## 1NC

**T Mergers**

**Practices are ongoing conduct---mergers violate---the merger itself is a one-off event, even if they’re evaluated because of their effects on ongoing practices.**

Stanley Mosk 88, Judge, California Supreme Court, “Cal. ex rel. Van De Kamp v. Texaco,” 46 Cal. 3d 1147, Lexis [italics in original]

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent business *practice* **. . . ." ( Bus. & Prof. Code, § 17200,** italics added**.)** In so doing it effectively requireswhat the court variously described in the leading case of Barquis **v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817],** as "a 'pattern' . . . of conduct**" ( id. at p. 108), "**ongoing . . . conduct**" ( id. at p. 111), "**a pattern of behavior**" ( id. at p. 113),** and, "a course of conduct**" (ibid.).**

What the Attorney General challenges in this actionis the **Texaco-Getty** merger**.** Under the Barquis court's construction **of the statute,** however, the merger itself cannotbe characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act.That the complaint, under **[\*\*\*\*156]** the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger**.**

**Voting issue---forcing AFFs to regulate ‘patterns of conduct’ locks in NEG defenses of ways of doing business---any other interp allows review of individual transactions and decisions which are impossible to negate.**

### States

#### The 50 states and all relevant territories should prohibit platform conduct that fails under rule of reason without imposing heightened burdens on plaintiffs.

#### A multistate AG antitrust enforcement over state antitrust statutes solves the aff---causes federal follow-on

Artega 19 (Juan A. Arteaga is an experienced antitrust attorney and a former Deputy Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division, The Role of US State Antitrust Enforcement, Global Competition Review, 11-19, <https://www.lexology.com/library/detail.aspx%3Fg%3Dd423301d-f4d1-4550-a99c-1880869e67e7+&cd=11&hl=en&ct=clnk&gl=us>, y2k)

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition. In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions. This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage. Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process. As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States. This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations. Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices. These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints. The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’. No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications. To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices. During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC. State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general have sued to block the transaction even though the DOJ, along with seven state attorneys general, have approved the deal after securing certain structural and behavioural remedies. After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who has been leading the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’

The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees)in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.

None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support. In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.

After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.

Given that companies will increasingly have to engage with state attorneys general in a meaningful manner with respect to antitrust matters, this chapter discusses key issues related to state antitrust enforcement in the United States. Specifically, this chapter discusses:

the federal and state antitrust laws under which state enforcers operate;

the processes through which state enforcers coordinate with each other and their federal counterparts;

the opportunity for coordination and conflict between state enforcers and private counsel during litigation;

strategic and practical considerations when engaging with state attorneys general; and

certain noteworthy enforcement actions that state enforcers have recently prosecuted.

Statutory regime governing US state antitrust enforcement

Civil enforcement of federal antitrust laws

Enforcement actions on behalf of state governmental entities

Under the federal antitrust laws, state attorneys general have the express authority to bring civil actions on behalf of their state, municipalities, and governmental entities for harm suffered when directly purchasing goods or services. In bringing such actions, state attorneys general can seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees.

In actions seeking monetary relief, state attorneys general typically allege that the state plaintiffs were forced to pay higher prices by an unlawful horizontal conspiracy, such as a price-fixing or bid-rigging scheme, and seek to recover the overcharges. In some cases, state attorneys general have sought to recover damages arising out of anticompetitive unilateral conduct, such as overcharges paid by state governmental entities due to a defendant’s actual or attempted monopolisation of a specific market.

In seeking injunctive relief, state attorneys general often argue that such relief is proper because the business practice or transaction in question – in addition to harming the state plaintiffs – has or will cause injury to the state’s general economy. While general harm to a state’s economy can serve as a basis for injunctive relief, state attorneys cannot base their request for damages on such harm.

Parens patriae enforcement actions

A well-settled principle in the United States’ legal system is that ‘the States have a quasi sovereign interest in protecting their citizens from ongoing economic harm’. Consequently, the federal antitrust laws expressly authorise state attorneys general to file parens patriae actions in federal court that seek to redress the harm suffered by their citizens due to federal antitrust violations. In providing state attorneys general with parens patriae authority, the federal antitrust laws permit state antitrust enforcers to seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees. State attorneys general have been empowered to seek such broad and substantial relief on behalf of their citizens to allow them ‘to deter further economic harm and to obtain relief for the injury inflicted on their economies and their citizens’.

In exercising their parens patriae authority, state attorneys general have often sought to protect their citizens and state economies from the harm caused by anticompetitive business practices. For example, in the e-Books Litigation, 33 state attorneys general alleged that Apple, Inc and various book publishers unlawfully conspired to fix the prices of electronic books, which resulted in their citizens paying higher prices and harm to their states’ general economies. Ultimately, these state attorneys general, working alongside private class counsel, secured settlements from the defendants that provided nearly US$600 million in direct refunds to their citizens. In a pending lawsuit brought against various manufacturers of generic pharmaceuticals, 44 state attorneys general have alleged that the defendants unlawfully conspired to fix the prices for numerous generic drugs, which forced their states and citizens to pay billions of dollars in overcharges, as well as significantly harmed their states’ general economies.

State attorneys general have also invoked their parens patriae authority to protect their citizens and state economies from the harm caused by anticompetitive transactions. For instance, in their pending challenge to T-Mobile’s proposed acquisition of Sprint, nearly 20 state attorneys general have alleged that the transaction will result in their residents paying higher prices for lower quality mobile phone services as well as harm to their states’ general economies. Likewise, the state attorneys general that joined the DOJ’s successful challenges to the proposed Anthem/Cigna and Aetna/Humana mergers alleged that these mergers would have harmed their citizens and the general economies of their states by reducing the number of large health insurance providers from five to three.

There are, however, important limitations on the parens patriae authority conferred to state attorneys general under the federal antitrust laws. For instance, the monetary relief sought by state attorneys general must: (1) arise out of a Sherman Act violation; (2) have been incurred by natural persons residing in their states (i.e., the losses suffered by business organisations cannot be included in the alleged damages); (3) exclude harm suffered by indirect purchasers of the goods and/or services in question; (4) avoid the risk of multiple recoveries by excluding amounts previously awarded for the same injuries; and (5) arise out of actual financial losses rather than general harm to their state’s economy. Moreover, state attorneys general must provide their residents with adequate notice of the lawsuit and a meaningful opportunity to opt out of the litigation.

In seeking to prove the monetary harm suffered by their citizens, state attorneys general can employ many of the same methods utilised by private plaintiffs. In price-fixing cases, for example, state attorneys general can prove the claimed aggregate damages by utilising ‘statistical or sampling methods’, ‘comput[ing[ [the] illegal overcharges’, or relying on any other methodology deemed ‘reasonable’ by the court. In addition, a number of state antitrust laws authorise their state attorney general to hire private lawyers to handle parens patriae actions, which the state attorneys general challenging the T-Mobile/Sprint merger have done.

Civil enforcement of state antitrust laws

Most states have enacted state antitrust laws that are comparable to Sections 1 and 2 of the Sherman Act. In addition, some states have passed antitrust laws that are similar to Sections 3 and 7 of the Clayton Act and the Robinson-Patman Act. These state antitrust laws typically contain provisions expressly requiring that ‘they be construed in conformity with comparable [f]ederal antitrust statutes’.

State antitrust statutes typically provide state attorneys general with broad authority to investigate possible violations, including the power to ‘issue civil investigative demands compelling oral testimony, the production of documents, and responses to written interrogatories to individuals and corporations’. Like the federal antitrust laws, most state antitrust laws authorise state attorneys general to file civil lawsuits on behalf of their states and state governmental entities whenever a violation has caused them to suffer harm in their capacity as direct purchasers of goods or services, as well as parens patriae actions on behalf of their citizens.

### ptx

#### The court will avoid abortion ban now due to the perceived fear of court reform

Scher 4-20 (Bill Scher is the host of the history podcast "When America Worked" and the co-host of bipartisan online show and podcast "The DMZ", Should Biden Pack the Supreme Court? <https://washingtonmonthly.com/2021/04/20/should-biden-pack-the-supreme-court/>, y2k)

After four congressional Democrats introduced a bill expanding the Supreme Court, Senate Minority Leader Mitch McConnell accused Democrats of trying to pressure the current Justices. “It’s not just about whether this insane bill becomes law. Part of the point here are the threats themselves,” said the Kentucky Republican who always evinces a tender concern for the sanctity of the Court. “The left wants a sword dangling over the Justices when they weigh the facts in every case.”

Well, yeah.

I agree with McConnell that packing the Court would be insane. Allowing one party to determine control of the Supreme Court whenever it controlled the White House and Senate would destroy the legitimacy of the entire judiciary, if not the underpinning of our constitutional government. Threatening to pack the Court, however, is perfectly sane, and may already be working. Count me in.

Prior ideologically driven attempts to either pack the Court or strip powers from the Court never became law. But they appear to have influenced Court behavior. As my colleague Daniel Block explained last fall, “In the mid-1950s, the liberal Warren Court backed away from protecting victims of McCarthyism because a popular Senate bill threatened to strip the Court’s powers. Throughout the 1970s and 1980s, conservative politicians flooded Congress with legislation to stop the Court from ruling on racial integration. The justices retreated from enforcing busing regulations.”

Franklin D. Roosevelt’s 1937 court-packing scheme came in response to rulings that shut down New Deal programs and curtailed federal government power. FDR’s bill was rejected by Congress—even though Democrats controlled 71 of 96 seats in the Senate. But after its introduction the Court began to uphold New Deal laws. Historians continue to debate whether FDR lost the battle but won the war. Understanding what happened then is instructive for determining how far Democrats should go today.

In the June 1936 Tipaldo case, decided on a 5-4 vote, the Supreme Court struck down a women’s minimum wage law in New York State. The decision was part of a long line of rulings based on the principle that employers and employees have the “freedom” to forge contracts, and any “[l]egislative abridgement of that freedom can only be justified by the existence of exceptional circumstances.”

Roosevelt announced his plan to expand the Court on Feb. 5, 1937. Fifty-two days after FDR’s move, the Supreme Court ruled in the Parrish case that Washington State’s minimum wage for women was constitutional. As the law was very similar to the one struck down nine months before, the ruling amounted to a complete reversal. Between the two cases, Justice Owen Roberts moved from the conservative to liberal position, a move that became known as the “switch in time that saved nine.”

Parrish was followed in April with the Court’s upholding of FDR’s National Labor Relations Act. Then in May, Social Security was also deemed constitutional. Even though in July the Senate sent the court-expansion bill back to committee, to be filleted, the Court was no longer an obstacle to the New Deal.

That chronology of events suggests FDR’s bill moved the Court. Roosevelt himself championed that narrative in an introduction to a volume of his public papers: “The Court began to interpret the Constitution instead of torturing it. It was still the same Court, with the same justices. No new appointments had been made. And yet, beginning shortly after the message of February 5, 1937, what a change!”

But FDR left out two key data points. One (most likely unbeknownst to FDR) is that Roberts executed his switch in December 1936—before FDR’s message. In a 1945 memo, Roberts explained that the December vote wasn’t immediately made public because one Justice was ill. The Court could have deadlocked 4-4 and still have upheld Washington State’s minimum wage law, because it would have left in place a lower court ruling, but the Justices knew their absent colleague would also support the law and they wanted a majority 5-4 vote.

We can say that FDR’s announcement did not pressure Roberts to switch, since the switch came first. What remains a source of scholarly debate is whether speculation in the press about a forthcoming court-packing plan, in the immediate aftermath of FDR’s landslide 1936 re-election win, nevertheless pressured Roberts to switch. If not, was there already evidence of doctrinal evolution by Roberts, and other Justices, in the midst of Depression and modernization, which culminated with the springtime 1937 liberal rulings? (For a deep dive into this debate, read this series of essays in the October 2005 edition of the American Historical Review.)

Roberts himself gives conflicting evidence. On one hand, he insisted in his 1945 memo (published posthumously 10 years later) that in the two minimum wage cases, he didn’t switch at all. He just wasn’t asked in Tipaldo, the first case, to overrule the 1923 Adkins opinion—which struck down a law passed by Congress establishing a minimum wage for Washington, D.C. But the second case, Parrish, did confront Adkins directly, and then Roberts made his view known. He admitted he could have taken the “proper course” and written his own concurring opinion for Tipaldo plainly stating his view, and neglected to give a reason why he didn’t.

FDR biographer Kenneth S. Davis, in FDR, Into the Storm 1937-1940, found Roberts’ belated explanation “disingenuous” and “desperately contrived … made solely for the purpose of protecting the Court against a probable attempt to drastically limit its powers.” And, as Block noted, Roberts acknowledged in congressional testimony that he was “fully conscious” of how the “court-packing plan” put “tremendous strain and threat to the existing Court.” Roberts didn’t say he switched because of that strain, but those dots seem very connected.

The other data point FDR left out of his narrative is the political damage he suffered as a result of his bill’s decisive rejection by the Senate. Many FDR allies in the chamber urged him to stand down after the switch, but he greedily persisted and paid a steep price.

In Roosevelt’s Purge, the historian Susan Dunn explained how the defeat emboldened the conservative anti-New Deal wing of the Democratic Party, mere months after Roosevelt’s historic 24-point election victory in 1936: “Gleefully, they banded together to sabotage the rest of the New Deal, voting down Roosevelt’s progressive tax measures, abolishing the graduated tax on capital gains, killing his proposal for seven regional agencies patterned after the TVA, tearing apart his executive reorganization plan and burying in committee his Fair Labor Standards Act.” Davis sharply concluded, “his sadly mistaken court-packing effort effectively ended the New Deal as a reforming, transforming social force[.]” FDR can’t cheerily claim he won the war for the Court, if in the process he lost the war for his agenda.

How should Democrats apply the FDR lessons? As the chess adage goes, “the threat is stronger than the execution.”

We can’t cleanly separate and sort out what factors influenced Roberts, but we do know that FDR’s announcement wasn’t one of them, because it was after the fact. Moreover, FDR’s proposal was immediately unpopular: 47 percent in favor, 53 percent opposed in an early March 1937 Gallup poll. After the “switch” became public, support further declined. Despite FDR’s electoral mandate, his attempted power grab depleted his strength. But beforehand, the landslide election and speculation over court-packing was likely helping to move the Court his way. If FDR hadn’t announced a specific proposal, he probably would have gotten the same results from the Supreme Court, without shattering his congressional coalition.

Today’s congressional Democratic leadership has kept their distance from the court-packing bill. Leaning on the President’s new blue ribbon commission exploring non-specific judicial reforms, House Speaker Nancy Pelosi said she has “no plans to bring [the bill] to the floor.” This is wise. FDR couldn’t move public opinion in favor of the bill, and he won his election by 20 more points than Biden. While there are far fewer conservative Democrats today than in 1937, a move to a floor vote could well have split the Democrats and harmed the rest of their agenda.

But McConnell is correct that the threat still looms—which is a good thing. What if the Supreme Court moved in a radical right-wing direction now that it has a 6-3 conservative majority? What kind of backlash would materialize? Could it lead to big Democratic gains in the upcoming elections and give Biden a greater mandate to pack the Court than FDR had? The conservative Justices can’t know for sure, and they may not want to test the proposition with a slew of provocative rulings.

John Roberts has shown for almost a decade that he’s happy to lead the march in a conservative direction, but not too quickly, avoiding some incendiary cases and defusing others—most notably, preserving Obamacare in 2012. This could explain why the Court has kept punting on the Mississippi 15-week abortion ban case. If the Court’s conservatives are ready to overturn Roe v. Wade, right now they would take the case. If they want to avoid needless divisiveness and protect their legitimacy, they will leave it alone.

So long as the latter strategy appears to be in effect, that strongly suggests the conservative Justices see the dangling sword. Biden, Pelosi and Schumer are wise to keep it sheathed, and keep them guessing.

#### Plan allows Roberts to moderate the court’s conservative credentials and builds credibility---that relieves pressure on the court

Masters 20 (Brooke Masters, FT’s Chief Business Commentator and an Associate Editor, US Supreme Court adjusts to new tilt to the right, 12-10, <https://www.ft.com/content/16489a50-e828-4cc6-8d0d-a261c1f1f9d8>, y2k)

The US Supreme Court is having adjustment problems. The addition of three conservative appointees by President Donald Trump in four years has disturbed the balance and possibly destroyed the comity of America’s highest court. The arrival of Amy Coney Barrett in October, replacing the late Ruth Bader Ginsburg, gives the court a 6-3 conservative majority after decades of a 5-4 split or control by a moderate block.

A court that has been reliably pro-business for years will stay that way at a time when incoming president Joe Biden is expected to favour stricter regulation and labour rights. The court also appears poised to invalidate or sharply narrow social reforms and government programmes that are popular with the majority of Americans, including abortion rights, gay marriage and Obamacare.

Some of the justices cannot wait. Samuel Alito, long one of the most conservative, recently complained in a speech that the court’s landmark 2015 gay rights decision in Obergefell vs Hodges had made traditional views unacceptable. “You can’t say marriage is a union between one man and one woman,” he said. “Until very recently, that’s what the vast majority of Americans thought. Now it’s considered bigotry.”

The significance of Ms Barrett’s arrival was underscored last month when the court blocked New York’s Covid-19 related restrictions on public religious services, saying they violated the freedom to worship. Before Ginsburg’s death, the court had upheld similar rules in California and Nevada, holding that they were necessary to control the pandemic and did not treat religious gatherings differently from secular ones.

The New York ruling was also notable for its many sharply worded opinions. Trump appointee Neil Gorsuch declared bitterly it was “past time” to strike down such restrictions, writing: “Even if the constitution has taken a holiday during this pandemic, it cannot become a sabbatical.”

The question now is not whether the court will move to the right, but how far. History shows that even though the justices are required to base their decisions on the constitution and legal precedent, popular opinion plays a role. After all, the court has no enforcement mechanism — it de­pends on the rest of government and the respect accorded to its rulings.

In the past, when Supreme Court rulings departed too far from public consensus, it has ended up adjusting. The best known instance is often described as the “switch in time that saved nine”.

In the 1935-36 terms, the justices capped a 40-year period of conservative rulings by striking down several New Deal statutes by 5-4 votes, drawing public opprobrium and a threat from then president Franklin Roosevelt to pack the court with additional liberals. While the bill was still pending, Owen Roberts changed sides — “switched” — and voted to uphold a Washington state minimum wage bill and continued to support regulation of business.

But liberals have seen the court shy away from confrontation as well. In 1954, in Brown vs Board of Education, the court invalidated segregated schools but put off immediate implementation, saying in Brown II a year later that states and school boards merely needed to act with “all deliberate speed”.

Chief Justice John Roberts has already shown he is deeply concerned with maintaining the Supreme Court’s institutional strength. For years, he has sometimes provided the liberals with a fifth vote on questions where he felt the court’s credibility could be at stake, including a 2012 ruling that turned back the first major challenge to the Affordable Care Act (ACA) that established Obamacare, and on cases regarding abortion rights and young immigrants last spring.

Supreme Court watchers observe that its history can place a powerful weight on members

Early signs suggest he is still playing a similar role, even though Ginsburg’s death has shifted the balance on the court. At a time when the ACA is more popular than ever, he was openly sceptical in oral arguments of a new claim that Congress wanted the entire act to fail when it voted to change one part of it. In the New York Covid-19 religious services case, he defended his liberal colleagues from Justice Gorsuch’s criticism, saying “they simply view the matter differently after careful study”.

But Ms Barrett’s arrival means the chief justice can no longer make the difference on his own: he must bring along at least one conservative colleague to make a majority. In a landmark LGBT+ case last year, that extra conservative was Mr Gorsuch, and at the ACA hearing Brett Kavanaugh sounded sympathetic to Mr Roberts’ efforts to limit the reach of the case. But on the New York Covid-19 restrictions, the conservative bloc held.

After the ACA, the biggest early tests are likely to be in social policy cases involving gun rights and abortion. There already were five votes for pro-business decisions, so Ms Barrett’s arrival is unlikely to change the outcome of financial and regulatory cases.

On guns, the court has not taken up a recent case, but four justices previously supported an expansive approach to the second amendment right to bear arms. Ms Barrett expressed similar views as an appeals court judge. On abortion rights, the conservative bloc has criticised Roe vs Wade, the 1973 decision that proclaimed a constitutional right to have an abortion. Ms Barrett has signed public letters opposing abortion, and on the appeals court she dissented when other judges declined to rehear an Indiana case where tough abortion restrictions had been blocked.

Still, Supreme Court watchers know the institution’s history can place a powerful weight on its members. With the balance tilted to the political right, and an incoming administration committed to changes on climate and labour, the left will hope one or more of the justices will surprise.

The question remains: which could it be?

#### That provides a breathing room for conservative rulings

Bazelon 15 (Emily Bazelon is a staff writer for the magazine and the Truman Capote Fellow at Yale Law School, Marriage of Convenience, 2-1, New York Times, l/n, y2k)

More significant, if the court is seen as transcending partisan politics, Roberts will probably have more chances, over time, to accomplish what appears to be his primary long-term goal: to move the court in a more conservative direction on a range of issues. In particular, Roberts's brand of conservatism has manifested itself in two main areas. The first is in decisions that are sympathetic to corporations. A 2013 study found that he had been more likely to side with businesses than any justice in the previous 65 years, except for Samuel Alito. The second is in decisions that are antagonistic toward the idea of taking race into account in shaping law or policy. Roberts has voted repeatedly against affirmative action, writing last year that it was not hard to conclude that racial preferences may ''do more harm than good.'

When Roberts was nominated to be chief justice 10 years ago by President George W. Bush, he exuded calm neutrality at his confirmation hearing, comparing judges to umpires who call balls and strikes. At the end of his first term, he emphasized the importance of the court's ''credibility and legitimacy as an institution,'' in an interview with the George Washington University law professor Jeffrey Rosen.

But in 2010, Roberts supplied the fifth vote for the court's remarkably unpopular ruling in Citizens United. By striking limits that Congress set on campaign spending by corporations, the court was perceived as favoring the interests of the wealthy. The court's approval rating fell 10 percentage points, to barely break even, from 61 percent.

Since then, the court has fared better with the public when it pairs conservative decisions with progressive ones. And same-sex marriage is part of that equation. In 2013, the term ended with a splashy ruling in which five justices -- Roberts not among them -- struck down part of the Defense of Marriage Act, which restricted federal benefits for spouses to male-female couples. This decision came one day after the court gutted a central component of the Voting Rights Act, in a 5-to-4 decision written by Roberts.

#### Abortion ban collapses reproductive rights---extinction

Paul Ehrlich 18, President, Center for Conservation Biology, Bing Professor of Population Studies, Stanford University, 3/24/18, quoted by Sputnik News, “Overconsumption, Inequity 'Lower Chances of Avoiding Global Collapse' – Scholar,” https://sputniknews.com/analysis/201803241062865525-overconsumption-inequity-global-collapse/

The collapse of civilization in the next few decades is imminent, and it could be triggered by a variety of factors, Paul Ehrlich told Sputnik. "It could be caused by a nuclear war, droughts and floods leading to mass starvation, a bursting of the debt bubble, political unrest from refugee flows or increasing economic inequity, trade wars, terrorism or synergizing combinations of these and other factors," the researcher said. The main reasons behind all these negative predictions are, according to the scientist, overpopulation and overconsumption. He is confident that these two factors will drive our civilization over the edge. "The basic problem is the wrecking of human life-support systems by growth in aggregate consumption — and that is a product of growth in population size and growth in per capita consumption. Various forms of inequity — gender, racial, religious could contribute by making it less likely that people will provide the cooperation required to give the chance of avoiding a collapse," the analyst argued. In Ehrlich's view, the situation has significantly worsened since he released a corresponding warning in his book "The Population Bomb" 50 years ago. "The population has doubled in size, climate disruption is now much more thoroughly understood and is already causing problems, there soon will be more weight of plastics in the oceans than fish; hormone-mimicking synthetic chemicals are now toxifying earth from pole to pole and are the likely cause of plunging sperm counts around the world; almost half of wildlife has been exterminated in the greatest mass extinction episode in the last 66 million years," the analyst said. According to him, the chances of a global nuclear war wiping out civilization are now also "higher than at any time during the Cold War except for the Cuban missile crisis." Although, there have been numerous warnings about the way humans are threatening life on earth, governments and the international community have so far failed to reduce this threat, and Ehrlich believes that there are several reasons for this. Among them are "the lack of education in basic science, especially among economists and politicians, who think economic growth is the cure for everything rather than what it is — the basic disease," the analyst said, adding that a key role is also being played by such negative traits if a human character as "greed, stupidity and arrogance." Answering the question about which measures he considers essential to change the situation for the better, the scientist said that, among other things, it's important to "supply everyone with modern contraception and backup abortion," "give women equal rights and opportunities with men," "end racial and religious discrimination so that all people are free to help solve the human dilemmas" and "redistribute wealth."

### Adv cp

#### Thus, the plan: The United States federal government should increase prohibitions on those anticompetitive financial technology business practices in which cause net-harm on one side of platforms.

#### CP promotes fintech innovation

Cag 10/27/21 (Derin, “New Fintech Regulations to Be Discussed by the U.S. Congress”, https://fintechmagazine.com/financial-services-finserv/new-fintech-regulations-be-discussed-us-congress)

The U.S. House Committee on Financial Services announced that it will hold a hearing during the current meeting of the U.S. federal government's legislative branch to discuss how to update the regulatory approach for fintech. The committee is made up of representatives from both parties. It has jurisdiction over laws affecting banks, credit unions, savings associations, securities firms, insurance companies and other entities that participate in the country's financial system. Such panels frequently include experts on international tax policy as well as experts on consumer protection law who are knowledgeable about how fintech innovations are impacting consumers across America. Keeping up with regulations while promoting innovation and competition According to the oversight plan, "The Committee will continue to review the existing regulatory framework for licensing and overseeing fintech products and services, and will examine what legislation may be needed to properly oversee fintech companies operating within the rapidly evolving intersection of technology and finance." There are many things that need to be considered when updating regulations, such as protecting consumers from fraud and abuse while promoting innovation and competition. The discussions will be overarching the entire fintech ecosystem, including cryptocurrencies, payments, artificial intelligence, cybersecurity, and data. Understanding the cryptocurrency part of the discussions The planned debate on the cryptocurrency section will cover: "the need for clear guidelines and regulations for crypto assets, stable coins, digital currencies, and related products." The committee also plans to review the U.S. Securities and Exchange Commission's (SEC) extent to which existing laws apply in this new technological sphere or whether new rules are necessary to enhance clarity for "issuers and investors." Clear rules will help to create growth in the crypto market by providing much-needed information for participants. With the upcoming debate on cryptocurrency regulations, the panel will have an opportunity to specify how it plans to treat digital currencies in order to boost investor confidence in the U.S. Coinbase also proposes a different solution to create a brand new regulatory agency. They want it to govern the digital currency industry instead of the SEC, which has previously regulated the legacy financial services sector. Imagine something called the Crypto Exchange Commission (CEC). An examination of how to regulate artificial intelligence in finance This part of the panel's oversight plan points to another essential aspect the committee intends to cover: how fintech firms are utilising artificial intelligence (AI) to provide financial services. The committee wants to "evaluate the challenge of how to assess, identify, and regulate bias in algorithms used by financial institutions for consumer loans and other products." Using AI for credit decisions brings up some issues concerning transparency and accountability. The purpose here seems to be asking what rules should apply regarding the lack of regulation for this type of technology, especially if bias influences the results provided by algorithms without consumers being aware. The House committee plans on considering whether any new regulatory approach would actually help innovation or slow down development within an industry so vast with potential growth opportunities around every corner. Regulating consumer protection issues that arise from big data Also on the agenda is an examination of data and security risk management frameworks. The session should highlight various ways through which financial technology entities handle the information they've collected about their customers. It's believed that it may be helpful if there were stricter rules and regulations for protecting Americans' personally identifiable information (PII). It's also possible that the panel could explore options for how to better safeguard people from identity theft and financial crimes, giving end-users peace of mind, knowing their information is being kept safe. The recently proposed Secure and Protect Americans' Data (SPAD) Act may be one of the topics discussed at this part of the hearing, which has been referred to as a bill aimed towards requiring companies to report data breaches involving sensitive personally identifiable information to provide notification within 30 days after discovering such a breach.

**FTC**

**COVID-related enforcement is key to effective recovery---it’s a key priority**

**OECD 20** (The Role of Competition Policy in Promoting Economic Recovery – Note by the United States, 12-2, <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/economic_recovery_us.pdf>, y2k)

1. The Antitrust Division of the **D**epartment **o**f **J**ustice (DOJ) and the U.S. **F**ederal **T**rade **C**ommission (FTC) (collectively the Agencies) offer this joint submission in response to the Competition Committee’s review of the **role** of **competition policy** in promoting **economic recovery**. In this paper, we highlight some **key steps** that the Agencies have taken to respond to the present **COVID-19 crisis** in the United States and to help promote **a rapid** and **sustained economic recovery.**

2. The U.S. antitrust agencies have undertaken initiatives in several categories to help spur recovery from the COVID-19 crisis, including stepped-up criminal enforcement, policy guidance to health and emergency-related government agencies, and expedited review of private sector cooperative efforts. The Agencies strongly believe that **competition policy** has an important role to play in the **COVID-19 recovery** process and intend to continue to engage in partnership with domestic and international counterparts to ensure the protection of competition and consumers.

