# 2AC

## Platform Adv

#### Non-unique—platform monopoly is a structural limit on high-tech innovation

Newman, Associate Professor, University of Miami School of Law, ‘19

(John, “Antitrust in Digital Markets,” 72 Vand. L. Rev. 1497)

Despite the fact that digital markets frequently exhibit high barriers to entry, skeptics of antitrust enforcement have one card left to play: they portray digital markets as nonetheless being characterized by intense innovative rivalry.135 As a result, the argument runs, antitrust would move too slowly to correct any problems and is unnecessary because the relevant markets will quickly correct themselves.136 Under this view, the lure of monopoly profits will inevitably attract disruptive upstarts seeking to replace dominant incumbents—and monopoly is actually good and desirable because it is necessary to spur technological progress.137 This unorthodox vision traces its roots to Schumpeter’s decades-old invocation of “creative destruction,”138 which became a favorite trope among those associated with the Austrian and Chicago schools.139

For empirical support, proponents of this digital creative destruction narrative commonly point to Facebook’s “disruption” of MySpace and Google’s “disruption” of Yahoo.140 Thus, for example, Robert Bork and Gregory Sidak argued that Google should not face antitrust liability because “[i]t surpassed Yahoo, just as Yahoo surpassed others before it.”141 Put another way, if Facebook and Google could supplant their predecessors, they must themselves face the constant risk of disruption—their perch at the top is a precarious one.

Let us pause to revisit these two commonly cited examples of digital disruption. It is true that Facebook supplanted MySpace as the largest social network—in April 2008.142 That was, to put it rather mildly, some time ago.143 Facebook’s reach continuously expanded during the following decade. As of 2018, Facebook, Inc. controlled the three largest mobile social networking apps in the United States144 and boasted a combined user base over five times larger than that of its nearest rival.145 With each passing year, the creative-destruction narrative becomes ever less credible.

The Google example fares even worse. Google was already the world’s second most popular search provider by 2000.146 That same year, Yahoo (previously the most popular provider) announced that Google would begin serving as the search engine for Yahoo’s web portal,147 effectively making Google the dominant global search provider.148 As with Facebook, Google’s stranglehold over search only increased with the passage of time—as of 2018, after nearly two decades of dominance, Google still controlled more than 90% of the global market for general search results.149

The anecdotes of MySpace and Yahoo, still commonly cited by those who argue that digital markets are epicenters of creative destruction,150 look increasingly creaky with age. The relevant markets have been characterized not by the “gale” of creative destruction described by Schumpeter, but by entrenched and unchecked dominance. It is high time to abandon the “romantic but naïve Schumpeterian [notion] that giant” monopolists and concentrated oligopolies are necessary for technological progress.151 In fact, a more sophisticated reading of Schumpeter suggests that he was not nearly so opposed to government intervention—particularly in the form of antitrust enforcement—as his modern-day adherents tend to be.152 An antitrust enterprise that somehow came to view monopoly as good and necessary has rather clearly lost its way.153

Durable market power is the precise evil antitrust laws are meant to prevent. Far from being self-correcting, digital markets often facilitate such power. This suggests that the orthodox position rests in part upon a flawed assumption about the balance of error costs in this context. The societal cost from false negatives is substantially higher than pro-defendant analysts have previously assumed. Normatively, this militates in favor of an invigorated approach to digital markets.

#### Turn—their link is backwards for platforms—defense-friendly regime incentivizes platforms NOT to innovate

Newman, Trial Attorney, U.S. Department of Justice, Antitrust Division, ‘12

(Jordan, “Anticompetitive Product Design in the New Economy,” 39 Fla. St. U. L. Rev 682)

What all these approaches have in common is that they place a thumb on the scale in favor of defendants, at least as compared to the generally used section 2 exclusionary-conduct inquiry,258 essentially a rule-of-reason analysis. The D.C. Circuit in Microsoft III set forth the general method of analysis, complete with allocations of the burden of proof. First, the burden is on the plaintiff to make a prima facie case that the defendant has engaged in monopolistic conduct (properly defined).259 If the plaintiff does so, the burden then shifts to the defendant to show a procompetitive justification for the redesign.260 If the defendant fails to do so, the conduct is exclusionary.261 If, however, the defendant shows some plausible justification, the burden shifts back to the plaintiff to rebut that justification.262 If the plaintiff fails to do so, then the plaintiff must show that the anticompetitive harm outweighs the procompetitive justification.263 The leading treatise takes issue with the last step, at least insofar as it seems to call for courts to engage in “balancing” of close cases—advocating instead a burden-shifting analysis that, while perhaps somewhat less defendant-friendly than the above approaches, calls for “resolv[ing] close cases in favor of the defendant.”264 The various approaches described above, however, end the analysis and dismiss the claim as soon as the defendant shows any plausible justification for its behavior. This favorable treatment traditionally accorded to defendants in this area is due largely to the concerns noted above—the fear that, because (1) the markets themselves act as a check on exclusionary product redesigns (making them quite rare) and (2) antitrust courts are generally not competent to second-guess design changes, condemning product redesigns will tend to unduly stifle innovation.

Yet, as shown above, these concerns largely dissipate in the types of markets under discussion. As to the first, the nature of code-based products and the widespread availability of high-speed Internet access have combined to make the now standard method of redesigning these products—software updates—a uniquely attractive method of foreclosing rivals. This is so for three primary reasons: (1) low development and distribution costs,265 (2) low risk that consumers will reject redesigns,266 and (3) low losses incurred if these product redesigns fail.267 Additionally, new-economy markets tend to be characterized by strong positive network externalities, which may further incentivize monopolistic behavior.268 Given the confluence of these factors, it is much more likely that Ci > Pm – LR in these markets.

And with regard to the second concern, as shown above, the inherent and unique nature of code-based product redesign makes it uniquely susceptible to antitrust scrutiny.269 Given that such redesigns are more easily analyzed than traditional, physical product redesigns, it should come as no surprise that firms may be able to offer no justification for their conduct (as occurred in Microsoft III). Alternatively, they may simply settle out of court or enter into consent decrees (as may have occurred in In re Intel). At any rate, the point is that antitrust courts no longer need to simply throw up their hands and find for defendants in design-related cases.

Since these concerns largely dissipate in these markets, the need to place a thumb on the scale in favor of defendants—that is, the need for the inquiry to end as soon as the defendant makes any plau sible claim of a procompetitive benefit—dissipates as well. And in the formula expressed above, a defendant-friendly approach lowers R by reducing the risk of antitrust liability for engaging in exclusionary, design-related conduct. Absent the usual check of market forces, such an approach even further incentivizes such conduct. Firms can and almost certainly do engage in anticompetitive design in these markets; witness Microsoft’s commingling of code,270 the FTC’s theory in In re Intel, 271 or Apple’s allegedly exclusionary software updates.272 While courts are rightly reluctant to review antitrust challenges to physical product design changes, code-based product markets exhibit unique features that obviate the need for an overly defendant friendly analysis.

#### Turn—legal uncertainty bad for innovation—aff increases predictability

Portuese, director of antitrust and innovation policy at ITIF, adjunct professor of law at the Global Antitrust Institute of George Mason University, ‘21

(Aurelien, “Principles of Dynamic Antitrust: Competing Through Innovation,” June 14, <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation>)

First, the rule-of-law principles require enhanced legal certainty that provides for firms’ dynamic capabilities and enables firms to engage in the rivalrous process. Indeed, legal uncertainties and unintelligibility generate risk-averse attitudes that prevent innovative products and services from being produced. The legal loopholes and regulatory vagueness constitute the basis for market uncertainties. This entrepreneurial risk prevents more aggressive competition from taking place and a bolder, innovative culture to emerge. The principles are pivotal to the ability of our institutions to create growth. To generate minimal uncertainty constitutes the fundamental premise on which competition through innovation can thrive.

Antitrust rules must retain their generalities and principle-based approach in order to be adapted and avoid accusations of being obsolete. Simultaneously, antitrust rules need a case-by-case application of the very meaning of these rules. Therefore, the role of the courts remains crucial. Nothing can prevent courts from judicially reviewing and elaborating, in an evolutionary process, antitrust enforcement. The dynamic nature of antitrust enforcement also pares down to the beautiful work of the court. Precedents are not legal constraints; they are the basis for an evolutionary interpretation of antitrust laws.

#### Pounders – A] current FTC approach creates a harsh environment

Dashefsky, Co-Chair of Antitrust & Trade Practices Group, Bass Berry Sims, ‘8/9/21

(Michael G., “Be Prepared: Aggressive Antitrust Enforcement Is Back,” <https://www.bassberry.com/news/aggressive-antitrust-enforcement-is-back/>)

This summer has seen a flurry of bold antitrust announcements from the Biden administration. By issuing a sweeping executive order calling for numerous changes to antitrust enforcement and by naming progressive favorites and prominent Big Tech critics to head the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), President Biden has signaled that federal antitrust policy is entering a new era.

The FTC has already begun carrying out its mandate to reshape antitrust policy. Under the leadership of new Chairwoman Lina Khan, the FTC has moved quickly to eliminate checks on its antitrust enforcement powers. A majority of the FTC’s commissioners have expressly disavowed the agency’s longstanding approaches to policing antitrust violations and have given the new chair unprecedented authority over investigations and rulemakings.

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should expect to see an increase in antitrust investigations, stiffer penalties for violations, more burdensome merger reviews, and new rules targeting a range of industry practices. In this environment, effective antitrust counseling and compliance programs are more important than ever.

#### B] Mechanism and internal link – recent court rulings, litigation, and reaffirmation of quick-look paradigm

Cornell 9/16 – Head of the U.S. antitrust practice at global antitrust powerhouse Clifford Chance LLP

Tim Cornell, 20 years of antitrust experience, has advocated on behalf of dozens of clients before the US Federal Trade Commission, the US Department of Justice, and the federal courts, with Robert Houck, Peter Mucchetti, and Brian Yin, Antitrust Litigation 2021, Last Updated September 16, 2021, <https://practiceguides.chambers.com/practice-guides/antitrust-litigation-2021/usa/trends-and-developments>

NCAA: a Unanimous Decision for a Divided Court

On 21 June 2021, the Supreme Court unanimously held that restrictions imposed by the National Collegiate Athletic Association (NCAA) limiting the "education-related benefits" that member schools could provide to student athletes violated federal antitrust law, re-affirming the virtues of the Court's long-standing "rule of reason" analysis and making clear that the antitrust laws apply to anticompetitive agreements in labor markets. [Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).] While the holding was a major blow to the NCAA, it has important implications beyond college sports—especially for its discussion of how courts could use a "quick look" form of the rule of reason analysis.

