Policing Corporations: An Analysis of Big Tech

Summit Sarkar
Amherst College
LJST-228: Police Power
Professor Brangan
9 May 2024

Table of Contents

Policing Corporations: An Analysis of Big Tech ***1***
INTRODUCTION 2
I. A BRIEF HISTORY OF AMERICAN ANTITRUST JURISPRUDENCE 3
II. THE FLAWS IN ESTABLISHED ANTITRUST DOCTRINE 7
III. DISSECTING THE FTC's SHORTCOMINGS INSIDE AND OUTSIDE OF COURT 9
IV. LEGISLATIVE FAILURE: 1 STEP FORWARD, 3 STEPS BACK 12
V. POLICY SUGGESTIONS 15

Length Excluding Footnotes and Formatting: ~10.75 pages
Word Count Excluding Footnotes: 3343

INTRODUCTION

A century ago, some of the highest valued companies in the world included U.S. Steel and Standard Oil.[1] These corporations sold tangible products at fixed prices to businesses and individuals, and their prices and market shares were transparent to observers and regulators: Standard Oil visibly charged consumers high monopoly prices in markets without competitors while slashing prices below competitive rates in other markets to drive competitors out of business.[2] In 1911, the United States Supreme Court decided that such behavior violated Section 2 of the Sherman Act, which prohibited "monopolization," "attempted monopolization," and "conspiracy to monopolize."[3] Because the corporation's successful "predatory pricing" was a clear-cut violation of this, Standard Oil was then forced to split into 43 separate companies, with ExxonMobil and Chevron being two of its most well-known offspring today.[4]

Over a century later, some of the highest valued companies in the world include Google and Meta, which provide ostensibly free services (Google Search / Facebook, WhatsApp, and Instagram, respectively) to global netizens.[5] For all intents and purposes, such corporations, especially Apple and Amazon, exclusively own and operate products and services that are necessary for modern-day livelihood: to contact a family, friend, or professor, a combination of physical technologies and digital software and applications must be used–to purchase a product not available locally in brick-and-mortar stores, online marketplaces must be used. These corporations provide goods and services that are so integral to modern life in the same manner

---

[1] Jeff Kauflin, *America's Top 50 Companies 1917-2017*, FORBES, https://www.forbes.com/sites/jeffkauflin/2017/09/19/americas-top-50-companies-1917-2017/ (last visited Apr 22, 2024).
[2] Lina M Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 723 n. 3 (2017).
[3] *Id.* at 723.
[4] Standard Oil, BRITANNICA MONEY (2024), https://www.britannica.com/money/Standard-Oil (last visited May 8, 2024).
[5] Companies ranked by Market Cap, https://companiesmarketcap.com/ (last visited May 8, 2024).

that electricity, water, roads, and the postal network are. To clarify, this whitepaper in no way urges for these corporations to be nationalized in the same way that utilities are, but asserts that additional regulation is necessary, largely because their disproportionate size and influence stifles market competition, but also due to their shadowy collection and ownership of user data.

In the United States, corporate technology regulation involves all three branches of the government. Through the legislative branch, Congress has created federal laws[6] (e.g. Sherman and Clayton Acts) to limit their anti-competitive behavior, and various state legislatures have taken the initiative to create data privacy laws (most notably California) protecting their constituents.[7] Violations of antitrust are generally brought forth by federal executive agencies (e.g. Federal Trade Commission and Department of Justice Antitrust Division) working in tandem with state executive agencies, whereas violations of state-specific antitrust and data privacy laws are solely handled by the respective states.[8] Such litigation is brought to state and federal courts, where judges interpret briefly worded Congressional Acts and dense FTC standards, which themselves are complex processes involving decades of cutting-edge legal scholarship. To understand the current landscape, this scholarship must be retraced.

