# Wake Round 2

# 1NC

## OFF

#### Politics DA:

#### Biden’s PC passes it.

Easley ’11-6 [Jason; 2021; managing editor, White House Press Pool and a Congressional correspondent; PoliticusUSA, “Biden Shows America What a Real President Who Gets Things Done Looks Like,” https://www.politicususa.com/2021/11/06/biden-shows-america-what-a-real-president-who-gets-things-done-looks-like.html]

In a display of total confidence, President Biden was asked what gives him the confidence Congress will pass Build Back Better. He said, “me.”

Video:

Tweet omitted.

The President was asked, “Mr. President, have you gotten assurances from moderate Democrats in the House and Senate that they are going to vote for your Build Back Better plan now that what they really wanted, the infrastructure bill, has passed.

President Biden answered, “You know I’m not going to answer that question for you because I’m not going to get into who or what made what commitments to me. I don’t negotiate in public, but I feel confident that we will have enough votes to pass the Build Back Better plan.

When he was asked, “What gives you that confidence? “

Biden responded, “Me.”

This is what a confident president who gets things done sounds like. Donald Trump turned infrastructure week into a national joke by being unable to deliver for the American people, as he continued to promise and promise, but nothing ever happened.

Biden is reminding America of what a real president can do when they know how to use their power and platform.

Trump talked the talk, but President Biden and the Democrats delivered action and results.

#### Antitrust requires PC. Knocks out competing domestic initiatives.

Carstensen ’21 [Peter; February 2021; Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School; Concurrences, “The ‘Ought’ and ‘Is Likely’ of Biden Antitrust,” <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen>]

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

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

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

#### Prevents existential climate disaster.

Moncrief ’11-11 [Aliki; 2021; executive director of Florida Conservation Voters; Orlando Sentinel, “Build Back Better Act would help in climate crisis,” https://www.orlandosentinel.com/opinion/guest-commentary/os-op-climate-change-congress-act-now-20211111-44u6bgyn5fdvnp3eqievkebqpe-story.html]

Last week, Congress passed the Infrastructure Investment and Jobs Act. This bipartisan bill will address upgrades to things like our transportation system, rural broadband, public transit, and clean-water infrastructure. These are badly needed, overdue investments that will make our communities more resilient to the climate impacts we are already seeing. But we know much more is needed.

It’s not enough to just respond to extreme weather — we need to cut the pollution driving it in the first place. That’s why Congress must also pass the Build Back Better Act, the most transformational climate and jobs legislation in our nation’s history. By investing in clean energy and things like electric vehicles and more energy-efficient homes and businesses, we can stop making the problem worse and avoid a growing disaster. We don’t have time for half measures, and Floridians know it — more than 75% of registered voters in the state support bold congressional action on climate change.

The Build Back Better Act takes bold steps to dramatically reduce climate pollution for everyone. But it also centers those who have been disproportionately impacted by this crisis by taking steps to address the decades of unchecked environmental injustice, ensuring at least 40% of the benefits of this bill go to those communities hardest hit by pollution and climate change.

Building a clean energy economy is an investment that will pay dividends for families today and for generations to come. Preventing the most catastrophic hurricanes, floods and heat waves will help ensure that we still bring people from all over the world to our beaches, the Everglades, and every amazing destination across our state that supports our multi-billion dollar tourism industry.

And the robust clean-energy investments in the Build Back Better Act will create millions of good-paying jobs for Floridians in every corner of our state. Florida already ranks fourth in the nation for clean-energy employment, and this legislation would help this industry grow exponentially by tapping into the Sunshine State’s solar power potential.

Orlando has some great members of Congress who understand that climate change is an existential threat to our state and they ran on being a part of the solution to this crisis. Now, we are counting on them to take bold action and pass the Build Back Better Act. This is a win-win-win that creates jobs, lowers energy bills for Floridians, and begins to address the climate crisis at the same time.

## OFF

#### T:

#### ‘Prohibiting’ a practice requires per se illegality.

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

Limits---many standards, requiring distinct answers, make the topic unmanageable.

Ground---fringe standards dodge links and allow bidirectional permissiveness.

## OFF

Labor Law CP:

The United States federal government should

* increase legal presumptions and affirmative defenses to workers under labor law that get triggered when a court finds an employer’s conduct beneficial to consumers but harmful for workers;
* penalize violations with treble damages and escalating civil penalties.

#### The CP expands labor law protections when consumer and labor welfare conflict – solves the aff without watering down antitrust.

Hafiz ’20 [Hiba; March 16; Assistant Professor of Law, Boston College Law School; University of Chicago Law Review, “Labor Antitrust Paradox,” vol. 86 no. 2; KP]

B. Regulatory Sharing Between Antitrust and Labor Law

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

1. Labor antitrust triggers and shared merger enforcement.

Labor-antitrust actions should apply a consumer welfare standard to determine antitrust liability. Yet when a court finds employers’ conduct beneficial to consumers but harmful to workers in either Section 1 or Section 2 cases, that would trigger a “red flag” establishing substantive legal presumptions and affirmative defenses to workers under labor law.114 If plaintiff-enforcers make a prima facie showing of employers’ unlawful agreements or monopsony power, or power to set wages, this would also trigger a “red flag.” The red flag would issue before defendants have an opportunity to rebut “by showing . . . no control over wages,” as others propose,115 because labor markets are naturally monopsonistic and such a rebuttal should not be relevant for labor-law inquiries. It will likely be difficult and costly for plaintiffs to disaggregate employers’ market power from search frictions, information asymmetries, job differentiation, heterogeneous tastes, job-lock, and other market failures that favor employers’ leverage over workers.116 Thus, while an employer may avoid antitrust liability by rebutting evidence of its monopsony power, the source of that power is less relevant in the labor and employment context; if it exists, workers should be entitled to substantive labor-law presumptions and affirmative defenses.

#### Using treble damages and increasing civil penalties solves deterrence.

Kleiner ’10 [Morris M. Kleiner and David Weil; December 2010; professor and AFL-CIO Chair in Labor Policy at the Humphrey School of Public Affairs; Dean and Professor of the Heller School for Social Policy and Management at Brandeis University; National Bureau of Economics Research, “Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies,” working paper no. 16626; KP]

In contrast to other statutes listed in Figure 1, the NLRA’s penalty scheme does not provide for escalating penalties in light of past behavior of an employer or union, nor does it allow for consideration of ancillary impacts (“harms-inflicted” in the terms described above) in setting penalties to better serve deterrence ends—even given a broad reading of 10(c). Brudney’s (2010) mandatory minimum penalty idea and the proposed NLRB policies on interest could possibly redress the fact that individuals are not usually made whole under existing procedures. But it seems a stretch that these changes could sufficiently increase expected penalties to the extent required from a deterrence perspective. In fact, even the substantially increased penalties incorporated into the recently proposed Employee Free Choice Act in the U.S. Congress would reduce, but not close, the yawning gap between the benefits and the costs of noncompliance.45

Footnote starts.

45 The Employee Free Choice Act (111th Congress, H.R. 1409, S. 560) proposes two important changes to NLRA policy. First, it would increase the amount an employer would be required to pay in cases of illegal employee discharge or discrimination during an organizing campaign or first contract drive to become two times back pay in the form of liquidated damages, in addition to the back pay owed (that is, treble damages for violations in these cases). Second, it would create civil penalties of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees’ rights during an organizing campaign or first contract drive. Together, the proposals would move the penalty model underlying the NLRA to one closer approximating the harms-inflicted approach and potentially raise deterrent effects appreciably.

Footnote ends.

## OFF

Advantage CP:

The United States federal government should

* pass the Consumer Protection and Recovery Act;
* exercise the FTC’s Section 5 authority to regulate scamming, trust, and emerging technology;

#### Solves FTC – their ev advocates the CP.

1AC Mermin ’21 [Ted; 2021; Executive Director Center for Consumer Law & Economic Justice UC Berkeley School of Law; Committee on Energy & Commerce Subcommittee on Consumer Protection and Commerce Hearing, “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]

To equip the FTC properly to do its job is a straightforward task, and a serious responsibility of this committee. The Consumer Protection and Recovery Act represents a sensible step forward toward restoring essential protections for all Americans.

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 cases that 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 Magnusson- Moss 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 be returned 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

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 to data security and privacy practices.

**\*\*\*THEIR 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.

#### AND solves emerging tech – their author again!

1AC Spiro ’20 [Michael; December 19; JD from the University of Washington School of Law, an L.L.M. in Innovation and Technology Law from Seattle University School of Law; Seattle Journal of Seattle Journal of Technology Environmental & Innovation Law, “The FTC and AI Governance: A Regulatory Proposal,” vol. 10]

E. The FTC can and Should Exercise its Section 5 Authority

Of particular relevance to emerging technologies, and AI specifically, the FTC has shown itself to be capable of regulating the communication, organizational, and design aspects of new technologies.226 It has acted to protect consumers from privacy and other harms, for example, by notifying commercial firms of their obligation not to act unfairly or deceptively in the design, sale, and use of emerging technologies that interact with consumers.227 In addition to the broad authority to regulate emerging technologies, the FTC’s efforts are further enabled to respond to unfair and deceptive trade practices by the diverse set of tools at its disposal.228

Although much of the FTC’s enforcement activity, vis-à- vis emerging technologies, has been principally in the area of privacy and data protection, there is no reason that the FTC cannot also apply its broad Section 5 authority to machine learning and other automated decision-making processes. During its history, the FTC has repeatedly “recalibrated” how emerging technologies are used to deceive or harm consumers.229 And given its move to assert its authority in regard to the Internet of Things, the FTC does not need any new grant of authority to confront other new technologies.230 Rather, it is enough if a new technology is used in commerce to harm or mislead consumers.231

Indeed, the FTC has begun to address the issue of algorithms in the privacy context.232 Further, the many tools the FTC has – including disclosures and design requirements – can help ameliorate the harms that algorithmic decision-making systems pose.233 The FTC also has looked to hold commercial entities accountable “for design choices that indirectly harm consumers.”234 Because AI often is employed in the backend of systems with no direct consumer interface, this approach offers a potential solution to harms caused by hidden AI. It could also address harms caused by third parties, since those who facilitate “the wrongful conduct of another” will also trigger FTC action under this theory.235

For a trade practice to be unfair, the harm must be substantial.236 The harm can be monetary, but it also may encompass unwarranted health and safety risks.237 Thus, AI technologies that pose such risks can and should meet the unfairness standard.238 Many algorithmic decision-making processes, however, will not fall under this category of harm. Further, trivial, speculative, and “other more subjective types of harm” generally do not constitute an unfair practice.239 Since in many cases it may not be clear the exact extent to which a decision made by an AI system has injured a particular consumer, it may be difficult to establish the requisite level of harm.

On the other hand, notions of what constitute an unfair harm continue to evolve, and there is some indication courts may be open to recognizing more subjective, non-monetary harms under Section 5.240 In addition, the FTC has clarified that a small or incremental injury may constitute sufficient injury if it harms a large number of consumers or if it “raises a significant risk of concrete harm.”241 And even where harms might be incremental for only a single individual, if those harms pose a collective problem, the FTC may still be able to act on them.242 Further, the FTC may consider “the cost to society in general” in determining whether there are countervailing benefits to consumers or competition.243

The FTC’s authority to promulgate rules defining unfair or deceptive acts or practices is limited, and therefore it must enforce its authority indirectly on a case-by-case basis.244 As such, and because it generally lacks the ability to assess civil penalties, the FTC mostly relies on settlements resulting from its enforcement activities to communicate the rules it wants companies to follow.245 In addition, due to staff and budget constraints, the FTC often must rely on informal complaints and self-reporting of potential violations.246 The FTC’s Section 5 authority, furthermore, does not extend to non-profit organizations, common carriers, financial institutions, and certain other entities, nor can it regulate harms committed by consumers in non-commercial contexts.247

**\*\*\*THEIR CARD STARTS\*\*\***

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

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

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

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

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

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

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

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

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

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

## OFF

#### Pharma DA:

#### Integration between pharma and biotech is accelerating, unlocking innovation.

Cancherini ’21 [Laura; April 30; Consultant in McKinsey’s Brussels office; McKinsey, “What’s ahead for biotech: Another wave or low tide?” https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/whats-ahead-for-biotech-another-wave-or-low-tide]

Fundamentals continue strong

When we asked executives and investors why the biotech sector had stayed so resilient during the worst economic crisis in decades, they cited innovation as the main reason. The number of assets transitioning to clinical phases is still rising, and further waves of innovation are on the horizon, driven by the convergence of biological and technological advances.

In the present day, many biotechs, along with the wider pharmaceutical industry, are taking steps to address the COVID-19 pandemic. Together, biotechs and pharma companies have [more than 250 vaccine candidates in their pipelines](https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/on-pins-and-needles-will-covid-19-vaccines-save-the-world), along with a similar number of therapeutics. What’s more, the crisis has shone a spotlight on pharma as the public seeks to understand the roadblocks involved in delivering a vaccine at speed and the measures needed to maintain safety and efficacy standards. To that extent, the world has been living through a time of mass education in science research and development.

Biotech has also benefited from its innate financial resilience. Healthcare as a whole is less dependent on economic cycles than most other industries. Biotech is an innovator, actively identifying and addressing patients’ unmet needs. In addition, biotechs’ top-line revenues have been less affected by lockdowns than is the case in most other industries.

Another factor acting in the sector’s favor is that larger pharmaceutical companies still rely on biotechs as a source of innovation. With the [top dozen pharma companies](https://www.mckinsey.com/business-functions/m-and-a/our-insights/a-new-prescription-for-m-and-a-in-pharma) having more than $170 billion in excess reserves that could be available for spending on M&A, the prospects for further financing and deal making look promising.

For these and other reasons, many investors regard biotech as a safe haven. One interviewee felt it had benefited from a halo effect during the pandemic.

More innovation on the horizon

The investors and executives we interviewed agreed that biotech innovation continues to increase in quality and quantity despite the macroeconomic environment. Evidence can be seen in the accelerating pace of assets transitioning across the development lifecycle. When we tracked the number of assets transitioning to Phase I, Phase II, and Phase III clinical trials, we found that Phase I and Phase II assets have transitioned 50 percent faster since 2018 than between 2013 and 2018, whereas Phase III assets have maintained much the same pace. There could be many reasons for this, but it is worth noting that biotechs with Phase I and Phase II assets as their lead assets have accounted for more than half of biotech IPOs. Having an early IPO gives a biotech earlier access to capital and leaves it with more scope to concentrate on science.

Looking forward, the combination of advances in biological science and accelerating developments in technology and artificial intelligence has the potential to take innovation to a new level. A [recent report](https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/the-bio-revolution-innovations-transforming-economies-societies-and-our-lives) from the McKinsey Global Institute analyzed the profound economic and social impact of biological innovation and found that biomolecules, biosystems, biomachines, and biocomputing could collectively produce up to 60 percent of the physical inputs to the global economy. The applications of this “Bio Revolution” range from agriculture (such as the production of nonanimal meat) to energy and materials, and from consumer goods (such as multi-omics tailored diets) to a multitude of health applications.

#### Antitrust law is a battering ram for innovation and chills patent stability.

Mosoff et al. ’19 [Adam, Kristen Osenga, Randall Rader, Mark Schultz, and Saurabh Vishnubhakat; January 28; Professor of Law at George Mason University; Regulatory Transparency Project, “How Antitrust Overreach is Threatening Healthcare Innovation,” <https://regproject.org/paper/how-antitrust-overreach-is-threatening-healthcare-innovation/>]

II. The FTC’s Heavy-Handed Meddling Upsets the Delicate Balance Between Branded and Generic Drug Companies, Hindering Innovation and Harming Consumers

Since the late 1990s, the FTC has devoted substantial resources to combating what it views as anticompetitive behavior on the part of drug companies in the healthcare market. The FTC has interposed its scrutiny even where the FDA has approved drugs and when the branded and generic companies have decided a legal fight is no longer worth having. The FTC’s meddling restricts behavior that is lawful under the Federal Food, Drug, and Cosmetic Act (FDCA). The FTC’s meddling also usurps the regime Congress carefully crafted for resolving patent disputes between branded and generic drug companies.

The FTC has devised a series of novel theories to justify treating lawful behavior as anticompetitive and worthy of enforcement action and legislative changes. These theories have been adopted—and adapted—by state antitrust enforcers as well as private antitrust plaintiffs. The FTC has conducted industry-wide investigations and prepared massive reports on supposed anticompetitive conduct to recommend legislative changes despite neither the branded nor generic drug industry seeking such changes. These changes to the law would restrict or punish patent owners and even patent challengers. The FTC has, on its own initiative, made the already volatile world of drug development more uncertain and more hostile, ultimately resulting in less innovation and fewer choices for consumers in the short term (e.g., generic options) and long term (e.g., new drugs).

