

The apologism is particularly absurd because unlike his predecessor Barack Obama, who was a relative newcomer to politics, Biden’s major selling point was that he knows “how to make government work”. The guy explicitly pitched himself as the best Democratic presidential candidate by suggesting that in an era of gridlock, he knows how to make the Democratic agenda a reality and Get Things Done™, like master of the Senate Lyndon Baines Johnson.

That’s where LBJ himself comes in to destroy the narrative that Democratic presidents in general – and Biden specifically – are inherently helpless.

**AT: Won’t Pass – T/L**

**PC controls uniqueness – their ev only describes existing challenges – only ours speaks to whether PC can overcome them – the process of getting everyone on board a narrower bill depends on avoiding over-reach on liberal policies like the plan – that’s Cohn**

**A new compromise is likely – BUT sustaining focus and PC this week is key**

**Brachfeld 12-29** (Ben Brachfeld, reporter at Brooklyn Paper, former reporter for the New York Post, BA political science and economics, New York University; **internally quoting U.S. Rep. Jamaal Bowman (D-NY)**; “‘We Need Historic Leadership from Biden and Schumer’: Jamaal Bowman on ‘Build Back Better’ Negotiations, Mayor-elect Adams, & More,” Gotham Gazette, 12-29-2021, <https://www.gothamgazette.com/state/10996-jamaal-bowman-build-back-better-congress-education>)

Bowman has been highly critical of Manchin, who represents West Virginia, a heavily red state, for blocking Build Back Better for what he describes as underhanded reasons, at the behest of his donors and against the interests of his constituents.

“People just want things to get done for them, for their families, for their children, for their community. And what Manchin is doing right now is he is stopping progress,” Bowman told Gotham Gazette editor Ben Max in the podcast interview, just a few days **after** **Manchin** had announced on Fox News that he was not in favor of moving ahead on Build Back Better. “He is stopping the progress of his own party. He is stopping the progress of those who are most vulnerable in our district and in our country. And…he seems to be more responsive to donors and dark money and special interests than he is to the people of West Virginia.”

**Manchin** has reportedly offered a **counterproposal** to the **Biden** administration, which includes the White House’s goal of universal pre-K and, crucially, hundreds of millions of dollars in money to address **climate change**. But it eliminates the child tax credit (Manchin reportedly believes, despite no evidence, that families spend money from the tax credit on drugs), a crucial lifeline for many families living in poverty, and which Bowman believes is not something he and other progressive Democrats should be forced to compromise on.

“I'm very frustrated that progressives are consistently the ones who are asked to compromise,” Bowman said. “I don't want to compromise on anything, just to be clear. But where we are now, there's going to be some compromise. I hate -- and I never use the word hate for anything -- but I hate that we are compromising on childhood poverty.”

Bowman highlighted the climate investments, but also noted that Build Back Better includes a massive influx of funding for public housing, including NYCHA, as well as childcare, pre-K, violence reduction, workforce development, capping insulin costs, paying home-care workers livable wages, and more. "The largest so-called social investment in U.S. history but one that is equitable...is the game-changer that we need right now,” he said.

While Bowman sounded somewhat **cautiously optimistic** that **some compromise agreement can be reached** in 2022, he believes that **Biden used most of his political capital** getting the $1 trillion infrastructure bill, and is worried that the Democrats **may not be able to pass** various other priorities, including **Build Back Better**, the George Floyd Justice in Policing Act, immigration reform, gun safety regulations, and protection of reproductive rights.

“It's not just on Manchin, it's on [Senate Majority Leader Chuck] Schumer and Biden, who all represent a sort-of old-guard status quo of Congress that is not moving any of these pieces of legislation forward,” Bowman said. “And then when you see declining approval rating numbers, then you wonder why, and you get upset and the administration doesn't seem to know what to do about that.”

"Biden ran on these things, and these things aren't moving,” Bowman said. “Don't run as a progressive and then get in and don't do anything, or do very little to move the progressive agenda forward."

“Hopefully we can **hit the ground running in January**. Because **if we don't**, then we **don't have a shot**,” he said of Democrats retaining their slim House majority in the 2022 elections. “It's gonna be hard to keep the majority if we don't come out swinging in early January."

“We **need** historic **leadership from Biden**,” Bowman said, “and we need historic leadership from Schumer,” he added of his home-state senior senator who ascended to Senate Majority Leader of the 50-50 Senate this year.