I. A BRIEF HISTORY OF AMERICAN ANTITRUST JURISPRUDENCE

When the Sherman Act was first tested, the Supreme Court disposed of antitrust litigation via "rule of reason," a weak interpretation holding that monopolies were only illegal if their

---

[6] Antitrust Division | The Antitrust Laws, DEPARTMENT OF JUSTICE (2015), https://www.justice.gov/atr/antitrust-laws-and-you (last visited May 8, 2024).
[7] US State Privacy Legislation Tracker, https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ (last visited May 8, 2024).
[8] The Enforcers, FEDERAL TRADE COMMISSION (2013), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers (last visited May 8, 2024).

effects "unreasonably restrain[ed] trade."[9] Following the Great Depression, however, the Court abandoned the old framework, as public belief maintained that the *laissez-faire* government facilitated the crash, at least in part.[10] As a result, *per se* violations broadened in scope, extending to nonprice vertical restraints, group boycotts, and horizontal agreements to carve out markets.[11] Similarly, the Celler-Kefauver Act allowed the government substantial discretion in blocking asset and stock mergers, even when market dominance would not be established.[12] Such was the aggression during this "structuralist" era that Justice Potter Stewart went so far to ruefully remark that the only consistency in antitrust jurisprudence was that "the Government always wins."[13]

But as American industry "[lost] ground in international markets and surrender[ed] market share at home" during the 1970s, popular sentiment shifted against the overbearing government, and thus antitrust doctrine evolved for the final time with the advent of the Chicago School of thought, reversing many formerly *per se* violations and going so far as deeming them *per se* legal.[14] That is, formerly anti-competitive behavior such as "predatory pricing," which the FTC had devoted substantial resources to litigating, was turned on its head as then-Yale professor Robert Bork described "predatory pricing" litigation as instances where "defendants were convicted not of injuring competition but, quite simply, of competing."[15] Through "law and economics," the Chicago School successfully redefined such behavior as *benefiting* consumers doubly: first, reduced prices were unambiguously good, and second, it was unlikely that

---

[9] William E Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 JOURNAL OF ECONOMIC PERSPECTIVES 43 (2000).
[10] *Id.* at 46-47.
[11] *Id.* at 50.
[12] *Id.* at 51.
[13] *Id.*
[14] *Id.* at 53.
[15] Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 387 (1978).

monopoly prices were maintained in the long run as competitors re-entered once again.[16] These two assumptions will be challenged later in this whitepaper.

In 1974, the federal government lost a merger challenge at the Supreme Court for the first time in twenty-five years, and in the fifty years to date, antitrust litigation has only truly succeeded on one occasion, breaking up the Bell System of telecommunications in 1982.[17] At the time, Bell was both the sole telephone provider in the nation *and* the *de facto* sole producer of telecom equipment through its ownership of Western Electric and was thus broken into seven independent companies (a la *Standard Oil v. U.S.*)[18] Determining the exact nature of the breakup was a monumental task, with the District Court for the District of Columbia overseeing the procedure for eight years.[19] In contrast, the highly publicized *U.S. v. Microsoft* (2001) was only a partial victory, where the District Court's holding was overturned by the Court of Appeals[20] and ultimately settled via consent decree between the DOJ and Microsoft.[21] Unlike Standard Oil and the Bell System, Microsoft was *not* broken up into two as proposed[22] (with one company developing the operating system and the other developing peripheral software), and it was notably allowed to continue its practice of bundling and software-tying, which has regrettably become the standard for hardware manufacturers today, preventing innovative third-party

---

[16] Khan, *supra* note 2, at 730.
[17] Kovacic and Shapiro, *supra* note 9, at 54.
[18] Bell Telephone System, https://www.u-s-history.com/pages/h1803.html (last visited May 8, 2024).
[19] STEVE COLL, THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T (2017).
[20] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[21] Microsoft Corporation Annual Report on Form 10-K, https://www.sec.gov/Archives/edgar/data/789019/000119312508162768/d10k.htm#tx31450_3 (last visited May 8, 2024).
[22] US Judge orders break-up of Microsoft, WORLD SOCIALIST WEB SITE (2000), https://www.wsws.org/en/articles/2000/06/micr-j09.html (last visited May 8, 2024).