In NCAA v. Alston, former and current student-athletes sued the NCAA in class action litigation. They argued that the NCAA's rules restricting compensation were agreements between member schools that unreasonably restrained trade, in violation of Section 1 of the Sherman Act. [15 U.S.C. Section 1.]. The California district court applied a rule of reason analysis, considering:

whether the challenged restraints had substantial anticompetitive effects;

procompetitive rationales; and

whether these procompetitive effects could be achieved through less anticompetitive means.

After trial, the district court upheld the NCAA's restrictions capping undergraduate scholarships and compensation related to athletic performance, accepting that both improve consumer choice among sports enthusiasts by maintaining a distinction between amateur and professional sports. But the court held that the policy limiting "education-related benefits" did not fulfill that objective and violated the law. The Court of Appeals for the Ninth Circuit agreed.

The Supreme Court affirmed. The NCAA argued that the lower courts should have applied an "abbreviated deferential review" of its challenged restraints. Writing for a unanimous Court, Justice Gorsuch explained that the lower courts had properly applied the full rule of reason analysis, given the "complex questions" about the consumer benefits of the challenged policies. In doing so, Justice Gorsuch pointed out that the "market realities" had changed since 1984, when the Court assumed (without deciding) that different NCAA restrictions were justifiable. Justice Kavanaugh's concurrence went further, chastising the NCAA for holding themselves as "above the law" and potentially inviting future plaintiffs to again challenge the NCAA's remaining compensation restrictions (which the plaintiffs had not appealed to the Court).

The majority opinion notably recognised that the "quick look" rule of reason analysis can apply to determine that a challenged restraint is not anticompetitive. Historically, courts have used "quick look" analysis to condemn restraints, when “an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect.” [Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999)]. The Court declined to apply the NCAA's requested quick look, but recognised that certain restraints may be "so obviously incapable of harming competition that they require little scrutiny."

While clearly a blow to the NCAA, the opinion will likely have ripple effects in other industries and contexts. It would not be surprising for more parties to advocate for "quick look" rule of reason analysis – particularly to absolve challenged restraints. And on the other end of the spectrum, the Department of Justice has already cited Justice Kavanaugh's concurrence to argue that price-fixing in labor markets should be per se unlawful. All this makes clear that attorneys and clients must be familiar with this case to be prepared when dealing with future antitrust issues.

#### Turn—Amex is so absurd it makes broad legislation *more likely*

Hovenkamp, James B. Dinan University Professor, Penn Law and the Wharton

School, University of Pennsylvania, ‘19

(Herbert, “Platforms and the Rule of Reason: The American Express Case,” Faculty

Scholarship at Penn Law. 2058)

But the theory never lived up to anything remotely resembling its expectations, although it did provide some valuable lessons. Even in the airline industry, thought to be a prime target for contestability, competition among incumbent carriers remains an important determinant of price and output. The theory of platform markets will pursue much the same course. After a brief period of exaggeration, industrial organization theory will be enriched, but will remain fundamentally the same. The *Amex* majority opinion serves to highlight what happens when a Court abandons fundamental economics in its haste to encounter something new. The decision that seems to come closest to Amex as an economic “misfire” is the Supreme Court’s 1992 ruling in Eastman Kodak Co. v. Image Technical Services, in which the Court held that sufficient power to condemn a tie of parts and service by a nondominant firm could be inferred from consumer “lock in.”230 Kodak was a six to three decision, but the reaction to Kodak was so strongly critical that subsequent lower court decisions went to great lengths to limit it.231 It has had little impact on antitrust outcomes even though lock-in is more prevalent today in our modern networked world than it was in 1992.

Other consequences could be on the horizon. This decision will encourage more legislation and regulation as more decision makers lose confidence in judge-made antitrust rules to promote competition. As Justice Breyer noted in his dissent, several jurisdictions around the world have acted against high interchange fees and antisteering rules, mostly by statute or agency rule.232 The United States legal system has historically relied less on regulation and more on antitrust law, which can be much less intrusive. But what this decision describes as “steering” is actually among the most ordinary and essential of competitive functions: encouraging people to acquire information and giving them the option to choose. This process protects the competitive process, both improving product quality and driving prices to the competitive level. For example, a common concern about healthcare costs is that they are so high because patients are indifferent to prices. First, medical bills are paid indirectly by insurers. Second, most patients do not even pay the insurance premium; rather, it is paid by either an employer or a government agency. As a result, the patient bears only a small portion of the cost and is inclined to spend too much. The antisteering rule operates in much the same way: it makes the cardholder indifferent to merchant costs and thus diminishes the consumer incentive to reduce them.

## Innovation Adv

No cards

## T – No Mergers

#### Practices, are specific business arrangements.

Kurita 04 – Professor, Faculty of Law and Economics, Chiba University, Japan

Makoto Kurita, “Chinese Anti-Monopoly Law: Effectiveness and Transparency of Competition Law Enforcement – Causes and Consequences of a Perception Gap Between Home and Abroad on the Anti-Monopoly Act Enforcement in Japan,” Washington University Global Studies Law Review, Vol. 3, Issue 2, 2004, LexisNexis

Antitrust or AMA violations must be specific restrictive "practices," as distinguished from restrictive "situations." For example, under antitrust laws, exclusive dealing must be an arrangement between a supplier and its distributors not to deal in competing products. Similarly, under the AMA, exclusive dealing is a practice by a supplier dealing with its distributors on the condition that the distributors do not deal with competing products. On the other hand, a situation where distributors, based on their respective business judgment, deal with the products of a specific supplier is not a violation of the AMA or the antitrust laws. However restrictive or exclusionary such a situation is, it cannot be deemed a violation because there is no "practice." Foreign complainants sometimes allege such a situation, but not a practice. Therefore, such allegations are meaningless in the context of an AMA violation.

## T – Prohibit

#### Prohibitions are implemented via legal tests—the threshold of the test determines how much or how little conduct is prohibited

Mark S. Popofsky, Antitrust Partner at Ropes and Gray, Served as Senior Counsel to DOJ Antitrust Division, Adjunct Professor of Advanced Antitrust Law and Economics at Harvard Law School and the Georgetown University Law Center, 2016, Section 2 and the Rule of Reason: Report from the Front, CPI Antitrust Chronicle March 2016 (1)

Courts remain, in the words of one observer, mired in an “exclusionary conduct ‘definition’ war.”2 Applying Section 2’s broad prohibition on “monopolizing” conduct requires courts to select a governing legal test. Section 2 legal tests run the spectrum from rules of per se legality to rules of near per se illegality.3 Courts, nonetheless, largely apply two dominant paradigms. The first consists of legal tests based on bright-line rules or safe harbors. Familiar examples include the Brooke Group4 below-cost price test for analyzing predatory pricing claims and the Aspen/Trinko5 “profit sacrifice” test for refusals to deal. Developing bright-line rules for Section 2, proponents argue, promotes business certainty and reduces the risk of chilling otherwise procompetitive conduct. The second paradigm is rule of reason balancing. Arguably the default Section 2 legal test,6 courts and commentators have described Section 2’s rule of reason in various ways: as mandating a step-wise approach, as requiring a balancing of pro- and anticompetitive effects, or (to borrow from Section 1) a framework for generating the enquiry “meet for the case.”7 However the rule of reason is expressed, its champions contend, its flexibility and fact-intensive approach permits courts to identify anticompetitive conduct without the under-inclusion that is an admitted feature of safe harbors and other bright-line rules.

#### By LOWERING the threshold for plaintiffs, the aff makes MORE CONDUCT illegal

Popofsky, Antitrust Partner at Ropes and Gray, Served as Senior Counsel to DOJ Antitrust Division, Adjunct Professor of Advanced Antitrust Law and Economics at Harvard Law School and the Georgetown University Law Center, ‘06

(“Defining Exclusionary Conduct: Section 2, The Rule Of Reason, and the Unifying Principle Underlying Antitrust Rules,” Antitrust Law Journal , 2006, Vol. 73, No. 2 (2006), pp. 435-482)

The first step in detecting an underlying principle for crafting Section 2 legal tests is to examine the comparatively few circumstances in which the legality of conduct under Section 2 is relatively clear.30 What is striking is that courts do not implement Section 2 through a single legal test. Rather, Section 2 courts often apply different liability tests to different conduct. Moreover, these liability tests (either express or implied) are "interventionist" to varying degrees. Certain conduct is unlawful only in very specific circumstances or not at all; the applicable doctrine is relatively less interventionist. For other conduct, the applica- ble test allows for illegality in a broader set of circumstances, and the test is more interventionist. At the extreme, certain conduct is virtually per se illegal under Section 2.

## States CP

#### States can’t do the plan – they’re bound by federal decisional precedent

Richard A. Duncan is a partner in the Minneapolis office of Faegre & Benson LLP, and Alison K. Guernsey is presently a third-year law student at the University of Iowa College of Law and Editor-in-Chief of the Iowa Law Review, 2008, Waiting for the Other Shoe to Drop:

Will State Courts Follow Leegin? https://www.faegredrinker.com/webfiles/leegin\_article.pdf

This article explores yet another barrier to widespread adoption of RPM programs, one that is particularly applicable to franchisors seeking to negotiate national account pricing or to establish nationwide minimum pricing: state antitrust laws. Nearly all states have antitrust statutes, and those few that do not have such laws regulate anticompetitive conduct through consumer protection statutes or common law theories. The good news, at least for those who favor uniform national economic regulation, is that most state courts follow federal antitrust precedent, either because of statutory command or a decisional preference for uniform operation of state and federal antitrust laws. However, a significant minority of states feel themselves relatively unbound by federal precedent, and even those that do follow federal decisional law generally leave themselves an escape route if federal law varies from state statute or putative state policy goals.

This article reviews the current statutory and decisional law on RPM in the fifty states and the District of Columbia, and offers some predictions on which are likely to continue to prohibit RPM. Because this area of the law is now rapidly changing, it is also foreseeable that state legislatures will attempt to pass new statutes prohibiting RPM in reaction to Leegin. Twenty-five states did just that to permit “indirect purchasers” to sue for monetary damages after the Supreme Court held in Illinois Brick Co. v. Illinois that such purchasers lacked standing to sue under federal antitrust law. 7 Ultimately, Leegin does offer significantly greater leeway to suppliers to regulate their customers’ pricing behavior and for national account pricing programs in particular to flourish. However, during the transition to the post-Leegin world, franchisors must still take care when designing sales and distribution programs to assess the likely response of individual states to restraints on resale prices.

State Levels of Adherence

Most states have antitrust statutes containing provisions analogous to, or the same as, Section 1 of the Sherman Act. In fact, only four states—Arkansas, Vermont, Georgia, and Pennsylvania—do not. 8 Consistent with the manner in which many state statutes parallel the language of federal antitrust provisions, the majority of states also give deference to federal decisional law when interpreting their state antitrust statutes. There are exceptions for instances in which the state statutory language differs significantly from that of the Sherman Act or when the state legislature has expressed a policy interest at odds with federal precedent.