**AND it’ll include climate**

**Gold 12-20** (Rich Gold, partner and leader of the Public Policy and Regulation team at Holland & Knight, D.C. lobbying firm; interviewed by Jim O’Brien, host of The Political Life podcast, “Can "Build Back Better" Come Back from the Dead?” The Political Life, 12-20-2021, <https://thelobbyingshow.libsyn.com/can-build-back-better-come-back-from-the-dead>) \*machine transcribed by otter.ai, manually corrected by Kevin McCaffrey

**Jim O’Brien 1:36** Yes. Yes. Great actor. So Rich, busy week in Washington with an incredible ending, wrapping up 2021 with Senator Manchin saying kind of out loud what people were thinking and that he is a no on Build Back Better. So asking you a very open ended question. What's the buzz in Washington? Why do you think he felt the need or made that announcement? And then secondly, which you can go right into, what happens from here?

**Rich Gold 2:24** So if we're, if we're talking about Festivus, it's a it's important to know that Senator Manchin started the airing of grievances early this year. On the Sunday morning talk shows where he could speak to all of West Virginia via Fox News. You know, look, everybody out there, you just need to chill. It's the holidays. We've been doing this forever, right? Like the whole year, we've been legislating these major bills, everybody's tired and cranky, and just wants to open presents. And we're **almost there**. **This too shall pass**. I'm not suggesting that it's a non-event. Obviously, it is a significant bump in the road. **But** I think what Senator **Manchin** was saying is that he has concerns about the House bill as passed, with the modifications that the Senate has so far made to it. The question at the end of the day is what does he support in these bills? Well, **his Committee**, the Senate **Energy** and Natural Resources Committee, **marked up its version**, its title of the bill this week. And obviously, **he strongly supports that**, and other Democrats support it. And that's a big chunk of change that will be helpful for our energy transition. He's been **supportive of a lot of the energy tax breaks** that are contained in the finance component of bill. I think where he runs into problems is things that, from his perspective, are illusory in terms of their promise. So the child tax credit is his sort of number one example. We are only continuing it for one more year in the bill, but the expectation is that it would last far beyond there. We're just not going to pay for it right now. And he has big concerns about that. So I think probably **what you'll see at the end of the day, if we're able to get these things back on track**, generally after everybody chills out, chill out out there, is a bill that has **fewer components** to it. That lasts for the **full budget window**, the full ten years, or the vast majority of those years, and that has, from the senator's perspective, honest scoring. In that sense, we're not starting programs that we phase out, even though we know they're gonna continue. And that sort of thing. This is not to diminish what happened yesterday, you know, yesterday was a tough day for the process. And certainly our thought before Sunday was that, you know, there was a chance we could finish this all up in January. That's clearly off the table, you know, we'll be doing well to finish it off, in, you know, the first quarter of 2022. But there were certainly a lot of bumps in the road, with the Affordable Care Act and President Obama's first year and second year, we didn't get there till the Q2. And we may not get through Build Back Better or whatever supplants it until Q2. But there are a lot of things in that bill that can be resuscitated that Senator Manchin supports including things like free **pre-K**, which is very popular in his home state. And, obviously, you know, **drug pricing**, which, you know, generally has had pretty good support in both the House and the Senate. So I don't think we're at the end of the road here, I think we're probably gonna see the body be **resuscitated in the new year**, and everybody just needs to let their anger evaporate here over the holidays, have a good time, we'll come back. And we'll figure out what the art of the possible is, which is, which is what we do for a living.

**JO 6:55** And so the five - very interesting, by the way, that's a very good point. You know, he did say, he didn't support build back better. But as you just pointed out, **there are a number of components that he does like and does support**. The **500 billion** or so for **climate change**. He has seemed okay with that?

**RG 7:18** Yeah, I mean, he has in a lot of that money goes to a technology transition, and helping the economy kind of transition and invest in emerging technologies, and help mature existing technologies. And **he seems pretty comfortable with that approach** to battling climate change, **he believes climate change is real**, he believes we need to, we need to do something, some of that money goes to, you know, making coal, you know, doable in terms of carbon capture, some of that money goes to industrial emissions reduction, which he's generally been supportive of. So I think I think there are, you know, a lot of items in in that package that are critical, **not only** for battling **climate change**, but are critical as well for making us the **global leader in tech**nology **around that**. And, you know, Senator **Manchin** has been **very strong on those issues as well**.

**JO 8:29** And, given that, I was a little bit surprised to see the strong reaction from the Biden administration, were they just caught flat footed, or?

**RG 8:40** Well, I think, any White House is going to be concerned when they've had a couple of meetings in the last week and didn't hear this coming. So, you know, I think they, they thought they had buttoned up the year with the Senator and agreed to move forward with discussions next year, and that there weren't any more surprises coming. And you know, all of a sudden, they have this thrown at them on the Sunday talk shows with very little heads up. It was it was a tough environment, for sure. And, you know, I think they reacted from that perspective, they too need to kind of get past it and I think we all need to kind of give them a pass. It's the nature of the beast to feel like a little bit frustrated. When do you think you're in one place and you find out very suddenly you're not there. So I think **they'll move past it**.

