# ADA Round 6 Wiki Doc

# 1AC

## 1AC

### Plan---1AC

#### The United States federal government should increase prohibitions on anticompetitive private sector business practices that substantially reduce bargaining power of workers in labor markets.

### Inequality---1AC

#### Increased concentration of buyer power in labor markets drives inequality---only antitrust can address the supply and demand side of wage suppression.

Lauren Sillman 20. Antitrust Associate, Clifford Chance LLP; J.D., Georgetown University Law Center; B.A., University of Iowa. “ANTITRUST FOR CONSUMERS AND WORKERS: A FRAMEWORK FOR LABOR MARKET ANALYSIS IN MERGER REVIEW.” https://lawjournal.ku.edu/wp-content/uploads/2020/12/4\_Sillman\_Antitrust\_V30\_I1.pdf

A détente is especially desirable today in light of the severe stagnation in American wages. In the past thirty-five years, U.S. gross domestic product has all in all grown but the purchasing power of the average worker has barely changed.3 Labor’s share of national income declined precipitously in the 2000s, and in the five years after the Great Recession it was lower than at any point since World War II.4 Because most people get most of their income from labor, and because those who get most of their income from capital tend to be wealthy, this income shift has dramatic consequences for inequality. Economists and policymakers have advanced numerous explanations for this troubling trend ranging from the decline of unions, to tighter monetary policy, to increased trade liberalization, and more.5 One explanation that has received attention in recent years is an apparent epidemic of market concentration and flagging competition.6 A growing body of evidence suggests that over time fewer and fewer firms have come to dominate sectors across the economy.7 One study found that from 1982 to 2012, the share of sales by the sectors’ top four firms increased in manufacturing, finance, services, utilities, retail trade, and wholesale trade.8 Average markups above cost—a manifestation of market power—rose from eighteen percent in 1980 to sixty-seven percent in 2014.9 This increase in concentration is due, in part, to a growing wave of mergers. By one count over 325,000 mergers have been announced since 1985.10 That year, around 2,000 mergers with a value of a little over $300 billion were announced.11 In 2018, 15,000 mergers occurred—valued at just under two trillion dollars.12 The ability of firms to charge prices for their products or services that exceed the competitive level harms workers in their role as consumers, and the reverberating inefficiencies have consequences for wages as well.13 Workers are harmed more directly, though by firms with buyer power in labor markets. Instead of enabling firms to charge high prices for the goods or services they sell, buyer power—also known as monopsony power—allows firms to push wages below the level workers would receive in competitive labor markets. A recent study applied the Herfindahl-Hirschman Index (HHI), which is used to measure market concentration. The Department of Justice (DOJ) and the Federal Trade Commission (FTC) (“the agencies”) used HHI in merger review, and found that at least forty percent of job markets fell into the “highly concentrated” category, making them especially susceptible to anticompetitive behavior by employers.14 The hiring markets for the twenty-five percent most concentrated occupations in almost every commuting zone in the country have concentration levels nearly tripled the “highly concentrated” threshold.15 In commuting zones across middle America, the hiring market for nearly every occupation is highly concentrated.16 As discussed below, a concentrated labor market generally increases the buyer power of participants in that market. Recent research on labor supply elasticity, which is an indicator of vulnerability to employers’ market power, further challenges traditional assumptions of competitiveness in labor markets.17 Historically, antitrust enforcers have given far less attention to firms’ power as buyers than as sellers and have been particularly hesitant to check their power as buyers of labor. However, the tide may be beginning to change. Federal and state enforcers have begun to challenge anticompetitive labor contracts,18 and there is a small but growing body of precedent addressing increased buyer power in mergers.19 In 2016, the Obama Administration’s Council of Economic Advisors issued a report describing the problem of labor market power and encouraging greater attention to the issue by the antitrust enforcement agencies.20 Separately, then-Acting Assistant Attorney General Renata Hesse stated that antitrust enforcement efforts should not only be concerned with the welfare of consumers, but should “also benefit workers, whose wages won’t be driven down by dominant employers with the power to dictate terms of employment.”21 Nevertheless, to date, the agencies have never blocked a merger on the basis of harm to workers. There are many reasons that may account for the dearth of enforcement, including misunderstandings of the relationship between labor and antitrust laws, the momentum of precedent focused on seller-side harms, and the resistance of some to increased antitrust enforcement as a general matter.22 In addition to these practical and ideological impediments, mistaken intuitions about the economics of buyer power create obstacles for enforcement. At first glance it would seem that if firms use their buyer power to lower their costs, downstream customers are ultimately benefitted. Therefore, the consumer welfare standard, which underpins modern antitrust enforcement, would seem to counsel against intervention contrary to buyer power. In most cases, though, this intuition is simply wrong.23 More competitive labor markets are not just good for workers; they are good for consumers too. Clarifying the relevant interests at stake is crucial as policy reforms begin in earnest, and there is reason to believe that such reforms are on the horizon. Several politicians have recently advocated for greater antitrust scrutiny of labor markets. For example, in 2017 Senator Amy Klobuchar introduced a bill that would require the enforcement agencies to pay greater attention to buyer power in merger review.24 Senator Elizabeth Warren—who seeks more interventionist antitrust policy on many fronts25—and Senator Cory Booker—who in 2017 sent a letter to the DOJ and FTC citing concern with the failure of the agencies to address labor market power—have also taken up the cause.26 Labor market issues are also garnering increased attention from antitrust scholars.27 In an article published in 2018, C. Scott Hemphill and Nancy Rose argued for more interventionist merger policy directed at various forms of buyer market power.28 The same year, Suresh Naidu, Eric Posner and Glen Weyl published Antitrust Remedies for Labor Market Power, a sweeping analysis of the myriad options available to enforcers to promote more competitive labor markets.29 This legal analysis has been spurred by a growing body of empirical work on buyer power in labor markets.30 An array of scholars concluded that labor market power is a problem and one that antitrust institutions should do more to address. This paper similarly argues that buyer power—and specifically buyer power in labor markets—deserves greater antitrust scrutiny and, to that end, develops a framework for systematically evaluating labor market power in merger analysis. The enthusiasm of some progressive politicians for more interventionist antitrust policy has drawn skepticism from many antitrust practitioners and scholars who worry that reforms will unmoor antitrust policy from its foundational principles and turn antitrust enforcement over to political whims.31 At least with respect to labor market power, however, economic theory and empirical evidence support increased enforcement without any reform of the basic legal framework and without deviating from substantial consensus about the proper role for antitrust in the economy.

#### Antitrust is key---permissive guidelines enabled the rise in monopsonies, expanding a worker welfare standard to labor markets is key to wage equality.

Joseph E. Stiglitz 21. Joseph E. Stiglitz is an economist and professor at Columbia University. He is the co-chair of the High-Level Expert Group on the Measurement of Economic Performance and Social Progress at the OECD, and the Chief Economist of the Roosevelt Institute. He has served as chief economist of the World Bank and chairman of the Council of Economic Advisers. He was awarded the Nobel Prize in economics in 2001“Fostering More-Competitive Labor Markets” Inequality and the Labor Market: The Case for Greater Competition. Brookings Institution Press. (2021) https://www.jstor.org/stable/10.7864/j.ctv13vdhvm.6

Of course, this is not the world in which we live. Even the corner grocery store knows it can raise its prices a little bit without losing all of its customers, which is what the standard competitive theory suggests. More and more, firms have demonstrated high and increasing levels of market power (Philippon 2019; Stiglitz 2019). At the same time, the bargaining power of workers has weakened. It was never an equal match. An employer typically can find an alternative worker far more easily than a worker can find an alternative employer. This is especially so during slack periods in the labor market, or in places where there has been persistent unemployment. Leaving or losing a job is often greatly disruptive to workers and their families. There are mortgages to pay, children to feed, bills coming due. From the perspective of workers, jobs are not easily substitutable. As the chapters in this volume make abundantly clear, this imbalance of market power has consequences. It enables firms to raise prices for goods and services—lowering the real incomes of workers. It enables firms to suppress wages of workers below what they would be in a competitive marketplace—contributing to the inequality crisis facing the country. This economic inequality gets translated into political inequality, especially in our money-driven politics, resulting in rules that evermore favor big corporations at the expense of workers. The growing political inequality, in turn, hampers economic performance, and ensures that most of the benefits of our anemic economic growth go to those at the very top (Stiglitz 2012). In the middle of the 20th century, John K. Galbraith (1952) described an economy based on countervailing power—where labor institutions and government checked the power of large corporations and financial institutions. But policy choices over the past half century have upset this balance in ways that have weakened not only the workers, but also the economy and the country. This volume explores what has happened by concentrating on one understudied part of the problem: the labor market. Explaining the Weakening of Workers’ Bargaining Power Multiple factors have contributed to the weakening of workers’ bargaining position. This volume focuses specifically on the ways that employers have increased their market power over workers. Employer Concentration Permissive antitrust enforcement has promoted concentration across industries, reducing the number of employers—particularly those in rural areas (Stiglitz 2016).1 With few alternatives, workers must accept the low wages that large local employers offer. More precisely, limited competition by buyers—in this case, employers who buy labor services—gives rise to monopsony power.2 Any firm with monopsony power knows that if it hires more workers, it will drive up the wage. The marginal cost of hiring an additional worker is thus greater than the wage. The result is lower employment and lower wages than if there were a competitive labor market. The chapter by Marinescu in this volume forcefully documents the degree of monopsony in labor markets across the United States, especially in rural areas—areas where, not surprisingly, wages lag behind the rest of the country. Collusion Typically there is some, but limited, competition in the labor market, but it is competition that is insufficient to achieve anything approximating what would emerge in a truly competitive marketplace. But employers often do not like even this limited competition, because even some competition means that wages are higher than they would be with no competition. Thus, firms sometimes collude to not compete; and that collusion drives down wages. The incentives for firms to do this—if they can get away with it—are obvious: collusion has been a feature of capitalism from the start. As Adam Smith observed in The Wealth of Nations, “Masters are always and everywhere in a sort of tacit, but constant and uniform, combination, not to raise the wages of labour above their actual rate. . . . Masters, too, sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy” (Smith 1776, book 1, chap. 8). Even then, Smith had observed an asymmetry not only in bargaining power, but also in capitalists’ response to workers’ attempts to redress the balance. When workers combine their forces, “the masters . . . never cease to call aloud for the assistance of the civil magistrate, and the rigorous execution of those laws which have been enacted with so much severity against the combination of servants, labourers, and journeymen” (Smith 1776, book 1, chap. 8). This stance, of course, was markedly different from capitalists’ own behavior—not only in labor markets, but elsewhere, too. As Smith put it in one of his most famous statements, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices” (book 1, chap. 10). This issue is central: to redress the natural imbalance of bargaining power, workers have to band together and engage in collective bargaining. Unions are critical. But it is precisely because unions have been somewhat successful in redressing the imbalance that employers have worked so hard to suppress them, as I comment later in this introduction. Contracts In multiple contexts, business enterprises have not been satisfied with the increased profits brought by greater market concentration and occasional collusion. Businesses have figured out how to sustain and amplify those profits by the clever design of contracts that are conceived to inhibit competition in the labor market. This is another method that enables them to drive down wages still further.3 The chapters by Evan Starr and Terri Gerstein (this volume) provide ample evidence of the harmful impact of the misuse of labor contracts, noting in particular that often-used ruses distort the true impact on workers. Noncompete agreements, by definition, reduce competition. There might be some justification for not allowing employees with knowledge of trade secrets to go to work for competitors, but that hardly applies to employees of fast-food chains. Employers have also put into contracts provisions that weaken workers’ rights—and power—if a dispute arises. Inserting arbitration clauses into most contracts has moved dispute resolution out of the public domain— where it can be protected in the public interest, through transparency and basic standards—into private hands. This not only weakens workers’ position after a dispute arises, but also subtly changes the balance of power— making it easier for firms to take advantage of workers, knowing that their ability to get redress is so circumscribed. Making matters worse is a broader set of changes in legal frameworks that has hurt workers and consumers at the expense of corporations. For instance, the ability to bring class-action lawsuits, particularly in arbitration, has been greatly limited. Asymmetric Information The standard competitive theory assumes perfect information. Research over the past 50 years has explained how even a little information asymmetry can have a large impact. Employers have recognized this—they have figured out that such asymmetry can weaken workers’ position and lead to lower wages. They have responded by doing what they can to increase these asymmetries, sharing data with each other but insisting that workers keep their own compensation data confidential, and punishing employees who violate such confidentiality. The chapter by Harris in this volume describes the adverse effects of informational asymmetries, how firms have tried to increase these asymmetries, and what governments have done and can still do to promote transparency—and thus competition—in the labor market.

