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Unifying Antitrust Enforcement for the Digital Age

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Unifying Antitrust Enforcement for the Digital Age

John O. McGinnis* & Linda Sun**

Abstract

As the digital revolution continues to transform competition among businesses, U.S. antitrust enforcement has struggled to remain effective. The U.S. has long depended on a system of dual antitrust enforcement through both the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Modern technology has greatly exacerbated existing structural deficiencies of the two-headed approach, at times resulting in deadlock. The two agencies approach new antitrust issues generated by computational technologies differently and fight over who should lead key investigations, leading to economic uncertainty in the most important business sectors. These enforcement disagreements can also hobble the government's response to significant national security issues emerging from the interplay of technological competition among private companies and among nation states. Further, dual enforcement hinders government action in the newly critical area of data privacy: the agency responsible, the FTC, suffers a mission overload of enforcing both antitrust and privacy, which can work against each other.

The best solution is for the DOJ to become the sole antitrust enforcement agency. First, antitrust decisions, especially in the

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technology arena, directly affect geopolitical competition and international relations, a province constitutionally assigned to the president. It therefore makes more sense for the DOJ, which, unlike the FTC, is controlled by the president, to direct antitrust enforcement as one piece of a larger foreign policy. Second, consolidating enforcement in the DOJ would also allow the FTC to concentrate on enforcing privacy law, free from its sometimes-conflicting antitrust mandate. Dual enforcement of antitrust law should yield to single agency enforcement, with the FTC enforcing privacy and the DOJ enforcing antitrust.

Table of Contents

INTRODUCTION	307
I. CONSOLIDATING ANTITRUST ENFORCEMENT.....	314
A. <i>Antitrust Regulation of Technology</i>	315
1. The Need for Certainty in Antitrust Regulation of Technology	317
2. Technological Turf Wars.....	326
3. Standard-Essential Patents: A Case Study in Incoherence.....	333
B. <i>Dual Enforcement Causes Inefficiencies and Inconsistent Outcomes</i>	341
1. Waste and Uncertainty	341
2. The Accidental Origins of Dual Enforcement...	347
3. Worldwide Trend of Single Enforcement.....	349
4. Private Antitrust Suits Do Not Support Continued Dual Agency Enforcement.....	349
II. ANTITRUST ENFORCEMENT SHOULD BE CONSOLIDATED WITHIN THE DEPARTMENT OF JUSTICE	352
A. <i>Antitrust Policy Increasingly Implicates Foreign Policy</i>	352
B. <i>Consolidating Antitrust Enforcement under the DOJ Allows the FTC to Focus on Privacy</i>	362
CONCLUSION.....	376

INTRODUCTION

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

Accelerated technological change exacerbates three main problems with the dual antitrust agency system. First, while dual enforcement has always created uncertainty and thus harmed business planning and economic growth, developments in computer technology have made these problems more acute.³ In recent decades, the technology industry has experienced the rise of a handful of dominant companies, such as Facebook, Google, Amazon, and Apple, all central to the economic vitality

1. See William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 508 (1996) (explaining the U.S. antitrust enforcement structure).

2. See, e.g., Norman Armstrong et al., *Senators Urge DOJ to Develop Antitrust Guidance for Licensing of Standard Essential Patents*, JD SUPRA (Oct. 25, 2019), <https://perma.cc/Q8H4-9JPL> (“The FTC and DOJ have adopted opposing positions at times [with regard to antitrust enforcement], and there have even been internal inconsistencies within the agencies.”).

3. See Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 695, 714 (1990) (remarking that as markets have become more competitive “dual enforcement is a luxury we can no longer afford”).

of the nation.⁴ Contemporaneously, debate has erupted over how antitrust law should be adapted to regulate these companies, which have introduced new platforms, markets, and products that were not anticipated by traditional tests.⁵ Advocates for cracking down on tech giants like Apple and Google argue that the companies wield outsized market power and harm competition.⁶ On the other side, critics of increased competition regulation for the technology sector note that technology advances so quickly that seemingly-entrenched monopolists are in fact easily replaced by competition.⁷ At such a pivotal moment, the FTC and DOJ have failed to work together effectively. Instead, inter-agency fighting and a divided framework have created uncertainty for the regulation of the economically vital technology industry.⁸

Second, the growing power and ever widening scope of computational technology has entangled antitrust policy with international politics and national security.⁹ Electronic

4. See Kyle Daly, *Big Tech's Power, in 4 Numbers*, AXIOS (July 27, 2020), <https://perma.cc/PE4G-A2EY> (reporting that the combined annual revenue of Facebook, Google, Amazon, and Apple was \$773 billion in 2019).

5. See Scott Scher et al., *United States: Digital Platforms*, in GLOBAL COMPETITION REVIEW INSIGHT: AMERICAS ANTITRUST REVIEW 2020 68, 68–74 (2019), <https://perma.cc/3RBW-DMQ8> (PDF) (evaluating how the new digital age impacts the DOJ's and FTC's fundamental analyses).

6. See Rachel Martin, *Have Tech Companies Become Too Powerful? Congress Will Investigate*, NAT'L PUB. RADIO (June 4, 2019, 5:00 AM), <https://perma.cc/KU7Y-LA2X> (“Some [members of] Congress think that [Facebook, Google, Apple, and Amazon] have gotten way too big and have way too much power to the point that they are snuffing out competition and actually harming consumers.”).

7. See Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade?*, 32 ANTITRUST 72, 73 (2018), <https://perma.cc/PP9T-SBUN> (PDF) (“[N]etwork effects do not imply entrenchment and can actually lead to quicker destabilization of a market leader position.”).

8. See Lauren Feiner, *Here's Why the Top Two Antitrust Enforcers in the US Are Squabbling Over Who Gets to Regulate Big Tech*, CNBC (Sept. 18, 2019, 10:31 AM), <https://perma.cc/2SYZ-XW3N> (noting the complaint among some lawmakers that the DOJ and FTC are “wasting time fighting with each other instead of digging into their investigations”).

9. See Jon Bateman, *The Antitrust Threat to National Security*, WALL ST. J. (Oct. 22, 2019, 6:43 PM), <https://perma.cc/GK4B-7E8Z> (“Any responsible

technology has increased the avenues of attack and transformed traditional weapons of war.¹⁰ Innovations in hardware and software have introduced novel methods of espionage and cyberwarfare such as computational propaganda, trolling, and sophisticated hacking.¹¹ This technological acceleration has led to an international battle for technological dominance that has been dubbed a “technology cold war.”¹² China and Russia in particular have dedicated significant resources towards hostile social manipulation or information/influence warfare.¹³ Ceding control over communications technologies to foreign powers may leave the U.S. vulnerable to surveillance and infrastructure takedowns.¹⁴ Hacking groups have targeted U.S. defense contractors and telecommunications companies.¹⁵ As both the Obama and Trump administrations recognized,¹⁶ antitrust

antitrust debate must address the national security risks of breaking up Big Tech—and the parallel risks of keeping these companies intact.”).

10. See Jon Harper, *U.S., Allies Bolstering Electronic Warfare Systems*, NAT'L DEF. MAG. (Feb. 27, 2020), <https://perma.cc/75JW-Y94B> (“The U.S. is expected to lead the way in electronic warfare spending [over the next several years.]”).

11. MICHAEL J. MAZARR ET AL., *HOSTILE SOCIAL MANIPULATION: PRESENT REALITIES AND EMERGING TRENDS* 22–23 (RAND Corp. ed., 2019), <https://perma.cc/SP6C-LBJJ> (PDF).

12. Billy Perrigo, *Britain Sides with China in Technology Cold War*, TIME (Jan. 30, 2020, 6:43 AM), <https://perma.cc/Q67Y-7AZP>.

13. See MAZARR ET AL., *supra* note 11, at xii (“Russia and China believe themselves to be engaged in an information war with the West . . . and have begun to invest significant resources in such tools.”).

14. See *id.* at xiii (“[D]espite the apparent limited effects to date, the marriage of the hostile intent of several leading powers and the evolution of several interrelated areas of information technology has the potential to vastly increase the effectiveness and reach of these [technological social manipulation] techniques over time.”).

15. See *9 Latest Cyber-Espionage Affairs*, EC-COUNCIL BLOG (Mar. 7, 2019), <https://perma.cc/D5T9-MMYD> (“[A] group of Chinese-linked hackers . . . targeted defense contractors and telecommunications companies in the United States and Southeast Asia.”).

16. See Liz Gaines, *President Obama Says Europe’s Aggressiveness Toward Google Comes from Protecting Lesser Competitors*, BENTON INST. FOR BROADBAND & SOC’Y (Feb. 16, 2015), <https://perma.cc/Y9XR-6SKY>; Caoimhe Toman, *Trump Attacks EU Sanctions US Tech Companies*, SHARECAST NEWS (June 26, 2019, 5:18 PM), <https://perma.cc/UZ7W-GBT8>.

enforcement can impede domestic technological advancement by giving foreign companies—collaborating with foreign governments—a competitive advantage. Because of the increased importance of antitrust to national security, enforcement should be left to the DOJ alone. Its leaders serve at the pleasure of the president, whose office has greater perspective and tools available in protecting the nation and navigating international relationships.

Third, digital technology has amplified a central issue of consumer protection—privacy. Technology has increased the amount and the ease by which personal data is collected, stored, and shared, leaving consumers in a vulnerable position. The FTC currently oversees both domestic antitrust enforcement and privacy, but has no more than fifty employees working on privacy issues.¹⁷ Without a doubt, the agency requires more people dedicated to privacy law and regulation.¹⁸ But more than a higher headcount, the FTC needs to shed its antitrust jurisdiction because the underlying purpose of competition law can conflict with the development of privacy regulation.¹⁹ Antitrust law promotes the free market, while privacy laws disturb the free market to protect consumers.²⁰ Agencies operate more efficiently when they can focus on a coherent mission free of internal tension.²¹ Eliminating the FTC's antitrust responsibilities would enable the agency to give the consumer

17. See Chris Jay Hoofnagle et al., *The FTC Can Rise to the Privacy Challenge, but Not Without Help from Congress*, BROOKINGS INST. (Aug. 8, 2019), <https://perma.cc/YA4Z-HS67> (describing the FTC's workforce). In comparison, the U.K.'s information commissioner's office has over seven hundred employees dedicated to privacy and data protection. *Id.*

18. See *id.* (“Resources are the FTC's greatest constraint. It is a small agency charged with a broad mission in competition and consumer protection.”).

19. See Ernest Gellhorn, *Two's a Crowd: The FTC's Redundant Antitrust Powers*, AM. ENTER. INST. (Dec. 7, 1981), <https://perma.cc/L22B-W354> (“The whole theory of consumer protection is very different from that which should underlie antitrust enforcement. Properly defined, antitrust intervenes in the market only to correct market failures by barring conduct that distorts market forces or otherwise by restoring competitive opportunities.”).

20. See *id.*

21. See *infra* notes 371–379 and accompanying text.

protection problems of data privacy and security the focus they warrant.

A recent important case, *Federal Trade Commission v. Qualcomm, Inc.*,²² showcases the contemporary confusion created by retaining two antitrust enforcement agencies.²³ The FTC brought suit against Qualcomm for allegedly violating antitrust law with its “no license, no chips” policy, which required phone makers to license Qualcomm’s patents if they wanted to purchase the company’s smartphone chips.²⁴ In the appeal before the Ninth Circuit,²⁵ the Department of Justice took the podium to argue directly against the FTC’s position on standard-essential patents, an issue of great importance to technological development. Additionally, the Department of Justice argued that the suit, brought by one of the government’s own agencies, posed a threat to national security because Qualcomm’s competitive position as a domestic chipmaker was important to maintain for the nation’s safety.²⁶ The impact of the case will be far-reaching, as evidenced by the multiple amicus briefs filed by scholars, companies, and organizations in fields from economics to patent law.²⁷ With so much on the line,

22. 411 F. Supp. 3d 658 (N.D. Cal. 2019).

23. See generally *id.* See John D. McKinnon & Brent Kendall, *U.S. Antitrust Enforcers Signal Discord over Probes of Big Tech*, WALL ST. J. (Sept. 16, 2019, 10:11 PM), <https://perma.cc/R8AV-2NKL> (referencing Senator Mike Lee’s statement regarding the Qualcomm case that “[t]his kind of dysfunction and confusion illustrates why having two agencies at loggerheads does not make for effective antitrust enforcement”).

24. See *Qualcomm*, 411 F. Supp. 3d at 669, 703.

25. *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

26. See Brief for the United States of America (Dep’t of Justice) as Amicus Curiae Supporting Appellant and Vacatur at 2, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122) (“[T]he court erred in imposing an expansive compulsory licensing remedy . . . that . . . has the potential to negatively impact innovation in 5G technologies and compromise national security.”).

27. See, e.g., Brief for Antitrust and Patent Law Professors, Economists, and Scholars as Amici Curiae Supporting Appellant and Reversal, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122); Brief for Alliance of U.S. Startups & Investors for Jobs (“USIJ”) as Amici Curiae Supporting Appellant *Qualcomm Incorporated*, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122); Brief for Dolby Laboratories, Inc. as Amici Curiae

the agencies wasted government resources, created confusion for corporations, and undermined a coherent foreign policy by advocating against each other. Even the Ninth Circuit noted the oddity of a divided opinion from the government.²⁸

This paper proceeds in two parts. Part I explains how the importance of technology to the economy together with the difficulty of applying antitrust laws to new technology combine to make the uncertainty generated by dual enforcement a crippling problem. The dispute between the FTC and DOJ regarding standard-essential patents (SEPs) exemplifies the confusion.²⁹ Even outside of the technology disputes, the dual agency structure has not worked, creating costly inefficiencies and turf disputes. The Part examines the problems that flow from a duplicative structure—from wasted resources to substantive delays.³⁰ These concerns show that antitrust enforcement must be consolidated under one agency.

The Part also responds to the view that dual enforcement may have compensating advantages by bringing to bear different views on complicated issues and letting the courts decide which is better. Courts are unlikely to be good at choosing between agency views in an area as complicated as antitrust. Indeed, more than in other areas, courts rely on the government's published antitrust guidelines for their framework of analysis.³¹ Moreover, antitrust cases take a very

Supporting Neither Party, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122).

28. *FTC v. Qualcomm, Inc.*, 935 F.3d 752, 754 (9th Cir. 2019) (“Although the hardship to the party opposing the stay and the public interest usually merge when the government is the opposing party, this case is unique, as the government itself is divided about the propriety of the judgment and its impact on the public interest.” (internal citations omitted)). Ultimately, the Ninth Circuit ruled in favor of Qualcomm on legal grounds. *Id.* at 757. But that victory for the DOJ's position was not based on foreign policy considerations, and another panel could have come out for the FTC, as did the district court.

29. *See infra* Part I.A.3.

30. *See infra* Part I.

31. *See infra* notes 85–86 and accompanying text.

long time to resolve,³² and the uncertainty created by agency disagreement can retard the most dynamic sector of the economy. Finally, if this approach were sound, the government would generally use dual agencies to enforce major laws, like those applying to securities or the environment, but it does not do so.

Part II discusses why antitrust enforcement should be consolidated in the Department of Justice. First, advancing technology has exacerbated the effects of antitrust policy on national security and rising data privacy concerns.³³ Therefore, the DOJ should lead antitrust enforcement to enable the executive branch to coordinate enforcement with foreign affairs. Whatever one's view of a particular president, the need for a unitary voice in foreign affairs has long been established.³⁴ And there is no substitute for the national security apparatus and the intelligence it brings that is under the president's control.

Second, consolidation of antitrust within the DOJ would enable the FTC to expand its efforts on protecting privacy, the pressing consumer protection problem of the technological age. Agencies do better when they have a focused mission without internal tensions.³⁵ Antitrust law promotes competition and yet privacy law often attempts to guarantee a level of privacy stronger than that which would be delivered by the market.³⁶ As

32. See Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 692 (2010) (“[T]he average private antitrust lawsuit today takes over six years to disposition . . .”).

33. See Dakota Foster, *Antitrust Investigations Have Deep Implications for AI and National Security*, BROOKINGS INST. (June 2, 2020), <https://perma.cc/VG6A-HVJ7> (“With defense officials arguing that U.S. military superiority may hinge on artificial intelligence capabilities, antitrust action aimed at America’s largest tech companies . . . could affect the United States’ technological edge.”).

34. The notion that the president alone is responsible for the nation’s foreign policy decisions goes back to the early republic. The most famous articulation at that time is John Marshall’s statement in the House of Representatives: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” 10 ANNALS OF CONG. 613 (1800); see *infra* notes 256–261 and accompanying text.

35. See *infra* notes 314–316 and accompanying text.

36. See Mark MacCarthy, *Privacy Is Not an Antitrust Issue*, FORBES (Oct. 1, 2018, 4:39 PM), <https://perma.cc/5WSS-SFCQ> (“How can ensuring

a result, most foreign nations have an agency devoted to privacy law distinct from that devoted to antitrust law. The United States should join that international consensus.

I. CONSOLIDATING ANTITRUST ENFORCEMENT

Antitrust enforcement should be consolidated under a single agency. The failures of dual enforcement by the FTC and DOJ can be placed in two buckets: inefficiencies and inconsistencies. Dual enforcement causes duplication of effort and uncoordinated workflow, but also divergent procedures and uncertain outcomes.³⁷ These problems are exemplified and exacerbated in our age of technological acceleration.

Subpart A shows that regulation of the technology industry, probably the most important area of our economy, is an emerging area of bitter contention. Both the FTC and DOJ regulate competition issues in technology, and the agencies have struggled to divide investigations of the industry due to the intertwined actors and complex issues.³⁸ First, the subpart describes the novel challenges brought on by electronic technology. Since traditional antitrust tests are often an uneasy fit for new markets and methods of competition introduced by technology,³⁹ divided enforcement exacerbates the uncertainty in how antitrust law will be applied. Second, the subpart examines agency turf wars over the industry: the agencies have

reasonable competitive conduct in markets advance consumer privacy interests? It seems like a classic case of apples and oranges.”).

37. William Blumenthal, *Models for Merging the U.S. Antitrust Agencies*, 1 J. ANTITRUST ENF'T 24, 29–30 (2013).

38. See McKinnon & Kendall, *supra* note 23 (citing tech issues as a “major contributing factor” to the strained relationship between the FTC and the DOJ).

39. See, e.g., Jeffrey A. Eisenach & Ilene Knable Gotts, *In Search of a Competition Doctrine for Information Technology Markets: Recent Antitrust Developments in the Online Sector*, in COMMUNICATIONS AND COMPETITION LAW KEY ISSUES IN THE TELECOMS, MEDIA & TECHNOLOGY SECTORS 69 (Fabrizio Cugia di Sant’Orsola et al. eds., 2015) (discussing cases that illustrate the challenges of enforcing competition law in information technology markets).

struggled to coordinate investigation of tech companies⁴⁰ to the detriment of the companies, consumers, and innovation as a whole.

Finally, the subpart offers a case study of how technological developments have led to intractable disagreement between the agencies by way of examining standard-essential patents. Standard-Essential Patents (SEPs) provide the foundation for future technological progress, but the DOJ and FTC disagree on whether licensing of SEPs should be forced to promote competition. Without resolution, this divide leaves key U.S. companies in the dark as to how to structure deals, hindering technological advancement.

Subpart B recalls that the problems created by dual enforcement, while more acute than ever, are not new and are not the result of a carefully deliberated choice by Congress.⁴¹ Eliminating dual enforcement would not only rationalize antitrust enforcement at home, but also bring the United States into conformity with technology agencies around the world.

