

Fighting 21st Century Monopoly Power: Legal Tools and Applications

Reading Group
Spring 2022
Yale Law School

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Introduction

The United States has a monopoly problem. Markets are increasingly concentrated across sectors, contributing to lower wages, higher prices, ballooning corporate profits, and political and economic inequality. In response, lawyers, policymakers, and activists are reimagining and reforming the legal foundations that undergird market organization. At the center of their focus lie antitrust law and regulatory policy. In a July 2021 address on competition policy, President Joe Biden—reflecting the influence of today’s antimonopoly movement—said, “We’re now 40 years into the experiment of letting giant corporations accumulate more and more power” by “pull[ing] back on enforcing laws to promote competition.” “I believe,” the President went on, “the experiment failed.”

This reading group will explore the status quo’s failures and some key proposed alternatives. In the first three weeks, students will discuss how law has evolved to facilitate private corporate power and the harms that concentrations of market power cause in the economy and society. The syllabus will then introduce students to some of the key legal tools to address monopoly power, including antitrust, public utility regulation, public options, and other regulatory approaches. The second half of the course will apply these tools and ideas to specific sectors, including finance, health care, agriculture, and pandemic response.

This syllabus is inspired by, and builds upon, the Law & Political Economy Project’s [Anti-Monopoly and Regulated Industries Summer Academy](#). Concerns central to the LPE approach—including questions of power, democracy, and equality—will be at the center of the group’s readings and discussions.

Some sessions will feature guest speakers, who will be announced as they are confirmed.

This reading group will meet for 13 weeks, with 75-minute sessions each week. Students must attend at least 10 sessions to receive credit for this course.

Reading Assignments

1. Introduction (70 pages)

Lina Khan, *The End of Antitrust History Revisited*, 131 Harv. L. Rev. 1655 (2020), <https://harvardlawreview.org/2020/03/the-end-of-antitrust-history-revisited/>.

28 pages

K. Sabeel Rahman, *Challenging the New Curse of Bigness*, Am. Prospect (Nov. 29, 2016), <https://prospect.org/economy/challenging-new-curse-bigness/>.

10 pages

Am. Econ. Liberties Proj., *The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach* (Jan. 2021), https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf.

Excerpt: Read the Executive Summary and Introduction

18 pages

Joe Biden, Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (Washington, DC, July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

5 pages

Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, & K. Sabeel Rahman, *Building a Law and Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784 (2020), https://www.yalelawjournal.org/pdf/Britton-Purdyetal.Feature_iwo42jj4.pdf.

Excerpt: Read the Introduction; *Optional*: Parts I-II

9 pages

2. History / Case Law (75 pages)

Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 Yale L.J. 175 (2021), <https://www.yalelawjournal.org/feature/recovering-the-moral-economy-foundations-of-the-sherman-act>.

Excerpt: Read the Introduction and Parts III and V

38 pages

Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J. F. 960 (2018), <https://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem>.

Excerpt: Pages 960-976
17 pages

Key Federal Antitrust Statutes (Sherman Act, Clayton Act, FTC Act) – Excerpts
2 pages

Case Excerpts:

Brown Shoe Co. Inc., v. United States, 370 U.S. 294 (1962).
Excerpt: Read Part III and “The Probable Effect of the Merger” section
9 pages

United States v. Von’s Grocery Co., 384 U.S. 270 (1966).
Excerpt: Majority opinion although the Appendix is worth looking through
3 pages

Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). [Note that this case
utilizes the Chicago School approach unlike the other cases]
Excerpt: Majority opinion
6 pages

Optional: Sandeep Vaheesan, *Two-and-a-Half Cheers for 1960s Merger Policy*, HLS
Antitrust Association Blog (Dec. 12, 2019),
<https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/>.