The FTC’s aggression extends to the courtroom. For nearly two decades, the FTC and other antitrust plaintiffs have attacked patent settlements reached by branded and generic drug companies. As explained above, the regulatory scheme for new drugs gives rise to an unusual type of patent litigation in which the generic drug company—the defendant—is not at risk of money damages for infringement because litigation generally occurs before the generic drug has obtained FDA approval and enters the market. Because of this unusual arrangement, where each side had to yield something of value to the other at the settlement table, a patent owner occasionally pays a settlement to the defendant (rather than forgiveness of damages, which is typically not an option) in exchange for the defendant agreeing to slightly delay the launch of its generic drug. Other considerations, such as the generic company agreeing to source materials from the branded company or other business or research partnerships, are not uncommon.

Beginning in the 1990s, the FTC took the position that such settlements were a categorically illegal restraint of trade. Courts did not agree, as modern antitrust jurisprudence recognizes that declaring something categorically illegal in the absence of more facts and details is dubious. Courts generally concluded that a settlement within the scope of the patent—where the defendant agreed to remain off the market no more than already required by the patent but perhaps longer than a successful court challenge—did not itself violate the antitrust laws. Yet the FTC persisted in arguing its position to the Supreme Court. In the 2013 Actavis case, the Supreme Court declined the FTC’s invitation to find reverse payment settlements categorically anticompetitive, ruling instead that these settlements must be evaluated under antitrust law’s “rule of reason,”, which is a detailed look at all the relevant facts and circumstances of the individual case.7 Still undeterred in the wake of Actavis, the FTC continues to argue that a variety of patent settlements are anticompetitive and accuse district courts of misinterpreting Actavis.

The FTC’s basic position is that antitrust scrutiny is triggered when the patent owner offers anything of value beyond the litigation expenses that settlement would save. Any patent owner who tries to entice a generic competitor to settle by offering anything more than litigation costs is treated suspiciously by the FTC. Even if the settlement is a complex corporate transaction that involves manufacturing and promotion deals or other products—where both parties might benefit beyond merely the ending of a lawsuit—the FTC’s basic position is to presume an antitrust violation.

Not surprisingly, the FTC’s overzealous actions against drug makers make it very difficult to settle pharmaceutical patent litigation without branded and generic drug companies both expecting an antitrust case, which may itself end up effectively revisiting the patent issues the parties sought to move beyond by settling. Companies still try to craft agreements that eliminate the risk that both face in litigation while ensuring that generic market entry occurs well before patent expiry, but no matter the terms, the FTC stands ready to argue that the companies should not have settled. In the end, these parties seem to want patent litigation cases to continue to final judgment, even when this is not in the interest of the branded companies, generic drug companies, consumers or the federal court system.

The FTC has also started to interfere with the ordinary cycle of incremental innovation in the drug industry. Incremental drug innovation is both commonplace and can be medically important. New dosage forms and routes of administration can make life-sustaining drugs easier to administer to new populations. New formulations, such as extended release formulations, can simplify dosing, thus increasing patient compliance.

In recent years, however, the FTC has targeted these patents. The chief complaint advanced by the FTC is that incremental innovations are trivial advances and do not deserve patent protection. Where the branded company replaces an older version of its product with the patented new version, the FTC accuses the branded company of “product hopping” to force the market to move to new drugs. The problem with this argument is threefold. First, these innovations have satisfied the requirements of the Patent Act. Second, if they are indeed trivial, the patents will likely be held invalid in federal court when challenged by generic competitors.  Third, if the branded company’s new product does not provide better outcomes, insurers are unlikely to cover the product and will instead require a patient to use the generic version of the branded company’s first product. The FTC’s actions are thus a solution in search of a problem.

Conclusion

The FTC’s goals may be well-intentioned, but its intrusion into domains that other, more expert agencies already oversee and comprehensively regulate is troubling. By substituting its own agenda for the business judgment of sophisticated parties in the marketplace, the FTC has overreached its proper role and begun to disrupt the cycle of investment, product development, recoupment, further incremental advancement, and risk management that drives the creation of new drugs that save lives and promote greater public health.

#### Innovation optimizes synthetic biology – extinction.

Karoui et al. ’19 [Meriem, Monica Hoyos-Flight, and Liz Fletcher; August 7; Centre for Synthetic and Systems Biology in the School of Biological Sciences at the University of Edinburgh; Innogen Institute in the School of Social and Political Sciences at the University of Edinburgh; Frontiers, “Future Trends in Synthetic Biology—A Report,” <https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full>]

Tackling Risk

Synthetic biology is an example of a dual-use technology: it promises numerous beneficial applications, but it can also cause harm. This has led to fears that it could, intentionally or unintentionally, harm humans or damage the environment. For example, there is huge value in our ability to engineer viruses to be more effective and specific shuttles for gene therapies of devastating inherited disorders; however, engineering viruses may also lead to the creation of even more deadly pathogens by those intent on harm.

“Synthetic biology should be regarded as an extension of earlier developments and technologies”

Some would argue that synthetic biology poses an existential risk and needs to be treated with extreme caution. However, many new technological advances across the decades have met similar concerns. The uncertainty and remote possibility of such risks could hamper the development of useful technology. Scientists, their host institutions and funding bodies should (and indeed already do) consider whether the research planned could be misused. Measures that reduce the likelihood of misuse and its consequences should be implemented and clearly communicated. The synthetic biology community needs to be aware of, and respond to, these challenges by engaging in horizon scanning exercises as well as open dialogue with regulatory bodies and the media.

“Don't avoid risk – manage it”

Being more open about risks, and how they are controlled, provides an opportunity to shift discourse toward the benefits of synthetic biology in addressing urgent global needs, such as the production of biofuels, food security and more effective medicines, and potentially improve public acceptance.

“The questions should not be ‘what’s the next big thing for synthetic biology' but ‘where is the greatest unmet need’.”

Despite the efforts by individual countries to establish synthetic biology research roadmaps, broader, international agreement on common standards (and red lines) across the field may help establish trust and to advance the best pre-competitive research into useful applications.

Meeting participants highlighted the importance of training in responsible research conduct and ethics. Given students' future role as science ambassadors and influencers, their training should not only convey skills and knowledge but also awareness and critical thinking about the prospects and potential for dual use of synthetic biology. All researchers must remain vigilant regardless of the many pressures and distractions of running a successful research lab; they may not have specialist training in identifying the risks of misuse but they are the people best placed to maintain informed oversight of risks.

One example of current synthetic biology research with potential dual use is gene drive technology, which can be used to propagate a particular suite of genes throughout a population. The benefits of using gene drive technology include the eradication of disease-carrying insect populations and the elimination of invading pest species but it has raised concerns about the unintended ecological impacts of reducing or eliminating a population ([Callaway, 2018](https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full#B5); [Collins, 2018](https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full#B9)).

Similar release concerns surround research that is harnessing the ability of pathogens to target particular tissues in the body or particular chemicals in the environment, which could greatly aid efforts to deliver targeted therapies or clean-up contaminated sites. To date, such large-scale release for environmental bioremediation interventions has not been possible.

“We need to mind the gap between R&D scale up and communications …. One bad blog can kill a commercial product”

There was consensus that the need for regulation over this community remains important. Regulation needs to keep up to speed with the emerging technologies and should focus on the product rather than the process used to create it ([Tait et al., 2017](https://www.frontiersin.org/articles/10.3389/fbioe.2019.00175/full#B34)). Unsuitable regulatory frameworks (as well as unfavorable public perception) could discourage private sector investment in synthetic biology.

## OFF

#### Small Business CP:

#### The United States federal government should

* create a Small Business Board program operated by the Small Business Administration,
* and encourage and match state contributions for the creation of subnational industry-wide Small Business Boards.

#### A network of Small Business Boards solves the case without antitrust expansion.

Atkinson ‘21 [Robert; 4/5/21; Founder and President of the Information Technology and Innovation Foundation, Ph.D. in City and Regional Planning from the University of North Carolina; Michael Lind; professor of practice at the Lyndon B. Johnson School of Public Affairs at the University of Texas, J.D. from the University of Texas Law School, M.A. in International Relations from Yale University; "Small Business Boards: A Proposal to Raise Productivity and Wages in All 50 States and the District of Columbia," https://itif.org/publications/2021/04/05/small-business-boards-proposal-raise-productivity-and-wages-all-50-states]

The crisis of pay in the United States is also a crisis of productivity. Low-paying jobs tend to be concentrated in non-exportable, domestic service sectors such as hospitality, nursing care, retail, restaurants, and construction.1 These sectors are dominated by small local firms in markets in which intense competition incentivizes employers to pay the lowest possible wages and provide few if any benefits. An alternative would be for these companies to develop innovative technology and new business models in order to boost firm productivity, thereby permitting both higher profits and higher wages and benefits for workers. But their low profit margins prevent many small businesses from investing in productivity-enhancing technology. The result is these sectors, which account for large numbers of firms and workers in the American economy, being trapped in a low-wage/low-productivity equilibrium, from which none by itself can escape.

To break this low-wage/low-productivity equilibrium in the most technologically laggard and poorest-paying sectors, there are two options. One is the replacement—through acquisitions or market-share loss—of many small firms with larger firms that can exercise at least some market power, enjoy economies of scale, and recycle higher net revenues into research and development (R&D), capital deepening, and higher wages.2 But this might not happen on its own, in part because small business now receives significant incentives and protections that enable them to keep their existing market share even though they are generally less productive.3 In addition, America’s political culture, unlike those of some other nations, would prevent the government from either incentivizing or ordering the merger of small and inefficient firms—a policy that would be demonized by many in the progressive antitrust movement, which seeks to break up big, efficient firms.

The other option is to allow firms to remain small or medium-sized, while at the same time helping them to reap at least some economies of scale and scope in areas such as R&D, investment, marketing, and the purchase of health insurance for workers by means of collaboration among most or all the firms in their sector. To prevent free riding, government must not only allow, but in some cases mandate, limited collaboration among numerous small and medium-sized firms for legitimate purposes. In other words, to maximize economic benefits for firms, workers, and the economy overall, some collective action is needed. As economist Paul Romer noted, “The lesson from economic growth is that collective action is very important and that everything, including institutions, can always be improved.”4

To that end, we propose creating a new Small Business Board (SBB) program, which would be operated by the Small Business Administration to increase productivity and raise wages in small firms. In return for matching grants from the federal government combined with state funding, each of the 50 states and the District of Columbia would be encouraged to create industry-wide SBBs, beginning with pilot projects in the least-productive and lowest-paying non-traded local service sectors. If at least half of the firms in the sector voluntarily agreed to a program, the state government, in partnership with the federal government, would help structure such a program and support joint inter-firm activities. In these cases, all the firms licensed to do business in a particular sector in the state, while competing in other areas, would be required to participate in the program. Depending on the sector, this might involve joint technology sharing; collaboration in R&D; production technology modernization; targeted investments to improve productivity of individual firms; marketing; minimal wage, benefit, and working-condition standards; vocational training; and health insurance and defined-contribution retirement plans for all workers.

The proposed SBB program is modeled on existing federal programs with records of success going back over a century. In the Agricultural Marketing Agreement Act of 1937, Congress allowed procedures for establishing arrangements called “marketing orders,” to be overseen by the Department of Agriculture. Congress also authorized the creation of the agricultural extension service and more recently a Manufacturing Extension Program (MEP) run by the National Institute of Standards and Technology (NIST). The federal government has supported technology research consortiums, such as Sematech, which were provided with exemptions from antitrust law with the passage of the 1984 Cooperative Research and Development Act, the SBA’s small business investment company (SBIC) program, and the combination of federal matching grants and state funding for joint federal-state programs such as Medicare. The Prescription Drug User Fee Act (PDUFA) raised the fees drug companies pay to the Food and Drug Administration (FDA) to enable the agency to hire additional review personnel.5

All that is needed in order to raise productivity and wages in many of the least-healthy sectors of the American economy is to apply the same approaches that have already succeeded elsewhere.

## Inequality

### 1NC – Turn

#### Concentration down and no impact to ‘market power’.

Atkinson ‘10/18 [Robert; 10/18/21; Founder and President of the Information Technology and Innovation Foundation, Ph.D. in City and Regional Planning from the University of North Carolina; "No, Monopoly Has Not Grown," <https://www.nationalreview.com/2021/10/no-monopoly-has-not-grown/>]

Over the past several years, advocates of much stricter antitrust laws and enforcement have grounded their case on a simple claim: U.S. industry concentration (monopoly) has increased to crisis proportions and the only solution is a radical overhaul of our nation’s antitrust laws, imposing much stricter limits on mergers and breaking up leading companies.

There is only one problem: Concentration has not increased, even though the “fact” of rising concentration has been picked up by a large number of pundits and commentators. The Economist got the ball rolling in 2016, concluding that two-thirds of the economy’s roughly 900 industries had become more concentrated between 1997 and 2012. Paul Krugman writes that “growing monopoly power is a big problem for the U.S. economy.” The anti-business advocacy group Open Markets refers to “America’s concentration crisis.” And now leading politicians parrot the claims. Senator Amy Klobuchar (D., Minn.), chair of the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights, states: “We are seeing higher levels of market concentration across our economy.” Congressman David Cicilline (D., R.I.), chair of the House Antitrust Subcommittee, warns that America has a “monopoly problem.” And new Federal Trade Commission chair Lina Khan alleges that the United States faces a “sweeping market power problem.”

You’d think that pundits, advocates, and public officials would make some attempt to rely on data. But alas, that is not the case. The definitive source of data to measure economic concentration comes from the U.S. Census Bureau’s newly released 2017 Economic Census data for over 850 industries, from cane-sugar manufacturing to cable-TV providers. Comparing data from 2017 (the most recent year for which figures are available) and 2002 shows what has really happened with industry concentration. And the data are quite clear: This is much ado about little.

Just 35 of 851 industries are highly concentrated, with the top four firms’ sales accounting for more than 80 percent of industry sales (this is called the C4 ratio). In 2002, 62 percent of industry output was from industries with low levels of concentration (a C4 ratio below 50 percent), but by 2017, 80 percent of industries had low concentration. Moreover, of the 115 industries with a C4 ratio of 60 percent or more in 2002, the majority got less concentrated. Overall, the average C4 ratio for American industry increased only slightly, from 34.3 percent to 35.3 percent.

In addition, many highly concentrated industries, such as luggage and leather-goods stores (a C4 ratio of 81 percent), performing-arts companies, geothermal power generation, and paint and wallpaper stores, all face significant competition from firms in other industries, such as movie theaters, department stores, and natural-gas power generation. Moreover, over those 15 years, imports as a share of GDP have increased, adding even more competition in many sectors. And technology has created new competitors in different industries. Satellite radio and smartphones now compete with over-the-air radio stations, for example.

Anti-corporate populists have taken particular aim at “Big Tech.” However, of the 135 advanced-technology industries, only eight have C4 ratios above 80, with a majority of sectors becoming less concentrated by 2017. And most sectors still face tough competition. For example, even with the rise of Amazon, the C4 ratio of electronic shopping and mail-order houses increased, but only from 24 percent to 37 percent.

Finally, even in sectors where concentration grew to high levels, consumers usually benefited. The C4 ratio in the wireless-telecommunications industry increased from 63 percent to 86 percent. But industry productivity grew 84 percent faster than economy-wide productivity, while capital-investment rates doubled and nominal prices fell by 31 percent from 2011 to 2020.

But surely firms in the few concentrated industries must be making huge profits and jacking up prices, right? In fact, prices rose less from 2002 to 2017 in industries with higher levels of concentration than did the overall producer price index. And looking at the 80 industries for which both IRS profit data and Census Bureau concentration data were available, it turns out that there is no statistical relationship between profits and concentration. This is consistent with the finding that U.S. non-financial domestic business profits were no higher in the few years before COVID than in the late 1970s, when antitrust regulations were supposedly more vigorously enforced.

As Daniel Patrick Moynihan once famously stated, everyone is entitled to his own opinion, but not his own facts. It is time for the debate about “monopoly” and industry concentration to be grounded in facts.