#### The plan solves inequality and wages.

Eric Posner 21. Professor at the University of Chicago Law School. “You Deserve a Bigger Paycheck. Here’s How You Might Get It.” https://www.nytimes.com/2021/09/23/opinion/antitrust-workers-employers.html

The spectacle of the antitrust challenge to Big Tech has been riveting. But a far more consequential transformation in antitrust law has largely escaped notice — the movement to use antitrust law to address wage suppression and inequality caused by the power of employers in labor markets. Economic theory says that when a pool of workers has only one potential employer, or a small number of potential employers, those workers will be paid below-market wages. Without the credible threat to quit and work for a competitor, workers lack leverage that could allow them to secure a raise and better conditions. This situation is sometimes called monopsony, and it is similar to monopoly in the market for goods. When buyers have no choice among sellers, a monopolist can charge high prices; when workers have little choice among employers, the employer can “charge” low wages. Monopolies result in sluggish economic growth as well as high prices because in order to raise prices, monopolists make fewer goods or provide less in services. Companies that use their market power to suppress wages do something similar: They hire fewer workers, and this leads to unemployment and low growth as well. And because employers push down wages by reducing employment, they supply fewer goods, causing higher prices to consumers even though labor costs are reduced. A business might have monopoly power (over goods it sells), monopsony power (over workers), both or neither. If a small town has one newspaper, the newspaper has both a monopoly over local news and a monopsony over journalists. If the town has a single automobile manufacturing plant, that business will have a monopsony over the relevant skilled workers but not a monopoly over cars, which are sold into a national market where there are competitors. Economists have understood these things since Adam Smith, who famously called wage-fixing by employers “the natural state of things, which nobody ever hears of.” But economists did not take this risk very seriously until recently, instead usually assuming that employers compete vigorously for workers. As a result, though the logic for using antitrust law to address market power is the same for monopsony as it is for monopoly, the legal community did not embrace the possibility that antitrust law should be brought to bear against employers, except in unusual cases. But in recent years, thanks to the remarkable work of a diverse group of mostly young economists, this conventional wisdom was shattered. Exploiting vast data sets of employment and wages that had become available, they discovered that concentrated labor markets — that is, with one or few employers — are ubiquitous. In one paper, José Azar, Ioana Marinescu, Marshall Steinbaum and Bledi Taska found that more than 60 percent of labor markets exceeded levels of concentration that are regarded as presumptive antitrust problems by the Department of Justice. Numerous papers have made similar findings. In highly concentrated labor markets, wages fall — as economic theory would predict. For example, Elena Prager and Matt Schmitt examined hospital mergers and found that when hospitals expand through mergers and gain significant market power, the wage growth of employees declines. Notably, this decline affected skilled health care professionals like nurses — but not administrators and unskilled staff members like cafeteria workers, who could easily find jobs outside hospitals. The work on labor market concentration has been supplemented by growing evidence that employers collude with one another and engage in other anticompetitive practices. Evan Starr and his co-authors have found that agreements not to compete — where employers block workers from moving to competitors — are extremely common (as many as nearly 40 percent of workers have been subject to one) and are associated with lower wages. Alan B. Krueger and Orley Ashenfelter found that nearly 60 percent of major brand-name franchises — companies like McDonald’s and Jiffy Lube — subjected franchise employees to no-poaching agreements, which prevented them, even within the same franchise system, from quitting one employer to join another. As a result, many workers, especially in rural areas and small towns — areas subject to high unemployment and economic stagnation — are squeezed by employers and underpaid. For example, when farm equipment manufacturers merge, they close dealerships, and so a mechanic who used to be able to get a good job as several dealers competed for his work must accept a less-appealing job from the single place in the area or drop out of the labor market. Antitrust law applies to “restraint of trade,” and courts agree that when employers enter cartels to suppress wages, they violate the law. Yet until a few years ago, there were hardly any antitrust cases against employers. The major exception was a 2010 case against Big Tech after Google, Apple and other companies agreed not to solicit one another’s software engineers. This was potentially criminal behavior, but the Justice Department slapped them on the wrist. (A subsequent lawsuit secured more than $400 million in damages for the workers.) But it was the academic research, not the tech case, that finally woke the antitrust community from its torpor. In the past year, the Justice Department has brought several criminal indictments against employers for antitrust violations (the first ever). The Federal Trade Commission is pondering a rule to restrict noncompetes. State attorneys general brought cases against franchises and other employers that used no-poaching agreements and noncompetes. Congress is holding hearings next week on antitrust and the American worker. Private litigators have joined in as discoveries of abusive wage practices have piled up. For example, “Big Chicken” companies face lawsuits not only for fixing the prices of chicken but also for fixing the wages of their workers. If the academic research on labor markets is correct, then millions of Americans are paid thousands or even tens of thousands of dollars less than they should be paid. Labor monopsony affects people at all income levels, but it is a particular problem for lower-income workers and people living in stagnant rural and semirural parts of the country. In his recent executive order on antitrust, President Biden became the first president to commit government resources to ensure that the antitrust laws are used to help workers. Let’s hope he follows through.

#### Antitrust enforcement is key.

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

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

#### Growing economic inequality drives diversionary nationalism and makes war inevitable.

Frederick Solt 11. Ph.D. in Political Science from University of North Carolina at Chapel Hill, currently Associate Professor of Political Science at the University of Iowa, Assistant Professor, Departments of Political Science and Sociology, Southern Illinois at the time of publication. “Diversionary Nationalism: Economic Inequality and the Formation of National Pride.” The Journal of Politics, Vol. 73, No. 3, pgs. 821-830, July 2011.

One of the oldest theories of nationalism is that states instill the nationalist myth in their citizens to divert their attention from great economic inequality and so forestall pervasive unrest. Because the very concept of nationalism obscures the extent of inequality and is a potent tool for delegitimizing calls for redistribution, it is a perfect diversion, and states should be expected to engage in more nationalist mythmaking when inequality increases. The evidence presented by this study supports this theory: across the countries and over time, where economic inequality is greater, nationalist sentiments are substantially more widespread. This result adds considerably to our understanding of nationalism. To date, many scholars have focused on the international environment as the principal source of threats that prompt states to generate nationalism; the importance of the domestic threat posed by economic inequality has been largely overlooked. However, at least in recent years, domestic inequality is a far more important stimulus for the generation of nationalist sentiments than the international context. Given that nuclear weapons—either their own or their allies’—rather than the mass army now serve as the primary defense of many countries against being overrun by their enemies, perhaps this is not surprising: nationalism-inspired mass mobilization is simply no longer as necessary for protection as it once was (see Mearsheimer 1990, 21; Posen 1993, 122–24). Another important implication of the analyses presented above is that growing economic inequality may increase ethnic conflict. States may foment national pride to stem discontent with increasing inequality, but this pride can also lead to more hostility towards immigrants and minorities. Though pride in the nation is distinct from chauvinism and outgroup hostility, it is nevertheless closely related to these phenomena, and recent experimental research has shown that members of majority groups who express high levels of national pride can be nudged into intolerant and xenophobic responses quite easily (Li and Brewer 2004). This finding suggests that, by leading to the creation of more national pride, higher levels of inequality produce environments favorable to those who would inflame ethnic animosities. Another and perhaps even more worrisome implication regards the likelihood of war. Nationalism is frequently suggested as a cause of war, and more national pride has been found to result in a much greater demand for national security even at the expense of civil liberties (Davis and Silver 2004, 36–37) as well as preferences for “a more militaristic foreign affairs posture and a more interventionist role in world politics” (Conover and Feldman 1987, 3). To the extent that these preferences influence policymaking, the growth in economic inequality over the last quarter century should be expected to lead to more aggressive foreign policies and more international conflict. If economic inequality prompts states to generate diversionary nationalism as the results presented above suggest, then rising inequality could make for a more dangerous world. The results of this work also contribute to our still limited knowledge of the relationship between economic inequality and democratic politics. In particular, it helps explain the fact that, contrary to median-voter models of redistribution (e.g., Meltzer and Richard 1981), democracies with higher levels of inequality do not consistently respond with more redistribution (e.g., Bénabou 1996). Rather than allowing redistribution to be decided through the democratic process suggested by such models, this work suggests that states often respond to higher levels of inequality with more nationalism. Nationalism then works to divert attention from inequality, so many citizens neither realize the extent of inequality nor demand redistributive policies. By prompting states to promote nationalism, greater economic inequality removes the issue of redistribution from debate and therefore narrows the scope of democratic politics.

#### Monopsonies are key---inequality hollows out economics resilience---shocks are inevitable, only worker stability makes recovery possible.

Kate Bahn 21. Washington Center for Equitable Growth Testimony before the Joint Economic Committee, "Kate Bahn testimony before the Joint Economic Committee on monopsony, workers, and corporate power". Equitable Growth. 7-14-2021. https://equitablegrowth.org/kate-bahn-testimony-before-the-joint-economic-committee-on-monopsony-workers-and-corporate-power/

Thank you Chair Beyer, Ranking Member Lee, and members of the Joint Economic Committee for inviting me to testify today. My name is Kate Bahn and I am the Director of Labor Market Policy and the interim Chief Economist at the Washington Center for Equitable Growth. We seek to advance evidence-backed ideas and policies that promote strong, stable and broad-based growth. Core to this mission is understanding the ways in which inequality has distorted, subverted and obstructed economic growth in recent decades. Mounting evidence, which I will review today, demonstrates how the rising concentration of corporate power has increased economic inequality and made the U.S. economy less efficient. Reversing the trends that have led to a “second gilded age” is critical to encouraging a resilient economic recovery following the pandemic-induced economic crisis of 2020 and encouraging a healthy, competitive economy for the future. Introduction The United States boasts one of the wealthiest economies in the world, but decades of increasing income inequality, job polarization, and stagnant wages for most Americans has plagued our labor market and demonstrated that a rising tide does not lift all boats. Furthermore, economic evidence demonstrates how inequality results in an inefficient allocation of talent and resources while increasing corporate concentration that enriches the few while holding back the entire economy from its potential. Understanding the causes and consequences of the concentration of corporate power will guide policymaking in order to ensure that the economic recovery in the next phase of the pandemic will be broadly shared and ensure a more resilient economy. “Monopsony” is a key economic concept to understand in this discussion. Monopsony is the labor market equivalent of the better-known phenomenon of “monopoly,” but instead of having only one producer of a good or service, there is effectively only one buyer of a good or service, such as only one employer hiring people’s labor in a company town. Like in monopoly, this phenomenon is not limited to when a firm is strictly the only buyer of labor. Today I will explain the circumstances and effects of employers having significant monopsony power over the market and over workers. When employers have outsized power in employment relationships, they are able to set wages for their workers, rather than wages being determined by competitive market forces. Given this monopsony power, employers undercut workers. This means paying them less than the value they contribute to production. One recent survey of all the economic research on monopsony finds that, on average across studies, employers have the power to keep wages over one-third less than they would be in a perfectly competitive market. Put another way, in a theoretical competitive market, if an employer cut wages then all workers would quit. But in reality, these estimates are the equivalent of a firm cutting wages by 5 percent yet only losing 10 percent to 20 percent of their workers, thus growing their profits without significantly impacting their business. It is not only important for workers to earn a fair share so they can support themselves and their families, but also critical to ensure that our economy rebuilds to be stronger and more resilient. Prior to the current public health crisis and resulting recession, earnings inequality had been growing since at least the 1980s while the labor share of national income has been declining in same period. This is cause for concern as recent evidence suggests that the labor share of income has a positive impact on GDP growth in the long-run. The unprecedented economic shock caused by the coronavirus pandemic revealed how economic inequality leads to a fragile economy, where those with the least are hit the hardest, amplifying recessions since lower-income workers typically spend more of their income in the economy. But the crisis also demonstrated how economic policy targeted toward workers and families can provide a foundation for growth. This is because workers are the economy, and pushing back against the concentration corporate power by providing resources to workers is the foundation for strong, stable and broadly shared growth. The Causes of Monopsony The concept of monopsony was initially developed by the early 20th century economist Joan Robinson, who examined how lack of competition led to unfair and inefficient economic outcomes. The prototypical example of monopsony is a company town, where there is one very dominant employer and workers have no choice but to accept low wages since they have no outside options. This is the most extreme case, but it is important to note that firms have monopsony power in any circumstance where workers aren’t moving between jobs seamlessly in search of the highest wages they can get. Firms can use monopsony power to lower workers’ wages any time workers: Have few potential employers Face job mobility constraints Can only gather imperfect information about employers and jobs Have divergent preferences for job attributes Lack the ability to bargain over those offers I will go through each of these factors in turn and demonstrate how labor markets are unique compared to other markets in dealing with competitive forces. While concentrated labor markets are not the norm, they are pervasive across the United States, especially within certain sectors or locations. When markets are very concentrated, employers can give workers smaller yearly raises or make working conditions worse, knowing that their workers have nowhere to go to find a better job with better pay. (See Figure 1.) A study published in the journal Labour Economics by economists Jose Azar, Ioana Marinescu, and Marshall Steinbaum finds that 60 percent of U.S. local labor markets are highly concentrated as defined by U.S. antitrust authorities’ 2010 horizontal merger guidelines. This accounts for 20 percent of employment in the United States. Research by economists Gregor Schubert, Anna Stansbury, and Bledi Tsaka goes further by estimating workers’ outside options, or the likelihood a worker is able to change into a different occupation or industry. This study finds that even with a more expansive definition of job opportunities more than 10 percent of the U.S. workforce is in local labor markets where pay is being suppressed by employer concentration by at least 2 percent, and a significant proportion of these workers facing few outside options are facing pay suppression of 5 percent or more. As study co-author Anna Stansbury noted, “for a typical full-time workers making $50,000 a year, a 2 percent pay reduction is equivalent to losing $1,000 per year and a 5 percent pay reduction is equivalent to losing $2,500 per year.” Certain sectors are now very concentrated, such as the healthcare industry. In a paper by the economists Elena Prager and Matt Schmitt, they find that hospital mergers led to negative wage growth among skilled workers such as nurses or pharmacy workers. Consolidation and outsized employer power, alongside other phenomenon such as the fissuring of the workplace, may have broader impacts on the structure of the U.S. labor market when it affects the overall structure of the labor market, including the hollowing out of middle class jobs that have historically been a pathway for upward mobility.

#### It’s the key internal link to growth---wage depression constrains worker supply, constrains output, and decreases investment.

Sharon Block & Benjamin Elga 21. Sharon Block is the former executive director of the Labor and Worklife Program at Harvard Law School, where she also teaches. She currently serves as the Associate Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget. Benjamin Elga is the founding executive director of Justice Catalyst and Justice Catalyst Law. “The Legal Case for Reform”. Inequality and the Labor Market: The Case for Greater Competition. Brookings Institution Press. (2021) https://www.jstor.org/stable/10.7864/j.ctv13vdhvm.7

Intuitively, it seems likely that less expensive inputs or lower wages would mean savings for firms to pass on to the consumers. But it turns out that inefficiencies and lack of competition in upstream markets have ripple effects that can harm everyone. In a competitive market, employers pay the market wage; when there are vacancies, a marginal increase in pay will follow so employers can fill those vacancies. Labor monopsonists have different incentives. If they raise pay to fill a marginal vacancy, they might also have to raise pay for their existing employees. The small increase in pay needed to attract one more worker could mean a massive swing in overall labor cost (Krueger 2017). So even if growth would generally be good for the company, they might not be able to add the workers they need specifically because of the special dynamics of controlling too much of the market.