Optional: Eleanor M. Fox and Philipp Bazenov, *Antitrust and Inequality: The History of
(In)Equality in Competition Law and Its Guide to the Future* (July 21, 2021), NYU Law
and Economics Research Paper Forthcoming, <https://ssrn.com/abstract=3897944>.
Excerpt: Pages 1-10, 69-85

3. Market Power Today (43 pages) – Guest speaker: Matt Stoller

Heather Boushey & Helen Knudsen, *The Importance of Competition for the American
Economy*, The White House: Blog (July 9, 2021),
<https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/>.
5 pages

Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*,
135 Quar. J. of Econ. 561 (2020),
<https://academic.oup.com/qje/article/135/2/561/5714769>.
Excerpt: Read the Introduction
6 pages

Steven Berry et al., *Do Increasing Markups Matter? Lessons from Empirical Industrial
Organization*, 33 J. of Econ. Perspectives 44 (2019),
<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.33.3.44>.

Excerpt: Pages 45-60, skim 46-53
16 pages

Alan B. Krueger, Luncheon Address: Reflections on Dwindling Worker Bargaining Power and Monetary Policy (Aug. 24, 2018),
https://www.kansascityfed.org/documents/6984/Lunch_JH2018.pdf.
16 pages

4. Anti-Monopoly Toolkit I - Antitrust (Goals) (79 pages)

William Kovacic, *The Roots of America's Competition Revolution*, ProMarket (Sept. 21, 2021), <https://promarket.org/2021/09/21/the-roots-of-americas-competition-revolution/>.
3 pages

Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979),
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4867&context=penn_law_review.
25 pages

Louis B. Schwartz, *'Justice' and Other Non-Economic Goals of Antitrust*, 127 U. Pa. L. Rev. 1076 (1979),
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4868&context=penn_law_review.
6 pages

A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 Rev. of Indust. Org. 741 (2019),
<https://link.springer.com/article/10.1007/s11151-019-09688-4>.
Excerpt: Pages 741-758; *Optional* 764-770)
18 pages

Sanjukta Paul, *A Democratic Vision for Antitrust*, Dissent (Winter 2022),
<https://www.dissentmagazine.org/article/a-democratic-vision-for-antitrust>.
5 pages

Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 William & Mary L. Rev. Online (forthcoming 2022),
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3929159.
17 pages

Daniel A. Hanley, *How Antitrust Lost Its Bite*, Slate (Apr. 6, 2021),
<https://slate.com/technology/2021/04/antitrust-hearings-congress-legislation-bright-line-rules.html>.
5 pages

Optional: Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378 (2020), <https://www.uclalawreview.org/antitrust-as-allocator-of-coordination-rights-2>.

Excerpt: Introduction and Part 1

Optional: Petition for Rulemaking to Prohibit Exclusionary Contracts, Open Markets Institute et al. (July 21, 2020), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf>.

5. Anti-Monopoly Toolkit I - Antitrust (Structure) (50 pages)

Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. Chi. L. Rev. 357 (2020),
<https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4/>.
23 pages

Tim Wu, *Antitrust Via Rulemaking: Competition Catalysts*, 16 Colo. Tech. L.J. 33 (2017),
https://scholarship.law.columbia.edu/faculty_scholarship/2056/.
27 pages

6. Anti-Monopoly Toolkit II - Public Utility, Corporate Regulation (45 pages) – Guest Speaker: Daniel Hanley (TBC)

William Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in *The Corporation and American Democracy* 139 (Naomi R. Lamoreaux & William J. Novak eds., Harvard University Press 2017), <http://williamjnovak.com/assets/final-page-proofs-of-public-utility-chapter.pdf>.
38 pages

Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. European Competition L. & Prac. 131 (2018),
<https://academic.oup.com/jeclap/article/9/3/131/4915966>.
2 pages

Daniel A. Hanley, *Pass Corporate Chartering Power to Washington*, Democracy (Sept. 8, 2021), <https://democracyjournal.org/arguments/pass-corporate-chartering-power-to-washington>.
5 pages

7. Digital Platforms (80 pages)

Lina Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019),
<https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/>.
Excerpt: Read Parts I and IV
47 pages

Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations of the Subcommittee on Antitrust, Commercial and Administrative

Law of the House Committee on the Judiciary, (2d Session 2020),
https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

Excerpt: Pages 6-21

16 pages

K. Sabeel Rahman, *The New Utilities*, 39 *Cardozo L. Rev.* 1621 (2018),
<https://brooklynworks.brooklaw.edu/faculty/988>.