#### It protects labor and buyer power – expansion undermines industry competition

Kennedy ’18 [Joe; 2018; Ph.D. in Economics from George Washington, former Chief Economist with the U.S. Department of Commerce; Information Technology and Innovation Foundation, “Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy,” <https://www2.itif.org/2018-consumer-welfare-standard.pdf?_ga=2.192427434.1418038939.1629691609-110184707.1628807018>]

A key criticism of the consumer welfare standard is it ignores buyer power—whether of labor or goods. Marshall Steinbaum et al. have criticized Walmart and other big retailers for squeezing small suppliers.28 Others argue that big companies are exerting monopsony power within labor markets.29 Carl Bogus, for example, complains that after a merger, “workers at all levels face a reduction in potential employers.”30

There are two possibilities here. One is the case in which, because of anticompetitive behavior or a merger, a company gets monopsony power over a specific market and uses it to engage in deliberate anticompetitive acts to harm suppliers, including labor. These cases can create harms even though the company is a buyer rather than a seller. The other is the general argument that every time a company merges there is one fewer potential buyer or employer (but not necessarily less demand or fewer jobs). It is clear the consumer welfare standard covers the former cases, because in reality, “consumer” is just a convenient substitute for “counterparty.” A report put out by the American Antitrust Institute, which favors tougher antitrust policy, points out: “[C]onsumer welfare” does not mean that antitrust protects only consumers. It protects all buyers, including companies, from seller market power. Antitrust also protects sellers from being exploited by powerful buyers and it promotes open markets and entrepreneurial freedom. Moreover, properly conceived, consumer welfare takes into account not only effects on price and output, but also product or service quality and innovation.31

In a recent article, Herbert Hovenkamp and Carl Shapiro stated: “As we use this term, applying the ‘consumer welfare’ standard means that a merger is judged to be anticompetitive if it disrupts the competitive process and harms trading parties on the other side of the market.”32

Existing competition policy also applies not just to monopsony, but to anticompetitive behavior toward suppliers, whether businesses or workers. For example, when a company takes specific action to limit competition within the labor markets, antitrust laws apply. In 2010, the Department of Justice (DOJ) filed a civil antitrust complaint against six hightech companies that had agreed not to cold call one another’s employees but used other means to attract workers.33 A class action suit resulted in a recovery of $415 million.34 Earlier this year, the Department sued two railroad equipment suppliers for entering into agreements not to solicit each other’s employees.35 A joint document by the two leading antitrust agencies clearly states, “The DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other’s employees.”36 More recently, several national fast-food chains dropped the practice of using noncompete agreements after being challenged by a group of state attorneys general. 37

#### Reforming the consumer welfare standard harms economic growth.

Muris ‘19 [Timothy; 3/20/19; Foundation Professor of Law at George Mason University, former Chairman of the Federal Trade Commission, J.D. from University of California, Los Angeles; Jonathan E. Nuechterlein; former General Counsel at the Federal Trade Commission, J.D. from Yale Law School. Partner and Co-Lead of Telecom & Internet Competition Practice at Sidley Austin LLP; "Antitrust in the Internet Era: The Legacy of United States v. A&P," Review of Industrial Organization, Volume 54, p. 651-681]

Increasingly one hears that current antitrust doctrine is ill-equipped to address the competitive dynamics of the internet age and should be fundamentally altered to address the putative “monopoly” power of large technology companies: The Economist, normally a beacon of journalistic sobriety, worries that internet “titans— Alphabet (Google’s parent company), Amazon, Apple, Facebook and Microsoft— look unstoppable.… Old ways of thinking about competition, devised in the era of oil, look outdated in what has come to be called the ‘data economy.’… A new approach is needed.”1 Various advocacy groups call for a dramatic overhaul of antitrust doctrine.2 Senate Democrats vow to “revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses— come[s] before big corporations.”3 And on the other end of the political spectrum, the American Conservative urges its readers “to break from the principles of free market fundamentalism” and join “in a bipartisan war” against “modern-day robber barons” on the West Coast.4

These proposals to overhaul antitrust doctrine share a few key attributes: First, advocates of radical change express nostalgia for 1960s antitrust, when the field had no clear objectives and cases were decided on impressionistic notions of “fairness.” During that pre-economic era, conduct was punished and mergers blocked simply because they disadvantaged competitors, even if they also increased consumer welfare.5

Second, the critics identify modern antitrust with “the Chicago School,” which they lampoon and excoriate. Barry Lynn writes in the Nation: “A generation ago, when a small crew within the Reagan administration set out to clear the way for a radical reconcentration of power, they did so not by openly assailing our antimonopoly laws but by altering the intellectual frames that guide how we enforce them.… [T]he new goal was ‘efficiency.’ Rather than protect the ‘opportunity’ of the citizen producer, the new goal was to promote the ‘welfare’ of the ‘consumer.’”6 According to Lynn, these developments were somehow malign.

Third, the adherents of this new movement argue that so-called “tech giants need to be cut down to size, immediately,” because they are “killing competitors and other industries” and are poised to “destroy … democracy itself.”7

This article exposes the intellectual void at the heart of this populist antitrust movement. In Part 1, we begin by following Justice Holmes’ tenet that “a page of history is worth a volume of logic.”8 More than 80 years ago, the A&P grocery chain was a vertically integrated retailer that made use of unprecedented scale and innovation to offer consumers a wider range of products than the competition and at lower prices. Like today’s leading online companies, A&P was exceptionally popular with consumers, which made it harder for smaller rivals to maintain their margins.

Yet A&P’s very popularity triggered a backlash. First, Congress passed the nownotorious Robinson–Patman Act to handicap A&P and other growing chain stores. Then the Justice Department criminally prosecuted A&P and its senior executives for offering consumers too good a deal; and, having secured their convictions, the Justice Department filed another case to break up the largest and most innovative retailer in American history. Although that case was ultimately unsuccessful, A&P’s management spent years fending off the government’s relentless pursuit, while new companies—not so burdened—ultimately eclipsed it.

This article recounts the attacks on A&P in some detail because, as discussed in Part 2 below, they bear an eerie resemblance to attacks today on leading online innovators. Increasingly integrated and efficient retailers—first A&P, then “big box” brick-and-mortar stores, and now online retailers—have challenged traditional retail models by offering consumers lower prices and greater convenience. For decades, critics on the right and left have reacted to such disruption by urging Congress, the courts, and the enforcement agencies to stop these American success stories by revising antitrust doctrine to protect small businesses rather than the interests of consumers. Using antitrust law to punish pro-competitive behavior makes no more sense today than it did when the government attacked A&P for offering consumers too good a deal on groceries.

Finally, as discussed in Part 3, antitrust doctrine does not need an overhaul. It is shaped by many economic perspectives, follows no one “School,” and is flexible enough to address any monopoly abuses in the twenty-first century.9 It is also well calibrated to serve its central function: promoting consumer welfare. It does so not only by prohibiting conduct that harms consumers in the long run, but also by avoiding interference with conduct that might appear problematic to non-economists but that demonstrably benefits consumers over time.

The advocates of doctrinal overhaul cannot show that consumers would benefit if we ripped up the current antitrust rulebook and replaced it with a more impressionistic “big is bad” doctrine. They argue instead that antitrust should be redesigned to promote objectives in addition to (and often in conflict with) consumer welfare, such as protecting existing jobs from dislocation, preserving the profit margins of inefficiently small businesses, and shielding the political system from influence by large corporations. But it is folly to pursue those non-consumer-oriented objectives, whatever their policy merits, through case-by-case antitrust litigation. Doing so would harm consumers, offer little guidance to successful businesses, hinder economic growth, and make antitrust enforcement more subjective and susceptible to charges of political manipulation.

### 1NC – Labor Power High

#### Labor power high – post pandemic labor shortage and demographic trends.

Irwin ’21 [Neil; June 5; senior economics correspondent; New York Times, “Workers Are Gaining Leverage Over Employers Right Before Our Eyes,” <https://www.nytimes.com/2021/06/05/upshot/jobs-rising-wages.html>; KP]

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 by the Federal Reserve Bank of New York.

Employers are feeling it: A survey 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, 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.

#### Wages are at historic highs.

Domm ’21 [Patti; May 22; CNBC Markets Editor, responsible for news coverage of the markets and economy; CNBC; “Workers’ wages are rising at the fastest pace in years. Companies’ profits could take a hit,” <https://www.cnbc.com/2021/05/22/wages-rise-at-the-fastest-pace-in-years-firms-profits-could-take-a-hit.html>; KP]

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

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

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

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

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

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

### 1NC – Antitrust Fails

#### Antitrust unnecessary and ineffective for resolving inequality.

Gotts ‘18 [Ilene Knable; February 2018; J.D. from Georgetown University Law Center, antitrust partner at Watchtell, Lipten, Rosen & Katz, recognized as one of the world’s top antitrust lawyers by the Euromoney’s Women in Business Law Lifetime Achievement Award; "Back to the Future: Should the “Consumer Welfare” Standard Be Replaced in U.S. M&A Antitrust Enforcement?" Antitrust Review, Volume 1, p. 1-31]

But what does income inequality have to do with antitrust enforcement generally, and with M&A activity specifically? Some Progressive think tanks, scholars, advocates, and others have issued reports blaming inadequate antitrust enforcement for high profits, concentration, and, ultimately, inequality effects.68 University of Chicago Economics Professor Luigi Zingales similarly has indicated that there is “a direct connection between economic power, bigness, and political power.”69 The University of Chicago’s Booth School of Business held a conference in March 2017, entitled “Is There a Concentration Problem in America?.” Many of the speakers at the conference endorsed the need for antitrust enforcement to be strengthened: The Economist article on the conference is accurately entitled “The University of Chicago worries about a lack of competition. Its economists used to champion big firms, but the mood has shifted.”70

So, too, did the Obama Administration’s leaders of the antitrust authorities express concerns. For instance, Renata Hesse, while Acting Assistant Attorney General (“AAG”) in September 2016, said that the “legislative history of the Sherman Act makes it clear that the antitrust laws were intended to benefit participants in the American economy broadly—not just in their capacity as consumers of goods and services.”71

The data may not actually support the claim that increased concentration is the source of political and economic inequality. More fundamentally, as DOJ economist Greg Werden and Vanderbilt University Economics Professor Luke Froeb point out, none of the Progressive advocates have demonstrated increased concentration of antitrust cognizable markets, but instead make these claims based on data that are far too aggregated.72 In addition, Werden and Froeb indicate that, even where market concentration has increased, that does not mean that there has been a failure of antitrust law or its enforcement; market concentration naturally increases when the most innovative and efficient firms grow, and correlates with the conclusions on concentration, as well as whether such an increase in concentration necessarily proves a decline in competition.73 However, assuming that both of the concentration concerns were true, Professor Carl Shapiro indicates:

Antitrust policy can address concerns about rising concentration and high corporate profits

(a) by increasing cartel enforcement efforts; (b) by imposing tighter controls on mergers; and (c) by taking a tougher approach to exclusionary conduct by dominant firms. Looking at competition policy more broadly, additional tools can come into play: (d) adopting policies that reduce entry barriers;74 (e) actively breaking up large firms in concentrated markets;75 and (f) regulating firms deemed to have substantial market power.76

Professor Shapiro stops short of suggesting that the last three of these actions be undertaken as a part of antitrust enforcement.

Professor Herbert Hovenkamp further argues that an antitrust policy that focuses on wealth inequality could actually harm consumers.77 For instance, a policy that condemned firms that produce lower prices or higher quality than rivals might “improve” distribution of wealth or protect smaller competitors, but at what cost to consumers? Or, for that matter, at what cost to the creation of new jobs from the increased output achieved by the efficient firm?

### 1NC – AT: Inequality

#### Inequality is statistically insignificant – there’s zero need for antitrust.

Wright et. al ‘19 [Joshua D., Elyse Dorsey, Jonathan Klick, and Jan M. Rybnicek; University Professor and Executive Director, Global Antitrust Institute at Scalia Law School; Attorney Advisor to Commissioner Noah Joshua Phillips, United States Federal Trade Commission; Professor of Law, University of Pennsylvania; Counsel in the antitrust, competition, and trade practice of Freshfields, Bruckahus Deringer LLP; Arizona State Law Review, “REQUIEM FOR A PARADOX: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” vol. 51; KP]

2. The Empirical Evidence: Is Inequality Really Growing?

All of the papers discussed above assume that inequality has increased in recent years. This view is fairly common among economists and would seem to be borne out as seen in Figure 2 below, which presents the Gini coefficient for U.S. incomes for the last fifty years.166

Chart, line chart

Description automatically generated

Figure 3, which plots the ratio of the share of US income among the fifth quintile of income-earning households to the share among the first quintile of households167 tells a similar story.

Chart, line chart

Description automatically generated

Robert Kaestner and Darren Lubotsky underscore the point that inequality measures can be significantly affected by a failure to account for government transfers and employee benefits that presumably substitute for cash income.168 Given that healthcare costs have grown faster than inflation in recent years, a failure to account for health insurance benefits could significantly affect economic inequality measures. Reviewing estimates from the literature, Kaestner and Lubotsky find that including health insurance substantially reduces the gap between incomes at the high end of the distribution and those at the low end.169 Interestingly, however, the authors find that there is still an upward trend in inequality over time when the cash equivalent of health insurance and government transfers are included.170 The trend, however, is substantially muted.171 Specifically, including government transfers and the imputed value of employer subsidized health insurance, Kaestner and Lubotsky indicate that the ratio of income between households at the ninetieth percentile and the tenth percentile was about five in 1995, growing to 5.2 in 2004 and to 5.6 in 2012.172

Although yearly estimates of this more complete measure of income inequality are not available, and the time series span is somewhat limited, another approach might be to examine consumption inequality since consumption will be a function of effective income, and consumption data are more readily available. Also, consumption might be a better measure of welfare as argued by Bruce Meyer and James Sullivan.173 When determining the desirability of antitrust enforcement to address economic inequality, presumably one not only wants to examine the indirect effects on people’s incomes and wealth, but also the direct effect on consumer welfare, for which consumption might be a useful proxy.

Considering the arguments raised above regarding the desirability of using antitrust to fight inequality, one might reason that higher prices coming from increased concentration make both the well-off investors and executives and the lowly consumer worse off, but the investors and executives are compensated through high incomes due to their monopoly profits. Under these arguments, we should see an upward trend in the consumption ratio between the haves and the have-nots. Figure 4, which uses data on average consumption by households in the various income quintiles from the Bureau of Labor Statistics Consumer Expenditure Survey,174 shows that while the ratio has grown over time, the growth is much smaller than that found for income itself. Further, unlike income, the growth is not nearly as consistent with periods of increasing inequality and decreasing inequality alike.

Chart, line chart

Description automatically generated

Based on potentially better (i.e., more complete) measures of income and better metrics of welfare (i.e., consumption), perhaps the concerns raised in the papers discussed above are a little overblown. If so, perhaps the calls for a ramp-up of antitrust enforcement are not justified (at least on inequality grounds). That said, even by these measures, it appears inequality is growing, albeit slightly; therefore, it is worth discussing whether there is any association between antitrust enforcement and inequality.

### 1NC – AT: Data

#### Their studies manipulate statistics, ignore local and global levels, and falsely assume antitrust enforcement is causal.

Atkinson ‘21 [Robert; 3/10/21; Founder and President of the Information Technology and Innovation Foundation, Ph.D. in City and Regional Planning from the University of North Carolina; "How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine," https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new]

Neo-Brandeisians have spent that last decade promulgating a series of myths related to the industrial organization of big companies in order to paint as dire a picture as possible. As we noted in ITIF’s “Monopoly Myths” series, most of these claims are either wrong or significantly overstated.14 The problem, however, is that in the echo chamber that pretends to be objective policy discourse, these ideas have by and large become conventional wisdom, even among non-Brandeisians—which is precisely what neo-Brandeisians want. For example, we all know that an increase in economic concentration causes a decline in start-ups; the fall in the share of income going to labor is caused by concentration; price markups, profits, and concentration have skyrocketed; “superstar” firms only exist from predation; and Big Tech creates “innovation kill zones.” The problem is all of these claims are either wrong or vastly overstated.

Myth 1: Industry Concentration Levels Have Increased to Dangerous Levels15

The core argument neo-Brandeisians have relied on to move the Overton window is that lax antitrust enforcement has led to market concentration rising to dangerous levels, and in turn leading to a decline in competition.

Yet, when looked at more closely, the problem is far less serious than the broad pronouncements would suggest. Despite the measured rise in concentration in some industries (at least from 2002 to 2012, the last year of government-provided data), in the vast majority of markets, it remains well below the levels that would normally trigger antitrust concern. Moreover, while concentration has grown in many industries, that growth is usually from very low to low levels. Census data from 2002 and 2012 shows 792 six-digit NAICS (North American Industry Classification System) industries (out of approximately 1,066 total industries) for which a percentage change between the two years could be calculated. Of these, the market share of the top 4 companies either fell or remained constant in 319 industries (40 percent). Another 116 showed an increase of 10 percent or less. Of the 473 industries where concentration increased, the C4 market share remained less than 20 percent in 142 industries and under 40 percent in 281 industries. Only 95 industries saw an increase in concentration that produced a C4 of 60 percent or more (and even at 60 percent, if each firm held an equal market share, this would mean each firm had just 15 percent of the market) and of these, just 45 had increases of more than 10 percentage points.

But there are measurement issues as well. For one thing, most studies often use an inappropriately broad definition of “the market,” and omit the role of imports that reduce concentration. Second, most look only at national concentration levels, when many markets are local in nature. Recent studies conclude that concentration in most local markets has been steady, or even falling. Third, a certain degree of concentration can be good. Rather than leading to a decline in competition, it may result in increased competition in which more productive firms increasingly gain market share over their less-productive and less-innovative rivals.

