# 1NC vs Emory HN

## OFF

### 1NC – T – “Prohibition”

#### Interp—“Expand the scope” requires broadening the range of claims that can be brought – that’s distinct from just the standard that courts apply

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### A prohibition requires ending something fully

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### Violation: the AFF changes the standard that courts use to interpret cases, it does not expand the scope to prohibit a new pattern of conduct – their new standard could lead to more OR less conduct being prohibited

#### Vote neg—

#### A] Limits—endless AFFs that make small tweaks to antitrust laws without prohibiting conduct on the basis of illegality

#### B] Ground—All core disad links and CP competition is based on prohibiting conduct rather than adjusting legal standards

### 1NC – Adv CP

#### The United States federal government should

PLANK 1:

--substantially increase taxes on corporations and the wealthy and direct those funds to social welfare programs

--substantially increase tax credits for those with lowest wages

--provide universal, high-quality, free education from pre-K through college

--establish and enforce labor protection laws

--provide a federal job guarantee

--provide universal healthcare

--increase construction of public housing

--direct all of these policies to primarily benefit historically disadvantage communities

PLANK 2

--substantially increase resources dedicated to antitrust agencies

--pass the Consumer Protection and Recovery Act

#### Plank one solves – CP is way more comprehensive approach to solving inequality – aff is neither necessary nor sufficient because it doesn’t overcome political attitudes that entrench inequality without CPs can of fiat

PIIE ’20 – Peterson Institute for International Economics, think tank based in DC

“How to Fix Economic Inequality? An Overview of Policies for the United States and Other High-Income Economies” <https://www.piie.com/sites/default/files/documents/how-to-fix-economic-inequality.pdf>

SECTION 7 Policy recommendations

This menu of policy recommendations is focused on the United States, with some also applicable to other advanced economies. It represents some commonly cited solutions by inequality experts, organized by policies related to taxes, education, labor, corporate regulations, and the social safety net. Economics can provide some guidance over which approach is most effective, but political attitudes toward inequality will play a significant role in which ones to focus on.

Table

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#### Antitrust enforcement has no effect on wealth inequality – market dynamics are too complex to establish a direct link - doesn’t redistribute funds from CEOs

Schechter ’16 – writer at ProMarket citing Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim

Asher, “Is More Antitrust the Answer to Rising Wealth Inequality?” ProMarket, <https://promarket.org/2016/07/08/antitrust-answer-rising-wealth-inequality/>

Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim. He also disputes the growing notion that a more rigorous antitrust enforcement can diminish wealth inequality, arguing that “more antitrust is not the answer to wealth inequality.”4

In a recent paper, Crane challenges what he deems as an oversimplification, claiming that that the relationship between antitrust law and wealth inequality is “far more complex” and that the relationship between income distribution and market power is “subtle, circumstantially contingent, and, at least for a developed economy, extremely difficult to generalize.” Crane then goes on to argue that more antitrust can in fact lead to greater inequality, and that “when it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”5

That the U.S. economy is suffering from increasing concentration levels, and that this rise in concentration has led in some cases to significant price increases, has been established in recent years by a growing number of studies. A recent paper by José Azar, Martin C. Schmalz, and Isabel Tecu6 showed that ticket prices are 3-11 percent higher due to common ownership among airlines. A similar paper by Azar, Schmalz, and Sahil Raina that looked at common ownership in U.S. banking7 found that that the largest U.S. banks share identical top shareholders, and that reduced competition in banking leads to worse service for consumers in the form of higher fees for deposit accounts and lower savings interest rates.

In health care, studies show that consolidations among hospitals led to significant price hikes. A 2015 study by Zack Cooper, Stuart Craig, Martin Gaynor, and John Van Reenen found that in markets where hospitals have a monopoly, prices are 15.3 percent higher than in more competitive markets that have four or more hospitals.8

To be sure, Crane does not completely dispute the idea that antitrust enforcement (or lack thereof) is related in some way to growing wealth inequality. What he does dispute, he says, is the “simplistic” version of the relationship between wealth inequality and antitrust, in which consumer-to-producer wealth transfers, enabled by lax antitrust enforcement and rent extractions, create regressive distributional effects. “In a complex, advanced economy, the lines of exploitation and profiting run in too many complicated and cross-cutting directions to permit broad generalization,” he writes in the paper.

“I am not claiming that there is no relationship between wealth inequality and antitrust or market competitiveness,” Crane tells ProMarket. “I am also not claiming that there couldn’t be certain antitrust interventions that would reduce wealth inequality. I think that there could be. All I am saying is that the overall picture, this facile assumption that more antitrust means greater equality and wealth is just way over-broad. The interactions between the distribution of wealth in society and market competitiveness are very complex and cross-cutting, and there are a number of ways in which more antitrust would actually increase wealth inequality.”

He adds: “I am not going to argue that there could never be case in which it would be appropriate to rationalize antitrust enforcement because of the inequality factor—if inequality is your priority, you could try to make a case—but it’s just that there are countercurrents where the effects are much more complicated than the people understand.”

In his paper, Crane disputes one of the key arguments for more antitrust enforcement–that shareholders and senior corporate managers are the main beneficiaries of monopoly rents. The literature on these issues, he argues, is ambiguous. Shareholding is something tens of millions of Americans do across social classes, as part of their 401(k)s and other retirement plans. It is far from clear that shareholders reap the lion’s share of monopoly profits, he notes, and a number of studies have shown that mergers don’t necessarily produce positive returns to the shareholders of the acquiring firm.

Some empirical studies, he claims, have actually shown that CEO compensation declines as markets become less competitive. Labor unions have also supported anti-competitive mergers in the past, he notes—such as the merger between US Airways and American Airlines—expecting that higher concentration would lead to a monopoly wage premium.

“When it comes to regressivity in monopoly, there are two questions: who bears the brunt—who is the effective payer of monopoly overcharges—and who obtains the gains. If you look at CEOs, for instance, the economic literature on CEOS earning a higher wage or stock option in more concentrated markets is very weak. In fact, there’s some literature that suggests that CEOs actually earn a lower wage in monopoly markets. If it’s a monopoly market, they’re less valuable to the firm, because it’s easier to generate income. There’s some literature suggesting it’s precisely where you see highly paid corporate executives that markets are very competitive, because then special talent is most beneficial to shareholders,” he says.

Moreover, Crane argues, antitrust cases have been brought not only against abusive corporations, but against middle-class professionals, such as music teachers, dentists, and lawyers. As an example, he points to a case brought by the Department of Justice against the National Association of Realtors in 2005, a case that concerned restrictions on home buyers to search for listings online.“If you look at statistics on the income of relators and the income of people selling homes, the income profile of a home-selling family is roughly twice the income profile of a realtor, on average,” he says. “Which means that if these allegations were correct, this is a huge wealth transfer from much-richer home sellers to much poorer realtors, and the enforcement action would have actually been regressive.” His point, he stresses, is not to dispute the case, but the notion that antitrust enforcement necessarily leads to progressive wealth redistribution.

Another factor that is often not taken into account, he argues, is government purchasing. Monopolists, he notes, often sell to “large intermediary organizations, which may distribute the incidence of monopoly charges progressively.” In the US, federal procurement accounts for roughly one-seventh of the GDP, not including state and local governments. Government, he argues, pays these monopoly overcharges and ultimately transmits them to taxpayers. Since the U.S. tax code is generally progressive, he argues, those overcharges are being borne progressively. Meaning: wealthy people should, in theory at least, pay a greater share, “which actually means that an antitrust intervention that diminishes anticompetitive conduct in government procurement actually has the effect of increasing wealth inequality.”

When it comes to the issue of price discrimination, says Crane, the relatively wealthy tend to be exploited proportionally more than the relatively poor. “According to most economic accounts, price discrimination has progressive distribution effects, meaning that a greater share of the higher prices charged by price discrimination comes from wealthier individuals than from poorer ones. That’s not uniformly true, but as a generality, in a market characterized by less competition, as monopolists are increasing their prices they are going to be charging proportionally higher prices on higher-income people, on average.”

The proponents of government antitrust action, argues Crane, ignore private efforts to curtail monopoly power. Government, he argues, should “get out of the way” of these private efforts. In the paper, he writes: “When it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”

“I think it’s just a mistake, as a general matter, to include reducing wealth inequality as one of the goals of antitrust law,” says Crane. “I’m resisting the idea that somehow talking about wealth inequality will improve antitrust enforcement. If anything, it will just distract, making it a political hot potato, but I don’t think it will have any appreciable effect on wealth inequality. Antitrust law works best when it’s concerned with economic efficiency and the protection of consumer welfare. That has been the consensus by economists, people in the field, and antitrust agencies for several decades now. My concern [is] that at a political level, people are looking for new scapegoats for wealth inequality, and particularly in recent times people have been looking at weak antitrust enforcement.”

#### Plank 2 solves—Adding funds let FTC win cases – otherwise companies will outlawyer any new legal standards

Jones and Kovacic 20 – Alison Jones, is a Professor of Law at King’s College London. William E Kovacic, is Professor of Global Competition Law and Policy at George Washington University, Visiting Professor at King’s College London, and Non-Executive Director, United Kingdom Competition and Markets Authority.

Alison Jones and William Kovacic, April 17 2020, “The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3619095

Measures to expand federal antitrust intervention dramatically – through the prosecution of lawsuits or the promulgation of trade regulation rules – will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (we assume that legislation to change the doctrinal status quo may not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies can create a serious gap between the teams assembled for the prosecution and defense, respectively. Although the public agencies can match the private sector punch for punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases that seek to impose powerful remedies upon global giants. An enhanced litigation program therefore will go only as far as the talent of the agencies will carry it. We propose three steps to build and retain the human capital – attorneys, economists, technologists, and administrative managers – to undertake a more ambitious litigation program. The first is to use antitrust as a prototype for a program to raise civil service salaries. The second two steps consist of cautions about the dangers of (a) denigrating the skills and accomplishments of existing agency personnel, and (b) attempting to shut the revolving door through which professionals now move between the public and private sectors. We discuss all three of these steps below. (i) Resources and Compensation. To accomplish the desired expansion of enforcement, we see a need for more resources, but not simply to build a larger staff by hiring more people. It is also to attract and retain a larger number of elite personnel who are equal to the tasks that the ambitious reform agenda will impose. We would use an increase in resources mainly to boost compensation, which means taking the antitrust agencies out of the existing civil service pay scale. We do not see how the public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to case handlers and to senior managers. It surprises us that adequate compensation for civil servants is not a focus of attention in contemporary proposals for an expansion of antitrust enforcement, including new cases to take on the leading firms in the high technology industry and in other sectors. Consider two possibilities for compensation reform. The first is to align antitrust salaries to the highest scale paid to the various U.S. financial service regulators. Here the model would be the compensation paid to employees of the banking regulatory agencies; the salary scale for these bodies exceeds the General Schedule (GS) federal civil service wage scale by roughly twenty percent.54 In adopting the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, 55 Congress concluded that the importance of the mission of the new Consumer Financial Protection Bureau (CFPB) warranted higher salaries for the agency’s personnel. If the higher salary scale made sense for the CFPB, we see no good reason why a more generous compensation schedule is not appropriate for the antitrust enforcement agencies.56 Are the duties entrusted to the federal antitrust agencies any less significant? Are the economic problems that the DOJ and the FTC (which is also the principal federal consumer protection agency and privacy regulator) are being called on to address – in the proceedings of this Committee and in many other fora -- any less significant? If the answers to these questions is “no,” Congress should allow the antitrust agencies to pay at least the same wages as the CFPB does. Our second alternative requires a more dramatic change, which we would implement in the first instance at the FTC.57 We would triple the FTC’s existing budget of about $330 million per year and use the increase mainly to raise salaries and partly to add more employees. This experiment might be carried out for a decade to test whether a major hike in pay would increase the agency’s ability to recruit the best talent, retain the talent for a significant time, and apply that talent with greater success in a program that involves prosecuting numerous ambitious cases and devising other significant policy initiatives. We see a major increase in compensation, either by adopting the CFPB model or trying our more dramatic alternative, to be a crucial test of the commitment and sincerity of elected officials who say a major expansion of antitrust enforcement is necessary to correct grave market power problems involving digital platforms. If fundamental competition policy reforms are vital to the nation’s well-being, then the country should spend what it takes to get the best possible personnel to run the difficult cases (and carry out other measures, such as the promulgation of trade regulation rules) that will be the pillars of a new, expanded enforcement program. Such steps will become even more important if new political leadership seeks to close the revolving door, which has operated as a mechanism to encourage attorneys and economists to accept lower salaries in federal service in the expectation of receiving much higher compensation in the private sector at a later time. In considering these proposals, legislators should take no comfort in the idea that the sense of satisfaction that can come from serving noble goals in public service creates a sufficient inducement for the best personnel to come to the DOJ, the FTC, or other federal agencies and stay there, notwithstanding the huge disparity in salaries between civil servants and their private sector counterparts. From personal experience working inside public institutions58 and studying their operations as academics, we are convinced that civil servants in the United States and in many other countries derive genuine “psychic income” from their work, and this reward offsets, to some degree, the wage disparities with the private sector. In the United States, the psychic income for civil servants at the DOJ and the FTC is evaporating quickly. In articles, books, blog posts, press releases, and tweets, a large body of commentators (including elected officials) today depict the federal antitrust agencies as “useless” and portray their activities as “toothless,” or worse.59 Who would aspire to join, or remain at, such institutions?60 A dramatic expansion of enforcement could create a temporary buzz of excitement that draws first-rate talent into the agency, but only for a time. As experience at the DOJ and the FTC in the 1970s shows, the excitement wears off after a few years as attorneys and economists, facing relentless opposition from better-resourced teams acting for defendants, leave the agencies for other jobs. Over time, there is no getting around the need to compensate civil servants properly in the paycheck, and not with appeals to patriotic spirit, if they are to persevere in conducting arduous cases, rules, or studies.

#### CP solves scammers by letting FTC get money back – their card says it’s necessary AND proves the plan doesn’t solve because legal barriers prevent prosecuting scammers

Mermin ’21 - Executive Director Center for Consumer Law & Economic Justice UC Berkeley School of Law

Ted Mermin 21. 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>

III. 10 Things This Committee, and This Congress, Can Do to Give the FTC the Tools It Needs to Do Its Job.

The Consumer Protection and Recovery Act advances the first two critical improvements to the FTC Act listed below. But the task before this committee is broader than simply filling the void left by the Supreme Court’s decision last week. The following suggestions – all endorsed in various forms by bipartisan cohorts of FTC commissioners, and all supported by broad coalitions of advocates for consumers, small businesses, veterans, and seniors – would restore the FTC to its rightful and logical position as the nation’s leader in consumer protection.

1. Restore the FTC’s authority to get money back to consumers from whom it was unlawfully taken. This most salient fix is critical to the functioning of the FTC as a consumer protection agency.

2. Give the FTC full authority to obtain an injunction barring future misconduct. A court order barring the conduct that the FTC has gone to such pains to investigate and prove is a vital part of the toolbox of the Commission or any consumer protection agency. A thief who takes your wallet may end up closely monitored on probation or, after prison, on parole – whether or not he had stopped taking wallets by the time he was caught. When a business steals your money, it too should be subject to additional supervision, with quicker enforcement.

3. Provide the FTC with the default ability to require the payment of civil penalties. Give businesses and individuals who are inclined to break the law a reason not to do so. Routine civil penalty authority is exercised by state Attorneys General – and in some states local government authorities – in almost all the casesthat they bring.16 It is common sense to ensure that the FTC is able to make use of the same tools as its state and local counterparts.

4. Establish a Civil Penalty Fund dedicated to providing compensation to victims of unfair and deceptive business practices who cannot be repaid by the businesses or individuals that harmed them. All too often, scam artists spend the money they steal from consumers. By the time the FTC can fully prosecute a case, the judgment – frequently for an impressively large amount of restitution – must be suspended because of the defendants’ inability to pay.17 There is a way around this dilemma: Congress can grant the FTC authority to set up a Civil Penalty Fund or Consumer Redress Fund to provide a source of relief to victims, funded by civil penalties collected in other cases. The CFPB has exercised this type of fund effectively and with great benefit to consumers.18 This fund could also receive funds paid pursuant to an order to disgorge illegally-obtained money when it is not practicable to return those funds to consumers.

5. Give the FTC the same ability to make rules that is exercised by other federal agencies. Rulemaking under the Administrative Procedures Act provides all stakeholders the ability to express their views, and requires the agency to consider those views. And unlike the Commission’s current sclerotic MagnussonMoss rulemaking authority, the proceedings will not be so delayed that the rule is likely to be outdated by the time it is finally issued.

6. Fully fund the FTC so that it may effectively play its role as the nation’s consumer protection agency. As former Commissioner William Kovacic explained at a hearing before this subcommittee in February, the FTC cannot accomplish the mission that Congress has set for it without a significant infusion of resources.19 That money is a wise investment: far greater sums will bereturned to consumers and small businesses, and received from customers by competitors who play by the rules.

7. Give the FTC general authority to prevent price gouging in emergencies. This is a power currently held by the states and exercised by attorneys general across the nation.20 Providing the FTC the same authority would add measurably to the nation’s ability to respond to natural disasters and other emergencies; these events are too frequent to make it feasible for Congress to pass separate legislation each time one occurs.

8. Provide the FTC authority over common carriers. When the common carrier exemption was included in the FTC Act more than 100 years ago, it was logical to exempt the monopoly providers of common carrier services, who were not disciplined by competition but rather by detailed rate and service regulation. Since that time, the telecommunications industry and the regulatory role of the federal government have changed dramatically. As the Ninth Circuit observed three years ago, the FTC Act already allows the Commission to regulate common carriers’ noncommon-carriage activities.21 This extension of the FTC’s jurisdiction would permit the “leading federal consumer protection agency”22 to take on widespread consumer protection issues that are in need of further attention, including data breaches, privacy and robocalls.

9. Give the FTC authority over non-profit corporations. The Internal Revenue Service has nominal authority now, but its purview is limited essentially to whether a tax-exempt organization should be able to maintain that status. Given the widespread business activities of nonprofit corporations like hospital chains, and all-too-common examples of unfair or deceptive conduct by charitable organizations, this extension would close an important gap in FTC protection, including in oversight of data security and privacy practices.

<<EMORY CARD STARTS>>

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.

### 1NC – Antitrust DA

#### Frenzy of deals now because Biden’s antitrust push won’t be implemented for years

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

#### Immediately expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### U.S. dominates tech innovation now – upending the consumer welfare standard ruins that and allows China to catch up

Springboard 21 – The Computer & Communications Industry Association (CCIA) is an international technology industry trade association established over four decades ago to promote open markets, open systems, open networks, and full, fair and open competition in the computer, telecommunications and Internet industries. Members include some of the world’s leading computer, Internet, information technology, and telecommunications companies, as well as manufacturers, software developers, service providers, re-sellers, integrators, and financial services companies.

CCIA, January 28 2021, “Setting the Record Straight: The Consumer Welfare Standard Powers U.S. Tech Leadership, https://springboardccia.com/2021/01/28/setting-the-record-straight-the-consumer-welfare-standard-powers-u-s-tech-leadership/

Yesterday’s Public Knowledge [event](https://www.publicknowledge.org/event/bigtechineuandus/) calling to undercut the consumer welfare standard and to shift standards governing mergers and acquisitions (M&A) does not acknowledge the damage such an approach would have on U.S. leadership in global tech. In fact, the U.S. tech sector sets an example for the rest of the world in competition and innovation thanks to the long-standing, pro-consumer antitrust and competition laws. For the U.S. to continue as a global tech leader, and for consumers and small businesses to continue as the major beneficiaries of tech innovation, policymakers should keep in mind:

— The U.S. is home to the most innovative companies, and provides the best regulatory and cultural environment for the next generation of innovators.

— The consumer welfare standard should continue to be upheld as the beacon of antitrust laws in the U.S. because it is objective, pro-innovation, and pro-consumer.

— Shifting the burden of proof in antitrust and M&A cases distorts the innovation economy.

The U.S. is home to the most innovative companies, and provides the best regulatory and cultural environment for the next generation of innovators.

BCG’s Most Innovative Companies 2020 rankings [shows](https://gaidigitalreport.com/2020/08/25/innovation-in-the-united-states-and-europe/) that American companies comprise 14 of the top 20 companies and half of the top 50. “Overall, U.S. companies represent 25 of the top 50 companies (50%). Only 14 of the top 50 companies (28%) are European-based, and they enter the ranks at 21. None of these [European] companies fall within what generally is considered the tech sector, but rather represent industries such as automobile manufacturing, retail, pharmaceuticals, and consumer goods.”

The U.S. is home to nearly half of the world’s “unicorn” firms, proving that the next generation of innovators value the tech climate in the U.S. [Jan Rybnicek](https://gaidigitalreport.com/2020/08/25/innovation-in-the-united-states-and-europe/), Senior Fellow at the Global Antitrust Institute: “This data shows that entrepreneurs seek to innovate and grow their businesses in the United States more so than in any other country further, further supporting the notion that the United States has fostered a superior climate for innovation than has Europe—one in which innovators and entrepreneurs can attain the funding they need to grow and have ample opportunity [to] vigorously compete against old and new rivals.”

American venture capital investing has grown by nearly 400%, with deals rising by 140% in the last 10 years, long leading Europe. [Jan Rybnicek](https://gaidigitalreport.com/2020/08/25/innovation-in-the-united-states-and-europe/), Senior Fellow at the Global Antitrust Institute: “The disparity between the United States and European venture capital markets is one reason why the U.S. has consistently been home to the most innovative companies and technological development. But it also is evidence that investors view the United States as a better place to invest, in part because of its more favorable innovation climate.”

The U.S. [leads](https://ncses.nsf.gov/pubs/nsb20201/global-r-d) the rest of the world in research & development spending, a key indicator of dynamic competition and innovation. “Among individual countries, the United States was the largest R&D performer in 2017, followed by China, whose R&D spending now exceeds that of the EU. Together, the United States (25%) and China (23%) accounted for nearly half of the estimated global R&D total in 2017.”

The consumer welfare standard should continue to be upheld as the beacon of antitrust laws in the U.S. because it is objective, pro-innovation, and pro-consumer.

The consumer welfare standard gives antitrust enforcers a clear mission, immune from political weaponization. [Joshua D. Wright and Aurelien Portuese](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400274), antitrust experts: “The adoption of the consumer welfare standard gave antitrust enforcers a coherent mission: protect the benefits of the competitive process by preventing activities likely to raise market prices, lower market output, or otherwise harm competition. When antitrust focuses upon socio-political goals, it detracts from this mission, likely slowing economic growth and depriving consumers of goods and services.”

Moving away from an innovation-based consumer welfare standard puts U.S. tech leadership at risk, enabling “regulatory imperialism” and bad-actor nations. [Robert D. Atkinson](https://itif.org/publications/2021/01/19/us-grand-strategy-global-digital-economy), President of the Information Technology and Innovation Foundation: “In this scenario, the United States either by commission or omission allows the EU model of digital governance to prevail in most parts of the world, other than China and digital bad-actor nations. By commission, the United States would support the right of the EU to enact stifling regulations and encourage companies around the world to adopt them, so they become the de facto rules. By omission, the United States does little to actively work with other nations to educate and pressure them to adopt the U.S. innovation-based model of digital regulation. Either way, the United States is isolated, and its firms face a global digital economy—one that isn’t based on open, rules-based competition and innovation, but rather on who can best manage multiple conflicting compliance regimes.”

The consumer welfare standard enables antitrust regulators to effectively promote innovation in the technology industry. [Joe Kennedy](http://www2.itif.org/2018-consumer-welfare-standard.pdf?_ga=2.220991576.1137044923.1611756909-636005299.1607031665), Senior Fellow at the Information Technology and Innovation Foundation: “[Consumer welfare standard] allows regulators to focus on the long-term trajectory of value and price, and take innovation effects directly into consideration. As UC Berkeley professor Carl Shapiro points out, the consumer welfare standard defines welfare broadly and encompasses nonprice aspects such as improved product variety and more rapid innovation. This is also clear from the merger guidelines themselves, which explain that potential effects are put in terms of price changes ‘[f]or simplicity of exposition,’ and that non price terms and conditions that adversely affect customers also matter, including ‘reduced product quality, reduced product variety, reduced service, or diminished innovation.'”

The claims that consumers are better off with higher prices and more competitors are not grounded in evidence. [Herbert J. Hovenkamp](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2987&context=faculty_scholarship), Professor of the University of Pennsylvania Law School: “To date, the strongest and most central claim of the neo-Brandeis movement remains untested; that is its assumption that individuals in our society would really be better off in a world characterized by higher prices but smaller firms. Everyone in society is a consumer and consumers vote mainly with their purchasing choices. The neo-Brandeisians still face the formidable task of providing evidence that most citizens believe they would be better off in a world of higher cost smaller firms selling at higher prices, their market behavior notwithstanding.”

#### Tech innovation prevents nuclear conflict—US lead is key

Kroenig and Gopalaswamy 18 – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full displayin its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

**Independently, merger frenzy is key for regional banks to gain sufficient resources to invest in cyber-defenses**

**Mendelson 18** – U.S. president and CEO of Bank Leumi

Avner Mendelson, "Survival strategy: Cut the number of banks in half," American Banker, 1-30-2018, https://www.americanbanker.com/opinion/survival-strategy-cut-the-number-of-banks-in-half#:~:text=Consolidation%20can%20actually%20help%20smaller,regulatory%20burden%20that%20accompanies%20growth.&text=Thus%2C%20as%20banks%20expand%2C%20there,for%20profitable%20growth%20over%20time.

It’s no secret that the banking industry has been consolidating for the last 30 years — the number of bank charters has fallen from 14,000 in 1985, to close to 8,500 in 2000, to 4,938 at the end of 2017 — a remarkable 64% drop, most of which happened during the '90s and after the financial crisis. New bank formation also virtually stopped, from a rate of nearly 100 per year up until 2008 to fewer than two per year now.

But while that reduction is remarkable, it’s not necessarily a bad thing.

Some of the post-crisis decline can be attributed to bank failure and the lack of de novo banks, but a significant amount is due to an uptick in M&A activity — particularly among smaller banks — driven by increased regulatory and technology standards that incentivize scale.

Over the past few years, there have been well over 200 M&A deals per year among community banks, those with less than $10 billion in assets, almost double the amount of such activity in the crisis years of 2008 and 2009, according to the S&P Global Market Intelligence.

Going forward, the trend of consolidation is likely to continue, and it’s possible that a healthy 2,000 to 3,000 institutions would serve the U.S. even better than the current number. The goal should be to maintain competition without creating concentration.

Further consolidation makes sense because the bar at which a bank can remain profitable has risen. The fixed costs of running a bank, both opening it for business and maintaining it for the long haul, continue to grow: These costs run the gamut from keeping up with compliance, anti-money-laundering and other standards to having a program and resources in place to attract talent. Now more than ever, technology is a major cost center. Banks must invest in their tech infrastructure to meet customer expectations, keep up with competitors and steel themselves against cyberattacks.

Consolidation can actually help smaller banks stay profitable, while managing the increased regulatory burden that accompanies growth. The regulatory requirements for banks vary by asset size, and the vast majority of U.S. banks have less than $10 billion in assets, the first major regulatory threshold. What often happens is that smaller players — those under the $10 billion mark— join together to surpass that first threshold by a wide margin. Once these banks reach $20 billion or $30 billion in assets, they can become attractive acquisition targets for banks in the $100 to $250 billion range, well above the $50 billion threshold that triggers even greater oversight from regulators. Thus, as banks expand, there is even more incentive for consolidation and mergers to reach scale to allow for profitable growth over time.

This is not to say that small banks don’t have their place in the ecosystem. In rural areas, regional and community banks fill an important social and economic role by bringing banking services to otherwise underbanked communities. These institutions deliver a product offering that is relevant to their customers and beneficial to the entire local community. As long as these smaller banks have a business proposition that truly justifies their size, there will always be room for them. I would even advocate that the industry, as a whole, should ensure these banks are properly incentivized and encouraged to exist. But in large urban markets like New York, Chicago and Los Angeles — where bigger players abound and where there is no shortage of competition — consolidation is the most logical path forward.

At the same time, there is still room for new entrants — but these select few newcomers will need to innovate and fill gaps, not just replicate the status quo. A handful of new banking charters will likely come from fintech startups with banking capabilities. Yet these, too, will eventually be ripe for acquisition by larger banks that need to build out their technology. Thus, the trend toward further consolidation will continue.

Community bank executives, especially those heading the very smallest banks, must continue to explore ways to be more competitive and more resilient. In doing so, they can’t ignore the fact that selling to or merging with another bank may benefit shareholders and customers alike.