**AT: Won’t Pass – Manchin**

**Manchin is only posturing because he needs to look like he’s standing up to Biden – PC will produce a deal jettisoning the CTC and retaining climate** – BUT plan ruins Manchin’s balancing act by fiating his vote in favor of a liberal policy

**Workman 1-1** (Samuel Workman, Professor of Political Science, West Virginia University, “Understanding Joe Manchin's BBB stance: Likely his standard West Virginia pivot,” Salon, 1-1-2022, https://www.salon.com/2022/01/01/understanding-joe-manchins-bbb-stance-likely-his-standard-west-virginia-pivot\_partner/)

As a scholar and native of the state who has long followed West Virginian politics, I know that Manchin is typically deft in balancing support for government programs that will benefit people in the state with the social conservatism that many adhere to. It is what he did in the "Dead Wrong" ad, and it is what he is trying to do now by delivering tangible benefits on some dimensions, while "standing up" to the president and Democratic leadership on others.

What say the lodestar?

There are reasons to suppose that West Virginians would be in favor of many elements contained in Build Back Better, Biden's package of legislation that aims to fix problems ranging from child care costs to climate change.

The legislation contains not only the child tax credit, which would send monthly payments of up to $300 per child to families across the U.S., but also improvements to the Affordable Care Act, upgraded infrastructure for health care and better access to housing. Its largest portion is $555 billion dedicated to climate change — representing the first major legislative action on climate in the U.S.

In a state where poverty is high, rural health care is sparse and climate change threatens to bring frequent, intense flooding, it seems unimaginable that the senator would fail to support the legislation.

Yet on Dec. 19, 2021, Manchin announced on Fox News that he would not. That Manchin did this on Fox News speaks to the general public sentiment in West Virginia.

It sparked a very public "battle of the Joes" in which Biden maintained that Manchin dealt in bad faith after months of personal cajoling and negotiations by the president. Manchin, for his part, reportedly offered Biden everything in Build Back Better except for the Child Tax Credit.

The fight threatens consequences for man and party. The viability of the razor-thin Democratic majority's ability to govern headed into the 2022 midterms is at stake. But the conflict also poses a major problem for Manchin himself, with Biden using Manchin's opposition to the child tax credit as a political pressure point — publicly shaming the West Virginian for failing to support a measure that would deliver support to many families in his own state.

Reconciliation masks broad agreement

To understand what Manchin opposes, it's useful to understand what reconciliation does to a multidimensional bill.

Normally, major legislative initiatives would each have their own bill. But each would need to pass the Senate with 60 votes in order to avoid a filibuster that could end up killing the bill. To get past that hurdle, Democrats have piled all of Biden's initiatives into what's called a budget reconciliation bill, which only requires a majority of votes to pass — a much lower threshold and one that a united Democratic Party could meet in the Senate.

Yet because legislators must cast a single vote for what is a diverse package, disagreement on one dimension can sink the whole reconciliation bill — even if there is broad agreement on the other proposals. In this case, **Manchin** wants to **jettison** the **c**hild **t**ax **c**redit, but **made an offer** that reportedly **includes** the improvements to the ACA, health care infrastructure, as well as the **climate change** provisions — remarkable for a senator from a state so dependent on fossil fuels for economic growth and stability.

It is **likely** **Manchin will return to the bargaining table** over the next few weeks, absent, or in spite of, the public shaming over the **c**hild **t**ax **c**redit from the president.

The typical Manchin pivot

West Virginians tend toward conservative views on typical culture war issues like guns, abortions and race.

The purported support for Build Back Better in West Virginia is likely overstated among the electorate — polling is sparse and generally done by supportive organizations — though West Virginians typically are in favor of government programs that benefit them. Winning elections in West Virginia historically entails candidates pledging to bring home benefits to the state. And this is exactly the approach Manchin typically adopts, delivering policy that has majority support, while signaling his fidelity to culture war issues.

Manchin has continually referred to his constituents as his lodestar: "If I can't go back home and explain it, I can't vote for it."

Normally, Manchin gets pressure on social issues from the more liberal wing of the Democratic Party. This criticism from the wider party is fuel for his positioning and policy goals within the state. On such issues, the more criticism he receives from the left, the better. He is deft at pivoting on this pressure to make policy that has general support in the state, such as displayed in the "Dead Wrong" ad.

The public pressure on child tax credits is not the norm and does not offer the same pivot for Manchin. West Virginians value programs like the child tax credit.