This is an extreme example, but the same general principle applies when employers have the market power to depress wages below competitive levels. When the marginal cost of filling vacancies and growing one’s business to efficient levels diverges from the firm’s individual incentives for doing so, firms are constricted and leave jobs unfilled. Constraining inputs like labor leads to constrained outputs, and if firms are producing less of the products that consumers want, then prices for those products go up. After all, supply constraints and price increases are two sides of the same coin, economically. Fewer workers ultimately means fewer goods, and fewer goods means higher prices for the limited amount of goods available.4 Over time, this problem is magnified because fewer workers are incentivized to enter the field at all. The supply of qualified workers will go down, further reducing the firm’s ultimate output below efficient levels. In the end, everyone suffers except the firm with market power, which captures outsized profits.

Think: Why does America have a chronic undersupply of nurses or teachers, as well as stagnant wages (Council of Economic Advisers 2016)? In a competitive market, undersupply would lead to higher wages and increased entry to the field. If wages are inefficiently underpriced, we end up without enough nurses and ballooning healthcare costs. (Not to mention that, in the case of nurses, we end up with worse health outcomes for consumers!) This is part of the reason it is so problematic to interpret the consumer welfare standard to mean that short-term consumer prices are increased: presumed price effects could be irrelevant or misleading as to the overall effect on consumers.

Antitrust enforcement is supposed to be dynamic and to be able to keep up with the state of economic theory.5 But this cross-pollination is not in evidence. For example, even though inefficiency anywhere in the supply chain leads to worse outcomes for consumers, product market cases outnumber labor market cases by a factor of nearly 15, and in mergers by closer to 35. Moreover, no recent merger has been blocked on the basis of labor market effects alone (Levi 1948, 540, fn10). A quick foray into how antitrust law has developed follows.

#### Eroding financial resilience causes war---that overcomes traditional barriers to conflict.

Jomo Kwame Sundaram & Vladimir Popov 19. Former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin “Economic Crisis Can Trigger World War.” <http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/>.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

More worryingly, in the current political landscape, prolonged economic crisis, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could easily spin out of control and ‘morph’ into military conflict, and worse, world war.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to unconventional monetary measures, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address underlying economic weaknesses, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the unprecedented liquidity central banks injected into economies has not been well allocated to stimulate resurgence of the real economy.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered likely. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to foment unrest, conflict, even war as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended. Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

They patently ignored Thucydides’ warning, in chronicling the Peloponnesian wars over two millennia before, when the rise of Athens threatened the established dominance of Sparta!

Anticipating and addressing such possibilities may well serve to help avoid otherwise imminent disasters by undertaking pre-emptive collective action, as difficult as that may be.

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

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

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

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

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

### Democracy---1AC

#### Advantage 2 is democracy:

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

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

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

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

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

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

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

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

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

#### Rule of law is essential to stave off societal collapse.

Stephen Breyer 18. An associate justice of the Supreme Court of the United States. “AMERICA’S COURTS CAN’T IGNORE THE WORLD” The Atlantic. October 2018. <https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/>

Third, and finally, my legal examples suggest the importance of looking to approaches and solutions that themselves **embody a rule of law**. To achieve and maintain a rule of law is more difficult than many people believe. The effort is ancient, stretching back to King John and the Magna Carta, and still earlier. And the effort does not always succeed. I often describe to judges from other countries how, in the 1830s, a president of the United States, Andrew Jackson, when faced with a Supreme Court decision holding that northern Georgia (where gold had been found) belonged to the Cherokee Nation, is said to have remarked, “John Marshall [the chief justice] has made his decision, now let him enforce it.” Jackson sent troops to Georgia, but not to enforce the law. Instead they evicted the tribe members, sending them along the Trail of Tears to Oklahoma, where their descendants live to this day. Not for more than a century, a period that included the Civil War and decades of racial segregation, would the Supreme Court hold, in Brown v. Board of Education, in 1954, that racial segregation violated the Constitution. Yet the country did not abolish segregation the next year or the year after that. When, in 1957, a judge in Little Rock, Arkansas, ordered Central High School desegregated, the local White Citizens’ Council, supported by the governor, rallied in front of the school, letting no black child enter. It took more than judicial decisions to end segregation. It took a president’s decision to send 1,000 paratroopers to Arkansas. It took Martin Luther King Jr., and the Freedom Riders, and the words and deeds of countless Americans who were not lawyers or judges. Today the public has come to accept the rule of law. When the Court decided Bush v. Gore, a case that was unpopular among many, and was (as I wrote in dissent) wrongly decided, the nation accepted the decision without rioting in the streets. That is a major asset for a nation with a highly diverse population of 320 million citizens. We do not have to convince judges or lawyers that maintaining the rule of law is necessary—they are already convinced. Instead we must convince ordinary citizens, those who are not lawyers or judges, that they sometimes must accept decisions that affect them adversely, and that may well be wrong. If they are willing to do so, the rule of law has a chance. And as soon as one considers the alternatives, the need to work within the rule of law is obvious. The **rule of law** is the opposite of the arbitrary, which, as the dictionary specifies, includes the **unreasonable, the capricious, the authoritarian, the despotic, and the tyrannical.** Turn on the television and look at what happens in nations that use other means to resolve their citizens’ differences. For my generation, the need for law in its many forms was perhaps best described by Albert Camus in The Plague. He writes of a disease that strikes Oran, Algeria, which is his parable for the Nazis who occupied France and for the evil that inhabits some part of every man and woman. He writes of the behavior of those who lived there, some good, some bad. He writes of the doctors who help others without relying upon a moral theory—who simply act. At the end of the book, Camus writes that the germ of the plague never dies nor does it ever disappear. It waits patiently in our bedrooms, our cellars, our suitcases, our handkerchiefs, our file cabinets. And one day, perhaps, to the misfortune or for the education of men, the plague germ will reemerge, reawaken the rats, and send them forth to die in a once-happy city. The struggle against that germ continues. And the rule of law is one **weapon that civilization has used to fight it.** **The rule of law is the** **keystone of the effort to build a civilized, humane, and just society.** At a time when facing facts, understanding the local and global challenges that they offer, and working to meet those challenges cooperatively is **particularly urgent**, we must continue to construct such a society—a **society of laws**—together.

#### Judicial activism undermines respect for rule of law and usurps democracy.

Jane S. Schacter 17. William Nelson Cromwell Professor of Law at Stanford Law School. “PUTTING THE POLITICS OF “ JUDICIAL ACTIVISM” IN HISTORICAL PERSPECTIVE”. The Supreme Court Review Volume 2017. https://law.stanford.edu/wp-content/uploads/2019/03/Jane.S.Schacter-Putting-the-Politics-of-Judicial-Activism-in-Historical-Perspective-2018.pdf

In 1980, as issues associated with the religious right rose, Republican rhetoric began to emphasize the idea that Democrats had shunted the family aside and “given its jurisdiction to the courts,” along with a call for judges who “respect the traditional family and the sanctity of innocent human life.”170 By 1984, when Ronald Reagan ran for reelection, Republicans offered a more fully elaborated set of institutional ideas about courts, arguing that: judicial power must be exercised with deference towards State and local officials; it must not expand at the expense of our representative institutions. It is not a judicial function to reorder the economic, political, and social priorities of our nation. The intrusion of the courts into such areas undermines the stature of the judiciary and erodes respect for the rule of law. Where appropriate, we support congressional efforts to restrict the jurisdiction of federal courts.171 The platform went on to “commend the President for appointing federal judges committed to the rights of law-abiding citizens and traditional family values,” “shar[ing] the public’s dissatisfaction with an elitist and unresponsive federal judiciary,” and calling for judges committed to “judicial restraint.”172 The language in George H. W. Bush’s 1992 acceptance speech marked the appearance of particular language about judicial activism that became common in GOP platforms and speeches thereafter. He said that Bill Clinton would “stock the judiciary with liberal judges who will write laws they can’t get approved by the voters.”173 By 1996 and the Dole campaign, the anti-activism rhetoric in Republican platforms was ramping up. At the same time, although no court had yet legalized same-sex marriage, the possibility of that result had been introduced by the Hawaii Supreme Court in a preliminary decision in 1993,174 and the Republican Party began to fold same-sex marriage into its portfolio of complaints about judicial activism. In 1996, for example, the platform applauded congressional passage of the Defense of Marriage Act, noting that it would prevent “federal judges and bureaucrats from forcing states to recognize other living arrangements as ‘marriages.’”175 Since 1996, references to same-sex marriage in relation to judicial activism have been a mainstay for Republican platforms. The 1996 platform also quoted the Tenth Amendment and said “[f]or more than half a century, that solemn compact has been scorned by liberal Democrats and the judicial activism of the judges they have appointed.”176 It admonished that: The federal judiciary, including the U.S. Supreme Court, has overstepped its authority under the Constitution. It has usurped the right of citizen legislators and popularly elected executives to make law by declaring duly enacted laws to be “unconstitutional” through the misapplication of the principle of judicial review. [These actions are] fundamentally at odds with our system of government in which the people and their representatives decide issues great and small.177 The sharper tone of 1996 has been maintained ever since. Succeeding platforms have argued, for example, that “scores of judges with activist backgrounds in the hard-left now have lifetime tenure” (2000 and 2004);178 the President should “name only judges who have demonstrated respect for the Constitution and the processes of our republic” (2000);179 “the sound principle of judicial review has turned into an intolerable presumption of judicial supremacy” (2004);180 “[j]udicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing personal opinions upon the public . . .” (2008);181 “judicial activism” is a “threat to the constitution” and “Republican Senators [must] do all in their power to prevent the elevation of additional leftist ideologues to the courts” (2012);182 and, most recently, the activist judiciary is a “critical threat to our country’s constitutional order,” and “only Republican appointments will enable the courts to begin to reverse the long line of activist decisions, including Roe, Obergefell and the Obamacare cases,” which have “expanded the power of the judiciary at the expense of the people and their elected representatives” (2016).183

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

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

3. Implications for Interpretation

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

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

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

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

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

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

#### Democracy solves great power war.

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

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

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

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

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

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

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

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

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

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

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

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

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

### FTC---1AC

#### Advantage 3 is the FTC:

#### Khan is advocating for the aff but is constrained by the existing body of antitrust law---only adopting a new standard solves.

Tara L. Reinhart et al 21. \*Tara Reinhart is head of the Antitrust/Competition Group in Skadden’s Washington, D.C. office. She focuses on civil litigation and government investigations, with an emphasis on complex antitrust litigation and international cartel probes. \*Steven C. Sunshine is the head of Skadden’s Global Antitrust/Competition Group. He represents clients in connection with antitrust aspects of mergers and acquisitions, litigation, counseling and grand jury investigations. \*David Wales is recognized as a leading antitrust lawyer and has over 25 years of experience in both private and public sectors. His practice focuses on providing antitrust advice to U.S. and international clients in a wide range of industries on all aspects of antitrust, including mergers and acquisitions, alliances, criminal grand jury investigations, dominant firm conduct, distribution arrangements, licensing and competitor collaborations. \*Julia York has represented numerous global corporations in various industries, including pharmaceuticals, telecommunications, energy and financial markets, in both litigation and transactional matters. “FTC Chair Khan Highlights Key Policy Priorities Going Forward, but Aggressive Agenda Faces Uphill Climb” Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates. 10-04-21. <https://www.skadden.com/insights/publications/2021/10/ftc-chair-khan-highlights-policy-priorities>

In a September 22, 2021, memorandum to staff, Federal Trade Commission (FTC) Chair Lina Khan formally laid out her “Vision and Priorities for the FTC,” reaffirming her calls for broad antitrust enforcement organized around three key policy priorities: merger enforcement, dominant intermediaries and restrictive contract terms. The memo further describes her vision for the agency’s strategic approach and operational objectives to support those priorities. Like her prior calls for antitrust reform and aggressive enforcement,1 the policy priorities outlined by Chair Khan are somewhat abstract and do not specify concrete actions the agency will take to achieve them. However, a close review of these high-level priorities, approach and objectives reveals some **practical obstacles to implementation**, including limitations **imposed by resource constraints and the existing body of antitrust law.** Policy Priorities: Merger Enforcement, Dominant Intermediaries and Restrictive Contract Terms Chair Khan listed three policy priorities for the agency going forward. First, she identified a need to strengthen the agency’s merger enforcement work to combat what she described as rampant consolidation and the market dominance she believes that consolidation has enabled. In particular, she expressed a concern that markets “will only become more consolidated” absent FTC vigilance and assertive action. She noted that revising the merger guidelines will be important to achieve merger reform, characterizing prior iterations of the guidelines as a “somewhat narrow and outdated framework for assessing mergers.” She also highlighted a need to find ways to deter unlawful transactions, including “facially illegal deals.” Second, Ms. Khan indicated her desire to focus enforcement on “dominant intermediaries and extractive business models.” After suggesting that market power is an increasingly systemic problem in the economy, and that the FTC should devote resources to regulating the most significant actors — with “next-generation technologies, innovations, and nascent industries” requiring particular vigilance, she focused specifically on the market position of “gatekeeper” companies and “dominant middlemen.” Such entities, according to Chair Khan, have been able to “hike fees, dictate terms, and protect and extend their market power.” She also posited that the involvement of private equity and other investment vehicles may strip such businesses of productive capacity and harm consumers. In discussing the agency’s strategic approach to address these issues, Chair Khan noted her intention to “focus[] on structural incentives that enable unlawful conduct,” and to “look[] upstream at the firms that are enabling and profiting from this conduct.” Third, Ms. Khan discussed certain contract terms, including **noncompete provisions**, repair restrictions and exclusionary clauses, that she believes could constitute unfair methods of competition or unfair or deceptive trade practices. She also **advocated for a “holistic” approach to identifying harms to account for effects on workers** and independent businesses. Describing this holistic approach in broad terms, she indicated that the agency would **focus on “power asymmetries** and the unlawful practices those imbalances enable,” and the effects such conduct has, for example, on **marginalized communities**. In sharing her hopes to “further democratize the agency,” Chair Khan similarly expressed that the FTC’s work should help “shape[] the **distribution of power and opportunity** across our economy.” More generally, the memo identifies areas of investment for the agency to help achieve these priorities. This includes incorporating a greater range of analytical tools and skillsets into the agency’s work, and expanding the agency’s regional footprint to grow its ranks, including by hiring additional technologists, data analysts, financial analysts and experts from outside disciplines. Chair Khan also announced that she will name Holly Vedova and Samuel Levine, both career FTC staff (as opposed to political appointees), as the director of the Bureau of Competition and the director of the Bureau of Consumer Protection, respectively. Practical Limitations on Implementation of Chair Khan’s Policy Priorities Chair Khan describes the antitrust agenda outlined in her memorandum as “robust,” and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will **face substantial practical challenges.** Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the **conduct in question is unlawful**. Chair Khan’s memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms **beyond the traditional focus on consumer welfare** and price effects. However, **courts have — and will likely continue to — rely on existing standards developed** in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. **Absent legislative change**, then, a **practical gap** will persist between Chair Khan’s **vision of refocused and more assertive antitrust enforcement**, on the one hand, and **the law that would apply** to any FTC enforcement action, on the other.2

#### The CWS means they’ll lose cases on labor they’re bringing now.

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

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

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

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

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

How the FTC can tackle antitrust

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

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

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

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

How Congress can tackle antitrust

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

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

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

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

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

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

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

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

The FTC’s Rulemaking Authority

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

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

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

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

The Future of the FTC

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

#### Fraud funds terrorists.

Frank S. Perri 10. Frank S. Perri, J.D., CFE, CPA. "The Fraud-Terror Link:". No Publication. xx-xx-xxxx. https://www.fraud-magazine.com/article.aspx?id=4294967888

The threat of terrorism has become the principal security concern in the United States since 9/11. Some might perceive that fraud isn’t linked to terrorism because white-collar crime issues are more the province of organized crime, but that perception is misguided. Terrorists derive funding from a variety of criminal activities ranging in scale and sophistication – from low-level crime to organized narcotics smuggling and fraud. CFEs need to know the latest links between fraud and terror.