**Cyberattacks against small banks collapse the US financial system---they’re uniquely vulnerable**

**Harner et al. 20** – Chris Harner is managing director of the cyber risk solutions practice at Milliman, an actuarial and consulting firm; Chris Beck is an executive risk consultant within the practice; Blake Fleisher is a senior cyber risk analyst in the practice

Chris Harner, Chris Beck, and Blake Fleisher, "Cyberattacks Could Cripple Major U.S. Banks," CFO, 3-11-2020, https://www.cfo.com/cyber-security-technology/2020/03/cyberattacks-could-cripple-u-s-banking-system/

In the 21st century, first-order, single-point failures with profound second- and third-order effects are especially common in cyberattacks against complex systems. For one, the U.S. financial system is complex and highly interconnected, making it very vulnerable to a cyberattack.

The Federal Reserve Bank of New York (FRBNY) recently epitomized this interconnectivity in a report, arguing that a cyberattack could impair a bank’s ability to service creditors. More specifically, impairment of any of the five most active U.S. banks could result in significant spillovers to other banks, with 38% of the network affected on average.

Perhaps even more concerning, the FRBNY identified a subset of smaller banks that, if impaired, could threaten the solvency of a top-five institution. In particular, the FRBNY estimated it would take the financial distress of six small banks, each below $10 billion in assets, or just one institution with between $10 billion and $50 billion in assets.

More than 80 U.S. banks fall into the midsize bank category, with aggregate assets of approximately $1.8 trillion, while there are about 4,440 small banks, with cumulative assets of around $4.7 trillion. Combined, the midsize and small banks account for about 36% of all commercial banking assets. This indicates that the complexity of the U.S. banking system may not be driven solely by the “megabanks.”

A cyberattack on these banks, which appear benign in isolation and have simpler balance sheets, could ultimately cause a cascading failure of interbank funding, leading to a tipping point for a broader systemic liquidity crisis.

At a glance, when viewed with typical “first-order thinking,” this is deeply troubling, because larger banks tend to have more resources and invest more in building robust cybersecurity than smaller banks. Even if a large bank puts in place a proper cybersecurity policy with the right controls for its own protection, which it absolutely needs to do, it may not be enough.

The issue is not just building a bigger cybersecurity “moat and castle.” Instead, financial institutions need to understand the interconnectedness of their entire ecosystem, integrating cyber risk, vendors, liquidity sources, off-balance-sheet exposures, etc.

More thoughtful analysis, using second- and third-order thinking, indicates that cyberattacks by their very nature know no physical boundaries and can spread rapidly across the globe. We know this from the infamous NotPetya attack in 2017, when a worm planted in Ukrainian tax software managed to infect not just Ukrainian critical infrastructure, but also the largest global shipper, A.P. Moller-Maersk, and the big pharmaceutical company Merck as well as a chocolate factory in Australia.

In a system like banking that is already highly interconnected in its own right, one would expect the overall impact on the U.S. financial system to be even greater. The FRBNY’s paper is a very important illustration of how an operational risk can rapidly lead to grave financial risk.

#### That causes nuclear war

Tønnesson 15 - Stein Tønnesson 15, Research Professor, Peace Research Institute Oslo; Leader of East Asia Peace program, Uppsala University, 2015, “Deterrence, interdependence and Sino–US peace,” International Area Studies Review, Vol. 18, No. 3, p. 297-311

Several recent works on China and Sino–US relations have made substantial contributions to the current understanding of how and under what circumstances a combination of nuclear deterrence and economic interdependence may reduce the risk of war between major powers. At least four conclusions can be drawn from the review above: first, those who say that interdependence may **both inhibit and drive conflict** are right. Interdependence raises the cost of conflict for all sides but asymmetrical or unbalanced dependencies and **negative trade expectations** may generate tensions leading to trade wars among inter-dependent states that in turn increase the risk of military conflict (Copeland, 2015: 1, 14, 437; Roach, 2014). The risk may increase if one of the interdependent countries is governed by an inward-looking socio-economic coalition (Solingen, 2015); second, the risk of war between China and the US should not just be analysed bilaterally but include their allies and partners. Third party countries could drag China or the US into confrontation; third, in this context it is of some comfort that the three main economic powers in Northeast Asia (China, Japan and South Korea) are all deeply integrated economically through production networks within a global system of trade and finance (Ravenhill, 2014; Yoshimatsu, 2014: 576); and fourth, decisions for war and peace are taken by very few people, who act on the basis of their future expectations. International relations theory must be supplemented by foreign policy analysis in order to assess the value attributed by national decision-makers to economic development and their assessments of risks and opportunities. If leaders on either side of the Atlantic begin to seriously **fear or anticipate their own nation’s decline** then they may blame this on external dependence, appeal to anti-foreign sentiments, contemplate the use of force to gain respect or credibility, adopt protectionist policies, and ultimately **refuse to be deterred by** either **nuclear arms** or prospects of socioeconomic calamities. Such a dangerous shift could happen **abruptly**, i.e. under the instigation of actions by a third party – or against a third party. Yet as long as there is both nuclear deterrence and interdependence, the tensions in East Asia are unlikely to escalate to war. As Chan (2013) says, all states in the region are aware that they cannot count on support from either China or the US if they make provocative moves. The greatest risk is **not** that **a territorial dispute** leads to war under present circumstances but that **changes in the world economy** alter those circumstances in ways that render inter-state peace more precarious. If China and the US fail to rebalance their financial and trading relations (Roach, 2014) then a trade war could result, interrupting transnational production networks, provoking social distress, and exacerbating nationalist emotions. This could have unforeseen consequences in the field of security, with nuclear deterrence remaining the only factor to **protect the world from Armageddon**, and **unreliably so**. Deterrence could **lose its credibility**: one of the two great powers might gamble that the other yield in a cyber-war or conventional limited war, or third party countries might engage in conflict with each other, with a view to obliging Washington or Beijing to intervene.

### 1NC – States CP

#### Text: The fifty states and all relevant United States territories should prohibit private sector business practices that violate an antitrust worker welfare standard.

Case turns are the NB

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those state-level laws are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

### 1NC – Section 5 CP

#### The Federal Trade Commission should:

**PLANK 1**

--determine that “unfair methods of competition” pursuant to section 5 of the FTC act to prohibit [xxx] and bring associative enforcement actions

**PLANK 2**

--issue cease and desist letters to companies engaging in platform conduct that [XXX]stating that their practice violates the core antitrust laws

#### Congress granted the FTC broad authority to regulate anticompetitive practices under section 5 – the CP prevents a slew of anticompetitive practices

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police “unfair methods of competition” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the FTC contradicted Congress’s political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the FTC should anchor Section 5 in the expansive political economic vision of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—three principal harms from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt presumptions of illegality for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and restraints on retail competition; and challenge monopolies and oligopolies that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the FTC should pursue simple structural remedies over complicated behavioral fixes.

**Section 5 expansion and clarification is critical to preventing international protectionism**

**Nam 18** – Distinguished Practitioner, Center for East Asian Studies, Stanford University; former Visiting Professor of Law at UC Davis School of Law; former Visiting Fellow at Columbia Business School Center on Japanese Economy and Business; former antitrust attorney at Jones Day

1. Interpretive Latitude in the FTC Act

A dearth of clarity on standards and criteria has been part and parcel of the FTC Act’s considerable normative influence abroad,66 especially with respect to areas of regulator discretion in enforcement. Within two years of the statute’s enactment, President Wilson would confess candidly of the new FTC: “It is hard to describe the functions of [the] [C]ommission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business.”67 While Wilson may have been referring to the FTC as a shield for business owners against monopolies and dominant competitors, his inability to easily condense the mandate of the Commission spoke to its versatility and breadth. The FTC Act’s purview over any “unfair methods of competition”68 per its Section 5 granted the agency wide berth in pursuing both ongoing and incipient antitrust violations beyond the Sherman Act’s reach, instead of limiting the FTC to codified standards and prescriptions for a generally defined set of antitrust violations. According to Winerman, “then, as now, the agency combined formal powers to investigate [and] formal powers to prosecute,” while permitting dialogues “with business to facilitate compliance with the law (those emphasized by Wilson).”69 As discussed, there existed a strong predilection in the FTC Act’s originators towards favoring cooperation with big business over heavy-handed policing and resultant debilitation of the national economy. The inferred use of discretion prevalent throughout the statute proved conducive to this aim.

Section 5 proceeds to state that a person, partnership, or corporation believed culpable of antitrust violations by the FTC will be issued a complaint and a notice of a hearing if “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.”70 This invocation of the public interest without further elaboration has left open a sizable margin for interpretive license,71 not the least a presumption that the public referenced is the domestic public. Certainly the public interest varies from country to country and is not a fixed concept. Even within a single domestic polity, different interest groups may be at odds regarding its intuitive definition. Former FTC Chairman William Kovacic noted that “in the 1950s and the 1970s, Commission efforts to use Section 5 litigation elicited strong political backlash from the Congress. The very breadth of Section 5 creates political risks in its application.”72 Whether manifestations of checks and balances or politicized affairs, such historical developments contributed to extralegal U.S. regulatory norms in antitrust enforcement that foreign competition regimes could not transplant and adapt in the same manner that they did American competition laws.

Section 5 also states “in determining whether an act or practice is unfair, the Commission may consider established public policies as evidence,” with the qualifier that “[s]uch public policy considerations may not serve as a primary basis for such determination.”73 Befitting the FTC Act’s elastic mandate, no specific examples of any such public policies are offered. Furthermore, the FTC may find unlawful only the unfair method of competition that “causes or is likely to cause substantial injury to consumers not outweighed by countervailing benefits to consumers or to competition.”74 Without further elaboration on countervailing benefits, the statute cedes to the Commission the leeway to finesse its responses to complex antitrust violations. While guidance to fill these descriptive gaps has been supplied domestically by over a century of successive judicial decisions, alongside evolving conventions accounting for legislative as well as private sector interests, most foreign competition regimes lack a comparable array of participant actors beyond the executive branch.75 When acting in a relative vacuum of precedent and checks, protectionist administrations abroad encounter less resistance to their justifications for selective antitrust enforcement in the name of public policy and/or countervailing national economic benefits.

Section 5 is not explicit regarding openness to presidential control, but Section 6 includes direct mention of presidential prerogative: “The Commission shall also have power. . . [u]pon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.”76 Wilson was quick to rely on Section 6,77 and even as the notion of FTC autonomy later became entrenched in the U.S., this portion of the FTC Act was left unamended. Today, the language easily could be construed overseas as an affirmation of the FTC’s subservience to the executive branch. In the event that foreign readers of the Act fail or do not choose to connect the historical dots, they would be unable to find any undergirding support for agency independence in Section 5 or 6. Indeed, novel expansions of FTC autonomy in Section 5 cases still risk political crossfire for “going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes creat[ing] immediate opportunities to scold the Commission for taking ‘unprecedented’ measures or entering ‘uncharted’ territory,” per Kovacic.78 The originators of the legislation would not have had it any other way.

**Protectionism causes global wars**

**Palen 17** – historian at the University of Exeter

Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is disintegrating.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the antagonistic protectionist politics that defined a bygone era that ended with World War I — suggesting that today’s protectionist revival threatens not just the global economy, but world stability and peace.

Leading liberal democracies have turned their back on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This widespread fear of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to halt the forces of globalization. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned against trade liberalization. Trade wars, colonialism and closed markets became the name of the geopolitical game.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the Franco-Italian trade war, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy ever closer to Austria-Hungary and Germany — the Triple Alliance — in the years before the First World War.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered international stability and peace, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how protectionism fomented geopolitical rivalry and conflict.

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds dire consequences for the liberal economic order by pitting nations against one another and breeding suspicion, distrust and conspiratorial thinking. The ultranationalism, militarism and tariff wars of the late 19th century spilled over into the 20th century, and ended in world war — suggesting a return to the protectionism of old could damage far more than national economies.

## Inequality adv

### 1NC – AT: inequality adv – T/L

#### The advantage is wrong—alt causes, no clear empirical connection btw. antitrust and labor effects, and concentration is good for labor

Wright et al., J.D., PhD, University Professor and Executive Director, Global Antitrust Institute at Scalia Law School, former FTC Commissioner, ‘18

(Joshua, Elyse Dorsey, Attorney Advisor to Commissioner Noah Phillips, United States Federal Trade Commission, Jonathan Klick, Professor of Law, University of Pennsylvania, and Jan M. Rybniek, : Senior Associate, Freshfields, Bruckahus Deringer LLP, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” August 10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524>)

The claim that modern antitrust ignores labor markets is certainly incorrect. That said, no credible attempt has been made to systematically measure antitrust enforcement activity as it relates to labor markets and its potential effects on monopsony power. Given the recent series of antitrust cases involving labor claims, it is difficult to view the recent antitrust enforcement in labor markets as a gaping hole in antitrust enforcement that invites anticompetitive abuses. If concentration in labor markets has awarded corporations with the monopsony power to suppress labor shares, it would be unwise to conclude without more evidence that antitrust enforcement’s presence or lack thereof in labor markets is the cause.

A second piece of evidence undermining the Hipster Antitrust position concerning monopsony power is potentially even more fundamental—it is not clear that monopsony power is, in fact, increasing. The most cited-to stylized fact in support of the conclusion that monopsony power is widespread and increasing in the United States economy is that the labor share is decreasing.210 There are, of course, many reasons why one might observe a decrease in the labor share. Lax antitrust allowing the creation of monopsony power is one hypothesis. Though the theoretical effects of a massive increase in monopoly and monopsony power through generally lax antitrust enforcement are ambiguous. Indeed, some studies have found a positive relationship between employer size and wages (i.e. bigger employers pay larger wages).211 It is also unsettled whether employers with more market power pay lower wages.212 Neither economic theory nor empirical evidence paint a clear picture that an increase in antitrust activity in labor markets would result in a reduction of monopsony power or upward pressure on wages. 213

Finally, even if the increase in monopsony power were empirically assumed to be present, the available evidence does not suggest that consumer welfare focused antitrust enforcement played any meaningful role in that change.214 Consider the figure below:

The decrease in labor share has been a worldwide phenomenon—with the United States experiencing a comparatively modest drop. However, if the U.S. drop in labor share is indeed attributed to the lax antitrust enforcement of regulatory regimes shackled to consumer welfare, it becomes difficult to explain the global phenomenon (surely the ghost of Robert Bork has not infiltrated each competition authority around the globe). Instead, the global statistics suggest that there are other explanatory variables external to antitrust enforcement that help to explain the recent decrease in labor share. As long as the Hipster Antitrust movement remains transfixed on antitrust enforcement as the cause and solution to decreasing labor shares, it will represent time lost—failing to identify the true causes and most prudent solutions.

The Hipster Antitrust movement has suggested a series of provocative policy proposals. The empirical support for those proposals involves important and interesting work by economists that, at times, reveals some interesting information and raises important questions. But the connection between the available empirical evidence and the Hipster Antitrust movement’s key propositions, are tenuous at best. The existing empirical evidence simply does not support the conclusion that (1) there is a meaningful concentration problem in the modern United States economy; (2) assuming such a problem, it is caused by a reduction in competition and a corresponding increase in monopoly power that has resulted in harm to consumers; and (3) again assuming such a problem, that lax antitrust enforcement is to blame, as it is for other social effects, including an increase in economic inequality.

### 1NC – Worker Rights Good Now

#### Worker rights are improving now – tons of examples

Sherer and Worker 21 – Jennifer Sherer is senior state policy coordinator for the Economic Analysis and Research Network (EARN) Worker Power Project. Jaimie K. Worker is the senior state policy coordinator for the Economic Analysis and Research Network (EARN) at EPI.

Jennifer Sherer and Jaimie K. Worker, July 20 2021, “Worker-led state and local policy victories in 2021 showcase potential for an equitable recovery,” Economic Policy Institute, https://www.epi.org/blog/worker-led-state-and-local-policy-victories-in-2021-showcase-potential-for-an-equitable-recovery/

What new world of work can be built from the crisis COVID-19 created for workers and working-class communities? Some 2021 state and local policy victories are providing early answers. Across the country, workers are organizing to win policy changes aimed at strengthening labor standards, raising wages, reversing long-standing race and gender-based exclusions from labor rights, and building power to ensure these gains are not short-lived. The following examples of campaign and policy victories from recent legislative sessions are just the beginning of what is necessary to create a world where all work truly has dignity.

Building worker power and protecting the right to organize at the state level

Long before COVID-19, the right to unionize varied widely depending on a worker’s occupation, race, gender, or ZIP code. [Union workers had more job security](https://www.epi.org/publication/union-workers-had-more-job-security-during-the-pandemic-but-unionization-remains-historically-low-data-on-union-representation-in-2020-reinforce-the-need-for-dismantling-barriers-to-union-organizing/) during the pandemic, and more [workers are expressing interest in gaining a voice on the job through a union](https://www.epi.org/publication/working-people-want-a-voice/), yet legal exclusions and steep barriers to organizing mean that far too few workers have access to the union protections they want and need. Because federal labor law still excludes farmworkers, domestic workers, and public-sector workers from coverage, states are left to determine whether millions of disproportionately Black, Brown, immigrant, and women workers in front-line occupations will have legal rights to pursue a union contract.

This year, educators, care workers, farmworkers, and public servants acutely affected by the pandemic worked to accelerate the passage of proposals to expand labor rights and defend existing rights from ongoing state legislative attacks. Colorado enacted a groundbreaking, [comprehensive Farmworker Bill of Rights](https://thecounter.org/colorado-farmworker-bill-of-rights-goveror-polis/) extending full rights to organize unions and collectively bargain to 40,000 farmworkers across the state in a significant effort to advance worker power at the state level. The [legislation](http://leg.colorado.gov/bills/sb21-087) also includes new workplace safety protections, rights to minimum wage and overtime pay, anti-retaliation protections, rest and meal breaks, and other minimum standards that have long covered workers in other sectors.

Several states and localities took important steps to extend collective bargaining rights to public-sector workers in 2021. Ongoing state struggles to extend full bargaining rights to public-sector workers have important economic impacts, including [closing pay gaps](https://www.epi.org/publication/unions-public-sector-pay-gap/) for Black workers and women, who are overrepresented among government workers. In Maryland, for example, legislators voted to [extend collective bargaining rights to community college faculty and staff](https://www.marylandmatters.org/2021/06/18/the-pandemic-inspired-passage-of-unionization-bills-but-vetoes-mean-fight-continues/) who have long been denied the same rights as other education workers in the state. Lawmakers are now poised for a second vote on the bill to override the governor’s recent veto.

In Virginia, a breakthrough state law authorizing local governments to enter into collective bargaining agreements with public employees took effect May 1, reversing a decades-long ban on public-sector collective bargaining in the state. The [city of Alexandria](https://www.alexandriava.gov/manager/info/default.aspx?id=121151) became the first local jurisdiction to pass an ordinance establishing a framework for negotiating union contracts with municipal employees under the new law, and multiple Virginia counties and cities are now considering how to follow suit.

In Nevada, state employees who won collective bargaining rights through state legislation in 2019 are now using the [process of negotiating their first contracts](https://thenevadaindependent.com/article/state-employee-union-files-unfair-labor-complaint-plans-rallies-to-protest-sisolak-budget-cut-plans) to have a say in their working conditions, state agency policies, and critical state budget decisions that will shape post-pandemic access to public services for all state residents. Nevada also created a new [Home Care Employment Board](https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7977/Overview) intended to provide home care workers with a mechanism for collectively bargaining over wage and employment standards to improve their working conditions.

In states where legislators continued attacking workers’ rights this year, workers largely succeeded in resisting. Workers in [Texas](https://everytexan.org/wp-content/uploads/2021/07/2021_EveryTexan_Lege_WrapUp.pdf) defeated efforts to prohibit local elected officials from improving working conditions through fair scheduling policies, worker safety requirements, and prevention of discrimination based on arrest and conviction history. A similar bill in [West Virginia](https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=SB303%20INTR.htm&yr=2021&sesstype=RS&i=303) that would have prevented local elected officials from strengthening labor rights was also defeated. In states like Montana and Florida, public-sector workers successfully defended existing bargaining rights against serious threats to erode them. In [Montana](https://theintercept.com/2021/03/12/union-right-to-work-montana/) and [New Hampshire](https://www.wmur.com/article/nh-house-rejects-buries-right-to-work-bill-on-key-roll-call-of-199-175/36623777), so-called “right-to-work” bills aimed at weakening unions were defeated via floor votes, preventing the [downward pressure on wages and job quality](https://www.epi.org/publication/so-called-right-to-work-is-wrong-for-montana/) that results from such measures.

Growing scrutiny of [worker misclassification](https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/) also generated important state policy advances in 2021. Employers who illegally misclassify employees as “independent contractors” skirt payroll tax, unemployment, and workers’ compensation payments, while depriving workers of fundamental workplace rights, including the right to organize a union. This year, [Nevada](https://nv.aflcio.org/pressmedia/nevada-state-afl-cio-building-trades-statements-mark-signing) and [New Jersey](https://www.jdsupra.com/legalnews/new-jersey-legislation-further-2298680/) were among states that adopted new measures aimed at cracking down on misclassification, and continued state and federal action on misclassification will be key to rebuilding worker power.

Raising wages

Building on over a decade of momentum for raising minimum wages, workers and advocates in both [Delaware](https://www.wdel.com/news/delaware-senate-passes-15-minimum-wage-sending-bill-to-house-where-it-faces-less-certain/article_e4737b58-8809-11eb-a785-0393b3955a24.html) and [Rhode Island](https://www.providencejournal.com/story/news/politics/2021/05/20/ris-minimum-wage-increase-15-hour-2025/5183683001/)won legislation to increase the minimum wage to $15 by 2025. [Rhode Island](http://www.rilin.state.ri.us/pressrelease/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=371897%22%20\) also passed bills designed to ensure equal pay for all employees performing comparable work, regardless of gender or ethnicity. A powerful [labor-community coalition in Connecticut](https://www.recoveryforallct.com/coalition) worked to expand state health and education funding, including Medicaid funding increases necessary to [boost starting wages of long-term care workers](https://www.courant.com/politics/hc-pol-nursing-home-negotiations-20210513-cvm6o2k3fnedfgik44ocwse65u-story.html). And [Washington](https://www.yakimaherald.com/news/local/inslee-signs-agricultural-worker-overtime-bill-into-law-in-yakima/article_37ef4c64-59df-5691-8176-ee9deec07684.html) legislators ended the exclusion of farmworkers from eligibility for overtime pay and passed legislation to boost compensation and ensure access to premium-free health care for child care workers.

Valuing and protecting front-line workers

Some states and cities are crafting innovative policies in response to popular demands for safer workplaces, supplemental pay for “essential” workers, and paths back to employment for those in industries hit hardest by COVID-19 unemployment. For example, Minnesota approved a state budget that includes [$250 million for payments to front-line workers](https://www.startribune.com/next-job-for-minnesota-lawmakers-spend-250-million-on-front-line-worker-aid/600078967/) and established a working group to make initial recommendations on how funds should be disbursed. Two city councils in southern California have approved union-initiated [proposals to distribute bonus payments to grocery store workers](https://ufcw770.org/essential-grocery-drug-store-workers-in-calabasas-to-be-granted-hazard-pay/?link_id=3&can_id=1e4b802cc12974d2e0d5219235f51774&source=email-daily-brief-34&email_referrer=email_1226402&email_subject=no-more-excuses-pass-the-pro-act) from funds allocated through the American Rescue Plan. Hospitality workers and their unions in California and Nevada led successful efforts to pass legislation [ensuring laid-off hospitality and tourism industry workers have rights to return](https://vegas.eater.com/2021/6/9/22525521/governor-signs-right-to-return-law-unemployed-hospitality-travel-workers-nevada) to their former jobs as positions open up during the recovery. And [union members laid off from multiple Chicago hotels](https://chicago.suntimes.com/city-hall/2021/6/15/22535087/hotels-reopen-employees-return-seniority-protections-unions-compromise-chicago-coronavirus?fbclid=IwAR2iF7lhtL4bNqV4uEpSNgucd9cYxLG9BeavrTkr6t3y4ZUExkWTSRdlG00) mobilized to enact a similar local measure covering hotel workers across the city.

Legislative action in several states has established or extended policies to ensure those who suffered illness or disability following COVID-19 workplace exposure could access benefits though state workers’ compensation systems (including health care, lost wage replacement, or death benefits). Connecticut committed $34 million to an Essential Workers COVID-19 Assistance Fund to pay expanded COVID-19 workers’ compensation benefits to affected workers. Other examples—like [Washington state’s new Health Emergency Labor Standards Act](https://www.thestand.org/2021/04/nation-leading-bill-to-protect-frontline-workers-heads-to-inslee/)—strengthened safety standards, antiretaliation protections, and exposure notification rules, while Oregon lawmakers also strengthened [antiretaliation protections for workers who raise safety and health concerns](https://www.natlawreview.com/article/oregon-enhances-whistleblower-protections-workplace-safety-complaints). Separately, Washington passed a bill requiring employers to provide hazard communication and training to temporary workers, who often fall through the cracks under existing employment laws.

These measures are just a few examples of policy responses to long-standing systemic problems exacerbated by the COVID-19 pandemic, where “at-will” employees lacking union protections were often forced to choose between their health and their paychecks on a daily basis; thousands found themselves fired or disciplined for speaking up about health and safety concerns; and those infected at work but unable to access evidence needed to prove the source of their exposure were often denied workers’ compensation benefits under restrictive state rules.

Unemployment insurance

The pandemic spotlight on state policy failures enabled workers and advocates to fend off persistent threats to unemployment benefits in some states, while making progress in others to improve or expand state unemployment systems. Examples include [increases to notoriously low unemployment benefit amounts in Arizona](https://grandcanyoninstitute.org/news/arizonas-unemployment-benefits-set-to-increase-in-july-2022/) and [expansion of unemployment to cover school workers for the summer](https://www.epi.org/blog/illinois-extended-unemployment-benefits-to-school-workers-in-the-summer-and-minnesota-should-follow/) in Illinois and Oregon.

In New York, a powerful [statewide coalition](https://fundexcludedworkers.org/) won a landmark [Excluded Workers Fund](https://www.epi.org/blog/new-york-included-undocumented-immigrants-in-pandemic-aid-and-290000-workers-will-benefit-other-states-should-replicate-the-program/) when the legislature committed an unprecedented [$2.1 billion](https://www.nytimes.com/2021/04/08/nyregion/covid-relief-undocumented-workers-nyc.html)to make up for the exclusion of undocumented immigrants from federal aid during the COVID-19 pandemic. The escalating campaign organized by coalition partners to propose, win, and implement the program serves as a model for other states to follow in directing funds to the primarily Black, Brown, and women workers most affected by the intertwined public health and economic crises of the past year while boosting local economies.

Elsewhere, ongoing struggles with highly uneven access to unemployment and recent harmful moves by over half of all states to [prematurely cut off federal pandemic unemployment](https://www.epi.org/blog/there-is-no-justification-for-cutting-federal-unemployment-benefits-the-latest-state-jobs-data-show-the-economy-has-not-fully-recovered/) benefits continue to point to the need for federal [reform of the unemployment system](https://www.epi.org/publication/unemployment-insurance-reform/) to address systemic inequities.

Paid sick leave and paid family and medical leave

While the pandemic continues to point to the desperate need for comprehensive federal paid leave policies, several legislatures acted to create or expand existing state programs in 2021. [Georgia initiated a new paid parental leave program](https://gbpi.org/sine-die-2021-lawmakers-can-do-more-to-put-people-first/) for state employees and teachers; [New Mexico](https://www.nmlegis.gov/Sessions/21%20Regular/final/HB0020.pdf) created a new paid sick time policy; and in Illinois, teachers and school employees will now be able to use up to [30 days of paid sick leave](https://foxillinois.com/news/local/legislation-would-expand-paid-sick-leave-for-teachers-after-fostering-adopting-babies) after giving birth to, fostering, or adopting a child. In Washington, two new policy changes aim to make the state’s paid family and medical leave program more accessible by allowing [people who lost work due to COVID](https://app.leg.wa.gov/billsummary?BillNumber=1073&Initiative=false&Year=2021)to qualify for family or medical leave and [expanding the definition of “family”](https://app.leg.wa.gov/billsummary?BillNumber=5097&Initiative=false&Year=2021) so that everyone can access leave to care for loved ones.

Each time workers win new policies that address both long-standing power imbalances and pressing pandemic challenges, they are contributing to a more robust and equitable recovery, an eventual end to racist, sexist occupational exclusions from fundamental labor rights, and a world where all workers have full and equal legal protections to organize and collectively bargain over the future of their own work. While prospects for federal action on paid leave, minimum wage, unemployment, labor standards enforcement, and [labor law reform](https://www.epi.org/blog/the-pro-act-giving-workers-more-bargaining-power-on-the-job/) remain uncertain, states and cities will play central roles in empowering workers and reshaping our economy in the months to come—and redefining what may become possible at the federal level.

