**NDT R8 Disclosure**

**1NC**

**Case**

**Competition Adv**

**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 **r**esearch **and d**evelopment 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, **know**ing 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**.

**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-gen**eration 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 **D**epartment **o**f **J**ustice 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 **U**nited **S**tates 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

**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 tech**nology. 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**

**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.

**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**.

**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**.

**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**.

## Off

**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**

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 domain**s **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

**2NC**

**Adv CP**

**Collaboration solves---doubles financing and skyrockets patent creation for startups**

**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. 2, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

**Collaborations** between climate-tech start-ups and federal agencies and laboratories **work because both partners bring complementary resources to the relationship and can benefit from it**. There are natural synergies between short-term competencies of start-ups for commercialization and long-term federal government technology resources. **Start-ups need access to experts and mentors, and testing and experimentation facilities**; federal agencies and labs can provide them. **Start-ups need access to technology**; agencies and labs offer licenses resulting from federal RD&D investment that has accrued for decades.

**Agencies**, for their part, **want to see their investments in RD&D to turn into products that improve societal outcomes**; start-ups can help them do that. The U.S. Department of Energy (DOE) and its 17 national laboratories are the largest and most visible partners for climate-tech start-ups. But they are not alone. Numerous other agencies also partner with climate-tech start-ups as a result of RD&D programs that simultaneously advance their missions along with clean energy innovation. 4

Our analysis reveals that **the patenting activity of a** climate-**tech start-up increases by 74 percent on average every time it partners with a government agency or laboratory. Each technology license made by an agency to a start-up increases the start-up’s follow-on financing by over 155 percent on average**. 5 While the ultimate goal is to commercialize products that reduce greenhouse gas emissions and allow the start-up to survive, intermediate successes such as these help that happen.

**The impact of these collaborations is all the more surprising, as it is not the result of a systematic approach. The number of start-ups that collaborate with federal agencies or laboratories is dismally low.** Lacking prior networks or targeted opportunities, start-ups often find it difficult to engage with federal partners. Although some agencies, including DOE, have set up mechanisms for technology transfer that can potentially foster collaboration, these mechanisms are scattered across different units and do not receive as much support as they should.

**[B]---Government collaboration uniquely creates competition**

**Almeida et al 10** – Former vice chairman of PricewaterhouseCoopers.

Don Almeida, Raman Chitkara, Brad Nakamoto, Bo Parker, Diane Baylor, Johan Furstenberg, Chris Monteleone, Malcolm J. Moss, Feargal O’Rourke, James D. Robinson, Jim Shanahan, Carolyn Singh, Krisztian Toth, and Angela Wiesner, “Innovation: Government’s Many Roles in Fostering Innovation,” *PricewaterhouseCoopers*, 2010, pp. 61, <https://www.pwc.com/gx/en/technology/pdf/how-governments-foster-innovation.pdf>.

**Government initiatives that encourage new entrants focused on innovative products or services have an additional**, bracing **effect of putting pressure on existing market participants to compete**, through modernization and innovation. **These incumbent players will respond only when they feel the consequences of their decisions**; if they continue to lose money but know the government will rescue them anyway in order to preserve jobs, they will have little motivation to compete or innovate.

**[C]---China proves---government funding fosters competition without inhibiting incumbents**

**Almeida et al 10** – Former vice chairman of PricewaterhouseCoopers.

Don Almeida, Raman Chitkara, Brad Nakamoto, Bo Parker, Diane Baylor, Johan Furstenberg, Chris Monteleone, Malcolm J. Moss, Feargal O’Rourke, James D. Robinson, Jim Shanahan, Carolyn Singh, Krisztian Toth, and Angela Wiesner, “Innovation: Government’s Many Roles in Fostering Innovation,” *PricewaterhouseCoopers*, 2010, pp. 7, <https://www.pwc.com/gx/en/technology/pdf/how-governments-foster-innovation.pdf>.

Take the case of China. **Many emerging economies have one dominant player in a specific market and lack** the **competition** that promotes innovation and performance improvements. In most of the developed world, by contrast, there is sufficient private capital and enterprise to create those circumstances. But **China has created a competitive domestic environment** in part **through funding of municipally owned enterprises** (MOEs) **competing amongst themselves** and with state-owned enterprises (SOEs). What distinguished China’s treatment of MOEs, in contrast to the historical approach with SOEs, was the decision to let MOEs retain their earnings. This created incentives for further investment, productivity improvements, and higher-quality products.

**China did not try to change existing SOEs directly**. These highly subsidized entities had little freedom of action and primarily served a social safety net function of providing employment. **Instead, China’s central and provincial governments funded the MOEs with the proviso that they were controlling their own destiny**. In many cases, **competition from MOEs over time forced moribund SOEs to become more innovative and competitive, or to shut down**.

**Counterplan lets FTC win cases that ARE CURRENTLY illegal under law**

**Jones and Kovacic 20** – Alison Jones, is a Professor of Law at King’s College London. William E Kovacic, is Professor of Global Competition Law and Policy at George Washington University, Visiting Professor at King’s College London, and Non-Executive Director, United Kingdom Competition and Markets Authority.

Alison Jones and William Kovacic, April 17 2020, “The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3619095

Measures to expand federal antitrust intervention dramatically – through the prosecution of lawsuits or the promulgation of trade regulation rules – will face **arduous** **opposition** from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (we assume that legislation to change the doctrinal status quo may not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies can **create a serious gap between the teams assembled** for the prosecution and defense, respectively. Although the public agencies can match the private sector punch for punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases that seek to impose powerful remedies upon global giants. An enhanced litigation program therefore will go only as far as the talent of the agencies will carry it. We propose three steps to build and retain the human capital – attorneys, economists, technologists, and administrative managers – to undertake a more ambitious litigation program. The first is to use antitrust as a prototype for a program to **raise civil service salaries**. The second two steps consist of cautions about the dangers of (a) denigrating the skills and accomplishments of existing agency personnel, and (b) attempting to shut the revolving door through which professionals now move between the public and private sectors. We discuss all three of these steps below. (i) Resources and Compensation. To accomplish the desired expansion of enforcement, we see a need for more resources, but not simply to build a larger staff by hiring more people. It is also to attract and retain a larger number of elite personnel who are equal to the tasks that the ambitious reform agenda will impose. We would use an increase in resources mainly to boost compensation, which means taking the antitrust agencies out of the existing civil service pay scale. We do not see how the public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to case handlers and to senior managers. It surprises us that adequate compensation for civil servants is not a focus of attention in contemporary proposals for an expansion of antitrust enforcement, including new cases to take on the leading firms in the high technology industry and in other sectors. Consider two possibilities for compensation reform. The first is to align antitrust salaries to the highest scale paid to the various U.S. financial service regulators. Here the model would be the compensation paid to employees of the banking regulatory agencies; the salary scale for these bodies exceeds the General Schedule (GS) federal civil service wage scale by roughly twenty percent.54 In adopting the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, 55 Congress concluded that the importance of the mission of the new Consumer Financial Protection Bureau (CFPB) warranted higher salaries for the agency’s personnel. If the higher salary scale made sense for the CFPB, we see no good reason why a more generous compensation schedule is not appropriate for the antitrust enforcement agencies.56 Are the duties entrusted to the federal antitrust agencies any less significant? Are the economic problems that the DOJ and the FTC (which is also the principal federal consumer protection agency and privacy regulator) are being called on to address – in the proceedings of this Committee and in many other fora -- any less significant? If the answers to these questions is “no,” Congress should allow the antitrust agencies to pay at least the same wages as the CFPB does. Our second alternative requires a more dramatic change, which we would implement in the first instance at the FTC.57 We would **triple the FTC’s existing budget** of about $330 million per year and use the increase mainly to raise salaries and partly to add more employees. This experiment might be carried out for a decade to test whether a major hike in pay would increase the agency’s ability to recruit the best talent, retain the talent for a significant time, and apply that talent with greater success in a program that involves prosecuting numerous ambitious cases and devising other significant policy initiatives. We see a major increase in compensation, either by adopting the CFPB model or trying our more dramatic alternative, to be a crucial test of the commitment and sincerity of elected officials who say a major expansion of antitrust enforcement is necessary to correct grave market power problems involving digital platforms. If fundamental competition policy reforms are vital to the nation’s well-being, then the country should spend what it takes to get the best possible personnel to run the difficult cases (and carry out other measures, such as the promulgation of trade regulation rules) that will be the pillars of a new, expanded enforcement program. Such steps will become even more important if new political leadership seeks to close the revolving door, which has operated as a mechanism to encourage attorneys and economists to accept lower salaries in federal service in the expectation of receiving much higher compensation in the private sector at a later time. In considering these proposals, legislators should take no comfort in the idea that the sense of satisfaction that can come from serving noble goals in public service creates a sufficient inducement for the best personnel to come to the DOJ, the FTC, or other federal agencies and stay there, notwithstanding the huge disparity in salaries between civil servants and their private sector counterparts. From personal experience working inside public institutions58 and studying their operations as academics, we are convinced that civil servants in the United States and in many other countries derive genuine “psychic income” from their work, and this reward offsets, to some degree, the wage disparities with the private sector. In the United States, the **psychic income for civil servants at the DOJ and the FTC is evaporating quickly**. In articles, books, blog posts, press releases, and tweets, a large body of commentators (including elected officials) today depict the federal antitrust agencies as “useless” and portray their activities as “toothless,” or worse.59 Who would aspire to join, or remain at, such institutions?60 A dramatic expansion of enforcement could create a temporary buzz of excitement that draws first-rate talent into the agency, but only for a time. As experience at the DOJ and the FTC in the 1970s shows, the **excitement wears off** after a few years as attorneys and economists, facing relentless opposition from better-resourced teams acting for defendants, leave the agencies for other jobs. Over time, **there is no getting around the need to compensate civil servants properly** in the paycheck, and not with appeals to patriotic spirit, if they are to persevere in conducting arduous cases, rules, or studies.

**Solves 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.

**Adv 2**

**Link alone turns adv 2---best for ensuring security**

**Carpenter 3/8** – Journalist writing for Fortune

Jacob Carpenter, "Can antitrust regulators really stop the Google-Mandiant deal?" Fortune, 3-8-2022, <https://fortune.com/2022/03/08/google-mandiant-antitrust-competition-amazon-microsoft/>

Google’s regulatory enemies will soon have a curious case on their hands.

In a move designed to **bolster its cloud computing** unit, which trails well behind that of Amazon and Microsoft, the search giant announced Tuesday its intent to acquire **cybersecurity firm Mandiant** for $5.4 billion. The deal ranks as Google’s second-biggest purchase ever, behind the $12.5 billion acquisition of Motorola Mobility in 2011.

**If the addition goes through**, Google could offer the services behind one of the **cybersecurity industry’s leading outfits**, best known for helping businesses **prevent and investigate network hacks**. In its most newsworthy contribution to the sector, Mandiant uncovered the **SolarWinds breach** in 2020 after hackers accessed dozens of corporate and government networks through a buggy software update.

With the ink barely dry on Tuesday’s press release, questions have arisen over the **potential** for antitrust officials to **block the deal**. The Google-Mandiant pact, **however**, is **hardly a slam-dunk** decision for them.

**For now, companies perceive threatening litigation as far-off and have priced-in current risks**

Lauren **Feiner**, CNBC, Google’s antitrust mess: Here are all the major cases it’s facing in the U.S. and Europe, December 18, 20**20**, https://www.cnbc.com/2020/12/18/google-antitrust-cases-in-us-and-europe-overview.html

While Google faces the threat of potential break-ups in the future, **it will likely be years** before any significant resolution is reached. Once the new cases make their way through the courts, there’s still **far from a guarantee** that a judge would grant **anything that drastic** **even if they do side with the government**. It’s likely at least some of the cases against Google will be **consolidated**, with the bipartisan coalition already indicating it would file a motion to do so with the DOJ case.

**While new laws** that could make the courts more favorable to the government in such cases **loom on the horizon**, **they are far from an immediate threat**.

That’s likely why these new lawsuits **have had little impact** on Google’s stock price. Shares of its parent company Alphabet have **rocketed nearly 30%** in 2020 and nearly 20% over the past three months alone. **Investors have grown used to the scrutiny** on the trillion dollar company **and the threat is already priced in.**

**2AC cherry-picking misses the forest through the trees---there certainly is action now, but it’s not transformative---enforcement only affects a small slice of deals, and companies do not expect the immediate statutory or legal changes necessary for successful antitrust action**

**Zero 21** – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be **more cloud cover than storms** on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they **lack the lightning** needed to **actually block deals.**

Let’s look at these twin threats and the risks they pose to dealmaking. President **Biden’s** executive **order** has **spurred** the Department of Justice and Federal Trade Commission to increase **scrutiny** of deals in a move that, **“if implemented** by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. **But that’s a big ‘if.’** The attorneys write that **actually intensifying competition review standards** would require **acts of Congress and/or litigation.** Both **regulatory agencies** have **mixed records in courts**. And it’s **unclear** if Democrats will **defy the political gravity** that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? **A frenetic M&A pace** has **overwhelmed** oversight body **the Federal Trade Commission** to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but **context is king**: the **handful** of challenged deals **represent a small slice of the year’s record value** of announced transactions.

For starters, **some of the highest profile deals** challenged by the new administration’s antitrust regime represent merger dynamics that **have always drawn intense scrutiny**. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have **long steered clear** of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well **be more thunder than lightning.**

**But, even if they win suits will succeed, it takes years which coincides with our uniqueness claims**

**Tran 2/22** – Media Analyst at Variety

Kevin Tran, "Why 2022 Might Disappoint Big Tech Antitrust Crusaders," Variety, 2-22-2022, https://variety.com/vip/why-2022-might-disappoint-big-tech-antitrust-crusaders-1235174942/

But **despite all the momentum** to rein in the power of Big Tech, 2022 may go down in the history books to antitrust crusaders and Big Tech critics as a year that showed much promise early but **ultimately failed to deliver**.

For one, several of the big probes by the FTC and DOJ into Big Tech companies are **not likely to end in 2022**. And the DOJ’s October 2020-filed lawsuit against Google for violating antitrust laws won’t go to trial until **2023**.

Meanwhile, the DOJ is currently probing Apple, but it **has not** yet **actually sued** it on antitrust grounds. The Information in October reported an Apple-DOJ antitrust suit was likely, but Politico in December reported that a decision on whether the DOJ will go to court with Apple wasn’t likely to come until March of this year.

The FTC has been pursuing an antitrust lawsuit against Facebook on the grounds that the platform has illegally maintained a social networking monopoly through anticompetitive practices, such as acquiring rivals like Instagram. While the FTC’s antitrust case against Facebook was rejected in June, a judge in January said the government agency could move forward with an amended version of the complaint.

Still, the permission granted to the FTC to move forward with the antitrust suit far from guarantees a victory to Lina Khan and Co. The judge accepting the FTC’s latest suit said the agency “may well face a tall task down the road in proving its allegations.” And it **will take years** before that case concludes, according to NYT.

In the meantime, the FTC will also be occupying its time with Amazon-related cases.

Last June, it was reported that the FTC would be investigating Amazon’s proposed deal to acquire MGM in addition to a broader investigation (which began under the Trump administration) that the agency had been conducting on the e-commerce giant’s business practices.

But some, like Cardozo law professor Sam Weinstein, see the MGM-Amazon deal as **likely to pass.**

This sheds light on why the New Yorker in early December reported that some FTC vets worry Khan “is underestimating the risks of pushing ahead with aggressive cases that are **likely to fail**.”

The broader FTC-Amazon investigation in December expanded to include the company’s cloud business. That expansion may have only pushed any end to the FTC’s years-long Amazon investigation even further out than initially anticipated.

Yes, there are different Big Tech-antitrust inquiries being conducted by other government officials and agencies.

But in the interest of not writing a piece that’s the length of a novel, this article focuses on antitrust-related probes or cases brought forth by the FTC and DOJ, which both enforce federal antitrust laws. The FTC and DOJ cases mentioned above also seem to have the most potential to spur meaningful changes in the business practices of Google, Apple, Meta and Amazon.

The ever-present government scrutiny makes it no wonder why Silicon Valley’s biggest players have spent so much on lobbying. Meta, Amazon and Alphabet, respectively, spent about $20 million, $19 million and $10 million on lobbying in 2021, all figures that were up year-over-year, according to filings from the U.S. Senate Lobbying Disclosure database.

Potentially **delaying antitrust legislative efforts** against Big Tech is also the **midterm elections**, which could cause Democrats (which overwhelmingly supported a suite of bills partly aimed at strengthening antitrust agencies) to **lose control** of either house of Congress.

