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### 1AC – Competition

#### Advantage one is competition.

#### Regulatory cycles create inevitable gaps in competition enforcement.

Shelanski ’18 [Howard; Professor of Law @ Georgetown University; Partner @ Davis Polk & Wardwell LLP; “Antitrust and Deregulation,” 127 Yale L.J. 1922; May 2018; Lexis]

Empirical evidence shows that antitrust enforcement and regulation have not always changed in the same direction. 7 Beyond the fact that both policy tools represent forms of government intervention, there is no clear reason why they should. Comparative policy priorities offer one reason why the political intuition that antitrust and regulation move together might not hold. Regulation tends to follow specific policy concerns--the environment, worker safety, immigration, and health care, for example--and therefore might increase for some objectives and stay steady or retreat for others, depending on an administration's policy goals. A given administration might or might not choose to prioritize antitrust enforcement's objective of promoting competition, possibly causing antitrust to rise or fall independently of regulation.

[\*1925] Ideological and pragmatic considerations might also lead to varying relationships in the trends of antitrust and regulation. A strongly market-oriented administration might decide that neither competition-enforcing rules nor antitrust is necessary, and reduce both forms of intervention. Alternatively, an administration suspicious of regulation might view antitrust as a less burdensome way to govern competition and replace regulation with antitrust enforcement, causing the two kinds of intervention to trend in opposite directions.

The relationship between antitrust enforcement and regulation thus depends on policy choices about the importance of competition enforcement and the institutions through which to accomplish that enforcement. Those policy choices raise an underlying normative question: how should antitrust enforcement and regulation relate to each other?

In addressing that question, this Feature argues that economics, legal doctrine, and current debates over competition policy all provide good reasons for antitrust enforcement to run counter to deregulation. Part I discusses why deregulation can lead to an enforcement gap, especially during an aggressive deregulatory cycle. Part II then turns to the question of how antitrust authorities should respond to the enforcement gaps potentially created by deregulatory cycles, explaining why sound economic policy, the clarification of precedent, and the politics surrounding competition enforcement all weigh in favor of keeping antitrust enforcement strong as regulatory intervention weakens.

I . DEREGULATION AND GAPS IN COMPETITION ENFORCEMENT

A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

Deregulation raises the prospect that federal agencies or Congress will repeal or stop enforcing some competition-oriented rules. The more rules the government repeals, the more likely it is that competition-oriented regulation gets caught in the dragnet and the greater the number of markets that will be affected, as recent experience demonstrates. 29 The result will be that competition enforcement could be lost from markets where a substantial enough market failure had previously been found to warrant regulatory oversight.

B. Why the Level and Trend of Regulatory Activity Can Matter for Competition

The likelihood of gaps in competition enforcement becomes higher as the government more aggressively pursues deregulation. The federal government [\*1929] has recently embarked on a comprehensive deregulatory agenda in both Congress and the Executive Branch. As the Trump Administration came into power, a group of House Republicans presented the President with a list of over two hundred regulations they wished to have immediately repealed. 30 Congress itself used the Congressional Review Act 31--a 1996 statute that allows expedited legislative repeal of a rule within a limited time of its publication--fourteen times in just five months after having successfully invoked it only once in the prior twenty-one years. 32 Meanwhile, and most significantly, President Trump signed executive orders mandating broad rollback of regulatory programs, 33 also issuing a sweeping mandate that Executive Branch agencies identify two rules to repeal for every new rule they issue. 34 Moreover, that same two-for-one executive order set a "regulatory budget" that constrains the total number of new rules any agency can issue, regardless of the rule's predicted benefits, 35 while another executive order requires that agencies establish "Regulatory Reform Task Forces" whose mission is to identify rules to repeal or reform. 36

The executive orders on deregulation could affect competition enforcement in two ways: the "two-for-one" mandate makes it more likely that agencies will repeal rules that currently promote competition and constrain market power, and the "regulatory budget" mandate makes it less likely that agencies will issue rules to address market failures for which regulation could be appropriate. This will erode the stock of existing rules and restrict the flow of new rules. Together, the executive orders increase the likelihood of diminished competition enforcement through regulation and decrease the probability that regulatory agencies can respond to market failures. Consistent with that prediction, data on the flow of rules from federal agencies to the Office of Information and Regulatory Affairs (OIRA)--the White House office that reviews all significant Executive Branch regulation--showed that the office reviewed an abnormally low number of rules [\*1930] during the first year of the Trump administration. 37 To give a broader picture of the current changes in regulatory activity, Trump's chief regulatory official reported at the end of 2017 that the administration had repealed 67 regulations, withdrawn 635 pending rules, put 244 proposed rules on "inactive" status, and delayed an additional 700 rules. 38

Data help to illustrate why the current deregulatory push is likely to open gaps in competition enforcement through repeal of relevant rules. Had government agencies in recent years in fact issued the unprecedented volume of regulation claimed by members of Congress, candidates, and interest groups, 39 then aggressive deregulation might be a corrective measure that would reduce burdens without removing anything essential--there would be plenty of low-benefit rules hanging around for agencies to repeal without harm. The data show, however, that regulation under the Obama Administration was by several measures lower than it had been under George W. Bush and Bill Clinton (and by overall number of rules, even Ronald Reagan).

[\*1931] FIGURE 1. FINAL RULES PUBLISHED IN THE FEDERAL REGISTER 40

[\*1932] FIGURE 2. SIGNIFICANT RULES PUBLISHED DURING PRESIDENTIAL TERM 41

[\*1933] FIGURE 3. ECONOMICALLY SIGNIFICANT RULES ISSUED DURING PRESIDENTIAL TERM 42

[\*1934] Figure 1 shows the total rulemaking activity by the federal government since the start of the Reagan Administration. The federal government issued fewer rules per year on average under President Obama than under any previous administration since 1980. Figure 2 looks more narrowly at "significant rules," those that typically require review by OIRA and are subject to requirements set forth by a series of executive orders starting under President Reagan. 43 Significant rules generally constitute the most important rules an administration will issue. As Figure 2 shows, the Obama Administration issued fewer such rules than either the Clinton or G.W. Bush Administrations. Only in Figure 3, which further restricts the focus to "economically significant" rules, does the Obama Administration exceed its predecessors. It bears noting that the absolute number of economically significant rules by which Obama exceeded the two preceding administrations is less than 150, with the Obama Administration having reviewed 970 such rules, compared to Bush's 760 and Clinton's 732. 44 Moreover, the threshold for defining an economically significant rule of $ 100 million per year of total economic activity is modest in the context of the U.S. economy--for perspective, it is less than the combined annual sales of just three average Walmart stores 45 (of which there are well over four thousand in the United States 46)--and has not been adjusted since 1981, when the Reagan Administration established the threshold. 47 To be sure, several rules that agencies issued under President Obama dramatically exceeded that threshold, although the overall number of such rules was small; for example, over the course of the Obama Administration, twenty-six rules had annual costs exceeding one billion dollars. 48

[\*1935] These figures show that the Trump deregulatory push did not follow an unusual spike in regulatory activity or unusual build up in the stock of rules that could be harmlessly repealed. If agencies could meet their two-for-one repeal obligations by picking and choosing from among unnecessary or ineffective rules, they might avoid choosing candidates that perform important competition-related functions. Such easy pickings are, however, scarcer than the deregulatory rhetoric would suggest. A large number of rules whose repeal might be beneficial had already been reviewed, revised, or taken off the books through a serious effort at regulatory lookback and repeal under the Obama Administration. Obama's Executive Order 13,610 in 2012 required agencies to submit biannual reports to OIRA identifying rules to reexamine and consider for reform or repeal. 49 By the end of the Obama Administration, agencies had reviewed hundreds of rules and made changes that led to projected regulatory savings of about $ 37 billion over five years. 50 As a result, when Trump issued his executive orders not only was there no obvious surplus of insufficiently effective rules, but the rules that most warranted repeal were likely already revised or removed. It is not surprising under these circumstances that the Trump Administration has been criticized for failing to disclose the costs of certain regulatory repeals and has been reversed by the courts for bypassing proper deregulatory processes. 51

To impose a radical deregulatory agenda in these circumstances is to ensure, either through the repeal process or through nonenforcement, that competition-oriented rules will be retracted or fall into disuse. Either outcome would cause potential gaps in effective competition policy. In fact, the Trump Administration has already slated for reconsideration or repealed several regulatory programs specifically addressing competition and market structure. The FCC, under the leadership of a Trump-appointed chair, repealed the agency's 2015 Open Internet Order within the first year of the Administration. 52 The Open Internet Order aimed to prevent anticompetitive discrimination and collusion in the delivery of [\*1936] digital content to subscribers. 53 The FCC had already used that set of regulations to investigate large carriers for not counting their proprietary content toward subscribers' data caps (so called "zero rating"), thereby potentially disadvantaging content from rival content producers. 54 The repeal of the rules serves as an example not only of a reduction in competition-focused regulation, but also of the Trump Administration's commitment to deregulation--it is willing to repeal rules with substantial public and political support. The FCC received a record 21 million comments on its potential repeal of the Open Internet Order. A study commissioned by a lobbying organization for large telecommunications companies seeking repeal of the order found that many of those comments were repetitive form letters, but acknowledged that the result of its deeper analysis of the body of comments was that "general sentiment [was] against" repeal. 55 Numerous polls found that most voters favored retaining the Open Internet Order's regulations, and moreover, that the support for the Order was bipartisan. 56

Perhaps not surprisingly given the prevailing public opinion, of which the FCC was well aware, 57 repeal of the Open Internet Order has been met with a strong legal and political response. A coalition of twenty-two states--led by Republicans and Democrats--filed suit to block the FCC's repeal. 58 An effort by Senate Democrats to force a vote to reverse the FCC's repeal and restore the 2015 Open Internet Order is reported to have marshalled fifty votes, one short of the needed majority. 59 If the administration is moving quickly to repeal rules largely [\*1937] viewed as necessary and beneficial by the public, then it is likely Trump's regulatory agencies will move even faster to repeal or stop issuing rules with less public visibility, regardless of whether those rules promoted competition or other beneficial objectives.

Indeed, deregulatory actions affecting competition have been taking place across a range of federal agencies. For example, the SEC is considering "pilot repeals" of two regulations designed to increase transparency and competition among market intermediaries, like stock exchanges. 60 Former SEC Chair Mary Jo White had identified those same rules as protecting investors by bringing increased competition to equity and bond markets. 61 During the Obama Administration, the DOT proposed rules to make airline pricing and policies more transparent to consumers and to enhance competition in air travel. 62 The Trump DOT withdrew those rules, specifically referencing the deregulatory Executive Order 13,771. 63 The Department of Agriculture (USDA) has announced that it will not allow finalization of the interim "Fair Farmer Practices" rule, 64 a rule described by one representative of cattle farmers as "implement[ing] the rules of competition" so that "producers would no longer have to wait for the federal government to act before anticompetitive conduct is corrected." 65 Moreover, the FCC did not restrict its competition-oriented deregulation to network neutrality, also issuing an order repealing decades-old limitations on media concentration and cross-ownership within a local geographic market. 66

[\*1938] The above list does not represent a comprehensive effort to identify deregulatory initiatives that relate to competition. These examples show, however, that even if competition-focused rules make up a very small proportion of total regulation, deregulation can still have important implications for competition enforcement. As seen in Figure 4, there has already been a notable decline in the proportion of rules emerging from the Trump Administration that even mention "competition" or "market competition" in their text. 67 While this is only the roughest measure of competition-oriented regulation, the results are consistent with a reduction in rules governing market performance, whether that reduction comes through removing existing rules or declining to promulgate new rules.

[\*1932] FIGURE 4. PROPORTION OF FINAL FEDERAL RULES MENTIONING "COMPETITION" OR "MARKET COMPETITION" 68

Certain characteristics of competition-enforcing rules might make them particularly vulnerable to repeal or non-enforcement. Notably, competition-oriented rules might have fewer fixed costs but higher recurring costs for firms [\*1939] than other kinds of regulation, which more likely require companies to make initial investments to meet regulatory standards. Rules such as those governing emissions reductions, toxic chemicals, workplace safety, transportation safety, agricultural standards, and the like often require companies to invest upfront in new technologies, compliance systems, or ways of doing business when a standard changes. To the extent such investments are fixed rather than recurring, repeal of the underlying regulation might not save much for the regulated firms going forward compared to what the rule has already cost them. 69 In such cases, the constituency for repeal of the rule will be much weaker than the constituency that might have existed to prevent initial promulgation of the rule. Indeed, regulated firms, having already sunk the costs of compliance, might want to keep the rule in place so that new competitors would have to incur the same regulatory costs to enter the market. This is particularly true for rules that require regulated firms to invest in new technology or other capital improvements. The OECD reports that "[i]n regulated sectors, licensing procedures, territorial restrictions, safety standards, and other legal requirements may unnecessarily deter or delay entry. In some cases, these regulations seem to be the result of lobbying efforts by incumbent firms to protect their businesses." 70

The economic logic that can drive incumbent firms to accept existing rules or even lobby for additional regulation no longer holds for rules that do not impose upfront costs and that increase rather than reduce competition for incumbent firms. Because such rules erode rather than protect incumbent firms' market positions, it seems likely that such rules will have a much stronger constituency for repeal. Regulated firms have much greater incentive to seek removal of rules that cause rather than impede competition.

The behavior of regulated telephone companies in the 1990s provides a supportive example. When FCC rules and a consent decree prevented providers of local telephone service from entering the market for long-distance and other telephone services, the local carriers sued in court to have the restrictions lifted so that they could compete in those markets. 71 A beneficiary of those restrictions, long-distance carrier AT&T not surprisingly opposed the petition of the local telephone companies. 72 Several years later Congress turned the tables and, in the Telecommunications Act of 1996, not only opened the long-distance market to [\*1940] competition but also required the FCC to issue regulations facilitating entry into the local telephone markets that had until then been monopolies. 73 Almost immediately after the FCC issued its market-opening regulations the local telephone companies sued to block them, ultimately losing in the Supreme Court. 74 The local companies continued to fight those rules for years, notwithstanding requirements to come into compliance in the interim. 75 These telecommunications cases illustrate the dynamics that can lead to a push by regulated firms to dismantle competition-enforcing rules. In this regard, it is relevant that many rules that would be either repealed or not issued as part of a deregulatory initiative could, like the examples from the SEC, DOT, and USDA discussed above, be rules that impose behavioral constraints to increase competition rather than standards that require capital expenditure.

Regardless of the merits of any particular deregulatory action, the examples and figures above demonstrate that aggressively deregulating while constraining new regulation is likely to diminish rule-based competition enforcement in markets where agencies at some point had found sufficient actual or potential market failures to warrant regulatory intervention. That probability is exacerbated by the fact that the Trump Administration's current deregulatory push does not begin from a historically inflated stock of rules. Not only had the Obama Administration, despite issuing some large and costly rules, issued fewer regulations than previous administrations, but as mentioned above, it had already engaged in a significant regulatory lookback and reform effort. Some regulations might still warrant repeal, and some competition rules might be outdated, counter-productive, or unnecessary. But other rules might, even if imperfect, be improving market performance relative to the unregulated baseline. The risk is therefore high that this deregulatory cycle will produce significant gaps in competition enforcement that must ultimately be addressed to preserve consumer welfare.

#### Antitrust claims are barred in industries where a competition regulator exists, regardless of whether the regulator is actually regulating competition.

Jablon ’13 [Robert et al; LLB @ Harvard Law School; Anjali Patel; JD @ Michigan Law; Latif Nurani; JD @ Columbia Law; “Trinko and Credit Suisse Revisited: The Need for Effective Administrative Agency Review and Shared Antitrust Responsibility,” *Energy Law Journal* 34(2), p. 627-666]

I. Introduction 1

Effective antitrust application in regulated industries is crucial to the nation's economic well-being. These industries are some of our most important, including segments of electricity, public transportation, communications, health care, banking, trading markets, and securities. Although in recent years aspects of these industries have been deregulated, regulated industries have a history of monopolization, and companies in them often have a continued ability to exercise market power. 2

Early in the history of regulated industries, courts were the major protectors of antitrust principles. Most regulatory agencies limited themselves, sometimes consistent with their statutes and their purposes, to enforcing their authorizing statutes, excluding any significant consideration of antitrust issues or [\*629] consequences. 3 However, somewhat coextensive with the movement towards deregulation, agencies took on greater responsibility for considering antitrust issues, often under some duress, leading to a model of shared judicial and agency antitrust responsibility. 4

Elements in the Supreme Court's 2004 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP (Trinko) decision represent a shift away from shared judicial and agency antitrust responsibility in which courts and agencies both exercise parallel antitrust review. 5 In a decision, which may be fairly characterized as largely dictum, the Supreme Court interpreted that substantial regulated industry antitrust formulation and enforcement is often best left to administrative agencies to the exclusion of the courts. 6 This presumption of agency primacy was reinforced in the Court's 2007 Credit Suisse Sec. (USA), LLC v. Billing decision. 7 Lower court cases have generally followed this direction, albeit with significant variations. 8

The Supreme Court appears to have been influenced by the view that administrative competition regulation may reduce the need for the strict judicial antitrust enforcement of pre-Trinko cases. 9 The Court expressed concerns that the complex and technical nature of antitrust enforcement may require expert knowledge that courts lack and that antitrust cases may be overly burdensome and expensive to defendants. 10 In moving towards giving agencies antitrust enforcement priority, the Court cites the complicated nature and agencies' presumed specialized knowledge of regulated industries' problems. 11 The Court implied that rigid antitrust enforcement may limit company investments in [\*630] innovative technology or create other market inefficiencies and suggested that "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" means that "the additional benefit to competition provided by antitrust enforcement will tend to be [sufficiently] small [so that] it will be less plausible that the antitrust laws contemplate such additional scrutiny." 12 Similarly, one part of the Credit Suisse implied repeal test was whether there was "clear and adequate [U.S. Securities and Exchange Commission (SEC)] authority to regulate." 13 The Court said that in view of the active SEC enforcement of the "rules and regulations that forbid the conduct in question[,] … any enforcement-related need for an antitrust lawsuit is unusually small." 14 However, it must be stressed that the Court's stated premises were that in some instances administrative agencies can substitute for courts in carrying out the antitrust function, not that regulated companies are granted a free pass to violate antitrust laws. 15

The direction of Trinko, Credit Suisse, and their progeny suggest movement towards an abdication of the courts' traditional role of antitrust enforcement in regulated industries. Such an abdication could be perilous for consumers. Contrary to assumptions that may underlie Trinko and Credit Suisse, agencies are not adequate or complete substitutes for courts in antitrust enforcement. There are structural and procedural barriers that prevent or limit agencies from properly implementing antitrust standards even where, as for example, in the case of Trinko and New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc., they may be deemed to be enforcing statutory competitive norms. 16 Most significantly, because antitrust market structures and conduct raise factual competitive issues, by its nature effective antitrust enforcement often requires thorough factual development. 17 Agencies are often either unwilling or unable to provide processes, including adequate discovery and hearings, to bring necessary facts to light. 18

[\*631] Trinko and Credit Suisse do not require courts to leave antitrust enforcement entirely to agencies. Although Trinko, and to a lesser extent Credit Suisse, suggest greater court deference to agencies, 19 their holdings are limited. The cases each have text and subtext: their texts require deference only where, as in Trinko, an agency is enforcing its own rules and there is no clear, separate antitrust violation and where, as in Credit Suisse, there is agency authority and an exercise of jurisdiction so that implied antitrust repeal is necessary to avoid judicial and agency conflicts. 20 By its terms, Trinko merely leaves enforcement of Federal Communications Commission (FCC) antitrust requirements to the FCC. 21 It does not purport to open a new area of implied antitrust repeal. Credit Suisse articulates standards to determine whether regulatory statutes effect implied repeal. 22 Therefore, neither case precludes courts and agencies from playing their proper antitrust roles and, where appropriate, courts and agencies from reinforcing each other in applying antitrust policies. However, the subtext of these and other cases must be recognized as at least suggesting that courts should grant agencies greater deference premised on the belief that where agencies are actively protecting against antitrust abuse, there is reduced benefit from strict judicial antitrust enforcement. 23 Taken together, Trinko and Credit Suisse have a flavor that courts should be more restrained in antitrust application in regulated industries and more deferential to agencies.