### 1NC – Antitrust Can’t Solve Inequality

#### Antitrust can’t solve inequality – economy’s too complex

Crane 16 – Professor of law at the University of Michigan.

Daniel Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review*, vol. 101, 2016, pp. 1184-1186, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles.

C. Why the Monopoly Regressivity Claim Is Misguided

The argument that antitrust violations are regressive and hence that antitrust enforcement is progressive is founded on two, sometimes unstated, axiomatic assumptions: (1) relatively rich classes of producers, in particular shareholders and senior corporate managers, capture the majority of the monopoly rents generated by anticompetitive behavior and (2) relatively poorer consumers bear the brunt of monopoly overcharges.56 These assumptions may be generalizable in some circumstances—particularly in the developing world—where the means of production are concentrated in a very small number of private hands and the vast bulk of society interacts with capital only as an employee and a consumer.57 But they are far more difficult to generalize in more economically developed societies where ownership of the means of production is widely distributed, both in terms of active management and passive investment, and there exists a broad middle class capable of appropriating monopoly rents as entrepreneurs, managers, investors, employees, and sellers of assets. As the case for each of the axioms weakens, the case for the progressivity of antitrust enforcement correspondingly diminishes.58

It is doubtful that antitrust violations involve systematic transfers from comparatively poor consumers to comparatively wealthy producers. Almost everyone, both rich and poor, who participates in markets does so both as a consumer and as a producer. People participate as producers in their capacities as employees, sole proprietors, and shareholders. They participate as buyers in their capacities as end consumers, business purchasers, and taxpayers. Thus, any assertion about the regressivity of antitrust violations cannot rest on the bare claim that such violations involve wealth transfers from consumers to producers.

In order to sustain the claim, there would need to be a further specification of the ways in which identified classes of producers skim money from identified classes of consumers. When the actual operation of market power exercises in developed economies and antitrust enforcement seeking to curtail them is explored, it becomes apparent that general claims about the wealth redistribution effects of antitrust violations and enforcement are extraordinarily difficult to sustain. Monopoly rents are not systematically borne by the poor or collected by the wealthy. Rather, in a complex, advanced economy, the lines of exploitation and profit run in too many complicated and crosscutting directions to permit broad generalizations.

### 1NC – Antitrust Can’t Solve Worker Rights

#### Worker oppression is baked into labor laws – just using antitrust to solve is insufficient

Rogers 18 – Brishen Rogers is an Associate Professor at Temple University's Beasley School of Law, and a Fellow at the Roosevelt Institute. Prior to law school, he worked as a community organizer promoting living wage policies and affordable housing, and spent several years organizing workers as part of SEIU’s “Justice for Janitors” campaign.

Brishen Rogers, April 30 2018, “The Limits of Antitrust Enforcement,” Boston Review, https://bostonreview.net/class-inequality/brishen-rogers-limits-antitrust-enforcement

I nevertheless want to sound a note of caution. More aggressive antitrust enforcement probably won’t do all that much to help workers, since the problem of employer power runs much deeper than monopsony, covenants, and other restraints on workers’ mobility. Capacious employer rights are written into the basic structure of our labor and employment laws and corporate laws. Those laws encourage investors to aggregate into corporations, while leaving workers atomized, and therefore largely powerless, unless the state encourages them to aggregate into unions or otherwise to exert countervailing power from below. Still more troubling, the basic logic of antitrust—that combinations in restraint of trade are forbidden—is in serious tension with workers’ organizing. Unions are literally cartels for the sale of labor, and unions’ major legal battle prior to the New Deal was to stop courts’ use of antitrust and related doctrines to thwart their efforts. Contemporary antitrust doctrine still has that effect in many instances.

This all points to a broader tension on the left: on the one hand, many are intuitively attracted to republican or progressive commitments to widely dispersed political and economic power; on the other hand, practically speaking, that may require strong countervailing institutions such as unions that have their own governance authority. Antitrust is clearly part of the solution here, but fundamental labor law reform is equally essential.

## Democracy adv

### 1NC – Democracy Doomed Now

#### Either democracy is doomed no matter what or its resilient, and the courts have nothing to do with it

Freedom House 21 – Freedom House is a non-profit non-governmental organization that conducts research and advocacy on democracy, political freedom, and human rights. Freedom House was founded in October 1941, and Wendell Willkie and Eleanor Roosevelt served as its first honorary chairpersons.

Freedom House, March 3 2021, “New Report: The global decline in democracy has accelerated,” https://freedomhouse.org/article/new-report-global-decline-democracy-has-accelerated

A need for reform in the United States

While still considered Free, the United States experienced further democratic decline during the final year of the Trump presidency. The US score in [Freedom in the World](https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege) has dropped by 11 points over the past decade, and fell by three points in 2020 alone. The changes have moved the country out of a cohort that included other leading democracies, such as France and Germany, and brought it into the company of states with weaker democratic institutions, such as Romania and Panama.

Several developments in 2020 contributed to the United States’ current score. The Trump administration undermined government transparency by dismissing inspectors general, punishing or firing whistleblowers, and attempting to control or manipulate information on COVID-19. The year also featured mass protests that, while mostly peaceful, were accompanied by high-profile cases of violence, police brutality, and deadly confrontations with counterprotesters or armed vigilantes. There was a significant increase in the number of journalists arrested and physically assaulted, most often as they covered demonstrations. Finally, the outgoing president’s shocking attempts to overturn his election loss—culminating in his incitement of rioters who stormed the Capitol as Congress met to confirm the results in January 2021—put electoral institutions under severe pressure. In addition, the crisis further damaged the United States’ credibility abroad and underscored the menace of political polarization and extremism in the country.

”January 6 should be a wake-up call for many Americans about the fragility of American democracy,” said Michael J. Abramowitz, president of Freedom House. “Authoritarian powers, especially China, are advancing their interests around the world, while democracies have been divided and consumed by internal problems. For freedom to prevail on a global scale, the United States and its partners must band together and work harder to strengthen democracy at home and abroad. President Biden has pledged to restore America’s international role as a leading supporter of democracy and human rights, but to rebuild its leadership credentials, the country must simultaneously address the weaknesses within its own political system.”

“Americans should feel gratified that the courts and other important institutions held firm during the postelection crisis, and that the country escaped the worst possible outcomes,” said Abramowitz. “But the Biden administration, the new Congress, and American civil society must fortify US democracy by strengthening and expanding political rights and civil liberties for all. People everywhere benefit when the United States serves as a positive model, and the country itself reaps ample returns from a more democratic world.”

The effects of COVID-19

Government responses to the COVID-19 pandemic exacerbated the global democratic decline. Repressive regimes and populist leaders worked to reduce transparency, promote false or misleading information, and crack down on the sharing of unfavorable data or critical views. Many of those who voiced objections to their government’s handling of the pandemic faced harassment or criminal charges. Lockdowns were sometimes excessive, politicized, or brutally enforced by security agencies. And antidemocratic leaders worldwide used the pandemic as cover to weaken the political opposition and consolidate power.

In fact, many of the year’s negative developments will likely have lasting effects, meaning the eventual end of the pandemic will not necessarily trigger an immediate revitalization of democracy. In Hungary, for example, the government of Prime Minister Viktor Orbán took on emergency powers during the health crisis and misused them to withdraw financial assistance from municipalities led by opposition parties. In Sri Lanka, President Gotabaya Rajapaksa dissolved Parliament in early March and, with new elections repeatedly delayed due to COVID-19, ruled without a legislature for several months. Later in the year, both Hungary and Sri Lanka passed constitutional amendments that further strengthened executive power.

The resilience of democracy

Despite the many losses for freedom recorded by [Freedom in the World](https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege) during 2020, people around the globe remained committed to fighting for their rights, and democracy continued to demonstrate its remarkable resilience. A number of countries held successful elections, independent courts provided checks on executive overreach, journalists in even the most repressive environments investigated government transgressions, and activists persisted in calling out undemocratic practices.

Following a marred election in Malawi in mid-2019, for instance, judges withstood bribery attempts and pressure from the incumbent administration and called for new elections. Opposition presidential candidate Lazarus Chakwera then won the 2020 rerun vote by a comfortable margin. The incident represented a critical win for Malawi’s democratic institutions and set a positive example of judicial independence for other African states.

In Taiwan, one of the highest-performing democracies in Asia, the government effectively suppressed the coronavirus without resorting to abusive methods, setting a sharp contrast with authoritarian China, where the regime has touted its draconian response as a model for the world. Even before the virus struck, Taiwanese voters defied a multipronged, politicized disinformation campaign from China and overwhelmingly reelected a president who opposes moves toward unification with the mainland.

“Our report concludes that democracy today is beleaguered but not defeated,” said Abramowitz. “Its adversaries have grown more powerful, making the world a more hostile environment for self-government, but its enduring appeal among ordinary people—which we’ve already seen this year in places like Russia and Myanmar—bode well for the future of freedom.”

#### Antitrust doesn’t spill over – the Crane ev is well-worded but doesn’t have a warrant or examples

### 1NC – Turn

#### The aff is backwards – restoring court legitimacy INCREASES judicial activism – specifically, Court will avoid overturning Roe v. Wade now UNLESS they get political cover to do so

Ziegler 9/1 – Law professor at Florida State University.

Mary Ziegler, “Supreme indifference: What the Texas case signals about the court’s treatment of abortion,” *SCOTUSblog*, 1 September 2021, https://www.scotusblog.com/2021/09/supreme-indifference-what-the-texas-case-signals-about-the-courts-treatment-of-abortion/.

In some ways, the court’s inaction can tell us only so much about the fate of Roe v. Wade and Casey, which the justices are slated to consider this coming term in Dobbs v. Jackson Women’s Health Organization, a case about a Mississippi law that bans most abortions after 15 weeks. While Texas has tried to avoid a confrontation with Roe and Casey through its private-enforcement scheme, the Mississippi case will all but force the justices to reverse or transform the court’s most important abortion precedents. Mississippi outlaws many abortions before viability — the point at which survival is possible outside the womb — notwithstanding the fact that Roe and Casey disallow undue burdens on the right to choose abortion before viability. To uphold Mississippi’s law, the court will have to reverse Roe outright or declare an end to viability as a limit on abortion bans. The Texas case does not require the same kind of sea change, especially given the emergency posture in which it came up to the court. Lower courts have upheld narrower laws allowing for lawsuits against abortion providers while purporting to enforce Roe and Casey (the U.S. Court of Appeals for the 5th Circuit, in Okpalobi v. Foster, is the most prominent example). The justices might yet respond to the Texas providers’ emergency application — or may simply think that providers cannot sue the state judges they have hauled into court.

Besides, the best chance for supporters of abortion rights is to lean on precedent. Chief Justice John Roberts wrote at length about the importance of stare decisis in voting to strike down a Louisiana abortion restriction last year in June Medical Services v. Russo. Justices Brett Kavanaugh and Amy Coney Barrett spoke at length about respect for precedent during their confirmation hearings. Reversing Roe and Casey would upend nearly a half century of jurisprudence. Allowing S.B. 8 to go into effect does not as obviously contradict precedent — or expose the court to backlash. Siding with Mississippi in Dobbs in what is sure to be a closely watched opinion next June seems risky. Allowing Texas’ law to go into effect through inaction in the middle of a night when the court is not even in session, not so much.

But the court’s willingness to allow Texas to functionally outlaw abortions sends a powerful message. The justices have shown that they can respond quickly to emergency applications when the spirit moves them. It is possible that one or more of the justices is writing a lengthy dissent that explains the wait here. Just the same, the court’s silence seems to mark a fundamental break with the respect the justices have long shown those on either side of the abortion issue. Saying nothing suggests that there was no emergency — and that a massive shift in abortion law in one of the nation’s largest states is a matter of no particular import. Americans opposed to abortion will celebrate Texas’ law as a crucial step toward the protection of the nation’s most vulnerable. Supporters of abortion rights mourn that the court has effectively reversed Roe without saying a word. Only the justices themselves seem to think that the matter is not worthy of comment.

The court’s silence cannot tell us whether the court will reverse Roe openly this June or in a subsequent decision. Inaction on the emergency application does not reveal much about how the court’s new 6-3 conservative majority views precedent; nor does it establish whether Roberts’ commitment in June Medical will persist (or whether Barrett, who replaced the late Justice Ruth Bader Ginsburg after June Medical was handed down, will share that commitment). But the events of the past 24 hours do raise questions about whether the court will approach Dobbs as the legacy-defining case that it is.

The Supreme Court’s membership has changed, but the gravity of the abortion issue has not. Dobbs gives the justices a second chance to show that they have not forgotten.

#### Reproductive rights key to solve overpopulation and systemic death – solves climate change and food shortages

Schlanger 14

Zoë Schlanger is a Newsweek reporter based in New York, Elijah Wolfson is Newsweek's Senior Editor, primarily responsible for the publication's science, health and technology coverage, Newsweek, December 18, 2014, “How to Defuse the Population Bomb”, http://www.newsweek.com/2014/12/26/fixing-crowded-earth-293024.html

It’s an ancient problem, with a very obvious solution: give women full reproductive rights, including easy access to contraception and other family-planning options. Family planning and reproductive health are some of the most crucial tools for reducing human suffering in a changing and increasingly crowded world.

No Food, No Water

Like many Kibera residents, Akinyi moved to the city only recently—she arrived a year ago from “the upcountry.” It’s not clear how many people live in Kibera, but the Kenyan census says that at least 200,000 are crammed into this makeshift, two-square-mile shantytown. The impact of this massing of humans is like a physical blow: The land and city infrastructure can’t keep up with the people. Step between the houses of Kibera and into a back alley and you are likely to come across gulches carved into the dirt by streams of wastewater, the ad hoc sewage system here, and garbage and waste piled high.

Kenya is in the midst of a population explosion. With a high fertility rate—the average Kenyan woman has 4.5 children, compared with 2.3 worldwide—Kenya’s population of 44 million is projected to more than double to 97 million by 2050. Meanwhile, more than a quarter of Kenyan women are still unable to access the contraceptives they want. Despite over a century of family-planning aid work, it remains one of the most misunderstood aspects of international development. This is in large part because of Western efforts to apply a coercive form of population control under the guise of “family planning.”

Globally, birth rates are lower today than ever, and more women than ever before are masters of their own bodies. But global populations are still on the rise, and in many parts of the world—Africa most prominently—the problems created by a lack of reproductive rights are getting more dire. In 1650, there were about 500 million people on Earth. By 1804, the population had doubled to 1 billion. In just 123 years, it doubled again, to 2 billion, and it doubled yet again, to 4 billion, by 1974. The world’s population passed 7 billion in 2011. The latest U.N. projections suggest we’ll be up to 12.3 billion by 2100, with no stabilization in sight.

Meanwhile the rest of Earth’s flora and fauna are being pushed aside. We are in the midst of the biggest mass-extinction event since the dinosaurs were obliterated 65 million years ago. A recent paper in Science found that plant and animal species are now going extinct at least 1,000 times faster than they did before humanity’s arrival, due mostly to human-caused habitat destruction and climate change. Some scientists have taken to describing our current epoch as the Anthropocene, to highlight the fact that humans have irreversibly changed the ecological makeup of the planet.

In the 1970s, with the global population hovering around 4 billion, humanity began using more resources than the Earth could replenish each year, and was producing more waste than it could absorb, pushing us all deeper and deeper into “ecological overshoot,” according to California think tank Global Footprint Network. It estimates that in 2014 humans used the resources of 1.5 Earths.

Most of the population growth is occurring in African nations. The continent hosts 15 percent of the world’s people; by 2050, the U.N. projects, that number will be closer to 25 percent. This is particularly problematic, because much of the continent is also where people are less able to adapt to the effects of overpopulation, says John Wilmoth, director of the U.N. Population Division. If the world can’t meet Africa’s need for family planning, the result will be more and more poor, and poorly educated, people, he says. Kenya, Ethiopia and Malawi, for example, are three nations where large numbers of women can’t get the contraception they need and are at high risk for climate change effects like flooding and drought.

As climate change turns more coasts into flood zones and more farmland to desert, the damage will be inextricably linked to population growth—the more of us there are, the more water, food and energy we’ll need to survive. In the past three years, Australia, Canada, China, Russia and the U.S. have all suffered devastating floods and droughts that severely impaired food harvests. Earlier this year, the Food and Agriculture Organization said that to feed a population of 9 billion in 2050, the world must increase its food production by an average of 60 percent or else risk serious food shortages that could bring social unrest and civil wars. By comparison, wheat and rice production have grown at a rate of less than 1 percent for the past 20 years.

Mark Montgomery, a scholar at the Population Council, studies how the urban population boom will cause dramatic freshwater shortages. By 2050, the U.N. projects that 70 percent of the world’s population will live in cities. Already, 150 million people in cities around the world suffer from freshwater shortages. In a recent paper, Montgomery and his colleagues found the number of urbanites with inadequate water will rise by more than 1 billion by 2050, and cities in certain regions “will struggle to find enough water for the needs of their residents.”

The Big Taboo

Roger-Mark de Souza is fed up. The director of the population, environmental security and resilience arm of the Wilson Center, a government think tank in Washington, D.C., he says most of the discussion about adapting to climate change ignores the population explosion. “If you have all of these initiatives being put in place, and you have ongoing population growth, to what end?” he asks. “If we only invest in programs that do not take into account these broader social interventions, there is a missed opportunity.”

The Green Climate Fund, perhaps the most high-profile fund helping developing countries adapt to climate change, does not say anything about population on its website. The United Nations Framework Convention on Climate Change, which manages climate-focused “national adaptation programmes of action” for the least-developed countries, devotes a section of its website to the role gender plays in climate change. Women, it explains, are more vulnerable to its ravages and must be included in adaptation efforts. But family planning and contraception aren’t on the official list of adaptation projects.

This failure has been exacerbated by the long and ugly history of wealthy, predominantly white powers manipulating family planning on the continent for several centuries. Europeans came to Africa “looking for bodies,” says Nwando Achebe, a professor of history at Michigan State University. First was the slave trade. Then came the colonist era, when Europeans settled in Africa, establishing massive farms and plantations requiring local labor. Both groups of invaders “needed a population of able-bodied Africans,” says Achebe. “They were enacting laws to make sure the population grew.”

Columbia University history professor Matthew Connelly argues that the 20th century was filled with wrong-minded approaches to family planning that have ranged from using risky contraceptives on unwitting clients—in 1967 a Ford Foundation report praised a proposal for a new technology involving “an annual application of a contraceptive aerial mist” (from a single airplane over India)—to offering cash incentives to poor people who agreed to be sterilized. Policies like these “made family planning seem like an imposition, rather than something that served clients’ own ­interests,” writes Connelly, and the backlash was ferocious. Revolutionary leaders worldwide (including Daniel Ortega in Nicaragua and Zulfikar Ali Bhutto in Pakistan) attacked family planning as a symbol of American imperialism, and the Vatican jumped on board, helping organize a global campaign against family-planning efforts, which just happened to line up with the Catholic Church’s official stance on procreation, particularly in developing countries.

In 1984, President Ronald Reagan instituted what has become known as the “global gag rule” (officially the Mexico City Policy), which stopped U.S. dollars from flowing to any international family-planning groups that provided abortions. The rule also stipulated that any organization receiving U.S. funding could not educate patients on abortion or take a stand against unsafe abortion. President Bill Clinton repealed the policy in 1993, George W. Bush reinstated it in 2001, and Barack Obama repealed it again in 2009. If a Republican takes the presidency in 2016, the gag rule will likely come back.

When the gag rule was in effect, United States Agency for International Development (USAID) funding to family-planning organizations plummeted. Clinics providing everything from condom distribution to HIV/AIDS treatment to neonatal care cut back their staff and services, and in some cases shuttered their doors entirely. In some cases, the rule backfired: Kelly Jones, a senior researcher at the International Food Policy Research Institute, found that in Ghana during gag rule periods, rural pregnancies increased by 12 percent and the rural abortion rate increased right along with it, going up by 2.3 percent.

Meanwhile, U.S. funding for family planning abroad has flatlined for several years, at about $530 million, although it would take relatively little money to make an enormous difference. For every dollar spent on family planning, USAID’s website boasts, up to $6 is saved on health care, immunization, education and other services. Put another way, every dollar not spent on family planning will cost the U.S. up to $6 more in the long run. “It’s not difficult to understand that contraceptive devices are relatively cheap compared to the cost of building roads and schools and hospitals,” Wilmoth, the head of the U.N. Population Division, says. “So it’s not for lack of money that it isn’t accomplished.”

While the West waffles on providing aid for family planning, “Africans are asking for [it],” says Faustina Fynn-Nyame, Marie Stopes’s country director for Kenya, who is from Ghana. “Africans see the importance of this. It’s not the West telling us to do something.”

Leaving Half the Population Behind

In 2012, the estimated number of unintended pregnancies was 80 million (63 million in the developing world). World population growth? Also 80 million. In other words, if women all over the world had the ability to prevent the pregnancies they don’t want, the world’s population would stabilize.

That would immediately improve both maternal and infant health. In most parts of the global south, access to abortion is either extremely limited or prohibited. In Kenya, a nurse was sentenced to death for providing abortions this past September. Any pregnancy terminations in Nairobi have to be done on the backstreets, often using DIY drugs made by chemists more concerned with sales than efficacy, says Njagi, the Marie Stopes clinic manager. That’s how Florence Akinyi ended up nearly bleeding to death in a wheelbarrow.

Worldwide, it’s estimated that 20 million women have unsafe abortions every year because they lack better options. Over 5 million of them end up needing urgent medical attention, and 47,000 die in the process. In addition, in the developing world pregnancies are often dangerous. Every year, an estimated 358,000 women die during childbirth, and many more suffer debilitating pregnancy-related health problems. In sub-Saharan Africa, the lifetime risk of dying from pregnancy-related problems is 1 in 22. Lower pregnancy rates and you lower those risks—fewer pregnancies means resources don’t have to be spread dangerously thin.

Since 2011, the United Nations Population Fund (working to “ensure universal access to reproductive health, including family planning”) has been led by Dr. Babatunde Osotimehin, a Nigerian national. At the U.N. General Assembly meeting in September, Osotimehin urged the group to focus on gender equality. “We cannot advance by leaving half of the population—our women and girls—behind,” he said. At the same meeting, Bathabile Dlamini, a representative of South Africa, said her country had recently implemented policies allowing access to safe abortion services and had seen an increase in life expectancy from 54 in 2005 to 60 in 2011.

Of course, abortion is the last resort; it’s far better to help women before conception. According to research from the Guttmacher Institute, 39 percent of all pregnancies in sub-Saharan Africa—an estimated 19 million—were unintended in 2012. Of those 19 million, the institute estimates 10 million resulted in unplanned births, 3 million in miscarriages and 6 million in abortions, most performed in unsafe conditions. Providing access to contraception for every woman in sub-Saharan Africa who wanted it might prevent 5 million abortions and save the lives of 48,000 women. What’s more, 555,000 fewer newborns and infants would die, cutting infant mortality in the region by 22 percent.

Many Kenyan women would like to have power over how many children they have, and when. “We have a high unmet need,” says Fynn-Nyame, adding that “20.9 percent of married women say they want to control their fertility somehow but don’t have the access, money or awareness of where to go.”

In the developing world, 222 million women want contraceptives but can’t get them. (That is more than the population of Germany, France, Belgium, Spain and the Netherlands combined, notes a video by Population Action International.) Meeting their needs would have prevented 54 million unwanted pregnancies, 26 million abortions, 79,000 deaths of mothers in pregnancy or childbirth and 1.1 million infant deaths in 2012 alone.

Plus, contraceptives let women space out births, leading to far healthier children. If all families in the developing world put a three-year gap between pregnancies, almost 2 million fewer children under 5 would die each year, according to research from the USAID.

The problem is that too many of these important decisions are taken out of women’s hands. Over 10 percent of Kenyan women report being raped by their partners. “Women have very little power when they are having sex within their marriage,” says Fynn-Nyame. A woman might know that she’s at a fertile point in her menstrual cycle, but she won’t be able to negotiate with her husband. If he wants sex, she has to give in.

Fynn-Nyame says a lot of the work her team does is with men. It works, she says, particularly among young men. The problem is that misinformation about contraceptives is so endemic that even men who want to participate in family planning either don’t know how or don’t have the access. For example, recent research shows that young Kenyan men in universities will often have a glass of water and the morning-after pill ready for their date to take before sex. It’s effective—though not exactly healthy for the woman who takes it. But “what else are you going to do?” asks Fynn-Nyame. “You want to finish your education and have a different life—you have all these dreams and aspirations.”

‘God Will Provide’

Achebe’s first name, Nwando, is a shortened version of Nwabundo, an Igbo word that translates roughly to “a child is the shade.” She says, “It means as the youngest daughter, I’m expected to stay with my parents as they grow old and shade them as a tree. Let my lineage not end. Let my path not close. These are names that Africans give their kids.”

In much of the developing world, there remains a deep-seated imperative to have as many children as possible. In part, this is due to the pernicious influence of colonialists and missionaries, but it also stems from many decades ago, when child mortality was so high that if you wanted to have a few kids, you had no choice but to follow one pregnancy with the next. This is particularly the case among people who live off of subsistence farming in the rural areas, who feel that “the more hands we have, the more work we can do, and the more money we can take in,” says Fynn-Nyame. Children are also considered an investment for a parent’s old age. After all, if you have eight children, there’s a chance at least one will have the wherewithal to care of you when you grow too old to care for yourself. And it doesn’t matter if you can’t afford eight children right now. “If you ask people whether they can afford these children,” says Achebe, “the answer is always, ‘God will provide.’”

Meanwhile, too many children lack information about sex and procreation. Many of the women in the Marie Stopes Kibera clinic come alone, with no real knowledge of their options. Often they will have been told by their husband what contraceptive to ask for—usually they are told to avoid intrauterine devices (IUDs) because it “makes sex less fun,” says Njagi. “I try to teach them about their options so they can make a more informed decision.”

And that might just be IUDs, which are one of the best forms of birth control—they have a failure rate of less than 1 percent, while birth control pills have a failure rate of between 8 and 9 percent. Plus, in regions where the health care infrastructure is shoddy, relying on a daily supply only drives up failure rates. As Elaine Lissner, director of the Male Contraception Information Project, puts it, “If you’re somewhere on the pill and the pill truck doesn’t show up one month, you’re pregnant.”

The Great Girl Bounce

What would happen if contraception suddenly became a universal right?

It did, in Bangladesh, which is seasonally flooded from Himalayan ice melt and is regularly bombarded by cyclones. The rising sea level, driven by climate change, is projected to wipe out 17 percent of its landmass by 2050 and displace 18 million people.

In the 1970s, Bangladesh, freshly independent, concluded it was growing too quickly—it was on pace to nearly triple its size in four decades. Women on average gave birth to more than six children. So the government made contraception free and distributed it widely.

In 1975, 8 percent of Bangladeshi women used contraception. By 2010, the number was over 60 percent. At the same time, educational opportunities increased: More than 90 percent of girls enrolled in primary school in 2005. Just five years earlier, female enrollment was half that number, according to The Economist. Women’s literacy hit 78 percent in 2010, compared with just 27 percent in 1981. Women who had an average of six children in the 1970s have roughly 2.2 children today. That fertility rate is well below India’s and far lower than Pakistan’s. Bangladesh is now the only developing country on track to meet the Millennium Development Goals for child and maternal health.

“This is not just a medical issue; it is a social issue as well,” the U.N.’s Wilmoth says. “The Bangladesh program did that community by community, with these women who would talk to people. It’s amazing that [the fertility rate] has fallen that low in a country so poor. It’s an example of what’s possible.”

The “Iranian miracle” is another example. It was the steepest population drop ever recorded—faster even than China’s one-child policy. And it came without coercion.

In the late 1980s, Iran’s Ayatollah Ruhollah Khomeini reversed a pro-natal policy meant to produce soldiers for the war against Iraq. Persuaded that the Iranian economy could not handle the bloated population, he issued fatwas making contraception available for free at government clinics. State-run TV broadcast information about birth control, and health workers educated patients on family planning as a means to leave more time between births. The fertility rate fell from seven births per woman in 1966 to fewer than two today. The plunging birth rate, coupled with increasing public education for girls, shifted the role of women in Iran. More women postponed childbirth to attend college, and now the country’s universities are 60 percent female.

But in 2006 the-President Mahmoud Ahmadinejad attempted to halt the decline, calling the family-planning programs a “prescription for extinction,” according to the Los Angeles Times. He urged Iranian girls to marry young, offered cash incentives per child, and thegovernment recently outlawed permanent surgical contraception. But it hasn’t worked. “Iranian women are not going back,” Sussan Tahmasebi, an Iranian women’s rights leader, told the Times.

