# 1NC R8 NDT

## Off

**Competition Adv**

1. **Innovation Turn:**

#### Platforms are competitive, innovative, and pro-consumer. Regulators must accept some static inefficiency for the sake of the next breakthrough.

Atkinson ’20 [Robert D. Atkinson & Joe Kennedy; November; Ph.D. at UNC-Chapel Hill; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; The Evolution of Antitrust in the Digital Era: Essays on Competition Policy, “The Antitrust “Challenge” of Digital Platforms: How a Fixation on Size Threatens Productivity and Innovation,” p. 11–15]

II. THE BENEFITS DIGITAL PLATFORMS BRING

The dominant fact about digital platforms is that they deliver significant benefits to a wide range of users, including app developers, sellers of a wide variety of goods and services, advertisers, consumers, and tens of millions of people who use social media to stay in touch with family and friends.

The value of these benefits is hard to measure, in part because many services are offered for free. But even if they were not, the consumer surplus between their value to Internet users and the amount that users actually have to pay is very large. A recent study by MIT economists estimates the median Internet user would require compensation of $17,530 to give up search engines for one year. The equivalent estimates for email and digital maps are $8,414 and $3,648, respectively.

A filing by scholars from the Mercatus Center lists five ways Internet platforms create value:

* By allowing people to rent out other people's cars, homes, and other property, they increase the value of underutilized capital.
* By connecting large numbers of buyers and sellers, they make both supply and demand more competitive and allow greater specialization among producers, leading to more choice for consumers.
* By lowering the transaction costs of finding willing partners, negotiating over price, ensuring quality, and monitoring performance, they increase the number of beneficial trades.
* By making it easy for both buyers and sellers to check on the past performance of potential counterparties, they increase the amount of information in the marketplace and reduce the risk to parties.
* By offering an alternative to traditional markets, whose regulators are often captured by existing producers, they create opportunities for new suppliers to satisfy the unmet needs of consumers and force incumbents to become more efficient.

These benefits tend to have progressive effects. The savings from lower prices and free services often benefit low-income consumers the most, because the savings represent a higher proportion of their total income. Moreover, higher-income users are more valuable to platforms because they are more likely to buy advertised goods and services, yet both higher income and lower-income consumers receive the same services.

These companies are also among the most innovative in the world. Amazon and Alphabet led all companies in investment in research and development in 2018.

Microsoft and Apple came in sixth and seventh, while Facebook was 14th. Each company is constantly innovating its core business in order to respond to competitive threats, including from each other, and attract new users. In addition to their core businesses, they are among the leaders in investing in the next generation of general-purpose technologies, including artificial intelligence, autonomous vehicles, block-chain, quantum computing, and robotics. Development of these technologies will deliver significant economic and social benefits.

III. THE ALLEGED THREAT TO ANTITRUST

Antitrust concerns about the largest digital giants are driven largely by the difficulty for antitrust thinking to effectively adapt to the network age. At the turn of the 19th century, some saw large firms with a significant share of the market as at best suspect; at worst a serious problem. Today, some see platform-based businesses in a similar light. But, in the digital economy, platforms may very well become the dominant form of business organization, for precisely the same reasons large industrial organizations became dominant in the 20th century: they are the most efficient organizational form for the current technology.

Today, antitrust concerns over platforms are driven by two common traits of multi-sided platforms. On the demand side, the push for bigness is caused by network externalities. The network's value to each user is increased by each additional user. One platform that contains everyone is more valuable than two platforms, each of which contains half the users. This is because with one platform every user can reach every other user. For example, Facebook has announced plans to make Facebook Messenger, WhatsApp, and Instagram interoperable, since these services are all owned by Face- book, so that users on one app can message users on the other apps using whichever service they prefer. Internet users would be worse off if the Federal Trade Commission obtained an injunction preventing Facebook from merging these services, or worse, split these companies apart, because then users would have to create and maintain separate accounts on each of these services to communicate with all of their contacts. Of course, not every network works this way, and mandating interoperability requirements for social networks could create security risks or create other problems for users, such as spam or harassment. Even the classic example, the telephone, has lost its monopoly on intercommunication; people no longer need a phone to call each other. Internet-protocol standards allow voice packets to be generated and sent on a variety of different platforms. Users also have different interests, so often not everyone needs to communicate with everyone else, in which case the network advantage will fade out at a certain size. The net result is scale. As an Obama administration Council of Economic Advisers' report noted, "Some newer technology markets are also characterized by network effects, with large positive spillovers from having many consumers use the same product. Markets in which network effects are important, such as social media sites, may come to be dominated by one firm. . ."

On the supply side, firms often grow bigger to benefit from economies of scale. By growing larger, firms can reduce their average total cost of production by spreading their fixed costs over more units. But traditional economic theory also assumes that most firms will eventually face increasing marginal costs because of inefficiencies that come from being too large. These increasing marginal costs limit how large firms can grow, making it difficult for any one firm to capture the entire market. However, digital platforms usually enjoy fixed marginal costs that do not increase with size. This means that their average total cost continues to decline as they add more users, and they do not face the same constraints on their size or market share. These efficiencies benefit society.

Digitally powered business models, including platforms, also have the advantage of being able to have strong offerings along a number of dimensions. Traditional firms normally focus on and gain advantage in one, or possibly two of three aspects: price, quality or customization, in large part because there are significant tradeoffs between each. Customization comes at the expense of low cost, for example. Indeed, much of the business strategy literature is premised on firms identifying which of these market areas they should specialize in. But for many Internet platforms, digital technologies enable them to make strong offerings in all three aspects: low prices, higher quality, and customization.

These advantages are not likely to be absolute, however. Economists Daniel Spulber & Christopher Yoo point out that market share due to network effects can be interrupted by periodic outbreaks of new competition for the market, raising the possibility that the dominant platform will be replaced. Two of the biggest drivers of this disruption are technology and demographics. Historically, technological innovation played a significant role in companies like IBM (mainframes), Digital Equipment Corporation (minicomputers), AT&T (telephony), Walmart (retail) and FedEx (delivery) losing dominant market shares. Indeed, important transitions such as the move from analog to digital, the rise of the Internet, and the advent of smart phones have been especially challenging for incumbents to spot and respond to.

As antitrust scholars Carl Shapiro & Hal Varian note, "[T]he information economy is populated by temporary, or fragile, monopolies. Hardware and software firms vie for dominance, knowing that today's leading technology or architecture will, more likely than not, be toppled in short order by an upstart with superior technology." And as IT industry expert David Moschella points out, "today's giants are more vulnerable than previous industry leaders in at least one way: the customer switching costs are mostly ones of changing habits, not conversion effort and cost, and this relative ease of transition could be an important factor sometime down the road." Today, rapid advances in technology continue to present platforms with new services and business models. Platforms that do not quickly adapt to these opportunities leave the door open for rivals.

In fact, Spulber & Yoo believe platforms are likely to face even more competition in the future, spurring more innovation. However, in order to enable this dynamic efficiency, regulators may have to allow static inefficiency for a limited period of time. Businesses with large upfront expenses and low marginal costs often need to earn higher rates of return to recoup their investments, and to fund the next big investments in innovation. But even then, their advantages may be temporary, particularly in a globally competitive economy. Similarly, the advantage of efficiencies of scale can be offset if competitors also enjoy zero marginal cost.

**Immediately expanding scope of antitrust liability brings mergers to a halt---undermines dynamism and global competitiveness**

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

**Internal link goes one way---large-firm dynamism is the only way to maintain tech leadership**

**Lee**, senior lecturer at the University of Hong Kong Faculty of Business and Economics, **‘19**

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- **effective** antitrust measures could **stifle** the ability of American tech companies to **compete with their Chinese challengers**. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing **consumer welfare**, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But **the wider the antitrust authorities reach**, the more likely they are to **damage the tech giants' global competitiveness**. This applies **especially in the key field of artificial intelligence**, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, **lots of data**. Such data can **only be collected at scale**, which conflicts with hipster antitrust **notions of size**. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a **disadvantage** to China.

The idea of **size** is one of many **fundamental differences** separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed **so-called "super apps"** that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, **that lead is shrinking**, and if China does overtake the U.S. in artificial intelligence, it will likely be a result **of advantages in data and government policy**.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have **broader implications** beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able **to close the growing competitive chasm**.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to **shape user privacy norms,** establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that **aggressive antitrust sanctions** would risk **inhibiting American companies** from **maintaining the scale necessary to compete with their Chinese rivals**.

**AI supremacy will be a defining feature of superpower status**. And if future researchers one day examine how the U.S. **lost the war for artificial intelligence**, the hindsight of history may show that **the current antitrust debate was the fatal turning point**.

1. **Startups high in quantity and quality---disproves scalability concerns**

* Unicorn = Startup worth at least $1 Billion

**Huet 2/9** – reporter covering startups and Silicon Valley for Bloomberg News

Ellen Huet, "There Are Now 1,000 Unicorn Startups Worth $1 Billion or More," Bloomberg, 2-9-2022, https://www.bloomberg.com/news/features/2022-02-09/there-are-now-1-000-unicorn-private-company-startups-worth-1-billion-or-more?utm\_campaign=news&utm\_medium=bd&utm\_source=applenews

Becoming a unicorn may have been a big deal for Productboard, but it’s a distinction that means far less within the tech industry than it once did. The term emerged almost a decade ago, a time when startups worth $1 billion were rare and treasured, something only the luckiest of founders and investors would ever glimpse with their own eyes. Now the production of unicorns is reaching the scale of industrial agriculture.

Productboard was particularly notable in one way, though: It became the 1,000th unicorn, marking the first time the herd has crossed into four digits, according to startup-tracking service CB Insights. That same week, six other companies became unicorns. On the day of Productboard’s internal announcement, Dune Analytics, a Norwegian crypto analytics startup, gained its horn by raising a cheeky $69,420,000. In January, 42 startups became unicorns and four became “decacorns”—the clumsy nickname given to startups worth $10 billion or more. “When you have 1,000 unicorns,” says Brian Lee, who oversees research at CB Insights, “that’s almost an oxymoron.”

It’s hard not to see the number of billion-dollar startups as proof that the private markets are overheated—something people have been saying for years. Even in the face of volatile public markets, inflation, and rising interest rates, the mood among private market investors appears to be as ebullient as ever. Some of that undaunted growth is valid, says Lee: As more of the world’s services become digital, software companies become more valuable, and infrastructure such as Amazon Web Services makes it easier than ever to start a tech business.

In the past, companies the size of the most valuable unicorns— ByteDance, SpaceX, and Stripe—would probably have already gone public. Today entrepreneurs feel less pressure to do so, given how easy it is for them to raise the money they need from private funders. Staying private allows many companies to avoid the additional scrutiny and potential loss of control that comes with an initial public offering. Plenty of investors are eager to get in early on rapidly evolving industries such as crypto, pushing up valuations. “You can’t discount the power of FOMO,” Lee says. “People are willing to go in with more capital.”

The term “unicorn” dates to a 2013 article that Aileen Lee, a venture capitalist who’d just started a firm called Cowboy Ventures, wrote for the news site TechCrunch. Her article was about lessons investors could take from examining the few U.S.-based tech companies that had reached a $1 billion valuation. Looking at private and public U.S. software companies founded since 2003, she identified 39 of them, representing the top 0.07% of venture-backed startups. They included Airbnb, Dropbox, Facebook, Groupon, LinkedIn, Tumblr, Twitter, Uber, YouTube, and Zynga. About four unicorns had been created each year during that decade, mostly in consumer software services. Despite the fascination with young founders hitting it rich from their dorm rooms, Lee found that the people who started unicorns tended to be in their 30s. Of all the list’s founding CEOs, not one was a woman.

When she was writing the article, Lee toyed around with using terms such as “monster hit” and “home run” to describe the megastartups. But “unicorn” seemed like an appropriate word for a distinction that, as she wrote, was “extremely rare and pretty awesome.”

[[Figure Omitted]]

The name stuck. In 2015, Fortune ran a cover story, “The Age of Unicorns,” in which it analyzed privately held startups with billion-dollar-plus valuations. Illustrated with a full-page image of a white unicorn in a Zuckerbergian hoodie, the piece fretted that there were already too many unicorns for the label to matter anymore. “Is this boom for real?” Fortune asked on the cover. The count at the time: 80.

In the years since, the answer has become a resounding yes. In 2022 unicorns are being minted at a rate of more than one a day.

There’s a shocking amount of investment money looking for a home—$621 billion into startups of all kinds in 2021. That’s more than double the 2020 amount and exceeds the capital raised through IPOs over the same period, which itself was a record. Low interest rates and record-breaking paydays when private companies finally go public or get acquired have caught the hungry eyes of investors who have traditionally focused on public markets.

Covid-19’s reshaping of the economy accelerated the boom. The number of unicorns had been growing steadily until the end of 2020, when the global count was 569. Then, in the next year, it almost doubled. “Covid created so much personal loss and pain, but it has put tremendous mojo in the sales of software of all kinds,” says Aileen Lee. “The ease and efficiency of software—it’s becoming the glue that runs how we communicate and how we do business.”

[[Figure Omitted]]

She’s quick to point out that more unicorns exist now in part because there are just so many more startups; the milestone is still a sign of rare success. “It’s so freaking hard” to get to $1 billion, Lee says—“it still takes timing, luck, superb execution, and longevity.” Reaching that valuation is a strong predictor of further success, she says, adding that she hopes more companies run by women or people of color will reach that level, because it’s a “life-changing” event.