A. *Antitrust Regulation of Technology*

Antitrust regulation of technology is vital to the economy.⁴² It has the power to change the future of the tech industry, and those changes in turn have domino effects on sectors from healthcare and manufacturing to transportation and energy.⁴³

40. See John D. McKinnon & James V. Grimaldi, *Justice Department, FTC Skirmish Over Antitrust Turf*, WALL ST. J. (Aug. 5, 2019, 5:45 PM), <https://perma.cc/R8AV-2NKL>.

41. See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 4 (2003) (describing the origins of the FTC Act passed by Congress in 1914, which created the FTC and empowered it to prosecute “unfair methods of competition”).

42. See, e.g., Makada Henry-Nickie et al., *Trends in the Information Technology Sector*, BROOKINGS INST. (Mar. 29, 2019), <https://perma.cc/8YMZ-FA6T> (“Digital technologies have risen to prominence as a critical determinant of economic growth, national security, and international competitiveness.”).

43. See *5G & the Future of Connectivity: 20 Industries the Tech Could Transform*, CBINSIGHTS (Mar. 19, 2019), <https://perma.cc/W4DR-KQL2> (describing numerous industries that are predicted to be disrupted by 5G technology); M. Ishaq Nadiri et al., *Impact of Modern Communication*

While the application of antitrust law to the technology sector is a hot topic among scholars, regulators, and politicians, the path forward is complex.⁴⁴ It is unclear how competition law will be applied to emerging technology, because traditional antitrust tests must be adapted to new markets, products, and methods of competition introduced by the digital revolution.⁴⁵

Infrastructure on Productivity, Production Structure and Factor Demands of U.S. Industries: Impact Revisited, 42 TELECOMM. POL'Y 433, 439–40 (2018) (concluding that communication technology has increased productivity in all industries, with health and construction in the top five industries).

44. See, e.g., Kaushik Basu, *New Technology and Increasing Returns: The End of the Antitrust Century?* 12–16 (IZA—Inst. of Lab. Econ., Working Paper, IZA Policy Paper No. 146, 2019), <https://perma.cc/E4H5-M68D> (PDF) (calling for new antitrust laws to address digital technology); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018) (arguing that antitrust regulation should be reinvigorated to address Big Tech); Thibault Schrepel, *Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox*, 3 GEO. L. TECH. REV. 281, 281–85 (2019) (discussing how regulators should tackle issues introduced by blockchain technology); Margaret Harding McGill, *Tech's Long Hot Summer of Antitrust*, AXIOS (May 26, 2020), <https://perma.cc/35P8-YUBS> (highlighting action by the DOJ, House Judiciary, state attorneys general, and FTC against tech giants); John D. McKinnon & Deepa Seetharaman, *FTC Expands Antitrust Investigation into Big Tech*, WALL ST. J. (Feb. 11, 2020, 5:18 PM), <https://perma.cc/UP7C-43AB>; Barbara Ortutay, *Big Tech Is Now a Big Punching Bag for Politicians*, ASSOCIATED PRESS (Oct. 11, 2019), <https://perma.cc/H5HB-2EUQ> (noting bipartisan criticism of Big Tech); Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://perma.cc/QH3K-M7XZ> (stating the then-presidential candidate's platform in regards to antitrust action against Big Tech).

45. See Cristina Caffarra & Oliver Latham, *Is Antitrust in Need of Disruption: What Is Disruptive Innovation and What, If Anything, Does Competition Policy Need to Do to React to It?*, 2 ITALIAN ANTITRUST REV. 86, 88–93 (2018), <https://perma.cc/83ZC-Y2NS> (PDF) (discussing how “existing antitrust theories of harm might need to be adapted in a context of disruptive innovation”); WILSON C. FREEMAN & JAY B. SYKES, CONG. RSCH. SERV., ANTITRUST AND “BIG TECH” 33–35 (2019), <https://perma.cc/WDB7-CUTC> (PDF) (stating that some commentators have proposed changes to antitrust law to promote competition in technology markets while others have advocated for competition regulation rules tailored specifically to the technology sector); Karry Lai, *Antitrust Regulators Struggle with Big Data*, INT'L FIN. L. REV. (June 11, 2019), <https://perma.cc/335U-DMF5> (“In an age of big tech where the likes of Google, Facebook and Amazon have monopolized markets, unbound by traditional antitrust laws, regulators around the world are playing catch up . . .”).

Thus, dual enforcement has greater risks than ever before, both because disagreement is more likely and costs of uncertainty are greater. This subpart outlines this potential for uncertainty in a variety of areas of antitrust doctrine. In fact, the risk is not just potential. The DOJ and FTC already disagree on the important issue of how to regulate SEPs, creating uncertainty in a growing industry worth billions of dollars.⁴⁶ The agencies are additionally fighting over who should take the lead in regulating high tech, resulting in divergent investigations when antitrust analysis requires consideration of the entire competitive market to reach sound conclusions.⁴⁷

1. The Need for Certainty in Antitrust Regulation of Technology

A unified approach to antitrust regulation is especially important when it comes to the technology industry for three reasons. First, the rapidly growing technology industry is at the center of the U.S. economy: in 2018, the internet sector accounted for \$2.1 trillion of the economy and 10 percent of the GDP.⁴⁸ Uncertainty about antitrust rules created by dual enforcement hinders economic growth.

Second, technological industries are especially sensitive to shifts in antitrust policy because antitrust actions can change the trajectory of fast-changing industries. For instance, the DOJ's antitrust enforcement action against the Bell System broke up the monopoly in telephony.⁴⁹ One court later summarized the effect as "an unprecedented flowering of innovation" in the telecom industry.⁵⁰ Agency antitrust action also played a large role in the growth of software, browser, and

46. See *infra* Part I.A.3.

47. See *infra* Part I.A.3.

48. David Shepardson, *Internet Sector Contributes \$2.1 Trillion to U.S. Economy: Industry Group*, REUTERS (Sept. 26, 2019, 3:58 PM), <https://perma.cc/4D84-MBKC>.

49. See Bret Swanson, *Lessons from the AT&T Break Up, 30 Years Later*, AEIDEAS (Jan. 3, 2014), <https://perma.cc/XFT8-45EB>.

50. *United States v. W. Elec. Co.*, 809 F. Supp. 1, 9 (D.D.C. 1995).

web company competition.⁵¹ In anticipation of a Justice Department antitrust suit,⁵² IBM unbundled its software and hardware products in the 1960s,⁵³ dramatically changing the software market. Nearly overnight, software went from a typically free good to a commercial product.⁵⁴ Governmental antitrust enforcement is additionally credited for Microsoft's 1997 investment in its rival company Apple, which saved the then-nascent company from the brink of bankruptcy.⁵⁵ Microsoft likely acted in self-preservation because it faced antitrust scrutiny that came to a head in a DOJ suit the year after.⁵⁶ The

51. See, e.g., Adi Robertson, *How the Antitrust Battles of the '90s Set the Stage for Today's Tech Giants*, VERGE (Sep. 6, 2018, 11:57 AM), <https://perma.cc/L2AU-GT8X> (“[T]he Microsoft settlement is credited with giving web companies like Google—and browsers like Google Chrome, which overtook Internet Explorer in 2012—space to grow.”).

52. See generally *United States v. Int'l Bus. Mach. Corp.*, 475 F. Supp. 1372 (S.D.N.Y. 1979).

53. IBM announced its unbundling prior to the antitrust suit, as what many believe was a preemptive action. See Martin Campbell-Kelly & Daniel D. Garcia-Swartz, *Pragmatism, Not Ideology: Historical Perspectives on IBM's Adoption of Open-Source Software*, 21 INFO. ECON. & POL'Y 229, 236 (2009); Burton Grad, *A Personal Recollection: IBM's Unbundling of Software and Services*, 24 IEEE ANNALS HIST. COMPUTING 64, 65 (2002) (“IBM executives . . . held discussions with senior DOJ attorneys and believed that IBM could preempt a DOJ suit by announcing it would unbundle its services, then doing so promptly.”); cf. James Pethokoukis, *Taking a Second Look at the Idea That Antitrust Action Created the U.S. Software Industry*, AEIDEAS (Jan. 12, 2018), <https://perma.cc/WNH8-KUTG> (proposing an alternate take that perhaps market forces were the primary reason for the decision to unbundle rather than government action); see also John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 146–48 (2000) (arguing that the suit against IBM was a poor decision).

54. See Martin Campbell-Kelly, *Development and Structure of the International Software Industry, 1950–1990*, 24 BUS. & ECON. HIST. 73, 88 (1995); *Software Becomes a Product*, COMPUT. HIST. MUSEUM, <https://perma.cc/Y4E6-RSU8>.

55. Catherine Clifford, *When Microsoft Saved Apple: Steve Jobs and Bill Gates Show Eliminating Competition Isn't the Only Way to Win*, CNBC (June 12, 2020, 11:48 AM), <https://perma.cc/V759-7XTH>.

56. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). The suit began in 1998. See Carlson Martin, *Did Bill Gates Save Apple from Bankruptcy or Microsoft from the Law?*, MONEYCONTROL (Jan. 31, 2019, 1:25 PM), <https://perma.cc/7RNC-788Y> (“Bill Gates didn't want his company broken up by a long-drawn-out court battle. So what better way to show

Microsoft settlement itself is “credited with giving web companies like Google—and browsers like Google Chrome . . . space to grow.”⁵⁷ These actions changed the technological landscape, and future antitrust decisions regarding technology companies will have just as significant of an impact, if not more.

Moreover, antitrust policy is very important to the research and development that is the heart of innovation in tech, particularly as more research and development has moved from the public sector to the private sector.⁵⁸ Private companies are affected more directly by antitrust policies.⁵⁹ Even the financing of technology is dependent on antitrust law. Today, as discussed in more detail below,⁶⁰ the primary reason a tech start-up receives funding from investors is its acquisition potential; merger and acquisition policies play a significant role.⁶¹ Once again, certainty here is important for investors, and

Microsoft isn’t a monopoly than by supporting the competition.”); John C. Abell, *Aug. 6, 1997: Apple Rescued—by Microsoft*, WIRED (Aug. 6, 2009, 12:00 AM), <https://perma.cc/9QW3-AWFD> (“Timing mattered: [Microsoft] was in the midst of an image-tarnishing antitrust fight over its heavy-handed promotion of IE during the height of the browser wars with Netscape.”).

57. Robertson, *supra* note 51.

58. David M. Hart, *Antitrust and Technology Innovation*, 15 ISSUES SCI. & TECH. 75, 75 (1999) (“As the funding and performance of scientific and technological activity increasingly shift into the private sector in the coming decades, the relative importance of antitrust policy will continue to grow.”).

59. *See id.*

In some sectors, antitrust policy has been far more consequential for research and innovation than the federal R&D spending policies that have attracted far more attention from analysts and policymakers. As the funding and performance of scientific and technological activity increasingly shift into the private sector in the coming decades, the relative importance of antitrust policy will continue to grow.

60. *See infra* notes 75–77 and accompanying text.

61. Ernesto Falcon, *Senate Antitrust Hearing Explores Big Tech’s Merger Mania*, ELEC. FRONTIER FOUND. (Sept. 30, 2019), <https://perma.cc/97BP-GWLQ> (“[A] hard look and update of mergers and acquisitions policy is one of many actions needed to preserve the life cycle of competition that has been a hallmark of the Internet.”).

possible and actual conflicts between DOJ and the FTC reduce certainty.

Third, a unified approach to antitrust has become more important because the antitrust issues affecting tech are particularly complex; it is difficult to determine how best to apply antitrust law to emerging technologies.⁶² This challenge makes it more likely that DOJ and the FTC will proceed on different theories, increasing uncertainty. For instance, antitrust scholars and regulators have struggled to apply the traditional small but significant non-transitory increase in prices (SSNIP) test to zero-price tech markets.⁶³ The SSNIP test, used by both the FTC and DOJ, defines a relevant antitrust market as the “smallest grouping of products for which a hypothetical monopolist could profitably impose a 5% price increase.”⁶⁴ However, many technology platforms offer their products at no monetary cost to customers. The lack of measurable price renders the SSNIP test difficult to operationalize.⁶⁵ This complexity makes it more likely that the DOJ and the FTC will apply the test differently, resulting in uneven and unfair outcomes. SSNIP is only one of many areas of debate regarding how antitrust is to be applied to technology.

Technology has raised questions regarding whether increased prices or decreased output is still a viable measure of monopoly. As an example, Facebook has not raised prices or restricted output since its founding, despite plausible claims that it dominates social media.⁶⁶ While dominant platform

62. See *supra* note 44 and accompanying text.

63. See John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 49 (2016) (“[D]espite the critical role that [zero-price] markets now play in modern economies, the antitrust enterprise has largely failed to account for their unique attributes.”).

64. FREEMAN & SYKES, *supra* note 45, at 5–6.

65. See *id.* at 6 (“The difficulty with applying the SSNIP test to such markets is clear . . . there is no sound way to analyze a 5% increase in a price of zero because such an increase would result in a price that remains zero.” (internal quotations omitted)).

66. See Tyler Cowen, *Breaking Up Facebook Would Be a Big Mistake*, SLATE (June 13, 2019, 7:30 AM), <https://perma.cc/LW3W-2LGN> (“It is commonly alleged that Facebook has a monopoly on social networking, yet

companies like Amazon have been accused of levying monopoly power,⁶⁷ others claim that platform giants and their house brands actually keep prices low.⁶⁸

Even defining the market of technology companies raises novel conundrums. To illustrate, Google has a very large share in the market for horizontal search (searches across the internet), but not in general search: users often turn to specialized websites, such as eBay or Amazon, for product searches.⁶⁹ Even if horizontal search is the defining market, Google's large share does not necessarily beget monopoly power. Consumers can easily switch between search engines and spend most of their time on websites, which compete with search engines for advertising revenue.⁷⁰ Addressing these complex

unlike traditional villainous monopolists, Facebook has not raised prices—the service is free—or restricted output.”).

67. Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM), <https://perma.cc/B5VV-U8C6> (“Amazon.com Inc. employees have used data about independent sellers on the company’s platform to develop competing products, a practice at odds with the company’s stated policies.”); Kim Hyun-bin, *Naver Under Fire for Unfair Marketing Practices*, KOREA TIMES (May 27, 2020, 7:12 PM), <https://perma.cc/M3MD-9K5Z> (“Naver, the country’s leading internet portal, is once again drawing negative attention for trying to sneak in advertisements to enhance benefits for its paid members, which many critics claim is an abuse of its dominant market power.”).

68. See Herbert Hovenkamp, *The Warren Campaign’s Antitrust Proposals*, REGUL. REV. (Mar. 25, 2019), <https://perma.cc/SX4B-5PWP> (“House brands such as AmazonBasics allow customers to avoid paying high prices for the trademarks of other large companies. And when house brands are sold in competition with branded goods, as they are on Amazon, they also force name brands to cut their own prices.”).

69. See Marina Lao, *Search, Essential Facilities, and the Antitrust Duty to Deal*, 11 NW. J. TECH. & INTELL. PROP. 275, 293 (2013) (“Users who are interested in a specific category of content can, and often do, turn to specialized websites for information, bypassing general search engines. Studies show that search on these specialized sites, which include Amazon, eBay, and Facebook, now accounts for over one-third of all web searches.”).

70. See Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case against the Case against Google*, 34 HARV. J.L. & PUB. POL’Y 171, 195 (2011) (“Over 60% of search engine visitors use at least two different search engines,’ meaning, as Google so often asserts, that competition really is ‘just a click away’ for a significant number of users.” (internal citations omitted)).

issues requires careful coordination between the DOJ and FTC, which based on the agencies' histories, is difficult at best and unachievable at worst.

Mergers between platforms and nascent technologies also raise new questions.⁷¹ On the one hand, some worry that such mergers and acquisitions will entrench the monopoly power of the platform.⁷² Preventing such mergers could enable nascent technologies to develop into strong competitors, diversifying the landscape and increasing consumer choice. For instance, some believe that Instagram, acquired by Facebook, might have become a strong competitor in social media.⁷³ Many quintessential U.S. tech companies, such as Intel, Apple, Google, and Netflix, had their beginnings as small start-ups.⁷⁴

On the other hand, the possibility of profitable acquisitions may be increasing innovation by incentivizing a greater number of start-ups. To reach a large market and grow quickly, start-ups typically require funding from external investors.⁷⁵

71. See *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Pol'y, and Consumer Rts. of the S. Comm. on the Judiciary*, 116th Cong. 7 (2019) (statement of Professor John M. Yun, Director, Economic Education at the Global Antitrust Institute) ("Clearly, the acquisition of a potential or nascent competitor can result in an outcome that is harmful to consumers and innovation, yet it can also result in an outcome that unlocks a great deal of consumer value.").

72. See, e.g., Megan Browdie et al., *United States: Technology Mergers*, GLOB. COMPETITION REV. (Sept. 20, 2019), <https://perma.cc/6ZN7-6QWJ> (expressing concern about acquisitions of nascent competitors in platform industries because "these markets are prone to tipping, and with tipping comes the potential for durable market power and substantial barriers to entry").

73. See, e.g., Makena Kelly, *Facebook's Messaging Merger Leaves Lawmakers Questioning the Company's Power*, VERGE (Jan. 28, 2019, 12:47 PM), <https://perma.cc/7CGB-CMSM> ("If Facebook were to come under real scrutiny by antitrust regulators, Instagram and WhatsApp would likely be their first two targets.").

74. Richard Florida, *America Is Losing Its Edge for Startups*, BLOOMBERG CITYLAB (Oct. 9, 2018, 12:55 PM), <https://perma.cc/7KZU-39ZF>.

75. See *Should You Pursue Funding for Your Startup?*, STARTUP DECISIONS, <https://perma.cc/D3WB-PBZV> ("External funding is most often used by high growth startups . . . that will scale rapidly or that need to acquire equipment, personnel, intellectual property or other assets quickly. High

Start-ups are inherently risky endeavors, and the prospect of acquisition drives investment.⁷⁶ Today, start-up funding largely hinges on the acquisition potential of the start-up: that is, how likely it is that the start-up will be acquired by a Big Tech incumbent and result in a payday for investors.⁷⁷ Antitrust regulation of mergers and acquisitions thus determines investment behavior that is central to the tech economy: the current dual system, with its inefficiencies and uncertainties, does not suffice.

Large technology platform companies engage heavily in R&D and promote consumer choice.⁷⁸ Preventing their growth via acquisitions could decrease those benefits.⁷⁹ Some argue that acquisitions actually allow companies to offer more options on the marketplace.⁸⁰ As an example, they note that Facebook is able to provide an ad-free service in its acquired texting service WhatsApp due to ad revenue that Facebook receives from its other offerings.⁸¹ Otherwise, consumers might not have an ad-free choice.

Even the basic antitrust concern about monopoly has been seen by some as not well taken. Critics of breaking up Big Tech

growth startups . . . use this funding to establish themselves before competitors enter the market.”).

76. See MAURITS DOLMANS & TOBIAS PESCH, CLEARY GOTTlieb STEEN & HAMILTON LLP, SHOULD WE DISRUPT ANTITRUST LAW? 8, <https://perma.cc/7FTK-U8RD> (PDF) (“It could be counterproductive to make buying startups prohibitively difficult. The prospect of being bought out is an important incentive for startups. The potential for acquisition drives venture capital firms to invest. This is the fuel that fires startups.”).

77. See Falcon, *supra* note 61 (“[H]ow attractive your company is to a big tech acquisition is now arguably the primary reason a startup gets funded.”).