#### Rogue state DA—CP creates mass uncertainty that chills all business

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2003, Federalism in Antitrust, 26 Harv. J. L. & Pub. Pol'y 877

When states file antitrust cases under state statutes rather than under the Clayton or Sherman Acts, the likelihood of inconsistent and conflicting antitrust precedent is even higher. As a result, state action affects not only current cases, but can also affect future firm behavior. With mergers, the possibility of a challenge from any of the fifty states, each with its own standard of evaluation, could prevent companies from even attempting a beneficial transaction. As Lande points out, "it is confounding enough for antitrust counselors to have to contend with two potential federal enforcement agencies.

Even if state laws were identical, the interpretation and application of those laws would differ "since enforcers with divergent philosophies necessarily will interpret ambiguous terms differently in various factual contexts." Philosophical differences in approaches to antitrust enforcement are likely to stem from many sources, such as political affiliation, educational training, and personal experience. The National Association of Attorneys General (NAAG) Merger Guidelines for the states explicitly allow for this, noting that the general policy can be supplemented or varied in light of differing precedents, and "in the exercise of [the AGs'] individual prosecutorial ... discretion." While differing views can be helpful in some areas of law, such as when different states provide a testing ground for new regulations appropriate for federal adoption, this kind of experimentation is likely to be wasteful in the antitrust arena.

#### Even if the CP results in uniform LAW, patchwork ENFORCEMENT undermines innovation

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2004, The Case for Federal Preemption in Antitrust Enforcement, 18 Antitrust 79

State-to-State Conflicts

When states file antitrust cases under their own statutes, rather than under the Clayton or Sherman Acts, the likelihood the cases will be governed by Inconsistent or even conflicting antitrust precedents runs high. Even if state laws were uniform, with enforcers in each state coming from different backgrounds and holding divergent philosophies, legal Interpretations are bound to differ. While diverse views can be helpful in some areas of law-for example, varying state rules can provide a natural test for the efficacy of new regulations at the federal level-this kind of experimentation is likely to be wasteful in the antitrust arena.

A Case Study

The problems cataloged above are not mere theoretical possibilities, United Stales v. Microsoft provides a real-world example. Throughout the course of the lawsuit, the parties lobbied state attorneys general, federal antitrust authorities, and even the courts ." Thus, California Attorney General Bill Lockyor chose to reject an early settlement attempt, noting that "his resolve was hardened after listening over the weekend to advice from technical technical experts and officials from Microsoft's competitors, such as IBM, AOL Time Warner Inc., Sun Microsystems Inc., and Novell Inc. "24 California subsequently took the lead in continuing the litigation on behalf of the non-settling states and even provided the bulk of the funding."

Comments made by officials at the Justice Department suggest that federal authorities are a much tougher sell for lobbyists. Assistant Attorney General for Antitrust Charles James emphasized his concern over special Interests. "The number of requests for meetings with me immediately after my nomination but before my confirmation became so daunting," he wrote, "that I adopted the posture of refusing to meet personally with any third parties in the Microsoft case. . ."?n While lobbying on Individual antitrust cases certainly occurs at the federal level, the magnitude of Issues and the probability that competing views will neutralize arguments make it far more costly to gain influence.

In addition to derailing early settlement talks,;" the states created uncertainty that the settlement finally reached by the Department of Justice would stick. Nine states agreed to settle along with the DOJ, but nine others proposed a radically different remedy. Those nine states, which included California and Massachusetts are home of some of Microsoft's most vocal rivals,'6 Not surprisingly, their remedy proposal neatly dovetailed with the Interests of Microsoft's competitors.

For example, the states that refused to settle demanded that Microsoft license large amounts of valuable intellectual property for little or no compensation." The Initial effect of weakening the protection of intellectual property after It has been developed Is always positive for consun'ers, who need not compensate the innovator to get the benefit. The long-term effects, however, are decidedly negative, even for consumers: Innovation could decline because firms will have less Incentive to Invest in R&D if they cannot prevent others from using the fruits of their efforts and will not receive any compensation for the expropriation." Under the litigating states' remedy, competitors would have gained access to Microsoft's software code at no cost, but consumers could have suffered In the long term because the disclosure requirements would have left Microsoft with little incentive to improve Windows or many of the company's software applications.

One of the litigating states' requirements would have forced Microsoft to auction off the right to adapt its Office business applications suite to three non Windows operating systems. In return, Microsoft would have received only the one-time auction fees and no royalty payments. As part of the auction, Microsoft would have had to provide the winning bidders with code for any future upgrades to Office, plus access to any Windows source code (the program's "blueprints") at no charge.

Another of the litigating states' proposals would have required Microsoft to release its Web browser software (Internet Explorer and MSN Explorer) under "open source" licenses. To comply, Microsoft would have had to publish the underlying source code, making it available at no charge to all (that is, not just to three winners of the Office auction). Indeed, most of the Intellectual property disclosure rules proposed by the litigating states seemed designed to prevent Microsoft from recouping the value of R&D investments through licensing. Thus, under the states' alternative remedy, technology companies stood to gain a great deal of Microsoft's Intellectual property at little or no cost. Still other provisions would have raised Microsoft's costs with little apparent benefit to consumers.

## 2AC – Regulation CP

#### Antitrust key—ex ante regulation is extremely dangerous in platform markets—ex post litigation minimizes costs

Shelanski, JD, PhD, Professor @ the Georgetown University Law Center, Partner, Davis Polk & Wardell, former ORIA Administrator, former FCC Chief Economist, former Director of the FTC Bureau of Economics, ‘13

(Howard, “Information, Innovation, and Competition Policy For The Internet,” University of Pennsylvania Law Review, May 2013, Vol. 161, No. 6)

Competition enforcers could adopt a number of approaches to these mixed results depending on whether the changes are on balance more beneficial than harmful, or depending on whether the harms are intentional or not. Both inquiries, however, run the risk of calling into question company's best judgment about how to engineer its own products. Finding that an innovation—say a new proprietary interface or product integration is anticompetitive because the value of the innovation to consumers deemed ex post to be outweighed by the costs of competitive exclusion cause firms to hesitate to make beneficial product changes. Knowing the firm could be punished for the effects the innovation has on rivals if the innovation does not turn out well (or perhaps turns out too well for compet itors' tastes), the firm will raise the required ex ante probability of success and undertake fewer R&D efforts. Similarly, punishing a firm that has or mixed motives for undertaking innovation might harm consumers deterring product changes that benefit consumers despite the firm's partly anticompetitive motives.

Absent compelling evidence, then, caution and modesty in enforcement are warranted in this area. This prescription comes not from a glib hope that competition or innovation will somehow eradicate any harm, but from risk that intervention is as likely to make things worse as to make things better. Some have advocated for a government regulatory body to evaluate search algorithms and other intermediary behavior on the Internet.112 There are compelling reasons to be very skeptical of interposing such a government review process into the ongoing and demanding process of private innovation. Algorithms change quickly and must adapt to gaming manipulation by those seeking to profit from online search.113 Regulators are certain to know less about a new technology than those who invent work with it daily. Moreover, regulatory processes and related litigation will inevitably become part of rivals' competitive strategy, distracting resources from competition and innovation in the marketplace. A much better course is for government to give a wide berth to innovation, even where the firm's intentions may not seem benevolent and where the conduct may appear harm competition at the same time that it benefits consumers. And where there is a compelling case for harm, ex post intervention on a case-by-case basis through antitrust law is preferable to general regulation in this context.

This wide berth does not, however, mean we should abandon enforcment or place all purportedly innovative conduct beyond the reach of antitrust law. Microsoft 7/114 gave significant deference to product innovation and integration, but clearly left open the door to a finding that such activity was a ruse or pretext for anticompetitive exclusion. It allowed for antitrust liability where a product innovation was not in some way different and better than what a consumer could do for himself, thereby preserving anticompetitive tying as a possible claim against a software platform.115

Generalizing from the Microsoft II decision, where innovation was clearly a pretext for harming rivals or for deterring rival innovation, competition enforcement should be available. Two kinds of conduct which digital platforms have been accused of undertaking would appear to harm innovation without constituting legitimate innovation: raising rivals' costs and forced free riding.

#### Picking winners fails – subsidies are offset by required tax increases and governments empirically pick more losers than winners

Thierer 8/18 – Adam Thierer is a Senior Research Fellow at the Mercatus Center at George Mason University. He specializes in innovation, entrepreneurialism, Internet, and free-speech issues, with a particular focus on the public policy concerns surrounding emerging technologies.  
Adam Thierer, August 18 2021, “Government Planning and Spending Won’t Replicate Silicon Valley,” Discourse, <https://www.discoursemagazine.com/economics/2021/08/18/government-planning-and-spending-wont-replicate-silicon-valley/>

Unfortunately, the “if you build it, they will come” mentality surrounding tech clusters and regional innovation hubs doesn’t take into account many economic, political, cultural and geographic challenges. Indeed, the history of previous efforts proves that these things cannot simply be willed into existence through top-down industrial policies, big bureaucracies and a lot of new spending programs. Clusters tend to grow more organically, and efforts by the government to force them are unlikely to meet with any more success than past experiments.

Wishful Thinking About Economic Development Subsidies

“Economic theory offers little reason to think that targeted economic development subsidies benefit the broader communities that ultimately pay for them,” concluded a recent Mercatus Center study on “[The Economics of a Targeted Economic Development Subsidy](https://www.mercatus.org/publications/government-spending/economics-targeted-economic-development-subsidy).” The authors highlighted the extensive economic literature that finds that “the net effect of targeted economic development subsidies is likely to be negative” because “the taxes funding the subsidies will discourage more economic activity than will be encouraged by the subsidies themselves.”

That points to the first problem with governments trying to pick winners: There is no free lunch. Economic development and industrial policy efforts always sound great in theory, but in the end they rely on government-granted privileges—discriminatory tax or regulatory relief, cash subsidies, loans and loan guarantees, in-kind donations and the provision of other valuable goods and services. The costs of these targeted privileges are passed along to those firms and economic sectors without the political clout to get the favors, or just borne by taxpayers more generally.

The second problem with policymakers trying to pick winners is that they’re just not very good at it. Forecasting future market trends and the evolution of technology has always been notoriously difficult, even in the private sector. Lacking a profit motive and business acumen, governments have a much worse track record than investors, regularly picking more losers than winners. This problem has grown more acute today due to “[the pacing problem](https://www.mercatus.org/bridge/commentary/pacing-problem-and-future-technology-regulation),” which refers to the inability of government policies and programs to keep up with the ever-quickening pace of modern technological innovation.