**No antitrust legislation---limited time, Jackson nomination, lobbying, and Ukraine**

**Chitkara 3/2** – reporter at Protocol

Hirsh Chitkara, "​In Washington," Protocol, 3-2-2022, https://www.protocol.com/newsletters/policy/ukraine-russia-antitrust?rebelltitem=1#rebelltitem1

The video struck a chord, I think, because it underscores how absurdly little control we seem to have over where we direct our attention. Even the **most pressing issues** can get **pushed aside**, should an algorithm or network executive award our screen to the next-highest bidder. Netflix and Spotify have used this to their advantage: They just **waited out their respective controversies** and, sure enough, the **news cycle had to move on**. Enjoy the next four Dave Chappelle specials.

The question I want to explore today is whether the **moment** **has** also **passed** for Big Tech antitrust: Is there enough wind in those sails to get anything done by midterms?

For a while, antitrust enforcement sat at the top of every D.C. agenda. Sen. Amy Klobuchar spearheaded two significant, bipartisan antitrust bills. And Lina Khan landed at the FTC ready to fend off critics and launch one of its most consequential antitrust campaigns in decades.

Antitrust **no longer occupies that top slot**. The war in **Ukraine** has instead become **everyone’s highest priority**, for obvious reasons. D.C. has a lot to figure out in the coming days, from the ramifications of further sanctions to the diplomatic fallout in Europe.

There’s also Biden’s **Supreme Court nominee**, Judge Ketanji Brown Jackson. Republicans may very well **attempt to block** her confirmation, and that would mean **further political deadlock**. It would also become another **wedge splitting support** for Klobuchar’s bills, which already held a **tenuous** bipartisan balance.

The war in Ukraine has **changed political calculus** surrounding antitrust. Big Tech and its lobbyists have pressured Republicans to **steer clear of antitrust** on the grounds that the U.S. needs big, powerful tech companies to **uphold national security**. That **angle of attack may** **gain more traction** as the U.S. faces off against Russia.

And timing is everything. We’re only eight months away from the midterms. Conventional D.C. wisdom (the irony of that phrase isn’t lost on me) says that **nothing gets done** during the eight weeks leading up to an election. Once you add the Labor Day recess into the mix, Congress realistically has until August to get antitrust measures passed. The lobbying arm opposing antitrust knows this, and it also knows **midterms** will likely swing Congress **to the right**. **The odds are in tech’s favor**, and the markets seem to agree — not that they ever took the threat all that seriously.

**No legislation---bipartisan opposition and uncertainty regarding priorities**

**Holland 21** – News Writer for TechTarget

Makenzie Holland, "Antitrust reform is uncertain despite bipartisan support," TechTarget, 11-12-2021, https://searchcio.techtarget.com/news/252509429/Antitrust-reform-is-uncertain-despite-bipartisan-support

Bipartisan support in Congress for antitrust reform **might not be enough** to get new laws enacted.

Six bipartisan antitrust reform bills passed in June by the U.S. House Committee on the Judiciary aim to do everything from ensuring interoperability between large online platforms to breaking up tech giants like Apple, Google, Amazon and Facebook. Meanwhile, Sen. Amy Klobuchar (D-Minn.) and co-sponsors have introduced companion bipartisan antitrust reform bills such as the American Innovation and Choice Online Act to "establish rules of the road for dominant digital platforms."

The show of bipartisan support for antitrust reform is significant, but it **doesn't guarantee passage**, said Pamela Gilbert, partner at Cuneo Gilbert & LaDuca LLP, at a recent antitrust conference. She is a former executive director of the U.S. Consumer Product Safety Commission.

There are **issues** facing some of the antitrust reform bills, like the American Innovation and Choice Online Act, which experts said are **too targeted** at specific companies -- namely, Google, Apple, Amazon and Facebook.

Other antitrust reform bills focusing beyond the big four tech giants, such as the Merger Filing Fee Modernization Act that would increase merger filing fees for large transactions, could be more successful down the road.

Still, the **outlook** on any of these bills is **mixed**, Gilbert said.

"They have good bipartisan support, but whether they get over the finish line is **difficult [to say**]," Gilbert said at the American Antitrust Institute's 15th annual Private Antitrust Enforcement Conference, where she serves as chair of the board of directors.

Although the House Judiciary Committee passed the six antitrust reform bills in June, they have **not advanced** **to the floor** of the U.S. House of Representatives.

Seth Bloom, president and founder of Bloom Strategic Counsel PLLC and former general counsel of the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, believes there's a reason for that.

"Speaker Nancy Pelosi has famously said, 'I don't bring up bills for a vote that **are going to lose**,'" he said during the conference. "I think there's a **real problem** getting those bills **passed** on the House floor."

The problem is that while there is bipartisan support for the bills, Bloom said there is also **bipartisan opposition**. He questions whether there is **enough Republican support** for the proposed legislation to **overcome Democratic opposition**.

Some of the antitrust reform bills' **specific targeting** of big tech companies based on thresholds the bills set, such as market capitalization of $600 billion or higher, are a "**radical departure**" from traditional antitrust legislation that **Congressional leaders** from **both sides** of the aisle **may oppose**, he said.

"There are a number of **Democrats from California** where some of these companies are, there's the new more **moderate Democrats**, and other Democrats that will **oppose it**," he said. "I think these bills, because they're so specifically targeted, **raise real questions**."

**Inter-party splits deck chances of passage**

Dave **Perera**, US antitrust legislation faces uphill battle despite unified Democratic government, MLex, March 12, 20**21**, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-antitrust-legislation-faces-uphill-battle-despite-unified-democratic-government

Those expecting — or fearing — more ambitious outcomes likely **won’t see them enacted**. So until America’s November 2022 election, **scratch from the list of high probabilities reforms** such as requiring dominant firms to separate lines of business, or shifting the burden of proof onto an acquiring company.

Put another way, unless a bill can attract significant Republican support, **not even two years of unified Democratic government** can guarantee reforms.

— American exceptionalism —

Single party control of both congressional chambers and the presidency is relatively rare in American politics. It has occurred in fewer than a third of legislative sessions since 1980. When it strikes, it doesn’t last long — typically just the two years between one congressional election and another.

Historically, unified control is a fertile period for new regulations. President George W. Bush overhauled Medicare. President Barack Obama ushered in financial sector reforms and the Affordable Care Act. Indications are that President Joe Biden is emboldened by his party’s last-minute capture of the Senate.

History, of course, isn’t a blueprint. Even a brief look at past episodes of unified control reveals that **not even single-party capture** of the executive and legislative branches of the US government **can assure the enactment of a partisan agenda.**

For one thing, neither political party is a **monolith**. Although far more politically aligned than when Democratic conservatives found common cause in the 20th century with Republicans, the major American parties nonetheless are coalitions of centrist and activist wings. For Democrats, the tensions inherent in appeasing all sides became apparent earlier this month when centrists trimmed benefits in the $1.9 trillion coronavirus stimulus package.

Neither is single party grip on power secure unless it commands an overwhelming majority in the Senate, thanks to a uniquely American institution: the filibuster. In the Senate, the rules mandate a three-fifths vote before debate over a bill is cut off. In recent decades, it’s become a weapon routinely wielded by the minority party to kill legislation.

The upshot is that policy legislation needs **supermajority** support before it can proceed, meaning the 50 Democrats of today’s Senate have little choice but to resign themselves to the grind of **finding Republican supporters**. There are limited exceptions. Assuming Democrats stay in unison, they don’t need Republican votes to appoint judges, approve executive branch nominations or pass fiscal legislation such as the coronavirus stimulus that just became law.

It’s within Democrats’ power to abolish the filibuster, but for now, the maneuver appears safe. Asked just days ago about the matter, White House spokeswoman Jen Psaki told reporters that the president’s preference is for it to stay in place. “The president is an optimist by nature,” Psaki added.

— Hunting for bipartisan consensus —

Not every bill introduced in Congress, nor even every bill approved by a committee or even an entire single chamber, makes it through the process because its sponsors believe it’ll become law. There are a host of bills drafted with the intent of sending a message to industry, to independent regulators, to donors, to constituents.

There are bills that lawmakers view as setting out a position to influence an ongoing policy debate. Even if it won’t become law this year, it might the next year, or the next, reintroduced and refined along the way.

Telltale signs of whether a bill is a serious attempt at law are the number of cosponsors, and whether that list of names includes members of both parties in good stead with their party’s leadership.

Bipartisan support is important even in the House, where Democrats have the votes to completely bypass Republicans. Because the House doesn’t have the filibuster to contend with, those with the majority of seats control the chamber. House Democrats can and do pass bills in the face of absolute House Republican opposition, but — special exceptions for fiscal bills aside — those bills are dead on arrival in the Senate.

As long as the filibuster exists or Democrats lack a Senate supermajority, the House Judiciary antitrust subcommittee must court Republican support if its intention is to make new law.

Finding clues of what House Democrats might seriously achieve, then, may be little more difficult than looking up the policy prescriptions House Republicans favor: giving regulators more resources, shifting the burden of proof in merger cases and boosting data portability and interoperability.

A report issued by now-ranking Republican Ken Buck as a rejoinder to last year’s Democratic House Judiciary antitrust subcommittee staff report on competition in digital markets allowed that the GOP shares other Democratic concerns, including predatory pricing, monopoly leveraging and control over marketplace platforms.

That conciliatory signal also came weighted, with warnings that Congress should be wary of “handing additional regulatory to agencies in an attempt to micromanage.” Instead, try instead telling enforcers they should return to first principles, the Colorado lawmaker advised.

Whether Republicans and Democrats in the Senate **can find common cause** is an even **more fraught question**. Unlike its House counterpart, the Senate Judiciary subcommittee on antitrust **hasn't conducted a 16-month investigation** into digital monopolization. The subcommittee’s senior Republican, Utah’s Mike Lee, is prone to **touting the importance of the consumer welfare standard** and rails against online platforms “eager to impose the ideological censorship called for by their political benefactors.”

Lee also says he’s open to working with subcommittee Chairwoman Amy Klobuchar on strengthening enforcement, adding the caveat that current antitrust laws are sufficient.

Klobuchar, a Minnesota Democrat, doesn’t need Lee to get a bill through her subcommittee, but failing to find consensus with Republicans imperils her chances of making law. The prospects for her Competition and Antitrust Law Enforcement Reform Act becoming law as current written aren't good.

— 'Big tech is out to get conservatives' —

A looming question hanging over any bill, even one tailored to win bipartisan support, is whether it could be **derailed by Republican anger** at online platforms for alleged anti-conservative bias.

A right-wing trope especially spread by President Donald Trump during his last year in office — the belief that platforms use their content moderation powers to silence conservatives — has mainstream acceptance in Republican circles. It’s a refrain almost obligatory for Republican lawmakers to repeat when discussing any issue related to online platforms. “Big tech is out to get conservatives,” House Judiciary Committee ranking member Jim Jordan of Ohio has said more than once.

Democrats have their own share of anger at online platforms’ content-moderation practices, to be sure. They accuse online platforms of circumventing consumer protections, undermining civil rights laws and not doing enough to stymie disinformation.

It’s Republicans, though, who appear the angriest, and are the more likely to insist that any legislative reform touching online platforms address content moderation,

**with the intention of making it harder,** not easier, for online platforms to remove users, **potentially imperiling a compromise measure.**

There is one bill that just might thread that narrow opening between antitrust and content. It has a bipartisan coalition in the House and the Senate. Attached are House antitrust subcommittee Chairman David Cicilline of Rhode Island, Representative Buck, Senator Klobuchar and Senator John Kennedy, a Louisiana Republican. It’s the Journalism Competition and Preservation Act, and it would establish a four-year safe harbor from federal and state antitrust laws for news organization to collectively negotiate with online platforms.

**It isn't antitrust reform**. Critics say **it’s the opposite of reform**, as the answer to monopoly shouldn’t be the mere suspension of antitrust law. But it’s something they agree on, and for lawmakers looking to lodge a win, it might suffice.

**Companies are fighting in court to give themselves time, but know that their window is quickly closing to complete transactions**

**The Economist 22**

The Economist, "The growing demand for more vigorous antitrust action," The Economist, 1-10-2022, https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action

If in doubt, litigate

Unlike their Chinese counterparts, Western businesses will **not take this lying down**, let alone vow “comprehensive self-examination and rectification”, as Meituan, a food-delivery giant, did after being fined $530m by SAMR in October. America’s tech giants are deploying **high-powered lobbyists** to **scupper or water down rules** before they see the **light of day**. In November the us Chamber of Commerce sent three strongly worded letters to the FTC accusing Ms Khan of overstepping her brief and dismantling procedural safeguards at the agency. It will be “active in litigating”, vows Mr Bradley, its policy chief.

Meta, Illumina and Penguin Random House are **fighting regulators in court**. Judges used to the consumer-welfare standard may **resist attempts** **to redefine it**. Corporate lawyers will remind them that, by prioritising outcomes other than price, the neo-Brandeisians “want people to pay for [their] policy preferences”, as the chief counsel at a big tech firm puts it.

Big firms argue that, as they expand into adjacent markets, they **increasingly compete** with one another. This is **especially true** of big tech, whose rise has fuelled the Brandeisian revival. Amazon is the third-biggest online advertiser behind Alphabet and Meta. Apple is building a search engine to challenge Google. Google’s cloud-computing division is taking on Amazon Web Services and Microsoft’s Azure. Meta is getting into e-commerce. The research papers cited in Mr Biden’s executive order date back half a decade. Concentration in America may since have **plateaued**.

This **resistance ensures** that the competition authorities’ multipronged assault on big business will **take time to play out**. The new trustbusting zeal also rubs up against a rekindled affection for national champions, which are by definition big and powerful. European bosses urge Ms Vestager to take into account how competitive global markets are, not just the EU’s, when deciding on mergers. The single-market commissioner, Mr Breton, is receptive to such ideas. Even Ms Vestager, who ignored Franco-German calls to permit the creation of the Alstom-Siemens rail champion, now speaks warmly of the battery consortium.

That may be why, **for all the antitrust commotion**, **M&A activity remains strong** in Europe and America, as companies take advantage of cheap capital and a surfeit of pandemic-distressed targets. Chinese tech titans have shed a collective $1.4trn in stockmarket value since China started turning the screws on them in earnest last February. America’s five biggest tech firms have added $2.1trn in the same period. The neo-Brandeisians may have “achieved political success prematurely”, suggests Mr Furman from Harvard.

Yet bosses, lobbyists and corporate lawyers acknowledge that a **chill has descended** as regulators test their powers. The **dealmaking frenzy** may partly **reflect a desire to get in under the wire**. Without clear rules, companies no longer know when to notify regulators about a deal and must think about competition from the outset. One lobbyist claims that clients with deals pending at the FTC are not getting answers. They may face an investigation halfway through a deal or even after it closes—and in a growing number of jurisdictions. Just one hold-out can put paid to a merger. In March 2021 Applied Materials, an American semiconductor company, scrapped its acquisition of a Japanese rival, which had been approved in America, Europe and Japan, but not in China. Boeing got clearance to merge parts of its business with Embraer, a Brazilian planemaker, everywhere except Europe.

**FTC and DOJ action haven’t chilled mergers, but have put dealmakers on high alert---a *key question* is court receptiveness to antitrust changes**

**Wise 1/24** – Senior Reporter at Law 360

Justin Wise, "Deals Boom Meets Expansive Biden Antitrust Agenda," Law360, 1-24-2022, https://www.law360.com/technology/articles/1457929/deals-boom-meets-expansive-biden-antitrust-agenda

Law360 (January 24, 2022, 4:51 PM EST) -- The pace and value of corporate transactions **soared to new heights** in 2021 and signals point to an **equally active environment** in early **2022**, creating a dynamic in which merger activity is surging as the Biden administration settles into a more ambitious and aggressive antitrust enforcement approach.

How that approach will impact the deals landscape remains uncertain, a group of corporate and antitrust lawyers told Law360 Pulse, but there's **no sign** yet that **rhetoric** from agencies like the Federal Trade Commission is **making deal makers pause.**

Still, some attorneys say important aspects of their work are changing, with more expansive regulatory scrutiny, longer investigations and general uncertainty about what other policies could emerge.

The FTC and U.S. Department of Justice announced on Jan. 18 the launch of a public inquiry likely aimed at toughening merger guidelines, encapsulating the changing dynamics.

"Right now, 2022 feels **very similar** to 2021 in terms of the pace of deals. We have a **full pipeline** of buyers and sellers looking to do M&A," Cooley LLP corporate partner Ian Nussbaum said. "But it's a bit of a **crystal ball**. We all have to acknowledge that **there's risks** that we can't see around corners."

Those risks can stem from a number of factors, including the way **antitrust** enforcement could influence businesses' mergers and acquisitions strategy.

"It's always possible that the regulators can affect the deals environment," Nussbaum added. "If there are more actions taken throughout the year, that is one of the things that could affect activity."

Businesses were bullish on mergers and acquisitions last year, with the value of corporate transactions worldwide surpassing $5 trillion, according to financial market data provider Refinitiv. Tech deals totaled more than $1 trillion, which some corporate attorneys say is partly linked to the push from many firms during the pandemic to digitize their business and move into cloud software.

