### OFF

Regs CP

#### The United States federal government should determine that the protection of competition, including through blocking mergers and instituting breakups, is required by non-antitrust laws.

#### The counterplan PICs out of anti-trust legislation and the FTC and DOJ as enforcers---other agencies’ regulations solve.

Lawrence Fullerton et al. 08. Joel M Mitnick, William V Reiss, George C Karamanos and Owen H Smith. Sidley Austin LLP. Vertical Agreements The regulation of distribution practices in 34 jurisdictions worldwide. “United States.” https://www.sidley.com/-/media/files/publications/2008/03/getting-the-deal-through--vertical-agreements-2008/files/view-united-states-chapter/fileattachment/united-states-21.pdf

5 What entity or agency is responsible for enforcing prohibitions on anticompetitive vertical restraints? Do governments or ministers have a role?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

### OFF

FTC DA

#### FTC focusing on privacy now, just enough resources

Jessica Rich et al. 10/3/21. Former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection (BCP), with Laura Riposo VanDruff, Alysa Z. Hutnik & William C. MacLeod. “FTC Chair Khan’s Vision for Privacy – and Some Dissents.” https://www.adlawaccess.com/2021/10/articles/ftc-chair-khans-vision-for-privacy-competition-and-big-tech-and-some-dissents/

First, Khan’s statement reiterates her commitment to address privacy through a “cross-disciplinary” approach that uses the tools of competition law, not just consumer protection law, to address privacy harms. She states that “concentrated control over data has enabled dominant firms to capture markets and erect entry barriers while commercial surveillance has allowed firms to identify and thwart emerging competitive threats,” resulting in reduced privacy.

To address these concerns, as outlined further in the report, the agency intends to focus “most” of its limited resources against the “data practices of dominant digital platforms,” including through additional compliance reviews and order modifications and enforcement, “as necessary,” against, for example, Facebook, Google, Microsoft, Twitter, and Uber.

The Report adds that (with more resources from Congress), the FTC also will prioritize:

Adtech and “Walled Garden” Advertising Practices, including:

“[B]usiness models that depend on expansive and potentially illegal data collection to fuel targeted advertising and user engagement,” and

“Exclusionary or predatory conduct by dominant digital platforms to defend their data troves, resulting in lower levels of privacy and data protections and more intrusive ads.”

Children’s Tech: “Platforms and other online services that are potentially violating COPPA, an area of particular importance given that many children may be increasingly relying on online services for both educational, entertainment, and social purposes during the pandemic.”

Other Privacy Considerations, such as data uses involving health, biometric, or other sensitive data, discriminatory algorithmic practices, or other deceptive or unfair data practices.

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FTC’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

### OFF

Trade DA

#### Protectionism is low now, but the plan sends a protectionist shockwave that shreds global free trade.

Allison Murray 19. JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Winter. “Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?” Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Lexis.

INTRODUCTION

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents. 1They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized. 2

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders’ best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.3 So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States (“U.S.”), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally.4 To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes.5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western *leaders* in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western *lawmakers* themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions that could counteract that progress.6 Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization (“WTO”), “once formal trade barriers come down, other issues become more important.”7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

#### Nuclear war.

Dr. Michael F. Oppenheimer 21. Clinical Professor at the Center for Global Affairs at New York University, Senior Consulting Fellow for Scenario Planning at the International Institute for Strategic Studies, Former Executive Vice President at The Futures Group, The Foreign Policy Roundtable at the Carnegie Council on Ethics and International Affairs, and The American Council on Germany, “The Turbulent Future of International Relations,” in The Future of Global Affairs: Managing Discontinuity, Disruption and Destruction, eds. Ankersen and Sidhu, p. 23-30.

Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president. 7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically pro- Trump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19 Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end.

Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the pre- World War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war. We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars. In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

### OFF

States CP

#### The fifty states and all relevant territories should recognize protection of competition as the purpose of antitrust law and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies.

#### States can pursue autonomous anti-trust enforcement even when conflicting with federal law.

Erik **Knudsen 20.** Erik G. Knudsen is a partner in the Corporate Department and Private Equity Buyouts & Investment Group. Erik focuses his practice on complex business transactions, including leveraged buyouts, strategic mergers, acquisitions, investments and joint ventures, reorganizations, growth equity and venture capital investments, and divestitures. He has led transactions in a wide variety of industries, including healthcare, internet, technology, real estate, distribution and manufacturing. "Trends In State Antitrust Enforcement: Colorado Expands Attorney General’s Authority To Challenge Transactions On Competition Grounds." JD Supra. 4-16-2020. https://www.jdsupra.com/legalnews/trends-in-state-antitrust-enforcement-42950

At the federal level, the U.S. antitrust laws—including the Sherman Act and the Clayton Act, which governs mergers and acquisitions—are enforced by the FTC and DOJ. States also have antitrust laws, which are enforced by state AGs and are often patterned after their federal analogs, but can contain important differences. States frequently collaborate with the federal antitrust agencies and/or other states on merger investigations. However, the Supreme Court has recognized that states are not required to do so, and have the right to make enforcement decisions that differ from other federal and state authorities.[[3]](https://www.jdsupra.com/legalnews/trends-in-state-antitrust-enforcement-42950/#_ftn3) States have sometimes exercised this authority in order to “fill the gap” of perceived under-enforcement at the federal level. For example, in June 2017, the California AG sued to block Valero Energy Partners LP’s acquisition of two petroleum terminals in Northern California, despite the FTC’s decision not to challenge the deal. Several months later, the parties abandoned the transaction. More broadly, in recent years, there has been a growing trend of robust and autonomous state antitrust enforcement, as illustrated by major investigations and enforcement actions by state coalitions in the healthcare, pharmaceutical, telecom, and technology sectors, among others. Consistent with this trend, Colorado AG Phil Weiser—who previously served as Deputy Assistant Attorney General in the DOJ Antitrust Division under the Obama administration—has affirmed his commitment to “protecting all Coloradans from anticompetitive consolidation and practices…whether or not the federal government acts to protect Coloradans.” In keeping with this mandate, the Amendment will bring Colorado increasingly in line with states such as California and New York that have demonstrated an appetite for aggressive, independent antitrust enforcement, even where it may depart (or conflict) with federal action.

### OFF

Politics

#### Reconciliation bill passes now, but Biden’s PC key to moderate’s votes. Solves warming

Emma Dumain, 11-8-2021, "Democrats cheer reconciliation vote, but big fights remain," E&E News, https://www.eenews.net/articles/democrats-cheer-reconciliation-vote-but-big-fights-remain/

Congressional Democrats painted a rosy view this past weekend of the prospects for swift legislative action on their massive, $1.7 trillion climate and social spending package.

From the White House on Saturday, President Biden said without equivocation, “We will pass this in the House, and we’ll pass it in the Senate.”

From Glasgow, Scotland, on a panel at the United Nations climate talks, Sen. Ed Markey (D-Mass.) said his message to the entire international community was that the Senate would ultimately get the votes to advance the reconciliation bill, enabling Biden to meet his goal of achieving 50 percent emissions reductions below 2005 levels by the year 2030.

“We will get this job done,” said Markey of legislation that would invest roughly $550 billion to fight the climate crisis — the biggest federal investment in the environment in history.

And yesterday, White House chief of staff Ron Klain hammered the point home: “We are going to lead the world in tackling climate change,” he said on on NBC’s “Meet The Press,” adding, “We’re going to pass this bill and have the tools to do it.”

But simmering beneath this optimism are real uncertainties as to how lingering disagreements over the cost and content of the reconciliation bill, known as the “Build Back Better Act,” will get resolved and fulfill the many promises on climate action Democrats intend to tout in Glasgow over the next several days.

This past Friday, progressives finally agreed to clear the separate, $1 trillion bipartisan infrastructure package for the president’s signature, even without ironclad commitments from moderate Democratic Sens. Joe Manchin of West Virginia and Kyrsten Sinema of Arizona that they would vote for the separate, partisan bill. Those commitments had been a hard line that liberals had held on to for weeks.

Meanwhile, another dilemma emerged: House Democratic moderates said they would not support the reconciliation bill until it had received an official cost estimate from the nonpartisan Congressional Budget Office.

House Democratic leadership ultimately culled together the votes to pass the bipartisan infrastructure bill, 228-206, with all but six Democrats supporting and with help from 13 Republicans to make up the shortfall. Moderates essentially promised progressives they’d vote for the reconciliation bill once the CBO score is finalized.

At the same time, Congress took a procedural step, 221-213, regarding the reconciliation bill to bring that measure closer to a final passage vote the week of Nov. 15, when the House returns following the Veterans Day recess.

Rep. Josh Gottheimer (D-N.J.), one of the moderates who insisted the reconciliation bill be scored prior to a vote, said on CNN’s “State of the Union” yesterday he expected the score to be in line with White House projections, in which case he and his colleagues would back the bill as soon as next week.

Party leaders, however, are taking a tremendous gamble that the CBO score will be sufficient. They are now working against a much tighter deadline to resolve intraparty differences on multiple policy proposals by the year’s end, where the final weeks of December will also be consumed by other legislative battles relating to the appropriations process and the debt ceiling.

They are also putting tremendous trust in Biden’s ability to convince Manchin and Sinema to support the larger spending package, about which Manchin has expressed serious reservations while Sinema has stayed mostly mum.

#### Antitrust reform requires PC and trades off with other legislative priorities.

Peter C. Carstensen 21, the Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, February 2021, “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

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.

#### Unchecked climate change causes extinction.

Bill McKibben 19. Schumann Distinguished Scholar at Middlebury College; fellow of the American Academy of Arts and Sciences; holds honorary degrees from 18 colleges and universities; Foreign Policy named him to their inaugural list of the world’s 100 most important global thinkers. "This Is How Human Extinction Could Play Out." Rolling Stone. 4-9-2019. https://www.rollingstone.com/politics/politics-features/bill-mckibben-falter-climate-change-817310/

Oh, it could get very bad.

In 2015, a study in the Journal of Mathematical Biology pointed out that if the world’s oceans kept warming, by 2100 they might become hot enough to “stop oxygen production by phyto-plankton by disrupting the process of photosynthesis.” Given that two-thirds of the Earth’s oxygen comes from phytoplankton, that would “likely result in the mass mortality of animals and humans.”

A year later, above the Arctic Circle, in Siberia, a heat wave thawed a reindeer carcass that had been trapped in the permafrost. The exposed body released anthrax into nearby water and soil, infecting two thousand reindeer grazing nearby, and they in turn infected some humans; a twelve-year-old boy died. As it turns out, permafrost is a “very good preserver of microbes and viruses, because it is cold, there is no oxygen, and it is dark” — scientists have managed to revive an eight-million-year-old bacterium they found beneath the surface of a glacier. Researchers believe there are fragments of the Spanish flu virus, smallpox, and bubonic plague buried in Siberia and Alaska.

Or consider this: as ice sheets melt, they take weight off land, and that can trigger earthquakes — seismic activity is already increasing in Greenland and Alaska. Meanwhile, the added weight of the new seawater starts to bend the Earth’s crust. “That will give you a massive increase in volcanic activity. It’ll activate faults to create earthquakes, submarine landslides, tsunamis, the whole lot,” explained the director of University College London’s Hazard Centre. Such a landslide happened in Scandinavia about eight thousand years ago, as the last Ice Age retreated and a Kentucky-size section of Norway’s continental shelf gave way, “plummeting down to the abyssal plain and creating a series of titanic waves that roared forth with a vengeance,” wiping all signs of life from coastal Norway to Greenland and “drowning the Wales-sized landmass that once connected Britain to the Netherlands, Denmark, and Germany.” When the waves hit the Shetlands, they were sixty-five feet high.

There’s even this: if we keep raising carbon dioxide levels, we may not be able to think straight anymore. At a thousand parts per million (which is within the realm of possibility for 2100), human cognitive ability falls 21 percent. “The largest effects were seen for Crisis Response, Information Usage, and Strategy,” a Harvard study reported, which is too bad, as those skills are what we seem to need most.

I could, in other words, do my best to scare you silly. I’m not opposed on principle — changing something as fundamental as the composition of the atmosphere, and hence the heat balance of the planet, is certain to trigger all manner of horror, and we shouldn’t shy away from it. The dramatic uncertainty that lies ahead may be the most frightening development of all; the physical world is going from backdrop to foreground. (It’s like the contrast between politics in the old days, when you could forget about Washington for weeks at a time, and politics in the Trump era, when the president is always jumping out from behind a tree to yell at you.)

But let’s try to occupy ourselves with the most likely scenarios, because they are more than disturbing enough. Long before we get to tidal waves or smallpox, long before we choke to death or stop thinking clearly, we will need to concentrate on the most mundane and basic facts: everyone needs to eat every day, and an awful lot of us live near the ocean.

FOOD SUPPLY first. We’ve had an amazing run since the end of World War II, with crop yields growing fast enough to keep ahead of a fast-rising population. It’s come at great human cost — displaced peasant farmers fill many of the planet’s vast slums — but in terms of sheer volume, the Green Revolution’s fertilizers, pesticides, and machinery managed to push output sharply upward. That climb, however, now seems to be running into the brute facts of heat and drought. There are studies to demonstrate the dire effects of warming on coffee, cacao, chickpeas, and champagne, but it is cereals that we really need to worry about, given that they supply most of the planet’s calories: corn, wheat, and rice all evolved as crops in the climate of the last ten thousand years, and though plant breeders can change them, there are limits to those changes. You can move a person from Hanoi to Edmonton, and she might decide to open a Vietnamese restaurant. But if you move a rice plant, it will die.

A 2017 study in Australia, home to some of the world’s highest-tech farming, found that “wheat productivity has flatlined as a direct result of climate change.” After tripling between 1900 and 1990, wheat yields had stagnated since, as temperatures increased a degree and rainfall declined by nearly a third. “The chance of that just being variable climate without the underlying factor [of climate change] is less than one in a hundred billion,” the researchers said, and it meant that despite all the expensive new technology farmers kept introducing, “they have succeeded only in standing still, not in moving forward.” Assuming the same trends continued, yields would actually start to decline inside of two decades, they reported. In June 2018, researchers found that a two-degree Celsius rise in temperature — which, recall, is what the Paris accords are now aiming for — could cut U.S. corn yields by 18 percent. A four-degree increase — which is where our current trajectory will take us — would cut the crop almost in half. The United States is the world’s largest producer of corn, which in turn is the planet’s most widely grown crop.

