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The Conservative Plan to Subvert Antitrust Enforcement

Corporate lawyers have laid out the blueprint to neuter the Federal Trade Commission.

BY MILES MOGULESCU AUGUST 15, 2022

ANDREW HARNIK/AP PHOTO

White House counselor Kellyanne Conway talks with Labor Secretary Eugene Scalia, right, on the third day of the Republican National Convention, August 26, 2020, at Fort McHenry in Baltimore.

On the last day of its 2022 session, the Supreme Court held in *West Virginia v. EPA* that the Environmental Protection Agency does not have the legal authority to take steps to systematically regulate greenhouse gas emissions from power plants. It was based on an invented "major questions doctrine" that, according to Chief Justice John Roberts's 6-3 majority opinion, prevents federal regulatory agencies from taking significant action on key problems even within their broad mandate, unless authorized by specific detailed language passed by Congress.

I warned when the ruling came out that the right-wing Supreme Court was not only blocking a particular effort by the EPA. It was also setting the precedent to block any efforts by federal agencies to do just about anything important about anything.

Unfortunately, I was all too right. In an August 8 column in the Murdoch-owned *Wall Street Journal*, Eugene Scalia (son of late Justice Antonin Scalia and former Trump anti-labor secretary of labor) and Federalist Society darling Svetlana Gans outlined a legal strategy to cripple the Federal Trade Commission from effectively enforcing antitrust laws. They warned that expanded antitrust enforcement "would run headlong into the major-questions doctrine" as set forth in *West Virginia v. EPA*.

The Scalia/Gans plan represents the corporate legal elite

The Scalia/Gans plan represents the corporate legal elite contribution to the right wing's plans to dismantle the federal government's ability to check corporate power, epitomized by what Paul Waldman recently called "Turnkey Authoritarianism."

Monopoly Power and the Progressive Backlash

The topic of antitrust enforcement is familiar to *Prospect* readers. As the *Prospect*'s executive editor David Dayen detailed in his book ***Monopolized***, fewer and fewer companies control most economic sectors, which "helps to explain virtually all the challenges America faces."

Antitrust was once vigorously enforced in America. But the stagflation of the 1970s, the increasing influence of big money on Republicans and Democrats, and the rise of a business-friendly "Chicago school" that captured legal thinking on competition policy led to a deregulatory impulse, even under Democratic President Carter. This was cemented by Ronald Reagan's 1980 election and has dominated up to this day under Republican and Democratic presidents.

Former Nixon solicitor general Robert Bork managed to convince the legal community in his 1978 book *The Antitrust Paradox* that the only legitimate purpose of antitrust law is to lower prices for consumers, the so-called "consumer welfare standard." Harms to workers, business innovation, and personal liberty fell by the wayside. And that's pretty much where antitrust enforcement has stood for the past 40 years: almost nonexistent, unleashing an unrivaled concentration of corporate power.

Enter Lina Khan, whom President Biden appointed in 2021 to chair the Federal Trade Commission, one of two agencies with responsibility for enforcing antitrust laws.

For the first time in four decades, Khan wants to bring antitrust back to the vigorous pre-Bork era and update it to deal with 21st-century monopolies like those which have sprung up in high tech.

In 2017, while a law student at Yale, Khan wrote the most influential tract on antitrust since Bork's. In "Amazon's Antitrust Paradox" Khan argued that, among other things, Bork's consumer welfare theory ignored the problem of predatory pricing, in which dominant companies like Amazon cut prices below cost in order to drive competitors out of business. Khan argued that Amazon's size and market power is similar to that of railroads and oil companies a century ago and requires similar antitrust treatment.

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Khan has faced strong corporate and Republican opposition, as well as a several-month stretch with a vacant seat on the commission and therefore no working Democratic majority. But she's already done things that no FTC in the past four decades would have even considered. Rejecting the advice of FTC staff, she had the agency sue to block Meta (formerly Facebook) from acquiring a virtual reality startup on the grounds that the acquisition could eliminate competition in the emerging virtual reality market. This was the first major challenge to a Big Tech merger, and it led to Meta pausing the acquisition. Before that, she blocked a major merger between two semiconductor companies.

Khan also helped design an executive order by President Biden that includes 72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy. Her vow to ramp up enforcement on giving consumers a right to repair their own electronic equipment led Apple, Microsoft, and other large companies to change

their policies on unlocking proprietary software. Khan and her counterpart at the Justice Department's Antitrust Division, Jonathan Kanter, are rewriting the merger guidelines that govern when the agencies sue to block mergers.

Just in the past week, Khan launched a rulemaking process on data collection and surveillance, aiming to protect Americans' privacy online. It's this type of rulemaking that corporate lawyers like Scalia have in their crosshairs, protecting big business by kneecapping the ability of government to function.

The Corporate Law Blueprint

Scalia and Gans's *Wall Street Journal* article sets forth their attack strategy. They warn that Khan "has Rooseveltian ambitions" for the FTC and, if she succeeds, "she will transform the FTC's regulation of American business." They declare that the Supreme Court can block Khan's attempts to revive antitrust enforcement. "The FTC is a textbook case for how federal agencies could be affected by the re-examination of administrative law under way at the Supreme Court," Scalia and Gans write.

