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**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 sub-national actors should ---amend their antitrust laws to increase prohibitions on platform conducts that fails under rule of reason without imposing heightened burdens on plaintiffs ---coordinate antitrust enforcement through the National Association of Attorneys General’s Multistate Antitrust Task Force

#### 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."

### T Per se

#### Prohibit means forbid by authority

Merriam-Webster No Date <https://www.merriam-webster.com/dictionary/prohibition> and <https://www.merriam-webster.com/dictionary/prohibiting>

Definition of prohibition 1: the act of prohibiting by authority

Definition of prohibit transitive verb 1: to forbid by authority : ENJOIN

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Prefer it:

#### 1) GROUND---key to link uniqueness and a unidirectional topic. Fringe standards dodge topic links, AND they can pick a broader but more permissive standard, making the topic bidirectional.

#### 2) LIMITS---too many possible standards, each requiring distinct answers, makes the topic unmanagbly large.

### 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

**Amex is goldilocks—the plan makes it impossible for firms to innovate**

John M. **Yun 21**—Associate Professor of Law and the Deputy Executive Director at the Global Antitrust Institute (GAI). ("Does Antitrust Have Digital Blind Spots?" March 5, 2021, from South Carolina Law Review, Vol. 72, No. 2, 2021, George Mason Law & Economics Research Paper No. 20-16, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3593467)

**Much has been written about Amex**, and there is no shortage of vocal critics and defenders.298 Critics assert that the Court did not understand network effects and platform economics and, more importantly, that the Court bungled the implementation of these economic concepts into a rule of reason framework, including who should bear the burden of showing the welfare benefits and harms.299 However, to the contrary, the Court **properly and reasonably fit the features of platform markets into a conceptually coherent methodology that aligns the rule of reason analysis with current economic learning.**

Some scholars argue that platform markets, such as credit card networks, should be defined as two separate, relevant product markets: one for cardholders and one for merchants.300 Further, while acknowledging the need to consider the interrelationship between the two sides, these scholars contend that since these are two separate markets, the prima facie burden is satisfied when anticompetitive harm is found on only one of these sides.30

**Splitting a platform into two separate markets for** the purpose of **antitrust** analysis, however, **runs afoul of a simple reality: no platform maximizes profit over just one side.**302 Rather, **profit maximization is determined through a joint consideration of both sides. A platform, by its very nature, balances the interests of multiple sides and structures its price and non-price terms to achieve this balance.** Further, **as the Court emphasized,** credit card **networks are “transaction platforms,”**303 which are **platforms where both sides share a common level of output.** This also illustrates that **artificially bifurcating the two sides** into **separate competitive effects** analyses **does not align with how firms actually make decisions. Antitrust law must start from these economic realities** and fit the administration of the rule of reason analysis around them.

Conceptually, perhaps one of the strongest criticisms of the Court’s approach is that it effectively eliminates step two of the rule of reason analysis—where the defendant bears the burden of justifying its conduct as procompetitive.304 Instead, that burden is shifted to the plaintiff in step one during which, in order to meet its prima facie burden, the plaintiff must show that the net effect is negative.305 This is an important criticism. Ultimately, **the Court had to weigh two possible regimes. The first** regime **involves** a framework **where the prima facie burden is met** **simply with a price increase on one side**.306 **The second** regime, which was **adopted by the Court, involves** a framework **where the plaintiff’s burden must not only include a one-sided price increase but also** include “evidence of **anticompetitive effects** . . . such as reduced output, increased prices, or decreased quality.”307 In other words, **is a one-sided price increase actually and reliably evidence of anticompetitive harm?** The **integrated nature of the two sides does not support this proposition**; consequently, the second regime better aligns with the economic realities of platforms. Importantly, Professors David Evans and Richard Schmalensee assert the following:

**This is not a matter of burden-shifting. There is simply no way to know, especially in the case of a platform that provides a service** that **customers on each side consume jointly, whether a practice is** **anticompetitive without** at least **considering both types of customers and the overall competition among platforms.** That **analysis must**, therefore, **happen at the first stage of the rule of reason** to assess whether the conduct is anticompetitive or not.308

Additionally, **under a framework where** the **prima facie burden is met simply with a price increase on one side**, this “**distorts** the assignment of **burdens** in the form of **placing a thumb on the scale** **for plaintiffs in platform cases** by **redefining ‘competitive harm’** **to mean any harm to any group of consumers**.”309 The reality is **that** **such an alternate framework would result in no real ability of the defendant to offer procompetitive justifications in step two**. Evans and Schmalensee, for example, observe:

First, **it isn’t clear that the court could consider the other side-specific market in the second stage** of the rule of reason inquiry. The trial court judge noted that **pro-competitive benefits on the consumer side**, in “a separate, though intertwined antitrust market,” **could not be used to offset anti-competitive effects on the merchant side.** Second, after finding that a practice is anti-competitive in the first stage, **courts seldom give** much **weight to pro-competitive benefits in the second stage.**310

Further, it is not entirely clear that the burden is actually higher for plaintiffs in step one—particularly for transaction platforms. For instance, **output**, which is **shared by both sides of a transaction platform, could serve as a reliable guide** to welfare effects. This **focus on output** is something that **conforms** **with** both the law and **economics of assessing markets and market power.**

In sum, the **interrelationship between the various sides of a platform is critical.**312 Specifically, for a platform like American Express, **changes** in cardholders’ terms **have a material impact** on the number of transactions that merchants will enjoy. These **feedback effects between the two sides are central to assessing conduct on the platform.** The rule of reason framework established by the Court in **Amex properly assessed and incorporated the econ**omic **lit**erature on platforms **into an administrable, coherent approach by shifting the burden of production.** Rather than increasing the burden on plaintiffs, it **requires plaintiffs to do a complete analysis** of the effects of a given conduct on the platform instead of on an unnatural and narrowly focused segment of an integrated market.313

Presently, antitrust law is among its most unprecedented times where there is a chorus—albeit lacking complete consonance—from various stakeholders seeking significant antitrust reforms. This chorus is comprised of myriad groups of academics, politicians from across the political divide, and various digital reports.314

Ultimately, these **calls for reform** too often **lack completeness and are too broad and general** to form a reliable guide for agencies, courts, and legislatures. This is not to say questions regarding large platforms are completely and categorically settled. Network effects are certainly a key consideration in assessing certain digital markets, but it is important to understand precisely how and to what extent they are affecting these markets. Rather than being a presumptive source of market failure, network effects are more properly assessed as a market feature that must be accounted for in order to understand firm conduct. Similarly, there is a paucity of evidence demonstrating that the conduct of digital platforms is actually reducing welfare and harming consumers. Finally, a close reading of the Court’s **Amex decision reveals an opinion that carefully treads the economic lit**erature on platforms **and implements that learning into a coherent rule of reason framework.**

The most radical claim being made today is perhaps the most controversial one: that **current antitrust law and enforcement** actually **are sufficient** to properly assess and adjudicate conduct involving digital platforms. Antitrust law has always **had an evolutionary character** that recognizes the need to adjust to new learnings.315 This does not mean that the law is necessarily efficient or always moving in the right direction. Still, as long as antitrust law is **tied to** measures of **economic efficiency** and welfare and **so long** **as it continues to carefully examine actual ev**idence **rather than fall victim to unfounded presumptions**, it provides a more reliable body of law for **foster**ing **innovation** **and** **economic progress** **than do the alternatives being proposed by its critics.**

**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 **U**nited **S**tates, 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 **U**nited **S**tates. 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 **U**nited **S**tates as the world’s economic and political leader.1 More compelling than opinions, several **U**nited **S**tates (“U.S.”) government and private studies document a **systematic** and coordinated effort by China to achieve **tech**nical 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 **U**nited **S**tates 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 **tech**nology 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**.

#### Big tech-pentagon relations are high and lead to AI dominance

McGee 21 (Patrick, FT’s San Francisco correspondent covering Apple and US technology. He was previously in Frankfurt, writing about the Volkswagen scandal and the challenge to German carmakers from electric vehicles and self-driving tech. He joined the Financial Times in 2013 to cover Asian markets from Hong Kong. He was previously a bond reporter at the Wall Street Journal in New York. He has a Master's in Global Diplomacy from Soas, University of London, and a degree in religious studies from the University of Toronto. “Silicon Valley reboots its relationship with the US military”, https://www.ft.com/content/541f0a02-ea27-43a4-b554-96048c40040d)

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

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

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

Shield AI is among the companies thriving thanks to their unabashed support for the defence sector. Others include Palantir, the big data group co-founded by Peter Thiel that is now worth $40bn, and Anduril, which builds tech for border surveillance.

And the success of these groups partly reflects how the US Department of Defense is adapting to the tech culture — all too aware that its rigid hierarchies and traditions are no match for tapping in to private companies’ software-first approach to innovation.

“What you’re seeing is a trend of the US government embracing individuals that have come up in Silicon Valley companies,” says Darron Makrokanis, senior vice-president D2iQ, a cloud management start-up that helped the Air Force shift to remote working during the pandemic.

America’s tech sector has long been intertwined with the military, ever since the US government became a huge spender on early semiconductors and other expensive equipment that lacked a commercial market. Historian Margaret O’Mara, a professor at the University of Washington, has written that “whether their employees realise it or not, today’s tech giants all contain some defence-industry DNA”.

“Silicon Valley traces its origins to the Department of Defense and the aerospace and defence industry,” explains Yll Bajraktari, executive director of the National Security Commission on Artificial Intelligence, an independent group formed to make recommendations to Congress and the president.

#### But the aff trades off - 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.

#### 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.

#### 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).

#### Israel is never going to strike Iran

--they’re so reliant on the US partnership, they would never jeopardize upsetting US leaders

Sajjad Safaei 9/17—Postdoc fellow at Germany’s Max Planck Institute for Social Anthropology. ("Israel Isn’t Strong Enough to Attack Iran," SEPTEMBER 17, 2021, from Foreign Policy, https://foreignpolicy.com/2021/09/17/israel-isnt-strong-enough-to-attack-iran/)

To be sure, Israel has in the past carried out relatively limited operations against Iran—such as raids on Iranian allies in Syria and nuclear sabotage—and may continue to do so in the future. But to what extent should we believe Tel Aviv is truly ready and willing to launch a strike on Iran because of advances in the Iranian nuclear program, knowing full well that this is likely to push the two countries and their allies into war? The political and military constraints on Israeli decision-makers suggests such a military showdown is highly unlikely.

To speak of an imminent and undisguised IDF strike deep inside Iranian territory is to overlook a long-established norm that has for decades governed U.S.-Israel relations: Israel cannot simply ignore the wishes and concerns of its chief patron, especially when core U.S. foreign policy priorities are at stake.

This norm was expressed in clear terms by no less a figure than Israel’s former premier and Defense Minister Ehud Barak in his autobiography My Country, My Life. Here, Barak spelled out the paradigm that has shaped—and will likely continue to shape—the contours of Israeli action against Iran. “There were only two ways,” he explained, that Israel could stop the Iranians from getting a nuclear weapon (read: “nuclear program,” for Barak willfully ignores U.S. intelligence assessments that Iran had halted pursuits for nuclear weapons in 2003). One way was “for the Americans to act.” The only other option was “for [the United States] not to hinder Israel from doing so.”

But according to Barak, “hinder” is precisely what consecutive U.S. administrations have done—and are still likely to do.

Even during the military interventionism of the George W. Bush presidency, Israel did not have a blank check to do as it pleased. As Barak notes in his memoirs, when Bush learned in 2008 of Israeli efforts to purchase heavy munitions from the United States, he confronted Barak and then-premier Ehud Olmert. “I want to tell both of you now, as president,” Bush warned, “We are totally against any action by you to mount an attack on the [Iranian] nuclear plants.”

“I repeat,” Bush further clarified, “in order to avoid any misunderstanding. We expect you not to do it. And we’re not going to do it, either, as long as I am president. I wanted it to be clear.” It deserves mention that according to Barak, Bush issued this warning despite knowing that Israel did not even possess the military capacity to assault Iran at the time.