Thus, Trinko, Credit Suisse, and their progeny warrant a close examination of how agencies function in enforcing competition policy. In this context, this article examines the capabilities of agencies to perform the antitrust role. It recommends that in antitrust enforcement, courts should limit deference to where it is justified. This is consistent with Trinko and Credit Suisse, which, in fact, allow courts and agencies to engage in complementary antitrust enforcement, resulting in more effective antitrust policy implementation. 24 In the last part of this article, we propose recommendations to appropriately draw the boundaries between court and agency authority to protect consumer interests.

[\*632]

II. Evolution of Antitrust Application in Regulated Industries

A. Historic Antitrust Application

The importance of the antitrust laws (or something like them) to ensure economic freedom has been repeatedly acknowledged from before the formation of this country 25 to the present time. 26 The importance of antitrust enforcement holds particularly true for regulated industries. 27 These industries provide essential public services, and despite the recent trend in such industries towards deregulation and a greater reliance on markets instead of strict regulation to control prices and services, these industries have a history of monopolization. 28 Companies in them often have a continued ability to exercise market power. 29

Many, if not all, regulated industries are undergoing a transformation, in whole or in part, from monopoly to more competitive industry structures. 30 Perhaps because of their history as regulated monopolies as well as industry characteristics (e.g., essential services produced by high-cost investments), such industries often have structures susceptible to the exercise of monopoly power. Therefore, the movement toward competition should lead to an increased need for antitrust enforcement in regulated industries. As one scholar has noted:

Deregulation has given antitrust an expanding role in many markets, such as telecommunications, electric power, and commercial aviation, to name a few. As an increasing number of activities in these markets pass out of the realm of strict agency control and into the realm of private, market-based decision making, antitrust picks up where the regulatory regime leaves off. 31

[\*633] Recognizing that antitrust laws are the cornerstones for ensuring economic freedom, Congress passed the principal antitrust laws, the Sherman and Clayton Acts nearly 125 years ago in grandly absolute terms. 32 Although staying grounded in the philosophy that antitrust laws play an important role in ensuring protection of a well-functioning market for the public good, courts have nevertheless nuanced the application of these laws as companies, economic activities, markets, and even theories in vogue have changed. 33

It is not surprising then, that as the application of antitrust laws has evolved, the interpretation applicable to those in regulated industries has also changed, including the theories of responsibility for the enforcement of those laws. 34 In the early years, if they thought about antitrust issues at all, most regulatory agencies concluded that their job was to enforce their authorizing statutes and to leave antitrust issues to the courts. 35 The Court agreed, defining the judiciary's function as "seeing that the policy entrusted to the courts is not frustrated by an administrative agency." 36

Furthermore, historically agencies have not been appreciative of being asked to take into account the perceived intricacies of antitrust policy nor of having antitrust doctrine interfere with agency support for perceived industry needs (satisfaction of which agencies may well have felt served public interests). 37 As late as the 1970s, agencies often continued to ignore antitrust [\*634] policy as it applied to their areas of expertise, and courts had to ultimately force them into doing so, kicking and screaming, as it were. 38 This was so, even though it was clear that the agency was not to enforce the antitrust laws as such, but to apply the principles of those laws as their principles affected the tasks committed to the agencies in their own statutes. 39

Courts did refer matters to agencies under the doctrine of "primary jurisdiction" where agencies had subject matter jurisdiction or necessary knowledge. 40 However, in doing so, they gave agencies deference generally only in those circumstances "where protection of the integrity of a regulatory scheme dictated preliminary resort to the agency which administers the scheme." 41 The courts generally required a clear showing of "plain repugnancy between the antitrust and regulatory provisions" as to "the precise ingredients of a case subject to the [agency's] broad regulatory and remedial powers" before they would defer to agency enforcement. 42 Even when courts deferred, appellate courts would continue to provide review of agency decisions, thereby helping to maintain antitrust review. 43 And in those cases where agencies had completed their proceedings prior to the commencement of the judicial antitrust enforcement action, the judiciary sometimes found it unnecessary to invoke the doctrine of primary jurisdiction. 44 A fair conclusion, we believe, is that courts maintained their primacy over antitrust enforcement except when their doing so would be in direct conflict with an agency statutory requirement.

B. The Effect of Trinko and Credit Suisse on the Court's Role in Antitrust Enforcement

Contrary to the above, in recent years the Supreme Court, through its opinions in Trinko and Credit Suisse, has ruled that courts should not decide certain antitrust cases brought in federal courts by directing dismissal of [\*635] proceedings where it believes that the issues could and should have been raised before regulatory agencies. 45 This is a turnabout from traditional, primary court enforcement of antitrust laws or, at the very least, agency enforcement complementing court jurisdiction. 46

At the outset, we note that the conclusions of Trinko and Credit Suisse's antitrust deference to regulatory agencies may be a significant overstatement of the decisions' scopes. In Trinko, the Court defined the question as "whether a complaint alleging breach of the incumbent's duty under the 1996 [Telecommunications] Act to share its network with competitors states a claim under [section] 2 of the Sherman Act." 47 Its holding was: "We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." 48 Fundamentally, the Court held that a breach of a statutory access mandate does not, in itself, make out an antitrust violation and that it is for the FCC to enforce its own rules. 49 And in Credit Suisse, the case did not involve issues of damages to particular plaintiffs. Rather, it involved the formulation of rules, which the SEC was apparently well-suited to make. 50 Thus, viewed in their specifics, the Court's holdings are limited and may be fairly interpreted as rendering unto Caesar that which is Caesar's. The Court's expansive dicta in Trinko and its four-step standard for determining when an agency statute implicitly precludes court enforcement in Credit Suisse 51 suggests that, at least in some circumstances, courts may adopt a diminished antitrust enforcement role in regulated industries. 52 The dicta in Trinko and the four step test of Credit Suisse rest on interrelated but potentially erroneous presumptions, including that agencies can and are effectively policing violations of antitrust principles in [\*636] regulated industries and, especially where there are agency competition requirements, that courts are ill-suited to examine the complexities of antitrust conflicts in highly technical fields. 53 Because the Court's dicta is largely based on flawed assumptions, it would be most unfortunate for American consumers and the place of antitrust law as the "Magna Carta of free enterprise" 54 if these suggestions of a limited judicial antitrust role were institutionalized.

A 2010 written statement before the House Committee on the Judiciary, which was stated to represent the views of the Federal Trade Commission (FTC), addressed the current state of the law in these areas, as relevant for these purposes:

The combined effect of Credit Suisse and Trinko is to make it more difficult than before for either private plaintiffs or public agencies to bring important antitrust cases in regulated sectors of the American economy. 55

The viewpoint expressed in the FTC statement is not uncommon. As government regulation expands, the category of entities that can claim that direct antitrust actions should be foregone in favor of continued "supervision" by often friendly agencies will expand as well. 56 Thus, the issues discussed are addressed to crucial, and not necessarily limited, segments of the economy.

III. Potential Impacts of Trinko and Credit Suisse on Antitrust Governance

Trinko and Credit Suisse counsel deference to regulatory agencies' determinations over substantial areas of antitrust policy formulation and enforcement. 57 Leaning towards a deferral to agency action on a theory that agency process must be more efficient for society without an examination of the alternative process and structure as it actually works would be an example of a beautiful theory submerging gritty actuality. 58 And, of course, the costs and burdens of excessive litigation to which the Court refers in cases like Trinko and Twombly may well be greatly overstated compared with the undoubtedly huge costs to society from non-antitrust enforcement. 59 The Court's apparent view in [\*637] Trinko and Credit Suisse that regulatory agencies can displace courts as the enforcers of antitrust norms does not come to grips with how agencies function.

Trinko has an undercurrent suggesting that there is a strict demarcation of authority between antitrust courts and administrative agencies with the former being largely confined to enforcement of antitrust rules in unregulated industries and the latter primarily enforcing antitrust policy in industries that agencies regulate. 60 For example, referring to the FCC and New York State Public Service Commission, in Trinko, the Court stated:

The regulatory framework that exists in this case demonstrates how, in certain circumstances, "regulation significantly diminishes the likelihood of major antitrust harm." 61

… .

[The Court further said:]

Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree… . An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations. 62

After reviewing the FCC's regulation of Verizon, including a "competitive checklist, which … includes the nondiscriminatory provision of access" as well as "continuing oversight," the Court concluded that the regulatory "regime was an effective steward of the antitrust function." 63

The Trinko decision does not say, but may come close to saying, that courts need not enforce the existing section 2 monopolization provisions where agencies have jurisdiction over the day-to-day enforcement of competitive access conditions. 64 The reference to the doctrine of implied immunity in this regard is particularly troublesome. 65 The Court's judgment may be viewed as a signal to lower courts that they should apply similar reasoning in implied immunity contexts and back off from antitrust enforcement in network and infrastructure industries, even those subject to deregulation mandates or policies. For these industries, the Court appears to view antitrust principles as being served adequately by leaving enforcement of section 2 policies to agencies that allegedly have more specialized knowledge and greater oversight capability than courts. 66 The importance of applying antitrust principles to these industries and [\*638] the regulatory inadequacies discussed below would make applying an unnecessarily expanded interpretation of Trinko and Credit Suisse unconscionable. Because of the political power of many industry market participants, once exemptions are allowed, they are difficult to remove. 67 Moreover, it is legally unnecessary to withhold enforcement because the issue in Trinko was narrowly stated to be limited to "deciding whether to recognize an expansion of the contours of [section] 2" of the Sherman Act and the Credit Suisse test would rarely be preclusive. 68 Both cases are structured to allow the law to develop as factual proofs may compel. 69

The Court seems to view antitrust courts and administrative agencies as performing much the same function. In fact, a major component of the Credit Suisse implied immunity test is that agencies have the authority to regulate and actively do so. 70 Therefore, the Credit Suisse Court appears comfortable leaving substantial antitrust enforcement in regulated industries to administrative agencies. 71 To the extent that it exists, this comfort would be misplaced not only because courts are required to apply the law, but also because courts and administrative agencies often act far differently both in procedural and substantive decision-making. Deference would often mean antitrust abandonment.

#### Implied immunity risks of monopolization in critical industries are much larger than potential for conflict between antitrust and regulation.

Jablon ’13 [Robert et al; LLB @ Harvard Law School; Anjali Patel; JD @ Michigan Law; Latif Nurani; JD @ Columbia Law; “Trinko and Credit Suisse Revisited: The Need for Effective Administrative Agency Review and Shared Antitrust Responsibility,” *Energy Law Journal* 34(2), p. 627-666]

IV. An Optimal Solution: Complementary and Effective Antitrust Responsibility

Trinko's strict holding only addresses the question of whether, if the FCC promulgates an access rule, violation of that rule creates a section 2 refusal to [\*656] deal claim, and Credit Suisse establishes a four part test that arguably seeks to avoid direct judicial-agency conflicts. 170 However, to the extent that the Supreme Court, other courts, or commentators suggest that lower courts should avoid section 2 or other antitrust enforcement in areas where agencies have jurisdiction, this dicta and commentary should be rejected because in regulated industries critical to the Nation's welfare, antitrust enforcement is "not less important but more so." 171 Such an either-courts-or-agencies-should-exercise-jurisdiction approach to antitrust enforcement can too easily result in no enforcement. Agencies and courts can and should complement each other in providing effective antitrust consideration. Such complementary consideration of anticompetitive issues would avoid much of the potential for conflict that concerned the Court in Trinko and Credit Suisse while better ensuring full antitrust consideration. 172

To some extent the concept of complementary jurisdiction reflects an attitude that recognizes that both courts and agencies have important and sometimes parallel antitrust responsibilities. It assumes that under their conjoint responsibilities both are expected to protect against anticompetitive abuse within their jurisdictions. As Judge Skelly Wright put the matter,

the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same - to achieve the most efficient allocation of resources possible… . Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other. 173

As is discussed herein, under these standards, except where there is a direct conflict, judicial antitrust and agency cases would both move forward within their jurisdictions. Through doctrines of primary jurisdiction, where appropriate, a court could refer questions or matters to agencies or agencies could defer to courts, with the non-lead forum holding the case in abeyance. 174 Sometimes court and agency preclusion rules would apply. 175 A court could make its relief subject to companies making tariff or other filings with agencies to avoid conflict and achieve efficiencies in oversight, as occurred, for example, in Otter Tail Power Co. v. United States. 176 Although a parallel court or agency claim might lead to a deferral of one of the actions, if we are to give a primacy to antitrust policy as it affects regulated industries, the fact of a deferral would not justify a dismissal as occurred in Credit Suisse except where (1) full agency antitrust consideration is assured; (2) agency duplicative statutory authority and [\*657] actions would be contradictory to a court or agency moving forward, which mandates such dismissal under properly applied Credit Suisse and Midcal standards, as are discussed infra; and (3) the authority of the court or agency which proceeds under deferral has jurisdictional or subject matter priority and knowledge. 177 Agencies would be responsible to exercise their authority to implement antitrust policy to the maximum possible extent, granting the most limited feasible antitrust exclusions consistent with their responsibilities under their enabling statutes. 178

The place of regulated industries in our economy warrants an appropriate emphasis on antitrust policy. These standards provide such emphasis. Notwithstanding suggestions to the contrary in the Trinko dicta, antitrust enforcement is essential in these industries because, as the FERC analysis exemplifies, such industries almost always lack sufficient competitive response potential to prevent the sustained exercise of market power. 179 This deficiency can be attributed to, among other things, preexisting and continuing industry concentration, historic monopoly positions of certain market participants, and the industries' intensive capital structures which impede non-incumbent entry. 180

Due to political and institutional pressures as well as agencies' continuing to move away from adjudicatory processes, regulatory agencies cannot, by themselves, adequately provide necessary antitrust enforcement. 181 Agencies often have broad jurisdictions over particular industry market structures and transactions and also particularized knowledge of industries that fall under their jurisdictions, including an ability to enforce day to day implementation of court remedies. 182 However, courts have direct antitrust adjudicatory jurisdiction and broad remedial authority. 183 Agencies and courts should work together to prevent violations of antitrust law and policy and to ensure consumer welfare.

A. Suggestions That Courts and Agencies Cannot Exercise a Complementary Antitrust Role Are Inapt

As we show in Section III, today's electricity industry provides a ready, but hardly exclusive, example of where antitrust courts and regulatory agencies can and should play complementary and reinforcing roles. Such complementary, [\*658] non-exclusive jurisdiction would tend to ensure the likelihood of necessary antitrust enforcement and the application of agency experience and knowledge in addition to maintaining both fora's advantages.

The Trinko and Credit Suisse Courts raise concerns that such dual jurisdiction can lead to duplicative proceedings and conflicting requirements and that courts cannot fashion appropriate antitrust relief in regulated industries. 184 However, these objections are more theoretical than real. Complementary jurisdiction has not posed problems to date or, if it has, the Supreme Court does not cite evidence of such problems. In fact, there has been no real showing that agencies do not welcome court antitrust enforcement, which expends none (or hardly any) of their resources and can lead to pro-competitive results for which they cannot be politically blamed. 185 For example, we have never heard of any NRC objection to the idea that the courts can also enforce NRC antitrust license conditions. 186 By the same token, agencies can implement judicial (and other administrative) remedies. 187

Of course, coordinate jurisdiction may, to some extent, allow for forum shopping or create duplicative costs. But if there is a primacy to preventing and correcting anticompetitive conduct, the fact that a court or agency may pass on a particular questionable company action does not automatically justify allowing that action to be continued. Courts and agencies have different roles and priorities: if a company's conduct is contrary to competition rulings in either judicial or administrative fora, it probably should be disallowed.

On balance, the availability of duplicate fora is preferable to non-enforcement risks. Because of the importance of antitrust to national economic policy, both agencies and courts could act in harmony, taking similar directions in applying antitrust policy. At minimum, one could be neutral during the pendency of the other's more aggressive antitrust enforcement. 188

Treating courts and agencies as complementary bodies permits more effective remedies than if courts and agency jurisdictions are deemed inherently separate. Regulated industries, including electricity, natural gas and oil pipelines, telecommunications and transportation, tend to be among our most important and, frequently, those where antitrust problems are most likely to [\*659] occur. These are industries that often have had monopoly structures, but are now evolving towards competition. Their products and services are vital. If there are any segments of the economy where one would want strict antitrust enforcement, it is in regulated industries.

#### Precedent is ambiguous – clarifying that antitrust is available in absence of an actual conflict is key.

Shelanski ’18 [Howard; Professor of Law @ Georgetown University; Partner @ Davis Polk & Wardwell LLP; “Antitrust and Deregulation,” 127 Yale L.J. 1922; May 2018; Lexis]

C. Clarifying Legal Precedent

The Supreme Court's decisions in Trinko and Credit Suisse are susceptible to broad and narrow interpretations. Federal courts could apply the judicial-confusion rationale of Credit Suisse to block almost any complicated antitrust claim that some court might misinterpret in some way that conflicts with regulation. But the decision provides little guidance on how likely judicial confusion [\*1954] between permissible and impermissible conduct must be, or how likely it must be that such confusion will interfere with regulation, before a court bars an antitrust claim.

With respect to the first question, the Court in Credit Suisse found the conduct challenged by the plaintiff to be similar to conduct allowable by the Securities and Exchange Commission, creating the risk that the trial court might mistakenly bar the allowable conduct by finding it illegal under antitrust law. 130 The Court did not, however, provide much guidance on how similar the conduct subject to an antitrust complaint must be to the conduct permissible under regulation in order for lower courts to bar the antitrust claim. Defendants are therefore likely to argue that courts should preempt antitrust on confusion grounds in less plausible circumstances than those that existed under the specific facts of Credit Suisse. It is perhaps helpful for antitrust plaintiffs that the very lower courts that the Credit Suisse majority found so inexpert and error prone are those that will interpret and apply the decision, as they might have incentives to narrow the zone of their presumptive incompetence. 131 Bringing cases in which the antitrust claims are clearer, and the applicability of regulation to the conduct being challenged less direct, would provide federal courts with opportunities to clarify and limit the scope of that zone.

With respect to conflict, the Court appears to find it enough that a regulatory agency has the authority to allow the conduct that courts might prohibit under antitrust law. 132 The opinion does not address how courts should apply Credit Suisse where the agency has declined to exercise its regulatory authority. For a potential conflict to exist, is it sufficient that the agency's statutory authority remains available, even if the agency has repealed rules implementing that authority? In such cases, the likelihood of conflict between mistaken application of antitrust law and actual exercise of regulatory authority is more remote. Meanwhile, the effect of blocking antitrust is to leave firms in the sector without oversight from either regulators or antitrust authorities. Bringing cases where a regulator has repealed, declined to promulgate, or stopped enforcing rules with which the antitrust action could allegedly conflict--all of which are likely during a pronounced deregulatory cycle--would test the limits of Credit Suisse in court. The results of such cases could be to narrow Credit Suisse to circumstances in which an agency in fact exercises, or is likely to exercise, its statutory authority in a way that could conflict with antitrust.

Trinko is similarly subject to both broad and narrow interpretations. As mentioned, the problem with Trinko is not the result it reaches as to the particular [\*1955] claim and question presented to the Court. Rather, its danger lies in its potential to bar legitimate antitrust claims on the presumption that antitrust has little incremental value where a regulatory structure already addresses competition. The possibility of such an interpretation arises because Trinko featured three important factors that might be absent in other regulatory settings. First, the competition rules under the 1996 Act imposed stronger monopoly constraints than did Section 2 of the Sherman Act. 133 Second, the FCC had issued a set of rules that directly regulated the anticompetitive misconduct alleged in the case. 134 Finally, the FCC actively administered these duty-to-deal regulations under the 1996 Act. 135 The Court, however, did not identify any of these factors as necessary either to its ruling in Trinko or its future application, opening the door to varying interpretations of the Court's opinion.