software from ever gaining traction.[23] Microsoft has taken this slap on the wrist in stride, as it remains perched atop the market capitalization list as the world's most valuable company.[24]

Antitrust had definitively lost its teeth post-Microsoft, with the Bush, Obama, and Trump administrations hardly bringing forth any litigation of note.[25] During this time, however, the New Brandeis movement of antitrust, named after the 20th-century Justice Louis Brandeis and guided by his mantra of "We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can't have both," painstakingly revived the once-dominant Harvard School of thought (preceding the Chicago School's triumph), sparking new discourse in the stagnating field.[26] Through the work of legal scholars Lawrence Lessig and his mentee Tim Wu,[27] the movement catapulted to worldwide recognition in 2017 with a Yale Law Journal Note published by then-student Lina Khan.[28] In the Note, she challenged the outdated foundation of the Chicago School, where its simple examination of short-term consumer welfare and profit maximization failed to address the monopoly behavior of modern-day corporations, particularly Amazon.[29]

---

[23] Gregory Jenkins & Robert Bing, *Microsoft's Monopoly: Anti-Competitive Behavior, Predatory Tactics, And The Failure Of Governmental Will*, 5 JOURNAL OF BUSINESS & ECONOMICS RESEARCH (JBER) (2011).
[24] Companies ranked by Market Cap, *supra* note 5.
[25] Antitrust Supreme Court Cases, JUSTIA LAW, https://supreme.justia.com/cases-by-topic/antitrust/ (last visited May 8, 2024).
[26] David Dayen, *This Budding Movement Wants to Smash Monopolies*, Apr. 2017, https://www.thenation.com/article/archive/this-budding-movement-wants-to-smash-monopolies/ (last visited Apr 30, 2024).
[27] Paul Starr, *The Manichean World of Tim Wu*, THE AMERICAN PROSPECT (2011), https://prospect.org/api/content/670a14e6-1241-500c-98c0-bffd68f26e02/ (last visited May 8, 2024).
[28] A Brief Overview of the "New Brandeis" School of Antitrust Law | Antitrust Update, https://www.pbwt.com/antitrust-update-blog/a-brief-overview-of-the-new-brandeis-school-of-antitrust-law#page=1 (last visited May 8, 2024).
[29] Khan, *supra* note 2, at 716.

II. THE FLAWS IN ESTABLISHED ANTITRUST DOCTRINE

A. How Amazon Cornered the E-Commerce Market

In the e-commerce and social media markets today, companies participate in behavior that 70s-era legal thinkers like Robert Bork once posited as irrational, and thus would supposedly never occur. By 1987, two FTC commissioners agreed that unlawful instances of "predatory pricing" were so rare or nonexistent[30] that they could be likened to white tigers or unicorns.[31] But observations defy such outrageous claims. Gone are the days when companies were sustainable, returning year-on-year profit after recouping their costs. Rather, companies like Amazon and Uber are *encouraged* to participate in selling their goods and services at market prices *below* cost, regularly bleeding billions of dollars annually.[32] Rather than treating this as irrational behavior, markets now reward years-long stretches of losses with *increased* investment and demand, propelling the market capitalizations to dizzyingly high values.[33] Today, investors say the quiet part out loud: "I don't see any cleaner monopoly available to buy in the public markets right now."[34] In markets where network effects are vast, becoming *the* option that consumers prefer is the product of years of discount offerings, followed by acquisitions of competitors, eventually discarding the discounts upon market consolidation when consumers have no alternative option to turn to. Nowhere is this better seen than in Amazon's calculated takeover of