According to Barak, this staunch opposition to a strike on Iran had a “dramatic” effect on him and Olmert since the Bush administration had supported Israel’s 2007 bombing of Syria’s nascent nuclear program just a year before. In both cases, Washington’s approval, or lack thereof, was demonstrably consequential.

Barak’s memoirs show that the same dynamic continued to govern U.S.-Israel relations during Obama’s presidency. He recalls how then-U.S. Secretary of Defense Leon Panetta “made no secret of the fact he didn’t want us to launch a military strike” at a time when the Obama administration was focused on putting international political and economic pressure on Iran. Panetta “urged me to ‘think twice, three times,’ before going down that road,” Barak wrote, and saw it as a given that Tel Aviv would keep Washington abreast of its decisions. “If you do decide to attack the Iranian facilities, when will we know?” he allegedly asked Barak.

According to Barak’s account, Israel was dissuaded from going forward with a supposed strike on Iran’s nuclear installations in summer 2012 “because of the damage it would do to our ties with the United States.” Washington’s demands continued to limit Tel Aviv after the finalization of the nuclear deal in 2015. Even then, Barak recalls, the Israelis could not simply act against Iran without a green light from the Obama administration: “We needed to reach agreement with the Americans about what kind of military strike we, or they, might have to take if the Iranians again moved to get nuclear weapons.”

As evinced by Barak’s autobiography, U.S. presidents are not taciturn about making their views and wishes known to Israeli officials, especially when primary U.S. foreign policy objectives are involved. Nor can Tel Aviv afford to ignore Washington’s express demands and concerns on such matters. And today, any flagrant Israeli violation of Iranian sovereignty will instantly clash with two mutually reinforcing goals that have come to define the Biden administration’s foreign policy: curbing Iran’s nuclear program through non-military means (efforts currently focused on reviving the 2015 Iranian nuclear deal) and winding down U.S. military presence in the Middle East.

These political realities make it unlikely Israel will pursue an overt strike on Iran. Just as important, however, are the military constraints that Israel faces.

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#### International disincentives check prolif

Burkhard 17 (Sarah - Research Fellow at the Institute For Science And International Security & Erica Wenig & David Albright & Andrea Stricker, “Saudi Arabia’s Nuclear Ambitions and Proliferation Risks,” p. 14-15, 3/30/17, https://isis-online.org/uploads/isis-reports/documents/SaudiArabiaProliferationRisks\_30Mar2017\_Final.pdf)

Disincentives. Saudi Arabia is expected to continually weigh these incentives to acquire advanced nuclear capabilities (which possibly include the ability to weaponize fissile material and deliver a nuclear weapon) against a considerable list of disincentives. For starters, Saudi Arabia would jeopardize its good standing in the international community, which it has established through signing several treaties and joining nonproliferation regimes. These include the NPT, IAEA, Convention for the Suppression of Acts of Nuclear Terrorism, Proliferation Security Initiative (PSI), Convention on the Physical Protection of Nuclear Material (CPPNM), and 2005 amendment of the CPPNM. Following the discovery of a covert program, Saudi Arabia would risk severe United Nations and other countries’ sanctions. While economic in nature, the sanctions take on a security dimension because Saudi Arabia’s economy is predominantly reliant on its oil exports. They accounted for nearly 50 percent of gross domestic product and about 85 percent of export earnings in 2015.39 Its imported reactors would also likely remain dependent on the supply of low enriched uranium fuel. Therefore, a targeted sanctions regime focused on Saudi oil exports and imported nuclear fuel could ~~cripple~~ [devastate] its economy and hurt its security. On the other hand, the countries and organizations applying sanctions would have to weigh their own significant energy and security demands against concerns that Saudi Arabia could get advanced nuclear capabilities. Saudi Arabia’s contribution to the global oil market (which is roughly three times greater than that of Iran) grants it substantial leverage in determining global oil prices.40 As such, establishing a credible sanctions regime targeting Saudi oil would pose a difficult choice for the oil-dependent West. This will be particularly true if some in the international community become sympathetic to a Saudi desire to obtain a nuclear deterrent to balance Iran. The threat of potential sanctions would also carry great weight in Saudi Arabia’s nuclear weapons calculus as the government is facing its largest budget deficit in history. It is currently seeking to diversify its energy usage in order to sell more oil abroad rather than use it domestically at an expensive loss.41 If there is a decrease in revenue, the Saudis would be unable to spend as much money balancing Iranian influence in neighboring countries as they are now.

#### 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.

# 2NC

## States

#### The case law generated by the CP causes federal adoption

**O’Connor 2** (Kevin J. O'Connor, Member of the Wisconsin Bar, and formerly Assistant Attorney General, Wisconsin Department of Justice, and Chair of the Multistate Antitrust Task Force, National Association of Attorneys General, Federalist Lessons for International Antitrust Convergence, 70 Antitrust L.J. 413, y2k)

But a system of multiple potential enforcers applying the same law has produced numerous opportunities for federal and state courts to rule on antitrust questions, thereby creating a rich trove of antitrust decisional law, at least in comparison to other enforcement regimes. **Even** in those instances where a **state** or private enforcer **unsuccessfully** litigates an alleged violation, the **end result** can be the development of useful, or even **significant, case law**.63 It is precisely this process that allows time-honored theories to be **tested** against the facts of **particular** cases. This system has both a qualitative and a quantitative element. Qualitatively, the concurrent enforcement system allows private parties, through litigation, to test theories adopted by the federal government in previous cases64 or in guidelines. 65 Even bedrock doctrine, such as the per se illegality of horizontal price fixing established in government cases, 66 subsequently have been "clarified" in private litigation. 67 Perhaps the most prominent example of an attempt to test theories **adopted by the federal agencies** is the attempt by a **number of states** to obtain **injunctive relief** against **Microsoft** beyond that obtained by the DOJ and several other states through negotiation. Whatever one thinks of the merits of the litigating states' position, their **persistence** is likely to generate **important decisional law** on the appropriate **antitrust remedies** in an important industry.6a

#### No pre-emption:

#### 1---Courts upheld state antitrust laws

**Schmidt 20** (Derek Schmidt, Attorney General for the State of Kansas, Kansas Antitrust Developments in the 21st Century: A Perspective from the Attorney General's Office, 68 U. Kan. L. Rev. 875, y2k)

VI. A CONTINUED ROLE FOR **STATE ANTITRUST** IN THE 21ST CENTURY

Some might question the need for state antitrust laws when there are federal laws, or the need for Attorney General enforcement when there are private actions, but there are many reasons Kansas antitrust law and actions by the Kansas Attorney General are important. For example, Kansas antitrust law specifically protects Kansans. While many antitrust issues in today's global society have a national or international effect, some anticompetitive actions are still limited to a small geographic area. Or, even if it has a broad effect, the action may have a particularly detrimental effect on a small localized area. That is where Kansas antitrust law, as well as the enforcement authority of the Kansas Attorney General, are particularly important. Even in multistate cases brought in federal court, Kansas legal authority and the involvement of the Kansas Attorney General ensure that the interests of Kansas citizens and the State of Kansas are protected.

[\*919] A. **Not** Preempted by Federal Law

The Supremacy Clause of the Constitution provides that federal law is the "supreme Law of the Land," And the Tenth Amendment designates that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." State antitrust laws are **not** preempted by federal antitrust laws. Rather "Congress intended the federal antitrust laws to **supplement**, not displace, state antitrust remedies." State antitrust laws have also been **upheld** in the face of **other federal enforcement.** One example is the U.S. Supreme Court case Oneok v. Learjet discussed previously. One of the arguments made by the State in its amicus filing was that the harmonization requirement in the KRTA and other states' antitrust laws is evidence that state antitrust laws are consistent with the goals and purposes of federal antitrust laws. In *Oneok*, the Court affirmed that "[s]tates have a long history of providing **common-law** and **statutory remedies** against **monopolies** and **unfair business practices"** and have **a "long-recognized** power to **regulate combinations** in **restraint of trade."**

#### 2---Preemption doesn’t assume Gorsuch and Kavanaugh

**Sykes 19** (Federal Preemption: A Legal Primer, 7-23, Congressional Research Service, <https://fas.org/sgp/crs/misc/R45825.pdf>, y2k)

The Court’s **recent additions** may also presage a **narrowing** of obstacle **preemption doctrine, as** some commentators have characterized Justices **Gorsuch** and **Kavanaugh** as **committed textualists**.259 Indeed, the Court’s 2019 decision in Virginia Uranium, Inc. v. Warren suggests that Justices **Gorsuch** and **Kavanaugh** may share Justice Thomas’s **skepticism** toward obstacle **preemption** arguments.260 In that case, Justice Gorsuch authored an opinion joined by Justices Thomas and Kavanaugh in which he rejected the proposition that implied preemption analysis should appeal to “**abstract** and **unenacted** legislative desires” not reflected in a **statute’s text.**261 While Justice Gorsuch did not explicitly endorse a wholesale repudiation of what he characterized as the “purposes-and-objectives branch of conflict preemption,” he emphasized that any **ev**idence of Congress’s preemptive purpose must be sought in **a statute’s text** and structure.262

#### It was about federal law

Jesse Leigh **Maniff and** Ying Lei Toh **2020** "Still on Trial? The Court’s Use of Economic Analysis in the American Express Case" <https://www.kansascityfed.org/research/payments-system-research-briefings/still-on-trial-courts-use-economic-analysis-american-express-case/#:~:text=In%20June%202018%2C%20the%20Supreme,not%20violate%20federal%20antitrust%20law>.

In June 2018, the Supreme Court found that American Express (**Amex) Company’s anti-steering rules did not violate federal antitrust law.** This was the first antitrust case decided by the Supreme Court to involve a two-sided platform—that is, a platform that creates value for two distinct groups of end users by facilitating interactions between them.

#### 3---Even if preemption is theoretically correct, there won’t be a court case about it---parties are fearful of becoming the test case so they drop litigation

**Nolette 11** (Paul Brian Nolette, PhD, Assistant Professor, Marquette University, Department of Political Science, ADVANCING NATIONAL POLICY IN THE COURTS: THE USE OF MULTISTATE LITIGATION BY STATE ATTORNEYS GENERAL, a dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, Boston College, The Graduate School of Arts and Sciences, Department of Political Science, <https://core.ac.uk/download/pdf/151481511.pdf>, y2k)

2. The Importance of **State** Law

SAGs have **a significant tool** with which to counter **federal regulatory decisions** – namely, **state** law. As noted above, the SAGs’ "gap-filling" litigation occurs most prominently in the area of consumer protection. A large reason for this is that many of these cases rely upon state consumer law, as opposed to federal enactments. In many of these consumer cases (and in some other policy areas), the underlying state laws impose stricter compliance standards on businesses than does federal law. This suggests again that states are often not filling a regulatory role ignored by federal agencies, but rather that they do not share assumptions about the proper level of regulation. The sharp rise in the use of state consumer statutes in multistate litigation actually arose from a policy failure. In the mid- to late-1980s, just when SAGs were beginning to realize the potential power of multistate litigation, NAAG lobbied Congress to allow states the power to enforce the Federal Trade Commission Act (FTCA) and FTC rules and orders with respect to unfair and deceptive trade practices. This would have allowed SAGs to prosecute alleged consumer protection violations in a single action in federal court.