A situation in which "[t]here is nothing built into the regulatory scheme which performs the antitrust function," where the Court would allow antitrust enforcement, 136 differs significantly from the very specific, actively enforced competition regulation of the 1996 Act. But the Court does not tell us how close to "nothing" the competition-oriented regulation must be before antitrust can play a role in the marketplace. The problem is particularly important in markets undergoing deregulation, where change may be gradual and piecemeal. Indeed, the very rules at issue in Trinko gradually weakened and then ceased to exist within a few years, even though the underlying statutory authority remained in place. In cases where such piecemeal deregulation occurs, or where an agency simply stops enforcing its rules, it is unclear at what point the incremental value of antitrust is high enough that it can be enforced in the deregulating market. Significant anticompetitive harm could occur if the agency is deregulating over time, but antitrust can supplement the weakening regulatory structure only when there is "nothing" left of that structure to govern competition. As with Credit Suisse, well-grounded antitrust challenges in markets undergoing deregulation could present lower courts with good cases through which to limit Trinko [\*1956] to its particular circumstances while narrowing the sweep of the decision's prudential recommendations. Such a narrowing would be good for antitrust enforcement generally, but is particularly important for the availability of antitrust to counter a strong deregulatory cycle.

#### Limiting implied immunity to active administration solves gaps in competition enforcement.

Shelanski ’11 [Howard; Law @ Georgetown, Administrator @ OIRA, Director of the Bureau of Economics @ Federal Trade Commission, Former Chief Economist @ FCC; “The Case for Rebalancing Antitrust and Regulation,” *Michigan Law Review* 109(5), p. 725-727]

The Court's presumption that expansion of antitrust in the presence of relevant regulation would be too costly appears harmless on the facts of Trinko itself. Even absent such a presumption, it seems unlikely that a district court would find the antitrust claim to be worthwhile given the nature of the claim and the direct correspondence between the underlying refusal to deal and the FCC's network-access rules. But nothing in the Trinko opinion confines the Court's presumption about the costs of antitrust in regulated industries to the facts of the case. Trinko stated that one key factor in deciding whether to recognize an antitrust claim against a regulated firm "is the existence of a regulatory structure designed to deter and remedy anticompetitive harm," because "[w]here such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small."87 The Court made clear its view that the regulation at issue in Trinko itself directly addressed the allegedly illegal conduct and was actively overseen by the FCC. Had the Court made equally clear that to preclude antitrust claims a regulatory structure must, like the one at issue in Trinko, be directly relevant to the conduct at issue, be as demanding as antitrust law, and be actively administered, one might worry less about any collateral consequences for legitimate antitrust cases. The Court did not, however, tie its decision to the particular attributes of the regulations at issue in Trinko or establish any standard that a regulatory program must meet to preclude antitrust claims. The Court instead offers as the contrasting scenario in which antitrust might be worthwhile the case where "'[t]here is nothing built into the regulatory scheme which performs the antitrust function.' "89 Between "nothing" and the actively enforced duties to deal under the 1996 act there is a lot of room. Unanswered in Trinko is the important question of whether the competition-focused regulation has to correspond closely to the conduct at issue and be actively enforced or whether its mere existence on the books is sufficient to forestall aggressive antitrust claims. At the heart of this question is what constitutes a "regulated" firm for purposes of Trinko's preclusion of aggressive antitrust claims. Trinko counseled courts to dismiss even well-pleaded claims to expand antitrust liability beyond its existing boundaries when those claims are made against regulated firms, whereas an unregulated firm may have to fight those same claims on the merits under antitrust law's rule of reason. In Trinko, the Court confronted a combination of statutory authority to regulate the conduct at issue, agency rules that implemented that authority, and active administration and enforcement of the regulations by the agency. But what if one of the latter two elements is missing or present in a weaker form than in Trinkol Future antitrust claims could arise against firms subject to a relevant regulatory statute but where the agency has not implemented rules, or where the agency has promulgated regulations that do not directly govern the allegedly anticompetitive conduct, or where the agency does not actively administer or enforce its rules. The Trinko decision left open the question of where along this spectrum of possibilities a firm becomes sufficiently "regulated" for the Court's rule against boundary expanding antitrust claims to apply. This is a key question after Trinko. If a presumption against antitrust can apply absent active enforcement of a regulatory statute that ostensibly "per forms the antitrust function," then a little regulation could be a dangerous thing for competition enforcement in regulated industries. The risk for anti trust enforcement is that, given the Trinko Court's emphasis on the "sometimes considerable disadvantages" of antitrust, lower courts will preclude antitrust suits where the regulatory scheme is something greater than "nothing" but something well short of the FCC's implementation of the 1996 act's competitive access provisions.

#### Anticompetitive markets sow the seeds of inequality.

Khan & Vaheesan ’17 [Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; and Sandeep; Legal Director @ Open Markets Institute, JD @ Duke; “Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents,” *Harvard Law & Policy Review* 11(1), p. 235-294; AS]

I. How MARKET POWER CONTRIBUTES To EcONOMIC INEQUALITY

Economics identifies two major ways in which firms with market power can harm society: first, by reducing output below the socially optimal level (the efficiency effect)', and second, by raising prices (the distributional effect).' 0 The dollar amount of the distributional effect is typically several times larger than the dollar amount of the efficiency effect." Moreover, these higher prices typically transfer wealth from consumers to the firms with market power, which can redistribute income and wealth upwards. The reason this redistributive effect tends to be regressive is that the managers and owners of firms with market power are typically wealthier than the consumers of the products the firms sell.' 2 To borrow the words of former Federal Reserve Chairman Marriner Eccles, pervasive market power in an economy is likely to operate as "a giant suction pump . . . draw[ing] into a few hands an increasing portion of currently produced wealth." 3

The figure below lays out the short-term economic effects of market power. A market in which suppliers have market power is compared to a market in which perfect competition prevails.1 4 Relative to a market with perfect competition, the equilibrium price is higher and the equilibrium quantity of output is lower when market power exists. As a result: (1) wealth is transferred from consumers to firms (the gray rectangle), and (2) economic efficiency is reduced (the two white triangles labeled "efficiency loss").

Further, in many markets-most notably agriculture-large buyers have the power to drive prices below the competitive level. In this monopsonistic or oligopsonistic scenario, wealth is transferred from suppliers to purchasers.

The wealth transfer from market power is likely to have regressive effects. Economic research has found that the ownership of stocks and other business interests is heavily concentrated among the top 10%, and especially the top 1% and 0.1% of American families ranked by wealth. Emmanuel Saez and Gabriel Zucman have estimated that in 2012 the top 10% owned 77.2% of total wealth in the United States, with the top 1% and top 0.1% accounting for 41.8% and 22%, respectively." In other words, the richest 160,000 families together owned nearly as much wealth in stocks, bonds, pensions, housing, and other assets as the 144 million families in the bottom 90% did as a whole.1 6 The following chart illustrates the concentrated ownership of business assets. Wealth, including business and non-business assets, is heavily concentrated at the very top of the distribution. Around seventyeight percent of the nation's wealth is concentrated in the top ten percent of the population. And as skewed as the overall wealth distribution is, this figure, in fact, understates the concentration of ownership of business assets because it includes housing wealth, which is distributed more broadly than other forms of wealth.' 7

Focusing on income from productive assets, capital income is heavily concentrated among the top 10% and, in particular, the top 0.1%.'1 In 2012, the top 0.1% families, as measured by wealth, received approximately thirtythree percent of total capital income excluding capital gains and approximately forty-three percent of total capital income including capital gains.2 0 In light of this distribution, a large percentage of market power rents likely flow to a tiny sliver of the American population.

Along with shareholders, top executives also appear to capture a portion of the rents 2 1 from their firm's market power.22 In recent decades, executive pay has increased dramatically. The spectacular increases in income for this group-dubbed "super managers" by Thomas Piketty-has been an important driver of rising inequality in the United States.23 Due to passivity among dispersed shareholders and captive boards of directors, chief executive officers and other top managers have the effective power to set their own pay. 2 4 A sizable fraction of this increase has come in the form of stockbased compensation. 25 Executives' discretion over their own pay allows them to capture a portion of market power rents.26 Economist William Lazonick has written that "[e]ven when adjusted for inflation, the compensation of top U.S. executives has doubled or tripled since the first half of the 1990s, when it was already widely viewed as excessive." 27

Contemporary corporate law and norms encourage managers to retain market power rents 28 among themselves and shareholders. The "shareholder revolution" of the late 1970s and early 1980s established a tight nexus between the interests of executives and shareholders-in particular short-term shareholders-of corporations based or publicly traded in the United States.29 Corporate law and norms in the United States today, much more so than in other industrialized nations and even the United States in the mid twentieth century, encourage executives to identify with shareholders and pursue short-term profit maximization.3 0 Instead of promoting the welfare of workers and communities, for example,' executives are socialized to maximize short-term profits and enhance the price of the stock.32 In effect, managers are conditioned and pressured to run the business to advance the interests of their wealthiest constituents: shareholders.33 While often taken as a given, the promotion of shareholder interests over those of workers or the public rests on questionable assumptions-and is historically new.3 4

At points in the past, managers may have felt sufficient pressure from other segments of the firm, specifically workers, to share market power rents more equitably. Indeed, in the unionized manufacturing sector in the mid-twentieth century United States, the windfalls from market power appear to have been divided with workers. The paradigmatic example is the "Treaty of Detroit" arrangements that governed the U.S. auto industry (and heavy industry generally) during the decades following World War II. 35 Although the three giant carmakers earned significant oligopoly profits, they shared some of the rents with their unionized workers through annual cost-of-living and productivity raises and pensions negotiated under collective bargaining agreements. 36

Other sectors also followed this practice of sharing market power rents with organized workers. Evidence from pre-deregulation airline and trucking industries suggests that, in oligopolistic industries with high union density, market power rents were, in part, disbursed to workers through higher compensation. 37 More generally, in concentrated industries characterized by oligopoly power, unionized workers appeared to earn more than their non-unionized [\*243] counterparts, receiving a portion of the rents obtained by their employers. 38 The effects of unionization extended beyond particular organized firms and industries. The higher density of unions contributed to the establishment norms of equity and to the securing of higher wages in non-unionized sectors as well. 39 On the whole, the power of organized labor blunted the regressive economic effects of market power.

Given that labor today lacks effective countervailing power, market power rents are not likely to be shared with workers in shareholder-centric business sectors. In recent decades, labor's countervailing power has been more notable for its absence than its presence. 40 Labor markets and workplaces have been radically transformed to the detriment of the working class, with a qualitative shift from unionized, full-time jobs in manufacturing to non-unionized, contingent jobs in the service sector. 41 In 2015, only 6.7% of private sector workers belonged to a union, 42 compared to 25% in 1975. 43 On top of the decades-long decline of organized labor, 44 the U.S. labor market has been weak in recent years. Nearly eight years after the financial crisis, the U.S. economy has not returned to full employment, 45 undermining the bargaining power of even those with jobs. 46 In an economy in which workers lack bargaining power and cannot demand higher wages, managers are un-likely [\*244] to share the spoils from market power with their employees. 47 Wage trends support this hypothesis. Despite rising labor productivity, wages have stagnated for most workers since the mid-1970s. 48

The trend of increasing consolidation and rising market power coupled with stagnant or declining wages suggests one possible way forward. A revived union movement and realigned CEO incentives could help mitigate the regressive effects of market concentration. 49 With the exception of industries whose network effects or high fixed costs necessitate monopoly, however, market competition is still preferable to market concentration.

In contrast to shareholders and executives at businesses with market power, consumers-the victims of market power-are much more likely to be representative of society at large. While an affluent person is very likely to spend more in absolute dollars on consumption than a person of lesser means, the relationship between income and consumption is not one-to-one. In other words, a person with an income fifty times greater than the median income is unlikely to consume fifty times as much as the person earning the median income. Rather, a person earning fifty thousand dollars per year almost certainly spends a larger fraction of his or her income on consumption than a person earning one million dollars per year. 0 More specifically, a less affluent person is likely to spend a larger portion of his or her income on essential goods-such as energy, food, and health care-than a wealthier person.' Monopoly and oligopoly overcharges are the functional equivalent of a sales tax and, in the markets for necessities, are very likely to have regressive effects, as most sales taxes do. 52

The distributive effects of market power are understudied. In a 1975 study, William Comanor and Robert Smiley found that market power in the U.S. economy had significant regressive wealth effects in the 1960s-a period of much less economic inequality and greater economy-wide competition than the present.53 Their economic simulations of the U.S. economy in 196354 found that monopoly power transferred wealth to the most affluent segment of society. Comparing the real-world economy in which firms in many markets possess monopoly or oligopoly power with a theoretical economy in which all markets are competitive, Comanor and Smiley found that a fully competitive economy would benefit the overwhelming majority of Americans. Specifically, 93.3% of the population that had limited or no business ownership interests would see an improvement in their relative wealth position, thanks to lower prices for goods and services.55 In contrast, the most affluent 2.4% of the population, which had total assets of greater than one hundred thousand dollars in 1962, would see a decline in wealth of as much as fifty percent.5 6 A recent study that performed an economic simulation of the European Union found comparable progressive distributional effects from curbing market power. 7

Given managerial norms that prize the interests of the generally affluent shareholder class, the inability of workers to demand a share of market power rents, and the higher fraction of income devoted to consumption by working and middle class Americans, market power in most sectors can be expected to redistribute wealth upwards. Oligopolistic and monopolistic firms, by raising prices, capture wealth from consumers. In the case of oligopsonists and monopsonists, these powerful buyers capture wealth from small producers by depressing purchase prices for their output. The higher prices borne by consumers (the ninety-nine percent as a rough shorthand) translate into larger profits for firms and ultimately larger dividends and capital gains for shareholders and larger salaries and bonuses for executives two groups that tend to be overwhelmingly affluent (the one percent as shorthand).

#### Inequality spurs populist backlash.

Flaherty & Rogowski ’21 [Thomas; PhD Candidate and NSF Graduate Fellow @ University of California – San Diego; and Ronald; Distinguished Professor of Political Science @ University of California – Los Angeles, Weatherhead Scholar @ Harvard University; “Rising Inequality as a Threat to the Liberal International Order,” *International Organization* 75(2), p. 495-523; AS]

Presiding over the November 2016 meeting of the International Political Economy Society, which followed that year’s US presidential election by only three days, David Lake began by saying, “To our theories, this result unfortunately comes as no surprise.” And indeed the field at large has believed that the growing “populist”1 backlash against the Liberal International Order (LIO)—not just the Trump victory but Brexit, the election of illiberal governments in Hungary, Poland, Turkey, the Philippines, and Brazil (to name only a few), and growing support for anti-immigrant and illiberal parties and candidates in many other democracies—has followed almost inevitably from the very changes the LIO has wrought, including of course increased trade and migration but also one major concomitant, rising economic inequality within states. According to our traditional economic theories,2 advanced and even middle-income countries are abundantly endowed with human capital, and poorly endowed with low-skill labor. And it is a rudimentary implication of international economics that, in those countries, expanded trade—or, even more, immigration of low-skill workers—will benefit the highly skilled and harm the less educated. Inequality will rise, and—perhaps the most prescient conclusion of the traditional analysis—partisanship will correlate increasingly with possession of human capital: opposition to the LIO will be strongest among the least educated and will decrease monotonically with more years of schooling.

The evidence, which we survey briefly, admits of no doubt that in almost all of the wealthier (and not a few semiwealthy) countries, inequality has risen, often quite sharply; returns on education3 have risen markedly; and education, even more than occupational status, has emerged as one of the most important predictors of electoral support for antiglobalization parties. What our theories however did not anticipate, and so far cannot explain, may well prove to have been even more important:

1. Not all who are well endowed in human capital, but chiefly a very thin upper layer—the top 1 percent, or even 0.1 percent—have harvested most of the gains from globalization.

2. The antiglobalization movements we observe • adopt a populist rhetoric that often excoriates not just globalization or immigration but also allegedly nefarious elites, who conspire, both domestically and across borders, to enrich each other at the expense of their fellow citizens;4 • benefit chiefly parties of the radical Right; and • have in important cases attracted non-negligible support among university-educated segments of the electorate, albeit far less than among the less skilled.5

We suggest that the extreme inequality and the anomalies are related, and that some insights from recent work in international economics may help explain them. Three advances in trade theory predict extreme inequality. “New new” trade theory (NNTT), with its emphasis on superstar firms, offers a natural framework. So too does an “enriched” neo-H-O-S-S (Heckscher-Ohlin-Stolper-Samuelson) perspective that explores how superstar workers arise in the context of heterogeneous talent.6 Finally, economic geography, explored thoroughly by Broz, Frieden, and Weymouth in this issue, shows how globalization gives rise to superstar cities.7 These three trade theories predict top-heavy inequality primarily by allowing for unit heterogeneity—an assumption that the actors our traditional theories treated as identical actually differ in important ways. Firms within sectors differ in productivity, workers within a factor class differ in innate talents, and regions within countries differ in agglomeration economies.

None of this suggests, of course, that rising inequality is the only, or even necessarily the most important, cause of the growing popular backlash against the LIO. Skill-biased technological innovation and resistance to cultural change also matter, as we discuss more fully later. We do find, however, at least from a cursory analysis of European elections, that backlash against shocks from immigration and imports is conditional on high inequality, disappearing where inequality is low; and we suspect that rising “top-heavy” inequality is related to a particularly prominent strain, within the antiglobalization movements, of anti-elite and anti-expert sentiment.

We go on to suggest why rising inequality matters, not only as a source of opposition to the LIO but as an impediment to economic growth and an exacerbant of domestic polarization and international conflict.

We assess the implications of top-heavy inequality for the LIO. What remedies have been proposed? And if they lack sufficient political support, what sources of resilience can sustain the LIO under top-heavy inequality? Relatedly, we return to the question of why antiglobalization sentiment has benefited the political Right more than the Left. Finally, we chart a course for future research on models of top-heavy inequality, and discuss how they illuminate “blind spots” in the literature on international political economy.

First, however, we survey briefly the extent of growing economic inequality in advanced economies and its seeming relation, chiefly through a human-capital channel, to antiglobalization and anti-elite attitudes and voting.

Convergence Across Countries, Divergence Within Them

The triumph of the LIO in the 1980s and 1990s—the collapse of Communism, the dismantling of trade barriers, the strengthening of institutions of international governance—coupled with, and facilitated by, breakthrough innovations in transport, communication, and finance, affected economic inequality in two ways that standard factor-endowment theories predicted: inequality declined significantly between countries, thus beginning to erode three centuries of the Great Divergence between rich and poor nations; but inequality within countries, especially among the advanced economies, increased almost as sharply.

• Between countries. As late as 1990, the richest 10 percent of the world’s population earned on average over ninety times what the poorest decile received; only twenty years later, that ratio had fallen to sixty-five times,8 or only slightly more than the within-country ratio of Brazil, where in 2008 the average income of the richest decile was about fifty times that of the poorest.9

• Within countries. Beginning even earlier, inequality of incomes, whether measured as the Gini index or the share of total income accruing to the top decile, has risen in virtually all of the advanced economies,10 and indeed in many of the middle-income ones.11 Bourguignon notes that the collapse of the Soviet empire and the opening of China, India, and Latin America injected roughly “a billion workers, for the most part unskilled, into international competition.”12 That will have drastically lowered the global capital-labor ratio and hence further raised returns on human and physical capital, while reducing those on low-skill labor, in virtually all but the poorest, most labor-abundant countries. In short, across much of the globe, the enormous overall gains from trade have benefited the highly skilled, the inventive entrepreneurs, and the owners of capital; the incomes of the less skilled and the capital-poor have risen more slowly, stagnated, or actually declined—exactly the development whose early manifestations alarmed Dani Rodrik two decades ago.13

Surely not all of the rise in inequality stems from globalization.14 Many analyses attribute much of the widening within-country gap—in the US, perhaps as much as four-fifths15—not to globalization but to skill-biased technological innovation.16 Bourguignon contends, to be sure, that innovation has been largely endogenous to globalization: wider markets and intensified competition have raised the returns on cost-reducing innovation.17 Cheaper labor, however, whether from offshoring or the competition of low-wage imports, might be expected to curtail the demand for labor-saving technologies, not to increase it.18 A stronger case is implied by “new new” trade theory: if managerial pay correlates closely with firm size, and if the most successful firms in a globalized economy tend to be the largest, it follows that globalization contributes directly to the rise in top incomes.19 Perhaps most importantly, however, whatever skill-biased innovation may have contributed to the gains of the top quintile or decile, it can say little about the gains of the top 1, or 0.1, percent of the distribution.20 Trade, as we argue, can more readily explain those disproportionate gains.