Excerpt: Read the Introduction

6 pages

Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 *Berkeley Bus. L. J.* 39 (2018),
<https://lawcat.berkeley.edu/record/1128876?ln=en>.

Excerpt: Read the Introduction

7 pages

Sandeep Vaheesan, *How Biden's FTC Can Go After Google and Facebook*, *Democracy* (May 25, 2021), <https://democracyjournal.org/arguments/how-bidens-ftc-can-go-after-google-and-facebook/>.

4 pages

Optional: Substitute Amended Complaint for Injunctive Relief and Other Equitable Relief, *FTC v. Facebook*, Case 1:20-cv-03590-JEB,
https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf.

Optional: Opinion on Motion to Dismiss, *FTC v. Facebook*, Case 1:20-cv-03590-JEB, ECF 73,
https://www.ftc.gov/system/files/documents/cases/073_2021.06.28_mtd_order_memo.pdf.

Optional: Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 *Stan. Tech. L. Rev.* 55 (2020), <https://law.stanford.edu/publications/why-google-dominates-advertising-markets/>.

Excerpt: Read the Introduction

Optional: Matt Stoller, *Amazon Prime is an Economy-Distorting Lie*, *Big* (May 30, 2021), <https://mattstoller.substack.com/p/amazon-primers-free-shipping-promise>.

Optional: Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 *Yale L.J.* 710 (2017), https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf.

8. Labor (64 pages)

Brian Callaci, *It's Time for Labor to Embrace Antimonopoly*, *The Forge* (Apr. 13, 2021), <https://forgeorganizing.org/article/its-time-labor-embrace-antimonopoly>.

6 pages

Kate Andrias, *Beyond the Labor Exemption: Labor's Antimonopoly Vision and the Desire for Greater Democracy*, in *The Antimonopoly Tradition* (Daniel A. Crane & William J. Novak eds., forthcoming 2022) [*Pending permission from author*]

39 pages

David Madland, *Wage Boards for American Workers: Industry-level Collective Bargaining for All Workers*, Center for American Progress (Apr. 9, 2018), <https://www.americanprogress.org/article/wage-boards-american-workers/>.

14 pages

Brian Callaci, *Competition is Not the Cure*, Boston Rev. (Nov. 23, 2021), <https://bostonreview.net/articles/competition-is-not-the-cure/>.

5 pages

9. Vertical Restraints (48 pages) – Guest speaker: Sanjukta Paul

Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, LPE Blog (Nov. 18, 2021), <https://lpeproject.org/blog/what-do-franchisees-do-vertical-restraints-as-workplace-fissuring-and-labor-discipline-devices/>.

5 pages

Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 *Law and Contemporary Problems* 65 (2019), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4919&context=lcp>.

23 pages

Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 *Law and Contemporary Problems* 45 (2019), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4918&context=lcp>.

20 pages

Optional: Brian Callaci, *Control without Responsibility: The Legal Creation of Franchising 1960-1980*, Washington Center for Equitable Growth (Dec. 2018), <https://equitablegrowth.org/working-papers/control-without-responsibility-the-legal-creation-of-franchising-1960-1980/>.

Optional: Sandeep Vaheesan, *Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law*, 1 *J. of L. & Pol. Econ.* 28 (2020), <https://escholarship.org/uc/item/8cj0z1tq>.

Excerpt: Pages 29-38

Optional: Sanjukta Paul & Nathan Tankus, *The Firm Exemption and the Hierarchy of Finance in the Gig Economy*, 16 *U. ST. THOMAS L.J.* 45 (2019), <https://ir.stthomas.edu/ustlj/vol16/iss1/4/>.

10. Health Care / Pharma (72 pages)

Allison K. Hoffman, *Health Care's Market Bureaucracy*, 66 UCLA L. Rev. 1926 (2019), https://scholarship.law.upenn.edu/faculty_scholarship/2085.