Corn is vulnerable because even a week of high temperatures at the key moment can keep it from fertilizing. (“You only get one chance to pollinate a quadrillion kernels of corn,” the head of a commodity consulting firm explained.) But even the hardiest crops are susceptible. Sorghum, for instance, which is a staple for half a billion humans, is particularly hardy in dry conditions because it has big, fibrous roots that reach far down into the earth. Even it has limits, though, and they are being reached. Thirty years of data from the American Midwest show that heat waves affect the “vapor pressure deficit,” the difference between the water vapor in the sorghum leaf’s interior and that in the surrounding air. Hotter weather means the sorghum releases more moisture into the atmosphere. Warm the planet’s temperature by two degrees Celsius — which is, again, now the world’s goal — and sorghum yields drop 17 percent. Warm it five degrees Celsius (nine degrees Fahrenheit), and yields drop almost 60 percent.

It’s hard to imagine a topic duller than sorghum yields. It’s the precise opposite of clickbait. But people have to eat; in the human game, the single most important question is probably “What’s for dinner?” And when the answer is “Not much,” things deteriorate fast. In 2010 a severe heat wave hit Russia, and it wrecked the grain harvest, which led the Kremlin to ban exports. The global price of wheat spiked, and that helped trigger the Arab Spring — Egypt at the time was the largest wheat importer on the planet. That experience set academics and insurers to work gaming out what the next food shock might look like. In 2017 one team imagined a vigorous El Niño, with the attendant floods and droughts — for a season, in their scenario, corn and soy yields declined by 10 percent, and wheat and rice by 7 percent. The result was chaos: “quadrupled commodity prices, civil unrest, significant negative humanitarian consequences . . . Food riots break out in urban areas across the Middle East, North Africa, and Latin America. The euro weakens and the main European stock markets lose ten percent.”

At about the same time, a team of British researchers released a study demonstrating that even if you can grow plenty of food, the transportation system that distributes it runs through just fourteen major choke-points, and those are vulnerable to — you guessed it — massive disruption from climate change. For instance, U.S. rivers and canals carry a third of the world’s corn and soy, and they’ve been frequently shut down or crimped by flooding and drought in recent years. Brazil accounts for 17 percent of the world’s grain exports, but heavy rainfall in 2017 stranded three thousand trucks. “It’s the glide path to a perfect storm,” said one of the report’s authors.

Five weeks after that, another report raised an even deeper question. What if you can figure out how to grow plenty of food, and you can figure out how to guarantee its distribution, but the food itself has lost much of its value? The paper, in the journal Environmental Research, said that rising carbon dioxide levels, by speeding plant growth, seem to have reduced the amount of protein in basic staple crops, a finding so startling that, for many years, agronomists had overlooked hints that it was happening. But it seems to be true: when researchers grow grain at the carbon dioxide levels we expect for later this century, they find that minerals such as calcium and iron drop by 8 percent, and protein by about the same amount. In the developing world, where people rely on plants for their protein, that means huge reductions in nutrition: India alone could lose 5 percent of the protein in its total diet, putting 53 million people at new risk for protein deficiency. The loss of zinc, essential for maternal and infant health, could endanger 138 million people around the world. In 2018, rice researchers found “significantly less protein” when they grew eighteen varieties of rice in high–carbon dioxide test plots. “The idea that food became less nutritious was a surprise,” said one researcher. “It’s not intuitive. But I think we should continue to expect surprises. We are completely altering the biophysical conditions that underpin our food system.” And not just ours. People don’t depend on goldenrod, for instance, but bees do. When scientists looked at samples of goldenrod in the Smithsonian that dated back to 1842, they found that the protein content of its pollen had “declined by a third since the industrial revolution — and the change closely tracks with the rise in carbon dioxide.”

Bees help crops, obviously, so that’s scary news. But in August 2018, a massive new study found something just as frightening: crop pests were thriving in the new heat. “It gets better and better for them,” said one University of Colorado researcher. Even if we hit the UN target of limiting temperature rise to two degrees Celsius, pests should cut wheat yields by 46 percent, corn by 31 percent, and rice by 19 percent. “Warmer temperatures accelerate the metabolism of insect pests like aphids and corn borers at a predictable rate,” the researchers found. “That makes them hungrier[,] and warmer temperatures also speed up their reproduction.” Even fossilized plants from fifty million years ago make the point: “Plant damage from insects correlated with rising and falling temperatures, reaching a maximum during the warmest periods.”

### OFF

Next off is the rule making counterplan---

#### Text: The United States federal government should delegate antitrust rulemaking authority to a new expert agency. The agency should begin notice-and-comment rulemaking to recognize protection of competition as the purpose of antitrust law and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies.

#### Solves the case, engages notice and comment.

Rebecca Haw 11. Climenko Fellow and Lecturer on Law, Harvard Law School. J.D., Harvard Law School, 2008; M. Phil, Cambridge University, 2005; B.A., Yale University, 2001."Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal." Texas Law Review, vol. 89, no. 6, May 2011, p. 1247-1292. HeinOnline.

Without the informational benefits of expertise and notice-and-comment rulemaking, the Court may be a poor choice to define the broad proscriptions of the Sherman Act. Framed this way, the problem has an obvious solution: give the power to interpret the Act to an expert agency.240 This idea has academic support already, 241 and the case for it is strengthened by this Article's observation that the Court has tried to approximate administrative decision making by relying on amicus briefs. The obvious candidates for reallocation are the two existing antitrust agencies: the Department of Justice's Antitrust Division and the FTC.

A. The Agency Solution

Using agencies to give specific meaning to American antitrust's most important statute means avoiding the problems with the Court's current quasi-administrative process for rulemaking. As adjudicators, agency experts would know what kind of economic evidence is necessary for an efficient solution and would be better able to understand it when it is presented by the parties. Repeat exposure to antitrust cases would only reinforce this advantage, while also giving the administrative judges a broader perspective on what kinds of conflicts commonly arise in competition law, a perspective necessary for efficient policy making in the first instance. A Supreme Court Justice hears about one antitrust case a year, hardly the cross section of controversies necessary to make efficient economic policy writ large.

Agencies could take policy making a step further using notice-and-comment rulemaking. Unlike in adjudication, regulation by rulemaking can be initiated without the formal requirements of a case or controversy and a proper appeal to the Supreme Court. Informal letters of complaint could spark an investigation. A rule-making agency could announce its intention to regulate publicly and provide a convenient venue for, or even solicit, expert opinions on the economic impact of the proposed rule. Not only would it have the benefit of these numerous perspectives, but it would also have the obligation to respond to them in a reasoned manner. Its rule would be subject to judicial review, affording an opportunity to catch mistakes 242 or invalidate rules that do nothing but deliver rents to special interests.

Another advantage of rulemaking, an option for agencies but not for the Court, since it only operates through adjudication, is that rulemaking regulates behavior ex ante, while resolution of economic policy through cases is necessarily ex post. Antitrust courts worry obsessively about "chill"--deterring procompetitive behavior with overly broad rules for liability.2 43 In fact, the overruling of Dr. Miles in Leegin implies that the entire twentieth century was a period of inefficient business practices and stunted innovation in distribution because of an early misunderstanding of RPM. Only after a long and expensive period of litigation was Leegin redeemed for breaking the law by effecting a change in the law, and only after Leegin was issued were similar firms, perhaps walking the Colgate line better than Leegin, redeemed for wanting some control over their product's ultimate retail price.24 4 The problem of ex post rulemaking is made worse by the treble damages afforded successful plaintiffs suing under the Sherman Act.2 4 5 To create a new form of liability, the Court has to punish a firm threefold for complying with standing antitrust norms. Thus Supreme Court lawmaking in antitrust is a kind of one-way ratchet.246

The result of the current ex post scheme is that "antitrust law leaves considerable gaps between what is permissible and what is optimal." 2 47 With judges making the rules one case at a time, this gap is justifiable. As discussed above, when judges are not economically sophisticated enough to know where "optimal" lies, 24 8 laissez-faire is a very inexpensive regulatory regime for courts to follow, and raising the level of regulation would effect a kind of taking of property from firms operating under the status quo. So if the Court is making antitrust policy, laissez-faire may be the only sensible approach. But that is not to say that it is the most sensible approach. An agency could provide firms with the necessary clarity-ex ante-that they need when conducting business in a world where competitive behavior so closely resembles anticompetitive conduct. The current state of affairs is that much more is illegal on the books than antitrust lawyers think is actually likely to be struck down in a court.24 9 Lawyers thrive in such a legally uncertain world, but firm efficiency suffers.

#### Key to democracy and court acquiescence---notice and comment engages participants and creates deference.

Harry First and Spencer Weber Waller 13. Harry First, New York University School of Law. Spencer Weber Waller, Loyola University Chicago School of Law. “Antitrust’s Democracy Deficit”. Fordham Law Review, Volume 81 Issue 5 Article 13. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4890&context=flr

Redressing antitrust’s democracy deficit on the procedural side can be done with the tools of administrative law. Administrative law is the body of law that controls the procedures of governmental decision making.151 It allows interested persons to participate in decisions that affect their interests. Normally, it requires appropriate notice, the right to be heard, fair procedures, protection of fundamental rights, and judicial review of the resulting decision. These basic features are present in the administrative laws of most foreign legal systems and are part of a growing international consensus.152 The tradeoff is that the decisions of administrative agencies that properly follow these strictures normally are granted a degree of deference as to the interpretation of the laws they enforce.153 Frequently, but not inevitably, private parties also have the right to proceed with actions for damages against private parties who violate their regulatory obligations and even against the government itself when it acts unlawfully, either substantively or procedurally. These tools of administrative law are available to make antitrust enforcement decisions more transparent and more responsive to the interests that the antitrust laws were meant to serve, thereby promoting both better decision making and greater democratic legitimacy.

CONCLUSION

Free markets and free people cannot be assured by the efforts of technocrats. Ultimately, both come about through the workings of democratic institutions, respectful of the legislature’s goals and constrained from engaging in arbitrary action. Antitrust has moved too far from democratic institutions and toward technocratic control, in service to a laissez-faire approach to antitrust enforcement. We need to move the needle back. Doing so will strengthen the institutions of antitrust, the market economy, and the democratic branches of government themselves.

#### US democratic retreat causes terrorism, great power war, famine, and poverty.

Garry Kasparov 17. Chairman of the Human Rights Foundation, founded the Renew Democracy Initiative. “Democracy and Human Rights: The Case for U.S. Leadership”. Feb 16 2017. U.S. Senate. http://www.foreign.senate.gov/imo/media/doc/021617\_Kasparov\_%20Testimony.pdf

The Soviet Union was an existential threat, and this focused the attention of the world, and the American people. There existential threat today is not found on a map, but it is very real. The forces of the past are making steady progress against the modern world order. Terrorist movements in the Middle East, extremist parties across Europe, a paranoid tyrant in North Korea threatening nuclear blackmail, and, at the center of the web, an aggressive KGB dictator in Russia. They all want to turn the world back to a dark past because their survival is threatened by the values of the free world, epitomized by the United States. And they are thriving as the U.S. has retreated. The global freedom index has declined for ten consecutive years. No one like to talk about the United States as a global policeman, but this is what happens when there is no cop on the beat. American leadership begins at home, right here. America cannot lead the world on democracy and human rights if there is no unity on the meaning and importance of these things. Leadership is required to make that case clearly and powerfully. Right now, Americans are engaged in politics at a level not seen in decades. It is an opportunity for them to rediscover that making America great begins with believing America can be great. The Cold War was won on American values that were shared by both parties and nearly every American. Institutions that were created by a Democrat, Truman, were triumphant forty years later thanks to the courage of a Republican, Reagan. This bipartisan consistency created the decades of strategic stability that is the great strength of democracies. Strong institutions that outlast politicians allow for long-range planning. In contrast, dictators can operate only tactically, not strategically, because they are not constrained by the balance of powers, but cannot afford to think beyond their own survival. This is why a dictator like Putin has an advantage in chaos, the ability to move quickly. This can only be met by strategy, by long-term goals that are based on shared values, not on polls and cable news. The fear of making things worse has paralyzed the United States from trying to make things better. There will always be setbacks, but the United States cannot quit. The spread of democracy is the only proven remedy for nearly every crisis that plagues the world today. War, famine, poverty, terrorism–all are generated and exacerbated by authoritarian regimes. A policy of America First inevitably puts American security last. American leadership is required because there is no one else, and because it is good for America. There is no weapon or wall that is more powerful for security than America being envied, imitated, and admired around the world. Admired not for being perfect, but for having the exceptional courage to always try to be better. Thank you

### Innovation

#### China tech fears are unfounded---they can’t catch up.

Fred Hu 18, economist and chairman of Primavera Capital Group, 8-22-2018, "The U.S. Is Overly Paranoid About China’S Tech Rise," Washington Post, https://www.washingtonpost.com/news/theworldpost/wp/2018/08/22/us-china-3/?utm\_term=.ed8dd0d27f82

But much of the fear over China’s technological rise is unfounded. Fundamentally, China is like most emerging economies around the world: still trying hard to close the enormous technological gap with advanced economies led by America. China has undoubtedly made more progress than many of its developing peers in that race. Its tech industries have grown at a faster pace and achieved a global scale beyond those of most developing countries. In a broad range of manufacturing sectors — notably consumer electronics, steel, ship building, high-speed rail systems and solar panels — China has established itself as the world’s leading producer. In areas such as consumer Internet and financial technology, it has arguably overtaken even the United States and now leads the rest of the world. Yet China hawks such as Robert Lighthizer and Peter Navarro charge that whatever progress China has made on the tech front is due to the country’s blatant theft of U.S. technology. Considering the enormous investments China has made in science and technology over recent decades, such claims do not hold water. China has devoted vast resources to research and development — $409 billion in 2015 (21 percent of the global total), according to the U.S. National Science Foundation. China’s investment in research and development grew over 20 percent annually between 2000 and 2010 and almost 14 percent from 2010-2015. U.S. research and development hovered around 4 percent over the same period. For a country with an average per capita income a mere one-sixth of America’s, China’s research and development investments reflect a real and sustained national commitment. At the same time, China has vastly expanded and improved STEM education and has one of the largest pools of STEM graduates in the world. The devotion of significant resources to research and development and human capital has in turn enabled China to reap some of the early fruits of innovation. China now tops the world in new patent filings. As the first country to receive more than 1 million patent applications in a single year — a record the World Intellectual Property Organization said reflected “extraordinary” levels of innovation — China accounts for almost 40 percent of the global total and more than that of the United States, Japan and South Korea combined. China has also significantly boosted venture capital investment, which supports the commercialization of emerging technologies. While the United States attracts the most investment worldwide (nearly $70 billion), venture capital investment in China rose from approximately $3 billion in 2013 to $34 billion in 2016, climbing from 5 percent to 27 percent of the global share — the fastest increase of any economy. China’s start-up ecosystem is both vast and vibrant; it has successfully incubated more tech unicorns than any other country except the United States. Too often, U.S. critics claim that Chinese industrial policies like Made in China 2025 are behind the country’s ascendancy in tech. In fact, virtually none of China’s leading tech firms, such as Alibaba, Baidu and Tencent, are state-owned or meaningful beneficiaries of state support. They are all founded and led by smart and risk-taking private entrepreneurs, just like their Silicon Valley brethren. Tellingly, many Chinese tech start-ups have received U.S. venture financing. And Chinese technology companies and venture firms have made significant investments in U.S. start-ups. Sadly, the virtuous two-way venture capital flows are now in jeopardy because of Washington’s growing paranoia about China. As impressive as China’s innovation and progress may be, however, it is premature to declare that China has caught up with the U.S. tech industry. Interventionist government bureaucracy, stodgy state-owned enterprises, a rigid school system and — above all — harsh restrictions on individual freedoms continue to stifle independent thinking and creativity and constrain China from realizing its full innovation potential. While China is well positioned to succeed in “strategic” industries such as semiconductors, pharmaceuticals and commercial aircraft due to its vast pool of engineering talent and the size of its domestic market, so far it has remained a laggard. China has failed to develop an indigenous chip industry despite a state-led drive to do so, with tens of billions spent over the past four decades. Despite its status as the “world’s factory,” making everything from cell phones and laptops to numerous other devices, China continues to import 90 percent of its microchips from foreign countries, predominantly from the United States. That is why the U.S. threat to cut off critical chip supply to ZTE, a Chinese telecom equipment firm, has been dubbed the “Sputnik moment” in China: a sober reminder of China’s continued weaknesses in critical technologies. While China has made spectacular progress on the tech front, the United States remains the undisputed global leader in science and technology. The United States holds most of the world’s leading research universities; it deploys the highest amounts of both public and private funding in research and development; attracts the most venture capital; awards the most advanced degrees; provides the most advanced business, financial and information services and is the largest producer in knowledge-intensive, high-tech sectors, from pharmaceuticals to semiconductors. The fear that China will displace the United States as the global tech superpower is grossly exaggerated. Unfortunately, such paranoia dominates the minds of protectionist U.S. politicians and China hawks and has already amplified a destructive trade war between the world’s two largest economies. For China’s part, its soul-searching is overdue. Beijing should resist the prevalent yet ill-justified self-complacency and triumphalism that contributed to the fear in Washington in the first place, and it should make serious efforts to reform and open its domestic economy. Unless Beijing amends its heavy-handed statist approach to economic development, China’s potential as a leading nation in science and technology could be seriously curtailed.