When women can have fewer children further apart, the effect on their lives is dramatic and immediate. They have more time to pursue education and get jobs, earning money that they are more likely to invest back into their family and community than their male counterparts do. They lead healthier lives and have healthier children. The power dynamic between men and women can change too: Women with more access to resources are less frequently victims of domestic violence, according to USAID.

The Aspen Institute estimates that if all women globally had access to the contraceptives they want, the reduction in unwanted pregnancies would translate into an 8 to 15 percent reduction in global carbon emissions. Fewer people would be in harm’s way as sea levels rise and farmland dries out, and less pressure on resources already stretched thin would mean less violent conflict over those resources.

#### Extinction – increasing reproductive rights is key

Ehrlich 13

Paul R. Ehrlich is the Bing Professor of Population Studies, and President, Center for Conservation Biology at Stanford University, Millennium Alliance for Humanity and Biosphere, November 5, 2013, “Overpopulation and the Collapse of Civilization”, http://mahb.stanford.edu/blog/overpopulation-and-the-collapse-of-civilization/

A major shared goal of the Millennium Alliance for Humanity and the Biosphere (MAHB) and Sustainability Central is reducing the odds that the “perfect storm” of environmental problems that threaten humanity will lead to a collapse of civilization. Those threats include climate disruption, loss of biodiversity (and thus ecosystem services), land-use change and resulting degradation, global toxification, ocean acidification, decay of the epidemiological environment, increasing depletion of important resources, and resource wars (which could go nuclear). This is not just a list of problems, it is an interconnected complex resulting from interactions within and between what can be thought of as two gigantic complex adaptive systems: the biosphere system and the human socio-economic system. The manifestations of this interaction are often referred to as “the human predicament.” That predicament is getting continually and rapidly worse, driven by overpopulation, overconsumption among the rich, and the use of environmentally malign technologies and socio-economic-political arrangements to service the consumption.

All of the interconnected problems are caused in part by overpopulation, in part by overconsumption by the already rich. One would think that most educated people now understand that the larger the size of a human population, ceteris paribus, the more destructive its impact on the environment. The degree of overpopulation is best indicated (conservatively) by ecological footprint analysis, which shows that to support today’s population sustainably at current patterns of consumption would require roughly another half a planet, and to do so at the U.S. level would take four to five more Earths.

The seriousness of the situation can be seen in the prospects of Homo sapiens’ most important activity: producing and procuring food. Today, at least two billion people are hungry or badly in need of better diets, and most analysts think doubling food production would be required to feed a 35% bigger and still growing human population adequately by 2050. For any chance of success, humanity will need to stop expanding land area for agriculture (to preserve ecosystem services); raise yields where possible; increase efficiency in use of fertilizers, water, and energy; become more vegetarian; reduce food wastage; stop wrecking the oceans; significantly increase investment in sustainable agricultural research; and move feeding everyone to the very top of the policy agenda. All of these tasks will require changes in human behavior long recommended but thus far elusive. Perhaps more critical, there may be insurmountable biophysical barriers to increasing yields – indeed, to avoiding reductions in yields – in the face of climate disruption.

Most people fail to realize the urgency of the food situation because they don’t understand the agricultural system and its complex, non-linear connections to the drivers of environmental deterioration. The system itself, for example, is a major emitter of greenhouse gases and thus is an important driver of the climate disruption that seriously threatens food production. More than a millennium of change in temperature and precipitation patterns is now entrained, with the prospect of more crop-threatening severe storms, droughts, heat waves, and floods— all of which are already evident. Thus maintaining – let alone expanding – food production will be ever more difficult in decades ahead.

Furthermore, agriculture is a leading cause of losses of biodiversity and the critical ecosystem services supplied to agriculture itself and other human enterprises, as well as a major source of global toxification, both of which pose additional risks to food production. The threat to food production of climate disruption alone means that humanity’s entire system for mobilizing energy needs to be rapidly transformed in an effort to hold atmospheric warming well below a lethal 5o C rise in global average temperature. It also means we must alter much of our water-handling infrastructure to provide the necessary flexibility to bring water to crops in an environment of constantly changing precipitation patterns.

Food is just the most obvious area where overpopulation tends to darken the human future – virtually every other human problem from air pollution and brute overcrowding to resource shortages and declining democracy is exacerbated by further population growth. And, of course, one of our most serious problems is the failure of leadership on the population issue, in both the United States and Australia. The situation is worst in the U.S. where the government never mentions population because of fear of the Catholic hierarchy specifically and the religious right in general, and the media keep publishing ignorant pro-natalist articles, and in Australia even advertise on prime-time TV to have more kids.

A prime example was a ludicrous 2010 New York Times screed by David Brooks, calling on Americans to cheer up because “Over the next 40 years, the U.S. population will surge by an additional 100 million people, to 400 million.” Equal total ignorance of the population-resource-environment situation was shown in 2012 by an article also in the New York Times by one Ross Douthat “More Babies, Please” and one by a Rick Newman in the USNews “Why a falling birth rate is a big problem,” both additional signs of the utter failure of the US educational system.

A popular movement is needed to correct that failure and direct cultural evolution toward providing the “foresight intelligence” and the agricultural, environmental, and demographic planning that markets cannot supply. Then analysts (and society) might stop treating population growth as a “given” and consider the nutritional and health benefits of humanely ending growth well below 9 billion and starting a slow decline. In my view, the best way to accelerate the move toward such population shrinkage is to give full rights, education, and job opportunities to women everywhere, and provide all sexually active human beings with modern contraception and backup abortion. The degree to which that would reduce fertility rates is controversial, but it would be a win-win for society. Yet the critical importance of increasing the inadequate current action on the demographic driver can be seen in the decades required to change the size of the population humanely and sensibly. In contrast we know from such things as the World War II mobilizations that consumption patterns can be altered dramatically in less than a year, given appropriate incentives.

### 1NC – No Impact to Democracy

#### Robust statistical research proves democracy has no influence on conflict

Cranmer 15 – Skyler J. Cranmer is the Carter Phillips and Sue Henry Associate Professor of Political Science at the Ohio State University.

Skyler Cranmer, September 3 2015, “‘Democratic peace’ may not prevent international conflict,” Ohio State University, https://news.osu.edu/democratic-peace-may-not-prevent-international-conflict/

COLUMBUS, Ohio – Using a new technique to analyze 52 years of international conflict, researchers suggest that there may be no such thing as a “democratic peace.”

In addition, a model developed with this new technique was found to predict international conflict five and even ten years in the future better than any existing model.

[Democratic peace](https://en.wikipedia.org/wiki/Democratic_peace_theory) is the widely held theory that democracies are less likely to go to war against each other than countries with other types of government.

In the new study, researchers found that economic trade relationships and participation in international governmental organizations play a strong role in keeping the peace among countries. But democracy? Not so much.

“That’s a startling finding because the value of joint democracy in preventing war is what we thought was the closest thing to a law in international politics,” said [Skyler Cranmer](https://polisci.osu.edu/people/cranmer.12), lead author of the study and The Carter Phillips and Sue Henry Associate Professor of [Political Science at The Ohio State University](https://polisci.osu.edu/).

“There’s been empirical research supporting this theory for the past 50 years. Even U.S. presidents have touted the value of a democratic peace, but it doesn’t seem to hold up, at least the way we looked at it.”

The study appears this week in the [Proceedings of the National Academy of Sciences](http://www.pnas.org/). Cranmer’s co-authors are [Elizabeth Menninga](http://clas.uiowa.edu/polisci/people/elizabeth-menninga), assistant professor of political science at the [University of Iowa](http://www.uiowa.edu/) and recent Ph.D. graduate in political science at the University of North Carolina at Chapel Hill; and [Peter Mucha](http://mucha.web.unc.edu/), professor of mathematics in the College of Arts and Sciences at [UNC-Chapel Hill](http://www.unc.edu/).

Along with casting doubt on democratic peace theory, the study also developed a new way to predict levels of international conflict that is more accurate than any previous model. The researchers used a new technique to examine all violent conflicts between countries during the period of 1948 to 2000. The result was a model of international conflict that was 47 percent better than the standard model at predicting the level of worldwide conflict five and even 10 years into the future.

“The Department of Defense needs to know at least that far in advance what the world situation is going to be like, because it can’t react in a year to changes in levels of conflict due to bureaucratic inertia and its longer funding cycle,” Cranmer said.

“Being able to have a sense of the global climate in five or 10 years would be extremely helpful from a policy and planning perspective.”

The researchers started the study with a famous idea posed by the philosopher [Immanuel Kant](https://en.wikipedia.org/wiki/Immanuel_Kant) back in 1795: that the world could enjoy a “perpetual peace” if countries would become more interconnected in three ways. The modern interpretation of those three ways is: Through the spread of democratic states, more economic interdependence through trade, and more joint membership in international governmental organizations, or IGOs. (Modern examples range from regional agricultural organizations to the European Union and NATO.)

Many studies have looked at how these three elements, either together or separately, affect conflict between countries. But even when they were considered together, the impact of the three individual factors were considered additively.

What makes this study unique is that the researchers were the first to use a new statistical measure developed by Mucha – called multislice community detection -- to analyze all three of these components collectively. They were able to examine, for the first time, how each component was related to each other. For example, how membership in IGOs affected trade agreements between counties, and vice versa.

“When we looked at these networks holistically, we found communities of countries that are similar not only in terms of their IGO memberships, or trade agreements, or in their democratic governments, but in terms of all these three elements together,” Cranmer said.

The separation between such communities in the world is what the researchers called “Kantian Fractionalization.”

“You might think of it as the number of cliques the world is split up into and how easy it is to isolate those cliques from one another,” Cranmer said.

But the deeper the separation between communities or cliques there are in the world at one time, the more dangerous the world becomes.

By measuring these communities in the world at one specific time, the researchers could predict with better accuracy than ever before how many violent conflicts would occur in one, 5 or 10 years in the future. This study had a broad definition of conflict: any military skirmish where one country deliberately kills a member of another country. Many of the conflicts in this study were relatively small, but it also includes major wars.

Predicting one year into the future, this new model was 13 percent better than the standard model at predicting levels of worldwide conflict. But it was 47 percent better at predicting conflict 5 and 10 years into the future.

“We measured how fragile these networks are to breaking up into communities,” Mucha said. “Remarkably, that fragility in a mathematical sense has a clear political consequence in terms of increased conflict.”

The linear relationship between higher levels of Kantian fractionalization and more future conflict was so strong that Cranmer couldn’t believe it at first.

“I threw up my hands in frustration when I first saw the results. I thought we surely must have made a mistake because you almost never see the kind of clean, linear relationship that we found outside of textbooks,” Cranmer said.

“But we confirmed that there is this strong relationship.”

## FTC adv

### 1NC – Aff No Solve - Big Tech Key

#### Aff is insufficient to restore FTC cred – their ev says that the FTC needs to win ongoing cases against BIG TECH – NO evidence says they would win those post plan – if they do, MASSIVE innovation DA link

Rivero ’21 – NU Graduate

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.

### 1NC – No Solve

#### No internal link – FTC can bring cases even if Congress backlashes to it

#### And, no backlash – Congress won’t destroy an agency headed by a Dem president

### 1NC – Backlash Turn

#### Congress more likely to backlash to activist FTC

Vaheesan, Regulations Counsel, Consumer Financial Protections Bureau, ‘17

(Sandeep, “Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission,” University of Pennsylvania Journal of Business Law, Vol. 19)

Among those sympathetic to an expansive Section 5, some are likely to express reservations about its political feasibility. History certainly lends support to this concern. Congress has been hostile to an activist FTC in the past and could be expected to move to rein in any activism. In the 1970s, the FTC zealously pursued its antitrust and consumer protection missions.251 This period of aggressive enforcement and rulemaking triggered a powerful backlash from corporate America.252 The Washington Post condemned the Commission as the “National Nanny” in a stinging editorial.253 This period of zeal ended poorly for the FTC. Congress asserted new power over the agency and imposed additional procedural conditions on the use of its consumer protection authority.254

This fear of a political backlash from business and Congress may be the strongest line of criticism of an expansive Section 5. Corporations pour money into Congressional campaigns to ensure that their interests are represented and advanced. Although the FTC has been averse to policy activism or innovation for decades, the House has tried to limit the FTC’s authority to challenge mergers under Section 5, in the name of creating harmony between the FTC and the DOJ.255

The recent experience of another federal agency is instructive. Congressional Republicans, with the support of some Democrats, have been trying to hobble the Consumer Financial Protection Bureau (“CFPB”).256 The CFPB is seen as aggressively pursuing its statutory mission, bringing a wide range of enforcement actions and writing a number of rules to regulate consumer finance markets.257 In light of its vigor, the opposition from Congress does not come as a surprise. Even under more favorable political circumstances, an FTC that seeks to breathe life into Section 5 is certain to invite comparable Congressional opposition.

The probable reaction from many ideologically or financially captured members of Congress should not be underestimated, let alone ignored. Corporate interests and their Congressional allies would seek to curtail any Section 5 expansions. The FTC is a creation of Congress and so must answer to Congress. Congress can undertake a range of actions to limit the FTC’s day-to-day ability to function and its statutory power. At an extreme, Congress could repeal the FTC Act and shut down the FTC entirely. The risks to the FTC’s future would include various existential threats and should not be brushed aside. Undertaking a reinterpretation of Section 5 without an awareness of political dynamics on Capitol Hill would be a grave mistake.

### 1NC – Aff No Solve Scammers

#### Aff doesn’t solve – SCOTUS explicitly revoked FTC authority to go after scammers

Reuters ’21 –

“What U.S. Supreme Court took away from the FTC, Congress can give back” April 22, 2021, <https://www.reuters.com/business/legal/what-us-supreme-court-took-away-ftc-congress-can-give-back-2021-04-22/>

The U.S. Supreme Court, by a 9-0 vote, on Thursday gutted the Federal Trade Commission's ability to force scam artists and companies that acted deceptively to return ill-gotten gains, ruling in favor of a criminally convicted payday lender who challenged the agency.

The court, essentially, tossed out a practice that the FTC has used since the 1980s.

THE BIG NUMBER:

The FTC, which enforces antitrust law and investigates deceptive practices, returned $11.2 billion to consumers over the past five years.

Among companies that paid restitution are Volkswagen Group of America (VOWG\_p.DE), which agreed in 2017 to pay $5 billion for cheating on diesel-emissions tests, to Yellowstone Capital which agreed this month to pay more than $9.8 million to settle allegations that it continued withdrawing money from businesses' bank accounts after they were repaid.

Those penalties imposed in the past will stand, but the agency's ability to take similar action in the future is now severely constrained.

THE LONG AND RESOURCE-INTENSIVE ROAD:

With this ruling, the FTC can still go after such companies but the process is elaborate and resource-intensive, said former FTC chairman William Kovacic. "There is another way but it's just not very damn good. As a result, it's (the decision) a horrible blow to the anti-fraud program."

For many other cases, the FTC could combine 5(b) and 19(a)(2) of the FTC Act to win monetary relief. To do this, the agency would first have to win in an administrative process and then go after monetary relief in a district court proceeding. One such case, in which Figgie International sold heat detectors that it said were more effective than smoke detectors, took 12 years to resolve under this longer process.

The bar for the government to win is higher under 19(a)(2), and it has a three-year statute of limitations. The 13(b) standard, which the Supreme Court ruled on on Thursday, has no statute of limitations.

CONGRESS CAN FIX:

Last fall, the FTC commissioners -- then three Republicans and two Democrats -- urged Congress to pass a law to specifically give it the power to demand restitution. Acting Chairwoman Rebecca Slaughter repeated that plea on Thursday.

Representative Tony Cardenas, a Democrat, introduced legislation this week to allow the FTC to seek "equitable relief" for violations of law that it enforces.

Senator Maria Cantwell, chair of the Senate Commerce Committee, also indicated interest in passing a bill to allow the FTC to seek restitution.

# Block

## Section 5 CP

### 2NC – top

**Protectionism causes global losses in confidence and economic crisis – past trade wars have put us on the brink**

**Gunnella and Quaglietti 19** – European Central Bank

Vanessa Gunnella and Lucia Quaglietti, "The economic implications of rising protectionism: a euro area and global perspective," ECB Economic Bulletin, Issue 3/2019, 4-24-2019, https://www.ecb.europa.eu/pub/economic-bulletin/articles/2019/html/ecb.ebart201903\_01~e589a502e5.en.html

5 Conclusions

Taken in isolation, the repercussions of the tariffs implemented in 2018 pose only a modest adverse risk to the global and euro area outlooks. Preliminary evidence indicates that, in order to circumvent the effects of rising tariffs, firms operating in the targeted sectors may have been frontloading their import orders. While trade flows in the affected sectors may have started to decelerate after the tariffs came into effect, particularly in China, the impact of implemented tariffs and tariff announcements owing to uncertainty effects appears to have remained confined to the targeted sectors for the time being.

If trade tensions were to escalate once again, however, the impact would be larger. Model-based simulations indicate that the medium-term direct impact of an escalation could be sizeable, compounded by heightened financial stress and a drop in confidence. Despite some trade diversion effects, euro area and global trade and, therefore, activity, would decline. The longer-term effects would be even more pronounced.

Trade liberalisation within the framework of multilateral cooperation has been a key factor driving global economic prosperity. Trade integration helped to drive economic growth in advanced and developing economies in the second part of the 20th century, while also helping to pull hundreds of millions of people out of poverty. At the same time, although free trade is often seen as one of the factors behind rising inequality both within and across countries, winding back globalisation is the wrong way to address these negative effects. A retreat from openness will only fuel more inequality, depriving people of the undisputed economic advantages that trade and integration bring. Instead, countries should seek to resolve any trade disputes in multilateral fora. By encouraging regulatory convergence, multilateral cooperation helps to protect people from the unwelcome consequences of openness, and therefore remains crucial as a response to concerns about the fairness and equity of trade. The distributional and social effects of greater economic integration should also be addressed by targeted policies that achieve fairer outcomes, including, for example, redistributive policies or adequate training and educational measures.

### 2NC – AT: PDB

#### It decks section 5 authority—Doing both will allow companies to win section 2 litigations and undermine FTC authority

Rosch 11 – Commissioner, Federal Trade Commission.

J. Thomas Rosch, January 27 2011, “The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?” Federal Trade Commission, https://www.ftc.gov/sites/default/files/documents/public\_statements/great-doctrinal-debate-under-what-circumstances-section-5-superior-section-2/110127barspeech.pdf

Some may say that the Commission has a fourth option which is to sue in Part 3 under both Section 2 and Section 5, as the majority elected to do in Intel. To be honest, the trial lawyer in me hasn’t yet been persuaded that a tag-along Section 2 claim will ever make sense if the Commission’s goal is to actually win a Section 5 case. The minute we allege both claims, **the respondent has the upper hand** because it can go before the ALJ (and ultimately an appellate court, if necessary) and get a ruling on the Section 2 claim. Once a court finds that conduct is protected under Section 2, I think a federal court is going to be **hard pressed** to say the same conduct is nevertheless inappropriate under Section 5. The reason for this is that the core of any Section 5 argument must be that the Commission has special expertise to add and that, for whatever reason, the conduct should not be subject to damages. Once the Commission has proffered the Section 2 claim, it has s**everely undercut these argument**s. It was for this reason, in addition to the others that I discussed above, that I d**issented from the Commission’s decision to challenge Intel’s conduct under Section 2**.19

#### Innovation—expansion of current law decks it – sole section 5 use is the best way to minimize the chilling effect on firms

Crane 13 – Professor of Law, University of Michigan.

Daniel Crane, 2013, “Section 5 and the Innovation Curve,” University of Michigan Law School, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1125&context=book_chapters>

Th ere is a case to be made for **using Section 5 to remove restraints** on innovation that might not be reachable under the Sherman Act because the technological conditions they raise have not previously been considered. But that case should not amount to an undiff erentiated assumption that legal innovation by the FTC should be applied consistently to keep pace with technological innovation. To the contrary, legal innovation will oft en be grossly outpaced by technological innovation. **No amount** of eff ort or determination to enhance the alacrity of legal innovation will do the trick, as even commissions (as contrasted with courts, which are notably ponderous) are constitutionally incapable of keeping up with many fast-moving industries. Nor would it be wise to rush the rate of legal innovation with the hopes of staying within sight of the technological innovation—like the turtle taking steroids to keep within striking distance of the hare. A legal innovation that lags a generation behind the technological state of the art will oft en do **far more damage than good.**

It should be clear that there is a time for declining to apply **even traditional antitrust rules** when the pace of innovation is so fast that application of the rule might interfere with technological progress. In the specifi c context of **Section 5,** the question is whether the Commission should be entitled to go beyond traditional antitrust principles—to impose liability beyond that which would obtain under the Sherman Act. Where the rate of innovation is high, and particularly where the innovation curve is steep, it should not. – k

### 2NC – T/L solvency

#### the 1AC has said [wws]. The CP solves by using S5’s co-extensive authority w/ antitrust laws to remove that heightened burden of proof. That enforcement is binding.

Hubbard 20 – Sally Hubbard is Director of Enforcement Strategy at the Open Markets Institute.

Sally Hubbard, October 1 2020, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online,” Testimony Before the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law, https://docs.house.gov/meetings/JU/JU05/20201001/111072/HHRG-116-JU05-Wstate-HubbardS-20201001.pdf

The Open Markets Institute believes that current statutes are capable of addressing the full spectrum of anti-competitive conduct by digital platforms. We believe the main reason for the radical concentration of power in these corporations is not any shortcoming in law, but the lack of political will by antitrust enforcers. We believe this lack of political will is exacerbated by the adherence of law enforcement agencies to dangerously flawed economic philosophies that largely brought us America’s monopoly crisis in the first place. In short, we believe law enforcement agencies can and should aggressively enforce the antitrust laws against platform monopolists now, without waiting for Congress to strengthen or reform these laws. Indeed, the Open Markets Institute believes that enforcers could push the law in the right direction simply by bringing more aggressive cases under existing legal standards. A good example of how this could work is United States v. Microsoft Corp., 11 because today’s digital platforms are following Microsoft’s monopolistic playbook. Similarly, federal antitrust enforcers also are not fully using the tools available to combat anticompetitive conduct. The FTC has a powerful tool with Section 5 of the FTC Act,12 which is broader than the Sherman and Clayton Acts.13 Through Section 5, the FTC can establish rules of fair competition and overcome bad Section 2 caselaw.14 But the agency rarely uses this authority. The FTC also has investigative and rule-making authority that it could broadly deploy.

#### Those penalties deter further illegal action.

Chopra and Levine 20 – Commissioner, Federal Trade Commission. Attorney Advisor to Commissioner Rohit Chopra, Federal Trade Commission.

Rohit Chopra and Samuel A.A. Levine, November 3 2020, “The Case for Resurrecting the FTC Act’s Penalty Offense Authority,” University of Pennsilvania Law Review, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3721256&download=yes

The Commission has rarely deployed its Penalty Offense Authority, but it can offer three key advantages over seeking monetary relief solely under Section 13(b). First, the authority allows the Commission to seek civil penalties, which unlike equitable **relief can be calibrated to actually deter** wrongful conduct, while promoting practices like self-reporting. Second, particularly given the challenges before the Supreme Court, the Penalty Offense Authority creates less litigation risk than 13(b). Finally, the Authority is well-suited to having a market-wide impact, which promotes widespread compliance and saves taxpayer resources. Each of these advantages is discussed in turn. (i) Deterrence The most important difference between Section 13(b) and the Penalty Offense Authority is that 13(b) authorizes the Commission to seek equitable monetary relief – restitution and disgorgement – while the Penalty Offense Authority authorizes the agency to seek civil penalties. Penalties offer a number of advantages over restitution or disgorgement available through Section 13(b), particularly when it comes to effectuating general deterrence. As discussed above, equitable relief under Section 13(b) is awarded based on a fairly rigid formula, according to which an award generally cannot exceed the amount directly lost by victims or earned by wrongdoers. This formula can under-deter serious wrongdoing, especially when the consequences of that wrongdoing are difficult to calculate, or far exceed direct losses or gains. In fact, the Supreme Court has indicated that punitive remedies are not available in equity.85 Unlike equitable relief, civil penalties are, by their nature, punitive. They are intended not only to punish the wrongdoer but also to deter others from engaging in similar misconduct.86 Because the likelihood of being caught by a law enforcement agency is usually very low, basic deterrence theory indicates that penalties on those who are caught **must be severe**. As one economist put it: Since some who engage in deception will not be caught, the actual fine must be greater than the observed harm for those who are detected. If, for example, one offender of three is detected, then the fine must be equal to three times the harm caused by those who are punished.87 Penalties can and should exceed ill-gotten gains. In a 2012 action against Google, for example, the Commission estimated that the penalties obtained (based on an alleged order violation) constituted more than five times the company’s ill-gotten gains.88 Meanwhile, penalties that do not exceed (or even capture) illgotten gains are generally too lenient, in that they are unlikely to deter others from engaging in similar misconduct, especially when the likelihood of detection is low.89 In addition to deterring wrongful conduct more effectively than equitable relief, civil penalties can be calibrated to the severity of the misconduct. 90 The FTC Act already lays out factors for courts to consider when ordering civil penalties. However, the Commission has **never issued any interpretive rules or guidance**, and these factors leave courts with considerable discretion.91 In contrast, many agencies explicitly outline when self-reporting of unlawful conduct will be rewarded with a degree of leniency.92 Armed with civil penalty authority, the Commission can do the same.93 Notably, in addition to advancing deterrence, civil penalties can also further the goal of obtaining adequate equitable relief. When the Commission has a clear basis to seek civil penalties against a firm, it is **well positioned to instead seek fulsome redress** as part of a negotiated settlement, or to seek a combination of the two. As noted earlier, a unique feature of civil penalty actions is that the Commission must refer complaints for civil penalties to the Attorney General to litigate the matter in the name of the United States. This has been successful. For example, in 2017, the Department of Justice litigated to a final judgment a civil penalty action against Dish Network. The judgment included $280 million in civil penalties.94 This arrangement also allows the Department of Justice to evaluate the Commission’s investigation for violations of other civil and criminal statutes. It can also bring to bear the expertise of the appropriate federal prosecutor, such as the United States Attorney of a federal district, whose office may have unique insights into local markets where the conduct may have occurred. The arrangement can help preserve FTC resources while also preserving its independence. If the Attorney General does not take action within 45 days of the civil penalty action referral, the Commission may file the complaint in its own name.95 In addition, the Attorney General will generally not settle any Commission referral without the agency’s assent.96 If the Commission resurrects the use of the Penalty Offense Authority, the agency should f**ormalize an agreement** between the Federal Trade Commission and the Attorney General that would h**elp to mature and operationalize the existing referral process**, which has the risk of being undermined by turf battles unrelated to the underlying goals of the enforcement action.

#### Previous court rulings have given great weight to commission interpretations of section 5 –

**FTC Commission 21 –** official website

July 9 2021, “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act,” Federal Trade Commission, https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is **not limited** to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17 The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20 The Supreme Court has **repeatedly affirmed this view** of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has **given “deference”22 and “great weight**”23 to the Commission’s determination that a practice is unfair and should be condemned. Although the Commission suffered a few notable defeats under Section 5 in the early 1980s, those decisions in no way support the 2015 Statement’s decision to tether Section 5 to the Sherman and Clayton Acts. For example, in Boise Cascade, the Ninth Circuit ruled that the evidence did not support the Commission’s factual finding that the defendants’ conduct had an adverse effect on prices.24 In Ethyl, the Second Circuit explicitly held that the FTC’s Section 5 authority is broader than the Sherman or Clayton Acts, but it required the Commission to show that the challenged conduct is “collusive, coercive, predatory, or exclusionary,” or has an “anticompetitive purpose,” or “cannot be supported by an independent legitimate reason.”25 In short, these decisions confirm that **Section 5 empowers the Commission** to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence.

### 2NC – AT: PCP

#### “antitrust laws” are only clayton and Sherman – they explicity exclude the FTC act and section 5

Whyte 07 – Judge, United States District Court, California Northern

Ronald M. Whyte, Hynix Semiconductor Inc. v. Rambus Inc., 2008 U.S. Dist. LEXIS 53220, United States District Court for the Northern District of California, San Jose Division, January 2008, LexisNexis

Section 5(a) accords prima facie weight to a final judgment brought "under the antitrust laws." The Clayton Act specifically defines the phrase "antitrust laws." See 15 U.S.C. § 12(a). The definition includes the Sherman Act and the Clayton Act, but it does not list the Federal Trade Commission Act (15 U.S.C. §§ 41, et seq). This exclusion accords with the final sentence of section 5(a), which distinguishes "the antitrust laws" from "section 45." 2

The Federal Trade Commission brought its proceeding against Rambus pursuant to Section 45, which is also known as Section 5 of the FTC Act. See In re Rambus, Administrative Complaint, Docket No. 9302, at 1, 31-33 (FTC June 18, 2002). 3 The FTC's final order found that "Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act." In re [\*12] Rambus, Opinion of the Commission, Docket No. 9302, at 3 (FTC August 2, 2006). HN4 Section 5 of the FTC Act incorporates various standards from the antitrust laws and also forbids practices the FTC deems against public policy for other reasons. FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). Although the FTC found that Rambus violated the Sherman Act, the FTC's order was in a proceeding under Section 5 of the FTC Act.