Overall, experts noted that low interest rates and private equity investors having access to a lot of capital were key drivers in the market.

Such feverish activity corresponded with more than 4,000 federal merger filings, according to preliminary FTC data, more than double the total from fiscal year 2020. And it didn't take long for major deals to get rolling in 2022. Microsoft, advised by Simpson Thacher & Bartlett LLP, last week announced a planned $68.7 billion purchase of video game company Activision Blizzard.

Moving Up The Priority List

The FTC and DOJ's joint announcement that they are considering overhauling federal merger guidelines is in line with a **series of policy shifts** under the Biden administration. Under Chair Lina Khan, the FTC has expanded its questioning in FTC merger investigations and reinstituted a "prior approval" requirement on transactions forced to cut clearance settlements with the agency.

The agency has also repealed its guidelines for vertical mergers, or transactions between two entities at different points in the supply chain.

The moves are a progressive posture from the administration, and many lawmakers see historic approaches to consolidation as too permissive. And the potential for new merger guidance could offer a clearer illustration of what direction enforcement is heading in, said Leslie Overton, an Axinn Veltrop & Harkrider LLP partner and former DOJ deputy assistant attorney general for civil enforcement.

"As the agencies craft revisions to their guidelines, we will have even more understanding in terms of how they are [approaching] antitrust analysis," she said. "Even if people disagree with it, that transparency will be valuable."

**All of this** **has the business community's attention**, attorneys noted, **with antitrust risk analysis shooting up the priority list** on merger agreements. Certain considerations in the deals process, such as the possibility of litigation, are receiving more attention, **but companies aren't suddenly halting their M&A plans** because of this approach, they said.

"**Nothing has occurred** to suggest that somebody who was **going to do a deal is now not going to** because of the changes at the FTC and the DOJ," said Tom Ensign, an antitrust partner at Fenwick & West LLP. He acknowledged it's still early, as Khan has been in her role for about seven months, and DOJ antitrust head Jonathan Kanter was only confirmed in November.

Proposed mergers are generally facing longer investigations from the FTC, Ensign said, and are going through a more expensive process as a consequence. Companies are also facing questions targeting nontraditional areas, such as a merger's impact on the labor market and privacy, as the FTC pushes beyond a focus on consumer welfare and prices of goods.

"At least in terms of the statements made by Khan, it seems as if [the agency's] perception is that a longer investigation may have a chilling effect on M&A activity generally," Ensign said, adding that any such impact has yet to be seen.

Khan has said her goal at the agency is to address "rampant consolidation," and she recently stated that a lack of competition has resulted in "diminished opportunity, higher prices, lower wages and lagging innovation."

Big Tech has received a great deal of attention in Washington, but enforcers' work over the past year has shown its focus won't be limited to Silicon Valley or big billion-dollar transactions, said Orrick Herrington & Sutcliffe LLP Partner Craig Falls. He noted the FTC has been actively scrutinizing "old-word" industries like gas and supermarkets, suggesting the agency won't ignore any sector.

"How we conceive of antitrust harm is changing, so companies have to really change how they approach their deals, their agreements and their business conduct," Falls said, noting that the shift is "changing how we advise companies so that they understand that issues to be investigated are broader than they used to be and that there's more to consider up front."

**'Deal Makers Are Watching'**

While the outbreak of COVID-19 jolted the greater U.S. economy in 2020, Cooley partners Nussbaum and Kevin Cooper noted that the stock market largely remained resilient despite the continued impacts of the virus in 2021, helping engender a sustained current of deal making.

Factors such as a more volatile stock market and interest rate hikes from the Federal Reserve could dampen some businesses' outlook, they noted, but it's **not expected to completely pump** **the** M&A **brakes**.

The unrelenting pace of deals has placed a "significant strain" on the FTC, according to Khan, and has left the roughly 1,100-person agency to make difficult decisions around which transactions to more closely scrutinize.

"When you have, like we did over the last year, a doubling, in terms of deal volume, our resources stayed the same," Khan said in a recent interview with The New York Times and CNBC. "And we have to make very difficult choices about which billion-dollar deals we're going to ensure we're closely investigating, but they're very real trade-offs, in terms of what that work is going to come at the expense of."

Khan said more money and resources for the agency is critical for the FTC to fulfill its agenda.

**Uncertainty persists** about what policies could be **on the horizon**, such as whether the FTC and DOJ will significantly rewrite horizontal and vertical merger guidelines. **A key question is** also **how receptive courts may be to the administration's actions.**

Under Khan, the FTC recently got the green light to move forward with its amended monopoly lawsuit against Facebook. Other recent actions include the FTC's complaint against computing company Nvidia Corp.'s planned $40 billion purchase of Arm Ltd., and the DOJ's action against book publisher Penguin Random House's proposed $2.2 billion purchase of Simon & Schuster.

"Both agencies seem interested in pursuing a more progressive, expansive view of antitrust, but **ultimately they will need to persuade courts** of that approach," Overton of Axinn Veltrop said. "That said, that doesn't mean a progressive take by the agencies won't have influence [without the courts]."

**Historically, courts have acted as a predictable and reliable backstop against over-aggressive antitrust enforcement**

**Crowell & Moring 20** – Contributions from: Shawn R. Johnson, partner and co-chair of Crowell & Moring's Antitrust & Competition Group; Wm. Randolph Smith, partner in (and former chair of) the firm's Antitrust & Competition Group; Jeane A. Thomas, partner in Crowell & Moring's Antitrust & Competition and Privacy & Cybersecurity Groups, and co-chair of the firm's E-Discovery & Information Management Practice; Andrew I. Gavil, senior of counsel in Crowell & Moring’s Washington, D.C., office and is a member of the firm’s Antitrust & Competition Group; Gail D. Zirkelbach, partner in Crowell & Moring's Government Contracts and Investigations groups; Alexis J. Gilman, partner in Crowell & Moring’s Antitrust & Competition Group; Jason C. Murray, co-chair of the firm's Antitrust & Competition Group; Lisa Kimmel, senior counsel in Crowell & Moring's Antitrust & Competition Group; Thomas De Meese, co-managing partner of the firm's Brussels office.

Crowell & Moring, "Antitrust in the Digital Age: How Antitrust Investigations into Big Tech Impact Companies in Every Industry," Regulatory Forecast 2020, 2-26-2020, <https://www.crowell.com/files/Regulatory-Forecast-2020-Antitrust-Cover-Story-Crowell-Moring.pdf>

But any litigants that choose to pursue an antitrust remedy in the courts—whether agencies, states, or private entities—will run into legal doctrines that have set a very high bar for plaintiffs, particularly standards relating to exclusion and the duty to deal with rivals, says Lisa Kimmel, a senior counsel in Crowell & Moring’s Antitrust Group in Washington, D.C., who formerly served as FTC attorney advisor on antitrust and competition policy matters for then-chairwoman Edith Ramirez. “The case law has been very defense-friendly for many years, especially for monopolization cases. **Novel theories** are unlikely to prevail **under the existing state of antitrust law**, which means there may be a disconnect between what U.S. enforcers want to do and what they can actually get done absent legislation that alters the status quo in the courts.”

With the courts and long-standing precedent **acting as a backstop**, a sea change in antitrust will likely **require new laws from Congress**. **And substantive new laws are unlikely** unless a bipartisan **consensus coalesces around specific reforms** or this year’s election results in single-party control of Congress and the White House, Gavil believes.

Ripple Effects

Regardless of whether this new wave of antitrust investigations results in a major change in law or legal doctrine, it could still have a **significant effect** on business **well beyond** Big Tech. That’s because it could impact the **robust markets** for data and disruptive technology that **drive the economy** in this era of digital transformation.

“The mere fact of the investigations is **already affecting the market**,” Gavil says. “It influences investors, venture capitalists, and innovators.” Potential competitors to the Big Tech platforms have been emboldened, the big platforms are more cautious, and some innovators who were looking forward to having their companies bought “could be disappointed.” The likely sources and shape of innovation may well change as a result.

**That predictability has given companies the confidence they need to pursue large deals in the face of scrutiny**

Jennifer **Saba and** Gina **Chon**, Reuters, Breakdown: U.S. antitrust frenzy stops with judges, 7/21/**21**, <https://www.nasdaq.com/articles/breakdown%3A-u.s.-antitrust-frenzy-stops-with-judges-2021-07-21>

Companies Win Cat-And-Mouse Game In Courts

**If a firm wants to fight**, it can **turn to federal courts**, where judges have often taken a narrow view of rules in a way that favors companies. For example, the burden of proof is on the government to show an acquisition target is a significant rival or that a deal will substantially reduce competition. This has **tripped up many high-profile cases**, including some recently. In 2019, the Justice Department lost an appeal to block the $85 billion tie-up between AT&T and Time Warner. A judge recently dismissed the FTC’s suit against Facebook saying the agency failed to prove its case.

To avoid wasted time and resources, and **potential embarrassment**, the two federal agencies **take on a small sliver of transactions**. For the year ending Sept. 30, 2019, the FTC and DOJ challenged **just 38 mergers** of the more than 2,000 transactions that were reported. And a more aggressive approach by watchdogs **hasn’t changed judges’ minds**.

There is precedent, too, of companies winning when states get in the way. That was the case with Sprint’s deal with T-Mobile US, which received court approval after years of slogging through both federal regulators and state pushback.

Deals do have a shelf life, and some firms, like LSC Communications and Quad/Graphics, throw in the towel. **But for those that are patient**, the court system **allows a path to beat an aggressive antitrust environment**.

**But, action now throws the system into chaos---it’s a bolt out of the blue that firms weren’t expecting in the short-term, and signals a novel, economy-wide shift in court approach that fundamentally changes the game**

**Tyler 11/1** – Senior Legal Analyst at Bloomberg Law

Eleanor Tyler, "ANALYSIS: The Very Purpose of Antitrust Law Is At Issue in 2022," Bloomberg Law, 11-1-2021, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-very-purpose-of-antitrust-law-is-at-issue-in-2022>

**New Laws, Old Power Struggles**

While antitrust has become a hot topic in the past few years, this year saw big legislative pushes in a number of key jurisdictions to revise or reform antitrust/competition law itself. Behind those proposed changes is a **fundamental debate** about what the laws **should do** and **where the balance of power lies** between lawmakers, enforcers, and courts.

Laws applicable to tech platforms have occupied most of the antitrust news headlines this year, but the new measures that enforcers are considering—or, in some cases, implementing—will often apply **much more broadly** (including the proposed U.S. legislation). And more importantly, the changed approach to market regulation reflected in these laws has policy **implications for everyone**. **Antitrust is one of the few areas** in U.S. law that **talk openly about market power**; attitudes about the balance of power between consumers and enterprises, big and small businesses, and government and private businesses are **all involved** in the debate.

**The plan is one of the first major pro-plaintiff decisions in decades, affecting every future decision---that allows aggressive enforcement to be translated to successful suits**

**Pale 04** – R. Hewitt Pale, Former Assistant Attorney General, Antitrust Division @ US DOJ

(R. Hewitt Pale, “ANTITRUST LAW IN THE U.S. SUPREME COURT, Presented at British Institute of International and Comparative Law Conference, May 11, 2004, <https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court>)

In considering my topic for a forum on comparative law, it occurred to me that it might be useful to focus on the special role of the United States Supreme Court in making American antitrust law. The topic is especially timely because our Supreme Court granted review in four antitrust cases this term, each of which is the object of intense study by U.S. antitrust practitioners. The Supreme Court, unlike the intermediate appellate courts of the federal system, has discretion to choose the cases it will hear, and its choices have a **profound effect** on **the development of antitrust law**.

Little has changed over the last century in terms of the wording of our antitrust statutes. The Sherman Act was enacted in 1890, and the Clayton Act in 1914, and the legislative amendments since that time have been minimal. Yet U.S. antitrust law has come a long way indeed in those years through judicial interpretations of the law. Congress chose not to enact detailed prescriptions for antitrust enforcement, relying instead on the courts to apply the broad statutory principles to particular fact situations. As former Assistant Attorney General William Baxter has observed, this "common law" approach may lack the certainty provided by a more detailed statute, but it "permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law." (1) Our Supreme Court has described the antitrust laws as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions."(2)

American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions. In 1911, it decided the landmark Standard Oil case, in which the United States sought to break up the famed oil conglomerate.(3) Observing that the standards of the antitrust law must be developed by the courts deciding each case "by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute,"(4) the Court announced the Rule of Reason, under which the Sherman Act is deemed to prohibit only "unreasonable" restraints of trade. In another decision that year, United States v. American Tobacco Co.,(5) involving a conglomerate in the tobacco industry, the Supreme Court emphasized the Rule of Reason's fundamental grounding in competition concerns. This standard proscribed "contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."(6)

In 1918, Chicago Board of Trade v. United States(7) made clear that the Rule of Reason encompasses all the relevant circumstances. To determine whether a restraint is illegal, a court must "ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable" and the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained."(8)

Around the same time, the Court was also developing the doctrine of per se illegality, which provides bright-line guidance as to certain clearly anticompetitive practices. In United States v. Trenton Potteries Co., (9) the Court held that a price fixing agreement among competitors is an unreasonable restraint "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."(10) In 1940, in another landmark case brought by the United States in the oil industry, United States v. Socony-Vacuum Oil Co.,(11) the Supreme Court repeated that price-fixing agreements are illegal per se and that "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."(12) The per se rule underpins the Antitrust Division's criminal prosecution of collusion among competitors.

The Supreme Court's pre-1950 decisions set the stage for the late twentieth-century developments in antitrust law. They established the fundamental principle — consistent with the modern approach worldwide — that antitrust laws prohibit only conduct that unreasonably restricts competition, to the detriment of consumers. And the Court established that the type of inquiry required depended on the nature of the particular conduct at issue.

That auspicious beginning did not mean that the course of American antitrust analysis always ran smoothly through the last half of the century. A consequence of the common law approach is that when antitrust thinking veers from the path of promoting consumer welfare, the Supreme Court may follow. We experienced that effect in the 1960s and 1970s as our Supreme Court issued decisions emphasizing artificial presumptions not soundly grounded in economic reasoning. In Brown Shoe, Pabst, and Von's Grocery, the Court ruled that mergers could be found unlawful based on extremely small increases in market concentration.(13) In Schwinn,(14) it abandoned its formerly cautious approach to vertical practices,(15) holding exclusive dealer territories unlawful per se. Similarly, in Albrecht,(16) it held vertical maximum price fixing illegal per se.

As the sophistication of economic analysis increased, our Supreme Court began to reexamine some of these precedents and return to fundamental principles of competition and consumer welfare. In GTE Sylvania,(17) the Court overruled Schwinn, and in State Oil v. Khan,(18) it overruled Albrecht. The Court adopted a significantly different approach to mergers in General Dynamics,(19) refusing to find a violation, despite current high market shares, in a case where those market shares did not reflect a realistic threat to future competition. And in Matsushita,(20) the Court poured cold water on theories of liability that make little economic sense, and it expressed skepticism of liability theories based on price cutting, which is often "the very essence of competition."(21)

Of particular note is the Court's decision in Brunswick,(22) in which it rejected the theory that a private plaintiff could obtain treble damages as compensation for continued competition resulting from a merger that prevented a firm from leaving the market. This may be one of the Supreme Court's lesser-known decisions outside the United States, but it is of fundamental significance. Private treble damage litigation is an important tool in the U.S. antitrust enforcement scheme, and the Brunswick decision mandated that it, like government enforcement, be firmly anchored to pro-competition, pro-consumer principles. The Court emphasized that private damages must be based on conduct causing injury of the type that the antitrust laws were intended to prevent. Plaintiffs may not prevail unless they are harmed by anticompetitive consequences of a defendant's conduct, for the antitrust laws were enacted to protect competition, not competitors.

In the last quarter of the twentieth century, the Supreme Court began hearing fewer antitrust cases. In part this reflects a general trend in the Court's practices. In its 2002 term, it issued only 81 written opinions, having issued only 71 the year before.(23) In contrast, thirty years earlier, the Court issued 164 written opinions in its 1972 term and 151 in 1971, including full opinions in ten antitrust cases during those two terms.(24) A litigant's chance of obtaining review today is quite low. In the last complete term, 2002, the Supreme Court considered 8,340 petitions for review by writ of certiorari, but granted full review to only 91 cases, or 1.1%.(25) Even if the unpaid, in forma pauperis, petitions are left out of the calculation, the odds improve only to 4.5%.(26)

A change in the statute governing appeals in civil antitrust cases brought by the government has also had the effect of limiting the number of Supreme Court opinions in antitrust cases in recent years. Until 1974, appeals in these cases went directly to the Supreme Court under the Expediting Act. That statute was amended in 1974 to provide that these appeals go to the intermediate appellate courts unless the district court certifies that immediate Supreme Court review is of "general public importance in the administration of justice."(27) Even then, the Court retains discretion to remand the case to the court of appeals. District courts have certified only three such cases for direct appeal.(28) One of these was Microsoft, but the Supreme Court declined to hear the case and remanded it to the court of appeals.