#### Huawei disproves tech authoritarianism---countries stopped buying their tech because they preferred democratic models.

#### Zero empirical economic support for concentration harming competition

Geoffrey A. Manne 18. President and Founder, International Center for Law & Economics, 12/19/18. “Why US Antitrust Law Should Not Emulate European Competition Policy.” Statement Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights. https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf

Despite numerous assertions to the contrary, there is, in fact, no rigorous economic support for claims that high concentration levels are a strong indicator of harm to competition or that they should trigger a presumption of such harm in antitrust analysis.77

As it stands, there is no empirical foundation on which to conclude that monopoly power is rising. To the extent that markups are increasing, other studies show that output has increased and that quality-adjusted prices have remained stable. Claims that concen- tration has increased at least find somewhat consistent empirical support, although the extent of those changes are up for debate. There is no reliable empirical basis, however, to support the inference that the United States economy has experienced a systematic increase in market power.78

By the same token, there is little evidence that the application of law or regulation to more vigor- ously prohibit, shrink, or break up large companies will correct these asserted problems.79 This is not surprising. As Henry Manne noted in his testimony on the IRA:

[T]he studies done to date strongly indicate that there is little or no significant correlation between industrial concentration and corporate profits. To be sure, if one selects a par- ticular year with peculiar characteristics, the figures can be made to appear otherwise, but in general, over a significant period of time, this lack of correlation seems well sub- stantiated....

The studies referred to [] indicate that there is no causal relationship between concentra- tion on the one hand and monopoly profit on the other. We are, it appears, as apt to find companies earning a higher than market rate of return in nonconcentrated indus- tries as in concentrated ones.

Indeed, one thing on which there is unequivocal agreement among economists... is that monopoly rates of return are realized regularly in some of the least-concentrated indus- tries imaginable: those for personal services.... In the industrial sector on the other hand, where remedies for unproved problems abound, monopoly rates of return, when they do occur, seem unlikely to persist for a significant period of time.80

The evidence proffered today is no more convincing. Further, there is also no reason to think that the EU’s more aggressive stance toward dominant firms leads to better economic outcomes.

Instead, such assertions are based on a simple inference of competitive effects from market struc- tures, and the unsupported assumption that an increase in concentration can mean only a reduc- tion in competition. The problem is that no such inference can be made: “[I]t is presumptuous to conclude... that markets populated by fewer firms perform less well or offer competition that is less intense.”81 As Yale Brozen so aptly put it back in 1978:

Industries have become concentrated where that was the road to lower costs. It is these lower costs that have created temporary, above-average profitability in concentrated in- dustries when it has occurred. Where concentration was not the road to lower costs, industries have remained unconcentrated. The market has worked surprisingly well, where it has been permitted, to conserve our resources and maximize our output. The antitrust agencies’ concentration on concentration in recent years is misdirected and should cease.82

For example, a quick empirical analysis of the US wireless sector shows that concentration is not a reliable predictor of either the health of competition or of consumer welfare. As shown in the graph below, as concentration in the industry increased, wireless communications prices to con- sumers decreased — precisely the opposite of what a concentration-based approach would predict.

The same trend is seen in the price of smartphone mobile data, which has fallen dramatically from $49.00 per gigabit in 2010 to just over $6.00 per gigabit in 2017, despite increasing concentration in the industry.83

Properly considered, a superficial increase in concentration is just as consistent with an increase in competition as with a decrease; the contrary claim — that there is a clear causal link between in- creased concentration and reduced competition — simply disregards the weight of economic evidence.84 Put simply: market share and industry concentration are poor predictors of competitive effects.85

The fact is that economists know very little about the relationships among market structure, firm size, competition, profits, prices, entrepreneurship, and innovation.86 Market shares and structural presumptions are not capable of predicting competitive effects and, thus, of specifying optimal pol- icy choices.

#### Killer acquisitions are good for innovation.

Joe Kennedy 20. Senior fellow at ITIF, Previous positions include chief economist with the U.S. Department of Commerce and general counsel for the U.S. Senate Permanent Subcommittee on Investigations, 11/9/20. “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones>

**Acquisitions Provide a Needed Exit Route** The knowledge of possibly being acquired can also spur entrepreneurial activity and investment. As the report for the European Commission notes: Simultaneously, the chance for start-ups to be acquired by larger companies is an important element of **v**enture **c**apital markets: **it is among the main exit routes for investors** **and** it **provides an incentive** **for** the private financing of **high-risk innovation**.43 This argument was echoed by James Pethokoukis of the American Enterprise Institute: Not every founder starts a company intending for it become Amazon. **Often future acquisition is the** **goal**. Then the entrepreneur can go on to start another firm or become an investor in other aspirational startups working on risky new ideas. Same goes for the investors in the acquired firm. What’s more, these purchases are often “acquisition-by-hire” situations where the prize is talent rather than the Next Big Thing. And when an upstart firm has a valuable idea, acquisition can be the fastest way to get it to users.44

#### Expanded antitrust causes a wave of additional expansions---tanks current innovation and economic output.

Wayne Brough 6-15. Policy Director at R-Street, Technology & Innovation. Washington wants to weaponize antitrust law to attack “Big Tech” and it is going to backfire horribly. R Street. 6-15-2021. https://www.rstreet.org/2021/06/15/washington-wants-to-weaponize-antitrust-law-to-attack-big-tech-and-it-is-going-to-backfire-horribly/

Solutions in Search of a Problem

As with many other regulatory incursions into the digital world, the renewed push for tougher antitrust laws is a solution in search of a problem. Both Republican and Democratic criticisms of Big Tech raise a litany of issues—from an anti-conservative bias to fake news and hate speech—none of which fall within the purview of antitrust law and anticompetitive behavior. Instead, the new regulatory regime under consideration is a punitive and political attack on politically disfavored corporations. Ultimately, that is the larger battle—abandoning the consumer welfare standard and its focus on demonstrable consumer harm in favor of a politicized regime that allows those in Congress greater control over private companies.

And while tech companies may be the exclusive focus of the current reforms, the scope of the proposed legislation could easily be expanded by a future Congress. Even today, many lawmakers are openly hostile toward a growing list of American businesses. Republicans have been vocal in calling for retaliatory measures against “woke” corporations deemed too progressive in their public stances. If policymakers continue to abandon economic principles, it would not be surprising to see calls for additional antitrust enforcement for any company that makes political waves.

Prior to the adoption of the consumer welfare standard almost 50 years ago, antitrust law was often confusing, economically suspect and even contradictory. In one notorious case, the Supreme Court blocked a merger where the merged company would have had a market share of merely 7.5 percent—hardly an example of market dominance. And economists examining antitrust enforcement prior to the consumer welfare standard found no correlation between antitrust enforcement and a reduction in the welfare losses from monopoly. Further research found congressional influence to be a better predictor of enforcement activity.

The consumer welfare standard helped rationalize antitrust enforcement and the case law that has emerged since its adoption has helped curb the political abuse of antitrust policies. Abandoning the need to identify demonstrable consumer harm would return antitrust law to an era characterized by arbitrary enforcement actions that many in today’s Congress seem to have forgotten. But the increased political oversight that comes with adopting more aggressive tools for antitrust enforcement poses a real threat to consumers, to innovation and to economic growth.

Abandoning the American Way in Favor of a European One

The bills introduced in the House can be interpreted as a turn toward a European approach to competition policy. Last year, the EU passed the Digital Markets Act, and the House proposals sound eerily similar. The EU started by defining “gatekeepers,” something similar to the “covered platforms” in the House bills. Restrictions on self-preferencing, interoperability requirements and other elements introduced in the House all have direct counterparts in the EU’s law.

The EU adopted its laws with a clear target in mind—American tech companies that were dominating markets in Europe and outperforming their European rivals. Politically, it made sense to rewrite the rules of the game in favor of homegrown talent. Among other things, this meant the EU could collect billion-dollar fines from American companies, all in the name of “fair competition.”

But the performance of European companies is probably the best reason not to follow the EU’s lead in redefining how we regulate competition. By virtually every measure, U.S. companies have been more innovative, more dynamic and more profitable than their European counterparts. There are more start-ups in the United States and they have greater access to capital. While the United States and the EU have economies of similar magnitudes, in 2019, U.S. startups had a valuation of $1.37 trillion compared to EU startups with an evaluation of $240 billion.

The rise of Silicon Valley is an American success story. Today the top five companies in the United States based on market capitalization are tech companies. They have led the digital revolution, providing consumers a virtually endless stream of new products at low or even zero cost in many cases. These are signs of a robust market that serves consumers well. It is important to remember that big does not equate to bad—sometimes a firm is large because it is efficient at serving its customers what they want. The tech sector supports 12 million jobs and more than $2 trillion in economic output. Current antitrust laws grounded in the consumer welfare standard are part of the institutional framework that make this possible. Congress should ensure antitrust laws fit best into the modern U.S. economy, but the House proposals are a radical departure that shifts the focus to protecting competitors rather than consumers. They would weaponize antitrust law, provide politicians a greater say in America’s boardrooms and replace economic efficiency with political expediency and preference.

#### Big Tech drives AI innovation and R&D investments---antitrust fractures it.

Nicole Hemsoth 20. Co-Founder and Co-Editor at the Next Platform. What Could Stifle American AI Innovation?. Next Platform. 5-21-2020. https://www.nextplatform.com/2020/05/21/what-could-stifle-american-ai-innovation/

There are many things the U.S. government can do, but innovating at a rapid pace in the ever-evolving world of artificial intelligence is not necessarily one of them.

Much of the work in deep learning hardware and software comes from the private sector, which various government agencies depend upon for their various directives. However, we are in an age of complicated antitrust conversations and unfortunately, many of the companies under the gun for such action are those who supply the feds with much-needed computational and algorithmic know-how and tools.

The Center for Security and Emerging Technology (CSET) issued a detailed brief this month reviewing the role of antitrust action and what it could mean for the Pentagon’s access to AI. Indeed, there are a number of other government entities that could feel the burn if some of the most prolific tech monopolies are divvied up, but the report is narrowly focused on the Pentagon specifically.

We talked with one of the authors of the report, Dakota Foster, a visiting researcher at CSET about the multi-layered question of antitrust, AI, and what governments stand to lose (and what smaller private companies and startups might gain).

One of the most interesting questions in the wake of potential antitrust action against some of the largest tech companies (Google Microsoft, etc.) is around innovation. How might it might stifled and what will the effect be on the agencies that rely on the swift pace of progress on strategically critical technology areas like AI?

“We estimate that antitrust action will likely reduce the net amount and diversity of data held by firms that are broken up and could also reduce firms’ R&D budgets,” Foster says. “However, the effect these losses will have on innovation remains unclear. Similarly, we expect firms’ computing resources to diminish with yet undetermined consequences; shared compute resources could perhaps more than compensate for any loss.”

The R&D problem of any potential antitrust action down the pike would be most keenly felt in R&D, which spurs the innovation of many of the platforms that have tricked into use in hyperscale, HPC, and enterprise settings as open source or simply inspiration. While plenty of work comes out of national lab and developer communities, few things can beat a near-limitless well of R&D funds to innovative and iterate.

Foster and colleagues argue that If “R&D spending drives innovation, firms that can spend more on R&D— presumably large ones—will generally hold an edge in innovation.” They add that a “postbreakup AI sector could be less innovative as a result. Large tech companies do in fact spend more on R&D both in absolute and relative terms. According to PricewaterhouseCoopers, in absolute terms, Amazon and Alphabet were the world’s top two corporate R&D spenders in 2018, with Samsung, Intel, Microsoft and Apple in the top ten.

“The debate over breaking up Big Tech has profound national security implications. The Pentagon maintains that the innovation and acquisition of AI technologies is critical to America’s national security. Defense Secretary Mark Esper recently called AI the most significant emerging technology for warfare, predicting that “whoever masters it first will dominate on the battlefield for many, many, many years.” Although others within and beyond the Pentagon stress the limits of AI, its potential is widely acknowledged. In order to develop and deploy new, strategically decisive AI tools, the Pentagon must rely on an AI innovation ecosystem in which large private-sector companies play a critical role. At the same time, the Department of Justice, the Federal Trade Commission, Congress, and state attorneys general have targeted many of the private sector’s largest and most innovative AI companies in ongoing antitrust probes.” – Dakota Foster, Visiting Researcher, CSET

#### Wrecks all sectors of the economy.

Daren Bakst and Gabriella Beaumont-Smith 20. Senior Research Fellow in Agricultural Policy in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, The Heritage Foundation. Policy Analyst for Macroeconomics in the Center for Data Analysis, of the Institute for Economic Freedom. A Conservative Guide to the Antitrust and Big Tech Debate. Heritage Foundation. 12-1-2020. https://www.heritage.org/technology/report/conservative-guide-the-antitrust-and-big-tech-debate

The United States should reward success, not punish it. Yet, the “big is bad” mindset is all about punishment. It would move the country to a misguided federal government intervention of “too big to succeed.” This should be rejected. Some of the criticism of Big Tech is reasonable, but it fails to make the case for changing antitrust law. Conservative critics are right to be worried about censorship, but they should not let this worry lead them to use the wrong tool to address their concerns and thereby make bad policy choices.