Rising Skills Premia

Also consistent with mainstream theory were the rising returns on education and the widening gap between high- and low-skill workers’ attitudes toward trade and migration. Exactly as theory would lead us to expect, antiglobalization sentiment rose sharply, and was increasingly concentrated, among voters with the least human capital—that is, the less educated.

Returns on education have indeed risen sharply. In the US in the 1970s, workers with a college degree earned only about a quarter more than ones of comparable ethnicity and age who had completed only high school; by 2010, that gap had risen to almost 50 percent.21 The “raw” difference in annual earnings (i.e., without controlling for ethnicity and age) between college graduates and those who have completed only high school is now 64 percent in the US, and on average in the OECD economies 45 percent.22

At the same time, less educated voters have mobilized strongly against globalization in almost all of the advanced economies. In the US, whites with less than a college education, having up to the year 2000 differed little in their partisanship from whites with university degrees, began to tilt Republican in the early 2000s23 and supported Trump in 2016 by a margin of more than two to one (64 to 28 percent).24 In the Brexit referendum, similarly, 70 percent of voters with only a General Certificate of Secondary Education, roughly equivalent to a US high-school diploma, supported leaving the European Union, while those with university degrees voted by almost the same margin (68 percent) to remain.25 And a recent International Monetary Fund working paper finds that since 2002 tertiary (i.e., university or equivalent) education has correlated, more than any other single variable, with not voting for a populist party in European parliamentary elections—an effect that has grown only stronger since 2012.26

The Riddle of the 1 Percent

In many ways, then, a standard factor-proportions picture of globalization’s distributional and political effects holds up. What it cannot explain, as economists have by now noted repeatedly,27 is why so much of the bounty has gone to the top 1 percent and why even the remainder of the top decile, let alone the highly educated generally, have benefited comparatively little. This pattern is reflected in average real income trends since 1991 across five advanced economies (Figure 1). Much of the real income growth of the top 10 percent owes to gains by the top 1 percent (compare panels 1 and 2); the next 9 percent (i.e., the remainder of the top decile) have seen a comparatively paltry increase. At the same time, the incomes of next 9 percent, which stagnate or even decline after about 2000, mirror those of the middle 40 percent (compare panels 2 and 3). Taken together, the three panels demonstrate the extent to which a narrow elite has risen above the rest of society’s otherwise skilled workers.

Haskel and colleagues more vividly make this case in the US with data on returns on education, finding that the median income of the top 1 percent had risen by 60 percent between 1990 and 2010, while the returns on university education, even for holders of advanced degrees, had declined in real terms after about 2000, virtually erasing their modest gains from the previous decade.28

The seemingly inexorable rise of the 1 percent, when contrasted with the relative stagnation of the rest of the top decile, and of owners of human capital in the middle 40 percent, raises at least three questions. Can our standard theories be modified to explain this “top-heavy” form of inequality? Would such a modified theory still provide a plausible link to globalization? And does such a theory help us understand the simultaneously anti-elitist and antiglobalization character of recent populist movements?

Heterogeneous Workers, Firms, and Regions: Three Ways Globalization Affects Top-Heavy Inequality

We argue that the top-heavy inequality we observe is consistent with three recent advances in trade theory. Each highlights how the bulk of globalization’s gains concentrate in a narrow subset of superstar workers, superstar firms, or superstar cities. An “enriched” H-O-S-S model shows how globalization concentrates wages in a small share of highly talented workers. New new trade theory implies that globalization concentrates profits in a few multinational corporations. Finally, economic geography, extensively reviewed by Broz, Frieden, and Weymouth (in this issue), predicts that globalization concentrates economic growth in a few metropolitan regions.29 By producing far more extreme inequality than traditional models suggest, these theories may help explain the puzzling composition of antiglobalization interests and why these movements adopt a populist tone that demonizes elites.

In presenting these advances, we spare the reader their mathematical exposition and instead focus on their sometimes subtle intuitions. We then explore their similarities and differences, as well as how they illuminate the puzzles of LIO backlash.

Neo-H-O-S-S

The first advance injects new life into the increasingly disesteemed, yet still heavily used, factor-endowments framework of Heckscher-Ohlin and Stolper-Samuelson. It turns out that modest enhancements introduced by Haskel and colleagues yield productive insights into the puzzles of LIO backlash.30 The key amendment introduces heterogeneous workers with varying degrees of innate talent. To state briefly the salient and surprising implications of that model, a drop in the relative price of labor-intensive goods, whether induced by globalization or by technology, can not only reduce the wages of low-skill workers, as in traditional models, but also distribute almost all of the resultant gains to a thin layer of highly talented people—and, at least as importantly, induce stagnation, or actual decline, in the earnings of highly skilled but less talented workers.31 And, once we observe that such a shift is both quite recent and plausibly linked to globalization, we may have shed some light on (a) the rabidly anti-elitist and antiglobalization tinge of the populist movements, (b) why such movements have recently peaked, and (c) why they gain (and may well continue to gain) support not only from the “usual suspects” among low-skill workers but also from those with moderate or even relatively high endowments of human capital.32

For those who appreciate a more rigorous introduction, we offer a graphical exposition of the “richer” H-O-S-S model in online Appendix A2. More intuitively, the key to understanding that model is what happens to high-skill workers when the relative price of capital rises.33 First consider the unsurprising fact that within most firms, sectors, and professions, some workers possess natural talent while the majority are perfectly average. Naturally, the most talented employees are far more productive than their average colleagues, even when everyone works with the same amount of capital. In Hollywood, for example, all actors may read the same script, but only A-list talent like Meryl Streep, Denzel Washington, or Tom Hanks can turn that script into an Oscar-winning performance.

In the classic model, trade lowers wages and raises the relative cost of capital; in the enriched model, the owners of capital make up for that higher cost by lowering the wages of mediocre employees and raising the wages of superstars. Capital owners become less able to afford mediocre workers whose productivity cannot keep up with rising capital costs. Instead, they hire the superstars, whose superior productivity can more than cover the increased costs of capital.

Consider the Hollywood example that Haskel and colleagues used, where film scripts represent intellectual capital, indeed the most important form of capital for the entertainment industry. As the world’s tastes and purchasing power increase demand for Hollywood entertainment, the price of scripts rises—those of stellar scripts, most of all. As that price rises, studios or streaming services become less and less likely to hire actors of only middling quality to perform such a script. The studios’ investment in a high-quality script will pay off, and bring their film the requisite audience, only if it stars actors of extremely high talent: Robert Downey Jr., Scarlett Johansson, or Samuel L. Jackson (or all three in the same film!).34

Admittedly, this analysis assumes, rather than explains, that we can attribute the rise of the top 1 percent to differences in talent but a lot of evidence supports the thesis. For one thing, in almost all countries—including such improbable cases as France and Spain—half to two-thirds of the income of the top 1 percent consists of salaries (compensation for work). Rarely, in any present-day advanced economy, do returns on capital constitute more than a quarter of the incomes of the top 1 percent (in the US, it is less than 15 percent), Thomas Piketty’s arguments notwithstanding.35 As one observer notes, “The fact that so many of [today’s] top earners work for a living is striking,”36 given that a century ago the great majority of elite incomes came from investments in property, bonds, or equities. For another, the model accurately predicts the kind of “fractal” inequality that so far has seemed to prevail almost everywhere in advanced and semi-advanced economies.37 That is, inequality seems to have grown not only between, but within firms and occupations: the top lawyers, academics, physicians, middle managers, and even shop floor workers, have begun to earn far more than the median member of their profession, or even the median co-worker of equal qualifications in their firm.

Once we grant that such differences in talent can become important, the model suggests that any globalization-induced rise in the relative price of capital-intensive goods (or, equivalently, decline in the relative price of labor-intensive products) in advanced economies will depress (or threaten to depress) the wages not only of low-skill workers but also of high-skill ones of less than superlative talent. It thus raises the prospect that the growing resistance to global markets may be embraced, sooner rather than later, not only by low-skill workers but by a growing segment of those with higher education or advanced training.

New New Trade Theory

“New new” trade theory (NNTT) offers an alternative firm-centric view of top-heavy inequality.38 Whereas neo-H-O-S-S focuses on how workers of different talents select into different sectors, NNTT focuses on how firms of different productivity levels sort into import-export activities. One of its salient implications is that increases in foreign trade concentrate the distribution of profits into the largest and most productive firms in each sector.39

The intuition is simple: import and export activities require large upfront costs, such as setting up global logistics networks and investing overseas—costs that only the largest firms can afford. The benefits of trade, access to larger markets, for example, then make these large firms even larger, which subsequently allows them to out-compete their smaller domestic rivals. Armed with global economies of scale, superstars like Walmart and Amazon flood the domestic market with lowcost goods and services. This squeezes out the smallest firms, for example, local mom-and-pop establishments, while reducing the profits of the midsize firms, whose middling productivity permits them to sell only domestically. In sum, NNTT implies, and offers evidence to show, that superstar firms in each sector reap the lion’s share of the gains from globalization.

In its earliest formulation, NNTT implied no wage inequality, because it assumed workers to be homogeneous. Recent advances draw implications for wage inequality by allowing some profits to pass through to workers—what the literature calls rentsharing. One modification allows firms to screen, and bargain over quasi-rents with, workers of varying abilities.40 More productive exporting firms pay higher wages to attract higher-ability talent. In the end, rent-sharing allows inequality in firm profits to spill over into inequality in workers’ wages.41

NNTT implies that globalization-induced inequality should manifest itself principally at the level of the firm, pulling up the compensation of all workers in the larger and more successful firms, and leaving behind all of those employed in smaller, domestically oriented firms (or those unemployed through the demise of the smallest firms). This is exactly what Helpman and colleagues find in Brazil, where 70 percent of overall inequality occurs within sectors and occupational categories; similar results were obtained by Akerman and co-authors in an analysis of wage inequality in Sweden from 2000 to 2007.42

Economic Geography

Economic geography explores the origins and effects of one of society’s most readily observable features: the unequal distribution of economic activity across space, a phenomenon commonly called agglomeration.43 Broz, Frieden, and Weymouth (in this issue) document how globalization’s effects appear most clearly at the level of communities, and operate through the mechanisms specified by economic geography.44 Here we complement their account by situating economic geography within only the broader set of trade models that contribute to extreme inequality. Globalization, we contend, exacerbates regional inequality by inflicting economic stagnation and decline on all but a handful of superstar cities. The mechanism works through the joint effect of agglomeration forces and trade costs. Globalization facilitates the lowering of trade costs (not just those of transportation and communication, but also costs imposed by tariff policies), and this frees up firms to locate in the places that confer the greatest advantage.

The literature identifies many advantages to urban agglomerations. Large cities increase access to suppliers of intermediate inputs, as well as to transportation infrastructure, large pools of specialized talent, and diverse consumers. Moreover, they facilitate the exchange of information about changes in competition, technology, and consumer tastes.45 Some locations also offer a fixed advantage such as access to deep ports or natural resources. Overall, large cities exist and continue to grow because they confer some large basket of benefits on those who locate there.46 The link to globalization seems obvious: the cheaper transportation becomes, and the farther tariff barriers fall, the easier it is for firms and workers to realize the benefits of agglomeration.

For regional inequality to speak to the puzzle of earnings inequality, it must be true that changes in regional growth both reflect and pass through to the wages of resident workers. We find this plausible and consistent with evidence of the stark spatial inequality in returns on skills. A growing literature documents the “end of spatial wage convergence” since 1980, with the bulk of wage gains going to high-skill workers concentrating in just a handful of large cities.47 However, enormous wage inequality within the largest cities suggests that between-region inequality provides only a partial picture. In reality, heterogeneity among workers and firms likely overlaps with, and is accentuated by, the effects of large cities.

Notable Similarities and Differences

All three advances in trade theory point to the same pessimistic outcome, that globalization produces extreme inequality, where a narrow segment of society benefits to the exclusion of the rest. Each theory identifies a different set of “superstars” within this narrow segment: workers with superlative talents, extraordinarily productive firms, or urban agglomerations. Despite varying mechanisms, each arrives at the conclusion of extreme inequality by introducing some form of unit heterogeneity—an assumption that the actors we once treated as identical actually differ from one another in important ways. Workers of similar education differ in innate talent; firms in the same sector vary in productivity; and regions in the same country vary in their advantages of agglomeration. This heterogeneity suggests a radically different perspective on the politics of globalization, one where we should not be surprised that populist protectionist movements arise; that they vilify elites; or that, despite finding their base constituency among lowskill workers, they enjoy nontrivial support from high-skill workers across many sectors.

We highlight two differences among these theories. First, they arrive at the implication of extreme inequality by varying degrees of theoretical complexity. In this regard, neo-H-O-S-S offers a clear advantage: its general framework requires no added assumptions about heterogeneous firms, economies of scale, locational mobility, or rent sharing.

Second, and at least as important, is the empirical accuracy of key theoretical assumptions. In the case of NNTT, evidence for the crucial rent-sharing assumption is decidedly mixed.48 For economic geography, countries almost certainly differ in the degree to which factors are spatially mobile. The neo-H-O-S-S model of differently talented workers will enjoy the most traction in longer-run analyses of wage outcomes, where factors are fully mobile across sectors and regions. Overall, the evident variance in empirical support for different modeling assumptions should caution users to validate these assumptions in their particular research contexts.

Finally, these unit heterogeneity models are not mutually exclusive—they likely reinforce one another in interesting ways. The most talented workers can earn the highest wage by working for the largest firms that can afford them. Regional agglomeration facilitates this advantageous match by locating these superstar workers and superstar firms in the same city. Thus, the top-heavy inequality we observe may very well arise at the intersection of heterogeneous workers, firms, and regions.

Hypothesis

Under any of the three trade theories described here, globalization produces topheavy inequality, wherein a thin margin of workers benefits while the rest are left behind. This drives a populist strain of backlash that views globalization as a struggle of the masses versus the elites. To our mind, this casts a different light on recent research that sees the backlash as a response to shocks from immigration or imports. To state our key hypothesis:

H: when top-heavy inequality is high, shocks from trade, whether in goods, services, or factors of production, increase public support for populist parties.49 In the absence of top-heavy inequality, however, such shocks have no effect on support for populism.50

This assumes that inequality reflects the long-run wage effects of trade and migration. That is, if our trade theories accurately predict wage outcomes, then we should observe extreme, or top-heavy, inequality. As previously discussed, even though much of the inequality we observe does reflect trade patterns, inequality also derives from other sources, such as technological change.51

Inequality and Antiglobalization: Evidence from European Elections

We offer a very preliminary test of this hypothesis in the context of two recent studies of populist far-right vote shares in Europe. Their wide empirical coverage, spanning between them twenty-eight countries over twenty-six years (1988 to 2014), affords a high degree of external validity, at least among economically developed nations in recent decades. Also, the two studies focus on different aspects of globalizationrelated shocks, one on immigration and the other on imports. Finally, both papers offer rigorous research designs. In further examining and extending their findings, we introduce as few modifications as possible to the original designs.

Immigration and Inequality

The study by Georgiadou, Rori, and Roumanias (hereafter GRR) requires the least modification.52 It explores the role of immigration shocks and inequality in all national and European Parliament elections in the twenty-eight member states of the European Union between 2000 and 2014. In particular, the authors study, at the level of Eurostat’s NUTS-2 regions,53 the vote shares obtained by “populist radical right” parties,54 which rose dramatically in the wake of the 2008–09 financial crisis (from 0.05 to 0.15 mean vote share across all countries).

In their original analysis, GRR find a positive association between right-populist vote share and both inequality and immigration, controlling for unemployment, immigration, and economic growth.55 Figure 2 replicates this result under the model labeled GRR2018.56

IO2020 extends that model simply by interacting their measures of inequality and immigration. We report the coefficients in standardized units for visual comparability and ease of interpretation. These models are also posted in Table A2 in the online appendix. Two findings follow from our analysis. First, GRR’s original finding remains intact: an increase of one standard deviation in national-level inequality, all else equal, is associated with a 2.8-percentage-point increase in populist vote shares (p < .01). Since this exercise holds immigration constant, it suggests that inequality independently undermines support for the LIO. This likely reflects, as we discuss later in the paper, inequality’s well-known effects on economic growth, polarization, and external conflict.

Second, our interaction model produces strong evidence for our key hypothesis, that surges in populist support from immigration shocks (which GRR found to have a modest and imprecisely estimated effect) are important but highly conditional on the level of inequality: magnifying backlash at extreme levels and nullifying backlash at lower levels. We visualize this result in a marginal effects plot in Figure 3. The differences in magnitudes are impressive. A one-standard-deviation (0.3 percentage point) increase in the share of migrants in the local population is associated with precisely zero change in vote shares for populist parties at even moderate levels of inequality (Gini < 0.29). At high levels of inequality (Gini > 0.34), the same one-standard-deviation increase in the share of migrants relates to a twenty-point increase in vote share for populist parties. These magnitudes are striking, given that the average NUTS-2 vote share for these parties is 6 percent, with a maximum of 54 percent. Rising immigration, it seems, poses a populist threat to the LIO only when paired with an income distribution that is, or has become, highly unequal.

Imports and Inequality

That inequality mediates shocks from immigration raises the obvious parallel question: does it similarly mediate import-related shocks? To this end, we repeat the earlier analysis, this time employing the data set from Colantone and Stanig (hereafter CS), who examine “China trade shocks” in the European context: fifteen Western European countries over the years 1988 to 2007.57 They report strong effects of Chinese imports on vote shares for radical Right parties58 at the level of the electoral district.59 We replicate their principal results, including their two-stage least squares estimators,60 in specifications 1 and 2 of Table A3 (in the online appendix).

The CS data set does not include a measure of income inequality. To test our interactive hypothesis, we employ inequality measures from the World Inequality Database.61 We report top 1 percent shares of post-tax income at the country level.62 We also apply logarithmic transformations to address issues of fit resulting from extreme outliers.63 Finally, we adopt a multilevel estimator that serves our particular data needs.64 The results rely on this preferred hierarchical estimator.65 Table A3 (in the online appendix) documents how these modifications affect the original CS findings.66

The results for import shocks closely mirror those for immigration. Figure 4 plots the coefficients of our preferred model (IO2020) alongside a baseline model in CS (CS2018). As expected, the positive association between Chinese imports and populist vote shares is highly conditioned by inequality. The coefficient on the China shock remains significant only when interacted with top-1-percent income shares. The marginal effects plot in Figure 5 translates this into real-world terms. At low to medium top-heavy inequality (top 1 percent shares < 0.09), a one-standard deviation increase in imports (approximately 170 EUR per NUTS-2 worker) relates to no statistically significant change in district vote shares for populist parties—that is, no populist backlash from rising imports. However, in countries where the top 1 percent earns approximately 10 percent or more of national income, the same magnitude of imports is associated with a 25-to-50-percent increase in district vote shares, on average, for right-populist parties.

In combination with the results from immigration shocks, this analysis provides strong support for our hypothesis that the politics of LIO backlash are best understood from the perspective of the three recent advances in trade theory that predict topheavy inequality. Trade in goods, or in factors of production, in the context of heterogeneous firms, workers, and regions, produces top-heavy inequality that, we argue, sets the stage for a particularly populist form of backlash. We provide suggestive evidence from European elections that is largely consistent with this; migration and imports drive support for populist parties only where we observe high inequality.

Possible Remedies and Sources of Resilience

An optimistic reading of this analysis is that national redistribution provides an effective remedy against right-populist backlashes. This finding is consistent with the “compensation hypothesis,” that government redistribution to globalization’s losers increases public support for trade.67 Our paper contributes to this literature by suggesting that redistribution targeted at top-heavy inequality (superstar earners, regions, and firms) to the benefit of otherwise skilled workers in smaller firms and cities would be especially effective.