#### **We’re beating China now – ONLY antitrust threatens to cede the race.**

Abbott et al. '21 [Alden; 3/10/21; Senior Research Fellow, formerly served on the Federal Trade Commission’s General Counsel, J.D. from Harvard Law School, M.A. in Economics from Georgetown University; "Aligning Intellectual Property, Antitrust, and National Security Policy," https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf/]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

As companies from around the world develop the technology and standards for 5G mobile devices and networks, American companies are under threat by aggressive antitrust enforcement that ultimately redounds to the benefit of these foreign companies, which are economic competitors in countries that are also military competitors of the U.S. Over the past five years, foreign governments, particularly in Asia, have subjected U.S. companies to antitrust investigations that failed to follow basic norms of the rule of law, such as providing basic due process protections.14 These antitrust investigations were a thinly-disguised effort by these countries to force the transfer of U.S. patented technology to their own domestic companies, or to insulate their domestic companies from American competition. In recent years, Chinese, Korean, and Taiwanese antitrust authorities have brought nearly 30 investigations against 60 foreign companies across a range of industries, including manufacturing, life sciences, and technology.15

Antitrust challenges undermine intellectual property rights by forcing companies to license their products on non-market-based terms. One prominent example in U.S. history is when the Department of Justice wrung a concession from AT&T to license royalty-free the entire portfolio of 8,600 patents held by Bell Labs in a 1956 antitrust consent decree with the company.16 Today, the White House Office of Trade and Manufacturing Policy has observed that “China uses the Antimonopoly Law of the People’s Republic of China not just to foster competition but also to force foreign companies to make concessions such as reduced prices and below-market royalty rates for licensed technology.”17 Companies have also complained about poor policy guidance and procedural protections under China’s competition laws.18 Others have complained about China’s use of its competition laws to promote policy objectives rather than protect competition and advance consumer welfare.19 In one example, companies raised concerns with Article 7 of China’s State Administration of Industry Commerce (SAIC) 2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights.20 Under this provision, intellectual property constitutes an “essential facility,” which could allow parties to raise abuse of intellectual property rights claims against patent owners for a unilateral refusal to license their patents.21

Predatory antitrust enforcement actions threaten the ability of U.S. companies to continue to be leaders in 5G technological development. China and other nations with similarly restrictive regulatory frameworks can weaken the ability of the United States to compete in global markets by exacting high monetary penalties from U.S. intellectual property owners or forcing the transfer of their intellectual property to domestic commercial rivals. As a penalty for violations of its competition laws, China can impose exorbitant fines that range up to 10% of a foreign company’s entire revenue in the prior year.22 This is not a legal rule observed in the breach; it has already resulted in fines just shy of $1 billion.23

1. **Zero empirical evidence for killer acquisitions in tech markets**

**Manne 21** – Geoffrey Manne, JD UChicago Law, fellow at Northwestern University Center on Law, Business, and Economics, founder of the International Center for Law and Economics. Samuel Bowman, Director of Competition Policy at the International Center for Law and Economics. Dirk Auer, LLM from UChicago.

(Geoffrey A. Manne, Samuel Bowman & Dirk Auer, “Technology Mergers and the Market for Corporate Control,” Draft edition released August 4, 2021, forthcoming in Missouri Law Review (Fall 2021), <https://laweconcenter.org/wp-content/uploads/2021/08/SSRN-id3899524.pdf>)

B. Killer Acquisitions in the Tech Sector

A natural extension of Cunningham et al.’s killer acquisitions work is to question whether mergers of this sort also take place in the tech industry. Interest in this question is driven by the prominent place that digital markets currently occupy in competition policy discussion, but also by the significant number of startup acquisitions that take place in the tech industry.

**Existing studies provide scant evidence that killer acquisitions are a common occurrence in these markets**, however. This is not surprising. Unlike the pharmaceutical industry, where drugs must go through a lengthy and visible regulatory pipeline before they can be sold, incumbents in digital industries will likely struggle to identify their closest rivals and prevents firms from rapidly pivoting to seize new commercial opportunities. As a result, **the basic conditions for killer acquisitions to take place** (i.e., firms being in a position to share monopoly profits) **are less likely to be present**—and it is also harder to design research methods that detect these mergers.

The empirical literature on killer acquisitions in the tech sector is still in its infancy. In fact, as things stand, **no study directly examines whether killer acquisitions actually take place in digital industries** (i.e., whether post-merger project discontinuations are more common in overlapping than non-overlapping tech mergers).

In one of the only empirical papers on this topic, Axel Gautier and Joe Lamesch look at 175 acquisitions by Amazon, Apple, Facebook, Google, and Microsoft.202 The authors observe that acquired firms’ products were discontinued in 60% of these mergers.203 On this basis the authors conclude that “the possibility of killing acquisitions cannot be leaved [sic] aside and it is important that competition authorities take into account the competitive potential of these young startups.” 204

As the authors themselves concede, however, **their study sheds no light on the occurrence of killer acquisitions, as opposed to mere product discontinuations**. 205 Indeed, the paper does not show that incumbents’ acquisitions are discontinued at a higher rate than the competitive baseline, or even that the discontinued mergers disproportionately concerned overlapping products that may threaten the acquirer’s market position. 206 Accordingly, the authors’ conclusion that authorities should pay closer attention to mergers that take place below existing notification thresholds appears premature. This is all the more true given that the paper says nothing about the relative benefits and costs of this policy change.

Similar issues also affect other empirical research on this topic. A recent paper by Elena Argentesi and her co-authors, for example, surmises that “merger control enforcement has not proved able so far to cope with several of the new challenges posed by digital markets,” and concludes that “[m]ore can and should be done. It might be that this will require a change in the legislation or the establishment of a new regulator.” 207

This conclusion rests mainly on two cases studies, and a more superficial analysis of almost 299 acquisitions by Google, Amazon, and Facebook.208 The authors collect several descriptive statistics about these transactions, and group these mergers by the target firm’s main business segment (however, as the authors observe, this is not a good proxy for actual overlaps between the acquirer and target firms’ businesses). 209

While this study sheds a fascinating light on the M&A activities of large tech firms, it **says little about the potential occurrence of killer acquisitions**. The authors find that a majority of the 299 scrutinized Big Tech acquisitions are spread between communication apps and tools (50), developer tools (40), physical goods and services (51) and AI & analytics (43).210 Moreover, the study shows that all three of Google, Amazon, and Facebook have, to varying degrees, invested in these sectors.211 This suggests these acquisitions might be better framed as “moligopoly” competition— where large platforms compete for control of markets outside of their core business areas—rather than killer acquisitions.212

Crucially, there is no sense that these acquisitions face higher termination rates than those made by other acquirers (such as venture capital firms), or that the activities of targets systematically overlap with those of incumbents. **There is** thus **little reason to believe that they were “killer acquisitions,” and even less that they ultimately harmed consumers.** In fact, the authors even observe that many of the target companies were likely complements, rather than substitutes:

However, most transactions do not have a clear horizontal element for each of Amazon, Facebook, and Google. Acquisitions target companies spanning a wide range of economic sectors and whose products and services are often complementary to those supplied by Amazon, Facebook, and Google. . . . Transactions that can be characterized as more horizontal in nature would seem to be the minority. 213

This tends to exclude the killer acquisition theory of harm. The authors supplement this empirical work with two case studies: one concerning Facebook’s purchase of Instagram; the other about Google’s acquisition of Waze.214 Crucially, in both cases, the authors fail to reach a conclusion as to whether the underlying merger ultimately harmed consumers, 215 and in the case of the Facebook/Instagram acquisition, the authors concede anecdotal evidence may even cut in the opposite direction.216

#### Size does matter, and bigger is better. Large companies innovate more.

Kennedy ’20 [Joe; November 9; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “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.

#### No defense contractors small AI firms won’t contract with the DoD.

Foster & Arnold 20 (Dakota Foster, Visiting Researcher at Georgetown’s Center for Security and Emerging Technology (CSET). She is a graduate student in the Department of War Studies at King’s College London, where she is studying the Third Offset Strategy and the national security implications of changing innovation patterns between the public and private sectors. Previously, she has conducted research on terrorism and U.S. national security policy for the U.S. military, the House Foreign Affairs Committee, and the Washington Institute. She holds a B.A. from Amherst College and is an incoming student at the University of Oxford. Zachary Arnold, Research Fellow at Georgetown’s Center for Security and Emerging Technology (CSET), where he focuses on AI investment flows and workforce trends. His writing has been published in the Wall Street Journal, MIT Technology Review, Defense One and leading law reviews. Before joining CSET, Zach was an associate at Latham & Watkins, a judicial clerk on the United States Court of Appeals for the Fifth Circuit and a researcher and producer of documentary films. He received a J.D. from Yale Law School, where he was an editor of the Yale Law Journal, and an A.B. (summa cum laude) in Social Studies from Harvard University, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI”)

Contracting with the Pentagon is difficult, expensive, and time-consuming. Smaller AI firms may be less able to navigate the federal procurement process, effectively preventing the Pentagon from accessing their technology. The few DOD programs that do partner with smaller firms are under scrutiny for their efficacy.

The high barriers of entry, coupled with an unstable budgetary environment and the high certification costs of federal contracting, favor larger companies.148 Simply put, large firms have more resources and deeper institutional knowledge to bring to the federal contracting process.

A number of programs encourage the Pentagon to partner with smaller firms, bypassing traditional obstacles. While the component pieces of large tech firms (Google Search, YouTube, AWS, and so on) would not qualify for these programs, niche AI firms focused on productization and Pentagon-specific AI applications could be eligible. The SBIR and STTR programs help fund new technologies developed by small businesses,149 and OTAs (Other Transaction Authorities) incentivize work with smaller vendors. These newer approaches to federal contracting—with their faster timelines and increased flexibility—suit technology products. Yet in spite of their promise and expansion,150 these programs have yielded mixed results; they would not be feasible options for major AI contracts like JEDI. Five recent audits found the Pentagon does not prioritize small business contracting.151 Other investigations concluded that these “small business” initiatives have disproportionately benefited large companies, channeling contracts to traditional vendors.152 In the long term, the extent to which the Pentagon invests in small businesses and how well existing programs facilitate that relationship remains unclear.

#### AI is a loss-leader! Smaller firms can’t lose $500M every year. Only megafirms like Google can maintain strength

Foster 20 (Dakota Foster is a graduate student at Oxford University and a former visiting researcher at the Center for Security and Emerging Technology. “Antitrust investigations have deep implications for AI and national security”, https://www.brookings.edu/techstream/antitrust-investigations-have-deep-implications-for-ai-and-national-security/)

As Silicon Valley’s largest companies consolidate AI talent and novel ideas through acquisitions, these companies gain an ever-larger say in the future of AI. This consolidation, which antitrust action could disrupt, may not favor innovation. But breaking up major tech firms also has potential pitfalls for AI innovation. With scale comes resources, and AI innovation is resource-intensive, requiring large quantities of data, diverse datastores, and vast computing power—known as “compute” in industry jargon.

American tech giants’ huge revenues uniquely equip them to fund costly AI research. Google’s DeepMind, arguably the world’s leading AI-research organization, is billions of dollars in debt and lost over $500 million in 2018 alone. Google’s fortress-like balance sheet can easily absorb the costs associated with such cutting-edge research, but smaller firms likely cannot. The economics of compute offer a concrete example of this dynamic. The rapidly increasing volume of compute required for deep learning research, coupled with compute’s prohibitively expensive prices, creates significant barriers to entry and innovation for smaller AI firms. As Microsoft co-founder Paul Allen noted in 2019, the “exponentially higher” costs of compute may leave the U.S. with only “a handful of places where you can be on the cutting edge.” Even the most well-funded independent AI organizations rely on Big Tech’s compute resources. OpenAI’s billion-dollar compute partnership with Microsoft, reached after OpenAI spent millions renting compute from leading tech firms, offers one example.

#### Antitrust fails at regulating big tech

**Rosoff 21** – Matt Rosoff, Editorial Director, Digital at CNBC

Matt Rosoff, “Op-ed: This week showed how the Big Tech antitrust campaign is totally misguided,” June 30, 2021, CNBC, <https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html>

On Wednesday, the tech industry saw five companies debut on public stock markets. One of them, Chinese ride-hailing giant Didi, is worth nearly $70 billion. Two others, Taboola and Integral Ad Science, compete in the online advertising industry -- one of the markets that has supposedly been ruined by Alphabet (in particular) and Facebook.

More generally, this year has seen the hottest IPO market in years, and investors continue to pile into start-ups at a record pace -- Q1 saw more than $64 billion in venture funding, a record.

This does not look like a deserted wasteland of stifled innovation and broken dreams.

Meanwhile, the general public doesn’t see tech power as a particularly pressing issue. In a survey funded by a tech industry group, 44% of respondents ranked tech industry regulations as the lowest priority on a list of five options, behind the economy, public health, climate change and infrastructure. Yes, 53% of the respondents thought some legislation was a good idea. But that does not mean the public wants Congress and the courts to aim the antitrust cannon at these giants.

As I wrote four years ago, antitrust is the wrong approach here.

None of these companies have monopolies over meaningfully defined relevant markets -- you really have to stretch and squeeze the market definitions for their dominance to come into clear view. The real state of the tech industry is an all-out business war between the five giants, a constantly shifting landscape of rivalries and backbiting -- think Great Powers Europe before World War I -- with numerous well-funded competitors of all sizes waiting to seize any opportunity and fill any gap they leave open.

For instance:

Google dominates search and Facebook is the biggest social media company by far. But the main source of their revenues is online advertising, and they compete bitterly for every available online ad dollar, with Amazon coming quickly up behind. And yet, there’s still enough space for TikTok, Twitter, Snap and a dozen small ad-tech competitors to build sustainable, thriving ad-supported businesses.