Credit card fraud, wire fraud, mortgage fraud, charitable donation fraud, insurance fraud, identity theft, money laundering, immigration fraud, and tax evasion are just some of the types of fraud commonly used to fund terrorist cells. Such groups will also use shell companies to receive and distribute illicit funds. On the surface, these companies might engage in legitimate activities to establish a positive reputation in the business community.

Financing is required not just to fund specific terrorist operations but to meet the broader organizational costs of developing and maintaining a terrorist organization and to create an enabling environment necessary to sustain their activities. The direct costs of mounting individual attacks have been relatively low considering the damage they can yield.

“Part of the problem is that it takes so little to finance an operation,” said Gary LaFree, director of the University of Maryland’s National Consortium for the Study of Terrorism and Responses to Terrorism.2 For example, the 2005 London bombings cost about $15,600.3 The 2000 bombing of the USS Cole is estimated to have cost between $5,000 and $10,000.4 Al-Qaida’s entire 9/11 operation cost between $400,000 and $500,000, according to the final report of the National Commission on Terrorist Attacks Upon the United States.5

Terrorist groups require significant funds to create and maintain an infrastructure of organizational support, sustain an ideology of terrorism through propaganda, and finance the ostensibly legitimate activities needed to provide a veil of legitimacy for their shell companies.6 However, don’t think that only large operations are needed for terrorists to carry out attacks; small semi-autonomous cells in many countries are often just as capable of conducting disruptive activities without extensive outside financial help – they just conduct smaller-scale frauds.7

Even though the nexus between fraud and terrorism is undisputed, there’s concern at state and local levels that law enforcement professionals lack specialized knowledge on how to detect the fraud-terror link because they’re more apt to investigate and prosecute violent crimes.8

A critical lack of awareness about terrorists’ links to fraud schemes is undermining the fight against terrorism. Fraud analysis must be central, not peripheral, in understanding the patterns of terrorist behavior.9

#### Causes extinction---nuclear escalation.

Matthew Bunn & Nickolas Roth 17. \*Professor of practice at the Harvard Kennedy School. \*\*Research associate at the Belfer Center’s Project on Managing the Atom at Harvard University and research fellow at the Center for International and Security Studies at the University of Maryland. “The effects of a single terrorist nuclear bomb.” Bulletin of the Atomic Scientists, http://thebulletin.org/effects-single-terrorist-nuclear-bomb11150

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Extra---Inequality---2AC

#### Concentration reduces wages---antitrust solves.

Zachary Brown 21. Program Associate. “The Harms of Monopolies on American Workers” Public Citizen. 11-2-21. <https://www.citizen.org/news/the-harms-of-monopolies-on-american-worker/>

Antitrust law and its enforcement **need a major overhaul.** Mergers of large corporations across the country disastrously impacts our economy. And while the broad economic effect of monopolistic rule often hogs all of the attention, we can’t forget the **strong impact** these corporate behemoths have on **American workers.**

In a hearing last month, the House Judiciary Committee took up this very problem. Multiple antitrust experts were called to testify. They illustrated that **effective antitrust protections benefit workers.** Just in case you missed it, here are a few quick hits from the hearing to keep you in the loop.

**More Competition, More Worker Empowerment**

Throughout the hearing, it was repeatedly shown that the lack of competition in the economic landscape **damages conditions for workers**. As markets become more concentrated, **income and wages decrease**, Brian Callaci, chief economist of the Open Markets Institute, testified. Additionally, labor market concentration also has a positive correlation with the amount of **labor rights violations**. Callaci went on to explain that monopsony power, in which there is one dominant buyer (employer) with many sellers (employees), leads to an unfair power balance that leaves workers at a distinct disadvantage. Put simply, if there’s an overwhelmingly powerful boss in town, they can set the salary to whatever they want without fear of competition.

During the hearing, we also heard about the effects of consolidation on workers from Daniel Gross, a delivery driver for United Parcel Service. Citing Amazon’s growth over the years, Gross explained that Amazon’s last mile delivery network especially harms workers because Amazon occupies an increasing percentage of the delivery market yet pays its workers less than UPS. Amazon’s unique power to link its online retail business to its delivery and logistics business puts other delivery services such as USPS, UPS, FedEx, and DHL at a clear disadvantage. This allows Amazons to unduly influence the market for labor conditions.

A Gap in Antitrust Law

Speaking to the distinct impact that the enforcement of antitrust laws could have on the labor markets, Eric Posner, a professor from the University of Chicago Law School, detailed a **“litigation gap” in antitrust** law. While antitrust cases usually revolve around the harms done to other companies, very few decisions consider the effects that mergers and monopolies **have on workers**. Concerns about mergers leading to higher prices are usually central to the debate, while concerns about mergers’ effect on wages are often treated as an afterthought. But recent research shows that **anticompetitive behaviors are just as prevalent in the labor market space** as the product market space.

Posner explained that the Justice Department and the Federal Trade Commission have never challenged a merger because of its anticompetitive effects on labor markets, specifically. Workers deserve fair resources, wages, and conditions – encouraging and protecting competition between companies provides the everyday worker better options.

We can find some encouragement that both President Biden and Jonathan Kanter, Biden’s recent nominee to lead the Justice Department’s Antitrust Division, have expressed an understanding of market concentration’s impact on workers. But it is up to all of us to keep the pressure on our elected officials and government.

Revamping antitrust enforcement to address effects on labor would **more equitably protect** **workers** across the country.

#### Reduced spending is the strongest internal link to the economy

Joseph E. Stiglitz 21. Nobel laureate in economics and University Professor at Columbia University, former chief economist of the World Bank, chair of the US President’s Council of Economic Advisers, co-chair of the High-Level Commission on Carbon Prices. “The Inflation Red Herring.” 6/7/21. https://www.project-syndicate.org/commentary/us-inflation-red-herring-by-joseph-e-stiglitz-2021-06

Conservatives blame the situation on excessively generous unemployment insurance benefits. But econometric studies comparing labor supply across US states suggest that these kinds of labor-disincentive effects are limited. And in any case, the expanded unemployment benefits are set to end in the fall, even though the global economic effects of the virus will linger.

Rather than panicking about inflation, we should be worrying about what will happen to aggregate demand when the funds provided by fiscal relief packages dry up. Many of those at the bottom of the income and wealth distribution have accumulated large debts – including, in some cases, more than a year’s worth of rent arrears, owing to temporary protections against eviction.

Reduced spending by indebted households is unlikely to be offset by those at the top, most of whom have accumulated savings during the pandemic. Given that spending on consumer durables remained robust during the past 16 months, it seems likely that the well-off will treat their additional savings as they would any other windfall: as something to be invested or spent slowly over the course of many years. Unless there is new public spending, the economy could once again suffer from insufficient aggregate demand.

Moreover, even if inflationary pressures were to become truly worrisome, we have tools to dampen demand (and using them would actually strengthen the economy’s long-term prospects). For starters, there is the US Federal Reserve’s interest-rate policy. The past decade-plus of near-zero interest rates has not been economically healthy. The scarcity value of capital is not zero. Low interest rates distort capital markets by triggering a search for yield that leads to excessively low risk premia. Returning to more normal interest rates would be a good thing (though the rich, who have been the primary beneficiaries of this era of super-low interest rates, may beg to differ).

# 2AC

## T Exemptions

### Exemptions---2ac

#### We meet---the plan expands the area, so core laws deal with employer power. That’s a non-statutory exemption because Courts are ruling against labor.

Sanjukta Paul 19. Assistant Professor of Law, Romano Stancroff Research Scholar. “9 - The Case for Repealing the Firm Exemption to Antitrust (A Modest Proposal; or, a Response to Professor Epstein)”. from Part II - Labor Law Is Out of Date. Published online by Cambridge University Press: 01 November 2019 <https://www-cambridge-org.proxy.library.emory.edu/core/books/cambridge-handbook-of-us-labor-law-for-the-twentyfirst-century/case-for-repealing-the-firm-exemption-to-antitrust/E8BA98C6D6606A6E6BC1073291C3F277>

Professor Epstein argues in this volume and elsewhere for repealing the already limited economic coordination rights accorded to working people. In this chapter, I respond to his argument – and by extension, to the more general skepticism toward the coordination rights of working people. I begin by first questioning a different exemption from the putatively general norm about the “dangers of collective behavior.”Footnote6 Business associations themselves enjoy an almost unlimited exemption from antitrust law, one that is now treated as axiomatic. But it wasn’t always. The “firm exemption” is not based upon the text of the statute, and it was never endorsed by the legislators who conceived and drafted the Sherman Act. Indeed, they would likely have rejected it in its present form. At the same time, the legislative record is plain that legislators favored and intended coordination rights for working people to be preserved under the statute.Footnote7 But judges rewrote the Act in light of their own vision for the allocation of coordination rights – and that vision favored business firms as the locus of economic coordination and disfavored labor organizations.Footnote8

Professor Epstein’s “welfarist” argument against the labor exemption relies upon a normative benchmark given by “the competitive order” centered by Chicago School law and economics.Footnote9 But no such benchmark can exist without a definition – necessarily supplied by law, not economics – of the entities that are to engage in that competition.Footnote10 The law defines business firms, rather than, say, cartels, as the entities that are to engage in competition, thereby exempting their internal coordination from antitrust scrutiny. The other normative benchmark upon which Professor Epstein’s argument at least indirectly relies is the notion of freedom of contract, as embodied in the pre–New Deal common law of labor relations. However, the common law’s denial of coordination rights to working people was in fact justified in hierarchical, antiliberty terms – illustrating a more basic justificatory problem with the policy decision to abridge working people’s freedom of association from a liberal perspective.

#### The scope of competition law defines it goals.

ESE No Date. Erasmus School of Economics (as per their website, “The Erasmus Center for Economic and Financial Governance is an international multidisciplinary network of leading researchers and societal stakeholders initiated by researchers from Erasmus School of Economics and Erasmus School of Law. ECEFG conducts interdisciplinary research (law, economics and political science) and contributes to current debates in public and in academia on issues relating to European and global economic and financial governance.”). "Competition Policy". <https://www.eur.nl/en/ese/affiliated/ecefg/research/competition-policy>

Competition Policy

Research in this field consists of two broad areas. The first area – Theory and Implementation of Competition Law and Policy – refers to fundamental and applied research into topics that are traditionally seen as the core of competition policy. The second area – Scope of Competition Law and Policy – refers to all research on the effect and desirability of including new considerations in competition law and policy in order to address the challenges of our time, such as the increasing power of big tech firms, or global warming.

Theory and Implementation of Competition Policy

This covers for instance collusion, abuse of dominance, mergers, market regulation and state aid. Some examples of research topics are:

* the practices firms can use to engage in collusion and its welfare consequences;
* the practices firms can use to abuse a dominant position and its welfare consequences;
* which practices can be considered proof of such activities;
* how to regulate access to a market;
* how to properly assess the effects of a particular practice or merger;
* the practices, by which the state and public authorities distort competition such as subisidies and tax measures
* the interpretation and application of EU and national competition law by Competition Authorities and Courts and the extent to which they achieve the goals of competition policy

Scope of Competition Policy

The effectiveness of European competition law and policy in combination with rapid technological changes have raised questions about its proper scope. Which policy objectives can and should be pursued by means of competition law and policy, and which should be delegated to other legal fields and policies? Some examples of specific research questions include:

* Can and should competition law be used to protect the privacy of consumers on the internet?
* Information gathered by firms can be used to increase their own profits. How does this affect consumers, and what does this depend on? Can and should competition law deal with market power derived from information gathering? For instance, should the big five tech giants be forced to divest activities?
* Should competition policy also include considerations of economic inequality or environmental effects?
* Can competition law remain effective if it is used for more than safeguarding fair competition?