---

[30] Jonathan Baker, *Predatory Pricing after Brooke Group: An Economic Perspective*, 62 ANTITRUST LAW JOURNAL 585, 586 (2000).
[31] *See id.* ("The Chicago School view of predatory pricing was perhaps best captured by a 1987 dispute between two FTC Commissioners over the aptness of a metaphor: the animal that best represents price predation. For one Commissioner, predatory pricing was a 'white tiger,' an extremely rare creature. For the other Commissioner, price predation more closely resembled a 'unicorn,' a complete myth. The narrow spectrum of views between a white tiger and a unicorn fairly reflects the Chicago School view that predatory pricing is almost always irrational, and so is unlikely actually to occur.").
[32] *See* Khan, *supra* note 2, at 787.
[33] *Id.*
[34] Billionaire VC says that most companies will eventually pay an Amazon "tax," BUSINESS INSIDER, https://www.businessinsider.in/billionaire-vc-says-that-most-companies-will-eventually-pay-an-amazon-tax/articleshow/50662558.cms (last visited May 8, 2024).

the e-commerce darling Quidsi, where Amazon first automated price matches and offered loss-leading discounts on annual membership, costing Amazon hundreds of millions of dollars annually to challenge Quidsi's ascent.[35] Of course, a relatively small e-commerce company could not incur such losses as an established market leader could, and bearish sentiment from investors prompted the sale to Amazon.[36] Following the acquisition, Amazon removed the discounts that it had previously offered in a more competitive market, *and* no new company entered the market to compete with Amazon as then-CEO Jeff Bezos "was 'such a furious competitor [that he] would drive diaper prices to zero…in which case 'the Amazon Mom onslaught would continue.'"[37] One would be hard pressed to find a more egregious anti-competitive situation where a predator swallowed its prey whole. Despite the situation meeting both prerequisites of *ex-post* unlawful "predatory pricing" *and* proving Richard Bork's irrationality assumptions moot, the FTC did nothing about the situation.[38]

B. *How Meta Cornered the Messaging Service Market*

Blatantly anticompetitive behavior not deemed illegal is not unique to Amazon, as Meta's internal memos have suggested intentional stagnation of acquired platforms in the absence of market competition.[39] Today, Meta owns the largest and third largest social media platforms in Facebook and Instagram (via acquisition),[40] as well as the two largest messaging apps outside of

---

[35] Khan, *supra* note 2, at 769.
[36] *See id.*
[37] Brad Stone, *The Secrets of Bezos: How Amazon Became the Everything Store*, BLOOMBERG.COM, Oct. 10, 2013, https://www.bloomberg.com/news/articles/2013-10-10/jeff-bezos-and-the-age-of-amazon-excerpt-from-the-everything-store-by-brad-stone (last visited May 8, 2024).
[38] *See* Khan, *supra* note 2, at 770.
[39] Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34, 55 (D.D.C. 2022)
[40] Top 32 Social Media Platforms (May 2024), EXPLODING TOPICS 32 (2023), https://explodingtopics.com/blog/top-social-media-platforms (last visited May 8, 2024).

China in WhatsApp (via acquisition) and Messenger.[41] WhatsApp and Messenger's market dominance is perhaps the clearest cut example of network effects in the industry: by nipping WhatsApp in the bud via acquisition, its features, alongside that of Messenger's, have stagnated, while competitors like Telegram have forged ahead with innovative features, few of which are copied with years of delay.[42] If antitrust truly had such a stifling impact on market efficiency as the Chicago School's proponents claim, why has the corporation with by far the largest R&D budget neglected the messaging arena?[43] A few reasons: first, messaging apps have *no* inter-operability. That means to contact someone through WhatsApp, the other person must have the same application. Naturally, once the critical market mass has been achieved (~2.78 billion and 1.30 billion monthly active users for WhatsApp and Messenger respectively), any individual person has no incentive to install a fledgling app, because their recipient likely uses or desires the dominant app where their friends and family already are. Secondly, messaging is incredibly unprofitable.[44] Storing billions upon billions of messages in secure servers with no direct monetization from users is almost verbatim the definition of high barriers to entry.