2. Deterrence of Cartel Activity, Price Gouging, and Other Harmful Activity

3. Deterrence of **unlawful commercial activities** has long been **a key mission** of the Agencies, rendered even more **critical** by the **social** and **economic disruptions** caused by the COVID-19 crisis.1 While most Americans have acted to help their neighbors and communities during the past year, **crisis-related disruption** increases the risk that some individuals will make **unlawful windfall profits** at the expense of **public safety** and **the health** and **welfare** of their fellow citizens.2

4. While hoarding and exploitation are not themselves antitrust violations, such behaviors are often accompanied by criminal antitrust collusion, price fixing, and bid rigging, and other attempts to take advantage of the public. As with other natural disasters, the COVID-19 crisis increases the risk that individuals and organizations will engage in these unlawful commercial activities, necessitating increased vigilance by the Agencies.

2.1. COVID-19 Hoarding and Price Gouging Task Force

5. To coordinate enforcement efforts, the Attorney General in March 2020 announced the creation of the COVID-19 Hoarding and Price Gouging Task Force.3 The Task Force is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities. Because **health care products** and **markets** are central in **responding to the health care crisis** and eventually to **economic resilience** and **recovery**, the Task Force focuses on **protecting** the availability of those **products** designated **essential** by the Department of Health and Human Services (HHS) under Section 102 of the Defense Production Act. The DOJ consults with HHS during this process, including advising on the antitrust implications of COVID-19 for affected markets and products.

6. The Task Force is currently being led by a coordinating U.S. Attorney, with assistance as needed from the Antitrust Division’s Criminal Program. Each United States Attorney’s Office, as well as other relevant Department components, is directed to designate an experienced attorney to serve as a member of the Task Force. The Antitrust Division’s role in the Task Force involves investigating allegations of criminal antitrust harms, such as price fixing and bid rigging, and responding to citizen complaints about collusive or anticompetitive disaster-related behavior.

2.2. Procurement Collusion Strike Force

7. The DOJ is also stepping up efforts to combat crisis-related disruption through the newly-created Procurement Collusion Strike Force (PCSF). COVID-19 recovery will require **substantial** **investment** by national, state, and local authorities, with $3.48 trillion appropriated to date.4 The size and pace of such efforts unfortunately create opportunities for **fraud** and **collusion** affecting government **procurement** and **grant-making**. Through the creation of the PCSF, DOJ is dedicating significant resources to help identify and prevent these unlawful activities.5

8. The PCSF is an interagency partnership dedicated to protecting taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Under the umbrella of the PCSF, prosecutors from the Antitrust Division’s five criminal offices and 13 U.S. Attorneys’ Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process.

9. Since its creation in 2019, over 50 federal, state, and local government agencies have already sought training and assistance from the PCSF, as well as opportunities to work with the PCSF on investigations. So far, the PCSF has led over a dozen interactive virtual training programs for approximately 2,000 criminal investigators, data scientists, and procurement officials.6 Over a third of the Antitrust Division’s current investigations relate to public procurement, and the PCSF marks an important effort to marshal enforcement resources to tackle these cases. Several grand jury investigations already have been opened as a direct result of the work of the PCSF. In addition to playing a meaningful role in COVID-19 economic recovery, the PCSF will continue to be an important resource for detecting fraud and collusion in government procurement for years to come.

2.3. Protecting Competition in Labor Markets

10. The DOJ and FTC are working to protect competition in labor markets, which have been subject to significant dislocation due to the economic impact of COVID-19. In April 2020, the Agencies issued a statement warning that antitrust enforcers are closely monitoring improper employer coordination that may disadvantage workers.7 The statement affirmed that antitrust laws with respect to hiring and employment remain fully in effect despite the crisis, and stated that “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”8

11. Given the special **impact** of COVID-19 on **medical staffing** and **employment**, the Agencies are focused on preventing **employers**, including health care staffing companies and recruiters, from engaging in **collusion** or other **anticompetitive** conduct in **labor markets**, such as agreements to lower wages or to reduce salaries or hours worked. This announced focus continues the Agencies’ policy of devoting resources to preventing labor malpractice in critical industries, especially health care. As one example, the DOJ in April 2020 reached a significant resolution in the criminal investigation of Florida Cancer Specialists (FCS) for entering into a market allocation agreement that gave FCS a monopoly for services in a densely populated part of southwest Florida. As part of the deferred prosecution agreement reached in that case, the Division obtained a $100 million fine – the statutory maximum – and FCS agreed to waive certain non-compete provisions for current and former employees, including physicians and other healthcare professionals.9 In another important matter, early this year, the FTC investigated, and the parties abandoned a proposed tie-up between two providers of nursing staff. The proposed merger had likely anticompetitive effects in multiple localities across the country on markets both for nursing services and for private duty nursing care.10

2.4. Consumer Protection

12. The FTC has worked aggressively to address consumer protection issues arising from the COVID-19 pandemic. Since late March, as the coronavirus emerged, the FTC has received nearly 225,000 consumer complaints relating to COVID-19, including concerns about fraud related to the government’s economic impact payments.11 In addition, the FTC has been monitoring the marketplace for unsubstantiated health claims, illegal robocalls, privacy and data security concerns, online shopping fraud, and a variety of other scams related to the economic fallout from the COVID-19 pandemic.

13. Acting on this market information, the FTC has pursued a rigorous warning letter program and filed law enforcement actions for injunctive and other relief in federal courts.12 In the health claims area, for example, the FTC and the Food and Drug Administration (FDA) have, to date, issued over 90 joint warning letters to marketers regarding claims that their products will treat, cure, or prevent COVID-19.13 The FTC on its own has issued more than 225 additional warning letters to marketers.14 The letters warn recipients that their conduct is likely to be unlawful, that they could face serious legal consequences if they do not immediately stop, and require a response to the FTC within 48 hours. In nearly every instance, companies that have received FTC warning letters have taken quick steps to correct or eliminate their problematic claims. The FTC also has issued warning letters, in conjunction with the Small Business Administration, to companies making potentially misleading claims about federal loans or other temporary small business relief.15

14. The FTC has also filed court actions involving COVID-19 health claims, distribution claims, and government stimulus check claims.16 For example, the FTC filed four lawsuits in federal district courts against online merchandisers for failing to deliver on promises that they could quickly ship products like face masks, sanitizer, and other personal protective equipment (PPE) related to the coronavirus pandemic.17

15. Finally, the FTC has launched numerous consumer education campaigns, including a website on COVID-19 scams and a resource page that contains brochures, graphics, and videos in multiple languages.18

3. Guidance and Cooperation to Peer Agencies as Part of a Coordinated, GovernmentWide Response Effort

16. The FTC and DOJ also have **shared** their **competition expertise** with other international and federal agencies in order to facilitate **COVID-19 response** and **recovery** while preserving competitive markets. Among other efforts, the Agencies have been working closely with the Federal Emergency Management Agency (FEMA) to develop a Voluntary Agreement governing cooperation among industry participants seeking to respond to the pandemic.19 The purpose of the Agreement is to **maximize** the effectiveness of the **manufacture** and **distribution** of critical healthcare resources **nationwide** to respond to the pandemic. Organized under the authority granted by the Defense Production Act, participants to the Agreement receive antitrust immunity for actions taken to carry out the Agreement. Before the Agreement can become effective, however, the Attorney General must find that the purposes of the Agreement may not be achieved through a voluntary agreement having less anticompetitive effects. These efforts also have helped inform the Agencies’ responses to business review letters seeking approval for cooperation in the production of critical health care products, as discussed below.

3.1. International Advocacy

17. U.S. enforcers also have been leveraging our existing bilateral relationships and ties to multilateral organizations, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), to increase communication and cooperation.

18. In the immediate aftermath of the declaration of a state of national emergency in the United States, the Agencies played a key role in facilitating communication and cooperation among international enforcers by collecting and sharing on a regular basis rapidly developing information on how COVID-19 has impacted competition law enforcement efforts around the world. After DOJ successfully developed a regular internal process for collecting and disseminating this information, the ICN integrated this project into its ongoing work streams. In early April, as the economic impact of COVID-19 and possible enforcement challenges began to emerge, the ICN Steering Group issued a statement on key considerations related to competition law enforcement during and after the COVID-19 pandemic.20 The Agencies contributed with the FTC serving as a lead drafter of the statement recognizing the importance of competition to economies in crisis and urging agencies to remain vigilant regarding anti-competitive conduct. The statement also calls for transparency of operational and policy changes during the crisis and advocates for competition as a guiding principle for economic recovery efforts in the aftermath of the pandemic.

19. Since spring 2020, the Agencies have participated in several virtual events hosted by the ICN, the OECD, and the United Nations Conference on Trade and Development on international cooperation, investigations and competition law policy in the wake of COVID-19.21 In September 2020, the U.S. Agencies hosted the ICN 2020 Virtual Conference, which brought together enforcers from around the world to discuss antitrust developments, including how to address enforcement and policy challenges raised by COVID-19.

3.2. Doctrinal Responses

20. While procedural aspects of the Agencies’ work have changed as a result of COVID-19, the Agencies’ view of key U.S. antitrust standards has not changed. The Agencies have reiterated that the antitrust laws are flexible enough to account for changing market conditions, even during uncertain times.22

21. In particular, the Agencies continue to take the view that the failing firm defense is “narrow in scope,” and should be invoked selectively.23 The Agencies have continued to reiterate in speeches and publications that they will not relax the stringent conditions that define a genuinely “failing” firm and continue to apply the test set out in the U.S. Horizontal Merger Guidelines24 and reflected in our long-standing practice, and that they will require the same level of substantiation as was required before the COVID pandemic.25 As such, while it is possible that more firms may fail as a result of an economic crisis such as COVID-19, the view of the United States is that economic dislocation, on its own, does not provide a compelling reason why the assets of failing firms should be purchased by close competitors.

3.3. Competition Advocacy

22. The Agencies are continuing to advocate for changes to regulations that may impede competition, which may cause even greater harm in the context of the COVID-19 crisis. For example, the Agencies have submitted multiple letters to state legislatures in recent years expressing their concerns over “certificate of need” laws26 and other restrictions on the availability of health care resources.27 Given the extraordinary disruptions created by COVID-19, the United States views protecting the free functioning of health care markets as even more urgent, and the Agencies plan to continue our advocacy to remove regulatory impediments to competition in the health care sector.

23. Directly relating to the COVID-19 public health emergency, FTC staff submitted a comment to the Centers for Medicare & Medicaid Services (CMS) on its Interim Final Rule with Comment Period (IFC).28 The FTC comment supported the IFC’s provisions that reduce or eliminate restrictive Medicare payment requirements for telehealth and other communication technology-based services during the public health emergency. FTC staff noted that if telehealth practitioners’ entry is limited or reimbursement requirements are overly restrictive, consumers’ access to care and choice of practitioner might be unnecessarily restricted, especially in areas where there is a shortage of healthcare professionals. The IFC’s rule would reduce restrictions on Medicare reimbursement for telehealth services. This is especially important, not only to enhance the use of telehealth to care for Medicare beneficiaries, but also to encourage private payers to expand the use of telehealth. Reducing or eliminating restrictions on reimbursement of telehealth services could potentially enhance competition, improve access and quality, and decrease health care costs in both the public and private sectors. By connecting widely separated providers and patients, telehealth can alleviate primary care and specialty shortages.

24. The FTC continues to advocate against states issuing certificates of public advantage (COPA). For example, in September 2020 FTC staff submitted a public comment opposing issuance of a COPA to the Texas Health and Human Services Commission. FTC staff expressed concern that the proposed merger at issue would lead to significantly less competition for healthcare services in Midwest Texas.29

25. The FTC and its staff have also analyzed potential competitive concerns associated with professional regulations in the health care sector, including licensure and scope of practice.30 For example, FTC staff sent advocacy letters to the Texas Attorney General and the Texas Medical Board relating to regulations that could harm competition by impeding access to surgical and other health care services provided by certified registered nurse anesthetists.31 FTC staff recommended that Texas maintain only CRNA supervision requirements that advance patient protection and avoid adopting regulations that impede CRNA practice.

26. DOJ hosted a virtual joint workshop with the USPTO in July 2020 that included debate on the role of innovation and public-private collaboration in responding to the COVID-19 pandemic.32 The workshop, entitled “Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property,” comprised 10 sessions over two days. Panelists included leading figures from industry, government agencies, prominent research labs, the non-profit sector, academia, and the broader legal and economic community. Members of the public were also able to submit questions throughout the event.

4. Facilitation of Cooperative Public and Private-Sector Efforts to Resolve the Crisis

27. The Agencies are working together to bolster the recovery by providing guidance relating to recovery-related collaborations on an expedited basis.33 In a joint statement in April, the Agencies emphasized the potential importance of pro-competitive collaborations between private firms to bring essential goods and services to communities in need. In addition to providing high-level collaboration guidelines consistent with previous DOJ and FTC policies, the statement contained guidance specific to COVID-related business activities, including reaffirming that the Agencies will account for exigent circumstances in evaluating collaborative efforts to address the spread of COVID-19, and that medical providers’ development of suggested practice parameters to assist in clinical decisionmaking will not be challenged, absent extraordinary circumstances.34

28. The Agencies also announced an expedited business review letter program, under which all COVID-19-related requests will receive responses within seven calendar days of the Agencies receiving all necessary information. This expedited process for COVIDrelated business review letters is an outgrowth of the Agencies’ role in advising other executive branch agencies on facilitating COVID-related cooperation within the antitrust laws, and each of the letters issued through the expedited process in 2020 addresses proposed conduct that is critical to COVID-19 response. Since March 2020, DOJ has issued the following four expedited business review letters:

1. A letter approving a collaboration by McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc to expedite and increase manufacturing for the distribution of personal protective equipment (PPE) and coronavirus-treatment-related medication in a way unlikely to lessen competition;35

2. A letter approving a collaboration by AmerisourceBergen with FEMA, HHS, and other government entities to “identify global supply opportunities, ensure product, quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients;”36

3. A letter approving a collaboration by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK to “exchange limited information about the manufacture of monoclonal antibodies that may be developed to treat COVID19” in order to optimize COVID-19 vaccine production as part of Operation Warp Speed;37 and

4. A letter approving a collaboration by the National Pork Producers Council (NPPC) and the U.S. Department of Agriculture (USDA) “to address certain hardships facing hog farmers as a result of the COVID-19 pandemic.”38 29. The Agencies also pledged to expedite the processing of filings under the National Cooperative Research and Production Act, which provides flexible treatment of certain standards development organizations and joint ventures under the antitrust laws.

5. Revised Rules Regarding Merger Enforcement

30. The Agencies have adapted to changing work conditions and reallocated resources to maintain continuity of core operations and enforcement efforts. COVID-19 initially necessitated temporary changes to ensure the continuation of expeditious and thorough merger review.39 Changes made by both Agencies include (1) extending standard timing agreement provisions so that the post-compliance period runs for sixty to ninety days (instead of thirty days) for pending or proposed transactions that may be subject to a Second Request, (2) requiring all merger filings with the FTC and DOJ to be submitted via the FTC’s electronic filing system, and (3) committing to conducting all meetings and depositions by phone or video conference when possible, absent extenuating circumstances.40 For the initial period of only two weeks at the start of the COVID crisis, the Agencies also suspended the granting of early termination, which can shorten the waiting period for non-problematic mergers. The option of early termination was resumed in March, and timing of grants of early termination has returned to pre-pandemic levels.41

31. Notably, COVID-19 did not sideline other important efforts to improve the Agencies’ enforcement programs. Among other efforts, in June 2020, the Agencies for the first time issued joint Vertical Merger Guidelines.42 In September, the Division also issued a modernized Merger Remedies Manual. As an update to the 2004 edition, the new manual provides “greater transparency and predictability regarding the Division’s approach to remedying a proposed merger’s competitive harm,” including an emphasis on structural remedies and a renewed focus on enforcing consent decree obligations. The Division also has continued to follow through on its September 2018 commitment to modernize banking merger review, with the goal of expedited and efficient resolution for uncomplicated merger matters.43 Economic downturns, as often occur in the wake of disasters such as the COVID-19 crisis, may impact **merger activity**, which is why continuing to improve the Agencies’ approach to **reviewing** and **remedying** potentially anticompetitive mergers **remains a priority.**

**Plan causes a trade-off and devastates antitrust agency effectiveness**

**Sacher & Yun 19** (Seth B. Sacher, Economist, & John M. Yun, Antonin Scalia Law School, George Mason University, TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT, 26 Geo. Mason L. Rev. 1491, y2k)

VII. Fallacy Seven: Not Recognizing That Their Proposals Will **Strain** Competition Agency **Resources**, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. 131As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how **neo-antitrust proponents** view the agencies, many of their proposals run a serious risk of **adversely** affecting competition agency **performance**.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. 133Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). 134Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own. 135

First, advocates of neo-antitrust would like to see the **responsibilities** of the antitrust agencies **expanded** in a number of ways. This includes more **aggressively** enforcing existing antitrust laws, as well as the consideration of issues **beyond those currently within that purview**. 136Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 137 will require **significantly** more active **market supervision** than is **currently the case**. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, 138 there is certainly a point at which **expanding** the antitrust agencies will have "**bureaucratic" diseconomies** of scale. Fully following the recommendations of **neo-antitrust** advocates could very well require many antitrust agencies to **expand** beyond some **critical point**, which will inevitably lead to significantly **larger bureaucracies** and **associated inefficiencies**.

Second, many of the above proposals would require not only **more staff**, but also staff with differing **expertise** from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

**Failed COVID recovery triggers multiple hotspots**

**Wright 20** (Robin Wright, a contributing writer and columnist @ The New Yorker, The Coronavirus Pandemic Is Now a Threat to National Security, 10-7, https://www.newyorker.com/news/our-columnists/america-the-infected-and-vulnerable, y2k)

The broader danger is the world’s **perception** now of America as **inept** and vulnerable, Doug Lute, a retired lieutenant general who was the director of operations for the Joint Chiefs and a deputy national-security adviser to Presidents George W. Bush and Barack Obama, told me. “There are two things that would drive our competitors—the general sense of incompetence by the executive branch and a reading that we are totally self-absorbed internally,” he said. “There’s an overlapping of the pandemic, the protests, and now the election that amplifies that image. In broad terms, those conditions internally will be viewed by external competitors as **opportunities**.” America faces **threats** from a spectrum of **overseas adversaries**, the retired Marine General John Allen, who is now the president of the Brookings Institution, told me. “I’m deeply concerned that there will be **foreign actors**, all the way from **jihadists** to **state actors,** that try to **take advantage** of a level of duress that we haven’t seen for a long time. It has not been lost on our adversaries, or those who would seek to gain ground, that the United States has consciously chosen to withdraw.” The sense of “**sheer confusion**” surrounding American politics in 2020 compounds the **temptation** of foreign actors to make **moves**, either for their own gains or to diminish America, Allen said. The most obvious perils are from the **big powers**, which may calculate that the White House will **not** counter their moves elsewhere in the world during such **domestic turbulence**, especially on the eve of an election, former military and Pentagon officials told me. From Russia, President Vladimir **Putin** could dig **deeper** into Ukraine, meddle in unstable **Belarus**, or **test** the strength of the **Baltic states** to resist. From China, President **Xi** Jinping could further threaten **Taiwan**, exert its claim to islands in the **S**outh **C**hina **S**ea by deploying equipment or personnel, or take more draconian actions in **H**ong **K**ong. Both countries have moved steadily to deepen their **presence** and **influence** across Asia and deep into the **Mid**dle **East**—with its access to the **Mediterranean** and the West. For Moscow and Beijing, overt challenges would be a big bet, especially with an erratic and sometimes reckless President (currently on steroids) in the White House. Yet both countries will also understand that the American public has little appetite for more trauma, the military and security officials said. “I’m sure that **foreign adversaries’** intelligence services have their collection systems turned up **high** so that they understand exactly how **disruptive** this pandemic is on our **national-security structure**,” the former C.I.A. director John Brennan said on CNN this week. **No**rth **Ko**rea and **Iran** may also try to **exploit** the moment, although both have fewer capabilities than Russia or China. Tehran is still smarting from the U.S. assassination, in January, of General Qassem Suleimani, the head of its élite Quds Force, a wing of the Revolutionary Guards, which supports several militias that have attacked U.S. troops in Iraq and Lebanon. “I suspect Iran is not done seeking revenge for the killing of Suleimani,” Lute told me. Tehran’s strength is in the proxy forces it arms, aids, and often directs across the Middle East, particularly Lebanon, Iraq, and Yemen. Since Suleimani’s death, attacks by the Popular Mobilization Forces on U.S. troops and the American Embassy in Iraq have steadily escalated; the P.M.F., backed and sometimes directed by Iran, is the umbrella for some sixty predominantly Shiite militias that operate in separate brigades. Last month, the campaign sparked a diplomatic crisis when Secretary of State Mike Pompeo warned the Iraqi government that the United States would close its Embassy in Baghdad—one of the largest American diplomatic facilities in the world—if the government did not prevent the militias from firing on the U.S. compound and American troops based elsewhere in Iraq. “Our global deterrence at the high end—nuclear and conventional deterrence in Europe, Asia, and the Gulf—will not be tested,” Lute said. “But there may be challenges at **lower levels** through **cyber** or by **proxies**.”

### Regulation cp

#### The United States federal government should substantially increase regulations on information and technology companies whose market capitalization exceeds $400 billion.

#### Increased scrutiny of tech companies solves without linking to the econ DA

Beaupre ’20 [Jacob; Associate @ Nicolaides Fink Thorpe Michaelides Sullivan LLP, JD @ DePaul University College of Law; “Big Is Not Always Bad: The Misuse of Antitrust Law to Break up Big Tech Companies,” *DePaul Business & Commercial Law Journal* 18(1), p. 25-48; AS]

IV. CONCLUSION

The big four technology companies should not be broken up under antitrust law. Antitrust law has an uneasy fit with internet-based businesses because is difficult to discern how to judge when an internet company has become a monopoly since the internet is so vast, changes so quickly, and has many sectors to it. The internet's nature is disruptive and because of the pace of technological change, it is important that antitrust policy take into account how breaking up an internet company may have negative effects on the American economy and on the development of technology.

Businesses who create the best products and do the most research should not be interfered with so long as the companies are not stifling competition and are not monopolies under the legal definitions. Certainly, antitrust law could be applied if Google hypothetically bought Facebook, Netflix, and Twitter since Google would control an outsized market share and would have an intent to monopolize the internet. But this is not what is occurring at this juncture. The big four technology companies record profits and are indisputably large and powerful corporations. Nevertheless, antitrust law should not be applied because the whims of the populist mob do not like tech companies' size and influence.

It is rational to worry about Big Tech's outsized influence on the American economy. However, simply targeting the big four tech companies because of their record earnings and increasing size is counter to the intent of the antitrust acts. If those feel that these companies have too much unchecked power, policymakers and officials should consider regulatory action. There are good and well-reasoned arguments for regulating these tech giants given the recent string of controversies regarding data privacy, but antitrust law is not the avenue to check tech giants' power. The antitrust laws cannot be used simply to satisfy the populist furor over corporate earnings and power, as the antitrust acts only apply if a company is stifling or intending to stifle competition and innovation. Regulatory actions or new legislation policing data use and privacy, cybersecurity, foreign interference in elections, and other issues are a better fit than simply breaking up an entire large business.

Right now, consumers are receiving great benefits because of the big four tech companies' dominance. Consumers have a near limited array of options on the internet and there is no shortage of innovation. With new issues arising as a result from changing pace of technology and the economy, the American legal system should let the market run its course, albeit with some regulation on the industry, unless these tech giants begin to take drastic steps to monopolize and engage in predatory behavior. The populism behind these arguments to break up the tech giants is not grounded in antitrust law nor the policy behind it.

### Conduct

#### The plan devastates American industry and innovation, undermining the entire financial system

Gary Shapiro 7/23—J.D. from the Georgetown University Law Center, sits on the State Department's Advisory Committee on International Communications and Information Policy, the No Labels Executive Council, the USO of Metropolitan Washington-Baltimore Board of Directors and the American Enterprise Institute Global Internet Strategy Advisory Board. ("Radical antitrust bills would be disastrous for consumers and innovation – Press Telegram," July 23, 2021, https://californianewstimes.com/radical-antitrust-bills-would-be-disastrous-for-consumers-and-innovation-press-telegram/452107/)

Consumers win when they can determine winners and losers so that Uber and Lyft can challenge the taxi monopoly. AirBnB provides an alternative to hotels, allowing working parents to save time and take advantage of next-day delivery from Amazon.

Innovation is built on innovation. I used to have a rotating phone, so I have an iPhone. I once had a Model T, so I have a self-driving car (Note: these were all invented in the United States).

The House of Representatives antitrust bill claims to protect the welfare of consumers, but in reality it is anti-consumer and anti-innovative. Initially, it meant that Amazon Prime’s free shipping, the pre-installed Find My iPhone app, and searching for YouTube videos in Google search results would end.

Aside from the clear and unavoidable consumer backlash, who knows what other inventions will get in the way in the future? Why are our parliamentarians trying to dismantle the products and services that Americans love? Why don’t these policy makers allow businesses to create more?

The bill targets “Big Tech,” but it actually hurt consumers, small businesses, and start-ups. Arbitrary rules contained in the drafted bill, such as merger and acquisition restrictions, will end opportunities for business growth. Today, SMEs looking to grow are usually considering two options. Either it’s bought by a big company and you get a lot of money, or you’re pursuing an IPO (which is much more difficult). What incentives or means do companies need to grow with these bills?

Similarly, venture capitalists and investors hesitate to invest in new and promising businesses. Challenges to the entire system of our financial opportunities and the status quo of old businesses are restrained. What happens to the American dream if it gets bigger, hires more people, invests in more startups, and can’t get the money back into the economy? The spillover effect is devastating.

If the bill is signed, the bill will also bring the United States a competitive disadvantage to China and other countries. The bill imposes obligations and restrictions on US companies and provides ammunition to the EU and other regulators targeting US companies.

What does that mean for the average American? Loss of work for Americans. Little investment in American companies. The price of technology is high. The product you purchase will be less transparent. As soon as China becomes a technology superpower, it will also become a political superpower. As the Atlantic wrote in 2020, “China will not be a pacifist force.” “Export value” with the product.

Finally, these bills are a threat to our cybersecurity. By requiring companies to expose the platform to all parties, this proposal eliminates the ability of services to monitor the site against hackers, terrorists, foreign governments, and other malicious individuals.

These bills do not take into account the views of people across the country, especially consumers and small business owners, who will be most affected by them. To make matters worse, these bills are being tracked quickly throughout the process without hearing or testimony.

We urge Congress to step out of the accelerator and take these complex issues into account. Thoughtful and careful. We work with innovators and consumers to protect America’s world-leading economy and those who are constantly striving to support it.

Out of the most challenging years of the century, we don’t need any more disciplinary law. Instead, we need lawmakers to prioritize growth and success.

#### Losing the innovation warfare battle to China causes World War III

Jeanne Suchodolski et al. 20—Attorney with the United States Navy Office of General Counsel where she currently serves as Patent and Intellectual Property Counsel for the Naval Undersea Warfare Center Division Keyport; Suzanne Harrison, Founder of Percipience, LLC, a board-level advisory firm focused on intellectual property strategy, management, and quantifying and mitigating intellectual property risk; Bowman Heiden, co-director of the Center for Intellectual Property, visiting professor at University of California, Berkeley. ("Innovation Warfare," December 2020, from North Carolina Journal of Law and Technology, Volume 22, Issue 2, Article 4, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1416&context=ncjolt)

Innovation, in particular, technology-based innovation, is the key driver for both economic competitiveness and national security. Other nations, with interests adverse to the United States, recognize this fact. In an increasingly interconnected world, nation states seek to accumulate innovation prowess, and hence economic strength, as a key element of their geopolitical power. Especially savvy nation states also pursue such ends as a mechanism to influence or diminish the national security and geopolitical power of the United States. There is no need to inflict upon the world the carnage of war if one’s geopolitical aims can be achieved via alternative competitive means.

Several authors suggest China’s long-term ambitions include unseating the United States as the world’s economic and political leader.1 More compelling than opinions, several United States (“U.S.”) government and private studies document a systematic and coordinated effort by China to achieve technical and economic dominance through misappropriation of U.S. technology.2 These efforts are additionally supported by a companion effort to weaken international economic institutions and norms designed to protect U.S. intellectual property and free trade.3 The Chinese tactics include illegal means, and sophisticated use of legal means, to misappropriate U.S. technology and weaken the U.S. innovation infrastructure including: a) Leveraging the open university and laboratory ecosystem via direct sponsorship and engagement of Chinese nationals;4 b) Devaluing U.S. positions in patents and technology platforms;5 and c) Accessing private sector U.S. technology through acquisitions and ownership stakes in existing firms, funding of high-tech start-ups, and forced joint ventures and other contractual agreements as a prerequisite for entering the Chinese market.6

This particular form of competitive strategy targeting the innovation ecosystem in the United States is labeled by the Authors as “Innovation Warfare,”7 and it is defined as an executable competitive strategy: a) Reflecting an innovation, intellectual property, and technology strategy articulated and executed by the state (e.g. China); b) Using illegal means, political means, and legal economic activities—of the type previously residing solely in the province of commercial enterprise, to achieve the state’s objectives; c) Employing these economic and innovation activities to achieve both economic geopolitical power and to enhance military capabilities; and d) Functioning as a military, national security, and defense doctrine not solely as a reflection of the state’s economic policy goals nor commercial competition in the ordinary course.