#### That means the aff must change the consumer welfare standard.

Trevor Wagener 21. "The Curse of Tradeoffs: Neo-Brandeisians vs. Consumers". Disruptive Competition Project. 5-21-2021. https://www.project-disco.org/competition/052121-the-curse-of-tradeoffs-neo-brandeisian-antitrust-versus-consumers/

Neo-Brandeisians seek to replace the longstanding objective and principles-based framework of the consumer welfare standard in antitrust enforcement with an amorphous, process-based framework guided by an ethos one Neo-Brandeisian described as: “Big is bad. Just don’t let big firms merge. The end.” A movement dedicated to replacing a consumer welfare-maximizing approach with an assortment of competing goals has proven unable to offer a quantified, systematic cost-benefit analysis justifying such a radical change, instead relying upon anecdotal evidence and moving prose. The many goals of the Neo-Brandeisian approach are often rhetorically appealing, but the rhetoric hides a simple truth: When you target every variable, you effectively target none. Addressing a wide range of goals through antitrust policy requires de-emphasizing consumer welfare, creating fundamental tradeoffs expected to harm consumers relative to the status quo. The willingness to sacrifice consumer welfare in order to achieve other ends is a defining characteristic of Neo-Brandeisian antitrust. This is illustrated by concrete Neo-Brandeisian critiques, which typically emphasize perceived harms to businesses rather than harms to consumers. For example, the Neo-Brandeisian activist group American Economic Liberties Project (AELP) published a pair of policy briefs on May 3 that criticize online service operators for a litany of purported inconveniences to businesses over a combined 22 pages, but struggle to quantify any harms to ordinary consumers and users. Those few purported harms to consumers that AELP raised are distinctly qualitative rather than quantitative, consistent with the broader reluctance of prominent Neo-Brandeisian thinkers to conduct a rigorous quantitative cost-benefit analysis of their antitrust policy prescriptions relative to the consumer welfare standard.

## Adv CP

#### Eliminating the CWS is key.

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

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

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

#### Court’s omission of congressional intent hurts legitimacy.

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

Before concluding, I undertake a brief look into the future of American antitrust. Chapter Ten examines the rise of post-Chicago economics and the advent of the New Economy as important challenges to the Chicago consensus, focusing on the role likely to be played by behavioral economists and students of the ‘chastened’ Harvard School in the next wave of antitrust reform. Finally, in Chapter Eleven I return to the question of what the role of the Court should be in antitrust enforcement, reviewing the Court’s experiences with different theories of antitrust before asking how the Court might hope to draw on its unique institutional resources in resisting the encroachments of external forces into its own legitimate, if limited, sphere of control over economic regulatory policy. In conclusion, I lay out my argument for the superiority of rule of reason analysis, which seeks to balance the insights of economic theorists with an appreciation of the constitutional framework within which the Court operates. If economic theory—leaving to one side the question of which theory, whether that of the Harvard School, the Chicago School, the post-Chicagoans or behavioral economists—is to be applied to antitrust cases, this standard must be written into statutes by Congress and signed into law by the President. The Court loses legitimacy and coherence when it removes itself from the task of applying written law to particular cases. It is poorly constituted for formulating and implementing durable and sensible economic policy independent of the political branches, and yet its independence and isolation from political pressures make it ideally suited for evaluating the facts and weighing the arguments of parties in particular cases, and thereby playing an important role in the continued unfolding and development of antitrust law through its unique competencies of interpretation, rationalization, balancing and legitimation.

#### Perm---do the CP---antitrust laws are regulations.

Robinhood Financial LLC 20. “What are Antitrust Laws?”. 10-6-20. https://learn.robinhood.com/articles/4x5oCZOtg43uORfxEnxPRW/what-are-antitrust-laws/

Antitrust laws are regulations that aim to promote fair business competition in an open market and protect consumers by banning certain predatory practices.

#### Integrating labor antitrust with labor-law is crucial to resolve labor-market concentration and inequality effects.

Hiba Hafiz 20. Assistant Professor of Law, Boston College Law School. “Labor Antitrust’s Paradox” The University of Chicago Law Review. Vol. 87, No. 2 (March 2020). https://www.jstor.org/stable/pdf/26892416.pdf?refreqid=excelsior%3A0f6a76576524be49f18207d9a4aa308a

CONCLUSION The critical turn in current antitrust policy and scholarship toward the **problem of labor-market concentration**, the natural asymmetries of power between employers and employees, and the broader **wealth transfer and inequality effects** of lax enforcement are motivated not only by the failures of the Chicago School’s past assumptions, but also by a **systemic collapse of labor and employment regulation** more broadly. Sustainable solutions to the **inefficiencies that pervade labor markets**, and the democratic and political economy effects of enfeebled labor-market institutions and worker protections, ought to be one and the same. **Integrating labor antitrust into labor-law enforcement** is a **crucial supplement** to both its protections and its administrative deployment, **offering a key intervention** in the right direction.

#### Regulations can’t solve future problems.

Jon Sallet 18. Partner at Steptoe. Previously, he was General Counsel of the Federal Communications Commission and Deputy Assistant Attorney General at the Antitrust Division. Before the Federal Trade Commission. “Competition and Consumer Protection in the 21st Century”. https://www.ftc.gov/system/files/documents/public\_events/1415284/ftc\_hearings\_session\_5\_transcript\_11-1-18\_0.pdf

One, we will look at incipiency, actions that have not had the kind of competitive effect that he thought the Sherman Act examined. Secondly, because, he said, there will be new kinds of harm that we cannot anticipate. If we write a detailed list, we are going to miss some. So he wanted a standard that would evolve as economic issues as the facts evolved.

### AT: Minimum Wage---2AC

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

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

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

## DOJ DA

### Antitrust Now---2AC

#### Major antitrust policy changes now---triggers the link.

Bryan Koenig 2/25/22. Reporter at Law360. “FTC's Phillips Sees No Path To Return Of Early Termination.” https://www.law360.com/competition/articles/1468528/ftc-s-phillips-sees-no-path-to-return-of-early-termination

Khan, who was picked to run the FTC as part of the Biden administration's rethink of modern antitrust enforcement, has already instituted a number of major competition policy changes through a series of party-line votes since taking the helm in June.

The administration's initiative comes at the same time the U.S. Congress is rethinking whether antitrust enforcement should look beyond corporate concentration and the power of online technology platforms.

In addition to maintaining the suspension of early terminations, Khan's most sweeping policy changes to date include demanding, in consent decrees permitting mergers to go through, "prior approval" requiring the parties get FTC permission for future deals. The changes also include ditching vertical merger guidelines finalized in 2020 and nixing a statement seen as putting guardrails on the limits of the agency's power.

### DOJ Thumpers---2AC

#### Thumpers:

#### 1---No-poach enforcement

Zachary Terwilliger et al. 3/3/22. Partner at Vinson & Elkins’ Washington, D.C. office, with Lindsey Vaala and Rami Rashmawi. “DOJ aggressively pursuing 'no-poach' agreements.” https://www.benefitspro.com/2022/03/03/doj-aggressively-pursuing-no-poachers-412-127578/?slreturn=20220203124625

On Jan. 28, the U.S. District Court for the District of Colorado declined to dismiss a criminal antitrust indictment alleging a dialysis operator, DaVita, and its former CEO colluded with competitors by agreeing not to recruit or “poach” each others’ employees. The same day, the Department of Justice announced yet another “no-poach” indictment—this time accusing four owners and managers of home health care agencies of allegedly conspiring to fix the rates paid to their workers and to refrain from hiring each others’ employees. These events are the latest in a string of criminal enforcement actions brought by the DOJ for alleged “no-poach” agreements and emphasize the DOJ’s focus on competition in labor markets

MARKED

and its effects on workers.

In his July 9, 2021, Executive Order on Promoting Competition in the American Economy, President Joe Biden affirmed his commitment to enforcing the antitrust laws in labor markets and denounced the consolidation of “corporate employers, making it harder for workers to bargain for higher wages and better work conditions.” The Biden administration has made good on this promise in the form of a series of criminal indictments brought by the DOJ’s Antitrust Division for alleged “no-poach” agreements between companies who compete for employees.

#### 2---shipping.

Gerald A. Morrissey III 3/1/22. Partner at Holland & Knight, with Allison N. Skopec. “Biden Administration Intensifies Offensive Against Ocean Shipping Industry.” https://www.hklaw.com/en/insights/publications/2022/03/biden-administration-intensifies-offensive-against-ocean-shipping

The Biden Administration issued a press release and fact sheet on Feb. 28, 2022, titled "Lowering Prices and Leveling the Playing Field in Ocean Shipping." The release builds on a series of ongoing efforts (see previous Holland & Knight alert, "DOJ to Collusive Price Gougers Exploiting Supply Disruptions: We Will Prosecute You," Feb. 18, 2022) to tackle supply chain disruptions by leveraging the Shipping Act and antitrust laws. The main takeaways are:

The U.S. Department of Justice (DOJ) is expanding its cooperation with the Federal Maritime Commission (FMC). Building on the DOJ-FMC 2021 memorandum of understanding (MOU), the DOJ will "provide the FMC with the support of attorneys and economists from the Antitrust Division for enforcement of violations of the Shipping Act and related laws." Likewise, the FMC will share shipping industry experience with the DOJ for Sherman Act and Clayton Act enforcement actions.

The FMC has already taken steps to audit ocean carriers, based on complaints received from cargo owners. In addition, the DOJ recently announced an initiative to investigate and prosecute antitrust activities in other parts of the supply chain. In its most recent initiative, the Administration is again focusing on ocean shipping, and highlighted high shipping costs and practices perceived to contribute to congestion and cost increases.

Shipping Act Reform. The Biden Administration called on Congress to "provide additional tools ... to address problems in the ocean shipping industry" and expressed encouragement with current legislative efforts. The Administration is referring to bills under consideration in the U.S. House of Representatives and Senate — the Ocean Shipping Reform Act of 2021 (OSRA 2021) (H.R. 4996) and the Ocean Shipping Reform Act of 2022 (OSRA 2022) (S. 3580) — proposing an array of different changes to the Shipping Act intending to target congestion, practices and charges. OSRA 2021 passed the House in December 2021 with bipartisan support. The Senate companion bill, OSRA 2022, is under consideration in that chamber. Despite the common purposes, the bills have significant differences that must be worked out.

Changes to Antitrust Immunity? The Administration also called on Congress to "address the immunity of alliance agreements from antitrust scrutiny under current law." According to the White House Fact Sheet, "Congress steadily deregulated the industry — expanding the antitrust immunity while weakening ocean carriers' obligations to publicly disclose prices and fees and treat businesses and their customers fairly." Further details were not provided, but neither OSRA 2021 nor OSRA 2022 appear to directly address antitrust immunity.

The White House also indicated that existing oversight efforts would continue, reported on progress with the FMC's audit program, new investigations, a new data initiative, and a pending FMC rulemaking on Demurrage and Detention billing currently open for public comment (through March 17, 2022).

Conclusion and Considerations

Coming on the eve of President Joe Biden's State of the Union address on March 1, it is anticipated that President Biden will highlight these and other efforts to address supply chain issues. Moving forward, expect continued activity on the legislative and regulatory fronts. Stakeholders with interests in the legislation and the current rulemaking still have opportunities for involvement.

Regarding the enhanced DOJ-FMC cooperation, the initiative points yet again in the direction of heightened scrutiny ahead, with the potential for more robust investigations, more enforcement capacity and harsher penalties. As Holland & Knight has advised previously, supply chain stakeholders should review their practices and antitrust compliance protocols, proceed cautiously and engage legal counsel before initiating discussions or entering into agreements with marketplace counterparties.

#### 3---supply chain.

Brandon Bigelow 2/23/22. Co-chair of Seyfarth Shaw's Antitrust Practice Group, with James McGrath. “Sellers Beware: DOJ Antitrust Division Announces Enforcement Initiative to Prevent Exploitation of Supply Chain Disruptions.” https://www.jdsupra.com/legalnews/sellers-beware-doj-antitrust-division-4212635/

With inflation on the rise and COVID restrictions receding but not yet gone, manufacturers and retailers alike should take care not to get caught in a regulatory squeeze with respect to the prices at which they sell goods to customers. The US Department of Justice (DOJ) Antitrust Division has announced a new enforcement initiative to find and stop price fixing agreements hiding behind supply chain disruptions, and some states continue to operate under emergency health orders that could trigger “price gouging” laws and regulations.

Heightened DOJ Antitrust Enforcement

On Thursday, February 17, 2022, the DOJ Antitrust Division announced that it is “prioritizing any existing investigations where competitors may be exploiting supply chain disruptions for illicit profit and is undertaking measures to proactively investigate collusion in industries particularly affected by supply disruptions.” In other words, the DOJ will be looking at significant price increases for goods to determine whether the sudden rise in price is attributable to legitimate economic forces, or whether inflation is being used as a cover for a horizontal price fixing scheme among competitors. Assistant Attorney General Jonathan Kanter, head of the DOJ Antitrust Division, said in a press release that “The Antitrust Division will not allow companies to collude in order to overcharge consumers under the guise of supply chain disruptions.”

Generally speaking, price increases in the face of constrained supply are an efficient way to allocate scarce resources, and the antitrust laws are not intended to stop suppliers from responding unilaterally to market forces. But the extraordinary market forces at play as the economy emerges from a global health emergency do not justify competitors at any level of distribution—wholesale or retail—from entering into agreements concerning the prices at which they will sell goods. In an enforcement environment where government officials may be searching for scapegoats to blame for the recent inflationary spiral, companies should ensure that they have a solid antitrust compliance program in place and that decisions about the prices they charge are made unilaterally. Even without an actual enforcement action, complying with a federal antitrust investigation can be a very intrusive and expensive proposition.