**Because there are so few Supreme Court antitrust decisions each year —** and because **each one sets precedent that will govern the application of** the **antitrust laws in** thelower courts for decades to come — **each decision is an event of major significance for antitrust enforcers and the antitrust bar. Every phrase is studied with care, and every future case is evaluated in terms of the Court's reasoning process.**

**Uncertainty becomes a *force multiplier* that means firms live in *constant fear***

**Hurwitz 14** – Assistant Professor of Law, University of Nebraska College of Law

Justin Hurwitz, "Chevron and the Limits of Administrative Antitrust," University of Pittsburgh Law Review, vol. 76, Winter 2014, https://www.researchgate.net/publication/281199570\_Chevron\_and\_the\_Limits\_of\_Administrative\_Antitrust

B. The FTC **Should Not Have This Power**240

While Congress did give the FTC very broad power, it **did not** give the FTC unbounded power. Unfortunately, the ambiguity in the agency’s power, and the ways in which the agency **uses that ambiguity**, has yielded an agency with **near boundless power** to regulate the economy **largely unconstrained** by judicial review.

To understand this, we must understand how the FTC has wielded its Section 5 authority in recent years. The scope of Section 5 is **unclear**. This is substantially because the FTC has **declined to explain** what it believes the scope to be. Lacking such explanation, **firms must live in constant fear of the agency’s potential vigilance**. The **possibility** that the agency may challenge a firm’s conduct is a **daunting one**, especially because the FTC may elect to first challenge the conduct internally through an administrative hearing.241 Should the defendant-firm lose, that decision may be appealed only to the full FTC. Until recently, the FTC never failed to uphold a complaint under its review.242 Effectively, then, it is only after multiple years and two complete rounds of litigation that the matter can be appealed to an Article III tribunal.243

In other words, if the FTC challenges a firm’s conduct, defending that conduct is **extremely expensive**.244 It is also **probabilistic** due to the **ambiguity inherent in Section 5.** The FTC has **broad power** to challenge conduct that may not be an unfair method of competition with **little concern** that a firm will attempt to defend itself. Rather, firms do a cost-benefit analysis and decide to settle with the agency, often agreeing to **decades-long oversight** of their business practices.245 In this way, the **agency wields the uncertain boundaries of Section 5 as a weapon**. The **possibility that the FTC would broadly receive Chevron deference** for its construction of these boundaries is a **force multiplier**, giving firms **even less incentive** to defend their innocent conduct.246

The most problematic aspect of the FTC’s approach to using the threat of litigation to extract consent decrees is that this approach **yields little if any** official statement of the FTC’s **interpretation** of Section 5 or any record of the FTC’s reasoning. Such records are important. They provide firms with notice of both the agency’s interpretation of Section 5 and the reasons for that interpretation. They may offer some constraints on the agency’s ability to subsequently change its interpretation. This is true even under Fox I, in which the Court gave agencies broad latitude to adopt new understandings of an ambiguous statute even in the face of prior, contrary understandings.247 If the agency has a longstanding construction of a given statute, it may need to address why it has changed that construction.248 Similarly, in explaining its basis for adopting a given construction, the agency may need to address (and contradict) the changed circumstances of prior justifications in order to change its construction—particularly where the prior policy was based on factual assumptions that have not changed.249 Perhaps most importantly, it provides Congress with information about the agency’s performance and consistency—information that is necessary both for **effective oversight** and to **indicate to Congress** where statutory changes **may be necessary**.

**Spills over to limit mergers in every sector**

**Crowell & Moring 20** – Contributions from: Shawn R. Johnson, partner and co-chair of Crowell & Moring's Antitrust & Competition Group; Wm. Randolph Smith, partner in (and former chair of) the firm's Antitrust & Competition Group; Jeane A. Thomas, partner in Crowell & Moring's Antitrust & Competition and Privacy & Cybersecurity Groups, and co-chair of the firm's E-Discovery & Information Management Practice; Andrew I. Gavil, senior of counsel in Crowell & Moring’s Washington, D.C., office and is a member of the firm’s Antitrust & Competition Group; Gail D. Zirkelbach, partner in Crowell & Moring's Government Contracts and Investigations groups; Alexis J. Gilman, partner in Crowell & Moring’s Antitrust & Competition Group; Jason C. Murray, co-chair of the firm's Antitrust & Competition Group; Lisa Kimmel, senior counsel in Crowell & Moring's Antitrust & Competition Group; Thomas De Meese, co-managing partner of the firm's Brussels office.

Crowell & Moring, "Antitrust in the Digital Age: How Antitrust Investigations into Big Tech Impact Companies in Every Industry," Regulatory Forecast 2020, 2-26-2020, <https://www.crowell.com/files/Regulatory-Forecast-2020-Antitrust-Cover-Story-Crowell-Moring.pdf>

“The antitrust world hasn’t seen an issue this large in **decades**. **Unlike** every major antitrust development of the past, a look into Big Tech involves companies that may not charge customers anything and whose assets involve private consumer data that may not be able to be transferred as part of a remedy,” says Shawn Johnson, a partner at Crowell & Moring and co-chair of its Antitrust Group in Washington, D.C. “And this is not just about Big Tech. In the end, **all companies** are becoming digital. From how we view the role of data privacy to so-called killer acquisitions, these investigations are going to impact a **wide range of businesses** for **years to come**.”

While an imminent breakup of any Big Tech firm is unlikely, the **increased attention** to antitrust issues has **implications far beyond** the handful of companies that dominate the news. These new developments could affect **mergers**, **acquisitions**, and business **practices** in **virtually every sector**. That’s because competitive advantage today is often reliant upon access to key data, to online platforms, and to **cutting-edge technologies**—and antitrust legal and regulatory action sets the rules for such access.

“**This is a megatrend**,” says Wm. Randolph Smith, a partner at Crowell & Moring in Washington, D.C., former chair of the firm’s Antitrust Group, and a former executive assistant to the chairman of the FTC. “A confluence of events, including political philosophy, economic impact, and missteps on issues like privacy, is creating a shift in antitrust focus and thinking that could **reverberate into other sectors**.”

**And, court victories breed more aggressive enforcement, compounding the risk of mergers everywhere**

**Geverola et al. 21** – Andre Geverola was the Director of Criminal Litigation in the Antitrust Division of the U.S. Department of Justice; Sonia Kuester Pfaffenroth was the Deputy Assistant Attorney General for Civil and Criminal Operations at the Antitrust Division of the US Department of Justice; Javier Ortega worked in the New York State Office of the Attorney General, Antitrust Bureau

Andre Geverola, Sonia Kuester Pfaffenroth, and Javier Ortega, "Buyer and Seller Beware: Criminal Antitrust Risks in Mergers & Acquisitions," Arnold & Porter, 7-26-2021, <https://www.arnoldporter.com/en/perspectives/publications/2021/07/criminal-antitrust-risks-in-m-and-a>

**Success Breeds Imitation**

DOJ’s success in the packaged-seafood investigation will **further embolden** its attorneys to scour through merger documents for signs of **potential criminal antitrust violations**. DOJ credited its civil attorneys’ keen eyes during the merger review, leading to the discovery of materials that resulted in the criminal investigation. DOJ formalized this practice in September 2020, when DOJ updated its civil investigative demand templates and deposition procedures to inform parties that their documents and testimony may be used in other proceedings, including criminal cases.

Importantly, **this risk is not limited to mergers** reviewed by DOJ. FTC coordinates with DOJ on many issues—for example, the two agencies recently announced their collaboration on a working group for reviewing pharmaceutical mergers. This collaboration historically has included referrals to DOJ of any potential criminal antitrust violations. The July 9 Executive Order is expected to increase coordination between the two agencies, including the pursuit of criminal antitrust violations uncovered by FTC.

Industries in Focus

As the packaged-seafood case study makes clear, failing to account for criminal antitrust risks can result in **significant financial losses** for companies and their investors, and individual liability for corporate executives. These risks are more acute in industries singled out in the July 9 Executive Order, which include agriculture, healthcare, and technology. In addition to these industries, the Executive Order also prescribed greater antitrust scrutiny in labor markets, affecting all employers. Companies conducting transactions in these industries and markets should be prepared for greater scrutiny of potential criminal antitrust violations.

**False positives spillover broadly and undermine industry dealmaking in every industry---automatic treble damages make transactions far too risky**

**Delrahim**, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, **‘20**

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

It **can be a serious mistake** for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn **“exclusionary” conduct** that is driven by **competition on the merits** such as **innovation**. Most obviously, **legitimate competition** on the merits **can be “exclusionary”** in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts **police the line between lawful and unlawful “exclusionary” conduct**, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an **unacceptable risk of “false positives”** or condemnations of lawful pro-competitive conduct. As the Court has explained, “**Mistaken inferences** and the resulting **false condemnations** ‘**are especially costly**, because they **chill the very conduct** the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior **will be wrongly classified** as predatory and suppressed.”

**This backdrop helps frame the question** whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of **unlawful exclusionary conduct.** A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may **warrant remedies under contract law,** **but the important difference is that contract remedies do not involve the threat of treble damages** that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. **Transforming such a contract obligation into an antitrust duty** would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of **increasing dynamic competition** by fostering **greater investment** in research and development, and **ultimately in innovation**.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

**More fundamentally**, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an **unacceptable risk of “false positive” condemnations** of pro-competitive conduct by licensees. **The prospect of antitrust liability and treble damages** for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to **chill incentives for innovators** to develop new technologies that fuel dynamic competition.

**Where contract law remedies exist** to remedy and deter breaches of a FRAND commitment, **the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct**—that is, **research and development** by innovators who make careful cost-benefit calculations as to **how much to invest in technologies** that **may not pay off**. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would **skew the** patent licensing **bargain** away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of **enormously costly litigation** and a **possible treble damages award**. **Bargaining in the shadow of litigation**, a patent holder would be wary that a high license demand could be penalized **by a significant damages award**, **whereas a prospective licensee’s low-ball offer would do no such thing**. Such a remedy would bestow any putative licensee with **disproportionate negotiating power.** In turn, the **cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline**.

**That creates robust incentives to challenge mergers in every sector, irrespective of their procompetitive benefits**

**Arthur et al.**, L. Q. C. Lamar Professor of Law, Emory Law, **‘21**

(Thomas C., Amitai Aviram, University of Illinois Jodi S. Balsam, Brooklyn Law School Jorge L. Contreras, University of Utah Anthony Dukes, University of Southern California Vivek Ghosal, Rensselaer Polytechnic Institute Michael S. Jacobs, DePaul University Jordan Kobritz, SUNY Cortland Alexander Volokh, Emory University, Brief of Amici Curiae Antitrust Law and Business School Professors in Support of Petitioners, NCAA v. Alston, available at: <https://www.supremecourt.gov/DocketPDF/20/20-512/168408/20210208135430804_20-512%2020-520%20tsacAntitrustLawAndBusinessSchoolProfessors.pdf>)

Second, requiring a defendant to prove that a restraint is the least restrictive means of achieving its goal makes it nearly impossible for the defendant to succeed. This rule not only would impose on antitrust defendants the titanic burden of proving a universal negative,3 it also would empower antitrust plaintiffs to invalidate virtually all collaborations, no matter how procompetitive, merely by dreaming up marginal ways to make them slightly more competitive. See Smith v. Pro Football, 593 F.2d 1173, 1215 (D.D.C. 1978) (MacKinnon, J., concurring in part, dissenting in part) (“In evaluating less restrictive alternatives as a matter of law, it is difficult to imagine what kind of draft would be valid if the existence of a less restrictive alternative would automatically render the present draft unreasonable. Some less restrictive alternative can always be imagined.”) Indeed, “[a] skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1913b (4th ed. 2018). And **a skilled plaintiffs’ lawyer** would have **little difficulty finding attorneys’ fees and treble damages** to be sufficient **incentive** to challenge **virtually all** such **collaborations**, thus ensuring that the most direct consequence of the Ninth Circuit’s application of the Rule of Reason would be a flood of antitrust litigation, followed by a reduction in collaborative enterprises and the negative effects of that reduction.

This consequence follows from the fact that the Ninth Circuit’s ruling is not limited to the NCAA’s “amateurism” rules. Instead, the Ninth Circuit’s opinion as written applies to all forms of joint ventures and procompetitive collaborations and thus is likely to disincentivize those arrangements. See, e.g., U.S. Dep’t of Justice & FTC, supra, at 1 (2000) (warning that making it too easy to condemn “agreements among actual or potential competitors may deter the development of procompetitive collaborations”).

The Ninth Circuit’s decision has sweeping implications for antitrust enforcement and may call into question collaborations and joint ventures **across a host of areas** including **healthcare**, **pharmaceutical development**, **information technology**, **consumer electronics**, and **manufacturing**. According to the Ninth Circuit’s approach, any court is empowered to re-write the rules of any industry before it so long as the plaintiff can conjure a slightly less restrictive alternative to the conduct being challenged, including, for example, asserting that a joint venture’s product is priced too high. But see Texaco Inc. v. Dagher, 547 U.S. 1, 6–7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”). The **potential exposure to treble damages** for such conduct is likely to **chill otherwise procompetitive arrangements**, thus **contradicting the ultimate goal of the antitrust laws: promoting competition**.

**Biopharma mergers up now and will continue into 2022, but it’s contingent on lack of regulatory action**

**Braun 22** – founder and CEO of Capstone Strategic, a leading M&A strategic consulting firm

David Braun, "What’s Next in Healthcare Mergers & Acquisitions," Managed Healthcare Executive, 2-17-2022, https://www.managedhealthcareexecutive.com/view/what-s-next-in-healthcare-mergers-acquisitions

Last year was a **record setting year** in worldwide merger and acquisition (M&A) activity across multiple industries, and healthcare was a big part of that.

As a matter of fact, one global report cites healthcare and pharmaceutical deals totaled $288 billion in 2021 which was a 38% increase over 2020. Several of these healthcare mergers were initiated by SPACs (special purpose acquisition company) and this is a trend **we can expect to continue** in the **first half of 2022** - based on **potential regulatory changes** that may be **enacted later in the year**. But that is not the only reason we can expect to see an upswing in healthcare industry M&A.

Biotechnology, data, medical devices, and pharmaceuticals are all **receiving intense scrutiny** from **potential buyers**. Larger companies, flush with cash and deep pockets, believe the **purchase of smaller players** is a **way to gain a competitive advantage** in terms of scale. According to one leading investment advisory service, the company Shockwave Medical, a maker of cardiovascular medical devices, is drawing interest from fellow device maker Penumbra, as well as heavy hitters Abbott Laboratories, Abiomed, Boston Scientific, and Medtronic.

While the **three-legged issues of inflation**, **labor shortages**, and **supply chain** are causing **sleepless nights** for those in other industries, **healthcare** will most likely **avoid the fray** and **enjoy a continued momentum** of n

ew deals. One of the primary reasons for this is the focus upon digital assets of what is being categorized as “**health-tech**” that **has such appeal**. Reporting by market intelligence firm CB Insights stated global digital health investment hit an all-time high of $57.2 billion in 2021.

Organizations are looking for deals focusing on technical capabilities that will improve both their internal efficiencies while enhancing provider and patient care. Telemedicine is a terrific example. Before the COVID pandemic, this was available but used infrequently. Now fully embraced, doctors are scheduling hundreds of web-appointments per month.

The adaptability by both providers and patients of virtual care, along with insurers and government agreeing to provide reimbursement for these services, created a virtual medical marketplace. Combine this with advances in remote healthcare sensing and monitoring, and we see new models of patient care which are having a growing impact on investors and C-suites.

The pandemic turbocharged the acceleration of healthcare driving into the digital age. Healthcare IT that encompasses data analytics and makes use of predictive modeling is now being used to identify trends across multiple demographic groups while at the same time cutting costs systemwide. Businesses with a focus on this data are also prime targets for healthcare companies seeking to grow through acquisition.

This express demand for health-tech, and the amount investors are willing to pay, might also benefit hospitals and health systems. Technology that allows more direct-to-consumer healthcare delivery options could spur health systems to initiate long delayed improvements to the overall patient experience including scheduling, intake paperwork, communications, and more transparent billing.

The healthcare buying escalation is expected to also reach physician practices. The potential for growth and regular cash flow represented by these practices can be very attractive to private equity firms. One of the key potential benefits for practice owners who entertain an acquisition will be in the area of lessening administrative hurdles so they can focus on patient care. Private equity also provides an infusion of cash that can be used to purchase new equipment and upgrade facilities.