88 However, partly due to fears that this would lead to "**balkanization,"** where disparate regulations among the states would impose **serious burdens** on multistate business activities, Congress never adopted this proposed amendment to the FTCA.89

**In response**, the states came up with their own solution to **coordination** in consumer cases, working through NAAG to **coordinate** consumer protection investigations and litigation based upon the many state consumer protection statutes (often dubbed "mini-FTC acts") existing in the states,90 a pattern that continues today. While similar to the federal FTCA in many ways, these state consumer protection statues often provide different – and stricter – regulatory standards than those found in the FTCA. Advertising that may be "deceptive" under strict state laws, for example, may only rise merely to the level of exaggeration and puffery not warranting enforcement action under federal law

As far as the SAGs are concerned, the advantage of using state consumer protection statutes is clear. State statutes often have broad, vague general deceptivetrade practices language allowing a great deal of legal flexibility.96 Further, **the legal limits** of many of these **state statutes** have not been **tested in court**, and **defendants targeted in multistate suits are loath to spend the resources necessary to become that test case**. The lines of **coordination** built through NAAG, in essence, have replaced the failure to allow SAGs to sue in a **single** action in federal court. In fact, threatening to sue independently in **state courts** and then working as a group to reach settlements is, in many ways, an even more **effective strategy** to reach out-of-court resolutions of cases than the single federal court suits could have been.

Though the prevalence of strict mini-FTC acts is surely a large reason why so much "gap-filling" litigation occurs in consumer protection law, the stricter state statute phenomenon also occurs within the context of other policy areas. Developments in **state antitrust law,** for example, have also empowered the SAGs. Following a Supreme Court ruling limiting the practical application of **federal** antitrust laws, 97 for example, many states enacted **amendments** to their antitrust statutes granting SAGs more enforcement authority and jurisdiction as a matter of **state law**.98 The upshot of all of this is that the combination of **state legal standards** and **nationally enforced settlements** gives SAGs **a prominent** avenue for "gap-filling" litigation that is less about the refusal or inability for federal enforcers to regulate than about the imposition of different regulatory standards. Thus, even in cases where AGs are "enforcing the law" rather than making law, it is important to consider the statutes at issue in the case. If enforcement of state law results in a settlement that applies **nationally**, this may be "enforcing" the law on **one** (state) **level** but **simultaneously** creating new law on the other (**national) level.**

#### 4---State courts decisions are final over state statutes---no federal rollback

**Frost 15** (Amanda Frost, Professor of Law, American University Washington College of Law, "Inferiority complex: Should state courts follow lower federal court precedent on the meaning of federal law." Vand. L. Rev. 68 (2015): 53, y2k)

Similar foundational questions were raised seventy-five years ago in ***Erie*** Railroad v. Tompkins, 11 when the **Supreme Court** overruled Swift v. Tyson12 and held that **federal courts** must follow **state law** as articulated by **a state’s highest court**. The Court explained that federal courts undermined state sovereignty by failing to treat state courts’ views on state law as controlling.13 Although *Erie* focused on the federal courts’ obligation to adopt state common law, the decision confirmed that **federal courts** must follow **state courts’ interpretations** of **state** positive **law** as well.14 The bottom line after Erie is that **state courts have the final word on the meaning of state law**

#### Multistate suits are seen as efficient---causes a single and comprehensive settlement with all states

**Nolette 11** (Paul Brian Nolette, PhD, Assistant Professor, Marquette University, Department of Political Science, ADVANCING NATIONAL POLICY IN THE COURTS: THE USE OF MULTISTATE LITIGATION BY STATE ATTORNEYS GENERAL, a dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, Boston College, The Graduate School of Arts and Sciences, Department of Political Science, <https://core.ac.uk/download/pdf/151481511.pdf>, y2k)

The experience of Sears and other companies subject to litigation led them to realize quickly that settlements addressing the **SAGs’ concerns** while preserving the ability of corporations to continue to operate "are often **preferable** to years of litigation, bad publicity, and regulatory attention."64 Most multistate settlements contain a clause specifying that the signing party does not admit wrongdoing, and that the company chose to settle "in order to cooperate with the States, to ensure that its customers are treated fairly, and to avoid expensive and potentially protracted litigation."65 **Settling litigation** in such a way, **even if** it imposes **regulatory requirements** and **monetary payments**, reduces the sort of **uncertainty** that makes shareholders **nervous**. Further, when sued, corporate defendants typically want "**a single, comprehensive, predictable settlement**" resolving the cases.66 As SAGs became more **frequent** and **successful** litigators, the targets of this litigation have pushed for **global settlements** including as **many states** as possible. Even if they deny the allegations underlying the litigation, they see this "as an **efficient** and **effective way** to deal with a matter comprehensively."67 In certain cases, the terms and reach of a global settlement may even advantage the involved firms at the expense of their competitors, a dynamic explained at length by Michael Greve and other authors in the context of the tobacco settlement.68 That both **SAGs** and **corporate defendants** alike have well understood the **efficiencies** of multistate litigation is an important reason why the use of this tool has increased. It is also likely one of the reasons why a greater number of states have joined such settlements over time, as indicated by Figure 3.3 earlier in this chapter.

#### This applies to the aff---the fed has to prosecute conducts that occur nationally---1AC proves there’s no risk

**HLR 20.** Harvard Law Review. 6-10-20. “Antitrust Federalism, Preemption, and Judge-Made Law" https://harvardlawreview.org/2020/06/antitrust-federalism-preemption-and-judge-made-law/

Like the patchwork regime critique, the overdeterrence critique is weakened if the federal regime has failed to achieve proper balancing. Many antitrust regimes around the globe adopt different balances than the United States does. The European Union, for example, differs from the United States on remedial structure, the standard for illegal unilateral conduct, and market definition, among other issues.68 Moreover, **many scholars argue** **that the U.S. antitrust balance is off** **and that more enforcement is needed**.69 Even if U.S. antitrust policies are getting the balance generally right, **it is unlikely that the federal regime is so finely tuned** **that any added deterrence will destroy the balance.**

#### 3---Real world---50 states action is real!

**Hubbard & Yoon 5** (Robert Hubbard is Director of Litigation and James Yoon is an Assistant Attorney General in the Antitrust Bureau of the New York Attorney General's office, FEATURE ARTICLE: HOW THE ANTITRUST MODERNIZATION COMMISSION SHOULD VIEW STATE ANTITRUST ENFORCEMENT. Loyola Consumer Law Review, 17, 497, y2k)

C. States Both **Lead** and **Initiate Antitrust Litigation**

Contrary to being free riders, states are often the first and only plaintiff in antitrust matters. Acting alone, states have **initiated matters** or **extended matters into new areas** or for new claimants. The **cases** cited in the **footnote** illustrates these points for **all fifty states**.

**(Footnote 127 starts)**

The following cases are illustrative of states' initiatives in antitrust matters:

**Alabama** v. Blue Bird Body Co., Inc., 573 F.2d 309, 311 (5th Cir. 1978) (Alabama and local educational authorities sued manufacturers and distributors of school bus bodies, claiming defendants conspired to fix prices and restrain trade);

**Alaska** v. Chevron Chem. Co., 669 F.2d 1299, 1300-01 (9th Cir. 1982) (Alaska sued manufacturers of agricultural fertilizer for fixing prices and allocating markets);

**Arizona** v. Maricopa County Med. Soc'y., 457 U.S. 332, 336-37 (1982) (Arizona sued medical societies for price-fixing through agreements among competing member physicians who agreed to set the fee amounts they could collect for their services);

**Arkansas** v. Chicago, Rock Island & Pac. Ry., Co., 128 S.W. 555, 55-56 (Ark. 1910) (Arkansas sued a railroad corporation for fixing the rates to be charged for freight and passenger service);

**California** v. Am. Stores Co., 495 U.S. 271, 275-76 (1990) (California sued for an injunction after the fourth largest grocery chain acquired all of the outstanding stock of the largest grocery chain in California, alleging the merger constituted an anti-competitive acquisition);

**Colorado** v. Goodell Bros., Inc., Civ. A No. 84-A-803, 1987, at \*1 (D. Colo. July 7, 1987) (Colorado sued contractors alleging a conspiracy to restrain trade in the highway construction industry by bid-rigging on various highway construction projects);

**Connecticut** v. Am. Med. Response, Inc., No. Cv-99-589962 (Conn. Super. Ct. June 3, 1999) (Connecticut sued to prohibit acquisition of major competing ambulance service providers in Connecticut);

**Delaware** v. Mid-Atlantic Paving Co., C.A. No. 7197, 1983 WL 14930, at \*1 (Del. Ch. June 24, 1983) (Delaware sued a construction company for price-fixing the sale of liquid asphalt);

**District of Columbia** v. CVS Corp., Civ. No. 03-4431 (D.C. Sup. Ct. May 30, 2003) (District of Columbia sued to challenge the acquisition of a pharmacy);

**Florida** v. Abbott Labs., 1993-1 Trade Cas.(CCH) P 70,241 (N.D. Fla. 1993) (Florida sued and settled with infant formula manufacturers for a conspiracy among competitors regarding pricing and marketing of infant formula products);

**Georgia** v. Pennsylvania R. Co., 324 U.S. 439, 443-44 (1945) (Georgia sued defendant railroads for conspiring to fix rates charged for transportation of freight);

**Hawaii** v. Standard Oil Co. of California, 405 U.S. 251, 253 (1972) (Hawaii sued defendants for conspiracy to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products and for monopolization of the market);

**Idaho** v. Daicel Chem. Indus., Ltd., 106 P.3d 428, 430 (D.C. Sup. Ct. May 30, 2003) (Idaho sued chemical manufacturers for an illegal conspiracy to fix prices in the commercial sorbates industry);

**Illinois** v. Sangamo Constr. Co., 657 F.2d 855, 857 (7th Cir. 1981) (Illinois sued construction companies for engaging in a conspiracy to allocate highway construction projects put out for public bids);

**Indiana** v. The Home Brewing Co. of Indianapolis, 105 N.E. 909, 910 ( Ind. 1914) (Indiana sued a corporation for monopolizing the business of selling beer and other intoxicating liquors);

**Iowa** v. Scott & Fetzer Co., Civil No. 81-362- E, 1982 WL 1874, at \*1 (S.D. Iowa July 8, 1982) (Iowa sued defendants for antitrust violations, in a case testing the state attorney general's ability to sue under the parens patriae provision of the Clayton Act);

**Kansas** v. Am. Oil Co., 446 P.2d 754, 755 (Kan. 1968) (Kansas sued corporations engaged in the supply of liquid asphalt for bid-rigging asphalt sales and allocating sales territory);

**Kentucky** v. Plain view Farms Dev. Corp., No. 234010, 1977 WL 18405 (Ky. Cir. Ct. Sept. 6, 1977) (Kentucky sued a real estate developer for an unlawful tying arrangement which conditioned the purchase of a residential condominium or unit upon the purchase of use of a recreational facility);

**Louisiana** v. Seifert, 524 So. 2d 160, 161 (La. Ct. App. 1988) (Louisiana sued three defendants for monopolization and attempted monopolization of the film industry);

**Maine** v. Connors Bros. Ltd., 2000-1 Trade Cas. (CCH) P 72,937 (Me. Super. Ct. 2000) (Maine, in a consent agreement, permitted a Canadian sardine processing company to a acquire the assets of a Maine-based competitor);

**Maryland** v. Blue Cross & Blue Shield Ass'n, 620 F. Supp. 907, 909 (D. Md. 1985) (Maryland sued health insurers for price fixing and allocating markets, customers, and contracts by submitting non-competitive and collusive bids);

**Massachusetts** v. William Bayley, Ltd., 1983 WL 14914, (Mass. Super. Ct. Jan. 21, 1983) (Massachusetts sued defendant for exclusive dealing by requiring bid specifications for public construction and renovation projects specify exclusive use of the products of a certain manufacturer of security windows);

**Michigan** v. McDonald Dairy Co., 905 F. Supp. 447, 450 (W.D. Mich. 1995) (Michigan sued dairy companies on behalf of public schools for bid-rigging on contracts to supply milk to area school districts);

**Minnesota** v. Nat'l Beauty Supply Co., No. 736778, 1977 WL 18389 (D. Minn. June 9, 1977) (Minnesota sued five beauty supply wholesalers for price-fixing and eliminating discounts from wholesale prices of beauty supplies);

**Mississippi** v. Jackson Cotton Oil Co., 48 So. 300, 300 (Miss. 1909) (Mississippi sued two competing cotton seed oil manufacturers for a price-fixing conspiracy to limit the price of a commodity);