Amazon, Microsoft and Google are locked in a hard-knocking three-way war for supremacy in cloud computing infrastructure. And yet, there are dozens of companies delivering thriving cloud services on top of or alongside these platforms, including Snowflake, which debuted last year and is now worth more than $70 billion, and Zoom, which went public in 2019, and is worth almost $115 billion.

Facebook hates Apple and complains about its control over iPhone apps every chance it gets -- except, Mark Zuckerberg now admits that Facebook might actually be stronger after Apple’s recent privacy changes to the iPhone. Meanwhile, Apple’s iOS is actually a minority competitor, as Google’s Android operating system is the dominant mobile platform in the world -- and Microsoft just signed a deal with Amazon to support Android apps on Windows.

To be perfectly clear: Yes, it is in the public interest to regulate these tech giants more strictly.

For instance, Facebook and Google’s YouTube exercise an enormous amount of influence over public discourse and politics by allowing misinformation to spread almost unchecked.

Amazon and Apple control extremely valuable marketplaces that reach hundreds of millions of people, and can use this control to pit suppliers against each other and extract arguably onerous fees.

Union advocates allege Amazon illegally interfered in a recent attempt to unionize in Alabama, and many workers have complained about working conditions in warehouses and delivery vehicles.

All of the companies have used acquisitions to enter adjacent markets and, arguably, to stifle potential competitors before they got too big -- a tactic also used by companies outside the Big Five, such as Oracle in past years and Salesforce more recently.

Several of their founders are now centi-billionaires, a perfect example of the runaway income inequality that many progressives believe must be curbed.

But all of these activities can be addressed with targeted regulations or stricter enforcement of existing laws. Antitrust is a blunt instrument meant to address major market distortions created by true monopolists. Being big, in itself, is not illegal. Applying antitrust law to these companies is misguided, wrong, and will not have the desired effect of curbing their power in meaningful ways.

### FTC Adv

1. **M&A Turn:**

**AFF signals a new era with a substantive shift in antitrust application---that chills biopharma mergers and decks efficient pharmaceutical innovation**

**Abbott 2/21** – senior research fellow with the Mercatus Center at George Mason University and a law and economics research fellow with the Scalia Law School. He formerly served as the Federal Trade Commission’s general counsel

Alden Abbott, "The FTC Should Keep Its Hands Off Innovative Biopharma Mergers," National Review, 2-21-2022, https://www.nationalreview.com/2022/02/the-ftc-should-keep-its-hands-off-innovative-biopharma-mergers/

Our nation’s biopharmaceutical companies are a **great American success story**. They are the **world leaders** in discovering the **drugs and vaccines** that are generating the cures and treatments for **diseases that plague humanity**. Strong U.S. government protection for patents and less-intrusive regulation than is found overseas have sparked the massive volume of R&D that has brought forth this bounty. What’s more, the biopharma sector is responsible for more than 4 million good American jobs and contributes over $1.1 trillion annually to the U.S. economy.

The “warp speed” development in 2020 of Covid-19 vaccines and the imminent release of effective Covid antiviral drugs are just two of the many path-finding achievements by American biopharma firms. But a **government crackdown** on biopharma mergers led by the Federal Trade Commission (FTC) could **undermine future accomplishments**, harming the American economy and American (and foreign) patients alike.

Biopharma Merger Review in a Nutshell

While the FTC and the Department of Justice share authority over antitrust enforcement, the FTC is primarily responsible for overseeing pharma-industry business practices, including mergers. It reviews all biopharma merger proposals with an eye on preventing acquisitions that would substantially reduce competition among drugmakers.

Biopharma mergers are **particularly good** at **facilitating new-product introductions** that advance medical science. They do this in two ways:

First, they allow for the **scaling up of remedies** that are developed by small biotechnology and research firms. **Small entities** that specialize in the initial R&D that yields innovative cures **cannot scale up efficiently**. Larger acquiring firms have the **capabilities to undertake the trials**, **regulatory work**, and **marketing** that **speed up** the **release** and **broad dissemination** of innovative drugs.

Second, they **create synergies**. Proprietary data and intellectual property brought together by a merger give the new entity **access to greater** pools of technically important **information**, **laying the groundwork for innovations** without spending increases. This new information resource may **improve the quality** of product-related research, thereby raising the **probability of new-product breakthroughs** without increasing risk.

Until very recently, the FTC invoked general merger guidelines applicable to all industries (jointly issued with DOJ) in assessing biopharma consolidations. Reviews of Biopharma mergers proceeded in a manner that was well understood by the private sector. But recent FTC **policy changes** may **threaten** **these** socially desirable mergers.

The FTC Is Jettisoning Sound Merger Policy

Last March, the FTC set up an interagency working group (including the DOJ and foreign and state antitrust agencies) to “build a new approach” to biopharma mergers. The FTC’s press release stressed an interest in “**going beyond” traditional merger analysis** and exploring “**new or expanded theories of** [merger-related] **harm**.” And a recent FTC challenge to a vertical merger shows that **the risks these changes pose** to good biopharma acquisitions **are real**, not just theoretical.

Illumina is a leader in “next generation sequencing” (NGS) platforms used to support genetic-testing programs that it and other companies develop. In 2015, it established and then later spun off Grail, a small firm dedicated to developing a blood test for the very early detection of cancer. The spinoff helped Grail attract capital and great management, a key to its successful creation of a unique “liquid biopsy” test that detects up to 50 cancers before symptoms appear.

In September 2020, Illumina sought to reacquire Grail. This would allow rapid scaling up and distribution of the new test and cost reductions in marketing it. These undoubted efficiencies echo the benefits of biopharma mergers that involve the acquisition of small R&D-specialist firms.

But in March 2021, the FTC sued to block the merger, claiming a theoretical threat to competition in some future market for “multi-cancer early detection tests.” Such purely speculative concern about a market that does not yet even exist is at odds with accepted antitrust norms, which focus on likely harm in actual markets. It also gives short shrift to the clear benefits of the transaction.

A former FTC chair and chief economist together condemned this lawsuit. They explained that “it would be tragic if the FTC’s misapplication of the appropriate standards for evaluating a vertical merger were to delay the American people[’s] access to such an important lifesaving breakthrough in cancer treatment for the benefit of a hypothetical future competition.” Their words serve as a dire warning applicable to future biopharma mergers.

Conclusion

Uncertainty generated by the FTC’s new threat to beneficial mergers **threatens to reduce U.S. biopharma R&D**, slowing the creation of **breakthrough drugs and vaccines.** This will **undermine** American leadership in **producing the cures of the future**, which is vital to our nation and to millions of people around the world.

The solution is simple. The FTC should back off its recent threats against innovative biopharma mergers by publicly and explicitly restoring pre-2021 merger policies. If it does not, Congress should consider stepping in.

**Continued pharmaceutical innovation is key to survival---COVID was only the first warning shot**

EID = Emerging Infectious Disease

**Excler et al. 21** – Jean-Louis Excler, International Vaccine Institute, Seoul, Republic of Korea; Melanie Saville, Coalition for Epidemic Preparedness Innovations (CEPI), London, UK; Seth Berkley, Gavi, the Vaccine Alliance, Geneva, Switzerland; Jerome H. Kim, International Vaccine Institute, Seoul, Republic of Korea

Jean-Louis Excler, Melanie Saville, Seth Berkley, and Jerome H. Kim, "Vaccine development for emerging infectious diseases," Nat Med 27, 591–600, 4-12-2021, <https://www.nature.com/articles/s41591-021-01301-0>

**Newly emerging** and **reemerging infectious viral diseases** have **threatened humanity** throughout history. Several **interlaced** and **synergistic factors** including **demographic trends** and high-density **urbanization**, modernization favoring **high mobility** of people by all modes of transportation, **large gatherings**, altered human behaviors, **environmental changes** with modification of ecosystems and **inadequate global public health** mechanisms have **accelerated** both the **emergence** **and** **spread of animal viruses** as **existential human threats**. In 1918, at the time of the ‘Spanish flu’, the world population was estimated at 1.8 billion. It is projected to reach 9.9 billion by 2050, an increase of more than 25% from the current 2020 population of 7.8 billion (https://www.worldometers.info). The novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) responsible for the coronavirus disease 2019 (COVID-19) pandemic1,2,3 engulfed the entire world in less than 6 months, with high mortality in the elderly and those with associated comorbidities. The pandemic has severely disrupted the world economy. Short of lockdowns, the only means of control have been limited to series of mitigation measures such as self-distancing, wearing masks, travel restrictions and avoiding gatherings, all imperfect and constraining. Now with more than 100 million people infected and more than 2 million deaths, it seems that the addition of **vaccine(s)** to existing countermeasures **holds the best hope** for pandemic control. Taken together, these reasons compel researchers and policymakers to be vigilant, reexamine the approach to surveillance and management of **emerging infectious disease threats**, and revisit global mechanisms for the control of pandemic disease4,5.

Emerging and reemerging infectious diseases

The appearance of new infectious diseases has been recognized for millennia, well before the discovery of causative infectious agents. Despite advances in development of countermeasures (diagnostics, therapeutics and vaccines), **world travel** and **increased global interdependence** have added **layers of complexity** to containing these infectious diseases. **Emerging infectious diseases** (EIDs) **are threats to human health and global stability6**,7. A review of emerging pandemic diseases throughout history offers a perspective on the emergence and characteristics of coronavirus epidemics, with emphasis on the SARS-CoV-2 pandemic8,9. As human societies grow in **size and complexity**, an **endless variety of opportunities** **is created** **for infectious agents to emerge** into the unfilled ecologic niches we continue to create. To illustrate this constant vulnerability of populations to emerging and reemerging pathogens and their respective risks to rapidly evolve into devastating outbreaks and pandemics, a partial list of emerging viral infectious diseases that occurred between 1900 and 2020 is shown in Table 1.

[[Figure Omitted]]

Although nonemerging infectious diseases (not listed in Table 1), two other major mosquito-borne viral infections are yellow fever and dengue. Yellow fever, known for centuries and an Aedes mosquito-borne disease, is endemic in more than 40 countries across Africa and South America. Since 2016, several yellow fever outbreaks have occurred in Angola, Democratic Republic of Congo, Nigeria and Brazil to cite a few10, raising major concerns about the adequacy of yellow fever vaccine supply. Four live attenuated vaccines derived from the live attenuated yellow fever strain (17D)11 and prequalified by the WHO (World Health Organization) are available12.

Dengue is an increasing global public health threat with the four dengue virus types (DENV1–4) now cocirculating in most dengue endemic areas. Population growth, an expansion of areas hospitable for Aedes mosquito species and the ease of travel have all contributed to a steady rise in dengue infections and disease. Dengue is common in more than 100 countries around the world. Each year, up to 400 million people acquire dengue. Approximately 100 million people get sick from infection, and 22,000 die from severe dengue. Most seriously affected by outbreaks are the Americas, South/Southeast Asia and the Western Pacific; Asia represents ~70% of the global burden of disease (https://www.cdc.gov/dengue). Several vaccines have been developed13. A single dengue vaccine, Sanofi Pasteur’s Dengvaxia based on the yellow fever 17D backbone, has been licensed in 20 countries, but uptake has been poor. A safety signal in dengue-seronegative vaccine recipients stimulated an international review of the vaccine performance profile, new WHO recommendations for use and controversy in the Philippines involving the government, regulatory agencies, Sanofi Pasteur, clinicians responsible for testing and administering the vaccine, and the parents of vaccinated children14.

Two bacterial diseases, old scourges of humanity, are endemic and responsible for recurrent outbreaks and are increasingly antimicrobial resistant. Cholera, caused by pathogenic strains of Vibrio cholerae, is currently in its seventh global pandemic since 1817; notably, the seventh pandemic started in 196115. Global mortality due to cholera infection remains high, mainly due to delay in rehydrating patients. The global burden of cholera is estimated to be between 1.4 and 4.3 million cases with about 21,000–143,000 deaths per year, mostly in Asia and Africa. Tragic outbreaks have occurred in Yemen and Haiti. Adding to rehydration therapy, antibiotics have been used in the treatment of cholera to shorten the duration of diarrhea and to limit bacterial spread. Over the years, antimicrobial resistance developed in Asia and Africa to many useful antibiotics including chloramphenicol, furazolidone, trimethoprim-sulfamethoxazole, nalidixic acid, tetracycline and fluoroquinolones. Several vaccines have been developed and WHO prequalified; these vaccines constitute a Gavi-supported global stockpile for rapid deployment during outbreaks16.

Typhoid fever is a severe disease caused by the Gram-negative bacterium Salmonella enterica subsp. enterica serovar Typhi (S. Typhi). Antimicrobial-resistant S. Typhi strains have become increasingly common. The first large-scale emergence and spread of a novel extensively drug-resistant (XDR) S. Typhi clone was first reported in Sindh, Pakistan17,18, and has subsequently been reported in India, Bangladesh, Nepal, the Philippines, Iraq and Guatemala19,20. The world is in a critical period as XDR S. Typhi has appeared in densely populated areas. The successful development of improved typhoid vaccines (conjugation of the Vi polysaccharide with a carrier protein) with increased immunogenicity and efficacy including in children less than 2 years of age will facilitate the control of typhoid, in particular in XDR areas by decreasing the incidence of typhoid fever cases needing antibiotic treatment21,22.