### AT: EU Soft Power

#### EU is obsolete and useless.

Sked 12—Professor of international history and former convener of European studies at the London School of Economics [Alan, “Why would anyone want to join the EU?” *Foreign Policy*, 14 Mar, <http://foreignpolicy.com/2012/03/14/why-would-anyone-want-to-join-the-eu/>, accessed 23 Nov 2016]

Superficially, the EU seems to have made great progress since the 1957 Treaty of Rome. Almost every aspect of policy is now determined by bureaucrats in Brussels in combination with the European Council and the European Parliament. The EU even has its own foreign service and is struggling to create its own intelligence and federal police services. No wonder it impresses Arabs and Africans, whose own struggles for unity have, relatively speaking, gone nowhere. The trouble, however, is that the EU as a whole is in absolute demographic decline and relative economic and technological decline, and its major policies — whether the common fisheries and agriculture policies or the euro and monetary union — have failed. In terms of foreign and security policies, it is an international joke. It spends next to nothing on defense, and even its main contributors in this area, Britain and France, have seen their armed forces so severely cut recently that in the Libyan war, where Europe "took the lead," they were entirely dependent on U.S. logistics and supplies. If the EU boasts of its reliance on "soft power," that is because it has no choice. Its head of foreign affairs, the British baroness Catherine Ashton, has been called "the world’s highest-paid female politician," yet she remains anonymous and has no influence on world events whatsoever. Her position sums up everything that is wrong with the EU — expensive but ineffective. The fundamental problem with the EU, however, is that the people of Europe have no faith in it and do not identify with it. A 2010 Eurobarometer poll found that only 49 percent of EU citizens think their country’s EU membership is a "good thing," while only 42 percent trust EU institutions. Meanwhile, those institutions, like the EU’s whole ethos, are positively anti-democratic. Its key decision-making bodies — the European Council, Court of Justice, and European Commission — are, for all practical purposes, unelected, unaccountable, and removed from the people (commissioners are usually washed-up has-beens whose political careers in their home states have ended in failure). Their decisions are irreversible in national parliaments, and the European Parliament, while vested with powers of co-decision-making with the European Council, is also remote. The Parliament is a glorified debating society — not a government with an official opposition — and its parties cannot promise any fundamental policy changes in their election manifestos; indeed, its election outcomes rarely have an impact on the course of EU politics. Its members are unknown and despised as opportunists who merely seek inflated salaries, perks, expenses, and pensions. Voter turnout in the EU’s parliamentary elections is low and falling, reflecting the widely held belief among EU citizens that the EU doesn’t protect or represent their interests. One of the most egregious examples of the lack of democracy in the EU is the practice of making small states that vote "no" in EU referenda vote again. Denmark had to vote twice on the Maastricht Treaty, while Ireland was forced to go two rounds on the Nice Treaty and the Lisbon Treaty. Big states are not immune from this kind of bullying treatment, either. When voters in France and the Netherlands rejected an EU constitution in 2005, European leaders tweaked about 4 percent of the original wording, renamed the document the Lisbon Treaty, and then rammed it through the French and Dutch parliaments despite the popular votes. When then Greek Prime Minister George Papandreou suggested a referendum on the Greek bailout last year, he was maneuvered out of office within days. The EU does not believe in the tolerant British saying, "When in Rome, do as the Romans do." Instead, its policy is, "When in Rome, do as the Germans do." Altogether, the outlook in Brussels and Berlin is like that of Napoleon in George Orwell’s Animal Farm: "He would be only too happy to let you make your decisions for yourselves. But sometimes you might make the wrong decisions, comrades, and then where should we be?" The official German attitude is summed up by the regular fury from German politicians and the German media whenever an EU country calls for a referendum on initiatives from Brussels. When Ireland announced in February that it would hold a referendum on the EU’s new fiscal treaty, Der Spiegel marveled, "The Irish Again!" while Süddeutsche Zeitung declared that if the Irish fail to realize that the fiscal pact "is in their national interest," Germany "will not be able to help them." Perhaps nothing captures Germany’s elitist attitude better than an essay last summer in Der Spiegel by German political scientist Herfried Münkler titled, "Democratization Can’t Save Europe: The Need for a Centralization of Power." Münkler argues that elections and referenda cannot be trusted in Europe because "the European population has never been and still is not a European people." EU elites, he adds, "need to improve — and power has to be taken away from the periphery." Can you imagine a leading U.S. magazine printing such stuff about American elites and voters in certain states? But this is exactly what is happening in Europe today. Power is being taken away from the periphery by centralizing elites. But these elites are failing. The EU’s key policy — monetary union — has been a disaster. The simple fact is that you cannot have a successful monetary union without a political and fiscal union, with monetary transfers between rich and poor areas legitimized by democratic institutions. (In a currency union of disparate economies where changes of interest and exchange rates are forbidden to members, weaker economies have no means of competing with stronger ones if there is no legal arrangement for democratic agreement among members that stronger economies will bail out weaker ones when they get into debt.)

## Politics DA

### At: Politics---Top Level

#### Ukraine thumps- takes up all of Biden’s attention

Jonathan Lemire, 3-1-2022, "How the Russia-Ukraine conflict has fundamentally changed Biden’s presidency," POLITICO, https://www.politico.com/news/2022/03/01/biden-white-house-russia-putin-00012696

For weeks, President Joe Biden has started and ended his day trying to get inside Vladimir Putin’s head.

The most consequential foreign policy crisis of his young term has overwhelmed the president’s schedule, shoving everything — from the State of the Union to a Supreme Court pick — to the backburner. And while he leans on a trusted inner circle of advisers to decipher Putin’s moves, he has also relied on his own experience, having practiced diplomacy with European leaders for decades and having been able to size up Putin face-to-face a number of times.

#### PC low AND fails

Evan Tarr 2/14, staff at Carolina Political Review, “Biden’s Build Back Better: Dead, Dead, Dead.,” Carolina Political Review, 2/14/2022, https://www.carolinapoliticalreview.org/editorial-content/2022/2/14/bidens-build-back-better-dead-dead-dead

West Virginia Senator Joe Manchin (D) has long been a thorn in the side of the Biden administration and the more progressive Senators of the Democratic Party. His latest pronouncement on February 1st that the Build Back Better act is “dead” is just the latest example. It is a serious blow to an administration and party that have struggled to maintain a positive image after a year of botched foreign policy, high inflation, a stubbornly persistent COVID-19 virus, and now the demise of Biden’s flagship bill. While on the surface, Manchin is the clear culprit for the bill’s failure to pass, there are deeper factors that have influenced Biden’s sluggish legislative start.

It may seem surprising that a President who received a record number of votes in the 2020 election should see his primary legislative goal so utterly stymied. Yet Democrats should be wary of assuming that 2020’s results amount to a political mandate. Much of Biden’s appeal came from being wedged between two politically polarizing extremes — on the left, the likes of Bernie Sanders and Elizabeth Warren, and on the right, Donald Trump and his ilk. Biden did not campaign as a visionary, unlike his former running mate Barack Obama. Instead, he marketed the 2020 race as a battle over “the soul of the country,” and himself as the center Democrat that would guide America with a steady and moderate hand. Yet, in the view of former Republican Governor of Louisiana and current Wall Street Journal contributor Bobby Jindal, Biden’s Build Back Better plan proposes sweeping, “Sanders-style policies.” Whether they are the right policies for this time is a separate question. But Virginia Democrat Rep. Abigail Spanberger echoed Jindal’s sentiments: “Nobody elected him to be FDR. They elected him to be normal and stop the chaos.”

The polling data for the 2020 election backs this idea up. While progressives may be eager to champion Biden’s election as signifying a broad leftward movement for the country, Biden made no significant gains over Hillary Clinton in traditionally progressive demographics. According to the PEW Research Center’s “validated voter” analysis of the 2020 election, significant gains among moderate suburbanites were responsible for Biden’s victory over Trump in comparison to Clinton’s loss in 2016. Particularly for Biden, moderates played a larger role in his victory than liberals. Because conservatives constitute a larger share of the electorate than liberals, Biden and the Democratic Party are more dependent on moderates than their Republican counterparts are. It is therefore not only naïve but also politically self-destructive to propose legislation that alienates or scorns one of the most important bases of the party.

It doesn’t help that the earlier stimulus bill passed in 2021 to the tune of $1.9 trillion dollars now seems to have contributed meaningfully to inflation. In the words of the Washington Post’s Caroline Rampell, who supported the bill originally, “Congress sent the states more money than they knew what to do with.” And among the recipients of the round of stimulus payments that came with the bill were “many high-income households that were financially unscathed by the pandemic and perhaps even improved their finances.” And while Build Back Better is projected to have little effect on inflation, the damage from the previous bill seems to have been done. Simply put, Biden’s administration and his fellow Democrats in the House and Senate tried to spend political capital they didn’t have by attempting to pass the Build Back Better bill.

Democrats, who still have hope for the bill, must now consider the political risk of reopening an intraparty battle when other pressing matters, such as a bill to increase competition with China and another to reauthorize the 1990s Violence Against Women Act, currently take center stage. And while some progressives are pushing for a March 1st deadline — in time for Biden’s State of the Union — to resurrect the bill, Biden also has the opportunity to appoint a new Supreme Court Justice, a rare chance for a political win amidst current chaos. It will be extremely difficult for Democrats to accomplish all of the above goals while swimming against the current of low trust in the current administration’s vision for America and its capability to execute on that vision. If the Democrats in the White House and Congress wish to make progress, they will need to be considerably more politically savvy than they have been so far.

### Not top of agenda

#### Conference committee will take months

Abby Vesoulis, 2-28-22, "How Record-Setting Inflation Could Affect Democrats in the Midterms," Time, https://time.com/6152697/inflation-democrats-midterm-elections-2022/

Axne also supports the America COMPETES Act, which would invest $52 billion into the U.S. production of semiconductors, a key element of vehicles and consumer electronics, in addition to tackling other supply chain vulnerabilities stemming from America’s reliance on other countries, including China. The COMPETES Act is the House’s response to the U.S. Innovation and Competition Act (USICA), which passed last year in the Senate. The legislation now needs to go through the conference process where lawmakers resolve the two chambers’ versions before it heads to Biden’s desk for signature. Axne anticipates that process will wrap up “in the next coming months.”Axne also supports the America COMPETES Act, which would invest $52 billion into the U.S. production of semiconductors, a key element of vehicles and consumer electronics, in addition to tackling other supply chain vulnerabilities stemming from America’s reliance on other countries, including China. The COMPETES Act is the House’s response to the U.S. Innovation and Competition Act (USICA), which passed last year in the Senate. The legislation now needs to go through the conference process where lawmakers resolve the two chambers’ versions before it heads to Biden’s desk for signature. Axne anticipates that process will wrap up “in the next coming months.”

### AT: Cyber

**Threat of retaliation checks cyber attacks---AND, terrorists lack the capabilities.**

Jon Lindsay & Erik Gartzke 16. \*\*Assistant Professor of Digital Media and Global Affairs at the University of Toronto. \*\*Associate Professor at UC San Diego. “Coercion through Cyberspace: The Stability-Instability Paradox Revisited” in K. M. Greenhill & J. P. Krause eds. *The Power to Hurt: Coercion in Theory and in Practice*. Oxford University Press. Forthcoming.

Widespread belief that offense is easier than defense in cyberspace, that stronger states are increasingly vulnerable while weaker actors are increasingly empowered, and that the anonymity of cyber operations precludes effective deterrence leads many to argue that cyberspace brims with unprecedented, even revolutionary dangers. 2 Yet national security officials, defense firms, media pundits, and a burgeoning private cybersecurity industry all have **incentives to exaggerate the threat**, while the extreme secrecy of cyber operations complicates sober assessment.3 Critics of the cyber revolution argue that most actors **lack the capacity** to overcome **significant barriers** to weaponization in cyberspace, while those that have the capacity **lack the motivation** to use it, choosing instead to explore digital variations on traditional espionage and covert action.4 Nevertheless, even if breathless scenarios of a “digital Pearl Harbor” or “cyber 9/11” are **overblown**, cyberspace poses real challenges for international relations in theory and practice. As Austin Long argues in chapter 2, intelligence and coercion are increasingly linked, and cyberspace is increasingly valuable for intelligence. Recent events demonstrate that strategic actors are willing to use cyber operations as a tool of statecraft, even as the strategic results have proved ambiguous at best: Russian denial of service attacks and information operations in Estonia, Georgia, and Ukraine; relentless Chinese espionage campaigns and intrusive internet censorship; U.S.-Israeli sabotage of Iranian nuclear enrichment infrastructure; Iranian retaliation against Saudi Aramco and American banks; American cooptation of major internet firms for global signals intelligence collection revealed by Edward Snowden; criminal breeches of leading firms and government agencies exposing the private data of millions of citizens and government employees; North Korean harassment of Sony in Hollywood to protest a satirical movie; Russian attempts to influence the 2016 U.S. presidential election, and the list goes on.¶ To paraphrase Clausewitz, cyberwar is politics by other means. Understanding the dynamics, magnitude, and likelihood of aggression online requires an assessment of the operational requirements for staging various types of cyber operations, the strategic benefits actors hope to gain through them, and the risks of unintended consequences. In this chapter we lay out a typology of cyber operations that combines the logic of technological possibility with the logic of strategic utility. We distinguish a number of myths that assume cyber attacks can provide high rewards at low cost from more realistic options that deliver variable rewards at variable costs. There is no free lunch in cyberspace. As a result of technical and political constraints on secret operations that depend on interconnections between adversaries, the coercive potential of cyberspace is more limited than generally appreciated. Because **voluntary connections** to the internet make cyber harms possible in the first place, aggressors must be careful not to provoke their victims to disconnect. The **social** and **economic value** of the internet both expands and **constrains the scope** for minor aggression like espionage, covert influence, and symbolic protest. Moreover, the availability of military instruments beyond the cyber domain creates potential for retaliation for unacceptable harms. There are **diminishing incentives** to “go big” with cyber warfare, **even** as an adjunct to battlefield **op**eration**s**, because victims have incentives to **mount major investigations** and **shift domains** to **punish cyber aggression**. Coercion still has an important role in cyberspace, nonetheless, especially when exploited in conjunction with other forms power such as military force. We thus delineate the ways in which the cyber domain can be used alone or in conjunction with other domains for **deterrence** or compellence.¶ Strategic logic helps to explain the highly skewed distribution of cyber harms we observe historically. While information technology creates the possibility for harm, it is political and economic incentives that determine the probability of harm. Small-scale aggression online and computer crime is relatively appealing and thus more abundant; large-scale cyber attacks are more difficult and less desirable for initiators and thus far less likely to occur. This argument extends the logic of the **“stability-instability paradox”** pioneered in the 1960s. Mutually assured destruction may have restrained the superpowers from engaging in direct confrontations during the Cold War, but nuclear threats could not credibly prevent the exercise of proxy wars throughout the Third World. The mechanisms of restraint in the cyber domain are slightly different than in the nuclear world insofar as actors look to maintain connectivity and avoid military retaliation vs. mutual Armageddon, but the results are similar: we see little to none of the most dangerous behavior but a great deal of provocative friction. It turns out that cyber revolutionaries and cyber skeptics are both partially correct. We should expect to see a lot more creative exploitation of global information infrastructure, but threat actors have **strong incentives** to **restrain** the intensity of their exploitation.