78. See DOLMANS & PESCH, *supra* note 76, at 5 (“[L]arge platforms engage heavily in R&D and release new features constantly.”).

79. See *id.* (“If we [threaten to] break them up, we reduce incentives to keep innovating.”).

80. See, e.g., Cowen, *supra* note 66 (noting that Google and Facebook “allow small and midsize businesses to engage in targeted advertising, and therefore to offer niche products that compete against the goods and services of larger companies”).

81. See *id.* (“An independent WhatsApp, once placed under the pressure to bring in more revenue and make profits as a solo enterprise, would acquire more of the features Facebook critics find objectionable.”).

argue that the rapid pace of change in high tech makes antitrust enforcement counterproductive.⁸² While a company may own a monopoly in one technology, that technology may be quickly overturned. Soon after the government poured resources into the DOJ's 2011 suit against Microsoft, revolutions in computing rendered the browser technology at the center of the case irrelevant.⁸³ As noted below,⁸⁴ given that technology companies are often potential competitors with one another, it would be intolerable to force them to live under different legal regimes. But given the difficulties of the issues involved and dual enforcement, that prospect is entirely possible.

To be sure, some might argue that two enforcement agencies provide advantages, precisely because the issues raised by technology are hard. When agencies disagree, courts can ultimately settle on the views that best comport with the law. But any such claim faces powerful counterarguments. First, antitrust is a very technical area.⁸⁵ Courts rely on the framework set by the antitrust administrative agencies more than in other areas of law, as evidenced by the dominance of the DOJ-FTC antitrust guidelines in judicial decisions.⁸⁶ We cannot be confident that the generalist judiciary can choose correctly between expert agencies.

Second, it would take a long time for the circuit courts and the Supreme Court to resolve fundamental conflicts between the agencies. Antitrust cases often take an enormously long time to conclude: they are the *Jarndyce v. Jarndyce* of modern civil

82. See, e.g., Jonathan B. Baker, *Can Antitrust Keep Up?: Competition Policy in High-Tech Markets*, BROOKINGS INST. (Dec. 1, 2001), <https://perma.cc/M89E-5BAR>.

83. See generally *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). See also Sharon Pian Chan, *Long Antitrust Saga Ends for Microsoft*, SEATTLE TIMES (May 12, 2011, 7:53 AM), <https://perma.cc/EFT3-7K2F> (“Pervasive broadband has made it irrelevant whether PCs are sold with preinstalled copies of Microsoft’s Internet Explorer. Now, anyone can download competing browsers . . . in a few minutes, for free.”).

84. See *infra* notes 92–96 and accompanying text.

85. See *infra* note 240 and accompanying text.

86. See John O. McGinnis & Andrew M. Merkins, *Dworkinian Antitrust*, 102 IOWA L. REV. 1, 42 n.216 (2016) (showing that more than 250 federal cases had relied on the antitrust merger guidelines).

litigation.⁸⁷ In contrast, technology moves fast. By the time the application of the antitrust law is resolved as it affects current technologies, they may well have moved on to be different in kind.⁸⁸ During the interim, uncertainty will reign, discouraging economic investment.

It might also be argued that companies will still face uncertainty with a single agency because antitrust enforcement policy can change from administration to administration. But, first, this uncertainty is circumscribed, occurring only at the change of administrations and is not the kind of continuous uncertainty caused by the potential and actual disagreement between the FTC and DOJ. Second, if antitrust enforcement authority is lodged in the DOJ, as we recommend, the loss in certainty comes with a gain in political accountability, as the elected president becomes responsible for the content of antitrust policy. No such gain occurs from disagreement between the DOJ and FTC. To the contrary, dual enforcement makes it unclear where political accountability lies.⁸⁹

Both these arguments for dual enforcement also sit uneasily with the structure of the rest of the administrative state. As we discuss below,⁹⁰ one agency is generally charged with enforcing a single set of laws.⁹¹ The dual enforcement

87. See, e.g., GREGORY J. WERDEN & LUKE M. FROEB, *ANTITRUST AND TECH: EUROPE AND THE UNITED STATES DIFFER, AND IT MATTERS* 1, 5 (2019) <https://perma.cc/8Y96-3AEZ> (PDF) (“Lengthy court proceedings nearly always preceded imposition of a contested remedy in the United States.”).

88. See Daniel Gifford & Robert T. Kudrle, *Antitrust Approaches to Dynamically Competitive Industries in the United States and the European Union*, 7 J. COMPETITION L. & ECON. 695, 713 (2011).

89. See GANESH SITARAMAN, *GREAT DEMOCRACY INITIATIVE, TAKING ANTITRUST AWAY FROM THE COURTS: A STRUCTURAL APPROACH TO REVERSING THE SECOND AGE OF MONOPOLY POWER* 7 (2018), <https://perma.cc/544N-XCWA> (PDF) (discussing the importance of political accountability in the field of antitrust enforcement).

90. See *infra* Part I.B.3.

91. The general presumption in favor of making one agency responsible for a regulatory area refutes any notion that the way to respond to fear of agency capture is to create multiple agencies. In any event, both the Antitrust Division and FTC are less likely to be captured than many agencies that singly enforce their laws. They are “relatively well insulated from such influence by the need to apply objective economic principles.” Joshua D. Wright et al.,

structure for antitrust is anomalous and its anomaly has more costs than before, because of the need for certainty in our dominant technology sector.

Regardless of the final policy decisions, addressing competition in the technology industry requires a well-planned, efficient, and cohesive approach, which can be achieved only under a unified antitrust enforcement agency. Creating uncertainty in the area has dire consequences for future research and development and the economy. Given their current performance, there can be little confidence that the FTC and DOJ can work together in a coordinated manner to regulate competition in the vital area of technology.

2. Technological Turf Wars

Division between the FTC and the DOJ regarding the technology industry is not merely a theoretical possibility. Under dual enforcement, antitrust regulation of technology has been plagued by bureaucratic turf wars.⁹² Not surprisingly, both agencies want to take charge of the most important area in antitrust and are unwilling to yield control to the other. Their deadlock has resulted in a piecemeal investigation of the technology industry. In late 2020, the DOJ filed an antitrust suit against Google.⁹³ Soon after, the FTC filed an antitrust suit against Facebook.⁹⁴ The DOJ is currently investigating Apple

Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 51 ARIZ. ST. L.J. 293, 365 (2019). Moreover, unlike many other agencies, important businesses both are sued and seek to sue at different times under the antitrust law, making it harder for businesses to form a unified front of influence.

92. See Emily Birnbaum, *Antitrust Enforcers in Turf War over Big Tech*, HILL (Sept. 17, 2019, 5:35 PM), <https://perma.cc/AT88-YTPM> (“The two federal agencies charged with investigating Big Tech are jockeying over how to divide up their responsibilities, setting up a messy showdown that could undermine the government’s efforts to take on the Silicon Valley giants.”).

93. Complaint, U.S. Dept. of Just. v. Google LLC, No. 20-cv-03010 (D.D.C. Oct. 10 2020), ECF No. 1.

94. Press Release, Fed. Trade Comm’n, FTC Sues Facebook for Illegal Monopolization, (Dec. 9, 2020), <https://perma.cc/4HCX-8UXG>.

while the FTC investigates Amazon.⁹⁵ This divided approach to antitrust regulation is illogical. Google, Apple, Facebook, and Amazon are competitors that rightfully should be considered under a coordinated investigation.

The bifurcated investigation of Google, Apple, Facebook, and Amazon (the “Big Four”)⁹⁶ is especially significant because the companies are part of what is referred to as “Big Tech.”⁹⁷ Big Tech refers to large, dominant technology companies that are known for their influence, market power, and aggressive acquisition strategies.⁹⁸ With a combined market capitalization of over \$4 trillion,⁹⁹ the “Big Five” (Google, Apple, Facebook, Amazon, and Microsoft) have spent billions each year on acquisitions, often acquiring nascent companies.¹⁰⁰ In 2014, they spent a record \$46 billion on 138 total acquisition deals.¹⁰¹

Big Tech’s rise has not gone unnoticed. After the 2016 presidential election, many questioned whether large tech platforms wield too much influence.¹⁰² In the years following, Big Tech has come under fire from lawmakers on both sides of

95. See McKinnon & Kendall, *supra* note 23 (“Both the FTC and DOJ are under considerable pressure to investigate and potentially challenge a range of actions by a handful of companies.”).

96. See *Big Five*, PCMAG, <https://perma.cc/ML7R-S6UW> (“The Big Four are Google, Apple, Facebook and Amazon (GAFA).”).

97. See *Big Tech*, PCMAG, <https://perma.cc/2BZ2-J2A9> (“Big Tech refers to the major technology companies such as Apple, Google, Amazon and Facebook, which have inordinate influence.”).

98. See Katie Jones, *The Big Five: Largest Acquisitions by Tech Company*, VISUAL CAPITALIST (Oct. 11, 2019), <https://perma.cc/4J3Q-VMRV> (“Given their financial weight, mergers and acquisitions have become a key tactic in maintaining their strong grip on tech supremacy.”).

99. See *id.*

100. See Kate Rooney, *New Government Pressure Could Mean the End of Tech Mega Deals*, CNBC (June 6, 2019, 1:34 PM), <https://perma.cc/LP72-9SSB> (noting that “Microsoft, Amazon, Apple, Facebook, Alphabet and their subsidiaries spent roughly \$30 billion total on mergers and acquisitions” last year).

101. See *id.*

102. See Birnbaum, *supra* note 92 (“The issues came to a head in 2016, when it was revealed that foreign actors were able to manipulate the top social media platforms in the U.S. to sow discord during the presidential elections.”).

the political spectrum.¹⁰³ In 2019, the House Judiciary Subcommittee on Antitrust opened a bipartisan “top-to-bottom” investigation of the tech industry, calling on tech executives to address allegations of anti-competitive behavior.¹⁰⁴ In the same year, fifty attorneys general from U.S. states and territories opened an antitrust investigation of Google.¹⁰⁵ Another coalition of state attorneys general announced a similar probe into Facebook.¹⁰⁶

The federal antitrust agencies attempted to mobilize to address the same kind of questions. However, they had to first agree on which agency would lead the investigation.¹⁰⁷ Both

103. See *id.* (“The Washington ‘techlash’ has grabbed headlines over the past two years as lawmakers, government regulators and the public have questioned the dominance of Big Tech.”).

104. See Seth Fiegerman & Brian Fung, *Democrats and Republicans Find Unity in Trashing Big Tech*, CNN (July 16, 2019, 6:45 PM), <https://perma.cc/NY2V-UDT6>; see also Marcy Gordon & Barbara Ortutay, *Justice Dept. Opens Sweeping Antitrust Investigation of Major U.S. Tech Companies*, RealClearPolitics (July 24, 2019), <https://perma.cc/Q5XC-8NTL> (noting industry tech giants were accused of “creating a ‘startup kill zone’ to insulate them from competition”). In February 2021, the House Judiciary Antitrust Subcommittee opened another series of hearings on Big Tech, this time regarding proposals to curb the dominance of online platforms and modernize antitrust law. Press Release, House Committee on the Judiciary, House Judiciary Antitrust Subcommittee Announces Series of Hearings on Proposals to Curb the Dominance of Online Platforms and Modernize Antitrust Law (Feb. 18, 2021), <https://perma.cc/67YR-JERV>; see Ashley Gold, *House Begins Brewing New Tech Antitrust Laws*, AXIOS (Feb. 25, 2021), <https://perma.cc/E4DK-JLKF>. Earlier that month, Amy Klobuchar, the incoming chairwoman of the Senate’s panel on antitrust law and competition, introduced a sweeping antitrust reform bill aimed at thwarting anticompetitive mergers. David McLaughlin & Ben Brody, *Democrats Pitch Antitrust Revamp for ‘Too Big to Fix’ Deals*, BLOOMBERG (Feb. 4, 2021), <https://perma.cc/2H72-FMSF>.

105. See Makena Kelly, *Google under Antitrust Investigation by 50 Attorneys General*, VERGE (Sept. 9, 2019, 2:59 PM), <https://perma.cc/DCD7-99SU> (“The probe, led by Republican Attorney General Ken Paxton from Texas, will focus primarily on Google’s advertising and search businesses. But in remarks given Monday, the attorneys general suggested that they may expand the investigation later.”).

106. See *id.*

107. See Birnbaum, *supra* note 92. According to former FTC Commissioner William Kovacic, “The federal agencies often vie to pursue the flashiest antitrust investigations of the day.” *Id.*

wanted to take the helm, which resulted in a public battle.¹⁰⁸ In early 2019, the agencies negotiated a clearance arrangement that split up Big Tech: the DOJ would investigate Google and Apple while the FTC would handle Facebook and Amazon.¹⁰⁹ This arrangement placed not only potential but actual competitors under separate jurisdictions. For instance, Google and Facebook compete in internet advertising.¹¹⁰ To that point, a recent multistate antitrust suit alleges that Google and Facebook colluded to set prices for online advertisements.¹¹¹ Amazon and Apple compete in the market for smart devices.¹¹² The Big Four compete with each other in multiple markets including the Internet of Things,¹¹³ music streaming,¹¹⁴

108. See Baker & Hosteler LLP, *Antitrust Agency Turf War Over Big Tech Investigations*, LEXOLOGY (Oct. 9, 2019), <https://perma.cc/DF49-5BLS>.

109. See McKinnon & Kendall, *supra* note 23.

110. See Amanda Lotz, *'Big Tech' Isn't One Big Monopoly—It's 5 Companies All in Different Businesses*, CONVERSATION (Mar. 23, 2018, 2:56 PM), <https://perma.cc/7HJ5-LQN5> (indicating that Google and Facebook dominate in internet advertising, collecting 63 percent of U.S. digital advertising revenue in 2017). Amazon and Facebook also compete in online advertising. See Taylor Soper, *Amazon's Big New Business: Here's How Much Advertising Revenue the Company Generated in 2018*, GEEKWIRE (Jan. 31, 2019, 2:14 PM), <https://perma.cc/ZV22-NYE2> (discussing how advertising drives a majority of revenue for Google and Facebook); see also Omar Oakes, *Apple Signals Greater Role for Ad Revenue as iPhone Sales Drop 15%*, CAMPAIGN US (Jan. 30, 2019), <https://perma.cc/Y7MX-25WY> (“Mentioning advertising in a dialogue with investors is significant for Apple, which has prided itself in selling hardware rather than relying on ads like Google and Facebook.”).

111. See Complaint at 5–6, *State of Texas v. Google LLC*, No. 40-cv-957 (E.D. Tex. Dec. 16, 2020), ECF No. 1 (discussing the alleged agreement between Google and Facebook); Ryan Tracy & Jeff Horwitz, *Inside the Google-Facebook Ad Deal at the Heart of a Price-Fixing Lawsuit*, WALL ST. J. (Dec. 29, 2020), <https://perma.cc/7Y7J-XMV3> (“Google gave Facebook special terms and access to its ad server.”).

112. See Cliff Saran, *Apple Faces Strong Competition from Amazon*, COMPUTERWEEKLY (Aug. 15, 2018, 4:15 PM), <https://perma.cc/2KRG-TMGK> (“There are general threats to Apple’s dominance, but the biggest shadow cast over Apple’s future is Amazon.”).

113. E.g., Facebook Portal, Apple HomePod, Amazon Alexa, and Google Home.

114. E.g., Apple Music, Google Music, and Amazon Music.

tablets,¹¹⁵ shopping platforms,¹¹⁶ photo platforms,¹¹⁷ and self-driving cars.¹¹⁸ Because of their intertwined markets, all of Big Tech should face a comprehensive investigation by a single agency. Instead, the FTC and DOJ charge a divided path on tech, beginning with their suits against Facebook and Google. Despite a relatively narrow case against Google,¹¹⁹ the two suits still overlap in subject matter, as they both address forms of online advertising.¹²⁰ Splitting the Big Four into separate agency investigations introduces inconsistencies in treatment, gaps in information, and duplication of effort. The situation is exacerbated by the agencies' divergent views towards intellectual property,¹²¹ national security,¹²² and other issues that affect technology. The Big Tech clearance agreement is far worse off than previous proposed clearance agreements, because prior agreements at least enabled one agency to conduct consistent enforcement within the industry.

After the agencies reached this clearance agreement, the DOJ announced a broad antitrust review into technology giants in July 2019.¹²³ Despite the FTC investigation of Facebook and Amazon, the DOJ suggested that Facebook and Amazon were in

115. E.g., Amazon tablet, iPad, and Google Nexus.

116. E.g., Amazon shopping, Google shopping, and Facebook marketplace.

117. E.g., Google photos, Amazon photos, iCloud, and Facebook albums.

118. E.g., Apple, Waymo (under Alphabet), and Amazon are all engaged in self-driving cars.

119. See Katie Benner & Cecilia Kang, *Justice Dept. Plans to File Antitrust Charges Against Google in Coming Weeks*, N.Y. TIMES (Oct. 20, 2020), <https://perma.cc/4Z7X-KU23> (stating that several state attorneys viewed the DOJ's suit against Google as too narrow to support).

120. See Complaint at 2, U.S. Dept. of Just. v. Google LLC, No. 20-cv-0310 (D.D.C. Oct. 20 2020), ECF No. 1 (alleging that Google maintained monopolies in online advertising); Complaint at 2, FTC v. Facebook, Inc., No. 20-cv-03590 (D.D.C. Dec. 9, 2020), ECF No. 3 (alleging that Facebook "monetizes its personal social networking monopoly principally by selling advertising").

121. See *infra* Part I.A.3.

122. See *infra* Part II.A.

123. See David McLaughlin et al., *Trump DOJ Escalates Big Tech Scrutiny with New Antitrust Probe*, BLOOMBERG L. (July 23, 2019, 5:16 PM), <https://perma.cc/B8EW-ASLQ> ("The department's antitrust division disclosed plans July 23 to scrutinize tech platforms following mounting criticism across Washington that the companies have become too big and too powerful.").

its sights as well.¹²⁴ The negotiated division did not seem to be holding up. After discussion, the agencies resolved that the DOJ and FTC would both pursue Facebook but in regards to different issues, in order to avoid overlap.¹²⁵ Nevertheless, disagreements regarding the clearance agreement arose again. In September of 2019, FTC Chairman Joe Simons wrote a letter to the DOJ raising complaints about the Department's behavior.¹²⁶ Industry observers have also questioned the overlap between the agencies.¹²⁷ While turf wars between the two antitrust agencies are not new, they reached a new high over the regulation of the Big Five.¹²⁸ The heads of both the FTC and DOJ Antitrust Division admitted to the Senate that any clearance agreements had broken down and that "squabbles" between the agencies had wasted time.¹²⁹

Senators were understandably concerned that the infighting between the agencies thwarts regulation of Big Tech

124. *See id.*

125. *See* McKinnon & Kendall, *supra* note 23 ("A turf battle over government scrutiny of Facebook is a key point of contention . . .").

126. *See id.* ("The previously undisclosed letter, signed by FTC Chairman Joseph Simons, raises the prospect that a longstanding power-sharing agreement between the agencies is fraying.")

127. *See* Diane Bartz, *U.S. Justice Department to Open Facebook Antitrust Investigation: Source*, REUTERS (Sept. 25, 2019, 7:52 PM), <https://perma.cc/3DQQ-ME5S>; *see also* McKinnon & Grimaldi, *supra* note 40

"For the outside observer, such internecine warfare can only undermine confidence in the agencies and lead to public distrust," said Andrew Gavil, a Howard University antitrust law professor. "It will also needlessly complicate any investigations and leave the wider technology community guessing as to where the line is between lawful and unlawful business strategies."