A model of vaccine development for emerging infectious diseases

The understanding of emerging infectious diseases has evolved over the past two decades. A look back at the SARS-CoV outbreak in 2002 shows that—despite a small number of deaths and infections—its high mortality and transmissibility caused significant global disruption (see Table 1). The epidemic ended as work on vaccines was initiated. Since then, the disease has not reappeared—wet markets were closed and transmission to humans from civets ceased. Consequently, work on vaccines against SARS-CoV ended and its funding was cut. Only a whole inactivated vaccine23 and a DNA vaccine24 were tested in phase 1 clinical trials.

Following a traditional research and development pipeline, it takes between 5 and 10 years to develop a vaccine for an infectious agent. This approach is not well suited for the needs imposed by the emergence of a new pathogen during an epidemic. Figure 1 shows a comparison of the epidemic curves and vaccine development timelines between the 2014 West African Ebola outbreak and COVID-19. The 2014 Ebola epidemic lasted more than 24 months with 11,325 deaths and was sufficiently prolonged to enable the development and testing of vaccines for Ebola, with efficacy being shown for one vaccine (of several) toward the end of the epidemic25,26. What makes the COVID-19 pandemic remarkable is that the whole research and development pipeline, from the first SARS-CoV-2 viral sequenced to interim analyses of vaccine efficacy trials, was accomplished in just under 300 days27. Amid increasing concerns about unmitigated transmission during the 2013–2016 Western African Ebola outbreak in mid-2014, WHO urged acceleration of the development and evaluation of candidate vaccines25. To ensure that manufacturers would take the Ebola vaccine to full development and deployment, Gavi, the Vaccine Alliance, publicly announced support of up to US$300 million for vaccine purchase and followed that announcement with an advance purchase agreement. Ironically, there had been Ebola vaccines previously developed and tested for biodefense purposes in nonhuman primates, but this previous work was neither ‘ready’ for clinical trials during the epidemic nor considered commercially attractive enough to finish development28.

[[Figure Omitted]]

From these perceived shortcomings in vaccine development during public health emergencies arose the Coalition for Epidemic Preparedness Innovations (CEPI), a not-for-profit organization dedicated to timely vaccine development capabilities in anticipation of epidemics29,30. CEPI initially focused on diseases chosen from a list of WHO priority pathogens for EIDs—Middle East respiratory syndrome (MERS), Lassa fever, Nipah, Rift Valley fever (RVF) and chikungunya. The goal of CEPI was to advance candidate vaccines through phase 2 and to prepare stockpiles of vaccine against eventual use/testing under epidemic circumstances. CEPI had also prepared for ‘disease X’ by investing in innovative rapid response platforms that could move from sequence to clinical trials in weeks rather than months or years, such as mRNA and DNA technology, platforms that were useful when COVID-19 was declared a global health emergency in January 2020, and a pandemic in March 202031,32.

CEPI has been able to fund several vaccine development efforts, among them product development by Moderna, Inovio, Oxford–AstraZeneca and Novavax. Providing upfront funding helped these groups to advance vaccine candidates to clinical trials and develop scaled manufacturing processes in parallel, minimizing financial risk to vaccine developers. The launch of the larger US-funded Operation Warp Speed33 further provided companies with funding—reducing risks associated with rapid vaccine development and securing initial commitments in vaccine doses.

Vaccine platforms and vaccines for emerging infectious diseases

**Vaccines** are the **cornerstone** of the management of **infectious disease outbreaks** and are the **surest means** to defuse pandemic and **epidemic risk**. The faster a vaccine is **deployed**, the faster an outbreak can be **controlled**. As discussed in the previous section, the standard vaccine development cycle is **not suited** to the needs of **explosive pandemics**. **New vaccine platform technologies** however may **shorten that cycle** and make it possible for multiple vaccines to be more **rapidly developed**, **tested** and **produced34**. Table 2 provides examples of the most important technical vaccine platforms for vaccines developed or under development for emerging viral infectious diseases. Two COVID-19 vaccines were developed using mRNA technology (Pfizer–BioNTech35 and Moderna36), both showing safety and high efficacy, and now with US Food and Drug Administration (FDA) emergency use authorization (EUA)37,38 and European Medicines Agency (EMA) conditional marketing authorization39,40. While innovative and encouraging for other EIDs, **it is too early to assert that mRNA vaccines represent a universal vaccine approach that could be broadly applied to other EIDs** (such as bacterial or enteric pathogens). While COVID-19 mRNA vaccines are **a useful proof of concept**, gathering lessons from their **large-scale deployment** and **effectiveness** studies still **requires more work** and time.

[[Figure Omitted]]

While several DNA vaccines are licensed for veterinary applications, and DNA vaccines have shown safety and immunogenicity in human clinical trials, no DNA vaccine has reached licensure for use in humans41. Recombinant proteins vary greatly in design for the same pathogen (for example, subunit, virus-like particles) and are often formulated with adjuvants but have longer development times. Virus-like particle-based vaccines used for hepatitis B and human papillomavirus are safe, highly immunogenic, efficacious and easy to manufacture in large quantity. The technology is also easily transferable. Whole inactivated pathogens (for example, SARS-CoV-2, polio, cholera) or live attenuated vaccines (for example, SARS-CoV-2, polio, chikungunya) are unique to each pathogen. Depending on the pathogen, these vaccines also may require biosafety level 3 manufacturing (at least for COVID-19 and polio), which may limit the possibility of technology transfer for increasing the global manufacturing capacity.

Other vaccines are based on recombinant vector platforms, subdivided into nonreplicating vectors (for example, adenovirus 5 (Ad5), Ad26, chimpanzee adenovirus-derived ChAdOx, highly attenuated vectors like modified vaccinia Ankara (MVA)) and live attenuated vectors such as the measles-based vector or the vesicular stomatitis virus (VSV) vector. Either each vector is designed with specific inserts for the pathogen targeted, or the same vector can be designed with different inserts for the same disease. The development of the Merck Ebola vaccine is an example. ERVEBO is a live attenuated, recombinant VSV-based, chimeric-vector vaccine, where the VSV envelope G protein was deleted and replaced by the envelope glycoprotein of Zaire ebolavirus. ERVEBO is safe and highly efficacious, now approved by the US FDA and the EMA, and WHO prequalified, making VSV an attractive ‘platform’ for COVID-19 and perhaps for other EID vaccines26 although the −70 °C ultracold chain storage requirement still presents a challenge.

Other equally important considerations are **speed of development**, **ease of manufacture** and **scale-up**, **ease of** **logistics** (presentation, storage conditions and administration), **technology transfer** to other manufacturers to ensure worldwide supply, and **cost of goods**. Viral vectors such as Ad5, Ad26 and MVA have been used in HIV as well as in Ebola vaccines42. Finally, regulatory authorities do not approve platforms but vaccines. Each vaccine is different. However, with each use of a specific technology, regulatory agencies may, over time, become more comfortable with underlying technology and the overall safety and efficacy of the vaccine platform, allowing expedited review and approvals in the context of a pandemic43. With COVID-19, it meant that the regulatory authorities could permit expedited review of ‘platform’ technologies, such as RNA and DNA, that had been used (for other conditions) and had safety profiles in hundreds of people.

1. **Narrow court interpretation decks solvency**

**Crane**, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, **‘21**

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts **frequently acknowledge** that the statutory texts have a plain meaning, **and then refuse to follow it.**

**But it gets worse**. The courts have **not merely abandoned** statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have **departed** from text and original meaning **in one consistent direction**—**toward reading down the antitrust statutes in favor of big business**. As detailed in this Article, this **unilateral process** began **almost immediately** upon the promulgation of the Sherman Act **and continues to this day**. In brief: within their first decade of antitrust jurisprudence, the courts **read an atextual rule of reason** into section 1 of the Sherman Act to **transform an absolute prohibition** on agreements restraining trade **into a flexible standard** often invoked to **bless large business combinations**; after Congress passed two reform statutes in 1914, the courts **incrementally** read much of the textual distinctiveness **out of the statutes** to **lessen their anticorporate bite**; the courts have read the 1936 Robinson-Patman Act **almost out of existence**; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to **textually unrecognizable levels** by judicial interpretation and **agency practice**. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has **bent always in favor of capital**.

1. **Yielding to grabs for power delegitimize the FTC and upset rule of law**

**Kruckenberg 22** – attorney at Pacific Legal Foundation

Caleb Kruckenberg, "The FTC's rebellion against the judiciary," The Hill, 1-3-2022, https://thehill.com/opinion/judiciary/587728-the-ftcs-rebellion-against-the-judiciary?rl=1

The Federal Trade Commission (FTC) **must be held accountable** for its **open defiance** of the Supreme Court’s **directives**.

For decades, the FTC relied on a statute authorizing “permanent injunctions” to obtain monetary fines. That always seemed strange. After all, neighboring sections of the law allow the commission to seek limited monetary penalties, while injunctions normally only prevent future action and do not entail an award of any damages. Yet “disgorgement” awards — the return payment of supposedly illegal gains — became so pervasive that in 2019, for example, courts ordered that $723.2 million be paid to the government in such awards.

The Supreme Court seemingly put that practice to an end in April, in AMG Capital Management, LLC v. FTC, when it unanimously held that the statute never allowed the “Commission to seek, and a court to award, equitable monetary relief such as restitution or **disgorgement**.” Disgorgement was just an **illegal power grab.**

Since then, the agency has scrambled to find a replacement for its most significant enforcement tool. In a memo sent to FTC staff when she assumed her role, Chair Lina Khan stressed the need to use the agency’s “full set of tools and authorities … post-AMG.”

So, when the FTC bragged in a recent news release about obtaining $21 million “for consumers” in a case involving alleged unfair practices, we wondered just how the agency managed to get such a large award without disgorgement.

It turns out not to be so hard when you ignore the Supreme Court. Khan must have meant that the agency would **simply ignore** any Supreme Court decisions it dislikes. The $21 million was part of a settlement, approved by a federal judge, ordering restitution with any remainder “to be deposited to the U.S. Treasury as disgorgement.” And looking further, we realized that the FTC entered into the same kind of settlement just a few weeks earlier. The agency is acting like the AMG decision **doesn’t exist.**

This conduct would be stunning if it weren’t so **predictable**. In a recent interview, Khan was **direct** **about her vision** for the agency — **worrying not about “overreaching”** but about “neutering the tools” available to the agency. It is **peak hypocrisy** for the agency charged with protecting the public from unfair and deceptive practices to **employ tactics** it knows are **illegal** to **strong-arm settlements** in litigation. Make no mistake: Forcing illegal disgorgement payments is akin to extortion.

Consider a typical case. The FTC obtains an injunction against a defendant with no notice or opportunity for the defendants to challenge it, which forces the target company into receivership. Many defendants first learn about the enforcement action when a receiver arrives with a court order to take over the business. To defend themselves, defendants must petition the receiver for the release of funds to pay their legal fees.

With both hands tied behind their backs, companies unjustly accused of wrongdoing can barely muster a fight. But when disgorgement is possible and the agency can ask for, and a court can order, essentially unlimited fines, the stakes become truly dire. Few dare to fight the charges, even when they are unfounded.

Disgorgement is **not a legal option**, though. Congress instead limited the FTC’s authority, likely to protect against such asymmetry in power. A unanimous Supreme Court confirmed as much just months ago. And if the FTC can ignore the law to demand payment through disgorgement in exchange for a settlement, it’s **no better** than the **mob demanding protection money**.

Maybe the commission thought no one would notice. After all, few people regularly read the details of its settlement agreements. But we did.

The FTC should have to answer for its continued abuses. The Supreme Court’s directives were clear, but the agency has not followed its legal duty. Perhaps it’s time for another branch — Congress — to demand answers.

This isn’t just about the FTC or unfair practices. It’s about power. And **power** has been the **driving force** at the Khan-led FTC. If any ordinary American ignored the law, they’d be held responsible. And so should those tasked with enforcing the law.

That’s particularly true today when punishments have ballooned. Crushing civil fines can **shut down a company overnight**. They ought to at least have the chance to know the potential penalties they face. Yet, **if FTC gets its way**, **companies’ futures will hinge on the whim or caprice of regulators unbounded** by congressional statutes, the Supreme Court, or **any legal constraint**. That’s a kind of power that **undermines** not only the **FTC’s institutional legitimacy** but the **rule of law itself**.

1. **Congress backlashes to activist FTC - kills solvency because they hollow out enforcement**

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

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

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

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

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

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

#### Their internal link is about twitter accounts being hacked---they don’t solve and no impact

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

**Reuters ’21** –

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

The U.S. **Supreme Court**, by a 9-0 vote, on Thursday **gutted** the **F**ederal **T**rade **C**ommission's **ability to force scam artists** and companies that acted deceptively **to return ill-gotten gains**, ruling in favor of a criminally convicted payday lender who challenged the agency.