## TSPS DA

#### 2] China tech is way behind

Zhang Jun 18, dean of the School of Economics at Fudan University and director of the China Center for Economic Studies, a Shanghai-based think tank., 8-3-2018, "The West exaggerates China's technological progress," Nikkei Asian Review, https://asia.nikkei.com/Opinion/The-West-exaggerates-China-s-technological-progress

Over the past two decades, China has been achieving rapid technological progress, thanks in no small part to its massive investment in research and development, which totaled some 2.2% of its gross domestic product last year. Yet China is nowhere near the technological frontier. In fact, the distance separating it from that frontier is far greater than most people recognize. In the West, many economists and observers now portray China as a fierce competitor for global technological supremacy. They believe that the Chinese state's capacity is enabling the country, through top-down industrial policies, to stand virtually shoulder-to-shoulder with Europe and the U.S. Harvard economics professor and former U.S. Treasury Secretary Larry Summers, for example, declared last March at a Beijing conference that it is a "historical wonder" that China, where per capita income amounts to just 22% that of the United States, could have the world's cutting-edge technology and technological giants. The U.S. Trade Representative, in a March report, presented the "Made in China 2025" plan -- a 2015 blueprint for upgrading China's manufacturing capacity -- as proof that the country is seeking to displace the U.S. in high-tech industries that it considers strategic, such as robotics. Moreover, the USTR report asserts, China has happily played the game by its own rules, and has violated current global regulations to achieve its goals. Indeed, many Westerners warn that China is planning to use its technology-based power to impose an entirely new set of rules that is inconsistent with those long enforced by the West. This is a serious misrepresentation. While it is true that digital technologies are transforming China's economy, this reflects the implementation of mobile-Internet-enabled business models more than the development of cutting-edge technologies, and it affects consumption patterns more than, say, manufacturing. This kind of transformation is hardly unique to China, though it is occurring particularly rapidly here, thanks to a huge consumer market and weak financial regulation. Furthermore, it is not so obvious that these changes have anything to do with the government's industrial policies. On the contrary, the growth of China's internet economy has been driven largely by the entrepreneurship of privately owned companies like Alibaba and Tencent. In fact, Western observers -- not just the media, but also academics and government leaders, including U.S. President Donald Trump -- have fundamentally misunderstood the nature and exaggerated the role of China's policies for developing strategic and high-tech industries. Contrary to popular belief, these policies do little more than help lower the entry cost for firms and enhance competition. In fact, such policies encourage excessive entry, and the resulting competition and lack of protection for existing firms have been constantly criticized in China. Therefore, to the extent that China relies on effective industrial policies, they do not create much unfairness in terms of global rules. Having said that, what are China's actual technological prospects? The Chinese are certainly fast learners. Over the last 30 years, Chinese manufacturers have proved adept at seizing opportunities to emulate, adapt and diffuse new technologies. But technological advances in the Chinese business sector occur at the middle of the smile curve (where gains are generally lower than at the innovative start of a new product or at the end, in marketing finished goods to consumers). Foreign core-technology owners extract most of the added value from Chinese manufacturing. For example, in Danyang, a county of Jiangsu Province that is a production hub of optical lenses for global markets, manufacturers can produce the most sophisticated models. Yet they lack the core software to produce, say, progressive lenses, so they must pay a fixed royalty to a U.S. company for each progressive lens they make. Likewise, China's automobile manufacturers still import their assembly lines from developed countries. Clearly, there is a big difference between applying digital technologies to consumer-oriented business models and becoming a world leader in developing and producing hard technology. The latter goal will demand sustained investment of time, human capital, and financial resources in sectors with long basic R&D cycles (such as pharmaceuticals). Given this, China probably remains 15-20 years away from matching the R&D input of, say, Japan or South Korea, and when it comes to output -- the more important factor -- it is much further behind. While China can accelerate progress by attracting creative talent and strengthening incentives for long-term research, there are no real shortcuts when it comes to achieving the gradual shift from learning to innovating.

#### 3] Big Tech isn’t innovative, it’s replacing innovative startups.

Alexis C. Madrigal 20. a contributing writer at The Atlantic, a co-founder of the COVID Tracking Project. "Silicon Valley Abandons the Culture That Made It the Envy of the World." Atlantic. 1-15-2020. https://www.theatlantic.com/technology/archive/2020/01/why-silicon-valley-and-big-tech-dont-innovate-anymore/604969/

But there’s a more troubling possibility. Maybe something has changed about the nature of innovation, at least in software.

The start-up tradition traces back to Hewlett-Packard, the original company-in-a-garage, in 1937, and later to the Fairchildren of the 1960s, a tangle of semiconductor companies that successively spun out of larger companies, one after the other. The go-your-own-way ethos infused later cohorts of entrepreneurs across the spectrum of technologies, all the way up through the 20th century. The best thing you could be in Silicon Valley was a founder, and the best thing a founder could do was supercede those who came before.

The newest generation of companies has not been able to fulfill the latter half of that

prophecy. It’s more difficult to dislodge the elder companies, which have grown ever more entrenched and valuable. CB Insights, a research firm, recently added up the (likely inflated) value of all 439 “unicorns”—start-ups that investors have valued at more than $1 billion—in the world. It got roughly $1.3 trillion, or about one Apple’s worth of market value. Remember, that figure accounts for hardly tech companies, such as Juul; so-far dubious technologies, such as augmented-reality headsets from Magic Leap (valued at $6.3 billion on this list); and all the Chinese and Indian players.

For start-ups not on the unicorn list—and even for many that are—the chance that they will have an initial public offering and remain independent is small. That means the only way their investors will get their money out will be via an acquisition by one of the large companies. Google, Facebook, and their ilk “have become enormous by swallowing small companies, so the network is no longer the network but the octopus,” Margaret O’Mara, a historian at the University of Washington, told me.

This could alter the course of technological development, not just corporate structures. Quantitative research suggests that big companies do different kinds of R&D than their more modest counterparts. Instead of coming up with new products, they come up with process improvements. “If the nature of innovation is distorted toward selling to an incumbent, you’re going to get more feature-driven innovation rather than systemic disruption,” Federal Trade Commissioner Rohit Chopra told me. As an example, O’Mara told me a story famous in Silicon Valley about how Xerox had a personal computer in its hands in the 1970s (thanks, Alan Kay!) but declined to commercialize it. “You get to a certain degree of bigness, and you’re making so much darn money on copy machines, why on Earth would you work on a PC and bring it to market?” O’Mara said. Apple, a start-up at the time, would famously popularize PCs instead.

Even though small firms have been responsible for many of the Valley’s most successful products and services, large firms have deep roots there too. As O’Mara points out in her book The Code, Lockheed Missiles and Space (later a unit of Lockheed Martin) was the largest Silicon Valley employer from the 1950s into the 1980s. The government supported the development of computing and networking in myriad ways. During the Cold War, the U.S. government pushed research dollars through a select few major research universities such as Stanford. Local companies directly benefited from this largesse, in terms of both the funding and concentration of talent around Palo Alto. It wasn’t until the 1970s that the military-industrial beginnings of the technology industry gave way to a different understanding of how to make change in the world.

“The story the Valley told about itself has been very much a small-is-beautiful story since the 1970s,” O’Mara told me. “It has a politics—this Vietnam-era rejection of the military-industrial complex, rejection of the mainframe, Big Business, Big Government, big universities.”

This led people to take risks and launch new projects and firms. Entrepreneurs from all over the world migrated to a place where people understood why they wanted to start companies. And the idea even embedded itself right near the heart of the Valley, at Google. The company’s slogan, “Don’t be evil”, had a particular meaning when it was adopted around the millennium. In the classic Valley mind-set, “evil is bigness of all kinds,” O’Mara said.

Now, of course, “the mainframe” has been replaced by the cloud, and companies such as Facebook have openly called for government regulation around key platform issues. The biggest companies moved closer and closer to Washington, D.C., during the Obama era, and despite some teeth-gnashing, stayed close after Donald Trump’s election.

# 1AR

## ADV CP

#### The aff solves inequality best.

Ike Brannon 20. senior fellow at the Jack Kemp Foundation. “A Wealth Tax Is Not A Solution For Income Inequality” Forbes. 09-29-20. <https://www.forbes.com/sites/ikebrannon/2020/09/29/a-wealth-tax-is-not-a-solution-for-income-inequality/?sh=6353462b7f5b>

A **permanent increase in pay in the occupations of low-income households is infinitely preferable than any commensurate increase in transfer payments.** Successive governments abetted this increase beneficial development by quickly acting to ameliorate the effect of the financial crisis and then making economic growth writ large a priority across both Democratic and Republican Administrations. And after the economic expansion reached 7 years, **wages at the bottom started to increase. This also describes our success at reducing inequality** in the 1990s.

## TSP DA

#### China doesn’t hurt US tech leadership

Economist 18, 5-3-2018, “Fears that China has hurt innovation in the West are overblown,” https://www.economist.com/finance-and-economics/2018/05/03/fears-that-china-has-hurt-innovation-in-the-west-are-overblown

POPULAR concern about free trade with China has focused on the loss of manufacturing jobs in America and Europe. Policymakers have an additional worry: that China’s rise is hurting innovation in the West. This fear is among the small set of issues that unites American Democrats and Republicans. In 2016 Barack Obama’s commerce secretary said that China’s state-driven economy would weaken the world’s innovation ecosystem. Donald Trump’s advisers allege that China makes it harder for foreign firms to invest in innovation by squeezing their returns. Mr Trump’s trade team was expected to raise this complaint, among others, with Chinese officials during talks in Beijing on May 3rd and 4th, as The Economist went to press. There is one problem. Data suggest that competition with China has coincided with more innovation in America, not less. The relationship between competition and innovation is complex, even before considering trade with China. Economists agree that the right competitive landscape fosters innovation. But they disagree about what exactly that landscape looks like. More competition might prod companies to try harder to develop new products in the hope of gaining market share. Alternatively, if competition is cut-throat, profits might evaporate to the point that companies have little incentive to take risks. The fear is that China generates the wrong kind of competition and stunts the good kind. Businesspeople elsewhere worry that when the Chinese government decides to fund this or that industry, investment soars and margins collapse. Overcapacity in steel was caused in part by Chinese investment in steel processing; semiconductor firms think their industry might be next. At the same time, argues Robert Lighthizer, the US Trade Representative, foreign companies that beat their Chinese competitors are not adequately rewarded because China presses them to transfer their intellectual property. The two main academic papers on this question looked at the years around China’s accession to the World Trade Organisation in 2001. Far from settling the matter, they were contradictory. Economists studying European companies found that competition from Chinese imports both caused firms to improve their technology and led to a shift in jobs to the most advanced firms. They concluded that 15% of the upgrading of technology in Europe between 2000 and 2007 could be attributed to the increase in imports from China. But economists examining the impact on America argued that, on the contrary, Chinese competition had led companies to spend less on research as profits fell. They calculated that imports from China explained 40% of a slowdown in American patenting between 1999 and 2007, compared with the preceding decade. The IMF has now weighed in with more recent figures. Its conclusion is rather more cheerful, at least for those who think a trade war with China is a rotten idea. In a report published in April the fund showed that, following an extended period of decline, high-quality patents granted to American companies had risen sharply between 2010 and 2014. It also pointed to a big increase in American spending on research and development during the same years—even as America’s trade deficit with China rocketed (see chart). The growth in patents was more sluggish in Europe and Japan. But both patents and research spending soared in South Korea, the country most directly exposed to manufacturing competition from China. A separate IMF working paper late last year unpicked some of what is happening in America. Competition from Chinese imports has caused research spending to be reallocated within certain industries, away from also-rans and towards the most productive and profitable firms. At the same time, many researchers left manufacturing industries and moved into service sectors such as data-processing and finance. Both results are consistent with an American economy that is playing to its strengths. The IMF’s analysts concluded that Chinese imports were not a threat to innovation in America, after all, and that policymakers could take a deep breath. No loud inhaling sounds have yet been reported from the White House.

### Noimpact

#### No terminal impact to cyber-attacks---people lack technical skills, strageic ambiguity and interdependence check---that’s Lindsay and Gartzke

And Lewis 20---senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies). Lewis, James. 2020. “Dismissing Cyber Catastrophe.” Center for Strategic & International Studies. August 17, 2020. https://www.csis.org/analysis/dismissing-cyber-catastrophe.