#### Consensus of courts agree

Raphael 16 – Litigation partner in the San Francisco office of Munger, Tolles & Olson

Justin P. Raphael, Motion to Dismiss and Memorandum in Support filed by Defendant, Thompson, et al. v. 1-800 Contracts, Inc., et al., US District Court for the District of Utah, November 2016, LexisNexis

The FTC administrative action was not brought “to prevent, restrain, or punish violations of any of the antitrust laws.” Rather, it was brought under Section 5 of the FTC Act, 15 U.S.C. § 45. The term “antitrust laws” is defined in the Clayton Act to encompass a specific list of federal antitrust statutes, 15 U.S.C. § 12(a), which the Supreme Court has held is exclusive. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958) (“[T]he definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment that [a statute not listed therein] may be colloquially described as an ‘antitrust’ statute.”). That definition does not include Section 5 of the FTC Act, and multiple courts have acknowledged that the FTC Act is not an “antitrust law.” See Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1031 n.4 (9th Cir. 2001) (analyzing “prima facie” weight provision of Clayton Act, 15 U.S.C. § 16(a), and noting that “prima facie weight is given only to violations of the ‘antitrust laws’ as defined by the Clayton Act,” which “does not include violations of the FTC Act”); Yamaha Motor Co. v. FTC, 657 F.2d 971, 982 (8th Cir. 1981) (noting that Section 5 of the FTC Act is not “one of the ‘antitrust laws’ within the meaning of Sections [16(a) and 16(i)] of the Clayton Act”).

### 2NC – AT: delay

#### The Court largely defers to the FTC to interpret section 5 – Chevron deference, vagueness of the statute and empirics prove

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

The FTC has broad power to define the meaning of Section 5. Modern administrative law gives executive and independent agencies considerable freedom to define the meaning of statutes phrased in general terms. A body of law, originating with the Supreme Court’s landmark 1984 decision Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 28 has granted elastic quasi-legislative power to the administrative state. The Court held in Chevron that agencies have power to interpret ambiguously worded statutes so long as the interpretation is reasonable.29 Section 5 of the FTC Act, with its language on “unfair methods of competition,” is the type of generally worded statute that an agency is empowered to interpret.30

In addition to interpretive authority under Chevron, when Congress enacted the FTC Act in 1914, it expressly granted the Commission the power to define the meaning of “unfair methods of competition.” Congress was reacting to the Supreme Court decision in Standard Oil Co. v. United States in which the Court held that it had the ultimate power to interpret the Sherman Act.31 In delegating the power to define “unfair methods of competition” to the FTC, Congress sought to reassert control over the development of antitrust policy and prevent the courts from subverting legislative desires.

A. Modern Administrative Law Gives the FTC Broad Discretion to Interpret Section 5

Modern administrative law has transferred significant lawmaking power from the courts to the numerous executive and independent agencies in the federal government. Questions of statutory interpretation that were once the jealous prerogative of the courts are now often resolved by, for example, the Department of Labor, the Environmental Protection Agency, or the Federal Communications Commission. While agency statutory interpretations are still subject to judicial review, interpretations of statutes phrased in general terms are examined under a deferential legal standard.

The Supreme Court’s Chevron decision revolutionized administrative law and policymaking in the United States. In reviewing a challenge to an interpretation of the Clean Air Act by the Environmental Protection Agency, the Court established a deferential standard of review for agency interpretations of statutes. The Court held that an agency’s interpretation of a statute would be accorded deference if the statute is ambiguously worded and the agency’s interpretation is reasonable.32 In practice, Chevron deference has meant that an agency’s interpretation is permissible unless the statute’s language expressly forecloses this particular interpretation.33 Chevron deference represents a transfer of power from the courts to the executive branch. Statutes that were traditionally interpreted by the federal courts are now often given meaning by federal agencies.34

The Court in Chevron justified this transfer of lawmaking and policymaking functions to agencies on multiple grounds. First, open-ended statutory language presumably reflects a desire on the part of Congress for agencies to interpret the statute.35 Second, the Court stated that agencies are better equipped than the courts, both in terms of expertise and resources, to decide the technical questions often implicated in statutory interpretation.36 Third, the Court stated that agency heads, while they are not selected by popular vote, do answer to the democratically elected president.37 As such, agencies face more public accountability than federal judges with life tenure.

## Democracy adv

### 2NC – legitimacy turn

#### Liberal decisions – legitimacy crisis results from the outsize influence of conservative politics – liberals don’t think the court represents their interests

Ziegler 20 – Professor at the Florida State University College of Law.

Mary Ziegler, “A Dangerous Moment for the Court,” *The Atlantic*, 21 September 2020, https://www.theatlantic.com/ideas/archive/2020/09/dangerous-court-legitimacy/616418/.

Regardless of what McConnell does, the Court now looks far more conservative than the electorate. That too doesn’t bode well for the Court’s legitimacy, especially when the justices could once again decide the result of a presidential election. The Court may have to wade into one of the hundreds of voting-rights lawsuits triggered by the COVID-19 pandemic. Many have followed fights about whether the president has deliberately crippled the U.S. Postal Service to make it harder to vote. Republicans have claimed (without evidence) that mail-in voting will lead to massive fraud and have sued to stop it.

These battles probably won’t stop on Election Day. As he trails in the polls, President Trump has already cast doubt on the legitimacy of the election. It would not surprise anyone if he asked the Supreme Court to intervene after the votes are in. In 2000, the Court’s reputation took a hit after the justices handed a win to George W. Bush in Bush v. Gore. The damage to the Court and the nation would likely be much worse this time around.

This damage could be compounded by the fact that, regardless of who wins this year’s election, many expect Joe Biden to easily carry the popular vote. If he does, that will mean Democrats have won a popular majority in seven of the last eight presidential elections. And yet no Democrat has chosen a chief justice since 1953. Democrats have not nominated a Supreme Court majority since 1969. The Court is much more conservative than the electorate, and voters know it. The number of voters who think the Court is too conservative hit a new high just last year. Historically, the Supreme Court has rarely broken too radically with public opinion without some kind of backlash. Yet today, the Court reflects the will of a smaller and shrinking slice of the electorate.

#### Decimating antitrust is central to the right’s capture of the courts

Klarman 20 – Kirkland & Ellis Professor at Harvard Law School since 2008.

Michael Klarman, interviewed by Liz Mineo, “Do justices really set aside personal beliefs? Nope, legal scholar says,” *The Harvard Gazette*, 15 October 2020, https://news.harvard.edu/gazette/story/2020/10/legal-scholar-warns-of-potential-supreme-court-changes/.

KLARMAN: First of all, when we think about the Supreme Court, we tend to think about big constitutional cases like Roe v. Wade or Obergefell, but there are lower-profile cases that are worth literally billions of dollars, which explains why Senate Majority Leader McConnell has made packing federal courts with conservatives his life’s mission and why right-wing billionaires like Charles and David Koch have been willing to invest hundreds of millions of dollars in every electoral cycle over the last decade to elect Republicans and appoint Republican justices. This conservative Supreme Court has decimated class-action litigation, which costs corporations that have misbehaved billions of dollars; it has cut back on antitrust enforcement and has severely limited punitive damages awards. The Trump administration has gutted environmental regulation, which is a large part of the reason why the Koch brothers and others have invested so much money in electing Republican politicians. This is a Chamber of Commerce Court above all things. On social and cultural issues, the liberals still sometimes win, but on the Chamber of Commerce issues, which are the issues that matter to McConnell and right-wing billionaires, this court has been more solidly in their camp than any other court in history.

### --at no I/L

#### Low court legitimacy prevents the Court from overturning Roe v. Wade now – it’ll only overturn major precedents if it gets a greenlight to move the court in a controversial direction

Stohr 20 – Supreme Court reporter for Bloomberg News. JD from Harvard.

Greg Stohr, “Roberts faces moment of truth on abortion issue at Supreme Court,” *Bloomberg News*, 28 February 2020, https://www.bloomberg.com/news/articles/2020-02-28/roberts-faces-moment-of-truth-on-abortion-issue-at-supreme-court.

For U.S. Chief Justice John Roberts, the moment of truth on abortion is coming.

The Supreme Court on Wednesday will hear its first abortion case since Roberts became the pivotal vote on the issue. Four years after invalidating a Texas law requiring clinic doctors to have hospital admitting privileges, the court will consider whether to switch directions and uphold a similar law in Louisiana.

The argument will test Roberts’s appetite for rolling back abortion-rights precedents and could foreshadow a fight over the landmark 1973 Roe v. Wade ruling. The justices will rule by the end of June, potentially making abortion and the court itself central issues in the November election. President Donald Trump’s administration is supporting the Louisiana law.

Opponents say the law would leave the state with only one clinic, in New Orleans, and just one abortion doctor to serve the 10,000 women who seek to end a pregnancy every year in the state.

“Roe becomes meaningless if there is no access to abortion,” said Kathaleen Pittman, director of the Hope Medical Group for Women, a Shreveport clinic that says it would have to close if the measure took effect. “These women that we work with now do not have the means to travel, to fly out of state, to go to other places for their care.”

Conservative states have been moving to sharply restrict abortion rights in recent years. States enacted 58 new abortion restrictions alone, including a total ban by Alabama, according to the Guttmacher Institute, a research organization that backs reproductive rights. Many of those laws are on hold.

Supporters of the Louisiana measure, which carries criminal penalties, say the state is trying to protect women from unscrupulous and incompetent abortion providers. Among other arguments, they are urging the court to say that Hope and two unidentified doctors lack the legal right to challenge the law on behalf of their patients.

“We need to be listening to women, not to abortion businesses,” said Catherine Glenn Foster, president of Americans United for Life.

Roberts — now back at the court full-time after presiding over Trump’s impeachment trial — dissented from the 2016 ruling that struck down the Texas rules and gave abortion-rights supporters reason to think the issue was resolved. The 5-3 decision said the state’s law “provides few, if any, health benefits for women” and “poses a substantial obstacle to women seeking abortions.”

That was before the court’s composition changed with the addition of Trump appointees Neil Gorsuch and Brett Kavanaugh. The latter succeeded Justice Anthony Kennedy, who had been the court’s swing vote on abortion and voted with the majority to throw out the Texas law.

Those changes have left Roberts, a 2005 appointee of Republican President George W. Bush, squarely in the middle. Last year he joined the four Democratic-appointed justices to put the Louisiana law on hold while the court considered whether to intervene. Kavanaugh and Gorsuch both voted to let the law take effect, hinting they were at least open to upholding it.

Roberts’ vote might suggest he has questions about the federal appeals court ruling that upheld the Louisiana law. The 2-1 decision said the impact wasn’t as great as in Texas, and the majority blamed Louisiana doctors for not making good-faith efforts to get the required privileges.

But Roberts gave no explanation for his vote, and he may view the Louisiana law differently now that the court is directly considering it.

If he votes to throw out the Louisiana law, “it will be an indication that he wants to move slowly on abortion and does not want to expose the court to a lot of criticism, at least at this point,” said David Strauss, a constitutional law professor at the University of Chicago Law School who signed a brief urging the court to strike down the law.

If Roberts votes to uphold the Louisiana statute, “that will suggest that he’s willing to be more aggressive, although a lot will depend on how the opinion is written,” Strauss said.

Roberts steered the court toward restricting abortion rights in a 2007 ruling he could use as a template. That decision, issued during Roberts’ second term as chief justice, upheld a federal ban on a rarely used late-term abortion procedure that opponents called “partial-birth abortion.”

The decision, written by Kennedy, didn’t overturn a 2000 ruling that struck down a similar Nebraska ban. Instead, Kennedy said the federal statute was clearer in describing what procedures were outlawed and how doctors could ensure they wouldn’t be prosecuted.

Roberts is far more reluctant to overturn precedents than his conservative colleagues. He said in his 2005 Senate confirmation hearing that overruling a precedent is a “jolt to the legal system.”

In that testimony, he called the 1992 Planned Parenthood v. Casey abortion-rights ruling a “precedent of the court entitled to respect under principles of stare decisis,” the policy that the court generally won’t disturb its settled rulings.

In the hospital-privileges case, abortion-rights advocates say the Texas and Louisiana rules are identical. Louisiana says there are enough differences that the court need not rule the same on both, but the state says the court should overturn the Texas ruling if necessary.

### --k2 overpop

#### Solves overpopulation

Crane 06

PhD in Political Science, VP of IPAS, Served as a senior policy advisor with the U.S. government, advised the U.S. delegation to the International Conference on Population and Development, Access to Safe Abortion, <http://www.unmillenniumproject.org/documents/Crane_and_Hord-Smith-final.pdf>

Finally, in countries where fertility was historically at high levels, access to abortion has been demonstrated by demographers to be a significant contributor to declining fertility and slower population growth (Bongaarts, 1997). These demographic changes in turn have been shown to facilitate economic growth, poverty reduction, and sustainable development. In the context of national policies to stabilize population, promoting use of effective means of contraception – as a substitute for abortion – is generally regarded as a desired policy goal. At the same time, while supporting contraception, governments should also ensure access to legal, voluntary and safe abortion.

## Inequality adv

### 2NC – AT: inequality – T/L

#### Their evidence does not demonstrate that enforcement causes a reduction in inequality – the entire advantage is at best speculative

Wright et al., J.D., PhD, University Professor and Executive Director, Global Antitrust Institute at Scalia Law School, former FTC Commissioner, ‘18

(Joshua, Elyse Dorsey, Attorney Advisor to Commissioner Noah Phillips, United States Federal Trade Commission, Jonathan Klick, Professor of Law, University of Pennsylvania, and Jan M. Rybniek, : Senior Associate, Freshfields, Bruckahus Deringer LLP, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” August 10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524>)

As discussed, Furman & Orszag take a more empirical approach, arguing that “a rising share of firms are earning super-normal returns on capital…workers at those firms are both producing and sharing in those super-normal returns, driving up wage inequality…the high returns to labor and capital at those firms reduces labor mobility by discouraging workers from leaving firms that earn higher rents.”134 In support, Furman & Orszag provide evidence that returns of S&P 500 firms have become more skewed over time. Furman & Orszag also outline that the return on invested capital has also become highly skewed at least since the 1990s. While such evidence suggests some implications, there is no implication of antitrust concerns because these results could be indicative of firms engaging in greater risk-taking or the presence of superior products.135 Furman & Orszag use metrics that bear little resemblance to actual antitrust markets, and do not provide any evidence that increases in antitrust enforcement would actually reduce these metrics, much less have any discernable effect on levels of economic inequality.

Marc Jarsulic et al. also point out that income inequality is rising. They argue that firms with “dominant market power” raise prices and earn supra-normal economic rents while simultaneously lower the real incomes of consumers.136 Jarsulic et al. argue that rent extraction in the U.S. economy is on the rise because of “unchallenged market power.”137 Jarsulic et al. outline other undesirable results, including higher barriers to entry for new firms, stifled innovation, degraded product quality, reduced prices paid to workers and suppliers, and increased influence with government officials.138 To reverse these effects, the authors argue that the antitrust laws can be employed, but have not been deployed vigorously enough over the last few decades.

Sean F. Ennis, Pedro Gonzaga, and Chris Pike take a calibration approach to examine the effect of increasing concentration on inequality.139 Their calibration model makes the following assumptions: 1) “Market power for each country can be approximated by the difference between the average mark-up (across all sectors) in the country and a minimum mark-up that reflects the best-practices of most competitive economies”; (2) “The marginal propensity to save from increased income arising from lower prices is constant across wealth groups.”140 The authors assert that “this assumption simplifies the solution to the model, but does not prevent the average saving rate from varying across wealth groups”; (3) “Market power gains are distributed in proportion to the current net wealth distribution.” According to Ennis et al., “this reflects the observations that corporate income and capital gains are distributed via business ownership, so that those with the largest wealth shares…will, in proportion, receive the largest share of the profits”; and (4) “The price of different baskets of goods will be inflated by market power in an equal percentage.”141 According to the authors, “this implies that product for the poor and products for the wealthy will be equally affected by market power. To the extent that the poor are more exposed to monopolization, the model provides conservative, lower-bound estimates.”142

Based on their study, Ennis et al., conclude that market power may contribute significantly to economic inequality; “violations of competition law, government-created barriers to entry or natural monopolies may be significant sources of market power”; the authors “do not suggest that competition law and policy should specifically target inequality” instead they “suggest that reduced inequality is a beneficial by-product of government actions and policies to reduce illegitimate market power.”143

Although these commentators uniformly suggest that increased antitrust enforcement could have beneficial effects on inequality, none directly examine this proposition using empirical data. The underlying economic logic of the claims that lax antitrust has resulted in increased inequality is fairly simple. In the absence of antitrust enforcement, firms gain market power, reduce output, raise prices, and generate monopoly profits, which enrich shareholders. Because shareholders tend to live in the top end of the wealth and income distributions, inequality increases. Further, because of rising prices, those in the lower end of the distributions (where a greater fraction of income and wealth are devoted to consumption) are made relatively worse off, increasing welfare inequality as well.

The question is whether this simple account of the problem is correct. There is little systematic empirical evidence of a link between antitrust enforcement and inequality. Below are some preliminary empirical analyses of the effect of antitrust enforcement on measures of inequality. Regardless of whether we examine income, wealth, or (in our view, the more relevant) consumption distribution, there is no evidence that metrics of enforcement are related to inequality. While these results do not guarantee that increased antitrust enforcement could not affect inequality, they do suggest that proposals for increased enforcement to address inequality concerns are premature and potentially misguided.

#### The most DIRECT empirical evidence demonstrates no relationship

Wright et al., J.D., PhD, University Professor and Executive Director, Global Antitrust Institute at Scalia Law School, former FTC Commissioner, ‘18

(Joshua, Elyse Dorsey, Attorney Advisor to Commissioner Noah Phillips, United States Federal Trade Commission, Jonathan Klick, Professor of Law, University of Pennsylvania, and Jan M. Rybniek, : Senior Associate, Freshfields, Bruckahus Deringer LLP, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” August 10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524>)

In Table 1 below, we focus on merger investigations, given the focus on increasing market concentration in the papers calling for increased antitrust enforcement. Again, the enforcement data determine our sample period which covers 1984-2016. Our outcome variable is the ratio of average consumption expenditures among those in the 5th income quintile to the consumption expenditures of those in the 1st income quintile.155 This ratio appears to be AR(1) so we allow for a one period autoregressive term in each of the regressions.156 Presumably past enforcement is as important or more important than current enforcement, so we provide distributed lag specifications.157

Although the merger investigations are uniformly negative, in no case are they statistically significant (individually or jointly).

In Table 2, we control separately for a linear trend to account for non-enforcement factors involved in pushing inequality up over the period.

We repeat these exercises using total investigations to allow for a more general measure of enforcement.

Distinct from the merger investigation results, which were uniformly negative though insignificant, in the specifications using total investigations the sign of the effect of investigations on the ratio of quintile 5 consumption to quintile 1 consumption switches from lag to lag.

To unpack these results, Table 5 presents the effect of investigations on real average consumption expenditures for the 1st and 5th quintile households by income. For brevity, we only present the specifications with 2 lags and the time trend estimates from an AR(1) distributed lag model examining the effects of DOJ investigations, both merger specific and total, on the income shares received by those individuals in the first quintile and the fifth quintile, while also controlling for a background linear trend.

As with consumption measures, there is generally no statistically significant effect (individually or jointly) of current or past investigations (regardless of whether we focus on merger-specific or total investigations) on the income shares of those at the bottom or the top of the income distribution. Putting aside statistical significance, while past investigations are associated with increases in the income share received by those at the bottom of the distribution, current investigations have the opposite effect. Further, many of the investigation coefficients are positive for the fifth quintile income share as well. If we examine combined ratios of the shares as we did with the consumption data, we still find no support for the assumption that an increase in antitrust enforcement has any systematic effect on inequality.161

Lastly, in Table 7, we examine similar relationships using wealth data in case the relevant effect of antitrust enforcement on inequality operates on a stock measure of welfare rather than on flows like consumption or income. Using data collected by Emmanuel Saez and Gabriel Zucman who examined wealth inequality since the beginning of the 20th Century,162 we again examine the period beginning in 1984 due to the limitations in our enforcement data, but we are required to stop the sample in 2012 since that is the final year of data provided by Saez and Zucman.163

Again, in addition to finding no statistically significant effects (individually or jointly) from any of the enforcement variables (i.e., current year or lagged enforcement; merger-specific or total), even the signs are inconsistent with a simple story that more enforcement leads to more equality.

Further, to the extent there is a subset of antitrust enforcement likely to unequivocally raise income for households in the lower quintiles of the income distribution, it is enforcement aimed at public restraints and government-imposed barriers to entry at the state and local level. For example, antitrust enforcement efforts and competition advocacy have been influential in targeting anticompetitive occupational licensure schemes. For example, the FTC has recently focused upon occupational licensing reform in an effort to inform and assist state legislators when making decisions on licensing requirements to avoid unnecessary restrictions on competition.164 Thus, regulations promulgated at the state-level that are often anticompetitive may be contributing to increasing economic inequality, not lax antitrust enforcement.165

### 2NC – Worker Rights Good Now

#### Aff ev is old – new gains in worker rights prove that the relationship between employer and employee is shifting

Irwin 21 – Neil Irwin is a senior economics correspondent for The New York Times, where he writes for The Upshot, a Times site for analysis of politics, economics and more.

Neil Irwin, July 20 2021, “Workers Are Gaining Leverage Over Employers Right Before Our Eyes,” The New York Times, https://www.nytimes.com/2021/06/05/upshot/jobs-rising-wages.html

The relationship between American businesses and their employees is undergoing a profound shift: For the first time in a generation, workers are gaining the upper hand.

The change is broader than the pandemic-related signing bonuses at fast-food places. Up and down the wage scale, companies are becoming more willing to pay a little more, to train workers, to take chances on people without traditional qualifications, and to show greater flexibility in where and how people work.

The erosion of employer power began during the low-unemployment years leading up to the pandemic and, given demographic trends, could persist for years.

March had a record number of open positions, according to federal data that goes back to 2000, and workers were voluntarily leaving their jobs at a rate that matches a historical high. Burning Glass Technologies, a firm that analyzes millions of job listings a day, found that the share of postings that say “no experience necessary” is up two-thirds over 2019 levels, while the share of those promising a starting bonus has doubled.

People are demanding more money to take a new job. The “reservation wage,” as economists call the minimum compensation workers would require, was 19 percent higher for those without a college degree in March than in November 2019, a jump of nearly $10,000 a year, according to a [survey](https://www.newyorkfed.org/microeconomics/sce/labor#/expectations-job-search18) by the Federal Reserve Bank of New York.

Employers are feeling it: A [survey](https://conference-board.org/pdfdownload.cfm?masterProductID=27396) of human resources executives from large companies conducted in April by the Conference Board, a research group, found that 49 percent of organizations with a mostly blue-collar work force found it hard to [retain workers](https://www.nytimes.com/2021/07/20/business/economy/workers-wages-mobility.html), up from 30 percent before the pandemic.

“Companies are going to have to work harder to attract and retain talent,” said Karen Fichuk, who as chief executive of the giant staffing company Randstad North America closely tracks supply and demand for labor. “We think it’s a bit of a historic moment for the American labor force.”

This recalibration between worker and employer partly reflects a strange moment: The economy is reopening, but many would-be workers are not ready to return to the job.

Yet in key respects, the shift builds on changes already underway in the tight labor market preceding the pandemic, when the unemployment rate was 4 percent or lower for two straight years.

That follows decades in which union power declined, unemployment was frequently high and employers made an art out of shifting work toward contract and gig arrangements that favored their interests over those of their employees. It would take years of change to undo those cumulative effects.

But the demographic picture is not becoming any more favorable for employers eager to fill positions. Population growth for Americans between ages 20 and 64 turned negative last year for the first time in the nation’s history. The Congressional Budget Office projects that the potential labor force will grow a mere 0.3 percent to 0.4 percent annually for the remainder of the 2020s; the size of the work force rose an average of 0.8 percent a year from 2000 to 2020.

An important question for the overall economy is whether employers will be able to create conditions attractive enough to coax back in some of the millions of working-age adults not currently part of the labor force. Depending on your view of the causes, the end of expanded pandemic-era jobless benefits might also have an effect. Some businesses may need to raise prices or retool how they operate; others may be forced to close entirely.

Higher wages are part of the story. The jobs report issued on Friday showed that average hourly earnings for nonmanagerial workers were 1.3 percent higher in May than two months earlier. Other than in a brief period of statistical distortions early in the pandemic, that is the strongest two-month gain since 1983.

But wages alone aren’t enough, and firms seem to be finding it in their own best interest to seek out workers across all strata of society, to the benefit of people who have missed out on opportunity in the last few decades.

“I’ve been doing this a long time and have never felt more excited and more optimistic about the level of creative investment on this issue,” said Bertina Ceccarelli, chief executive of NPower, a nonprofit aimed at helping military veterans and disadvantaged young adults start tech industry careers. “It’s an explosive moment right now.”

In effect, an entire generation of managers that came of age in an era of abundant workers is being forced to learn how to operate amid labor scarcity. That means different things for different companies and workers — and often involves strategies more elaborate than simply paying a signing bonus or a higher hourly wage.

At the high end of the labor market, that can mean workers are [more emboldened](https://www.bloomberg.com/news/articles/2021-06-01/return-to-office-employees-are-quitting-instead-of-giving-up-work-from-home) to leave a job if employers are insufficiently flexible on issues like working from home.

It also means companies thinking more expansively about who is qualified for a job in the first place. That is evident, for example, in the way Alex Lorick, a former South Florida nightclub bouncer, was able to become a mainframe technician at I.B.M.

Mr. Lorick often worked a shift called “devil’s nine to five” — 9 p.m. to 5 a.m. — made all the more brutal when it was interspersed with day shifts. The hours were tough, but the pay was better than in his previous jobs, one at a retirement home and another serving food at a dog track. Yet it was a far cry from the type of work he had dreamed about in high school, when he liked computers and imagined making video games for a living.

As a young adult, he took online classes in web development and programming languages, but encountered a Catch-22 many job seekers know well: Nobody wanted to hire a tech worker without experience, which meant he couldn’t get enough experience to be hired. College wasn’t for him. Hence the devil’s nine to five.

Until late last year, that is. After months on unemployment during the pandemic, he heard from I.B.M., where he had once applied and been rejected for a tech job. It invited him to apply to an apprenticeship program that would pay him to be trained as a mainframe technician. Now 24, he completed his training this month and is beginning hands-on work in what he hopes is the start of a long career.

“This is a way more stable paycheck, and more consistent hours,” Mr. Lorick said. “But the most important thing is that I feel like I’m on a path that makes sense and where I have the opportunity to grow.”

Before Adquena Faine began an I.B.M. apprenticeship to become a cloud storage engineer, she was driving for ride-hailing services to support herself and her daughter, dealing with the erratic income and sore back that came with it.

“I really hate driving now,” she said. “I could feel the car vibrating even when I wasn’t in the car.”

She had attended but not completed college, and served in the Air Force, but the information technology industry was new to her.

“They were confident they could teach me what I needed to know,” she said. “It was intense, but I didn’t want to let myself down or my baby girl down.”

The hiring of Ms. Faine and Mr. Lorick was part of a deliberate effort by I.B.M. to rethink how it hires and what counts as a qualification for a given job.

The apprenticeship program began in 2017, and thousands of people have moved through it and similar programs. Executives concluded that the qualifications for many jobs were unnecessarily demanding. Postings might require applicants to have a bachelor’s degree, for example, in jobs that a six-month training course would adequately prepare a person for.

“By creating your own dumb barriers, you’re actually making your job in the search for talent harder,” said Obed Louissaint, I.B.M.’s senior vice president for transformation and culture. In working with managers across the company on training initiatives like the one under which Mr. Lorick was hired, “it’s about making managers more accountable for mentoring, developing and building talent versus buying talent.”

“I think something fundamental is changing, and it’s been happening for a while, but now it’s accelerating,” Mr. Louissaint said.