III. DISSECTING THE FTC's SHORTCOMINGS INSIDE AND OUTSIDE OF COURT

Neo-Brandeisians understand the significance of these two case studies acutely, but as current FTC Chair Lina Khan has learned the hard way, pointing out these issues in an academic

---

[41] Most Popular Messaging Apps (2024), EXPLODING TOPICS (2023), https://explodingtopics.com/blog/messaging-apps-stats (last visited May 8, 2024).
[42] Emma Roth, *WhatsApp Is Widely Rolling out Its Telegram-like Channels Feature*, THE VERGE (2023), https://www.theverge.com/2023/9/13/23871553/whatsapp-telegram-channels-feature-global-rollout (last visited May 8, 2024).
[43] Trendline, *Visualizing the R&D Investment of the 10 Biggest Nasdaq Companies*, VISUAL CAPITALIST (2023), https://www.visualcapitalist.com/cp/ranked-the-10-biggest-nasdaq-companies-by-rd-investment/ (last visited May 8, 2024).
[44] Parmy Olson, *Messaging Apps Like LINE, WeChat Face A Revenue Problem*, FORBES, https://www.forbes.com/sites/parmyolson/2015/06/11/messaging-apps-wechat-whatsapp-facebook-revenue-problem/ (last visited May 8, 2024).

setting is vastly different from successfully challenging a half-century of entrenched antitrust doctrine in court. Within four years of graduating law school, Ms. Khan was suddenly thrust into one of the most scrutinized jobs on planet Earth, overseeing over a thousand employees and dictating a new vision of antitrust through aggressive complaints.[45] In this whitepaper, studying the FTC's 2021 complaint filed against Meta provides crucial insight as to why the courts have remained hesitant of the FTC's reasoning, substantially pushing back in many cases.

In the initial filing, the FTC claimed that Meta violated both parts of Section 2[46] of the Sherman Act: possessing monopoly share in the relevant market, *and* willfully maintaining that power without a superior product, business acumen, or historic accident.[47] First and foremost, Judge Boasberg noted that proof of a 65% market share in the relevant market was required to establish a *prima facie* case of market power.[48] Here, the FTC made a rookie mistake: rather than even suggesting any market share, its only evidence during the initial filing was that no other platform of its size existed in the market today.[49] As a result, Judge Boasberg made short work of the allegation, and thus refused to address the second part of Section 2 regarding entry barriers.[50] Scathingly, he went so far to describe that "It is hard to imagine a market-share allegation that is much more conclusory than the FTC's here."[51] According to him, the very nature of the Personal Social Network (PSN) eludes accurate market share calculations. After all, a market would imply the sale of goods or services, and thus payments and revenues. If that were the case, then market

---

[45] Human Capital Management Office, FEDERAL TRADE COMMISSION (2013), https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/human-capital-management-office (last visited May 9, 2024).
[46] Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 4 (D.D.C. 2021).
[47] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[48] Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997).
[49] Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 18 (D.D.C. 2021).
[50] *See id.* at 18 ("These allegations — which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years — ultimately fall short of plausibly establishing that Facebook holds market power.").
[51] *Id.* at 18.

share could be simplified to a comparison of revenues or goods sold.[52] But because Facebook and Instagram users do not pay for access to these platforms, a potential revenue test would be hard-pressed to prove the critical "60%-plus" market share.[53] Similarly, he highlights the shortcomings of comparing MAUs (due to overlapping users between platforms), as well as how crude time-spent on the platforms would not meet the burden of proof anyways.[54] The FTC must present an innovative, verifiable and relevant calculation–a tall order. Nonetheless, there exist glimpses of hope for antitrust reformers: after the FTC brought forth an amended complaint, Judge Boasberg allowed for proceedings to continue, and maintained that prior green lighting of the WhatsApp acquisition by the FTC did not preclude future possibility of post-review challenges, agreeing that "The [FTC] reserves the right to take such further action as the public interest may require."[55] Over time, the FTC may find more success through persistence.