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

THE BIG NUMBER:

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

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

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

THE LONG AND RESOURCE-INTENSIVE ROAD:

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

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

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

CONGRESS CAN FIX:

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

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

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

#### Too many alternative terrorist financing mechanisms – there’s no way that scamming is key.

#### No means or motive for nuclear terror – their authors are hacks.

Weiss 2015 Leonard, visiting scholar at the Center for International Security and Cooperation at Stanford University, USA, and a member of the National Advisory Board of the Center for Arms Control and Non-Proliferation, On fear and nuclear terrorism, Bulletin of the Atomic Scientists 2015, Vol. 71(2) 75–87

There is clearly some risk of nuclear terrorism via theft of weapons, but the risk is low, and a successful theft of a nuclear weapon would likely require a team of insiders working within an otherwise highly secure environment. There is also some risk that a nuclear-armed country might use a terrorist group to launch a nuclear attack on an adversary. This possibility is also of low probability, because the sponsor country would almost inevitably risk nuclear annihilation itself. Finally, a terrorist group might try to design and build its own weapon, possibly with the help of disaffected persons from a weapon state who might provide them with nuclear know-how and/or materials. Given all the steps needed to achieve a weapon that is workable with high probability without being discovered and without suffering an accident this scenario is also fraught with risk for the terrorists. As a result, terrorists are much more likely to try to achieve their aims using conventional weapons, which are cheaper, safer, and technically more reliable. Thus, while no one can discount completely the acquisition by a terrorist group of a nuclear explosive weapon, such an event appears to be of very low probability over the next decade at least, and can be made still lower using techniques or policies that do not require constitutionally problematic steps by the federal government or an optional war whose death rate could match or exceed what the terrorists are capable of. There is a tendency on the part of security policy advocates to hype security threats to obtain support for their desired policy outcomes. They are free to do so in a democratic society, and most come by their advocacy through genuine conviction that a real security threat is receiving insufficient attention. But there is now enough evidence of how such advocacy has been distorted for the purpose of overcoming political opposition to policies stemming from ideology that careful public exposure and examination of data on claimed threats should be part of any such debate. Until this happens, the most appropriate attitude toward claimed threats of nuclear terrorism, especially when accompanied by advocacy of policies intruding on individual freedom, should be one of skepticism. Interestingly, while all this attention to nuclear terrorism goes on, the United States and other nuclear nations have no problem promoting the use of nuclear power and national nuclear programs (only for friends, of course) that end up creating more nuclear materials that can be used for weapons. The use of civilian nuclear programs to disguise national weapon ambitions has been a hallmark of proliferation history ever since the Atoms for Peace program (Sokolski, 2001), suggesting that the real nuclear threat resides where it always has resided in national nuclear programs; but placing the threat where it properly belongs does not carry the public-relations frisson currently attached to the word Òterrorism.Ó

**Multinational unity inevtiable**

**Mohan et. al. 2/2** – Andrew Small is a senior transatlantic fellow with GMF's [Asia](https://www.gmfus.org/asia-program) Program, which he established in 2006. Bonnie S. Glaser is director of the Asia Program at the German Marshall Fund of the United States. Dr. Garima Mohan is a fellow in the Asia program, where she leads the work on India and heads the India Trilateral Forum.

[Andrew Small](https://www.gmfus.org/find-experts/andrew-small), [Bonnie S. Glaser](https://www.gmfus.org/find-experts/bonnie-s-glaser), and [Garima Mohan](https://www.gmfus.org/find-experts/garima-mohan), February 2 2022, “US-European Cooperation on China and the Indo-Pacific,” The German Marshall Fund of the United States, https://www.gmfus.org/news/us-european-cooperation-china-and-indo-pacific

The Biden administration took office with the intention of making **partnership with Europe a central element of its China strategy**. This paper assesses what has been achieved in the first year of these efforts, and what to expect in 2022. Despite some of points of contention, such as the disputes over the security pact between Australia, the United Kingdom, and the United States (AUKUS), European and US officials ended the year **in a more optimistic place on the transatlantic China** and Indo-Pacific **agendas than they were at the start**. Over the course of 2021, the two sides put in place new structures—from the EU-US Trade and Technology Council (TTC) to the Indo-Pacific high-level consultations—that have **helped to get the right issues on the table** and pushed their bureaucracies to deal with each other in ways that they had not before. Instead of a thin layer of periodic dialogues on China, there is an increasingly **thick web of interactions**, from working-level groups in different policy areas **to leader-level exchanges**. The EU and the United States also removed many of the **obstacles to their joining forces** more effectively on economic goals, particularly with the deal on steel and aluminum tariffs. Meanwhile, without raising excessively high expectations of a new coalition government that will not depart radically from its predecessor, **the change in Berlin should also provide a stronger basis for cooperation on China** than was present during the final phase of Chancellor Angela Merkel’s government.

**No impact to populism**

Louis F. Cooper 16, His online writing includes “Reflections on U.S. Foreign Policy” at the U.S. Intellectual History Blog (July 16, 2014). His Ph.D. is from the School of International Service, American University., 12-6-2016, "WPTPN: Will Populist Nationalism Lead to Great-Power War?," No Publication, http://duckofminerva.com/2016/12/wptpn-will-populist-nationalism-lead-to-great-power-war.html

Several reasons present themselves. First, nuclear weapons have given the prospect of a global war, or any great-power war, a possibility of **civilization-ending finality** that it did not have in the past. Second, the security architecture created under U.S. leadership after World War II has arguably worked to **reduce the likelihood of major armed conflict** among the great powers. Third, the existence of a network of **international institutions**, both inside and outside the UN system, has pushed in the same direction. Fourth, it is very possible that, as John Mueller and Christopher Fettweis have argued, decision-makers have to come see great-power war as “**subrationally unthinkable**, or not even part of the option set for the great powers.”[ii] The extreme destructiveness of the twentieth century’s world wars, fueled partly by developments in technology, might well have produced long-term effects on how leaders and publics think about global or great-power war, in a way, for instance, that the Napoleonic Wars, for all their horror and bloodiness, did not. Phil Arena’s recent contribution to this series argues that if the U.S. under a Trump administration signals an unwillingness to defend its allies, then Putin might be tempted to gamble on an invasion of the Baltics or Kim Jong-Un similarly might gamble on an invasion of South Korea (and that would drag in China). Putting aside Kim Jong-Un for the moment as a special case, let’s consider Putin. As long as NATO exists – and Trump, despite his statements about the unfairness of the distribution of cost burdens, has not suggested, as far as I’m aware, that he wants to dissolve the alliance – then Putin would have to assume that an attack on the Baltics would trigger a NATO response. Even if Putin does not see great-power war as unthinkable or outside his “option set,” one would assume that for reasons of pure self-interest he would not want to risk a nuclear war. Nor, one might think, would he want to jeopardize the prospect of better (from his standpoint) relations with a U.S. administration less concerned with, among other things, his commission of war crimes in Syria or his annexation of Crimea than the Obama administration has been. For these reasons, I’m not too worried that the advent of the Trump administration will lead to a war with Russia over the Baltics. The Korean peninsula is, perhaps, a more worrisome situation. Chances are, however, that Trump, after taking office, will be prevailed upon to make reassuring noises about the U.S. commitment to South Korea, and that should suffice to deter Kim Jong-Un from doing anything too rash. The cautionary point here, admittedly, is that it’s not clear whether Kim can be counted on to behave in a minimally rational fashion. Putin, whatever one might think of him, is rational. It’s not entirely clear whether Kim is. However, if Kim is irrational then all bets are off regardless of what U.S. policy pronouncements are forthcoming. World politics is not invariably cyclical and states can **learn from experience** (as even Gilpin acknowledged). If one admits this and pays **due attention to history**, then it is plausible to think that **the force of populist nationalism**, as expressed in more erratic and/or less ‘internationalist’ official policy, will **not**, whatever its **other effects may be**, **increase the low likelihood of a global war**.

**1NC---T**

T Expand the Scope---

**The scope of antitrust law is limited only by judicially impermissible interpretations of antitrust law---they violate because they don’t expand to cover previously per se legal practices**

**Zeisler 14** – J.D. Candidate 2014, Columbia Law School; B.S., B.A. 2012, University of British Columbia.

Royce Zeisler, "Chevron Deference And The FTC: How And Why The FTC Should Use Chevron To Improve Antitrust Enforcement," Columbia Business Law Review 2014, no. 1, p. 266-312, 2014, https://heinonline.org/hol-cgi-bin/get\_pdf.cgi?handle=hein.journals/colb2014&section=9

To summarize, **Figure 1** diagrams the **statutory landscape**. The inner circle represents the Sherman Act; this is the judicially determined common law component of section 5.107 The larger oval represents section 5's maximal **scope** of liability. This includes the Sherman Act and the unfair methods "penumbra." The FTC may regulate conduct in the penumbra space through interpretations gaining Chevron deference. Finally, **there is an outer boundary** of judicially determined **impermissible meanings**. This denotes possible interpretations that **Congress did not empower the FTC to pass**. As a practical matter, this limit would likely **coincide with conduct** that is **per se legal** under the **Sherman Act**. The next section examines this boundary in more detail.

Figure 1: Space Of Antitrust Delegation

Diagram

Description automatically generated

**Vote neg---**

**[1]---Limits---allowing any slight tweak to how the courts determine prohibitions opens the floodgates to infinite affs**

**[2]---Ground---forcing the aff to cover a currently per se legal practice ensures predictability neg link uniqueness for antitrust disads**

### 1NC---CP

Adv CP---

#### The United States federal government should:

#### establish mechanisms that allow government agencies and laboratories to collaborate directly with private technology start-ups through at least co-development and technology-licensing agreements

#### pass the Consumer Protection and Recovery Act and increase funding for FTC privacy efforts

#### without increasing prohibitions on anticompetitive conduct, expand the scope of FTC authority over privacy violations, and encourage increased cooperation with international counterparts

#### Stop prioritizing antitrust enforcement of large platform companies

#### Give tech platforms monetary and regulatory incentives to not cooperate with China

#### Plank 1 solves startup health and innovation

Surana et al 20 – Assistant research professor at the Center for Global Sustainability, School of Public Policy at the University of Maryland College Park. She previously worked at the Harvard Kennedy School and the World Bank.

Kavita Surana, Claudia Doblinger, and Laura Diaz Anadon, “Collaboration Between Start-Ups and Federal Agencies: A Surprising Solution for Energy Innovation,” *Information Technology & Innovation Foundation*, August 2020, pp. 1, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

Despite their potential to bridge the gap between RD&D and deployment, climate-tech start-ups face fierce headwinds. To be sure, all start-ups, regardless of sector, face barriers, and only around half of them survive beyond five years. 2 In climate tech, the challenges facing start-ups are amplified. In some cases, climate-tech innovation may require decades of investment in human, technological, and financial resources before bearing fruit. In others, technology deployment might interface or compete with incumbent utilities and businesses that can be resistant to change, having already built carbon-intensive infrastructures and business models over decades.

Consequently, despite their promise from a societal and environmental perspective, climate-tech start-ups are often perceived to be unattractive from a financial perspective. In the early 2010s, VCs invested in climate-tech firms without adequately accounting for these challenges. Thus, instead of making quick returns and a big upside, many lost much of their investment.

The perceived risks of climate-tech start-ups still linger. The infamous commercialization “valley of death” claims a higher proportion of climate-tech start-ups than information or medical technology start-ups, which receive the lion’s share of VC funding. 3 Yet some climate-tech startups make it through. Identifying approaches that help ease barriers faced by climate-tech startups can ultimately catalyze their role in accelerating clean energy innovation.

One solution to improve the chances of climate-tech start-up survival is particularly surprising: collaboration with federal agencies and laboratories. By collaboration, we mean mechanisms that allow agencies and government laboratories to work directly with start-ups, such as co-development and technology-licensing agreements. We do not include grants and loans. Entrepreneurs and agencies may seem like an unlikely match, but our rigorous, peer-reviewed research found them to be compatible. Indeed, collaborations between climate-tech start-ups and federal agencies yield better results than their collaborations with universities or other firms, as measured by patents received and follow-on financing.

**The next 3 solve FTC efficacy without expanding authority**

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

Ted Mermin 21. Before the United States House of Representatives Committee on Energy & Commerce Subcommittee on Consumer Protection and Commerce Hearing on “The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers”. <https://docs.house.gov/meetings/IF/IF17/20210427/112501/HHRG-117-IF17-Wstate-MerminT-20210427.pdf>

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

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

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

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

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

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

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

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

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

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

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

<<THEIR CARD STARTS>>

10. Trust the FTC. This final step informs all the others. There can be no doubt that there is more work to do protecting consumers than the FTC currently has the tools or resources to accomplish. There is also no doubt that **the FTC has been trammeled in ways that its sister agencies**, federal and state, **have not**. Whatever the reason, it is high time to retire the “zombie ideas” about the FTC – that the Commission is unnecessary, or overreaching, or heavy-handed, or inefficient.23 It is time, as one commissioner stated in Senate testimony last week, to “turn the page on the FTC’s perceived powerlessness.”24

For an American public eager for greater – not lesser – protection from increasingly sophisticated scam artists, deceptive advertisers, and privacy violating tech companies, **building an effective FTC is an easy decision**. It can and should be for this committee as well.

IV. Conclusion

This subcommittee meets at a remarkable historical moment, when the COVID-19 pandemic has revealed the profound need for a robust Federal Trade Commission just days after the Supreme Court made action by Congress an absolute necessity. This is a perilous time, with the chief protector of American consumers rendered nearly powerless just when those consumers are experiencing a heightened threat resulting from a once-in-a-century pandemic. **The Consumer Protection and Recovery Act provides a critical first step toward restoring authority and effectiveness to the nation’s leading consumer protection agency**.

Swift action to restore the FTC’s traditional 13(b) authority means that when constituents contact your office, and tell your staff that they have lost their life’s savings to a work-at-home scam, or their identity has been stolen and someone has opened accounts in their name, or they just spent their stimulus payment on a supposed cure for COVID for their grandmother who’s on a respirator – there will still be an agency to refer them to. No one wants that staffer to have to add: “Well, we could send you to the FTC, but they don’t actually have the power to get you your money back.”

Inaction or delay will mean no recovery for millions of wronged American consumers. The time to pass the Consumer Protection and Recovery Act is now.