Finally, the definition of relevant markets for antitrust purposes has continuously been criticized and questioned as being excessively narrow and out of touch with market realities. Indeed, relevant product markets are defined as narrowly as possible to make any company with a certain market power look like a monopolist. Equally, geographically relevant markets are drawn so narrowly that global competition is often overlooked. And potential competition with dynamic entry does not represent a sensible criterion for market definition, contrary to competitive constraints exerted on the market. Consequently, neo-Brandeisians want to narrow the definition of relevant markets to the smallest possible size (only one firm), contrary to academic antitrust literature, which advocates for broader and more-accurate market definitions. Once labeled as a monopolist (akin to Brandeis’s mark of Cain), the resulting backlash and techlash can spread even farther, soon followed by antitrust reforms.16

#### Effects of concentration are too small to influence aggregate wages or income inequality.

Schubert et al. ‘21 [Gregor; 1/18/21; Ph.D. Candidate in Business Economics at the Harvard Economics Department and the Harvard Business School; et al.; "Employer Concentration and Outside Options," https://scholar.harvard.edu/files/stansbury/files/stansbury-jmp-jan18.pdf/]

Policy and academic debates have become increasingly focused in recent years on the issue of employer concentration. A lack of choice of job options for workers - as a result of a few large firms dominating their local labor market - has been posited as a possible explanation for inequality, low wages, and stagnant wage growth. Antitrust authorities have been called upon to consider employer concentration when reviewing mergers and acquisitions. Concerns have been raised that high employer concentration may facilitate (legal or illegal) restrictions to labor market competition, such as the use of no-poaching agreements or non-compete clauses. And, since employer concentration can be a source of monopsony power in labor markets,1 concerns around high employer concentration have bolstered calls for higher minimum wages and for a strengthening of workers’ collective bargaining power.2

But to assess whether – or in which cases – policy should respond to employer concentration, we need a deeper understanding of the nature and effects of employer concentration in the United States. Two major open issues remain. First, endogeneity: while there is a well-documented negative correlation between local employer concentration and wages, the extent to which this is causal – and the magnitude of any such causal effect – is unclear. Second, market definition: assessing the effect of local employer concentration on wages, and pinpointing the workers who are most affected by it, requires a good definition of the relevant local labor market for workers.3

Our paper addresses both of these issues, estimating the effect of employer concentration on wages across the majority of U.S. occupations and metropolitan areas. To address the endogeneity issue, we develop a new identification strategy based on differential local exposure to national firms’ hiring growth. To address the market definition issue, we segment our analysis by the degree of outward mobility from different occupations. We also develop a new measure for the outside option value of local jobs in other occupations, proxying for workers’ ability to find a job in another occupation using new occupational mobility data which we construct from 16 million U.S. workers’ resumes, and use our new measure to estimate the joint effect of within-occupation employer concentration and outside-occupation options on wages.

Our baseline results suggest an important effect of employer concentration on wages: moving from the degree of employer concentration faced by the median worker to that faced by the worker at the 95th percentile results in a roughly 3% lower wage, holding all else equal. This average, however, masks substantial heterogeneity: the effect of employer concentration is at least six times higher for the least outwardly mobile than the most outwardly mobile occupations. A back-of-the-envelope calculation, using our coefficient estimates, suggests that over 10% of the 110 million workers covered in our data experience wage suppression of 2% or more as a result of employer concentration.

Overall, our findings point to a middle ground between two prominent views about the effects of employer concentration in the U.S. labor market. On the one hand, employer concentration is not a niche issue confined to a few factory towns: our results suggest that a material subset of U.S. workers see non-trivial effects of employer concentration on their wages. On the other hand, employer concentration does not seem to be an important determinant of wages for the majority of U.S. workers, and the effects of employer concentration do not seem big enough to have a substantial effect on the aggregate wage level or degree of income inequality in the U.S. economy.

### 1NC – AT: Slow Growth

#### ‘Slow growth’ is inevitable AND has no impact.

Dietrich Vollrath 20, Professor of economics at the University of Houston, "Slow economic growth is a sign of success," USAPP, 02/22/2020, https://blogs.lse.ac.uk/usappblog/2020/02/22/slow-economic-growth-is-a-sign-of-success/.

We’re accustomed to looking at the growth rate of GDP to evaluate the health of our economy. Which is why the recent slowdown in growth appears so troubling. In the US, GDP growth for 2019 was 2.3%, meaning it has been nineteen years since growth hit 4%, and nearly as long since it touched 3%. For the UK the story is similar, as it has been fifteen years since growth hit 3%. In the Eurozone as a whole, growth last came close to 4% in 2000. These slowdowns across developed economies predates the financial crisis, and leads to natural questions: what went wrong with the economy, and how do we fix it?

But the slowdown we’re observing isn’t something we can fix – or that we would want to fix – because the slowdown was never a consequence of things that went wrong. Instead, as I show my new book, the slowdown is a consequence of things that went right.

From a simple accounting perspective, there are two main factors behind slower growth: the fall in fertility during the 20th century, and the shift of our expenditures away from goods and towards services. And both of those explanations can be traced back to economic success.

The fall in fertility had a significant impact on economic growth for decades, particularly in the US. The baby boom generated a one-time wave of human capital that hit the economy during the middle of the 20th century. As those new workers hit the workforce, the proportion of workers to population rose substantially, as evidenced by the fall in the youth dependency ratio between 1960 and 1980 (see Figure 1). Combined with the relatively high educational attainment of the baby boomers compared to prior generations, this provided a substantial boost to the growth rate, increasing it around 1.25 percentage points in 1990 compared to immediately after World War II.

As that wave of human capital receded, so did the growth rate. Starting in the early 2000s, the old age dependency ratio started to rise (see Figure 1) the inevitable consequence of the drop in youth dependency back in the 1960s and 1970s. As workers aged out of the workforce – and continue to do so – this dragged down the growth rate of the aggregate economy. That 1.25 percentage point boost during the 20th century disappeared in the 21st, explaining most of the slowdown in the US.

But why should we see these demographic shifts as a success? The drop in fertility after the baby boom which explains the shifts was driven by several successes. Expanded access to college education pushed back the age at which people were willing to marry. The opening up of many professions to women, along with growth in overall wages, meant that it made sense for many women to delay marriage. Finally, advances in contraceptive technology meant it was possible for women to take advantage of the new educational and professional opportunities that arose. The growth slowdown today is a consequence of family decisions made decades ago in response to rising living standards and the expansion of women’s rights.

The second source of the slowdown, the shift from goods towards services, was also driven by success. In the past one hundred years we became incredibly efficient at producing goods like clothes, food, furniture, and computers. The consequence was a steady reduction in the price of those goods relative to services. We could have used that reduction to buy even more goods than we did, but instead we took advantage of the savings to purchase more services like education, healthcare, and travel. Therefore the composition of our expenditures shifted away from goods and towards services (see Figure 2). We still consume more goods than before; it is just that they got so cheap that their share of our total expenditure fell relative to services.

This had a consequence for overall economic growth, however. Productivity growth in services is lower than for goods. That wasn’t a failure of services in the last few years. It appears to be an inherent quality noted by economist William Baumol in the 1960s. If a restaurant — a service — tried to operate with half their normal staff, you’d complain about the slow service and lack of attention. In comparison, if a manufacturer produced a laptop – a good – with half as much labour, you’d never know. This makes productivity growth harder for services than for goods. As we shifted expenditures towards services, aggregate productivity growth was thus bound to fall. Between the middle of the 20th century and today, that probably shaved another 0.2 to 0.25 percentage points off of the growth rate. But note that this only happened because of the productivity growth we experienced in the first place, a success.

Relative to the successes in the demographic shifts and spending shifts, the usual suspects are not capable of explaining the growth slowdown. Tax rates fell right as the slowdown started, and evidence from across states and industries shows that, if anything, more regulation was associated with faster growth, not slower. Trade with China exploded in the last twenty years, but evidence suggests that this had little effect on growth for the economy as a whole, even though individual regions and industries saw booms or busts. Economy-wide measures of the mark-up of price over cost rose, but it turns out that this didn’t lower growth. The shift of activity to high mark-up industries kept economic growth rates from falling even further than they did, as it meant we produced more valuable products.

If you’re still uncertain that the growth slowdown is a consequence of success, ask yourself what you’d give up to bring growth back to 4%. We could destroy half of all our goods: cars, couches, TVs, laptops, houses, trampolines, and so on. That would lead to a massive shift of spending towards goods as we scrambled to replace everything, and we’d see a jump in productivity growth. Alternatively, we could roll back contraceptive rights and women’s participation in the workforce in the hopes of starting a new baby boom. Wait twenty years and we’d have another surge of human capital into the economy. Would either of those be worth it just to see growth hit 4% again, perhaps not until 2040? Assuming the answer is “no”, that tells us the growth slowdown happened because of things that went right, things we would not sacrifice.

## FTC

### 1NC – Alt Cause

#### Losing cases is an alt cause.

Marianela 1AC Lopez-Galdos 21. Global Competition Counsel at the Computer& Communications Industry Association, previously served as Director of Competition & Regulatory Policy, and is a professor at George Washington University Competition Law Center and at the University of Melbourne Law School. “Policy Decisions of Antitrust Institutions Series: The Future of the FTC and Its Perils”. Disruptive Competition Project. https://www.project-disco.org/competition/072821-policy-decisions-of-antitrust-institutions-series-the-future-of-the-ftc-and-its-perils/

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

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

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

The FTC’s Rulemaking Authority

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

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

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

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

The Future of the FTC

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

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

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

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

### 1NC – AT: Terror

#### Terrorism are incompetent misfits.

Walt 16 – Stephen M. Walt, international relations professor at Harvard University. [My Top 5 Foreign-Policy Unicorns — and Why I Want to Kill Them, 9-8-2016, https://foreignpolicy.com/2016/09/08/my-top-5-foreign-policy-unicorns-and-why-i-want-to-kill-them/]

3. The terrorist mastermind. A close cousin to the nuclear rogue is the terrorist mastermind, busily concocting elaborate and highly destructive plots to bring the world to its knees. People like Osama bin Laden and Islamic State leader Abu Bakr al-Baghdadi have made extravagant and dire threats, but the good news is that they’ve never come close to toppling a foreign government, winning millions of followers, or threatening our way of life. I don’t deny that some terrorist groups have devised and executed successful assaults — of which the 9/11 attacks were by far the most damaging — but a word like “mastermind” conjures up images of Dr. Evil-style villains who will inevitably outwit our feeble efforts to stop them and unleash fearsome destruction on an innocent world. In fact, as John Mueller and others keep reminding us, the vast majority of contemporary terrorists are incompetent misfits, and even the very best of them fall well short of evil genius. They can and do stage small-scale attacks that cause modest amounts of harm, but they have repeatedly shown themselves to be incapable of orchestrating complicated operations that could actually bring a stable country to its knees. There have been serious terrorist attacks in Boston; London; Paris; Brussels; Orlando, Florida; and several other places in recent years, for example — yet in each case, these societies proved resilient, and they are thriving again today. Or just look at New York City, which suffered the worst single attack ever and has since fully recovered. Terrorism is a problem, the lives lost to it are an unfortunate tragedy, and those who employ it are dangerous criminals. A few terrorists are moderately clever; most are not. None rises to the level of a “mastermind,” and none poses an existential threat. Reporters, pundits, and speechwriters should drop this term from their lexicon, because this particular animal doesn’t exist. Fortunately.

### 1NC – AT: Emerging Tech

#### No emerging tech impacts – gradualism and hype.

Sechser 19 – Todd S. Sechser, Public Policy Professor at the University of Virginia. Neil Narang, Political Science Professor at the University of California, Santa Barbara. Caitlin Talmadge, Security Studies Professor at Georgetown University. [Emerging technologies and strategic stability in peacetime, crisis, and war, Journal of Strategic Studies, 42(6), Taylor and Francis]

Yet the history of technological revolutions counsels against alarmism. Extrapolating from current technological trends is problematic, both because technologies often do not live up to their promise,

and because technologies often have countervailing or conditional effects that can temper their negative consequences. Thus, the fear that emerging technologies will necessarily cause sudden and spectacular changes to international politics should be treated with caution. There are at least two reasons to be circumspect.

First, very few technologies fundamentally reshape the dynamics of international conflict. Historically, most technological innovations have amounted to incremental advancements, and some have disappeared into irrelevance despite widespread hype about their promise. For example, the introduction of chemical weapons was widely expected to immediately change the nature of warfare and deterrence after the British army first used poison gas on the battlefield during World War I. Yet chemical weapons quickly turned out to be less practical, easier to counter, and less effective than conventional high-explosives in inflicting damage and disrupting enemy operations.6 Other technologies have become important only after advancements in other areas allowed them to reach their full potential: until armies developed tactics for effectively employing firearms, for instance, these weapons had little effect on the balance of power. And even when technologies do have significant strategic consequences, they often take decades to emerge, as the invention of airplanes and tanks illustrates. In short, it is easy to exaggerate the strategic effects of nascent technologies.7

Second, even if today’s emerging technologies are poised to drive important changes in the international system, they are likely to have variegated and even contradictory effects. Technologies may be destabilising under some conditions, but stabilising in others. Furthermore, other factors are likely to mediate the effects of new technologies on the international system, including geography, the distribution of material power, military strategy, domestic and organisational politics, and social and cultural variables, to name only a few.8 Consequently, the strategic effects of new technologies often defy simple classification. Indeed, more than 70 years after nuclear weapons emerged as a new technology, their consequences for stability continue to be debated.9

### 1nc – AT: Scammers

#### No access---the tech barrier is too high

**Liang 15** [CPT Lim Ming - an armoured infantry officer by vocation and is currently a staffofficer in HQ Armour. He received the SAF Academic Scholarship and graduated from the National University of Singapore with a Bachelor of Social Sciences (Honours) in Political Science. “Hype or Reality: Putting the Threat of Cyber Attacks in Perspective”, Ministry of Defense Singapore, April 16, 2015, <http://www.mindef.gov.sg/imindef/publications/pointer/journals/2015/v41n1/feature4.html>] bjs

Another claim advances the asymmetric nature of cyber-attacks and its low entry barriers which facilitate its exploitation by non-state actors or weak states. As the Stuxnet case study demonstrates, cyber-attacks on the higher end of the ‘threat’ spectrum are contrary to the asymmetric claim. Effective cyber weapons are costly and impose high technology barriers beyond the reach of non-state actors such as terrorist groups. Furthermore, they often do not guarantee success and are surgical and ‘one-shot’ in nature. Hence, it is more rational for non-state actors to resort to conventional tactics with higher rates of success at much lower costs.

# 2NC

# Labor Law CP

#### Labor agencies solve better – antitrust authorities lack the expertise for effective enforcement.

Hafiz ’20 [Hiba; March 16; Assistant Professor of Law, Boston College Law School; University of Chicago Law Review, “Labor Antitrust Paradox,” vol. 86 no. 2; KP]

If employers’ monopsony power is sufficiently alleged in a Section 2 antitrust case, plaintiff antitrust enforcers would then need to show anticompetitive conduct: unlawful acquisition or maintenance of monopsony power (through mergers-to-monopsony, wage-fixing agreements, no-poaching agreements, or other forms of exclusionary conduct and foreclosure), attempted monopsonization, or conspiracy to monopsonize. Other scholars suggest that liability-triggering conduct under antitrust law should extend be- yond those traditionally associated with reducing competition to also include work law violations: the use of broad noncompete clauses or class-action waivers in employment contracts, unfair labor practices under the NLRA, independent-contractor misclassification, and restrictive wage transparency policies.117 However, there are a number of reasons to relegate consideration of this kind of activity to labor agencies when worker and consumer welfare conflict. First, not all such conduct is harmful to labor-market competition per se, but is instead more indicative of employers’ monopsony power (and, concomitantly, workers’ relative bargaining leverage) and should be analyzed as such, contributing to the issuance of that first-stage monopsony power “red flag.” Second, labor agencies have more expertise, data, and remedial mechanisms to assess impacts of employment terms and deploy shop-floor solutions, most certainly in tandem with anti- trust enforcement; inviting antitrust agencies and courts to determine “reasonable terms of employment” without labor agencies’ expertise may not be smart labor policy. Thus, any work-law violations should be evidence workers can use to justify the applicability of substantive presumptions and defenses in relevant adjudications under labor law discussed below.

#### Expanding labor presumptions and defenses deter employer monopsony and collusion.

Hafiz ’20 [Hiba; March 16; Assistant Professor of Law, Boston College Law School; University of Chicago Law Review, “Labor Antitrust Paradox,” vol. 86 no. 2; KP]

While worker welfare cannot be a coherent goal of antitrust when it conflicts with consumer welfare, Congress has mandated worker protections under other laws. And labor law should be deeply informed by labor-antitrust enforcement: to tailor rights and remedies to the structural realities of labor markets; to deter unlawful employer monopsony and collusion; and to reinforce the remedial effects of labor-antitrust enforcement. Thus, as a supplement to existing work-law enforcement, this Section outlines a system of legal presumptions and affirmative defenses that could be integrated into work law cases based on labor-antitrust inves- tigations and enforcement. A single system can prevent regulatory arbitrage and limit the creation of buyer power in the first instance. This is a tremendous benefit over ex post regulation when considering enforcement costs and the costs of employer buyer power in labor markets and the larger economy.128 A more unified approach to labor-market regulation could allow for cross- pollination between substantive rules and adapt remedies to coordinate achievement of regulatory goals.