Furthermore, support in the state for child tax credits means Manchin is left exposed politically in a way that damages his ability to maintain the fragile coalition that he normally relies on. And, despite progressive outcry for a primary challenger, make no mistake about it, no other Democrat could hold that West Virginian seat.

Manchin's seeming obstinance can be understood in two ways. He's either a conservative Democrat failing to get behind the president's legislative agenda or he simply wants to prioritize programs within that agenda that keep to a general spending target.

Manchin's opposition to the child tax credit reflects his concern about how the monthly benefit will affect the budget. Simultaneously, colleagues say he is concerned over how lower-income citizens will spend the money, reportedly worrying about it being spent on drugs.

This second concern echoes a common conservative trope. But if a comment like that might hurt a politician in a liberal state, it is understandable in the context of the West Virginia electorate's social conservatism.

**Despite Manchin's comments** sparking predictions that his position **doomed** **B**uild **B**ack **B**etter, it may **not** be as clear cut as that.

The senator's **willingness to accept all the other major provisions** in the bill leaves **plenty of room for bargaining**. If Manchin can find a way to do his **customary pivot** — supporting the Democratic proposals while **satisfying his constituents** that he's being socially conservative and **standing up to the left** — he may well **get on board** and **put away the shotgun**.

**Biden can swing Manchin – at least on the climate provisions**

**Gongloff 12-20** (Mark Gongloff, editor with Bloomberg Opinion, former managing editor of Fortune.com, ran the Huffington Post's business and technology coverage, and columnist, reporter and editor for the Wall Street Journal, “It’s Joe Manchin’s World. We Just Live in It,” Bloomberg, 12-20-2021, https://www.bloomberg.com/opinion/articles/2021-12-20/joe-manchin-on-build-back-better-what-will-he-support)

How Do You Solve a Problem Like Joe Manchin?

On paper, Joe Manchin (D-Maserati) is just one of 100 U.S. senators, with no more influence than either of North Dakota’s senators, who I challenge you to name without checking Google first.

In reality, Manchin is the median member of an evenly split legislative body, giving him enormous influence he exercises often, which is why you know his name and not that of either John Hoeven or Kevin Cramer. He flexed these muscles this weekend by seeming to sink the chances of the **B**uild **B**ack **B**etter bill, the would-be signature achievement of his ostensible party leader, Other President Joe Biden.

This caused a lot of Democratic heads to understandably explode and led some to wish Manchin would just leave the party already — although that would only put the GOP back in charge of the Senate, making Biden’s life even more miserable. And **Manchin** may **not** be the **hard “no” on BBB that he seems**, writes Jonathan Bernstein. If anything, **publicly trashing the bill** could **give him the political room to vote** for a different version more to his liking.

We will spend the next several weeks trying to figure out if such a mythical bill exists, though Manchin has given us some rough guidelines. Assuming he sticks to those, Matthew Yglesias suggests the Dems could **easily cut BBB down to Manchin size** and **still get** quite a lot of bang for their buck, with benefits for the **climate**, parents and more.

The question then would be whether some other swing-vote Democrat abandons ship. Still, accommodating Manchin would be a far more fruitful exercise, writes Ramesh Ponnuru, than simply whining and browbeating him, as enjoyable as that might be. Biden’s presidency, and maybe the economic recovery, hang in the balance.

**AT: Won’t Pass – Manchin Climate / Water Down**

**He’s on board full climate funding**

**Yglesias 12-23** (Matthew Yglesias, columnist for Bloomberg Opinion, co-founder and former columnist for Vox, “Build Back Better can come back better, by Matthew Yglesias,” The Press of Atlantic City, 12-23-2021, https://pressofatlanticcity.com/opinion/article\_0dc03b6a-0df5-5911-9ae7-79e2f008be70.html)

President Joe Biden’s signature economic legislation **isn’t dead**. In fact, if Democratic Party leaders could only bring themselves to make a few hard choices, Build Back Better could even get better.

Momentum for the nearly $2 trillion bill has seemingly collapsed, with talks between Senator Joe Manchin and the White House breaking down and Senate Majority Leader Chuck Schumer’s self-imposed Christmas deadline looking impossible. But it’s never a good idea to take congressional deadlines seriously. And Democrats should realize that **Manchin’s red lines** leave them **plenty of room** to enact a major piece of legislation that **all factions** of the party can be proud of.

To see how to fix the bill, though, it’s necessary to understand how the current mess came to pass.