128. *See* McKinnon & Kendall, *supra* note 23 ("While [the DOJ and FTC] have at times been rivals and engaged in turf battles, employees in both agencies acknowledge that their interactions lately have become abnormally strained.")

129. *See* Lauren Feiner, *Here's Why the Top Two Antitrust Enforcers in the US Are Squabbling over Who Gets to Regulate Big Tech*, CNBC (Sept. 18, 2019, 10:31 AM), <https://perma.cc/82KR-337B> ("While both agency officials said they continue to stick by clearance agreements that prevent overlapping probes, they admitted there had also been some tension over the agreement at times.")

at a time when it is greatly needed.¹³⁰ House lawmakers criticized the agencies for not challenging mergers involving the Big Four, with one representative calling the agencies “paralyzed.”¹³¹ Congress did not hold back in noting the severe inefficiencies of the current dual system.¹³² By the time the DOJ filed suit against Google in October 2020, a Congressman called it “long overdue.”¹³³ Critics noted that the delay had given Facebook years to prepare for an antitrust suit, and the company had in fact taken steps in that time to integrate its technologies and deter an easy breakup.¹³⁴

The FTC and DOJ are currently trying to evaluate previous mergers involving the tech giants for their effect on competition. In February 2020, the FTC issued Special Orders to the Big Five, requiring them to provide information about prior acquisitions not reported to the antitrust agencies.¹³⁵ The study could result in the unwinding of acquisitions made over the past ten years.¹³⁶ However, “unscrambling of the eggs” of already-completed acquisition is difficult and potentially ineffective.¹³⁷ Coordinated action under a single agency might

130. *See id.*

131. Cristiano Lima, *House Antitrust Chair Suggests Halting Major Tech Mergers Until Federal Probes Wrap*, POLITICO (Nov. 13, 2019, 5:57 PM), <https://perma.cc/Q7AF-EV82>.

132. *See id.* (“House lawmakers grilled [high ranking officials at the FTC and DOJ] over concerns that they have done little to challenge mergers by Google, Facebook, Amazon and Apple.”).

133. Michael Balsamo & Marcy Gordon, *Justice Dept. Files Landmark Antitrust Case Against Google*, PBS (Oct. 20, 2020), <https://perma.cc/M79A-8677>.

134. *See* Brian Fung, *Facebook Must Be Broken up, the US Government Says in a Groundbreaking Lawsuit*, CNN (Dec. 10, 2020), <https://perma.cc/6QPZ-8URA> (noting that Facebook “moved to tightly integrate its apps on a technical level”).

135. Press Release, Fed. Trade Comm’n, *FTC to Examine Past Acquisitions by Large Technology Companies*, (Feb. 11, 2020, 1:00 PM), <https://perma.cc/FL82-V63H>.

136. Emily Birnbaum, *FTC to Review Past Acquisitions by Tech Firms*, HILL (Feb. 11, 2020, 12:27 PM), <https://perma.cc/TW9Y-SHQB>.

137. *See Mergers*, FED. TRADE COMM’N, <https://perma.cc/U42B-ETYQ> (noting that premerger notification requirements of the Hart-Scott-Rodino Act are intended to avoid a situation in which a merger has to be reversed).

well have produced timely action and simpler resolutions regarding these tech mergers.

3. Standard-Essential Patents: A Case Study in Incoherence

Turf battles aside, the FTC and the DOJ have promoted directly opposing policies regarding the application of antitrust law to technology.¹³⁸ The contentious disagreement on the important issue of standard-essential patents shows the divergent treatment and uncertainty already generated by dual enforcement. The FTC believes violation of a SEP licensing agreement is potentially an antitrust violation.¹³⁹ Standard-setting organizations often require patent holders to license SEPs for free or on fair, reasonable, and non-discriminatory (FRAND) terms.¹⁴⁰ The FTC argues that a violation of these licensing terms can violate antitrust laws by enabling a patent holder to “parlay the standardization of its technology into a monopoly in standard-compliant products.”¹⁴¹

138. See *infra* Part I.B.

139. See Timothy Syrett, *The FTC’s Qualcomm Case Reveals Concerning Divide with DOJ on Patent Hold-Up*, IPWATCHDOG (June 28, 2019), <https://perma.cc/C8MU-ZKZF> (discussing the DOJ and FTC’s divergent treatment of SEPs).

140. See NAT’L RSCH. COUNCIL NAT’L ACADS., *PATENT CHALLENGES FOR STANDARD-SETTING IN THE GLOBAL ECONOMY: LESSONS FROM INFORMATION AND COMMUNICATIONS TECHNOLOGY* 51 (Keith Maskus & Stephen A. Merrill eds., 2013).

141. See Complaint at 49, *FTC v. Qualcomm, Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 17-cv-00220)

Once a standard incorporating proprietary technology is adopted, the potential exists for opportunistic patent holders to insist on patent licensing terms that capture not just the value of the underlying technology, but also the value of standardization itself. To address this “hold-up” risk, [standard setting organizations] often require patent holders to disclose their patents and commit to license standard-essential patents (“SEPs”) on fair, reasonable, and non-discriminatory (“FRAND”) terms. Absent such requirements, a patent holder might be able to parlay the standardization of its technology into a monopoly in standard-compliant products.

See also STANDARDS, LICENSING, AND INNOVATION: A RESPONSE TO DOJ AAG’S COMMENTS ON ANTITRUST LAW AND STANDARD-SETTING, FED. TRADE COMM’N 21, <https://perma.cc/M3CA-TM7Y> (PDF) (“[W]hen companies promise through

The DOJ disagrees, because it believes “it is not the duty or the proper role of antitrust law to referee what unilateral behavior is reasonable for patent holders in this context.”¹⁴² The DOJ argues that patent holders enjoy a government-granted monopoly over the item under patent.¹⁴³ Thus, a violation of a SEP licensing agreement may raise an issue of contract law or other common law right, but not antitrust.¹⁴⁴

SEPs are vital to technological innovation and economic growth, with billions of dollars at stake.¹⁴⁵ To understand the importance of SEPs to technology, one must first understand the importance of a standard. A standard is a uniform practice around which a technology develops.¹⁴⁶ For example, a standard could describe a specific design of a charging port. Once the standard is set, multiple devices, from cell phones to speakers, can be designed to work with that standard charging port. Standards enable uniformity and operability across

their FRAND commitments not to exercise the market power they gained from incorporation of their patents into standards but then breach those commitments, they are exercising market power they acquired by promising to forgo that exercise.”).

142. Makin Delrahim, Assistant Att’y Gen., U.S. Dep’t Just., Remarks at the USC Gould School of Law’s Center for Transnational Law and Business Conference (Nov. 10, 2017) [hereinafter USC Speech], <https://perma.cc/DNF9-8RZS> (last updated Nov. 14, 2017).

143. *See id.* (“Patents are a form of property, and the right to exclude is one of the most fundamental bargaining rights a property owner possesses.”).

144. *See id.*

If a patent holder is alleged to have violated a commitment to a standard setting organization, that action may have some impact on competition. But, I respectfully submit, that does not mean the heavy hand of antitrust necessarily is the appropriate remedy for the would-be licensee—or the enforcement agency. There are perfectly adequate and more appropriate common law and statutory remedies available to the SSO or its members.

145. Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?*, 104 CORNELL L. REV. 607, 607 (2019).

146. *See* CHARLES M. SCHMIDT, BEST PRACTICES FOR TECHNICAL STANDARD CREATION, MITRE 1 (Apr. 2017), <https://perma.cc/Y4WK-XNWB> (PDF) (“Technical standards support the unification of practice with regard to some technical activity through a precise description of that activity.”).

manufacturers, devices, or platforms.¹⁴⁷ We interact with and depend on countless technology standards such as USB, Bluetooth, HTML, and 3G in our everyday life. Their importance cannot be overstated: they provide the foundation for the development and implementation of technology.¹⁴⁸

Despite their benefits, standards also present a dilemma: they are most beneficial when there is widespread adoption.¹⁴⁹ But most entities, from companies to countries, want to have their own individual designs become standard so as to gain a competitive advantage.¹⁵⁰ Thus, there must be some process

147. See *id.* (“Uniformity of practice allows defenders to concentrate their efforts on a small number of defensive products and tools that then are able to protect multiple types of devices, applications, and functional roles within the enterprise.”).

148. See *Understanding How Technical Standards Are Made & Maintained*, IEEE, <https://perma.cc/2ZXS-93AK> (“Standards are used by people around the world, in various industries and professions. From healthcare, to education, energy, construction, environment, technology and more, published specifications and procedures help maximize the reliability of materials, products, methods, and services.”).

149. Standards facilitate the interoperability of products and services, so their usefulness increases with the number of adopters due to network effects. See Neil Gandal, *Compatibility, Standardization, and Network Effects: Some Policy Implications*, 18 OXFORD REV. ECON. POLY 80, 81 (2002) (“Because of the network effects that are inherent in [the high-tech consumer electronic products industry], successful diffusion of these [electronic] products is often contingent on a single product winning a battle of market standards or firms achieving compatibility among competing standards.”); see also Robert L. Mallett, *Why Standards Matter*, 15 ISSUES SCI. & TECH. 63, 63 (1999) (“Divergent standards peculiar to a nation or region, complex conformity assessment requirements, and a thicket of other standards-related barriers have been estimated to impede the sale of an additional \$20 billion to \$40 billion worth of U.S. goods and services.”).

150. See Mallett, *supra* note 149, at 66 (“We must act determinedly and intelligently to advance U.S. technologies and concepts as the basis for international standards.”); see also Sangin Park, *Quantitative Analysis of Network Externalities in Competing Technologies: The VCR Case*, 86 REV. ECON. & STAT. 937, 939 (2004) (explaining the standards war between JVC’s VHS and Sony’s Betamax technologies for the video cassette recording (VCR) technology market, wherein Sony lost business to JVC and eventually switched to producing VHS over its own Betamax technology).

that encourages collaboration and consensus even among competitors.¹⁵¹

Such collaboration is facilitated by a standards development organization (SDO) or standard setting organization (SSO), which creates, revises, and coordinates technical standards.¹⁵² Standards development organizations have rules and criteria to prevent a single interest from dominating the definition of a standard.¹⁵³ Their rules govern how they approach patented technologies.¹⁵⁴ For example, an SDO may require that only unpatented technologies can be adopted as standard. Thus, in deciding what charging port will be the industry standard, the SDO would reject any charging ports that were patented. While this is, in a sense, a procompetitive solution—no entity would have a monopoly over the standard technology that was decided upon—it is largely unrealistic in today’s world where most useful and current inventions are patented. Adopting an unpatented technology that is outdated as standard defeats the purpose of a standard,

151. See Patricia R. Harris, *Why Standards Matter*, 1 PORTAL: LIBR. & ACAD. 525, 526 (2001) (“Standards . . . do not emerge without costs, without time, without effort and contributions from the individuals and businesses that embrace a vision and are committed to addressing and solving a problem they share.”).

152. See *Develop Standards: What Are Standards?*, IEEE STANDARDS ASS’N, <https://perma.cc/C8MM-H2QL> (“Typically, each SDO is comprised of Boards, Committees and staff who establish and maintain the policies, procedures and guidelines that help ensure the integrity of the standards development process, and the standards that are generated as an outcome of this process.”).

153. See *id.* (“To build consensus through democratic means, participants engage in meetings, draft and review position pieces, create and review presentations, examine data and engage in active discussion and debate to resolve outstanding issues.”).

154. See *IEE SA Standards Board: Patcom*, IEEE STANDARDS ASS’N, <https://perma.cc/R82X-DXBR> (“[Patent Committee] provides oversight for the use of any patents and patent information in IEEE standards. The committee will review any patent information submitted to the IEEE SA to determine conformity with patent procedures and guidelines.”).

which is to facilitate the development and adoption of innovative technology.¹⁵⁵

As a result, SDOs must contend with standard-essential patents (SEPs), patents that are necessary for the implementation of a standardized technology.¹⁵⁶ SDOs typically require that if a proposed standard is encumbered by patents, those patents must be licensed on “fair, reasonable, and non-discriminatory” (FRAND) terms to those seeking to utilize the technology.¹⁵⁷ This requirement is thought to facilitate the adoption of the standard in the industry while providing fair terms to all parties involved.¹⁵⁸ Because standards are critical to almost everything that touches technology, standard-essential patents are as well. When a patent is essential to a standard, there is no way to comply with the standard without infringing or licensing the patent.¹⁵⁹ A dispute over a single SEP can prevent a company from making its product compatible with the internet, computers, or mobile devices.¹⁶⁰ For example, a typical cellphone charging port has SEPs that cover every part of its design, from the electronic circuitry to communication protocols. Methods that enable a mobile phone to stay connected to a 4G/LTE network are

155. See *Develop Standards*, *supra* note 152 (“[S]tandards fuel the development and implementation of technologies that influence and transform the way we live, work and communicate.”).

156. See Gene Quinn, *Standard Essential Patents: The Myths and Realities of Standard Implementation*, IPWATCHDOG (Feb. 4, 2019), <https://perma.cc/CE6W-M773> (“[SEPs] represent core, pioneering innovation that entire industries will build upon. These patents protect innovation that has taken extraordinary effort to achieve.”).

157. Thomas F. Cotter, *Comparative Law and Economics of Standard-Essential Patents and FRAND Royalties*, 22 TEX. INTELL. PROP. L.J. 311, 312 (2014).

158. Most SDOs also require a disclosure of any standard-essential patents before approval of the standard. See Lorenz Brachtendorf et al., *Approximating the Standard Essentiality of Patents—A Semantics-Based Analysis* 3 (June 4, 2019) (draft prepared for 12th Searle Conference on Innovation Economics), <https://perma.cc/TN9U-BB5P>.

159. See Lemley & Simcoe, *supra* note 145, at 609 (“Unlike most other patents, when a patent is truly essential there is no way to design around it and still comply with the standard.”).

160. See *id.*

covered by a multitude of SEPs that are essential to the 4G/LTE standard.¹⁶¹ Qualcomm owns SEPs essential to widely adopted cellular communication standards such as CDMA and LTE.¹⁶²

A competition problem arises when, despite any agreement made at the time a standard was chosen, SEPs are later not licensed at fair, reasonable, and non-discriminatory terms. When the owner of a SEP bars a competitor from utilizing a SEP and therefore a standard technology, this decision deals a huge blow to the competitor. The FTC believes that when a SEP-owner violates an agreement to license the SEP on fair, reasonable, and non-discriminatory terms, this is an anticompetitive action in violation of antitrust laws.¹⁶³ In *FTC v. Qualcomm*,¹⁶⁴ the FTC pursued action against Qualcomm under Section 5 of the FTC Act for refusing to license its SEPs to competitors.¹⁶⁵

In contrast, the DOJ has taken the stance that SEP owners refusing to license on FRAND terms is not an anticompetitive antitrust violation.¹⁶⁶ It is simply a patent owner exercising his or her earned right to exclude competitors. As dictated under patent law doctrine, a patent owner has the right to prevent anyone from utilizing his or her patented technology.¹⁶⁷ Going

161. See *Your Phone, Our Technology: How Patents Make It Possible*, ERICSSON (Sept. 13, 2018), <https://perma.cc/JAG7-JBZM> (“It is impossible to manufacture 4G/LTE standard-compliant products such as smartphones or tablets without using technologies covered by one or more SEP.”).

162. See Joe Raffetto et al., *FTC v. Qualcomm: Court Requires Licensing of Standard Essential Patents to Competitors*, IPWATCHDOG (Dec. 9, 2018), <https://perma.cc/S6D6-JNLX>.

163. See *supra* notes 139–141 and accompanying text.

164. 969 F.3d 974 (9th Cir. 2020).

165. See Raffetto et al., *supra* note 162 (describing the nature of the case).

166. See USC Speech, *supra* note 142 (“A patent holder cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent.”).

167. See 35 U.S.C. § 154(a)(1)

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout

forward, it is uncertain whether the government will pursue antitrust enforcement actions related to the licensing of SEPs.¹⁶⁸

This disagreement between the DOJ and the FTC rippled out to cause concern in the legislative branch. Because of the DOJ's disagreement with the FTC, Senators wrote to the DOJ urging the agency to clarify its policy and provide guidance to stakeholders.¹⁶⁹ The uncertainty created by this bifurcated approach creates dissatisfaction in Congress and so undermines

the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.

168. In the early 2000s, both agencies agreed that SEPs were subject to antitrust enforcement. See Syrett, *supra* note 139 (“[T]he FTC and DOJ had worked both in parallel and together to address the potential competitive harms posed by patent hold-up.”). During this period of agreement, the agencies issued a joint statement. See U.S. DEP’T JUST. & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 3 (2007), <https://perma.cc/K48Q-A4LY> (PDF). In 2007, the FTC and DOJ joint report on antitrust and intellectual property rights explained their position on SEPs, citing competitive harms that would result if FRAND commitments of SEPs were not enforced. *Id.* at 47. Specifically, the report warned that if SEPs were not required to be licensed at fair, reasonable, and non-discriminatory terms, as were agreed upon at the time of the approval of the standard, the problem of patent hold-up would occur. *Id.* Patent hold-up arises when a patent owner is able to extract a higher royalty or concession for his or her patent than it would have warranted *ex ante*. Thomas F. Cotter et al., *Demystifying Patent Holdup*, 76 WASH. & LEE L. REV. 1501, 1505–07 (2019).

The period of harmony between the antitrust agencies regarding SEPs was put to an end five years later. In 2018, Makan Delrahim, the head of the DOJ Antitrust Division, formally withdrew the DOJ's approval of the prior 2013 joint policy statement, stating that the DOJ is “committed to ensuring that patent holders maintain their full constitutional right to seek an injunction against infringement.” Memorandum from Makan Dalrahim, U.S. Dep’t Just., “Telegraph Road”: Incentivizing Innovation at the Intersection of Patent and Antitrust Law 14 (Dec. 7, 2018), <https://perma.cc/LQ4C-52Y9> (PDF).

169. See Norman Armstrong et al., *Senators Urge DOJ to Develop Antitrust Guidance for Licensing of Standard Essential Patents*, JD SUPRA (Oct. 25, 2019), <https://perma.cc/4K9C-4MET> (describing the letter as a “request for clarity [which] stems, in large part, to a recent shift in the DOJ's position as to FRAND issues”).

support for these agencies among those who control their funding.¹⁷⁰

The disagreement between the DOJ and FTC has international implications as well. Divergence in treatment of FRAND agreements among countries already causes difficulties for companies operating under different national standards in the global economy.¹⁷¹ These international challenges are further exacerbated by the different policies of the two domestic antitrust enforcement agencies of the United States, still the most important commercial nation in the world.¹⁷² Companies are subject to potentially conflicting standards depending not only on the national identity of the enforcement agency but also on the identity of the agency with the United States. International harmonization becomes more difficult if the United States has internal disagreements. Therefore, the case

170. Cf. Leah Nylan, *DOJ Seeks 71 Percent Bump from Congress for Antitrust*, POLITICO (Feb. 14, 2020, 5:32 PM), <https://perma.cc/Q7MM-XG9H> (discussing DOJ's budget request for a 71 percent increase in funding for the antitrust division). Other agencies also changed their position to align with DOJ, creating a split with the FTC's policies. The United States Patent and Trademark Office put out a joint statement with DOJ on the subject. See U.S. PAT. & TRADEMARK OFF., NAT'L INST. OF STANDARDS AND TECH., & U.S. DEPT' OF JUST., POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 6 (2019), <https://perma.cc/BG6Y-QBU6> (PDF) (rejecting "a special set of legal rules that limit remedies for infringement of standards-essential patents subject to a F/RAND commitment"). The International Trade Commission, a domestic agency which handles many patent disputes, issued injunctive relief to a SEP owner in the same year. See Michael T. Renaud et al., *Out with the Old, and in with the New: Joint Policy Statement and Recent Cases Confirm That Injunctive Relief on Standard-Essential Patents Is Available at the ITC*, MINTZ (Dec. 23, 2019), <https://perma.cc/U4G3-N83V>.