Increasing the federal government’s control over the economy by using antitrust law to go after the technology sector would be a bad policy choice. Even worse, many of the changes would not merely affect the technology sector, but all sectors of the economy. Policymakers should recognize that antitrust law is perfectly capable of addressing genuine anticompetitive behavior. Conservatives should be the stalwarts of economic freedom and liberty, fighting back against these measures that could undermine Americans’ freedom and prosperity.

### Inequality

#### Plan nukes regulatory certainty AND creates vagueness that monopolists exploit to dodge enforcement

D. Daniel Sokol 9, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “Limiting Anticompetitive Government Interventions That Benefit Special Interests”, George Mason Law Review, 17 Geo. Mason L. Rev. 119, Fall 2009, Lexis

Antitrust litigation produces regulatory uncertainty because different courts may rule inconsistently with the same set of facts. Anecdotal evidence indicates that when courts do not understand complex antitrust issues, they rule based on a highly procedural formalism. 140 These problems of procedural formalism in antitrust decisions create particular concerns in conduct cases or with regard to penalties for conduct, regardless of the origin of the legal system. 141 For example, in New Zealand, telecommunications regulation focused on a general antitrust solution in conjunction with courts rather than with sector regulation. 142 In a case involving interconnection rates within telecommunications between the incumbent provider and a new entrant for access to the local loop, the case took five years to decide, with significant procedural delay. 143 The lack of the New Zealand judicial system's understanding of the complex pricing issues and methodologies for interconnection underlying the case meant that the conflicting court decisions left little certainty-none of the courts came up with a specific interconnection price. This enabled the incumbent Telecom Corporation to maintain its monopoly position, and it left the victims of its anticompetitive behavior without any effective means of redress. 144 A similar problem occurred in Chile, where the Chilean Supreme Court recently overruled the Chilean Competition Tribunal in cases regarding tacit collusion based on procedural rather than substantive grounds, and where it seemed apparent that the Supreme Court did not understand the antitrust issues. 145 [\*148]

#### Expanded antitrust enforcement of anticompetitive practices causes backlash---turns the case.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

#### Antitrust enforcement targets noncorporate actors---FTC and DOJ failures exacerbate income inequality.

Daniel Crane 16. Professor of Law at the University of Michigan Law School. Antitrust and Wealth Inequality. University of Michigan Law School. Cornell L. Rev. 101, no. 5 (2016). Pg. 1195-1198

The progressive argument for enhanced antitrust enforcement on wealth inequality grounds assumes that large corporate actors are the principal subjects of antitrust law and enforcement. However, apart from a portion of section 7 of the Clayton Act, which applies solely to the acquisition of securities,96 the prohibition of the antitrust laws is not limited to corporate entities but applies generally. The antitrust laws apply to any persons who engage in anticompetitive behavior, whether large corporations or hot dog vendors on opposite street corners.97 This point is not merely theoretical. The antitrust laws extensively regulate the market behavior of noncorporate actors. It bears recalling that out of the first thirteen successful antitrust cases, only one involved a combination of capitalists, with the majority involving labor combinations.98 Since that time, the creation of statutory and nonstatutory labor exemptions from the antitrust laws has mitigated—if not entirely stopped—the direct use of antitrust law against labor organizations.99 However, a wide swath of antitrust enforcement continues to be focused on noncorporate actors, with confounding effects for claims about the regressivity of market power exercises.

Many of the producers whose commercial arrangements antitrust authorities have challenged in recent decades are not large corporations but professionals such as doctors, dentists, engineers, lawyers, real estate brokers, stock brokers, and small business owners involved in trade associations.100 While in some cases members of the petty bourgeoisie and professional classes may be wealthier on average than their clients, thus implying regressive effects from antitrust violations, in many cases the effects of the antitrust violations are likely progressive, since the regulated classes would otherwise extract income from clients up the income distribution from themselves. As with most of these questions, the effects on income distribution are simply too complex to ascertain economy-wide.

In the past several years, a large portion of the Federal Trade Commission’s (FTC) docket has centered on anticompetitive rules and practices by trade associations organizing and regulating middle class professions. Take, for instance, the FTC’s 2014 enforcement action against the Music Teachers National Association based on an ethical rule prohibiting music teachers from soliciting clients from rival teachers.101 According to the Bureau of Labor Statistics, music, art, and drama teachers average a squarely middle-class income of $66,260.102 In recent years, the FTC has also brought an enforcement action against property managers,103 with an average annual income of $65,880,104 and legal support professionals,105 with an average annual income of $52,830.106 Professional lighting and sign managers107 and ice-skating coaches108 have also felt the FTC’s wrath over anticompetitive agreements in the last two years.

The Justice Department has brought similar suits. For example, in 2005 it successfully sued to enjoin the National Association of Realtors from preventing its members from using password-protected Internet sites that enabled the brokers’ customers to search for and receive real estate “multiple listing services” listings over the Internet.109 If the Justice Department’s factual allegations were correct, the Association’s restriction inhibited competition among brokers that would have “place[d] downward pressure on brokers’ commission rates.”110 In other words, the restriction facilitated a wealth transfer from home sellers to realtors. The median income of home sellers, who typically bear the incidence of real estate commissions, is approximately $97,500111 and that of realtors is $43,430.112 Thus, on average, higher commissions would allow realtors to extract income from clients with more than double their income.

The effect of the antitrust enforcement decision was to redistribute that income back up to the sellers. The effects of antitrust enforcement on noncorporate, middle-class actors cannot be dismissed as insignificant. In the Realtors case, the Justice Department alleged that virtual office website brokers, whose activities the challenged rule tended to suppress, had offered discounted commission rates that had saved their customers tens of millions of dollars in commissions.113 Given the sheer volume of existing home sales in the United States—$1.2 trillion per year114—even a comparatively small change in broker commission rates due to increased competition would have very significant economic effects. For example, a reduction in the average broker commission from 5.5% to 4.5%115 would redistribute $12 billion annually from brokers to their clients with strongly regressive effects.

#### Monopolies do not correlate to income inequality---empirics in wealth accumulation, shareholder distribution and power, and managerial compensation.

Daniel Crane 16. Professor of Law at the University of Michigan Law School. Antitrust and Wealth Inequality. University of Michigan Law School. Cornell L. Rev. 101, no. 5 (2016). Pg. 1186-1192

Contrary to the assumption underlying the monopoly regressivity claim, a monopoly position in the market is neither a necessary nor a sufficient condition for accumulations of wealth by the capitalist class. For instance, a study by Scherer and Ross reported that of the twenty-five wealthiest families reported in Forbes magazine in 1988, “only six owed their fortunes primarily to industries in which profitability depended crucially upon monopoly positions.”60 According to the study, six of the other families “became rich by building great enterprises in industries characterized for the most part by vigorous competition.”61 And most of the others achieved success by buying assets cheap and selling them high in more competitive than monopolistic industries.62 Thus, the mere fact of growing wealth in the hands of the wealthiest owners of capital does not necessarily point to an increase in market power as a root cause.

Nonetheless, the assumption underlying the progressive claim challenged in this Article is that senior managers and wealthy shareholders of large companies are capturing the majority of the rents attributable to anticompetitive conduct and hence outpacing the modal consumer in the accumulation of wealth.63 But are CEOs and rich shareholders in fact capturing the lion’s share of monopoly profits? It is far from certain that they are.

Shareholding is far from an exclusively upper class vocation. Tens of millions of middle class Americans indirectly own productive capital through defined contribution, defined benefit, or state and local pension plans. In 2012, for example, the Federal Reserve calculated that pensions controlled 16% of domestic corporate equity assets.64 Participation in these plans is widely distributed across the population. There are currently 88 million total participants in 401K retirement plans (73 million of these are active).65 When one adds the large additional shares of U.S. equities owned by retail investors and intermediaries such as state and local governments, charitable trusts and endowments, and depository institutions, it is apparent that gains to shareholders from anticompetitive conduct are not enjoyed exclusively by the wealthy. At a minimum, the widely held distribution of share ownership may mitigate the regressive effect from monopoly power.66

Still, proponents of the view that exercises of market power tend to be regressive note that corporate shareholding is disproportionately concentrated in the hands of the very wealthy.67 So the question arises whether corporations are passing a large share of monopoly profit through to their shareholders—a necessary condition for the regressive shareholder effect. Perhaps surprisingly, the case that they are is murky.

Monopoly is not free money to corporations—it has to be purchased. As Richard Posner has shown, one of the significant social costs of monopoly is that firms invest considerable sums of money in attempting to acquire monopoly profits and, once they have them, to retain them.68 In neoclassical economic terms, these expenditures to obtain monopoly rents are considered economic waste since they benefit neither consumers nor producers.69 In more practical terms, the cost of acquiring and maintaining monopoly power is a significant drag on the profitability of monopoly to shareholders. Empirical work has cast doubt on whether firms in concentrated industries earn greater average profits than other firms,70 implying either that increases in concentration do not create market power or market power is not cheap to acquire and maintain. If firms are spending a large share of their rents to obtain monopoly power, the remaining margins left for shareholders may be relatively small.

Monopoly rents are not captured uniformly by the owners of capital (i.e., shareholders) but are distributed in various complex ways throughout the firm.71 Perhaps executive suite managers benefit disproportionately at the expense not only of the firm’s customers but also its shareholders; for example, they could leverage short-run income gains from antitrust violations to justify higher compensation even though shareholders do not realize long-term value. The evidence on that will be considered in a moment. But it is also possible that monopoly rents are captured by midlevel managers at the expense of both senior managers and shareholders. For example, midlevel managers and other firm employees may expend considerable firm resources to exclude rivals simply to obtain John Hicks’s famous “quiet life”72 or internally expend monopoly profits through the wastefulness and sloth qualities of monopoly identified by Judge Learned Hand in his famous Alcoa decision.73 Indeed, it is a common assumption in antitrust law that many monopolists do not show high economic profits on their balance sheets, as Alcoa did not, but rather internally dissipate monopoly rents through complacency.74 In such cases, the shareholder regressivity effect from product market monopoly would shrink or vanish altogether.

Further evidence against the claim that shareholders are regressively grabbing a large share of monopoly rents comes from another progressive critique of antitrust law—that large corporate mergers do not in fact produce positive returns to the shareholders of the acquiring firm, but rather negative ones.75 These claims are generally based on economic studies showing that the shareholders of acquiring firms experience negative returns in various windows after the relevant corporate acquisitions.76 In light of such studies, progressives claim that corporate mergers are often not genuine efforts to create efficiencies and hence build wealth for the benefit of shareholders, but rather “kingdom building” exercises by narcissistic CEOs.77 If that claim is correct, then shareholders do not reap a large share of the monopoly profits attributable to anticompetitive mergers.78

Turning now to top corporate managers, the question is whether managers are in fact able to extract significant monopoly profits in terms of executive compensation. There is no clear evidence that they are. Empirical studies find that the relationship between increases in product market competition and managerial compensation is ambiguous.79 For instance, a study by Patricia Funk & Gabrielle Wanzenreid found a decrease in executive compensation with an increase in competition in industries such as paper, wood products, petroleum, chemicals, plastics, and minerals but an increase in executive compensation with increases in competition in the metal product manufacturing, machinery, computers and electronics, electrical equipment, transportation equipment, furniture, and general manufacturing industries.80 No general effect on increasing compensation was observed.

Other literature suggests that, if anything, increases in product market competition might increase managerial compensation. A leading critique of corporate compensation claims that prevailing corporate compensation structures inflate managerial compensation by disproportionately rewarding managers based on general market profitability rather than individual corporate performance.81 Other literature shows that the use of relative performance evaluations, which compensate managers based on the performance of their own company compared to the performance of other firms in the same industry, decreases as the competitiveness of the industry increases.82 The intuition behind these empirical results is that compensating senior managers based on the negative performance of peer firms induces those managers to take actions that dilute the profitability of the industry.83 Hence, from a principal-agent perspective, a more competitive market structure may increase the principal’s incentive to reward managers in ways that may lead to more inflated pay structures. Antitrust enforcement that increased market competitiveness could produce the unintended byproduct of increased executive compensation.

In sum, the argument that senior managers are the primary beneficiaries of anticompetitive market structures is weak, at best. And while shareholders may capture some of the gains from monopoly pricing, any such regressivity effect is weaker than assumed in the monopoly regressivity claim.