It all starts with the arcana of Senate procedure, in particular the budget reconciliation process. Most bills need 60 votes to pass, due to another bit of Senate arcana, but a budget reconciliation bill needs only 50 — which is exactly the size of the Senate Democratic caucus. (The bill would pass when the vice president breaks the tie.) So any Democrat who wants their legislative proposal to have a chance will try to include it in the reconciliation bill.

That helps explain why Build Back Better has always been a grab bag of progressive ideas rather than a thematically coherent piece of legislation. Democrats basically have one shot to legislate. So they started out with a giant $3.5 trillion bill that doled out goodies to every element of the party’s coalition. They paid for it all with increased taxes on the wealthy, but moderates revolted at some of the revenue proposals, so the whole thing got cut down to $1.75 trillion.

That’s still a lot of money. But Democratic leaders didn’t want to disappoint anyone in their coalition by telling them “no.” So the legislation they passed in the House is full of weird spending phase-ins and mid-decade revenue expirations in order to limit the total cost.

When this deal reached the Senate, Manchin threw a wrench in the works. He regards these provisions as budget gimmicks, since his House colleagues clearly intend for the programs to be made permanent.

On the facts, I think Manchin is wrong: I think it’s unlikely that the expiring programs would be extended. But that only underscores the foolishness of the House’s bonanza of expiring provisions. The $1.75 trillion headline number is a large sum of money — substantially bigger than the 2010 Affordable Care Act — and Democrats ought to be able to accomplish a lot of good with it. To spend $273 billion on a subsidized child-care program that only lasts for a few years, for example, would be a wasted opportunity when the money could be used on a smaller but permanent and durable program.

The problem here is simple to describe, if not solve: Nobody in the party wants to make tough choices and tell some groups that they aren’t going to get what they want.

Since Manchin and Senator Kyrsten Sinema were responsible for cutting the bill’s overall price tag, the White House and congressional leadership would like them to break the bad news to individual members and interest groups about which programs are getting killed. So far they have been unwilling to play that role. The result is a pointless and frustrating exercise for everyone — but it shouldn’t be hard to come up with a good bill here.

Start with child poverty. The Tax Cut and Jobs Act of 2017 increased the child tax credit from $1,000 to $2,000 per year and made some of its benefits available to the lowest income families — but also scheduled these enhancements to expire in 2025. Then this year’s American Rescue Plan boosted the credit (for one year) to $3,600 for children under 6 and $3,000 for kids between 7 and 17. It also made the tax credit fully refundable, so even families with no income could get the full benefit.

Progressives want to make this bigger child tax credit permanent, which it should be. But that would cost about $1.6 trillion. So advocates like Sen. Michael Bennet have been trying to sell Manchin on a one-year extension, and Manchin is saying no.

Here’s a more viable idea: The Jain Family Institute says that about half of the poverty-fighting impact of the enhanced tax credit comes from full refundability rather than making the credit larger. The Tax Foundation says that change plus making 2017’s enhancement permanent would cost $580 billion.

Then there’s the part of the legislation dealing with **climate**. In many ways the emotional and intellectual core of the bill is the **$500 billion** worth of investments in **clean energy** production and other climate-related issues. This is an issue Democrats care passionately about — and, remarkably, **even Manchin is on board**.

**He'll support climate**

**Wasson and Davison 12-20** (Erik Wasson, Capitol Hill reporter at Bloomberg LP, former staff writer at The Hill, MS journalism, Columbia University; and Laura Davison, tax reporter at Bloomberg LP, MA journalism, Missouri School of Journalism; “Democrats Wrestle With Where to Cut Wish List to Satisfy Joe Manchin,” Bloomberg, 12-20-2021, https://www.bloomberg.com/news/articles/2021-12-20/democrats-wrestle-with-where-to-cut-wish-list-to-satisfy-manchin)

President Joe Biden’s economic agenda now hinges on whether Democrats can make enough changes to satisfy moderate Joe Manchin, a pivotal vote in the Senate whose objections Sunday ground the roughly $2 trillion plan to a halt. The administration and its allies in Congress will look for programs to cut or significantly revise in the tax and social-spending plan, known as “**B**uild **B**ack **B**etter,” that carries the bulk of Biden’s priorities on climate change, health-care costs and child-rearing expenses.

The West Virginia Democrat outlined demands on Monday that could form the basis for a **new plan**. He wants to start by reducing its cost to $1.75 trillion and extend its benefit programs to 10 years. He would rather cut entire programs from the bill than shrink benefits across the board to make them fit.

While such changes to the bill may bring Manchin back aboard, wholesale cuts risk driving away other Democratic votes. With Republicans uniformly opposed to the plan, Biden needs support from all 50 senators who caucus with Democrats to win passage under the budget maneuver known as reconciliation.