Innovation Warfare does not just threaten American jobs and economic prosperity. By simultaneously co-opting and weakening the innovation capabilities of the United States, China seeks to advance its rise to world power. China’s prosecution of Innovation Warfare not only encompasses a rejection of a rules-based international order, but also poses an existential threat. A world where China dominates the technology landscape is not just about who earns the profits or prevails in an abstract geopolitical fight. According to the National Security Strategy of the United States of America (“National Security Strategy”), China pursues a world in which economies are less free, less fair, and less likely to respect human dignity and freedoms.8 China’s Innovation Warfare activities risk the type of economic and geopolitical aggressions that were a root cause of two World Wars.

#### Anti-trust enforcement hamstrings military AI acquisition

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

In the early 1980s, Steve Jobs assumed leadership of the group of engineers and designers tasked with developing the Apple Macintosh computer. Despite Apple’s rapid growth at the time, Jobs refused to expand the size of his team. Jobs had a rule: there could never be more than 100 people working on the Mac.1 He believed large organizations were “bureaucratic and ineffective,”2 hindering innovation. In fact, he once proposed breaking the different divisions of Apple into separate corporations so as to retain the features of smaller companies.3

Today, lawmakers and policymakers, rather than corporate leaders, contemplate breaking up Apple and other tech giants. Rising concerns about the concentration of economic and political power, anticompetitive behavior, and consumer protection have elevated antitrust enforcement in the national discourse. As of early 2020, Apple, Amazon, Google, Microsoft, and Facebook had a combined value of $5.5 trillion4—an amount equivalent to the combined value of the S&P 500’s bottom 282 companies5—and dominated sectors including cloud computing, digital advertising, and internet search.

Some politicians and users argue that the scale and market power of these companies lets them collect and exploit massive quantities of personal data with minimal oversight. In turn, tech giants insist a break-up will make the United States less secure and competitive.6 As Alphabet CEO Sundar Pichai has stated, “There are many countries around the world which aspire to be the next Silicon Valley. And they are supporting their companies, too. So we have to balance both. This doesn’t mean you don’t scrutinize large companies. But you have to balance it with the fact that you want big, successful companies as well.”7 Some policymakers agree. Senator Mark Warner (D-VA) recently stated that he was not ready to support a break-up, as companies like Facebook and Google might be “replaced by an Alibaba, Baidu or Tencent model, where there is no ability to have...controls.”8 Others disagree, noting vigorous federal enforcement of antitrust laws against tech giants such as IBM, AT&T, and Xerox in the 1970s and 1980s. These companies remained successful in spite of regulation; some even argue federal enforcement helped establish the modem market, online networking, and new, innovative companies like CompuServe and AOL.

Understanding AI Innovation

The debate over breaking up Big Tech has profound national security implications. The Pentagon maintains that the innovation and acquisition of AI technologies is critical to America’s national security.17 Defense Secretary Mark Esper recently called AI the most significant emerging technology for warfare, predicting that “whoever masters it first will dominate on the battlefield for many, many, many years.”18 Although others within and beyond the Pentagon stress the limits of AI,19 its potential is widely acknowledged.20 In order to develop and deploy new, strategically decisive AI tools, the Pentagon must rely on an AI innovation ecosystem in which large private-sector companies play a critical role. At the same time, the Department of Justice, the Federal Trade Commission, Congress, and state attorneys general have targeted many of the private sector’s largest and most innovative AI companies in ongoing antitrust probes.21

To be sure, AI innovations take many forms, not all of which hinge on Big Tech. For example, researchers across academia, government, and the private sector continue to push the conceptual bounds of AI, developing new theories and mathematical frameworks that could yield significant technical and commercial benefits down the road. In other cases, AI advances through smaller, practical steps that indirectly support its development—for example, as companies develop more efficient ways to clean and sort data for use in machine learning models.

While important, these theoretical efforts and incremental AI innovations are beyond our scope. We instead focus on AI tools and methods resulting from the integration of basic research with systems of production and deployment, and those with practical, foreseeable implications for AI end users. We assume innovations of this sort would most directly and significantly affect national security and strategic competition.

Today, the private sector dominates this domain of AI innovation. Other actors, including government funders and academic researchers, play an important role—especially in basic research—but at the application stage, the private sector generally consolidates critical inputs of data, computing power, and human capital, then applies them to real-world needs. In some cases, such as with Project Maven—where Google built AI-enabled image recognition programs for the Pentagon—the Pentagon is the customer; more often, AI products and conceptual breakthroughs developed by the private sector, from autonomous vehicles to image and speech recognition platforms, are (or could be) adapted for national security use.

Because most U.S. AI innovation currently occurs in the private sector, and at least some of this innovation pertains to the Pentagon, the Pentagon needs the private sector.22 Large tech companies, from Google, Apple and Amazon to slightly lower-profile giants such as IBM, Intel and Qualcomm, form the foundation of the private-sector AI innovation ecosystem.i For example, Google, Facebook, Microsoft, Apple, and Amazonii generate the most AI patents with a “significant competitive impact” worldwide, according to analysis by economic consultancy EconSight.23 The McKinsey Global Institute reports that large, digitally oriented tech companies worldwide spent $20-$30 billion on AI in 2016, 90 percent of which went toward R&D and deployment; for comparison, the Pentagon plans to spend $4 billion on AI and machine learning R&D in FY2020.24 Private-sector AI companies are especially dominant in applied research and experimental development.25 AI innovation would presumably continue in some form without Big Tech, but the data indicates that breaking up the largest tech companies would fundamentally change the broader AI innovation ecosystem. Such action would create unpredictable, but likely significant, trickle-down effects on AI applications in specific domains, including national security.

Shifting Incentives

In order to use AI for America’s strategic advantage, the Pentagon requires more than an innovative private sector. It must induce private companies to build defense-relevant AI products, acquire those AI innovations through procurement, and prevent those same products from diffusing to U.S. adversaries. In other technological domains, such as aerospace, the Pentagon has long relied on the private sector for procurement and holds significant leverage over industry. Its sheer scale and budget make it the defense industry’s primary consumer. In 2017, for example, 70 percent of Lockheed Martin’s sales went to the U.S. federal government.26 Historically, this financial leverage has incentivized companies to meet the Pentagon’s demands and build to its requirements.27

But these incentives do not exist with AI: while AI is a priority for the Pentagon, the Pentagon is not a priority for AI companies. In general, the largest U.S. tech companies do not rely on government contracts and have relatively little need for Pentagon funding.28 As a result, their research and products do not reflect defense priorities, and they have relatively little incentive to engage deeply in the government procurement process. Even in a future, AI-centric world, we expect large-scale, commercially oriented tech companies to play a critical role in AI innovation, and the Pentagon to remain a minor customer. As such, the Pentagon may rely on other firms —from defense-focused startups to traditional defense contractors—to translate general AI advances into defense-relevant products.

The Pentagon’s access to these cutting-edge, national security-relevant AI products hinges on private sector cooperation. This willingness will drive whether it sells to the Pentagon, shapes its technologies in accordance with DOD priorities, and complies with DOD terms of acquisition—including, potentially, by safeguarding the same products from U.S. competitors and adversaries.29 We need to understand how antitrust enforcement might affect these dynamics, as well as private-sector innovation more broadly.

#### Small firms are worse for government contracts

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

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

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

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

#### No impact to technology monoculture theory---existing innovations solve cyber security

Bergmayer 9 (John Bergmayer is a law student at the University of Colorado, Legal Director at Public Knowledge, specializing in telecommunications, media, internet, and intellectual property issues @ Public Knowledge, DON'T SEND A LAWYER TO DO AN ENGINEER'S JOB: HOW ADVANCING TECHNOLOGY CHANGES THE SOFTWARE MONOCULTURE DEBATE, 7 J. on Telecomm. & High Tech. L. 393, 418-423, y2k)

III. Technology Has Proven Sufficient to Deal With Most Computer Security Issues

As noted above, discussions of the negative security consequences of software monocultures are generally focused on the problems of a Microsoft monoculture particularly. While any software monoculture can be threatened by the rapid exploitation of a software vulnerability (and, as demonstrated by the Internet Worm, non-Microsoft monocultures have been), in the case of Microsoft, the monoculture effect is seen as a "force multiplier" that greatly increased the effects that are ultimately caused by flawed software in the first place. Therefore, my analysis of the proper policy response to a software monoculture will be based primarily on an analysis of the factors that have led to Microsoft's products being widely viewed as insecure, and on the responses that Microsoft has deployed in order to deal with this problem. It is also informed by an understanding that government interventions in markets often have unintended consequences. As Hahn and Layne-Farrar write,

From an economist's perspective, before the government decides to intervene to impose software security, it must be reasonably certain that private parties are unable to do so on their own. In other words, it must be clear that the market failed in some way. Otherwise, interventions run the risk of interfering with properly functioning [\*419] markets and, therefore, of introducing inefficiencies where none existed before-what could be termed a "government failure" as opposed to a market failure.

After a comprehensive review of the marketplace for computer security, those authors remain skeptical that government intervention is needed. They even point out that seemingly benign reforms, such as a "lemon law" for software, could have negative consequences.

Because, as discussed below, technological solutions to many fundamental computer security issues (including the problem of monoculture itself) appear to be making progress, in order to avoid potential negative consequences, the government should not regulate to increase software diversity.

Geer's analysis of the problematic nature of Microsoft's software engineering principles is sound. However, it bears keeping in mind that Microsoft is a software company that became successful in a time before ubiquitous, always-on computer networking. Indeed, broadband adoption is not yet complete: in 2007, 23% of Internet users still used dial-up connections. Microsoft's design strategies may have always been bad from a software engineering standpoint. But most computer worms, virus and trojans today spread over the Internet. In the days where the primary vector of computer malware transmission was the floppy disk or BBS downloads, many computer vulnerabilities would simply not be exploited. The penalty throughout the 1980s and 1990s for insecure software design was not as severe as it is today. It is reasonable to assume that even without any policy action, Microsoft's software engineering strategies will change to reflect the new, networked reality.

In fact, Microsoft's approach to software engineering has changed in the past several years. The year before Geer's paper, Microsoft issued its "Trustworthy Computing" whitepaper. This paper called for a fundamental reengineering of computers, down to the level of the [\*420] microprocessors, with the aim of increasing security and preventing unauthorized code from running. Many, including Geer himself, have criticized that paper's proposals, arguing that the proposal for a Next Generation Secure Computing Base, commonly referred to as "Palladium," threatened to put too much control of what software can run on a computer into too few hands and to exacerbate the risk of vendor lock-in. Microsoft has since abandoned the most ambitious of its "trusted computing" plans. Although overly ambitious and perhaps misguided, the Trusted Computing whitepaper did at least demonstrate an increased awareness of security issues.

Several other initiatives have had more of a practical impact. In 2002, Microsoft undertook a two-month hiatus in the development of its software in order to focus on security concerns. It has shown itself to be more nimble in its response to problems as they are uncovered. Its research arm has begun to look for long-term security solutions that, unlike secure computing, do not rely on changes to hardware. However, Microsoft's improved dedication to security issues can most clearly be seen on a practical level by looking at a few of the security-related improvements found in the most recent version of the Windows operating system, Vista.

One longstanding weakness in Windows had been that it possessed a "file permissions system" that did not adequately prevent untrained users or rogue programs from making damaging changes to the operating system. Vista addresses this by introducing a more robust, Unix-style permissions system whereby even computer administrators need to supply a password before certain settings or files can be changed. Under Vista, Internet Explorer now runs in a "sandbox" that makes it so neither it, nor any programs it spawns (such as malware from a web site) can do much damage to the underlying system. Vista also contains security features designed to prevent a user's computer from becoming part of a botnet, and the most notorious current worm, Storm, which makes [\*421] computers it infects part of the Storm botnet, currently does not infect Windows Vista.

These examples show that there are often technological solutions to problems created by technology-solutions that make a policy response unnecessary. One technological change in particular, however, has the potential to alleviate many of the negative externalities caused by software monocultures. This technology, Address Space Layout Randomization (ASLR), uses software techniques to produce a kind of virtual diversity, limiting the vectors by which malware can spread. Elements of software traditionally load into a particular part of a computer's memory. Malware can take advantage of this fact to more easily spread from one computer to another. ASLR reduces the ability of malware to spread from one computer to another by randomly changing the memory location software loads into. As Ollie Whitehouse writes,

ASLR is a prophylactic security technology that strengthens system security by increasing the diversity of attack targets. Rather than increasing security by removing vulnerabilities from the system, ASLR makes it more difficult to exploit existing vulnerabilities… . By randomizing the memory layout of an executing program, ASLR decreases the predictability of that layout and reduces the probability that an individual exploit attempt will succeed.

Although ASLR is not a new technology, its inclusion in Windows Vista shows technological methods taken by Microsoft can lessen the effects of software monoculture. It is the flexible nature of software that gives it the ability to create virtual diversity of this sort-it is difficult to imagine an analogous solution to the problem of, for example, agricultural monoculture. The impressive number of technological solutions Microsoft has brought to bear in Vista in order to address software security should at least argue in favor of giving technology, rather than law and policy, the chance to solve problems in computer security.

#### No cyber impact---every scenario is empirically denied

James Andrew Lewis 18, senior vice president at the Center for Strategic and International Studies, Ph.D. from the University of Chicago, January 2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/180108_Lewis_ReconsideringCybersecurity_Web.pdf>, p. 7-11

The most dangerous and damaging attacks required resources and engineering knowledge that are beyond the capabilities of nonstate actors, and those who possess such capabilities consider their use in the context of some larger strategy to achieve national goals. Precision and predictability—always desirable in offensive operations in order to provide assured effect and economy of force—suggest that the risk of collateral damage is smaller than we assume, and with this, so is the risk of indiscriminate or mass effect.

State Use of Cyber Attack Is Consistent with Larger Strategic Aims

Based on a review of state actions to date, cyber operations give countries a new way to implement existing policies rather than leading them to adopt new policy or strategies. State opponents use cyber techniques in ways consistent with their national strategies and objectives. But for now, cyber may be best explained as an addition to the existing portfolio of tools available to nations.

Cyber operations are ideal for achieving the strategic effect our opponents seek in this new environment. How nations use cyber techniques will be determined by their larger needs and interests, by their strategies, experience, and institutions, and by their tolerance for risk. Cyber operations provide unparalleled access to targets, and the only constraint on attackers is the risk of retaliation—a risk they manage by avoiding actions that would provoke a damaging response. This is done by staying below an implicit threshold on what can be considered the use of force in cyberspace.

The reality of cyber attack differs greatly from our fears. Analysts place a range of hypothetical threats, often accompanied by extreme consequences, before the public without considering the probability of occurrence or the likelihood that opponents will choose a course of action that does not advance their strategic aims and creates grave risk of damaging escalation. Our opponents' goals are not to carry out a cyber 9/11. While there have been many opponent probes of critical infrastructure facilities in numerous countries, the number of malicious cyber actions that caused physical damage can be counted on one hand. While opponents have probed critical infrastructure networks, there is no indication that they are for the purposes of the kind of crippling strategic attacks against critical infrastructure that dominated planning in the Second World War or the Cold War.

Similarly, the popular idea that opponents use cyber techniques to inflict cumulative economic harm is not supported by evidence. Economic warfare has always been part of conflict, but there are no examples of a country seeking to imperceptibly harm the economy of an opponent. The United States engaged in economic warfare during the Cold War, and still uses sanctions as a tool of foreign power, but few if any other nations do the same. The intent of cyber espionage is to gain market or technological advantage. Coercive actions against government agencies or companies are intended to intimidate. Terrorists do not seek to inflict economic damage. The difficulty of wreaking real harm on large, interconnected economies is usually ignored.

Economic warfare in cyberspace is ascribed to China, but China's cyber doctrine has three elements: control of cyberspace to preserve party rule and political stability, espionage (both commercial and military), and preparation for disruptive acts to damage an opponent's weapons, military information systems, and command and control. "Strategic" uses, such as striking civilian infrastructure in the opponent's homeland, appear to be a lower priority and are an adjunct to nuclear strikes as part of China's strategic deterrence. Chinese officials seem more concerned about accelerating China's growth rather than some long-term effort to undermine the American economy.6 The 2015 agreement with the United States served Chinese interests by centralizing tasking authority in Beijing and ending People's Liberation Army (PLA) "freelancing" against commercial targets.

The Russians specialize in coercion, financial crime, and creating harmful cognitive effect—the ability to manipulate emotions and decisionmaking. Under their 2010 military doctrine on disruptive information operations (part of what they call "New Generation Warfare"). Russians want confusion, not physical damage. Iran and North Korea use cyber actions against American banks or entertainment companies like Sony or the Sands Casino, but their goal is political coercion, not destruction.

None of these countries talk about death by 1000 cuts or attacking critical infrastructure to produce a cyber Pearl Harbor or any of the other scenarios that dominate the media. The few disruptive attacks on critical infrastructure have focused almost exclusively on the energy sector. Major financial institutions face a high degree of risk but in most cases, the attackers' intent is to extract money. There have been cases of service disruption and data erasure, but these have been limited in scope. Denial-of-service attacks against banks impede services and may be costly to the targeted bank, but do not have a major effect on the national economy. In all of these actions, there is a line that countries have been unwilling to cross.

When our opponents decided to challenge American "hegemony," they developed strategies to circumvent the risks of retaliation or escalation by ensuring that their actions stayed below the use-of-force threshold—an imprecise threshold, roughly defined by international law, but usually considered to involve actions that produce destruction or casualties. Almost all cyber attacks fall below this threshold, including, crime, espionage, and politically coercive acts. This explains why the decades-long quest to rebuild Cold War deterrence in cyberspace has been fruitless.

It also explains why we have not seen the dreaded cyber Pearl Harbor or other predicted catastrophes. Opponents are keenly aware that launching catastrophe brings with it immense risk of receiving catastrophe in return. States are the only actors who can carry out catastrophic cyber attacks and they are very unlikely to do so in a strategic environment that seeks to gain advantage without engaging in armed conflict. Decisions on targets and attack make sense only when embedded in their larger strategic calculations regarding how best to fight with the United States.

There have been thousands of incidents of cybercrime and cyber espionage, but only a handful of true attacks, where the intent was not to extract information or money, but to disrupt and, in a few cases, destroy. From these incidents, we can extract a more accurate picture of risk. The salient incidents are the cyber operations against Iran's nuclear weapons facility (Stuxnet), Iran's actions against Aramco and leading American banks, North Korean interference with Sony and with South Korean banks and television stations, and Russian actions against Estonia, Ukrainian power facilities, Canal 5 (television network in France), and the 2016 U S. presidential elections. Cyber attacks are not random. All of these incidents have been part of larger geopolitical conflicts involving Iran, Korea, and the Ukraine, or Russia's contest with the United States and NATO.

There are commonalities in each attack. All were undertaken by state actors or proxy forces to achieve the attacking state's policy objectives. Only two caused tangible damage; the rest created coercive effect, intended to create confusion and psychological pressure through fear, uncertainty, and embarrassment. In no instance were there deaths or casualties. In two decades of cyber attacks, there has never been a single casualty. This alone should give pause to the doomsayers. Nor has there been widespread collateral damage.

### Platforms

#### Fintech innovation is at an all-time high

CB Insights 21 (CB Insights is a private company with a business analytics platform and global database that provides market intelligence on private companies and investor activities, The United States Of Fintech Startups, 3-9, <https://www.cbinsights.com/research/fintech-startups-us-map/>, y2k)

The fintech space is rapidly maturing.

Investors are backing huge deals, with Q1’21 already setting the record for total mega-rounds in a quarter. It has also seen the highest funding total for a quarter since Q2’18, which included Ant Financial’s massive $14B raise.

The surge in e-commerce is likely to continue offering tailwinds to the space, as late-stage fintechs become ripe for exits. Already, there has been a host of exit activity from mature fintech startups of late, with multiple fintech companies filing for IPOs, going public, or getting acquired, including:

Affirm, which made its public market debut in January

SoFi, which exited via an $8.7B SPAC in January

Sweden-based Klarna, which filed its prospectus late last year (and which we highlighted in our Fintech 250 list)

Robinhood, also a Fintech 250 company, helped drive record-high fintech funding in 2021 and is another IPO hopeful

Using CB Insights data, we mapped out the top-funded fintech startup in every US state.

Collectively, these 44 startups have raised nearly $14.3B in equity funding, with leading companies including accounts payable automation startup AvidXchange (North Carolina, $1.2B raised), restaurant finances management system Toast (Massachusetts, $903M), and data analytics company Dataminr (New York, $569M).

#### Sanctions regime are resilient to cryptocurrencies

Tweed 18 (David Tweed, Former Hong Kong-based reporter at Bloomberg, Bitcoin can't save world's autocrats from the sanctions squeeze, 1-16, <https://economictimes.indiatimes.com/markets/stocks/news/bitcoin-cant-save-worlds-autocrats-from-the-sanctions-squeeze/articleshow/62518096.cms&hl=en&gl=us&strip=1&vwsrc=0>, y2k)

Vladimir Putin’s finance ministry wants to let cryptocurrencies trade on official Russian exchanges. Kim Jong Un’s hackers are stealing digital cash. Nicolas Maduro hopes a cryptocurrency backed by oil will lure investment back to Venezuela.

All three leaders are wading into the crypto-craze as their regimes grapple with the same problem: Sanctions curbing their access to the global financial system. But while bitcoin and opaque virtual currencies can provide sources of cash for political pariahs, the market’s still too nascent to make a meaningful skirting of a U.S.-led economic blockade possible.

Any autocrat eyeing bitcoin as a sanctions safe haven must confront a simple matter of scale. All the world’s digital tokens are worth about $700 billion, according to Coinmarketcap.com. That’s about one-seventh of the daily foreign exchange market.

“Think about how many U.S. dollars are in circulation and how much each bitcoin would have to be worth to match that value -- it would be a ludicrously big number,” said Tom Uren, a visiting fellow at the Australian Strategic Policy Institute’s International Cyber Policy Centre. “In the long term, that’s possible, but we are talking decades and decades. Cash isn’t going away any time soon.”

Curbing the Market

Moreover, regulators are quickly moving to rein in digital currencies. China’s central bank declared initial coin offerings illegal in September. And on Thursday, South Korea’s justice minister reiterated a proposal to ban cryptocurrency exchanges altogether. Yonhap New Agency reported Saturday that authorities asked banks to adopt real-name digital currency accounts.

U.S. Treasury Secretary Steve Mnuchin told the Economic Club of Washington, D.C., on Friday he was “not at all” worried that Russia or others countries could use digital tokens to evade sanctions. “I don’t think that’s a concern,” Mnuchin said, noting that digital coin exchanges were subject to the same requirements as banks to scrutinize who their customers are.

The U.S. sanctions people and organizations, not assets, and those measures still apply to states that park their earnings in cryptocurrencies. Even if Maduro can overcome investor skepticism and attract support to Venezuela’s oil-backed “petro,” those who use the token could find themselves ensnared by sanctions.

“The detail of how you issue it is critical because you have to trust the currency and there has to be a market for it,” said Jim Fitzsimmons, a director at Control Risks in Singapore. “Venezuela is having a really bad time. I just don’t see how the gee-wizzery cryptocurrency stuff is going to help.”

In Russia, the central bank opposes a finance ministry effort -- announced Thursday -- to allow cryptocurrency trading on official exchanges. Undeterred, Deputy Finance Minister Alexey Moiseev told reporters the ministry would use the “power of thoughts and words” to convince the central bank.

Using digital currencies to evade sanctions would be particularly problematic for petro-states that need access to the mainstream financial system -- especially U.S. dollars -- to sell their oil. Iran’s economy, for instance, is too big for bitcoin to serve as savoir.

#### No circumvention—crypto collapse inevitable

Clayton Jarvis 9/10—Mortgage reporter at MoneyWise, citing John Paulson, billionaire hedge fund manager. ("Crypto crash: Here's why billionaire John Paulson's 'worthless' call might be right," September 10, 2021, from Yahoo, https://www.yahoo.com/now/crypto-crash-heres-why-billionaire-162000886.html?guccounter=1&guce\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\_referrer\_sig=AQAAALeFYAdbnuaid\_ayGDwoUiREJ0D8yClHssF9OtgKhO\_OPdPk9Xx0I-iQYH\_fbt4ZpvUbuhPOE7lEvf9SjuPifjxl42ftA0wF9O2xpPH9B\_XIonp6DzahzK65nvoSVsEXz5ZypSt\_x2eLuNa69S00uFZYIVM3NXknvWaNd-xagrVF)

It feels as though cryptocurrency has been deemed a worthless fad since Bitcoin first emerged from the guts of an anonymous engineer’s computer rig back in 2009.

While some of the criticism has come from the general public, who may not have a clear grasp on what cryptocurrencies are, how they work or why they possess any value whatsoever, some very clued-in financial minds have also questioned crypto’s rising prominence.

One such critic is billionaire investor John Paulson, who, in recent comments, called digital currencies a bubble that will “eventually prove to be worthless.”

The volatility seen in crypto markets over the last few days — Bitcoin dropped by 17% at one point on Tuesday, the same day El Salvador began accepting it as legal tender — doesn’t provide much of a defense against Paulson’s criticism.

Let’s see what his issue with crypto is, and if you should be cashing out or buying the dip.

Paulson’s reasons for being bearish on crypto

Paulson has experience exposing at least one notable financial scam. As the co-founder of the Carlyle Group, he was one of the hedge fund heavyweights who saw the corruption at the heart of the subprime mortgage industry and subsequently shorted the U.S. housing market before it tanked in 2007, earning himself a reported $4 billion.

And he seems to be just as skeptical about crypto.

“I wouldn’t recommend anyone invest in cryptocurrencies,” Paulson said during an appearance on Bloomberg Wealth with David Rubenstein Bloomberg TV.

“I would describe them as a limited supply of nothing. So to the extent there’s more demand than the limited supply, the price would go up. But to the extent the demand falls, then the price would go down. There’s no intrinsic value to any of the cryptocurrencies except that there’s a limited amount.”

It’s also worth wondering just how much value an asset can truly have if it’s price can swing so wildly from one minute to the next, as Bitcoin’s did on Tuesday. According to analysis by CoinMarketCap, the entire crypto market shed about $300 billion in value between Tuesday morning and Wednesday afternoon.

#### Pressure on Iran backfires – it destroys multilateral efforts and emboldens Iran – best internal link to regional conflict and isolationism

Brewer and Tabatabai 18 Eric Brewer, Ariane Tabatabai, 9-18-2018, "Iran Hawks Could Make a Bad Situation Worse," Foreign Policy, https://foreignpolicy.com/2018/09/18/iran-hawks-could-make-a-bad-situation-worse-jcpoa/ Eric Brewer is a visiting fellow at the Center for a New American Security. Ariane Tabatabai (@ArianeTabatabai) is a visiting assistant professor in the Security Studies Program at the Georgetown University School of Foreign Service and a columnist for the Bulletin of the Atomic Scientists.