However, democracies famously fail to address rising inequality with redistribution.68 This leads us to a more pessimistic conclusion that, even though lower inequality increases support for globalization, there is little evidence that governments will redistribute in countries with already high top-heavy inequality. We therefore agree with Atkinson that more redistribution of the large gains from globalization would be both possible and effective; but mass support for it, paradoxically, is weak.69 There is hope for other policy suggestions, as well. Investment in education, even if it could achieve the requisite political support, would fail to address the central problem: outsized gains from “superstar” talent, cities, and firms. Global forms of redistribution, such as the world “Tobin tax” on cross-border financial transactions, promise to tax capital without encouraging capital flight. However, such visions have been dismissed as “utopian.”70 They would also raise the substantial issues of global governance that Rodrik’s “globalization trilemma” has highlighted: who would enact such a tax, and to whom would the revenues flow?71

Instead, governments are far more likely to enact protection—restrictions on imports and immigration that reduce welfare but undeniably also reduce inequality. Williamson shows that the choking-off of US immigration from the 1920s to the 1960s contributed significantly to the “great leveling” of American inequality, including the Great Migration of African Americans out of the US South, as Northern employers began to substitute Black for immigrant labor.72 Restricting low-wage imports would of course have a similar effect. These options offer the losers from globalization only a larger slice of a (likely much) smaller pie.

If governments under pressure from top-heavy inequality continue to substitute protectionism for redistribution, can the LIO that stands for globalization nonetheless be sustained? We see two possible sources of resilience. First, powerful interests in the LIO can be expected to defend it.73 Second, international institutions still matter. The retreat of the US, as a principal guarantor of the LIO, poses an undeniable threat to its institutions and to the peace and cooperation they foster. However, IR research cautions against premature reports of its demise. Despite declining US support, international institutions will continue to serve vital functions for their members—functions that make these institutions “sticky” in the face of shocks.74 More recent scholarship in this vein suggests that the international institutions that were hardest to create, and whose rules are flexible, are the most likely to weather the shock of declining US support.75 To the extent that other institutions were created with less effort and exhibit less flexibility, however, other powerful states will seek to install alternatives that better serve them.

Limitations and Future Research

Future research in this area will need to address at least three shortcomings of our analysis: imprecise measurement, identification, and external validity. First, our nationallevel measures of inequality cannot discriminate among the three possible trade theories, since all predict top-heavy inequality. One solution would require decomposition of earnings into worker, firm, and region heterogeneity.76 Future measures should also be mindful of several indirect routes by which inequality undermines the LIO, independent of globalization shocks. It slows economic growth,77 probably by restricting the formation of human capital.78 It exacerbates domestic polarization79 and, seemingly, induces aggressiveness in foreign policy, especially among less welloff voters.80 And, to the extent that it installs governments of the Right, it further increases inequality.

Second, the lack of a careful identification strategy leaves much for future research, which must isolate the variation in top-heavy inequality that is independent of technological change (as discussed earlier), institutions, and redistributive politics, among other sources of endogeneity. Instrumental variable approaches, such as those featured by Enamorado and colleagues, offer one promising direction.81

Future research will also need to account for non-economic aspects of globalization and inequality. Our analysis assumes that inequality operates narrowly through economic mechanisms. We doubt that material interests alone explain the variance in attitudes to globalization.82 Surely status anxiety and cultural threats matter too in ways not reflected in the theory here.83 We know that some voters do not consider trade salient enough,84 or find it too complicated,85 for economics alone to determine vote preferences. Relatedly, attitudes on trade and migration partially reflect sociotropism and out-group anxieties.86 Nonetheless, an at least equally large literature confirms that economic shocks accurately predict election outcomes,87 and our own analysis shows that these economic shocks especially drive voting where inequality is high. Clearly, both economic and cultural factors matter, probably in mutually reinforcing ways. To know for sure, future research will need to test our three trade theories with individual-level data.88 What we contribute to this important debate is a way to sharpen the way international political economy thinks about the economic side of globalization politics.

Third, future research will need to investigate whether these results extend, as recent research suggests,89 to low- and middle-income countries.90 We also expect, although we lack the data to prove it, that our analysis does not extend to support for left-populist parties.

Why does rising inequality move many voters toward right-wing populism rather than left-wing populism? Put simply, the Left’s failure to enact adequate redistribution91 has pushed many of its own voters to support right-wing parties whose protectionist policies offer a plausible alternative to redistribution.92 In the US, the pattern of “Obama-toTrump” voters, particularly among less educated workers, is well documented.93 In Germany, the right-populist Alternative für Deutschland received about 15 percent of its support from traditional left-wing parties in 2017, and similar patterns seem to have driven support both for France’s Le Pen and for the right-populist FPÖ (Freedom Party) in Austria.94 In all three cases, manual workers demonstrably form the core of right-populist support.95 These shifts from redistributive to protectionist parties, we suspect, are exacerbated by the Left’s growing association with elitism, expertise, and globalization: all things that those farther down in the income distribution have come to distrust, or even to despise.

Conclusion

The openness to trade in goods, services, and factors of production the LIO has so effectively advanced over decades has concentrated real income growth in a very thin layer of workers. While this rise in top-heavy inequality doubtless has other causes, chief among them skill-biased technological innovation, trade openness has contributed mightily, particularly since the “China shock” of 2001;96 and certainly the populist movements that reject the LIO cast openness to trade and migration as the chief villain.

The ways in which rising inequality has threatened the LIO expose lacunae in international political economy’s intellectual apparatus—“blind spots” that require remediation. Most importantly, our basic economics are, if not wrong, at least outdated. The field’s adherence to classical trade models blinds us to the distributional effects revealed by top-heavy inequality: far more people lost from globalization, and fewer gained, than traditional theories (factor proportions and specific factors) suggested. While economists rapidly updated their trade models to account for the emerging reality of extreme inequality, political science largely stayed the course —and ran the danger, now realized, of misapprehending the domestic politics of globalization.

The trade literature offers three explanations for top-heavy inequality. The “enriched” Heckscher-Ohlin model of Haskel and colleagues shows how only a thin layer of extraordinarily talented individuals within the larger set of high-skill workers unambiguously benefits from a rise in the relative price of a skill-intensive product; the wages of both the less talented high-skill and the low-skill workers stagnate or fall.97 New new trade theory shows how a similarly narrow subset of very large and productive firms, and their employees, absorb the bulk of trade’s gains at the expense of all other firms. Finally, economic geography suggests that trade concentrates economic growth in a few large metropolitan regions while inflicting stagnation and decline elsewhere. Each offers a pessimistic view of the politics of globalization in which variously defined superstars gain a far larger share than the society at large.

We validate these theories of top-heavy inequality with data on local election outcomes from as many as twenty-eight countries over twenty-six years. We find that public support for right-populist parties rises dramatically with exposure to imports and immigration, but only in those countries with high top-heavy inequality. The fact that the huge gains from trade and technology have flowed to such a small elite, while earnings in other categories have stagnated, may go far to explain why the antiglobalization movements blame not only crucial elements of the LIO, but increasingly a small and nefarious global elite, for what one politician luridly portrayed as the “carnage” among many regions and sectors of the advanced economies.

That these movements, with rare exceptions, seek relief in restrictions on trade and migration from populist movements of the Right, rather than in redistribution or training, probably owes much to the failure of the political Left to redistribute sufficiently.98 That so much of these parties’ electoral support, both in Europe and in the US, comes from manual workers and former supporters of the political Left lends credence to this conjecture.

The ill effects of rising inequality, however, extend well beyond the rising tide of antiglobalization movements and politicians. They extend to slower economic growth (bound to exacerbate existing resentments), increased political polarization, and even a heightened risk of international conflict.

While eminent scholars have advanced quite plausible and growth-enhancing remedies for rising inequality, none elicits, or seems likely to elicit, sufficient political support. Tragically, inequality will likely be reduced, in any serious way, only by what Scheidel has accurately counted as one of history’s “great levelers,” our current high-mortality pandemic.99 While COVID-19 mercifully inflicts nothing approaching the death toll of history’s worst plagues, in the long run its combined effects of labor shortage, capital abundance, and panicky deglobalization will likely result—despite short-term unemployment and recession—in greater equality (but also less prosperity) in the advanced economies, greater inequality in the less developed countries, and greater between-nation inequality. Those developments may partially reduce developed-country hostility to the LIO; but, to survive, the LIO will have to find stronger sources of resilience among business elites and political leaders.

We thus conclude by disagreeing with Lake’s morning-after observation about the 2016 election. While it seemed that the populist backlash came as “no surprise” to the field of international political economy, some of its most important aspects, including the link to top-heavy inequality and the rejection of elites and expertise, were neither foreseen nor understood by our conventional theories. As Abraham Lincoln said during an earlier time of trial, “As our case is new, we must think anew and act anew.”100

#### Populism magnifies all existential risk.

Andrew Leigh 21, Australian member of Parliament, former professor of economics at the Australian National University, 2021, What's the Worst That Could Happen?: Existential Risk and Extreme Politics, unpaginated ebook version

How likely is it that humanity could end? Experts working on catastrophic risk have estimated the chances of disaster for a wide range of the hazards that our species faces. Adding up the threats, philosopher Toby Ord estimates the odds that humanity could become extinct over the next century at one in six, with an out-of-control superintelligence, bioterrorism, and totalitarianism among the largest risks. He argues that most of the risks have arisen because technology has advanced more rapidly than safeguards to keep it in check. To encapsulate the situation facing humanity, Ord titled his book The Precipice.

A one in six chance of going the way of dodos and dinosaurs effectively means we are playing a game of Russian roulette with humanity’s future. Six chambers. One bullet. Even the most foolhardy soldier usually finds an excuse not to play Russian roulette. And that’s when just their own life is at stake. In considering extinction risk, we’re contemplating not one fatality but the death of billions or possibly trillions of people—not to mention countless animals.

It can seem impossible to imagine our species becoming extinct due to a catastrophe such as nuclear war, asteroids, or a pandemic. But in reality, the danger surpasses plenty of perils we already worry about. One way to put catastrophic risk into perspective is to compare it with more familiar risks. If extinction risk poses a one in six risk to our species over the next century, then it means that it is far more hazardous than many everyday risks. Specifically, it suggests that the typical US resident is fifteen times more likely to die from a catastrophic risk—such as nuclear war or bioterrorism—than in car crash.2

Extinction risk outstrips other dangers too. Ask people about their greatest fears, and you’ll get answers like “street violence,” “snakes,” “heights,” and “terrorism."4 But in reality, these are much less hazardous than catastrophic risks. People in the United States are 31 times more likely to die from a catastrophic risk than from homicide. Catastrophic risk is 3,519 times likelier to kill than falls from a height, and 6,194 times more likely to kill than venomous plants and animals. If you have ever worried about any of these threats, you should be more fearful about cata- strophic risk. Extinction risks aren’t just more dangerous than any of them; they are more hazardous than all of them put together. Catastrophic risk poses a greater danger to the life of the typical US resident than car accidents, murder, drowning, high falls, electrocution, and rattlesnakes put together.

A one in six risk is just the danger in a single century. Suppose that the risk of extinction remains at one in six for each century. That means there’s a five in six chance humanity makes it to the end of the twenty-first century, but less than an even chance we survive to the end of the twenty-fourth century. The odds that we survive all the way to the year 3000 are just one in six. In other words, if we continue playing Russian roulette once a century, it’s probable that we blow our brains out before the millennium is halfway through, and there’s only a small chance that we make it to the end of the millennium.

Part of the reason humans undervalue the future is that it’s hard to get our heads around the idea that our genetic code could live on for millions of years. At present, the best estimates are that our species, Homo sapiens, evolved around three hundred thousand years ago.1 That means we have existed for about ten thousand generations. But we have another one billion years before the increasing heat of our sun brings most plant life to an end.1 That’s plenty of time to figure out how to become an interstellar species and move to a more suitable solar system. Humans could live to enjoy another thirty million generations on earth.

Thinking about the mind-boggling scale of these numbers, I’m reminded of the Total Perspective Vortex machine, created by Douglas Adams in The Restaurant at the End of the Universe. Anyone brave enough to enter sees a scale model of the entire universe, with an arrow indicating their current position. As a result, their brain explodes. As Adams reflects, the machine proves that “if life is going to exist in a universe of this size, then the one thing it cannot afford to have is a sense of proportion.”

Still, let’s try. Imagine your ancestors a hundred generations ago. They are your great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-grandparents. These people lived around 1000 BCE, at the start of the Iron Age. They might have been part of Homeric Greece, ancient Egypt, Vedic age India, the preclassic Maya, or Zhou Dynasty China.

Contemplate for a moment about what the hundred genera- tions between our Iron Age ancestors and today have achieved. They built the Taj Mahal and Sistine Chapel, the Angkor Wat and Empire State Building. Thanks to them, we can relish the poetry of Maya Angelou, novels of Leo Tolstoy, and music of Ludwig van Beethoven. An abundance of inventions has delivered us deli- cious food, homes that are comfortable year-round, and technol- ogy that provides online access to a bottomless well of entertain- ment. If time machines existed, we might pop in to visit our great100 grandparents, but few would volunteer to stay in the Iron Age.

Yet humanity is really just getting started. If things go well, it’s ten thousand generations down, thirty million to go. Imagine what those future generations could do, and how much time they have to enjoy. Here’s one way to think about what it means to have thirty million generations ahead. Suppose humanity’s potential time on the planet was shrunk down to a single eighty- year life span. In that event, we would now be a newborn baby— just nine days old. Homo sapiens is a mere 0.03 percent through all we could experience on earth.

We won’t meet most of those who follow us on the planet, but we should cherish future generations all the same. If you value humanity’s past achievements—the Aztec and Roman civiliza- tions, art of the Renaissance, and breakthroughs of the Industrial Revolution—then the generations to come are just as worthy. This is what political philosopher Edmund Burke meant when he described society as “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.’- To appreciate the past is akin to admiring the achievements of distant places. Like geography, his- tory helps us better understand the way of the world.

Politicians like me like to speak fondly about looking after "our children and our grandchildren.” But it usually stops after a generation or two. Policy pays little heed to the many generations that will follow. For my own part, it took a coronavirus-induced shutdown to have the time to spend reflecting deeply about the long term. This book had been rattling around in my head for years, but it was only when all my meetings, events, and travel were canceled that I had the time to write it. Pandemics are one of the threats to humanity that I’ll discuss in this book, but in this instance, it provided a chance to reflect on the long term. It’s tempting to ignore the distant future. It’s easier to love the grandchildren whom we hug than the great-great-great-grand- children whom we’ll never get to smile on. But that doesn’t make those far-flung generations any less important. Via my wife, our children can trace their lineage to Benjamin Franklin, but I’m more excited about the potential achievements of the generations yet to be born.

For companies and governments, a major impediment to long- term thinking is the idea of discounting the future. When investing money, this is a reasonable approach. A dollar in a decade’s time is less valuable than a dollar today for the simple reason that a dollar today could be invested and earn a real return. Share markets have good and bad years, but based on returns from the past 120 years, someone who put $1,000 into the US stock market for an average year could expect it to be worth $1,065 after twelve months (accounting for dividends and inflation).2 Approximating these returns, when governments contemplate making investments, they often apply a discount rate of around 5 percent, while companies use rates that are higher still.2

When it comes to growing your greenbacks, this makes perfect sense. If Kanesha offered you $ 1,000 today, and Jane offered you $ 1,000 in a year’s time, most of us would think that Kanesha was making the more generous offer. Kanesha’s cash can be put to productive use and would be worth more than Jane’s when the year is out.

But what if we’re talking about Kanesha and Jane themselves? Suppose Kanesha is alive today, and Jane is yet to be born. When discounting is applied to lives, it suggests that Kanesha’s life to- day is worth twice as much as Jane’s life in fifteen years’ time. It implies that Kanesha today is worth 132 times as much as Jane in a century’s time. So if we’re spending money to keep them safe, a 5 percent discount rate indicates that we should spend more than a hundred times as much to protect Kanesha today than to pro- tect Jane in a century’s time.

The further we stretch the time period, the more ridiculous the results become. Discounting at a rate of 5 percent implies that Christopher Columbus is worth more than all eight billion people on the planet today.— Naturally, it also implies that your life is worth more than eight billion lives in five hundred years’ time. Even if you value the hug of a loved one over the unseen successes of next century’s generations, is it fair to ruthlessly dis- miss the distant future? Discounting is the enemy of the long term.

As philosopher Will MacAskill points out, there is something morally repugnant about concluding that the happiness of those who will be alive in the 2100s is inconsequential simply because they live in the future. MacAskill coined the term “presentism” to refer to prejudice against people who are yet unborn.” Just like racism, sexism, or other forms of bigotry, he argues that mis- treating those who live a long way in the future is unfair. To dis- criminate in favor of Kanesha against unborn Jane is a form of presentism. If you traveled back in time to the 1500s and met someone who claimed that they were worth more than everyone alive in the 2000s, you’d rightly regard them as an egomaniac. Isn’t it equally narcissistic to ignore the happiness of people in the 2500s?

Some have contended that we should favor the living over the unborn for the same reason that philanthropy favors the down- trodden over the wealthy. If incomes rise over time, the argument goes, then asking today’s citizens to help those in the future is like taking from the poor to give to the rich.— But this reasoning ignores the fact that we are talking about the survival of future generations. Theoretical riches won’t do them any good if they are practically dead—or if planetary apocalypse snuffs out their chance to be born. Similarly, it misses the possibility that future pandemics, wars, or climate disasters could make coming genera- tions significantly poorer.—

Insights from behavioral science help explain why humans aren’t good at understanding extinction risk.— Our thinking about dangers is skewed by an “availability bias”: a tendency to focus on familiar risks. Like the traders who failed to forecast the collapse of the securitized housing debt market, we are lousy at judging the probability of rare but catastrophic events. Most important, our instincts fail us as the magnitudes grow larger. In research titled "The More Who Die, the Less We Care,” psychologists Paul Slovic and Daniel Vastfjall argue that we become numb to suffering as the body count grows.— Humans’ compassionate instincts are aroused by stories, not statistics. Indeed, one study found that people were more likely to donate to help a single victim than they were to assist eight victims. This may help explain why the international community has been so slow to respond to genocide, including recent incidents in Rwanda, Darfur, and Myanmar. As artificial intelligence researcher Eliezer Yudkowsky notes, human neurotransmitters are unable to feel sorrow that is thousands of times stronger than a single funeral.— The problem is starker still when it comes to extinction risk. Our emotional brains cannot multiply by billions.

Add to this a media cycle that has become a media cyclone, in which stories explode in a matter of minutes, and “outrage porn” seems to drive the news choices of many outlets. In the 2016 US election, researchers found that for every piece of professional news shared on Twitter, there was one piece of “junk news.’’— Conflict fueled by social media keeps us in a primal state of rage and retaliation. And this isn’t the only force that makes politics myopic. Campaign contributions tend to come from donors who have an immediate interest in a “today” issue rather than from people aiming to solve long-term problems. This kind of “instant noodle” politics prioritizes quick results and sidelines fundamental challenges.

In this environment, a special style of politics has thrived: populism. The term “populist" gets thrown around a lot—typically as an insult—so it’s worth taking a moment to define it precisely.— Populists see politics as a conflict between crooked elites and the pure mass of people. Many candidates trying to defeat an incumbent will criticize “insiders,” but populists make a stronger attack on elites, claiming that they are dishonest or corrupt. Populists then claim that they—and only they—represent the “real people.” Populists combine a fierce critique of elites and personal appeal to the “silent majority.”

The political strategy of populists involves critiquing intellectuals, institutions, and internationalism. The political style of populists tends to be fierce. They do not strive for unity and calm consensus. Populists share with revolutionaries a desire for sudden and dramatic change. They have little respect for experts and the systems of government. Populists’ priorities tend to be immediate issues such as crime, migration, jobs, and taxes. Consequently, the electoral success of populists has served to sideline work on long-term dangers such as climate change and nuclear war.