**BEST CHANCE**

**Universal pre-k**: The House-passed bill would expand free education to 3- and 4-year-olds through payments to states, a provision Manchin has praised.

**Obamacare subsidies**: The House bill extends for two years Affordable Care Act tax credits set to expire for those making more than the poverty line. Doing so is in line with moderates’ efforts to bolster Democrats’ signature policy achievement in recent decades.

**Prescription drug cuts**: Manchin has repeatedly pushed for cuts to drug prices and he doesn’t think the bill goes far enough. What’s more, drug price provisions don’t push up the cost of the bill.

**Climate change tax credits**: The expansion of tax credits for renewable power, tax credits for hydrogen and nuclear power and advanced and clean energy manufacturing supports likely **can get Manchin support**, even if at lower levels.

**Corporate minimum tax and international tax changes**: Minimum taxes on domestic financial-statement profits and offshore business earnings generate hundreds of billions of dollars in new revenue and have broad support among Democrats. Previous versions of the legislation would have prevented U.S. companies from moving assets and jobs offshore, which Democrats, including Manchin, say is important.

**Stock buyback tax**: A 1% excise tax on companies when they buy back their own stock solves two problems for Democrats. The proposal raises $124.2 billion to offset new social spending and proponents say it would help equalize the tax treatment between corporate dividends and share repurchases.

Net investment income tax increase: The House bill expands a 3.8% tax funding Medicare to cover the small business, or pass-through income, of high earners. That income had previously been exempted from the tax.

IRS enforcement: Democrats want to give the IRS $80 billion to expand audits, improve taxpayer service and upgrade their computer systems to boost tax compliance. Manchin has said he supports ensuring people pay the taxes they already owe before imposing new taxes.

**MEDIUM CHANCE**

**Smaller expanded Child Tax Credit**: Democrats planned to use the bill to renew $3,600 credits for children under 6 and $3,000 benefits for older children, which works out to $300 a month for young children and $250 for those six and over. Given Manchin’s opposition to the costs, Democrats may need to reduce the credits and the income thresholds for phasing out the benefit. Manchin suggested $200,000 income cap in a radio interview.

**Earned Income Tax Credit**: The bill would expand the availability of the earned income tax credit, a low-income subsidy, to more childless workers, helping some of the poorest Americans. Work requirements, which Manchin likes, are already built into this credit.

**Millionaires surtax**: A millionaire surtax would place a 5% levy on individual incomes in excess of $10 million and an additional 3% tax on those over $25 million. Manchin said he supports higher taxes on wealthy Americans, but also said he doesn’t want tax hikes to be punitive.

**SALT**: An expansion of the state and local tax, or SALT, deduction is a priority for many in the House and any bill likely cannot pass if that write-off isn’t addressed. Senate Democrats are working on a compromise to limit the deduction to those earning under a certain income level and Manchin has expressed ambivalence about what they ultimately decide. The $80,000 cap in the House bill for the deduction could come much closer to the $10,000 level set in current law.

**Housing**: The House bill has more than $100 billion for public housing, affordable housing, home-owner assistance and related services but Democrats rarely highlight these provisions. The levels could be greatly reduced to shoehorn them into a smaller bill.

**Home healthcare expansion**: The House bill has a little-touted provision that matches funds to the states for home health care and extends coverage of administrative costs.

**Electric Vehicles Tax Credit**: Democrats will likely need to overhaul their plans for electric vehicle tax credits — or scrap them all together. The current bill provides a $7,500 consumer tax credit to be made refundable and expanded by $4,500 for cars assembled domestically in union plants with an extra $500 for batteries made in the U.S. Manchin, whose state is home to a non-union Toyota factory, said he is opposed to the union portion of the tax credit. He also wants income limits on the credit.

**LITTLE CHANCE**

**Paid leave**: Manchin has never supported government-subsidized paid family leave as laid out in the House bill but has said a bipartisan deal on a different version is possible.

**Medicaid expansion**: The House bill expands Medicaid eligibility to residents in states that chose not to expand coverage under Obamacare. Manchin says it isn’t fair to states that are spending their own money to expand Medicaid. It is a must-have for Senator Raphael Warnock, who will fight for its inclusion.

**Child Tax Credit refundability**: Manchin says he also wants to impose some work requirements on the child tax credit so that parents with little or no income can’t claim the benefit. Democrats had written the tax credit so the lowest-income households with children could still get the money. Manchin has said he doesn’t want parents without any tax liability to get the credit in the form of a tax refund.

**Methane fee**: Manchin has been opposed to new fees on methane that would hurt the fossil fuel industry.

**Bike tax credit**: Democrats may have to slash some provisions with limited constituencies, including a tax rebate for electric bikes. The House envisioned that the maximum $900 benefit is only available to individuals who earn up to $75,000 or couples who make $150,000.