#### Plank 3 solves FTC privacy effectiveness and leadership---green

1AC Simons, 20

(Joe Simons, American attorney who formerly served as chairman of the Federal Trade Commission, A.B. in Economics and History from Cornell University in 1980 and his J.D., cum laude, from Georgetown University Law Center in 1983."Hearings on Competition and Consumer Protection in the 21st Century The FTC’s Role in a Changing World", accessed 2-18-2022, https://www.ftc.gov/system/files/documents/reports/commission-report-hearings-competition-consumer-protection-21st-century/p181201internationalhearingreport.pdf) jcw

The FTC should **continue** to exercise international **leadership**, leveraging its **expertise** and cross-disciplinary **synergies** to address **emerging** issues. The hearings provided strong support for FTC leadership on **antitrust**, consumer **protection**, and privacy and data security issues in **international** policy organizations and enforcement networks.22 Panelists recognized the FTC’s leadership in promoting sound antitrust enforcement internationally, and offered suggestions for its continuation and expansion. They cited the FTC’s **role** in the International Competition Network (**ICN**), a network of virtually all of the world’s competition agencies aimed at promoting **convergence** toward sound competition policy and enforcement and cooperation among member agencies. The FTC has led **projects** resulting in several important **best practice** recommendations, including on merger notification and review procedures and on the assessment of dominance. Most recently, the FTC led the ICN’s project on due process principles, resulting in Guiding Principles on Procedural Fairness and Recommended Practices for Investigative Process. Several panelists urged the FTC to continue its leadership, including in the critical area of due process. The FTC’s leadership in the **OECD** and **UNCTAD** were similarly cited for their **positive** influence on the development of global antitrust policies and enforcement.23 Panelists also commended the FTC’s sharing of its **research**, **policies**, and **practices** with the international community, including through issuing **guidelines** and publishing **studies**.24 In 2017, for example, the FTC played a primary role in revising the provisions of the Antitrust Guidelines for International Enforcement and Cooperation that described the agencies’ policy regarding the use of **extraterritorial** remedies, and recommended that other agencies consider adopting the same approach.25 The hearings also drew calls for the FTC to expand its leadership efforts in newer international policy areas. While many jurisdictions are tackling privacy and data security issues for the first time, the FTC has **decades** of experience in analyzing privacy issues arising from new consumer- facing technologies and bringing enforcement actions that establish strong privacy and data security norms and practices for businesses. Several panelists urged the FTC to promote these norms and advance best practices globally, including through interoperable data transfer frameworks and accountability mechanisms.26 One panelist from the OECD explained that the FTC’s **understanding** of markets makes it “**perfectly poised”** to lead on issues relating to privacy and data as a driver of production in the **economy**.27 Panelists also identified **challenges** to FTC leadership, noting the growth of privacy laws and **frameworks** in Europe and other foreign jurisdictions.28 Even without comprehensive U.S. privacy legislation, panelists agreed that the FTC has an important leadership role to play internationally. They cited the agency’s broad jurisdiction and history of strong enforcement and remedies in privacy and data security cases. Some panelists recognized, however, that the FTC would need **help** from **Congress** to maintain U.S. **leadership** in this area. Echoing the Commission’s recent Congressional testimony calling for strong, comprehensive privacy legislation, former Chairman Kovacic called for new U.S. privacy laws with a “**comprehensive** FTC mandate with no jurisdictional carve-outs” to ensure the FTC’s continued, **effective** international **engagement**.29 4. The FTC should expand on its initiatives to build strong relations with counterparts, including through its International Technical Assistance and International Fellows programs. Panelists urged the FTC to build on its work promoting **international** convergence and developing strong enforcement cooperation partnerships by engaging **directly** with the **leadership** and staff of its foreign **counterparts** in new ways. The agency already fosters these relationships bilaterally and through regional and multilateral fora, including the OECD, ICN, and ICPEN. In addition to a continuing focus on case cooperation and dialogue, panelists suggested that the FTC explore additional opportunities for joint initiatives such as joint workshops and studies, and more regional engagement to deepen relationships and understanding among agencies.

**1NC---DA**

Axon DA---

**Axon narrowly challenged internal adjudication by trying to make it easier to challenge in district court—a broad adverse ruling spills over to similar agencies like the SEC and creates precedent that threatens the administrative state**

Christopher **Cole**, Law360 Reporter, citing FTC General Counsel Stephen Caulkins, **2/18**/22, High Court's FTC Case Carries Potential For Broad Impact, Law360 via Lexis

The U.S. Supreme Court is poised to decide when lower courts can take up challenges to the Federal Trade Commission's **structure** in a case that could have **far-reaching implications** for commission merger reviews and efforts to protect consumers from fraud, but more broadly for **administrative powers** of **other** federal **agencies**, too.

The court recently agreed to hear one question, that of when parties defending themselves in an FTC administrative proceeding may challenge the constitutionality of the FTC's action.

The case arose from police body cam supplier Axon Enterprises' bid to fend off an FTC merger challenge. Axon initially asked that the high court case examine the constitutionality of the FTC's structure, but the court agreed to review only the narrower question of whether district courts could take up such constitutional challenges **before** the agency **has issued a final order** of some kind.

The company, which faces an FTC administrative trial over the merger, has argued that its challenge to the agency's in-house proceeding should be heard by a district court right now rather than after the agency action wraps up. The company argues that the FTC's administrative proceedings violate due process rights because cases are fixed in favor of the agency, which effectively serves as prosecutor, judge and jury.

Justices chose not to get to the heart of Axon's due process concerns in their upcoming review, but they agreed to dissect the trial courts' authority to field the issue while an underlying agency proceeding remains underway. In the meantime, the commission's in-house proceeding over the Axon merger remains on ice pending the Supreme Court outcome.

Their ruling in this case **will** likely **establish a key precedent** that will affect **other federal agencies** that **carry out administrative trials**.

And while the jurisdictional question currently before the court **is narrow**, observers told Law360 that the high court's decision to take the case at all **emboldens** those who would challenge **the FTC structure's legality** and that larger issue **inevitably return to the high court someday.**

New York antitrust lawyer Leonard Gordon, former FTC regional director in the Northeast, told Law360 the court appears focused for now on the process of disputing agency actions, not whether the commission's own mechanics pass constitutional muster.

"I think they're interested in the procedural question" of whether someone in the crosshairs of an FTC proceeding can challenge the constitutionality of the administrative process, said Gordon, chair of Venable LLP's advertising and marketing group.

That question is **"limited,"** he said, but the jurists **may well decide** that federal courts can hear such challenges before the commission's own procedure is over, which would mark a **shift** in jurisprudence. "**The law as it sits right now** is **not very favorable** for those kinds of challenges."

FTC On Defense — Again

When the justices hear oral arguments in Axon Enterprise Inc. v. FTC this fall, it will be the second time in two years that government lawyers hop the marble steps on First Street in hopes of shielding the commission from a private sector legal attack.

The last round didn't go well for the feds. In AMG Capital Management v. FTC, the commission was challenged on its use of injunctive powers to seek monetary relief directly in district court, a unanimous court ultimately ruled that the FTC's injunction power, established under Section 13(b) of the FTC Act, is meant only to stop bad behavior going forward, not recover money for consumers.

That dealt a body blow to a chief FTC weapon long used to obtain court orders for restitution or disgorgement of ill-gotten gains, though it retained the power to seek restitution and disgorgement through its own administrative trials.

But now those in-house procedures are themselves under siege in the Axon case, in which the Arizona company had originally sought not only the power to sue the FTC in district court to stop the merger suit, but also to overturn the agency's structure as unconstitutional.

By only taking up the former question, the justices have **punted** what would otherwise amount to **existential threat to the FTC**, since taking away its power to bring cases before the commission's administrative law judge would **undercut the agency's main weapon** against alleged marketplace abuses.

That **doesn't mean**, though, that the high court has permanently tossed aside the larger issue. Companies such as Axon, which faces an FTC administrative complaint seeking to unwind its completed purchase of body cam supplier Vievu, **stand ready to litigate the FTC's structure** in the lower courts if the justices say there's no **need to wait** on the administrative trial.

Although the justices declined to review the **larger issues of the FTC's structure** right now, Axon officials say that their willingness to look at when such a challenge can be brought to the lower courts **is a victory in itself**. The thrust of Axon's argument is that harm accrues to a party during the FTC's slow-moving administrative process, so district courts should allow for a remedy — especially given that the process runs afoul of the Constitution in the first place.

"The question the Court agreed to resolve has enormous practical consequences, both for Axon and for others embroiled in proceedings before the FTC," Pam Petersen, Axon's vice president of litigation, told Law360 in a recent email.

"Under a series of recent Supreme Court decisions, it is clear that there are constitutional defects with how the FTC is structured," she said. "But as things stand, we could be forced to spend years submitting to proceedings before an unconstitutionally constituted FTC before we can ever get a court to consider and remedy those defects. We're hopeful that the Supreme Court will recognize that there is no legal basis for such an illogical regime."

The FTC has responded in court papers that Axon is wrongly trying to bypass the plan established by Congress for reviewing commission decisions.

An FTC spokeswoman declined to comment Friday.

Wider Implications Likely

As former FTC general counsel Stephen Calkins put it, the court's review of **Axon**, which came out of a Ninth Circuit ruling, draws the **battle lines for a "two-front war"** where Axon fights at the Supreme Court while other companies **continue to file** district court **challenges**.

Calkins, a professor at Wayne State University Law School, said Thursday there was nothing to stop litigants from filing a case in federal court regardless of what's happening at the high court.

"You would think there would be a very good chance that the FTC would lose this case, and that any FTC administrative complaint going forward is sure to be met by a district complaint challenging the constitutional structure of the FTC," he said. "It must think simultaneously about being a defendant in a district court lawsuit." He predicted "a number of district court challenges" and that **eventually the FTC will be back on the second question**, although the FTC could try to stay other court cases with Axon still unresolved.

"The irony with the loss of its 13(b) power," he said, is that "the FTC has been scrambling to find ways to get money to consumers, and one possible option is to file an administrative case and wait to go to district court until after the administrative case has gone through," but now that option could be dashed as well.

Calkins said a Supreme Court ruling striking down **the FTC's in-house authority** and its overall structure would give become **important case law for other challenges** **to federal bodies that use similar procedures**, **such as the Securities and Exchange Commission.**

Venable's Gordon pointed out that even with the justices tackling only the question of bringing suit in district court against the FTC, **a ruling in Axon's favor** could be **cited in any number of lower court cases** **seeking to buck agencies' administrative authority**.

"**Anybody who's got a challenge** to the constitutionality of either the process that the government agency is engaged in, or the constitutionality of the way the agency **is set up** … it will open up the opportunity for **a sort of collateral attack on what the agency does**," he said.

Gordon said plenty of these cases are **waiting in the wings**. "There are always some people claiming the administrative state is depriving them of due process."

**FTC can’t push the envelope—expanding the contours of section 5 destroys capital with the Court**

Joshua D. **Wright**, JD, PhD, Professor, Antonin Scalia Law School, George

Mason University, **and** Alexander **Krzepicki**, J.D. Candidate, 20**21**, Antonin Scalia Law School, George Mason University, What Is an Independent Agency to Do? The Trump Administration’s Executive Order on Preventing Online Censorship and the Federal Trade Commission, George Mason University Law & Economics Research Paper Series, 21-03

The FTC faces a **crossroads** on both **legal** and political **dimensions**. President Trump’s Executive Order on Preventing Online Censorship does make some demands on it, and the FTC must respond or risk open warfare with the White House. Context is critical here; the controversy over the Order is but a skirmish in a broader campaign about the **role of administrative agencies**—particularly independent ones—**in our constitutional scheme.** Fighting is on multiple fronts: **Axon’s facial challenge** to the FTC’s legitimacy, although unsuccessful, **is on appeal** before the Ninth Circuit and is **just one salvo** inspired by the reinvigorated skepticism about Humphrey’s Executor and independent agencies.88 The Supreme Court **fired a shot over the bow** when it found the CFPB’s sole independent director structure unconstitutional.89 Chief Justice Roberts’s opinion in Seila Law recasts Humphrey’s Executor and Morrison v. Olson as narrow exceptions to the rule of presidential control of agency heads, and it will take some time for the full implications of that decision to bear fruit.90 And Justice Gorsuch’s dissent in Gundy v. United States91—coupled with favorable remarks about it by Justice Kavanaugh’s in his concurrence in Paul v. United States92—has reinvigorated the conversation around the nondelegation doctrine, the bedrock of the administrative state writ large.

So how should the agency respond? On the legal dimension as an enforcement agency, there are inherent flaws with any UDAP investigations based on speech restrictions; fundamentally these are akin to asking the U.S. government to police speech and allegations of anti-conservative bias. As former-Chairman Muris made clear, this “is a task the First Amendment leaves to the American people, not a government agency.”93 The FTC is a law enforcement agency, and the First Amendment is one of the laws it must enforce.

With that in mind, one can broadly sketch out four alternative approaches the FTC could pursue in response to the Executive Order. The first would be to embrace the order’s call for UDAP investigations into social media platforms and to conduct a study. Commissioner Wilson suggested considering the Order’s UDAP suggestions, but the 6(b) inquiry she proposed is focused upon privacy as opposed to policing speech and platform bias.94 Another alternative would be to conduct the 6(b) study, but with no UDAP investigation. A third option would be to jump straight into the investigation without a study. The fourth would be following Chairman Muris’s lead which, in this case, would mean no UDAP investigation and abstaining from using the FTC’s resources on a 6(b) study targeted at an area—content curation and alleged political bias—that have no nexus to the FTC’s mission of protecting competition and consumers.