Donald Trump may have lost his presidential reelection bid, but he has transformed the Republican Party, which has jettisoned its longstanding commitment to free trade, immigration, and global alliances. Many moderate Republicans, who might have served comfortably under Ronald Reagan or George H. W. Bush, have quit the party or been defeated by Trump-supporting populists. The Republican Party, which holds nearly half the seats in Congress and controls a majority of state legislatures, has embraced populism to a degree that was unimaginable when it was led by George W. Bush, John McCain, or Mitt Romney. After four years under President Trump, the Republican Party is now more cynical and isolationist, focused on immediate grievances rather than long-term challenges.

Yet while the strength of populism threatened to sideline issues of catastrophic risk, coronavirus did the opposite. The worst pandemic in a century led to the most severe economic crisis since the Great Depression. Churches and concert halls fell silent. International travel collapsed. The Summer Olympics were postponed. Stocks plunged, and for a brief moment, the price of a barrel of oil went negative. Globally, millions lost their jobs, and millions more faced famine.

COVID-19 never threatened to extinguish humanity, but it highlighted our vulnerability to infectious diseases. More than at any time in living memory, people focused on the dangers of pandemics. The popularity of Geraldine Brooks’s Year of Wonders, Stephen King’s The Stand, Emily St. John Mandel’s Station Eleven, and Albert Camus’s The Plague vividly illustrates the way in which fear of pandemics has become more acute.

We know that disasters can remake society. The black death helped usher in the Renaissance.— The Great Depression made a generation of investors more risk averse.— World War II spawned the United Nations and formed the modern welfare state. In autocracies, droughts and floods can topple dictators.—

Coronavirus is reshaping the world in numerous ways.— Handwashing is in. Cheek kissing is out. The rise of big cities is slowing as people consider the downsides of density. Firms that automated their production systems to deal with physical dis- tancing requirements and stay-at-home orders are discovering that they can get by permanently with fewer staff. More tele- working and less business travel is leading to a drop in demand for receptionists, bus drivers, office cleaners, and security guards. When it comes to our use of technology, coronavirus suddenly accelerated the world to 2030. When it comes to globalization, the pandemic took us back to 2010.

But it’s still an open question as to how COVID-19 will affect humanity’s ability to think about the long term. Most of the examples I’ve listed are instances in which crises affected societies organically: the shock came, and it changed our behavior. But accentuating the long term requires taking risk more seriously and placing greater emphasis on saving our species. Linebackers are swift to respond when an offensive player suddenly takes a step to the right. But it takes longer to recognize that a team’s offensive plays are skewed to the right and modify the defensive formation accordingly.

Like a football team that adapts its tactics, this book argues that we should lengthen our thinking. At minimal cost, society can massively reduce the odds of catastrophe. By ensuring that the big threats get the attention and resources they need, we can safeguard the future of our species. As insurance policies go, this one is a bargain.

In the chapters that follow, I’ll outline the biggest risks facing humanity. I’ll begin in chapter 2 with pandemics, such as the possibility that the next virus might combine the infectiousness of COVID-19 with the deadliness of Ebola. What can we do to shut down exotic animal markets, speed up vaccine develop- ment, and create surge capacity in hospitals? I’ll then delve into bioterrorism, and the danger of extremists developing their own versions of smallpox or the bubonic plague. How difficult is it for them to create these devilish diseases, and what can we do to prevent it?

In chapter 3, I’ll then explore climate change—perhaps the in- tergenerational issue that has received the most public attention in recent years. While much of the modeling looks at how global warming could be bad, my focus is on the chances that it’s catastrophic. This isn’t about climate change shortening the ski season; it’s about the possibility of temperatures rising by 18°F (10°C), rendering large sections of the planet uninhabitable. What does the risk of cataclysmic climate change mean for energy policy?

Next, I’ll turn to nukes. As a child in the 1980s, I vividly re- member watching The Day After. My classmates and I agreed that a nuclear war was inevitable. When the Cold War ended, the world seemed safer, but in the three decades since, the threat from new nuclear powers has made the problem less predictable. As I discuss in chapter 4, what we used to call an arms race now looks more like a bar fight, with hazards coming from unexpected directions, including terrorist groups. Yet just as there are practical ways to avoid pub brawls (don’t drink past midnight, avoid the stairs, look out for the glass), so too are there sensible strategies that can reduce the odds of nuclear catastrophe (adopt a “no first use" policy, reduce the stockpiles, control loose nukes).

A superintelligence has been dubbed the “last invention” we’ll ever make. An artificial intelligence machine whose abilities exceed our own could turbocharge productivity and living stan- dards. But it could also spell disaster. If we program our artificial intelligence to maximize human happiness, it could fulfill our wishes literally by immobilizing everyone and attaching electrodes to the pleasure centers of our brains. As chapter 5 notes, what makes artificial intelligence different from every other risky technology is its runaway potential. Once a superintelligence can improve itself, it is unstoppable. So we need to build the guardrails before the highway.

What are the odds? In chapter 6,1 complete the discussion of catastrophic danger by examining less risky risks, including asteroids and supervolcanoes. I also consider the prospect of “unknown unknowns.” For example, prior to the first atomic bomb test, some scientists thought there was a chance it could set the atmosphere on fire, destroying the planet. When the Large Hadron Collider was being built, critics warned that the particle collisions inside it could create micro black holes. Although neither situation eventuated, they raise the question of what other doomsday scenarios could be lurking around the corner. How should the prospect of these unexpected risks change our approach to cutting-edge science? Drawing together these dangers with the major hazards, I report the likely probability of each, benchmarking existential risks such as nuclear war and pandemics against individual risks such as being struck by lightning or dying on the battlefield.

Ultimately, tackling existential risks is a political problem. Private citizens can achieve many things, but preventing nuclear war, averting bioterrorism, and curbing greenhouse emissions are fundamentally problems of government. Governments control the military, levy taxes, and provide public goods. So the values of those who run the country will determine how much of a priority the nation places on averting catastrophe.

That’s why the rise of populists is crucial to humanity’s long- term survival. In chapter 7,1 discuss the factors that have led to the electoral success of populists during recent decades, and why populists tend to be uninterested in dealing with long-term threats. Populists’ focus on the short term means that—like a driver distracted by a back seat squabble—we’re in danger of missing the threats that could kill us. I’ll explore why populists around the world struggled to respond to COVID-19, and what this says about the dangers that populism poses to our species. Most critics of populism have concentrated on the present day. They’re missing the bigger picture. Populists are primarily endangering the unborn.

Bad politics doesn’t just exacerbate other dangers; it represents a risk factor in itself through the possibility of a totalitarian turn —in which democracy is replaced by an enduring autocracy. The road to democracy is not a one-way street. Over the centuries, dozens of countries have backslid from democracy into autocracy —abandoning the institutions of fair elections, protection for minorities, and free expression. Such an outcome could be deadly for dissenters and miserable for the multitudes. Chapter 8 explores why democracy dies and identifies the signs that institutions are being undermined. Chapter 9 suggests how we might strengthen democracies to allow citizens to have a greater say, and lower the chances of the few taking over from the many. Chapter 10 concludes the book.

When COVID-19 hit, many rushed out to buy life insurance.— In our personal lives, we know that spending a small amount on insurance can guard against financial ruin. Societies can take a similar approach: implementing modest measures today to safe- guard the immense future of our species. For each of the existential risks we face, there are sensible approaches that could curtail the dangers. For all the risks we face, a better politics will lead to a safer world.

Because of its focus on the urgent over the important, populist politics should perhaps bear the label, “Warning: populism can harm your children." But what is the alternative? In the conclusion, I argue that the answer lies in the ancient philosophy of stoicism. A stoic approach to politics isn’t about favoring one side of the ideological fence over another. Instead, it’s about the temperament of good political leadership. Stoicism emphasizes that character matters and holds that virtue is the only good. Decisions are based on empirical evidence, not emotion. Anger has no place in effective leadership. Strength comes from civility, courage, and endurance. Stoics make a sharp distinction between the things they can change and those they cannot.

#### Anticompetitive market power subverts democracy.

Lande & Vaheesan ’20 [Robert; Professor of Law @ University of Baltimore School of Law and Sandeep; Legal Director @ Open Markets Institute, JD @ Duke; “Preventing the Curse of Bigness Through Conglomerate Merger Legislation,” *Ariz. St. LJ* 52; AS]

Corporate size often translates to political power. An extensive body of research has found that firm size is correlated with more political activity.41 Larger firms make larger contributions to political campaigns and devote more resources to lobbying members of Congress and government agencies.42 Judicial reinterpretations of the First Amendment have granted corporate political activity broad constitutional protection. 43 Their power is not confined to these “narrow” political activities. Large businesses also use their wealth power to fund sympathetic media coverage and scholarly research. This corporate political activity benefits executives and shareholders at the expense of the rest of society.

Corporate power in politics and public life is not an academic concern and today attracts critics from across much of the political spectrum.44 A large segment of the public is deeply concerned about corporate clout and influence in American politics. From the progressive left to the nationalist or conservative right, many individuals and organizations have expressed worries about powerful corporations capturing the political system and using it to advance their narrow aims. An ideologically diverse set of figures and groups have raised concerns about the political power of large corporations and started offering remedies.

A. Corporate Size Translates to Political and Economic Power

Corporate size often translates to political and economic power. An extensive body of research has found that firm size is correlated with political activity. 45 Larger firms make larger contributions to political campaigns and other activities and devote more resources to lobbying members of Congress and government agencies. 46 They can also use their power to fund sympathetic media coverage and scholarly research.47 This corporate political activity has tangible benefits for executives and shareholders. An influential 2014 study found that members of Congress in voting on bills are responsive to the views of two groups: large businesses and the wealthy.48 In contrast, they are largely indifferent to the political concerns and preferences of the middle and working classes.49

Large firms exercise political power through campaign contributions. An extensive body of empirical literature has found that large firms make larger campaign contributions to members of Congress and political action committees than small firms do.50 Campaign contributions are an important way to build and maintain political influence. While the findings on the question are mixed, campaign contributions may increase the likelihood that the member’s votes and other actions are aligned with the donor’s interests.51

Political contributions can give corporate donors access to those in power. Lending credence to what research had found,52 Mick Mulvaney, the current director of the Office of Management and Budget and former acting director of the Consumer Financial Protection Bureau, openly admitted this dynamic in a speech before bank lobbyists.53 He stated that, as a member of Congress, he granted preferential access to lobbyists who had donated to his political campaigns.54

Large firms also wield political power through lobbying, an arguably much more important form of political activity than political contributions.55 They often have large staffs of lawyers and lobbyists to present their messages to politicians and regulators.56 Relative to smaller firms, large firms devote more resources to lobbying activity. 57 This lobbying allows corporations to shape the narrative around an issue and influence members of Congress and regulators. Lobbying is often an effective strategy for casting doubt on the public benefits of legislation and regulation. 58 Corporate lobbyists can create counter-narratives that proposed legislation restricting their client’s activities would either not advance or undermine the public interest.59 For instance, despite triggering the worst economic crisis in nearly eighty years, large banks and financial institutions in the United States, through all-encompassing lobbying and public relations blitz, subsequently avoided structural breakups and significant restrictions on their activity.60

Indeed, the present weak enforcement of antitrust may, in part, be a product of corporate power and influence over the federal antitrust agencies.61 “Regulatory capture” occurs when a regulatory agency or enforcer is so greatly influenced by businesses that it fails to act in the public’s interest.62 Instead it acts in ways that benefits the players in the industry that the regulators were charged with policing.63 One possible cause of regulatory capture is that the agency often has limited resources compared to the regulated companies. 64 When the regulated business is a multi-billion-dollar company, the disparity in resources can be especially large and regulatory capture becomes more probable.65

The FTC and DOJ’s reluctance and unwillingness to challenge some huge mergers could, in part, be caused by the considerable influence massive companies have over them and the political environment in which they operate. For instance, FTC Commissioner Rohit Chopra recently voiced concern over the power of big tech in a trade regulation context, stating: “All too often, the government is too captured by those incumbents that use their power to dictate their preferred policies.”66 Consistent with the “capture” theory, mergers can produce large companies with substantial resources to hire the requisite numbers of lawyers, lobbyists, and experts to “capture” a regulatory agency or enforcer.

The power of large corporations extends beyond the political, regulatory, and legal realms. Their power can be characterized as hegemonic. They can shape the parameters of public debate through a variety of means. They use their advertising dollars to boost supportive outlets and voices and marginalize critical ones 67—and even co-opt individual and organizational voices that are conventionally perceived as progressive.68 They also own media outlets (think of Amazon founder Jeff Bezos and his ownership of the Washington Post) and fund think tanks that can propagate their preferred narrative on a range of issues.69 Big businesses have also become adept at manipulating academic debates to their own ends, donating to universities, sponsoring new academic centers, and paying ideologically-aligned scholars to produce academic defenses.70 Indeed, present-day antitrust embodies the extraordinary influence of corporations. Over the past several decades, corporate-funded economists and lawyers have played an outsized role in antitrust debates.71

Furthermore, corporate size confers power through the control of economic resources. At a large corporation, a handful of individuals— executives and directors—make decisions that affect entire cities, regions, and even the nation. A decision to open a plant in one city, instead of another, or to relocate a plant from the United States to a foreign country can affect large numbers of people. Senator Sherman recognized how concentration of assets in a few hands amounted to private government. 72 He asked his colleagues to “consider . . . whether, on the whole, it is safe in this country to leave the production of property, the transportation of our whole country, to depend upon the will of a few men sitting at their council board in the city of New York.”73

Corporate size means that every nominally private decision has major public implications.74 They can use their control of key resources to stop unfavorable government action and induce favorable action.75

Consider the recent contest among states and cities to host Amazon’s second headquarters. Amazon invited state and local governments across the country to compete for this second headquarters in exchange for a pledge to create 50,000 local jobs.76 States and cities showered Amazon with a range of carrots amounting to billions of dollars in tax incentives. 77 Exemplifying the lengths to which governments were willing to go to lure Amazon, New York Governor Andrew Cuomo (half-) jokingly even offered to change his first name to Amazon if Amazon chose New York City. 78 This frenzied competition illustrates the power of a large corporation over democratically elected governments. And this episode is not an outlier but representative of how large corporations use their power and the threat of relocation to pressure and twist governments for their own ends.79

#### Democracy caps all existential risk.

George Eaton 20. Senior online editor of the New Statesman. Citing Noam Chomsky, Laureate professor in the Department of Linguistics at the University of Arizona and professor emeritus at MIT, Ph.D. in linguistics from Penn. “Noam Chomsky: The world is at the most dangerous moment in human history”. The New Statesman. Sept 17 2020. https://www.newstatesman.com/politics/2020/09/noam-chomsky-the-world-is-at-the-most-dangerous-moment-in-human-history

Noam Chomsky has warned that the world is at the most dangerous moment in human history owing to the climate crisis, the threat of nuclear war and rising authoritarianism. In an exclusive interview with the New Statesman, the 91-year-old US linguist and activist said that the current perils exceed those of the 1930s.

“There’s been nothing like it in human history,” Chomsky said. “I’m old enough to remember, very vividly, the threat that Nazism could take over much of Eurasia, that was not an idle concern. US military planners did anticipate that the war would end with a US-dominated region and a German-dominated region… But even that, horrible enough, was not like the end of organised human life on Earth, which is what we’re facing.”

Chomsky was interviewed in advance of the first summit of the Progressive International (18-20 September), a new organisation founded by Bernie Sanders, the former US presidential candidate, and Yanis Varoufakis, the former Greek finance minister, to counter right-wing authoritarianism. In an echo of the movement’s slogan “internationalism or extinction”, Chomsky warned: “We’re at an astonishing confluence of very severe crises. The extent of them was illustrated by the last setting of the famous Doomsday Clock. It’s been set every year since the atom bombing, the minute hand has moved forward and back. But last January, they abandoned minutes and moved to seconds to midnight, which means termination. And that was before the scale of the pandemic.”

This shift, Chomsky said, reflected “the growing threat of nuclear war, which is probably more severe than it was during the Cold War. The growing threat of environmental catastrophe, and the third thing that they’ve been picking up for the last few years is the sharp deterioration of democracy, which sounds at first as if it doesn’t belong but it actually does, because the only hope for dealing with the two existential crises, which do threaten extinction, is to deal with them through a vibrant democracy with engaged, informed citizens who are participating in developing programmes to deal with these crises.”

### 1AC – Plan

#### The United States federal government should limit implied immunity from its antitrust laws to actively administered regulations of anticompetitive conduct.

### 1AC – Internet

#### Advantage two is internet.

#### FCC repeal of net neutrality constitutes active deregulation of telecommunications.

Srago ’21 [Josh; JD @ Santa Clara Law. EFF Legal Fellow. "Why You Can't Sue Your Broadband Monopoly". Apr 5 2021. EFF. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3805914]

Telecommunications and Modern Regulation – The 1996 Act and Classification

The 1996 Act has not only been the key law in ensuring that the telecommunications market is competitive, it has also been at the center of a great deal of debate when it comes to regulating the networks. In particular, the classification of broadband services as either a Title I or a Title II service is the underlying issue regarding the amount of authority available to the FCC to regulate broadband services. These designations stemmed from the Computer II Order that established the concept of basic or enhanced services. “[B]asic service [was] limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combine[d] basic service with computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”6 Basic services, or the parallel term telecommunications services,7 were those subject to common carrier, or Title II regulations,8 while enhanced services were services subject to Title I.

The crucial determination as to whether broadband services are subject to Title I or Title II regulations establishes the ability of the FCC to promulgate rules over those services If the FCC determines that broadband is a Title I service, such services are exempted from the FCC’s Title II authority under the 1996 Act to pass rules and regulations.9 If the FCC determines that broadband is better classified as a Title II service, then it has greater rulemaking and oversight authority to ensure that the providers of broadband services are providing equal access to the networks for both content providers and consumers of the service, and could even go so far as to enact control over pricing of the services. Under Title II, the FCC can also forbear from enforcing its rules.10

When Congress passed the 1996 Act, regardless of whether a consumer accessed the internet via a telecommunications service or a cable internet service, the services were treated as Title II services. That changed under the Supreme Court’s Brand X decision when the Court deferred to the FCC’s determination that cable internet services should be designated as a Title I service while maintaining DSL (Digital Subscriber Line) services as Title II due to the changing market conditions.11 In 2015, the FCC passed the Open Internet Order (2015 OIO)12 which reclassified all broadband services under Title II of the 1996 Act along with the net neutrality rules. The FCC’s basis for passing the rules was to “enact strong, sustainable rules grounded in multiple sources of legal authority to protect the Open Internet and ensure that Americans reap the economic, social, and civic benefits of an Open Internet today and into the future.”13 The authority to enact those rules stemmed from Title II of the 1996 Act:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.14

The FCC’s premise for the reclassification was “prevent[ing] specific practices we know are harmful to Internet openness – blocking, throttling, or paid prioritization – as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness.”15 The FCC had attempted to enforce more stringent rules without reclassification, but the United States Court of Appeals found that it lacked the authority to do so under Title I.16

The FCC recognized that as the infrastructure became faster and more advanced, the providers of services utilizing that infrastructure would also innovate. Even the broadband providers suing to prevent the FCC from enacting such regulation agreed that the end goal was to promote the “virtuous cycle of innovation and growth between that ecosystem and the underlying infrastructure—the infrastructure enabling the development and dissemination of Internet-based services and applications, with the demand and use of those services...driving improvements in the infrastructure which, in turn, support further innovations in services and applications.”17

The Title II reclassification would be short-lived, as just two years later the FCC returned to a deregulated services model by retracting the 2015 OIO and returning broadband to a Title I classification. This light-touch oversight of broadband services has been generally favored by FCC Chairman Ajit Pai. When the FCC promulgated the Restoring Internet Freedom Order (RIFO)18 in 2017 he touted that, “by returning to the light-touch Title I framework, we are helping consumers and promoting competition. Broadband providers will have stronger incentives to build networks, especially in unserved areas, and to upgrade networks to gigabit speeds and 5G. This means there will be more competition among broadband providers.” 19 The key argument Chairman Pai made is that if broadband services are not heavily regulated, there will be increased competition and therefore avoiding regulation is in the public interest.