The pandemic is now entering its third year and it has forced the healthcare industry to **adapt and innovate** at a pace faster than anyone could imagine prior to COVID. This in turn has **quickened the pulses of dealmakers** and investors. While there are factors, both economic and **regulatory**, that could **cause a slowdown**, the **trend is upward** as 2022 is giving us a **prescription for growth.**

**Innovation is high now in pharma because of M&A---their stats ignore how pharmaceutical innovation works**

**Bansal et al. 18** – Roerich Bansal is a research specialist in the McKinsey Knowledge Center in Gurgaon; Ruth De Backer is a partner in McKinsey’s New York office, where Vikram Ranade is an associate partner

Roerich Bansal, Ruth De Backer, and Vikram Ranade, "What’s behind the pharmaceutical sector’s M&A push," McKinsey & Company, 10-10-2018, https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/whats-behind-the-pharmaceutical-sectors-m-and-a-push

M&A as a **source of innovation**

Large pharmaceutical companies have used M&A to **bolster their innovation** for a long time, and that isn’t likely to change any time soon. Previous McKinsey research has shown that the share of revenues coming from innovations sourced outside of Big Pharma has **grown** from about **25 percent** in 2001 to about **50 percent** in 2016 (Exhibit 1). The development of a new drug requires **high early-stage investment** for what is often a **low probability of succes**s. At the same time, late-stage trials also require **high investment** and an ability to **navigate complicated regulatory pathways**—capabilities that larger pharma companies typically have. These dynamics create an industry profile in which **smaller**, creative **companies** end up **fund**ing **innovation**. Once their research is more advanced, larger pharmaceutical companies **enter the picture**, looking for the next “new” thing and **ponying up the resources** **required** to fund expensive late-stage trials and large commercial marketing campaigns. Regardless of trends, **innovation** in this industry **is—and will remain—fragmented**.

**Republicans in Congress and on the FTC will backlash to Khan’s aggressive enforcement, which undermines overall trust in the institution AND guts enforcement capabilities**

**Nylen 9/29/21** – tech reporter at POLITICO

Lean Nylen, “Lina Khan’s big tech crackdown is drawing blowback. It may succeed anyway.” POLITICO, 9/29/2021, <https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581>

In July, the CEO of the biotech giant Illumina flew to D.C., checked into a hotel room off M Street and tried to conduct a routine piece of business: Persuading the Federal Trade Commission to let his company buy a cancer startup.

But nobody from the FTC would meet with him.

In the Obama and Trump eras, a pilgrimage to Washington was a tried-and-true strategy for CEOs seeking to resolve antitrust logjams — often yielding a flurry of meetings between commissioners and companies like Google, T-Mobile and Apple. But as Illumina’s Francis deSouza learned, that was a different FTC.

Under new FTC Chair Lina Khan, the century-old regulatory agency long accustomed to blessing corporate mergers is veering back to its original trustbusting mission and becoming markedly less friendly to the businesses it regulates. The **shift has inspired** cheers from her fellow progressives **while unsettling** many **GOP lawmakers**, the agency’s two **Republican commissioners and** even some **longtime FTC employees**, according to interviews with more than 20 FTC employees, commission alumni and people on Capitol Hill.

The 32-year-old law professor’s most prominent target is the tech industry, whose biggest players swelled to behemoth size on the commission’s watch. Nearly a decade after the commission overruled its own attorneys and declined to file an antitrust suit against Google, Khan is trying to prove that the agency is capable of taking on the nation’s wealthiest companies, including in Silicon Valley.

Some executives from other industries, like deSouza, say they’re being caught in the crossfire.

“There is an anti-big-company, anti-tech sentiment,” deSouza said of the FTC’s refusal to meet with him. “We’re the baby in the bathwater.”

Khan: ‘We can deliver’

President Joe **Biden’s decision to elevate Khan as the FTC’s chair** on June 15 **stunned many** in D.C. Those **included** some of the nearly two dozen **Republican** senators **who had voted** hours earlier **to confirm** the outspoken anti-monopolist, **thinking she would be just one of the agency’s five commissioners.**

The choice elated progressives who say the FTC, an antitrust and consumer agency created during Woodrow Wilson’s administration, has lost its antitrust firepower since the Reagan era.

Khan, a self-described FTC history nerd, has been outspoken in criticizing the agency. For decades, she told Congress this month, commissioners of both parties had pursued a philosophy that “recommended enforcers err on the side of inaction, on the assumption that monopoly power would be disciplined by the free market.”

Those days are over, she said in a memo to her employees last week that laid out her priorities: “American consumers, workers, and honest businesses depend on the Commission to champion a fair and thriving economy for all, and I am confident that we can deliver.” She said her top priority is taking on a massive wave of proposed mergers and other forms of “rampant consolidation.”

The other changes that Khan has pushed target a wide range of corporate behavior, from employee non-compete agreements to warranties that prevent customers from repairing their own electronic devices. Some steps the FTC has approved in 3-2 party-line votes have also enhanced Khan’s own authority. For instance, letting her approve antitrust subpoenas without agreement from the other commissioners.

“With only a few months on the job, Lina Khan has proven she is committed to strengthening competition policy and taking on monopolies,” said Sen. Amy Klobuchar (D-Minn.), who chairs the Senate Judiciary Committee’s antitrust panel. Klobuchar is drafting legislation that could give the FTC more resources to take on anti-competitive behavior.

But **GOP critics** like Utah Sen. Mike Lee **accuse Khan of mounting a “progressive putsch.”** Others, including the agency’s two **Republican commissioners, say she is risking** a repeat of the 1970s when a **congressional backlash against** **alleged FTC overreach hobbled the commission’s authority.**

“I am very concerned about giving the agency more power under current leadership,” Republican Commissioner Christine Wilson told the House Judiciary Committee in a hearing Tuesday. Under Khan, she said, “decades of tradition have been thrown out the window to the detriment of our decision making and consumers.”

Facebook and Amazon have demanded — unsuccessfully — that Khan abstain from decisions on their companies, citing her history of work and statements criticizing tech monopolies. The Wall Street Journal has published at least six editorials and four op-eds on Khan since mid-June, including one editorial that dismissed her as “a 32-year-old academic who has no experience running anything.”

**Opponents to increased litigation are stronger than proponents**

Alison **Jones**, Professor of Law at King's and a solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, George Mason University Foundation Professor at the George Mason University School of Law, former FTC Commissioner, **2020**, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin 2020, Vol. 65(2) 227-255

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an **idiosyncratic way**.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is **dependent** on a **good relationship with Congress**, which **controls its budget** and can react with **hostility**, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be **derailed** or muted if political support for them **wanes** and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be **volatile**, **unpredictable**, and **evanescent**.127 If the FTC does not manage its relationship with Congress carefully, **its litigation opponents may mobilize legislative intervention** that causes ambitious enforcement measures **to the founder**.

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

**SCOTUS case gutted ALL FTC enforcement authority against scammers – plan doesn’t restore FTC authority!**

**Nylen ’21** – reporter at POLITICO focusing on tech

Leah Nylen, “The Supreme Court ruled in favor of scam artists,' FTC chief says after justices gut agency's powers” POLITICO, April 22, 2021, <https://www.politico.com/news/2021/04/22/9-0-supreme-court-ruling-guts-ftcs-ability-to-seek-redress-for-consumers-484194>

**The F**ederal **T**rade **C**ommission **can’t force companies that engage in wrongdoing to pay back consumers** or give up ill-gotten profit, the Supreme Court held Thursday, **dealing a huge blow to the agency** that could hamper its antitrust and privacy cases.

The FTC’s authority under a provision known as Section 13(b) is limited to seeking an injunction to stop illegal actions and doesn’t authorize it to seek monetary remedies like restitution, Justice Stephen Breyer wrote for the unanimous court.

Section “13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief,” Breyer wrote, noting that the FTC can seek restitution under other provisions of the law. “If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority.”

**Acting FTC Chair** Rebecca Kelly Slaughter **slammed the ruling**, saying it **deprived the FTC of its strongest tool to help consumers**.

"**The Supreme Court ruled in favor of scam artists** and dishonest corporations, leaving average Americans to pay for illegal behavior,” she said. "We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.”

Congressional response: FTC leaders had already warned that consumers would be the ones to suffer if the Supreme Court rolled back the agency’s ability to seek monetary penalties.

“**Enforcement actions will slow** and **redress for consumers will dry up if Congress does not act quickly** to affirm our full authority under 13(b),” Slaughter said at a Senate hearing Tuesday.

Congress is already considering legislation to remedy the Supreme Court decision. The House Energy and Commerce Committee has scheduled a hearing for next week on whether the FTC needs new authority to seek consumer redress. The Supreme Court case was also a key topic at an FTC oversight hearing in the Senate this week.

“We have to do everything we can to protect this authority and if necessary pass new legislation to do so,” Senate Commerce Chair Maria Cantwell (D-Wash.) said at the same Tuesday hearing.

The case: The agency has used 13(b) for decades to force companies to pay back harmed consumers, but appeals courts have recently raised questions about that authority.

In the case before the Supreme Court, the FTC sued AMG Capital Management, a payday lender run by former race car driver Scott Tucker, for allegedly misleading consumers about the terms of short-term, high-interest loans. A trial court ordered AMG and Tucker to pay back $1.3 billion in restitution to consumers, an order upheld on appeal. AMG then asked the Supreme Court justices to weigh in on the FTC’s authority.

**Alt causes---green**

**Perri 10**

(Frank S. Perri, J.D., CFE, CPA. "The Fraud-Terror Link:". https://www.fraud-magazine.com/article.aspx?id=4294967888)

**The threat of terrorism** has become the principal security concern in the United States since 9/11. Some might perceive that fraud isn’t linked to terrorism because white-collar crime issues are more the province of organized crime, but that perception is misguided. **Terrorists derive funding from** a variety of **criminal activities** ranging in scale and sophistication – from low-level crime to organized narcotics smuggling and fraud. CFEs need to know the latest links between **fraud and terror**. Credit card fraud, wire fraud, mortgage fraud, charitable donation fraud, insurance fraud, identity theft, money laundering, immigration fraud, and tax evasion are just some of the types of **fraud** commonly used to **fund terrorist cells**. Such groups will also use shell companies to receive and distribute illicit funds. On the surface, these companies might engage in legitimate activities to establish a positive reputation in the business community. **Financing is required** not just to fund specific terrorist operations but to meet the broader organizational costs of **developing and maintaining a terrorist organization** and to create an enabling environment necessary to sustain their activities. The direct costs of mounting individual attacks have been relatively low considering the damage they can yield. “Part of the problem is that it takes so little to finance an operation,” said Gary LaFree, director of the University of Maryland’s National Consortium for the Study of Terrorism and Responses to Terrorism.2 For example, the 2005 London bombings cost about $15,600.3 The 2000 bombing of the USS Cole is estimated to have cost between $5,000 and $10,000.4 Al-Qaida’s entire 9/11 operation cost between $400,000 and $500,000, according to the final report of the National Commission on Terrorist Attacks Upon the United States.5 Terrorist groups require significant funds to create and maintain an **infrastructure** of organizational support, sustain an ideology of terrorism through propaganda, and finance the ostensibly legitimate activities needed to provide a veil of legitimacy for their shell companies.6 However, don’t think that only large operations are needed for terrorists to carry out attacks; small semi-autonomous cells in many countries are often just as capable of conducting disruptive activities without extensive outside financial help – they just conduct smaller-scale frauds.7 Even though **the nexus between fraud and terrorism is undisputed**, there’s concern at state and local levels that law enforcement professionals lack specialized knowledge on how to detect the fraud-terror link because they’re more apt to investigate and prosecute violent crimes.8 A critical lack of awareness about terrorists’ links to fraud schemes is **undermining the fight against terrorism**. **Fraud** analysis **must be central**, not peripheral, **in** **understanding** the patterns of **terrorist behavior**.9

**No risk of nuclear terrorism---too many obstacles**

**Mearsheimer 14**

John J. Mearsheimer 14, R. Wendell Harrison Distinguished Service Professor of Political Science at the University of Chicago, “America Unhinged”, January 2, nationalinterest.org/article/america-unhinged-9639?page=show

Am I overlooking the obvious threat that strikes fear into the hearts of so many Americans, which is terrorism? Not at all. Sure, the United States has a terrorism problem**. But it is a minor threat**. There is no question we fell victim to a spectacular attack on September 11, but it did not hurt ~~cripple~~ the United States in any meaningful way and another attack of that magnitude is **highly unlikely** in the foreseeable future. Indeed, there has not been a single instance over the past twelve years of a terrorist organization exploding a primitive bomb on American soil, much less striking a major blow. Terrorism—most of it arising from domestic groups—was a much bigger problem in the United States during the 1970s than it has been since the Twin Towers were toppled.¶ What about the possibility that a terrorist group might obtain a nuclear weapon? Such an occurrence would be a game changer, but **the chances of that happening are virtually nil**. No nuclear-armed state is going to supply terrorists with a nuclear weapon because it would have no control over how the recipients might use that weapon. Political turmoil in a nuclear-armed state could in theory allow terrorists to grab a loose nuclear weapon, but the United States already has detailed plans to deal with that highly unlikely contingency.¶ Terrorists might also try to acquire fissile material and build their own bomb. But that scenario is extremely unlikely as well**: there are significant obstacles to getting enough material and even bigger obstacles to building a bomb and** then **delivering it.** More generally, virtually every country has a profound interest in making sure no terrorist group acquires a nuclear weapon, because they cannot be sure they will not be the target of a nuclear attack, either by the terrorists or another country the terrorists strike. **Nuclear terrorism, in short, is not a serious threat**. And to the extent that we should worry about it, the main remedy is to encourage and help other states to place nuclear materials in highly secure custody.

**No nuke terror---detection solves and no expertise**

**Seitz 16** (Sam, Director of Nuclear Security Studies @ the Global Intelligence Trust, “Why WMD Terrorism Isn’t as Scary as it Seems” https://politicstheorypractice.wordpress.com/2016/08/26/why-wmd-terrorism-isnt-as-scary-as-it-seems/)

Of all the potential WMD terror attacks, nuclear attacks seem to generate the most fear among the public. This is not surprising. After all, nuclear weapons represent the pinnacle of humans’ destructive potential, and Hollywood frequently utilizes nuclear weapons to drive the plot in movies ranging from Dr. Strangelove to The Avengers. Fortunately, though, there is very little risk of terrorists acquiring or detonating nuclear weapons, particularly in large, Western metropolises. The reason for this is simple; it is **exceedingly difficult** for terrorists to acquire and transport nuclear weapons without being **detected and stopped**. First, terrorists would have to break into **heavily guarded facilities**, likely in Russia or the United States, and steal weapons weighing multiple tons. Then, after securing the weapons, these terrorists would need to escape while being pursued by elite security forces. Assuming the terrorists are able to escape, they would then need **highly skilled technicians** to assemble the nuclear device, as nuclear weapons held in storage are almost always broken down into their constituent parts so as to prevent unauthorized use. The terrorists would have to do this while being sought after by the **most powerful and well-funded intelligence networks in the world,** and would then need to transport the nuclear device into a major city without being detected. According to **John Mueller, an expert on nuclear terrorism at Ohio State University**, the risk of a successful nuclear terrorist attack occurring is, therefore, less than **one in three billion** (1).

Certain analysts contend that while the risk of terrorists stealing nuclear weapons is low, it is possible that terrorists might simply construct their own nuclear devices instead. This scenario is even less likely than nuclear theft, though, as the production of nuclear weapons is an exceedingly complicated task. Terrorists would need highly specific blueprints detailing how to construct a nuclear device, access to highly enriched uranium or plutonium, and a secure, well-equipped site to construct the weapon. As Mueller points out, the odds of all of these conditions being met are quite low. Moreover, the need for so many complex and uncommon materials – **h**ighly **e**nriched **u**ranium, heavy industrial equipment, etc. – would **raise suspicion** among intelligence analysts, increasing the chance of detection. Even if intelligence agencies missed these clues one of the many middle-men used to acquire these materials might inform on the terrorist network, either for profit or because of moral qualms (1).