Efforts like the one at I.B.M. are, to some degree, a rediscovery in the value of investing in workers.

“I do think companies need to relearn some things,” said Byron Auguste, chief executive of Opportunity at Work, an organization devoted to encouraging job opportunities for people from all backgrounds. “A lot of companies, after the recessions in 2001 and 2008, dismantled their onboarding and training infrastructure and said that’s a cost we can’t afford.

“But it turns out, you actually do need to develop your own workers and can’t just depend on hiring.”

Any job involves much more than a paycheck. Some good jobs don’t pay much, and some bad jobs pay a lot. Ultimately, every position is a bundle of things: a salary, yes, but also a benefits package; a work environment that may or may not be pleasant; opportunities to advance (or not); flexible hours (or not).

Statistics agencies collect pretty good data on the aspects of jobs that are quantifiable, especially salary and benefits, and not such great data on other dimensions of what makes a job good or bad. But it is clear, as the labor market tightens, that people routinely favor those less quantifiable advantages.

That has become vividly apparent in the restaurant industry, which is facing extreme labor shortages.

“Traditionally in restaurants, it was: ‘Hey, this is the job. If you want these hours, great; if not, we’ll find somebody else,’” said Christopher Floyd, owner of the hospitality industry recruitment firm Capital Restaurant Resources in Washington. “Now employers have to say, ‘You have the qualities we’re looking for; maybe we can work out a more flexible schedule that works for you.’ Employers are becoming much more cognizant that yes, it’s about money, but also about quality of life.”

Whether it’s a bigger paycheck, more manageable hours or a training opportunity offered to a person with few formal credentials, the benefits of a tight labor market and shifting leverage can take many forms.

What they have in common — no matter how long this shift toward workers lasts, or how powerful a force it turns out to be — is that it puts the employee in the position that matters most: the driver’s seat.

#### Tightness in labor markets has increased worker representation – Solves

Finley and Krisher 21 – Correspondents at the Associated Press.

Ben Finley and Tom Krisher, September 6 2021, “Labor shortage leaves union workers feeling more emboldened,” Associated Press, https://apnews.com/article/business-health-coronavirus-pandemic-4895e84ab6ed4bb61e9cb8d6c0bcfad5

NORFOLK, Va. (AP) — When negotiations failed to produce a new contract at a Volvo plant in Virginia this spring, its 2,900 workers went on strike.

The company soon dangled what looked like a tempting offer — at least to the United Auto Workers local leaders who recommended it to their members: Pay raises. Signing bonuses. Lower-priced health care.

Yet the workers overwhelmingly rejected the proposal. And then a second one, too. Finally, they approved a third offer that provided even higher raises, plus lump-sum bonuses.

For the union, it was a breakthrough that wouldn’t likely have happened as recently as last year. That was before the pandemic spawned a worker shortage that’s left some of America’s long-beleaguered union members feeling more confident this Labor Day than they have in years.

With Help Wanted signs at factories and businesses spreading across the nation, in manufacturing and in service industries, union workers like those at the Volvo site are seizing the opportunity to try to recover some of the bargaining power — and financial security — they feel they lost in recent decades as unions shrank in size and influence.

“We were extremely emboldened by the labor shortage,” said Travis Wells, a forklift driver at the Volvo plant in Dublin, Virginia, near Roanoke. “The cost of recruiting and training a new workforce would’ve cost Volvo 10 times what a good contract would have.”

In addition to 12% pay raises over the six-year contract, the Volvo deal provided other sweeteners: Many of the union workers will be phased out of an unpopular two-tier pay scale that had left less-senior workers with much lower wages than longer-tenured employees. All current workers will now earn the top hourly wage of $30.92 after six years. And by holding out as long as they did, the workers achieved a six-year price freeze on health care premiums.

Volvo conceded that it’s had difficulty finding workers for the Virginia plant but says it offers a strong pay and benefits package “that also safeguards our competitiveness in the market.”

The improvements achieved by the Volvo workers in Virginia provided a case study of how union workers may be gaining leverage as companies scramble to find enough workers to meet customer demand in an economy that’s been steadily recovering from the pandemic recession.

The growing demand for labor has also benefited [lower-paid workers](https://apnews.com/article/health-coronavirus-pandemic-business-5eb1432c117e217fea65bfaa138002e9) at restaurants, bars and retailers. But the financial gains for union workers mean that a category of jobs that have long been seen as supportive of a middle-class lifestyle may now be moving closer to that realty.

Chris Tilly, a labor economist at UCLA, said the shortages among burger-flippers and cashiers is notable “because those low-end jobs more typically have a labor surplus.”

“But there are also shortages,” Tilly noted, “at higher skill levels — including jobs where there are chronic shortages like nurses, machinists and teachers.”

In Ventura County, California, 37 transit workers voted in July to join the Teamsters. They plan to negotiate with management to seek higher pay and eliminate split work shifts. Ruby McCormick, a bus driver who voted to join, said the booming job market was a big factor in her decision.

“Several years ago, before I came on to the company, there was an attempt to have the union, but it was voted down,” she noted. “This time, we actually passed by a landslide.”

For years, companies in most unionized industries have commanded an upper hand. During the slow, grinding economic recovery that followed the 2008-2009 Great Recession, they negotiated concessions and held down pay raises. Rising health care costs further diluted wages.

By contrast, this recovery has produced an unexpected labor shortage and given many workers more bargaining power than they’ve had since the 1980s, when the Reagan administration set a tone of hostility toward unions, and manufacturers began moving many jobs overseas, said Susan J. Schurman, who teaches labor studies at Rutgers University.

Schurman noted that the current worker shortage has compelled many employers to raise pay.

“Typically, when they have to do that to hire somebody, they kind of have to do it to keep the people they have,” she said. “So you get kind of an across-the-board wage effect.”

Unions may also be benefiting from frustration among working class Americans over wages that, adjusted for inflation, have been stagnant for decades. That discontent helped drive President Donald Trump’s 2016 election victory, particularly in states in which auto and steel industries once thrived — as well as the outsize support for Sen. Bernie Sanders, who ran for president as a Democrat.

“They simply have not benefited from the economy over the last three decades,” Schurman said of many American workers. “That anger is going to go somewhere. And if I were a union organizer right now, I’d be really excited.”

During the contract talks with Volvo Trucks, workers felt more confident about demanding a better contract because other jobs were open, noted Mitchell Smith, regional director for the UAW in the South.

President Joe Biden, who has frequently vowed to help create “good-paying union jobs,” has also appointed a more worker-friendly National Labor Relations Board to settle disputes with employers.

An expanded footprint could help unions organize in places where they haven’t been welcome before. Citing growing interest in membership, the 1.4 million-member Teamsters union says its organizing unit is eyeing Amazon’s vast warehouse and distribution operations. Much is at stake for the Teamsters. Amazon is expanding its own distribution network, striking at the union’s heart — transportation and package workers — and relying less on United Parcel Service, the largest employer of Teamsters’ members.

Martin Rosas, a union leader for the United Food and Commercial Workers in Kansas and parts of Missouri and Oklahoma, said that meat packing workers seized the opportunity created by the labor shortage and the dangers of COVID to negotiate pay increases for some skilled positions.

Still, to gain major victories on a widespread scale, unions will need much more time. Last year, there were only eight strikes involving 1,000 or more workers, said Joseph A. McCartin, a Georgetown University history professor who studies labor unions. From 1960 to 1980, a period when organized labor commanded far more influence, the average annual total, McCartin said, was 282.

The Labor Department reported in January that the percentage of workers who were union members rose 0.5 percentage point last year to 10.8%. And that was due mainly to fewer union workers losing jobs during the pandemic than nonunion workers. Union membership has fallen from 20% of the work force in 1983, the last year for which comparable data is available.

Lagging wages have been a sore point for unions for years. Worker productivity has grown faster than average pay for four decades, McCartin noted, with the benefits going disproportionately to executives and corporations, not rank-and-file employees.

“The very emergence of organizing efforts,” he said of unions, “is likely to prod employers to try to get ahead of the curve by offering incentives intended to take the wind out of organizing efforts.”

That said, some experts say it’s far from clear that any leverage that workers may now be gaining will endure. As the economy began to emerge from the pandemic, businesses were opening faster than people were returning to work. But Tilly, the UCLA professor, suggested that the job market is likely to slow in the coming months — and once it does, workers may lose some bargaining power.

“As long as the economy is growing — and growing at a relatively vigorous pace — that’s going to continue helping workers, and for that matter dealing unions a better hand, too,” Tilly said. “But we are not necessarily in a new era that’s going to look exactly like it has for the last few months.”

#### Also means wages are massively increasing

Rosenberg 21 – Eli Rosenberg covers work and labor for The Washington Post. He joined The Post in 2017 after a decade in New York, where he worked at the New York Times, the Daily News, and the Brooklyn Paper. He has covered misinformation campaigns, politics in the Trump era, immigration issues, and disasters across the country.

Eli Rosenberg, June 10 2021, “These businesses found a way around the worker shortage: Raising wages to $15 an hour or more,” The Washington Post, https://www.washingtonpost.com/business/2021/06/10/worker-shortage-raising-wages/

The owners of Klavon’s Ice Cream Parlor had hit a wall.

For months, the 98-year-old confectionary in Pittsburgh couldn’t find applicants for the open positions it needed to fill ahead of warmer weather and, hopefully, sunnier times for the business after a rough year.

The job posting for scoopers — $7.25 an hour plus tips — did not produce a single application between January and March.

So owner Jacob Hanchar decided to more than double the starting wage to $15 an hour, plus tips, “just to see what would happen.”

The shop was suddenly flooded with applications. More than 1,000 piled in over the course of a week.

“It was like a dam broke,” Hanchar said. [Media coverage](https://twitter.com/NateDoughty/status/1389625945372430341) that [followed his decision](https://www.msnbc.com/stephanie-ruhle/watch/ice-cream-parlor-raises-minimum-wage-to-15-hr-flooded-with-job-applications-112471621755) soon pushed other candidates his way.

With stimulus payments and additional unemployment, some workers are reassessing when and how they’ll get back to work as the economy emerges from crisis. (Mahlia Posey/The Washington Post)

Across the country, businesses in sectors such as food service and manufacturing that are trying to staff up have been reporting an obstacle to their success — a scarcity of workers interested in applying for low-wage positions.

The issue has raised concerns about the strength of the country’s recovery as [coronavirus](https://www.washingtonpost.com/coronavirus/?itid=lk_inline_manual_13) cases abate, with the economy still down [more than 7.5 million jobs compared with before the pandemic](https://www.washingtonpost.com/business/2021/06/04/jobs-report-may-unemployment-shortage/?itid=lk_inline_manual_13).

Republicans have [blamed enhanced unemployment benefits](https://www.washingtonpost.com/us-policy/2021/05/13/unemployment-benefits-worker-shortage/?itid=lk_inline_manual_14) for the shortage; Democrats and most labor economists say the issue is the result of a complicated mix of factors, including many schools having yet to fully reopen, lingering concerns about workplace safety and other ways the workforce has [shifted during the pandemic](https://www.washingtonpost.com/business/2021/05/24/restaurant-workers-shortage-pay/?itid=lk_inline_manual_14).

The experience of 12 business operators interviewed by The Washington Post who raised their minimum wage in the last year points to another element of the equation: the central role that pay — specifically a $15-an-hour minimum starting wage — plays in attracting workers right now.

Nine of the businesses had announced pay increases to at least $15 an hour since March, amid concerns about hiring in the face of the tight labor market. The other three increased wages last year.

The business operators spoke about the challenges associated with increased labor costs, with three saying they had to raise prices for consumers. One of those, as well as two that did not raise prices, said they had to reduce some seasonal staffing or staff hours to make up the cost.

Enrique Lopezlira, a labor economist at the University of California at Berkeley and an expert on the low-wage workforce, said the stories were a sign, albeit anecdotal, that the market was functioning as it should in the face of excessive demand for workers.

“The more employers improve the quality of the jobs and the more they think of workers as an asset that needs to be maximized, the better they’re going to be able to find and retain workers long term,” he said.

A flex point

Patrick Whalen outside Tempest in Charleston. He is an owner of the 5th Street Group, a group of restaurants in Charleston and Charlotte. (Cameron Pollack for The Washington Post)

For Patrick Whalen, co-owner of [the 5th Street Group](https://the5thstreetgroup.com/), comprising five restaurants in Charleston and Charlotte, the breaking point came in late March. The restaurants were getting busier as more people started venturing out to eat. But applicants for the dozens of positions the company was trying to hire for were scarce. Understaffed and busy, the company was starting to get shredded with negative reviews online.

After one of his managers told him that a line cook needed to borrow money to get groceries, Whalen was moved to reconsider wages at the company.

“It was just one of those moments where you just kind of stop and you say, ‘Is there a real problem in our industry?’” he said. “We always kind of knew it was there, but we didn’t really know what to do with it.”

A credit card slip from Tempest, with a line specifically for a kitchen-staff tip. ( Cameron Pollack for The Washington Post)

The company raised the starting wage for all of its staff to $15 an hour, up from $12 to $13. And it created a “tip the kitchen” program, adding a second line to table checks for gratuity for the back-of-the-house staff, which the restaurant matches up to $500 per night. That move has increased wages for non-tipped employees such as line cooks and dishwashers to an average of $23.80 an hour, Whalen said.

Applicants began pouring in nearly overnight, Whalen said. A manager at one of his restaurants, Tempest, told him that 10 people walked in to drop off résumés over the course of one week after the policy change, compared with just 15 people over the four previous months.

Within three weeks, the restaurant group went from about 50 to 60 percent staffed to nearly fully staffed.

“There is no one in Charleston or Charlotte that can compete with what my guys are making,” Whalen said.

Aaron Dearing, a sous chef at Whalen’s 5Church Charlotte, said the tipping initiative had raised his pay by about $1,000 a month — the biggest raise he has received in 20 years in the industry.

“It puts everybody in a better position in their home life, so they come to work a lot happier,” he said.

John Puckett, one of the owners of Punch Pizza, a fast-casual restaurant group with about a dozen locations in the Twin Cities area, said the company experienced a similar boom when it made the decision in April to raise the minimum wage to $15 an hour from $11 as the company sought to fill 30 to 40 positions.

“We’ve seen an explosion of interest,” Puckett said. Job applications increased fivefold on its [website](https://punchpizza.com/jobs/) and were 10 to 15 times higher on the jobs portal Indeed, he said.

Lexington Co-Op, which operates two grocery stores in Buffalo, is another business that found success by raising wages, from $13 an hour to $15, after having trouble filling about 15 positions in February and March.

Applications had been scarce. New hires who had accepted job offers then [ghosted](https://www.washingtonpost.com/business/2018/12/12/workers-are-ghosting-their-employers-like-bad-dates/?itid=lk_inline_manual_44), failing to show for orientation or leaving the job after a few days. The company had begun leaning on high-schoolers to fill the positions.

“We’ve definitely been seeing a lot more candidates show up in their application pool and in orientation every week,” general manager Tim Bartlett said.

[‘The final straw’: How the pandemic pushed restaurant workers over the edge](https://www.washingtonpost.com/business/2021/05/24/restaurant-workers-shortage-pay/?itid=lk_interstitial_manual_46)

‘Investing in your people first’

Tyler Cook, a sous chef at Tempest restaurant in Charleston. (Cameron Pollack for The Washington Post)

Many of the business operators interviewed said that the decision to raise their employees’ starting wage was not motivated primarily by altruism or a desire to do right: It just made good business sense.

They said wage increases would help attract stronger candidates, reduce turnover and elevate company morale and culture — important for customer-facing businesses such as restaurants.

“We’re going to see savings in retention and turnover, which is so expensive,” said Nicole Marquis, the founder and chief executive of HipCityVeg, a group of fast-casual vegan eateries with locations in Philadelphia and D.C. that recently announced a $15 starting wage. “And this is going to help with recruiting, which will help with our culture — and is really what drives profit at the end of the day and creates a long-lasting brand.”

Other business owners said that they had raised wages to out-compete other companies for the best workers.

“We said let’s get way out ahead of this,” said Carl Segal, chief enterprise success officer at the “[ghost kitchen](https://www.newyorker.com/news/letter-from-silicon-valley/our-ghost-kitchen-future)” and technology company [Reef](https://reeftechnology.com/), which raised its starting wage for its kitchen and grocery workers to $20 an hour in June, up from an average of around $16 to $18. “Let’s take care of the people that are on our team and really take them to the next level — just like they’re helping to take Reef to the next level — and do something amazing for them and their families.”

Most employers The Post spoke with acknowledged the challenges that came from increased labor costs, which already make up an outsize portion of the budget in restaurants and bars compared with other industries.

Three of the 12 businesses interviewed said that they had raised prices for consumers to help offset the wage increase. White Castle increased menu prices in the Detroit area after increasing its minimum wage there to $15 an hour, as did another restaurant that raised wages, Brown Sugar Kitchen in Oakland, Calif. The Midwest-based clothing and design store Raygun increased prices by about 1 percent after raising wages to an average of $15 last year, owner Mike Draper said.

Marquis said that HipCityVeg had not raised prices but that she thought customers would be willing to pay a bit more — 25 cents extra for a burger, for example — knowing employees were paid better.

One of the business owners, Gina Schaefer, who runs [A Few Cool Hardware Stores](https://acehardwaredc.com/), which has 13 locations in D.C., Maryland and Virginia, said that the wage increases led her company to trim some hours from the staffing schedule — some seasonal positions were left unfilled longer after workers left.

But she credited increasing wages at her stores to $15 an hour with helping her fill 71 positions since March.

“We’re having pretty good success,” she said.

Puckett, of Punch Pizza, said that raising wages had increased labor costs by 10 percent. Those costs eat up about 40 percent of sales revenue during normal times, and with a weakened bottom line during the pandemic, that meant that it had wiped out nearly 100 percent of the company’s profits.

But Puckett said the decision was not about short-term gains, even though the company was operating at a loss for the year.

“We are doing this for long-term competitive advantage through delivering more customer delight through engaged employees doing a great job,” he said. “Our business model to focus on the highest quality and service also makes a best-in-class wage structure for employees a good fit.”

For other businesses, increased costs from rising wages did not mean less profit.

While the staffing costs have gone up for the restaurants in 5th Street Group, overall sales also increased, and by a larger proportion, Whalen said. Customer reviews on sites such as OpenTable have gone up by nearly a half a point, too. Better service has translated to more sales and happier customers.

“Our top line is impacted dramatically because people come back and they talk about us,” Whalen said. “All these restaurants that are trying to figure out how to save money? The best way to save money is to make more, just have a better top line. The way you do that is by investing in your people first.”

Len Morris, owner of the Indiana-based staircase manufacturers Viewrail and StairSupplies, which recently raised starting wages to $25 an hour, said that material shortages — certain steels, aluminum extrusions, molds for plastic and rubber — were a much bigger concern for the company than worker availability.

“Wage increases aren’t necessarily driving price increases. Raw-material shortages are driving price increases,” he said. “It’s absolutely the greatest threat to our business.”

[Cash payments spread from Congress to Stockton to Brazil — but notion of ‘universal basic income’ far from reality](https://www.washingtonpost.com/business/2021/04/22/guaranteed-income-ubi-stockton-congress-aid/?itid=lk_interstitial_manual_73)

Not just pay

Sydney Spainhour waits on a table at Tempest. (Cameron Pollack for The Washington Post)

Most business owners emphasized that money was just one component of creating an appealing work environment for prospective employees, after a brutal year in which workers in sectors such as retail and hospitality faced high levels of job loss, the constant threat of coronavirus infection and other stressors.

“It’s tough if you have a family crisis and you need to deal with that and you have an employer that says, ‘If you leave to deal with that, you’re fired,’” Raygun’s Draper said. His company has emphasized leniency for workers, in addition to policies such as guaranteed sick time and paid time off.

“We provide an environment where people don’t find themselves in that situation,” he said. “Work doesn’t have to be intractable.”

[The union’s defeat at Amazon is shaking up the labor movement and exposing a rift between organizers](https://www.washingtonpost.com/technology/2021/04/18/after-amazon-bessemer-union-fight-labor-movement/?itid=lk_interstitial_manual_79)

After White Castle had trouble hiring at its 37 stores in the Detroit area, its wage increase helped bring in more applicants. That also relieved pressure on its longtime staffers, who had picked up shifts to cover gaps amid shortages and turnover, Vice President Jamie Richardson said.

With 362 locations nationwide, White Castle has opened only about 50 of its restaurants for dining, sticking instead with drive-through service, after employees reported in internal surveys that they felt safer that way.

## FTC adv

### 2NC – Aff No Solve – Big Tech Key

#### Khan can ONLY regain legitimacy if she wins the Facebook case – NO WAY the aff affects outcome of that ongoing case because it’s not about labor – that triggers their internal link

Zakrzewski ’21 - technology policy reporter, tracking Washington's efforts to regulate Silicon Valley companies. Her reporting covers antitrust, privacy and the debate over regulating social media companies

Cat Zakrzewski, “Lina Khan’s first big test as FTC chief: Defining Facebook as a monopoly” Washington Post, <https://www.washingtonpost.com/technology/2021/08/19/ftc-facebook-lawsuit-lina-khan-deadline/>

Just two months into her tenure as chair of the Federal Trade Commission, Lina Khan already is facing a moment that could end up defining her legacy as the U.S. government’s top antitrust arbiter.

Thursday is the deadline for the FTC to refile its antitrust case against Facebook, the agency’s highest-profile competition case in years, and how that case proceeds will determine if Khan can follow through on her tough rhetoric to curb concentration in the tech industry.

Khan inherited the case from her Trump-appointed predecessor. But observers say it is Khan’s actions that will be closely watched as she manages what is likely to be a costly, years-long legal battle. On the line is the widespread sentiment in Washington that something must be done to rein in Big Tech after years of what critics would summarize as election interference, misinformation, privacy breaches and predatory business practices. “This is the most important case you have,” said William E. Kovacic, a former Republican FTC chair, of Khan’s priorities.

The FTC first brought its lawsuit in December 2020, under former Republican chair Joseph J. Simons, in a move that was hailed by both Democrats and Republicans as a sign of tough enforcement. Just a year earlier, critics derided the agency’s record-setting $5 billion penalty as a slap on the wrist for the company, now valued at more than $1 trillion.

At the time, Facebook’s reputation in Washington was spiraling and the lawsuit amounted to the most significant political and legal threat to Facebook’s business in company history, symbolizing the dramatic deterioration of the company’s relationship with both parties in Washington. The lawsuit was warmly received by lawmakers from both parties, particularly as they were reeling amid the coronavirus pandemic and in the heated, contested 2020 presidential election.

But that was unsettled in June when U.S. District Judge James E. Boasberg dismissed the case, saying the FTC hadn’t proved that Facebook was a monopoly.

In the case, the agency argues that Facebook’s pattern of buying up or crushing smaller rivals has resulted in a monopoly, allowing the company to rake in more advertising dollars while users have fewer options for social networks. The agency asks the court to force Facebook to divest from WhatsApp and Instagram, to prohibit Facebook from imposing anticompetitive conditions on software developers and seeks to require approval for future mergers and acquisition.

Facebook has argued that the FTC has “not alleged facts amounting to a plausible antitrust case,” and said that the case ignores the realities of competition that it faces.

But the movement to break up large tech companies faces natural hurdles in the U.S. court system, an institution that many experts say is ill-equipped to enforce such broad change. For decades, courts have held a relatively narrow view of antitrust harm, largely focusing on whether it results in higher prices for consumers in contrast to Khan’s sweeping vision of competition enforcement.

Since the agency began its probe two years ago, the video app TikTok has exploded and reportedly surpassed Facebook Messenger last year as the most downloaded app in the United States. The app’s rise shows how quickly the social media landscape can change, signaling the challenges of defining how much power one social network has relative to competitors.

The FTC isn’t the only regulator that has faced a setback in its efforts to challenge Facebook’s power. The judge also dismissed a similar lawsuit from more than 40 state attorneys general, filed in tandem with the FTC’s. The judge said the states waited too long to bring their case, but they plan to appeal his decision.

“The states are sovereign enforcers of federal antitrust law and deserve to be heard,” said Colorado Attorney General Phil Weiser at a conference on Sunday. “I believe at the end of the day, whatever process that takes, that’s where we need to and should end up.”

Amid that backdrop, Congress has been considering a bipartisan package of bills that would result in major changes to tech companies’ operations. There are also efforts across the Justice Department and state attorneys’ general offices; Google is the target of a DOJ antitrust lawsuit, as well as multiple state antitrust lawsuits.

Liberals working on antitrust issues see the Facebook case as just the beginning of a renewed effort by the FTC and others to hold companies like Facebook accountable for alleged anticompetitive behavior. One former Senate aide working on antitrust issues who requested anonymity to speak candidly about the case said the political environment has changed dramatically in recent years, ushering in a new era of enforcement.

“The courts can be an impediment to strong antitrust enforcement, but there are a lot of smart people and there is a lot of political energy focused on how to overcome it,” the aide said. “The energy on Facebook and other Big Tech platforms is going to increase and increase until something meaningful happens in Washington to rein in their power and to stop anticompetitive behavior. There’s rising antitrust pressure coming at Facebook from a huge number of directions right now and clearly the momentum is not on their side.”

From Capitol Hill to the states, advocates for greater antitrust enforcement are closely watching the FTC’s response to the federal judge. Boasberg was detailed and prescriptive in his dismissal, giving the FTC a clear road map to bring a stronger case. He asked the agency to provide more evidence

e to prove its assertion that Facebook controls 60 percent of the social media market, including showing its calculations, and criticized arguments the agency made about how Facebook abused smaller rivals by controlling their access to data.

But Boasberg indicated that the agency could answer these questions and move forward.

“While there are certainly bones that one could pick with the FTC’s market-definition allegations, the Court does not find them fatally devoid of meat,” he wrote.

Some legal experts think that the FTC will be able to address these criticisms from the judge to ensure that the case is not completely dismissed. But it’s no easy task for a relatively small agency, which sought several extra weeks to respond to the judge’s issues with the case after an initial July 29 deadline.

“There’s multiple signals that FTC is serious about doing their job of investigations and bringing these cases and fighting them hard,” said Charlotte Slaiman, competition policy director at the consumer group Public Knowledge.

Though the most significant, the Facebook case is but one of a wide range of issues on Khan’s plate. A month after she assumed office, the Biden administration issued a sweeping competition executive order, which called for her agency to take a tougher line on concentration throughout the economy.

So far, Khan has taken a series of steps to signal a shake-up has arrived at the FTC. She’s started hosting open meetings to open the agency’s business to the public, and she’s warned that greater scrutiny of mergers is on its way.

But the challenge will be for the agency to remain focused on the most important cases, including Facebook, Kovacic said. “She has a downpour of demands from both ends of the avenue,” he said.

And none of her other efforts will matter if she can’t show that she can win against companies, including Facebook, in court.

“The real measure to business decision-makers of your effectiveness and seriousness is your ability to prosecute and win cases,” Kovacic said.

#### Their ev agrees – insurmountable obstacles to FTC wins - big tech companies will lawyer up AND new successful antitrust suits take ages to properly prosecute!

Chakravorti  ’21 - dean of global business at Tufts University’s Fletcher School of Law and Diplomacy. He is the founding executive director of Fletcher’s Institute for Business in the Global Context, where he established and chairs the Digital Planet research program.

Bhaskar Chakravorti, “Lina Khan Has Her Own Antitrust Paradox” Foreign Policy, <https://foreignpolicy.com/2021/07/07/ftc-lina-khan-regulate-tech-congress/>

But the FTC’s levers are limited.

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

Antitrust in digital industries cannot be considered in isolation. It is also quite different from antitrust in other industries because there are issues unique to the industry. A holistic view of digital antitrust means tying antitrust concerns with numerous broader questions, such as securing users’ data rights, the responsibilities platforms ought to have for the content they host, and criteria that helps demarcate the benefits of network effects from the abuses of network power. The FTC is too much of a general purpose entity to dive into these complexities. As former Federal Communications Commission chair Tom Wheeler observed: “The vast scope of the FTC’s present responsibilities—as diverse as funeral director practices, robocalls, and labeling hockey pucks—means that the oversight of digital platform regulation must compete with the agency’s existing diverse responsibilities and limited resources.”

Meanwhile, Facebook is shoring up its defenses. Even as the FTC gets its act together and its complaint is reconsidered, Facebook is busy integrating the backend infrastructure that supports its popular apps: Facebook Messenger, Instagram, and WhatsApp. This is likely to make it impossible to tear the apps apart. In addition to the integration’s technical aspects, which offer the company many benefits, Facebook is making the case that consumers benefit from it as well. It is testing a unified “accounts center” that shows the user all the apps the user has open; Facebook Messenger and Instagram users can send messages and get access to features across apps as well. Most significantly, this could also enable end-to-end encryption across all the apps, which would be an enormous boost to Facebook’s argument that its changes are meant to enhance users’ privacy.