The first three approaches are each plagued by the same problem. Ultimately, the FTC’s Section 5 authority does not support any action in this sphere on the backend, so any study or investigation would do little more than waste precious government resources. Commissioner Wilson’s proposals adeptly avoid these issues about the inability to act on private speech, but they only do so by shifting the focus of the study away from free speech, which is where the Executive Order directs its focus, to privacy and targeted advertising. Any study or investigation of alleged platform bias cannot avoid entangling the FTC in the policing of speech. Former Chairman Muris had the right answer when it comes to the FTC’s involvement in free speech issues, and it has the added benefit of being extremely cost effective.

The FTC also faces an important political challenge arising from the Executive Order. Should the FTC defend its independence in light of the Executive Order? And if so, how?

In our view, the FTC must also protect **whatever *Seila Law* leaves of its independence**. Not just for the sake of independence itself, but because its **independence** is a **critical asset** that helps the under resourced agency achieve **its core objectives** in protecting consumers and competition **across the modern economy**. Former-Chairman William E. Kovacic explained the importance of the “FTC managing carefully its [independence]. One way to envision the FTC’s work is that its activities involve either **accumulating political capital** or **spending political capital**. **In choosing new programs**, the agency must **be attentive to the balance** of its political capital account.”95 The FTC is in a difficult position as an independent law enforcement agency. The FTC’s duty to the whole of the law, which includes the First Amendment and not just Section 5, implies that requests—including those from the White House—to consider investigations that are plainly not consistent with the First Amendment should be rejected. The FTC’s independence—so long as it remains—exists precisely for circumstances such as these. As a law enforcement agency, it need not and **should not dip a toe into this arena**.

**That disrupts financial stability---effective and unilateral SEC regulation is critical**

**Allen**, Associate Professor, Suffolk University Law School, **‘18**

(Hillary, “The SEC as Financial Stability Regulator,” 43 J. Corp. L. 715)

After the financial crisis of 2007-2008 (the “Crisis”), regulators around the world adopted the pursuit of “financial stability” as one of the foremost goals of financial regulation.2 However, the ubiquity of the goal belied a lack of consensus about how regulators should approach financial stability, and that lack of consensus persists today. This Article takes an expansive view of financial stability regulation, arguing that such regulation should seek to prevent disruptions to both financial institutions and markets, if such disruptions would have negative consequences for the broader economy. Because the Securities and Exchange Commission (the “SEC”) has much more experience with the securities markets than other US financial regulators, the SEC is the agency best positioned to **ensure the robustness of those markets**. The SEC can therefore make a significant contribution **as a market-oriented financial stability regulator** – even if other forms of financial stability regulation might be best left to prudential regulators, like the Federal Reserve.

Private participants in the securities markets have neither the **incentives** nor the **ability** to promote **financial stability** (a collective good),3 and so **only a government body** can work to ensure that the securities markets are **robust to shocks**, and minimize the likelihood of shocks occurring in the first place. **If the SEC fails** to take on this role, we **cannot expect any other government agency to fill the lacuna**. While the Financial Stability Oversight Council (“FSOC”) was created to address threats to the stability of the financial system, it is, at its core, a committee that is designed to leverage the expertise of its member agencies rather than performing extensive regulatory functions itself. Other than the SEC, there is no regulatory agency represented on the FSOC that has extensive experience with the securities markets.4 And there are certainly developments in the securities markets that raise financial stability **concerns** – this Article will focus in **particular** on the increasing prevalence of **high frequency trading** (“HFT”) in the equity markets.

HFT is an umbrella term for a variety of different automated trading strategies; their common characteristic is that the computer algorithms that make the trading decisions are designed to hold assets for only a very short period of time. HFT now accounts for **more than half of all trading** in the US equity markets,5 and while the practice certainly affords benefits in terms of reducing the time and cost of executing trades, it also increases the **complexity**, **interconnectedness** and **opacity** of the equities markets.6 Events such as the **“Flash Crash”** in May 2010 have alerted regulators to HFT’s potential to both generate and transmit shocks through the financial system: the potential **threats** that HFT **poses to financial stability** (as well as to **investors** and **capital formation**) will be explored in detail in this Article. Of course, high frequency traders do not trade exclusively in the equity markets (i.e. the secondary trading market for listed stocks): 7 there is an almost limitless list of assets that HFT firms will trade, including a multitude of derivatives instruments. However, this Article will focus on the equity markets.

The SEC is **currently considering** how to **reform its regulation of the equity markets** in light of HFT and other developments, a project that began in earnest with the issuance of a “Concept Release on Equity Market Structure” on January 14, 2010 (the “Concept Release”).8 Although some reforms have been implemented since that time, the project of market structure reform is nowhere near complete. To the extent that the SEC is planning to promulgate further rules addressing HFT and the equity market structure more generally, **such rules can be said to be in the “preproposal period”** (i.e. the time prior to the proposal of any rule in the Federal Register). As Krawiec notes, the preproposal period is “a time period about which little is known, despite its importance to policy outcomes. . . the need to produce a proposed rule that is ready for comment pushes much regulatory work to this early stage of the rule development process.”9 This Article seeks to provide some insight into the preproposal stage of the market structure reform project by considering the testimony, public statements, speeches and press releases that have been disseminated on the subject of HFT by the SEC, its Commissioners, and its staff.10

**Repeat shock financial crises cause great power war**

**Liu 18**

Qian Liu, Economist based in China, From Economic Crisis to World War III, 8 November 2018, <https://www.project-syndicate.org/commentary/economic-crisis-military-conflict-or-structural-reform-by-qian-liu-2018-11>

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the **current social, political, and technological landscape**, a **prolonged economic crisis**, combined with rising income inequality, could well **escalate** into a **major global military conflict**. The **2008-09** global financial crisis **almost** bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy **back from the brink**, using massive monetary stimulus, including **q**uantitative **e**asing and near-zero (or even negative) interest rates. But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.1 Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment. The lack of structural reform has meant that the **unprecedented excess liquidity** that central banks injected into their economies was not allocated to its most efficient uses. Instead, it **raised global asset prices** to levels **even higher** than those prevailing before 2008. In the **U**nited **S**tates, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929. As monetary tightening reveals the vulnerabilities in the real economy, the **collapse** of **asset-price bubbles** will **trigger another economic crisis** – one that could be **even more severe than the last**, because we have built up a **tolerance** to our **strongest macroeconomic medications**. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has **severely depleted their power to stabilize and stimulate the economy**. If history is any guide, the **consequences** of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, **prolonged periods of economic distress** have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to **fuel** unrest, terrorism, or even **war**. For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, **World War II** had begun. To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.3 According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels. This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be **trigger points** for a **future crisis**.

**1NC---CP**

Congressional Intent CP---

**The United States federal government should prohibit expansion of its core antitrust laws on the basis that antitrust decisions should be constrained primarily by congressional intent. The United States Congress should codify all currently applicable judicial antitrust decisions.**

**The counterplan reverses the increasing disregard for Congressional intent in antitrust decisions---key to rule of law**

**Stucke 8** – Professor of Law, University of Tennessee College of Law

Maurice E. Stucke, "Does the Rule of Reason Violate the Rule of Law?" UC Davis Law Review, Vol. 42, No. 5, 9-12-2008, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1267359

While the Roberts Court has been active in deciding antitrust issues, and addressing the risk of false positives under its per se rule, the Roberts Court never **assessed the deficiencies** of its rule of reason under **rule-of-law principles**.38 **This assessment**, however, **is critical**. Although a perfectly realized rule of law may be unattainable, **antitrust standards must be reoriented toward rule-of-law ideals**. I offer several suggestions toward that end.

First, the Supreme Court’s **antitrust standards** should be **in accordance** with the **originally intended and understood** **meaning** of the directives of legitimate, democratically accountable lawmaking authorities. Congress **never drafted** the Sherman Act as a **vehicle for the Court to advance** its own **ideologies**, nor those of certain economists. The Court should **refrain from announcing new policies** based on its **perception of “modern” economic theory** that run counter to the Sherman Act’s originally intended and understood meaning. Reckless statements, like one suggesting that monopoly pricing is an important element of the free-market system,39 can lead to **uninformed competition policies** that are **inconsistent** with the citizens’ preferences. To give content to the Sherman Act, the Court should **update its interpretation** of the Sherman Act’s words **in the light of its legislative history** and of the particular evils at which the legislation was aimed. **Any** trade-off or **policy pronouncement** should **come from Congress**, rather than the **democratically unaccountable judiciary**.

**Spills over globally**

**Perito 19** – Senior Peace Fellow at PILPG, former Director of the Center for Security Sector Governance at the USIP

Robert M. Perito, Senior Peace Fellow at the Public International Law and Policy Group and former Director of the Center for Security Sector Governance at the U.S. Institute of Peace, and Donald J. Planty, Senior Advisor to the Albright Stonebridge Group and former U.S. Foreign Service Officer and U.S. Ambassador to Guatemala, Saving Democracy Abroad PRISM , Vol. 8, No. 2 (2019), pp. 68-81, <https://www-jstor-org.proxy.library.georgetown.edu/stable/pdf/26803231.pdf?refreqid=excelsior%3A8dfbc1cc1b3a560a88e43179f83decec>

In **crisis states**, democratic activists and rule of law advocates are **facing challenges**. These dedicated people **still look to the United States for inspiration, leadership**, and intelligent, practical, and sustained support. We **fail them** at our **own peril**.

Promoting the **rule of law abroad** is in the **best interest of the United States**. **Historically**, our **democratic values** have been the **key** to building **America’s geopolitical power**. The **global system** of democratic alliances and institutions **based upon the rule of law** has improved material conditions and **brought peace** and prosperity **abroad**. Given the **current challenges** from **authoritarianism**, international organized **crime**, and Islamist **terrorism**, it is **ever more urgent** that we **utilize the power of core American values** to promote U.S. national security interests. Going forward, the United States should treat support for the **rule of law as a strategic priority** that is integrated with our other national security goals. By **doing so**, we will **provide a compelling alternative** to **models offered by our competitors** and **secure the benefits** for ourselves and others.

**The alternative is political fragmentation---extinction**

**Slattery 20** – Emeritus Professor of Law and Distinguished Research Professor at York

Brian Slattery, Emeritus Professor of Law and Distinguished Research Professor at the Osgoode Hall Law School of York University, in Toronto, Canada. He has numerous publications in the areas of Indigenous Rights, Constitutional Law, and Legal Theory, The Tragedy and Promise of Self-Determination, Yale Law Journal, Vol. 129, 2019-2020, 20 March 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3544238

What lessons may be drawn from these ongoing efforts in East Africa? There is much to be said on this score—taking us far beyond the present Essay. But one lesson stands out. The negative theory of national self-determination misconstrues the task that lies ahead of us, which is the **construction of broader frameworks** for human interaction—frameworks that strengthen mutual respect and sense of obligation, building greater community and solidarity. Such frameworks are the **essential basis** for the advancement of human well-being and human rights. **In their absence**, **poverty**, **social conflict**, and **outright war** will continue to be the **scourge of humanity**, undermining basic rights and destroying the conditions essential for individual and group flourishing.

Not only does the negative theory of national self-determination misunderstand what needs to be done, it has the effect of hindering efforts to achieve that goal. In tacitly encouraging and enabling **political fragmentation**, it **undermines the basic normative structures needed** to serve the broader cause of human welfare and rights—paradoxically the very goods it aims to promote. These goods are better secured through the creation of multinational frameworks that stimulate different ethnic and cultural groups to interact and work for common goals—in effect, through positive self-determination.

The world is **not** a **static** place, divided forever into “us” and “them.” As Julius Nyerere emphasized, there is a **pressing need** for humans to broaden their sympathies and moral horizons. Yet a **culture of toleration does not spring into existence unaided**. It **requires a midwife—in the guise of legal norms**. The **future of humanity** **depends** on **constitutional structures** that show the other is also us.

### 1NC---CP

States CP

#### Text: The fifty states and all relevant United States territories should:

#### Increase all necessary prohibitions on anticompetitive unilateral conduct by dominant digital platforms.

#### Coordinate unified, multistate efforts to prosecute violations of said prohibitions through the National Association of Attorneys General

#### States solve---they can enact and interpret their own laws, and cannot be inherently preempted

HLR 20 – Harvard Law Review

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

I. THE ANTITRUST FEDERALISM LANDSCAPE

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

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

#### State coordination through the NAAG solves certainty and resource disparities

ABA 10 – American Bar Association

“ABA Antitrust Health Care I-G,” Antitrust Health Care Handbook, American Bar Association, 2010, LexisNexis

Federal and state enforcement authorities frequently cooperate in health care antitrust investigations and enforcement actions, and the agencies have issued a protocol describing basic procedures for their coordinated enforcement. States also coordinate their antitrust enforcement through the Multistate Antitrust Task Force of the National Association of Attorneys General. These efforts serve important enforcement goals by permitting participants to share expertise and resources and affording greater certainty to health care providers and payors seeking to resolve antitrust concerns in a consistent and expeditious manner. Federal and state enforcement authorities have overlapping jurisdiction with respect to most conduct, and some states have aggressively enforced the antitrust laws in the health care sector.