More pressure on Tehran won’t work. Here’s what Trump should really do. One of U.S. President Donald Trump’s chief foreign-policy objectives is to persuade or force the Iranian government to abandon policies that pose a threat to U.S. interests—namely, the country’s ballistic missile and nuclear programs as well as its support for terrorists in the region. To this end, the administration has pulled the United States out of the nuclear deal achieved under President Barack Obama, reimposed sanctions on Iran, and undertaken a pressure campaign to try to force Iran back to the negotiating table to strike a new bargain. In its efforts to cajole Iran, however, the United States could be making a mistake if it assumes that more pressure will automatically bring it closer to its goals. Particularly when it comes to measures aimed at Iran’s nuclear program, more pressure could heighten nuclear risks and further drive a wedge between the United States and its European allies. In the months leading up to and since Trump’s announcement that he was pulling the United States out of the nuclear deal, many Iran watchers have taken to the pages of prominent foreign-policy outlets, including this one, to argue for or against the U.S. withdrawal from the Iran deal and provide recommendations for what the United States should do next. Advocates of the tough approach, such as Mark Dubowitz of the Foundation for the Defense of Democracies (FDD) and the Council on Foreign Relations’ Ray Takeyh, see economic sanctions and political isolation as critical to achieving a new, better deal or compelling the regime to change its policies by other means. Although some experts, such as Dubowitz and his FDD colleague Richard Goldberg, have offered specific suggestions, there doesn’t appear to be a consensus on what sanctions and isolation should entail in practice. In addition, such observers have paid relatively little attention to how the United States should execute what will likely be a yearslong campaign of maximum pressure aimed at a new deal while mitigating the risks of Iranian nuclear advances and further provocations that such a strategy will likely produce. In essence, observers may be losing sight of the broader objective and thus offering some counterproductive ideas. For example, several authors have argued that the United States shouldn’t limit its pressure campaign to Iran. Rather, Trump should also target the United States’ own European allies that refuse to get in line behind Washington and show some willingness to work with Tehran. The administration has also seemed to back this approach. But such plans are shortsighted and, rather than bringing allies closer, could widen the gulf between them and the United States and play into the hands of key adversaries, like Russia and China, as well as Iran. Such an approach might thus help tighten the economic vise on Iran, but it would also undermine important U.S. advantages when it comes time to strike a meaningful deal: U.S. multilateralism and leverage over key international players, which would be critical in any diplomatic process with Iran over the long run. Goldberg and FDD’s Jacob Nagel also argue that the United States should hold back funding earmarked for the International Atomic Energy Agency (IAEA) until it cancels certain types of technical assistance to Iran and fires all Iranian employees. Holding U.S. support for the IAEA hostage to narrow U.S. political aims is not a new idea, but it would be counterproductive. It would politicize an agency whose access to Iran’s nuclear program—and nuclear facilities all over the world—is dependent on it being viewed as a neutral party. If the IAEA caved to these demands, it would play into the hands of Iranian hard-liners who are already prone to viewing the agency as a tool of the West, making Iran less likely to cooperate with inspectors. Ultimately, these measures would undermine the international body’s ability to fulfill its mandate of ensuring that countries’ nuclear programs remain exclusively peaceful, damaging broader U.S. nonproliferation goals. Likewise, other authors, including Goldberg and Nagle, have suggested that the United States should actively seek to subvert key provisions within the existing nuclear deal, which are currently being implemented by the remaining parties to the agreement. This would include sanctioning any company or bank involved in providing Iran with nuclear technology via the procurement channel endorsed by the agreement and the United Nations. Doing so, however, would likely cause the channel—which grants U.S. allies control over, and insight into, Iranian nuclear-related procurement activities—to collapse. Iran, meanwhile, would not stop acquiring nuclear-related technology. Rather, it would once again ramp up its illicit nuclear procurement activities, significantly reducing the international community’s ability to control or monitor Iran’s purchases. Far from a concession or benefit to Tehran, as critics have called it, the channel has instead led to a fair bit of criticism from Iranian hard-liners, who claim that it undermines national sovereignty by allowing foreign powers to decide what technology Iran can and can’t have access to. Similarly, some critics have called on the administration to pressure remaining parties to the nuclear deal into stopping the redesign of the Arak heavy-water research reactor—a project aimed at significantly reducing the amount of plutonium produced by the reactor—and the underground Fordow complex, which was once used for uranium enrichment but is being repurposed to pose less of a proliferation concern. Goldberg and Nagle have similarly argued for the necessity for the Trump administration of using “all its legal authorities to cut off international support to Iran’s nuclear weapons infrastructure.” But it is precisely the international support that is key to making these facilities less useful for nuclear weapons. If global partners withdraw from these projects and leave them incomplete, Iran would have more of an incentive, not less, to convert the facilities back to their pre-agreement designs, increasing the proliferation risk. Finally, recognizing that aggressive measures could in fact prompt Iran to expand its nuclear program, advocates for the high-pressure approach have defended using military action should Iran resume nuclear activities halted under the deal. There are incredibly few scenarios that might actually warrant a U.S. military strike on Iran’s nuclear program: The most obvious is an Iranian attempt to produce weapons-grade uranium in a sprint to nuclear weapons. Another might be ending all cooperation with the IAEA. By contrast, a U.S. strike in response to Iranian efforts to marginally increase centrifuge numbers or to accumulate enriched nuclear material in excess of the nuclear deal’s requirements—measures that, in all likelihood, would be political signaling by Tehran and not a dash to a bomb—would risk sparking a regional war and leave the United States more isolated. It is this calculation that perhaps exposes the deepest—and most dangerous—flaw of an indiscriminate maximum pressure approach: willingness to rely on military force to achieve a goal that was already met via peaceful means.

#### Iran won’t dominate the Middle East – limited benefits from influence in places like Iraq, financial burden from allies, domestic unpopularity of expansion, lack of valuable symbolic allies, rise of sectarian lines, Iranian unpopularity, and Arab/Sunni cooperation against Iran

Keck 15 **----** Zachary, former Managing Editor of The Diplomat, MA in Political Science (George Mason University), Bachelor of Arts in Political Science (State University of New York at New Paltz), “Exposed: Iran Can't Dominate the Middle East,” The National Interest, 7/11, <http://nationalinterest.org/feature/exposed-iran-cant-dominate-the-middle-east-13307>

In recent weeks, many have expressed growing concern over Iran’s potential to dominate the Middle East, particularly if it receives sanctions relief as part of a comprehensive nuclear deal. These concerns, while not completely without merit, are greatly exaggerated. Iran's gains in recent years have not been nearly as extensive as is often claimed, while the setbacks it has suffered have been all but ignored. Concerns about Iran’s potential to dominate the region originate from the belief that Iran has made significant gains throughout the region over the last decade. James Stavridis, the former Supreme Commander of NATO, summed up the thinking of many when writing, “A glance around the region shows the power and reach of Iran today, despite the significant imposition of sanctions. Indeed, Iran is deeply and successfully dominating politics in the capitals of four major states in the region from Beirut to Baghdad, Sanaa to Damascus.” This vastly overstates the expansion of Iranian power in recent years, however, and fails to acknowledge the limited benefits Iran accrues from its influence. Iran’s only significant recent gain has been the influence it has acquired over Shia Iraq as a result of the overthrow of Saddam Hussein’s Baathist regime. Unlike Iran’s other supposed gains in the region, its influence in Iraq is actually consequential for two reasons. The first is that it strengthens Iran geopolitically by giving Tehran greater strategic depth. Due largely to reasons of geography, Iran's border with Iraq has historically been its greatest vulnerability, as well as its outlet to project power across the Middle East. As such, it is crucial for Tehran to control this border region, which was impossible so long as a Sunni government controlled Baghdad. Shi’a Iraq is also important to Tehran because, in stark contrast to its other supposed gains in the region (all of which have come in resource poor countries), southern Iraq is rich in hydrocarbons, giving it economic significance. Even this has been of questionable benefit to Iran, however, as Iraq’s growing oil exports helped enable the United States and Europe to impose ~~crippling~~ sanctions against Iran without disrupting global energy markets. Elsewhere Iran’s supposed gains have been transitory at best. For example, the Sunni rebellion in Syria has undoubtedly enhanced the Assad regime’s dependence on Tehran. Yet this dependency has been an immense financial burden on Iran, and one that is not particularly popular at home. Furthermore, the civil war has greatly reduced Syria’s strategic importance to Iran, which was almost wholly geostrategic and symbolic in nature. From a geostrategic perspective, Syria was a crucial component of the so-called Shia crescent that gave Tehran a sphere of influence stretching from Iran itself through the Levant. The Assad regime’s intermittent control of its own territory interrupts this land route, a problem made worse for Tehran by Baghdad’s loss of control over much of western Iraq. In short, the Shia crescent has been punctured in half—with the lost territory now largely in the hands of an anti-Shia fanatic group. The Assad regime was symbolically beneficial for Iran in that for years it was the only Arab government allied with Iran. The importance of this cannot be understated for a Persian nation with hegemonic designs on an Arab region. Some of the Assad regime’s importance to Iran in this regard was lost when Tehran gained another Arab ally in the form of the Iraqi government. More importantly, the Syrian and Iraqi Civil Wars have redrawn the Middle East along strictly sectarian lines. As such, the Assad and Iraqi governments are now perceived in the region less as fellow Arab states and more as Shia enemies in a sectarian war that is engulfing ever more of the Middle East. This is a strategic nightmare for a Shia power like Iran, and it strictly limits Tehran’s ability to project influence throughout the Middle East. This is seen by Iran’s growing unpopularity in the region. For example, a 2013 Zogby Research Services poll found that “Iran is now viewed unfavorably in 14 out of 20 Arab and Muslim countries.” Only in Iraq, Lebanon, Libya and Yemen did a majority of respondents say that “Iran is working to promote peace and stability in the region.” The sectarian divide has also greatly curtailed the popularity of Iranian proxy groups like Hezbollah. Indeed, a 2014 Pew Research poll found that a majority of the population in every Middle Eastern country surveyed held a negative view of Hezbollah, including in Lebanon itself, where nearly 60 percent of the population viewed the group unfavorably. The same poll found that more than 80 percent of the publics in Jordan and Egypt had an unfavorable view of Hezbollah, roughly double the numbers from seven years before. It is little wonder then that Hamas has distanced itself from Iran since the Syria Civil War broke out in 2011, instead cozying up to Sunni countries like Turkey and Qatar. Iran and its Shia partners’ growing unpopularity in the Sunni and Arab worlds is having real strategic consequence for Iranian foreign policy. Specifically, it is giving Sunni and Arab governments, most of whom have long feared Iran, greater freedom of maneuver in checking Iranian power. This was first evident in the proxy war many Sunni countries are waging against Iran in Syria. More recently, the gains of the Iranian-backed Houthis in Yemen have led to an unprecedented Arab military coalition led by Saudi Arabia. Thus, there is now an overt anti-Shia coalition in the region committed to checking Iranian power, wherever it may manifest itself. This is extremely troubling for Iran. To begin with, Saudi Arabia has used the Yemen conflict, as well as regional fears of a rising Iran more generally, to carve out a larger leadership role for itself in the region. Perhaps more importantly, the Sunni Persian Gulf states hold a significant military advantage over Iran, leaving Tehran incapable of standing up to them militarily. As J. Dana Stuster notes in a new policy brief for the National Security Network, “Iran is currently fighting the greatest challenge to its power since its sphere of influence coalesced in the 1980s.” The financial windfall Iran may receive as part of any nuclear deal will do little to help Iran overcome its worsening strategic landscape in the region. In fact, Iran’s position may further deteriorate as the United States takes steps after a deal is signed to bolster the support for its Arab allies, who will have an even stronger impetus to counterbalance any perceived Iranian gains.

#### No Iran/US escalation – rhetoric and military tests won’t translate into violence, effective US policy, JCPOA remains in place to effectively prevent adventurism, no means/motives for US interventions, and no international support for war – also no Israel strikes or Saudi proxy wars

-Green for Saudi proxy wars

-Yellow for Israel strikes

Tabatabai 17 ---- Adnan, master’s degree in Middle East Politics (School of Oriental and African Studies / University of London), holds an assigned lectureship focused on social relations and political science in the Middle East (Heinrich-Heine-University of Dusseldorf), “Why Iran-US War of Words Won't Turn Physical,” Al-Monitor, 2/9, http://www.al-monitor.com/pulse/en/originals/2017/02/iran-us-war-words-trump-escalating-rhetoric.html

As much as the United States' new tone toward Iran is worrisome, and as much as the Islamic Republic's Jan. 29 ballistic missile test is disconcerting, Tehran and Washington are unlikely to collide directly.

In both capitals, decision-makers see an urgent need for harsh rhetoric — albeit for different reasons. The Iranians see a need to show resilience vis-a-vis an explicitly hostile US administration. Meanwhile, the latter wants to make clear to both its domestic and international audience that the Obama era is over. This involves signaling that the easing of tensions with Iran has ended. It also involves reassuring regional allies such as Saudi Arabia and Israel that Washington would not engage in a rapprochement with Tehran at their expense.

Indeed, it should not come as a surprise that US national security adviser Michael Flynn's warning that Iran "is officially on notice" came shortly after lengthy phone calls between the White House and both Israeli Prime Minister Benjamin Netanyahu and Saudi Arabia's King Salman bin Abdul-Aziz Al Saud.

But escalating rhetoric aside, the reality is that US policy toward Iran has largely remained intact.

In the 13 months since the implementation of the Joint Comprehensive Plan of Action (JCPOA), Iran has repeatedly conducted ballistic missile tests. And it is entitled to do so. In UN Security Council Resolution (UNSCR) 2231, which endorses the nuclear deal, Iran is "called upon" not to carry out tests of missiles "designed" to carry nuclear weapons. There is no legally binding prohibition of such launches, unlike in UNSCR 1929 — the last and most harsh UN resolution against Iran over its nuclear program — which is superseded by UNSCR 2231.

To be clear, the nuclear deal does not address Iran's missile program. Moreover, the world powers with which Iran negotiated UNSCR 2231 — apart from the United States — did not display any appetite to insert legally binding text on Iran's missile tests.

Thus, as provocative as the missile tests may be, it is hard to see them providing a legal basis for the United States to spearhead new multilateral sanctions, leaving Washington with the option of adopting unilateral sanctions, which it did on Feb. 3.

While it took the Trump administration less than two weeks to slap sanctions on Iran, the idea that there was a sanctions freeze in Obama's final year in office is inaccurate. In fact, the latest sanctions were prepared by the previous administration.

In January 2016, not long after the implementation of the nuclear deal, changes were made to the Visa Waiver Program, which excluded Iranian dual nationals and anyone who had visited Iran in the preceding five years. Moreover, last December, Obama refrained from moving to veto the congressional vote on a 10-year extension of the Iran Sanctions Act. While these sanctions are unrelated to Iran's nuclear program, they undoubtedly undermine the impact of the lifting of nuclear-related sanctions.

Iran has reacted to the escalating rhetoric and sanctions by stressing that its missile program is defensive in nature, promising retaliatory sanctions, and by carrying out new military drills.

Yet, there is little incentive for Iran to greatly alter the status quo. Iranian leaders see the JCPOA as much more than just about the United States. It is an international arrangement with world powers — including the European Union, which Iran holds in high regard as a multinational institution. They see this arrangement as beneficial to Iran's economic and security calculations. Foreign investment, albeit limited due to remaining US sanctions, is trickling in. The EU oil embargo has been lifted and major contracts in the area of petrochemicals, civic aviation and transport are increasingly sealed. Additionally, the JCPOA provides a sense of security to Iran. It is highly unlikely for any party to the agreement to green-light military action by another party against Iran. Hence, Iran has little incentive not to abide by the nuclear deal.

As such, while the cycle of escalating rhetoric is discomforting at a time of deep uncertainty and conflict in the Middle East, it is important to see that it has its limits. Short of outright regime change, the United States has in fact rather limited options to weaken and contain Iran.

Given its experiences in places like Iraq and Afghanistan, it is unlikely that the United States will launch full-scale unilateral military action against Iran. It could move to arm a third country to hit Iranian infrastructure. This was tried with Iraq under Saddam Hussein. Today, Saudi Arabia could be such a third country. But given the lack of appetite in Riyadh for direct confrontation with Tehran, and considering the downward spiral in the Saudi military intervention against Yemen — the poorest country in the region — it is unthinkable that Saudi Arabia would take such a step. Israel has repeatedly threatened to attack Iranian nuclear sites. But considering the low chances of success and the potentially dire consequences, including retaliatory attacks by Lebanon's Hezbollah movement, it can be argued that such threats primarily serve a political purpose.

Less costly measures aimed at weakening and containing Iran, such as sanctions, have been tried and tested. The Obama administration managed to put in place an unprecedented multilateral sanctions regime targeting Tehran. Yet, it was under those very sanctions that Iran’s nuclear program evolved into what the international community came to perceive as a major threat to global security. Consequently, the Obama administration tried diplomacy. And it worked. The JCPOA reduced the capacity and increased the transparency of Iran's nuclear program in exchange for the lifting of nuclear-related sanctions. And as the International Atomic Energy Agency has repeatedly certified, the deal is working.

Bearing in mind the nuclear deal is fulfilling its objectives, the limited military options to contain Iran, and perhaps most of all the likely US inability to forge an international consensus against Iran in case of its unilateral breach of the accord, the security establishments of both Israel and Saudi Arabia have publicly urged Washington not to dismantle the JCPOA.

While reveling in the newfound reassurances from Washington, it can thus be argued that Riyadh and Tel Aviv understand the limits of the cycle of escalation and mostly take solace in Trump's unwillingness to realize their nightmares under Obama.

In this vein, the Trump administration can be expected to do whatever it can to minimize the economic benefits Iran will reap under the JCPOA. It will likely seek to discredit Iran's regional policies to prevent the normalization of the Islamic Republic's ties with the world, while also diminishing the political capital the deal affords Iran. But it will do this short of breaching the accord.

Thus, while likely to squabble about respective obligations and further drift away from rapprochement, neither Iran nor the United States has the incentive or ability to take the new cycle of tension to a military confrontation.

#### Great powers don’t want to enter—it would be contained

Sano 15 - Yoel, Head of Global and Political Security Risk at BMI Research, August 25, "Why Great Power Conflict Risk Is Rising", <http://thewhyforum.com/articles/why-great-power-conflict-risk-is-rising>

Middle East: A conflict between Israel and Iran, between Iran and Saudi Arabia, or Iran and Turkey, would be unlikely to escalate into a world war, because the scope for combat to spread beyond the Middle East is highly limited. For example, the Iran-Iraq War of 1980-1988 was certainly substantial, and involved the US, USSR, and several Arab countries as proxy players, but was limited in geographic scope to the Gulf region. So too were the Gulf War of 1991 and the Iraq War of 2003-2011. While the US could get dragged into a new Middle Eastern quagmire in Syria and Iraq as a result of the militant group Islamic State's advances, or against Iran if the present rapprochement fails, neither Russia nor China has the combined ability and willingness to intervene directly on behalf of Iran.

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#### Wrong—big firms are the largest contributors to R&D spending, anticipate new competition, and create new markets

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

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

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

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

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

#### Their evidence doesn’t account for cost spreading and returns on innovation

Joe Kennedy 20—Senior Fellow at ITIF, previously chief economist with the U.S. Department of Commerce, JD, and PhD in economics from George Washington University. ("Monopoly Myths: Is Big Tech Creating ‘Kill Zones?’" November 9, 2020, from Information Technology and Innovation Foundation, https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones)

The Assumption That Small Firms Are Inherently More Innovative Than Large Firms Is Not Borne Out by the Evidence

One core argument made by anti-monopolists who oppose large companies and argue that kill zones and killer acquisitions are real and harmful is that small firms are inherently more innovative than large firms. As FTC Commissioner Christine Wilson argued, “[M]any today believe that small firms are inherently more innovative than large ones, so that the acquisition of a small firm by a large one necessarily reduces innovation.”45 For example, Tim Wu recently testified before Congress that innovation in technology sectors would increase if government imposed greater regulations and increased antitrust enforcement because “[o]ver the last century, competitive, open sectors—ecosystems—have proved themselves superior to those monopolized or dominated by a ‘big three’ or ‘big four.’”46

In fact, large companies are as or more innovative than small firms. In a 1996 paper, Wesley M. Cohen and Steven Klepper found that large firms invest more in R&D as a share of sales.47 The number of patents and innovations produced per R&D dollar decline with increasing firm size. But they argued that this reflects a mismeasurement of innovation outputs. Large firms benefit from “cost spreading,” because they can spread the benefits from one innovation across more units and products, leading to a greater overall level of innovation per unit of R&D. They wrote, “Not only does cost spreading provide the basis for explaining the R&D-size relationship, it also challenges the consensus that has emerged from the R&D literature that large firm size imparts no advantage in R&D competition.”48

More recently, in 2016, business professors Anne Marie Knott and Carl Vieregger estimated that a 10 percent increase in the number of employees increases R&D by 7.2 percent, and a 10 percent increase in firm revenues increases R&D productivity by 0.14 percent. This shows that large firms not only invest more in R&D activities, they also enjoy higher returns on innovation output per dollar invested in R&D.49

Other research has found that “small firms prevail in the early stages and innovation tends to concentrate in larger firms as industries evolve towards maturity.”50 In the 1990s, many small firms emerged and competed to be the winners in IT platforms. But only a few firms could emerge as winners, and the ones that did continue to invest in innovation.

#### Even if small businesses innovate, they rely on bigger firms to compete

Joshua D. Wright & Jan M. Rybnicek 21—Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission; Antitrust Attorney, former Advisor at FTC, Editor for the Antitrust Law Journal. ("A Time for Choosing: The Conservative Case Against Weaponizing Antitrust," Summer 2021, from National Affairs, https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust)

But that is only part of the story. These major tech firms not only directly employ Americans, but through their investment and innovation, they have created entirely new markets that also have created millions of jobs. Take for instance the app economy—a more than $1 trillion global industry—that has created millions of U.S. jobs since Apple’s iPhone launched in 2007. According to one estimate, the U.S. had more than two million app-related jobs as of April 2019.[xvii] America’s large tech companies also benefit small businesses in yet another way: by connecting them to new markets that they could not access before. Today small businesses are able to take advantage of the major tech firms’ size and scale to grow domestically and compete globally with affordable and secure services.

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#### Everything is non-binding.

Holding et al. ’21 [Christopher, Paul Jin, Andrew Lacy, Arman Goodwin; July 15; Experts at JD Supra, a daily source of legal intelligence on all topics business and personal, distributing news, commentary, and analysis from leading lawyers; JD Supra, “Biden Executive Order Calls for Heightened Antitrust Scrutiny,” <https://www.jdsupra.com/legalnews/biden-executive-order-calls-for-7783960/>]

Key Implications

Revised horizontal and vertical merger guidelines are expected, which will likely implement a much more aggressive approach to deals. Note, however, that agency merger guidelines are not binding on courts and merger challenges under more aggressive theories may be met with skeptical courts;

Anticipate delays in HSR review especially for deals in industries singled out by the Order (e.g., tech, pharma, healthcare, among others), even if competitive overlaps are minimal;

Deals not subject to HSR filing requirements, even when purchase prices are relatively low, should be reviewed by antitrust specialists to assess risk, especially in the sectors identified in the Order;

#### Cases take years and have zero impact on confidence absent a victory.

Zakrzewski ’21 [Cat; August 19; Technology Policy Reporter; Washington Post, “Lina Khan’s first big test as FTC chief: Defining Facebook as a monopoly,” <https://www.washingtonpost.com/technology/2021/08/19/ftc-facebook-lawsuit-lina-khan-deadline/>]

Some legal experts think that the FTC will be able to address these criticisms from the judge to ensure that the case is not completely dismissed. But it’s no easy task for a relatively small agency, which sought several extra weeks to respond to the judge’s issues with the case after an initial July 29 deadline.

“There’s multiple signals that FTC is serious about doing their job of investigations and bringing these cases and fighting them hard,” said Charlotte Slaiman, competition policy director at the consumer group Public Knowledge.

Though the most significant, the Facebook case is but one of a wide range of issues on Khan’s plate. A month after she assumed office, the Biden administration issued a sweeping competition executive order, which called for her agency to take a tougher line on concentration throughout the economy.

So far, Khan has taken a series of steps to signal a shake-up has arrived at the FTC. She’s started hosting open meetings to open the agency’s business to the public, and she’s warned that greater scrutiny of mergers is on its way.

But the challenge will be for the agency to remain focused on the most important cases, including Facebook, Kovacic said. “She has a downpour of demands from both ends of the avenue,” he said.

And none of her other efforts will matter if she can’t show that she can win against companies, including Facebook, in court.

“The real measure to business decision-makers of your effectiveness and seriousness is your ability to prosecute and win cases,” Kovacic said.

#### It’s a question of error

Geoffrey A. Manne 20, president and founder of the International Center for Law and Economics, “Error Costs in Digital Markets,” November 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3733662

Legal decision-making and enforcement under uncertainty are always difficult and always potentially costly. The risk of error is always present given the limits of knowledge, but it is magnified by the precedential nature of judicial decisions: an erroneous outcome affects not only the parties to a particular case, but also all subsequent economic actors operating in “the shadow of the law.”2 The inherent uncertainty in judicial decision-making is further exacerbated in the antitrust context where liability turns on the difficult-to-discern economic effects of challenged conduct. And this difficulty is still further magnified when antitrust decisions are made in innovative, fastmoving, poorly-understood, or novel market settings—attributes that aptly describe today’s digital economy.

Rational decision-makers will undertake enforcement and adjudication decisions with an eye toward maximizing social welfare (or, at the very least, ensuring that nominal benefits outweigh costs).3 But “[i]n many contexts, we simply do not know what the consequences of our choices will be. Smart people can make guesses based on the best science, data, and models, but they cannot eliminate the uncertainty.”4 Because uncertainty is pervasive, we have developed certain heuristics to help mitigate both the direct and indirect costs of decision-making under uncertainty, in order to increase the likelihood of reaching enforcement and judicial decisions that are on net beneficial for society. One of these is the error-cost framework.

In simple terms, the objective of the error-cost framework is to ensure that regulatory rules, enforcement decisions, and judicial outcomes minimize the expected cost of (1) erroneous condemnation and deterrence of beneficial conduct (“false positives,” or “Type I errors”); (2) erroneous allowance and under-deterrence of harmful conduct (“false negatives,” or “Type II errors”); and (3) the costs of administering the system (including the cost of making and enforcing rules and judicial decisions, the costs of obtaining and evaluating information and evidence relevant to decision-making, and the costs of compliance).

In the antitrust context, a further premise of the error-cost approach is commonly (although not uncontroversially5 ) identified: the assumption that, all else equal, Type I errors are relatively more costly than Type II errors. “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”6 Thus the error-cost approach in antitrust typically takes on a more normative objective: a heightened concern with avoiding the over-deterrence of procompetitive activity through the erroneous condemnation of beneficial conduct in precedent-setting judicial decisions. Various aspects of antitrust doctrine—ranging from antitrust pleading standards to the market definition exercise to the assignment of evidentiary burdens—have evolved in significant part to constrain the discretion of judges (and thus to limit the incentives of antitrust enforcers) to condemn uncertain, unfamiliar, or nonstandard conduct, lest “uncertain” be erroneously identified as “anticompetitive.”

The concern with avoiding Type I errors is even more significant in the enforcement of antitrust in the digital economy because the “twin problems of likelihood and costs of erroneous antitrust enforcement are magnified in the face of innovation.”7 Because erroneous interventions against innovation and the business models used to deploy it threaten to deter subsequent innovation and the deployment of innovation in novel settings, both the likelihood and social cost of false positives are increased in digital and other innovative markets. Thus the avoidance of error costs in these markets also raises the related question of the proper implementation of dynamic analysis in antitrust.8

#### Acquisitions drive innovatoin

Kennedy ’20 [Joe; November 9; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones]

So-Called Kill Zones Could Maximize Welfare and Innovation

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

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

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

Acquisitions Often Increase Innovation

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

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

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

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

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

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

#### Drives competition.

Atkinson ’21 [Robert D; March 10; Ph.D. at UNC-Chapel Hill, the founder and president of ITIF; Information Technology & Innovation Foundation, “How Progressives Have Spun Dubious Theories and Faulty Research into a Harmful New Antitrust Doctrine,” https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new]

Myth 8: Big Technology Companies Create Innovation Kill Zones28

Large U.S. technology platforms invest almost as much in R&D as the entire U.K. economy does (business and government).29 But knowing that innovation is important, neo-Brandeisians have argued that big technology companies actually limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in them (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation.

In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firms to benefit from economies of scale or network effects, and enable the smaller firms to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell therefore might make it harder for promising firms to find funding.

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler that guides entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring, as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities.

Moreover, if they are creating kill zones, why did the number of angel and seed deals rise almost sixfold between 2006 and 2019, peaking in 2015? The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down. (See figure 5.)

#### Zero empirical evidence supports the link between dominant platforms and reduced innovation

Patrick F. Todd 20, Trainee Solicitor, Herbert Smith Freehills LLP, London, 3/3/20, ““You don’t get to be the umpire and have a team”: should we regulate the activities of digital platforms in neighboring markets?,” <https://truthonthemarket.com/2020/03/03/you-dont-get-to-be-the-umpire-and-have-a-team-should-we-regulate-the-activities-of-digital-platforms-in-neighboring-markets/>

2. Widespread harm in adjacent markets

To ban platform owners from leveraging anti- and pro-competitively, one would expect there to be cogent evidence of harm to competition across a multitude of adjacent markets that depend on the platforms for access to consumers. However, as Feng Zhu and Qihong Liu note, there is a dearth of empirical evidence on the effects of platform owners’ entry into complementary markets. Even studies that support the proposition that such entry dampens or skews innovation incentives of firms in adjacent markets conclude that the welfare effects are ambiguous, and that consumers may actually be better off (see e.g. here and here). Other studies show that third-party producers can benefit from platform entry into adjacent markets (see e.g. here and here). It is therefore clear that this criterion, which should also be a prerequisite to imposing blanket regulation to control the behavior of platform owners, has not been satisfied.

#### Small firms are bad –

#### 1) Increasing competition causes de-concentration without increasing aggregate data

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

The distribution of new companies will also be a critical factor. These companies could create new markets, products, and platforms distinct from existing firms, yielding previously untapped sources of data and new forms of innovation. Facebook and Amazon have successfully engaged in these practices. On the other hand, a more even playing field might prompt emerging companies to compete directly with broken-up giants. Incumbent firms could challenge Google’s internet search monopoly, YouTube’s video dominance, and Apple’s smartphone market share. Although this competition may spur innovation and shake up the marketplace—just as today’s large tech companies did when they arrived—it could also de-concentrate data sources without increasing aggregate data quantities.