Overall however, such thorough dissections are humiliating setbacks for Lina Khan's FTC, and yet the agency's woes extend far beyond the courtroom. Opponents accuse this edition of the FTC as solidly partisan, off the back of "a party-line vote in 2021 that empowered [Chairwoman Khan] to control subpoenas and investigations without consulting other commissioners. It's important to understand how unusual this is… [The FTC is] supposed to be independent, and as such have commissioners of both parties."[56] Worryingly, "The FTC's senior attorneys have been leaving at a pace not seen in at least two decades," presumably overworked

---

[52] *Id*.
[53] *Id*.
[54] *See id.* at 19 ("To the extent that, say, Instagram users spend their time on the site or app watching a comedy routine posted by the official page of a famous comedian, are they spending time on a PSN service?").
[55] F. Supp. 3d 34, 57 (D.D.C. 2022)
[56] Republicans Expose FTC Dysfunction Under Chair Lina Khan in New Video | House Judiciary Committee Republicans, (2024), http://judiciary.house.gov/media/press-releases/republicans-expose-ftc-dysfunction-under-chair-lina-khan-new-video (last visited May 9, 2024).

and uninterested in partisan warfare.[57] At the highest level, former FTC commissioner Christine Wilson publicly resigned in February 2023, coming out in a Wall Street Journal opinion editorial with scathing rebukes of the entire agency from top to bottom.[58] Startlingly, she explained that "Lina Khan's disregard for the rule of law and due process make it impossible for me to continue serving," with Wilson claiming that she and her staff "[had] spent countless hours seeking to uncover [Khan's] abuses of government power."[59] In 2022, only 45 percent of FTC employees reported a "high level" of respect for FTC leaders, as opposed to a staggering 80 percent a mere two years prior.[60] This edition of the FTC has brought forth a deluge of low-quality complaints that have yielded no major victories in court.[61] Observers are worried that Chairwoman Khan's strategies may backfire since they are anything but slam-dunks, rejecting traditional FTC practice: "if [the FTC] shoehorn[s] the facts of the case into a Sherman Act framework, [they] run the risk of…making bad law."[62] Khan may be playing with fire here.

IV. LEGISLATIVE FAILURE: 1 STEP FORWARD, 3 STEPS BACK

On the legislative end, Congress does not put money where its mouth is. A 20% cut for antitrust enforcement at the DOJ was snuck out of subcommittee, and the bundled legislation

---

[57] Emily Birnbaum & Leah Nylen, *FTC Staff Morale, Satisfaction Rise Under Khan, Survey Shows*, BLOOMBERG.COM, Nov. 13, 2023, https://www.bloomberg.com/news/articles/2023-11-13/ftc-staff-morale-rises-survey-shows-increased-satisfaction (last visited May 9, 2024).

[58] Christine Wilson, *Opinion | Why I'm Resigning as an FTC Commissioner*, WALL STREET JOURNAL, Feb. 14, 2023, https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d (last visited Apr 17, 2024).

[59] *Id.*

[60] Birnbaum and Nylen, *supra* note 57.

[61] Are the FTC and DOJ Losing Antitrust Battles but Gaining Ground? | Insights | Skadden, Arps, Slate, Meagher & Flom LLP, https://www.skadden.com/insights/publications/2023/04/quarterly-insights/are-the-ftc-and-doj-losing-antitrust-battles (last visited May 9, 2024).

[62] J. Thomas Rosch, *The Great Doctrinal Debate: Under What Circumstances Is Section 5 Superior to Section 2?*, (2011), https://www.ftc.gov/sites/default/files/documents/public_statements/great-doctrinal-debate-under-what-circumstances-section-5-superior-section-2/110127barspeech.pdf (last visited May 9, 2024).