### 1NC---K

Baudrillard K---

**The affirmative’s intervention in markets to incite competition ignores the inevitability of stable duopoly**

**Baudrillard 83**

Jean Baudrillard, *Simulations*, translated by Paul Foss, Paul Patton and Philip Beitchman, Semiotext(e), Columbia University, New York City, New York, 1983, pg. 133-134

It might appear that the historical movement of capital carries it from one open competition towards oligopoly, then towards monopoly—that the democratic movement goes from multiple parties toward bipartism, then toward the single party. Nothing of the sort: oligopoly, or the current duopoly results from a tactical doubling of monopoly. In all domains duopoly is the final stage of monopoly. It is not the public will (state intervention, anti-trust laws, etc.) which breaks up the monopoly of the market—it is the fact that any unitary system, if it wishes to survive, must acquire a binary regulation. This changes nothing as far as monopoly is concerned. On the contrary, power is absolute only if it is capable of diffraction into various equivalents, if it knows how to take off so as to put more on. This goes for brands of soap-suds as well as peaceful coexistence. You need two superpowers to keep the universe under control: a single empire would crumble of itself. And the equilibrium of terror alone can allow a regulated opposition to be established, for the strategy is structural, never atomic. This regulated opposition can furthermore be ramified into a more complex scenario. The matrix remains binary. It will never again be a matter of a duel or open competitive struggle, but of couples of simultaneous opposition.7

**Attempts at disruption inescapably cause World War 3---the alternative is to reject the affirmative’s interference in the system**

**Sandbrook 22** – writer and specialist consultant; former legal lecturer at RMIT University

Dominic Sandbrook, "The war in Ukraine: is it really taking place?" UnHerd, 3-1-2022, https://unherd.com/thepost/the-war-in-ukraine-is-it-really-taking-place/

Baudrillard’s thesis was that the growth of instantaneous media reports of The Gulf War, rolling news coverage from organisations such as CNN, as well as the use of simulations and models for understanding military tactics had made Western experiences of the war purely virtual.

In previous wars, worried mothers and wives were never confident about their understanding of events overseas. Instead, they had to rely on snippets understood as partial and incomplete. However, the growth of mass media has led to a purely fictionalised theatre of war:

“[R]eal time” information loses itself in a completely unreal space, finally furnishing the images of pure, useless, instantaneous television where its primordial function irrupts, namely that of filling a vacuum, blocking up the screen hole through which escapes the substance of events.

- Jean Baudrillard

At the time, Baudrillard’s words were widely panned as a postmodern quackery, the kind of insensitive intellectualising that lacks seriousness in a time of high stakes military conflict. But his words resonate as we see the spectacle of the Ukrainian invasion flood our newsfeeds with Western consumers of war porn piecing together their own purely virtual perspective on events.

Take former chief strategist of the Bush-Cheney 2004 political campaign, Matthew Dowd, who bizarrely called Putin “Emperor Palpatine” and analogised the Ukrainian people and America as Rey Skywalker, Jyn Erso, and the Rebel alliance.

Or wrestler-turned-actor John Cena, who invoked his DC comics alter-ego, writing in a tweet “If I could somehow summon the powers of a real life #Peacemaker I think this would be a great time to do so”.

Peak absurdity came in the form of actress Anna Lynne McCord, with a self-indulgent beat poem about baby Putin where she imagines herself as a caring mother melting the heart of a dictator.

However, these are just the most obviously narcissistic takes virtualising the invasion. The old “West vs East” dichotomy which carves up the world in its image, is quickly coalescing in the minds of consumers of the spectacle — with eyes darting from Russia to China **in a narrative which sees World War Three as predestined.**

As political commentators decry the rise of misinformation, the harmful consequences of information overload and virtualisation tend to be lost. The sheer groundswell of images, data points and opinions brought about by social media have forced us as consumers of the spectacle to rely on short-hand narratives to give meaning to incomprehensibly complex and horrific real-time developments. As Baudrillard wrote on Gulf War coverage:

Information is like an unintelligent missile which never finds its target (nor, unfortunately, its anti-missile!), and therefore crashes anywhere or gets lost in space on an unpredictable orbit in which it eternally revolves as junk.

- Jean Baudrillard

**1NC---CP**

ITC CP---

#### The United States federal government should expand the scope of the Tariff Act to increase all necessary prohibitions on anticompetitive unilateral conduct by dominant digital platforms.

**Section 337 is a superior alternative to core antitrust laws—super efficient, more predictable, avoids capture, and retains foreign policy coherence**

**Kieff**, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, **‘18**

(Scott, “Private Antitrust at the U.S. International Trade Commission,” GWU Legal Studies Research Paper No. 2018-16)

Keeping the private antitrust injury doctrine out of ITC practice also leaves society with a relatively **low cost** **additional option** to have private **litigants bring antitrust causes of action** in a forum – **the ITC** – that offers a **distinct blend of characteristics** **not available in the federal courts or before the other agencies**.62 When a private litigant brings an action in district court **under the Clayton Act**, the defendant is exposed to at least **four significant categories of risk:** (1) **damages**; (2) **treble damages**, costs, and **attorney fees**; (3) **injunctions** to make structural modifications to their business; and (4) **class actions**. At the ITC, the defendant essentially can **only** be **kept out** of the U.S. economy. There is always the risk of over-deterrence and in-terrorem threats to extract settlements; and both the courts and the ITC have various rules at their disposal to **police bad-faith litigation tactics**. After district court litigation, the reviewing courts typically have a **black-box jury verdict** and the opinion of a **single jurist.** After litigation before the ITC, the reviewing courts typically have an **extensive** administrative record, with the opportunity for it to have been bolstered by the legal advocacy on behalf of the **public interest** from the ITC’s independent Office of Unfair Import Investigations (“OUII”) as well as potentially by the ITC’s extensive staff of economists, industry experts, and investigators, and that typically includes an administrative law judge’s opinion and the opinion of a plurality of Commissioners. District court proceedings in **complex commercial cases like antitrust** typically **span 3-5 years.** ITC 337 proceedings typically **span 18 months**. Further, while government antitrust enforcement by the **Department of Justice Antitrust Division** (DoJ) and **the FTC** **inherently involve the political impact of the Executive Branch** both as the direct supervisor of the Department and as the one designating the FTC Chair from the members who are typically in the President’s party (and typically backed up by a majority in the President’s party), the ITC is **statutorily mandated** to have (when all seats are filled) a **politically balanced** even number of Commissioners with a Chair required to rotate person and party every two years.63 This all adds up to a view of the ITC as one option for private litigants to bring antitrust actions that provides a unique blend of characteristics not available through the other venues.64 And **in recognition** that ITC action **might clash with the foreign policy** or domestic policy **goals of the Administration**,65 it should be kept in mind that ITC Section 337 **remedial orders are subject to a statutory period of Presidential Review**.66

**Increasing the ITC’s role creates a model for accountable agency decision-making—agencies like DOJ and FTC are hyper-political and conflict with administration policy**

**Kieff**, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, **‘16**

(F. Scott, A Stylized Model of Agency Structure for Mitigating Executive Branch Overreach, in *Liberty’s Nemesis: The Unchecked Expansion of the State*, Dean Reuter & John Yoo Eds., Encounter Books)

With so many reasons to be grateful to the framers and our other intellectual forebears for implementing the many constructive approaches in U.S. institutions and organizations of government, we should not be surprised to fi­nd within our system an **existing model of agency structure** that goes a long way toward **mitigating Executive Branch overreach** and other **excessive political influence**.2 This chapter explores one such **model** that already exists but **is often overlooked**: a largely independent commission adjudicating commercial law, with a structure similar to that of the U.S. International Trade Commission (**ITC**).

Several crucial caveats are due at the outset. The fi­rst is that like most other agencies, the ITC is itself imperfect, a work in progress, and ever a candidate for improvement. The second is that the bulk of the credit for the salutary attributes of the agency model explored in this chapter lies with a few key internal structural elements of the ITC. The focus here is therefore on the rules of the game rather than any particular players or team. The third is that one size rarely fi­ts all and that mitigation of undue political influence from the Executive Branch or elsewhere is just one goal to be weighed against many when conducting an overall assessment of any agency structure.3 Nor is such undue political influence a problem uniquely facing **any one administration** over others or any one side of the political spectrum over the other. Finally, this chapter builds on and presumes familiarity with the broad and deep legal literature on the theory and practice of administrative agencies.4 With all of these caveats in mind, the agency model explored here in merely stylized or summary fashion is offered to positively engage in constructive dialogue with readers across the political spectrum about one type of tool for mitigating effects that are widely recognized to be pernicious.

Rising from the shadow of the Civil War’s violent political divisions, when the country was funded almost entirely by import tariffs rather than the modern income tax, the essential structure of the **agency model** explored here traces its intellectual roots to the famous Harvard economics professor Frank W. Taussig, who was appointed the ­first chair of the ITC’s predecessor (the Tariff Commission).5 After having long advocated for a very independent commission so as to **de-politicize** the import component of U.S. international trade, Taussig oversaw the creation of an agency structured to do **only** **fact-fi­nding**, **analysis**, **adjudication**, and **technical advising**, **leaving policy-making to the political branches of government**.

The ITC is **somewhat** like the many other independent administrative agencies, such as the Federal Trade Commission (**FTC**) and Securities and Exchange Commission (SEC). Each of these commissions is often seen as **less subject to political pressure** than typical Executive Branch agencies, such as the Department of Justice **(DOJ) Antitrust Division** and the Department of Commerce Patent and Trademark Office (PTO), because each is not within any Executive Branch department.6

**But unlike almost all of the other independent commissions**, there are several **essential statutory features** of the ITC’s structure that enable **signifi­cantly greater independence**, most of which date back to the statute creating the original Tariff Commission:7

• six members, appointed by the President and confi­rmed by the Senate, **with no more than three from any one political party**;8

• nine-year staggered terms for each member;9

• the position of chair rotates among the members every two years, switching party every time;10

• each member has the same vote on substantive matters;11

• any four members can overrule the chair on administrative matters;12 and

• analytical studies assigned by and technical assistance provided to both political branches, including both houses of Congress.13

As a result of these structural features, the commission staff generally work closely with all six of the commissioners’ offices, recognizing that every two years the chair will rotate and that many of the commissioners have a good chance of serving as chair. This incentivizes **close coordination** among the members and the commission staff, which has long helped the ITC operate by consensus on internal administrative matters as well as on substantive decisions. Such coordination and support from the staff help ensure the best factual record is assembled and enable resulting published work products, including those for the majority as well as minority dissents and concurrences, to be written with **moderation**, **careful explanation**, and citation to the **law and record**. This, in turn, **strengthens external con­fidence** in the agency’s **expertise** and **independence** among reviewing courts and the elected branches of government, including both houses of Congress, across the political spectrum.

**DOJ and FTC squabbles render them ineffective and power grabs undermine national security policy—risks war without effective model of executive review**

John O. **McGinnis**, George C. Dix Professor, Northwestern University, **and** Linda **Sun**, Associate, Wilmer Pickering Hale & Dorr LLP, 20**21**, Unifying Antitrust Enforcement for the Digital Age, 78 Wash. & Lee L. Rev. 305

For over a century, the U.S. has maintained a system of **dual antitrust enforcement**. Antitrust laws are executed by two federal agencies: the Federal Trade Commission (**FTC**) and the Department of Justice (**DOJ**) through its Antitrust Division.1 Throughout their histories, the agencies have **struggled** to navigate their **overlapping jurisdiction**, **often butting heads and creating redundancies**.2 With the digital revolution, existing cracks in the system have widened to the point of rendering the current system **irrelevant** and **ineffective**. Dual enforcement is a **waste** of government resources **that duplicates efforts**, **fails to provide** the technology industry with **reasonable certainty** for business and **investment decisions,** **introduces barriers to a cohesive foreign policy and defense strategy**, and hinders the development of privacy regulation and enforcement.

Accelerated technological change exacerbates three main problems with the dual antitrust agency system. First, while dual enforcement has **always created uncertainty** and thus harmed business planning and economic growth, developments in computer technology have made these problems more **acute**.3 In recent decades, the technology industry has experienced the rise of a handful of dominant companies, such as Facebook, Google, Amazon, and Apple, all central to the economic vitality of the nation.4 Contemporaneously, debate has erupted over how antitrust law should be adapted to regulate these companies, which have introduced new platforms, markets, and products that were not anticipated by traditional tests.5 Advocates for cracking down on tech giants like Apple and Google argue that the companies wield outsized market power and harm competition.6 On the other side, critics of increased competition regulation for the technology sector note that technology advances so quickly that seemingly-entrenched monopolists are in fact easily replaced by competition.7 At such a pivotal moment, the FTC and DOJ have **failed to work together effectively**. Instead, inter-agency fighting and a divided framework have **created uncertainty for the regulation of the economically vital technology industry**.8

Second, the growing power and ever widening scope of computational technology has entangled antitrust policy **with international politics and national security**.9 Electronic technology has increased the avenues of attack and **transformed traditional weapons of war**.10 Innovations in hardware and software have introduced novel methods of **espionage** and **cyberwarfare** such as **computational propaganda**, trolling, and **sophisticated hacking**.11 This technological acceleration has led to an international battle for technological dominance that has been **dubbed a “technology cold war.”**12 **China and Russia in particular** have dedicated significant resources **towards hostile social manipulation** or information/influence warfare.13 **Ceding control** over communications technologies to foreign powers may leave the U.S. vulnerable to surveillance and **infrastructure takedowns**.14 Hacking groups have targeted U.S. defense contractors and telecommunications companies.15 As both the Obama and Trump administrations recognized,16 **antitrust enforcement can impede domestic technological advancement** by giving foreign companies—collaborating with foreign governments—a competitive advantage. Because of the increased importance of antitrust to national security, enforcement should be left to the DOJ alone. **Its leaders serve at the pleasure of the president**, whose office has **greater perspective** and tools available in **protecting the nation** and **navigating international relationships**.