Excerpt: Pages 1930-1967, 2002-2021
58 pages

Nicholas Bagley, *Medicine as a Public Calling*, 114 Mich. L. Rev. 57 (2015), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1225&context=mlr>.

Excerpt: Pages 58-68; *Optional*: 79-99
11 pages

Allison Hoffman, *Medicare for All as a Democratic Movement*, LPE Blog (July 22, 2019), <https://lpeproject.org/blog/medicare-for-all-as-a-democratic-movement>.

3 pages

11. Banking / Finance (90 pages) – Guest speaker: Saule Omarova

Morgan Ricks, *Money as Infrastructure*, 2018 Colum. Bus. L. Rev. 757 (2018), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2052&context=faculty-publications>.

Excerpt: Read Part I
15 pages

Graham Steele, *The New Money Trust: How Large Money Managers Control Our Economy and What We Can Do About It*, American Economic Liberties Project (Nov. 23, 2020), <https://www.economicliberties.us/our-work/new-money-trust/>.

34 pages

Thomas Herndon & Mark Paul, *A Public Banking Option as a Mode of Regulation for Household Financial Services in the United States*, Roosevelt Institute (Aug. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Public-Banking-Option-201808.pdf>.

33 pages

Saule T. Omarova, *Why We Need A National Investment Authority*, Cornell Law School Legal Studies Research Paper No. 20-34 (2020), <http://ssrn.com/abstract=3566462>.

8 pages

Optional: Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 Vand. L. Rev. 1301 (2021), <https://vanderbiltlawreview.org/lawreview/2021/10/the-peoples-ledger-how-to-democratize-money-and-finance-the-economy/>.

Optional: James Fallows Tierney, *Woke Capital*, LPE Blog (May 5, 2021), <https://lpeproject.org/blog/woke-capital/>.

12. Food / Agriculture (42 pages) – Guest speaker: Claire Kelloway

Claire Kelloway & Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, Open Markets Institute, Mar. 2019, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/614a2ebef7d510debfd53f3/1632251583273/200921_MonopolyFoodReport_endnote_v3.pdf.

29 pages

Claire Kelloway, *How Biden Can Rein in the Big Meat Monopoly*, Vox (Feb. 24, 2021), <https://www.vox.com/future-perfect/22298043/meat-antitrust-biden-vilsack>.

6 pages

Peter S. Goodman, *Record Beef Prices, but Ranchers Aren't Cashing In*, N.Y. Times (Dec. 27, 2021), <https://www.nytimes.com/2021/12/27/business/beef-prices-cattle-ranchers.html>.

4 pages

Jim Tankersley & Alan Rappaport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. Times (Dec. 25, 2021), <https://www.nytimes.com/2021/12/25/business/biden-inflation.html>.

3 pages

13. COVID / Intellectual Property (42 pages) - Guest speaker: Amy Kapczynski

Amy Kapczynski, *How to Vaccinate the World, Part 1*, LPE Blog (Apr. 30, 2021), <https://lpeproject.org/blog/how-to-vaccinate-the-world-part-1/>.

4 pages

Amy Kapczynski & Jishian Ravinthiran, *How to Vaccinate the World, Part 2*, LPE Blog (May 4, 2021), <https://lpeproject.org/blog/how-to-vaccinate-the-world-part-2/>.

4 pages

Amy Kapczynski and Aaron S. Kesselheim, *Government Patent Use": A Legal Approach to Reducing Drug Spending*, 35 Health Affairs 791 (2016), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2015.1120>.

7 pages

Amy Kapczynski, Paul Biddinger, & Rochelle Walensky, *Remdesivir Could be in Short Supply: Here's How to Fix It*, NY Times, July 28, 2020, <https://www.nytimes.com/2020/07/28/opinion/remdesivir-shortage-coronavirus.html>.

2 pages

Amy Kapczynski, *The Law of Informational Capitalism*, 129 Yale L.J. 1460 (2020), <https://www.yalelawjournal.org/review/the-law-of-informational-capitalism> (Read: Intro, Part III).

Excerpt: Read the Introduction and Part III

25 pages