## Regulations

#### 1. Anti-Trust fails---lack of clarity and doesn’t address the root cause---regulation solves better

Herbert Hovenkamp 21. James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School of the University of Pennsylvania. 2021. “Antitrust Remedies for Big Tech.” January 18, 2021. https://www.theregreview.org/2021/01/18/hovenkamp-antitrust-remedies-big-tech/

The U.S. Department of Justice, Federal Trade Commission, and several states attorneys general have brought major antitrust cases against Facebook and Google. The complaints allege several anticompetitive agreements, and a judicial finding of liability against the tech companies is a realistic possibility. Yet too often the government has proven antitrust violations against large firms only to have the case fall apart at the remedy stage. The antitrust laws themselves are not very helpful: They empower the government to “prevent and restrain” antitrust violations but say nothing about how to do that. We cannot identify proper antitrust remedies without some clarity about antitrust policy’s goals. The antitrust laws speak in unmistakably economic terms about “monopoly,” “restraint of trade,” and “competition.” The laws cannot be interpreted as limitations on political power, large size, or some common law or criminal offense, such as theft, invasion of privacy, or fraud, unless those bad acts serve to injure competition. Other statutes exist for pursuing those harms, and they are important components of legal policy. If we wanted antitrust laws to police these practices, however, antitrust laws would have to be amended. But antitrust should not be some general fix for issues that the U.S. Congress has not seen fit to address more directly. Under antitrust’s consumer welfare principle, the goal of antitrust law is competitive markets, which produce the highest output of goods and services consistent with sustainable competition. High economic output delivers low prices to consumers. It will also protect labor and other suppliers, who almost always benefit when markets produce more goods and services. More competitive markets, however, does not necessarily mean the absence of large firms. This is particularly true if economies of scale make production by large firms cheaper, or if network effects make a firm more valuable as the number of users increases. The goal of an antitrust remedy should be driven by this same rule—to make markets more competitive. Courts have the power to break firms into little pieces or even to dissolve them. The hard part is for courts to fix the problem in a way that is consistent with maximum competitive output. Often the least disruptive and most effective antitrust remedy is an injunction against competitively harmful conduct. The antitrust lawsuits against Facebook and Google charge the firms with agreements forbidding their contracting partners from competing with them or from dealing with other competitors. The Google complaint, for example, asserts that Google paid billions of dollars to make the Google search engine the default on iPhones, and Google does the same thing with manufacturers’ Android devices. Requiring Google to break off its search engine would not necessarily address this issue—it would just give the monopoly to a different owner. By contrast, an injunction—a legal tool that would forbid Google from paying other companies to make Google search the default search engine—can go straight to the problem by giving control to the user. The European Union has taken that approach: New devices come with a startup screen for the user to select from several search engines as a default. Many antitrust breakups for monopolistic practices have done more harm than good, making firms less efficient, ruining consumer benefits, and sometimes even bankrupting firms. One exception to this practice is when courts impose breaking off assets that have been acquired by merger. Requiring divestiture to undo mergers is nearly always less disruptive than trying to break up integrated firms. Here, good candidates are Facebook’s acquisitions of Instagram and WhatsApp, neither of which has been completely integrated into Facebook. Another possibility is Android, which Google acquired when Android was still a fledgling firm. But there are better ways to make platform markets more competitive. One remedy that could work well for a platform such as Amazon is a court order governing its commercial decision processes. Antitrust law treats agreements between entities much more aggressively than it does unilateral conduct. As a unitary firm, Amazon’s decisions about product selection, pricing, dealing with competitors, and other aspects of its business can be treated only as unilateral monopolistic practices. Some corporate boards, however, have members with independent business interests who make many important economic decisions. Among these entities are real estate boards (which are typically corporations whose decisions are carried out by their individual licensed brokers), hospitals (which have admitting privileges granted by a board of physicians with independent practices), and sports leagues such as the National Football League (whose individual teams collaborate through corporations to conduct business such as trademark licensing). Amazon’s commercial decision-making could be entrusted to a board whose members include Amazon as well as representatives of the various merchants and others with whom it does business. This board would have control over product selection and exclusion, pricing, and distribution practices. This change might not make Amazon smaller. Indeed, greater internal competition might make Amazon even larger. But it would behave more competitively. Another remedy, which could apply to platforms such as Facebook or Google that deal in large amounts of information, would be for a court to impose interoperability requirements. Platform firms are valuable to consumers because they take advantage of network effects, becoming more valuable to users as the number of participants on all sides increases. This principle also applies to the phone system, credit card platforms, ride-hailing services, dating sites, and many other things. Rather than breaking platforms apart, courts should make them interoperable by requiring these platforms to share the data they collect with competitors, subject to user rights to withhold data. Sharing in this way would increase value to consumers, but it would also remove the size advantage that accrues to the largest players. They would have to find other ways to compete. The phone network is a successful example of this remedy. An antitrust decree issued by a federal court in 1984 changed it from a single firm into a network operated by hundreds of competitors that share interoperability protocols and information. Interoperability works so well that a caller cannot even identify the equipment or carrier used by another caller. These approaches to antitrust remedies reflect an important principle: The remedy should be consistent with the underlying goal of antitrust, which is to make markets work better by expanding rather than contracting their offerings—and in a more competitive environment. This approach will benefit a broader range of constituents, including consumers, labor, and other suppliers.

#### 2. Antitrust makes too many mistakes and firms remonopolize---regulation solves

Sumit K. Majumdar 21. Sumit K. Majumdar Ph. D. is Professor in the Jindal School of Management at the University of Texas at Dallas. “Stick Versus Carrot: Comparing Structural Antitrust and Behavioral Regulation Outcomes.” The Antitrust Bulletin. June 2021. DOI:[10.1177/0003603X211023463](https://doi.org/10.1177/0003603X211023463)

There is continuing debate on whether structural (stick) or behavioral (carrot) remedies are preferred in implementing institutional mandates. Antitrust and regulatory authorities’ goals are to balance anticompetitive and efficiency considerations. A distinctive context has provided historical data, for an entire population of firms for a fourteen-year period, to evaluate structural and behavioral regulations’ impacts on performance, for the same firms at the same time.

The 1984 breakup of AT&T was followed by structural changes accompanying the TA 1996 implementation to permit competitor entry into ILECs’ territories. Simultaneously, the ILECs had been subject to price regulation, a behavioral remedy to ameliorate local monopolists’ pricing behavior. The two parallel remedies are compared, in like-for-like analyses, to assess outcome variations. Well-designed behavioral regulations (the carrot), grounded in realistic views about firms, representing how market processes work in an ex ante manner, **have had a larger positive impact relative to structural remedies (the stick). The incremental benefit of the carrot vis-`a-vis the stick has been US$2 billion annually.**

There is consistent contemporary demand for actions against technology companies involving separations, by activists, scholars, and politicians. **Such actions may not be able to hold technology firms accountable**. Ameliorative structural remedies, based on an ex post destructive attack on firms’ prior entrepreneurship conduct **would yield one-shot outcomes**. Such an outcome would be a shortterm media win, perhaps with electoral benefits, for the proselytizers of the separations manifesto.

After a period of adjustment to the institutionally altered scenario, there is ever-present clear and significant danger of firm attitudes displaying retrograde patterns and the spectacle of recidivist behavior occurring.134 The remonopolization of the U.S. telecommunications sector, in less than two decades after the so-called path-breaking structural separation reforms were put through in 1984, is **a stark example of extremely rapid recidivism.** In the oil and gas sector, the companies that were created as a result of the implementation of separation remedies in the Standard Oil case merged to remonopolize the sector in later decades.

Behavioral regulation approaches, rather than a structural remedy, may be relevant in ameliorating harmful behavior. Such behavioral approaches are based on an ex ante constructive support of firms’ future conduct. These behavioral designs permit firms strategic autonomy and operational flexibility, eliminate adverse selection and moral hazard concerns, and make firm and institutional incentives compatible. These conditions permit firms to display traits consistent with engaging in discovery processes to meet goals. The discovery processes can lead to appropriate resource mixes and yield the best-possible efficiency outcomes.

The innately forward-looking behavioral remedies are to be preferred in generating long-run sustainable dynamic efficiencies with sustainable large fiscal benefits. **Hence, a managed regulation framework, to implement behavioral remedies, oriented around outcomes and goals, would significantly enhance consumer welfare**. A fundamental challenge lies ahead in designing such a framework to tackle modern technology-era contingencies.

#### 3. New agency solves best---resources, authority, expertise

Anita L. Allen, 21. Henry R. Silverman Professor of Law and Professor of Philosophy at the University of Pennsylvania. "A New Digital Age Privacy Protection Agency Holds Promise." The Regulatory Review, August 9, 2021. https://www.theregreview.org/2021/08/09/allen-new-digital-age-privacy-protection-agency-holds-promise/

Data privacy regulation in the United States is overdue for an upgrade. Not only have basic internet governance rules defied comprehensive amendment but specific calls for the U.S. Congress and the Federal Trade Commission (FTC) to address data platform governance in a way that systematically responds to privacy and racial equity problems—along with antitrust and intellectual property concerns—have gone unheeded. For consumers of online platforms, neither industry self-regulation nor litigation has proven effective constraints on Big Tech companies such as Amazon, Facebook, Google, TikTok, Twitter, Airbnb, and Uber that serve as gateways to the internet or provide communication, shopping, travel, and entertainment services.

A recent bill introduced by U.S. Senator Kristen Gillibrand (D-N.Y.) holds promise. If passed, the Data Protection Act of 2021 (DPA) would create a Data Protection Agency. But does it go far enough to meet the enormous challenges?

Enacting the DPA could shine more light on privacy violations, discrimination, and racial bias through the new agency’s research and investigative authority; lead to the development of new regulations grounded in careful evaluation and assessments; and spur compliance through investigations, accountability hearings, and the levying of meaningful penalties.

The DPA would significantly strengthen a bill Senator Gillibrand introduced with similar aims in 2020. The bold, new DPA would push the United States beyond reliance on the under-resourced and power-limited FTC by establishing a new Data Protection Agency with the sweeping policymaking, research, and law enforcement authority needed to make a difference in data privacy regulation.

#### 2. “Do both” is antitrust duplication---the disputes collapse resources, effectiveness, and signaling.

Carl W. Hittinger and Tyson Y. Herrold 19. Carl W. Hittinger (LAW ’79) is a senior partner and serves as BakerHostetler’s Antitrust and Competition Practice National Team Leader and the litigation group coordinator for the firm’s Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. Tyson Y. Herrold is an associate in the firm’s Philadelphia office in its litigation group. His practice focuses on complex commercial litigation, particularly antitrust and unfair competition matters, as well as civil rights litigation. "Antitrust Agency Turf War Over Big Tech Investigations". Temple 10-Q. https://www2.law.temple.edu/10q/antitrust-agency-turf-war-over-big-tech-investigations/

Disputes over clearance can have tangible adverse effects on enforcement. First, some have commented that delays caused by clearance disputes can narrow the efficacy of remedial options, particularly with mergers. As Sen. Richard Blumenthal has commented, “The Big Tech companies are not waiting for the agencies to finish their cases. They are structuring their companies so that you can’t unscramble the egg.” Structural remedies are favored by Delrahim, who has commented that alternative, behavioral remedies should be used sparingly: “The division has a strong preference for structural remedies over behavioral ones. … The Antitrust Division is a law enforcer and, even where regulation is appropriate, it is not equipped to be the ongoing regulator.”

Second, disputes over clearance and, more so, duplicative investigations waste agency resources, threaten to blunt their effectiveness, and can lead to inconsistent and confusing governmental positions. In the Sept. 17 oversight hearing, Simons and Delrahim were both criticized for requesting an increase in funding: “As you both acknowledged, both of you could use, and desperately need, more resources. That being the case, it makes no sense to me that we should have duplication of effort, when that has a tendency inevitably to undermine the effectiveness of what you’re doing.” Duplicative investigations dilute the specialization that is a principal goal of the agencies’ clearance agreement and raise the risk that one agency will take legal positions that undercut the other. No doubt the DOJ’s amicus brief in the Qualcomm case influenced the U.S. Court of Appeals for the Ninth Circuit’s decision to issue a stay pending appeal.

So how will the FTC and DOJ resolve their latest turf war? Perhaps they will revisit their clearance agreement and decide to split their authority by company or the business practice being investigated, based on prior agency experience, rather than by industry as Appendix A currently does. Or maybe Congress will decide to consolidate civil antitrust enforcement jurisdiction under one agency. That seems like a long shot considering the political implications. However, during the Senate’s antitrust oversight hearing, Sen. Josh Hawley proposed “cleaning up the overlap in jurisdiction by removing it from one agency” and “clearly designating enforcement authority to one agency.” One thing is sure—the agencies should not be duplicating civil antitrust investigations. Stay tuned.

#### “Expanding the scope” of “anti-trust laws” must be the DOJ and FTC.

Jarod Bona 21. Bona Law PC. "Five U.S. Antitrust Law Tips for Foreign Companies". Antitrust Attorney Blog. 1-16-2021. https://www.theantitrustattorney.com/five-u-s-antitrust-tips-foreign-companies/

1. Two federal and many state agencies enforce antitrust laws in the United States

The United States government has two separate antitrust agencies—the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The FTC is an independent federal agency controlled by several Commissioners, while the Antitrust Division of the DOJ is part of the Executive Branch, under the President.

Both of them enforce federal antitrust laws (among other laws). Their jurisdictions technically overlaps, but they tend to have informal agreements between each other for one or the other to handle certain industries or subjects. If you are part of a major industry, your antitrust lawyer may be able to tell you whether the DOJ or FTC is likely to oversee competition issues in your field.

#### *expanding the scope of antitrust causes regulatory capture.*

Thibault Schrepel 20, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris 1 Pantheon-Sorbonne and Invited Professor at Sciences Po Paris. ARTICLE: Antitrust Without Romance, 13 NYU J.L. & Liberty 326

Private and Pseudo-State Interests. Antitrust authorities can be captured by various outside groups that lead antitrust employees to please them so as to maximize their own future interest. 59 Public choice theorists have pointed out that special interest groups may capture regulatory authorities. 60 This issue cannot be overlooked and [\*344] a precise risk map should be drawn in this area as antitrust authorities' employees may please these groups for personal benefit, to the detriment of consumers. 61 The importance of this issue is growing as the scope of antitrust authorities is expanding, which increases the risk of regulatory capture by interest groups. 62

See, e.g., Bundeskartellamt prohibits Facebook from combining user data from different sources (Bundeskartellamt, Feb. 7, 2019), archived at https://perma.cc/B9S2-9659. For more on this extension of antitrust authorities' power, see Directive (EU) 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2019 O.J. L11 3 (Jan. 14, 2019). For risks this creates in terms of regulatory capture, see Michael E. DeBow, Social Costs of Populist Antitrust: A Public Choice Perspective, 14 Harv. J. L. & Pub. Pol. 205, 220 (1991) (explaining that as the government expands the scope and aims of antitrust enforcement, private parties invest more significant sums in manipulating this greater government intervention in the economy).

#### 1. CP encourages efficiency in any industry.

Kristelia A. García 14, Associate Professor, University of Colorado Law School, “Penalty Default Licenses: A Case for Uncertainty,” NYU Law Review, Vol. 89, No. 4, October 2014, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1071&context=articles

Companies, like individuals, are risk averse. The existence of a fallback option, even a poor one, allows them to take a chance on private negotiation. This is the case because the parties know they have an alternative should the deal not work out. Moreover, the fallback allows them the freedom of dabbling in individual deals with only one partner or a handful of them, affording valuable feedback on which terms work and which ones do not without committing the time and effort required to negotiate individually with all comers. If the private terms prove functional and an industry norm begins to take shape-as in the case of the Clear Channel-Big Machine deal-it can then be extended to the larger, more comprehensive partners and eventually reflected in the underlying legal regime.

CONCLUSION

When coupled with a penalty default, uncertainty can bring greater efficiency to the marketplace by encouraging private ordering, which allows for tailored terms and responsiveness to rapid technological change. This is great news in the music sampling context, where for years scholars, legislators, and industry players have been debating a statutory license. 271 This Article suggests that a penalty default license for samples, coupled with existing uncertainty about the future state of protections for derivative works, might alleviate efficiency concerns by encouraging more and better private negotiation. 272

This prescription is particularly timely given the imminent rewrite of "the next great copyright act," 273 and may find application outside the United States as well. In the European Union, for example, there has been a recent push for single-market licensing of intellectual property rights. 274 Copyright territoriality has largely thwarted this initiative, 275 whereas private ordering has resolved it. In November 2012, for example, Google accomplished something the European Union has thus far been unable to: The company struck a private, multiterritory agreement with thirty-five European countries. 276

Acknowledgment of the role uncertainty and penalty defaults play in increasing effectiveness in the market for statutory licensing and in copyright enforcement is only the beginning. A better understanding of uncertainty as a tool for efficiency has application in any industry facing change as a result of rapid technological growth, evolving consumer preferences, or ambiguity about the future state of the law.