As discussed above, “red flags” punctuating developments in labor-antitrust investigations and enforcement would trigger substantive presumptions and affirmative defenses under the NLRA that would supplement existing labor-law protections.

Because organized workers are a countervailing power to monopsonistic employers,129 when a court finds employers either have monopsony power to artificially suppress wages or have reached agreements restraining labor-market inputs, workers would be entitled to these presumptions and defenses. First, when such findings are made, workers should be entitled to a default rule of union bargaining,130 or if a union is in place, a Board order to mandate collective bargaining under NLRB v Gissel Packing Co.131 If workers have formed a union and their employers refuse to bargain in good faith, workers should also be entitled to a Gissel bargaining order and protections to engage in concerted activity under the NLRA.132 Analysis of whether an employer is bargaining in good faith could be informed by the employer’s buyer power and social-scientific data on industry-specific, productivity-maximizing wages. Similarly, analysis of, and remedial options for, whether employers commit unfair labor practices that infringe workers’ right to organize, bargain collectively, and strike could be informed by monopsony-power determinations and the scope of worker’s outside options.

Substantive labor-law presumptions and defenses could also extend to workers’ right to engage in concerted activity against colluding employers by classifying those employers as joint employers with obligations to collectively bargain with workers. When employers have monopsony power within labor supply chains or reach wage-fixing, no-poaching agreements, or noncompete agreements enabling their exercise of buyer power over workers’ wages, workers should be entitled to a rebuttable presumption of entitlement to a multifirm or sectoral bargaining unit obligating sectoral bargaining. In such cases, bargaining unit definitions should expand to encompass employers with buyer power to the extent workers’ concerted activity against a single employer would be ineffective. Because joint ownership among employers offers deeper pockets to maintain insurmountable leverage over workers, making it nearly impossible for workers to successfully engage in concerted activity, the same presumption should apply to ensure restoration of equal bargaining power.133 Further, NLRA-protected workers should be entitled to affirmative defenses for engaging in self-help and concerted activity that is currently prohibited, highly regulated, or subject to steep penalties, including secondary boycotts and strikes against monopsonistic or collusive employers. Additionally, employer buyer power should be integrated into the NLRB’s analysis of whether to clas- sify independent contractors as employees. To the extent buyer power is shown, independent contractors should be eligible for a rebuttable presumption of immunity from antitrust liability under the labor exemption to the antitrust laws to the extent they coordinate to demand higher wages and better working conditions.134

# ADV

#### There’s no concentration locally which is all that matters. If there was, it wouldn’t cause inequality. They cite bogus studies.

Kennedy ’20 [Joe; October 30; Ph.D. in Economics from George Washington, former Chief Economist with the U.S. Department of Commerce; Information Technology & Innovation Foundation, “Monopoly Myths: Is Concentration Eroding Labor’s Share of National Income?” https://itif.org/publications/2020/10/13/monopoly-myths-concentration-eroding-labors-share-national-income]

WHY MARKET POWER IS NOT LIKELY TO BE THE CAUSE OF A DECLINE IN LABOR’S SHARE OF INCOME

Central to the arguments presented in the previous section is the theory that lax antitrust enforcement has encouraged firms to acquire market power, which allows them to raise prices and reduce wages while increasing profits. Earlier papers in ITIF’s Monopoly Myths series challenge each of these arguments.27

First, although concentration has been increasing in many industries, in most, it is still far below the levels that normally trigger antitrust concern, especially when markets are defined more narrowly.28 Moreover, recent studies show that concentration in local markets—which are the most relevant for many industries, including restaurants and retail shopping—is actually decreasing. Esteban Rossi-Hansberg and two other economists looked at competition in local markets between 1990 and 2014 and found that while concentration increased at the national level, it fell in local markets. Although large firms captured a growing portion of the national market, their expansion into new markets increased local choice. The entry of a top firm reduced local concentration for at least seven years.29

Some studies have also shown concentration falling in labor markets. Kevin Rinz of the U.S. Census Bureau arrived at this conclusion using data from the Longitudinal Business Database and IRS W-2 forms. He estimated that in 2015 earnings were about 1 percent higher than they would have been if local competition had remained at its 1976 level.30 Economists Anna Stansbury and Lawrence Summers also noted that local labor market concentration has declined over time, which should help workers. Most workers are not in highly concentrated labor markets, especially when considering the full range of occupations many workers could fill.31

David Berger et al. looked directly at local labor markets using data from the Longitudinal Business Dynamics database and defining local labor markets through a combination of three-digit NAICS codes for tradable industries and commuting zones. He then looked at a series of changes to state corporate income taxes and compared the reaction of company establishments within the same state. The model shows that existing imperfections in local labor markets are significant; costing workers on average 5.4 percent of their lifetime consumption. These lower wages cause them to work 19.6 percent less than otherwise. But the problem has been getting better, not worse. The team found that rising labor market power has not contributed to the declining labor’s share because the concentration of local labor markets declined between 1976 and 2014. The change in concentration equates to going from 5.0 to 7.1 equal-sized employers within each commuting zone.32

Second, although markups have been rising in many industries, they are notoriously hard to measure. They may not have been rising at all if functions such as marketing and R&D are included in variable costs. Indeed, most of any increase can be explained by the rising importance of hard-to-measure intangible assets, high fixed costs, rapidly diminishing marginal costs, and significant network effects. In these situations, it is possible for a company to have high markups but still lose money.33

Finally, looking at nonfinancial domestic corporate profits as a share of net value added shows that, although the profits share rose significantly in the first six years of this century, it remained below its share from 1950–1965. Since then, it basically held steady for several years, before declining for the last six years, giving back almost half of its gain.34

The studies showing a rise in market power also have some weaknesses. The De Loecker paper in particular has come under criticism from other scholars. Susanto Basu, for example, pointed out that the authors’ model produces implausible estimates for other economic values, such as implying that adding more capital to the production process actually decreases output.35 Economist Chad Syverson noted that, even if profits were zero in 1980, De Loecker’s finding that the pure profit rate jumped from 1 percent to 8 percent means firms succeeded in turning 25 percent of all revenues into profits in 2016, which is significantly higher than other estimates.36 For example, in 2016, domestic corporate profits as a share of net value added was 17.7 percent. Syverson also pointed out that the fastest rise in markups occurred between 1980 and 2000, while much of the decline in labor’s share did not take place until after 2000.37

More broadly, these studies use econometric models and firm data to measure the relationship between concentration, profits, and margins on the one hand, and the decline in labor’s share and wages on the other. The outcomes can be heavily dependent on the specific model being used. In addition, their samples are never complete. At most, they show the relationships that prevail in a portion of the economy. Moreover, the models only show correlation. The causal relationships may run both ways and involve many more variables. Finally, some studies use a fairly comprehensive source of corporate data such as Compustat, and in doing so, ignore the noncorporate sector. Because corporations are on average larger and more efficient than other kinds of firms, this would skew the data toward a smaller labor share among these firms, but not necessarily in the broader economy.38 This gets to the importance of looking at the issue through macroeconomic data that is representative of the entire economy.

Measuring Labor’s Share Through Macroeconomic Data

Researchers within BLS recently estimated labor’s share going back to 1947 (see figure 1). Based on their data, the wage share of income was largely stable from 1947 to around 2001 at approximately 63 percent. Since then, it has fallen to around 57 percent (with a likely temporary increase this year due to the COVID-19 recession). In calculating labor’s share, BLS split proprietors’ income between wages and return on capital by assuming proprietors make the same hourly wage as employees. Michael Elsby, Bart Hobijn, and AyÅŸegÅ±l Åžahin argued that this method overstates the self-employed share of income, and that a more accurate method would reduce the measured decline in labor’s share by one-third.39

Figure 1: Wage share of output in the non-farm business sector (1947–2020)40

Economic models often assume there are only two types of inputs: labor and capital. Some papers follow this practice by defining capital’s share of income as 1 minus labor’s share.41 By this definition, any fall in labor’s share automatically goes to capital, which many people equate with profits.

BEA provides a finer-grained picture of national income, dividing it into several categories including compensation of employees, proprietors’ income, and corporate profits. In fact, the BEA statistics include a number of separate components in addition to corporate profits. One of these is rental income, a large part of which is the imputed value of housing homeowners get from living in their homes.

A closer look at the national income accounts shows that there has in fact been almost no decline in the share of U.S. national income going to labor once net income and the share going to rent are included. Depreciation (which BEA terms “capital consumption”) amounts to about 16 percent of gross domestic income (GDI). GDI also includes business taxes on production and imports, which have recently averaged 7 percent. When these are pulled out, labor’s share was around 84 percent of net domestic income in 2019. In 1947, this share was 87 percent (figure 2). Although the share declined in the early decades, the total share of income going to workers, proprietors, and rent has actually risen since the mid-1980s.

Figure 2: Total employee compensation, rental income, and proprietors’ income as a share of net domestic income (1947–2019)42

A greater breakdown shows that compensation to employees fell by 2.2 percentage points from 1998 (when labor’s share begins its steep fall in the BLS calculations) to 2019. This was matched by an identical fall in net interest payments. However, the decline in employees’ share was partially offset by an increase of 0.7 percentage points in proprietors’ income (many of whom were for all intents and purpose workers who happened to own their own very small business), leaving a total decline in labor’s share of approximately 1.5 percentage points.

Table 1: Percentage point change in components of GDI (1998–2019)43

Rather than simply assuming this loss was big monopolistic business’s gain, it’s important to look at the other components of national income. As table 1 shows, corporate profits rose only 0.4 percentage points between 1998 and 2019, accounting for just 27 percent of the loss of labor’s share. It is hard to reconcile this with the theory of increased market power decimating labor’s share of income. The biggest increases during this time period were rental income (1.9 percentage points) and consumption of fixed capital (1.6 percentage points). The rise in depreciation may actually be beneficial if it means firms are deploying more capital. It could also signal the increased importance of intangible, faster depreciating capital such as software and other intellectual property.

And the rise of rental income by such a large share means that the fall in the share of labor income had almost nothing to do with capital becoming more important than labor. It had more to do with housing becoming more important than labor, with demographic forces pushing up demand for housing, regional economic forces leading jobs to concentrate in places with already high housing prices, and government zoning rules limiting supply—all leading to higher rents and mortgage payments.44

Former Obama administration officials Jason Furman and Peter Orszag have agreed with this assessment, writing that “the decline in the labor’s share of income is not due to an increase in the share of income going to productive capital— which has largely been stable—but instead is due to the increased share of income going to housing capital.”45 According to the authors, in 2014, returns to labor were 3.8 percentage points below their 1970–1999 average. Yet returns to capital excluding housing rose only 0.3 percentage points. Returns to housing rose 2.8 percentage points (the remainder went to depreciation and government). If the price of housing rises substantially, the percentage share of labor and all other components must fall.

The point here is not that labor’s share has held steady; as conventionally measured, it has been falling, although not as much as some studies claim. But the lost share is not going to employers exercising market power. Most has gone instead to the owners of housing (including workers who own their homes) and to a lesser extent mismeasurement of self-employed income. We have a housing problem, not an antitrust problem. The solution is to relax zoning laws and permitting regulations so that more affordable housing can be built in the places workers want to live, coupled with a big federal government push to support economic development outside of already expensive and crowded large metro areas.

OTHER EXPLANATIONS

The rise in rental income is not the only alternative explanation with empirical support. The previous sections show why increased market power stemming from lax antitrust enforcement is unlikely to be a major cause of labor’s falling share and stagnant wages. Even when ignoring the macro data on income shares and focusing only on the studies of particular groups of firms, there are a number of alternative causes, which have better support in the literature. Several academic studies, including those emphasizing market power, contain a long list of other possible explanations.46

McKinsey Global Institute looked at Organization for Economic Cooperation and Development (OECD) industry-level data from 1998 to 2016 and concluded that the decline in labor’s share of income was due to several causes. The most important, explaining 33 percent of the decline, was due to business cycle effects. Other causes were rising and faster depreciation of capital (26 percent); superstar effects, together with industry consolidation (18 percent); capital substitution for labor and automation (12 percent); and globalization and reduced worker power (11 percent).47

Other studies have focused on a more limited set of explanations. For example, Elsby et al. identified globalization, specifically the offshoring of labor-intensive production, as the leading potential explanation for the rest of the decline.48 When firms move jobs abroad in order to reduce labor costs, total compensation of employees falls. Other explanations seem even more promising when compared with the theory that market power is the root cause of any decline in labor’s share.

Rising Competition Among Superstar Firms

One possible explanation is, rather than signaling the inadequacy of antitrust law, rising concentration in some markets is the result of increased competition between firms. Autor et al. found that the unweighted mean labor’s share across firms has not decreased much since 1982.49 What seems to have happened is a rise in competition caused largely by globalization and new technologies has allowed more competitive firms to gain market share at the expense of laggards. The “superstar” firms are winning, not because they have market power, but because they are more productive and more efficient, and have lower costs. Higher margins are thus not due so much to rising prices (which makes sense at a time when inflation is well below the Federal Reserve target of 2 percent) but to lower production costs, including from employing a relatively smaller share of workers. The decline of labor’s share within specific firms has been relatively constant, but more-efficient firms using less labor have been gaining market share.

Sharat Ganapati used U.S. Census data to measure market concentration between 1972 and 2012.50 Using industry-level estimates, he showed that concentration increases are positively correlated with productivity and real output growth, indicating they might be the result of enhanced competition rather than lax antitrust enforcement. Nor is concentration correlated with rising prices, a claim central to the market power theory. However, Ganapati also found that higher concentration is correlated with a decline in labor’s share. As market share migrates to more-productive firms, it is possible to produce the same amount using less resources, including labor.

Technological Change

A related theory is that the introduction of labor-saving technologies and mechanization has caused some companies to replace labor with capital. These changes have also increased the importance of fixed investment and declining marginal cost, thereby raising the size of markups needed to recover total costs, but keeping overall profits the same. A 2018 paper by Loukas Karabarbounis and Brent Neiman links the decline in labor’s share to technological changes facilitated by a steady decline in the cost of capital, which reduces the need for labor.51 These lower costs benefit consumers. They should also eventually benefit workers directly since worker income is tied to labor productivity, which increases with the amount of capital labor has to work with.52 Consistent with other studies, Karabarbounis and Neiman found that the decline in the labor’s share is not confined to the United States, the fall in labor’s shares occurred primarily within industries, and the average labor share not weighted by firm size did not fall much since 1982. In other words, declines in labor’s share were concentrated in more-productive industries, with less-productive firms gaining more employment. This is consistent with the theory of Baumol’s cost disease: the observation that employment and nominal spending grows faster in sectors that have lower productivity growth.

The Decline of Labor Power

Another compelling theory is that both the decline in labor’s share and rising inequality are the result of a broader decrease in labor’s economic and political power. Stansbury and Summers used a variety of individual-, industry-, and state-level data to measure the relationship between general indicators of labor power and outcomes such as labor’s share of income.53

Stansbury and Summers focused on a broader decline in worker power that is due to three significant macroeconomic shifts in the economy. The first is institutional changes, including a decline in both union power and the real value of the minimum wage. The second source of decline is changes within firms, including the rise of shareholder power and outsourcing. The final source of pressure is increased competition from technology and low-wage labor abroad. Both together and individually, these factors have weakened the bargaining power of employees over time. The result, however, has not been a decline in labor’s share of output within competitive markets.

But not every market is competitive. In some noncompetitive markets, firms have enough market power to earn profits that are above the level that would exist in a competitive market. Some of these excess profits are shared with labor. Stansbury and Summers found that the decline in worker power has resulted in a smaller share of these profits going to labor. They estimated that these profits fell from 12 percent of value added in the early 1980s to 6 percent in the 2010s.54 They found that total profitability of firms stayed roughly the same or even fell during that time, indicating an absence of greater market power. But the division of profits in industries that do have market power has changed, with labor getting less of a share.

Stansbury and Summers were unconvinced by other causes such as globalization, technological change, and rising monopoly power. Specifically, they found that rising concentration can explain only 10 percent of the fall in labor’s share.

#### Census data proves. Local concentration’s fall has boosted earnings AND reduced top percent inequality.

Rinz ’18 [Kevin; September 24; economist in the Center for Administrative Records Research and Applications at the U.S. Census Bureau, Economics PhD at the University of Notre Dame; Census Bureau, “Labor Market Concentration, Earnings Inequality, and Earnings Mobility,” https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/carra-wp-2018-10.pdf

6 Discussion and Conclusion

This paper's finding that increased local labor market concentration reduces earnings is consistent with other recent findings from online job boards (Azar et al., 2017) and the manufacturing sector (Benmelech et al., 2018). My estimates of the effects of concentration on inequality are consistent with Webber (2015): when concentration increases, the gap between the top of the distribution and the middle of the distribution widens not because earnings increase at the top but because they decline in the middle. The gap between the middle and the bottom increases by more because earnings fall more at the bottom than they do in the middle. To the extent that employers in more concentrated markets have more power over workers, these estimates provide some evidence that that power may contribute to increased inequality, as the Council of Economic Advisers (2016b) suggested it might.