These realities have not stopped policymakers from repeatedly trying to use both direct and indirect subsidies to attract high-tech sectors and talent to specific destinations. But there is no precise recipe for growing tech clusters. And as economists [William R. Kerr](https://www.hbs.edu/competitiveness/faculty/Pages/faculty-profile-details.aspx?profile=wkerr) and [Frédéric Robert-Nicoud](https://www.unige.ch/gsem/en/research/faculty/all/frederic-robert-nicoud/) [note](https://www.aeaweb.org/articles?id=10.1257/jep.34.3.50), “developing even a semi-formal definition is tricky.” Typically, however, a tech cluster includes “an important overall scale of local activity, complemented by spatial density and linkages amongst local firms.”

This is not easily replicated. Indeed, in the U.S. a huge amount of the nation’s high-tech startup activity and venture capital funding is concentrated only in Silicon Valley and eight other big-city areas: New York City, Boston, Los Angeles, Seattle, Washington, D.C., San Diego, Austin and Chicago. Of course, large cities have long possessed many advantages for attracting skilled labor and investors, and they often tend to have a high concentration of universities and research labs, making it far easier for tech clusters to develop in these large urban centers than in rural areas. Fine. But much of the nation is dotted with other large cities. Why can’t they become thriving tech clusters?

This kind of thinking is driving the latest push to create the next great innovation hub. “With federal support, the U.S. can recreate Silicon Valley success nationwide,” [says Steve Case](https://thehill.com/opinion/technology/550262-with-federal-support-the-us-can-recreate-silicon-valley-success-nationwide?rl=1), former head of America Online. [Others argue](https://www.brookings.edu/events/leveraging-regional-tech-hubs-to-advance-racial-equity/) regional tech hubs can help advance economic inclusion and racial equity.

#### Regulatory programs cannot address all platform conduct

Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School, ‘21

(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

If action is needed, the alternative to antitrust is some form of regulation. But broad regulation is ill-suited for digital platforms because they are so disparate. By contrast, regulation in industries such as air travel, electric power, and telecommunications targets firms with common technologies and similar market relationships. This is not the case, however, with the four major digital platforms that have drawn so much media and political attention—namely, Amazon, Apple, Facebook, and Google. These platforms have different inputs. They sell different products, albeit with some overlap, and only some of these products are digital. They deal with customers and diverse sets of third parties in different ways. What they have in common is that they are very large and that a sizeable portion of their operating technology is digital. To be sure, increased regulatory oversight of individual aspects of their business—such as advertising, acquisitions, or control of information—is possible and likely even desirable. But the core of their business models should be governed by the antitrust laws.

This Article argues that sustainable competition in platform markets is possible for most aspects of their business. As a result, the less intrusive and more individualized approach of the antitrust laws is better for consumers, input suppliers, and most other affected interest groups than broad-brush regulation. It will be less likely to reduce product or service quality, limit innovation, or reduce output. Where antitrust law applies, federal judges should be given a chance to apply the law.

#### If they try to, it’s too broad and harms innovation

Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School, ‘21

(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

Few platforms are natural monopolies. If the market contains room for competition among multiple incumbent firms, regulation is usually a poor alternative. 70 It rarely comes close to mimicking competitive behavior. Regulation necessarily generalizes and applies the same rules to several firms in an area, while antitrust requires a fact-specific inquiry for each firm. This is particularly important if the firms in question are quite diverse.

Regulation also entrenches existing technologies and, in doing so, bolsters existing incumbents. For example, the Federal Communications Commission’s (FCC) longstanding willingness to protect AT&T’s dominant position from all rivals very likely held back innovation in telecommunications for decades.71 Of course, proper regulatory design might mitigate this. But if viable and robust competitive alternatives are available, regulation usually is not the best answer.

## Only FinTech CP

## FTC Tradeoff DA

#### Non-unique and turn – A] defense-friendly standards increases cost and reduces impact of agency enforcement

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

Measures to expand federal antitrust intervention dramatically—through the prosecution of lawsuits or the promulgation of trade regulation rules—will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (again, we assume that legislation to change the doctrinal status quo will not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies will create a serious gap between the teams assembled for the prosecution and defense, respectively. Although therefore the public agencies can match the private sector punch for the punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases, seeking powerful remedies upon global giants.

#### B] *Amex* requirement eats up agency resources

Ben Brody, Bloomberg, U.S. Google Monopoly Case Could Hit Supreme Court AmEx Hurdle, August 28, 2020, <https://www.bloomberg.com/news/articles/2020-08-28/u-s-google-monopoly-case-could-hit-supreme-court-amex-hurdle>

Google’s lucrative search ad business sells advertising space to brands around the results it provides to consumers. It also plays a key intermediary role connecting buyers and sellers of digital display ads across the web, and as a seller of display ad space for its YouTube video unit. Investigators have looked into all three, Bloomberg has reported.

Antitrust experts said that one reason for the delay in the Google lawsuit, which was expected in July, could be that government lawyers needed more time to construct the case to meet the standards in the AmEx ruling.

“That’s a complex, lengthy complaint to draft, and that takes time,” said Spencer Weber Waller, director of the Institute for Consumer Antitrust Studies at Loyola University Chicago. The government would probably have to create a “a belt-and-suspenders approach” that says why it would win under two kinds of market definitions, he said.

#### No internal link—agency resources ineffective b/c they drive away the best talent

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

The modern critique of the U.S. system often describes the federal agencies as captured by the business community or beholden to ideas that disfavor robust intervention.143 Advocates of change suggest that the execution of their reform program at the federal antitrust agencies will require the appointment of senior managers and new staff who repudiate the consumer welfare standard, or at least embrace a vision for expanded enforcement under the consumer welfare, and embrace the multidimensional conception of the proper goals of competition law. Those already employed by the enforcement agencies as managers and staff will be expected to accept the expanded (goals) framework or they will find their duties reduced and their roles marginalized. New appointees to top leadership positions will not be tainted by substantial previous experience in the private sector, nor will they have spent too much time as civil servants in a government enforcement culture that assumed the primacy of consumer welfare as the aim of antitrust law and accepted norms that tilted toward underenforcement. The concern about compromised motives is also likely to disqualify many academics who, though sympathetic to some expansion of antitrust enforcement, remain excessively beholden to some notion of a consumer (rather than citizen) welfare standard, or have engaged in consulting on behalf of large corporate interests.

One consequence of the acute anxiety about capture is to slam the revolving door shut, or at least to slow the rate at which it spins. We offer two cautions about this approach. First, the modern experience of the FTC raises reasons to question the strength of the theory. For example, if business perspectives dominate the FTC, why did the agency persist in its efforts to challenge reverse payment agreements involving leading pharmaceutical producers?144 Was it because the pharmaceutical firms weren’t as good at lobbying as, say, the information services giants? And what explains the FTC’s decision to sue Qualcomm for monopolization early in 2017?145 Is this simply attributable to the inadequacy of Qualcomm’s Washington, DC, lobbyists, or is the capture explanation for the behavior of the federal antitrust agencies not entirely airtight?

Our second caution is that severe restrictions on the revolving door could deny the federal agencies access to skills they will need to carry out a major expansion of antitrust enforcement. Recruiting attorneys, economists, and other specialists from the private sector can give the agencies a vital infusion of talent which, when combined with agency careerists, permit the creation of project teams that can equal the capability of the best teams that the defense can mount in major litigation matters. We also are wary of the idea that an attorney or economist coming from the private sector will discourage effective intervention during the period of public service as a way to pave the road to a better private sector position upon leaving the agency. Rather, there is evidence to suggest that creating a reputation for aggressiveness and toughness as an enforcer increases one’s post-agency employment options. More than a few individuals have development prosperous careers based on piloting businesses through navigational hazards that they helped create while they were senior officials in public agencies.

## Court Legitimacy Bad DA

#### Antitrust doesn’t affect legitimacy – no one cares

Baum and Devins 10 – Lawrence Baum is a professor emeritus in the Department of Political Science at Ohio State University; his primary research focus is judges’ behavior in decision making. Neal Devins is Sandra Day O’Connor Professor of Law and Professor of Government at William and Mary Law School.

Lawrence Baum and Neal Devins, “Why the Supreme Court Cares About Elites, Not the American People,” *The Georgetown Law Journal*, vol. 98, 2010, pp. 1549-1550, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs.

It is worth underlining the point that a great deal of the

Court’s work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court’s legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.170 More telling, the Rehnquist Court’s federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,171 thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or any other Supreme Court invalidations of federal statutes.173

#### Court isn’t moderating its decisions – their evidence cherry-picks cases – VRA and campaign finance cases prove

Litman and Murray 7/1 – Leah Litman is an assistant professor of law at the University of Michigan Law School. Melissa Murray is a professor of law at the New York University School of Law.

Leah Litman and Melissa Murray, “Don’t be fooled: This is not a moderate Supreme Court,” *The Washington Post*, 1 July 2021, https://www.washingtonpost.com/opinions/2021/07/01/make-no-mistake-this-is-conservative-supreme-court-it-just-sometimes-acts-slowly/.

This Supreme Court term was significant mostly because of what the court did not do: The newly constituted 6-3 conservative supermajority did not use every case to openly and dramatically move the law rightward. Rather, in several important cases — including those involving the fate of the Affordable Care Act and the tension between religious liberty and gay rights — the court managed to resolve matters on seemingly narrow grounds and with broad majorities that transcended ideological differences.

But to call this term a model of judicial restraint — or even nonpartisanship — would be misleading. This is not a moderate or apolitical court. It is a reliably conservative court that, on occasion, chooses to act incrementally.

Characterizing this term as moderate would also overlook the profound impact of the court’s final two decisions, a pair of 6-to-3 rulings — one that hobbled what remains of the Voting Rights Act and another that lays a foundation for a seismic shift in campaign finance rules.

In some cases where there was cross-ideological agreement, the court achieved that result by deciding very little. In its 8-to-1 ruling on the case of the cheerleader disciplined for vulgar speech, the court declined to impose a broad rule letting schools regulate students’ off-campus speech in all circumstances. But meaningfully, the court did not say off-campus speech was never subject to oversight by school authorities. As its reasoning suggests, cross-ideological agreement is possible, as long as you agree to not say very much.

Technical legal doctrines also gave the court a way to appear less ideological. In the Affordable Care Act case, the court, voting 7 to 2, turned aside a third challenge to the law on the narrow grounds that the states and private parties challenging the law didn’t have standing to sue because they couldn’t show they were injured by the unenforceable requirement to obtain insurance.

Cross-ideological agreement also prevailed in the case involving whether Catholic Social Services could decline to certify same-safe couples as foster parents. In Fulton v. City of Philadelphia, the court ruled unanimously in favor of Catholic Social Services’ challenge to Philadelphia’s policy requiring city contractors not to discriminate on the basis of race, sex or sexual orientation. But the court’s fragile unanimity only warded off the more aggressive approach to religious liberty favored by some of the court’s Republican-appointed justices.