**1NR**

**Adv 1**

**The plan backdoors-in legal consideration for harms to competitors not just consumer welfare—That directly wrecks innovation, but it also smuggles in a framework focused on equal opportunity for competitors even where it harms consumer welfare!**

**Trebilcock 19** – Professor of Law & University Professor, University of Toronto

Michael Trebilcock, and Francesco Ducci, SJD Candidate, University of Toronto, Faculty of Law, The Revival of Fairness Discourse in Competition Policy, *The Antitrust Bulletin* 64(1): 79-104, March 2019, <https://journals.sagepub.com/doi/10.1177/0003603X18822580?icid=int.sj-full-text.similar-articles.1>

From an **economic perspective**, the **goal of protecting small and medium-sized** competitors **creates trade-offs** with the maximization of either **consumer welfare** or total welfare. **Protecting less efficient producers disregards** the **advantages of economies of scale** enjoyed by larger suppliers, which **benefit consumers** with **lower prices**. **Protecting competitors for their own sake** **also sacrifices** efficient resource allocation by reducing the **positive incentives created by competitive dynamics** in order to **protect less efficient rivals from market forces**. We share the **widespread consensus** that **competition policies** should generally **avoid protectionist interventions** in favor of less efficient competitors, and we **see room only** for “**narrow**” notions of horizontal fairness among competitors concerned with undue exclusion of efficient or potentially as efficient competitors,108 **disregarding** the **incidental negative externalities on competitors** created by **conduct that does not negatively affect** total or **consumer welfare**. **Competition in fact values the negative externalities that competitors impose on each other.** At the same time, by **targeting barriers to entry and exclusionary conduct,** it **implicitly also** **attempts to promote a framework of equal opportunity** **for competitors** to enter the market and potentially displace incumbents as a result of superior efficiency, greater product variety, or socially valuable innovations. Hence, even after setting as a normative background the efficient allocation of resources, a total welfare oriented competition policy is not entirely empty of fairness considerations to the extent that it protects the opportunity of firms to compete on their merits and to serve a market in the most efficient and innovative way. Beyond this “narrow” form of fairness that focuses on exclusionary forms of conduct and barriers to entry, however, we see no role for protecting competitors based on broader notions of fairness or equity.109

**It breaks with 50 years of precedent insisting on static economic efficiency through the rule of reason as the only theory of harm**

**COC 9/20** – U.S. Chamber of Commerce

The Dangers of Upending Decades of Supreme Court Precedent, 20 September 2021, https://www.uschamber.com/regulations/the-dangers-of-upending-decades-of-supreme-court-precedent

Antitrust critics have signaled their interest to radically **change existing U.S. antitrust law**. Their ideas often seek to **overturn decades of Supreme Court precedent** (**over 50 years** in some cases), **risking** the **very harms the Court sought to prevent.**

**Proposed changes** look to **abandon the Court’s insistence** that **antitrust law be grounded in the rule of reason** and **adhere to economic evidence**, **rejecting** **shortcuts used to reach findings of harm.**

**Triggers massive uncertainty AND rent-seeking.**

**Colomo 20** – London School of Economics and College of Europe.

Pablo Colomo, July 17 2020, “Self-Preferencing: Yet Another Epithet in Need of Limiting Principles,” World Competition, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3654083

It has been rightly noted that the use of legal categories is indispensable in EU competition law.45 These, however, a**re only helpful where they are meaningful and sound from a legal and economic perspective**. Unsound categories can give rise to uncertainty, **can be used strategically by stakeholders and may lead to a mismatch between the applicable test,** on the one hand, **and the nature, purpose and potential effects of the practice, on the other**. The fundamental flaw of self-preferencing as a legal category is that it potentially captures a very diverse range of practices **that differ in important** **respects** from one another and for which the use of the same legal test would not be appropriate. What is more, **there appears to be no meaningful way to narrow down the category** to some practices to the exclusion of others. As outlined above, firms can use different mechanisms to favour their affiliates and **discriminate** against third parties. As in Bronner or IMS Health, a vertically-integrated operator may give priority to its own division by refusing to supply its inputs to would-be **rivals on the relevant downstream market**. Alternatively, it may deal with third parties, but grant them terms and conditions that are less advantageous than those granted to the affiliate. This is, in essence, the complaint at the heart of the ongoing investigation concerning Amazon Marketplace.46 It is also the scenario at stake in a case like Slovak Telekom, where the incumbent telecommunications operator imposed cumbersome obligations on third parties providing services in competition with its own retail arm47

**Independently—Causes regulatory capture—That link-turns the case**

**Melamed 20** – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

**Second**, **if** antitrust **decisions** are **perceived as arbitrary**, they will be more

**easily subject to regulatory capture** because **there will not be seemingly principled bases to cabin antitrust decision-making.** The **beneficiaries** of a regime

susceptible to capture are **likely to be the powerful, not the powerless**. **Ironically, therefore**, **adding** **equality** **and dispersion of economic and political**

**power to the objectives** of the antitrust laws could **prove detrimental to those**

**very objectives.**

**Big firms are the largest contributors to R&D spending, anticipate new competition, and create new markets**

Jan **Rybnicek 20**—Antitrust Attorney, former Advisor at FTC, Editor for the Antitrust Law Journal. ("Innovation in the United States and Europe," November 11, 2020, from The Global Antitrust Institute Report on the Digital Economy 13, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733698>) edited for ableist language

A key indicator of a vibrant economy that is characterized by **vigorous competition** and **intense innovation** is high levels of spending on **r**esearch and **d**evelopment. **R**esearch **and** **d**evelopment fuels **economic growth**, **job creation**, and **competition** by allowing **researchers** and **entrepreneurs** to discover **new tech**nologies, **design new products**, **tap new markets**, and **improve efficiency** and **enhance performance**. Critics of U.S. competition policy have argued that today’s **large**st firms have become so large that they are untouchable by competition from current or future rivals and, as a result, have lost the incentive to innovate that once may have been part of their core identity as scrappy upstarts but that has since faded as they rest on their laurels, happy in their dominant positions.37 They further argue that dominant firms snuff out **would-be entrants** that otherwise would be devoting capital to research and development initiatives to build competing offerings for consumers.38 These critics allege that this purported dampening in the incentive to innovate has deprived consumers of better products and services that would otherwise arise through the **push and pull of competition**.

But the actual **data tell a different story** about the state of **r**esearch **and** **d**evelopment in the United States and how it compares to its counterparts in Europe. In fact, companies in the **U**nited **S**tates lead the world in **r**esearch **and** **d**evelopment. As shown in Figure 6, out of the top companies globally investing in research and development spending, 11 out of the top 20 (55 percent) and **seven** out of the **top 10** (70 percent) are based in the **U**nited **S**tates as of 2018.39 By comparison, only six of the top 20 are located in Europe (30 percent), and only two find themselves in the top 10 (20 percent). The remaining firms on the list based on research and development spend are based in Asia.

Contrary to critics’ claims, there is no lack of **r**esearch **and** **d**evelopment in the **U**nited **S**tates, and U.S. firms continue to **outpace** global counterparts in investing in **new tech**nologies and products. The reality is that companies in the United States invest **in a broad range** of research and development initiatives despite the presence of **large**, successful tech companies. Unsurprisingly, just as no one today would invest in developing a new combustion engine-powered car that would have to compete against established and mature competitors that have considerable expertise in the market, it would be unwise to try to compete against any of the large tech companies with a “**me too**” product. Instead, innovators (and, as discussed below, the **venture capital** and other sources of capital that fund them) devote resources to discovering **new and different solutions** that may indirectly replace incumbents by **disrupting** old markets and **creating new** ones. Indeed, this how many of today’s most successful tech firm achieved success— by building new products and **creating new markets**, not by mimicking yesteryear’s giants, such as IBM, Microsoft, and Intel.

A closer look at research and development investment in the United States further shows that tech firms are leading the way. In fact, many of the tech firms that have allegedly contributed to the decline of **competition** and innovation in the United States are the **biggest spenders**. As shown in Figure 7, **Amazon**, **Alphabet**, **Intel**, **Microsoft**, and **Apple** comprise the nation’s topic five spenders, with investments totaling more than $75 billion in 2018.40 These companies are **pouring money into innovation** not because they have nothing else to do with it but because they are attempting to **stay ahead of the competition** in their core markets by introducing even **better products** and services, and to **break into adjacent markets** where they see opportunities to use their expertise to be disruptive forces.

**True for AI – size limits gut. deep learning**

**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/)

Changes to firms’ scale also may impact their access to data, another key resource required for AI innovation. Studies have linked the performance of deep learning models **to the quantity of data fed into them**. At present, tech giants have access to unprecedented volumes of data about their users. Google, for example, can harness data from Google Search, Maps, YouTube, Gmail, and other sources. If antitrust enforcement leads to divestment or broader break-ups, **access to data may diminish, lessening innovation.**

**Incentive is backwards---acquisitions allow innovation in adjacent markets.**

Thomas A. **Lambert 20**, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri School of Law, J.D. from the University of Chicago, “The Case Against Legislative Reform of U.S. Antitrust Doctrine,” University of Missouri School of Law Legal Studies Research Paper No. 2020-13, 05-12-2020, https://ssrn.com/abstract=3598601

Reduced Investment in Innovation? Proponents of reforming the antitrust laws have also pointed to reductions in the level of venture capital investment as indicative of a market power crisis in the U.S. Such investment slowed somewhat after 2015 (though it appears to have rebounded),27 and some venture capitalists have referred to a “kill zone” around dominant technology firms.28 The claim is that big technology firms either usurp small firms’ innovations or use their power over platforms to force smaller firms that need access to those platforms to sell out at a bargain price. Venture capitalists are less inclined to invest if such outcomes are likely, and innovation therefore suffers.

The **ev**idence, however, **does not support the view that lax** U.S. **antitrust is reducing innovation.** Eleven of the top sixteen global spenders on **r**esearch **and d**evelopment are U.S. firms,29 and six of those—Amazon, Alphabet, Intel, Microsoft, Apple, and Facebook—are “Big Tech” firms that have been accused of acting like monopolists. Moreover, **the U.S. is home to half** (178 of 356) **of** the world’s so-called “**unicorn” companies**—i.e., private companies valued at greater than $1 billion. China ranks second with 90, and all of Europe contains a fraction of that number. The U.S. also far outpaces Europe in terms of **v**enture **c**apital spending, with 10,777 investments in 2019 worth $136.5 billion compared to Europe’s 5,017 deals worth $36.3 billion. Finally, the fact that large American **tech**nology firms are purchasing smaller producers of complementary products or technologies **in no way implies that the incentive to innovate is thereby reduced**. Many **start-ups are organized with the goal of being bought out by a larger firm**; a buy-out option allows the initial investors in a company to enjoy a return on their investment without the company’s having to incur the significant cost of a public offering.

**Data disproves killer acquisitions. Duplication is wrong, limiting acquisitions reduce innovation VARIETY.**

**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]

So-Called Kill Zones Could **Maximize** Welfare and Innovation

To the extent established companies are conducting research in a narrow market, it makes sense for entrants to **avoid head-on competition** and **instead exploit complementary markets**. This is almost as likely to be true whether the industry is dominated by one firm or five. Breaking into an industry with relatively mature technology dominated by large players is never easy. That is why many industries have gone through periods of heavy investment in the early stages of an industry as companies try to become one of the dominant players. Once the industry has matured to achieve economies of scale or network effects, new entrants tend to focus on complementary technology rather than trying to challenge the larger companies head-on.

Few complained after the 1930s automobile-sector start-ups declined precipitously. By the 1930s, it made little sense to invest in new automobile companies when it was clear the technology system (internal combustion engine) and major players (American Motors, Chrysler, Ford, and GM) had already been established. Investment to create new entrants would have represented a waste of societal resources. Instead, funding went to emerging industries such as radios, chemicals, and machine tools.

Today is no different. The technology and business models for search, social networks, and Internet retailing are **relatively mature**; society is better off if entrepreneurs and venture capitalists focus on other areas. Indeed, to the extent investors may be focusing their capital outside a few areas where large firms have established positions in what are somewhat mature technologies, it is arguably a good thing because it means there is more capital for other promising areas. Hathaway, in fact, acknowledged the possibility that “venture capital investment may have increased in non-tech sectors too, so that the tech giants have simply diverted the flow of capital to other areas.”25 The is buttressed by an **earlier study** by Oliver Wyman, which shows that **acquisitions** by Facebook, Google, and Amazon have not had a **negative effect** on the amount of **venture capital** flowing into tech industries.26 (See figures 1 and 2.)

Acquisitions Often Increase Innovation

There is often an assumption that acquisitions decrease innovation, but a **number of studies** suggest **the opposite**. A Dutch study looks at acquisitions in the manufacturing sector, which includes technology companies, and finds that **both acquisitions and divestitures** are **positively correlated** with **increased innovation**.27

Likewise, a paper by Igor Letina, Armin Schmutzler, and Regina Seibel argues that prohibiting killer acquisitions **strictly reduces** the **variety of innovation projects** in an industry because it **deters innovation**.28 They built a model in which prohibiting acquisitions has a positive effect on consumer surplus only if the bargaining power of the entrant is small and competition in the industry is not too intense, because both raise the incentives for an incumbent to do its own innovation rather than purchasing that of others. They cautioned:

While prohibiting acquisitions always has a strictly negative innovation effect in the case without commercialization (i.e. for killer acquisitions), it is not necessarily true for acquisitions with commercialization. Thus, even though killer acquisitions may appear to be particularly problematic, the case for prohibiting them is not necessarily stronger than for acquisitions with commercialization if one takes ex-ante innovation incentives into account.29

Moreover, Will Rinehart of the Center for Growth and Opportunity wrote that the **large majority of acquisitions** are motivated by the desire to purchase either the **technology or** the **talent** of the specific firm, rather than to stifle a **potential rival**.30 Sometimes termed “acqui-hires,” these acquisitions refer to when a company is acquired largely as a means to hire its workforce, and the newly hired team is often more productive after acquisition, in part because of economies of scope and increased resources.31 These acquisitions also often benefit **both parties** by integrating new technology into a **broader network** and helping the new firm **scale up**. They also benefit consumers by **disseminating innovations more broadly**. Rinehart related how Facebook’s purchase of Instagram was frequently mocked at the time. Since the purchase, Facebook has helped Instagram become a widely used platform.

Likewise, when Google purchased the start-up Keyhole, an innovative digital mapping company, (at the request of Keyhole founders), Google invested billions to improve and expand the mapping coverage. Bill Kilday, one of the founders of Keyhole, wrote that Google “gave them zero direction [and] unlimited resources.”32 In Keyhole’s early days, Kilday talked with someone who had an idea to do street-level mapping, complete with pictures. He estimated that because of the vast scale of it, coupled with an uncertain business model, it was essentially science fiction, not likely to be seen in his lifetime. Google, with its Street View project, did it in less than five years, providing it to consumers for free. Moreover, by acquiring Keyhole to help it create Google maps, Google disrupted an incumbent duopoly (MapQuest and TeleAtlas) that was charging for their products.

Moreover, the assumption there are many killer acquisitions does not seem to be borne out. One reason is they are **seldom profitable**. A mathematical model developed by Pehr-Johan Norbäck, Charlotta Olofsson, and Lars Persson predicts that companies will **only purchase a new technology** in order to kill it if the **quality of the invention** is **small**, otherwise the **profit** from **introducing the technology** is **higher** than the value of deterring its use.33 This incentive to acquire also falls when intellectual property rights are strong, thereby increasing the entrant’s commercial value. Likewise, a paper by Axel Gautier and Joe Lamesch that surveyed acquisitions by Google, Amazon, Facebook, Microsoft, and Apple finds that out of **175 acquisitions** in the 2015–2017 period the paper surveys, **only one** qualified for being **a potential “killer” acquisition**: Facebook’s acquisition of a photo-sharing app called Masquerade, which had raised just $1 million in funding before being acquired.34

**They provide a safe exit option and encourage *more innovation***

Jennifer **Huddleston &** Juan **Londoño 21**—Director of Technology and Innovation Policy at the American Action Forum; Technology & Innovation Policy Analyst at the American Action Forum. ("Technology and Telecommunications Policy in the Executive Order on “Promoting Competition in the American Economy”," July 12, 2021, from AAF, https://www.americanactionforum.org/insight/technology-and-telecommunications-policy-in-the-executive-order-on-promoting-competition-in-the-american-economy/)

This argument provides an extremely limited vision of the dynamics and the benefits of mergers for both big and small players, but, more important, for consumers. For **entrepreneurs** and **innovators**, mergers and acquisitions provide an **exit option** when they lack of financial **resources**, marketing **power**, **regulatory burdens**, or a desire for expansion becomes a barrier for further **growth**. Merging or being acquired allows these innovators to **receive compensation** for their idea and can result in teams that may be able combine talents more easily. Mergers also allow those innovators who desire to move on and **start another innovative product** to do so with **valuable seed capital** from a prior acquisition. For their part, big companies receive valuable talent and product improvements. But it is not just the businesses that benefit from mergers and acquisitions. Consumers benefit from having access to better products and services that could possibly not exist had the merger not taken place. The focus of merger analysis should remain on the impact on consumer welfare, not on a belief that a certain number of competitors determined by policymakers rather than the market is ideal.

The reasoning for allowing challenge of past mergers often focuses on whether mergers such as Instagram and Facebook or Google and DoubleClick received the appropriate scrutiny. But focusing on past unchallenged **mergers** could also impact future, consumer-benefitting mergers by **deter**ring **risky acquisitions** harming small developers in the process. The counterfactual of how a company would have evolved without a merger is often difficult to know and will have to rely on multiple assumptions that would be difficult to prove with any empirical evidence.