However, these estimates, combined with the fact that local industrial concentration has declined since 1976 indicate that it has not contributed to the increase in inequality over that period. Back- of-the-envelope calculations suggest that the average within-market 90/10 earnings ratio was 6.3 percent lower and average annual earnings were 1.2 percent higher in 2015 than they would have been if average local industrial concentration had been at its 1976 level, which was about 36 percent higher. For context, the national 90/10 ratio increased by about 40 percent between 1976 and 2015, while average annual earnings increased by about 30 percent in real terms for prime-age workers over that period. Changes in concentration appear to have modestly mitigated the trend toward increased inequality rather than contributing to it.

#### Big is good – structural anti-corporatism sacrifices growth, wages, and innovation.

Atkinson ‘21 [Rob; 8/25/21; Founder and President of the Information Technology and Innovation Foundation, Ph.D. in City and Regional Planning from the University of North Carolina; "Urban myths about economics have taken root — and the cost is high,"https://americancompass.org/the-commons/the-emergence-of-anti-corporate-progressivism/]

Opposition to globalization. Efforts to weaken intellectual property protections. Pushing for municipal broadband. Calls for the National Institutes of Health to develop drugs. What do these positions have in common? They are all examples of the recent turn toward anti-corporate progressivism. This shift is defined by a fierce determination to expand government provision of goods and services; to support small, locally owned firms; and to break up or heavily regulate big corporations.

So-called Big Tech companies face broad scrutiny these days from the media, advocacy groups, lawmakers, and regulators. But for most progressives, this anti-corporatism extends well beyond the tech sector. It has become a general operating principle: the go-to policy formula for righting wrongs. It’s a conviction so firmly held that it is no longer just the means to an end—for many, it’s the end in itself.

This has not always been the case. For more than a century, starting in the 1910s and continuing through to the 1990s, most progressives accepted that large corporations were a permanent and even valuable part of American economic life, to be balanced by other forces, such as unions and regulation.

Yet, over the last two decades, the criteria that progressives have used to evaluate policymakers has shifted dramatically. Rather than assessing policymakers on whether they support policies that generate progressive outcomes—getting broadband to rural areas, fostering drug development, addressing global warming, helping workers get training—many progressives now judge them on whether they advocate for positions that would restrict, restrain, or replace the corporate sector. For example, it’s not enough for the federal government to support broadband deployment to rural areas; the broadband providers must be municipal governments.

Few on the anti-corporate left will acknowledge that anti-corporatism is their true goal, in large part because they realize that few voters support shrinking the corporate sector. Gallup finds that that only 23% of Americans want stronger regulation of big business and a majority have positive views of big business—14 percentage points higher than positive views of the federal government. Three-quarters of Americans do not want the government to break up big tech companies, and more than half of Americans employed in the private sector work for big companies.

Aware of this disconnect, anti-corporate progressives camouflage their endgame by wrapping their proposals in ideas that enjoy near-universal support: lower prices, more privacy, more fairness, more broadband, safer food, a protected climate, cheaper drugs, etc. But the policies they embrace as solutions are first and foremost designed to restrict, restrain, or replace the corporate sector—a silver-bullet solution, they believe, for all of the above, but also an end in itself.

The voters who chafe at anti-corporate sentiment are right. If structural anti-corporate policies are implemented, the result will be lower economic and wage growth, less innovation, reduced U.S. competitiveness, and fewer opportunities for disadvantaged Americans.

On average, large corporations (defined by the Small Business Administration as firms employing 500 or more workers) are significantly more productive than small firms, which translates into lower prices for consumers and higher wages for workers. Indeed, if the United States had the same size distribution of companies as the European Union—which has much tougher antitrust laws—average U.S. household income would be approximately 6.4% lower.

Big companies not only pay their workers more; they also provide more and better benefits, including health care, overtime pay, and retirement benefits. Workers at large companies are less likely to be injured on the job and less likely to be fired or laid off than are workers at small companies. Large companies invest more in training their workers, and they are more likely to employ a unionized workforce than their smaller counterparts. Their workers are also more diverse, with large companies employing a higher share of women, minorities, and veterans than small companies. They invest more in R&D than small firms as a share of revenue and they export more. And contrary to the prevailing narrative that small companies are the source of most new jobs, big companies actually create more net new jobs annually.

If policymakers are to advance effective policies to support competitiveness, economic growth, opportunity, and innovation across a wide array of industries, they need to understand the real nature of the debate. The choice is not between supposedly evil Amazon and smiling small business. The question is which kind of economic system best supports innovation, progress, and American competitiveness. Large corporations—competing with other companies of all sizes and balanced by government regulation and public spending—are clearly a critical component of a healthy ecosystem, and progressives shouldn’t be so quick to dismiss their benefits.

#### Targeting M&As destroys growth by prioritizing stagnating firms – it’s our largest economic problem.

Lind ‘21 [Michael; 3/12/21; professor of practice at the Lyndon B. Johnson School of Public Affairs at the University of Texas, J.D. from the University of Texas Law School, M.A. in International Relations from Yale University; Robert Atkinson; Founder and President of the Information Technology and Innovation Foundation, Ph.D. in City and Regional Planning from the University of North Carolina; "When The Pandemic Is Over, Don’t Despair the Loss of Laggard Small Businesses," <https://itif.org/publications/2021/02/22/when-pandem>ic-over-dont-despair-loss-laggard-small-businesses]

Some sectors of the U.S. economy have been hit far worse than others as the coronavirus pandemic has upturned personal consumption habits and government has ordered a halt to normal economic activity. But the greatest suffering has been in sectors with low productivity and low wages, such as hospitality, leisure, personal services, and bricks-and-mortar retail. The left has tried to fit this fact into pre-existing narratives by pointing out that workers in these sectors are disproportionately nonwhite and female. The anti-government right, for its part, has explained the disparity as the result of an attack by tyrannical federal, state and local governments on independent small business owners.

But these conventional partisan framings should not blind us to an obvious fact: The sectors that have suffered the most are laggard sectors—laggard, that is, in moving from old-fashioned, labor-intensive and low-wage business models to innovative, capital-intensive, technology- and skilled-based ways of delivering goods and services. Upgrading these backward industries into high-wage, technology-intensive sectors must be a priority for bipartisan public policy in the aftermath of the COVID-19 pandemic.

December data from the Bureau of Labor Statistics provide shocking confirmation of the huge disparity in economic impact. In the leisure and hospitality super sector, unemployment was 16.7 percent and in “other services” 7.4 percent, compared to 4.3 percent in manufacturing, 6.4 percent in information sectors, and 6.1 percent in business and professional services. Not only is pandemic-induced unemployment vastly higher in leisure and hospitality, but wages, benefits, union representation and the number of hours worked per week are also lower.

Real hourly wages grew an unprecedented 5.5 percent in April, due to massive numbers of low-wage jobs workers losing their job, which boosted the remaining average. However, wages fell in real terms from July to December of last year, as the pandemic worsened and the effect of economic stimulus measures wore off. Apart from mass unemployment, all of those sectoral disparities preceded the COVID-19 pandemic and will reassert themselves in the future, unless the country does something about them.

The U.S. economy since 1990 has added 20 million low-quality private sector jobs, compared to only 12 million high-quality jobs, according to the Job Quality Index. The difference is reflected in hours worked, as well as wages. Americans trapped in low-quality jobs work on average only 30 hours a week, compared to 38 hours for those in high-quality jobs. The federal minimum wage of just $7.25 per hour, which has not increased since 2009 while inflation has grown 21 percent, contributes to the problem.

Long before the pandemic, it was clear that many firms in the laggard sectors of retail, leisure, hospitality and personal services were privatizing their profits while socializing their overhead costs—by paying such low wages that many of their workers could survive only with the help of food stamps, the earned income tax credit (EITC) and other aid charged to taxpayers. For example, 52 percent of fast food workers have at least one family member relying on a public assistance program. And as we point out in our book Big Is Beautiful: Debunking the Myth of Small Business, the largest share of these workers are employed by small businesses. Indeed, a 2007 study by the Urban Institute found that “Low-income workers are disproportionately likely to work in smaller firms.”

During the Great Depression, President Roosevelt declared: “It is my conviction that the South presents right now the Nation’s No. 1 economic problem.” During today’s Great Pandemic these laggard, low-wage sectors may be the nation’s number one economic problem. Just as the impoverished rural South was brought up to the standards of the industrialized North by government-sponsored electrification, minimum wage and farm programs, so the sectors that are dragging down U.S. average wages and productivity need to be transformed.

Rescuing good and bad firms alike during the initial stage of the pandemic makes sense. But in the years and decades ahead, American taxpayer support should be limited to businesses that pay and treat their employees well and seek to increase profits, wages and output at the same time by adopting innovative technologies, like self-service technology, and high-performance labor practices. Firms whose business models rely on low-wage labor (and no benefits), or shifting fixed costs to workers, or paying so little that their employees have to use welfare services, deserve to go extinct. This will make it easier for firms that want to do right by their workers to do so.

The low-road firms of the laggard sectors should be replaced either by bigger firms in the same sector, almost all of which pay higher wages and use more technology, or by small firms that have taken the high-road path to high wages and high productivity. When the pandemic is behind us, we should be encouraged, not appalled when laggard sectors replace small, undercapitalized low-road firms with fewer large firms and chains, including many with online business models that reap the benefits of increasing scale or networks effects. For most of us, small-producer romantics to the contrary, the American dream is to earn enough by working to support a family at a decent and rising standard of living—not to own your own tiny, undercapitalized business that cannot turn a profit without underpaying and mistreating its employees. If fewer, larger, and more modern firms in a previously laggard sector can afford higher pay and benefits, all the better.

#### Demographic shifts make it permanent.

Irwin ’21 [Neil; June 5; senior economics correspondent; New York Times, “Workers Are Gaining Leverage Over Employers Right Before Our Eyes,” <https://www.nytimes.com/2021/06/05/upshot/jobs-rising-wages.html>; KP]

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 to leave a job if employers are insufficiently flexible on issues like working from home.

#### Wage increases across the board.

Bump ‘21 [Philip; August 6; National correspondent focused largely on the numbers behind politics; New York Times, “Among the good jobs news: Wages are rising as businesses look for employees,” <https://www.washingtonpost.com/politics/2021/08/06/among-good-jobs-news-wages-are-rising-businesses-look-employees/>; KP]

The coronavirus pandemic crunched large parts of the economy, and they’re still being rebuilt. In recent months, that rebuilding has often meant that employers have scrambled to fill positions left vacant by some people who are rethinking their career paths. But that scramble seems to at last be doing what economists would have expected: It’s pushing wages higher.

“The data for recent months suggest that the rising demand for labor associated with the recovery from the pandemic may have put upward pressure on wages,” according to the Bureau of Labor Statistics’ July jobs report, released Friday. It’s still a bit murky: “Because average hourly earnings vary widely across industries, the large employment fluctuations since February 2020 complicate the analysis of recent trends in average hourly earnings,” the report says.

There are some places where the effects correlate pretty obviously, though, including in the leisure and hospitality industry. For years, that industry — think restaurants, bars, hotels — has been among the lowest-paying for nonsupervisory employees. It still is. But, as in other private-sector industries, average weekly earnings have climbed since March 2020, when the pandemic first started to shake up the economy.

When considered as change relative to March 2020, the surge in earnings for leisure and hospitality employees is obvious. Since that month, weekly earnings are up about 25 percent. They’re up 13 percent over the pre-pandemic high.

This is also the industry where employers have been most eager to fill jobs. May data on job openings shows that the rate of openings in leisure and hospitality was way over the private sector overall and well over other industries.

More job openings, bigger upward pressure on wages.

This doesn’t hold across industries, mind you. That leisure and hospitality employees make up 1 in 8 private-sector jobs gives that industry significant weight. But some industries that haven’t seen unusual employment demand have also seen large increases in earnings. (We’re comparing the most recent data for each here, but that means comparing May job-opening data to July jobs data.) Those tend to be white-collar, high-paying jobs.

The mining and logging industry, which makes up about 0.5 percent of private-sector employment, has not seen a sharp increase in weekly earnings. But before the pandemic, it was the industry with the highest average weekly wages.

The leisure industry had relatively low wages before the pandemic and made up a large chunk of private-sector jobs. It was also hit hard by the pandemic in a way other industries weren’t, prompting employers to race to fill jobs when the crisis receded. All of that contributes to the recent wage increase.

#### They can’t solve even if labor market concentration were eliminated – their author!

1AC/2AC Posner ’21 [Eric A.; August 31; Kirkland & Ellis Distinguished Service Professor at University of Chicago; “How Antitrust Failed Workers”]

While antitrust law is an important response to labor market monopsony, it cannot solve all the problems of labor monopsony. A significant degree of labor market power is “frictional,” that is, without artificial barriers to entry or excessive concentration of employment. The two major sources of such friction are search costs and job differentiation. Search costs refer to the costs a worker must incur in order to find a job. Job differentiation refers to the variations in amenities and other conditions that distinguish otherwise similar-seeming jobs. A simple mathematical exercise, drawing on estimates of concentration and aggregate and firm-specific labor supply elasticities, shows that even if labor market concentration were eliminated, workers would be paid less than 60% of the competitive wage.

# Case

## FTC ADV

#### It’s empirically overemphasized.

Allenby 16 – Brad Allenby, an American environmental scientist, environmental attorney and Professor of Civil and Environmental Engineering, and of Law, at Arizona State University. [Emerging technologies and the future of humanity, Bulletin of the Atomic Scientists, 71(6), https://journals.sagepub.com/doi/full/10.1177/0096340215611087]

Emerging technologies as an Earth system

The first question to ask about emerging technologies is deceptively simple: Is today really that different? Is there something about today’s emerging technologies—which for purposes of this analysis include nanotechnology, biotechnology, information and communication technology (ICT), robotics, applied cognitive science, humtech (design and engineering of the human as a foundational emerging technology), and their various combinations and permutations—that is qualitatively different from those that characterized other eras of technological change? If there isn’t, much of today’s dramatic language can be understood as simply a reflection of the emphasis that all humans give to the particular era and landscape and culture within which they exist. Each generation tends to overemphasize the degree of change that it experiences, partly because of the immediacy of the stresses to which it is exposed, and partly because it is easy to underestimate how difficult and unpredictable life was in the past, since when one looks back at history it seems to flow logically and necessarily. Indeed, apocalyptic fears have been common when many major technology systems first emerged because of this immediacy, even as subsequent generations grew to view the technology as banal, even boring. In the early days of railroads, for example, there was a widespread belief that traveling at the heretofore unimaginable speed of 25 miles per hour would kill the passengers,

in part because such technology was against the obvious will of God. As an Ohio school board put it,

If God had designed that His intelligent creatures should travel at the frightful speed of 15 miles an hour by steam, He would have foretold it through His holy prophets. It is a device of Satan to lead immortal souls down to Hell. (Nye, 1994: 57)3

In this case, however, a strong argument can be made that emerging technologies today are different not just in degree, but in kind, from those of the past. To begin with, the scope, scale, and speed of technological change are unprecedented. Where previous waves of technological change have involved a few core technologies, such as railroads or electrification, today technological evolution is occurring across the entire technological frontier. Partially as a result of such technologies rippling across a population of seven billion people, we now live on a terraformed planet, the first world we know of anywhere that has been shaped by the deliberate activities of a single species. That is not a discontinuous process, but it is qualitatively new.

Moreover, as the discussion of the engineered warrior of 2050 suggests, the human itself has become a design space. It is certainly true that people have always changed themselves in many ways, from consuming intoxicants of all kinds, to medicine, to education, but there is little question that the direct interventions that are now possible, combined with accelerating advances in fields such as neuroscience, genetics and molecular biology, and prosthetics, make virtually all aspects of the human, including cognitive and psychological domains, potentially subject to design. That the designer is not just engineering external systems, but him- or herself, adds a degree of reflexivity, nonlinearity, and complexity that makes simple predictions about particular technologies tangential and irrelevant at best.

It is worth emphasizing in passing that the argument that humans are at risk from emerging technologies is in an important sense circular. Humans are increasingly both designer and designed; they are, in other words, increasingly an emerging technology in their own right. People are many things, but they are now, and certainly will be in the future, a design project. Thus, in a meaningful way the argument that people are at risk from emerging technologies becomes the argument that emerging technologies are at risk from emerging technologies, which makes little sense, and isn’t very helpful analytically, or in guiding policy or practice.