#### 2. BUT, antitrust deters injunctions, overburdens SEP owners, and links to the net benefit.

Claire Guo 19. Juris Doctor, Peking University School of Transnational Law. Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes, 18 J. MARSHALL REV. INTELL. PROP. L. 259 (2019). Pg. 282

Another reason that antitrust laws need to step down from addressing FRAND violations is the risk of impeding innovation and standardization processes. The antitrust laws protect competition which is a public interest. That is why the enforcement of antitrust laws entails administrative fines and punitive damages. Breaking antitrust laws in EU and China may lead to fines of up to 10% of last year’s turnover of the undertaking.165 Qualcomm was fined both by NDRC for 1 billion dollars in 2015, and then by EU commission for over 1 billion dollars again in 2018.166 In the U.S., companies can be fined up to 100 million dollars or double gains/loss;167 private litigations also offer treble damages.168 Such tough penalties are imposed because the concerned antitrust violation hurts competition- an essential component of market economy and society progress. The U.S. courts are refrained from intervening in opportunistic FRAND breaches from lawfully obtained monopolization, because the evasion of a pricing constraint may hurt consumers but not the competitive process that warrants treble damages.169 Thus, when FRAND terms have effectively managed the monopoly power of SEP owner to the extent that mere FRAND breaches could not result in competition harm, the forceful intrusion of antitrust laws would only deter SEP owners from pursuing injunctions and devalue the essential patents.170 In the end, the antitrust liability may over burden the SEP owners to innovate or to promote standardization. 171

## Innovation

#### Decline fuels nationalism---great power war

Lawrence H. **Summers** **17**. Secretary of the Treasury (1999-2001) and Director of the US National Economic Council (2009-2010), former president of Harvard University, where he is currently University Professor. “Will the Center Hold?” *Project Syndicate*. 12/21/2017. <https://www.project-syndicate.org/onpoint/recession-or-financial-crisis-political-fallout-by-lawrence-h--summers-2017-12?a_la=english&a_d=5a37edac78b6c709b8d260dd&a_m=&a_a=click&a_s=&a_p=%2Fsection%2Feconomics&a_li=recession-or-financial-crisis-political-fallout-by-lawrence-h--summers-2017-12&a_pa=section-commentaries&a_ps>=

There is also the question of financial institutions’ health. While major firms appear far better capitalized and far more liquid than they were prior to the crisis, market indicators of risk suggest we may not be quite as far out of the woods as many suppose. Despite apparently large increases in capital and consequent declines in leverage, it does not appear that bank stocks have become far less volatile, as financial theory would predict if capital had become abundant. Financial markets are widely cited, including by US President Donald Trump, as providing comfort in the current moment. But a relapse into **financial crisis** would likely have **catastrophic** political **consequences**, sweeping into power even more **toxic populist nationalists**. In such a scenario, the center **will not hold**. Beyond the kind of near-term risks that markets price, there is the question of an economic downturn. The good news is that sentiment is positive in most of the world. Inflation seems unlikely to accelerate out of control and force a lurch toward contractionary fiscal and monetary policies. Most forecasters regard the near-term risk of recession as low. But recessions are never predicted successfully, even six months in advance. The current expansion in the US has gone on for a long time, and the risk of policy mistakes there is very real, owing to highly problematic economic leadership in the Trump administration. I would put the annual probability of recession in the coming years at 20-25%. So the odds are better than even that the US economy will fall into recession in the next three years. The risk from a purely economic point of view is that the traditional strategy for battling recession – a reduction of 500 basis points in the federal funds rate – will be unavailable this year, given the zero lower bound on interest rates. Nor is it clear that the will or the room for fiscal expansion will exist. This means that the next recession, like the last, may well be **protracted and deep**, with **severe** global consequences. And the political capacity for a global response, like that on display at the London G-20 Summit in 2009, appears to be **absent** as well. Just compare the global visions of US President Barack Obama and UK Prime Minister Gordon Brown back then with those of Trump and Prime Minister Theresa May today. I shudder to think what a serious recession will mean for politics and policy. It is hard to imagine avoiding a resurgence of **protectionism, populism, and scapegoating**. In such a scenario, as with another financial crisis, the center will not hold. But the greatest risk in the next few years, I believe, is neither a market meltdown nor a recession. It is instead a **political doom loop** in which voters’ conclusion that government does not work effectively for them becomes a self-fulfilling prophecy. Candidates elected on platforms of resentment delegitimize the governments they lead, fueling further resentment and even more problematic new leaders. Cynicism pervades. How else can one explain how the candidacy of Roy Moore for a US Senate seat? Moore, who was twice dismissed for cause from his post on the Alabama Supreme Court, and who is credibly charged with sexually assaulting teenage girls when he was in his 30s, could enter the US Senate as many of his colleagues look the other way. If a country’s citizens lose confidence in their government’s ability to improve their lives, the government has an incentive to **rally popular support** by focusing attention on threats that only it can address. That is why in societies pervaded by anger and uncertainty about the future, the temptation to stigmatize minority groups increases. And it is why there is a tendency for officials to **magnify foreign threats**. We are seeing this phenomenon all over the world. Russian President Vladimir Putin, Turkish President Recep Tayyip Erdoğan, and Chinese President Xi Jinping have all made nationalism a central part of their governing strategy. So, too, has Trump, who has explicitly rejected the international community in favor of the idea that there is only a ceaseless struggle among nation-states for competitive advantage. When the world’s preeminent power, having upheld the idea of international community for nearly 75 years, rejects it in favor of ad hoc deal making, others have no choice but to follow suit. Countries that can no longer rely on the US feel pressure to provide for their own security. America’s adversaries inevitably will seek to **fill the voids** left behind as the US **retrenches**.

#### Expanding scope of enforcement decks competition and innovation for Big Tech.

Joe Kennedy 20. Senior Fellow at ITIF and Former Chief Economist with the US Department of Commerce. Monopoly Myths: Is Big Tech Creating “Kill Zones”?. ITIF. 11-9-2020. https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones

Competition authorities must always be on the lookout for acquisitions that, by giving the acquirer market power to either raise prices or lower quality and innovation, threaten future competition. The challenge can be especially difficult in digital markets because of the fast pace of technological change, network effects, and the fact that innovative companies can have large market valuations even though they are not making a profit. However, concerns that large Internet companies are impeding competition by engaging in killer acquisitions are exaggerated.

While greater vigilance might be warranted, significant reforms such as banning future acquisitions or breaking up existing companies would be unwise for several reasons. First, although the companies in question have engaged in hundreds of mergers over the last several years, very few have attracted any criticism. The heavy focus on the few deals that have proven highly successful ignores those that have been complete failures, such as Amazon’s purchase of Quidsi.

Second, acquisitions serve useful purposes such as motivating investments in new companies, obtaining workers with key skills, and putting technology in the hands of those that can develop and scale it the fastest.

Finally, and perhaps most importantly, many of these acquisitions are procompetitive. The vast majority of the cases mentioned in an Economist story on the subject involved either the acquirer copying a technology that was introduced by another firm and thereby giving consumers another product to choose from, or using technology to enter a related market, thereby increasing the number of competitors. Both are procompetitive.58

A dramatic expansion in the scope of review would be problematic. Without additional resources, a significant increase in noticed deals could overwhelm the regulator. Significantly raising the bar for acquisitions could also prove ineffective in protecting entrants. Companies are allowed to obtain a monopoly through legitimate competition. If an incumbent firm were prevented from purchasing a promising innovation, it could try to copy it instead. This is relatively easier to do in digital markets than it is in other industries. This could result in roughly the same increase in profits and market share as an acquisition would—but it would provide less of an incentive for venture capitalists.

The antitrust agencies already have the powers they need to stop problematic acquisitions. But that does not mean they will always get it right. Their odds increase when their decisions are based on a detailed understanding of the markets in question, including current and future sources of innovation, and are guided by the goal of increasing social welfare.

#### CWS key to big tech innovation and economic growth.

Michael R. Strain 18. Director of economic policy studies and Arthur F. Burns Scholar in Political Economy at the American Enterprise Institute. Big Tech May Be Monopolistic, But It's Good for Consumers. Bloomberg. 3-20-2018. https://www.bloomberg.com/opinion/articles/2018-03-20/google-and-amazon-antitrust-fears-are-misplaced

“Big tech” is under increasing scrutiny. Tech giants like Amazon, Google, Apple and Facebook are being accused of a wide variety of sins: promulgating fake news, stifling innovative competitors, and crushing mom-and-pop shops, to name a few. Some critics have gone so far as to call for these powerful companies to be converted into public utilities. Others want the government to use its antitrust powers to break up big tech.

This borders on the absurd.

For the past half century, the US government has followed the best standard that economists and legal scholars have come up with to define anticompetitive behavior: Are these companies threatening or reducing the welfare of consumers as determined by the prices, quality of products and services, and choices consumers face and the benefits of economic innovation that consumers enjoy?

This is the right standard. Another standard that could be used in antitrust enforcement is essentially "big is bad" -- the presumption that large and powerful companies should be suspect because of the political and economic influence they wield. This vague, fuzzier standard is inferior. It ignores the good things that come from size, including the ability to produce output at lower cost. It also invites regulatory mischief. And it weakens the focus on the benefits competitive markets offer to consumers.

By the standard of consumer welfare, big tech is a blessing. I have been using Gmail every day for over a decade. It operates flawlessly. And its search feature is so good that it acts as a virtual diary, allowing me to revisit correspondence from years ago with just a few keystrokes. Google, the creator and operator of Gmail, has charged me exactly zero dollars for this fantastic product. Amazon is pushing prices so low that some believe it is reducing the rate of price inflation for the overall economy. Apple put a sleek computer -- and the ability to access previously unimaginable quantities of knowledge -- in our pockets.

In short, by the standards of consumer welfare -- providing a variety of high-quality products, innovation, low prices -- big tech is one of the best things to happen in the economy in decades.

A more subtle argument against big tech involves the future: Yes, many new and innovative products are given away free today. But what effect is big tech having on tomorrow’s prices and innovation?

This argument assumes that big tech is stifling the competition today that tomorrow would lead to innovation or lower prices. I’m not sold. It is certainly true that consumer welfare can be harmed by the absence of products that might have been created if a market had had more competition. But look at what is actually happening: Big tech firms plow revenue into research and development in order to continue creating new and better products. These companies are innovation powerhouses, and there are no signs that that will change.

Are they stifling competition in news and information? Hardly. It wasn’t long ago that the average American’s choice in news consumption was the morning paper and three networks for the nightly news. Thanks to Google, for example, you can type in a few keywords and read dozens of news stories on your topic of choice.

Because of the importance of network size and upfront investment, does the tech sector naturally tend toward concentration? This is a reasonable argument. But it must contend with the fact that the web browser Netscape fell to Internet Explorer, that Hotmail was displaced by Gmail, the decline of America Online, that many speculate Apple’s ability to innovate is descending, and that Facebook “is losing its teenage users” because -- in the words of The Guardian -- “parents killed it.”

In other words: These companies haven’t been dominant for that long, there were dominant tech companies before them, and we shouldn’t assume that the current market leaders will dominate forever.

Yet another concern is that the tendency of tech giants to gobble up startups is suppressing innovation -- Facebook’s purchase of Instagram and Google’s purchase of YouTube, as examples. But it’s just as possible that the opportunity for an entrepreneur to create something great and sell it to big tech encourages more innovation than it suppresses. And by the standards of consumer welfare, it is not clear that it matters whether Facebook or shareholders or the founders own Instagram.

And let’s assume for the sake of argument that Amazon’s master plan actually is to dominate all retail sales -- including groceries -- by charging low prices that squeeze the profit margins of its competitors (again, a great thing for your pocketbook) and then, at some point in the future, jacking up prices and harvesting outsize profits.

Even if that lay in store, the appropriate regulatory response would be to wait until much more evidence accumulates that Amazon actually might harm consumers and reduce competition. Online sales make up less than 10 percent of all retail sales. Walmart’s revenue is more than twice Amazon’s. It’s not time to call in the trust busters.

#### \*Err neg--- It’s worse to make a Type I error. The market is self-correcting to fix monopolies--populist antitrust tubes innovation.

Elyse Dorsey et. al. 19. \*\*Adjunct professor at Antonin Scalia Law School at George Mason University. Geoffrey A. Manne is the president and founder of the International Center for Law and Economics. Jan Rybnicekis Counsel in the antitrust, competition and trade group of Freshfields Bruckhaus Deringer LLP. Kristian Stout is the Director of Innovation policy at the International Center for Law and Economics. Joshua D. Wright is University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University. "Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement." Regulatory Transparency Project. 4-15-2019. https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement/

IV. The Dangers of the Populist Antitrust Movement

At root, and in large measure because of the clear lack of evidence supporting its claims, the populist antitrust movement is fundamentally a “precautionary” approach. Largely unconcerned with problems that might arise from over-enforcement, the populist approach considers the merest possibility of harm to be a sufficient basis to proscribe uncertain conduct. But in an era of rapid technological innovation and evolving business models impelled by shifting consumer preferences and technological capabilities, such an approach is extremely costly.

The US Supreme Court has repeatedly recognized the limitations the courts face in distinguishing between pro- and anticompetitive conduct in antitrust cases, particularly the risk of false positives in monopolization cases.90

The Court has also expressed concerns, originally laid out in Judge Frank Easterbrook’s seminal article, The Limits of Antitrust, that the cost to consumers arising from type I errors might be greater than those attributable to type II errors because “the economic system corrects monopoly more readily than it corrects judicial errors.”91

The populist antitrust “precautionary principle” approach is the antithesis of this. It is rooted in a belief that markets do not — or, more charitably, are unlikely — to function well in general, and certainly not sufficiently to self-correct in the face of monopolization.

Of course, no one believes that markets are perfect, or that antitrust enforcement can never be appropriate. The question is the marginal, comparative one: Given the realities of politics, economics, the limits of knowledge, and the errors they can lead to, which imperfect response is preferable at the margin? That is: Should we give antitrust enforcers and private plaintiffs more room to operate, or should we continue to cabin their operation in careful, economically grounded ways, aimed squarely at optimizing — not minimizing — the amount of antitrust enforcement?

This may be a question about changes at the margin, but it is far from marginal. It goes to the heart of the role of the market in the modern economy. While there are plenty of views on this, the arguments that the market has failed us in ways that more antitrust would correct are unsupported. We should certainly continue to look for conditions where market failures of one kind or another justify intervention, but we should not make policy on the basis of mere speculation, and we should certainly not do so without taking into account the likelihood and costs of regulatory failure, as well. In order to reliably adopt sound antitrust policy that might improve upon the status quo (which has evolved over 100 years of judicial decisions, generally along with the field’s copious advances in economic understanding), we need far, far better information about the functioning of markets and the consequences of regulatory changes than is currently available. Unfortunately, there is little indication that this concern resonates with the proponents of a populist approach to antitrust.