171. See Patrick Wingrove, *FRAND Divergence Stifles Global Licensing Strategies*, MANAGING IP (Aug. 7, 2019), <https://perma.cc/9MGR-N7BK> ("With steady divergence of what constitutes fair, reasonable and non-discriminatory (FRAND) terms in licenses for standard essential patents, some in-house counsel say the disparate treatment of IP across the world is stifling their global licensing strategies.")

172. See Jacqueline Yin, *Delrahim Out of Step With FTC, Industry, Academics on FRAND/SEP*, PAT. PROGRESS (Apr. 11, 2019), <https://perma.cc/RX62-XPGU> (arguing that the DOJ's interpretation causes international conflict and that the DOJ should instead follow the FTC's approach).

of SEPs shows how dual enforcement has created uncertainty in the industry, in Congress, and internationally.

B. *Dual Enforcement Causes Inefficiencies and Inconsistent Outcomes*

Technology did not create, but only exacerbates long-standing problems of dual antitrust enforcement. In this subpart we briefly offer more general arguments against joint enforcement by the FTC and Antitrust Division. It wastes resources, and even in non-technological areas, it creates uncertainty.¹⁷³ Both waste and uncertainty are compounded by turf wars, as exemplified by conflicts over mergers.¹⁷⁴

Moreover, Congress never intended for a system of full dual enforcement.¹⁷⁵ Thus, eliminating it would not undermine a fully deliberated scheme. Single enforcement would additionally bring the United States in conformity with industrialized nations worldwide, which generally have a single antitrust enforcer.¹⁷⁶ Finally, we respond to the argument that single agency enforcement would not improve matters much because private actors can enforce antitrust.¹⁷⁷ Private enforcers are subject to heavy restrictions and do not have the same ability to direct antitrust policy as the agencies do.

1. Waste and Uncertainty

Requiring two agencies with two sets of staff to perform similar tasks creates costs and waste. As Ernest Gellhorn noted, “These costs are particularly pronounced in labor-intensive bureaus [such as the FTC and DOJ Antitrust Division] where lawyers and economists are the principal resource.”¹⁷⁸ The DOJ Antitrust Division requested \$166.8 million from Congress in

173. See *infra* Part I.B.1.

174. See *infra* notes 186–188 and accompanying text.

175. See *infra* Part I.B.2.

176. See *infra* Part I.B.3.

177. See *infra* Part I.B.4.

178. Gellhorn, *supra* note 19.

2020 to support their 695 positions and 335 attorneys.¹⁷⁹ In the same year, the FTC requested over \$312 million to support 1,140 positions.¹⁸⁰ In total, the country spent over \$470 million in 2019 on antitrust efforts, much of which could have been saved absent the dual agency structure.¹⁸¹ Dual enforcement results in duplicated efforts and unnecessary expenditures.¹⁸² When power is diffused across multiple actors, no single actor is truly empowered, resulting in inefficiencies and a lack of accountability.¹⁸³

Additionally, the FTC and DOJ Antitrust Division must coordinate workflow with each other.¹⁸⁴ Such coordination wastes agency time that could be spent directly on enforcement.¹⁸⁵ For instance, since 1938, the two agencies have held numerous conferences in attempts to divide and coordinate their responsibilities related to merger review.¹⁸⁶ Despite minor improvements, the negative effects of a two-agency antitrust enforcement system persist. Merger clearance is still inconsistent and contentious between the FTC and DOJ. Its

179. DEP'T OF JUST., FY 2020 BUDGET REQUEST AT A GLANCE 1, <https://perma.cc/5423-E5R4> (PDF).

180. FED. TRADE COMM'N, FISCAL YEAR 2020 CONGRESSIONAL BUDGET JUSTIFICATION 2 (2019), <https://perma.cc/NGQ8-KDY2> (PDF).

181. *Id.*; DEP'T OF JUST., *supra* note 179, at 3.

182. Blumenthal, *supra* note 37, at 29–30.

183. *See* SITARAMAN, *supra* note 89, at 8 (describing the problems that arise when power is diffused).

184. *See id.* at 14 (noting that the agencies must determine which agency has power to review a merger in each case prior to conducting the review); Garry A. Gabison, *Dual Enforcement of Electric Utility Mergers and Acquisitions*, 17 J. BUS. & SEC. L. 11, 34–36 (2017) (describing the problems under a dual enforcement system).

185. *See* SITARAMAN, *supra* note 89, at 14 (“In some cases, the agencies take up more than half of the pre-merger review time period (30 days) determining which agency has the power to review the merger, leaving the agency with little time to conduct a robust review.”).

186. *See* David L. Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure*, 31 BUS. LAW. 2075, 2077 (1976) (describing the agencies' efforts to coordinate enforcement).

long history suggests that this problem will continue so long as two antitrust agencies exist.¹⁸⁷

Dual enforcement also leads to missed enforcement opportunities. Under § 7 of the Clayton Act,¹⁸⁸ both agencies are charged with the prevention of monopolies.¹⁸⁹ The Act prohibits mergers of companies that would substantially lessen competition or tend to create a monopoly.¹⁹⁰ In 1976, the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act)¹⁹¹ was passed, which enabled the agencies to investigate mergers before they happened and also provided procedures for coordinating merger review between the agencies.¹⁹² The HSR Act required each antitrust agency to obtain clearance from the other before opening an investigation, and the Act additionally established time limits for the process.¹⁹³ Deciding which agency had the go-ahead in a timely and organized manner proved difficult.¹⁹⁴ Due to HSR time limits, if the agencies could not

187. Dual enforcement has rightfully been the subject of scrutiny for decades. *See, e.g.*, Kovacic, *supra* note 1, at 507 (“Each aspect of U.S. antitrust enforcement, including dual federal jurisdiction, has received close scrutiny.”); Milton Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1319–20 (1982); Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 695, 701 (1990) (stating that dual enforcement is “inefficient and misguided”); Darren Bush, *Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency*, 53 WILLAMETTE L. REV. 33, 34 (2016). Previous criticism has not focused on the impact of technology, especially modern technology, on antitrust enforcement. *Cf. id.* at 52 (proposing a single enforcement scheme without discussing the impact of technology under the current scheme or the proposal).

188. 15 U.S.C. § 18.

189. *See id.* § 18a (vesting enforcement authority in both the FTC and the DOJ).

190. *Id.* § 18.

191. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

192. Kelly Signs, *Milestones in FTC History: HSR Act Launches Effective Premerger Review*, FED. TRADE COMM’N (Mar. 16, 2015, 8:00 AM), <https://perma.cc/PK5Z-GFEF>.

193. *See* 15 U.S.C. § 18a(d) (setting out premerger procedures).

194. *See* Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307, 1315–16 (2007) (describing the initial difficulties of resolving clearance disputes).

agree on which agency would conduct the investigation, both agencies would miss their chance to resolve possible antitrust violations.¹⁹⁵ Valuable investigation time was often wasted by agency turf battles over clearance.¹⁹⁶ Such battles over cases also undermine agency morale, further hurting agency efficiency.¹⁹⁷

In attempts to streamline the clearance process, the FTC and DOJ agreed to joint guidelines in 1993.¹⁹⁸ The guidelines delineated which agency had expertise in different product areas, but clearance disputes continued to drag on: neither agency had the incentive to defer to the other, regardless of expertise.¹⁹⁹ Another inter-agency agreement in 1995 similarly failed to improve matters.²⁰⁰ Between 1999 and 2002, one or both agencies sought clearance on approximately 1,250 matters.²⁰¹ On average, 24 percent of those matters resulted in delays of three weeks or a cumulative delay of more than seventeen years.²⁰² In 2002, the agencies tried yet again, proposing a clearance agreement that would permanently divide mergers between the agencies based upon industry.²⁰³

195. *See id.* at 1315 (“Under the HSR Act, these investigations were constrained by statutorily enforced time limits. If the agencies failed to resolve disputes in a timely fashion, they risked missing the only window of opportunity for thwarting the merger before it occurred.”).

196. *See id.* at 1316 (“Clearance disputes [took up] a considerable percentage of the thirty-day waiting period, leaving the ‘winning’ agency with a truncated period of time within which to investigate . . .”).

197. ANTITRUST MODERNIZATION COMM’N, REPORTS AND RECOMMENDATIONS iv (2007), <https://perma.cc/8SMF-Y92U> (PDF) [hereinafter 2007 ANTITRUST MODERNIZATION REPORT].

198. Peay, *supra* note 194, at 1315.

199. *Id.* at 1316 (describing the effect of the 1993 guidelines).

200. *Id.* at 1317.

201. *FTC Releases Antitrust Clearance Process Documents*, FED. TRADE COMM’N (Feb. 27, 2002), <https://perma.cc/GK7N-JA8N>.

202. *See id.*

203. *See* Kris Dekeyser et al., *Coordination Among National Antitrust Agencies*, 10 SEDONA CONF. J. 43, 51 (2009) (“In 2002, the DOJ and FTC announces the creation of a Memorandum of Agreement . . . that delineated the industry sectors that were to fall under each agency’s purview, and the divisions would be permanent.”).

This time, the clearance agreement was blocked by the Senate.²⁰⁴

Clearance battles are also harmful because they create uncertainty. With two sets of directions, companies waste resources attempting to adhere to both guidelines as is feasible.²⁰⁵ For example, the agencies have different merger procedures:²⁰⁶ the FTC can pursue action through its administrative court, while the DOJ must litigate before Article III courts.²⁰⁷ This results in significantly unequal power in seeking permanent injunctions during merger investigations.²⁰⁸ The FTC usually only seeks a preliminary injunction in court, retaining the option to pursue a permanent injunction through its internal administrative litigation process.²⁰⁹ The DOJ usually agrees with the merging parties to consolidate proceedings for preliminary and permanent injunctions, which forces it to meet a higher burden of proof.²¹⁰ As a result, the outcome of a merger may turn on which antitrust agency is reviewing it.²¹¹

204. *See id.*

205. *See Kovacic, supra* note 1, at 521 (“If agencies apply dissimilar analytical techniques or standards, a fourth cost of competition and redundancy is the expense that businesses incur to evaluate commercial plans and strategies under both sets of enforcement approaches.”).

206. Blumenthal, *supra* note 37, at 29–30.

207. Gabison, *supra* note 184, at 24.

208. *See id.* (noting that the DOJ must meet a higher standard of proof than the FTC); Raymond Z. Ling, *Unscrambling the Organic Eggs: The Growing Divergence between the DOJ and the FTC in Merger Review after Whole Foods*, 75 BROOK. L. REV. 935, 938 (2010) (“[T]he FTC’s lower preliminary injunction standard and its ability to commence administrative litigation gives the FTC a significant advantage over the DOJ in challenging a merger and extracting a settlement, a result that is unacceptable in a dual enforcement system.”).

209. *See* ANTITRUST MODERNIZATION COMM’N, *supra* note 197, at 138 (stating that the FTC has “statutory authority to secure permanent relief through administrative litigation, an avenue not available to the DOJ”).

210. *See id.* at 139. While the House in 2018 passed legislation aimed at eliminating this inequality, the bill was never passed by the Senate. *See H.R. 5645 (115th): Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018*, GOVTRACK, <https://perma.cc/FY9Z-DVGY>.

211. *See* Ling, *supra* note 208, at 938.

Even when the agencies follow the same procedures, they apply them differently, leading to different results based on which agency handles the case²¹² and creating inconsistencies in the enforcement of the law.²¹³ At times, one agency approves conduct that the other agency rejects.²¹⁴ For example, DOJ leadership under the Trump administration is skeptical of behavioral remedies in vertical mergers, while the FTC has continued to apply behavioral remedies when approving vertical mergers.²¹⁵ Thus, conflicts between the FTC and DOJ even outside the technology context persist to the present day.²¹⁶

212. See Blumenthal, *supra* note 37, at 30 (stating that disparate outcomes result from differing views about the application of substantive antitrust law).

213. SITARAMAN, *supra* note 89, at 7.

214. See Handler, *supra* note 187, at 1319; see also *FTC v. Qualcomm, Inc.*, 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019) (finding for the FTC, which alleged that Qualcomm's conduct violated antitrust laws, despite the DOJ's approval of Qualcomm's conduct).

215. See Browdie et al., *supra* note 72, at 77. Behavioral or conduct remedies allow mergers to proceed subject to specified behavioral commitments, such as non-discrimination provisions, mandatory licensing, anti-retaliation provisions, or prohibitions on certain contracting practices. U.S. DEP'T JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 13 (2011), <https://perma.cc/6BQ7-T4PM> (PDF); John E. Kowka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, AM. ANTITRUST INST. 4 (2011), <https://perma.cc/G7LD-PWU7> (PDF). In contrast, structural remedies typically require divestiture of a business entity or assets, which enables the divested entity to act as an independent firm. See *id.* at 4–6 (comparing structural remedies to behavioral remedies).

216. As recently as May 2020, economists, legal scholars, and practitioners submitted a joint letter to Congress, calling on the legislature to help solve inefficiencies caused by the country's unique system of antitrust enforcement. See JOINT SUBMISSION OF ANTITRUST ECONOMISTS, LEGAL SCHOLARS, AND PRACTITIONERS TO THE HOUSE JUDICIARY COMMITTEE ON THE STATE OF ANTITRUST LAW AND IMPLICATIONS FOR PROTECTING COMPETITION IN DIGITAL MARKETS 13 (May 15, 2020), <https://perma.cc/2QN4-JJP3> (PDF) ("Congress could enhance enforcement efficiency and efficacy by harmonizing the agencies' procedures and by clearly articulating their respective responsibilities . . .").

2. The Accidental Origins of Dual Enforcement

Creating a unified antitrust enforcement agency would not reverse a fully deliberated decision of Congress: to the contrary, it would right an accidental duplication that was not anticipated.²¹⁷ As Jason Marisam has noted, “[D]uplicative delegations are largely incidental and unintentional creations.”²¹⁸ The overlapping jurisdiction between the DOJ Antitrust Division and the FTC is no exception. The agencies were never intended to serve the same role as antitrust enforcers.²¹⁹

The Department of Justice’s antitrust enforcement began in 1903, when Congress earmarked money for antitrust enforcement and created the Antitrust Attorney General position.²²⁰ In the same year, President Roosevelt created the Bureau of Corporations, the FTC’s predecessor.²²¹ The DOJ was the prime litigator in antitrust cases and sought to enforce the Sherman Act²²² which was passed by Congress to address antitrust concerns.²²³ However, the results varied widely from court to court, with the judiciary placing much of the power in their own hands.²²⁴ Congress was not pleased with these judicial

217. See Harry First et al., *Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System* 3 (N.Y. Univ. Sch. of L., Working Paper No. 12-18, 2012) (stating that Congress did not anticipate the two agencies to have “overlapping enforcement authority”).

218. Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 184 (2011).

219. See First et al., *supra* note 217, at 3 (“At the time the statutes were enacted . . . Congress apparently saw the two agencies as focusing on competition problems in different ways and using different procedures.”).

220. Gregory J. Werden, *Establishment of the Antitrust Division of the U.S. Department of Justice*, 92 ST. JOHN’S L. REV. 419, 424–25 (2018). The DOJ Antitrust Division was formally established a few years later in 1919. *Id.* at 425–26.

221. *Our History*, FED. TRADE COMM’N, <https://perma.cc/9U86-QX6M>.

222. 15 U.S.C. §§ 1–38.

223. See First et al., *supra* note 217, at 3 (stating that Congress anticipated the DOJ to continue litigating antitrust cases while the FTC engaged in “preventative regulation”).

224. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911) (establishing the Rule of Reason); Neil W. Averitt, *The Meaning of “Unfair*

interpretations and sought to create a commission to carry out their original vision.²²⁵ They created the Federal Trade Commission in 1914 in an attempt to cut down on the divergences between courts and to shift control over antitrust policy away from the courts.²²⁶ Ironically, the creation of the FTC and subsequent overlapping jurisdiction has divided executive authority.

At the time of the FTC's creation, Congress believed the DOJ and FTC would take on different roles in antitrust law. Most fundamentally, they believed the DOJ would enforce antitrust against those who violated the law while the FTC would regulate the behavior of corporations, preventing monopolies from occurring in the first place.²²⁷ Congress, however, failed to expressly differentiate the roles that it intended the agencies to play.²²⁸ When the FTC Act was passed, the agency had broad powers that intersected with those of the DOJ. Crucially, the two agencies have concurrent authority over §§ 2, 3, 7, and 8 of the Clayton Act and the Sherman Act.²²⁹ These statutes are significant and cover everything from mergers and civil nonmerger investigations to noncriminal pricing conspiracies.²³⁰ It is under this shared authority that

Methods of Competition" in Section 5 of the Federal Trade Commission Act, 21 B.C. L. REV. 227, 233 (1980).

225. See First et al., *supra* note 217, at 2–3 (discussing the congressional response to *Standard Oil*); Averitt, *supra* note 224, at 233 (same).

226. See Averitt, *supra* note 224, at 233–36 (describing the Congressional effort to wrest control from the courts); *Our History*, *supra* note 221.

227. First et al., *supra* note 217, at 3 (describing the DOJ's intended role as handling existing monopolies and the FTC's role as engaging in "preventative regulation").

228. See *id.* ("Congress paid no attention to the potential for conflict between the agencies.").

229. U.S. DEP'T JUST., ANTITRUST DIVISION MANUAL VII-3 (5th ed. 2012) <https://perma.cc/5MVP-R2JF> (PDF) [hereinafter DOJ ANTITRUST DIVISION MANUAL]; see *The Antitrust Laws*, FED. TRADE COMM'N, <https://perma.cc/JS77-ME9Q> (stating that while the FTC does not have direct jurisdiction over the Sherman Act, the Supreme Court has ruled that violations of the Sherman Act also violate the FTC Act).

230. First et al., *supra* note 217, at 3. It is true that the agencies have some differences in jurisdiction. For example, the DOJ exclusively handles criminal antitrust cases and the FTC exclusively handles civil Robinson-Patman Act

many conflicts have arisen, culminating in the far-reaching conflicts brought on by our technological age. Consolidating enforcement would eliminate much duplication that Congress never intended.

3. Worldwide Trend of Single Enforcement

Other countries that had similar overlapping jurisdiction problems in antitrust enforcement have recently consolidated enforcement into a single agency, making the dual enforcement in the United States even more anomalous. For example, Brazil restructured its own dispersed competition authorities into a single agency in 2011.²³¹ In 2018, China passed legislation to amalgamate its three antitrust bodies into one.²³² The United States is no stranger to consolidation of competition law itself. In 1989, regulation of mergers in the trucking and airline industries was moved from the Department of Transportation to the DOJ Antitrust Division.²³³ Creating a single enforcement agency for antitrust would thus be consonant with both international and domestic trends.