# 1NR

## Pharma DA

### DA Overview – 1NR

#### Innovation makes pharma sustainable.

Ikeda ’21 [Naomi; February 4; Manager of Innovation Incentives at Ayming; Pharma Times, “Pharma R&D: 2021 and beyond,” https://www.pharmatimes.com/web\_exclusives/Pharma\_R\_and\_D\_2021\_and\_beyond\_1362768]

The sector has come a long way in this regard, with companies doing a lot more in response to criticism that they’re not doing enough for the environment. The International Innovation Barometer (IIB) has shown that the pharma industry is investing significantly in sustainable innovation, with 18% of respondents dedicating 26-50% of their budget on sustainable innovation, which is compared to an average of 14% across all sectors.

Take GlaxoSmithKline for example. Since 2010 it has reduced its carbon emissions by 34%, water usage by 31% and the waste sent to landfill by 78%. This change has been driven by implementing new waste management systems for carbon neutrality and using more green chemistry, for example, the use of using greener solvent and emphasising catalysis and enzymatic chemistry. Significant strides have also been made when it comes to ethical practices, such as phasing out animal testing in non-medical settings, with higher standards of public and regulatory scrutiny.

#### Extinction.

Martinez and Cuautle **’21** [Nestor and Mariana; February 4; Universidad de Las Americas Puebla; Springer International, “Impact of Pharmaceutical Waste on Biodiversity,” https://www.researchgate.net/publication/322127132\_Impact\_of\_Pharmaceutical\_Waste\_on\_Biodiversity]

The increase in levels of pharmacological substances in the environment and their potential adverse effects on biological systems are a problem of global relevance that will pose greater challenges to countries with high rates of population growth. There is evidence that the incorporation of pharmacological substances into organisms and ecosystems puts genetic diversity, species diversity, and community diversity at risk.

There are several pathways through which waste pharmaceuticals can reach to organisms; the main one is through sewage discharge into aquatic ecosystems affecting organism such as microorganisms, fishes, and invertebrates, which can be consumed by higher trophic levels and cause trophic cascade effects. Also the use of treated wastewater for agricultural irrigation can affect the plants which are at the base of the trophic chain. Most of the studies about the effect of pharmaceutical on organisms have omitted to test nonlethal effects, such as change in behavior, reproduction, and stress and changes in community composition and structure. The few studies that have addressed these effects have showed that these changes can affect organisms’ survival or reproductive success, which are linked to their biological fitness, and can affect population and community dynamics and precede species extinctions.

#### 2 – Advantage 2 – the link alone turns the case – new antitrust crowds out ongoing enforcement.

Wilson and Hyman ’20 [Christine and David; July 10; Commissioner of the Federal Trade Commission; Scott K. Ginsburg Professor of Health Law & Policy at Georgetown University School of Law; The Hill, “Pharma pricing is a problem, but antitrust isn't the (only) solution,” <https://thehill.com/blogs/congress-blog/healthcare/506763-pharma-pricing-is-a-problem-but-antitrust-isnt-the-only>]

As we address the ills of soaring drug prices, one prescription should be ignored. Rather than focusing on the drivers of escalating prices, some policymakers argue for abandoning settled principles of antitrust law in a misguided attempt to “fix” something — effective, evidence-based antitrust enforcement — that is not broken.

Sen. [Elizabeth Warren](https://thehill.com/people/elizabeth-warren) (D-Mass.) and Rep. [Alexandria Ocasio-Cortez](https://thehill.com/people/alexandria-ocasio-cortez) (D-N.Y.), for example, [propose a ban](https://www.warren.senate.gov/newsroom/press-releases/warren-ocasio-cortez-to-introduce-pandemic-anti-monopoly-actread-one-pager-here) on all mergers large enough to require pre-notification to the antitrust agencies. Warren claims that “giant corporations and private equity vultures are just waiting for a chance to gobble up struggling small businesses.” Even if that were true — notifications have actually declined — a merger moratorium is like choosing old-fashioned chemotherapy and its life-threatening side effects over more targeted therapy. The moratorium will kill a few problematic mergers that might threaten the body economic, but it will also kill many good mergers, needlessly stifling economic activity.

A narrower approach entails banning nearly all pharmaceutical mergers, as [advocated by the Open Markets Institute](https://openmarketsinstitute.org/wp-content/uploads/2019/12/WhitePaper_DrugPrices_Bluhm.pdf). Two FTC commissioners seem amenable. Two months ago, they voted to reject AbbVie’s acquisition of Allergan, and one proposed to unleash the Inspector General on FTC staff for daring to recommend to the Commission that pharma mergers be permitted to proceed. A few months earlier, the same two commissioners voted to reject Bristol-Myers Squibb’s acquisition of Celgene, even though they acknowledged the proposed settlement, involving the biggest divestiture in merger review history, resolved every antitrust problem the FTC identified.

As current and former FTC officials, we believe these proposals represent a flawed approach. The notion that the FTC should prevent mergers absent evidence of an antitrust violation is deeply misguided – and jeopardizes the FTC’s impressive winning streak based on the many cases it has brought. During the past five years, the Commission has challenged 14 pharmaceutical mergers and required companies to divest 131 drugs. Beyond mergers, in 2013 the FTC won a landmark victory at the Supreme Court in [FTC V. Actavis](https://www.supremecourt.gov/opinions/12pdf/12-416_m5n0.pdf), essentially eliminating anticompetitive patent litigation settlements. [And in January, the FTC sued Vyera Pharmaceuticals](https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin#:~:text=The%20Federal%20Trade%20Commission%20has,life%2Dsaving%20drug%2C%20Daraprim.&text=%E2%80%9CVyera%20kept%20the%20price%20of,illegally%20boxing%20out%20the%20competition.%E2%80%9D) and “pharma bro” Martin Shkreli. These efforts result in massive savings for consumers and taxpayers; just ending reverse payments in patent litigation settlements [saves](https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf) $3.5 billion each year.

Still, drug prices continue to rise, especially for new drugs debuting at prices once considered unimaginable. For example, Zolgensma, a gene therapy for treating spinal muscular atrophy, has a [list price of $2.1 million](https://www.npr.org/sections/health-shots/2019/05/24/725404168/at-2-125-million-new-gene-therapy-is-the-most-expensive-drug-ever). Cancer drugs are so expensive that oncologists talk about “[financial toxicity](https://www.cancer.gov/about-cancer/managing-care/track-care-costs/financial-toxicity-pdq)” as a side effect of treatment.

This is a particularly knotty problem for the elderly who receive health care coverage through Medicare and have been hard hit by COVID-19. The government is prohibited from using competitive bidding or direct negotiation when sourcing drugs for Medicare Part B — those administered by medical professionals. So drugmakers name their price and the federal government must pay.

Medicare Part D operates under a different model – companies use formularies to push down prices for outpatient drugs. Even that model falls short for drugs that do not yet face competition, and Part D is [projected](https://www.cbo.gov/system/files/2019-05/51302-2019-05-medicare_0.pdf) to cost more than $88 billion in 2020. Market exclusivity on so-called biologics like vaccines and insulin often outlasts patent protection, given the technological challenges in creating bioequivalent generics known as biosimilars. Incumbents often compound this problem by restricting distribution and withholding samples from potential competitors.

We support efforts to address rising drug prices while maintaining strong incentives for innovation. Strategies include the new CREATES Act, which allows drug makers to sue for access to drug samples; expedited or automatic approval for biosimilars that have passed muster with the European Medicines Agency; and incentivizing innovation with prizes.

As this list indicates, many causes of breathtaking pharma prices lie beyond the reach of the antitrust laws. Notably, the structure of the U.S. health care system inhibits consumers’ ability and incentive to choose among different providers and products, including prescription drugs. Because insurers pick up much of the tab, patients have little incentive to compare the prices of potentially interchangeable drugs. Even if they were so inclined, the opacity of drug prices and dearth of data available to patients about quality and outcomes inhibits comparison shopping.

To fix the root causes of high pharma prices, we should focus on the drivers of those prices rather than scrapping fundamental antitrust doctrine, including the requirement for evidence of an actual competitive problem.

### Link – 1NR

#### Three links:

#### 1 – Vertical integration – consumer welfare standard is the bedrock of biopharmaceutical innovation – companies orient business strategies around vertical integration AND will decrease innovation if confronted by an upsurge of challengers.

Kennedy ’18 [Joe; 2018; Ph.D. in Economics from George Washington, former Chief Economist with the U.S. Department of Commerce; Information Technology and Innovation Foundation, “Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy,” <https://www2.itif.org/2018-consumer-welfare-standard.pdf?_ga=2.192427434.1418038939.1629691609-110184707.1628807018>]

Innovation Neo-Brandeisians claim that market concentration impedes innovation—and that the consumer welfare standard ignores this fact.38 Regarding the claim that the consumer welfare standard does not adequately take into account nonprice harms such as reduced product quality and slower innovation, it in fact does incorporate nonprice harms, including threats to innovation. Specifically, it 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.39 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 nonprice terms and conditions that adversely affect customers also matter, including “reduced product quality, reduced product variety, reduced service, or diminished innovation.”40

Moreover, according to Joshua Wright of George Mason University, between 2004 and 2014, the Federal Trade Commission (FTC) challenged 164 mergers, alleging harm to innovation in 54 of them.41 For example, former FTC Commission Terrell McSweeny wrote that in 2014, “The FTC challenged the proposed acquisition of Eagle-View Technology by Verisk Analytics…. The FTC closely examined whether likely future competition between the merging parties would offer customers ever more innovative products.”42 More recently, DOJ prevented two potential mergers based on the likely effect to research and innovation.43 DOJ guidelines on horizontal mergers explicitly consider whether a merger is “likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.”44

Neo-Brandeisians also argue that innovation is maximized by less-concentrated market structures. In a concentrated market, they argue, companies face less pressure to innovate, and innovators face higher barriers to entry. Over time, the structure of the market produces stagnation. Bogus, for example, cites research that shows small businesses are more inventive than large firms.45 The Roosevelt Institute claims, “Rather than investing in research and development (R&D) to generate innovative products, corporations have relied on lax merger regulation to buy out competitors, or they have employed a litany of anticompetitive practices to prevent them from entering the market in the first place.”46

The empirical evidence regarding these claims, however, is debatable, and in some cases simply lacking. For example, more recent studies using better data from the National Science Foundation show that large firms invest more in R&D activities and enjoy higher returns on innovation output per dollar invested in R&D.47

Moreover, these questions regarding innovation and market structure must be looked at market by market, and the desirability of any particular market change should be judged by whether it increases innovation or harms consumers. In the process of this investigation, it is very important to keep in mind that while bigness in some cases may pose a threat, in other cases, it is critical to innovation.48 William Baumol, a leading scholar of innovation economics, has written: “In markets without too much difficulty of entry, an increase in concentration in the longer run may not be ascribable to attempts by firms to achieve monopoly power but, rather, to innovation and the resulting technological changes that make it efficient for output to be provided by firms that are larger than previously was the case.”49

In fact, many studies have shown innovation and competition can be modeled according to an inverted “U” relation, with both too much and too little competition producing less innovation. A study of U.K. manufacturing firms discovered this relationship: Competition above a certain level reduces the high profits successful innovators earn and are able to reinvest in their next round of innovation.50 Others, including F.M. Scherer and Toshihiko Mukoyoma have found similar patterns.51 Similarly, in a study of U.S. manufacturing firms, Aamir Hashmi found that too much competition led to slightly less innovation.52 Firms need to be able to obtain “Schumpertarian” profits to reinvest in innovation that is both expensive and uncertain. As Carl Shapiro notes, “Innovation incentives are low if expost competition is so intense that even successful innovators cannot earn profits sufficient to allow a reasonable risk-adjusted rate of return on their R&D costs.”53

The pharmaceutical industry offers an example of this even as neo-Brandeisians often point to this industry as an example of the dangers of bigness. The Roosevelt Institute complains that: “Instead of investing in R&D, many pharmaceutical companies plan their business models around their ability to purchase smaller firms that have shouldered the burden of developing new products.”54 Carl Bogus asks rhetorically: “When, for example, a large pharmaceutical company buys a small firm that invented a potentially profitable new drug, should the law care that there will be one less firm in the industry?”55

The pharmaceutical industry has indeed migrated to a model wherein small companies often perform initial research and are then purchased by large companies. But there are good reasons for this. First, having breakthrough research performed by small companies allows them to be much more focused and lets investors bet on specific therapies or diseases with the assurance company owners have a high stake in their success. OK, but why allow big companies to buy them just when the technology looks most promising? Because the process of testing and marketing a drug is very complicated and time consuming. Federal laws regarding testing, labeling, and marketing are very detailed and complex, so a large firm is much more likely to successfully bring a new drug to market. Also, given the difficulties in performing an initial public offering, investors increasingly look to an acquisition as a way of cashing out and obtaining the capital to invest in the next company.

Moreover, given the fact that in 2014 domestic pharmaceutical firms devoted 43.8 percent of their gross value added to research and development, it is hard to argue that consolidation is hurting innovation.56 In fact, many studies have shown innovation and competition can be modeled according to an inverted “U” relation, with both too much and too little competition producing less innovation.

Finally, the argument that bigness hurts innovation would have more power if the markets it targets were characterized by low investment and profit-taking. But many of these companies are investing heavily in R&D. Of the top 10 global R&D spenders, half are U.S. technology companies (Amazon, #1; Alphabet [Google], #2; Intel, #3, Microsoft, #6, and Apple, #9).57 Together, they invested approximately $65 billion in R&D in 2017. Big Internet platforms, for example, have made large bets on a wide variety of technologies outside their normal services, including virtual reality, driverless cars, artificial intelligence, broadband coverage, drones, and cloud services. Regardless of whether these investments pay off for shareholders, it is hard to argue that society will not benefit greatly. In summary, irrespective of one’s view on the relationship between firm size and innovation, the consumer welfare standard enables antitrust officials to effectively consider the effects on innovation.

#### 2 – Overaggressive enforcement – Moving away from the CWS reduces innovation and causes overaggressive enforcement.

Miller ’21 [Tracy; 5/3/21; Ph.D. in Economics from the University of Chicago, Senior Policy Research Editor at the Mercatus Center; "Evaluating Arguments for Antitrust Action Against Tech Companies," <https://www.mercatus.org/publications/antitrust-and-competition/evaluating-arguments-antitrust-action-against-tech-companies/>; **Note**: article ends without a period]

In the United States, growing concern that large digital platform companies such as Google, Facebook, Amazon, and Apple are exercising monopoly power has resulted in accusations of anticompetitive behavior and investigations into whether these companies are guilty of exclusionary practices. Tracy Miller examines the validity of these concerns in “Evaluating Arguments for Antitrust Action against Tech Companies.” He finds that increased enforcement could be detrimental to consumer welfare, which has been, and should remain, the guiding light in antitrust policy.

What if Antitrust Laws Were More Stringently Enforced?

* Companies found guilty of antitrust violations would likely face divestiture of acquired firms. Companies that benefit from combining different stages of the production process (known as vertical integration) might find their products and services structurally separated.
* These antitrust remedies would likely harm consumers, who benefit from the lower costs and increased innovation that result from combining complementary products into one ecosystem.
* Assessing the tradeoffs that result from alleged anticompetitive firm conduct would likely be difficult—such conduct often benefits some consumers while making others worse off.
* Further, antitrust decisions may not be based entirely on objective analysis but be influenced by political pressure, sometimes coming from a firm’s competitors.

The Benefits of Keeping the Consumer Welfare Standard

To become dominant in any market, companies must engage in mutually beneficial, voluntary exchanges with millions of customers on a regular basis.

Tech companies can remain dominant only by effectively coordinating the plans of numerous diverse market participants worldwide (a huge undertaking).

Billions of people are better off because of the information they can access thanks to the market-coordination efforts of firms like Google.

The goal of antitrust policy should be the promotion of market competition that results in mutually beneficial transactions. This consumer welfare standard has guided antitrust policy since the 1970s. It also serves as a check on regulators interfering with the plans of consumers and entrepreneurs in a market economy.

Key Takeaway

Firms such as Google, Facebook, Amazon, and Apple have remained dominant, in part, because they continually improve the quality of the goods and services they offer while keeping prices low and affordable. Focusing on static measures of competition (e.g., number of firms competing) may discourage the dynamic competition that has helped spur the innovation that has improved consumer welfare in recent years.

Excessive rules and regulations (such as strict privacy regulations) make it harder for new firms to compete with existing firms. Lowering such barriers to entry allows competitors to find creative ways to keep the pressure on the big tech companies so that, as they try to retain their position in the marketplace, they must continue to provide innovative products and services at affordable prices

#### It ripples across sectors.

Huddleston ’20 [Jennifer; 7/30/21; Director of Technology and Innovation Policy at the American Action Forum, J.D. from the University of Alabama; "Continuing a Principled Approach to Antitrust," <https://www.americanactionforum.org/insight/continuing-a-principled-approach-to-antitrust/>]

To utilize antitrust law to solve problems unrelated to competition would be to fundamentally reshape U.S. antitrust law. Most of the comments submitted to the committee from a wide range of scholars show a general consensus that the current standards for antitrust are fair and able to serve the purposes of antitrust law. This general consensus reflects the conclusion of the Antitrust Modernization Commission during the Obama Administration that found, “There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.” Maintaining the current standards allows competition and innovation to continue to flourish without unnecessary government intervention and its potential consequences. As subcommittee Ranking Member Rep. Jim Sensenbrenner stated during yesterday’s hearing, “Congress does a poor job picking winners and losers. I have reached the conclusion that our antitrust laws work and do not need to change.”