**Missouri** v. Poplar Bluff Physicians Group, Inc., No. CV195-393-CC, 1995 WL 788087 (Mo. Cir. Ct. Apr. 12, 1995) (Missouri sued a group of physicians who operated a medical clinic -partnership for conspiracy and attempted monopolization for the sale of prescription drugs and durable medical equipment to patients, nursing homes and residential care facilities);

**Montana** v. SuperAmerica, 559 F. Supp. 298, 299-300 (D. Mont. 1983) (Montana sued an oil company for a conspiring with its competitors to fix prices for gasoline);

**Nebraska** v. Associated Grocers, 332 N.W.2d 690, 691 (Neb. 1983) (Nebraska sued dairy product wholesalers, a retail grocer and individuals for price-fixing the sale of milk);

**Nevada** v. Merkley & Hankins, Inc., No. 20644, 1988 WL 247972 (D. Nev. July 6, 1988) (Nevada sued a gasoline and petroleum product wholesaler for fixing the resale prices of gasoline);

**New Hampshire** v. New Hampshire Grocers Ass'n, Inc., 348 A.2d 360, 360-61 (N.H. 1975) (New Hampshire sued a retail grocers association for attempts to coerce manufacturers and distributors to refrain from offering fresh baked goods to discount bakery stores);

**New Jersey** v. Morton Salt Co., 387 F.2d 94, 95 (3d Cir. 1967) (New Jersey filed suit in district court against seven corporations, seeking treble damages for violations of Sections 1 and 2 of the Sherman Act);

**New Mexico** v. Scott & Fetzer Co., Civil No. 81-054- JB. 1981 WL 2167 (D. N.M. Dec. 22, 1981) (New Mexico sued defendants for antitrust violations, in a case testing the state attorneys general ability to sue under the parens patriae provision of the Clayton Act);

**New York** v. St. Francis Hosp., 94 F. Supp. 2d 399, 402-03 (S.D.N.Y. 2000) (New York sued two New York hospitals for engaging in illegal price-fixing and market allocation through joint negotiations);

**North Carolina** v. P.I.A. Asheville, Inc., 740 F.2d 274, 276 (4th Cir. 1984) (North Carolina sued the owner of psychiatric facilities alleging that acquisition of particular facility violated the antitrust laws);

**Ohio** v. Louis Trauth Dairy, Inc., 925 F. Supp. 1247, 1248-49 (S.D. Ohio 1996) (Ohio sued several dairies, alleging conspiracy to set prices and allocate territories in sale of milk to school districts);

**Oklahoma** v. Allied Materials Corp., 312 F. Supp. 130, 131 (W.D. Okla. 1968) (Oklahoma sued corporations for conspiring to rig bids for liquid asphalt sales);

**Oregon** v. Fields & Endsley, Inc., No. 151873, 1984 WL 15669 (Or. Cir. Ct. Oct. 4, 1984) (Oregon sued defendants for price-fixing wholesale and retail gasoline);

**Pennsylvania** v. Providence Health Sys., Inc., Civ. A. No. 4: CV-94-772, 1994 WL 374424 (D. Pa. May 26, 1994) (Pennsylvania charged that three competing hospitals combining to manage the provision of health care would result in an anti-competitive concentration of market power);

**Puerto Rico** v. Wal-mart Puerto Rico, Inc., 238 F. Supp. 2d 395, 409 (D.P.R. 2002) (Puerto Rico sued to obtain a preliminary injunction to enjoin a retail chain from buying a chain of grocery stores);

**Rhode Island** v. Neptune Int'l Corp., Civil Action No. 80-4503, 1980 WL 4688 (R.I. Super. Ct. Dec. 30, 1980) (Rhode Island sued a manufacturer-wholesaler and retailer of furniture products for price-fixing and implementing exclusive dealing and refusal to deal agreements);

Loftis v. **South Carolina** Elec. & Gas Co., 604 S.E.2d 714, 715 (S.C. Ct. App. 2004) (South Carolina instituted an UTPA (consumer protection) action against SCE&G for routinely overcharging municipal franchise fees to a portion of its population);

**South Dakota** v. Cent. Lumber Co., 123 N.W. 504, 506 (S.D. 1909), aff'd, 226 U.S. 157 (1912) (South Dakota sued a lumber company for criminal and civil antitrust violations by forming a combination to restrain trade);

**Tennessee** v. Joe Stewart Body Shop, 1992-1 Trade Cas. (CCH) P 69,748 (W.D. Tenn. 1992) (Tennessee sued auto body repair shop for attempting to fix the prices of repair services);

**Texas** v. Zeneca, Inc., No. 3-97 CV 1526-D, 1997 WL 570975, at \*1 (N.D. Tex. June 27, 1997) (Texas led a multistate case against a pesticide manufacturer for conspiring with its distributors to fix resale prices);

**Utah** v. Univ. of Utah, 1994-1 Trade Cas. (CCH) P 70,550 (D. Utah 1994) (Utah sued a state university hospital for exchanging wage information with other health care facilities concerning compensation paid to nurses, fixing prospective compensation, and discouraging others from negotiating with other third-party payers);

**Vermont** v. Densmore Brick Co., Inc., Civil Action File No. 78-297, 1980 WL 1846, at \*1 (D. Vt. Apr. 10, 1980) (Vermont brought a state parens patriae action against a manufacturer of wood burning stoves for price-fixing);

**Virginia** v. Buckley Moss, Inc., Civil Action No. G-8998-2, 1983 WL 14948, at \*1 (Va. Cir. Ct. Apr. 5, 1983) (Virginia sued a seller of decorative artwork for price-fixing the resale prices of its dealers);

**Washington** v. Larson, No. 39916-1- I, 1998 WL 141935 (Wash. Ct. App. Mar. 30, 1998) (Washington sued two pharmacy owners for price-fixing the prices that would be paid by insurers, third-party payers, or consumers for drugs);

**West Virginia** v. Meadow Gold Dairies, 875 F. Supp. 340, 343 (D. W. Va. 1994) (Action against two dairies alleging conspiracy to illegally and artificially raise price of milk supplied to school boards);

**Wisconsin** v. Marigold Foods, Inc., 1980 WL 4676, at \* 1-2 (Wis. Cir. Ct. Sept. 3, 1980) (Wisconsin sued a milk products firm for resale price-fixing selected dairy products).

**(Footnote ends)**

As the parentheticals in the footnote specify, many of these cases are local and involve local activity such as groceries, dairies, construction firms, and a varied list of manufacturers and retailers. The majority of the litigations assert claims for price-fixing and bid-rigging, but include other antitrust claims such as tying, monopolization, and exclusive dealing.

#### Specifically, multistate suits are a real thing!

**Dishman 20** (Elysa M. Dishman is an Associate Professor at BYU Law School, CLASS ACTION SQUARED: MULTISTATE ACTIONS AND AGENCY DILEMMAS, 96 Notre Dame L. Rev. 291, y2k)

**Multistate actions** often involve many states, sometimes with **almost every state in the country** participating in the action. For example, the National Mortgage Settlement had forty-nine participating states, the Target multistate [\*306] settlement had forty-seven participating states, the **W**estern **U**nion multistate settlement had **fifty participating states**, and the Master Settlement Agreement had forty-six states. Since each AG represents a large number of state residents, the interests of many states and people are represented in multistate actions.

#### All states have antitrust laws

**Nolette 11** (Paul Brian Nolette, PhD, Assistant Professor, Marquette University, Department of Political Science, ADVANCING NATIONAL POLICY IN THE COURTS: THE USE OF MULTISTATE LITIGATION BY STATE ATTORNEYS GENERAL, a dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, Boston College, The Graduate School of Arts and Sciences, Department of Political Science, <https://core.ac.uk/download/pdf/151481511.pdf>, y2k)

b) **Antitrust**

The role of SAGs in **antitrust** issues date back to the late 19th century, when several attorneys general brought cases against "trusts" that were allegedly engaged in **price-fixing** and other **monopolistic practices**.13 Many of their activities were followed by other state and federal efforts seeking to encourage market competition and prevent anticompetitive business practices, including the enactment of the Sherman Act in 1890 and many similar state statutes. Today, **all fifty states have antitrust statutes**, and other federal laws have supplemented the original Sherman Act, including the Clayton Act of 1914.

#### 4---Literature and solvency advocates check

**Rose 13** (Amanda M. Rose, Associate Professor, Vanderbilt University Law School, Article: State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm). Minnesota Law Review, 97, 1343, y2k)

**A mature debate** exists over the **wisdom** of concurrent state enforcement in the **antitrust context**. See, e.g., Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673 (2004) (defending concurrent state enforcement); Carole R. Doris, Another View on State Antitrust Enforcement - A Reply to Judge Posner, 69 Antitrust L.J. 345 (2001) (same); Harry First, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo. Wash. L. Rev. 1004 (2001) (same); Robert L. Hubbard & James Yoon, How the Antitrust Modernization Commission Should View State Antitrust Enforcement, 17 Loy. Consumer L. Rev. 497 (2005) (same); cf. Richard A. Posner, Federalism and the Enforcement of Antitrust Laws by State Attorneys General, in Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 252-66 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter Competition Laws in Conflict] (criticizing concurrent state enforcement); Michael L. Denger & D. Jarrett Arp, Does Our Multifaceted Enforcement System Promote Sound Competition Policy?, 15 Antitrust 41 (2001) (same); Robert W. Hahn & Anne Layne-Farrar, Federalism in Antitrust, 26 Harv. J.L. & Pub. Pol'y 877 (2003); Posner, supra note 22 (same). For more information about this debate, see also Michael DeBow, State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in Competition Laws in Conflict, at 267-88; Michael S. Greve, Cartel Federalism? Antitrust Enforcement by State Attorneys General, 72 U. Chi. L. Rev. 99 (2005).

#### No patchwork

**Gugliuzza 15** (Paul R. Gugliuzza, Associate Professor, Boston University School of Law, PATENT TROLLS AND PREEMPTION, 101 Va. L. Rev. 1579, y2k)

**State-by-state** regulation of patent enforcement does threaten to impede national uniformity, which was one of the Court's reasons for finding preemption in Bonito Boats. **Yet** it is not as if the **fifty different states take fifty different approaches to unfair competition law**, deceptive trade practices law, or business torts. Many of the new state statutes are also **similar**, condemning "bad faith" assertions of patent infringement. In addition, the uniformity with which the Supreme Court was concerned in Bonito Boats was uniformity in the scope of intellectual property rights. When the Court has been confronted with bodies of state law, such as contract law, that govern intellectual property rights whose scope has already been determined by federal law, **the Court has allowed state law room to operate.**

#### CP establishes a uniform state antitrust law---any solvency deficit applies to the aff because there’s no “perfect” uniformity

**Sandeen 17** (Sharon K. Sandeen, Robins Kaplan LLP Distinguished Professor in Intellectual Property Law and Director of IP Institute, Mitchell Hamline School of Law, THE MYTH OF UNIFORMITY IN IP LAWS, 24 J. Intell. Prop. L. 277, y2k)

All the foregoing rationales for **federal uniformity** seem good **on paper**, but as noted previously, for a variety of **legal** and **practical reasons**, federal uniformity is **difficult** to achieve **even when a detailed federal law is written**. Moreover, the perceived legitimacy of federal law over state law could easily be applied to a wide variety of state laws, such as commercial law, but no one is clamoring to supplant the Uniform Commercial Code with a federal law. In fact, if anything, our system of **federalism** establishes both a **Constitutional** and [\*300] **institutional preference** for the application of **state substantive law** over **federal substantive law.**

While policymakers and lobbyists are apt to trot out the rhetoric of uniformity whenever they wish to enact a new federal law, because the desired uniformity does not always result, it is important to focus on other possible rationales for new federal laws. One such rationale is that a federal law is **needed** to fill a gap that exists in **state law**, for instance the legal vacuum that was created in **unfair competition law** following the Supreme Court's decision in *Erie*. 105 However, in such cases, the gap might **also** be filled by **a uniform state law**, as was the case with the **U**niform **T**rade **S**ecrets **A**ct, 106again raising the important question **why** a federal law would be **better**.