**Journalist tax credit**: An employment tax credit for local news outlets could be eliminated. The preference would give local news organizations a $25,000 benefit to offset a journalist’s payroll taxes in the first year of employment and $15,000 for the subsequent four years. Republicans have said Democrats are seeking to buy favorable coverage.

**Immigration**: The Senate parliamentarian has already repeatedly ruled against a pathway to citizenship or relief from deportation for undocumented immigrants. Manchin has said he would not support overruling the Senate rules official.

**Vaping tax**: Senate Democrats already removed this nicotine fee from the House-passed bill even before Manchin came out formally against the whole package.

**AT: Won’t Pass – Sinema**

**Sinema is winnable**

**Rob 1-1** (Rob in Vermont, political pundit on DailyKos, “The way forward is to view Manchin and Sinema as opportunities not just as obstacles,” Daily Kos, 1-1-2022, https://www.dailykos.com/stories/2022/1/1/2072163/-The-way-forward-is-to-view-Manchin-and-Sinema-as-opportunities-not-just-as-obstacles)

So how can Sens. Joe Manchin and Kyrsten Sinema be opportunities for progress, not just obstacles to progress?

First, we have seen in the past that they actually will support progressive legislation; both of them voted for President Biden’s first major program, the American Rescue Plan, which has helped reduce poverty in America to the lowest level on record. No Republicans voted for it. They also both supported his second major program, the Infrastructure Investment and Jobs Act, which will make a lot of progress in areas such as replacing lead pipes which poison drinking water (EPA estimates there are 6 to 10 million of these pipes across America) and repairing roads and bridges, which is of course necessary even as we move more and more to using eco-friendlier vehicles — which this legislation also invests in, as well as in public transportation and expanding broadband access. These investments will employ a great many American workers. The vast majority of Republicans voted against this bill.

So though they are hardly model Democrats, it’s reasonable to believe that there is **some version** of a **B**uild **B**ack **B**etter bill with substantial investments in progressive programs that **Manchin** and **Sinema** **would support**. For example, it's been reported that Manchin has floated investing $1.8T to fund universal pre-K (a program already available in his home state), expansion of the ACA, and **climate** action, but he won’t support continuing the child tax credit (which has had such a tremendous impact on reducing poverty). Who knows exactly what and how much investment he would end up supporting, but his and **Sinema’s votes** on a **BBB** bill are **likely attainable**.

So Opportunity #1 for Democrats is to **pass whatever** progressive legislation has Manchin and **Sinema’s blessing**, because passing a BBB bill with some good progressive programs in it is far better than passing no bill.

**AT: PC Not Key**

**2 – more importantly, it’s key to prevent defections on amendments that otherwise gut any deal’s ability to solve our impacts**

**Super 12-16** (David A. Super, Professor of Law and Economics at Georgetown Law School, formerly taught law at Columbia, Harvard, Howard, Maryland, Penn, Washington & Lee, and Yale, former general counsel for the Center on Budget and Policy Priorities, “Build Back Better or Build Back Best?” Balkinization, 12-16-2021, https://balkin.blogspot.com/2021/12/build-back-better-or-build-back-best.html)

The question was **not** whether the large package could win enactment but rather **how to get to a package that could**. President Biden could have made his best guess of what could get through and scaled his budget accordingly. Any such guess would have been inevitably imprecise, and he might have limited the discussion more than was necessary from the start. Progressive social reforms typically get the lowest of what the budget, the policy, and the politics, respectively, will allow. If the President’s budgetary top-line had been politically viable but some of his individual proposals were not, the package would have shrunk further.

Democratic leaders, too, could have tried to match the package’s size to what could pass by putting more modest limits in the concurrent budget resolution that authorized the current reconciliation process. Getting moderate and conservative Democrats to vote for the larger numbers, and endure the resulting criticism back home, in hindsight might not have been the best expenditure of **finite political capital**. On the other hand, negotiating against oneself when the politics are unclear is usually unwise. Many of the most politically unpopular features of the 2017 tax law resulted from Republicans setting too low a ceiling on their package’s revenue losses before they had complete estimates and then scrambling to plug the gap. Lower allocations in the budget resolution also might have inhibited committees’ development of coherent policies.

The higher numbers in the budget resolution likely misled many progressives into believing that a package approaching that size was truly possible. In fact, moderate and conservative Democrats had put the leadership on notice early that they would not support spending anywhere near that level. It now appears that the leadership did not have a clear plan for how to manage grassroots expectations. And many progressive leaders wanted to keep those expectations high so that their base would be energized to press for the largest possible package.