Much to the chagrin of some of the court’s most stalwart conservatives, the decision avoided overruling a major religious liberty precedent. But even in its so-called restraint, the majority changed the law. By invalidating a nondiscrimination requirement on the ground that it includes some system for exercising discretion — even if that discretion is never exercised — the court’s ruling opens the door to religious liberty challenges to a wide range of laws and policies.

In lower-profile cases, the court behaved in more obviously ideological ways — with conservatives banding together to aggressively move the law sharply to the right. In a major labor case that continues the conservatives’ hostility toward unions and worker organizing, the six conservative justices voted to invalidate a California regulation that facilitated agricultural workers’ ability to unionize.

The ruling could affect other private-sector unions’ ability to enter employers’ property if organizers cannot easily contact workers off-site. But the potential impact goes far beyond labor organizing. The court concluded that a California law that allowed union organizers to enter a workplace for a few hours a day constituted a taking of private property. This finding could call into question all manner of laws and regulations that require businesses to allow certain people onto their property — including for health and safety inspections, for child welfare or to prevent discrimination in the provision of goods and services.

In another case that will insulate corporations from regulation, five conservative justices held that a major credit reporting agency could not be sued for wrongly labeling its customers as possible terrorists or drug traffickers on a Treasury Department watch list. The decision accelerates a trend toward blocking the courthouse doors to persons seeking to enforce federal consumer protection laws.

As the term reached its conclusion, the muscular conservatism of the Roberts court was in full flower. In a major Voting Rights Act challenge, the justices sharply divided along ideological lines, weakening what remained of the act’s protections for our multiracial democracy. Likewise, in a challenge to a California public disclosure law, the court determined that states cannot require charities to report the identity of their donors to state authorities — a decision that will likely have sweeping repercussions for state and federal laws that require disclosure of campaign donations.

Instead of viewing this term as a triumph of restraint and moderation, we should see it for what it was — table-setting for the term to come. When the court resumes its work in October, it will have even more opportunities to reshape the landscape of American law, including on abortion rights and gun regulation. The question is whether the justices will do so explicitly, or in this term’s more slow and subtle fashion.

#### Texas thumps – the decision was BONKERS and totally undermined any illusion that the court cares about the rule of law

Sarat and Aftergut 9/6 – Austin Sarat is the William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College. Dennis Aftergut is a former federal prosecutor who has successfully argued before the Supreme Court.

Austin Sarat and Dennis Aftergut, “Supreme Court trashed its own authority in a rush to gut Roe v. Wade,” *The Hill*, 6 September 2021, https://thehill.com/opinion/judiciary/570958-supreme-court-trashed-its-own-authority-in-a-rush-to-gut-roe-v-wade?rl=1.

But in addition to the harms to women’s rights in this law, the court’s Sept. 1 decision in Whole Women’s Health v. Jackson reveals something dangerous to lawful society writ large: the 5-4 ultra-partisan, conservative majority has, in its haste to gut Roe, eviscerated the rule of law it is supposed to stand for and diminished the court’s own authority.

The decision adds fuel to the already strong arguments for reforming the Supreme Court and urgency to the work of President Biden’s Commission on the Supreme Court.

It concedes, perhaps even celebrates, the fact that states, and individuals, can engage in legally questionable action and evade judicial scrutiny. By allowing Texas to flout Roe’s clear meaning, the court undermines an ordered society and may be paving the way for authoritarian rule.

The decision is a radical departure from the institutional history of the Supreme Court, which previously has been marked by efforts to assert and preserve the court’s exclusive prerogative to “say what the law is.” That was the crux of Chief Justice John Marshall’s famous 1803 opinion in Marbury vs. Madison, the case that established the Supreme Court as the ultimate arbiter of the Constitution’s meaning.

Over time, the court has jealously guarded its authority against those who have challenged it. It is the court’s right to have the last word on constitutional questions that has secured for it a central place in our system of government. As Supreme Court Justice Robert Jackson once explained, “We are not final because we are infallible. We are infallible only because we are final.”

And the court has time and again insisted that everyone abide by its rulings no matter how much they might disagree with them.

This was vividly demonstrated in the civil rights era during the middle of the last century when southern states refused to respect the court’s constitutional decisions and when demonstrators took to the streets to promote racial integration in defiance of court orders. The court responded by insisting to both sides: obey the laws first, and only then can you challenge our views of what the Constitution means.

When Dr. Martin Luther King and other civil rights activists ignored an Alabama state court injunction in the belief that the order to desist from a planned protest was unconstitutional, the Supreme Court upheld their arrest and conviction.

In his majority opinion in the 1967 case of Walker v. Birmingham, Supreme Court Justice Potter Stewart recognized the “substantial constitutional questions” that a challenge to that injunction would have raised. But he firmly rejected the marchers’ contention that they were free to ignore a law they believed to be unconstitutional and condemned their decision to take the law into their own hands:

“This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law…. [I]n the fair administration of justice, no man can be [the] judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.”

And the U.S. Supreme Court has not been alone in that view nor has it been alone in striking down attempts by citizens or governments to disobey existing law.

In 2004, the California Supreme Court invalidated then-San Francisco Mayor Gavin Newsom’s declaration that the city would marry same sex couples in defiance of an existing voter-approved law that declared “Marriage shall be restricted to a man and a woman.”

Justice Sotomayor’s dissent in Whole Women’s Health makes precisely the same point about courts’ exclusive role in deciding on the law’s meaning. Calling the Texas anti-abortion law a “breathtaking act of defiance,” she labelled the court’s failure to act “stunning.” In her view, it “rewards tactics designed to avoid judicial review and inflicts significant harm on the applicants and on women seeking abortions in Texas.”

Until last week, defense of the judiciary’s role in saying what the law is and insisting that others defer to its judgments has united conservative and liberal justices.

But, in Whole Women’s Health, only one conservative, Chief Justice Roberts, joined with the court’s three liberal justices in standing up for such nonpartisan jurisprudential principles. His five conservative colleagues seem so eager to gut Roe that they are willing to disembowel the judiciary’s own authority.

The risk of legal chaos from the Supreme Court’s inaction on Sept. 1 may soon be realized in a kind of Cold War between the states.

Imagine blue states reacting to Whole Women’s Health with laws permitting private lawsuits against anti-vaxxers who help someone evade a business’s COVID vaccination mandate, or against owners of banned guns whose prohibition is the subject of federal court challenges.

When the current conservative majority on the Supreme Court trashes its own authority to tilt the scales in the current culture wars, it endangers the liberty of all, no matter which side of the cultural wars they are on.

#### Court legitimacy is resilient – positivity bias is entrenched

Feldman 20 – Distinguished professor of law and adjunct professor of political science at the University of Wyoming.

Stephen M. Feldman, “Court-Packing Time? Supreme Court Legitimacy and Positivity Theory,” *Buffalo Law Review*, vol. 68, no. 5, December 2020, pp. 1548-1552, <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4892&context=buffalolawreview>.

In fact, political science studies suggest that the public’s diffuse support for the Court is resilient, sustained by “a reservoir of favorable attitudes or good will.”87 A “positivity bias” helps the Court maintain this good will and institutional legitimacy. According to positivity (bias) theory, “anything that causes people to pay attention to courts— even controversies— winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts.”88 Even when the Court issues a decision contrary to an individual’s personal views, that individual is unlikely to lose faith in the Court. If anything, when news of Court activities draws an individual’s attention, then that attention (to the Court) will likely reinforce the individual’s positive views of the institution. In a sense, the more one knows about the Court, the more one is likely to find its decisions legitimate (the opposite is true for Congress).89

To be sure, the Court’s legitimacy is not bulletproof: It depends on a perception that the Court is not merely another political institution. For instance, a confirmation battle in the Senate is unlikely to damage the Court’s legitimacy, but if widely viewed advertisements (related to the confirmation battle) attack the Court as purely political, then diffuse support for the Court is likely to diminish.90 Thus, while a politically salient Supreme Court decision might offend some Americans based on political ideology,91 a lack of specific support for that decision does not translate into a meaningful reduction of diffuse support. Only those Americans who already reject the Court as an institution—those individuals who have not developed a favorable attitude and good will toward the Court—are likely to denigrate it because of a small number of specific decisions. For the most part, the Court is able to maintain its institutional legitimacy despite “the ideological and partisan cross-currents that so wrack contemporary American politics.”92 Even so, sustained disappointment with the Court’s decisions over the long term, especially in politically salient cases, can weaken diffuse support for the Court. To take one example, diffuse support for the Court diminished among black Americans during the post-Warren Court years (consider the Burger, Rehnquist, and Roberts Courts’ consistent hostility toward race-based affirmative action).93

Significantly, the people’s diffuse support for and loyalty to the Court does not depend on the myth of pure law—that is, the myth of the law-politics dichotomy. To the contrary, many Americans seem to understand that Supreme Court decision making entails a combination of law and politics— the law-politics dynamic. As Gibson and Caldeira conclude: “[T]he American people seem to accept that judicial decisionmaking (sic) can be discretionary and grounded in ideologies, but also principled and sincere. Judges differ from ordinary politicians in acting sincerely . . . .”94 This insight into the Court’s institutional legitimacy has enormous implications for Democratic court-packing. Although a court-packing controversy would undoubtedly entail debates over the Court’s politically-charged decisions, the Court’s overall diffuse support would probably remain relatively stable. Most likely, in these hyper-polarized times, individuals’ political ideologies—leaning Republican or Democratic— would influence reactions to a Democratic court-packing plan. Republicans of course would oppose it, but many Democrats would likely support it, especially if Democratic politicians emphasized that they sought to return the Court to sincere and principled decision making.95 To the extent that individual views of the Court’s legitimacy might change in response to a court-packing plan, partisan shifts would likely cancel each other out. In the end, despite divergent views of the court-packing plan, the overall legitimacy of the Court itself would likely be sustained (or even grow) whether because of a positivity bias favoring the Court or a widespread Democratic (policy) opposition to the Roberts Court’s conservatism (as well as Democratic abhorrence toward recent Republican Senate maneuvers, including the rushed confirmation of Barrett, which resulted in an ironclad six-justice conservative bloc).96

#### Their DA assumes 5-4 swing vote dynamics, that doesn’t make sense on a 6-3 court

Peter W. Stevenson, Washington Post, Chief Justice John Roberts: From key swing vote to potential bystander?” May 20, 2021, <https://www.washingtonpost.com/politics/2021/05/20/chief-justice-john-roberts-key-swing-vote-potential-bystander/>

The Supreme Court has long declined to take on such cases, often falling back on the precedent set by previous decisions. Under Roberts, even with a 5-4 conservative majority after Trump’s first two nominees, Neil M. Gorsuch and Brett M. Kavanaugh, were confirmed, the court seemed reluctant to take on big, landmark cases — and certainly to challenge precedent on politically sensitive issues. It has been suggested that Roberts aimed to make the court appear less political by avoiding those sensitive issues. Some conservatives have even said he lacks the will to address issues such as abortion at all. But such things could increasingly be out of his hands.