passed with little outrage, 339 votes to 85.[63] This is horrific for the American people, as the Department of Justice is the only organization that represents the average American consumer's interests. This continues an already disturbing trend, where the United States Senate appropriated *less* money (in real terms) to federal antitrust agencies in 2018 relative to 2000, when the tech and corporate spheres were only a fraction as threatening and influential as they are today.[64] Neutering an already underfunded DOJ allows for corporations to exploit Americans without any oversight. Similarly, there is a misalignment between rhetoric and actual voting patterns: while "Kevin McCarthy…Jim Jordan cosplay as 'anti-Big Tech Trump Republicans,' they both sided with maligned-Tech giants…against the *Merger Filing Fee Modernization Act.*"[65] While many states try to bypass the ineffectual and deadlocked Congress, they are faced with hundreds of well-paid lobbyists menacing state representatives. Amazon, Meta, Microsoft, Google, and Apple alone employed 445 lobbyists in the 31 states considering privacy bills in 2022.[66] At the same time, these corporations flood social networks that *they already own* with ads opposing state bills, disingenuously claiming that the changes would break these cherished products.[67] Note that the European Union has taken far more drastic steps in the past three years through their world-class General Data Protection Regulation, fining Amazon, Meta (twice), and TikTok for "Non-compliance with general data processing principles," collecting €746m, €405m, €390m, €345m respectively, and yet these tech corporations have continued to support EU markets–not quite

[63] The Stealth Budget Cuts Imperiling the Biden Antitrust Agenda, THE NEW REPUBLIC, https://newrepublic.com/article/179664/jeanne-shaheen-antitrust-funding-cuts (last visited Apr 18, 2024).
[64] The state of U.S. federal antitrust enforcement, EQUITABLE GROWTH, http://www.equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/ (last visited May 9, 2024).
[65] Sacha Haworth, *Vulnerable Democrats Take Tech Accountability Stand*, (2022), https://techoversight.org/wp-content/uploads/2022/10/TOP_Vulnerable-Dems-Anti-Big-Tech-10.6.22..pdf (last visited May 9, 2024).
[66] Suzanne Smalley, *State Privacy Laws Have Been Crippled by Big Tech, New Report Says*, THE RECORD, https://therecord.media/state-privacy-laws-big-tech-lobbying-report (last visited May 9, 2024).
[67] Aaron Schaffer, *Analysis | Meet the Tech Trade Group Outspending Trump on Facebook Ads*, WASHINGTON POST, Jan. 10, 2022, https://www.washingtonpost.com/politics/2022/01/10/meet-tech-trade-group-outspending-trump-facebook-ads/ (last visited Apr 18, 2024).

"breaking the products."[68] In states like California where there does exist relatively robust user rights, its representatives oppose a nationwide standard like the American Data Privacy and Protection Act[69], claiming that such an implementation would nullify its California Consumer Privacy Act (despite specific carveouts in the bill addressing this unfounded fear).[70] Other lawmakers oppose federal regulation by citing ludicrous edge cases, where increased privacy measures for hundreds of millions of consumers could potentially limit law enforcement's ability to establish probable cause and attain warrants,[71] particularly harming kidnapping victims (note that American tech users outnumber kidnapping victims 1,000,000:1 annually).[72]

Finally, in another instance of diversion, PAFCA[73] achieved immense bipartisan support in Congress, where the revolutionary social media app TikTok will be banned in the United States unless the company is sold to an approved buyer (one not deemed a foreign adversary) by January 15th, 2025.[74] While the law will face substantial challenge in court, PAFCA itself indicates that the United States government, at least in effect, protects domestic tech titans against innovative foreign products under the guise of national security. And unlike Microsoft and Meta, TikTok has yet to establish a track record of anti-competitive behavior. Their data