4. Private Antitrust Suits Do Not Support Continued Dual Agency Enforcement

To be sure, removing the FTC's antitrust jurisdiction would not prevent private antitrust suits. The Sherman and Clayton Acts provide a private right of action.²³⁴ For every antitrust case

matters, which are related to price discrimination. DOJ ANTITRUST DIVISION MANUAL, *supra* note 222, at VII-3.

231. See Tito Amaral de Andrade et al., *Brazil: Merger Control*, GLOB. COMPETITION REV. (Sept. 19, 2019), <https://perma.cc/EN83-ZHQZ> (describing the restructuring legislation as some of the most important governance over merger review in Brazil); Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Antitrust Law*, 52 CONN. L. REV. 123, 178 (2020) (comparing the dual system in the United States with the single agency systems in Brazil).

232. Noah A. Brumfield et al., *China Merges Antitrust Enforcement Agencies into One, as Its Anti-Monopoly Law Approaches 10th Anniversary*, WHITE & CASE LLP (Mar. 29, 2018), <https://perma.cc/J94K-ZB7R>.

233. Gabison, *supra* note 184, at 37.

234. See DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 51 (2011) (stating that the private right of action was likely

brought by the FTC or DOJ, there are about ten cases brought by private actors.²³⁵ Private antitrust litigation is often motivated by business objectives, with companies strategically filing suit against rivals.²³⁶ These private actions may be uncoordinated with the country's domestic policy interests, causing headaches for the government. For example, a private antitrust litigant has the right to bring an action against a foreign defendant, even if the foreign defendant's behavior was permitted by foreign law.²³⁷

That said, the existence of private litigants is not a strong argument against consolidating the DOJ and the FTC. Deadlocks and disorganization at the federal agency level are much more problematic than any unpredictability resulting from private action. The FTC and DOJ are repeat actors with institutional knowledge and large staffs devoted to bringing antitrust cases.²³⁸ Repeat actors in an area of law have outsize power to shape it, because they can make strategic and long-term litigation decisions to shape the rules to their advantage.²³⁹ And no antitrust plaintiff is as much a repeat player in antitrust as the Department of Justice and the FTC. In a technical area like antitrust,²⁴⁰ the professional staffs of the

intended to be “a supplement to public enforcement,” but it is exercised more often than framers of the Acts likely imagined).

235. See *id.* at 63.

236. See *id.* at 50.

237. Hannah Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 225 (2001). A private litigant is vested “with the power to assert domestic policy even in situations in which a government agency, considering the international implications of such an action, might decline to do so.” *Id.* at 237.

238. See *supra* notes 178–180 and accompanying text.

239. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 112 (1974).

240. See William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 850 (2001) (“To a degree unmatched in other fields of economic regulation, the elaboration of antitrust doctrine draws upon the contributions of economic theory.”).

agencies can influence courts to a far greater degree.²⁴¹ The reach of these agencies is not limited to the cases they bring. The agencies also file amicus briefs, and these can be very influential.²⁴²

Moreover, private antitrust action is limited by many constraints not imposed on federal agencies. For example, private plaintiffs must prove a personal injury in antitrust suits.²⁴³ This standing requirement proves an obstacle in challenging mergers: plaintiffs must not only prove that the merger is anticompetitive, but also that the post-merger firm would do something anticompetitive that harms them personally.²⁴⁴ To bring suit under a theory of monopolization, a private litigant must be a direct purchaser of the alleged monopolist to have standing.²⁴⁵ In the realm of international affairs, forum selection and choice of law clauses and the rise of arbitration provide a barrier to private antitrust action.²⁴⁶ The antitrust agencies have significantly more power in antitrust law than private litigants. It is important that this power is wielded in a unified and orderly way.

241. See, e.g., *id.* at 853–54 (stating that the FTC’s professional staff conducts studies to evaluate the agency’s past enforcement decisions).

242. See Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625, 628 (2001) (discussing the influence of DOJ and FTC amicus briefs).

243. Dan Butrymowicz, *Antitrust Violation vs. Injury-in-Fact: A Distinction That Makes a Difference*, FED. TRADE COMM’N (Feb. 26, 2016, 11:16 AM), <https://perma.cc/GY4Z-P2S2>.

244. Paul F. Brzyski, *Collateral Damage: Private Merger Lawsuits in the Wake of Section 2’s Contraction*, 68 DUKE L.J. ONLINE 119, 132 (2019).

245. See Case Comment, *Clayton Antitrust Act and Sherman Antitrust Act—Antitrust Trade and Regulation—Antitrust Standing—Apple Inc. v. Pepper*, 133 HARV. L. REV. 382, 382 (2019) (“Indirect purchasers, who transacted with these direct purchasers rather than with the monopolist itself, had no standing, even if the direct purchaser ‘passed on’ the full cost of the monopolistic overcharge in the form of higher prices.”).

246. See Buxbaum, *supra* note 237, at 237–45 (examining the role of foreign arbitration and choice-of-law clauses in domestic regulatory cases).

II. ANTITRUST ENFORCEMENT SHOULD BE CONSOLIDATED WITHIN THE DEPARTMENT OF JUSTICE

With the understanding that dual enforcement cannot continue, this Part explains why antitrust enforcement is best placed under the DOJ's Antitrust Division. We first show that the DOJ, not the FTC, should be the choice because antitrust now has serious foreign policy and national security ramifications in our technological era that must be handled by an agency directly responsible to the president, who controls the numerous other mechanisms for dealing with such issues.²⁴⁷ We next show that removing the FTC from antitrust will have the substantial added advantage of improving its oversight of privacy—a consumer protection matter also given new prominence by technology.

A. *Antitrust Policy Increasingly Implicates Foreign Policy*

Antitrust law has always affected foreign policy. That much is evident in the various international antitrust organizations and agreements in existence.²⁴⁸ Enforcement decisions, even those involving only domestic companies, have political and economic ramifications for the United States internationally.²⁴⁹

247. E.g., the Department of Defense, the Department of Energy, the State Department, the Federal Bureau of Investigation, foreign ambassadors, and treaties.

248. The International Competition Network, Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development, Asia-Pacific Economic Cooperation, and Inter-American Competition Alliance are some of the many international antitrust organizations. RANDOLPH TRITELL & ELIZABETH KRAUS, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION'S INTERNATIONAL ANTITRUST PROGRAM 6 (2019), <https://perma.cc/7MQV-26DC> (PDF). On their websites, the DOJ and FTC provide extensive lists of international competition and consumer protection agreements entered into by the United States. See generally *International Competition and Consumer Protection Cooperation Agreements*, FED. TRADE COMM'N, <https://perma.cc/SZZ8-EM9R>; *Antitrust Cooperation Agreements*, U.S. DEP'T JUST., <https://perma.cc/ZWE7-6P9M>.

249. See Brief for the United States of America (Dep't of Justice) as Amicus Curiae Supporting Appellant and Vacatur at 3, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122) (arguing that an antitrust enforcement decision against Qualcomm, a domestic company, will shift the United States'

However, antitrust law plays a particularly important role in international politics today due to the rise of technology. Technology has revolutionized foreign intelligence and espionage.²⁵⁰ Accordingly, countries have grappled for control of the technology industry, notably China and the United States,²⁵¹ initiating “the technology cold war.”²⁵² Both the United States and China have used antitrust regulation to further their position in this technology war.²⁵³ Therefore, technological advancement requires that antitrust enforcement be carefully coordinated with foreign policy.

The executive branch, specifically the president, directs and controls relations with international entities.²⁵⁴ Thomas Jefferson described the president as “the only channel of communication between the United States and foreign nations.”²⁵⁵ Traditional descriptions of executive power by political writers have necessarily included foreign affairs

dominance in 5G technologies and harm national security); *see also* David J. Gerber, *International Competitive Harm and Domestic Antitrust Laws: Forms of Analysis*, 10 NW. J. INT'L L. & BUS. 41, 41 (1989).

250. *See* Edward Lucas, *The Spycraft Revolution*, FOREIGN POL'Y (Apr. 27, 2019), <https://perma.cc/25BH-7NE8> (“The biggest disruptive force is technological.”).

251. *See* Marguerite Reardon, *How 5G Got Tied Up in a Trade War Between Trump and China*, CNET (July 15, 2019, 7:30 AM), <https://perma.cc/3GR5-5DLK>

[T]he outcome of the 5G race is likely to determine whether the US will continue to maintain its technological edge and shape geopolitics for the next couple of decades or if [it will] cede that control to China, which sees technological dominance as a way to become a world superpower.

252. Adam Segal, *Year in Review 2019: The U.S.-China Tech Cold War Deepens and Expands*, COUNCIL ON FOREIGN RELS.: BLOG (Dec. 18, 2019), <https://perma.cc/QB6W-3SQB>.

253. *See infra* notes 277–299 and accompanying text.

254. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001). While some scholars argue that Congress plays a dominant role in foreign affairs, they concede that the president has significant foreign powers under the Constitution. *Id.* at 240–41.

255. *A Short History of the Department of State*, U.S. DEP'T STATE, OFF. HISTORIAN, <https://perma.cc/6H5V-9C4P>.

powers.²⁵⁶ The Constitution specifically enumerates the president's power to make treaties, appoint ambassadors, and control the army and navy.²⁵⁷ These designations enable the president to conduct diplomacy with foreign nations.²⁵⁸ The Supreme Court has affirmed that the president is "the sole organ of the federal government in the field of international relations."²⁵⁹ The secretary of state, the Foreign Service, and the U.S. Agency for International Development report to the president and carry out his or her foreign policy.²⁶⁰ Outside of constitutional grants of power, as a practical matter, the president is generally privy to information relevant to foreign affairs on a more up-to-date basis than other governmental bodies.²⁶¹ His or her constitutional power and comparative information advantage both place the president in a position to direct international relations and safeguard against foreign threats. Therefore, the president must directly oversee antitrust policy to carry out his or her constitutional foreign policy duties.

The president has such direct oversight of the DOJ. The president appoints the attorney general and assistant attorneys

256. See Prakash & Ramsey, *supra* note 254, at 234 ("[T]he ordinary eighteenth-century meaning of executive power . . . included foreign affairs powers.").

257. U.S. CONST. art II.

258. See Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL FOREIGN RELS., <https://perma.cc/CHY2-AL8T> (last updated Mar. 2, 2017) (describing the implied power of conducting diplomacy with other countries as flowing from the express power to appoint and receive ambassadors).

259. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

260. *The Secretary of State*, U.S. DEP'T STATE, <https://perma.cc/AGV4-Y2Q5>.

261. See Brandice Canes-Wrone et al., *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 J. POL. 1, 4 (2008) (arguing that the president can use various policies and tools to act without congressional endorsement).

general²⁶² and retains the power to fire these agents at will.²⁶³ The Antitrust Division has a particularly hierarchal structure wherein the president appoints an assistant attorney general who oversees the entire Antitrust Division.²⁶⁴ The same cannot be said for the FTC. The FTC is an independent agency, and heads of the agency can only be removed by the president for good cause.²⁶⁵ The president may exert political pressure on the FTC as an independent agency to take a specific action, but he is not able to direct the agency in the same way.²⁶⁶ And, since the Supreme Court upheld the constitutionality of the independence of the FTC,²⁶⁷ the president has never fired any commissioner.²⁶⁸

Under dual antitrust enforcement, the president is thus handicapped in his or her direction of antitrust policy. The FTC and DOJ jointly represent the United States in multiple international antitrust organizations, such as the Internal Competition Network²⁶⁹ and Competition Committee of the

262. *Assistant Attorney General*, U.S. DEP'T JUST., ANTITRUST DIV., <https://perma.cc/6EUD-XQBV>.

263. That said, the DOJ traditionally operates with a degree of prosecutorial independence. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 38–68 (2018).

264. DOJ ANTITRUST DIVISION MANUAL, *supra* note 229, at I-3.

265. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935) (concluding that the president's power to remove a head of the FTC is limited to the causes enumerated in the Federal Trade Commission Act).

266. For example, in 2011, President Obama released executive orders requiring agencies to conduct retrospective regulatory reviews. Independent agencies were not bound to these orders. Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011), <https://perma.cc/RK4E-TFGD> (PDF); Exec. Order No. 13610, 77 Fed. Reg. 28,469 (May 10, 2012), <https://perma.cc/VN2H-WDC6> (PDF).

267. *See Humphrey's Ex'r*, 295 U.S. at 628 (stating that the duties of the FTC “are performed without executive leave and, in the contemplation of the statute, must be free from executive control”).

268. *See Commissioners, Chairwomen and Chairmen of the Federal Trade Commission*, FED. TRADE COMM'N (2018), <https://perma.cc/32XV-5TDT> (listing each commissioner and their term of service and stating that commissioners serve a seven-year term unless they resign early).

269. DOJ ANTITRUST DIVISION MANUAL, *supra* note 229, at VII-34.

Organization for Economic Cooperation and Development.²⁷⁰ The FTC has the power to enforce its antitrust judgments abroad,²⁷¹ which further hinders the president's ability to form cohesive international policies. Further, the FTC does not distinguish between its international and domestic activities.²⁷² After the agency determines its enforcement policies, it "enforces them to the fullest extent of its jurisdictional authority, whether foreign or domestic."²⁷³ This could give rise to antitrust decisions that cut against the nation's best interest. Antitrust policy is a tool in the toolbox when it comes to navigating a complex global economy and political landscape. It should be used in the context of the country's overall international policies and goals.

FTC v. Qualcomm reveals how international relations and national security are intertwined with antitrust policy.²⁷⁴ Opposing the district court's decision in the case successfully brought by the FTC, the DOJ argued that the antitrust enforcement action harmed Qualcomm's ability to compete and so posed a serious national security threat.²⁷⁵ As support, the agency cited to statements by the Departments of Defense and Energy.²⁷⁶ Through various departments, the executive branch

270. *Id.*

271. *See, e.g.,* Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944) (holding that the FTC had the power to order Branch to cease and desist in a diploma mill in Latin America).

272. *See* Jesse R. Ruhl, Comment, *The International Law Limits to the FTC's International Activity: Does the Law of Nations Keep the FTC at Home?*, 7 PA. ST. INT'L L. REV. 319, 325 (1989) ("[T]he FTC does not have a different strategy for pursuing domestic as opposed to international activities.").

273. *Id.*

274. 969 F.3d 974 (9th Cir. 2020).

275. *See* Brief for the United States of America (Dep't of Justice) as Amicus Curiae Supporting Appellant and Vacatur at 12, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122) (describing Qualcomm as a supplier of "mission-critical" products and services to the United States).

276. *See* Declaration of Department of Energy Chief Information Officer Max Everett, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122); Declaration of Under Secretary of Defense for Acquisition and Sustainment Ellen M. Lord, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122).

has taken strong steps to protect Qualcomm amidst the technology cold war between the United States and China. This suit threatened to do the opposite.

Qualcomm is the world's largest manufacturer of smartphone chips.²⁷⁷ It is also the only American company that manufactures such chips, with China-backed Huawei as one of its biggest competitors.²⁷⁸ These two companies are at the heart of a battle between the United States and China for technological dominance.²⁷⁹ Qualcomm and Huawei are central to the development of 5G, the new standard network for mobile devices.²⁸⁰ The outcome of the 5G race will determine whether the U.S. will continue to dominate the technology industry, or if it will “cede that control to China, which sees technological dominance as a way to become a world superpower.”²⁸¹ National security experts worry that if Huawei dominates the 5G market, it could use its networks for espionage or shut down critical communications.²⁸² Many lawmakers have also expressed

277. See Jene Park, *Samsung Became the Third Largest Smartphone Application Processor Vendor Globally in 2019*, COUNTERPOINT (Apr. 13, 2020), <https://perma.cc/Q74S-BSDL> (showing that Qualcomm had 33.4 percent of the global smartphone application processor market share in 2019, the most of any company).

278. See Brian Fung, *Qualcomm Is Now Alone at Top of 5G Chip Market*, LEDGER (Apr. 18, 2019, 4:34 PM), <https://perma.cc/Z3LG-RBJC> (naming Qualcomm's biggest competitors as Huawei and Samsung); Rob Enderle, *Qualcomm vs. Huawei: Is This a Battle Between Companies or Countries?*, IT BUS. EDGE (Mar. 9, 2019), <https://perma.cc/9ELC-AMRY>.

279. See *The Threat of a U.S.-China “Tech Cold War”*, AXIOS (Nov. 18, 2019), <https://perma.cc/JUR2-Q2XX> (describing a tech cold war between the U.S. and China as “the greatest threat to globalization since the end of World War II”).

280. See Ethan Epstein, *The Little-Known Court Case That Could Damage U.S. National Security*, WASH. TIMES (Jan. 9, 2019), <https://perma.cc/6248-DD7X> (stating that 5G networks will allow for autonomous vehicles, robo-surgeries, smart cities, and drone flying); Daniel Shane & Sherisse Pham, *Why the US Killed Broadcom's Giant Bid for Qualcomm*, CNN (Mar. 13, 2018, 7:31 AM), <https://perma.cc/K854-JQ4J>.

281. Reardon, *supra* note 251.

282. *Id.*

concern with China's rise in technology, fearing a Chinese surveillance state.²⁸³

In addressing these threats, President Trump blocked an attempted acquisition of Qualcomm by Broadcom in 2018.²⁸⁴ The president expressed concern that Broadcom, a Singaporean company, would cut off Qualcomm's R&D and enable Huawei to dominate the marketplace.²⁸⁵ The transaction was blocked through the Committee on Foreign Investment in the United States (CFIUS), a committee comprised of executive branch officers such as the secretaries of the Treasury, Justice, Homeland Security, Commerce, and Defense—all directly responsible to the president.²⁸⁶ CFIUS reviews economic transactions by foreign entities and advises the president, who can block transactions that threaten national security.²⁸⁷ CFIUS reviews have increased steadily in the last decade and Chinese transactions have accounted for the majority of the investigations.²⁸⁸

Outside of CFIUS, the executive branch imposed restrictions on Huawei and affiliated companies. In 2019, the U.S. Commerce Department placed Huawei on a trade blacklist based on national security concerns.²⁸⁹ In announcing the action, the secretary of commerce cited a presidential directive ordering the department to be vigilant in protecting national

283. Nitasha Tiku, *Big Tech: Breaking Us Up Will Only Help China*, WIRED (May 23, 2019, 7:00 AM), <https://perma.cc/HL4J-QPHC>.

284. Kate O'Keefe, *Trump Orders Broadcom to Cease Attempt to Buy Qualcomm*, WALL ST. J. (Mar. 13, 2018, 12:33 PM), <https://perma.cc/656Z-PWX8>.

285. *Id.* (describing the attempted acquisition as a national security risk).

286. *CFIUS Overview*, U.S. DEP'T TREASURY, <https://perma.cc/L3UT-G64G>.

287. CONG. RSCH. SERV., THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 1 (Dec. 16, 2019), <https://perma.cc/8SBU-V9AE> (PDF).

288. *See* COMM. ON FOREIGN INV. U.S., ANNUAL REPORT TO CONGRESS 18, <https://perma.cc/36NH-MS5T> (PDF) (stating that Chinese investors received the most notices from 2015 to 2017).