Nowhere is this more clear than in the dominant populist antitrust position on unilateral conduct (monopolization or abuse of dominance) and vertical restraints. While the consumer welfare approach, as discussed, adheres closely to modern economic principles, economics is substantially disregarded by the populist approach in favor of unsupported inferences rooted in presumptions of competitive harm based on industry structure (e.g., the extent of concentration in a market), particularly in the case of unilateral, vertical restraints.

As discussed above, there is no reliable empirical support for claims that concentration is increasing, or that it necessarily leads to, or has led to, increased market power and the economic harm associated with it.92 There is even less support for claims that concentration leads to the range of social ills advocates of populist antitrust ascribe to it. By the same token, there is little evidence that the application of antitrust or related regulation to more vigorously prohibit, shrink, or break up large companies would correct these asserted problems.

Meanwhile, economic theory, empirical evidence, and experience teach that vertical restraints rarely harm competition and often benefit consumers by reducing costs, better distributing risk, better informing and optimizing R&D activities and innovation, aligning manufacturer and distributor incentives, lowering price, increasing demand by inducing greater supply of promotional services, and/or creating more efficient distribution channels.

As the FTC’s former Director of the Bureau of Economics explained in summarizing the body of economic evidence analyzing vertical restraints: “it appears that when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.”93 A host of other studies corroborate this assessment.94 As one of these notes, “some studies find evidence consistent with both pro- and anticompetitive effects… virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition.”95 Similarly, “in most of the empirical studies reviewed, vertical practices are found to have significant procompetitive effects.”96

At the very outside, we must consider ourselves to be profoundly uncertain of the effects of vertical conduct (particularly in the context of modern, high-tech and platform industries), with the proviso that, so far, most of what we do know suggests that this conduct is good for consumers. But even that worst-case version of the state of our knowledge is inconsistent with the approach promoted by populist antitrust. By adopting presumptions against conduct for which there is no economic basis, the populist stance is substantially hostile to novel business conduct, especially in these innovative contexts. As a result, antitrust poulism necessarily errs on the side of their condemnation, deterring beneficial business activities where authorities should, rather, try to better understand them first.

#### 3] “Killer” acquisitions boost innovation.

Robert D. Atkinson 21. Senior fellow at ITIF, previous positions include chief economist with the U.S. Department of Commerce and general counsel for the U.S. Senate Permanent Subcommittee on Investigations, 3/10/21. “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

Large U.S. technology platforms invest almost as much in R&D as the entire U.K. economy does (business and government).29 But knowing that innovation is important, neo-Brandeisians have argued that big technology companies actually limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in them (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation.

In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firms to benefit from economies of scale or network effects, and enable the smaller firms to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell therefore might make it harder for promising firms to find funding.

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler that guides entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring, as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities.

Moreover, if they are creating kill zones, why did the number of angel and seed deals rise almost sixfold between 2006 and 2019, peaking in 2015? The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down. (See figure 5.)

#### 1] Their evidence doesn’t account for cost spreading and returns on innovation

Joe Kennedy 20. Senior fellow at ITIF, previous positions include chief economist with the U.S. Department of Commerce and general counsel for the U.S. Senate Permanent Subcommittee on Investigations, 11/9/20. “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones>

The Assumption That Small Firms Are Inherently More Innovative Than Large Firms Is Not Borne Out by the Evidence

One core argument made by anti-monopolists who oppose large companies and argue that kill zones and killer acquisitions are real and harmful is that small firms are inherently more innovative than large firms. As FTC Commissioner Christine Wilson argued, “[M]any today believe that small firms are inherently more innovative than large ones, so that the acquisition of a small firm by a large one necessarily reduces innovation.”45 For example, Tim Wu recently testified before Congress that innovation in technology sectors would increase if government imposed greater regulations and increased antitrust enforcement because “[o]ver the last century, competitive, open sectors—ecosystems—have proved themselves superior to those monopolized or dominated by a ‘big three’ or ‘big four.’”46

In fact, large companies are as or more innovative than small firms. In a 1996 paper, Wesley M. Cohen and Steven Klepper found that large firms invest more in R&D as a share of sales.47 The number of patents and innovations produced per R&D dollar decline with increasing firm size. But they argued that this reflects a mismeasurement of innovation outputs. Large firms benefit from “cost spreading,” because they can spread the benefits from one innovation across more units and products, leading to a greater overall level of innovation per unit of R&D. They wrote, “Not only does cost spreading provide the basis for explaining the R&D-size relationship, it also challenges the consensus that has emerged from the R&D literature that large firm size imparts no advantage in R&D competition.”48

More recently, in 2016, business professors Anne Marie Knott and Carl Vieregger estimated that a 10 percent increase in the number of employees increases R&D by 7.2 percent, and a 10 percent increase in firm revenues increases R&D productivity by 0.14 percent. This shows that large firms not only invest more in R&D activities, they also enjoy higher returns on innovation output per dollar invested in R&D.49

Other research has found that “small firms prevail in the early stages and innovation tends to concentrate in larger firms as industries evolve towards maturity.”50 In the 1990s, many small firms emerged and competed to be the winners in IT platforms. But only a few firms could emerge as winners, and the ones that did continue to invest in innovation.

#### 2. Wrong---innovation strong now

James Andrew Lewis 21. Senior Vice President and Director, Strategic Technologies Program, Center for Strategic & International Studies, 4/7/21. “Linking National Security and Innovation: Part 1.” https://www.csis.org/analysis/linking-national-security-and-innovation-part-1

The Endless Frontiers Act, when it is funded, will begin to remedy these 1990s cuts. This is a good start for repeating earlier successes in using technology to advance national security. However, there are now crucial differences in how America creates new technologies that require a new approach. America’s national innovation base has changed dramatically in the last three decades. While defense prime contractors remain engineering and technological powerhouses, they are not the source of innovation. Similarly, the centralized private labs such as Bell Labs or Xerox Parc that played a major innovative role in the last century no longer exist. These changes do not mean U.S. innovation is weak, but that it is different. U.S. innovation is strong, and major technology companies invest heavily in R&D, but it is focused on “D”—the development of new products and services for commercial markets. The transformation in how America creates new technology has altered the relationship between national security and innovation.

This transformation in the nature of innovation in the United States is the result of several factors. First and most important is the central place technology now occupies in economic activity. As one bank CEO put it, “every [big] company is now a technology company.” Private sector investments dominate R&D for new technologies, in 5G, artificial intelligence (AI), biotechnology, quantum computing, and alternative power sources. Second, innovation shifted to the private sector as a result of flat federal spending on R&D. This helped incentivize a focus on commercial markets. Finally, post-Cold War peace brought a wave of global business opportunities that dwarfed the national security market. These three factors mean that most innovation now occurs in the private sector and is focused on commercial developments.

#### Concentration can reflect more competition.

Ryan Bourne 20. R. Evan Scharf Chair for the Public Understanding of Economics, Cato Institute, 2/13/20. “Does Rising Industry Concentration Signify Monopoly Power?” https://www.cato.org/economic-policy-brief/does-rising-industry-concentration-signify-monopoly-power

All this suggests that the observed increases in national concentration in the past two to three decades have been driven in part by large enterprises expanding into new local markets. The rising national concentration that we hear so much about might therefore be indicative of more, rather than less, firm competition at the local level. The concern about weak antitrust policy driving higher concentration may be completely invalid.

#### Concentration is the consequence of competition.

Ryan Bourne 20. R. Evan Scharf Chair for the Public Understanding of Economics, Cato Institute, 2/13/20. “Does Rising Industry Concentration Signify Monopoly Power?” https://www.cato.org/economic-policy-brief/does-rising-industry-concentration-signify-monopoly-power

In theory, then, the higher national concentration we see alongside rising markups in many U.S. industries over the past two to three decades could be evidence of worrying anti‐​competitive consolidation, or it could be a consequence of competition in a world of globalization and technological change. But the evidence—particularly that industries with higher concentration tend to see robust productivity growth—increasingly points to the latter.

There are other reasons to doubt the commonly held view that weak U.S. antitrust legislation or enforcement is to blame for rising concentration. Autor and others show that the broad patterns of rising national industry concentration and the phenomenon of superstar firms are common among members of the Organisation for Economic Co‐​operation and Development, including those in the European Union, despite big differences in the application of antitrust and competition law.

A skeptic of this positive explanation of rising national concentration might say, “OK, that may explain the trends of rising concentration in some markets. But, surely, in competitive markets, firms wouldn’t enjoy sustained higher markups of price over cost.” In other words, shouldn’t a competitive market see markups from leading firms driven down quickly as other competitors or new entrants adopt any new cost‐​effective technologies? Economists might worry that firms that were initially innovative, having obtained a market‐​leading position, are now “rigging” the market to their own ends—and so are still benefiting from lax antitrust enforcement after initial consumer welfare‐​enhancing behavior.16

But Varian posits a simpler explanation: diffusion of the best technological and organizational practices in an industry takes time, particularly in industries where demand is constrained. Consumers are currently enjoying more choices as a result of superstar firms’ innovations. But they will not experience the full benefits of lower prices enabled by these productive improvements until the best technologies and practices are more broadly adopted.

## Inequality

#### Backlash kills all FTC enforcement.

Adam Speegle 12. J.D. Candidate, May 2012. “Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process”. Michigan Law Review. March 2012, Vol. 110, No. 5 (March 2012), pp. 847-873. https://www.jstor.org/stable/23216802

Another major concern with bringing cases under an independent Section 5 is that, as the application of the provision expands and the bounds of its flexibility are tested, the FTC risks eventual backlash from the courts or Congress similar to the backlash it experienced in the 1980s.129 The FTC relies on Section 5 in both antitrust and consumer protection actions. A negative holding on Section 5's use in the standard-setting context may not only bear on future patent holdup enforcement efforts but may also severely impede the FTC's efforts in other areas. If the FTC fails to limit the application of Section 5, it risks subjecting Section 5 to the same or more severe judicial and congressional treatment than it experienced in the past.130 Additionally, many states have their own statutes that are modeled after the FTCA. These state statutes are interdependent with the federal FTCA, and state courts interpret them using federal FTCA precedent.131 Because holdings related to the FTCA at the federal level can, for better or for worse, impact these state statutes, unfavorable Section 5 precedent could also undermine actions at the state level.

#### 1. The Link is magnified by lobbying.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted

if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

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

## FTC

#### 1---democracy and inequality---Algorithmic bias threatens them.

Karl Manheim\* and Lyric Kaplan\*\*, 19 – \*Professor of Law, Loyola Law School, and \*\*Associate in Privacy & Data Security Group, Frankfurt Kurnit Klein & Selz. “Artificial Intelligence: Risks to Privacy and Democracy.” 21 Yale J.L. & Tech. 106. https://yjolt.org/sites/default/files/21\_yale\_j.l.\_tech.\_106\_0.pdf

Objectivity is not one of AI’s virtues. Rather, algorithms reflect back the biases in the programming that are input when models are de- signed and in the data used to train them. Additionally, while data analysis can identify relationships between behaviors and other var- iables, relationships are not always indicative of causality. There- fore, some data analysis can develop imperfect information caused by algorithmic limitations or biased sampling. As a result, decisions made by AI may intensify rather than remove human biases contrary to popular conception. 267 This poses real risks for equality and de- mocracy.

The main problem with “algorithmic bias” is the data that is used to “train” the AI how to solve problems. In the law context, typically, factors from the real world, such as those reported in a judicial opin- ion, are fed into the computer, along with doctrinal rules describing how the law is applied to the facts. The AI is likely to return a wrong answer (measured against the result in the training case) on the first try, and maybe on the hundredth try. But because of machine learn- ing, the AI adapts its algorithms until it eventually finds ones that return the same result as that of the training cases all or most of the time. However, training data can itself be biased, a feature that is simply amplified once the AI is let loose on a new set of facts. So, for instance, if historical data in criminal sentencing or crime statis- tics is racially biased, then the AI will be too each time it is used to recommend a sentence. The risks of training AI with inaccurate or biased data are also clear from the example of Microsoft’s Tay, a “teen-talking AI chatbot built to mimic and converse with users in real time.”268 Due to Tay’s machine learning capabilities, she was making racist and discriminatory tweets within a few hours.269 She was not designed to be human proof and block malicious intent. As Tay shows, AI functions can mirror and amplify societal biases and infirmities, only with the veneer of impartiality.270

#### 2---economy---drains business profitability.

Kalinda Ukanwa 21. Assistant professor of marketing at the University of Southern California’s Marshall School of Business, 5/23/21. “Algorithmic bias isn’t just unfair — it’s bad for business.” https://www.bostonglobe.com/2021/05/23/opinion/algorithmic-bias-isnt-just-unfair-its-bad-business/

These moves respond to growing concerns that algorithms have been reproducing discrimination in situations such as home lending, the allocation of health care, and decisions about who deserves parole. While many people hoped machines could help us make fairer decisions, as the use of AI has exploded it’s become clear that all too often they simply replicate and even amplify our existing prejudices.

An important part of the story has been missing, however. It’s one that might make businesses more amenable to regulation or even preclude the need for it by motivating them to act on their own. Algorithmic bias is not only a pressing ethical and societal concern — it’s also bad for business.

My research shows that over time, word of mouth about algorithmic bias among customers will hurt demand and sales and cut into profits. This damage won’t just hit a few unlucky companies that find themselves embroiled in public controversy around algorithmic discrimination. It can occur even if the inner workings and biases of an algorithm remain invisible to the public.

To understand how this can happen, consider one tech giant’s failed attempts at algorithmic design. In 2014, Amazon launched an internal tool to evaluate resumes. Although the algorithm was not programmed to look at the gender of the job applicants, it was trained using data from the company’s previous decade of hiring decisions, and the applications in that period mainly came from men. Based on past patterns, the algorithm learned to downgrade resumes that mentioned certain women-only colleges or women’s sports or clubs.

Amazon dropped that tool once these biases were discovered, but companies still widely use algorithms for recruiting and hiring. Not only are employers potentially missing out on valuable candidates, but over time these losses will compound through word of mouth. People learn about opportunities from members of their social circles, who often have race, age, gender, and other demographic characteristics in common. When women hear that their female friends and colleagues have been passed over for jobs at a particular company, they are less likely to apply, even if they know nothing about why these other candidates were rejected.

Using group characteristics to make decisions about whether and how to provide services to individual consumers may seem logical in some cases and may even be profitable in the short term. For example, a property manager might believe there are legitimate business reasons to choose tenants based on their age or education level. But my research, which uses computational methods to simulate consumer behavior, shows that these types of “group-aware” algorithms will tend to become less profitable over time.