**US will remain leader in AI---funding and quality advantages secure a tentative lead.**

**Savage '20** [Neil; 12/9/20; science writer for Nature; "The race to the top among the world’s leaders in artificial intelligence," https://www.nature.com/articles/d41586-020-03409-8/]

For the near **future**, Ding says, the US is likely to **remain** the **world leader** in AI. “Though China has some exceptional universities, such as Tsinghua University, the US dominates in terms of maybe the **top 20 universities** doing AI research, and that is reflected in the **quality** of the papers. It’s **very unlikely** that China will become the **singular innovation** centre by 2030.”

Many countries see AI as providing a **competitive edge**, not only **economically**, but **militarily**, says Husain. He likens the competition in AI to the Space Race of the mid-twentieth century, in which the US and the Soviet Union vied to be the first to achieve milestones in space travel. “The Space Race yielded **contributions** that differentiated the American **technological ecosystem** from all others **for decades** to come,” says Husain. “If a country **invests heavily** in this area, it will **yield technologies** that will form the **pillar** of **defence capability** and **economic differentiation** for the rest of the century.”

Technologies that can be developed based on AI will indeed have both economic and military benefit, says Daniel Araya, a policy analyst at the Center for International Governance Innovation, a think tank in Ontario, Canada. “We’re talking **new weapons**, data-driven **innovation** for **industry** and **automation**, and **redesigning** how our **society** works from the ground up.”

**U.S. innovation is high and globally dominant---big business is key.**

**Wolf ’21** [Martin; April 27; Chief Economics Commentator, M.A. in Economics from Oxford University; Financial Times, “China is wrong to think the US faces inevitable decline,” <https://www.ft.com/content/8336169e-d1a8-4be8-b143-308e5b52e355>]

The Chinese elite are **convinced** that the US is in **irreversible decline**. So reports Jude Blanchette of the Center for Strategic and International Studies, a respected Washington-based think-tank. What has been happening in the US in recent years, particularly in politics, supports this perspective. A stable liberal democracy would not elect Donald Trump — a man lacking all necessary qualities and abilities — to national leadership. Nevertheless, the notion of US decline is **exaggerated**. The US retains **big assets**, notably in **economics**.

For **one and half centuries**, the US has been the world’s **most innovative** economy. That has been the **basis** of its **global power** and **influence**. So how does its innovative power look today? The answer is: **rather good**, despite competition from China.

Stock markets are imperfect. But the value investors put on companies is at least a relatively impartial assessment of their prospects. At the end of last week, **7 of the 10 most valuable** companies **in the world** and **14 of the top 20**, were **headquartered** in the US.

If it were not for Saudi Arabian oil, the **five most valuable** companies in the world would be **US technology giants**: Apple, Microsoft, Amazon, Alphabet and Facebook. China has two valuable technology companies: Tencent (at **seventh** position) and Alibaba (at **ninth**). But those are China’s **only companies** in the top 20. The most valuable European company is LVMH at 17th. Yet LVMH is just a collection of established luxury brands. That ought to worry Europeans.

When we look only at technology companies, the US has **12 of the top 20**; China (with Hong Kong but excluding Taiwan) has **three**; and there are two Dutch companies, one of which, ASML, is the largest manufacturer of machines that make integrated circuits. Taiwan has the Taiwan Semiconductor Manufacturing Company, the world’s biggest contract computer chipmaker, and South Korea has Samsung Electronics.

Life sciences are another **crucial sector** for **future prosperity**. Here there are seven European companies (with Switzerland and the UK included) in the top 20. But the US has **seven of the top 10**, and 11 of the top 20. There is also one Australian and one Japanese company, but no Chinese businesses.

In sum, US companies **are globally dominant** and **nearly all** the **most valuable** non-US firms are headquartered in **allied countries**.

**China’s inevitably doomed and can’t out innovate America – maintaining our capacity in the next 10 years is critical**

**Pei 21** – Minxin Pei is a Chinese-American political scientist and expert on governance in China, U.S.-Asia relations, and democratization in developing nations.

Minxin Pei, August 30 2021, “Minxin Pei on why China will not surpass the United States,” The Economist, https://www.economist.com/by-invitation/2021/08/30/minxin-pei-on-why-china-will-not-surpass-the-united-states

AMERICA’S CHAOTIC exit from Afghanistan must be seen by Chinese leaders as the latest proof of its irreversible decline. But their euphoria will be short-lived. As consummate realists, they know that President Joe Biden is taking the United States out of the “grave of empires” so that he can conserve America’s power to prevail against China in the next chapter of their contest for global supremacy.

In its essence, the United States-China “strategic competition” is less a confrontation between duelling ideologies than a familiar clash between a **hegemonic power and its challenger**. It seems reasonable to bet that although China will continue to narrow the gap in most dimensions of power in the coming two decades, it will ultimately fail to surpass America. This may elicit a sigh of relief in some quarters of Washington. But a China that has reached near-parity will nevertheless be a formidable geopolitical adversary.

America has adopted a strategy to thwart China’s rise. Framed as “economic decoupling”, this has featured a trade war to force global supply chains to relocate out of China and a tech war to choke off the flow of critical technologies and know-how to China. Few should doubt the efficacy of these measures—just witness how quickly American sanctions have crippled Huawei, the Chinese telecom giant that used to be the leader in 5G technology. But on its own this strategy will only slow down, not stop, China’s advance.

China still has relatively strong economic momentum in the coming decade. Its GDP is about 70% of America’s at market exchange rates (and is already larger than America’s at purchasing-power parity). **Yet Chinese income per person, at slightly over $10,000 a year, is about one-sixth of Americans’ standard of living**. This implies that China has a lot more room to grow, thanks to its huge internal market, its dynamic private sector and its vast pool of workers.

China will also make substantial, albeit slower, progress in the tech sector, despite American restrictions. Beijing has vowed to make huge investments in science and technology to reduce its vulnerability. To be sure, President Xi Jinping is unlikely to realise his ambition of full technological self-sufficiency. However, with millions of well-trained scientists and talented engineers, and trillions of dollars in R&D investment in the coming decade, China should be able to gain greater technological capabilities.

Even if China surpasses the United States as the world’s largest economy at market exchange rates in the next fifteen years (assuming its annual growth averages 4.75% compared with 2% for America**) its GDP per person will still be about one-fourth that of America**. A country four times as rich as its closest geopolitical foe has, in effect, more spare cash to invest in military forces and R&D. It should have the means to stay ahead of the game, assuming that American leaders can muster the necessary political will and unity.

What is more, **China is ageing faster than America**. The UN projects that in 2040 the median age in China will be 46.3 years, compared with 41.6 for the United States. As a result, China’s growth is expected to slow down significantly in the 2030s.

In other areas of power, **America’s lead will prove insurmountable. It will continue to have the world’s best research universities, most innovative technology firms and most efficient financial markets.**

Ironically, the ruling Chinese Communist Party (CCP) will be China’s biggest obstacle in its race with America. The party’s existential fear of losing control will impel it to maintain a tight grip on the economy, making it less efficient. Giant but ossified state-owned enterprises will continue to waste resources. The CCP’s arbitrary exercise of power—as exemplified by its sweeping crackdown on China’s most successful tech companies, such as Didi and Alibaba—**will stifle the innovation and growth of its tech sector more effectively than America’s sanctions**. Most alarmingly, as China descends further into personalistic rule, it will be less able to correct or reverse the questionable decisions made by its top leadership.

Factor in the capabilities of America’s allies, and the balance of power tilts further in America’s favour. Whereas China has no real allies, America is blessed with many. And whereas the United States has no big rivals in its region, **China must contend with several powerful adversaries, notably India and Japan, in its immediate neighbourhood. China is far weaker than most people realise.**

**The U.S. outpaces China in investment, hiring, patents, skill development and deep learning for AI – only we have issue specific evidence**

**Knoema 21** – Knoema Corporation is a privately owned New York-based data technology company launched in 2014, founded in 2011.

Knoema, May 11 2021, “US-China AI Competition | Who is Winning?” https://knoema.com/infographics/sxovfdc/us-china-ai-competition-who-is-winning

(5 May 2021) According to the latest [Artificial Intelligence (AI) Index Report](https://hai.stanford.edu/research/ai-index-2021) by Stanford University, in 2020 for the first time ever China surpassed the USA in the share of AI journal citations worldwide. This is not surprising given the fact that China surpassed the US several years ago in the number of AI journal papers published each year. Another fact from the UN: due to rapid economic expansion and information and communications technology (ICT) investment growth in recent decades, [China's ICT](https://knoema.com/tlnbmw/china-has-built-up-its-digital-muscles) sector today is almost as big as the ICT sector in the US. The question that is raised by these trends is — where is China in the AI race with the US?

Why AI? AI, as the core component of the modern economy based on digital platforms, is becoming the key factor of global competitiveness. The more efficient the AI component, the more added value a digital platform can generate.

Besides AI journal publications and citations, **the US still outpaces China in all other AI-development-related indicators**. For example, **the annual US AI investment exceeds AI investment in China by 138%.**

In a broader context, the R&D (research and development) **investment in the digital sector by US companies exceeds China's R&D investment in the digital sector by 237%.** And today **there are only two Chinese companies, compared with seven US companies**, among the companies worldwide that invest more than $6 billion in the digital sector each year.

Given its faster long-term economic growth, China has the potential to gradually change the balance of global AI power. However, **it is highly unlikely that China or any other country will equal the US in AI potential in the near future.**

Chart, radar chart

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**Startups are booming---the pandemic created fertile ground for innovation.**

Greg **Rosalsky 21**, Reporter at NPR, M.A. in Economics and Public Policy from the Woodrow Wilson School at Princeton University, “What America's Startup Boom Could Mean For The Economy,” NPR, 06-29-2021, https://www.npr.org/sections/money/2021/06/29/1010229557/what-americas-startup-boom-could-mean-for-the-economy

Back in November, the Planet Money newsletter reported that — despite a deadly pandemic and an ugly recession — **America was seeing a boom in the creation of** new **startups**. We spoke with University of Maryland economist John Haltiwanger, one of the leading scholars of business formation. Now Haltiwanger has a new study out, and the trend is clear: "The surge continues," Haltiwanger says. "We're now convinced **this wasn't just a blip."**

Like so many other areas of the economy, applications for new businesses pulled back in the first half of 2020 but then snapped forward again like a slingshot. Not only was 2020 the best year on record for new business creation since the Census Bureau began tracking it in 2004, but applications for new businesses have continued to soar, through at least last month. In May, there were a half a million applications for new businesses; the second highest month on record, below only last July. In total, there have been more than six million filings for new businesses since the pandemic began. The boom can be seen in both businesses composed of only one self-employed person and businesses that the Census expects will employ multiple people.

Over the last year and half, we have been reshuffling how and where we work and shop; and that shift has created all sorts of opportunities for entrepreneurs. With the pandemic, it's like someone ripped out an irrigation pipe for brick-and-mortar commerce and plugged it into virtual commerce. It's brought a drought to face-to-face businesses, and a bounty to businesses you interact with on a digital screen. The retail sector alone, driven by e-commerce, accounts for about a third of all the new startup growth. In addition, trucking, warehousing, and delivery services are all seeing surges — which makes sense, as we've seen a massive shift of spending on in-person services to tangible goods that are bought online.

We've also seen the rise of remote work and a reshuffling of the population, from city centers to suburbs, and from traditional job centers to "Zoom Towns." Where people go, they bring their dollars. It may help explain why the food and accommodation sector is the greatest area of growth. We've also seen huge growth in the types of businesses that can provide remote services.

There are at least two potential theories for what's going on. First, while **the boom is undeniably good news**, there is a slightly negative take: we've seen a surge in new businesses mainly because the pandemic forced two painful restructurings to the economy. It began by ravaging the face-to-face economy and creating an awkward marketplace where we could only do stuff six feet apart. This suffocated many existing businesses while providing oxygen for others, such as online retailers, video conferencing apps, drive-thrus, delivery services, mask and sanitizer companies, and the like. Yet, many of these new opportunities for pandemic-friendly businesses may prove to be only temporary. Many of them could die as we head back to normal.

Now that most of us are vaccinated, we're releasing the pressure cooker of our pent-up demand for going out. It's leading to the second major restructuring: new businesses — restaurants, bars, salons and so on — are growing out of the ashes of the businesses scorched by the pandemic. This is great news! It's better than no new businesses. But it's possible that we're now just heading back to normal, as opposed to something new and better. Think of it like the economy doing a pendulum swing from a normal economy to a pandemic economy and back to a normal economy again.

It's hard to completely rule out this Negative Nancy take. We don't have many details about what exactly the new businesses created during the pandemic are doing, or how big they're gonna get. More importantly, we still don't have great data on how many and what kinds of businesses died over the last year, and whether these new businesses are merely just filling the massive hole created at the beginning of the pandemic. The data suggests the biggest surges occurred at the beginning and tail ends of the pandemic, which is consistent with the idea that this was a pendulum swing.

But Haltiwanger offers a second, more optimistic theory, which says this is about way more than just a pendulum swing**: it's a rocket ship to a better economy**. As painful as the pandemic has been, he believes it has forced the business world to drop outdated ways of doing things and embrace **tech**nology in a new way. "I don't think any of us had a clue that we could do so much business activity remotely," Haltiwanger says. "That sparks all kinds of new ideas."

The MIT economist Erik Brynjolfsson told us last year that history suggests there is "a lot of inertia in the way people work" and that "unless there's a shock, most people will tend to continue to do things the old way." The pandemic, he said, provided that shock. It's forced businesses to fully embrace technologies that enable a whole raft of new business practices, including remote work. Moreover, he argued, **these changes** may finally **result in real productivity growth after** so many **years of stagnation.**

When Haltiwanger looks at the data on business creation, he sees signs that this pickup in productivity may be on the verge of happening. "I have been struck over the last six months at how much of a sustained increase this surge in new business applications has been," he says. "Here's the thing: when we've seen sustained increases like this in the past, it has boded well for job creation, innovation, and productivity growth in the United States."

The legendary Harvard economist Joseph Schumpeter developed a concept known as creative destruction that may help explain what's going on. It describes the cycle of business death and birth that remakes the economy into something more efficient and productive. Economists believe it's a vital process to improve society's living standards. **As destructive as the pandemic has been, it's possible we'll look back and see it as the spark for creating a new and better economy.**

**Particularly in tech.**

Robert D. **Atkinson 21**, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill, “How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine,” Information Technology & Innovation Foundation, 03-10-2021, https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new

Neo-Brandeisians have argued that market concentration has grown, and that this has caused a precipitous decline in the number of business start-ups. In this narrative, “monopoly” is a sclerotic scourge, **rob**bing the economy of its traditional dynamism—which is largely wrong.

This claim is based on correlation. Concentration has increased while the number of start-ups has fallen; therefore, they argue, concentration caused the decline. In fact, **there is no statistical relationship between** changes in **concentration and changes in new firm formation**. Moreover, all the net decline in new firm formation is in one major sector—retail—wherein the results of increasing retail firm size have been superior productivity growth, higher wages for workers in larger stores, and significant consumer benefit in the form of lower prices and broader selection. (See figure 3.)

And when it comes to the most important kind of start-ups—potentially high-growth start-ups, especially in **tech**nology sectors—**there has been no decline**. When MIT professors Jorge Guzman and Scott Stern looked at trends in high-growth entrepreneurship for 15 large states from 1988 to 2014, they found that even after controlling for the size of the U.S. economy, **the second-highest rate of high-growth entrepreneurship occurred** in 2014.21

Chart, waterfall chart

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**More ev---data, talent, and computing power requirements all necessitate big tech firms**

**Vanian 20** – Staff Writer at Fortune

Jonathan Vanian, August 4, 2020, "How antitrust investigations impact U.S. A.I. supremacy," <https://fortune.com/2020/08/04/how-antitrust-investigations-impact-u-s-a-i-supremacy/>

Members from both political parties are concerned that slowing progress by Big Tech in A.I. may benefit China. That country is investing heavily in A.I., with the goal of becoming the world’s leader 2030.

Whatever the case, the federal government shifting to using smaller U.S. tech companies as an alternative to Big Tech isn't particularly realistic. The **data** used by the upstarts for A.I. projects **isn't as complete** as what the tech giants have. Furthermore, the small fry **lack the money** to pay for the tremendous amount of computing power required for A.I. projects. At the same time, they face a tougher time **attracting** the necessary **talent**, she explained.

**Data is the ONLY thing that matters in the development in high tech weaponry---startups will lead to a bunch of half-baked solutions that CAN’T solve**

**Sundblad 18** – Willem Sundblad is a manufacturing industry expert and specializes in analyzing and commenting on trends with clarity and technical expertise.