#### Guts deep learning

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

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

#### 2) Contracts –

#### a) transaction costs are too high AND no political will

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

Breaking up large tech firms would scatter the inputs to AI innovation, such as datasets, computing power, and human talent, across more companies. However, these same inputs could be reconsolidated through joint ventures, data sharing agreements, industry consortia, and other forms of collaboration between smaller post-breakup companies. If reasonably easy to implement and sustain, interfirm cooperation could drive innovation as effectively as intrafirm coordination pre-breakup, or even more so. In fact, this sort of cooperation is already emerging in the market. Microsoft and Graphcore, for example, just announced the development of Graphcore Intelligence Processing Units, designed to support machine learning.83 Recent DARPA challenges, like the Spectrum Collaboration Challenge, also indicate that the Pentagon values a collaborative approach to AI.84

In practice, though, cooperation is not always easy.85 When different parties supply set components for larger products, the end product can suffer because no entity has high-level, comprehensive control over it. 86 Similarly, existing research suggests that cooperation driven by vague or short contracts often falls short for “projects involving advanced innovation.”87 Greater reliance on contractual relationships and collaboration for critical inputs like data and compute could also make AI firms more vulnerable to supply shocks.

Finally, a more collaborative environment also raises questions of integration. Instead of drawing on central, intrafirm sources, companies will have to leverage diverse inputs from multiple vendors, which could complicate coding, cleaning, and sorting data. Although contracts could serve as substitutes for intrafirm resources, negotiating and enforcing contractual relationships entails potentially significant transaction costs; large firms can avoid this inefficiency and accelerate innovation by bringing inputs together under one roof, making contracts unnecessary.88

activity,161 yet “Defense Technology” and “Information and Communication Technology” are two of six industries identified by the National Counterintelligence and Security Center as the most likely targets for foreign intelligence collectors.162

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

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

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

American tech giants’ huge revenues uniquely equip them to fund costly AI research. Google’s DeepMind, arguably the world’s leading AI-research organization, is billions of dollars in debt and lost over $500 million in 2018 alone. Google’s fortress-like balance sheet can easily absorb the costs associated with such cutting-edge research, but smaller firms likely cannot. The economics of compute offer a concrete example of this dynamic. The rapidly increasing volume of compute required for deep learning research, coupled with compute’s prohibitively expensive prices, creates significant barriers to entry and innovation for smaller AI firms.

As Microsoft co-founder Paul Allen noted in 2019, the “exponentially higher” costs of compute may leave the U.S. with only “a handful of places where you can be on the cutting edge.” Even the most well-funded independent AI organizations rely on Big Tech’s compute resources. OpenAI’s billion-dollar compute partnership with Microsoft, reached after OpenAI spent millions renting compute from leading tech firms, offers one example.

#### Their ev concludes neg

Foster and Arnold ’20 – Researchers at ***Georgetown’s*** Center for Security and Emerging Technology [Dakota; Visiting Researcher at Georgetown’s Center for Security and Emerging Technology, graduate student in the Department of War Studies at King’s College London, conducted research on terrorism and U.S. national security policy for the U.S. military, the House Foreign Affairs Committee, and the Washington Institute; Zachary; Research Fellow at Georgetown’s Center for Security and Emerging Technology, where he focuses on AI investment flows and workforce trends, J.D. from Yale Law School; 2020; "Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI"; Center for Security and Emerging Technology at Georgetown University; https://www.geopolitic.ro/wp-content/uploads/2020/05/CSET-Antitrust-and-Artificial-Intelligence.pdf; accessed 8-10-2021]

3. Are smaller vendors more likely to produce innovative products that meet the Pentagon’s needs?

Tech industry leaders have relatively **little incentive** to work with the Pentagon. Their companies already enjoy **broad customer bases** and financial independence from U.S. government contracts—including those **at the Pentagon**.89 DOD contracts involve **applying** AI technology in varied, complex, and **operationally demanding** environments with **low tolerance** for error. Similarly, industry has **little motivation** to take on unique DOD **data management** and privacy requirements, such as data compartmentalization, protection against deceptive or compromised data inputs, and strict **data accountability** provisions complicating **algorithm training**.90 Finally, some commercial AI advances will easily convert into Pentagon applications. Others will require significant, difficult adaption and productization.

Antitrust action could create **smaller AI firms** targeting DOD business as their “**niche**.” With the Pentagon as their **sole customer**, these firms could focus on its unique needs, tailoring broader AI innovations for the Pentagon through **productization** and **organizational adaptation**. They could follow the example of **Palantir**, which makes 50 percent of its revenue from **government contracts**,91 or Kratos (60 percent).92 In the last five years, a **number of companies** have emerged in this mold, including Anduril Labs (2017), Shield AI (2015), Descartes Labs (2014), and Uptake (2014). As smaller firms’ primary, high-value customer, the Pentagon can **dictate** their innovation objectives, ultimately yielding AI applications better suited to **defense needs**.

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#### No retal

Jensen and Banks, ’18, (Benjamin, dual appointment as a scholar-in-residence at American University, School of International Service and as an associate professor at the Marine Corps University and David, lecturer at the American University, School of International Service, “Cyber warfare may be less dangerous than we think,” The Washington Post, April 26, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/26/what-can-cybergames-teach-us-about-cyberattacks-quite-a-lot-in-fact/?noredirect=on&utm\_term=.8e4acaaa9349)

“Frankly, the United States is under attack.”∂ This February 2018 warning to the Senate from Director of National Intelligence Dan Coats included a message that “there should be no doubt” that Russia, emboldened by its 2016 cyberattacks and informational warfare campaign, will target the U.S. midterm elections this year.∂ We agree. However, our research suggests that, although states like Russia will continue to engage in cyberattacks against the foundations of democracy (a serious threat indeed), states are less likely to engage in destructive “doomsday” attacks against each other in cyberspace. Using a series of war games and survey experiments, we found that cyber operations may in fact produce a moderating influence on international crises.∂ Here’s why: Cyberspace offers states a way to manage escalation in the shadows. Thus, cyber operations are more akin to the Cold War-era political warfare than a military revolution.∂ Would you like to play a game?∂ To understand how actors use cyber operations to achieve a position of relative advantage, we designed a series of analytical war games. This methodology lets us assess how multiple factors could combine in a competitive environment, and helps identify recurrent strategic preferences associated with cyber operations. We ran military officers and university students through these war games. Next, we turned the war games into survey experiments via Amazon Mechanical Turk (MTurk) — so randomized respondents answered questions about how to respond to an international crisis.∂ War games offer a time-tested means of assessing the changing character of crisis and competition. Following scripted scenarios, players are assigned to different “teams” and armed with resources to meet their objectives. They earn points based on their choices, with referees guiding the play and military/security analysts interpreting the results.∂ [There’s more to Russia’s cyber interference than the Mueller probe suggests]∂ As players seek to win the game, they may choose previously unconsidered options or draw on or combine resources in unexpected ways. By observing these games, recording their results, repeating the plays and redesigning the scenarios, analysts can understand the nature of the complex and highly contingent problems the scenarios represent.∂ And political scientists use war games to create survey experiments to test hypotheses about strategic preferences. Our study of over 100 military officers and students, for instance, gave players a crisis scenario and a range of response options, all of which included the ability to escalate in cyberspace — as well as more traditional diplomatic, economic and military instruments. Players could also choose to de-escalate.∂ What would a great power cyber crisis in East Asia look like?∂ In our first round, “Island Intercept,” we sought to identify whether states escalated using cyber capabilities. Players took on the role of China or the United States in an escalating dispute in the South China Sea.∂ Over the course of multiple war games, we found our mix of military officers and university students often sought to de-escalate the crisis and rarely used offensive cyber operations. Players assigned to the Chinese side often combined cyber espionage and more traditional intelligence activities to identify the U.S. players’ intentions and capabilities. Players replicating strategic decision-making in Beijing seemed to prefer a “wait and see” approach involving increased intelligence and diplomatic lobbying, rather than escalatory offensive cyber operations.∂ [Did the U.S. ‘hack back’ at Russia? Here’s why this matters in cyber warfare.]∂ The broader survey experiment replicated these findings. The 800 MTurk respondents revealed a bias toward not escalating into the cyber domain. Specifically, about 52 percent chose to de-escalate while 30 percent opted for minor escalation in the diplomatic or economic arena. Only 18 percent of respondents preferred escalatory offensive cyber operations. These findings support other studies demonstrating that states do not prefer escalatory responses to cyber intrusions.∂ How will states employ cyber capabilities against their domestic populations? ∂ In a second round, we shifted to examine intrastate conflicts. In our “Netwar” game, players took on the role of either the government, a paramilitary organization, a multinational company or a transnational group of hackers and activists, all attempting to achieve their interests in a weak and corrupt state. This scenario sought to replicate the complex, often proxy, multiparty competition in cyberspace.∂ In these games, the results were more mixed. Players replicating the state tended to use offensive cyber operations as a means of targeting domestic opposition groups — while opposition groups used cyber to blackmail the state by leaking sensitive information.∂ In an MTurk survey experiment involving 800 respondents, we found that states still preferred not to jump into the cyber domain, opting about 43 percent of the time to limit escalation. Yet these results appeared to be a function of regime type. When we controlled for regime type in a second round of surveys involving 800 respondents, we found that democracies had a higher than expected count of de-escalatory measures (53 percent). But authoritarian regimes escalated to cyber measures 35 percent of the time, vs. 18 percent for democracies.∂ Where is the escalation? ∂ [The Netherlands just revealed its cybercapacity. So what does that mean?]∂ Our findings suggest that cyber weapons may be far less destabilizing than many assume. First, we found that actors in crisis situations were restrained in their use of cyber weapons. Indeed, actors were more likely to use military, economic or diplomatic alternatives before escalating into the cyber domain.∂ How might this work in the real world? We might interpret the Russian shift to cyber operations to be one of desperation, rather than evidence of a calculated strategy. Our findings suggest that actors are uncomfortable in the cyber domain an

d only operate there when they lack relative influence in other areas — or seek to limit the risk of escalation, likely due to attribution issues associated with cyber operations.∂ Second, fears of large-scale cyber operations are likely overblown due to cyber’s unique “use it and lose it” character. Individual cyberattacks could potentially wreak considerable damage, but any such exploits could — once deployed — be quickly reverse-engineered and the vulnerability in target networks patched.∂ Here’s the catch: Once you convert network access and cyber espionage into an attack payload, you signal your capabilities and lose the ability to conduct similar attacks. There is a unique shadow of the future in cyber statecraft. States have to assess whether they want to jeopardize an exploit in the short term — and lose long-term coercive options against rivals.

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#### FinTech start-ups are exploding!

Analytics Insight 10-25 (a leading media authority in artificial intelligence, big data, analytics, robotics covering the latest trends in the industry. TOP 100 FINTECH STARTUPS MAKING A BREAKTHROUGH IN 2021, <https://www.analyticsinsight.net/top-100-fintech-startups-making-a-breakthrough-in-2021/>, y2k)

These fintech startups have been grabbing everyone’s attention in 2021

As we all use mobile banking and make transactions just a click these days, whether it be financial applications to calculate EMIs or insurances, things have become much easier. And all thanks to new fintech startups that have opened the doors for many significant changes in how payments are made. With new technologies coming to space, the fintech startups have been keen to leverage them.

The financial service industry now continues to attract tech companies that transform how people and businesses save, spend, borrow and invest and this is also attracting funding that can be helped in the growth of the companies. As more and more companies pour into the fintech space, it can be tough to sift through them and identify the major players.

The explosion of fintech startups is quite surprising. Most financial institutions such as banks have made tech-driven changes. The market has been witnessing a great shift from digital loans and mobile stock services to eCommerce payment platforms and digital modes of currency exchanges that are rooted in digital financial access.

Fintech is not only about finances now but it also involves several industries and sectors such as education, fundraising, investment management, retail banking, and nonprofit services. It also includes the developments and progress in the crypto market. To give you a wide array of fintech startups and their services, Analytics Insight has listed the top 100 fintech startup companies that are driving the next-generation financial industry.

[Below it cites 100 new fintech startup companies]