Sometimes a new federal law is justified by changes in technology that require a response that is quicker than either the common law or the drafting and adoption of a uniform law can provide. Both the Digital Millennium Copyright Act 107and the Computer Fraud and Abuse Act 108are examples of this approach, but they also reveal that a rush to enact federal legislation can result in legislation being enacted before all the problems are known. Related to this rationale is the fact that a federal statute (or a uniform state law) can often be used to speed-up or fix the development of common law in a certain area, as was the case with the Uniform Trade Secrets Act. 109

Most arguments in favor of federal uniformity focus on the asserted benefits of uniformity but fail to explore the reasons why Congress does not act to further uniformity in all areas of law. This underscores the weakness of the uniformity argument because it shows that there is no general interest in the uniformity of legal principles, only an interest in federal uniformity with respect to those areas of law over which Congress wishes to assert control. Whether explained as respect for states' rights or an inability to get legislation passed, the simple fact is that the **benefits** of **federal uniformity** are often **not enough** to **motivate** the enactment of a **federal law**, even when there are numerous **conflicting state laws** on the subject. Privacy laws governing the protection of personally identifiable information and rights of publicity laws provide two IP-related [\*301] examples of laws that have been left to the states despite the benefits of federal uniformity.

#### Multistate litigation solves uniformity---even though 50 states act, the litigation occurs in a single jurisdiction

**Hildabrand 14** (Clark L. Hildabrand, Assistant Solicitor General, Tennessee Attorney General's Office, Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now, 16 Transactions: TENN. J. Bus. L. 67, y2k)

State **antitrust** laws and enforcement also encourage **greater consistency in antitrust enforcement** over time by weakening barriers to enforcement from financial, jurisdictional, and political restrictions. First, dual enforcement of antitrust regulations allows access to the resources of both the federal government and state governments. Government agency budgets certainly are not immune to reductions and limitations in times of fiscal difficulty. 54 The DOJ's Antitrust Division announced in 2012 that it planned to close four field offices following the 2013 budget process in an effort to reduce costs. 55 According to Judge Dan Polster, who presides over the United States District Court for the Northern District of Ohio and started his career in the Cleveland field office of the Antitrust Division, closing the field offices will reduce the DOJ's ability to prosecute regional antitrust cases and resolve local price fixing disputes. 56 These cases "really have a direct impact on [the] local economy and people's pocket books," but the DOJ Antitrust Division has turned its focus toward larger domestic and international cases.5 Encouraging **state enforcement** of state and federal antitrust statutes may alleviate concerns about a lack of **regional** enforcement. State **a**ttorneys **g**eneral can **pool** their **resources** for enforcement and even appear **together** as **amici cuiae** to better **inform courts** as to the interests of state consumers. One widespread fear was that states might pool their resources in order to pursue **protectionist litigation** in their mutual favor, and to the disadvantage of a few states.59 In response to this criticism, Congress dramatically **limited** the availability of **multistate actions** "by requiring that any state enforcement action take place 'in any **district court** of the United States **in that State** or in a **State court** that is located in that state and that has **jurisdiction** over the defendant.""'6 Thus, state antitrust enforcement and limited regional pooling enable **greater consistency** in antitrust enforcement even in the presence of shifting federal priorities.

#### That solves industry backlash

**Nolette 11** (Paul Brian Nolette, PhD, Assistant Professor, Marquette University, Department of Political Science, ADVANCING NATIONAL POLICY IN THE COURTS: THE USE OF MULTISTATE LITIGATION BY STATE ATTORNEYS GENERAL, a dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, Boston College, The Graduate School of Arts and Sciences, Department of Political Science, <https://core.ac.uk/download/pdf/151481511.pdf>, y2k)

Nevertheless, the suggestion that polyphonic federalism promotes regulatory "dialogue" remains problematic in context of multistate litigation. Initially, it might seem that the biggest problem to arise would be the potential for cacophony rather than dialogue. Numerous observers have broached the problem of corporations struggling to comply with a **patchwork of state regulatory regimes** in addition to federal requirements. Frequently, industry much prefers **a single** comprehensive regulatory **regime** than a patchwork of confusing regulations. As Pietro Nivola stated, companies believe it is "better to have **one 500-pound gorilla** in charge of regulating the industry...than to deal with 50 monkeys on steroids."12 In the case of **multistate** litigation, however, **the problem is rarely one of regulatory balkinization**. More settlements in recent years involve **all** or nearly all **of the nation's SAGs**, reducing the **specter of dozens of "monkeys on steroids" operating separately**. Instead, the real issue of multistate litigation is not that it is balkanizing policy but that it is replacing one set of national regulatory choices with another. Much multistate litigation involves two main sets of regulators – the SAGs and federal regulators – proceeding with different visions of the optimal national regulatory regime. It is difficult to see how these instances of multistate litigation produces "dialogue" – instead, the litigation is simply a tool used to replace one particular regulatory vision at the expense of another. This replacement often comes after attempts to achieve this regulatory vision have already lost in Congress or in administrative agencies. Rather than spurring a dialogue, then, multistate litigation simply keeps one side of the conversation going when federal representative institutions have already rejected that point of view. To continue the aural metaphor, SAGs' use of multistate litigation in a "polyphonic" system is the equivalent to using a bullhorn to express one's position in a crowded room – it threatens to drown out other voices, not add to them.

can yield **essentially the same results.**

## 2NC – Conduct – AI Turn

#### All metrics show US leadership

AFP1 21 (Associated Foreign Press, Citing a report from the Information Technology and Innovation Fund, “US leading race in artificial intelligence, China rising, EU lagging: survey”, https://www.euractiv.com/section/china/news/us-leading-race-in-artificial-intelligence-china-rising-eu-lagging-survey/)

The United States is leading rivals in development and use of artificial intelligence while China is rising quickly and European Union is lagging, a research report showed Monday (25 January). The study by the Information Technology and Innovation Foundation assessed AI using 30 separate metrics including human talent, research activity, commercial development and investment in hardware and software. The United States leads, with an overall score of 44.6 points on a 100-point scale, followed by China with 32 and the European Union with 23.3, the report based on 2020 data found. The researchers found the US leading in key areas such as investment in startups and research and development funding. But China has made strides in several areas and last year had more of the world’s 500 most powerful supercomputers than any other nation — 214, compared with 113 for the US and 91 for the EU. “The Chinese government has made AI a top priority and the results are showing,” said Daniel Castro, director of the think tank’s Center for Data Innovation and lead author of the report. “The United States and European Union need to pay attention to what China is doing and respond, because nations that lead in the development and use of AI will shape its future and significantly improve their economic competitiveness, while those that fall behind risk losing competitiveness in key industries.” The EU lagged notably in venture capital and private equity funding, while faring better in terms of research papers published. The report found China published some 24,929 AI research papers in 2018, the latest year for which data was available, to 20,418 for the European Union and 16,233 for the United States. But it said that “average US research quality is still higher than that of China and the European Union.” The survey also concluded that the United States “is still the world leader in designing chips for AI systems.” To remain competitive, the report said, Europe needs to boost research tax incentives, and expand public research institutes working on AI. For the United States to maintain its lead, it must boost support for AI research and deployment, and step up efforts to develop AI talent domestically while attracting top talent from around the world.

#### 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.

#### 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.

## 2NC – Conduct – defense

#### Leadership’s irrelevant.

Christopher **Fettweis 17**. Associate Professor of Political Science at Tulane University. “Unipolarity, Hegemony, and the New Peace,” Security Studies, 26:3, 423-451, 5-8-2017, http://dx.doi.org/10.1080/09636412.2017.1306394

Conflict and Hegemony by Region Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The United States has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic-stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear. Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist across regions. If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1. These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace. In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day. The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

#### 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.

## Platforms

#### Israel *knows* their ground forces are inferior in a war, so it’s an empty threat for more US aid

Sajjad Safaei 9/17—Postdoc fellow at Germany’s Max Planck Institute for Social Anthropology. ("Israel Isn’t Strong Enough to Attack Iran," SEPTEMBER 17, 2021, from Foreign Policy, https://foreignpolicy.com/2021/09/17/israel-isnt-strong-enough-to-attack-iran/)

But this prodigious superiority will be rendered far less consequential in the event of an all-out war that lures the IDF ground forces into the battlefield. Why? Ever since the IDF’s embarrassing defeat during the 2006 war with Hezbollah, Israel’s top military brass have become acutely aware that the country’s land forces are ill-prepared for a full-scale war with a fighting force even moderately capable of packing a punch.

As shown by Israel’s own scathing inquiry into the 2006 war, as well as reports by the Washington Institute for Near East Policy and the U.S. Army, the 33-day war with Hezbollah demonstrated that the IDF ground forces had been woefully ill-prepared to fight a real war with a formidable foe.

Since then, there have been some signs of remedial measures undertaken by the IDF to address its shortcomings. Still, there is little reason to believe its ground forces have undergone a drastic improvement since the 2006 war. Unsurprisingly, when Gadi Eizenkot began his tenure as Chief of General Staff of the IDF a few months after Protective Edge (the 2014 Gaza War), he reportedly “found the ground forces in rather bad shape” and “an army that had gotten fat in … all the wrong places in the decade after the Second Lebanon War.” The picture looked more or less the same in late 2018 when the outgoing ombudsman of the Israeli Defense Ministry Maj. Gen. (res.) Yitzhak Brick warned lawmakers in a “contentious” meeting that the country’s ground forces were unprepared for a future war.

Mindful of the gaping chink in the IDF’s armor, Israel’s highest military and political echelons are unlikely to order an overt military operation inside Iranian territory, knowing full well that such an assault will most likely lock Israel and Iran in an irreversible spiral of escalation that promises to pit ill-prepared IDF ground troops against Iranian forces and their regional allies such as Hezbollah.

But if Washington’s red light and Tel Aviv’s own military calculus render a flagrant violation of Iranian sovereignty by the IDF unlikely, then what is to account for the public, at ti

mes even garish, saber-rattling emanating from Israeli statesmen? Such threats are partly tailored for domestic consumption. In a highly militarized social context that has in recent decades steadily drifted toward the far-right, talk of bombing Iran may be an effort to not appear weak before one’s political rivals.

It may also be read, however, as a bargaining posture to strengthen Israel’s position vis-à-vis the Biden administration on issues far closer to home than the Iranian nuclear program. By continuously breathing life into the specter of striking Iran—a source of great unease in Western capitals due its catastrophic ramifications—Israeli leaders can offer to forgo their non-existent plans to enter an all-out war with Iran in return for other gains: Biden dropping his opposition to illegal settlement expansion in the occupied territories (a secondary issue for the United States) as well as more military and financial aid.