Roberts’s status as a key swing vote was solidified by the 2012 decision he wrote upholding the Affordable Care Act’s constitutionality, in which the individual care mandate was preserved as a tax, a decision that infuriated conservatives.

But his supposed efforts to depoliticize the court were blunted by Barrett’s appointment. In a 6-3 court, Roberts is no longer a swing vote. Even if he were to side with the liberal-leaning justices, they could be outvoted 5-4.

This isn’t the first case that has seemingly made Roberts’s vote potentially less potent — but it has the potential to be the most high-profile (though we have no idea what the court will do with it).

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## Platforms

#### Specifically, Amex has prohibited fintech entrance into financial markets---that’s key to innovation within the industry

**DOJ and FTC 19** – Antitrust Division of the Department of Justice; U.S. Federal Trade Commission

DOJ and FTC, "Digital Disruption in Financial Markets – Note by the United States," This document reproduces a written contribution from the United States submitted for Item 5 of the 131st OECD Competition committee meeting on 5-7 June 2019, Directorate For Financial And Enterprise Affairs Competition Committee, Organisation for Economic Co-operation and Development, 6-5-2019, <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/fintech_us-oecd.pdf>

3. In July 2018, the U.S. Department of the Treasury released a report entitled “A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation.” The report provides an overview of innovation and regulation in the U.S. financial sector. The 2008 financial crisis altered the competitive environment in the United States for banks and nonbanks to provide financial services.1 The financial crisis triggered the adoption of hundreds of new regulations that made certain product segments unprofitable for banks.2 This created opportunities for nonbanks to address unmet consumer demands.3 At the same time, with the advent and continued progress of artificial intelligence (AI), machine learning, big data analytics, and other technological capabilities, barriers to entry into financial services have declined for a wide range of startups and other technology-based firms.4 These startups and technology firms leverage their experiences and expertise to compete or partner with traditional financial services providers.5 Innovation in the financial sector is critical to the U.S. economy. Technological advances in financial services have the potential to expand dramatically access to credit and services for underserved individuals and small businesses; provide improved speed, convenience, and security of using financial services; and reduce the cost of services and increased operational efficiencies.6

4. As the report emphasized, innovation is the hallmark of a competitive economy, but it can create challenges for regulators trying to keep pace with a rapidly evolving industry.7 In the United States, the financial services and activities of traditional banks and nonbank firms are regulated differently.8 Generally, banks operate within a largely federal regulatory regime, which provides for greater regulatory uniformity and efficiency on some dimensions.9 The federal banking regulations are largely structured to ensure the safety and soundness of the banks and are heavily focused on bank-specific activities.10 Nonbank financial services firms, on the other hand, are generally regulated by the states.11 State financial regulators’ authorities over the nonbank firms can include firm licensing requirements, safety and soundness regulation, product limitations, interest rate limits, and enforcement authority for violations of state and federal laws.12 Due to a state-based regulatory regime, some nonbank firms with a national footprint have raised concerns about the difficulty of compliance across a fragmented state-regulatory landscape.13 Some have called for the modernization of financial regulations to support innovations while maintaining strong consumer and investor protections and safe-guarding the financial system.14 The report concluded that these regulatory responses should promote innovation in financial technology while maintain a level playing field for financial system participants.

5. The report also cites a number of initiatives at U.S. financial regulators on innovation in financial services and outlines efforts to address financial innovation in other international forums with mandates that encompass those issues.15 3. Department of Justice 6. The Antitrust Division of the Department of Justice (“DOJ”), on several occasions, has conducted competitive analyses that have required it to assess innovations in FinTech. Two significant matters that have implications for FinTech are described below: (1) the TCH Business Review Letter, and (2) United States v. American Express.

3.1. TCH Business Review Letter.

7. The DOJ had occasion to consider the competitive effects of a financial technology joint venture arrangement by The Clearing House Payments LLC (“TCH”). TCH, a joint venture of 24 U.S. banks, operates a clearing house and several other payment systems (or “payment rails”) to its members and other depository institutions to facilitate transactions among them. In 2016, in response to the Federal Reserve Board’s initiative to improve the U.S. payment system (described above), TCH proposed to create a new payment rail that would enable the real-time transfer of funds between depository institutions, called the Real Time Payment System (“RTP”). The venture requested a statement of the Department’s enforcement intentions with respect to the creation of RTP pursuant to the Antitrust Division’s business review process.16

8. The Division’s business review procedure allows individuals to request that the Department issue a statement as to whether it currently intends to challenge the described proposed action under the antitrust laws. See 28 C.F.R. § 50.6. This procedure provides a way for businesses to determine how the Division may respond to proposed joint ventures or other business conduct, thus providing greater certainty to businesses as they undertake innovative and other procompetitive actions. It also provides a vehicle for the Division to prospectively share its analytic framework and expand the public’s understanding of competition issues, thus providing private sector actors more broadly with greater notice, clarity, and confidence.17

9. Based on the information TCH provided, the Division issued a favorable business review letter.18 TCH indicated that it would create and operate RTP, which would, provide for real-time funds transfers between depository institutions for payroll and other scheduled transfers and thus enable depository institutions to offer faster fund transfers for their enduser customers. According to TCH, RTP would not interfere with the continued use and operation of existing payment rails, including automated clearing houses, wire, and check clearing houses..

10. The Division concluded that the RTP system could yield significant procompetitive benefits, including the introduction of a new, faster payment rail that reduced banks’ and payment service providers’ risks in providing those services, to the benefit of consumers. The Division noted that, although many collaborations among significant competitors, such as TCH, have some potential to harm competition, none of TCH’s proposed rules seemed to limit rival banks’ ability to access RTP in an anticompetitive way; nor was there evidence that TCH was likely to use RTP to harm the rivals of TCH’s member banks. DOJ indicated, therefore, that it had no present intention to take antitrust enforcement action against TCH’s proposal.

3.2. United States v. American Express.

11. In 2010, the United States, 18 states, as well as a several groups of merchants in separate private actions, filed lawsuits against American Express Company challenging anti-steering provisions in its contracts with merchants that accepted American Express credit cards as violating the antitrust laws. See United States v. Am. Exp. Co., 88 F. Supp. 3d 143, 218 (E.D.N.Y. 2015), rev’d and remanded sub nom. United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016), aff’d sub nom. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). Although the plaintiffs’ main allegations in the cases did not involve FinTech as defined in this paper—the allegations focused on the effect of these provisions on competition between rival credit card networks—competition from innovative payment forms was also at issue. For different reasons, both plaintiffs and the defendant pointed to various new payment forms to support their arguments. The plaintiffs argued that the antisteering provisions made it difficult for several new “merchant-owned payment solutions”—including “a new payment platform that would operate on customers’ mobile devices and significantly reduce the participating merchants’ payment processing costs”— to gain share by offering merchants low prices. United States v. Am. Exp. Co., 88 F. Supp. 3d 143, 218 (E.D.N.Y. 2015). The district court expressed some skepticism regarding this theory, but it did give it some weight, finding that “novel payment solutions . . . potentially may inject greater diversification into the network services industry.” Id. at 218. For its part, American Express argued that the rise of various mobile payment options for consumers—including Square and Google Wallet—meant that the plaintiffs had defined the relevant market too narrowly to focus only on competition between credit card networks. The district court did not follow the defendant’s invitation to broaden the relevant market because it viewed these new products, which work on top of a traditional payment network such as a credit or debit card or an automated clearing house (ACH), more as complements than substitutes to credit cards. The court did, however, accept that “electronic wallets like PayPal and Square are recognized by American Express to present unique competitive challenges to its business” because “their services have proven effective at steering customers to debit and ACH and that they interrupt the typically direct relationship between Amex and its cardholders.” Id. at 190.

12. The Second Circuit reversed the district court’s ruling for the plaintiffs, holding that the district court erred in not defining the relevant market to include both sides of the two-sided payment platform—the merchants who accept credit cards and the cardholders who use them for their purchases. See United States v. Am. Express Co., 838 F.3d 179, 197 (2d Cir. 2016), aff’d sub nom. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). On a petition for certiorari filed by the plaintiff states, the Supreme Court upheld the Second Circuit’s holding that the relevant market had to include both the merchant and the cardholder sides of the credit card platform. See Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018).

#### Would be quick and easy to get one from Pakistan—only preventing demand can stop them

Landau 18 – Senior Research Fellow & Head of Arms Control, INSS

Emily Landau, Senior research fellow at the Institute for National Security Studies (INSS) and head of its Arms Control and Regional Security Program, and Shimon Stein, Senior research fellow at the Institute for National Security Studies (INSS) and a former Israeli ambassador to Germany (2001-2007), Can the United States Prevent Saudi Arabia from Getting Nuclear Weapons?, December 2018, <https://nationalinterest.org/feature/can-united-states-prevent-saudi-arabia-getting-nuclear-weapons-37812>