1. Acorns Headquarters(s): Irvine, California, United States Founded: 2021 Focus Area: Micro-investing, Robo-investing Industry: Fintech, financial services Website: https://www.acorns.com/ Acorns are the first-ever company that offers micro-investing to the world. The exclusive financial engine permits to roundup and spare change from everyday buying and invests these sub-dollar amounts into a professionally managed portfolio of index funds. The mission of this fintech startup is to look after the financial best interests of up-and-coming, beginning with the empowering step of micro-investing. The firm offers services in the banking, earning, and education sectors. 2. Active.ai Headquarters(s): Singapore Founded: 2016 Focus Area: Artificial intelligence Industry: Financial services Website:https://active.ai/ Active.ai is a fintech startup that connects consumers with their banks via micro conversation. It offers a conversational banking platform to financial institutions which is created using an artificial intelligence-powered virtual assistant that caters to emergent banking needs by enabling banks, wealth managers, and financial service providers with their customers using voice, messages, and IoT devices. The firm helps banks and credit unions to create intelligent virtual assistants by bringing in automation and insightful customer engagement. 3. Adyen Headquarters(s): Amsterdam, Netherlands Founded: 2006 Focus Area: Payments Industry: Financial services Website: https://www.adyen.com/ Adyen allows businesses to accept e-commerce, point-of-sale, and mobile payments. It offers risk management, integrated gateway, acquiring, processing, and settling of the payments. It provides end-to-end infrastructure connecting directly to Visa, Mastercard, and consumers’ globally preferred payment methods and also delivers frictionless payments across several online, as well as the in-store channels serving customers such as Facebook, Uber, Casper, Spotify, L’Oreal, and Bonobos. The platform enables merchants to accept payments in a single system, allowing revenue growth easily. 4. Affirm Headquarters(s): California Street, San Francisco, California, U.S Founded: 2012 Focus Area: Financial technology Industry: Financial services Website:https://www.affirm.com/ Affirm is a fintech startup company that operates as a financial leader of installment loans for consumers to use at the point of sale to finance a purchase. The firm uses technology to bring vital disruptive innovation to the financial industry. It aims to improve the lives of consumers by delivering honest, simple, and transparent financial products. Affirm provides shoppers an alternative to transitional credit cards that can be easier to use. 5. Anyfin Headquarters(s): Stockholm, Sweden Founded: 2017 Focus Area: Payments Industry: Financial services Website:https://anyfin.com/sv\_SE Anyfin saw that very many people pay unnecessarily much interest and fees for their installments, credit cards, and personal loans. That’s where this company reaches out. With the help of smart technology and skipping unnecessary intermediaries, they were able to offer as low an interest rate as possible. And decided right away that they would always try to help you to a better economy. Anyfin claims to do this with a combination of AI and publicly available consumer data, and with additional information garnered through a photo of existing loan statements, including repayment history. This, it says, gives Anyfin a more complete picture than a credit score alone, which is likely the main data point used by the original lender. 6. Argyle Headquarters(s): New York, United States Founded: 2018 Focus Area: Employment data Industry: Developer APIs, real-time Website:https://argyle.com/ At Argyle, they recognize that employment data is owned by the individual it represents. By building the first gateway to employment data, the company is unlocking a dataset that has been monopolized by a single, giant corporation (name omitted, because of decorum) for 70 years. It is making it easier, faster, better, smarter for innovative companies to put points around the world and is accessible via mobile devices employment data to work for their users, enabling access to products and services that improve lives. 7. Array Headquarters(s): New York, United States Founded: 2020 Focus Area: Fintech Industry: Financial services, software Website:https://www.array.com/ Array is a fintech platform to gain personalized credit and financial data for users. The platform is helping businesses form deeper bonds with consumers through meaningful information sharing. The company’s API is complete with data attribution and dictionaries, plus it’s fully structured. Its aggregator model simplifies pricing by avoiding large monthly data commitments and the need to stick with any single bank, credit bureau, or security vendor Array was founded by Martin Toha and Phillip Zedalis in 2020. 8. Ascend Money Headquarters(s): Asia-Pacific (APAC), Association of Southeast Asian Nations (ASEAN), Southeast Asia Founded: 2015 Focus Area: IT Industry: Financial services, Fintech Website:https://www.ascendmoneygroup.com/home/ Ascend Group is an information technology company that specializes in the fields of cloud centers, fintech, and E-commerce. It is driven by its mission to be the leader in digital services and platforms for customers and businesses. Ascend Money is a testimony to our beliefs. The company constantly innovates and enables millions of people to ascend to lives’ greater heights with accessible, affordable, and secure financial services. For that reason, their logo – the Binary Bond – symbolizes our desire to integrate the opportunities of the world (the’O’) with the individual (the ‘I’) in the digital age using advanced technologies. 9. Atom Headquarters(s): Durham, United Kingdom Founded: 2014 Focus Area: Mobile banking Industry: Banking, mobile apps, fintech Website:https://www.atombank.co.uk/ Atom Bank is a mobile banking application that offers a range of personal and business banking products. Users can log in using face and voice recognition and receive support from a 24/7 customer service team. The application, available on iPad and iPhone devices, was launched in March 2014 and its operations are based in Durham, the United Kingdom. In 2017, Atom was named by LinkedIn as one of the UK’s top 25 start-ups and ranked 14th alongside companies such as Deliveroo, Uber, and Airbnb, and in 2019, Atom ranked second in business analyst Beauhurst’s list of 50 top fintech UK start-ups and scale-ups. It was the only company from outside London in the top 20 of the lists. 10. Avant Headquarters(s): Chicago, Illinois, United States Founded: 2006 Focus Area: Finance Industry: Financial services, consumer Lending Website:http://www.avant.com/ Avant operates an online marketplace that provides users with access to personal loans to consolidate debt, pay unexpected medical expenses, and for family vacations. Through the use of big data and machine-learning algorithms, the company offers a customized approach to streamline credit options. The company caters to consumers in the United States and the United Kingdom. Upon entering the growing financial technology FinTech industry, Avant developed proprietary software that attempts to efficiently mitigate default risk and fraud by using machine-learning technology. The company has worked towards a fully online experience where customers can apply on Avant’s website. 11. AvidXchange Headquarters(s): Charlotte, North Carolina, United States Founded: 2006 Focus Area: Payments Industry: Software, Saas, financial services Website:http://www.avidxchange.com/ AvidXchange is the industry leader in automating invoice and payment processes for mid-market businesses. Founded in the year 2000, AvidXchange processes over $140 billion transactions annually across its network of more than 680,000 suppliers, transforming the way 6,000 customers in North America pay their bills. AvidXchange is distinguished as a global fintech unicorn and one of the fastest-growing technology companies in the U.S. with 1,500 employees supporting customers across seven office locations. 12. Azimo Headquarters(s): London, United Kingdom Founded: 2012 Focus Area: Online Payment Industry: Financial services, Fintech Website:http://azimo.com/ Azimo is an online money transfer company that provides a fast, secure, and low-cost alternative to legacy high street remittance services. Azimo is created with an explicit mission of cutting the costs of sending money home. Its international money transfer platform allows users to send money either to a bank account or to over 270,000 cash pick-ups. Azimo offers money transfers to 190 receiving countries in over 80 different currencies. The company has half a million customers connected to its platform and offers more than 270,000 cash pick-up locations globally. As of October 2019, sending countries are limited to Europe. 13. BankBazaar Headquarters(s): Chennai, Tamil Nadu Founded: 2008 Focus Area: Loans, credit cards, FD, and calculators Industry: Fintech Website: https://www.bankbazaar.com/ BankBazaar is known as the world’s first neutral online marketplace where it provides instant customized rate quotes on loans, credit cards, loans, and many other personal finance products and services to compare and choose the suitable option. It is a secure and user-friendly platform focused on harnessing technology for end-to-end paperless transactions to support the environment. It is supported by global investors like Sequoia Capital, Amazon, Mousse Partner, and many more. BankBazaar offers CIBIL Score, free credit score, and free CIBIL score. 14. Basis Headquarters(s): Bengaluru, Karnataka Founded: 2019 Focus Area: Payment for women Industry: Financial services, Fintech, and Personal finances Website: https://www.getbasis.co/ Basis is popular for being India’s financial services stop for women that are powered by education and communities. It helps to keep women updated on options to make smarter and informed financial decisions about monetary transactions. Basis offers full access to a rich library of curated financial advice, recommendations, resources, content, and many more. Basis First provides an enhanced set of services to have a better understanding of the relationship between a woman and her money. 15. BharatPe Headquarters(s): New Delhi, Delhi Founded: 2018 Focus Area: Financial services, payments, lending, fintech, and digital payments Industry: Financial services Website: https://bharatpe.com/ BharatPe is one of the fintech start-ups to make financial inclusion a reality for multiple Indian merchants. It is known for launching the first-ever UPI interoperable QR code, ZERO MDR payment acceptance service, as well as the UPI payment-backed merchant cash advance service in India. It has also launched BharatSwipe, India’s only ZERO MDR card acceptance terminal. It is backed by several reputed investors such as Sequoia, Insight Partners, Beenext, and many more. BharatPe offers multiple different financial products and services such as BharatPe Balance, BharatPe Card, easy loans, bill payments, and BharatSwipe. 16. Billtrust Headquarters(s): Lawrenceville, New Jersey Founded: 2001 Focus Area: Outsourced invoicing, ebilling, EBPP, EIPP, billing services, B2B, payment application, online invoicing, print invoicing, cash application, A/R automation, invoice-to-cash, order-to-cash, payments, SaaS, fintech, technology, sales, marketing, and customer success Industry: Financial services Website: https://www.billtrust.com/ Billtrust is focused on making it easier for B2B companies to get paid regularly. It is known as the leading innovator in AR automation with over 40 industries as the client base. This fintech start-up innovates by pushing automation into different areas such as supplier-driven payments network, automated invoice delivery, and many more. It has a record of crossing US$1 trillion invoice dollars processing and more than US$49 billion in total payment volume. Billtrust helps to deploy automation to shift customers seamlessly through the whole order-to-cash cycle. 17. Blend Headquarters(s): San Francisco, CA Founded: 2012 Focus Area: Financial Services Industry: Computer software Website: https://blend.com/ Blend is known for helping lenders streamline the customer journey for multiple banking products from application to closing with its cloud-based platform. It offers a Digital Lending Platform to acquire more customers, accelerate productivity, and enhance customer relationships. Blend has processed an average of over US$5 billion in transactions per day while maximizing operational efficiency. It offers a mortgage suite and consumer suite by leveraging technology, data, and service providers to deliver a seamless customer experience. 18. Bolt Headquarters(s): San Francisco Founded: 2014 Focus Area: Online shopping Industry: Fintech, financial services Website:https://www.bolt.com/ The company pitches its offering as a universal login credential that will allow e-commerce sites to compete with Amazon’s speed. Bolt said that once shoppers sign up, including providing shipping and payment information, they can quickly log into any site using its software and complete a one-click purchase. Bolt’s product and the team have grown by leaps and bounds — raising US$215M in funding and growing by over 200 team members and 250+ retailers. 19. Braintree Headquarters(s): Chicago, IL Founded: 2007 Focus Area: Mobile payments Industry: Financial services Website: https://www.braintreepayments.com/ Braintree is known as a leader in mobile payments because it believes that payments technology can drive both innovation and revenue efficiently and effectively. It provides the commerce tools to minimize security concerns, expand globally, and allow new commerce experiences. This platform offers to drive higher conversion, reach more buyers in more places, streamline business operations, and mitigate risk to keep payment data secure. It provides products such as Braintree Direct, Braintree Extend, Braintree Auth, and Braintree Marketplace with exciting features like fraud tools, 3D secure, data security, and many more. 20. Built Technologies Headquarters(s): Nashville, The U.S Founded: 2014 Focus Area: Commercial lending and SaaS Industry: Financial Services and fintech Website: https://getbuilt.com/ Built is a popular provider of construction finance technology by connecting commercial and consumer construction lenders, real-estate owners, title companies, and many more to enhance the flow of capital in the ecosystem. It helps to power faster draws, mitigate risks, inspire customer loyalty, improve construction payments, etc. It offers Built construction, built pay, Lien Waiver Management, compliance tracking, and Built club to the construction department while for the lending department, it offers construction loan administration, home builder finance, asset management, and built plus. 21. CashBook Headquarters(s): Haryana Founded: 2020 Focus Area: Apps and software Industry: Fintech and IT Website: https://cashbookapp.in/ CashBook is focused on tracking the income and expense of business as a digital record-keeping app to add entries, segregate records, and seek overall balance efficiently and effectively. It helps in real-time calculations with group cash books and multiple books for each account. It also generates reports and sharing options through PDF and Excel. CashBook provides instant balance and assistance for making quick decisions. It has shown more than US$500 million monthly transactions through its app. Customers can receive automatic data backup with 24\*7 customer support. 22. Chillr Headquarters(s): Mumbai, Maharashtra Founded: 2013 Focus Area: Mobile payments Industry: Banking and fintech Website: http://www.chillr.com/ Chillr is well-known for revolutionizing banking through its strong partnerships, deep integrations, and friendly user experience. It offers multiple banking experiences such as instant money transfer, connecting multiple accounts at one place, recharging utility bills, and many more at Chillr merchants. It also provides a range of in-app services for hotels, flights, and movies. It is popular as a mobile and web application that allows users to send money directly between bank accounts through a mobile number. 23. Chime Headquarters(s): San Francisco, California Founded: 2013 Focus Area: Debit card Industry: Banking, fintech, and financial services Website: https://www.chime.com/ Chime is known as a fintech company that helps to build credit history with no annual fees or interests and fee-free overdrafts up to US$200. It offers benefits such as no hidden fees, building credit, automatic savings, minimum balance requirements, and the utmost security and control. It partners with multiple regional banks to design member-first financial products. There are three types of accounts in Chime— spending account, credit builder, and savings account. 24. Circle FinTech Headquarters(s): Dhaka, Bangladesh Founded: 2018 Focus Area: Payments Industry: Fintech and Financial Services Website: https://www.circlefintech.com/ Circle FinTech is a well-known fintech start-up that establishes simplified payments for banks, retail, and consumers with technology infrastructure and agent networks. It is focused on introducing payment products and services for banks and other financial institutions to utilize. It offers a mobile-first approach, compatible with public and private cloud, API-driven, system security, business intelligence, and elastic scale. It also provides Banking-as-a-Service and Collection-as-a-Service to its clients. 25. Clyde Headquarters(s): New York Founded: 2017 Focus Area: IT, Insurance, and E-Commerce Industry: Financial Services and IT Website: https://www.joinclyde.com/ Clyde is a popular fintech start-up that offers product protection as well as drives revenue in the future. It empowers multiple businesses with extended warranties and accident protection to continue the current purchase flow. It helps to increase the average order value while selling a product by leveraging a competitive network of insurance partners. The warranty covers extensions, wear and tear, water damage, and accidents for up to five years. Clyde offers customizable calls-to-action to make the protection seamless while purchasing product protection. The technology platform tends to match warranty contracts with products and provides complete customer information, claims, and program performances on a merchant dashboard as well as a customer dashboard. 26. CRED Headquarters(s): Bengaluru, Karnataka Founded: 2018 Focus Area: Credit cards, payments, and personal finance Industry: Financial services and fintech Website: https://cred.club/ CRED is well-known for offering rewards to customers who utilize this platform to pay credit card bills. It helps to automate all credit card bill payments and manage all credit cards on a single portal. CRED offers multiple services such as CRED mega jackpot, CRED coin rewards, CRED rent pay, and CRED IPL offers. It helps to never miss the due date of payment with CRED protection. The users receive a category-wise analysis of expenditures, detect hidden charges, and track credit limits in real-time. 27. CreditMantri Headquarters(s): Chennai, Tamil Nadu Founded: 2012 Focus Area: Credit Industry: Fintech and financial services Website: https://www.creditmantri.com/ CreditMantri is one of the fintech start-ups to change the way credit is delivered in India by leveraging the power of technology and digital medium. The main aim is to reinvent the credit landscape by providing consumers full access to responsible and transparent credit options. It offers specific solutions and services to address the needs of consumers and lenders across the entire spectrum such as credit cards, personal loans, small loans, business loanss, credit improvement service, monitoring service, loan restricting, and flexible repayment plans. CreditMantri consists of more than 10 million users with 35 lakhs loan applications processed and over 50 lenders. 28. CreditVidya Headquarter(s): Hyderabad, Telangana Founded: 2012 Focus Area: Alternative data, AI, and machine learning Industry: Financial services Website: http://www.creditvidya.com/ CreditVidya is the leading player in the alternative credit scoring space in India. A pioneer in the domain, it is leveraging alternative data, AI, and machine learning to facilitate institutional credit for the underserved. Its products are helping a large section of the salaried and self-employed population become visible to lenders, by making it financially viable for banks and NBFCs to underwrite customers for much smaller unsecured loans. With over 10,000 data points, CreditVidya’s credit underwriting model is 2x more powerful than traditional bureau scores, helping banks and NBFCs underwrite 15% more individuals, including the completely new-to-credit segment (first-time borrowers). 29. Crezco Headquarter(s): London Founded: 2020 Focus Area: Software and API Industry: Computer software Website:https://www.crezco.com/ Crezco provides instant, innovative payment solutions. Crezco eliminates unnecessary costs and friction to allow the creation of products and services. Collaborate with suppliers and customers and provide role-based access for internal team members. Crezco makes payments cheaper and faster, but no less convenient. It eliminates the unnecessary costs and frictions to trading, so businesses can grow, markets can develop and economic progress can be enjoyed everywhere. Crezco received financial support from established individuals and companies in the Fintech space. 30. Cube Wealth Headquarter(s): Mumbai, Maharashtra Founded: 2016 Focus Area: Software and AI solutions Industry: Financial services Website:https://www.bankoncube.com/ Cube is enabling everyone to invest in the simplest manner possible along with guidance from the world’s top-performing investment managers – the same that guide the world’s richest families. The service is already live in India and is soon to be available across the USA and multiple Asian countries. Cube has an experienced team that comes from the world of fintech, entrepreneurship, design, systems, banking, and global sales. It is founded by Satyen Kothari, a battle-scarred entrepreneur who is on his 5th adventure. He has previously founded Citrus Pay in India and three companies in Silicon Valley. Citrus was sold in 2016 in India’s largest fintech cash deal at the time and was processing $2 bn at its peak and servicing 20 mn users. 31. Curve Headquarter(s): London, England Founded: 2015 Focus Area: Customer Protection and Issuance of Card Industry: Financial Services Website:http://www.curve.com/ Curve is a banking platform that consolidates cards and accounts into one smart card and app. It allows customers to supercharge their legacy banks to the 21st century without leaving their bank or topping up. Curve offers a host of benefits to its customers; it makes cards fee-free when spending abroad, get instant notifications and categorization of spend, earn an instant 1% cashback at the likes of Amazon, Uber, Netflix and Sainsbury’s and Time Travel enables customers to swap spend to a different card in the app for up to two weeks after the purchase was made. Curve also offers Curve Customer Protection, a policy that covers all credit and debit card payments made via the Curve card up to £100,000, giving cardholders an extra layer of protection for disputes with merchants and any unauthorized use of their Curve card. IDC Ventures backs Curve with Fuel Venture Capital, Vulcan Capital, OneMain Financial, and Novum Capital back Curve. 32. Digit Insurance Headquarter(s): Bengaluru, Karnataka Founded: 2016 Focus Area: Car Insurance, travel insurance Industry: Insurance Website:https://godigit.com/ Digit is a general insurance company started by Kamesh Goyal and backed by the Fairfax Group. Its services include car insurance, travel insurance, home insurance, commercial vehicle insurance, and shop insurance. The company is driven by a mission to reimagine products and redesign price processes. Car Insurance, also known as auto or motor insurance, is a type of vehicle insurance policy that protects you and your car from any risks and damages caused by accidents, thefts, or natural disasters. So, you will be financially secure in case of any losses that may be incurred because of any such unforeseen circumstances. In addition to that, you will also be protected from third-party liabilities. 33. Dwolla Headquarter(s): Des Moines, Iowa Founded: 2008 Focus Area: Payments API, ACH API, payment network, mass payments Industry: Computer software Website: http://www.dwolla.com/ Dwolla is a fintech company offering modern payments technology for businesses. From startups to enterprises, businesses across every industry use Dwolla’s Platform to collect, facilitate or send electronic payments. We’ve made an incredibly complex process of accessing the various payment networks and navigating regulations feel simple. Since 2008, Dwolla’s modern platform has powered billions in payments for millions of end-users. Today’s most innovative companies are programming their payments with Dwolla. 34. ePayLater Headquarter(s): Mumbai Founded: 2015 Focus Area: Technology products and services Industry: Financial services Website:https://epaylater.in/ Founded in December of 2015 and based in Mumbai, India, ePayLater is a zero-cost credit solution for SMEs for purchasing their supplies. This solution is available to SMEs across physical and digital sales channels and empowers them to purchase inventory across product categories at the best available prices without being constrained for credit. It also helps reduce the trust deficit that typifies digital B2B commerce as buyer obligation to pay arises only after goods are physically received, with a further period of 14 days of interest-free credit. 35. Ezetap Mobile Solutions Headquarter(s): Bangalore, Karnataka Founded: 2011 Focus Area: Mobile solutions Industry: Financial Services Website:http://www.ezetap.com/ At Ezetap, veterans from the payments, hardware, cloud, and SaaS industries have joined hands for the sole purpose of ushering in a new era of a frictionless digital payment ecosystem in India. Ezetap’s Smart and Secure capabilities as an intelligent SaaS payments platform are already helping thousands of brick-and-mortar retailers, e-commerce players, enterprises, and financial inclusion organizations, transform their businesses. Vision To be the single solution through which businesses complete any financial transaction with their customers, supporting every instrument and method that their customers want to use. Disruptor. Innovator. Payments Leader. Ranked twice in a row by CNBC in their Global Top 50 Disruptor List in 2016 and 2017, Ezetap has been reimagining payments since 2011. Ezetap is the only payments solution company that has an end-to-end smart payment solution (including hardware) to address the needs of fast-growing enterprise companies. First, to introduce mobile POS SDK for enterprise companies in India, Ezetap is trusted by seven of the top ten mPOS merchants in Asia. As per the Reserve Bank of India POS Report published (Oct 2014-15), Ezetap’s market share was 1/3rd of all terminals activated in 2015. 36. Figure Headquarter(s): San Francisco, California Founded: 2018 Focus Area: Home equity products, blockchain, consumer lending Industry: Industrial services Website:http://www.figure.com/ Figure is transforming the trillion-dollar financial services industry using blockchain technology. In three short years, Figure has unveiled a series of fintech firsts using the Provenance Blockchain for loan origination, equity management, private fund services, banking, and payments sectors – bringing speed, efficiency, and savings to both consumers and institutions. Today, Figure is one of less than a thousand companies considered a unicorn, globally. Figure was founded in 2018 by serial technology entrepreneur Mike Cagney, who also founded SoFi and built the company into a multi-billion-dollar business under his leadership as CEO. 37. Financial Software & Systems (FSS) Headquarter(s): Chennai, Tamil Nadu Founded: 1991 Focus Area: Transaction switching services, ATM managed services, financial inclusion, processing, and hosted services Industry: Financial services Website:http://www.fsstech.com/ FSS is a global banking and digital payments company, with headquarters in India. The company has 150+ global customers, a team of 2500+ payment professionals, and a presence in India, Africa, Asia Pacific, Europe, the Middle East, and North America. FSS offers an integrated payments portfolio of Software Products & Custom Solutions and ATM, POS & Hosted Services. With 25+ years of experience in the payment domain, FSS offers expertise in Issuance, omnichannel acquiring, digital banking, smart reconciliation, payment processing, monitoring, digital security, payment analytics, and financial inclusion across various delivery channels and ecosystems. FSS’ customers include banks, central regulators, governments, financial intermediaries including third-party electronic payment processors, merchants, and payment associations. 38. Finly Headquarter(s): Bangalore Founded: 2015 Focus Area: Expense reporting, reimbursements, getting approvals, control spending, real-time visibility, tracking expenses Industry: Information technology &services Website: http://www.finlyhq.com/ Finly ensures CFOs & Finance Teams gain complete control & visibility over payables. All of this while increasing the Finance Teams’ productivity by over 80% by automating manual & repetitive operations and by simplifying remote collaboration within finance teams, through a powerful finance communication framework. Streamline invoice approvals, automate reminders, auto-update GLs on accounting systems, ensure audit compliance & governance with a system designed & built for finance teams. By providing the company with complete visibility into its spending, Finly keeps all company business systems in sync and offers the most dynamic reporting in the market. Their goal is to provide finance teams with tools and data that enable them to have real-time insights into their spends to make better strategic decisions and remove all expense management hurdles as your business scales. 39. Fisdom Headquarter(s): Bangalore, Karnataka Founded: 2015 Focus Area: Investment management, personal finance, save tax, building wealth Industry: Financial services Website:http://www.fisdom.com/ Fisdom is an automated investment service provider that manages a personalized online investment account. The personal finance startup also provides personalized investment recommendations. It plans to monetize by charging a commission from financial services companies and mutual funds. Its one-stop solution for customers choosing from a wide range of financial products, spell convenience in wealth management. Its trusted partnerships with leading banks, NBFCs, and financial institutions offer its customers a robust digital platform for investing. 40. Flywire Headquarter(s): Greater Boston Area, East Coast, New England Founded: 2011 Focus Area: B2B, global payments, financial services, universities, higher education, currency, payment processing Industry: Financial services Website:http://www.flywire.com/ Flywire Corporation (Nasdaq: FLYW) is a global payments-enablement and software company trusted by organizations around the world to deliver on their customers’ most important moments. Unlike other companies, Flywire is proven to solve high-stakes vertical-specific payment and receivables problems for organizations that deliver high-value services. Whether in education, healthcare, travel, or technology, Flywire has vertical-specific insight and technology that allows organizations to optimize the payment experience for their customers while eliminating operational challenges—from invoicing to payment reconciliation. Around-the-clock multilingual support via phone, email, and chat, and online tracking, ensure that both the client and customer have complete control over their payments. Flywire supports over 2,400 clients around the world with diverse payment methods in more than 140 currencies across 240 countries and territories. The company is headquartered in Boston and has offices in Chicago, Palo Alto, London and Manchester (UK), Valencia (Spain), Shanghai, Singapore, Tel Aviv, Tokyo, Cluj (Romania), and Sydney. 41. Forward Financing Headquarter(s): Boston, Massachusetts Founded: 2012 Focus Area: Working capital, business funding, and fintech Industry: Financial services Website:https://www.forwardfinancing.com/ Forward Financing is a Boston-based financial technology company that provides fast, flexible working capital to small businesses nationwide. Its dedicated account representatives and advanced proprietary technology help customers spend less time finding capital and more time growing their business. With a simple, secure online application, business owners can trust Forward Financing for approvals within minutes, funding within hours, and personalized support when they need it most. Since 2012, Forward Financing has expanded Main Street’s access to credit by providing over $1.2 billion in funding to more than 30,000 small businesses. The company is A+ rated by the Better Business Bureau and consistently receives top ratings across all major customer review platforms. Forward Financing has been named by both Inc. Magazine and the Boston Business Journal as one of the fastest-growing companies in Massachusetts each year since 2017. Forward Financing is committed to helping more small business owners succeed and achieve their full potential. 42. Fyp Headquarters(s): DLF Cyber City, Gurgaon, India Founded: 2012 Focus Area: Digital banking, banking for teenagers, and Fintech Industry: Financial Services Website:https://www.fypmoney.in/ Fyp is a numberless prepaid card for teenagers, empowering them with financial literacy. With Fyp Prepaid card, you can make online and offline payments without setting up a Bank Account. The company employs innovative technology to make the process of learning and managing expenses easier for these young, fierce, tech-savvy brains. It is a prepaid card for teenagers and their parents to easily manage their online as well as offline transactions. To give it a twist, it has employed gamification features that will help to inculcate financial literacy in teenagers. Not only this, but they can also check their spending analysis on the app. 43. Gravity Payments Headquarters(s): Seattle, WA Founded: 2004 Focus Area: Merchant credit card processing, credit card payment processing, business services, small business funding, mobile credit card processing, etc. Industry: Financial services Website:https://gravitypayments.com/ Gravity Payments delivers friendly, world-class, in-house customer service. It serves over 13,000 merchants across America, saving them millions in fees and hours of frustration. It strives to make credit card processing as simple as possible. Its specialties include mobile credit card processing, POS solutions, electronic payment processing, working capital funding, integrated payments, Wechat pay, AliPay, affordable merchant services, best credit card processor, best merchant services, accept payments, recurring billing, and eCommerce. 44. Hyperface Headquarters(s): Bengaluru, Karnataka Founded: 2021 Focus Area: Credit cards Industry: Information technology and services Website:https://hyperface.co/ Hyperface helps companies launch their own credit card program in a matter of 4-8 weeks, as opposed to 18-24 months. Hyperface offers customizable SDKs and APIs to make people design the credit card program of the future for their customers. The startup’s key clients include eCommerce companies, neobanks, and fintech looking to offer credit cards to their customers. It earns its revenue via the pay-as-you-use pricing model. The company believes in empowering brands and fintech to offer banking products contextually to their customers. Its credit cards-as-a-service is a ready-to-go card platform for fintech looking to create a fantastic card experience. 45. Instamojo Headquarters(s): Bengaluru, Karnataka Founded: 2012 Focus Area: Social commerce, mobile commerce, payments, MSME, small businesses, and online stores Industry: Internet Website:https://www.instamojo.com/ Instamojo is India’s simplest online selling platform. It powers small, independent businesses, MSMEs & startups with online stores and online payment solutions to help them run an eCommerce business successfully. Instamojo started with Payment Links, a simple URL that one can copy and paste anywhere on the internet and receive payments online via any payment mode. The company provides products and features that are built to give every business the complete eCommerce experience. 46. Judo Bank Headquarters(s): Southbank, Victoria Founded: 2016 Focus Area: SME business loans, business loans, business banking, banking, and business finance Industry: Banking Website:https://www.judo.bank/ Judo Bank is a challenger business bank determined to lead the way forward. The company is building a strong bank delivering successful outcomes. It strives to make today better, stronger, and more productive than yesterday. Judo’s relationship model places a priority on highly skilled and knowledgeable and imaginative relationship bankers who take the time to listen to business owners and understand their business, the market they operate in, and their ambition. 47. Khatabook Headquarters(s): Bangalore, Karnataka, India Founded: 2019 Focus Area: Online payment, QR code, UPI, etc Industry: Financial services Website:https://khatabook.com/ Khatabook is the world’s fastest-growing Saas company. It has become India’s leading business management app for MSMEs with 50M+ downloads in a remarkably short period of time. Khatabook enables micro, small and medium merchants to track business transactions safely and securely. It also offers features such as online payment collection through UPI and QR; sending periodic reminders to creditors via messages and report generation. Merchants are using its app extensively while adding US$200M worth of transactions every day. The high engagement has resulted in more than 25% of the total active merchants joining the platform through word-of-mouth and referrals. 48. Klarna Headquarters(s): Stockholm, Sweden Founded: 2005 Focus Area: Online payments, IT development, data analysis, expansion, E-commerce, international sales, and retail Industry: Financial services Website:https://www.klarna.com/international/ Klarna is the leading global payments and shopping service, providing smarter and more flexible shopping and purchase experiences to 90 million active consumers across more than 250,000 merchants in 17 countries. Klarna offers direct payments, pay after delivery options, and installment plans in a smooth one-click purchase experience that lets consumers pay when and how they prefer to. It offers products and services to consumers and retailers within payments, social shopping, and personal finances. Today, the company has 4,000 employees from more than 100 nationalities who all work for the same mission: to reshape shopping, by elevating the entire shopping experience for avid shoppers. 49. KredX Headquarters(s): Bangalore, Karnataka Founded: 2015 Focus Area: Bill discounting, invoice financing, alternative investments, etc Industry: Financial services Website:https://www.kredx.com/ KredX was started with the single mission of solving working capital challenges for businesses by utilizing an asset lying idle in its balance sheet in the name of accounts receivable. The KredX suite of products gradually evolved from an Invoice Discounting Platform catering to Working Capital requirements to solving bigger problems like early payments for corporate treasuries in the form of Early Payments Technology and Growth Capital solutions while fostering a thriving community of partners. Today, KredX is India’s leading integrated cash flow solutions provider helping enterprises & suppliers through innovative offerings while providing investors with an opportunity to earn high returns at low risk through an alternative short-term instrument. 50. Lendingkart Headquarters(s): Ahmedabad, Gujrat Founded: 2014 Focus Area: Financing, lending, small business loans, data analytics, automated credit decisions, and business loans Industry: Financial services Website:https://www.lendingkart.com/ Lendingkart Technologies Private Limited is a fintech startup in the working capital space. The company has developed technology tools based on big data analysis which facilitates lenders to evaluate borrowers’ creditworthiness and provides other related services. It is a non-deposit-taking NBFC, providing SME lending in India. The company aims to transform small business lending by making it convenient for SMEs to access credit easily. The company uses technology and analytics tools, analyzing thousands of data points from various data sources to assess the creditworthiness of small businesses rapidly and accurately. 51. Lendinvest Headquarters(s): London Founded: 2008 Focus Area: Debt trading, mortgages, fintech, alternative lending, alternative investment, property finance, capital markets, and engineering Industry: Financial Services Website:https://www.lendinvest.com/ LendInvest is the UK’s leading platform for property finance. Its mission is to make property finance simple. It has built an asset management platform designed to make the process of getting a mortgage simpler, reducing the form-filling, increasing the speed to get a ‘yes, and creating a better customer experience for our borrowers, intermediaries, and investors. In 2019 the company became the first UK fintech to securitize a portfolio of buy-to-let mortgages. 52. Loanwalle Headquarters(s): Delhi Founded: 2015 Focus Area: Instant loan, instant loan provider, quick cash loan, money, salary advance loan, short term loans, finance, easy loan. Industry: Financial services Website:https://www.loanwalle.com/ Loanwalle is a fintech quick 30-minute loan company with headquarters in Delhi and branches in Mumbai, Hyderabad, Bangalore, Kolkata, and 22 more. Its main USP is to give instant loans to its clients so whatever emergency situation they are finding themselves in gets resolved without any further hurdles. It has gone beyond the tedious waiting periods and speeded up the process of approval in such a way that it gets the client’s loan approved in just 15 minutes. 53. M2P Fintech Headquarters(s): Chennai, Tamil Nadu Founded: 2015 Focus Area: Mobile Payments, interoperable wallets, wallet as a service, digital payments, fintech, and neo banking Industry: Financial services Website:https://m2pfintech.com/ M2P fintech was born out of the need to build a highly scalable, secure yet nimble technology stack at the intersection of mobility, commerce, and payments. Its mission is to help every company become a fintech company. It has been able to help 500 of them since its inception. The company challenges the status-quo of how fintech works with regulated financial services providers. It provides a state-of-the-art modular API platform to build Fintech products with seamless money flow. The company also offers resource-based URLs that accept JSON or form-encoded requests. 54. MANTL Headquarters(s): New York Founded: 2016 Focus Area: Financial technology, banking, credit unions, core banking technology, UI/UX, systems architecture, data security, distributed systems, cloud infrastructure, etc. Industry: Financial services Website:https://www.mantl.com/ MANTL is an enterprise SaaS company helping traditional financial institutions modernize and grow. Its mission is to expand access to financial services. MANTL’s white-labeled account opening platform enables people to open deposit accounts on any device in roughly 2 minutes and 37 seconds. MANTL began as a challenger bank when an aha moment inspired the founders to pivot from competing to partnering with banks to deploy its technology at scale. It helps community institutions raise billions of dollars in core deposits each year and are proving that they can compete online with the right set of tools. 55. Money View Headquarters(s): Bengaluru, Karnataka Founded: 2014 Focus Area: Finance, technology, operations, analytics, class-leading customer support, simple apps, quick loans, and personal loan Industry: Financial services Website:https://moneyview.in/ Money View redefines financial inclusivity for a billion people. The company provides a Money Manager App that helps in tracking and managing clients’ personal expenses smartly. The App auto-tracks and organizes total spending, bills, and account balances to give a single real-time view of your overall finances. Along with the app it has Money View Loans which provides instant personal loans to underserved segments through a completely digital, easy-to-use platform. Its unique credit-assessment tool looks at more than just a credit score. 56. MoneyTap Headquarters(s): India Founded: 2015 Focus Area: Micro-investing Industry: Fintech, financial services Website:https://www.moneytap.com/ MoneyTap is India’s first app-based credit line. Offered in partnership with leading banks, it is not just a personal loan, not just a credit card, but a personal credit line. In simple words, MoneyTap is catering to the credit needs of middle-class customers in India. Present in 40+ cities, MoneyTap is providing small-medium cash loans, quick credit on mobile, affordable interest rates, and flexible EMIs. The MoneyTap application process is extremely consumer-friendly. It is continuously striving to bring the most seamless and hassle-free credit experience to consumers. 57. Monzo Headquarters(s): London, United Kingdom Founded: 2015 Focus Area: Mobile banking Industry: Fintech, financial services Website:https://monzo.com/ Monzo is known for doing things differently. For too long, banking has been obtuse, complex, and opaque. Monzo wants to change that and build a bank with everyone, for everyone. Its amazing community suggests features, tests the app, and gives us constant feedback so the company can build something everyone loves. Now more than 5.62M people use Monzo’s hot coral cards to manage their money and spend around the world. 58. Morningstar India Headquarters(s): India Founded: 2004 Focus Area: Micro-investing Industry: Fintech, financial services Website:https://www.morningstar.com/ Morningstar started with an idea, one great idea from a 27-year-old stock analyst. Joe Mansueto thought it was unfair that people didn’t have access to the same information as financial professionals. So, he hired a few people and set up shop in his apartment to deliver investment research to everyone. Morningstar builds products and offers services that connect people to the investing information and tools they need. The company puts in extra work to improve the quality of work and is always looking for new ideas to empower investors. 59. Mswipe Technologies Pvt Ltd Headquarters(s): Mumbai, India Founded: 2011 Focus Area: Digital payments Industry: Fintech, financial services Website:https://www.mswipe.com/ Mswipe is an independent mobile POS merchant acquirer and network provider. The company believes in serving the smallest of merchants. India currently has 12-15 million SMEs and mobile POS is the only channel that can efficiently link these SMEs to mainstream financial services and digital commerce. The Wisepos Neo is our latest smart POS terminal that accepts all payments – card, chip, magstripe, NFC, and Scan-to-pay QR. The terminal has a long battery life of ~15 hours on a single charge. 60. N26 Headquarters(s): Berlin, Germany Founded: 2013 Focus Area: Mobile banking Industry: Fintech, financial services Website:https://n26.com/en-eu N26 is The Mobile Bank, helping you manage your bank account on the go, track your expenses, and set aside money in real-time. N26 operates with a full European banking license, and your bank account with a German IBAN is protected up to €100,000, according to EU directives. And with fingerprint identification and advanced 3D Secure technology, you can rest assured you’re extra safe when making purchases in stores and online. Discover N26 Smart, the bank account that gives you more control over your money with a direct customer service hotline if you ever need support. 61. Navi Headquarters(s): Bengaluru, Karnataka, India Founded: 2018 Focus Area: Micro-investing Industry: Fintech, financial services Website:https://navi.com/ Navi offers instant personal loans to middle-class Indians at attractive interest rates through its mobile app which can be downloaded from the Google play store and within a few minutes users can check their loan eligibility along with the loan amount and interest rate offered. Once the personal loan is approved the user can choose the amount they need and EMI they are comfortable with. After completing the simple and fully online contactless KYC process the loan amount is instantly disbursed to the user’s bank account. Most users are able to complete the process within 10-15 minutes of downloading the app. 62. Niyo Solutions Headquarters(s): Bengaluru, Karnataka, India Founded: 2015 Focus Area: Micro-investing Industry: Fintech, financial services Website:https://www.goniyo.com/ Niyo is focused on creating banking that is simpler, smarter, and safer for its customers by simplifying finance with technology. Niyo is a Bengaluru-based fintech startup that offers digital banking solutions such as prepaid payroll cards, cross-border travel payment debit cards, and multi-wallet tax benefit cards to customers. Founded in 2015, Niyo operates as a neo-bank or challenger bank and offers digital banking products and services through partnerships with banks. Niyo is present in more than 30 cities across India with an employee strength of over 10000 across different cities. 63. Nubank Headquarters(s): Bengaluru, Karnataka, India Founded: 2013 Focus Area: Digital solutions Industry: Fintech, financial services Website:https://nubank.com/ Nubank is a technology company with a young and innovative spirit that develops simple, secure, and digital solutions for your financial life. The NU way of doing things was born out of nonconformity and became a force to build fair and transparent products for you. Your money will be in a Nubank account, but the control of it is totally yours. If you need any help, Nubank is there 24/7/365 ready to help you out. Nubank is a company made for people by people. And because of that, the firm is confident that Nubank is for you. 64. OakNorth Bank Headquarters(s): London, United Kingdom Founded: 2013 Focus Area: Digital bank Industry: Fintech, financial services Website:https://www.oaknorth.com/ OakNorth Bank is a UK bank for small and medium-sized companies that provides business and property loans. The bank, which gained regulatory approval in early 2015, was founded by entrepreneurs Rishi Khosla and Joel Perlman, who had previously founded Copal Amba. In 2018, the bank’s pre-tax profit was £33.9m. OakNorth Bank is redefining the way banks lend to the Missing Middle, giving today’s entrepreneurs access to the capital they need to grow, create jobs, build communities, and power the economy. The OakNorth Credit Intelligence Suite gives banks a 360-view of their borrowers, delivering extraordinary insight, and enabling faster, smarter credit decisions to open up new, profitable markets. 65. OfBusiness Headquarters(s): Gurugram, Haryana, India Founded: 2015 Focus Area: Credit for SMEs Industry: Fintech, financial services Website:https://www.ofbusiness.com/ OFB Tech (OfBusiness) is a tech-enabled platform that facilitates raw material procurement and credit for SMEs with a focus on the manufacturing and infrastructure sectors. It integrates technology to SME’s buying behavior to make available better products, at better prices, in better timelines to customers with comprehensive online and offline support. Key raw materials include metals, chemicals, polymers, Agri commodities, petrochemicals, and building materials. OfBusiness provides SMEs access to cash flow-based financing for buying raw materials through its NBFC ‘Oxyzo Financial Services’. The Company also offers a host of tech services for SMEs including BidAssist for new growth opportunities. 66. Optiver Headquarters(s): Amsterdam, Netherlands Founded: 1986 Focus Area: Cash equities, exchange-traded funds, bonds, and foreign exchange Industry: Fintech, financial services Website:https://www.optiver.com/ Optiver is a proprietary trading firm and market maker for various exchange-listed financial instruments. Its name derives from the Dutch Optiver handelaar, or “options trader”. The company is privately owned. Optiver trades listed derivatives, cash equities, exchange-traded funds, bonds, and foreign exchange. Good management and culture. The company treats its employees fairly and maintains a great life/work balance. Hardest part is keeping up, they move quickly and they hire top-tier talent. I enjoyed the work hard, play hard mentality. 67. Paydiant Headquarters(s): Massachusetts, United States Founded: 2010 Focus Area: Cloud-based services Industry: Fintech, financial services Website:http://www.paydiant.com/ Paydiant, Inc. is a PayPal-owned financial services company based in Auburndale, Massachusetts, which was incorporated in 2010. Paydiant provides cloud-based services for merchants, banks, and point-of-sale and ATM providers. Paydiant provides a white-label mobile wallet platform that includes mobile payments, loyalty, offers, ATM cash access, and related commerce services. The patented cloud-based platform enables merchants and banks to deploy their own secure mobile wallet solutions under their own brands, in their own apps. 68. PayJoy Headquarters(s): San Francisco, California Founded: 2015 Focus Area: Consumer finance, mobile, data science, emerging markets, next billion, and access Industry: Financial services Website:https://www.payjoy.com/ PayJoy’s mission is to deliver access to credit to the next billion people in emerging markets worldwide. Its unique mobile locking technology gives customers the ability to afford their first smartphone on credit, using the phone itself as collateral, and then provides further access to credit to help weather life’s unexpected financial surprises and climb the ladder of economic well-being. PayJoy has reached millions of customers in a dozen countries around the globe, including Mexico, Brazil, India, Kenya, and South Africa, and is on a strong growth path with support from major industry partners to bring credit to the next billion emerging consumers. 69. Payoro Headquarters(s): Birkirkara Founded: 2021 Focus Area: Banking, finance, software, psd2, and open banking Industry: Fintech, financial services Website:https://payoro.com/ Payoro is an innovative PSD2 account servicing platform, connecting consumers with European financial institutions. It enables easy bank account creation and money transfer through dynamic partner relationships and innovative fintech. In accordance with PSD2, all user information is verified based on strong customer authentication (SCA) so you don’t have to worry about the legalities. With an in-house team of attorneys and auditors, Payoro handles all aspects relating to national AML and KYC, allowing financial institutions to concentrate on what they are best at handling money and building customer relationships. 70. Paytm Headquarter(s): Noida, India Founded: 2010 Focus Area: Mobile payments, financial services, E-Commerce, lending, and insurance Industry: Fintech, financial services Website:https://paytm.com/ Paytm is a global Indian technology firm located in Noida that focuses on digital payment systems, e-commerce, and finance. Paytm is currently available in 11 Indian languages. It offers a web- and mobile-based platform for mobile recharges, money transfers, bill payments, trip reservations, hotel, and ticket bookings, booking cylinders, gold purchases, and contributions, among other things. It provides banking, credit cards, loans, and investment platforms for insurance, mutual funds, and other types of investments. The app is compatible with both Android and iOS devices. 71. Perfios Headquarter(s): Bangalore, Karnataka Founded: 2008 Focus Area: Financial services, banking, data sciences, loan analytics, data analytics, machine learning, artificial intelligence, credit underwriting, fintech, credit risk management, and machine learning data platform Industry: Fintech, financial services Website:https://www.perfios.com/ Perfios is a leading product technology firm that helps organizations gather structured and unstructured data, curate it, analyze it, and use it to make better decisions. Perfios’ product solutions assist businesses in developing vertical apps across a variety of sectors. In the last nine years, Perfios has gained over 100 big clients in India and overseas, including banks, NBFCs, digital lending platforms, mutual fund firms, insurance companies, and human resources. 72. PineLabs Headquarter(s): Noida, India Founded: 1998 Focus Area: Payment solutions, card swipe machine (GPRS, WiFi, NFC, DGPRS), EMI at POS, business loan at POS, mobile wallet acceptance at POS, POS integration with the billing system, card points redemption at POS, and POS integration with the billing system Industry: Information technology and services Website:https://www.pinelabs.com/ Pine Labs provides a merchant platform with technological and financial solutions to assist merchants in growing revenue, lowering the cost and complexity of running a business, and managing the risks that come with it. The firm brings together financial institutions and consumer brands to enable merchants to provide value to their consumers. Pine Labs and its technology platform enable physical and online last-mile retail transactions, give merchants consumer data for targeted sales, and provide risk-managed finance solutions to help merchants expand their businesses. 73. Plum Headquarter(s): London, England Founded: 2016 Focus Area: Money management Industry: Financial services Website:https://withplum.com/ Plum is driven by automation and works as a financial autopilot. You’re in command, with smart expenditure analytics and budgeting tools at your disposal to help you reach your financial goals. Plum will get you there securely, so you won’t have to worry about things like saving money or finding the greatest price on home expenses. Plum helps you get the most out of your savings and investments. They have imagined a world in which people manage their money without having to worry about it or even think about it. 74. Policy Bazaar Headquarter(s): Gurgaon, Haryana, India Founded: 2008 Focus Area: Insurance, banking liabilities, and loans Industry: Insurance Website:https://www.policybazaar.com/ PolicyBazaar.com is a leading online life and general insurance aggregator in India. They specialize in comparing and contrasting insurance policies. The comparison is based on pricing, quality, and major features. All of India’s major public and private insurance firms have strong ties with PolicyBazaar.com. Life insurance, health insurance, vehicle insurance, travel insurance, business insurance, and lending companies are among their partners. They use these alliances to streamline their expertise and business processes, display pricing directly from insurers, compare plans with full information, and provide the option of purchasing insurance online. 75. Prodigy Finance Headquarter(s): London Founded: 2007 Focus Area: International MBA funding, student finance, postgraduate funding, international masters funding, and fintech Industry: Financial services Website:https://prodigyfinance.com/ Prodigy Finance was founded by three INSEAD MBA alumni who had first-hand experience with the challenges of funding an overseas degree. They decided to tackle this problem and revolutionize the industry in 2007, and since then, Prodigy Finance has supported over 19,000 students from 115 countries attending over 750 institutions all over the world. Prodigy Finance thinks that talent knows no boundaries and that the greatest education should be offered to the most deserving pupils. The firm offers no-collateral education loans to worldwide master’s students who wish to follow their dreams at the world’s top universities. 76. RazorPay Headquarter(s): Bangalore, Karnataka, India Founded: 2014 Focus Area: Financial products, payment processing, payout processing, banking services, neo banking, working capital loans, E-commerce fraud detection, and payroll processing Industry: Computer Software Website:https://razorpay.com/ Razorpay is the first full-stack financial solutions provider in India. They’re on a quest to improve the payment experience for more than 300 million people. They hope to make it possible for Indian businesses, large and small, to take payments online with little effort and maximum convenience. Razorpay has evolved from a payment gateway provider to a solutions-oriented company with a broad product suite for accepting and disbursing payments, as well as raising funds and parking money. In a nutshell, the corporation may be found in every nook and cranny of your organization that involves money. 77. Remitly Headquarter(s): Seattle, Washington Founded: 2011 Focus Area: Mobile payments, remittance, digital money transfer, and fintech Industry: Financial services Website:https://www.remitly.com/us/en/india Remitly is an international payments firm that uses digital methods to transmit money throughout the world, including mobile phones. Customers can move money across borders faster, cheaper, and more conveniently using Remitly’s digital products. It assists the millions of immigrants across the world who leave their families behind to live and work in another nation. These unsung heroes keep their pledges to look after individuals they care about and offer them opportunities for advancement. They work hard to make their hard-earned money go further, ensuring that more of it reaches their loved ones securely. 78. Renewbuy Headquarter(s): Gurgaon, Haryana, India Founded: 2015 Focus Area: Insurance, two-wheeler insurance, car insurance, motor insurance, health insurance, life insurance, online insurance, insurance POSP advisors, travel insurance, insurance advisor, and insurance POSP Industry: Financial Services Website:https://www.renewbuy.com/ Indraneel Chatterjee and Balachander Sekhar founded RenewBuy in 2015. Its business operates on a B2B2C model, with a unique technology platform (App & Web platform) that allows their trained POSP (point of sale person)/advisor to sell insurance to their clients. RenewBuy operates based on a digital agent model, which provides transparency and quick insurance at cheaper costs from a variety of sources. RenewBuy has 42 offices with a total of 1312 employees and works with over 20 insurers in the areas of auto, health, life, and travel insurance. 79. Riskified Headquarter(s): New York Founded: 2013 Focus Area: E-commerce, machine learning, chargeback guarantee, card not present, eliminating chargebacks, and minimizing declines Industry: Computer Software Website:https://www.riskified.com/ Riskified is on a mission to help businesses reach their full eCommerce potential by making it secure, accessible, and frictionless. They’ve created a cutting-edge platform that enables internet businesses to build trusting connections with their customers. Their software identifies the human behind each online contact using machine learning and a worldwide merchant network, allowing merchants – their customers – to reduce risk and ambiguity from their company. When compared to their merchants’ performance before onboarding, they produce better sales, lower fraud, and other operational expenses, and deliver superior consumer experiences. 80. Robinhood Headquarter(s): Menlo Park, California Founded: 2013 Focus Area: Financial markets Industry: Financial services Website:https://robinhood.com/us/en/ Robinhood was established on the basic premise that financial markets should be open to everyone. This hasn’t always been simple in an industry where restrictions have existed for far too long. They’re leveling the playing field by making trading more straightforward, inexpensive, and inclusive, so that everyone can participate in the financial system, regardless of wealth or industry experience. They think that the financial system should be designed to benefit all people. That is why they provide products that enable you to begin investing at your own speed and on your own terms. 81. Rubique Headquarter(s): Mumbai, Maharashtra, India Founded: 2014 Focus Area: Financial products Industry: Financial services, Fintech Website:http://www.rubique.com/ Rubique, a fintech firm, demystifies complicated financing procedures and empowers consumers and small businesses by giving quick and easy access to credit through a variety of credit cards and loan products, making finance simple for them. Rubique’s marketplace lending platform, which is based on a unique matchmaking algorithm, offers ground-breaking features such as real-time processing and online approval through direct interaction with financial institutions’ systems, considerably decreasing processing time. Rubique’s technology uses data analytics to analyze clients’ creditworthiness (loan origination qualification), providing predictability by presenting him with suitable offers to pick from. 82. Shiksha Finance Headquarter(s): Chennai, Tamil Nadu, India Founded: 2014 Focus Area: Education Industry: Financial services Website:https://shikshafinance.com/ Shiksha Finance is an RBI-licensed non-bank finance company (NBFC) that has made a significant impact in the education sector by providing loans for asset creation and working capital to schools and educational institutions to establish high-quality educational infrastructure, as well as loans for school fees to lower-income parents to lower school drop-out rates. School vendors may also be granted loans in exchange for the delivery of goods and/or services to schools. They operate across the education sector, with a particular focus on the bottom of the pyramid’s cheap education (and schooling) segment. 83. Shopkeep Headquarter(s): New York Founded: 2008 Focus Area: iPad point of sale, IPad cash register, cloud POS, mobile POS, POS system, and POS software Industry: Computer software Website:https://www.lightspeedhq.com/ ShopKeep by Lightspeed empowers tens of thousands of small companies to sell in-store and online, accept payments, and manage their day-to-day operations. Businesses use ShopKeep by Lightspeed to manage their inventory and workers, create an eCommerce shop, send invoices, get real-time sales statistics, and more – all from a single, user-friendly platform. ShopKeep by Lightspeed is based in New York City, with offices in Portland (OR), Chicago (IL), and Belfast (NIR). 84. SoFi Headquarter(s): San Francisco, California, United States Founded: 2011 Focus Area: Insurance, loans, personal finance, credit scores, budgeting Industry: Fintech, financial services Website:https://www.sofi.com/ SoFi aims to help its customers reach their financial goals. It is a finance company that offers a wide range of lending and wealth management services. The company primarily caters to aspiring professionals and offers variable and fixed-rate percentages for personal, study loans, mortgage refinancing, and more. They develop modern financial products to help people borrow, save, invest, and protect their money better so that they achieve financial independence. 85. Spring Labs Headquarter(s): Marina Del Ray, California, United States Founded: 2017 Focus Area: Blockchain, credit, financial services Industry: Fintech Website: https://www.springlabs.com/ Spring Labs created the Spring Protocol. It is a network designed to allow network participants, such as financial institutions, to share information, such as credit and identity data, without needing to share any underlying information. The company allows organizations to share information among themselves to verify their identities and reduce fraud by securing all the information. Spring protocol focuses on ‘thin file’ or ‘credit invisible’ consumers by creating incentives to provide data and create value. 86. Starling Bank Headquarter(s): London, United Kingdom Founded: 2014 Focus Area: Banking, payment services Industry: Fintech, financial services Website: https://www.starlingbank.com/ Starling Bank is an award-winning, fully-licensed, and regulated bank that is created to provide the customers with fairer, smarter, and, more humane alternatives to the banks of the past. The company offers different types of accounts like a joint, teen, business, euro, dollar, personal, and child cards. Starling also provides B2B banking facilities and payment services through its banking-as-a-service model based on the proprietary technology platform created by the bank. Its world-class tech has reimagined banking for the future. 87. Stripe Headquarter(s): San Francisco, California, United States Founded: 2010 Focus Area: SaaS technology, mobile payments, online invoicing, billing Industry: Fintech, financial services Website:https://stripe.com/en-in Stripe is a technology company that is focused on building economic infrastructure for the internet. Businesses of every size, starting from new startups to public companies, use the company’s software to accept online payments and run complex global operations. Stripe combines economic infrastructure with a set of applications for modern business models like crowdfunding and marketplaces, fraud prevention, analytics, and more. The company navigates for global regulatory uncertainty and partners closely with internet leaders like Apple, Google, and Twitter, to name a few. 88. Suplari Headquarter(s): Seattle, Washington, United States Founded: 2016 Focus Area: Artificial intelligence, machine learning, finance, enterprise software Industry: Financial services Website:https://suplari.com/ Suplari is an innovative startup, led by veteran entrepreneurs focused on leveraging machine learning to help enterprises change the way they manage their suppliers and costs. The company has developed the first-ever Spend Intelligence Cloud that enables finance, procurement, and business leaders to continuously and collaboratively optimize sourcing, forecasting, risk, and compliance. Suplari aggregates data from disconnected internal systems including contracts, invoices, and other relevant data into a common data store. 89. Tag Headquarter(s): Islamabad, Pakistan Founded: 2020 Focus Area: Money transfer, instant P2P transfers, mobile recharge, financial services Industry: Fintech Website: https://tagme.pk/ TAG Innovation is the first digital bank of Pakistan. It provides digital wallets and payment services to its customers. TAG provides its users with a personal IBAN account number to receive funds from anyone around the world, without any charges attached. It also provides an easy money transfer feature that allows the transfer of money from any bank or digital wallet in Pakistan. Their systems are encrypted with the highest levels of security so that the personal information and transaction details of the customers are not jeopardized. 90. Tala Headquarters(s): Santa Monica, California Founded: 2011 Focus Area: Mobile technology, credit scores, big data Industry: Financial services Website:https://tala.co.in/ Tala is a fintech company that aims to build financial systems that can work and help everyone. Tala has disbursed about US$1 Billion to more than 4 million customers across East Africa, Mexico, the Philippines, and India. Most of the businesses in these regions have expanded the businesses to pay school fees and bills for building more stable financial lives. The company is powered by data science and machine learning that builds modern credit infrastructure from scratch. 91. Tandem Headquarter(s): London, United Kingdom Founded: 2015 Focus Area: Banking, finance Industry: Financial services Website:https://www.tandem.co.uk/ Tandem is building a good green bank. Tandem Bank operates as an internet bank, accompanied by a web app. It is challenging the traditional banking legacy by building an app and other products with input from their community of users. Tandem’s goal is to make money simple, help the users save and relax from financial stress. Its open banking feature ensures easier management than traditional bank transfers and is more secure than card payments. 92. Tide Headquarter(s): London, United Kingdom Founded: 2015 Focus Area: Banking, credit, mobile apps, financial services Industry: Fintech Website:https://www.tide.co/en-in/ Tide’s mission is to help SMEs save time and money while running a business. It is one of the leading providers of digital business banking services and is also one of the UK’s fastest-growing fintech. Tide platform not only offers business accounts and related banking services but is also a comprehensive set of highly usable administrative solutions, such as full integration with accounting systems. Tide believes that truly serving SMEs requires a relentless focus on their needs. 93. TransferWise Headquarter(s): London, United Kingdom Founded: 2011 Focus Area: Payments, finance Industry: Fintech, financial services Website:https://wise.com/ TransferWise is now known as Wise. This platform focuses on providing a core money transfer product, along with a borderless account for its audience of travelers and freelancers. The primary mission of Wise is to help people make money without borders. Their multi-currency account and the clever debit card will replace the international banking systems. This platform mainly focuses on customer experiences to be transparent, simple, and fair. 94. TransUnion Headquarter(s): Chicago, United States Founded: 1968 Focus Area: Information technology, credit bureau, legal Industry: Financial services Website:https://www.transunion.com/# TransUnion is a global information and insights company that helps establish trustworthy relationships between customers and businesses, by ensuring that each partner is reliably and safely represented in the market. The company provides a platform that brings total credit protection, all in one place, from credit alerts, credit scores, and credit reports. With this help, organizations can better understand consumers to make more informed decisions. Businesses and consumers can transact safely and achieve great things together. 95. TrueAccord Headquarter(s): Lenexa, Kansas, United States Founded: 2013 Focus Area: Debt Collection, machine learning, financial services Industry: Fintech Website:https://www.trueaccord.com/ TrueAccord is reinventing the relationship between creditors and lenders with an ML-driven digital approach for debt collection. The company’s technology personalized outreach to each customer across digital channels, optimizing for performance while delivering a customer experience that will build long-term brand loyalty. TrueAccord also believes in building ethical values in organizations to promote equality and advance diversity and inclusion in the workplace. The company believes in bringing the A-game and continues to be prepared to contribute the best. 96. TrueLayer Headquarter(s): London, United Kingdom Founded: 2016 Focus Area: Banking, developer APIs, developer Tools Industry: Fintech, financial services Website: https://truelayer.com/ TrueLayer is focused on building an infrastructure that puts fintech at people’s fingertips. Its fintech platform is utilized to build different financial apps that connect to bank data, verify accounts, and access transactions in real-time. It uses its toolkit to develop consumer and server message block applications in the areas of payments, online lending, robotic advisers, insurance, P2P marketplaces, and cryptocurrencies. It aims to grow the open banking economy for companies to develop new financial services and plans. 97. Upstox Headquarter(s): Mumbai, Maharashtra, India Founded: 2010 Focus Area: Trading platform, finance Industry: Fintech Website:https://upstox.com/ Upstox is a fintech company that allows innovative investment options for its clients. It also provides securities brokerage and stock trading services. It also allows retail investors to trade in the equity market through its platform, which ensures that the clients reap the benefits of a high-tech online trading platform and world-class services every step of the way from the time they open an account to executing trades and beyond. 98. Varo Bank Headquarter(s): San Francisco, United States Founded: 2015 Focus Area: Mobile banking Industry: Fintech Website:https://www.varomoney.com/ Varo is an entirely new kind of bank. It is driven by a mission to redefine banking so it is easy for everyone to make smart choices with their money. In one mobile app, Varo offers customers no-cost premium bank accounts and high-interest savings accounts offered through the BanCorp Bank, and tech-first features to help people manage their money efficiently. The company believes that every person regardless of their net worth should be treated fairly by the banks if they want to succeed. 99. Venmo Headquarter(s): New York, United States Founded: 2009 Focus Area: Payment service Industry: Financial service Website: https://venmo.com/ Venmo is a mobile payment service that is owned by PayPal. The account holders of Venmo can transfer funds to others via a mobile phone app, but the only condition of this payment app is that both the sender and receiver need to stay in the U.S itself. It is a digital wallet that can make money transactions easier for everyone ranging from students to small businesses. The users can purchase items and split checks without using a credit card. It also allows you to choose a funding source by linking a credit card, bank account, or using the Venmo balance too. 100. Zebpay Headquarters(s): Malta, Rezeknes, Latvia Founded: 2014 Focus Area: Cryptocurrency Exchange Industry: Financial services, blockchain, apps Website:https://zebpay.com/ Zebpay is a trusted and secure crypto exchange with a wallet that serves customers across the globe. Zebpay is available on the Web, Android, and iOS for trading bitcoin, ether, ripple, and various other popular cryptocurrencies. Zebpay for Android and iOS offers a seamless mobile trading experience to everyone, everywhere. More than 3 million consumers have trusted Zebpay for its security and ease of use for crypto trading worldwide. It is one of the first major exchanges to integrate Lightning Network transactions.