#### The existence of the FCC immunizes ISPs from antitrust scrutiny. The plan reverses that.

Srago ’21 [Josh; JD @ Santa Clara Law. EFF Legal Fellow. "Why You Can't Sue Your Broadband Monopoly". Apr 5 2021. EFF. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3805914]

The 1996 Telecommunications Act and Antitrust Laws – Trinko

In Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, the Supreme Court established a new relationship between the 1996 Act and antitrust laws.26 The court confronted the question of whether “the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency’s regulatory scheme that might be voiced by courts exercising jurisdiction under the antitrust laws.”27 The 1996 Act explicitly spoke to antitrust law in its savings clause: “nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of the antitrust laws.”28

The Court applied the standards under Section 2 of the Sherman Act:29 “A firm shall not monopolize or attempt to monopolize...this offense requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.”30 The Court emphasized that “mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. In order for monopoly power to be found unlawful, it must be accompanied by an element of anticompetitive conduct.”31

The anticompetitive conduct alleged in Trinko concerned the obligation of an ILEC to provide access to unbundled network elements (UNE) to new entrants into the market under the 1996 Act. To create a competitive marketplace, Congress recognized that the infrastructure to provide telecommunications services carries with it a high cost of entry. To reduce barriers to entry and promote greater competition, Congress gave the ILECs, and other telecommunications providers in place when the 1996 Act became law, a duty to provide access to those UNE to new entrants into the marketplace. They were, however, not required to provide the UNE free of charge.32 The plaintiff’s claim in Trinko was that Verizon, an ILEC, was filling the orders of competitors on a discriminatory basis.

The duty to cooperate under the 1996 Act elicited two questions. If the 1996 Act required cooperation with competitors, was that cooperation required to be equal to the services that the ILEC was providing to its affiliates? Second, was the refusal to cooperate and provide an equal service a violation of antitrust laws?

To determine the answer to the first question, the Court looked to a prior refusal to deal case, Aspen Skiing Co. v. Aspen Highlands Skiing Corp.33 In Aspen Skiing the court found that “[t]he unilateral termination of a voluntary course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.”34 In that case, it was the elimination of a competitive ski resort. The Court in Trinko distinguished Aspen Skiing because the cooperative dealing by Verizon was not voluntary, but rather was ordered by the 1996 Act.35 The duty the 1996 Act imposed was, “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory,”36 and the cost of which “may include a reasonable profit.”37 Further, it was up to the FCC to interpret the language of the statute and whether the behavior met the standard for nondiscriminatory access. This means that the ILEC, Verizon, was required to get FCC sign- off on the deal to provide UNE to the competitor. The Court determined that because the FCC oversight authority of both the market and the behavior in question already existed under the 1996 Act, the antitrust claim was precluded.

As to the second question raised regarding whether the refusal to cooperate was a violation of antitrust laws, the court ventured beyond its analysis of Aspen Skiing and concluded that this claim should not result in a new exception to the duty to aid competitors because in Trinko there was already “the existence of a regulatory structure designed to deter and remedy anticompetitive harm.”38 The court reasoned that being an ILEC offering UNEs to new competitors, Verizon would already be under FCC oversight, leaving no need for antitrust. Failure to meet any FCC requirements could “be corrected, in the imposition of penalties, or in the suspension or revocation of...approval.”39 That the FCC had already responded to complaints by competitors40 in Trinko and determined that Verizon had breached its sharing duties speaks to the very point the Court is making – that if the FCC was already monitoring for anticompetitive behavior, there was no need to turn to antitrust laws.

The end result is that the Court determined there was no antitrust claim available for the plaintiff in Trinko because Verizon’s duty was imposed by statute and therefore a breach of that duty did not violate antitrust laws. Additionally, the Court held that where there was already a regulatory regime in place that had oversight authority over the practices of market participants, there was no need to look to antitrust as a solution because the 1996 Act imposed a greater duty, and the benefits of imposing antitrust laws would be minimal.

Trinko Doctrine Expands Under Credit Suisse

The decision in Trinko regarding the authority of regulatory bodies was expanded a few years later when the Court decided Credit Suisse Securities (USA) LLC v. Billing.41 While the subject matter in Credit Suisse was securities rather than telecommunications, the principle that resulted from the decision affected all regulated industries.

Credit Suisse presented the court with a case where the Securities Exchange Act was in direct conflict with antitrust laws. In determining which should take precedence, the Court laid out three determinative factors: (1) that the relevant securities law enables the Securities Exchange Commission (SEC) to monitor the challenged activities; (2) the history of Commission regulations suggests no laxity in the exercise of this authority; and (3) allowing an antitrust suit to proceed that is so directly related to the SEC’s responsibilities would present a substantial danger that defendants would be subjected to duplicative and inconsistent standards.42 A fourth factor, which operates more as a threshold question, is whether there is a serious conflict between antitrust and the regulatory regime.43

The Court’s efforts to determine how best to resolve a conflict created another rule of deference to the interpretation of the overseeing agency. “[T]o distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to the services provided, a commission is “excessive,” indeed so “excessive” that it will remain permanently forbidden.”44 The concern was the “unusually high risk that different courts will evaluate similar factual circumstances differently,”45 and having such different interpretations would cause harm to that market where there was already a diminished need for antitrust enforcement because the regulatory agency was already closely monitoring the activity.46

The Court’s Deference to the FCC

Where does this leave us in regards to the FCC, its oversight authority, and antitrust claims? Under the Chevron framework, unless Congress expressly spoke to a given issue in a statute discussing a regulated industry, it will be left for the agency granted oversight authority to interpret the statute. So long as they do so reasonably, the courts will defer to the agency’s interpretation and judgment. The 1996 Act provides for specific rules for telecommunications service providers. Under Trinko, and its expansion in Credit Suisse, we find that “the Supreme Court's decision prevents . . . courts from engaging in [an antitrust] inquiry at all for claims that push the boundaries of antitrust in the context of a regulated industry.”47 Telecommunications service providers must work with the FCC in order to offer the services in compliance with the 1996 Act and any other rules or regulations laid down by the FCC. As a result of telecommunications being a regulated market with agency oversight, including the ability to monitor for anticompetitive behavior and enforce penalties for such behavior, the courts will defer to the FCC’s conclusions. Howard Shelanski, former Director of the Federal Trade Commission’s (FTC’s) Bureau of Economics put it most succinctly:

By broadening the conditions under which regulation blocks antitrust enforcement, those cases redrew the boundary between antitrust and regulation and would likely have prevented the government from bringing, in previous decades, a number of important antitrust cases in regulated industries. Most notably, Trinko and Credit Suisse would likely have blocked the suit by the U.S. Department of Justice ("DOJ") that in 1984 broke up AT&T's monopoly over telephone service, considered among the most important antitrust enforcement actions in history.48

The Court’s creation of antitrust immunity for regulated industries extends the premise that if an antitrust claim were to include conduct that has been approved by the regulating agency, any such enforcement of antitrust laws could be contrary to the enforced regulatory regime. The FTC drew upon this comparison in its amicus filing in Credit Suisse where it stated “the complaint’s allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct.”49 And further that, “the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct. A court should not permit discovery to go forward as a fishing expedition based on conclusory or ambiguous allegations that focus on immune conduct.”50 The Court agreed, stating that in order for the antitrust suit to be allowed, there must be, “a plain repugnancy between . . . antitrust claims and the federal . . . law.”51 Therefore, if the FCC establishes regulations that dictate that 1996 Act’s competition policies are no longer applicable under its regulatory structure, the Court will be required to dismiss an antitrust claim as being implicitly precluded under the telecommunications laws, as to do otherwise would violate the authorized regulatory regime.

This antitrust enforcement reasoning is in direct conflict with the reasoning of the FCC in the retraction of net neutrality rules when they enacted RIFO. The FCC heavily leaned on the logic that the “antitrust and consumer protection laws would provide means for consumers to take remedial action if an Internet Service Provider (ISP) engages in behavior inconsistent with an open Internet.”52 However, RIFO is an express regulation dictating that broadband service providers must merely disclose their network management practices, performance, and commercial terms of service. The FCC’s decision to determine which express regulation should be upheld would be subject to the Chevron deference. So long as the statute was ambiguous and the FCC’s interpretation is reasonable, the Courts must defer to the FCC’s judgment. Additionally, the FCC has jurisdiction over the matters defined in the 1996 Act, as was determined in Trinko, and under Credit Suisse the Court must imply an antitrust preclusion when there is a plain repugnancy with the federal law.

As such, the weight the FCC gave to antitrust being the better mechanism for consumer protection under the RIFO 53 is irrelevant, because the FCC has expressly decided to not regulate. That would mean that all conduct that falls outside of the transparency requirements would be protected conduct as part of the regulatory regime and prevent a claim under antitrust laws.

Collectively, this creates a significant barrier because a private actor, be it a person or municipality acting on behalf of its residents, has lost the private right of action to file a lawsuit under antitrust laws and seek legal recourse under the Sherman Act against a broadband service provider. They do have the option to file a complaint with the FCC to seek redress using the agency’s procedures, however, any possible remedy would be available only through the FCC, pursuant to its granted authority and interpretation of the 1996 Act and any subsequent rulemaking it established. This includes refraining from acting based on its reasonable interpretation of the 1996 Act.

A World Without Trinko and Credit Suisse

Real-World Access

Under these precedents, consumers may have little recourse when broadband providers disserve them. Truckee, California is a small mountain town of with a population of 16,377.54 A cursory search for broadband internet providers shows that there are six companies claiming to offer services to the town.55 AT&T and Earthlink offer DSL connectivity with a download speed of up to 10 Mbps. This means that they don’t technically qualify as a fixed broadband provider because they are below the FCC’s standard of 25 Mbps download and 3 Mbps upload.56 HughesNet and Viasat offer satellite services, advertising download speeds up to 25 Mbps, but whether satellite service is an equivalent to fixed wireline broadband is very much up for debate.57 That leaves Oasis Broadband, a fixed wireless internet provider58 advertising up to 100 Mbps,59 and Suddenlink providing 1000 Mbps (1-Gig) over cable. When we take into consideration the actual real-world needs of modern broadband usage, the relevant market of choices is far more limited with only one fixed wireline choice for a broadband connection that provides a broadband service that is sufficient.60 Under these circumstances, the relevant market is defined as broadband service providers offering a minimum connection of 100 Mbps download and 10 Mbps upload. Truckee is therefore subject to the monopoly of Suddenlink.

The FCC has classified broadband as a Title I service, which means the agency has jurisdictional authority over the service under the 1996 Act, but under their own interpretation of the Act has elected to limit that authority to ensuring that the broadband services operate with transparency.62

Broadband is a complicated service to deploy. Under our hypothetical, we can assume that Suddenlink is in the process of upgrading its facilities in the region, and while it is claiming that it can hit 1000 Mbps download speeds, that is not the case for all homes until the upgrades are done. Consumers in the region begin signing up for the services, relying on the fact that this is the only advertised 1000 Mbps service in the region. However, due to costs, delays, or other factors, such as a lack of willingness to invest, the broadband service provider is unable to fulfill the promised network speeds and instead is only able to provide its customers 250 Mbps downloads. A customer can file a complaint with the FCC, but as a Title I service, the FCC’s authority over the provider is limited to ensuring that Suddenlink is being transparent with its existing and potential customers regarding its network management practices, performance and commercial terms of service.63

Further, the monopolist broadband provider, Suddenlink, has control of the local market and can charge a monopoly price. As the Court declared in Trinko, merely taking advantage of the monopoly position to charge more is not enough to violate antitrust laws. However, if Suddenlink were to use its position to restrict other parties from entering the market by undercutting pricing to the point where it was not feasible for a competitor to enter, the consumers would be suffering at the hands of a monopoly engaging in anticompetitive behavior and have no legal redress. This is because the decisions in Trinko and Credit Suisse provide that when a regulatory agency has oversight authority, the courts are to defer to the agency’s interpretation because it has the broad enforcement powers, the specialized knowledge to know whether or not the practices in question are reasonable under the circumstances, and the authority to pass national regulations to ensure that there will not be confusion between jurisdictions, all under the statutory authority granted by Congress to make such determinations.

In the hypothetical, whether the consumer seeks to improve oversight of Suddenlink’s transparency or whether they seek redress for the anticompetitive behavior of a monopoly, the consumers must turn to the FCC because it has deferential authority as the oversight agency of a regulated market. It doesn’t matter whether it is regarding the practices of the service provider in a competitive market. Nor does it matter if broadband were classified as Title II and the consumers were asking for oversight enforcement as to unjust or unreasonable in a given circumstance. In either case, private actors have lost their access to seek legal remedies from the justice system.

This nuanced restriction calls for Congress to pass legislation that would overturn the decisions in Trinko and Credit Suisse and return a private right of action to people and municipalities to file claims against the broadband service providers for anticompetitive behavior. If Congress wishes to see improved competition in services under the 1996 Act, which was its original intent, then restoring the private right to enforce antitrust laws when broadband providers behave in an anticompetitive fashion falls in line with that end.

This was also addressed in the October 2020 report from the United States House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary’s Investigation of Competition in Digital Markets.64As a part of the subcommittee’s recommendations, it suggested that “Congress should consider overriding judicial decisions that have treated unfavorably essential facilities65- and refusal to deal-based theories of harm,”66 specifically citing Trinko as well as Pacific Bell Telephone Co. v. linkLine Communications, Inc.67

#### Antitrust is key – it preserves internet openness better than regulation by responding to consumer demand.

Ohlhausen ’16 [Maureen; FTC Commissioner. “Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously”. 15 Colo. Tech. L.J. 119. 2016. Lexis]

II. Why Net Neutrality? Antitrust Protects the Competitive Process and, in Turn, the Nonpecuniary Values that ISP Consumers Value

Part I explained that the FCC's net neutrality rules disregard market competition, as bolstered by antitrust, as an adequate constraint on ISPs. Based on that premise, the FCC banned paid prioritization - as well as blocking and throttling - on the ground that such ISP conduct would harm the competitive process, innovation, and the Internet's "ability to serve as a platform for speech and civic engagement." 76 I disagree. Market forces and antitrust policy can not only protect competition in ISP-related markets, but also safeguard nonmonetary goals like free speech and openness, at least to the extent that consumers share those values.

Ironically, the 2015 Open Internet Order may actually harm consumers because its unyielding, per se ban on paid prioritization is difficult - if not impossible - to square with economics. In that respect, the FCC's net neutrality rules do not merely substitute for effective antitrust enforcement. Their inflexibility makes them inferior to an antitrust solution in protecting competition within the ISP space. Is this suboptimal approach necessary to protect the goals of free speech and civic engagement? The remainder of Part II considers whether markets and antitrust would adequately protect non-pecuniary goals absent net neutrality regulation. Contrary to some opinion, I argue that an antitrust market solution is both sufficient and better.

A. Antitrust Would Effectively Protect Competition in ISP Markets

The FCC found that net neutrality rules are necessary to protect competition. 77 In particular, it determined that paid prioritization deals between ISPs and edge providers would harm the competitive process. 78 It maintained that view regardless of whether ISPs have market power in selling fixed or wireless broadband service to consumers. 79 That conclusion is dubious to those versed in antitrust law and economics.

1. Lessons from Antitrust Economics: The Market Economy Relies on Vertical Restraints to Coordinate Efficient Investment and Competition

The Internet raises passionate views, which can obscure careful analysis. The FCC enacted a per se, ex ante prohibition on paid prioritization. 80 To determine whether that ban makes economic sense, consider that preferential arrangements between producers and distributors exist in almost all competitive markets. 81

For the purposes of the 2015 Open Internet Order, paid prioritization occurs when an edge provider pays an ISP to deliver its content ahead of other data to end users. 82 Such contracts are vertical restraints, in which the creator of a product agrees with a distributor that the latter will carry its goods on particular terms. 83 Such vertical arrangements do not generally harm consumers, competition, or social welfare. 84 Hence, there is no economic basis on which to justify a categorical ban on paid prioritization. Yet, the 2015 Order enacts a de facto, per se rule against all such contracts between ISPs and content creators. 85 The antitrust profession's experience in analyzing vertical restrictions, based on learning from industrial-organization economics, sheds much light on the 2015 Open Internet Order. 86

[\*135] Competition law once treated vertical restraints like paid prioritization with suspicion. 87 Today, however, economists agree that such restraints often boost efficiency and competition. 88 The principal reason is that manufacturers want to minimize the cost, and to maximize the efficacy, of the distribution process. 89 Hence, when a manufacturer imposes conditions on firms that operate in its downstream supply chain, it presumptively does so to advance those procompetitive goals. Vertical restraints can spur capital investment, coordinate optimal network usage, deter free riding, and reduce Cournot competition problems that increase price and suppress output when complementary assets are disaggregated. 90

Only in limited circumstances can vertical restraints harm competition. 91 For example, a company might use vertical restraints to facilitate a horizontal conspiracy at the upstream or downstream level. 92 Similarly, a vertically integrated firm that competes downstream with firms that it also supplies may have an incentive to raise its rivals' costs or to deny them a critical input. 93 [\*136] And a monopolist that faces the prospect of otherwise effective entry into a market with scale effects might sometimes use vertical contracts, like exclusive dealing requirements, to foreclose competition. 94

Due to evidence that vertical restraints generally promote competition, antitrust law has determined that no vertical restraint should be per se illegal. 95 Indeed, the Supreme Court has jettisoned the per se rule entirely from vertical contracts. 96 Today, manufacturers and distributors often agree for preferred delivery. Firms pay for preferred shelf placement in supermarkets, prominent locations in shopping malls, and expensive advertising opportunities. They enter into all manner of other vertical contracts. Such agreements rarely create antitrust issues. Nor do they provoke cries of foul play because less-well-capitalized rivals cannot afford to buy prime shelf space, store locations, or advertising slots. As with vertical contracts generally, such arrangements typically enhance efficiency and promote competition.

2. Understanding Opposition to Paid Prioritization

So why do so many critics passionately oppose paid prioritization deals between ISPs and edge providers? Such contracts have the same procompetitive potential as vertical contracts in other markets. In the event of scarcity - in the ISP context, congestion - paid prioritization may allow higher value content to flow more quickly to end users. That outcome may be more efficient than a system in which no edge provider can pay for prioritized delivery. The core objection to vertical restraints here may be that price does not reliably capture the value of the prioritized content or applications. But that objection carries no more weight in broadband [\*137] ISP markets than it does in any other market.

Willingness and ability to pay reflect economic value. The premise underlying the free market system is that price is a workable proxy for utility, which means that it makes sense to allocate scarce resources to those who will pay the most for them. Such price mechanisms also induce buyers to reduce consumption and firms to invest in more output during excess demand. 97 There seems to be a proclivity among commentators, however, silently to reject those axiomatic principles in the online space. It is not obvious that that distinction reflects critical thought. Or, perhaps, the Internet is a preferred battleground for an initial foray into a larger movement against a free market system for some commentators.

Nevertheless, conventional economic principles justifying vertical restraints exist in the ISP space. First, not all online content is equally valuable. Simply compare telemedicine to cat videos. Even within a particular category of content, demand varies tremendously for different offerings. Second, some content and applications consume more bandwidth than others. Video streaming like Netflix and Amazon Prime, interconnected-video communication like Skype, and interactive gaming such as Xbox Live, for instance, use more data than does email. Third, different content types have different quality requirements. For example, some are more susceptible to latency than others. The quality of a video stream suffers more from delayed delivery of data packets than email does. Fourth, congestion can occur within ISP networks and at the interconnection ports between ISPs and other networks. Finally, investment by ISPs in adding capacity to their networks and updating their interconnection points expands output and may therefore carry large social value up to the point where extra investment imposes costs that exceed the associated marginal benefit.