After having sought negotiations with previous U.S. administrations on civilian nuclear cooperation, Saudi Arabia has recently renewed these efforts with the Trump administration, for the development of nuclear energy, power plants and desalination reactors. Negotiations on a possible deal are ongoing, although according to a recent New York Times article, the administration refuses to say where things currently stand. Saudi Arabia claims that it is seeking purely civilian capabilities, but it has also insisted on retaining its “right” to work on the fuel cycle and enrich uranium, which can lay the ground for a military nuclear capability in the years ahead. However, it is also clear that the Saudis’ nuclear plans are intimately tied to Iran’s, and since 2010 Saudi leaders have become more and more open about the fact that if Iran attains nuclear weapons, they will quickly follow suit. The latest statement was by Crown Prince Mohammed bin Salman (MBS) in March 2018, in the context of an interview to 60 Minutes. He noted that while Saudi Arabia does not want to acquire nuclear weapons, if Iran develops nuclear weapons, so would Saudi Arabia. Generally speaking, the Iranian program has been a trigger for additional Gulf states to establish or revitalize civilian nuclear programs. The United States has always been very concerned about the proliferation risks involved in nuclear cooperation, and in 2008 it was able to achieve a memorandum of understanding with Saudi Arabia on nuclear energy cooperation whereby the latter pledged to acquire nuclear fuel from international markets, rather than producing it indigenously. But ten years later, it seems that Saudi Arabia no longer views itself as bound by that understanding. The current challenge for the United States is how to insist on what is known as a 123 agreement with Saudi Arabia, meaning that the agreement explicitly denies Saudi Arabia the right to work on sensitive nuclear technologies (enrichment capabilities and plutonium reprocessing), without driving it into the hands of other nuclear suppliers, such as Russia, China and South Korea, that may be less worried about ensuring these restrictions. There are concerns that the Trump administration might be willing to concede to Saudi Arabia sensitive capabilities, and the fact that it is not willing to divulge information regarding the status of the negotiations does not bode well in this regard. The administration is keenly aware of the link to Iran’s nuclear posture, and that the Joint Comprehensive Plan of Action (JCPOA) set a very negative precedent for nuclear cooperation with other states when it legitimized Iran’s enrichment capabilities. While Iran must cap its stockpile of enriched uranium for the duration of the deal, it is allowed—under the explicit terms of the deal—to work on R&D into an entire range of advanced centrifuges. Iran has plans to install and operate these centrifuges eleven years into the deal. There is a real question of how these capabilities can be denied to states like Saudi Arabia who are in good standing with the NPT, whereas Iran—who blatantly violated the nonproliferation treaty—was granted the right to continue with these dangerous enrichment-related activities. The dilemmas of nuclear cooperation between the United States and Saudi Arabia have recently come into sharper relief against the backdrop of the Jamal Khashoggi murder at the Saudi consulate in Istanbul last month. This brutal murder, and the ensuing Saudi evasion has sparked a major debate in the United States and around the world about the reliability of MBS as a strategic partner. There are many calls in the United States—from both Democrats and Republicans in Congress—for the administration to not only punish Saudi Arabia for this gross transgression, but to rethink its relations with the kingdom, and certainly not to reward it with cooperation in the nuclear realm. But Saudi Arabia is not dependent solely on the United States for cooperation in the nuclear realm. Will other potential suppliers be willing to agree not to cooperate with Saudi Arabia unless it forsakes sensitive nuclear technologies? Will they agree to set up a supplier mechanism and insist that Saudi Arabia, and other states seeking nuclear cooperation, can only buy fuel from this source? With lucrative deals on the table, it might prove difficult to garner this kind of commitment. Moreover, there have long been suspicions that, after Saudi Arabia financed Pakistan’s nuclear program, a deal might have been struck whereby Pakistan will return the favor by providing some kind of nuclear cover—whether by transferring technologies directly to the kingdom or providing a nuclear umbrella from Pakistan—in Saudi Arabia’s hour of need. As such, the nonproliferation challenge remains, whether or not the United States concludes a deal on civilian nuclear cooperation. And if it is the United States that makes the deal, it can insist that Saudi Arabia ratify the Additional Protocol (which would grant the International Atomic Energy Administration additional inspections rights), return spent fuel and generally supervise the project. Beyond attempts to deny Saudi Arabia technologies and capabilities, it is important also to address Saudi motivation for going nuclear. There is no doubt that Saudi Arabian concerns focus on the Iranian nuclear threat; the kingdom’s concern with Iran’s capabilities—as a motivation to go nuclear itself—is reflected in the few explicit Saudi statements on the topic. As long as the motivation to go nuclear remains strong, states are likely to find a way to develop capabilities, even if they have to pay a price for doing so. In Iran’s case, the major motivation for going nuclear is to enhance its hegemonic power in the Middle East—a difficult motivation to address. But in the case of Saudi Arabia, if strong international powers—the P5+1 and perhaps others—were to take a harsher stance on Iran’s regional aggressions and missile developments, and were to cooperate in order to improve the provisions of the JCPOA, this would most likely have a direct and favorable impact on Saudi Arabia’s calculation of whether or not to develop nuclear capabilities. Additionally, without minimizing the impact of the crisis atmosphere surrounding the Khashoggi affair, it is nevertheless important to consider whether significantly downgrading ties with Saudi Arabia is the right way to go, from a proliferation point of view. While this might not be the most opportune time to reward the Saudi’s desired nuclear cooperation, U.S. security guarantees to the Saudis could be another route to lowering their motivation to achieve a nuclear deterrent vis-à-vis Iran.

## Conduct

Kicked

## States CP

#### Even if CP changes ALL state laws, state *courts* will interpret new language in accordance with federal precedent

Dodson, Harry & Lillian Hastings Research Chair and Professor of Law, UC Hastings College of the Law, ‘16

(Scott, “The Gravitational Force of Federal Law,” 164 U. Pa. L. Rev. 703)

b. State Conformity Under Dissimilar Rules

The gravitational pull of federal law can be so forceful that state courts follow federal courts even when the language of their state rules is different from the language of federal rules. Pleading standards again present a useful example, for Rule 8 and its federal interpretation have exerted a strong gravitational pull even on states that retained code pleading.65

A useful 2001 study by Thom Main illustrates this phenomenon. Main studied the way state courts in code-pleading states reacted to federal court interpretations of federal rules on pleading and summary judgment.66 Main selected states whose rules were among those least influenced by the federal rules.67 In Illinois, Main found "persuasive evidence of substantial intra-state uniformity, notwithstanding the fundamental differences between code pleading ... and notice pleading,"68 as well as evidence that Illinois state courts followed the Supreme Court's interpretive gloss on pleading and summary judgment under the Federal Rules.69 Main also found similar following in Pennsylvania.70 Further, both states marched in tune-with relatively consistent lag times-with the federal changes to summaryjudgment after Celotex,71 despite different summary-judgment rule texts.7 2 And Edward Cavanaugh has reported that state appellate courts in New York-a codepleading state-are using the Supreme Court's "plausibility" standard even though it applies only to pleadings in federal court.7 3

Note how the Supreme Court's gravitational pull on state courts compounds the overall gravitational effect of federal law. The federal rules pull state rulemakers toward parallel state rules in the first instance, resulting in rampant mimicry. Even when state rulemakers do resist, state courts are still drawn to interpret divergent state rules in a manner that approaches the interpretation of the federal rules. The overall effect amplifies the gravitational force of federal law.

#### CP impliedly preempted—conflicts with federal precedent

Victoria Graham, Bloomberg Law, Ohio Rethinks State Antitrust Laws to Confront Facebook, Google (1), October 17, 2019, <https://news.bloomberglaw.com/antitrust/ohio-rethinks-state-antitrust-laws-to-confront-facebook-google>

Ohio Rethinks State Antitrust Laws to Confront Facebook, Google (1)

Ohio legislators are considering whether to rewrite antitrust laws to reflect the growth of big tech in the latest sign of growing bipartisan state-level interest in confronting Alphabet Inc.’s Google and Facebook Inc.

Most state antitrust laws directly mirror U.S. competition law and Ohio could only go so far with antitrust revisions before they potentially conflict with federal law or interfere with how companies do business.

“Given the global and national footprints for the digital technology companies, state legislative carve-outs for the sector could affect companies’ ability to do commerce across states and regions,” said Diana Moss, president of the American Antitrust Institute.

States do have some room to maneuver in areas where the U.S. Congress hasn’t expressly enacted legislation, similar to how California enacted its own privacy law in the absence of a federal statute.

“Just because certain conduct is legal under federal law doesn’t mean the state couldn’t outlaw it,” Ralph Breitfeller, of counsel at Kegler, Brown, Hill & Ritter Co. in Columbus, Ohio, said.

State Scrutiny

Ohio lawmakers discussed a possible rethink of the state’s antitrust laws Oct. 17 during a legislative hearing in Cleveland examining the impact of Google and Facebook. The hearing featured several academics and Yelp Inc. executive, Luther Lowe, who has emerged as an outspoken critic of Google’s power to control the internet.

Legislators should consider changing state antitrust laws to allow regulators to assess factors other than price, such how much data one firm controls, when reviewing a merger, Dennis Hirsch, a professor at The Ohio State University Moritz College of Law, said during the hearing.

Current merger analysis, at both the state and federal level, doesn’t factor in data aggregation since it’s mostly concerned on how consumer prices are impacted by a merger.

A second hearing will follow in Cincinnati on Oct. 28.

The probe—the first of its kind by any U.S. state legislature—is led by state Sen. John Eklund, a Republican who represents a district east of Cleveland and practiced competition law for more than 40 years.

Ohio’s Attorney General Dave Yost (R) is among state attorneys general in both parties that have emerged as some of the most vocal critics of big tech’s power. Multi-state investigations into Facebook and Google’s dominant market power have positioned the states as potentially more aggressive enforcers than federal regulators.

At the federal level, Justice Department and Federal Trade Commission officials have been hesitant to call for new antitrust legislation, while Congress contemplates whether modifications need to be made to address the unique challenges of big tech.

The antitrust laws that date back as late as 1890 during the breakup of Standard Oil don’t need major changes since they are flexible enough to deal with new technology changes, such as the rise of Amazon.com Inc. and Apple Inc., most federal enforcers argue.

Yost, who is involved in both a Google and Facebook multi-state antitrust investigation, said during a September press conference that these hearings will “help inform” the state’s investigation and the discovery it conducts into both tech companies.

Ohio has played a pivotal role in shaping the history of U.S. antitrust law.

The nation’s first antitrust legislation which is still the current federal statute that prohibits monopolistic conduct, the Sherman Antitrust Act, was introduced by Senator John Sherman (R-Ohio).

After the Sherman Act’s passage, it was then Ohio’s Attorney General David Watson who first sued Standard Oil, which eventually lead the U.S. Supreme Court to force a breakup of the corporate trust in 1911.

Workarounds

States have to ensure that any new antitrust statutes don’t directly conflict with existing federal law since courts generally strike state laws as invalid if they clash with the federal government, John Newman, a former attorney at the DOJ’s antitrust division, who is now an antitrust professor at The University of Miami School of Law, said.

#### Supreme court has directly concluded the CP is preempted

Stamp, Chief Counsel, Washington Legal Foundation, ‘14

(Richard A., “The Role of State Antitrust Law in the Aftermath of Actavis,” 15 Minn. J.L. Sci. & Tech. 149 (2014))

On the other hand, state antitrust laws—like all state laws—are subject to the restrictions imposed by the Supremacy Clause of the U.S. Constitution,15 and are impliedly preempted to the extent that they conflict with federal law.16 Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility,”17 or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”18 On a number of occasions, the Supreme Court has concluded that state antitrust law is preempted because it conflicts with a federal statute other than federal antitrust law.19

The Court has been particularly quick to find preemption when state antitrust law has an impact on labor law, an area in which federal law is pervasive.20 Indeed, on at least one occasion, the Court found that a claim arising under state antitrust law was preempted by federal labor law even though the Court concluded that the conduct that gave rise to the state claim could proceed as a claim under federal antitrust law.21 The Court explained that “Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.”22 The Court said that state antitrust laws “generally have not been subjected to this process of accommodation” and thus that “[t]he use of state antitrust law . . . [must] be pre-empted because it creates a substantial risk of conflict with policies central to federal labor law.”23

#### Specifically applies to divergent procedural devices

Stamp, Chief Counsel, Washington Legal Foundation, ‘14

(Richard A., “The Role of State Antitrust Law in the Aftermath of Actavis,” 15 Minn. J.L. Sci. & Tech. 149 (2014))

It seems reasonably clear, however, that Actavis prohibits states from adopting the procedural devices rejected by the U.S. Supreme Court—either a per se condemnation of reverse payment settlements or a presumption of illegality accompanied by “quick look” review. The Supreme Court rejected those approaches because it determined that in many cases there might well be pro-competitive economic justifications for reverse payment settlements and that presuming their illegality could result in the suppression of economically useful conduct.82 State antitrust laws that adopted the FTC’s proposed presumption of illegality would be subject to similar criticism, and thus would likely be impliedly preempted as inconsistent with the careful balance between antitrust and patent law established by Actavis.