Further, changing antitrust laws would intervene in a currently competitive and dynamic market. To see how rapidly technology changes, one need only consider that not long ago similar claims of unassailable dominance were faced by companies such as Blockbuster, AOL, and MySpace that now rest in nostalgia. As the CEOs at yesterday’s hearing all pointed out, technology and innovation are quintessentially American values and enable other entrepreneurs to better serve their consumers.

Not only do current antitrust laws work for dynamic markets, any changes to these laws could have consequences on numerous markets beyond technology and open the door for the use of competition law for more political purposes. Antitrust action based on either an incomplete analysis or a non-competition issue could prevent consumers from receiving the benefits of acquisition and could spread to other industries that might one day find themselves the subject of political ire. To ensure the U.S. economy remains a leader in innovation—in other words, to ensure that competitors to the largest tech companies can emerge—it remains critical that competition policy and antitrust enforcement remain reserved for their intended objective purposes.

Although critics may claim that the consumer welfare standard neglects network effects, scale advantages, harm to innovation, or monopsony power (including in labor markets), the standard can and does address these issues— at least where they threaten to harm market performance.139 Indeed, the current FTC and DOJ Horizontal Merger Guidelines contemplate consideration of these issues,140 which have engendered recent antitrust enforcement actions. For example, the DOJ based its action against American Express on a theory of market power reinforced and protected by network effects.141 And the agencies have challenged mergers based on theories of monopsony harm142 and harm to innovation.143 Stripped of rhetoric and properly understood, populist critiques focused on these issues do not reject the consumer welfare standard, but call for more aggressive intervention under that standard.

#### 3 – Mergers – they’re vital to innovation – err neg because only small minorities harm competition.

ITIF ’21 [Information Technology and Innovation Foundation; June 25; Independent research institute focused on technological innovation and public policy; ITIF, “Pharmaceutical Consolidation & Competition: A Prescription for Innovation” <https://www2.itif.org/2021-pharmaceutical-task-force.pdf>

The Information Technology and Innovation Foundation (ITIF) appreciates this opportunity to comment on the Pharmaceutical Task Force. We first caution against hasty economic analysis about a complex industry. We then envisages the optimal course of actions for antitrust agencies to achieve their stated objectives: namely, limiting market power while incentivizing pharmaceutical innovation. There is no need to radically alter antitrust doctrines and law. However, there are some actionable steps relevant to attain the stated objectives of incentivizing pharmaceutical innovation while controlling drug price increases.

Introduction

In pharmaceutical markets, more than anywhere else, “innovation is the name of the game.”1 Innovation rather than production drives the industry’s growth.2 Pharma markets are the pinnacle of “innovation markets” as defined by Richard Gilbert and as enshrined in the 1995 I.P. Guidelines.3 Because innovation requires sufficient scale, firms have often gained that scale through mergers.4

The FTC’s strong enforcement record in pharma mergers suffers a paradox: While more than 50 consent decrees over the last 25 years required divestitures of products as a condition for merger approval, the political pressure for stricter antitrust enforcement continues ramping up.5 In the year 2020 for instance, notable pharma mergers included AstraZeneca acquiring Alexion for $39 billion, Gilead acquiring Immunomedics for $21 billion, BMS acquiring MyoKardia for $13.1 billion, and Johnson & Johnson acquiring Momenta for $6.5 billion. While popular perception of the pharmaceutical industry greatly improved with its effective response to the COVID-19 pandemic, these and other pharma mergers garnered political concerns.

The political pressure increased partly in response to an academic paper, “Killer Acquisitions,” by Colleen Cunningham, Florian Ederer, and Song Ma. 7 The idea behind killer acquisition theory is that an incumbent buys an innovative nascent company developing a competing product and discontinues the competing product. The acquisition pre-empts future competition. The incumbent killed the potential rival and thereby distorted competition and stifled innovation. The antitrust implications are straightforward: Killer acquisitions go unnoticed by antitrust authorities and require a change of law and new theories of harm. In that regard, the present call for public input fits into the perceived need that the current antitrust framework cannot catch some detrimental mergers. Cunningham et al. assert that killer acquisitions represent only a small share of mergers: 5.3 to 7.4 percent of mergers.

But does the killer acquisition theory materialize in business reality? Do incumbents ever discontinue the acquired firm’s products for anticompetitive reasons? At least one study finds a similar share as Cunningham et al. and suggests that approximately 95 percent of pharma mergers are not “killer acquisitions.” And within the five percent that are allegedly problematic, any discontinuation of products requires balancing against counterfactuals absent the merger. Would discontinuation of the drug have occurred irrespective of the merger due to changing market circumstances or due to different corporate strategies? The authors of the killer acquisition theory assume that these five allegedly problematic percent are all anticompetitive acquisitions. In fact, this number could very well be less. 8 Madl qualifies the very notion of killer acquisition stating that:

The mechanism of action used in the Cunningham, Ederer, and Ma study to identify cases of overlap is not mutation-specific, meaning that two drugs targeting the same enzyme and having the same net effect (e.g., inhibition) may not treat the same patients. Accordingly, purchasing the second drug could expand the acquirer’s market, rather than cannibalize sales.9

In other words, Cunningham et al. overlook the possible positive effects on competition and innovation of these acquisitions. The notion of killer acquisitions overly emphasizes Kenneth Arrow’s concept replacement effect of innovation and overlooks the Schumpeterian aspect of innovation. In other words, the tenets of the notion of killer acquisitions rest upon the assumption that a dominant firm would acquire a rival to avoid the rival’s product “cannibalizing” the dominant firm’s profits. However, the acquiring firm may seek to create complementarities, thereby opening new markets. Schumpeter indeed wrote that entering new markets (through organic growth or mergers) “incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a

### AT: High Costs

#### 2 – Big Pharma doesn’t hurt consumers or workers – effects are unrelated due to inherent market segmentation.

Richman et al. ’17 [Barak, Will Mitchell, Elena Vidal, and Kevin Schulman; June 6; Professor of Law at Duke; Professor of Strategic Management at the University of Toronto; Assistant Professor of Management at Baruch College; Professor of Medicine at Duke University Medical Center; Loyola University Chicago Law Journal, “Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition,” vol. 48]

Figure 2 estimates industry concentration based on the Hirschman Herfindahl Index (“HHI”) for both the global and United States pharmaceutical markets.18 It appears that overall concentration in the industry is both low and relatively stable; the 500–700 range is well below the Department of Justice’s guidelines that consider HHI between 1,500 and 2,500 points to be moderately concentrated.19 Figure 2 demonstrates that recent price increases do not appear to correlate with market power based on greater overall concentration in the industry.

Additionally, increases in list prices for drugs can be somewhat misleading because they represent actual market prices. Insurance companies, hospital systems, pharmaceutical benefit managers (“PBMs”), and other payors with market power commonly negotiate deep discounts from list prices through a system of rebates and chargebacks. The health care industry has seen high levels of provider and payor consolidation in the last two decades due to inadequate antitrust enforcement. This consolidation raised health care prices for consumers while simultaneously enhancing market power of providers and payors when demanding discounts from pharmaceutical manufacturers. 21 While these negotiations are typically confidential and nontransparent, there are suggestions that discounts can reach as high as 40–50 percent off the listed prices.22 Other customers, such as the United States Department of Veterans Affairs (“VA”) and Medicaid in the United States, also typically receive prices at a discount from list prices (the VA through direct negotiation and Medicaid through statutory rebates).23 Even with such discounts, overall drug spending is increasing in the United States and in many other countries.24

Instead of prices correlating systematically with industry concentration, it seems that individual price increases are products of specific market structures and opportunities. Specifically, recent price increases appear to have emerged from changes in firm strategies rather than arising from an increase in overall market power. Some instances of price increases are consequences of firms exploiting opportunities to raise prices on generic drugs with few competing products. More generally, many established proprietary drug companies are placing greater emphasis on specialty drugs, including drugs based on traditional small cell science and those stemming from the biological science revolution, that have few competitors in their targeted market segments.25 While these strategies reflect the presence of market power (i.e., there are few competing products in the biofunctional space where these price increases take place), they appear uncorrelated with changes in industrywide concentration arising from M&A trends. Instead, they reflect changes in market segmentation strategy, in which firms target medical needs where there are few competing products.

This suggests that market power is better measured not in industrywide measures, but instead along functional equivalents, which is how antitrust regulators typically scrutinize proposed acquisitions. More important, it suggests that pricing strategies will continue along a segmentation strategy, in which firms will seek market rigidity or a market niche in which there is a lag in opportunities for competitors to respond with competing products.

Such lags are highly sensitive to the surrounding regulatory framework that facilitates or deters entry. The primary source of such lags in the United States is the pharmaceutical regulatory system under the United States Food and Drug Administration (“FDA”). This time, lag means that companies with few, or no, competitors that raise prices on generic drugs will have the market to themselves until another firm is able to bring a competing drug through the Abbreviated New Drug Approval (“ANDA”) process, which often takes several years.26 Similarly, a company that introduces a breakthrough drug at high prices will have the market to themselves until competitors are able to discover, develop, and bring competing drugs through the New Drug Approval (“NDA”) or Biological Licensing Approval (“BLA”) process; this, again, can take several years.27

Reciprocally, market structures also allow for competitive reactions that limit pricing power. In many instances, new drugs that reach the market do lower list prices, deepen discounts, and reduce consumer prices. For instance, the introduction of AbbVie’s Viekira Pak into the Hepatitis C market in 2016 led to extensive price competition with Gilead based on discounts in the tens of thousands of dollars to pharmaceutical insurance and benefit management companies.28 Similarly, Mylan steadily increased the list price of its patent-protected EpiPen. When Mylan acquired the product in 2007, the list price was a little over $100, but its current price is over $600, largely reflecting strong market preference for the company’s proprietary technology for injecting the allergic reaction drug.29 Mylan indicated that it will also be launching a generic version at about half the price, in anticipation of Teva Pharmaceuticals launching a generic competitor, while continuing to offer the branded product.30 Again, while this is a market power issue, the pricing questions have little to do with industry-wide M&A trends. Indeed, industry reports in early 2017 suggest that alternatives to the EpiPen were rapidly eroding Mylan’s market share.31

To the degree that market segmentation strategies are primarily responsible for price increases, it means that antitrust authorities should scrutinize specific biofunctional markets and evaluate mergers on whether a consolidated entity will have new pricing power within a specific pharmacological space or deter the entry of a pharmaceutical competitor. If AbbVie, for instance, were to seek to purchase Gilead, there could be a case for evaluating the deal because it would eliminate all competition within a specific biofunctional market. Similarly, Teva’s recent acquisition of Allergan’s generic drug lines warranted examination for potential market power in some product classes.32 But despite specific mergers that aggregate market power within a discernable submarket, it is not clear that the general trend in M&A activity warrants suspicion in terms of its impact on prices. The larger lesson is that maintaining a competitive pharmaceutical marketplace requires assessing and improving the surrounding regulatory structure, more so than deterring megamergers.

### AT: Biden XO

#### Everything is non-binding.

Holding et al. ’21 [Christopher, Paul Jin, Andrew Lacy, Arman Goodwin; July 15; Experts at JD Supra, a daily source of legal intelligence on all topics business and personal, distributing news, commentary, and analysis from leading lawyers; JD Supra, “Biden Executive Order Calls for Heightened Antitrust Scrutiny,” <https://www.jdsupra.com/legalnews/biden-executive-order-calls-for-7783960/>]

Key Implications

Revised horizontal and vertical merger guidelines are expected, which will likely implement a much more aggressive approach to deals. Note, however, that agency merger guidelines are not binding on courts and merger challenges under more aggressive theories may be met with skeptical courts;

Anticipate delays in HSR review especially for deals in industries singled out by the Order (e.g., tech, pharma, healthcare, among others), even if competitive overlaps are minimal;

Deals not subject to HSR filing requirements, even when purchase prices are relatively low, should be reviewed by antitrust specialists to assess risk, especially in the sectors identified in the Order;

#### Corporations don’t think there is a threat.

Graham ’9-16 [Jed; September 16; Author and analyst; Investor’s Business Daily, “FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court,” <https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/>]

Investors don't seem to see a major threat. Google parent [Alphabet](https://www.investors.com/news/technology/google-stock-buy-now/) ([GOOGL](https://research.investors.com/quote.aspx?symbol=GOOGL)), Apple and Facebook stock have hit all-time highs this month. After Khan's ascension as FTC chair, Amazon stock ran to a record, before its second-quarter revenue miss briefly halted its momentum.

Recent antitrust rulings help explain the apparent lack of concern.

The Supreme Court's June opinion rejecting NCAA limits on educational benefits for student-athletes reads like a celebration of noninterventionist antitrust law, William Kovacic, who chaired the FTC under President George W. Bush, told IBD.

"Markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare," Justice Neil Gorsuch wrote. Courts examining business dealings should take care not to "set sail on a sea of doubt," he added, elevating William Howard Taft's warning of the danger of a "shifting, vague and indeterminate" antitrust standard.

The words seemed to carry a not-too-subtle message for the Biden team, Kovacic says. "Until the Congress changes the law, we will continue to endorse the approach we have taken for the last 40 years," he said.

Can Parties Unite On Antitrust Law?

The House Judiciary Committee narrowly passed a package of antitrust measures in June called the Ending Platform Monopolies Act. Amazon has warned of massive disruption from restrictions preventing the biggest online platforms from favoring their own goods and services. "These bills would jeopardize Amazon's ability to operate a marketplace for sellers, potentially resulting in hundreds of thousands of small and medium-sized businesses losing access to Amazon's customers and services."

Another measure would shift the burden of proof for Big Tech acquisitions under antitrust law. Companies with a market cap of $600 billion or more — including Apple, Amazon, Facebook and Google — would have to prove that a proposed merger wasn't anticompetitive.

GOP Sen. Josh Hawley's antitrust bill goes much further, essentially banning acquisitions by companies with a market cap over $100 billion.

Skepticism about Big Tech and excessive corporate power is clearly bipartisan. That helps explain why Khan's nomination as commissioner sailed through the Senate with 21 Republican votes. Yet Biden didn't reveal until after the vote that he intended to name Khan FTC chair, which might have given some senators pause.

Fundamental changes to antitrust law are unlikely to pass the closely divided Congress this year, Goldman Sachs analysts say. Some Democratic lawmakers have voiced opposition to the House antitrust package. Meanwhile, Hawley's Trust-Busting for the 21st Century Act has zero co-sponsors.

### AT: Turn

#### 2ac 7---

#### Big phrama not bad but even if they win this companies still have to reapply for paatents and major companies do innovate otherwise we wouldn’t have vaaccines and life saving meds

#### Profitability is key.

Shepherd ’18 [Joanna; August 8; Professor of Law at Emory; Health Care Law and Policy, “Consolidation and Innovation in the Pharmaceutical Industry: The Role of Mergers and Acquisitions in the Current Innovation Ecosystem,” <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1356&context=jhclp>]

However, concerns about the impact of consolidation on drug innovation are largely based on an outdated understanding of the innovation ecosystem in the pharmaceutical industry. Today, most drug innovation originates not in traditional pharmaceutical companies, but in biotech companies and smaller firms, where a culture of nimble decision-making and risk-taking facilitates discovery and innovation. In the later stages of the drug development process, the biotech companies routinely partner with large pharmaceutical companies to advance through expensive late-stage clinical trials and to effectively manufacture, market, and distribute the drugs. In this current ecosystem, biotech and pharmaceutical firms are each able to specialize in what they do best, bringing expertise and efficiencies to the innovation process. The specialization has led to an environment in which approximately three-fourths of new drugs are externally-sourced. Internal R&D is no longer the primary source, or even an important source, of drug innovation in large pharmaceutical companies.

As a result, analyses that focus on mergers’ impacts on internal R&D and innovation are missing the point. Instead, proper analyses of the impacts of consolidation on innovation should focus on whether consolidation enables firms to better support aggregate drug innovation in the current ecosystem. Concerns about harm to innovation could be relevant in specific mergers or acquisitions if the consolidating firms are the primary innovators in the area, the firms innovate internally, and there are essentially no sources of external innovation. However, such scenarios are increasingly rare in the current ecosystem. As long as there is sufficient market competition so that firms must innovate to ensure their future profitability and market share, consolidation will often allow firms to devote more resources to externally-sourced innovation. The increased demand for externally-sourced innovation will, in turn, spur incentives to innovate in biotech and small companies. Indeed, data suggests that consolidation is associated with increases in aggregate innovation. In recent years, aggregate innovation has held strong notwithstanding dramatic increases in M&A activity; in fact, 2014 and 2015 generated both record numbers of new drug approvals and record pharmaceutical M&A.