As a first strike, they oppose a potential FTC regulation, which has not yet been issued, banning noncompete clauses in employment contracts. Such clauses prevent an employee from leaving a company and working for a competitor. Noncompetes have grown as a feature of American working life; some even ban a McDonald's burger-flipper at one franchise from leaving and working for another McDonald's franchise. According to critics, such clauses suppress wages and increase economic inequality by preventing workers from seeking potentially better-paying jobs.

Scalia and Gans suggest that *West Virginia v. EPA*

Scalia and Gans suggest that *West Virginia v. EPA* provides the legal precedent for striking down bans on noncompete agreements. This could then set the precedent for blocking any other steps by the FTC to expand antitrust enforcement, including the recent proposed rulemaking on digital privacy or any other.

Recall that in *West Virginia v. EPA*, the Court held that system-wide regulation of greenhouse gases from coal-fired power plants is such a "major question" that the EPA could not legally promulgate such a rule. It could not be authorized through broad language in the Environmental Protection Act, giving the EPA the mission of safeguarding the environment; it would have to be specifically mentioned in congressional statute. The EPA, of course, was enacted in 1969, before climate change became a significant mainstream concern.

Scalia and Gans argue that a nationwide ban on noncompete clauses represents a similarly "major question." If they are correct, then it's hard to see what regulation would *not* constitute an illegal "major question." Indeed, they assert that the FTC does not have "clear" statutory authority to make *any* competition rulemaking, which would overturn an appellate court ruling that has stood for half a century.

Scalia and Gans go even further. Even if the courts don't overrule a ban on noncompete clauses based on the "major questions doctrine," they advocate overturning it based on a reinvigorated "non-delegation doctrine," which is being advanced by Justice Neil Gorsuch. Until recently, this has been a fringe doctrine that hasn't been applied to strike down a law since 1935 when a conservative Court was overruling much of the New Deal.

The doctrine asserts that Congress can't delegate rulemaking authority to administrative agencies because it violates the separation of powers, in which

because it violates the separation of powers, in which only Congress can make laws or rules and the executive branch can only enforce them. Thus an FTC rule banning noncompete clauses would overstep the FTC's authority, since the rule would be enacted by the FTC, not specifically by Congress.

As Justice Elena Kagan has noted, if delegating rule-making to administrative agencies is unconstitutional, "then most of government is unconstitutional." If the likes of Scalia and Gans use an FTC ban on noncompete clauses to get a ruling that Congress didn't grant the power to issue such a ban, then they will have succeeded in their goal of effectively dismantling the federal government as a check on corporate power.

And that's exactly what they're trying to do. As their article concludes, "As the FTC advances its aggressive agenda, there's a distinct possibility it will end up restricting not American business but the FTC itself." Or, as another *Wall Street Journal* editorial asserted, Khan's "power grab will end with her wings melting in the courts."

Ideas Matter

When it comes to the law, ideas matter. Even the most politicized right-wing judges must justify their decisions based on an arguable legal theory.

The corporate right has spent the past four decades devising legal theories that generally result in conservative, pro-corporate decisions. "Originalism" and "textualism" are essentially theories that were reverse-engineered to yield conservative results. Since then, they've devised other legal theories like corporate personhood, the major questions doctrine, and the non-delegation doctrine, all of which have little basis in the original Constitution, as amended, but have been widely disseminated by the likes of the Federalist Society and

disseminated by the likes of the Federalist Society and conservative media. An op-ed like this from Scalia and Gans is precisely the beginning of how new theories get institutionalized on the legal right.

In a 1988 speech, Robert Bork proclaimed that he originally "overlooked the power of ideas … But ideas have ultimately reformed antitrust law and I do not give up the prospect that we can win this fight with ideas in constitutional law." Organizations like the Federalist Society have trained a generation of lawyers in these right-wing legal ideas, and then placed those lawyers on district and appellate courts and ultimately the Supreme Court.

At the same time, Democrats have been committing virtual malpractice in failing to fight back. They have not rebutted the conservatives' bogus originalism. Indeed, back in 1978, when Justices Scalia and Breyer debated originalism, there were only two originalists on the Court. Today, there are at least six. As the Senate debated the confirmation of Ketanji Brown Jackson, when Republicans aggressively questioned her on judicial philosophy, she stated that the Constitution should be interpreted according to its text as publicly understood at the time, which constitutes a summary of originalism. Not a single Democratic senator criticized originalism.

Lina Khan is one of the first Democrats to offer a clear alternative to 40 years of conservative legal theory. President Biden, because of the force of her ideas, appointed her to chair the FTC.

Democrats and progressives need to develop and publicize such ideas, appoint more such thinkers to the courts and key government positions, and fight the right-wing pipeline of conservative doctrine from corporate boardrooms to the halls of judicial power.

MILES MOGULESCU

Miles Mogulescu is a writer, entertainment attorney, and producer. He has written hundreds of articles for HuffPost, Common Dreams, and other publications, and has appeared as a guest commentator on MSNBC.

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