The mismatch between the large package that the budget resolution made procedurally possible and the much smaller one that was politically possible created a series of tensions. In the House, progressives wanted to go on record voting for a large package even if it could not ultimately become law; Members from conservative districts, however, did not want to take the political heat for voting for controversial measures with no chance of enactment. Votes for ambitious House proposals widely known to have no chance in the Senate played key roles in the Democrats’ loss of their House majorities in 1994 and 2010. The ultimate compromise was a bill containing many features that clearly could not pass the Senate but also falling well short of what the budget resolution allowed.

As the bill moved to the Senate it faced three challenges, only one of which is widely understood. First, Democratic leaders and now President **Biden** must **negotiate** with the **moderate** and conservative Democrats to secure the **fifty votes** needed to allow Vice President Harris to break a tie and put the bill over the top. Second, the bill must undergo a “Byrd bath” through which the Senate Parliamentarian determines which provisions of the legislation violate the special Senate rules governing reconciliation bills. With no chance of obtaining the sixty votes required to waive these points of order and potential procedural complications if the provisions are stricken through objections on the Senate floor, Senate Majority Leader Schumer will remove anything against which the Parliamentarian would sustain points of order. And third, once the legislation reaches the floor, Republicans have relatively broad ability to force Democrats to vote on an unlimited number of politically difficult amendments.

These three processes interact. Democratic leaders do not want to waste what limited leverage they have in negotiations with moderate and conservative Democrats on provisions that ultimately will not survive the Byrd bath. With some high-priority provisions facing reluctance both from the moderate and conservative Democrats and from the Parliamentarian, the Byrd bath needs largely to be complete before the leaders know which pieces are worth prioritizing in negotiations. It now appears that the Parliamentarian’s rulings on several key provisions, which had been expected imminently, may not appear until January. This ensures that no deal with the moderate and conservative Democrats is possible until the New Year.

**Moreover**, many people **wrongly assume** that whatever package Senator Schumer and President **Biden** can negotiate with Sens. **Manchin** and **Sinema** will be the final legislation. The leadership needs a deal with all Democratic senators to bring the bill to the floor, **but** once the bill is there, the leadership likely will **need every Dem**ocrat to **vote against all** Republican **amendments** that

would weaken the bill. Agreements to oppose all amendments to an agreed-upon package are common in congressional negotiations, but those agreements generally come only when all parties are genuinely content with the deal. As progressives keep pressing the moderates and conservatives to accept provisions the latter thoroughly dislike, the odds of a deal to oppose all amendments dwindle dramatically.

The process by which these amendments come to a vote increases the pressure on vulnerable Democrats. To prevent the minority from filibustering through the amendment process, reconciliation rules require that, after the permissible twenty hours of debate have been exhausted, any amendments remaining be decided without debate. (Customarily, the Senate grants unanimous consent for one minute of debate on each side of each amendment.) This gives senators no opportunity to explain votes that may be unpopular back home. An energized minority can force votes on dozens of hot-button amendments during such a “vote-a-rama.” Thus, for a controversial provision to be enacted, moderate and conservative senators must not only vote for a large package containing that provision but also must vote down an amendment to strike that provision from the bill.

Progressives understandably expressed disappointment at several key omissions from the version of the legislation presented as being the near-final deal earlier this Fall. Progressives pressed senators not to make that version final until some key provisions that had fallen out of the legislation, such as paid family leave, were restored. In taking this position, they implicitly assumed that the version they had seen was a floor beneath any final deal and that, with time to apply more pressure to Senators Machin and Sinema and more time to develop alternative designs that the Parliamentarian would approve, something better could be achieved.

It now seems clear that the final legislation will be significantly weaker than the version released as a tentative deal. It is certainly clear that progressives were not the only ones to mobilize as the legislation stalled. The cost of the largely futile effort to pressure reluctant senators to allow inclusion of provisions they clearly oppose – provisions that they might well have voted to strike during vote-a-rama – has been stalling the legislation long enough to allow Republicans and special interest lobbyists to pick apart important provisions that were securely included in the legislation initially announced. For example, after having previously accepted expansion of the Child Tax Credit, Senator Manchin is now arguing publicly for its complete removal. The longer the legislation is delayed to try to rescue doomed provisions, the more similar casualties are likely.

Build Back Better still seems likely to pass eventually. And when it does, it will make dramatic improvements in several areas of long-neglected social and environmental policy. But before that can happen, someone will have to tell several worthy constituencies with compelling cases for important proposals that the train will have to leave the station without them. That will be tragic, and at this point it is unclear who has the heart, and the credibility, to do that.