#### No laundering risks from crypto

Bisen 21 (Arjun Bisen is a Fulbright scholar, technology policy advisor, former Australian diplomat, and affiliate of the Technology and Public Purpose Project at Harvard Kennedy School’s Belfer Center for Science and International Affairs, Will digital currencies dethrone or cement the US dollar? 5-16, <https://thehill.com/opinion/finance/553771-will-digital-currencies-dethrone-or-cement-the-us-dollar?rl=1>, y2k)

Overstated risks of crypto currencies

In reality, however, only an estimated 0.34 percent of all cryptocurrency activity in 2020 related to criminal activity, according to Chainalysis’ 2021 report, significantly less than the UN’s estimate of the proportion of money laundering in the global economy. This is because while cryptocurrencies appear anonymous, chain analysis methodologies can often reveal who owns a wallet in order to identify illicit activities and sanctioned entities. Furthermore, Know Your Client (KYC) style regulatory requirements force intermediaries and exchanges to collect tax and identity data to ensure compliance.

#### Great powers don’t want to enter—it would be contained

Sano 15 - Yoel, Head of Global and Political Security Risk at BMI Research, August 25, "Why Great Power Conflict Risk Is Rising", <http://thewhyforum.com/articles/why-great-power-conflict-risk-is-rising>

Middle East: A conflict between Israel and Iran, between Iran and Saudi Arabia, or Iran and Turkey, would be unlikely to escalate into a world war, because the scope for combat to spread beyond the Middle East is highly limited. For example, the Iran-Iraq War of 1980-1988 was certainly substantial, and involved the US, USSR, and several Arab countries as proxy players, but was limited in geographic scope to the Gulf region. So too were the Gulf War of 1991 and the Iraq War of 2003-2011. While the US could get dragged into a new Middle Eastern quagmire in Syria and Iraq as a result of the militant group Islamic State's advances, or against Iran if the present rapprochement fails, neither Russia nor China has the combined ability and willingness to intervene directly on behalf of Iran.

## 1NR

**Outweighs the aff on magnitude**

Damian **Carrington 17**, environment editor @ the Guardian, citing Paul Ehrlich, Professor @ Stanford, "Earth's sixth mass extinction event under way, scientists warn," Guardian, https://www.theguardian.com/environment/2017/jul/10/earths-sixth-mass-extinction-event-already-underway-scientists-warn

The scientists conclude: “The resulting **biological annihilation** obviously will have serious ecological, economic and social consequences. **Humanity** will eventually **pay a very high price** for the decimation of the **only assemblage of life that we know of in the universe**.” They say, while action to halt the decline remains possible, the prospects do not look good: “All signs point to ever more powerful assaults on biodiversity in the next two decades, painting a dismal picture of the future of life, including human life.” Wildlife is **dying out** due to habitat destruction, overhunting, toxic **pollution**, invasion by alien species and **climate change**. But the **ultimate cause of all of these factors is** “human **overpopulation** and continued population growth, and overconsumption, especially by the rich”, say the scientists, who include Prof Paul Ehrlich, at Stanford University in the US, whose 1968 book The Population Bomb is a seminal, if controversial, work. “The serious warning in our paper needs to be heeded because civilisation **depends utterly** on the **plants**, **animals**, and **microorganisms** of Earth that supply it with **essential ecosystem services** ranging from crop pollination and protection to supplying food from the sea and maintaining a livable climate,” Ehrlich told the Guardian. Other ecosystem services include **clean air** and **water**.

**Abortion is the vital internal link to controlling population growth – here’s a study that cites data from 116 countries**

Steven **Mumford 86**, PhD in Population Studies @ University of Texas, “Role of abortion in control of global population growth”, https://www.ncbi.nlm.nih.gov/pubmed/3709011

**No nation** desirous of reducing its growth rate to 1% or less can expect to do so **without the widespread use of abortion**. This observational study, based on the experience of **116 of the world's largest countries**, supports the contention that abortion is **essential** to **any national population growth control effort**. The principal findings are: Except for a few countries with ageing populations and very high contraceptive prevalence rates, developed countries will **need to maintain abortion** rates generally in the range of 201-500 abortions per 1000 live births if they are to maintain growth rates at levels below 1%. The current rate in the USA is 426 abortions per 1000 live births. Developing countries, on the other hand, are faced with a different and more difficult set of circumstances that require even greater reliance on abortion. No developing nation wanting to reduce its growth to less than 1% can expect to do so without the widespread use of abortion, generally at a rate greater than 500 abortions per 1000 live births. Widespread availability of abortion is a **necessary** but not sufficient **condition** to achieve growth rates below 1%. A high contraceptive prevalence is essential as well in order to achieve growth rates below 1%. A high contraceptive prevalence is a necessary but not sufficient condition to achieve population growth rates below 1%. A high rate of abortion (generally 201-500 or more abortions per 1000 live births in the developed and greater than 500 abortions per 1000 live births in the developing countries) is essential to achieve growth rates below 1%. The different and more difficult set of circumstances faced by developing countries that will necessitate even higher abortion rates than developed countries includes a young population with resultant rapidly growing numbers of young fertile women, poor contraceptive use-effectiveness, low prevalence of contraception, and poor or non-existent systems for providing contraceptives. These data show that high death rates of infants and children can moderate population growth rates--a most undesirable solution. The data in this report suggest that actual alternatives are high death rates of infants and children or widespread use of contraception and abortion. African nations tend to have the very lowest abortion rates and the very highest infant and child death rates. To **avoid a world** with deteriorating **social**, **economic** and **political stability**, with the concomitant loss of personal and national security, we must ensure that **safe abortion** is made available to **all who wish to use this service.**

**US abortion policy is modeled – spills over globally**

Naomi **Elster 16**, “How U.S. Policies Shape Abortion Rights Around The World”, https://theestablishment.co/how-u-s-policies-shape-abortion-rights-around-the-world-4ffcb3677a43

It’s no secret that the United States has a massive global influence on politics — but too often, we forget how this influence **extends to women’s rights**. Around the world, **countries make decisions on abortion** and **reproductive health** that **can be traced**, at least in part, **to precedents set in the U.S**. “The U.S. can be quite isolationist; it doesn’t often look outside of its borders. But a lot of other countries do **look to the U.S.** and will cite U.S. Supreme Court proceedings in their own court proceedings,” explains Grace Wilentz, a human rights activist and policy expert based in Dublin, Ireland, who has over 10 years of experience working in the sexual and reproductive rights arena and consulting for multiple international NGOs and UN agencies on these issues. With the election approaching, it’s a particularly valuable time to look at the ways that **U.S. policies shape those around the world** — and how this affects even more than **the crucial issue of abortion access.**

**Normal means for the aff would be a 5-4 ruling with Kavanaugh and Roberts voting with the liberals---this link is extremely unique to antitrust and resolves court backlash**

**Stohr 20** (Greg Stohr, Bloomberg News, Kavanaugh Emerges as Man-in-Middle With Court Set to Shift Right, 9-23, <https://news.bloomberglaw.com/us-law-week/kavanaugh-emerges-as-unlikely-liberal-hope-for-court-swing-vote>, y2k)

“**Kavanaugh** would by default become the most logical person to play the **pivot role**,” said Carter Phillips, a lawyer at Sidley Austin who has argued 79 Supreme Court cases.

That would mean to some degree supplanting Chief Justice John **Roberts**, who has held the **balance of power** for the past two years, largely backing **conservative** results **but** joining with the **liberal wing** to strike down an abortion regulation and preserve the DACA deferred-deportation program.

Confirmed in 2018 after a bitter fight, Kavanaugh is hardly an ideal choice for Democrats, even if they ignore the lingering raw feelings stemming from the sexual assault allegations that almost derailed his nomination. Kavanaugh angrily denied the allegations before winning confirmation on a 50-48 vote.

In his two terms on the court, Kavanaugh has established himself as a consistent conservative. He has backed religious freedoms, voted against LGBT workers and sided with Trump on presidential powers and immigration issues. Kavanaugh has also supported property rights and the death penalty and voted to shield partisan gerrymanders from constitutional challenges.

Unlike fellow Trump appointed Justice Neil **Gorsuch**, Kavanaugh hasn’t shown any inclination to side with the liberal wing and flip the outcome of a blockbuster case. Only **once**, in **an antitrust dispute,** has he joined the court’s liberals in **a 5-4 ruling** in an argued case.

When Gorsuch and Roberts voted to interpret federal job-discrimination law as protecting gay and transgender workers this year, Kavanaugh was in dissent. Even as he wrote that gay people “have advanced powerful policy arguments and can take pride in today’s result,” Kavanaugh said Congress would have to change the law to give them job protections.

The Eight Remaining Supreme Court Justices: Who Are They?

In other areas, Kavanaugh has emerged as more of a centrist and an incrementalist than fellow Trump appointee Gorsuch. Kavanaugh has agreed with Roberts more than with any other justice so far, **according to statistics** compiled by Scotusblog.

Abortion Opinion

When he voted in favor of a Louisiana abortion regulation this year, Kavanaugh wrote separately to underscore that he wasn’t offering an ultimate verdict on the law. Doctors were challenging a requirement that they get privileges at a local hospital, and Kavanaugh said they hadn’t yet proven they would be unable to obtain those rights.

“In my view, additional factfinding is necessary to properly evaluate Louisiana’s law,” he wrote. Kavanaugh had previously urged his colleagues in a private memo to sidestep the abortion dispute, CNN’s Joan Biskupic reported in July.

Kavanaugh has also suggested he is less willing than Gorsuch to overturn the court’s past decisions, says David Strauss, a constitutional law professor at the University of Chicago School of Law. That could prove important when the court is inevitably asked to overturn the 1973 Roe v. Wade decision, which legalized abortion nationwide.

“Justice Kavanaugh is more committed to what you might call traditional judging -- following precedent, deferring to the political branches, doing what Congress wanted to do even if it didn’t express itself perfectly,” Strauss said. “Justice Gorsuch is more inclined just to reject positions that he thinks are wrong.”

Health-Care Fight

Kavanaugh has proven reluctant to throw out an entire statute just because one part is unconstitutional. That will be a central issue when the court on Nov. 10 takes up a Trump-backed bid to throw out the Affordable Care Act and its protections for people with pre-existing conditions.

“Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute,” Kavanaugh wrote in July in a case involving the federal ban on robocalls to mobile phones.

Ginsburg’s Death Injects New Doubt Into Fate of Obamacare

In other areas of the law as well, Kavanaugh has shied away from absolutist positions. This year he joined a 6-3 decision that said the Clean Water Act applied to some pollution discharges that don’t go directly into a major body of water. In 2019 he joined Roberts and the liberals in halting the death sentence of a man unless he was allowed to have a Buddhist spiritual adviser in the death chamber with him.

And after the court heard its first gun-rights case in a decade last year, Kavanaugh joined Roberts and the liberals by voting to drop the case because New York City and the state of New York changed the handgun-transportation laws that were being challenged.

Kavanaugh, however, later said the court should have heard a challenge to a New Jersey law that requires people to show a “justifiable need” to get a carry permit.

**Court’s Legitimacy**

All that could leave Kavanaugh as an occasional, if not frequent, supporter of **Roberts’s efforts** to protect the **court’s institutional legitimacy** by trying to avoid **polarizing rulings.**

Kavanaugh isn’t likely to change his approach just because the court gets a new member, said Helgi Walker, a Washington lawyer with Gibson Dunn & Crutcher and a former law clerk to Thomas.

“I think he has a firm jurisprudence of his own, and he’s committed to what he believes is the right approach, and I don’t see changes in the composition of the court changing his course,” Walker said.