---

[68] GDPR Enforcement Tracker - list of GDPR fines, https://www.enforcementtracker.com (last visited Mar 27, 2024).
[69] H.R. 8152, 117th Cong. (2022) ("Specifically, the bill requires most companies to limit the collection, processing, and transfer of personal data to that which is reasonably necessary to provide a requested product or service and to other specified circumstances. It also generally prohibits companies from transferring individuals' personal data without their affirmative express consent. The bill establishes consumer data protections, including the right to access, correct, and delete personal data…The bill provides for enforcement of these requirements by the FTC and state attorneys general.").
[70] Margaret Harding McGill, *Online Privacy Bill Faces Daunting Roadblocks*, AXIOS (2022), https://www.axios.com/2022/08/04/online-privacy-bill-roadblocks-congress (last visited May 9, 2024).
[71] Alicia Kozak, *Alicia Kozak: American Data Privacy and Protection Act Could Thwart Efforts to Save Abducted Children*, CHICAGO TRIBUNE (Aug. 22, 2022), https://www.chicagotribune.com/2022/08/22/alicia-kozak-american-data-privacy-and-protection-act-could-thwart-efforts-to-save-abducted-children/ (last visited May 9, 2024).
[72] Kidnapped children make headlines, but abduction is rare in U.S., REUTERS, Jan. 11, 2019, https://www.reuters.com/article/idUSKCN1P52BJ/ (last visited May 9, 2024).
[73] Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521, 118th Cong. (2024).
[74] Will TikTok Be Banned In the U.S.? What the New Law Means, https://variety.com/2024/digital/news/tiktok-ban-us-biden-law-1235980790/?sub_action=logged_in (last visited May 9, 2024).

collection policy is on par with other PSNs,[75] and like Google's meteoric rise twenty years ago, the platform has organically grown through its incredible algorithm, holding onto its first-mover advantage.[76] Then, a TikTok acquisition could potentially repeat history: stifle innovation in the respective tech post-acquisition sphere *a la* Meta-WhatsApp. The United States should mimic the established bellwether in the European Union whenever possible, exercising restraint when and where the EU does (note that the EU has yet to force a sale of a PSN in the name of national security). Rather, the EU rationally applies and enforces the Digital Markets Act[77] upon all the largest digital platforms, and TikTok has vocally taken steps to comply with DMA.[78]

V. POLICY SUGGESTIONS

The policy suggestions are simple: at the very least, enact the American Data Privacy and Protection Act into law and substantially increase the funding for the FTC and DOJ. By spelling out what data companies can and cannot collect and transfer, as well as what express rights consumers have to their own data, the law would allow the FTC and state attorney generals to enforce the law. Note that without such a law, the FTC operates in unknown territory, and is exponentially more likely to suffer setbacks in court. The FTC *needs* Congress to endow it with responsibility. There exists a chicken-and-egg dilemma that must be addressed: the FTC is

---

[75] These Apps Collect the Most Personal Data, PCMAG, https://www.pcmag.com/news/sick-of-data-collection-try-these-apps-instead (last visited May 9, 2024).
[76] Alex Hern, *How TikTok's Algorithm Made It a Success: 'It Pushes the Boundaries,'* THE GUARDIAN, Oct. 24, 2022, https://www.theguardian.com/technology/2022/oct/23/tiktok-rise-algorithm-popularity (last visited May 9, 2024).
[77] The Digital Markets Act: ensuring fair and open digital markets - European Commission, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last visited May 9, 2024) ("The Digital Markets Act establishes a set of clearly defined objective criteria to qualify a large online platform as a "gatekeeper" and ensures that they behave in a fair way online and leave room for contestability…Innovators and technology start-ups will have new opportunities to compete and innovate in the online platform environment without having to comply with unfair terms and conditions limiting their development…Consumers will have more and better services to choose from, more opportunities to switch their provider if they wish so, direct access to services, and fairer prices.").
[78] TikTok's compliance with the Digital Markets Act, NEWSROOM | TIKTOK (2019), https://newsroom.tiktok.com/en-eu/tiktoks-compliance-with-the-dma (last visited May 9, 2024).

failing both internally and within the courtroom *because* they are far more innovative and shielded from corporate lobbying than Congress is. The FTC cannot succeed without innovative lawmaking from Capitol Hill, nor can they effectively investigate and litigate enormous corporations without a larger budget. If all of this is done, then even more rigorous privacy regulation modeling the EU's GDPR and expansive tech antitrust regulation modeling the EU's DMA may one day be on the horizon. Altogether, American consumers will reap the rewards of increased control (and potentially ownership) over their personal data alongside an overall increase in technological innovation as the world's most critical industry is no longer cornered.