289. *Department of Commerce Announces the Addition of Huawei Technologies Co. Ltd. to the Entity List*, U.S. DEP'T COMMERCE (2019) <https://perma.cc/QBA2-7JLA>.

security activities.²⁹⁰ In 2020, the DOJ indicted Huawei for intellectual property theft and conspiring to steal trade secrets.²⁹¹ The international importance of the U.S. actions is underscored by its joining a movement of democracies to isolate Huawei and promote other companies as 5G providers.²⁹²

China has also taken counteractions against U.S. technology, making any mechanism the United States has in this struggle more important. In 2018, Chinese antitrust regulators blocked Qualcomm from acquiring rival chipmaker NXP.²⁹³ The Trump administration had lobbied the Chinese government to approve the deal, which would have allowed Qualcomm to expand into new market areas.²⁹⁴ In 2019, the Chinese government ordered Chinese public institutions to replace foreign software and computer equipment with domestic suppliers within a few years.²⁹⁵ In sum, both China and the U.S. have leveraged antitrust regulation to give domestic companies a strategic international competitive advantage. And this

290. See *id.* (explaining that a placement on the Entity List “will prevent American technology from being used by foreign owned entities” in a potentially threatening way).

291. *Chinese Telecommunications Conglomerate Huawei and Subsidiaries Charged in Racketeering Conspiracy and Conspiracy to Steal Trade Secrets*, U.S. DEP’T JUST. (Feb. 13, 2020), <https://perma.cc/B8LX-6QQH>.

292. See Srijan Shukla, *UK Wants 5G Alliance of 10 Countries, Including India, to Avoid Reliance on Chinese Huawei*, PRINT (May 29, 2020, 4:34 PM), <https://perma.cc/9WWW-69W4> (noting that the United Kingdom is pursuing an alliance of ten democratic countries, including the United States, that would seek to create an alternative pool of 5G technology and equipment).

293. Liana B. Baker & Greg Roumeliotis, *Qualcomm Says China Comment Will Not Revive NXP Deal*, REUTERS (Dec. 3, 2018, 12:21 AM), <https://perma.cc/53YK-V9LK>; Sherisse Pham, *China Kills Qualcomm’s \$44 Billion Deal for NXP*, CNN (July 26, 2018, 7:07 AM), <https://perma.cc/C2LG-NVNY> (stating that Qualcomm confirmed that it was “terminating its proposed takeover of Dutch counterpart NXP . . . after China failed to grant it regulatory approval”).

294. See Matt Rosoff, *Qualcomm Reportedly Says It Sees No Prospect for NXP Deal Despite US-China Trade Truce*, CNBC (Dec. 3, 2018, 12:37 AM), <https://perma.cc/T88T-CMFZ> (noting actions taken by the White House to appease China in hopes of reviving the Qualcomm deal).

295. REBECCA FANNIN, *STAKES RISE IN U.S.-CHINA TECH COLD WAR WITH LATEST BLOCK 1–2* (2019), <https://perma.cc/S8RC-JYE9> (PDF) (describing the split in software and computer equipment as a “splinternet”).

technology war is only one part of a broader strained trade relationship between the United States and China.²⁹⁶ The White House has reported that China's market-distorting policies and economic aggression pose a threat to the global economy.²⁹⁷ A 2018 report pointed to state-sponsored IP theft through cyber espionage and forced technology transfer regulations.²⁹⁸ Since 2018, the two countries have had to negotiate various tariffs and trade agreements.²⁹⁹

Therefore, it is highly anomalous that the FTC has exercised its prosecutorial discretion to bring an antitrust action against Qualcomm that will—in coordination with China's actions—directly benefit Huawei and aid China in its foreign policy goals, when the president and his advisors are actively pursuing exactly the opposite goal. The problem created by the struggle for technological dominance and antitrust's role in it goes beyond this single case, important as it is. As of 2018, China had nine of the world's top twenty technology companies.³⁰⁰ Big Tech executives have argued that breaking up Big Tech under antitrust law will only help Chinese companies dominate the industry.³⁰¹ Effectively, they promote a “national

296. See Rick Gladstone, *How the Cold War Between China and U.S. Is Intensifying*, N.Y. TIMES (July 22, 2020), <https://perma.cc/KW2C-UG9B> (last updated July 24, 2020) (“In defense, trade, technology, media and diplomacy, among other areas, the rancor between the Trump administration and China's ruling Communist Party is worsening.”).

297. WHITE HOUSE OFF. TRADE AND MFG. POL'Y, *HOW CHINA'S ECONOMIC AGGRESSION THREATENS THE TECHNOLOGIES AND INTELLECTUAL PROPERTY OF THE UNITED STATES AND THE WORLD 1* (2018), <https://perma.cc/KY4U-HS9M> (PDF).

298. *Id.* at 2–5.

299. *United States and China Reach Phase One Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE (Dec. 13, 2019), <https://perma.cc/5WJL-VWF8>.

300. See Stephen Armstrong, *Splitting Up Facebook and Google Would Be Great for China*, WIRED (Oct. 17, 2019), <https://perma.cc/UD7X-THXB> (listing the nine companies, ranked by market valuation, located in China and their respective roles in the tech sphere).

301. See *id.* (noting that if the big American companies get broken up, there is a fear that no equally formidable Western player will be left to defend against Chinese companies); Tiku, *supra* note 283 (stating that Facebook's chief operating officer and the CEO of Google have both expressed the idea that breaking up Big Tech will only serve China).

champion” view: the nation needs powerful, dominant companies lest a foreign company take the helm.³⁰² Some scholars have criticized national champion policies, stating that any short-term advantages are outweighed by the harm to national innovation.³⁰³ Regardless, the battle over the future of technology shows how antitrust regulation plays a key role in a struggle for technological, economic, and political power—and that the U.S. needs a single, president-coordinated agency to guide the process.

The problem of integrating antitrust with the rest of foreign policy is not unique to China or President Trump. President Barack Obama, like President Trump, accused the EU of pursuing antitrust or regulatory actions against Big Tech in order to help their own tech companies compete.³⁰⁴ Some countries in the EU are using state authority to promote national champions to combat U.S. tech dominance.³⁰⁵ For instance, France and Germany have spent significant government resources in attempts to create a European rival to U.S. cloud computing companies.³⁰⁶ France has additionally

302. Cf. Rana Foroohar, *National Champions Are Not the Way to Compete with China*, FIN. TIMES (Mar. 24, 2019), <https://perma.cc/8KMX-AB68> (defining “national champions” as “large companies protected and supported by the state”).

303. See Daniel Kishi, *Against Bigness? Begin by Breaking Up Big Tech*, AM. CONSERVATIVE (Nov. 28, 2018, 12:01 AM), <https://perma.cc/9LLH-BAJG> (interviewing Tim Wu, the author of *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE*, who argues a national champion policy does not work). Wu notes that breaking up IBM and AT&T didn’t allow Japan to take over in the 1970s and 1980s and in fact led to supremacy in American tech. *Id.*

304. See Gaines, *supra* note 16 (“President Obama said the European companies were sore losers and were using their governments to gain footing against American rivals.”); Toman, *supra* note 16 (“US President Donald Trump attacked the European Union for taking action against US tech companies such as Google and Facebook over antitrust issues.”).

305. See Adam Satariano & Monika Pronczuk, *Europe, Overrun by Foreign Tech Giants, Wants to Grow Its Own*, N.Y. TIMES (Feb. 19, 2020), <https://perma.cc/J8T8-U65C> (“[European Union] [o]fficials laid out some broad ideas that suggest the authorities will seek to nurture homegrown businesses by taking on the giants from overseas . . .”).

306. See Mark Scott, *What’s Driving Europe’s New Aggressive Stance on Tech*, POLITICO (Oct. 29, 2019, 4:01 PM), <https://perma.cc/Y7V7-RZV3> (“The countries’ joint efforts to create a European rival to Google, known as Quaero,

levied a tax on digital giants, commonly dubbed “GAFA,” because it will primarily affect American tech companies Google, Apple, Facebook, and Amazon.³⁰⁷ U.S. antitrust regulators must also counter these threats to the American economy and technological dominance when exercising prosecutorial discretion over enforcement actions in the technological arena.

The competition for technological dominance is an enduring fact of our age. Moreover, technology is encompassing more and more important industries, encapsulated in the saying that “software is eating the world.”³⁰⁸ It is thus more important today for the nation’s antitrust policy to be aligned with other foreign policy actions taken by the executive branch.³⁰⁹ The FTC should not be able to bring antitrust actions when they can cut against the various other international efforts taken by the country.

B. *Consolidating Antitrust Enforcement under the DOJ
Allows the FTC to Focus on Privacy*

Eliminating its jurisdiction over antitrust will also give the FTC the resources and focus to address issues of privacy. Privacy law has grown in prominence along with the rise of digital technology.³¹⁰ While most Western countries have

were quietly scrapped in 2013 after receiving millions of euros in government grants with little, if any, impact on the search giant’s dominance.”).

307. Christina Okello, *France to Levy Digital Tax Despite US Decision to Walk Out of Talks*, RFI (June 18, 2020, 4:20 PM), <https://perma.cc/67KZ-H3K2>.

308. Marc Andreessen, *Why Software Is Eating the World*, WALL ST. J. (Aug. 20, 2011), <https://perma.cc/6ZEW-W3NE>. Thus, it would not be foresighted to simply make the DOJ responsible for industries driven by current technology. Moreover, dividing antitrust enforcement responsibilities along these lines would lead to the kind of turf fight between the FTC and the DOJ we have seen before—this time over what constitutes an industry with foreign policy effects.

309. See 2 SPENCER WEBER WALLER & ANDRE FIEBIG, *ANTITRUST & AMERICAN BUSINESS ABROAD* § 23.22 (4th ed. 2020) (“Coordination of antitrust policy . . . is only one aspect of far larger problems in coordinating foreign policy with defense and domestic interests.”).

310. See Cameron F. Kerry, *Why Protecting Privacy Is a Losing Game Today—and How to Change the Game*, BROOKINGS INST. (July 12, 2018),

comprehensive privacy protections, the U.S. has taken a piecemeal approach, with various sector-specific and state-specific laws.³¹¹ These uneven regulations have been criticized for causing confusion for businesses and failing to adequately protect consumers.³¹² In fact, 79 percent of Americans are concerned about the way their data is being used by companies and most feel that they have little to no control over how their personal data is used.³¹³

First, eliminating FTC antitrust jurisdiction would free up resources, enabling the agency to dedicate more of its funding, personnel, and time to privacy issues.³¹⁴ Second, it would streamline the FTC's mission, which is currently divided between dueling goals of consumer protection and antitrust.³¹⁵ Agencies tend to perform better when they have a cohesive mission.³¹⁶ Removing the agency's antitrust duties would resolve this problem. Narrowing the focus of the FTC's responsibilities would be a significant step in the right direction for the agency and the future of privacy law.

<https://perma.cc/JH7W-PZWG> (noting the rapid increase in technological advances and the concurrent “increasing spread of state legislation” on privacy concerns that may push the adoption of a “single set of federal rules”).

311. See, e.g., 42 U.S.C. § 1320d-6 (Health Insurance Portability and Accountability Act (HIPAA)); 740 ILL. COMP. STAT. ANN. 14/15 (West 2020) (Illinois Biometric Information Privacy Act); CAL. CIV. CODE § 1798.100 (West 2020) (California Consumer Privacy Act).

312. See Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELS. (Jan. 30, 2018), <https://perma.cc/T4ZU-FLHR> (“[C]ompanies need clearer rules, and individuals need to be able to incentivize companies to secure data.”).

313. Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), <https://perma.cc/C9WQ-L7GT>.

314. David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1117, 1144 (2019).

315. See *id.* (“[A]n agency responsible for antitrust, consumer protection, and privacy is likely to find itself making tradeoffs as it sets priorities for how to use its resources.”).

316. See *id.* (“An agency focused solely on privacy will make privacy policy its single concern.”); see also *infra* notes 371–379 and accompanying text.

The FTC needs more resources to adequately address the nation's growing privacy concerns.³¹⁷ Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,³¹⁸ making the FTC the chief federal agency on privacy policy and enforcement³¹⁹ and the nation's de facto privacy agency.³²⁰ The agency has long-standing experience in enforcing privacy statutes³²¹ and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.³²² The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology.³²³ Very few Americans feel confident in the privacy of their information in the digital age.³²⁴ According to a 2019 study, over 80 percent of Americans feel that they have little to no control over the data collected on them by companies and the government.³²⁵ To adequately address privacy concerns, the

317. See Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, 32 BERKELEY TECH. L.J. 1027, 1049 (2017) (stating that the FTC needs additional resources and expanded enforcement mechanisms concerning its privacy work).

318. Hyman & Kovacic, *supra* note 314, at 1131.

319. *Protecting Consumer Privacy and Security*, FED. TRADE COMM'N, <https://perma.cc/HQ4V-4W2Q>.

320. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 600 (2014).

321. See Hyman & Kovacic, *supra* note 314, at 1142 (“Of all U.S. privacy implementation institutions, the FTC has unequalled capacity in the form of expert case handling and policy teams and physical resources . . .”).

322. See *id.* (noting that the FTC has spent the last decade developing an “internet laboratory to do high-quality forensic work, and the hiring of technology experts to assist in that effort”).

323. See, e.g., Nicholas Confessore & Cecilia Kang, *Facebook Data Scandals Stoke Criticism That a Privacy Watchdog Too Rarely Bites*, N.Y. TIMES (Dec. 30, 2018), <https://perma.cc/6RR2-NRUM> (describing concerns about the FTC's ability to adequately address privacy concerns associated with technological advances).

324. See Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RSCH. CTR. (May 20, 2015), <https://perma.cc/L7BG-232E> (“Americans have little confidence that their data will remain private and secure.”).

325. Auxier et al., *supra* note 313.

FTC needs more resources.³²⁶ The agency has been explicit that it needs more manpower to police tech companies.³²⁷ In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.³²⁸ A former director of the FTC's Bureau of Consumer Protection, which houses the privacy unit, has called the FTC "woefully understaffed."³²⁹

As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the U.K. and Ireland, respectively.³³⁰ Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.³³¹ Currently, the FTC's resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency's antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection.³³² Further, it would free up the scarce time of the commissioners to oversee this essential effort.³³³

This reallocation of resources is especially timely because the FTC's privacy responsibilities are expected to grow in the

326. See Shaun G. Jamison, *Creating a National Data Privacy Law for the United States*, 10 CYBARIS INTELL. PROP. L. REV. 1, 33 (2019).

327. See Harper Neidig, *FTC Says It Only Has 40 Employees Overseeing Privacy and Data Security*, HILL (Apr. 3, 2019, 11:01 AM), <https://perma.cc/6MPL-LX4W>.

328. *Id.*

329. Jessica Rich, *Give the F.T.C. Some Teeth to Guard Our Privacy*, N.Y. TIMES (Aug. 12, 2019), <https://perma.cc/F4FK-L46P>.

330. See Neidig, *supra* note 327.

331. See *id.*

332. See Hyman & Kovacic, *supra* note 314, at 1145 ("[T]he long-term result of making the FTC the nation's top privacy cop may transform the agency into a consumer protection/privacy regulator, rather than a consumer protection/antitrust regulator.").

333. This restructuring has long been called for, even in the 1980s, scholars proposed releasing the FTC from its antitrust duties so that the agency could concentrate on consumerism. Handler, *supra* note 187, at 1320.

future. The FTC is already on its way to becoming a consumer protection agency primarily focused on privacy.³³⁴ In its 2019 budget request to Congress, over half of the agency's budget was allocated to privacy.³³⁵ In addition, lawmakers on both sides of the political spectrum have proposed federal privacy legislation.³³⁶ Such legislation would expand the FTC's jurisdiction, empower it to bring more privacy actions, and increase the demands on its privacy resources.³³⁷ Right now, the U.S. is one of the only Western countries that does not have a comprehensive federal privacy law.³³⁸ Public pressure is great from both industry and scholars to change that, which would lead to increased privacy action at the federal level.³³⁹ Moving the FTC's antitrust duties to the DOJ would cleanly complete a readjusting of priorities that is already happening organically.

Removing its authority over competition law would also provide the FTC with organizational clarity. Currently, the agency serves dual missions of antitrust and consumer protection. Originally, the FTC only had antitrust jurisdiction: the FTC Act banned "unfair methods of competition in or affecting commerce."³⁴⁰ In 1931, the Supreme Court held that

334. Hyman & Kovacic, *supra* note 314, at 1145.

335. FED. TRADE COMM'N, FISCAL YEAR 2019 CONGRESSIONAL BUDGET JUSTIFICATION 198 (2018), <https://perma.cc/E3T3-VSCA> (PDF).

336. See Emily Birnbaum, *GOP Senator Introduces Privacy Legislation After Bipartisan Talks Break Down*, HILL (Mar. 12, 2020, 6:30 AM), <https://perma.cc/F8LC-RY4H> (stating that the legislative proposals show some "substantive common ground" between lawmakers on both sides of the aisle).

337. Neidig, *supra* note 327.

338. See Birnbaum, *supra* note 336 ("[T]he U.S. is one of the only countries in the Western world without a comprehensive law providing safeguards around how corporations collect personal information on their users.").

339. See Dina Temple-Raston, *Why the Tech Industry Wants Federal Control over Data Privacy Laws*, NAT'L PUB. RADIO (Oct. 8, 2018, 5:00 AM), <https://perma.cc/AH8G-YM6F> (indicating that the tech industry supports federal legislation that would preempt potentially restrictive state legislation); Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 905 (2009) (considering arguments for and against a federal omnibus law that would fill the gaps in the patchwork of state privacy law).

340. 15 U.S.C. § 45(a)(1)–(2).

this did not include consumer protection.³⁴¹ In 1938, Congress passed the Wheeler-Lea Act,³⁴² which amended the FTC Act to cover “unfair or deceptive acts or practices.”³⁴³ This paved the way for the FTC’s modern consumer protection mission.³⁴⁴ Since then, the agency has had to pursue goals that are sometimes in conflict.

Consumer protection laws prevent companies from misleading or cheating customers. Viewed broadly, consumer protection encompasses a paternalistic social goal of protecting consumers from themselves.³⁴⁵ Consumers may not wish to be educated on manipulative practices or dangerous products, but consumer protection laws aim to protect consumers despite any preference for ignorance. The FTC enforces numerous consumer protection statutes that govern bankruptcy abuse, scholarship fraud, tobacco education, and credit card accountability, among other things.³⁴⁶

The FTC approaches privacy as a consumer protection issue.³⁴⁷ Accordingly, the FTC promotes privacy interests through its Bureau of Consumer Protection.³⁴⁸ At first, the agency pursued a limited deception-based approach to privacy by targeting companies that did not comply with their own

341. See *FTC v. Raladam*, 283 U.S. 643, 648–49 (1931) (holding that “unfair methods of competition in or affecting commerce” does not include consumer protection).

342. Ch. 49 § 2, 52 Stat. 111 (1938).

343. Lesley Fair, *FTC Milestones: Weighing in on Weight Loss Cases*, FED. TRADE COMM’N (Dec. 4, 2014, 11:25 AM), <https://perma.cc/GW9W-T29A>.

344. See *id.* (“Wheeler-Lea put the focus on consumer injury . . .”).

345. See *id.* (discussing the application of the FTC’s consumer protection mission to a dangerous and deceptively advertised weight loss product).

346. *Statutes Enforced or Administered by the Commission*, FED. TRADE COMM’N, <https://perma.cc/6YQ8-ZG72>.

347. Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 146 (2015).