#### No Saudi Prolif—lack of capabilities, skills, and no selling

Zakaria 15 (Zakaria, Fareed. “Why Saudi Arabia Can't Get a Nuclear Weapon.” *The Washington Post*, WP Company, 11 June 2015, [www.washingtonpost.com/opinions/saudi-arabias-nuclear-bluff/2015/06/11/9ce1f4f8-1074-11e5-9726-49d6fa26a8c6\_story.html?noredirect=on&utm\_term=.102da03232f4](http://www.washingtonpost.com/opinions/saudi-arabias-nuclear-bluff/2015/06/11/9ce1f4f8-1074-11e5-9726-49d6fa26a8c6_story.html?noredirect=on&utm_term=.102da03232f4)., DG)

Of the many unnerving aspects of the future of the Middle East, a nuclear arms race would top the list. And to feed that unease, Saudi Arabia has been periodically dropping hints that, should Iran’s nuclear ambitions go unchecked, it might just have to get nuclear weapons itself. This week, the Saudi ambassador to London made yet another explicit threat, warning that “[all options will be on the table](http://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/11658338/The-Saudis-are-ready-to-go-nuclear.html).” Oh, please! Saudi Arabia isn’t going to build a nuclear weapon. Saudi Arabia can’t build a nuclear weapon. Saudi Arabia hasn’t even built a car. (By 2017, after much effort, the country is expected to manufacture its [first automobile](http://www.arabianbusiness.com/saudi-produce-first-locally-made-car-by-2017-546955.html).) Saudi Arabia can dig holes in the ground and pump out oil but little else. Oil revenue is about [45 percent](http://www.forbes.com/places/saudi-arabia/) of its gross domestic product, a staggeringly high figure, much larger than petro-states such as Nigeria and Venezuela. It makes up almost 90 percent of the Saudi government’s revenue. Despite decades of massive government investment, lavish subsidies and cheap energy, manufacturing is less than 10 percent of Saudi GDP. Where would Saudi Arabia train the scientists to work on its secret program? The country’s education system is backward and dysfunctional, having been largely handed over to its puritanical and reactionary religious establishment. The country ranks 73rd in the quality of its math and science education, [according to the World Economic Forum](http://reports.weforum.org/global-competitiveness-report-2014-2015/middle-east-and-north-africa/) — abysmally low for a rich country. Iran, despite 36 years of sanctions and a much lower per capita GDP, [fares far better at 44](http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/#indicatorId=GCI.A.04). And who would work in Saudi Arabia’s imagined nuclear industry? In a penetrating book, Karen Elliott House, formerly of the Wall Street Journal, [describes the Saudi labor market](https://books.google.com/books?id=_wzyIQAVE_AC&pg=PA157&lpg=PA157&dq=Karen+Elliott+House+%E2%80%9COne+of+every+three+people+in+Saudi+Arabia+is+a+foreigner%22&source=bl&ots=bZjjKiyPQJ&sig=Gzon7HrIwYKWZJkyCZeEza-XJgk&hl=en&sa=X&ved=0CB4Q6AEwAGoVChMInsisoLqIxgIVA0KSCh1yUQBe#v=onepage&q=Two%20out%20of%20every%20three%20people%20with%20a%20job%20of%20any%20sort%20are%20foreignKaren%20Elliott%20House%20%E2%80%9COne%20of%20every%20three%20people%20in%20Saudi%20Arabia%20is%20a%20foreigner%22&f=false): “One of every three people in Saudi Arabia is a foreigner. Two out of every three people with a job of any sort are foreign. And in Saudi Arabia’s anemic private sector, fully nine out of ten people holding jobs are non-Saudi. . . . Saudi Arabia, in short, is a society in which all too many men do not want to work at jobs for which they are qualified; in which women by and large aren’t allowed to work; and in which, as a result, most of the work is done by foreigners.” None of this is to suggest that the kingdom is in danger of collapse. Far from it. The regime’s finances are strong, though public spending keeps rising and oil revenue has been declining. The royal family has deftly used patronage, politics, religion and repression to keep the country stable and quiescent. But that has produced a system of stagnation for most, with a gilded elite surfing on top with almost unimaginable sums of money. Saudi Arabia’s increased assertiveness has been portrayed as strategic. In fact, it is a panicked and emotional response to Iran, fueled in no small measure by long-standing anti-Shiite bigotry. It is pique masquerading as strategy. In October 2013, after having spent years and millions of dollars campaigning for a seat on the U.N. Security Council, it abruptly [declined the post at the last minute](https://www.washingtonpost.com/world/saudi-arabia-rejects-seat-on-un-security-council/2013/10/18/9d9ae476-3813-11e3-ae46-e4248e75c8ea_story.html), signaling that it was annoyed at U.S. policy in its region. Its most recent international activism, the air campaign in Yemen, has badly backfired. [Bruce Riedel](http://www.brookings.edu/blogs/markaz/posts/2015/05/19-yemen-saudi-arabia-attacks-riedel), a former top White House aide, says that damage to civilians and physical infrastructure “has created considerable bad blood between Yemenis and their rich Gulf neighbors that will poison relations for years. Yemenis always resented their rich brothers, and now many will want revenge.” He notes that the air campaign is being directed by the new defense minister, the king’s 29-year-old son, who has no experience in military affairs or much else. But couldn’t Saudi Arabia simply buy a nuclear bomb? That’s highly unlikely. Any such effort would have to take place secretly, under the threat of sanctions, Western retaliation and interception. Saudi Arabia depends heavily on foreigners and their firms to help with its energy industry, build its infrastructure, buy its oil and sell it goods and services. Were it isolated like Iran or North Korea, its economic system would collapse. It is often claimed that Pakistan would sell nukes to the Saudis. And it’s true that the Saudis have bailed out Pakistan many times. But the government in Islamabad is well aware that such a deal could make it a pariah and result in sanctions. It is unlikely to risk that, even to please its sugar daddy in Riyadh. In April, [Pakistan refused repeated Saudi pleas](http://www.reuters.com/article/2015/04/10/us-yemen-security-idUSKBN0N10LO20150410) to join the air campaign in Yemen. So let me make a prediction: Whatever happens with Iran’s nuclear program, 10 years from now Saudi Arabia won’t have nuclear weapons. Because it can’t.

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#### Fetal tissue from abortions key to development diseases

Nidhi Subbaraman 21, , “NIH reverses Trump-era restrictions on fetal-tissue research”, 16 April 2021 | Nature

The US National Institutes of Health (NIH) announced the changes on 16 April. “That’s good news,” says Lawrence Goldstein, a neuroscientist at the University of California, San Diego, who was a member of the Trump-era board that carried out the additional ethics reviews. Researchers use fetal tissue, obtained from elective abortions, to study a range of conditions, from infectious diseases to human development, and say it is crucial to studying some illnesses.

Some restrictions on fetal-tissue research remain in place and could continue to pose hurdles. For example, in 2019, the NIH began requiring that a literature review be added to grant proposals; Goldstein says that this threatens to overwhelm the page limit on applications.

Irving Weissman, director of the Institute of Stem Cell Biology and Regenerative Medicine at the Stanford University School of Medicine in California, agrees. “You don’t have enough space in any grant to do both the comprehensive review and anything you planned to do,” he says.

In 2019, following pressure from anti-abortion groups, the Trump administration announced a series of changes limiting fetal-tissue studies, upsetting many researchers. The rules directed government scientists to stop such projects once their tissue supplies ran out. Also, the Department of Health and Human Services (HHS), which includes the NIH, announced that it would appoint an ethics-review board to vet academic scientists’ proposals seeking NIH funding for projects that required fetal tissue. This was in addition to scientific evaluations already carried out during normal grant review at the NIH.

When the NIH listed members of the board in 2020, scientists pointed out that it was stacked with anti-abortion advocates. At its first and only meeting, in July last year, the group recommended funding just one of the 14 proposals it reviewed.

“I was very worried — I was on the ethics advisory board and saw some highly meritorious projects get killed because of the bias,” says Goldstein, who has used fetal tissue in his research and has spoken up to support such work.

Last year, in the early months of the COVID-19 pandemic, The Washington Post reported that restrictions had barred a researcher at the NIH’s Rocky Mountain Laboratories in Hamilton, Montana, from conducting experiments to develop treatments for coronavirus infections, because the work would have used a mouse model created using human fetal tissue.

Working in a scientific discipline that’s perennially caught up in politics can be challenging “when you can’t rely on consistent funding, when you can’t rely on support — even if you’re doing good research”, says Kirstin Matthews, a science-policy scholar at Rice University’s Baker Institute for Public Policy in Houston, Texas. “There’s not a lot of groups that do fetal-tissue research, but what they do is pretty vital, and so it’ll be good to be able to continue that research.”

The International Society for Stem Cell Research (ISSCR), which petitioned the current and past administrations to lift the limits, praised the change. “Research grants should be based on the scientific and ethical merit of each proposal. The ISSCR welcomes the return to evidence-based policymaking,” said the society’s president, Christine Mummery, in a statement.

#### Human brain development diseases will mutate and cause extinction by reversing brain evolution

Wickramasinghe & Steele 16 (Chandra Wickramasinghe, PhD from Cambridge University Buckingham Centre for Astrobiology (BCAB), Buckingham University,& Institute for the Study of Panspermia and Astroeconomics & EJ Steele, O'Connor ERADE Village Foundation, “Dangers of Adhering to an Obsolete Paradigm: Could Zika Virus Lead to a Reversal of Human Evolution?”, https://www.omicsonline.org/open-access/dangers-of-adhering-to-an-obsolete-paradigm-could-zika-virus-lead-to-a-reversal-of-human-evolution-2332-2519-1000147.pdf)

It is generally agreed that a virus or bacterium that is endogenous to Earth could acquire new characteristics, not only from random mutations, but also by incorporating new genetic sequences from ambient virions. The Zika virus, that is much in the news, appears to have undergone precisely such a change in recent months. Before 2000 the Zika virus was in circulation, but did not cause microencephaly in new born babies - this suggests a major change in the virus. The altered Zika virus, which is now spreading in many countries via a mosquito vector, has been found to affect fetuses in pregnant women, causing babies to be born with reduced brain and skull size. It is also of interest to note that at least one case of transfer of the virus to gametes has been noted in an infected male. The isolation of the virus in semen may be an indication of the soma-to-germline feedback process already occurring in this instance. More are to be expected, much like the peculiar and unexpected seminal transmission mode of HIV when it exploded on the scene unexpectedly in 1981. This epidemic, if it proceeds unchecked, will eventually lead to the emergence of a new human phenotype with reduced brain size and greatly diminished cognitive capacity. It is to be hoped, however, that modern medical science will intervene in time to prevent such a tragic outcome.

We note in this connection that the human brain has seen dramatic changes of volume in the past. Between 2 million and 500,000 years ago, skull volumes in human skeletons appear to have doubled, possibly in several discrete steps [43]. Over the same period it seems likely that our cognitive abilities including the development of speech with the acquisition of the FOXP2 genes had grown [44,45]. In all these acquisitions we might assume they have been integrated into preexisting ancestral haplotype assemblies akin to the targeted integration processes already discussed.

Villarreal [44] and Ryan [45] have shown that viral footprints can be identified in human brain tissue to mark important steps that led up to its present condition. The possibility that Zika-virus induced microencephalitis might represent a retrogression of this trend is an alarming prospect that medical science will have to avert besfore it is too late.