It is conceivable that even if the FTC’s rewritten complaint is accepted, an antitrust case would take a long time to prosecute. In the meantime, Facebook will have already accomplished a fait accompli, making it hard to push further with the current, narrow complaint’s core. In fact, Khan’s predecessor, Joseph Simons, acknowledged that Facebook’s plan to integrate its apps would pose challenges to any move to break up the company.

#### They can’t win the Facebook case because it’s impossible to define the digital monopoly – breaking up big tech ISNT about labor monopsony power, it’s about advertising markets – AND plan is insufficient to prove evidentiary burden to actually break up companies, which is key to their internal links

Portuese ’21 – director of antitrust and innovation policy at ITIF. He leads ITIF’s Schumpeter Project on Competition Policy for the Innovation Economy, advancing a dynamic framework for competition policy in which innovation is a central concern for antitrust enforcement, not a secondary consideration. He is also an adjunct professor of law at the Global Antitrust Institute of George Mason University, and at the Catholic University of Paris.

Aurelian, “The Newly Assertive FTC Faces Its First Big Test—and It Doesn’t Look Promising”https://itif.org/publications/2021/08/23/newly-assertive-ftc-faces-its-first-big-test-and-it-doesnt-look-promising

FTC Chair Lina Khan has filed a suit against Facebook seeking to unwind the social network’s past acquisitions of WhatsApp and Instagram. This is the first lawsuit for the new chair, and it is a test for her populist agenda: Her management of the FTC has appeared to be problematic so far. So does this lawsuit.

While the antitrust complaint alleging that Facebook has “monopoly power” is Khan’s first as chair, it is actually more of a legal mulligan for the FTC, which is renewing a prior complaint after a judge dismissed it for failing to define the relevant market for Facebook. So, unless it provides a convincing demonstration of Facebook’s monopoly power, the new complaint will be rendered boneless. And the argument Khan and her staff have come up with is that social networks such as TikTok, Twitter, LinkedIn, and many others do not compete with Facebook. They say the relevant market for antitrust purposes is the “personal social networking” market. In other words, the FTC believes Facebook is used for communication with family and close friends while other networks are designed to communicate with the wider public (“followers”).

That makes little sense. Because most Internet networks are two-sided markets (with advertisers on one side and users on the other), and because most are free to users, the relevant market from an antitrust perspective is the advertising market: Users enjoy Facebook for free, which then monetizes the consumers’ attention in the time they spend on the platform.

When considering the advertising market, the FTC complaint seems to erroneously suggest that the level of competition in the “personal social networking” market will determine the level of competition in the advertising market. It thus inaccurately assumes advertisers cannot reach end users through alternative platforms such as LinkedIn, Twitter, Snapchat, TikTok, Reddit, Clubhouse, and Telegram—much less alternative media such as TV, radio, print, etc.) Indeed, the FTC claims in the 10th paragraph of its complaint that:

Many personal social networking providers monetize their platforms through the sale of advertising; thus, more competition in personal social networking is also likely to mean more competition in the provision of advertising. By monopolizing personal social networking, Facebook thereby also deprives advertisers of the benefits of competition, such as lower advertising prices and increased choice, quality, and innovation related to advertising.

This undocumented assertion suggests that if Facebook would degrade the quality of its advertising services for advertisers, then advertisers will have insufficient alternatives to reach consumers. This analysis is misguided, as the current competitive constraints on the digital platform advertising market (should we narrowly define it as such) are quite strong given the numerous channels and platforms available to advertisers (e.g., digital news sites, search, email marketing services, etc.). Thus, this inaccurate assertion undermines the very basis of the FTC’s antitrust complaint. It is precisely because Facebook competes intensely for advertising dollars that it also competes intensely for “eyeballs,” knowing that if users spend more of their time on other platforms like Twitter or TikTok that their advertising revenues will fall.

On the users’ side, the FTC defines the “personal social networking” market as different from related social media platforms to conclude that, with the exception of Snapchat, they exert no competitive constraint on Facebook. Such arbitrary definition of this market bluntly ignores market realities and consumer habits. Contrary to what the FTC argues in its complaint, with an average of 338 “friends,” Facebook users hardly consider their “Facebook friends” as family and close friends. Indeed, features such as Facebook Pages, public groups, and of course followers on Instagram, prove that Facebook users interact with individuals they don’t know. Ignoring that users can, interchangeably, post information either on Facebook, Twitter, or LinkedIn—or post a video on Facebook, TikTok, or YouTube—leads the FTC to narrowly delineate the relevant market to make Facebook look like the monopolist it wants.

In defining the market Facebook allegedly monopolizes, the FTC complaint rightly distinguishes personal social networking from mobile messaging services. But it advances this distinction by referring to WhatsApp as being in a different market than Facebook! In other words, the FTC wants simultaneously to include WhatsApp in the market of social networks to demonstrate Facebook’s intention to acquire a rival while also excluding WhatsApp from the social networking market to demonstrate Facebook’s monopoly in the “personal social networking” space. Unfortunately, the FTC’s vague complaint wants to have its cake and eat it too: Facebook acquired the rival WhatsApp without competing with WhatsApp (and in acquiring WhatsApp eliminating the fee, making it a free service).

Equally, the FTC complaint considers TikTok as “not an acceptable substitute for personal social networking services.” To exclude TikTok from Facebook’s rivals appears so detached from consumer habits and the competitive rivalry currently at play that such assertion is likely to raise the judge’s eyebrows.

Meanwhile, the procompetitive effects of Facebook’s acquisitions of Instagram and WhatsApp seem not to be of interest to the FTC. Antitrust cases typically must balance out procompetitive and anticompetitive effects of the practices under scrutiny. Not the FTC complaint: Without further explanation or scrutiny, the complaint considers that “Facebook cannot justify this substantial harm to competition with claimed efficiencies, procompetitive benefits, or business justifications that could not be achieved through other means.” Making WhatsApp free and vastly extending the size of its network made consumers better off. Moreover, it generated significant efficiencies as software firms with high fixed costs, and close to zero marginal costs benefit enormously from economies of scale and scope.

Again, given the need to respect the due process, the judge may be more inclined to adequately assess the defendant’s arguments to avoid unintended consequences of sanctioning efficient conduct beneficial to consumers. Therefore, this renewed complaint by the FTC to unwind Facebook’s mergers with WhatsApp and with Instagram may not be any more promising than the first complaint: It is problematic to argue that Facebook monopolizes a market that regulators fail to identify convincingly. Moreover, the FTC complaint uses Facebook’s “enormous advertising profits” as evidence of anticompetitive practices. The FTC indeed argues in paragraph 207 of its complaint that:

Facebook has enjoyed enormous profits for an extended period of time, suggesting both that it has monopoly power and that its personal social networking rivals are not able to overcome entry barriers and challenge its dominance. Since 2011, Facebook has sustained high profits and market capitalization.

This argument is fundamentally flawed for at least two main reasons. First, Facebook’s profitability does not directly derive from its position as a social media platform but as a provider of advertising services to advertisers. Should these services become less attractive, inferior, or uncompetitive, advertisers may easily switch to alternate providers of digital advertising services or more traditional advertising means. To infer from profits an abusive market position on a specifically created market not only errs in the sources of the profits but also on the merits and instability of these profits. The FTC also seems to ignore the fact that profits are a reflection of costs and revenue. Because marginal costs go down with more users, Facebook (which has 2.9 billion) is being punished simply for having many users find its free service of value. And its revenue, as noted above, comes from the competitive advertising market.

Second, the inference that Facebook’s profits since 2011 illustrate anticompetitive conduct in the “personal social networking” market cannot constitute compelling evidence. Created in 2003, Facebook generated profits for the first time in 2009. Therefore, to look at Facebook’s profits from 2011 onwards is misleading.

Indeed, the FTC only focuses on the platform’ years of profits as evidence of anticompetitive conduct: The complaint does not acknowledge that these profit patterns—of long periods of losses potentially followed by large profits that make up for them thanks to network effects—are common to many digital platforms or capital-intensive companies.

Consequently, the FTC’s flawed assertion is replicable for any innovative company enjoying some market power on the user side without considering the fierce competition taking place on the supply side. To illustrate, it would be tantamount to arguing that after years of losses, Uber’s profits resulted from the anticompetitive practices against consumers without considering that Uber constantly has to attract and retain drivers who can choose competitors. Otherwise, the digital app would instantly lose share.

The FTC should not ignore the years of losses and the economics of digital platforms where the competition takes place on both sides of the platforms. Of course, if the product is successful, profits may unfold in subsequent years—but this is the result of competition, not a lack of it. Moreover, high profits in and of themselves are not a sign of inadequate competition. They can be, and in this case are, a sign of a highly efficient firm.

Finally, the FTC’s case faces an obstacle in the fact that the evidentiary burden that must be met to unwind consummated mergers is, justifiably, a very high standard. “Not only would such a challenge be difficult for the enforcers legally, it should be difficult,” writes attorney Steven J. Cernak. Indeed, the ability of an agency to unwind the mergers it previously approved frustrates fundamental rights at the core of our legal system. The government and regulators owe businesses and individuals a degree of legal certainty. Approval of mergers gives market actors legitimate expectations that the government will not subsequently intrude into the merged firm’s property rights. The whole rationale of our merger laws, which provide for ex-ante merger controls, is to avoid the impossibility of “unscrambling the eggs” with ex-post merger challenges.

De facto, a non-retroactivity principle prevents antitrust agencies from unwinding consummated mergers: Given the FTC complaint’s weaknesses, it is unlikely that even an adventurous judge will frustrate the legitimate expectations market actors ought to have from regulators. The benefits for consumers would be illusory, but the legal uncertainty that would ensue is certain.

### 2NC – Backlash Turn

#### Republicans in Congress and on the FTC will backlash to Khan’s aggressive enforcement, which undermines overall trust in the institution AND guts enforcement capabilities

Nylen 9/29/21 – tech reporter at POLITICO

Lean Nylen, “Lina Khan’s big tech crackdown is drawing blowback. It may succeed anyway.” POLITICO, 9/29/2021, <https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581>

In July, the CEO of the biotech giant Illumina flew to D.C., checked into a hotel room off M Street and tried to conduct a routine piece of business: Persuading the Federal Trade Commission to let his company buy a cancer startup.

But nobody from the FTC would meet with him.

In the Obama and Trump eras, a pilgrimage to Washington was a tried-and-true strategy for CEOs seeking to resolve antitrust logjams — often yielding a flurry of meetings between commissioners and companies like Google, T-Mobile and Apple. But as Illumina’s Francis deSouza learned, that was a different FTC.

Under new FTC Chair Lina Khan, the century-old regulatory agency long accustomed to blessing corporate mergers is veering back to its original trustbusting mission and becoming markedly less friendly to the businesses it regulates. The shift has inspired cheers from her fellow progressives while unsettling many GOP lawmakers, the agency’s two Republican commissioners and even some longtime FTC employees, according to interviews with more than 20 FTC employees, commission alumni and people on Capitol Hill.

The 32-year-old law professor’s most prominent target is the tech industry, whose biggest players swelled to behemoth size on the commission’s watch. Nearly a decade after the commission overruled its own attorneys and declined to file an antitrust suit against Google, Khan is trying to prove that the agency is capable of taking on the nation’s wealthiest companies, including in Silicon Valley.

Some executives from other industries, like deSouza, say they’re being caught in the crossfire.

“There is an anti-big-company, anti-tech sentiment,” deSouza said of the FTC’s refusal to meet with him. “We’re the baby in the bathwater.”

Khan: ‘We can deliver’

President Joe Biden’s decision to elevate Khan as the FTC’s chair on June 15 stunned many in D.C. Those included some of the nearly two dozen Republican senators who had voted hours earlier to confirm the outspoken anti-monopolist, thinking she would be just one of the agency’s five commissioners.

The choice elated progressives who say the FTC, an antitrust and consumer agency created during Woodrow Wilson’s administration, has lost its antitrust firepower since the Reagan era.

Khan, a self-described FTC history nerd, has been outspoken in criticizing the agency. For decades, she told Congress this month, commissioners of both parties had pursued a philosophy that “recommended enforcers err on the side of inaction, on the assumption that monopoly power would be disciplined by the free market.”

Those days are over, she said in a memo to her employees last week that laid out her priorities: “American consumers, workers, and honest businesses depend on the Commission to champion a fair and thriving economy for all, and I am confident that we can deliver.” She said her top priority is taking on a massive wave of proposed mergers and other forms of “rampant consolidation.”

The other changes that Khan has pushed target a wide range of corporate behavior, from employee non-compete agreements to warranties that prevent customers from repairing their own electronic devices. Some steps the FTC has approved in 3-2 party-line votes have also enhanced Khan’s own authority. For instance, letting her approve antitrust subpoenas without agreement from the other commissioners.

“With only a few months on the job, Lina Khan has proven she is committed to strengthening competition policy and taking on monopolies,” said Sen. Amy Klobuchar (D-Minn.), who chairs the Senate Judiciary Committee’s antitrust panel. Klobuchar is drafting legislation that could give the FTC more resources to take on anti-competitive behavior.

But GOP critics like Utah Sen. Mike Lee accuse Khan of mounting a “progressive putsch.” Others, including the agency’s two Republican commissioners, say she is risking a repeat of the 1970s when a congressional backlash against alleged FTC overreach hobbled the commission’s authority.

“I am very concerned about giving the agency more power under current leadership,” Republican Commissioner Christine Wilson told the House Judiciary Committee in a hearing Tuesday. Under Khan, she said, “decades of tradition have been thrown out the window to the detriment of our decision making and consumers.”

Facebook and Amazon have demanded — unsuccessfully — that Khan abstain from decisions on their companies, citing her history of work and statements criticizing tech monopolies. The Wall Street Journal has published at least six editorials and four op-eds on Khan since mid-June, including one editorial that dismissed her as “a 32-year-old academic who has no experience running anything.”

#### Opponents to increased litigation are stronger than proponents

Alison Jones, Professor of Law at King's and a solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, George Mason University Foundation Professor at the George Mason University School of Law, former FTC Commissioner, 2020, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin 2020, Vol. 65(2) 227-255

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

### 2NC – No Solve Scammers

#### SCOTUS case gutted ALL FTC enforcement authority against scammers – plan doesn’t restore FTC authority!

Nylen ’21 – reporter at POLITICO focusing on tech

Leah Nylen, “The Supreme Court ruled in favor of scam artists,' FTC chief says after justices gut agency's powers” POLITICO, April 22, 2021, <https://www.politico.com/news/2021/04/22/9-0-supreme-court-ruling-guts-ftcs-ability-to-seek-redress-for-consumers-484194>

The Federal Trade Commission can’t force companies that engage in wrongdoing to pay back consumers or give up ill-gotten profit, the Supreme Court held Thursday, dealing a huge blow to the agency that could hamper its antitrust and privacy cases.

The FTC’s authority under a provision known as Section 13(b) is limited to seeking an injunction to stop illegal actions and doesn’t authorize it to seek monetary remedies like restitution, Justice Stephen Breyer wrote for the unanimous court.

Section “13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief,” Breyer wrote, noting that the FTC can seek restitution under other provisions of the law. “If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority.”

Acting FTC Chair Rebecca Kelly Slaughter slammed the ruling, saying it deprived the FTC of its strongest tool to help consumers.

"The Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior,” she said. "We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.”

Congressional response: FTC leaders had already warned that consumers would be the ones to suffer if the Supreme Court rolled back the agency’s ability to seek monetary penalties.

“Enforcement actions will slow and redress for consumers will dry up if Congress does not act quickly to affirm our full authority under 13(b),” Slaughter said at a Senate hearing Tuesday.

Congress is already considering legislation to remedy the Supreme Court decision. The House Energy and Commerce Committee has scheduled a hearing for next week on whether the FTC needs new authority to seek consumer redress. The Supreme Court case was also a key topic at an FTC oversight hearing in the Senate this week.

“We have to do everything we can to protect this authority and if necessary pass new legislation to do so,” Senate Commerce Chair Maria Cantwell (D-Wash.) said at the same Tuesday hearing.

The case: The agency has used 13(b) for decades to force companies to pay back harmed consumers, but appeals courts have recently raised questions about that authority.

In the case before the Supreme Court, the FTC sued AMG Capital Management, a payday lender run by former race car driver Scott Tucker, for allegedly misleading consumers about the terms of short-term, high-interest loans. A trial court ordered AMG and Tucker to pay back $1.3 billion in restitution to consumers, an order upheld on appeal. AMG then asked the Supreme Court justices to weigh in on the FTC’s authority.

## Antitrust DA

### 1NR – O/V

#### Timeframe—Immediate implementation is bad

Jan Rybnicek is Counsel in the antitrust practice of Freshfields Bruckhaus Deringer and a Senior Fellow at the Global Antitrust Institute at Antonin Scalia Law School at George Mason University, February 12, 2021, Op-ed: Recent antitrust proposals could ‘throw sand in the gears’ of economic recovery by stalling M&A, https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html

Last year, some in Congress called for a merger moratorium banning all M&A during the pandemic. Then, in a surprise announcement, the FTC — over the objection of two commissioners — said it would no longer quickly approve the vast majority of transactions notified to the government that cannot plausibly reduce competition. Most recently, Senator Amy Klobuchar, D-Minn., introduced antitrust reform legislation that would give the government even greater power to block M&A it deems problematic.

While these proposals are well-intentioned, they threaten to throw sand in the gears of the economy and to do far more harm than good. Adding friction to M&A activity has the potential to stall capital markets, reduce innovation and investment, and frustrate economic growth. And it does so at precisely the wrong time — when the nation is attempting an economic recovery during an ongoing global pandemic that has upended how we work.

Antitrust has seized lawmakers’ interest like no other time in modern memory. Senator Klobuchar’s legislation is the most ambitious attempt to reform the antitrust laws in nearly half a century. A key focus of the bill is to make it even easier for the federal antitrust authorities — the Federal Trade Commission (FTC) and the Department of Justice (DOJ) — to intervene in private parties’ dealings by blocking M&A that they decide will harm competition.

Under existing law, the antitrust agencies must convince a judge that a deal is likely to substantially lessen competition in order to obtain an injunction preventing the transaction. The agencies bear the burden in proving their case. That typically has not been too tall an order. While reviewing a government challenge to a small grocery store merger and lamenting the internal contradictions in antitrust law, Supreme Court Justice Potter Stewart once observed that the only thing consistent about merger litigation is that the government always wins.

Over the last several decades, antitrust has become a more principled body of law through the incorporation of economics and a focus on promoting consumer welfare, but one thing has not changed: the government still nearly always wins.

Reform advocates would have you believe that the FTC and DOJ show up in court on a wing and a prayer and rarely are able to convert the power and credibility of the federal government into merger litigation victories. But reality is far different. The government has no problem blocking mergers it believes are problematic. Over the last 20 years the DOJ and FTC have prevailed in nearly 85% of merger challenges. That is a record any litigator would envy. And the government’s win-rate only improves when looking at more recent cases. In fact, after the DOJ or FTC challenge a merger, companies more often than not abandon their deal before trial because the legal standard is so favorable to the government. This even includes successful challenges against deals involving the acquisition of a nascent firm that does not compete against the acquirer today but, in the government’s view, could in the future, such as the DOJ’s recent success in blocking Visa’s purchase of fintech upstart Plaid.

Senator Klobuchar’s legislation would put the thumb on the scale even more in favor of the government. It would lower the legal standard and allow the government to stop any deal that raises even an “appreciable risk of materially lessening competition.” It also would create presumptions against large deals that do not even involve competitors. Most significantly, the legislation flips the traditional burdens of proof on their head and requires defendants to prove that their deal should be allowed to close. In light of the disadvantages companies already face when confronted with government opposition, such changes are unwarranted, unless you believe the government is infallible and should win 100% of its cases.

Giving the government greater discretion to intervene in deals would add unnecessary friction to the M&A market and reduce the types of investments that have fueled U.S. economic growth, including in the many startups whose founders and investors develop new and innovative products in part due to the prospect of exit through M&A.

#### Magnitude—Unbridled tech competition erodes firebreaks with China and Russia--leads to nuclear escalation

Klare, professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association, ‘20

(Michael, :A Strategy for Reducing the Escalatory Dangers of Emerging Technologies,” December, <https://www.armscontrol.org/act/2020-12/features/strategy-reducing-escalatory-dangers-emerging-technologies>)

The level of risk associated with the military exploitation of cutting-edge technologies cannot be separated from the geopolitical context in which this process is occurring, given that the principal enablers of such weaponization—China, Russia, and the United States—perceive themselves to be engaged in a competitive struggle for military advantage at a time when war among them is deemed entirely possible. Under these conditions, all three countries are enhancing their capacity for what the Pentagon calls “high end” warfare, or all-out combat among the modern, well-equipped forces of their adversaries—combat that is expected to make use of every advance in military technology.

The U.S. military leadership first described this evolving environment in its National Defense Strategy of February 2018. “We face an ever more lethal and disruptive battlefield, combined across domains, and conducted at increasing speed and reach,” it stated. “The security environment is also affected by rapid technological advancements and the changing character of war. The drive to develop new technologies is relentless…and moving at accelerating speed.”1

If the United States is to retain its technological edge and prevail in future wars, the leadership asserted, it must master these new technologies and incorporate them into its major military systems.

A very similar outlook regarding the strategic environment is embedded in Chinese and Russian military doctrines. In language strikingly similar to that of the U.S. strategy, but in mirror image, China’s July 2019 white paper on national defense asserts that the United States “has provoked and intensified competition among major countries, significantly increased its defense expenditure, pushed for additional capacity in nuclear, outer space, cyber, and missile defense, and undermined global strategic stability.” If Chinese forces are to prevail in this environment, it states, “greater efforts have to be invested in military modernization to meet national security demands.”2 Russian doctrine makes similar claims and places equal emphasis on the utilization of emerging technologies to ensure success on the battlefield.3

The modernization and enhancement of front-line conventional forces are common themes in the military doctrines of all three countries, but so also is the modernization of strategic nuclear forces. All three are engaged in costly upgrades to their nuclear delivery systems, in some cases involving the replacement of older ICBMs, bombers, and missile-carrying nuclear submarines with newer, more capable versions. More worrisome still, all three are developing nuclear warheads for use in nonstrategic scenarios, for example, to defeat an overpowering conventional assault by an adversary. This is an explicit goal of the Nuclear Posture Review adopted by the Trump administration in February 20184 and is believed to figure in Russian military doctrine. China is less transparent about its nuclear weapons policies, but is known to have developed nuclear warheads for its medium- and intermediate-range ballistic missiles designed for use against U.S. and allied forces in the Asia-Pacific region.

The Eroding Nuclear Firebreak

In light of these developments, many analysts believe that the barriers to nuclear weapons use have been substantially eroded in recent years. Most of these obstacles were erected during the Cold War era, when leaders of the United States and the Soviet Union came to realize that any nuclear conflict between them would result in their mutual annihilation, impelling them to devise a variety of measures intended to prevent a conventional war from escalating across the “firebreak” separating non-nuclear from nuclear combat. These measures included the “hotline” agreement of 1963; successive limitations on the size of each other’s nuclear arsenals, beginning with Strategic Arms Limitation Talks agreement in 1972; and the Intermediate-Range Nuclear Forces Treaty of 1987. In the language of the time, these measures were designed to preserve “strategic stability” by eliminating the risk of accidental, inadvertent, or unintended escalation across the nuclear firebreak.

In today’s strategic environment, however, analysts fear that strategic stability is being undermined by changes in the nuclear doctrines of the major powers and by the introduction of increasingly capable non-nuclear weapons. These developments include, on one hand, the adoption of policies envisioning the use of “tactical” or “nonstrategic” nuclear arms in response to overwhelming non-nuclear attack by an adversary, and, on the other, the deployment of sophisticated cyber and conventional weapons thought capable of locating and destroying an adversary's nuclear combat capabilities, especially its nuclear command, control, communications, and intelligence (C3I) systems. Also contributing to this environment of instability, analysts warn, is the dissolution of the arms control regime established by the two superpowers during the Cold War era and the emergence of India and Pakistan as major nuclear weapons powers.5

None of these countries would deliberately choose to initiate a nuclear exchange, recognizing that the costs of doing so in terms of homeland devastation would be so high. Yet, they have adopted military doctrines that emphasize non-nuclear attacks on their adversary’s critical military assets—radars, missile batteries, command centers, and so on—at the very onset of a conflict. In most cases, these assets are primarily intended for conventional operations, but some also house nuclear C3I facilities or perform dual-use functions, both conventional and nuclear—a situation described by James M. Acton as “entanglement.” If these dual-use or co-located facilities come under attack, the target state might conclude this was the prelude to a nuclear strike and decide to launch its own nuclear munitions before they could be destroyed by its adversary’s incoming weapons. “Entanglement,” says Acton, “could lead to escalation because both sides in a U.S.-Chinese or U.S.-Russian conflict could have strong incentives to attack the adversaries dual-use C3I capabilities to undermine its non-nuclear operations.”6

With all these countries fielding ever more capable conventional weapons and embracing nuclear policies that authorize the use of nuclear weapons in response to severe non-nuclear threats, the risk of such scenarios is bound to increase under any circumstances. Worse still, these dangers are being further amplified by the utilization of emerging technologies for military use. Such technologies pose an added threat to the durability of the nuclear firebreak by multiplying the types of non-nuclear attacks that can be launched on critical enemy assets and by increasing the vulnerability of nuclear C3I systems to non-nuclear attack.

The Risk of Nuclear Escalation

The pathways in which militarized emerging technologies could increase the risk of nuclear escalation can be summarized in four areas.

First, increasingly capable air and naval autonomous weapons systems equipped with advanced sensors and AI processors could be deployed in self-directed “swarms” to find and destroy key enemy assets, such as surface ships and submarines, air defense radars, anti-air and anti-ship missiles, and major C3I facilities. To an adversary, such attacks could be interpreted as the prelude to a nuclear first strike, especially if they result in the destruction of nuclear C3I systems co-located with non-nuclear C3I facilities, prompting it to launch its own nuclear weapons for fear of losing them to enemy weapons.7

Second, multiple strikes by hypersonic missiles could be used early in a conflict to destroy key enemy assets like those described above, again causing the target state to fear that a nuclear strike is imminent and cause it to launch its own nuclear arms. This danger is multiplied by the fact that the flight time of hypersonic missiles is extremely brief and that many of these weapons now being developed by the major powers are designed to carry a nuclear or a conventional warhead, leaving a target country in doubt as to an attacker’s ultimate intentions, especially if key C3I facilities are degraded, preventing senior leaders from knowing the nature of the attack and inclining them to assume the worst.8

Third, just before or at the very onset of a conflict, a belligerent could launch a cyberattack on its adversary’s early-warning and C3I systems, hoping thereby to degrade that country’s ability to resist a full-scale assault by conventional forces. Because many of these systems are also used to warn of a nuclear attack and to communicate with nuclear as well as conventional forces, the target country’s leaders might conclude they are facing an imminent nuclear attack and order the immediate launch of their own nuclear weapons.9

Fourth, as the speed and complexity of warfare increases, the major powers are coming to rely ever more heavily on AI-empowered machines to sort through sensor data on enemy movements, calculate enemy intentions, and select optimal responses. This increases the danger that humans will cede key combat decision-making tasks to machines that lack a capacity to gauge social and political context in their calculations and are vulnerable to hacking, spoofing, and other failures, possibly leading them to propose extreme military responses to ambiguous signals and thereby cause inadvertent escalation. With machines controlling the action on both sides, this danger can only grow worse.10

These are some of the major pathways to escalation that are being created by the weaponization of emerging technologies, but other pathways of a similar nature have been identified in the academic literature and are likely to arise as these technologies are pressed into military service.11

### AT: Big Firms Better

#### Consumer welfare standard is the lodestar of antitrust—ensures predictable, non-arbitrary enforcement

Wright et al., J.D., PhD, University Professor and Executive Director, Global Antitrust Institute at Scalia Law School, former FTC Commissioner, ‘18

(Joshua, Elyse Dorsey, Attorney Advisor to Commissioner Noah Phillips, United States Federal Trade Commission, Jonathan Klick, Professor of Law, University of Pennsylvania, and Jan M. Rybniek, : Senior Associate, Freshfields, Bruckahus Deringer LLP, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” August 10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524>)

The adoption of the consumer welfare standard as antitrust’s lodestar has come with numerous benefits that have reoriented antitrust jurisprudence over the last 50 years to more effectively protect competition. At its core, the consumer welfare standard provides a coherent, workable, and objective framework to replace the multiple, and often contradictory, vague social and political goals that governed antitrust prior to the modern era. By providing a disciplined framework for antitrust analysis, unified under a singular objective, the consumer welfare model fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions. Similarly, promoting the use of the consumer welfare approach by competition authorities worldwide reduces the opportunity for enforcers to use their domestic competition laws to pursue non-economic objectives, including a protectionist agenda that targets U.S. and other foreign businesses.215

#### Replacing the consumer welfare standard is a disaster—leads to politicized enforcement, mass uncertainty, and arbitrary guidelines

Wright et al., J.D., PhD, University Professor and Executive Director, Global Antitrust Institute at Scalia Law School, former FTC Commissioner, ‘18

(Joshua, Elyse Dorsey, Attorney Advisor to Commissioner Noah Phillips, United States Federal Trade Commission, Jonathan Klick, Professor of Law, University of Pennsylvania, and Jan M. Rybniek, : Senior Associate, Freshfields, Bruckahus Deringer LLP, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” August 10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524>)

Opponents of the modern approach to antitrust law and policy have called for nothing less than the complete dismantling of the consumer welfare standard and the consensus that has been built over the last nearly 50 years through vigorous debate among antitrust practitioners, enforcers, and academics from across the political spectrum about how best to promote competition. It is no exaggeration to say that what these critics desire is an anti-economics revolution that untethers the antitrust laws from a coherent and consistent framework and replaces consumer welfare with vague social and political standards that ultimately would once again plunge antitrust into crisis.244

In the current debate about the appropriate framework for antitrust analysis, the most often cited replacement for the consumer welfare model is either the “public interest” or “citizen interest” standard.245 The “public” and “citizen” interest standards would purportedly capture a much broader range of potential effects emanating from a challenged transaction or business practice, including: the availability of services, the openness of markets, the stability of global supply chains and financial systems, and the ability of rivals to compete.246 Of course, there is reason to believe that any new antitrust standard might also be broad enough to capture other non-competition factors touted by proponents of consumer welfare reform, such as income inequality247, undue political influence, and perceived conflicts of interest between firms in a vertical relationship.