348. See *Division of Privacy and Identity Protection*, FED. TRADE COMM’N, <https://perma.cc/Y55L-U62Y> (listing the responsibilities of the Division of Privacy and Identity Protection and noting that it operates within the Bureau of Consumer Protection).

privacy policies.³⁴⁹ Since then, the FTC has broadened its approach to a harms-based inquiry against unfair handling of consumer data.³⁵⁰ The harms are generally linked to the rise of digital technology. For instance, consumers cannot effectively protect themselves in our dynamic, information-intense environment.³⁵¹ Some argue that digital products have led to externalities such as reduced offline interaction, addiction by design, and environmental harm in the form of electronic garbage and energy consumption.³⁵² Competition will result in the amount of privacy demanded by the market, which may not account for externalities and inaccurately reflect society's desires compared to the amount of privacy that people would collectively choose through legislation.³⁵³

In contrast to consumer protection law, antitrust law aims to preserve “free and unfettered competition.”³⁵⁴ The foundation of antitrust law is now understood to be protecting consumer welfare that flows from economic efficiency.³⁵⁵ Antitrust promotes the free market by outlawing monopolization and

349. See Ohlhausen & Okuliar, *supra* note 347, at 148–49 (“Early online enforcement actions targeted companies that failed to comply with promises in their privacy policies about how they collected and used data.”).

350. See *id.* at 149 (“In the early 2000s, the Commission changed tack to focus more explicitly on specific harms to consumers in connection with privacy.”).

351. See Derek Ireland & Michael Jenkin, *Embedding Consumer Protection in Competition Policy*, POLY OPTIONS (June 18, 2018), <https://perma.cc/QU3H-3XSA> (“Consumers are very vulnerable to manipulation by sophisticated marketers and sellers when they make their purchasing decisions and are often locked into poor decisions by long-term contracts that are one-sided and unfair, with poor access to redress.”).

352. See, e.g., Woodrow Hartzog & Neil Richards, *Privacy’s Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687, 1725–26 (2020) (examining the negative consequences of “industry’s appetite for data”).

353. MAURICE STUCKE & ALLEN GRUNES, *BIG DATA AND COMPETITION POLICY* 7 (2016).

354. Sherman Act, 15 U.S.C. §§ 1–38.

355. See Avishalom Tor, *Should Antitrust Survive Behavioral Economics?*, CPI ANTITRUST CHRON. 1–2 (2019), <https://perma.cc/8B8L-3YMQ> (PDF) (summarizing the tenets of the neoclassical market model, which provides the economic foundation of antitrust law).

unreasonable restraints of trade.³⁵⁶ Rather than the social goals of privacy and protection from deception promoted by consumer protection, antitrust pursues economic efficiency.³⁵⁷

Consumer protection and free competition can work against each other. Consumer protection regulation has been empirically proven to introduce barriers to entry, especially for small companies.³⁵⁸ Environmental, safety, and health regulations protect consumers while inhibiting the free market.³⁵⁹ Consider a specific example of the tension between consumer protection and competition. The Fair Credit Reporting Act³⁶⁰ provides an important service to consumers by protecting the fairness, accuracy, and privacy of personal information kept by credit reporting agencies.³⁶¹ At the same time, these protections introduce high compliance costs that have limited entry in the credit reporting industry.³⁶² The four

356. *See id.*

357. *See* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 *LOY. CONSUMER L. REV.* 336, 336–37 (2010) (discussing the appropriate economic standard); Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, *INFO. TECH. & INNOVATION FOUND.* 1–2 (2018), <https://perma.cc/FX2J-R6ZQ> (PDF) (“The consumer welfare standard generally states that overall consumer welfare and economic efficiency should be the main criterion regulators look to when evaluating a merger or alleged anticompetitive behavior.”).

358. *See* James Bailey & Diana Thomas, *Regulating Away Competition 2* (Sept. 2015) (unpublished manuscript), <https://perma.cc/LY73-WFRF>

[We ran] fixed effects regressions to show that more-regulated industries experienced fewer new firm births and slower employment growth in the period 1998 to 2011. Large firms may even successfully lobby government officials to increase regulations to raise their smaller rivals’ costs. We also find that regulations inhibit employment growth in small firms more than in large firms.

359. *See* KATALIN JUDIT CSERES, *COMPETITION LAW AND CONSUMER PROTECTION 1* (2005) (“Health, safety and environmental issues of consumer protection can lead to the withdrawal of products or to the regulation of markets limiting entry and innovation and eventually lead to higher prices.”).

360. 15 U.S.C. § 1681.

361. CONSUMER FIN. PROT. BUREAU, *A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT 1*, <https://perma.cc/ZT9U-SSDA> (PDF).

362. *See* ALEX MARTHEWS & CATHERINE TUCKER, *PRIVACY POLICY AND COMPETITION 12* (2019), <https://perma.cc/V55F-3JZH> (PDF) (discussing the

incumbents that dominate the market were established before the Act was passed.³⁶³

Safeguarding privacy as an aspect of consumer protection provides similar examples of tensions with promoting competition. In the U.S., the Children's Online Privacy Protection Rule (COPPA) establishes strict requirements on websites that target children.³⁶⁴ These limitations guard the privacy of children but have also led to less innovation in children's websites and apps in the country. Many apps targeted at children are developed in countries that have weaker privacy protections for children, such as Ukraine.³⁶⁵ The passage of General Data Protection Regulation (GDPR),³⁶⁶ a sweeping privacy legislation in Europe, led to increased control by consumers over their personal data.³⁶⁷ Simultaneously, it decreased competition among technology vendors and shrank overall business.³⁶⁸ The anticompetitive effects are unsurprising, given that the average cost of compliance with the regulation was £1.67 million.³⁶⁹ Additionally, privacy regulation

difficulty smaller entrants have experienced in competing in the credit reporting industry).

363. See *id.* (listing Equifax, Experian, Innovis, and TransUnion as the four large credit reporting agencies that have seen little competitive entry in decades).

364. Children's Online Privacy Protection Rule, 16 C.F.R. § 312.1–13 (2020).

365. See MARTHEWS & TUCKER, *supra* note 362, at 16 (noting that countries like Ukraine allow developers to gather more detailed data on young users than the United States permits).

366. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1.

367. See *EU Data Protection Rules*, EUR. COMM'N, <https://perma.cc/3FM2-E4E9> (“Stronger rules on data protection mean people have more control over their personal data and businesses benefit from a level playing field.”).

368. See Allison Schiff, *Privacy Regs like GDPR Hurt Competition in the Short Term, Study Finds*, AD EXCHANGER (Oct. 31, 2019, 8:16 AM), <https://perma.cc/9XX4-V4B6> (discussing the negative consequences of the GDPR).

369. See Marthews & Tucker, *supra* note 362, at 9. (“The average cost of compliance was £1.67 million. For firms between 100 and 249 employees, the average investment in GDPR compliance was £947,000, and the average

in the U.S. focuses on regulating interfirm data transfers over intrafirm uses, privileging large tech companies that are able to commercialize user data on their own.³⁷⁰ This may have the effect of further entrenching monopolists, contrary to the goals of antitrust. This conflict between consumer protection, including the protection of privacy, and antitrust poses a problem of incompatible missions for the FTC.

When Congress recognized conflicting goals in other agencies, it divided or reorganized them so that agencies are not tasked with contradictory missions. For instance, the Federal Aviation Administration (FAA) struggled to balance its goals of promoting commercial aviation and promoting aviation safety.³⁷¹ Changes that would ensure safety were often abandoned because they were outweighed by financial costs that would harm the aviation business.³⁷² After a high-profile plane crash in 1996, Congress removed the FAA's mission in promoting aviation, and from then on the agency was able to focus solely on safety.³⁷³ The Immigration and Naturalization Service (INS) also experienced tensions from its dual mission. The agency dealt with a "mission overload and conflict" of enforcing immigration while also providing immigration services.³⁷⁴ Immigration enforcement keeps people out, while

compliance investment of firms with more than 1,000 employees was £2.3 million.”).

370. See, e.g., CAL. CIV. CODE § 1798.120 (West 2020) (detailing rights consumers have when a business sells consumer personal information to third parties).

371. See FED. AVIATION ADMIN., HISTORY OF AVIATION SAFETY OVERSIGHT IN THE UNITED STATES 18 (2008), <https://perma.cc/5Y4E-2QRM> (PDF) (detailing the FAA's responses to airline accidents).

372. Lea Ann Carlisle, *The FAA v. the NTSB: Now That Congress Has Addressed the Federal Aviation Administration's Dual Mandate, Has the FAA Begun Living Up to Its Amended Purpose of Making Air Travel Safer, or Is the National Transportation Safety Board Still Doing Its Job Alone*, 66 J. AIR L. & COM. 741, 746–47 (2001).

373. See *id.* at 741.

374. *Restructuring the INS—How the Agency's Dysfunctional Structure Impedes the Performance of Its Dual Mission: Hearing before the H. Comm. on the Judiciary*, 107th Cong. 20 (2002) [hereinafter *Restructuring the INS*] (statement of Ms. Susan Martin, Director, Institute for the Study of International Migration, Georgetown University).

immigration services admits entrants.³⁷⁵ A study concluded that the incompatible missions led to “competition for resources,” “lack of coordination and cooperation,” and “confusion regarding mission and responsibilities.”³⁷⁶ The INS itself proposed a restructuring to separate its conflicting goals into two separate agencies.³⁷⁷ Congress acted and created the U.S. Citizenship and Immigration Services (USCIS) to handle immigration services³⁷⁸ and the U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) agencies to handle investigative and enforcement actions.³⁷⁹ Given the proven problems with conflicting mandates, Congress should reorganize the FTC as it has done in the past for the FAA and INS.

FTC commissioners themselves have recognized that there is a tension between its mandates to pursue competition and privacy. FTC Commissioner Christine S. Wilson has expressed that “both information asymmetries and the presence of externalities lead to inefficient outcomes with regard to privacy and data security.”³⁸⁰ While she has “great faith in markets,” she believes federal privacy and data security legislation is needed.³⁸¹ FTC Commissioner Noah Joshua Phillips notes that

375. Compare DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 1–2 (2013), <https://perma.cc/72RG-5ZQ7> (PDF) (immigration enforcement), with *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/YAV7-WHB6> (last updated Feb. 27, 2020) (immigration services).

376. *Restructuring the INS*, *supra* note 374, at 21.

377. See *id.* (“Under the Commission’s proposal, the responsibility for immigration enforcement would remain with the Justice Department in a new Bureau for Immigration Enforcement. The responsibility for immigration services, now dispersed among the State, Justice and Labor Departments, would be consolidated into a new office for Citizenship, Immigration, and Refugee Admissions.”).

378. Homeland Security Act of 2002, Pub. L. No. 107-296, § 411, 116 Stat. 2135, 2195–96.

379. *Id.* § 411, 116 Stat. at 2178–79.

380. Christine S. Wilson, Comm’r, U.S. Fed. Trade Comm’n, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation, Remarks at the Future of Privacy Forum 3 (Feb. 6, 2020), <https://perma.cc/6ULG-WM6D>.

381. *Id.*

such legislation has substantial trade-offs on competition, growth, and innovation that must be recognized.³⁸² Joe Simons, chairman of the FTC, has made similar statements, recognizing that privacy protections can have the effect of reducing competition and entrenching large tech platforms.³⁸³ Commissioner Phillips has addressed the issue most directly, remarking that:

The tension between competition and privacy means that, rather than strengthening either, pushing competition and privacy law to converge threatens to confuse (and thus weaken) the enforcement of each. He who serves two masters serves none, they say. Where the interests of both align, perhaps we are less concerned. But competition and privacy are often at odds. Are law enforcers forced to make a choice that cannot be made? And how could courts review such decisions?³⁸⁴

Creating a single antitrust agency in the DOJ resolves the conflict between two missions that multiple commissioners have acknowledged. Government reorganization is easier here than in these previous examples because an experienced agency is at the ready to undertake its responsibilities under competition law. Housing antitrust under the DOJ allows the FTC to pursue consumer protection and privacy goals without compromising effective antitrust enforcement.³⁸⁵

382. Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Remarks at Antonin Scalia Law School's Program on Economic and Privacy Program: Is EU Privacy Regulation Being Exported to the US? 13 (Dec. 3, 2019), <https://perma.cc/JFT9-CRG9> (PDF).

383. *Oversight of the Federal Trade Commission: Hearing Before the Subcomm. on Digit. Com. & Consumer Protect. of the H. Comm. on Energy & Com.*, 115th Cong. 59–60 (2018) (statement of Joseph Simons, Chairman, Fed. Trade Comm'n).

384. Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy, Prepared Remarks for the Mentor Group Paris Forum 15 (Jan. 30, 2020), <https://perma.cc/RYQ8-9QMZ>.

385. Removing the FTC's jurisdiction over antitrust law would not preclude the agency from considering impacts on competition in its consumer protection decisions.

Focusing the FTC on privacy will also bring the United States into line with much of the rest of the world. In the 1980s, countries such as Sweden, West Germany, and France already had years of experience with data protection agencies.³⁸⁶ Since then, the number of stand-alone data protection agencies around the globe has only grown. The United Kingdom upholds information rights through its Information Commissioner's Office,³⁸⁷ Germany through its Federal Commissioner for Data Protection and Freedom of Information,³⁸⁸ Tunisia through its National Authority for Protection of Personal Data,³⁸⁹ Ghana through its Data Protection Commission,³⁹⁰ Japan through its Personal Information Protection Commission,³⁹¹ Canada through its Office of the Privacy Commissioner,³⁹² Argentina through its National Directorate for Personal Data Protection,³⁹³ and Costa Rica through its Agency for the Protection of Individual's Data.³⁹⁴

It is true that the FTC would not be a pure data protection agency, but rather a consumer protection agency with a strong focus on privacy. But putting privacy under the greater umbrella of consumer protection would have the advantages of

386. David H. Flaherty, *Governmental Surveillance and Bureaucratic Accountability: Data Protection Agencies in Western Societies*, 11 *SCI., TECH., & HUM. VALUES* 7, 7 (1986). The World Wide Web was invented in 1989. See *A Short History of the Web*, CERN, <https://perma.cc/HCW4-N6FA>. Even before the World Wide Web was invented, scholars noted the importance of a data protection agency in the United States, calling it both “desirable and essential.” Flaherty, *supra*, at 16.

387. *Who We Are*, INFO. COMM'RS OFF., <https://perma.cc/N8GH-N2KR>.

388. *Tasks and Powers*, FED. COMM'R FOR DATA PROT. & FREEDOM INFO., <https://perma.cc/4ZCK-424W>.

389. *State of Surveillance Tunisia*, PRIV. INTERN'L (Mar. 14, 2019), <https://perma.cc/677M-A9ZP>.

390. *Data Protection Commission (DPC)*, MINISTRY OF COMMC'NS, <https://perma.cc/DB85-6MMY>.

391. *About Us*, PERS. INFO. PROT. COMM'N, <https://perma.cc/G9UW-NMHW>.

392. *Protecting and Promoting Privacy Rights*, OFF. PRIV. COMM'N'R CAN., <https://perma.cc/Z9QJ-DZEU> (last updated Oct. 8, 2020).

393. *Missions and Duties*, PDP, <https://perma.cc/8P5V-U28M>.

394. *Agencia de Protección de Datos de los Habitantes*, PRODHAB, <https://perma.cc/EWQ8-ZDV8>.

having a single regulator addressing consumer protection issues in a unified manner.³⁹⁵ For example, the FTC currently handles privacy and data security issues related to social media such as adherence to privacy policies, access to nonpublic information, and password requirements.³⁹⁶ It also regulates consumer protection issues that arise from social media, such as truthful advertising and disclosure of sponsorships.³⁹⁷

Proponents of the status quo argue that consumer protection and competition should be considered together because the two goals are closely interlinked.³⁹⁸ Certainly, consumer protection and antitrust laws can sometimes be mutually beneficial to each other. Consumer protection can resolve information asymmetries that hurt competition. It can also bolster consumer trust in markets by preventing deceptive business practices.³⁹⁹ Antitrust laws may move us to better privacy protections: companies can compete based on different privacy protections.⁴⁰⁰ However, these small areas of overlap

395. Solove & Hartzog, *supra* note 320, at 585–90.

396. Julie Brill, *Privacy & Consumer Protection in Social Media*, 90 N.C. L. REV. 1295, 1298–99 (2012).

397. *See id.* at 1305–07 (enumerating the disclosures required of social media advertisers and endorsers under the amended FTC Enforcement Guides).

398. *See, e.g.*, Blumenthal, *supra* note 37, at 45 (explaining that if separated, “the consideration of competition values in consumer protection would be diluted, probably to the detriment of the public”).

399. *See* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2172 (2015) (“By striving to keep sellers honest, consumer protection policy does more than safeguard the interests of the individual victim—it serves the interest of consumers generally and facilitates competition.”).

400. *See* Hyman & Kovacic, *supra* note 314, at 1143 (“Enforcing antitrust law has given the FTC ongoing involvement in multiple high-tech markets—as well as an understanding of how competition can motivate companies to offer better privacy protections.”); Charles Duan et al., *Comments on Competition and Consumer Protection in the 21st Century Hearings Hearing #12: The FTC’s Approach to Consumer Privacy*, R STREET (May 31, 2019), <https://perma.cc/Z9G7-KWWH> (“First, privacy and competition are inextricably linked. Increasing protections for one may result in the limitation of the other. At the same time, some privacy protections can

and positive effects do not imply an essential relationship between consumer protection and antitrust. If the market generally delivered the level of privacy that society deemed necessary, we would not need the current laws to protect privacy, nor would the Congress be considering introducing new and strengthened laws on the subject. By retaining its general consumer protection duties, the FTC would be well positioned to address privacy issues.⁴⁰¹

CONCLUSION

Dual antitrust enforcement by the DOJ and the FTC has always created some problems of waste and uncertainty by maintaining overlapping centers of interpretive authority.⁴⁰² But technology has made these costs intolerable and added others. Because there are so many difficult questions about how to apply antitrust law to emerging technology, different enforcement agencies confuse companies key to our economic growth as these agencies try to figure out the correct way forward. In the important case of standard-essential patents, the confusion is already rampant, as the DOJ and FTC are locked in fundamental conflict.⁴⁰³

Consolidated antitrust enforcement should be lodged in the DOJ.⁴⁰⁴ Technology has made antitrust more relevant to international affairs because technology companies can be so important to national security.⁴⁰⁵ Antitrust enforcement can harm national security by advantaging foreign companies over domestic ones. The DOJ, not the FTC, should be trusted to consider the foreign policy objectives of the United States, because the department is under direct control of the president, who has the most tools at his or her disposal to conduct

actually improve competition, such as by making companies' data practices more transparent.?).

401. Solove & Hartzog, *supra* note 320, at 585–90.

402. *See supra* Part I.B.1.

403. *See supra* Part I.A.3.

404. *See supra* Part II.

405. *See supra* Part II.A.

international affairs and direct national security as a constitutional right.⁴⁰⁶

Consolidating antitrust enforcement in the DOJ would also free up the FTC to focus on privacy, another issue that is coming to the fore because of the rising importance of digital technology.⁴⁰⁷ The removal of antitrust responsibilities would permit FTC employees and commissioners to focus on privacy as one important aspect of consumer protection, already at the core of the agency's statutory mission. Consolidation of antitrust within the DOJ would eliminate the FTC's current mission of promoting market competition which at times can be inconsistent with promoting privacy, because privacy regulation may require constraints on the market.

It is well understood that private companies must adapt to rapid technological change if they are to be effective in their markets. The structure of government needs to adapt no less. The division of antitrust enforcement between the DOJ and FTC is a paradigmatic example of a government structure whose weaknesses have been exacerbated by technological change. Consolidating antitrust enforcement within the DOJ will show that the federal government can reshape itself to address technological transformation. Its successful completion will provide impetus for the needed structural change in other areas of government so that the nation's regulatory capacity can match the dynamism of our world.

406. See *supra* Part II.A.

407. See *supra* Part II.B.