**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

#### Lina Khan’s article proves – Amex decision was substantial, conservative, and tied to Congress

Lina Khan, 7-3-2018, "The Supreme Court just quietly gutted antitrust law," Vox, <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>

The decision was overshadowed by other blockbuster cases and the announcement of Justice Anthony Kennedy’s retirement, but the **Supreme Court last week delivered the most significant antitrust opinion by the Court in more than a decade** — one that made it extraordinarily more difficult for the government to rein in certain companies that abuse their market power. The case was Ohio v. American Express, and it arrived against a backdrop of growing public recognition of the excessive clout wielded by corporations over American workers and consumers, and rising interest in anti-monopoly law and policy, especially on the left. In it, the Court dealt a huge blow to the ability of government and private plaintiffs to enforce existing antitrust laws, making it easier for dominant firms — especially those in the tech sector — to abuse their market power with impunity. How American Express exerts pressure on merchants This case asked whether certain restrictions American Express places on merchants violated the Sherman Act, which prohibits certain monopolistic behavior. American Express, like other credit card companies, provides services both to merchants and to cardholders; it “mediates” transactions between them. For decades, American Express has contractually forbidden merchants from encouraging cardholders to use its competitors’’ cards. So even though the fees charged to merchants by American Express are higher than those charged by Discover Card, for example, AmEx banned merchants from advertising that fact or doing anything that could steer customers toward Discover. The parts of the contract that impose these restrictions are therefore known as “anti-steering” provisions. In 2010 the US government and 17 state attorneys general sued AmEx along with MasterCard and Visa, which also had these provisions; the latter two agreed to settle and dropped the anti-steering language from their contracts. After a lengthy trial, the District Court of the Eastern District of New York held that these anti-steering provisions were illegal. Specifically, the judge found that the provisions made it possible for AmEx to routinely hike merchant fees — 20 times in five years — without losing significant business, and that the provisions effectively blocked entry by other firms. That’s because efforts by rivals to offer merchants low-cost alternatives couldn’t gain traction unless merchants could actually signal to customers that that AmEx was more expensive for merchants to use than other cards. Because the provisions eliminated the benefits a credit card company could derive from a low-price business model — most obviously, a greater share of the market — all four major credit card networks charged higher fees than they would have absent the provisions. All told, the four major credit card networks collect more than $80 billion per year from merchant fees, which merchants then passed on to consumers in the form of higher prices for goods. Critically, although American Express members reaped card rewards as a result of these higher fees — benefits like gift cards and flight upgrades — the judge found that these perks only partially offset the higher prices. (Of course, the low-income populations that don’t use credit cards end up paying the higher prices driven by merchant fees without any of the rewards, which means that AmEx’s anti-competitive behavior also enabled a wealth transfer from poor to rich.) The Second Circuit Appeals Court reversed the district court’s decision. It reasoned that, since American Express serves both merchants and cardholders, plaintiffs alleging anticompetitive harm to merchants must also show that cardholders were worse off overall. They concluded that, while the government showed that merchants had been hurt, they failed to prove net harm to cardholders. The Court’s holding represents a stark departure from existing law Antitrust laws have never permitted monopolistic firms to wield their market power against one set of customers so long as they benefit another set of players. Yet this kind of “balancing” is exactly what the Second Circuit ratified. Consider: Under the logic the appeals court used, an anticompetitive scheme by Uber to suppress driver income would not be considered illegal unless those bringing the suit showed that riders were also harmed. What’s more, the court said, plaintiffs have to meet this new burden at the very earliest stage of litigation. Last Monday, a 5-4 majority on the Supreme Court upheld that approach. Not only does the decision show stunning disregard for core elements of antitrust law, it carelessly mangles long-accepted legal rules along the way to establishing its position. Perhaps most strikingly, it overrides or ignores facts established by the district court. For example, the Supreme Court states that AmEx’s increased merchant fees reflect “increases in the value of its services,” even though the lower court expressly found that AmEx’s price hikes exceeded the value of the cardholder rewards. In practice, the Court has shielded from effective antitrust scrutiny a huge swath of firms that provide services on more than one side of a transaction — and, in today’s digital economy, there are many (as Justice Stephen Breyer noted in a dissent he read from the bench to emphasize his concerns). Worse yet, the Court left unclear what kinds of businesses actually qualify for this new rule. As the Open Markets Institute, for which I work, explained in an amicus brief, deciding an antitrust case using the amorphous concept of a “two-sided” market will incentivize all sorts of companies to seek protection under this bad new theory. What kinds of companies might have more freedom to exert pressure on customers, as a result of this decision? Not newspapers, the Court said: Readers are “largely indifferent” to the number of advertisements on newspaper pages, even though advertisers are looking to reach readers. So someone suing a newspaper on antitrust grounds (say, for prohibiting advertisers from doing business with other newspapers) would not have to prove that a newspaper’s conduct harmed both readers and advertisers. On the surface, the Court’s language suggests that the special rule would apply to Amazon’s marketplace for third-party merchants, to eBay, and to Uber — but not to Google search or Facebook. Indeed, the Justice Department’s antitrust division chief, Makan Delrahim, has also come to this conclusion about the scope of the decision. But the Court’s opinion hardly delivers a clear and workable standard for judges to go by. One can imagine the reams of studies Google would commission to show that targeting users with advertising did indeed amount to a “transaction” with users that users highly valued — a showing that, if successful, would likely qualify it for the shield of the special rule. If so, Google might be able to impose exclusionary contracts on advertisers and significantly boost the prices it charges them. Amazon, meanwhile, can continue to squeeze the suppliers and retailers reliant on its platform with little worry about being charged with the abuse of monopsony power. Federal judges generally lack the expertise needed to independently assess the hyper-complex economic studies that this new rule will spur. Rather than focusing on the conduct between a company and one set of its customers, the new rule requires a much more involved showing. But the degree to which current antitrust enforcement turns on the competing analyses of specialist antitrust economists is something to move away from rather than expand. It’s misguided to expose yet another critical inquiry in antitrust to the vagaries of how any single judge happens to read the complex economic analysis at hand. **With the courts undermining antitrust law, it’s time for Congress to assert itself** The Court’s American Express decision comes at a moment when politicians, journalists, and members of the public increasingly recognize that America has a major market power problem and that we must revitalize our antitrust tradition. When companies have too much market power, they can depress wages and salaries, raise prices, block entrepreneurship, stunt investment, and exert undue political power. **For the Court to weaken antitrust further now is an effective way to draw the attention of members of Congress who are concerned about the growing concentration of corporate power**. This includes US Sens. Cory Booker (D-NJ), Amy Klobuchar (D-MN), and Elizabeth Warren (D-MA) and Reps. David Cicilline (D-RI), Keith Ellison (D-MN), and Seth Moulton (D-MA) — all of whom have introduced anti-monopoly legislation in the past year. If Democrats should win the House or Senate, anti-monopoly legislation could, and should, be a top priority. For decades our courts have constructed an antitrust regime at odds with the values that Congress articulated when passing the antitrust laws. American Express marks a continuation of that abnegation. While the judiciary has claimed for itself significant authority over shaping the substantive content of antitrust policy, it’s time for both the antitrust agencies and lawmakers to reassert their power. The time for a robust and muscular antitrust regime is now.

#### Plan secures liberal legitimacy from Amex Blunder

Adam Liptak, 6-25-2018 – covers the United States Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The New York Times's news staff in 2002. He was a finalist for the 2009 Pulitzer Prize in explanatory reporting. ("Supreme Court Sides With American Express on Merchant Fees (Published 2018)," New York Times, <https://www.nytimes.com/2018/06/25/us/politics/supreme-court-american-express-fees.html>)

WASHINGTON — American Express did not violate the antitrust laws by insisting in its contracts with merchants that they do nothing to encourage patrons to use other cards, the Supreme Court ruled on Monday. The decision has **implications not only for** what one brief called “an **astronomical number of retail transactions” but also for other kinds of markets, notably ones on the internet,** in which services link consumers and businesses. Such “two-sided platforms,” the court said, require special and seemingly more forgiving antitrust scrutiny. **The vote was 5 to 4,** with the court’s **more conservative members in the majority.** Justice Clarence Thomas, writing for the majority, said the specialized nature of credit-card transactions justified what in other circumstances might have been anti-competitive conduct. Retailers pay so-called swipe fees when customers use credit cards. American Express charges higher fees than Visa or Mastercard, meaning that merchants have good reason to prefer those other cards. But credit card networks create “two-sided platforms,” Justice Thomas wrote, and they “differ from traditional markets in important ways.” Since card companies deal with both merchants and consumers, he wrote, people challenging actions as anticompetitive must take account of the effect on both sets of market participants. Viewed that way, Justice Thomas wrote, American Express promoted competition by designing rewards programs to attract affluent customers. “Amex’s business model sometimes causes friction with merchants,” he wrote. “To maintain the loyalty of its cardholders, Amex must continually invest in its rewards program. But, to fund those investments, Amex must charge merchants higher fees than its rivals.” “Even though Amex’s investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees,” Justice Thomas wrote. “One way that merchants try to avoid them, while still enticing Amex’s cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale.” The steering agreements were justified in these circumstances, Justice Thomas wrote. “While these agreements have been in place,” Justice Thomas wrote, “the credit-card market experienced expanding output and improved quality. Amex’s business model spurred Visa and Mastercard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served.” Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Samuel A. Alito Jr. and Neil M. Gorsuch joined the majority opinion. **Justice Stephen G. Breyer read his dissent from the bench, a rare move indicating profound disagreement.** He said the implications of the ruling were vast and could hurt competition in many realms. “I particularly fear the interpretive impact of the majority’s discussion of what it calls ‘two-sided platforms,’ in an era when that term might be thought to apply to many internet-related goods and services that are becoming ever more important,” Justice Breyer said. Merchants expressed disappointment with the decision. “Today’s ruling is a blow to competition and transparency in the credit card market,” said Stephanie Martz of the National Retail Federation. “The American Express rules in question have amounted to a gag order on retailers’ ability to educate their customers on how high swipe fees drive up the price of merchandise.” American Express issued a statement saying the long court battle was “well worth the fight because important issues were at stake: consumer choice, fair market competition, and the ability to deliver innovative products and services to our customers, both consumers and merchants.” In 2010, the Justice Department and 17 states sued several credit card companies, saying that their steering practices had violated the antitrust laws. Visa and Mastercard settled, but American Express fought the case. In 2015, Judge Nicholas G. Garaufis of the United States District Court in Brooklyn ruled that contracts forbidding merchants to steer customers toward other forms of payment were an unlawful restraint of trade. The United States Court of Appeals for the Second Circuit, in New York, disagreed, ruling that Judge Garaufis had unduly focused on merchants’ interests “while discounting the interests of cardholders.” “This approach does not advance overall consumer satisfaction,” Judge Richard C. Wesley wrote for a unanimous three-judge panel. “Though merchants may desire lower fees, those fees are necessary to maintaining cardholder satisfaction — and if a particular merchant finds that the cost of Amex fees outweighs the benefit it gains by accepting Amex cards, then the merchant can choose to not accept Amex cards.” Eleven states asked the Supreme Court to hear the case, Ohio v. American Express, No. 16-1454, saying that the appeals court’s decision was at odds with established antitrust principles and affected “an astronomical number of retail transactions in the United States.” The Supreme Court affirmed the appeals court’s decision. In dissent, Justice Breyer faulted every part of the majority’s analysis. He said that the way American Express deals with merchants should be considered in isolation and that its contracts were anti-competitive. He added that two-sided transactions were commonplace. “Consider a farmers’ market,” Justice Breyer wrote. “It brings local farmers and local shoppers together, and transactions will occur only if a farmer and a shopper simultaneously agree to engage in one.” “What about travel agents that connect airlines and passengers?” he asked. “What about internet retailers, who, in addition to selling their own goods, allow (for a fee) other goods-producers to sell over their networks?” “Nothing in antitrust law, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good,” Justice Breyer wrote. Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan joined the dissent. American Express, Justice Breyer concluded, had other ways to achieve its goals. “If American Express’ merchant fees are so high that merchants successfully induce their customers to use other cards, American Express can remedy that problem by lowering those fees or by spending more on cardholder rewards so that cardholders decline such requests,” Justice Breyer wrote. “What it may not do is demand contractual protection from price competition.”

#### Perceived strong

Lane, 18 – Lawyer, instructor at UNH School of Law (Matthew, "The Amex Decision: Cataloguing the Discussions, Debates, and Disagreements," 10-10-18, https://www.project-disco.org/competition/101018-the-amex-decision-discussions-debates-disagreements/)

**The Supreme Court decision in Ohio v. American Express (“Amex”),** referenced in my latest post on multi-sided markets, **has spawned much discussion in antitrust circles**. While there are those that fully support the entire decision (e.g., Gus Hurwitz and Kristian Stout), or modestly support the decision (e.g., Randy Picker), **there are also critics that believe the ruling represents a major step backward for antitrust enforcement.** **This has caused a vigorous debate on antitrust panels, blogs, and even in Op-Eds.** **This debate is wide-ranging and hits on many practical and philosophical parts of antitrust policy**. This post attempts to break down the discussion and disagreements into discrete arguments that can, perhaps, help newcomers understand the debate.