Willem Sundblad, October 18 2018, “Data Is The Foundation For Artificial Intelligence And Machine Learning,” Forbes, https://www.forbes.com/sites/willemsundbladeurope/2018/10/18/data-is-the-foundation-for-artificial-intelligence-and-machine-learning/?sh=6640b85251b4

Artificial intelligence (AI) and machine learning (ML) are going to have a huge impact on manufacturing. With these technologies, manufacturers will gain the computational power needed to solve problems that humans can’t possibly solve. They will ultimately be able to provide prescriptive answers to production issues manufacturers have been asking for centuries. Namely, how do we make our product as efficiently as possible, with zero waste and the least amount of downtime.

As with most reports about groundbreaking technology, this discussion of the ‘holy-grail’ is way ahead of industry practices. The vision serves a useful purpose in suggesting what’s possible. But with many manufacturers lacking the data infrastructure necessary to obtain real AI and ML capabilities, the journey towards perfect production can also be so abstract that it confuses the very people looking to achieve it. I’m often asked by corporate leadership, “Where and how do we adopt AI technology?”

Begin with data

While the sci-fi-sounding AI scenarios highlight the technology’s incredible computational power, the practical, **effective applications begin with data. Indeed, data is both the most underutilized asset of manufacturers and the foundational element that makes AI so powerful. Think of**[**Maslow’s Hierarchy of Needs**](https://www.simplypsychology.org/maslow.html), a theory of motivation that is depicted as a pyramid, with the most basic, most important needs at the bottom, and the most complex needs at the top.

The Data Science Hierarchy of Needs Pyramid

 SOURCE: “THE AI HIERARCHY OF NEEDS” MONICA ROGATI.

Similarly, [Monica Rogati’s Data Science Hierarchy of Needs](https://hackernoon.com/the-ai-hierarchy-of-needs-18f111fcc007) is a pyramid showing what’s necessary to add intelligence to the production system. At **the bottom is the need to gather the right data, in the right formats and systems, and in the right quantit**y. Any application of AI and ML will only be as good as the quality of data collected.

When beginning to adopt AI, many manufacturers discover that their data is in many different formats stored [throughout several MES, ERP, and SCADA](https://www.forbes.com/sites/willemsundbladeurope/2018/10/03/beyond-digital-transformation-how-industry-4-0-benefits-your-customers-employees-and-culture/#1704f40f29fc) systems. If the production process has been manual, very little data has been gathered and analyzed at all, and it has a lot of variance in it. This is what’s known as ‘dirty data’, which means that anyone who tries to make sense of it—even a data scientist—will have to spend a tremendous amount of time and effort. They’ll need to convert the data into a common format and import it to a common system, where it can be used to build models.

Once good, clean data is being gathered, manufacturers must ensure they have enough of the right data about the process they’re trying to improve or the problem they’re trying to solve. They need to make sure they have enough use cases and that they are capturing all the data variables that are impacting that use case.

For example, gathering only one variable about revolutions per minute of your machine is not going to be enough to tell you why a failure happened. However, if you add vibration, temperatures, and data about many conditions that contribute to machine failure, you can begin to build models and algorithms to predict failure. In addition, as more data is collected, you can create accuracy requirements, such as This algorithm will be able to predict this failure within one day’s time, with 90% accuracy.

If this all sounds complicated, solutions are available to automatically collect the data from a variety of devices and systems, then automatically clean the data or format. This allows engineers to focus on building models and algorithms, rather than spend time cleaning the data.

Start by solving a simpler problem

Starting an AI journey with a data first approach allows manufacturers to start understanding and controlling their processes from the beginning. This not only helps manufacturers get to a controlled process and begin reaping some relatively quick benefits like eliminating process variations, it will improve the types of analytics they can do in the future, with more advanced AI and ML models.

Remember: If your process is out of control, adding AI to it won’t magically fix it.

Another crucial reason to start with gathering data and solving immediate production problems is to gain first mover advantage in your industry. C**ompanies like Google, Amazon and Facebook dominated their industries because they were the first to begin building data sets. Their data sets have become so large, and their data collection and analysis so sophisticated that they are able to grow their competitive advantage.**

For manufacturers, the equation is similar. The sooner a manufacturer starts the journey toward AI, the sooner they will build large data sets that will enable them to execute advanced AI and ML models. With each iteration, they’ll put more distance between themselves and the competition

**B] Innovation decline’ from mergers is wrong**

**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>)

The bigger picture is that **it is extremely difficult**, even with hindsight, **to determine whether these mergers might have been detrimental to competition and consumers**. Perhaps more problematically, there are no obvious heuristics to identify mergers that are, on balance, more likely to harm competition.

Scholars have also published several theoretical papers concerning potential killer acquisitions in the tech sector. Mark Lemley and Andrew McCreary, for instance, argue that the acquisition of startup companies by large platforms leads to concentration in the tech industry and averts the Schumpeterian competition that would otherwise enable the acquired startups to compete with, and ultimately displace, incumbents.217 The authors substantiate this claim by citing evidence that acquisitions have gradually gained in importance, relative to IPOs.218 In other words, in a world without startup acquisitions, the authors believe thar far more companies would opt for IPOs and ultimately compete head-on with incumbents.

But the authors gloss over several critical counterarguments. For a start, **it is not clear that VC funding would remain at its current levels if exit by acquisition were taken off the table**. 219 Put simply, acquisitions may offer an exit to early investors in cases where IPOs are not a realistic prospect, thus increasing the incentive to invest in startups in the first place; barriers to market exit have been known to slow investments. 220

Likewise, **it is far from clear that market concentration is a problem in and of itself**. For example, economic analysis of the relationship between **market structure an innovation** suggests there is an **ambiguous relationship** between both variables, or at the very least a nonmonotonic one.221

Finally, the authors are dismissive of potential efficiency justifications that may underpin startup acquisitions. But the fact that startups routinely opt for acquisition instead of IPOs suggests the former is often more lucrative. While, in some cases, this could be due to market power reinforcing effects, in other cases superior efficiency of acquirers (or the inefficiency of targets) may play a larger role. This is almost by definition the case when the acquiring and target firms are not competitors or potential competitors.222 The managerial efficiency of incumbents223 , economies of scale224, and complementary dynamic capabilities225 are but a few potential explanations for these purchases. In short, the authors thus fail to adequately substantiate their claim that startup acquisitions reduce consumer welfare.

To summarize, while studies of this sort may indeed suggest that the clearance of certain mergers may not have been optimal**, it is hardly a sufficient basis on which to argue that enforcement should be tightened.** The reason for this is simple: As explained above, the fact that some anticompetitive mergers may have escaped scrutiny and/or condemnation is **never a sufficient basis to tighten rules**. For that it is also necessary to factor in the administrative costs of increased enforcement, as well as potential false convictions to which it might give rise. As things stand, economic research on killer acquisitions in the tech sector does not warrant tougher antitrust enforcement, though it does show the need for further empirical research on the topic.

**Government relationships---Pentagon subcontractors refuse to prioritize small businesses**

**Maucione 18** – Scott Maucione is a defense reporter for Federal News Network and has worked in journalism for over a decade. He received his B.A. in journalism and political science from the University of Maryland and his Master’s from American University in applied politics.

(Scott Maucione, 5-17-2018, "Military not giving small business subcontractors a fair shake, DoD IG says," Federal News Network, <https://federalnewsnetwork.com/defense-main/2018/05/military-not-giving-small-business-subcontractors-a-fair-shake-dod-ig-says/>)

**The military services are not giving small businesses a fair shake when it comes to awarding contracts**.

The Defense Department Inspector General Office unearthed some disturbing trends over the past few years for small business owners trying to do business with the military.

“We’ve done five different audits,” said Michael J. Roark, assistant inspector general for readiness and global operations at DoD IG, while testifying before the House Small Business Subcommittee on Contracting and Workforce on May 17. “The consistent challenges contracting officials face is monitoring prime contractors’ compliance with individual subcontracting plans and determining why individual contractors with subcontracting plans did not meet their small business subcontracting goals.”

Two of the DoD IG audits were performed on the Marine Corps, two others were on the Air Force and the final on the Army.

The requirements overlooked are mandated by the Small Business Act to help small companies work with the government and give them a chance to inject their ideas into the government’s procurement.

Tiffany Scroggs, president of the Association of Procurement Technical Assistance (PTAC) said the trends the DoD IG found are consistent with PTAC’s experience not only in military procurement, but **across all agencies and buying activities.**

“**In the broader context of government acquisitions**, **expanding access to small business subcontracting** opportunities **is** often **not treated as a priority at any level**, not by buying offices, not by agency leadership, and not by policy. As a consequence, **it is not a priority for prime contractors either**. But it should be,” Scroggs said.

The most recent audit by DoD IG found two Army Contracting Commands (ACCs) did not comply with rules requiring them to administer subcontracting plans, which ultimately denied small businesses about $915 million in subcontracting opportunities.

“The Inspector General investigated 50 contracts for this report. **Extrapolate this across the entire Army procurement system and the damage to small businesses could be devastating.** Make no mistake, these are disturbing and egregious errors made by the Army that should not have occurred,” Subcommittee Chairman Rep. Steve Knight said during the hearing. “Perhaps most alarming is the IG’s finding that **administering subcontracting plans is not a high priority at the ACC**. This is a short-sighted view, failing to take into account the enormous cost the loss of qualified, high-performing small business contractors would have on our industrial base.”

**And the contract procurement process fundamentally excludes small companies**

**Foster 20** –Visiting Researcher at Georgetown’s Center for Security and Emerging Technology (CSET). Graduate student in the Department of War Studies at King’s College London. B.A. from Amherst College.

(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-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.

**Major deals are up and only increasing**

**McGee 21** – FT San Francisco Correspondent

Patrick Mcgee, 5-16-2021, "Silicon Valley reboots its relationship with the US military," Financial Times, https://www.ft.com/content/541f0a02-ea27-43a4-b554-96048c40040d

But for all the headlines suggesting that Big Tech is shunning work with the military, **major deals continue.**

Earlier this year, Microsoft won a 10-year, $22bn contract to supply 120,000 close-combat US soldiers with augmented reality headsets. In 2019, it was awarded a $10bn cloud computing contract for the Pentagon that many assumed was going to Amazon, which had also been an enthusiastic bidder.

Brandon Tseng, co-founder of Shield AI — a start-up helping the Pentagon build unmanned systems for conflict zones — says that, **for every example of a Google stepping back, there is a Microsoft stepping in**. **“It’s a myth that talented engineers don’t want to work with the military,”** claims Tseng, a former Navy Seal. “We’re close to 200 employees now, doubling year-to-year, and there’s tons of inbound interest . . . By and large, you find an enthusiastic workforce interested in helping the government solve these problems.”

**No impact – we can still maintain the tech advantage through continuous innovation**

**Smith 21** – Bloomberg Opinion columnist, former assistant professor of finance at Stony Brook University

Noah Smith, "Don't Waste America's Best Chance to Beat China," Bloomberg, 4-6-2021, https://www.bloomberg.com/opinion/articles/2021-04-06/beating-china-means-the-u-s-must-keep-its-research-lead

Making the U.S. more competitive with China is a big talking point for President Joe Biden as he promotes his economic agenda. After watching China seemingly go from strength to strength for two decades, it's natural to wonder in which industries we might actually have a chance at winning. The answer is: More than you might think, as long as the U.S. adopts a smart strategy and takes care to maintain its core advantages.

In the 2000s, large segments of U.S. industry packed up and went overseas, drawn by the unbeatable “China price.” China’s low-cost advantages included not just labor, but subsidized capital, cheap land, cheap coal power and lax environmental regulations. Now, in the 2020s, the competitive landscape is much different. Decades of rapidly rising wages, limits on coal supplies, and efforts to clean up air and water have forced up Chinese costs until China is no longer automatically the cheaper place to manufacture things anymore. Mexico or Vietnam are more likely to get the factories of manufacturers who care chiefly about cost.

That doesn’t mean China isn’t a fearsome competitor, only that the type of competition has shifted. Whereas once China did low-value assembly work, now it’s pushing into high-tech industries, such as semiconductors, 5G wireless equipment, drones, high-speed trains and cell phones. So while the battle for jobs is now over, the fight for market share and technological supremacy is just beginning. China’s government is going all-in on industrial policy in order to make sure its companies, which enjoy a substantial amount of state support, dominate as many high-value sectors as possible.

But the U.S. has plenty of tricks left up its sleeve. Our victory in the vaccine race was resounding, thanks in large part to the almost magical mRNA technology. Former President Donald Trump’s export controls also exposed various supply-chain weaknesses in key Chinese industrial champions like Huawei Technologies Co.; there were a number of high-tech products, like certain computer chips and specialized chip manufacturing equipment, that China hasn’t been able to make yet. These were often produced by small, obscure U.S. firms with highly specialized knowledge. China also lags in aircraft and a number of other high-tech manufacturing industries. Nor have many of its software companies become as internationally successful as Alphabet Inc.'s Google, Facebook Inc., Microsoft Corp., or Amazon.com Inc.

The industries in which the U.S. can outcompete China have one thing in common: continuous innovation. China’s vast, hard-working, and experienced manufacturing workforce is very good at figuring out how to make high-tech products very efficiently. U.S. designs tend to leak to Chinese companies, either through joint ventures, industrial espionage or reverse engineering. And because East Asia is now such a center of global manufacturing, it’s easy for Chinese companies to source needed parts domestically or nearby, while the U.S. has more trouble doing this. Thus, when the U.S. beats China in a high-tech industry, it’s because American companies manage to innovate and come out with new and better products faster than Chinese companies can copy them. These new products can rapidly seize market share and keep margins high.

**Turn – two arguments –**

**New entrants increase Chinese investment**

**Thompson 20** (Loren, Deputy Director of the Security Studies Program at Georgetown University and taught graduate-level courses in strategy, technology and media affairs at Georgetown, taught at Harvard University's Kennedy School of Government. I hold doctoral and masters degrees in government from Georgetown University and a bachelor of science degree in political science from Northeastern University. “Inventing Bogus Antitrust Arguments To Bring Down Big Tech Is Bad For National Security’, https://www.forbes.com/sites/lorenthompson/2020/07/16/inventing-bogus-antitrust-arguments-to-bring-down-big-tech-is-bad-for-national-security/?sh=75afc944784b)

What makes this relevant to national security is that the new entrants increasingly **aren’t American, they’re Chinese**. The biggest reason U.S. manufacturing has receded since 2000 is the rise of China, and the success of companies like Beijing-based Bytedance—TikTok’s parent—is a signal that China is capable of doing the same thing to U.S. tech companies that it has already done to steel makers and electronics manufacturers.

TikTok was downloaded over 300 million times during the first quarter on 2020, making it the most downloaded app during a single quarter in history. Six of the top ten apps in India, soon to be the world’s most populous country, are Chinese. Indian authorities reversed that trend when they banned Chinese apps after a border skirmish, but America’s Internet-based service providers can expect continuous assaults by Chinese rivals **for the foreseeable future.**

Beijing is undoubtedly encouraging if not subsidizing such assaults. The contrast between how the Chinese government treats its tech companies and the way Washington treats its own players is hard to miss. Whether we like it or not, companies like Alphabet and Facebook have become the leading purveyors of American ideas and influence to the world. If they are hobbled, Chinese competitors **will eagerly take their place.**

There is no compelling argument for breaking up or otherwise sanctioning U.S. technology leaders. If you think America’s Big Tech companies have too much power, imagine how it will feel when their successors are **run out of the People’s Republic.**

**Increased antitrust forces big companies to give China their data.**

**CCIA 21** – Computer & Communications Industry Association

Computer & Communications Industry Association, "National Security Issues Posed By House Antitrust Bills," CCIA White Paper, prepared by King & Spalding LLP on behalf of the Computer & Communications Industry Association., 9-13-2021, https://www.ccianet.org/wp-content/uploads/2021/09/CCIA-KS-NatSec-White-Paper.pdf

Giving Foreign Companies Advantageous Treatment Without Requiring Reciprocity

The House Judiciary bills impose a series of restrictions on **leading U.S. tech companies**, but do not place **any similar restrictions** on **foreign competitors**. Most important from a national security perspective, the bills would make it easier for Chinese and other foreign competitors to **acquire U.S. tech**nology. For instance, the limits on acquisitions imposed in H.R. 3826 would apply only to a handful of leading U.S. tech companies. This would **better position foreign companies** to acquire innovative U.S. companies, enabling foreign countries to **own key tech**nologies **and IP** that are currently held in the United States. Foreign companies would also benefit from **reduced competition** and prices when bidding on U.S. technologies. Similarly, the restrictions on the operations of a handful of leading U.S. tech firms in H.R. 3825 would likely result in these companies divesting parts of their integrated product lines, potentially allowing foreign companies to **acquire these divested assets** and lines of business. Indeed, other covered U.S. companies would likely be unable to acquire these divested assets, significantly lowering the price that foreign companies would need to pay to acquire them.

**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.