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack. To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation. The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability. One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

## DOJ DA

### ITL---1AR

#### NO internal link---DOJ can’t solve all human trafficking---means too many alt causes to eu stability make their impact inevitable, but Europe solves all cartels on their own

McIlvenna-Davis 19

12/16/19. Dylan McIlvenna-Davis, Student, Berkeley Political Review, “Gangs and Gulags: How Vladimir Putin Utilizes Organized Crime to Power his Mafia State”, <https://bpr.berkeley.edu/2019/12/16/gangs-and-gulags-how-vladimir-putin-utilizes-organized-crime-to-power-his-mafia-state/>

While the Russian mafia is a favorite antagonist of Hollywood screenwriters, it is thought to be all-but-defunct in reality. After all, when was the last time anybody in the U.S. heard about major Russian mafia activity? The criminal underworld is thriving like never before in Europe. The individuals and groups are not random; they are highly organized, well-funded and responsible for rising levels of cyberterrorism, money laundering and murder. Fortune Magazine lists the Solntsevskaya Bratva, alternately known as the Russian mafia, as the largest organized crime group in the world and it ranks above both the Japanese Yakuza and the Mexican Sinaloa cartel in terms of overall revenue. More interesting than its current standing is how it achieved its status. From a culture that encouraged crime to a government that aided and abetted it, the Russian Federation has become a hotbed for a growing criminal underworld. Soviet-era repression has given way to a marriage between kleptocracy and organized crime. Among industrialized nations, Russia’s relationship with crime is uniquely symbiotic. Organized crime in Russia has blossomed as an outgrowth of the political machine. Mafia cells have undertaken assassination attempts, facilitated coercion and acted as tools for the assorted and sundry dirty jobs the Russian elites require. Russian vory, thieves, have been a staple since Stalin’s U.S.S.R. Mark Galeotti, a Senior Associate Fellow at the Royal United Services Institute and author of The Vory: Russia’s Super Mafia writes in the 2018 book that Joseph Stalin incentivized the collaboration between criminals and the government during the 1917 Bolshevik revolution. The soon-to-be Soviet leader utilized gangsters to rob banks and commit piracy to fund the revolution and sow chaos amongst the establishment. Once the Communist Party took power, the government allowed those trapped in gulags – Soviet forced labor camps housing all ranges of criminals – to attain an easier life in exchange for acting as enforcers for the government. These newly established enforcers formed the seedy underbelly of Russian society that expanded upon the collapse of the U.S.S.R. and the move towards free-market practices. Since his rise, Vladimir Putin has incentivized gangsters to do his bidding in a new way. Rather than overt collusion, the Russian government, as ABC puts it, “make[s] its views known” and allows gangs to operate within the guidelines set forward by Putin. As the European Council on Foreign Relations notes, more and more crime networks tangentially linked to Russian actors have appeared all over Europe. Multiple politically convenient assassinations or assassination attempts have been made on anti-Russia figures by gang members who have been accused of being Russian assets. The Russian government, via the Russian mafia, has dabbled in ventures ranging from hacking to money laundering. In February of 2018, 18 Russian nationals were accused of money-laundering €50m through Spanish real estate. Among those accused was one Vladislav Reznik, a member of Putin-loyalist party United Russia. An attempted assassination of Chechen Adam Osmayev, a staunchly anti-Putin freedom fighter, was allegedly orchestrated by Russian mafia members in 2017. Since then, the Interior Ministry of Ukraine has pinpointed Russian intel that called for Osmayev’s murder. Leaked secret diplomatic cables from US Diplomats outright called Russia a “mafia state”. In 2019, Europol and Italy’s Anti-Mafia Investigation Directorate met to assess the state of organized crime in the European Union. The conclusions were striking, leading the body to declare organized crime as “the highest risk” to E.U. security. Organized crime is arguably just as difficult a task to wrangle today as it was in the Prohibition era in the United States, with the E.U. scrambling to contain the spread. The exact degree to which the vory impact international organized crime statistics is up for debate, mostly owing to the somewhat decentralized nature of how the Solntsevskaya Bratva operates. Research indicates that many cells of organized crime, especially those in Eastern Europe, are directly connected to the Bratva, including many Chechen mafia-affiliated groups. This decentralization makes it incredibly difficult to take down, and the Russian government’s implicit support of the vast array of organized crime means that the surge of activity across the European Union won’t be going away any time soon. As demonstrated by its handling of political dissidents and freedom fighters, Russia and Vladimir Putin have little care for the opposition voices to their harsh tactics, whether such opposition comes domestically or from the international community. The validity of Ex-NFL lineman Justin Bannan’s claims of being the target of the Russian mafia may be in question. After all, with the evident ruthlessness of the many organized crime cells operating in Russia, it seems unlikely that Bannan would have made it as far as he did. Regardless, Bannan’s story spotlights the very real problems facing Europe. Organized crime is frying bigger fish than ever before without any end in sight. What the international community can or will do remains to be seen. For now, take some solace in your safety here in the United States, at least while you still can.

### DOJ Antitrust Now

#### The DOJ’s bringing back aggressive antitrust enforcement and pushing the limits of Sherman and Clayton.

Debbie Feinstein 1/31/22. Partner at Arnold & Porter and former top antitrust enforcer at the FTC, with Andre Geverola and C. Scott Lent. “United States: Back To The Future: The Antitrust Division Looks To The Past To Chart Aggressive New Course.” https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1155518/back-to-the-future-the-antitrust-division-looks-to-the-past-to-chart-aggressive-new-course

On January 24, 2022, Jonathan Kanter, the recently confirmed Assistant Attorney General (AAG) of the US Department of Justice's Antitrust Division (Division), laid out his enforcement plans and priorities to a meeting of the New York State Bar Association's Antitrust Section.1 Consistent with the Biden Administration's stance on competition issues,2 AAG Kanter set forth an aggressive approach that draws inspiration from the past—specifically, from former AAG and Supreme Court Justice Robert Jackson.

Citing the "dozens of cases" Justice Jackson brought during his first year leading the Division, AAG Kanter said he was ready "to embark on an aggressive campaign of antitrust enforcement" to, in his words, "free markets from the grip of monopoly power." AAG Kanter observed that the economy has changed significantly in the last several decades, and expressed his view that "[a]ntitrust law enforcement has not succeeded in keeping pace with these massive changes." Accordingly, AAG Kanter announced plans to reinvigorate antitrust enforcement in the following ways:

Section 2 Enforcement

AAG Kanter said he intends to place greater priority on filing cases under Section 2 of the Sherman Act. Section 2 makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."3 Highlighting the 20-year gap between the filing of "major DOJ monopolization cases" (United States v. Microsoft in 1998 and United States v. Google in 2020), AAG Kanter's remarks indicate that he plans to litigate more Section 2 cases to address the "dearth of Section 2 case law addressing modern markets."

AAG Kanter believes there is a "growing divide" between Section 2 antitrust doctrine and current markets, and said he will apply Section 2 in a way that is "responsive to market realities," not "outdated models." Further foreshadowing a new approach to evaluating competition in "modern markets," AAG Kanter observed that "there are an increasing number of markets where competition is not reflected merely, or primarily, in consumer prices or output." For example, AAG Kanter noted concerns about the accumulation of large quantities of personal, private data by "dominant platforms whose digital services have few, if any, realistic alternatives."

Continuing the Division's focus on competition in labor markets,4 AAG Kanter also expressed concerns about "monopsony power of employers in labor markets." AAG Kanter's remarks suggested that the Division may consider less traditional measures of monopsony harm, such as reduced quality of life, as potential measures of harm in labor markets.

Merger Enforcement

Quoting Section 7 of the Clayton Act, AAG Kanter stated that he intends to challenge any merger that may substantially lessen competition or tend to create a monopoly.5 In line with his emphasis on Section 2, AAG Kanter specifically highlighted the "tend to create a monopoly" prong of Section 7, suggesting that the Division may increasingly challenge mergers by dominant firms that pose a risk to incipient competition.

AAG Kanter emphasized two other efforts to bolster the Division's merger-enforcement efforts. First, he noted the Division's work with Congress to increase the Division's funding. AAG Kanter described a "historic resource shortage" at the Division in the face of an "unprecedented explosion" of premerger notifications and retrospective studies suggesting that consolidation over the past decades has led to less competition. Second, he cited the recent joint DOJ-FTC public inquiry6 seeking comments on ways to modernize the 2010 Horizontal Merger Guidelines7 to reflect developments in the modern economy and make sure "our economic models reflect market realities."

Remedies

Finally, AAG Kanter indicated a preference toward pursuing litigation, rather than negotiated settlements, to prevent the loss of competition from anticompetitive mergers. He expressed concern that "merger remedies short of blocking a transaction too often miss the mark" and skepticism in the Division's ability to determine appropriate divestitures "for evolving business models and innovative markets." In his view, "a simple injunction to block the transaction. . . is the surest way to preserve competition."

AAG Kanter noted, however, that divestitures may still be an option where "business units are sufficiently discrete and complete" such that "disentangling them from the parent company in a non-dynamic market is a straightforward exercise." But, in his view, these circumstances are "the exception, not the rule." Like his predecessor, AAG Makan Delrahim,8 AAG Kanter expressed a preference for structural remedies over behavioral remedies to resolve antitrust concerns.

Takeaways

The Antitrust Division will be more inclined to sue to block transactions than to negotiate settlements with targeted divestitures. AAG Kanter's remarks suggest that the Division likely will seek to enjoin transactions that the Division believes are anticompetitive unless it has a high level of confidence that a structural remedy will fully preserve competition. Whether this approach will be feasible (because parties can "litigate the fix," and given the Division's "historic resource shortage" it may not have the resources to litigate every merger where it might otherwise accept a divestiture) remains to be seen. Nevertheless, parties should approach deal planning and merger reviews understanding that the Division may now be more likely to take an "all or nothing" approach to merger remedies.

The Antitrust Division will place greater emphasis on real-world evidence of competitive harm than economic models. In his introduction, AAG Kanter asserted that economics "are merely tools to understand facts relevant to particular case" and "where there are natural experiments and direct evidence of competitive harm, economic theory must give way to market realities." This statement suggests that the Division will place greater weight on actual competitive effects—even if anecdotal—over economic predictions. Parties should be prepared to provide examples of past procompetitive deals and other real-world evidence to defend their transactions, whether to the Division or to the courts.

The Antitrust Division is more likely to bring cases testing the limits of the antitrust statutes and precedent. AAG Kanter repeatedly emphasized that current enforcement must reflect today's market realities, and that new litigation is needed to "bring clarity to the law" and "reconsider the application of old precedents" to "modern markets." AAG Kanter's statements indicate that the Division may be willing to bring cases that test the boundaries of the Sherman and Clayton Acts and existing caselaw, in order to obtain "new published opinions from courts that apply the law in modern markets." Parties should be prepared to address competitive-harm theories that are not based on traditional measures of harm such as price and output effects.

#### And, The DOJ is on a no-poach enforcement bender.

Zachary Terwilliger et al. 3/3/22. Partner at Vinson & Elkins’ Washington, D.C. office, with Lindsey Vaala and Rami Rashmawi. “DOJ aggressively pursuing 'no-poach' agreements.” https://www.benefitspro.com/2022/03/03/doj-aggressively-pursuing-no-poachers-412-127578/?slreturn=20220203124625

The current landscape: A proliferation of no-poach indictments

For decades, per se treatment and criminal prosecution of Sherman Act violations have been reserved for three long-established categories of “hard-core cartel activity:” price fixing, bid rigging and market allocation. However, in the 2016 Guidance, the agencies announced that “no-poach” conduct is merely a form of market allocation in which competing employers allocate the market for employees, and thus, that per se treatment of such agreements is proper. The agencies declared that “no-poach” agreements “eliminate competition in the same irredeemable way as agreements to fix product prices or allocated customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.”

Despite the enthusiasm for “no-poach” criminal enforcement exhibited by the 2016 guidance, it was not until January 2021 that the DOJ made good on its promise and brought the first “no-poach” criminal indictment. In United States v. Surgical Care Affiliates, a grand jury returned an indictment alleging that Surgical Care Affiliates and two other then-unindicted companies had “engaged in a conspiracy to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other’s senior-level employees.”

The indictment characterized the conduct as a “per se unlawful, and thus unreasonable” restraint of trade that violated § 1 of the Sherman Act. After this first indictment, the DOJ continued its march on “no-poach” conduct by bringing indictments in four other cases over the past year: United States v. Hee, United States v. DaVita (indicting DaVita as an alleged co-conspirator of SCA), United States v. Patel, and United States v. Manahe. In Manahe, the most recent of these indictments, the DOJ indicted only individuals—bringing charges against four owners and managers of home health care agencies for allegedly conspiring to fix the rates paid to their workers and to refrain from hiring each other’s.

The only “no-poach” motion to dismiss that has been ruled upon is in DaVita, where the court rejected DaVita’s arguments that the indictment is improper. Motions to dismiss other no-poach indictments are pending in federal courts in Texas and Nevada, and it remains to be seen whether the Antitrust Division will similarly prevail in those jurisdictions. It will very likely be some time—months or years—before federal appellate courts weigh in on this issue and give more guidance as to whether no-poach conduct should in fact be treated criminally.

Unless and until a significant court decision strikes down its approach, companies should expect that the Antitrust Division will continue to investigate and criminally pursue no-poach agreements. It is thus more important than ever that companies undertake deliberate efforts to minimize liability and prevent no-poach conduct before it happens.

### No tradeoff

#### 1] money is locked in for years---zero tradeoff---even if the doj can’t solve THEIR EV says other law enforcement steps in and solves

#### 1NC TCR [BLUE]

“Garland Pledges ‘Full Force’ of DOJ in Battle Against Human Trafficking”, https://thecrimereport.org/2022/02/01/garland-pledges-full-force-of-doj-in-battle-against-human-trafficking/

Releasing the Justice Department’s new National Strategy to Combat Human Trafficking, U.S. Attorney General Merrick B. Garland promised to step up the government’s capacity to interdict traffickers, prosecute existing cases, and to support victims and survivors.

“Human trafficking is an insidious crime,” Garland said in a statement accompanying the release Monday. “Traffickers exploit and endanger some of the most vulnerable members of our society and cause their victims unimaginable harm.

“The Justice Department’s new National Strategy to Combat Human Trafficking will bring the full force of the Department to this fight.”

With an estimated 24.9 million victims worldwide at any given time, human traffickers often prey on adults and children of all ages, backgrounds, and nationalities, exploiting them for their own profit.

In the United States, people are often forced into commercial sex trades, or other industrial sectors, like hospitality, salon services, massage parlors, and drug smuggling operations, the U.S. Department of State website details.

Since the Trafficking Victims Protection Act of 2000, America has followed a fundamental framework approach called the “3P” paradigm — prosecution, protection, and prevention — which is further exemplified in the latest released strategy.

DOJ’s Enhanced Ability for Change

As part of the latest multi-year strategy, the Department of Justice is enhancing its capacity to detect human trafficking and identify human trafficking victims. Much of this initiative includes advanced training across sectors with nationwide networks, juvenile systems, and drug trafficking investigations, as well as increased attention, and resource allocation.

This also includes the development of a new victim screening protocol, designed to support survivors within their interactions with law enforcement, the report outlines, including the coordination and joint efforts across all 94 U.S. Attorneys’ Offices and by the federal law enforcement to stop the heinous crimes.

There will also be an enhanced initiative spearheaded to reduce vulnerabilities of American Indians and Alaskan Natives, including human trafficking vulnerabilities while also working to locate missing children.

With that, the department is also further employing a victim-centered and trauma-informed approach, the report outlines, adding that they will be culturally-responsive in order to gain the trust of survivors and avoid re-traumatization.

This goes hand-in-hand with the announcement of more victim-centered assistance programs, including supporting efforts to ensure financial restoration to survivors.

Lastly, the Department of Justice pledges in their report to improve data gathering and reporting, considering information is “critical to developing sound anti-trafficking policy.”

“The Department of Justice places the highest priority on its efforts to combat human trafficking,” the report concludes. “The Department looks forward to implementing this Strategy to prevent victimization, protect those who have been harmed, and vindicate their rights through criminal prosecution.”