**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.

**Courts do respond to political opinion, they want to avoid backlash.**

**Thomson-DeVeaux 18** [Amelia Thomson-DeVeaux, FiveThirtyEight, Who Can Stop The Supreme Court?, Oct 15, 2018, https://fivethirtyeight.com/features/who-can-stop-the-supreme-court/?src=obsidebar=sb\_1]

Now that he’s officially taken his seat on the Supreme Court, Brett Kavanaugh has no obvious reason to care what you think. Neither does Sonia Sotomayor, or Samuel Alito, or Ruth Bader Ginsburg. They and their colleagues are justices for life,[1](https://fivethirtyeight.com/features/who-can-stop-the-supreme-court/?src=obsidebar=sb_1#fn-1) which should in theory give them the freedom to write unpopular opinions. But Supreme Court history shows that’s not always how it works. In the [past](https://www.nytimes.com/2018/10/08/opinion/kavanaugh-supreme-court-conservative.html), the justices have appeared to **bend to popular opinion**, in addition to being reined in by other branches of government when they deviate dramatically from the mainstream. That history has a lot to tell us about how much leeway the court’s new majority has when deciding future cases on issues where a conservative ruling might spark a backlash, like abortion. These justices may have an [unprecedented](https://www.washingtonpost.com/politics/courts_law/the-kavanaugh-court-is-the-one-conservatives-have-worked-decades-to-build/2018/10/06/8a160dec-c975-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.49f058eadb4e) opportunity to shift an [already](https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html) [conservative](https://www.cnn.com/2018/04/24/politics/conservatives-supreme-court/index.html) court even further to the right, but they’ll likely have to navigate more than just jurisprudence if they want their rulings to last. The relationship between the court and the rest of us is well-studied by historians and political scientists. And [several](https://poseidon01.ssrn.com/delivery.php?ID=964083123101066084021090095009102104000082090035005036124001114090078006102004011087123102061029031045017120107085092091089087016018074003068076030095009091069116053061017009097067013064098119124085103072023112068113027030006080105094126114119105082&EXT=pdf) [studies](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087255) [do](http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.567.7361&rep=rep1&type=pdf) [suggest](https://onlinelibrary.wiley.com/doi/abs/10.1111/lasr.12219) [that](http://people.tamu.edu/~jura/papers/Merrill,%20Conway,%20&%20Ura%20(2017)%20WUJLP%20Ungated.pdf) the justices [respond](https://ajps.org/2015/02/23/the-supreme-court-is-constrained-by-public-opinion-in-cases-where-the-justices-fear-nonimplementation-of-their-decisions/) to public opinion. For example, Peter Enns, a political science professor at Cornell University, [found](https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5907.2010.00485.x) that the court’s ideological tilt tracks with public opinion over time. “We can’t get inside their minds and understand how they’re weighing the potential public reaction,” he said. “But when the public’s perspective is more liberal, we consistently see more liberal Supreme Court decisions, and the reverse is true when the public mood is more conservative. It’s hard to believe that’s just a coincidence.” It’s possible, of course, that the justices’ individual worldviews are simply influenced by the same forces that shape broader public opinion. But history has shown that there are practical reasons for the court to avoid bucking mainstream sentiment. In the past, Congress, the president and state governments have openly defied controversial Supreme Court rulings. Congress can also [regulate](https://fas.org/sgp/crs/misc/R44967.pdf) the types of cases the court is allowed to hear or [dilute](http://www.scotusblog.com/2013/07/the-first-court-packing-plan/) a recalcitrant majority by “packing” the court with ideologically sympathetic justices. Proposals that take advantage of that power have been considered seriously only a handful of times, according to Tom Clark, who is a political scientist at Emory University and studies the limits of judicial independence. But when they have, the court avoided formal retaliation — like being remade into a 15-member chamber — because the justices ultimately backed down. Perhaps the most famous [example](https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/) of a Supreme Court brought to task by the other branches of government was in the 1930s, which also happened to be the last time the court was controlled by a strong conservative majority. The country was in the depths of the Great Depression, and the Supreme Court was aggressively striking down President Franklin D. Roosevelt’s progressive economic legislation, which was widely [popular](https://millercenter.org/president/fdroosevelt/domestic-affairs) at the time. Finally, Roosevelt announced a plan to increase the size of the court by as many as six justices. The scheme ultimately collapsed in Congress — and may have done some damage to Roosevelt’s popularity in the process — but not before one of the right-leaning justices suddenly began voting to uphold New Deal laws that were identical to ones he had voted to gut only a year earlier. Barry Friedman, who is a professor at New York University Law School and studies legal history, said there’s a clear lesson from the 1937 court-packing episode. “The court can’t get too far out of step with public opinion before something happens to rein them in,” he said. And it wasn’t the first time Congress or the president had intervened when the court appeared to block a popular policy agenda. During Republican-led Reconstruction, when [three constitutional amendments](https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm) were passed to end slavery, give legal equality to former slaves and prohibit racial discrimination at the polls, the GOP swept the 1866 congressional elections. That gave them a veto-proof majority against President Abraham Lincoln’s Democratic successor, who wanted to allow Southern states to re-enter the union more easily than many Republicans were willing to countenance. When the Supreme Court seemed likely to halt Reconstruction’s progress, Congress repeatedly [changed](https://www.nytimes.com/2007/07/26/opinion/26smith.html) the size of the court for political ends and [revoked](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1649&context=faculty_scholarship) the court’s ability to review a case that could have threatened military rule in the South — a decision the court itself upheld. **Even in moments when the court has taken steps to shore up a controversial decision, a backlash has first delayed the enforcement of the ruling and eventually set the stage for the court to back down**. The landmark ruling in Brown v. Board of Education, which said that school segregation laws were unconstitutional, was decided [unanimously](https://www.thirteen.org/wnet/supremecourt/rights/sources_document4.html) with the [explicit](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=7852&context=journal_articles) goal of lending additional legitimacy to the decision. But it was still met by [outrage](http://www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown) and [defiance](http://www2.vcdh.virginia.edu/xslt/servlet/XSLTServlet?xml=/xml_docs/solguide/Resources/vus13.xml&xsl=/xml_docs/solguide/sol_new.xsl&section=sols&area=single&item=VUS.13a.2) from Southern [state](https://www.nytimes.com/1956/01/25/archives/4-southern-governors-join-to-fight-pupil-integration-heads-of.html) [governors](http://articles.latimes.com/1994-12-15/news/mn-9162_1_orval-faubus) and a [lukewarm](http://www.msnbc.com/msnbc/why-dont-we-ike-civil-rights) response from President Dwight Eisenhower, who [thought](https://www.theatlantic.com/magazine/archive/2018/04/commander-v-chief/554045/) the court should pursue integration by subtler means. And after years of striking down attempts to thwart desegregation — and amid a fierce national debate about the use of [school](https://www.nytimes.com/1972/05/28/archives/fear-of-busing-exceeds-its-use-expected-busing-orders-cause-more.html) [busing](http://www.wbur.org/news/2014/09/05/boston-busing-anniversary) to integrate schools — the court finally capitulated to the status quo when it [ruled](https://www.oyez.org/cases/1973/73-434) in 1974 that the Detroit public schools could remain [functionally](https://www.npr.org/sections/codeswitch/2013/11/19/245970277/how-courts-bus-ruling-sealed-differences-in-detroit-schools) segregated. In a dissenting opinion, Justice Thurgood Marshall [wrote](https://en.wikisource.org/wiki/Milliken_v._Bradley/Dissent_Marshall) that the majority’s ruling was “more a reflection of a perceived public mood” that desegregation had gone far enough than “the product of neutral principle of law.” These historical showdowns are uncommon, but Clark said that’s precisely because the Supreme Court justices are concerned about their own institutional legitimacy and aware of limitations on their power. For a [book](https://www.amazon.com/Judicial-Independence-Political-Institutions-Decisions/dp/0521194881) published in 2010, Clark [reviewed](https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5907.2009.00411.x) all of the bills introduced in Congress to curb the court starting in 1877 and found that the court seemed to respond through its opinions. When Congress introduced more bills that would limit the court’s power, the court struck down fewer laws. Clark sees the court-curbing bills — which almost never became law — as a way of sending a signal to the court. “These reactions allow the justices to learn if they’ve gone too far out of line,” he said. Whether the current Supreme Court justices have internalized this view is another question. [Some](https://www.journals.uchicago.edu/doi/abs/10.2307/2960354?journalCode=jop) [research](https://poseidon01.ssrn.com/delivery.php?ID=964083123101066084021090095009102104000082090035005036124001114090078006102004011087123102061029031045017120107085092091089087016018074003068076030095009091069116053061017009097067013064098119124085103072023112068113027030006080105094126114119105082&EXT=pdf) has concluded that the court’s historical “swing” justices are more likely to respond to strategic concerns like public opinion when casting pivotal votes. If true, the addition of Kavanaugh could put even more pressure on the new [median](https://fivethirtyeight.com/features/john-roberts-will-probably-be-the-supreme-courts-next-swing-justice/) justice, Chief Justice John Roberts, who is already known for his [concern](http://theweek.com/speedreads/613931/john-roberts-slammed-highly-politicized-supreme-court-nomination-process--just-10-days-before-scalia-died) about the court’s [reputation](http://www.slate.com/articles/news_and_politics/politics/2015/06/john_roberts_isn_t_a_reliable_conservative_vote_the_chief_justice_is_siding.html), to [moderate](https://fivethirtyeight.com/features/is-chief-justice-roberts-a-secret-liberal/) the court’s right wing. He might even join the liberals in key cases, as retired Justice Anthony Kennedy, the court’s previous median justice, [sometimes](https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate/) did. Who controls Congress could have an impact on the conservative majority’s willingness to make a sharp right turn, too. If Republicans retain control after this year’s midterm elections, the court would be largely safe from reprisal (although its institutional legitimacy [could](https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/) be even further damaged on the left). But the stakes would change considerably if the Democrats take one or both houses of Congress in November. Part of the problem is that no one — including the justices — knows exactly what “too conservative” means. Over the past decade, the Roberts court has [already](https://www.nytimes.com/2007/06/29/washington/29scotus.html?) [issued](https://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html) a [slew](https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html) [of](https://www.oyez.org/cases/2013/12-536) [right-leaning](https://www.washingtonpost.com/politics/supreme-court-says-arbitration-agreements-can-ban-class-action-efforts/2011/04/27/AFp23j0E_story.html?utm_term=.c5471743e10d) [rulings](https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html) without triggering widespread public outrage. And even when a decision is unpopular, it can be difficult to predict what will spur Congress and the president to action and what won’t. The 2010 [ruling](https://www.oyez.org/cases/2008/08-205) in Citizens United v. Federal Election Commission, which allowed unlimited corporate spending on direct advocacy for and against political candidates, was broadly [disliked](http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html) when it came down, but the Democrats — who were in control of both Congress and the White House at the time — didn’t retaliate against the court. The country’s deep ideological divisions may also help insulate the court, said Steve Vladeck, a law professor at the University of Texas. “We’re so divided — it’s hard to think of many issues that an outright majority would get really angry about,” he said. Overturning Roe v. Wade is one clear [example](https://www.politico.com/magazine/story/2018/09/04/kavanaugh-roe-v-wade-conservatives-beware-backlash-219623) of a ruling that could spark a legitimacy crisis, since polls have [consistently](https://news.gallup.com/poll/237071/nearly-two-thirds-americans-roe-wade-stand.aspx) found that a solid majority of Americans oppose such a move. But it’s [possible](https://fivethirtyeight.com/features/how-trumps-supreme-court-could-overturn-roe-v-wade-without-overturning-it/) to significantly undermine abortion rights without overruling Roe explicitly, using what [some](https://www.nytimes.com/2018/08/30/opinion/brett-kavanaugh-abortion-rights-roe-casey.html) [legal](https://twitter.com/rickhasen/status/1012100294417805313?lang=en) experts have called the “death by a thousand cuts” approach. These questions won’t be answered overnight. So far, the Supreme Court’s term looks relatively [sleepy](https://www.nytimes.com/2018/09/30/us/politics/supreme-court-new-term.html), and it will take time for the engines of the conservative legal movement, now [emboldened](https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html) by Kavanaugh’s confirmation, to bring new, sweeping challenges to the court. But the figure to watch for clues isn’t Kavanaugh — it’s Roberts, who will need to start figuring out what kind of conservative court he wants to lead.