## Court legitimacy DA

#### Decisions like the aff can’t affect legitimacy – public needs a defined opinion for the case to be salient

Crane 13 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust and the Judicial Virtues,” *Columbia Business Law Review*, no. 1, 2013, pp. 4, https://core.ac.uk/download/pdf/232689875.pdf.

Antitrust law is not plagued by a substantial countermajoritarian difficulty and thus presents no reason for judges to exercise passive or avoidant virtues. Judges making antitrust law do not have to worry that their decisions will trump the popular will, except in the limited sense that they may reject suits by public enforcers like the Justice Department or Federal Trade Commission ("FTC"). To the extent that judges promulgate legal norms different from those favored by the executive branch, a small countermajoritarian difficulty is presented. But since judicial antitrust decisions are theoretically reversible by Congress, the courts do not have the final word on antitrust questions, as they do in constitutional cases. There is therefore little reason for judges to worry that their decisions in antitrust cases will compromise the legitimacy of the courts by undermining popular will.

#### Other high-profile liberal decisions outweigh – LGBT rights

Fritze 6/1 – Supreme Court correspondent for USA Today who has covered politics for nearly two decades.

John Fritze, “How a Supreme Court decision last year is reshaping the legal battle over LGBTQ discrimination,” *USA Today*, 1 June 2021,https://www.usatoday.com/in-depth/news/politics/2021/06/01/lgbtq-rights-helped-landmark-supreme-court-bostock-decision/7421094002/.

A year after the Supreme Court handed down a landmark decision barring workplace discrimination against LGBTQ employees, gay rights advocates continue to benefit from the aftershocks even as they brace for a more challenging legal environment.

In a ruling with far-reaching implications for education, housing and health care, the Supreme Court sided last June with three employees who were fired because of their sexual orientation or gender identity. The 6-3 decision, written by conservative Associate Justice Neil Gorsuch, has a big impact beyond the workplace.

President Joe Biden noted the opinion in an executive order he signed on his first day in office to prohibit discrimination in the federal government. The Justice Department concluded in March that the court's holding applies broadly to other laws. And two appeals courts recently relied on the case to strike down bans on transgender students using school bathrooms aligned with their gender identity.

"I have had time to process everything, and I'll be honest: It still feels amazing," Gerald Bostock, one of the three employees whose lawsuits led to the blockbuster ruling last year, told USA TODAY in an interview. "I’m just thrilled every day I think about the impact that we have made and the impact we are making currently."

Though the court’s ruling in Bostock v. Clayton County has been heralded by gay rights groups as the most important outcome since the decision legalizing same-sex marriage in 2015, the celebration has been muted by other issues on the horizon. A growing number of states are passing laws restricting LGBTQ rights, and a more conservative Supreme Court signaled its desire to strengthen religious freedom protections.

Those competing interests – LGBTQ rights and the First Amendment’s protection of religious freedom – will come head to head in one of this year’s most closely watched cases at the high court. In that dispute, a Catholic charity declined to honor Philadelphia’s requirement that it screen same-sex couples as potential foster parents because the mandate runs counter to its religious beliefs.

A decision in the case is likely this month, and observers predict the court, which has a 6-3 conservative majority, will side with the Catholic group – giving religious advocates a big victory since the justices absolved a Colorado baker of discrimination for refusing to create a wedding cake for a same-sex couple in 2018.

"The Bostock court – it just punted on religious freedom,” said Kim Colby, director of the Center for Law and Religious Freedom at Christian Legal Society.

Colby and other advocates are concerned about the impact the Bostock decision may have on federal and state laws that do not have clear carve-outs for religious beliefs. That's another area of conflict experts predict will work its way to the high court in coming years.

"The court, the majority, really was negligent in its responsibility to religious employers and others that would be impacted by the ramifications," Colby said.

#### Texas decision eviscerates legitimacy – it’s legal nonsense

Seddiq 9/11 – Politics reporter for Business Insider.

Oma Seddiq, “‘Lawless behavior’: Legal experts say the Supreme Court acted out of ‘political motivations’ in upholding Texas’ abortion ban,” *Insider*, 11 September 2021, https://www.businessinsider.com/legal-experts-supreme-court-is-lawless-after-upholding-texas-abortion-law-2021-9.

The Supreme Court opened the door to fierce backlash when a narrow majority of justices in a ruling last week upheld a strict Texas law that bans abortions after six weeks of pregnancy.

From President Joe Biden to advocacy leaders, critics have knocked the court's decision, arguing it flouts the constitutional right to an abortion established nearly 50 years ago under Roe v. Wade. That Supreme Court decision, along with other major abortion rulings since, protect the right to an abortion until pre-viability, or the point when a fetus can survive outside of the womb, which most experts say occurs around 24 weeks of pregnancy.

The court's refusal to block the Texas law "unleashes unconstitutional chaos," Biden said last Thursday, hours after the decision was handed down. The Department of Justice filed a lawsuit this week in an attempt to block the six-week abortion ban.

"This is the loudest alarm yet that abortion rights are in grave danger, in Texas and across the country," Alexis McGill Johnson, president and CEO of Planned Parenthood Federation of America, said in response to the ruling.

Some legal experts, too, have piled on the criticism. They argue that the Supreme Court justices, who are meant to behave as interpreters and appliers of the law, instead conducted themselves as partisan lawmakers in the Texas decision.

"Our court is broken. I mean, it's more of a political institution than it is a legal institution," Barry McDonald, a law professor at Pepperdine University Caruso School of Law, told Insider, adding that the Texas law is "flagrantly unconstitutional."

The Texas decision came via a little-known process called the 'shadow docket'

At midnight on September 1, a Texas statute that bans abortions after six weeks of pregnancy, a time when many people do not yet know they are pregnant, went into effect. The law makes no exceptions for cases of rape or incest and invites private citizens, rather than state officials, to enforce the ban.

It was not until 24 hours later when the Supreme Court responded to a request from abortion providers in the state to block the law. The court declined the appeal, and handed down its 5-4 opinion via a little-known process dubbed the "shadow docket."

The shadow docket, a term coined by University of Chicago law professor William Baude in 2015, refers to the range of decisions the Supreme Court makes that fall out of line with its normal routine. Unlike the lengthy process the court uses to decide 60-70 major cases per term, these shadow docket rulings are usually short, unsigned and could come before any oral arguments take place before the court, as was the case with the Texas decision.

Traditionally, the court uses the shadow docket for procedural purposes — to accept or deny applications for emergency action — in typically small, uncontroversial cases. But in recent years, the court's use of the shadow docket has sparked outrage over what critics describe as increasingly partisan and unsubstantial rulings, including now in the Texas abortion case.

"In the abortion case, it's not only short, it's just a jumble of nonsense," Richard Pierce, a law professor at the George Washington University Law School, told Insider of the court's opinion. "It's incoherent. The reasoning makes no sense at all."

The court's majority, in an unsigned opinion, argued that its ruling was technical and not based on the substance of the Texas law, which could still be legally challenged.

"In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts," the majority wrote.

Yet experts dispute the court's decision-making. "That's lawless behavior," Pierce said.

"It just concerns me tremendously," he added. "To me, the court should never take any action without providing a full set of reasons, telling us why it acted as it did. And the court has not been doing this in these cases that are referred to as the shadow docket."

"It's stunning," McDonald said of the court's ruling. "It just adds to this perception that the court is acting out of political motivations as opposed to impartial and objective application of legal principles."

#### Moderate trends won’t hold – the world ends next term

Robinson 6/18 – Supreme Court reporter for Bloomberg Law.

Kimberly Strawbridge Robinson, “Barrett Channels Roberts’ ‘Go-Slow’ Approach in Landmark Cases,” *Bloomberg Law*, 18 June 2021, https://news.bloomberglaw.com/us-law-week/barrett-channels-roberts-go-slow-approach-in-landmark-cases.

End of the World

But the ACA and LGBT cases, along with the extraordinary agreement all term, suggests a majority of the justices don’t think it’s the right time to make major changes in the law.

“In the throes of everything"—the pandemic, Barrett’s first term, Kavanaugh’s biting confirmation, calls for Breyer to retire, and the caustic 2020 presidential election—"they didn’t want to shock the world this year,” Segall said.

“Preserving the court’s own political capital is incredibly important to the justices because they know their only capital is the confidence of the American people,” he added.

Adler said the court has developed a sort of 3-3-3 split—that is, three liberals, three conservative justices willing to chuck precedents they don’t agree with, and three conservative justices hesitant to overturn cases they may disagree with. Roberts, Kavanaugh, and now, apparently, Barrett make up that last group.

Adler said that split will create some interesting pressures for the three justices in the middle next term, when—as Segall said—"the world will end.”

The end of the world was a reference—in part—to the court’s abortion case, which could call into question the landmark ruling in Roe v. Wade and later cases.

Incomplete Story

The ACA and LGBT rulings are, however, not the complete story on Barrett, who isn’t even a full year into what’s likely to be a decades-long tenure.

Barrett’s nomination raised questions about her personal views on abortion and whether they would influence her decisions. In a 1998 law review article, she wrote that abortion and euthanasia “take away innocent life” and that abortion is “always immoral.”

On guns, some have seen a willingness in Barrett to go further even than the late Justice Antonin Scalia in protecting Second Amendment rights.

And along with the blockbuster issues the justices are set to tackle next term, the court still has some consequential cases to decide, including a free speech case dealing with corporate disclosures and a property dispute involving labor organizing.

Adler said he’d expect to see some splintered rulings this term.

Moreover, “we have seen important 6-3 decisions” in cases like Jones v. Mississippi and Edwards v. Vannoy, Chemerinsky said, referring to cases on life sentences for juvenile defendants and unanimous jury verdicts for criminal trials.

Both divided the justices ideological, with Barrett siding with her conservative colleagues.