In a study I conducted with Roland Rust, we simulated how customers would respond to two banks. One bank is “group-aware” and has various loan-approval thresholds for members of different groups. For example, women might have to meet a higher standard than men to get a loan. The other bank in the model is “group-blind”: It has the same approval threshold for every applicant.

Our model indicates that most members of the favored group meet the loan threshold at both banks, so they are likely to apply to either. But members of the group being discriminated against learn from one another to avoid the group-aware bank in favor of the group-blind one. Furthermore, members of the group experiencing discrimination also influence some members of the favored group to avoid the group-aware bank. As time passes, there is a net movement of customers toward the group-blind bank, hurting the profitability of the group-aware bank.

In short, when consumers learn from one another that a company is less likely to serve them, even if the discrimination is unintentional, they’ll avoid that company and it’ll lose revenue.

Algorithms often become group-aware when they aren’t intended to be. AI teases out correlations in the data that serve as stand-ins for group membership. For example, in our geographically segregated society, ZIP codes and other location data are a common proxy for race. Ride-sharing companies discovered the problem when a study revealed that their location-based pricing algorithms charge customers more for rides to or from neighborhoods primarily occupied by people of color. In other words, programming an AI system to ignore people’s gender or race or leaving this information out of the data set entirely isn’t enough to ensure an algorithm is group-blind.

What can companies do to make algorithms treat people fairly? Here are three key steps they can take:

1. Rather than removing group identifiers, businesses should include demographic characteristics in their data so they can continually audit their algorithms to determine whether they inadvertently discriminate against certain groups. There are a number of tools to evaluate whether bias is creeping in. IBM’s AI Fairness 360 is an open-source tool kit that helps detect bias in machine learning models. Microsoft’s FATE research group produces reports and tools aimed at reducing bias and increasing transparency and accountability in AI.

2. Companies can model how their systems’ decisions will affect demand over the long run among consumers who learn that some groups are treated differently. For example, if a bank used a model similar to the one in my study, it could easily see the long-term impact of a group-aware algorithm for making loans.

3. Whenever possible, algorithms should be designed to make decisions using context-specific data about individuals — looking at someone’s bill payment frequency in loan decisions, for example, or a patient’s cholesterol levels in health care, or a student’s grades in education — rather than trying to infer such information from other data points like their education level or where they live. The data used to train the algorithm is important too. Increasing the variation among and representation of different kinds of consumers allows algorithms to better evaluate individuals on their own merits.

Algorithms can lead to fairer outcomes, but only if they are designed and managed carefully. As computers increasingly make influential decisions about our lives, from the health care and financial services we receive to our educational and career prospects, we must remain alert to the potential for bias. There are strong ethical and moral reasons to do so, but there is also a business case to be made. We need to make sure companies understand how algorithmic bias can hurt their bottom lines.

#### 1. FTC currently implementing Biden’s XO to focus on privacy.

Crowell & Moring 9/1/21. Law firm. “FTC Rulemaking Pursuant to Biden’s Executive Order and Beyond: What is Settled, Not Settled, and What to Expect Going Forward.” https://www.crowell.com/NewsEvents/Events/FTC-Rulemaking-Pursuant-to-Bidens-Executive-Order-and-Beyond-What-is-Settled-Not-Settled-and-What-to-Expect-Going-Forward

On July 13, President Biden signed the sweeping Executive Order on Promoting Competition in the American Economy, which contained 72 directives to multiple federal agencies aimed at establishing a “whole-of-government” effort to promote competition across broad swaths of the American economy. Many recommendations within that Executive Order called upon the FTC to issue new rules relating to consumer protection, privacy, and competition issues. Even before the Executive Order, several Commissioners and other commentators were calling upon the FTC to exercise its rarely-used independent rulemaking authority to issue new rules to address a broad range of issues.

This webinar will focus on how the FTC and other federal agencies may seek to implement these recommendations and directives to engage in new rulemaking. It will focus on the scope of FTC’s rulemaking authority and the rulemaking process, opportunities companies may have to participate in the rulemaking process, and how to prepare for the challenges new FTC rules may create.

#### 2. FTC ramping up enforcement against biased AI now.

Mark McCarty 9/15/21. Writer for BioWorld. “FTC eyes streamlined enforcement for algorithm bias, drug patents and right to repair.” https://www.bioworld.com/articles/511439-ftc-eyes-streamlined-enforcement-for-algorithm-bias-drug-patents-and-right-to-repair?v=preview

The U.S. Federal Trade Commission (FTC) has taken a more assertive stance regarding enforcement of several considerations, most conspicuously about mergers and acquisitions. However, the agency’s push for less cumbersome processes has now been applied to a host of considerations pertinent to the life sciences, including bias found in artificial intelligence algorithms, abuse of drug patents, and repairs for medical equipment, a signal that more frequent and more rapid FTC enforcement is on the near horizon.

#### 3. Privacy enforcement now---resources are limited.

Andrea Vittorio 20 – Reporter, Bloomberg Tax, 12/16. “FTC’s Demand for Tech Company Data Shows ‘Underutilized’ Power.” https://news.bloombergtax.com/privacy-and-data-security/ftcs-demand-for-tech-company-data-shows-underutilized-power

The Federal Trade Commission’s orders to Amazon.com Inc., Facebook Inc., and seven other companies to turn over information on their use of consumer data shows how a little-used inquiry authority has been exercised lately to regulate the tech industry. The authority comes from Section 6(b) of the FTC Act, which allows for wide-ranging studies that don’t have a specific law enforcement purpose. The FTC has used this power to launch a handful of similar studies in recent years. There’s some skepticism over the studies’ impact, since they can take years to complete, but they can signal future agency action. Earlier this month, for example, the commission sued Facebook for alleged violations of antitrust laws after launching a similar ongoing study in February on acquisitions by large tech companies. Seeing FTC action before the study’s completion makes it an outlier amid heightened scrutiny of the tech industry, as other studies from 2019, including one on broadband privacy, are still pending. The study on tech companies’ data collection and use could reveal information that’s later used for enforcement action against some or all of the nine companies targeted in the order, according to Rory Van Loo, a law professor at Boston University. “It seems pretty clearly like the FTC is informing itself about what kinds of cases it might bring against these companies in the future,” Van Loo said. That could include pursuing any alleged consumer privacy violations as unfair or deceptive trade practices, he said. Privacy Policy The FTC has faced pressure to more regularly use its “underutilized” authority to demand data from companies, according to Justin Brookman, a former FTC official who’s now director of consumer privacy and technology policy at Consumer Reports. That’s especially true for privacy policy, where Brookman said the FTC is seen as “understaffed,” “under-resourced,” and regulating industry without a federal consumer privacy law. “So this is the FTC trying to use relatively novel tools to move the debate and inform policymakers,” he said. Brookman added that the study could lead to the FTC calling on Congress to provide more power to oversee privacy protections for consumer data. The FTC is seeking information on the tech companies’ data privacy policies and practices. The agency is also asking about the companies’ advertising and user engagement practices, and how their practices affect children and teens. The information gathered could shed light on data flows in Silicon Valley, according to Quentin Palfrey, president of the International Digital Accountability Council, a tech watchdog group. The group investigates issues such as apps sharing the data they collect with third parties and brings concerns to app platforms like Apple Inc. and Alphabet Inc.'s Google. “It’s important for the FTC to use the tools it has to get a handle on some of the unseen data flows and what the companies are doing that’s not visible to consumers,” said Palfrey, who used to work in the Obama administration and the Massachusetts attorney general’s office.

#### 2. FTC streamlining antitrust enforcement now.

Bruce D. Sokler 10/1/21. Chair of the Antitrust Section at Mintz, with Farrah Short. “FTC Promises More Rigorous Merger Reviews.” https://www.natlawreview.com/article/ftc-promises-more-rigorous-merger-reviews

A blog post from the Federal Trade Commission (“FTC”) on Tuesday was the latest announcement suggesting that a shake-up is underway for the agency’s merger review process. The post stated that the FTC’s Bureau of Competition is instituting new process reforms to make the merger review process more rigorous and streamlined. According to the post, the change was triggered by the need to best use the agency’s limited resources in light of the recent surge in merger filings. This message is consistent with other recent changes and statements from the antitrust enforcement agency suggesting that businesses should not expect “business as usual” for merger reviews.

#### 3. They’re taking it slow now---will implement the new agenda over time.

Ben Brody 7/30/21 – senior reporter at Protocol, formerly covered tech policy and lobbying at Bloomberg News. “Lina Khan wants to hear from you: The new FTC chair is trying to get herself, and the sometimes timid tech-regulating agency she oversees, up to speed while she still can.” https://www.protocol.com/policy/khan-ftc-momentum

For now, though, Congress and the White House seem inclined to back the FTC in corralling tech after years of companies facing virtually no regulation and insisting they've done nothing wrong. The gridlocked Congress, for instance, has looked to the FTC on issues like privacy and competition. President Joe Biden, in naming Khan as chair, seemed to take for granted the criticisms that the FTC has for decades been too timid and intellectually out-gunned under Democratic and Republican administrations alike.

In July, Biden even issued his own sweeping order on competition, which Khan called "a hugely significant document." Then there have been her own efforts — to speed up rule-makings, to remove the agency's self-imposed limits on its powers over "unfair methods of competition," to issue guidance boosting consumers' rights to repair their devices and to clear the way to require more disclosure of future deals from those who break the merger laws. The monthly open meetings are new, too.

"It's, what — week five, week six for us?" she said, adding that she's giving herself the rest of the summer to "understand how the agency works" and get a sense of what's already being worked on so she can implement her agenda.

Khan is hardly working alone. The agency's chief technologist recently floated the idea of forcing companies to give up algorithms built on data abuses and restructuring companies that "sacrifice security" illegally. Khan and the other commissioners also spent Wednesday testifying in a congressional hearing about what kinds of additional consumer protection powers and funding the agency is seeking.

It's a long and ambitious set of changes to have rolled out in just a few weeks, far more than the bread-and-butter patrolling for scams and potentially anticompetitive mergers that has defined the FTC's efforts in recent decades. And those are just the things Khan will talk about. She and an aide declined to answer questions about the Facebook case, which the FTC must re-file by mid-August to continue, or its Amazon investigations, or the two companies' efforts to have her recuse herself from their cases because of her prior work in law journals and Congress.

#### 1. FTC is cash-strapped---the plan destroys other enforcement priorities.

Nicolás Rivero 21. Technology reporter at Quartz. “Biden’s antitrust crusaders can’t crusade without Congress.” 3/11/21. https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/

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

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

#### 2. Limited resources force tradeoffs in enforcement decisions.

Bernard (Barry) A. Nigro Jr. et al., 21 – Chair of Fried Frank's Global Antitrust and Competition Department, former Principal Deputy Assistant Attorney General at the DOJ, with Nathaniel L. Asker and Aleksandr B. Livshits, 1/5/21. “Managing Antitrust Risk in the Biden Administration.” Fried Frank Antitrust & Competition Law Alert. https://www.friedfrank.com/siteFiles/Publications/FFAntitrustAggressiveAntitrustEnforcement01052021.pdf

Further, despite a record number of litigated cases, the budget at the antitrust agencies is insufficient to match the rhetoric of more enforcement. The DOJ had 25% fewer full-time employees in 2019 than it had 10 years earlier9 and the FTC recently imposed a hiring freeze. With limited resources, the agencies are forced to make important tradeoffs in deciding what matters to challenge, settle, or walk away from. Indeed, Commissioner Wilson reportedly voted against bringing a lawsuit to block CoStar’s acquisition of RentPath, in part, because of limited FTC resources.10 Although the agencies will receive a modest budget increase for the current fiscal year,11 it is far short of what some think is needed.12 As antitrust enforcement has become a bipartisan issue, a significant increase in the antitrust agencies’ budgets in the future is likely.

#### 3. It directly undermines privacy enforcement.

David Hyman 19 – Professor at Georgetown University Law Center, with William E. Kovacic, “Implementing Privacy Policy: Who Should Do What?” 29 Fordham Intell. Prop. Media & Ent. L.J. 1117 (2019). https://ir.lawnet.fordham.edu/iplj/vol29/iss4/3

The case for making an enhanced FTC the national privacy regulator is straightforward. Of all U.S. privacy implementation institutions, the FTC has unequaled capacity in the form of expert case handling and policy teams and physical resources (including the development, over the past decade, of an internet laboratory to do high-quality forensic work, and the hiring of technology experts to assist in that effort). The agency’s capacity also is the product of extensive experience in applying its UDAP authority and enforcing statutes such as the FCRA and COPPA. The FTC has a broad portfolio of policy instruments (litigation, rulemaking, consumer and business education, data collection, the preparation of reports, the convening of conferences), and it has demonstrated its ability to use all of them to good effect in the privacy domain. The FTC’s stature as an independent agency gives it additional credibility in the eyes of foreign officials, who generally distrust the vesting of privacy powers in an executive department.

Within an enhanced FTC, privacy policy implementation also would be informed by the Commission’s larger experience with consumer protection. The FTC’s privacy unit is one part of its Bureau of Consumer Protection, rather than being a self-contained bureau. This reflected the institution’s reasonable view that the effort to safeguard consumer interests in “privacy” was one dimension of “consumer protection,” rather than a wholly distinct policy realm. Our impression is that many matters that involve privacy issues also raise problems that fit within other areas of the FTC’s consumer protection program. The analysis of the “privacy” issue often benefits from perspectives developed in the course of applying the agency’s deception and unfairness authority in other cases. The intertwining of privacy issues with other consumer protection concerns in many scenarios has important implications for how the mandate of a privacy agency should be defined. In whatever setting one ultimately might place a “privacy” mandate, we would expect that the host agency would have a mandate that incorporates powers that traditionally have been associated with the FTC’s broader consumer protection program.83

The FTC’s expertise in antitrust should also help it develop and enforce privacy policy. Enforcing antitrust law has given the FTC ongoing involvement in multiple high-tech markets—as well as an understanding of how competition can motivate companies to offer better privacy protections. The FTC’s work in both consumer protection and antitrust draws upon a Bureau of Economics with over 80 PhDs in economics.84 The Bureau of Economics has developed considerable skill in sub-disciplines (including behavioral economics) with special application to privacy issues.

Of course, inputs are not the same thing as outputs. The FTC has not always achieved the full integration of perspectives that the combination of these institutional capacities would permit. And, although there are policy complementarities across the domains of antitrust, consumer protection, and privacy, this combination of functions is not an unmixed blessing. An agency with all three functions might seek to use its position as a gatekeeper with respect to one policy domain to leverage concessions from firms over which it exercises oversight in another domain.85 Such temptations have been present when the FTC has applied its antitrust powers to review mergers involving companies in the information services sector.86

Finally, there is the possibility that any one of these functions might be diminished if all three are contained in the same agency. An agency focused solely on privacy will make privacy policy its single concern. An agency responsible for antitrust, consumer protection, and privacy is likely to find itself making tradeoffs as it sets priorities for how to use its resources.