Abandoning the consumer welfare standard and embracing the “public” or “citizen” interest standard (or a similar approach) would have significant adverse costs on competition policy. It would again force antitrust to serve multiple masters, many of which have inconsistent interests. The inevitable confusion and lack of unified approach also would create uncertainty in the business community that ultimately would have a chilling effect on procompetitive conduct and encourage new efforts by firms to influence antitrust outcomes through political pressure and agency rent-seeking. This is not mere speculation. Indeed, the history of the Federal Communication Commission, which employs a similar public interest standard, serves as a prime example of the deleterious effects of vague enforcement standards that are not rooted in economic evidence.248

A. Replacing Consumer Welfare with an Incoherent and Inconsistent Approach

Replacing the well-established consumer welfare standard would necessarily require courts to trade-off some amount of consumer welfare for some other set of values, thereby throwing open the door to uncertainty and to exploitative behavior. As has been discussed above, decades of debate and case law has worked to refine the precise contours of the consumer welfare standard and to bring consensus about the types of evidence that are indicative of harm to competition and consumers. The consumer welfare standard employs a variety of economic tools to evaluate the effect transactions and business practices may have on consumers in the form of increased prices, reduced output, reduced innovation. By using current economic theory and empirical evidence as the starting point for creating liability rules and subsequently conducting an evidence-based inquiry into the welfare effects of a particular practice, the consumer welfare model offers a tractable method for weighing procompetitive and anticompetitive effects.

If consumer welfare were to be replaced by some other set of values the result explicitly would be for courts and enforcers to elevate other factors above consumer welfare and to reach different conclusions about liability. Under a “public interest” or “citizen interest” approach, a transaction that would reduce prices to consumer, increase output, or spur innovation may be prohibited under the antitrust laws for failing to satisfy any number of other vague factors, including failing to leave some arbitrary number of competing firms in the market despite the clear presence of competition or create a more efficient albeit consolidated supply chain. Even more dramatically, a new standard also may result in a transaction that increases prices, reduces output, or stifles innovation to not necessarily run afoul of the antitrust laws if a court concludes that such consumer harm can be tolerated to satisfy other aspects of the multidimensional standard, such as income equality. In light of these very real concerns, a subjective, multi-prong antitrust standard untether from economics offers nothing beyond speculative benefits. Accordingly, it would be imprudent to abandon the consumer welfare standard.

#### The plan destabilizes antitrust and spills over to other substantive changes targeting tech companies

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(Joshua D. and Jan, “A Time for Choosing: The Conservative Case Against Weaponizing Antitrust,” <https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust>)

None of this means that the tech sector should be immune from antitrust scrutiny, that there are not serious economic issues facing American businesses and workers, or that certain tech platforms have shown an unmistakable bias against conservative viewpoints. Where anticompetitive conduct exists, it can and should be challenged under the existing antitrust laws and legal doctrines, which are more than capable of protecting competition in the digital economy. And the antitrust agencies are right to be vigilant against potential anticompetitive behavior by the major U.S. tech companies given their significant presence across key parts of the US economy.

But conservatives should be skeptical of attempts by politicians and bureaucrats to reorder economies simply to appease current animosity against tech firms and put at risk the substantial benefits they have brought to American consumers and workers. And that is precisely what recent radical proposals would do. These proposals include abandoning the consumer welfare standard that has helped make antitrust a coherent and principled body of law. Liberals instead seek to untether antitrust from the rule of law and return it to its Stone Age by reintroducing vague new “public interest” tests with multiple conflicting goals or by reestablishing arbitrary and obsolete market share thresholds—either of which would serve only to increase government discretion. Others have called to overturn unanimous and supermajority judicial precedent that are the foundations of the modern economic approach to antitrust. Still others seek to abandon the principle that it is the government and not business firms that bears the burden of proof of demonstrating the legality of free enterprise. These proposals require businesses to affirmatively prove to regulatory bodies that commercial conduct is not only not harmful but also that it is beneficial—beneficial to whom exactly is still unclear. And, of course, there have been calls to ban nearly all mergers, even those like Amazon’s acquisition of Whole Foods, which did not consolidate two rival companies and has brought customers lower prices and better services. These efforts inevitably will only be the starting point; and with no limiting principle will increase the government's authority to substitute its own judgement for those of entrepreneurs.

Conservatives long have believed in competition, markets, and the rule of law. The late Justice Scalia famously noted that antitrust’s signature statute, the Sherman Act, is “indeed the ‘Magna Carta of free enterprise’ … but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.” The force of Justice Scalia’s admonition that the antitrust laws are not an appropriate vehicle for tinkering with the inner workings of private firms is even stronger when the tinkering is not even in furtherance of greater competition, but for political ends. Those core principles should not hastily be sacrificed now to achieve transient political satisfaction against America’s largest tech companies.

The tech sector is a centerpiece of the modern U.S. economy. America’s tech firms have innovated countless new products, created millions of U.S. jobs, and now are simultaneously envied and attacked by our counterparts abroad. As Ronald Reagan observed in 1964, the government rarely does anything as well or as economically as the private sector. And when the government does seek to control the economy it invariably does so through force or coercion of the people. An invitation to allow politicians and bureaucrats to use antitrust law to break up tech companies, to redesign digital products, or to moderate content for the “greater good” will end like most attempts at introducing just a little bit of liberal orthodoxy: the government’s discretion will grow and the people’s ability to check it will fade overtime until it is a figment of its former self. It is the camel’s nose under the tent. Now is the time for conservatives to choose whether they have a newfound faith in central planning or if they will recommit to principles of limited government and free markets.

#### And, they’re just wrong – Mrket concentration doesn’t reduce competition

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(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

National market concentration measures, however, do not necessarily prove that actual competition is declining. Carl Shapiro, one of the nation’s leading industrial organization economists and former chief economist for the Justice Department’s antitrust division, has shown that national concentration measures of product or service markets do not always constitute a relevant geographic market where competition takes place.23 Shapiro identifies several industries where this difference is important. Although national chains may account for larger shares of revenue in these industries, there is (yet) no evidence of reduced competition at the local level where these firms tend to compete: accommodations and food, finance, health care, professional services, property, retail trade, transport and warehousing, utilities, and wholesale trade.24

Nonetheless, the growth rate of labor productivity in the U.S. has remained low by historical standards – at around 1 percent – over the past decade. This is worrisome because productivity growth is the key to rising living standards.

One reason for the productivity growth slowdown may be the decline in the rate of formation of new firms, which, over the past two centuries, have been disproportionately responsible for commercializing disruptive innovations.25 Likewise, workers are moving less frequently than they once did – either between firms in the same city or between cities.26

The temptation is great also to blame poor productivity performance on increasing industry concentration, but it should be resisted for several reasons. For one thing, as already noted, trends in national concentration statistics are poor measures of the state of competition. Moreover, as Shapiro has noted, even the increases in concentration that have occurred in narrowly defined industries at the national level – some of which can be attributed to relaxed merger enforcement by the Department of Justice after it updated its Merger Guidelines in 1982 – are mostly in unconcentrated industries and not of a magnitude that would indicate any material diminution of competition.27 And, if competition has not materially declined, then the state of competition cannot be linked to the decline in productivity growth or other measures of economic “dynamism” such as startup activity or worker mobility.

Statistical studies also do not support any connection between the modest increases in national industry concentration and the decline in productivity growth. David Autor and colleagues, who have been critical of increased concentration for its impacts on the labor market, have found a statistically positive relationship between an industry’s concentration level and its productivity improvements.28 Likewise, there is evidence linking investment in information technology (which is productivity enhancing for the firms making the investment), with more industry concentration. However, Bessen argues that – because much IT investment is proprietary and not diffusing to the rest of the economy – the economy-wide impact on productivity may be less than optimal.29

#### The vast majority of innovation comes from firm improvement, not competitors

Garcia-Macia et al. 19 – Garcia-Macia, International Monetary Fund; Hsieh, Booth School of Business, University of Chicago and National Bureau of Economic Research; Klenew, Department of Economics, Stanford University and National Bureau of Economic Research

Daniel Garcia-Macia, Chang-Tai Hsieh, and Peter J. Klenew, "How Destructive Is Innovation?," Econometrica, Vol. 87, No. 5 (September, 2019), 1507–1541, September 2019, <http://klenow.com/DestructiveInnovation_GHK.pdf>

Likewise, when a new product replaces an existing product, one would like to identify whether the new product is owned by another firm (“creative destruction”) or the same firm (“own innovation”). Based on case studies, Christensen (1997) argued that innovation largely takes the form of creative destruction, and almost always from new firms. Akcigit and Kerr (2018) looked at whether patents cite earlier patents by the same firm or by other firms. The case studies and the sample of patenting firms, however, may not be representative of firms in the broader economy. Many innovative firms, particularly outside of manufacturing, do not patent.

In the absence of more direct evidence, we try to infer the sources of growth indirectly from the patterns of job creation and job destruction among all private sector firms in the U.S. nonfarm economy. We use data from the U.S. Longitudinal Business Database (LBD) from 1983 to 2013. The seminal work of Davis, Haltiwanger, and Schuh (1996) documents the magnitude of job flows within U.S. manufacturing, and these flows are commonly used as proxies for the intensity of creative destruction. For example, Decker, Haltiwanger, Jarmin, and Miranda (2014) pointed to the decline in U.S. job reallocation since the 1970s as evidence of a decline in the rate of creative destruction.

We view the LBD data through the lens of an exogenous growth model featuring creative destruction, own innovation, and new varieties. For industries such as manufacturing, the object of innovation may be products. For services and retail, which make up the bulk of the LBD data, innovation may take the form of new and improved establishments. For example, Walmart opening a new store may be akin to adding a new product. A new Walmart store arguably gains market share by offering a distinct variety (the store format, including all the items for sale within it) and/or by offering low prices (due to high process efficiency) relative to existing stores in the local market.

We reach four conclusions from our indirect inference based on LBD data. First, most growth appears to come from incumbents rather than entrants. This is because the employment share of entrants is modest. Second, most growth seems to occur through quality improvements rather than brand new varieties. Third, own-variety improvements by incumbents loom larger than creative destruction (by entrants and incumbents). The contribution of creative destruction is around 25 percent of growth, with the remainder mostly due to own innovation by incumbent firms. Fourth, the contribution of entrants and creative destruction declined from 1983–1993 to 2003–2013, while the contribution of incumbent firms, particularly through own innovation, increased.

### AT: Kill Zones

#### Link turn is wrong for big tech—acquisition is key to effectively leveraging startup ideas, otherwise innovation is too complex and resource intensive

Kennedy, senior fellow at ITIF, previous chief economist with the U.S. Department of Commerce and general counsel for the U.S. Senate Permanent Subcommittee on Investigations, ‘20

(Joe, “Monopoly Myths: Is Big Tech Creating “Kill Zones”? November 9, <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones>)

As in much of the anti-monopoly movement’s criticism of technology industries, the critique of killer acquisitions does not reflect the unique nature of technology industries, wherein continued innovation is key and product platforms are complex and require many different components, often ones that companies simply do not have capabilities in. As Edward Roberts and Wenyun Kathy Liu wrote in 2001:

The most dramatic change in global technological innovation—the movement toward externally oriented collaborative strategies that complement internal research-and-development investments—began more than a decade ago. Today companies use alliances, joint ventures, licensing, equity investments, mergers and acquisitions to accomplish their technological and market goals over a technology’s life cycle.20

Unlike most other industries, the large Internet companies have plenty of cash to invest in new research. Their markets also experience rapid technological innovation that threatens to displace them if they do not continue to offer a better service than their rivals. The high capacity for internal investment reduces the need for venture capital. But the dynamic nature of the markets ensures continuous innovation, even without entrants. A market leader that merely buys up companies to protect itself from having to innovate will soon be eclipsed by the next new thing. This is part of the reason these companies spend significantly more on research as a portion of their revenue than virtually any other public companies in the world.21

This is why, despite expressing many concerns about the competitive threat posed by large Internet firms, a recent report for the European Commission urges caution in toughening merger policy for digital companies:

In the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them.22

Likewise, economist Luis Cabral argued that several features of digital platforms make acquisitions a more attractive form of technology transfer.23 First, the evolution of business models is much harder to predict. Partly for this reason, preemptive actions are difficult to judge given the poor definition of markets and the uncertainty in identifying future rivals. Second, intellectual property is more difficult to protect than in markets such as pharmaceuticals. As a result, companies cannot be sure of what they are licensing. Nor can they be confident that a rival will not simply copy their technology for free. Cabral noted that, out of hundreds of mergers completed by these companies over the last decade, only a handful typically attract any criticism. As an anecdote, he mentioned Alta Vista’s refusal of an offer to purchase Google for $1 million. He pointed out that Google’s substitutability and superiority was not apparent at the time. In fact, two years later, Alta Vista still had more than double Google’s market share.

Also, while the tech industry does use acquisitions as a way to gain needed technology and talent, it does not do so as a substitute for investing in its own innovation. According to the 2019 EU Industrial R&D Scorecard, of the top companies globally with the largest increase in research and development (R&D) expenditures, four were large U.S. tech companies (Apple, Facebook, Google, and Microsoft). And of the top 5,000 companies in the world ranked by R&D spending in 2019, Alphabet (Google’s parent) ranked number 1, Microsoft 3, Apple 6, and Facebook 11. And according to the EU, Amazon would have ranked first overall if it had broken out its R&D and content development expenditures. Even with the ability to acquire other firms, these firms seem to have plenty of incentive to invest in R&D. Moreover, it is precisely their size and market power that gives them the ability to invest so heavily in R&D.24

So-Called Kill Zones Could Maximize Welfare and Innovation

To the extent established companies are conducting research in a narrow market, it makes sense for entrants to avoid head-on competition and instead exploit complementary markets. This is almost as likely to be true whether the industry is dominated by one firm or five. Breaking into an industry with relatively mature technology dominated by large players is never easy. That is why many industries have gone through periods of heavy investment in the early stages of an industry as companies try to become one of the dominant players. Once the industry has matured to achieve economies of scale or network effects, new entrants tend to focus on complementary technology rather than trying to challenge the larger companies head-on.

Few complained after the 1930s automobile-sector start-ups declined precipitously. By the 1930s, it made little sense to invest in new automobile companies when it was clear the technology system (internal combustion engine) and major players (American Motors, Chrysler, Ford, and GM) had already been established. Investment to create new entrants would have represented a waste of societal resources. Instead, funding went to emerging industries such as radios, chemicals, and machine tools.

Today is no different. The technology and business models for search, social networks, and Internet retailing are relatively mature; society is better off if entrepreneurs and venture capitalists focus on other areas. Indeed, to the extent investors may be focusing their capital outside a few areas where large firms have established positions in what are somewhat mature technologies, it is arguably a good thing because it means there is more capital for other promising areas. Hathaway, in fact, acknowledged the possibility that “venture capital investment may have increased in non-tech sectors too, so that the tech giants have simply diverted the flow of capital to other areas.”25 The is buttressed by an earlier study by Oliver Wyman, which shows that acquisitions by Facebook, Google, and Amazon have not had a negative effect on the amount of venture capital flowing into tech industries.26 (See figures 1 and 2.)

Acquisitions Often Increase Innovation

There is often an assumption that acquisitions decrease innovation, but a number of studies suggest the opposite. A Dutch study looks at acquisitions in the manufacturing sector, which includes technology companies, and finds that both acquisitions and divestitures are positively correlated with increased innovation.27

Likewise, a paper by Igor Letina, Armin Schmutzler, and Regina Seibel argues that prohibiting killer acquisitions strictly reduces the variety of innovation projects in an industry because it deters innovation.28 They built a model in which prohibiting acquisitions has a positive effect on consumer surplus only if the bargaining power of the entrant is small and competition in the industry is not too intense, because both raise the incentives for an incumbent to do its own innovation rather than purchasing that of others. They cautioned:

While prohibiting acquisitions always has a strictly negative innovation effect in the case without commercialization (i.e. for killer acquisitions), it is not necessarily true for acquisitions with commercialization. Thus, even though killer acquisitions may appear to be particularly problematic, the case for prohibiting them is not necessarily stronger than for acquisitions with commercialization if one takes ex-ante innovation incentives into account.29

Moreover, Will Rinehart of the Center for Growth and Opportunity wrote that the large majority of acquisitions are motivated by the desire to purchase either the technology or the talent of the specific firm, rather than to stifle a potential rival.30 Sometimes termed “acqui-hires,” these acquisitions refer to when a company is acquired largely as a means to hire its workforce, and the newly hired team is often more productive after acquisition, in part because of economies of scope and increased resources.31 These acquisitions also often benefit both parties by integrating new technology into a broader network and helping the new firm scale up. They also benefit consumers by disseminating innovations more broadly.

#### And, the internal link is net neg—some enforcement increases innovation—but expanding liability for conduct decreases it

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(Gregory, “How Antitrust Affects Innovation,” October 17, https://clsbluesky.law.columbia.edu/2017/10/17/how-antitrust-affects-innovation/)

My research responds to this state of affairs by empirically testing antitrust enforcement’s relationship with innovation. The history of antitrust law is an ideal natural laboratory for empirical study since its rate of enforcement has fluctuated, creating variations that generate strong statistical results. For example, each category of antitrust action initiated by the government has changed in a unique pattern. The rate of Section 1 investigations has steadily declined, but merger enforcement—which has traditionally been less common than sections 1 and 2 investigations—peaked in the 1990s and has since become more prominent than Sherman Act investigations. As a result, it can be statistically determined with a high level of confidence whether the rate of innovation has changed in accordance with increases and decreases of antitrust activity, controlling for mitigating factors.

I constructed a new dataset of publicly available information as well as data received from Freedom of Information Act (“FOIA”) requests. The dataset spans from 1963 to 2015 with a unique entry each year. The results of the models are consistent, strong, and quite unexpected, demonstrating the effects of antitrust enforcement on society’s ability to produce patents and R&D.

First, a greater number of antitrust lawsuits filed by private parties—which are the most common type of antitrust action—impedes innovation. Second, the different types of antitrust actions initiated by the government tend to affect innovation in profoundly different ways. Merger challenges (under the Clayton Act) promote innovation while restraint of trade and monopolization claims (under sections 1 and 2 of the Sherman Act) suppress innovative markets. Even more interesting, these effects become stronger after the antitrust agencies explicitly made promoting innovation a part of their joint policies.

My results suggest that the arguments for and against antitrust have merit. On one hand, antitrust enforcement fosters the incentives to innovate when it preserves the number of firms competing within a market. Yet enforcement reduces innovation when it scrutinizes *how* firms compete. This makes sense. Commentators have noted that the Sherman Act is designed to raise suspicions about many activities in which innovative firms typically engage. An inventor may, for instance, exclude competitors from using her invention or enter into contracts and agreements with competitors to license or develop technology— either scenario can draw an antitrust challenge. Enforcing the Sherman Act can thus curb innovation by creating liability for inventors who would like to comply with the law. In short, antitrust appears to promote innovation when it maintains competition by preserving the number of firms competing within a market, but it ~~retards~~limits innovation when it limits how exactly those firms compete against each other.

#### Aff is worse – its incentive is so blunt it chills activity everywhere – prevents large tech from investing in small firms

Dushnitsky 21– Gary Dushnitsky is an associate professor of Strategy and Entrepreneurship at London Business School. He also serves as a senior fellow at the Mack Institute for Innovation Management at the Wharton School of the University of Pennsylvania. Daniel Sokol is a professor of Law and affiliate professor of Business at the University of Florida. =

(Gary Dushnitsky and Daniel Sokol, “Competition laws could be a death knell for startup mergers and acquisitions,” 7/22/2021, The Hill, https://thehill.com/opinion/white-house/564321-competition-laws-could-be-a-death-knell-for-startup-mergers-and?rl=1)

Technology entrepreneurs and innovations yet to be imagined are in the crosshairs of misguided antitrust legislation. Antitrust policy is under the microscope from both political parties.

The Biden administration’s Executive Order on Promoting Competition in the American Economy lays the groundwork for the first-ever antitrust regulations for technology companies and internet platforms, and proposed legislation by Sens. Amy Klobuchar (D-Minn.) and Josh Hawley (R-Mo.) would rewrite antitrust law. Both bills and the order seek to limit merger activity focused on acquisitions of smaller companies by larger technology companies, with their proposals ranging from presuming anticompetitive effects to outright prohibitions.

However, these proposals likely will have unintended consequences that would hamper innovation and entrepreneurship. The result is that certain potential deals will never leave the boardroom and others will be abandoned because the risks of antitrust intervention are too high.

For deals that do move forward, many will be challenged under more stringent merger laws. Such a change in the law will fundamentally alter the ability of U.S. companies to innovate in the technology sector, and result in collateral damage across a wide range of traditional industries such as biotech, consumer goods and finance, along with sustainability-focused or previously neglected sectors.

Investors and founders must be able to realize returns on their investments and efforts, commonly referred to as ‘entrepreneurial exit,’ or they will not take the risk of investing in startups and commercializing emerging technologies. Without the ability to exit, neither founders nor investors will be able to reap the gains of entrepreneurial value creation. If the proposed legislation becomes law, it will foreclose many merger and acquisition exits and thus lessen the incentives for founding and growing a business. It therefore makes investment in innovative ventures less likely since founders and investors cannot reap the rewards of a relatively timely exit at high valuations. When certain potential acquirers can no longer make acquisition bids, venture capital investors will lose the ability to make significant returns and funding to the entrepreneurial ecosystem may wither.

### AT: Squo Merger Review

#### Current action flows neg – it incentivizes short term M&A before regulations are implemented – but, the aff preempts expected action, which proves the link

**Dobbs 21** – American Banker community banking reporter

Jim Dobbs, "Biden order seen as minimal threat to bank M&A," American Banker, 7-12-2021, https://www.americanbanker.com/news/biden-order-seen-as-minimal-threat-to-bank-m-a

As the pace of bank mergers and acquisitions picks up, the Biden administration may have added another motivator to pursue and complete deals in 2021.

An executive order issued Friday by the president calls for greater scrutiny of bank mergers, as part of a broader effort to promote competition in financial services, technology and other sectors. But just as the specter of gun control is known to encourage near-term firearm sales, Biden's order could spur banks to rush into deals out of concern that stricter regulation will follow.

Small banks may speed up deal talks this year to get acquisitions completed before new regulatory pressure reaches them, said Michael Jamesson, a principal at the bank consulting firm Jamesson Associates. “There will be some bankers that say, 'Hey, we’re not letting this go beyond 2021,' " he said.

Analysts said the order is not directed at small companies, but rather is meant to curb activities such as the merger of BB&T and SunTrust in 2019 — the largest bank deal since the financial crisis, analysts say. That acquisition created the $518 billion-asset Truist Financial in Charlotte, North Carolina.

Community bank M&A drives the bulk of deal activity, and "most community and regional bank mergers should be unaffected” by the executive order, Cowen analyst Jaret Seiberg said Friday.

The need for scale is likely to drive more consolidation even if deals slow down in the immediate future, according to Mike Mayo, analyst for Wells Fargo. “Economics should win out over politics and bank mergers should increase,” Mayo said.

There were 60 bank acquisitions announced during the second quarter, according to Raymond James. That was nearly double the 35 announced in the first quarter and six times greater than the total in the second quarter of 2020. Bankers and analysts say M&A is likely to gather more momentum in the second half of the year, sending this figure even higher.

Acquisitive banks are likely to get asked an abundance of questions about M&A during upcoming earnings calls this month, according to analysts. Earnings season gets underway this week.

#### Post-Biden XO mergers prove no slowdown

**Sikander and Gull 21** – S&P Global Market Intelligence Contributors

Ali Shayan Sikander and Zuhaib Gull, "Bank M&A 2021 Deal Tracker: Fla. deals lead US in a hot August," S&P Global Market Intelligence, 8-24-2021, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/bank-m-a-2021-deal-tracker-june-hits-highest-monthly-total-since-2019-62489908

U.S. bank M&A activity kept up a torrid pace in August as 20 deals were announced, bringing total 2021 deal announcements to 132, compared to 103 over all of 2020.

Total deal value has also soared this year to $38.95 billion, compared to $27.75 billion for the full year 2020. Similarly, the median deal value-to-tangible common equity ratio for 2021 deals rose to 152.8%**,** up from 134.2% for the full year 2020.

#### There is a dealmaking boom despite antitrust scrutiny—tech sector leading

Nicolas Rivero, Tech Reporter, Quartz, The tech industry is leading a record boom in mergers and acquisitions, 7/3/21, <https://qz.com/2028920/the-tech-industry-is-leading-a-record-ma-boom/>

As of June 30, businesses worldwide had closed over $2.8 trillion in mergers and acquisitions, according to data from financial intelligence firm Refinitiv. “Over the course of 40 years of tracking mergers & acquisitions, we’ve never seen deal-making at this pace, by value and volume,” said Matt Toole, director for deals intelligence at Refinitiv, in a statement.

The booming merger market is a sign of an economy bouncing back from a pandemic-induced slump, buoyed by low interest rates and fiscal stimulus from governments around the globe. Toole attributes much of the growth to trends that started before the pandemic, including tech industry consolidation, a greater number of private equity firms buying up companies, and the rise of the special purpose acquisition company (SPAC); each of those trends picked up steam this year. Today’s merger momentum shows no sign of slowing. “As fiscal, monetary, and regulatory policies become clearer over the course of the second half of the year, deal-making will have to adapt, but conditions seem favorable for the current momentum to continue,” said Toole.

Some of the recent tech deals have already triggered antitrust scrutiny. The US Justice Department is reviewing medical industry giant UnitedHealth Group’s $13 billion acquisition of the data analytics firm Change Healthcare. Antitrust regulators all over the world have trained their sights squarely on the tech industry, but most have focused on Silicon Valley tech giants such as Facebook, Amazon, Google, and Apple.

Even so, Refinitiv’s data show that tech industry deal volume has accelerated faster than any other sector.

#### And, perception – companies don’t expect the legislation to pass

Zero 21 – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be more cloud cover than storms on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they lack the lightning needed to actually block deals.

Let’s look at these twin threats and the risks they pose to dealmaking. President Biden’s executive order has spurred the Department of Justice and Federal Trade Commission to increase scrutiny of deals in a move that, “if implemented by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. But that’s a big ‘if.’ The attorneys write that actually intensifying competition review standards would require acts of Congress and/or litigation. Both regulatory agencies have mixed records in courts. And it’s unclear if Democrats will defy the political gravity that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? A frenetic M&A pace has overwhelmed oversight body the Federal Trade Commission to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but context is king: the handful of challenged deals represent a small slice of the year’s record value of announced transactions.

For starters, some of the highest profile deals challenged by the new administration’s antitrust regime represent merger dynamics that have always drawn intense scrutiny. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have long steered clear of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well be more thunder than lightning**.**