But a new justice could put Kavanaugh in a **different position**, forcing him to decide whether conservatives will accomplish long-sought legal goals, or at least how quickly.

“There was some speculation when Justice Kavanaugh was appointed that he would give the chief ‘**cover’** by voting **with him** when he agreed with the liberals in **5-4 cases**,” Strauss said. “That didn’t happen very much last term, but **if there is a real threat to the court**, I can see that **changing**.”

**Ideological crossing---unexpected departure from the conservative turn is central to Robert’s vision to shield the court from partisan backlash**

**Abelite 21** (Isabella Abelite, Fordham University School of Law, Protecting the Supreme Court: Why Safeguarding ding the Judiciary’s Independence is Crucial to Maintaining its Legitimacy, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2108&context=faculty_scholarship>, y2k)

**Ideological Predictability**

In recent years, many justices now arrive at the Court with **already-established** judicial ideologies.155 This is because presidents have been selecting their Supreme Court nominees almost exclusively from the Courts of Appeals.156 The underlying strategy of selecting federal appellate judges as Supreme Court nominees is to ensure some semblance of ideological reliability.157 By selecting justices with a clear ideology, certain views may disproportionately influence the Court and the greater legal community, even if those views represent a minority outlook when a justice comes to the Court.158 Despite this strategy, several justices throughout history have appeared to **depart** from the ideologies they held when they were appointed. Justice James McReynolds, who was appointed by the Democratic President Woodrow Wilson, became one of the “four horsemen” who threatened to completely derail Democratic President Franklin Roosevelt’s **New Deal** legislation.159 Justice Harry Blackmun, whom Republican President Richard Nixon nominated, became more liberal during his tenure and even authored the majority opinion in Roe v. Wade. 160 Justice Blackmun later defended the importance of the decision, which held that the Constitution protects a woman’s right to obtain an abortion, and continued to vote to preserve the right to choose.161 This phenomenon of **unexpected**, **ideological aisle-crossing** has become rarer.162 More predictable rulings indicates that presidents are nominating individuals who are more ideologically consistent in their decision-making and less moderate in their ideology.163 In fact, President George W. Bush’s appointees, Chief Justice John Roberts and Justice Samuel Alito, have been described as “impeccably conservative.”164 Meanwhile, President Bill Clinton’s and President Barack Obama’s appointees, Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor, have maintained a liberal presence on the Court.165 With the additions of Justices Neil **Gorsuch**, Brett **Kavanaugh** and Amy Coney **Barrett**, it seems to many that the Court has a solidified **conservative** majority, renewing concerns of **partisan imbalance** on hot-button issues for the foreseeable future.166 Nonetheless, Chief Justice **Roberts’** institutionalist inclinations to **shield the Court**’s independence from political capture **may** reduce the likelihood that a definitive **conservative majority** has **unilateral decision-making** authority on the Court.167 And Justices Gorsuch and Kavanaugh have recently shown signs of independence on major issues before the Court.168

**That’s key to save the reputation of the courts**

**Pomerance 20** (Benjamin Pomerance serves as a Deputy Director with the New York State Division of Veterans' Services. J.D., summa cum laude, Albany Law School, THE KING IN HIS COURT: CHIEF JUSTICE JOHN ROBERTS AT THE CENTER, 83 Alb. L. Rev. 169, y2k)

Yet Roberts has long been a master of winning wars even when losing battles was necessary to accomplish his ultimate aim. 465 In the cases where he votes with the Court's **liberal wing**, the **C**hief **J**ustice may be utilizing this same **cagy discretion** that he has employed for much of his life. 466 He oversees a Court in which the majority of the public lacks faith, a Court that commentators frequently accuse of political partisanship, a Court that indeed often does divide in **split decisions** along **conventional political lines** with Justices on both sides of the aisle frequently staking out extreme positions and issuing verbally **stinging opinions**. 467 Historians would likely look back upon such a Court with **criticism**, a fate that Roberts **fears**. 468 The **only way** to avoid such an outcome [criticism], it seems, is for the **C**hief **J**ustice to [\*231] take a leadership role in moving the Court in **a direction of** moderation, **bipartisanship**, and dignity. 469

**In crossing the aisle**, Roberts appears to be doing exactly that. With each **swing vote** comes a new round of **commentaries** speculating that the Chief Justice's jurisprudence is **not as** **politically motivated** as people initially suspected. 470 Such commentaries help both Roberts's own reputation and **the reputation of** his **Court**, weakening the oft-repeated claim that a case brought before the Court is **virtually a foregone conclusion** depending on the **political interests** at stake. 471

**The court *wants* to reverse Roe BUT the threat of court reform causes the conservatives to back off---it’s working now**

**Ziegler 9-3** (Mary Ziegler is a professor at the Florida State University College of Law, The Justices Are Telling Us What They Think About Roe v. Wade, <https://www.theatlantic.com/ideas/archive/2021/09/scotus-roe-political-fallout/619969/>, y2k)

The five justices who upheld **Texas’s** anti-abortion law in the middle of the night this week insisted that their **hands were tied**: Texas had invoked sovereign immunity, and abortion providers had not proved that the state was wrong. Above all, the majority warned people not to overreact. Women in Texas might not be able to get an abortion anymore, and abortion providers might have already shut down, but **worry not**. The Supreme Court had not drawn “any conclusion about the **constitutionality** of Texas’s law.”

For anyone paying attention, **the upshot of this was clear**. For starters, Texas lawmakers had not kept their intentions secret: They wanted to ban almost all abortions and skirt the consequences. The law raised “complex and novel” “procedural questions,” according to the Court majority, but only because the law’s designers had homed in on a creative strategy for achieving their goals.

That the Court pretended this **wasn’t** about the **fate** of abortion rights tells us that the justices **may** be **ready** to strike down **Roe** v. Wade—**but** are less prepared for the **havoc** such a decision would wreak. Reversing Roe would not be a mere part of the legacy of John Roberts’s Court and the justices sitting on it—it would define that legacy.

And it could have enormous **institutional** and **political consequences**: Court reform—which remains a matter of abstract inquiry rather than an earnest legislative push—would be more **seriously** on the table. Pro-abortion-rights voters in 2022 and 2024 could make their discontent known at the polls.

The justices who allowed Texas’s law to go into effect **hardly** seem to love the thought of that **backlash**. Their order tried to **reassure** the public by spelling out what was not being decided—and tried to signal that the Court takes all of this very seriously. And even before this particular question arose, during their confirmation hearings, Brett **Kavanaugh** and Amy Coney **Barrett** repeated that when it came to **Roe**, they would keep an **open mind**. After all, they are neutral arbiters of the law, not pre-committed ideologues.

The justices desperately want the public to believe that is true, even though similar procedural hurdles did not stop the Court from blocking COVID-19 stay-at-home orders that affected in-person worship, and even though the Court’s overnight order made a laughingstock of what is still supposedly a constitutional right. The message was clear: Texas wanted to pass a legal-consequence-free abortion ban, and the Supreme Court wanted to find a political-consequence-free way to uphold one.

Transparency has never been a hallmark of the Court’s abortion jurisprudence. In 1992, when the Court declined an invitation to reverse Roe, the justices held that states could not unduly burden women seeking abortions. What an undue burden meant was rarely clear to anyone—and often depended on which judge was considering a law. In the years since, the Court has changed the value attached to fetal life—describing the dignity of unborn children—without clearly explaining how this shift has affected abortion jurisprudence.

Anti-abortion leaders blame this opacity on Roe, which they argue is a hopelessly muddled, unworkable decision. The real explanation is present in yesterday’s decision: The Supreme Court may want to **reverse** Roe, but it is **afraid** of what will happen when the decision is gone. This fear makes it attractive to hem and haw, to deny and obfuscate. Clarence **Thomas** may not miss a chance to denounce Roe, **but his colleagues are less keen to do so.**

**The court won’t overturn Roe now---fear of backlash deters judges**

**Bokat-Lindell 9-2** (SPENCER BOKAT-LINDELL, a staff editor in the Opinion section, Reviews | Did Texas announce the end of abortion rights in America? <https://www.nytimes.com/2021/09/02/opinion/abortion-texas-roe-supreme.html>, y2k)

**Roe v. Is Wade dead?** Does he even need it?

As the Times’ David Leonhardt explained recently, the public has complicated and in many cases conflicting views on abortion: A majority of Americans say they support restrictions on abortion that Roe v. reign himself.

Indeed, toppling Roe could **energize** abortion rights advocates and **fuel the cause** for court reform, which is why many legal experts speculate that Supreme Court justices are **loath** to do so explicitly. “He’s the genius of Texas strategy,” Mary Ziegler, a professor at Florida State University College of Law in Tallahassee, wrote in The Times last week. “There doesn’t seem to be a trade-off between building on precedents and phasing out abortion rights.”

And eliminate abortion rights this law goes, say the suppliers. Even those who comply with the law can face lawsuits from plaintiffs seeking a reward of $ 10,000, and they will bear the financial burden of defending themselves in court. Abortion service providers who filed to block the law said it would ban care for at least 85% of Texas abortion patients, “likely forcing many abortion clinics to close. “. As of mid-August, the 11 Planned Parenthood health centers in Texas that offer abortions have stopped scheduling those prohibited by law, NBC reports.

Texas law could still be temporarily blocked by the Supreme Court, says my colleague Lauren Kelley. But for now, at least, abortion is almost illegal in Texas. And “it now seems likely that more laws like SB 8 will be passed, as other anti-abortion heads of state will surely try to follow Texas’ lead,” she predicts. “Why wouldn’t they do it?” The Supreme Court may not yet have ruled on the merits of the Texas law, as some anti-abortion activists no doubt would prefer, but the state’s savage ploy has clearly succeeded in threatening the future of clinics across the state. In this way, the court gave the green light to lawmakers around the world who have been eager for decades to overturn Roe v. Wade.

Even bigger than abortion

Orion Rummler notes in The 19th that Texas law could involve miscarriage management, which often uses the same procedure – dilation and evacuation, which Texas became the first state to ban last month – as second trimester abortions. . While miscarriage management is theoretically still legal if no cardiac activity is detected, the wording of the law does not directly address the issue and could create a deterrent among providers fearing civil liability.

“Any doctor who is going to remove a fetus from a uterus, after a miscarriage or without a miscarriage, will have to document that he has tested a fetal heart rate”, Rachel Rebouché, professor of law at Temple University and expert in jurisprudence on reproductive rights, said Rummler.

The Supreme Court also blessed a legal tactic that could be used to undermine virtually any constitutional right, Ian Millhiser of Vox explains, “Imagine, for example, New York City passed an SB 8 style law allowing individuals to sue for a $ 10,000 bounty against anyone who owns a gun. Or, for that matter, imagine if Texas passed a law allowing similar lawsuits against anyone who criticizes the governor of Texas. “

Times columnist Michelle Goldberg argues that one party is much more likely to maintain such vigilance than the other. She notes that in addition to touting the endangerment and even shooting of suspected liberals, Republican lawmakers have taken steps in recent years to legalize various forms of intimidation: Several states have given partisan conspiracy theorists access. election materials to find ways to corroborate the accusations. electoral fraud, for example, while others have granted immunity to drivers who hit people protesting in the street. “Texas law must be seen in this context,” she wrote.

And after

The Supreme Court will look into this and other **abortion cases** in more detail when he returns from vacation in **October**. In addition to Texas law, judges should consider a law in **Mississippi** that **prohibits abortions** after 15 weeks of pregnancy (or about 13 weeks after conception).

There will be **little room** for judges to **cover up** in this case, predicted legal journalist Linda Greenhouse in July:. Maintaining a **ban** on abortion **before viability** is tantamount to **overturning Roe v. Wade and Planned Parenthood v. Casey**. It is that simple. And for once, a state says yes, that’s exactly what it wants.

**The Texas decision didn’t evaluate substantive merits of rights to abortion---the court is staying away from it now**

**Feldman 9-8** (Noah Feldman, a professor of law at Harvard University who was a clerk to U.S. Supreme Court Justice David Souter, We don't know if the Supreme Court is ready to overturn Roe, <https://pressofatlanticcity.com/opinion/columnists/we-dont-know-if-the-supreme-court-is-ready-to-overturn-roe-by-noah-feldman/article_b2af3a97-7b33-5a38-94fe-56890f40db3e.html>, y2k)

Every **nonlawyer** on the planet — and no doubt a few lawyers, too — is likely to read this outcome as prefiguring a 5-to-4 vote to **overturn** Roe v. Wade, the 1973 precedent that made abortion a constitutional right. Later this year, the court will address a **Mississippi** anti-abortion law that lacks the cleverly diabolical enforcement mechanism of the Texas law but is equally unconstitutional. Indeed, the day after the law went into effect and before the Supreme Court ruled, many non-lawyers who were unfamiliar with court procedures had already concluded that they knew how the upcoming Mississippi case would come out.

That’s a possible interpretation of the latest opinion, to be sure. But the opinion for the five conservatives explicitly **denied** it. “We stress,” said the justices, “that we do not purport to resolve **definitively** any **jurisdictional** or **substantive** claim in the applicants’ lawsuit.” That’s lawyer-speak for saying both that the law could **still** be **unconstitutional** and that there might still be some **procedural way** to block its operation. For good measure, the opinion said the challengers “have raised serious questions regarding the constitutionality of the Texas law.”

These formulations indicate that at least some of the five conservatives who joined it wanted to **take pains** not to send the message that **Roe v. Wade** is sure to be **overturned**. What is less clear is whether anyone on the political battlefield wants to hear that message. The pro-choice camp will doubtless spend the months until the court term ends in June whipping up public sentiment, either in the hopes of changing the outcome or turning any decision overturning Roe into the impetus for packing the court or producing a heavy Democratic turnout in the 2022 midterm elections. The pro-life camp has an equal interest in making the overturning of Roe seem inevitable.

Consequently, neither side cares much for dispassionate analysis. But the fact remains that the majority in the Texas ruling did not address the underlying issues, so it would be **premature** to **predict the outcome** in the Mississippi case based on it.

**Maintaining a credible threat of reform causes the courts to moderate**

**Block 20** (Daniel Block, executive editor of the Washington Monthly, The Case for Threatening the Courts, December, <https://washingtonmonthly.com/magazine/november-december-2020/the-case-for-threatening-the-courts/>, y2k)

Throughout modern U.S. history, the Supreme Court has proved **susceptible** to outside **pressure**. FDR’s proposal is just one of many successful institutional attacks. In the mid-1950s, the liberal Warren Court backed away from protecting victims of McCarthyism because a popular Senate bill threatened to strip the Court’s powers. Throughout the 1970s and ’80s, conservative politicians flooded Congress with legislation to stop the Court from ruling on racial integration. The justices retreated from enforcing busing regulations.

For Democrats worried about being railroaded by **a 6–3 conservative bench**, these conflicts should be **instructive**. In **none** of these instances did Congress or the president truly enact laws that changed the Court. In each of them, **the Court changed anyway**. These attacks can **exact costs**, as FDR discovered; his particularly aggressive push weakened his power within Congress. But they also have clear payoffs. Threats to expand, strip, or otherwise **limit the Court**—done with **credibility**—can **influence** judicial behavior.

“**Historically**, I think we have found that the Court gets the **message**,” Keith Whittington, a political scientist at Princeton University who studies the politics of the judiciary, told me. “When conservatives are pressing these types of bills, the Court becomes a little more conservative. When liberals are pressing these types of bills, the Court becomes a little more liberal.”

If Joe Biden takes office in January, he will confront a landscape not unlike the one FDR faced in 1937. Biden, like Roosevelt, will grapple with an economic downturn of historic dimensions. He’ll have won promising to enact a variety of sizable spending and welfare programs. In interviews, Biden has explicitly cited the Roosevelt presidency as a template.

But, much like FDR, Biden will have to contend with a Supreme Court stacked with six conservatives. For Roosevelt, these six men were perhaps his most powerful enemies. With large majorities in both the House and Senate, the president moved transformative economic legislation—from minimum wages to maximum hours—with remarkable ease, only to have it struck down by justices who didn’t abide by the bromide of not “legislating from the bench.” These activist rulings infuriated Roosevelt, who in 1935 declared that the Court was creating a “ ‘no-man’s-land’ where no government—state or federal—can function.” They also stirred up popular sentiment. Much like today, the Supreme Court hung over the 1936 presidential election.

FDR won that election with more than 60 percent of the vote. Emboldened, he decided to confront the Court. Within weeks of his inauguration, Roosevelt announced an initiative to add six justices to the body. The Supreme Court was furious. Privately, Chief Justice Charles Hughes remarked that the bill would “destroy the Court as

an institution.”

At first, the public was closely divided over Roosevelt’s plan, as was Congress. Republicans, southern conservatives, and some liberals came out against the idea. But Senate Majority Leader Joseph Robinson, who was promised a seat on the expanded bench, backed the president. After a fireside chat on March 8, so did a large plurality of Americans. “We cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present,” Roosevelt said.

As FDR spoke, the Court was preparing to rule on perhaps the biggest case of his tenure, National Labor Relations Board v. Jones & Laughlin Steel Corporation. The decision would determine the constitutionality of the National Labor Relations Act, landmark New Deal legislation that made it significantly easier to join and form a union. Legal observers widely expected that the act, like its predecessors, would fall. So did the president.

Instead, in mid-April, the Court upheld it in a 5–4 decision, with Hughes and Roberts in the majority. Almost immediately afterward, public support for adding justices dipped. Then, at the end of May, the Court upheld the creation of Social Security, again in a surprise 5–4 ruling. The plan grew even more unpopular. In a May 25 cartoon in the Rochester Times-Union, Roosevelt’s “Supreme Court Packing Case” was depicted as a large crate, collapsing as the Court’s various liberal decisions, each representing an underlying plank, toppled beneath it. By the end of July, FDR’s proposal was dead.

There’s a vigorous academic debate about the extent to which the Court’s pivot had to do with pressure from Roosevelt versus organic jurisprudential development. There’s no doubt that the Court’s constitutional doctrine was already evolving in ways that made siding with the president easier. The Court that had struck down child labor laws and FDR’s National Recovery Act was evolving into a body more deferential to Congress. But it’s **hard** to see how the swing justices **couldn’t** have been touched by Roosevelt’s **attacks** and the resulting **public discourse**. As The New Yorker sarcastically wrote in 1937, the only way the Supreme Court could not have been impacted was if its then-new building, completed in 1935, “has a soundproof room, to which the Justices retire to change their minds.”

Does that mean that if Democrats win in November, they could be equally effective by threatening to expand the size of the bench? There are reasons to be skeptical. If he wins, Biden will not enter the White House backed by more than 500 electoral votes. If Democrats control 52 Senate seats come 2021, they will consider it a roaring success. In 1937, the party held more than 70. (It’s also unclear if the Roberts Court will aggressively strike down Biden legislation.)

But some of the differences between Roosevelt’s era and today’s could actually work to the advantage of modern Democrats. In the 1930s, the Democratic Party was a sprawling entity, featuring both New Deal liberals and the southern right. The latter were some of the most tenacious opponents of court expansion. They included, for example, former Texas Congressman John Nance Garner—Roosevelt’s own vice president.

Today, the Democratic Party is far more **unified**. The southern conservative constituencies that once fought Roosevelt now almost all vote Republican. Unlike FDR’s vice president, Kamala Harris won’t go AWOL. She expressed openness to **expanding** the size of the Supreme Court during the Democratic primaries, well before the death of Ruth Bader Ginsburg led Biden to soften his opposition.

FDR was not the first person to intimidate the Supreme Court. In the Progressive Era, major politicians put forth all kinds of proposals to curb the power of a judiciary they viewed as in thrall to big businesses, from allowing voters to override Supreme Court decisions to making it easier to recall justices. None passed, but scholars believe that the clamor may have kept the Court from making it impossible for reformers to reshape economic power. They’re not alone in that assessment. “I may not know much about law,” President Theodore Roosevelt remarked in 1905, “but I do know that one can put the fear of God in judges.”

In the latter half of the 20th century, politicians toyed with more targeted attacks. According to Article III, Section 2 of the Constitution, the Supreme Court has appellate jurisdiction over all cases “with such exceptions, and under such regulations as the Congress shall make.” Conservative congressmen and senators seized on this language to propose bills that would “strip” the Court of its right to rule on racial integration. These bills, for the most part, went nowhere. But, much like FDR’s court-expansion attempt, they still made a difference. During the tenure of Chief Justice Warren Burger from 1969 to 1986, the justices kept careful track of “jurisdiction-stripping” legislation, circulating them to one another whenever they came up. Burger himself kept a file of all these proposals as they moved through Congress. In both the 1970s and 1980s, the Court retreated from many attempts to force integration, even as it gave a yellow light to affirmative action.

Part of that change, no doubt, stems from personnel; the Burger Court had more conservative membership than the Warren Court that preceded it. But academics argue that congressional pressure also had a clear role. In a memo to eight of the Court’s justices, for example, one law clerk noted that a major busing case had attracted great political and congressional controversy. He recommended that the judges deny a petition to hear it. They followed his advice.

“The clerk is writing for eight of the nine justices,” said Tom Clark, a political scientist at Emory University and the author of The Limits of Judicial Independence. “[It] tells me that the clerk was aware the justices would want to know that.”

During the tenure of Chief Justice Warren Burger from 1969 to 1986, the justices kept careful track of “jurisdiction-stripping” legislation, circulating them to one another whenever they came up.

It’s unclear exactly why John Roberts decided in 2012 to uphold the Affordable Care Act, but it’s entirely possible that his vote was one of institutional deference: He didn’t want to nullify a sitting president’s greatest accomplishment. And so far, under Donald Trump, Roberts has sided with liberals on a number of surprising occasions, including an abortion case. Perhaps that’s to keep the Court from being dragged into the country’s partisan slugfest. Perhaps, and relatedly, it’s because of Democrats’ heated rhetoric about the need to bend the judiciary.

“I think he takes those threats seriously,” Princeton’s Whittington said.

But once Amy Coney Barrett is confirmed (her nomination is pending as of this writing), Roberts will no longer be the Court’s swing justice. That title will instead likely belong to either Neil Gorsuch or Brett Kavanaugh. Both were elevated to their jobs by a conservative judicial movement increasingly incensed that the Supreme Court won’t tack further right, even though Republicans have appointed 12 of the last 16 justices. Barrett clerked for Antonin Scalia. With such a rock-solid conservative majority, this bench will be more hostile to liberal policies than the one that came before. Can we really expect it to show any restraint?

The behavior of some leading jurists suggests that the answer is no. In a speech before Notre Dame Law School (where Barrett used to teach), Attorney General Bill Barr summarized much of the legal right’s thinking in astonishingly blunt terms. “Militant secularists,” he warned, “seem to take a delight in compelling people to violate their conscience.” He cited as evidence a now-struck-down Affordable Care Act provision requiring that employers cover contraception.

On the other hand, many of the justices who fought Roosevelt’s New Deal had similarly apocalyptic visions. The sweeping programs FDR thought necessary for the economy were, to them, a tyrannical violation of the Constitution. Dissenting from a case that upheld Congress’s power to heavily regulate gold, four of the era’s justices declared that the government’s actions “annihilate its own obligations” and destroy “the very rights” the Constitution was supposed to protect. That passion didn’t stop two justices from bowing to popular reality. As Justice Owen Roberts said after Roosevelt’s reelection, “the Court took cognizance of the popular will.”

Today’s Chief Justice **Roberts** is also clearly concerned with the Court’s **legitimacy** and does not want it to be seen as a **purely partisan body**. And despite their **impeccably** conservative credentials, **Kavanaugh** and **Gorsuch** have both shown a willingness to **break** with orthodoxy on **high-profile occasions**—including, in the case of Gorsuch, a seismic expansion of LGBTQ rights.

Whether the Court can be pressured, then, may **ultimately** come down to just how much muscle Democrats are willing to employ. To truly **constrain** the Court, the party must, of course, win both the presidency and the Senate. But winning is not enough. They must be willing to **credibly** threaten the Court, something that requires a **bold**, **unified front** on the judiciary. Right now, such tenacity and unity are lacking. But that may well be changing. Senate Minority Leader Chuck Schumer, a procedural moderate, told reporters in late September that should Republicans fill Ginsburg’s seat, “nothing is off the table.” Biden, a former court-expansion opponent, now ducks court-expansion questions. Even Pennsylvania Senator Bob Casey, one of the only congressional Democrats who support overturning Roe v. Wade, told reporters he wants “to get through the election” before taking a stance.

Barrett’s confirmation is not the only thing radicalizing Democrats. Support for **reining in** the Supreme Court will become **fevered** if it actually strikes down, rather than “simply” menaces, cornerstone **liberal policies**. Not long after the election (and during whatever chaos comes next), the bench will hear its third challenge to the Affordable Care Act. If Democrats win the White House and Senate, and the Court still invalidates the ACA in the midst of a pandemic, the party of FDR may not be able to resist retaliatory measures. Biden famously called the act’s passage, which came while he was vice president, a “big fucking deal.” It is unlikely that he will let it go gentle into that good night.

Today’s justices, of course, know this. Like their counterparts in the 1930s, they do not exist in a soundproof room. If they nonetheless begin an aggressive assault on whatever New Deal–style social policies liberals enact—like a public health insurance option, major climate change legislation, or heavy regulations on internet giants—they will be wagering that Democrats are just full of hot air. They may well be right. The Court is generally more popular than Congress or the president, making attacks on it very risky. Even Roosevelt, operating at the peak of his powers, paid a political cost for battling the bench. Roosevelt’s plan helped save laws he had already passed. But it alienated many congressional Democrats, and his New Deal was effectively ended by the election of conservatives in 1938.

Nonetheless, **modern Democrats cannot shy away from intimidation**. The justices FDR confronted were almost all in their 70s; he might have been able to wait them out. Today’s conservatives are substantially younger. Barrett is 48, and if she’s confirmed and stays on the Court until Ginsburg’s age, she’ll be ruling until 2059. And as the 1970s showed, politicians don’t need to threaten the Court with expansion to get a response. Stripping legislation that limits the Court’s powers could also help Democrats send a powerful message. The party may not need to go as far as Roosevelt did to make their point.

But if they face serious defeat at the Court, they can learn from his resolve. “You’ve got to really **rattle the saber**,” Whittington said. “Then you get the **justices to respond**.”

**Every “liberal” rulings of the court so far has been decided on a narrow ground---it doesn’t signal a shift to the left**

**Piper 6-24** (Greg Piper has covered law and policy for 15 years, with a focus on tech companies, civil liberties and higher education, SCOTUS consensus on divisive issues, including student speech, undermines court-packing push, 6-24, https://justthenews.com/government/courts-law/scotus-consensus-divisive-issues-including-student-speech-undermines-court

One thing is clear from the recent spate of **lopsided majorities** in high-profile and potentially divisive cases: The Supreme Court can find **agreement** when it wants to. All but Justice Clarence Thomas agreed Wednesday that **K-12 schools** can't regulate student speech in contexts that are not school-supervised, including social media outside of of school hours, simply on the assertion that it could conceivably disrupt the learning environment. The 8-1 tally followed unanimous votes June 21 against the **NCAA's limits** on educational benefits for student athletes and June 17 against Philadelphia's revoked contract with a Catholic foster care agency that refuses to consider same-sex couples. Another 8-1 ruling June 18 threw out a lawsuit alleging **child slave trafficking** in Africa by cocoa product makers Nestle and Cargill. The June 17 vote upholding **Obamacare** against its latest challenge was 7-2, with Barrett and Kavanaugh in the majority. Many of the lopsided majorities reached agreement on **fairly narrow grounds**. The Obamacare challenge failed on conservative states' **lack of standing** to sue, while student athletes didn't challenge the NCAA's ban on **non-educational** compensation. George Washington University constitutional law professor Jonathan Turley saw the same pattern in the student speech case, known as Mahanoy. He wrote that he had hoped for a "bright-line decision protecting student speech" but the court achieved near-unanimity by limiting its reach. "I do believe that the Court is speaking through these [lopsided] decisions to its critics" who are open to court-packing, Turley told Just the News in an email. While it often issues "non-ideological and unanimous opinions ... these are some major cases where greater divisions were expected," he said. "The Court is leaving critics with simply outcome-determinate court packing as a rationale for these proposals." Other legal scholars told Just the News it wasn't clear if recent decisions including Mahanoy reflected the pursuit of unanimity at the expense of useful and conclusive holdings. "I think the Court is really more of a 3-3-3 institution," Josh Blackman of South Texas College of Law wrote in an email. "The 9-0 topline votes mask a lot of disagreement." The Philadelphia, Africa and Obamacare rulings revealed "a conservative wing, a moderate wing, and a principle-fluid progressive wing," Blackman argued in a blog post last week. While Roberts "may have been conservative at one point ... he has embarked on a life-long odyssey to pilot the Court to middling moderation," and Kavanaugh is "cut from the same cloth." "**It's hard to read the tea leaves**" on whether there was a "conscious effort to get a broad coalition" for Justice Stephen Breyer's opinion in the student speech case, Adam Steinbaugh of the Foundation for Individual Rights in Education (FIRE) wrote in an email.