Those considerations show that paid prioritization may efficiently allocate scarce network capacity in the event of anticipated congestion. When demand exceeds supply in a market, price rises to the clearing point. The resulting allocation is efficient, given the prevailing supply and demand conditions, because price is a proxy for utility. In that respect, the price that an edge provider would willingly pay reflects, at least in part, the value of the relevant [\*138] content to consumers. Of course, the proxy is imperfect, but that is true of all markets. Nevertheless, markets rely on price mechanisms both to capitalize on market actors' unique preferences - which they may not reveal publicly - and to spur desirable incentives, thus distributing scarce resources more effectively than any other instrument. That principle holds true in the Internet space. There, as everywhere, treating all units equally can be decidedly inefficient because it lumps less-valuable units in with the most valuable ones that consumers demand.

A recurring criticism is that paid prioritization would divide the haves from the have-nots. 98 Proponents of net neutrality argue that start-ups and other less-well-financed competitors may not be able to afford to pay as much as dominant incumbents. 99 Hence, the thinking goes, paid prioritization would suppress competition and entry by less-well-capitalized edge providers.

That concern is true of all industries, however, and it is unclear why online markets are different. Further, that line of argument rests on the fiction that today's Internet is currently a world of equals where each content provider enjoys similar access to end users. The reality is anything but: many of today's largest and most well-capitalized edge providers have invested billions of dollars each in building private, content delivery networks (CDN). 100 Those CDNs enable faster delivery of their owners' content by reducing both the geographic distance that data packets must travel and the number of network hops that they have to make. In short, CDNs are already "fast lanes" that are often imbedded within ISPs' last-mile networks. The FCC's 2015 Open Internet Order will not affect them. 101 That point says nothing, of course, about the myriad of other ways in which a superior ability to pay yields heightened advantages in the marketplace, such as larger engineering, R&D, and marketing budgets. Asymmetric market positions are part of a healthy competitive process fed by [\*139] capital markets and fueled by incentives to compete across metrics that include private investment.

Nevertheless, the myth that net neutrality places all content providers on an equal playing field persists. Even if edge providers were otherwise identically positioned, it still may not make sense to reject market pricing principles in the Internet space. First, capital markets finance compelling ideas, content, and applications. Should a new edge provider offer content of particular value to consumers, capital will likely be available to facilitate its distribution, as the host of venture capital firms that funded Internet start-ups has shown. By contrast, it would likely be irrational to borrow against (and for investors to bestow capital for) lousy content. Second, ISPs benefit when their subscribers enjoy swift access to their preferred applications. ISPs may thus have an incentive to negotiate price and delivery terms that work with the entrant's financial situation. Even when an ISP is vertically integrated and offers rival content, the ISP will not necessarily eschew competing content. Rather, the ISP will trade-off (1) maximizing the value of its ISP network to existing and prospective subscribers and (2) maximizing the value derived from monetizing the content it created or purchased upstream. There is no reason why the second consideration will dominate the first, especially since it did not when paid prioritization was permitted.

Thus, the FCC's per se prohibition of paid prioritization finds little or no support in economics, which holds that vertical constraints are largely good for consumers. These analytical shortcomings might be understandable if there were direct evidence that net neutrality violations have harmed competition and consumers in the past. As already discussed, however, the FCC merely assumed market power and incentives to exclude. 102

3. Net Neutrality Violations Can Sometimes Harm Competition

As with other vertical restraints, paid prioritization could harm competition under certain conditions. A requisite of injury to competition, of course, is significant market power. Hence, facing sufficient competition, broadband providers could not successfully block, throttle, or otherwise degrade consumers' preferred content in a bid to bolster less attractive content owned by them, their affiliates, or edge providers paying them for priority delivery. Yet, many ISPs enjoy at least some market power, potentially allowing them to disadvantage applications or content to which their consumers want access. In that setting, it may be possible for an ISP - in conjunction with its favored edge provider - to raise competing [\*140] content providers' costs or, absent an alternative ISP, to exclude rival edge providers from local markets altogether. This means that net neutrality violations warrant scrutiny from a competition policy perspective. The key question, however, is under what antitrust standard, per se or rule of reason.

Possible anticompetitive outcomes are a factor to weigh against the potential benefits of paid prioritization. The choice of legal standard - (i) per se prohibition by an ex ante net neutrality rule or (ii) ex post evaluation under antitrust's rule of reason - turns on the potential for procompetitive and anticompetitive outcomes from paid prioritization. As such vertical contracts between ISPs and edge providers can benefit consumers, the FCC's net neutrality rules necessarily carry a Type I error cost (false positives). By contrast, the rule of reason allows more discerning analysis - albeit at greater enforcement expense - to prohibit anticompetitive paid prioritization deals and to allow others.

An important question weighing on the need for ex ante regulation concerns the state of competition in today's ISP markets. Under monopoly, for example, market forces may not deter anticompetitive vertical exclusion even when supported by antitrust enforcement. That consideration has long justified ex ante regulation in network industries that constitute natural monopolies. Indeed, the whole point of Title II was to regulate telephone monopolies that, even after partial deregulation, could suppress entry by controlling bottleneck access points. Does the same rationale apply here? The answer is no.

Although commentators debate the degree of competition to which wireline ISPs are subject, everyone can agree that ISP markets are not natural monopolies. Hundreds of ISPs compete in the United States today. 103 Competition between wireless broadband access providers is strong. True, wireline ISPs typically operate in concentrated markets, and some U.S. consumers enjoy limited choice between ISPs. Competition not only remains, however, it is growing. 104 And there is a dearth of evidence of paid prioritization, throttling, or exclusion that has demonstrably harmed the competitive process. Absent evidence that competition is insufficient to stop ISPs from excluding rivals, and with all signs showing that competition is on the rise, what possible justification exists for common carrier regulation to preserve the competitive process?

The FCC saw things differently. Its dismissive treatment of market forces and competition is apparent throughout its 2015 Open Internet Order. One provision, though, is particularly illuminating. The agency found that, "even if the mobile market were [\*141] sufficiently competitive, competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness." 105 The FCC further observed:

Even in a competitive market certain conditions could create incentives and opportunities for service providers to engage in discriminatory and unfair practices… . We thus reject suggestions that market forces will be sufficient to ensure that providers of broadband Internet access service do not act in a manner contrary to the public interest. 106

Why would ISPs be a special case? One possible answer is that ISPs control a bottleneck through which content must pass to reach subscribers, meaning that ISPs could foreclose competitors. This issue is the familiar question of vertical foreclosure. Firms integrated up and down the supply chain, and which control an essential facility, can use their controlled bottleneck to exclude competition or to raise rivals' costs. It is a common problem in partially deregulated network industries, where incumbents control a piece of critical infrastructure that remains a natural monopoly. In such cases, regulations often impose licensing and unbundling requirements. But the ISP market is not a natural monopoly. And, outside of such industries, forced sharing is generally seen as counterproductive to investment and innovative by the Supreme Court and by economists. 107

Consumers would enjoy protection in a world without net neutrality. Antitrust law is a formidable tool for promoting the public interest. If harmful exclusion, throttling, or paid prioritization by ISPs occurs, antitrust is well positioned to tackle those cases. Section 1 of the Sherman Act proscribes unreasonable restraints of trade. 108 That provision has sufficient teeth to capture vertical restraints that harm competition when entered into by parties that enjoy market power. If an edge provider is dominant, Section 2 prohibits attempted or actual monopolization. 109 If the FCC did not reclassify broadband ISPs under Title II, the FTC would have jurisdiction to challenge anticompetitive conduct under Section 5 of the FTC Act. 110 With the treble damages available to private litigants under the Clayton Act, 111 and with the FTC's and Department of Justice's dedicated missions to bring antitrust [\*142] cases in the public interest, there would be no lack of effective antitrust enforcement.

For illustrative purposes, suppose that a broadband ISP with market power decided to contract with an edge provider to exclude all competing content from its last mile network. Pursuant to the agreement, the ISP blocks or materially degrades competing content offered by other edge providers. As a result, the conspiring edge provider's market share and power increase vis-a-vis its rivals, while the ISP's consumers lose preferred content. The vertical boycott would likely fail scrutiny under the rule of reason unless the ISP and edge provider could proffer sufficient procompetitive justifications.

It is true that antitrust liability would not attach in every instance of throttling or paid prioritization. But that is a feature, not a bug, of antitrust scrutiny. Imagine that an edge provider offers bandwidth-heavy content for which there is great consumer demand versus alternative content. To maximize the value of its content, the edge provider partners with an ISP that agrees to prioritize its content over lesser alternatives. Is there an antitrust violation? There may not be, especially if the parties can show that the procompetitive effects of the restraint - faster delivery of content favored by consumers - outweighed the exclusionary effects. The rule of reason adopts an all-encompassing inquiry, paying close attention to the consumer benefits and downsides of the challenged practice based on the facts at hand. If that inquiry shows that a particular act of paid prioritization, throttling, or blocking enhanced consumer welfare, then that should be the end of the matter from a competition standpoint.

That outcome - allowing paid prioritization if it makes consumers better off - does not appeal to all advocates of net neutrality. This reality hints at a broader point: the real case for regulating ISPs under Title II is not to protect the competitive process, but to advance policies going beyond marketplace efficiency. In particular, some advocates call for net neutrality to protect non-monetary goals like free speech, civic participation, and equality. In their view - and apparently in the FCC's view - competition and antitrust enforcement alone cannot sufficiently protect those virtues. The next section explores that question.

B. Free Speech and Civic Participation: Antitrust is up to the Job

Antitrust is a time-tested guardian of the competitive process. But, for some people, non-monetary goals like free speech, debate, and equality raise different issues. They believe that ISPs that block, degrade, or disadvantage content not to their liking harm democratic principles imbedded in the Internet with its history of [\*143] freedom and best-efforts delivery. Antitrust typically focuses on price and output effects, which are quantifiable in dollar terms. For some, those monetary values seem far removed from issues like civic participation and online freedom. The concern that antitrust fails to protect nonpecuniary values animates calls for rules to guard against "non-neutral" ISP conduct.

It might seem surprising to proffer antitrust as a meaningful guardian of goals like freedom of speech and democratic participation. The mystery dissolves, however, because consumers care about a host of qualities for Internet access, not just price, and antitrust protects market forces, which respond to consumer demand under competition.

In pivoting toward non-monetary values associated with ISPs, we must ask whether consumers hold those values. Although many ISP subscribers doubtless value neutrality, they will not always do so in every case. That possibility has important implications for the analysis of net neutrality regulation, which may elevate regulators' values over those held by consumers. But assuming for now that consumers share the full array of non-monetary values embraced by net neutrality advocates, it follows that ISPs have an incentive in contested markets to provide broadband access that caters to those values. To the extent that ISP subscribers demand neutral treatment of data flowing over the last mile, then we would expect competitive markets to produce that outcome. Antitrust is thus a viable solution to threats to non-monetary values because it guards the competitive process that makes ISPs satisfy consumer demand.

Some net neutrality advocates, however, are convinced that markets and antitrust do not protect openness, equality, and freedom. 112 That view featured prominently in a 2014 congressional hearing entitled "Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?" 113 Columbia Professor Tim Wu argued, for example, that "the Internet implicates a whole host of noneconomic values, which are simply not well-captured by antitrust processes." 114 He explained further: [\*144]

I have the highest admiration for the antitrust laws and the agencies enforcing antitrust laws. But I simply don't think they are equipped to handle the broad range of values and policies that are implicated by net neutrality and by the open Internet… . When we consider Internet policy, what we are really considering is not merely economic policy, not merely competition policy, but also media policy, social policy, oversight of the political process, issues of free speech. There are a wide range of noneconomic values that I fear the antitrust law, despite its expertise, despite the decades, indeed, over a century of lawmaking in that area, simply does not capture. 115

Such arguments carry superficial appeal and find recurring expression in portions of the academic literature. 116 Indeed, at least one commentator goes so far as to argue that "antitrust law, with its primary emphasis on economic efficiency, accords no value to the speech at issue - in much the same manner that it largely disregards any noneconomic consideration." 117

Those viewpoints overlook the broader role of competition by focusing solely on the most common way that market power is measured: control over price. Thus, they skip past the critical, threshold question: do markets fail to satisfy consumer demand for ISP services that promote nonmonetary values? As noted above, there is a glaring lack of evidence of net neutrality violations to date. More importantly, the criticisms fail to ask why antitrust, in turn, cannot protect the market forces that lead firms to respond to consumer demand for attributes other than price. In that respect, it bears noting that harms to competition are not limited to static price effects. Dynamic efficiency focused on a restraint's impact on innovation is of tremendous importance, for instance, and can trump static concerns. 118 A restraint that reduces the quality of goods or services sold in a market may impose actionable anticompetitive effects. 119 And a restriction that eliminates consumers' revealed preference for a particular good or service [\*145] may - in conjunction with other factors - inflict an antitrust injury. 120

The overarching point - one lost on the antitrust skeptic crowd - is that the Sherman Act opposes conduct that, by restricting competition, denies consumers any benefits that they desire and would otherwise obtain. It is easy to caricature antitrust as a narrow inquiry that myopically focuses on price and nothing else. That erroneous portrayal sticks only because most forms of antitrust harm involve quantifiable monetary effects in terms of suppressed output and depressed prices.

Of course, antitrust's consumer welfare prescription is not synonymous with every facet of the public interest. But that fact does not grant the point to net neutrality advocates. Firms that fail to satisfy consumer demand create competitive openings for their rivals, a process that we have seen occur repeatedly in Internet related industries. The analysis then turns to whether the marketplace is sufficiently competitive so that firms will in fact cater to consumer demand, which calls for antitrust analysis.

One possibility is that end users place great value on equal treatment of data by ISPs, regardless of content, even if that means occasional congestion for some high-bandwidth content. Should that be consumers' preference, then woe be to the ISP that systemically degrades applications and content that its subscribers demand. There is good reason to think that active blocking or throttling of popular content would invite a furor among the consuming public. One need merely consider how the public responded to (apparently erroneous) claims that Comcast throttled Netflix in 2014, for instance. If consumer demand is indeed sharply at odds with efforts by ISPs to exclude certain content, then we should expect market forces to deter such behavior.

The last section explored the state of competition between ISPs in the fixed and wireless spaces, but there is also crucial direct evidence. In the last decade, during much of which time no net neutrality rules were in effect, ISPs almost never blocked or disfavored content. Because market forces have thus far protected free speech and civic participation norms in the Internet space, there is little basis for concluding that competition and antitrust policy are not up to the job. Maybe it is fear of what lies ahead, rather than what occurred before, that drives concerns that ISPs will harm free speech and equality online. But that puts the case for regulatory intervention backwards.

Perhaps net neutrality advocates would argue that the 2015 Open Internet Order can do no harm because it simply guarantees what the free market would provide. Indeed - someone might argue - regulation [\*146] does a better job because ISP markets are imperfectly competitive and antitrust, for all its benefits, is an unwieldy tool. Such arguments, however, overlook a possibility unwelcome to some net neutrality advocates: either today or in the future, some consumers may value differentiated ISP plans that prioritize certain content over others. The cost of net neutrality regulation is that it will foreclose preferred ISP plans, frustrating consumer preferences and innovation in context and its delivery.

Suppose that a population of end users consumes certain high-data content and values guaranteed, prioritized access to that content. If an ISP were to market a product designed for those customers, then antitrust would see no net anticompetitive effect, at least if competing ISPs remain free to offer alternative plans. There lies the unspoken crux of the debate. Net neutrality advocates reject an antitrust solution because they cannot accept that ISPs might offer prioritized plans that reflect consumer demand. Many supporters of net neutrality ardently and sincerely believe that deviations from equal carriage of data across the last mile to end users are wrong as a matter of principle. 121 They hold that view, regardless of whether some consumers would prefer to buy an ISP product that departs from net neutrality principles in certain ways. 122 This is the juncture at which proponents of market forces and antitrust enforcement part ways with some net neutrality advocates.

Because the law should allow consumers to decide through their own market choices what plans work best for them, the case for net neutrality to protect free speech and equality is weak. Competitive pressures, bolstered by antitrust enforcement, protect end users' interests in this respect. Of course, not everyone agrees and it is worth exploring the other argument. Take examples given by Professor Wu in support of antitrust's supposed deficiency in capturing non-monetary values unique to the Internet:

Let me just give an example. Let's imagine we had an Internet service provider that for its own reasons decided it did not like political speakers on one or another side of the spectrum. Let's say we had a different ISP that for whatever reason believed that local news sources were less valuable than national news sources and decided to favor them. Or let's say we had an ISP that had a bias in favor of big speakers as opposed to small speakers, for whatever reasons. Or maybe just something totally irrational, like it favored one sports team, it just thought the New York Rangers [\*147] were a better hockey team despite losing the Stanley Cup than the L.A. Kings, and so tried to adjust coverage around sports. Whatever it was, these are the kinds of issues, whether political, social, sports, whatever, you name it, that simply do not register in the antitrust analysis, because if you have political bias, it doesn't necessarily give a competitive advantage to the ISP. 123

That critique seems to judge antitrust as a regulatory mechanism, rather than as a tool for protecting the competitive process. To ask whether antitrust is up to the job is to begin at step two. The first step is to look at consumer demand and competition in the market. Consumers likely do not want their ISPs to dictate their content options for political positions, news sources, and sports teams. ISPs face competition and thus would lose customers if they engaged in the net neutrality violations hypothesized by Professor Wu. The critical issue is whether market forces are sufficiently potent to deter such ISP conduct. Observers dispute the degree of competition in ISP markets, of course, but an evidentiary record devoid of such conduct is telling.

Antitrust would get involved if ISPs diluted the competitive process that prevents them from, in Professor Wu's examples, favoring one set of speakers, news sources, and sports teams. Were ISPs to agree to boycott certain political content, to allocate various forms of content exclusively between them, or otherwise to collude with anticompetitive effect, for example, antitrust would hold them liable. Antitrust would protect consumers from political harms not by banning those outcomes, but by guarding the process that encourages firms to respond to consumer demand. The proposition that consumer preferences - whether for ISP neutrality toward sports teams or otherwise - "simply do not register in the antitrust analysis" is wrong. 124 What Professor Wu presumably means is that antitrust is not a form of ex ante regulation that, in itself, prohibits net neutrality violations. That is not how one should evaluate an antitrust solution. Instead, we should first look to the strength of the competitive process to start the analysis.

The case for net neutrality thus reduces to a question of consumer preference. Do end users want guaranteed, relatively high-speed delivery of certain preferred content such as gaming or medical monitoring? If they do not want such ISP products today, might they want them tomorrow? The only way to know is to allow ISPs to experiment with plans tailored to changing content, technology, [\*148] network capacity, and consumer demand. Net neutrality rules take freedom of choice away not just from ISPs, but, more importantly, also from consumers - their end users. The result may be reduced consumer benefits stemming from the replacement of free competition and innovation with unneeded regulation and static offerings.

#### Without net neutrality, ISPs have ramped up blocking, throttling, and paid prioritization of content.

Wheeler ’21 [Tom; visiting fellow in Governance Studies at The Brookings Institution. “Restoring non-discrimination to the 21st century’s most important network”. Brookings. Feb 25 2021. https://www.brookings.edu/blog/techtank/2021/02/25/restoring-non-discrimination-to-the-21st-centurys-most-important-network/]

INTERNET MONOPOLIES

At the time of adoption of the Open Internet Order, three-out-of-four Americans had, at best, access to only one internet service that could even plausibly be called high-speed, as illustrated by this FCC chart:

[CHART 1 REMOVED]

When the Trump FCC took over in 2017, it conveniently ceased measuring the level of ISP competition. But here’s what we do know: The largest number of broadband subscribers – 67 percent – are cable company subscribers and the cable companies have long enjoyed the benefits of exclusive franchises. Trying to deal with this lack of competition, the Obama FCC required Charter Communications to build a competitive alternative for four million homes as a condition of its merger with Time Warner Cable. The Trump FCC vacated that requirement in its first four months in office.

THE INVESTMENT CON

Like a drunk uses a lamppost, the ISPs and the Trump FCC supported repealing 157 years of non-discrimination on critical networks with the assertion that net neutrality “discourages investment” in broadband infrastructure.

“Under the heavy-handed regulations adopted by the prior Commission in 2015,” Trump Chairman Pai told Congress, “network investment has declined for two straight years.” Using the “say-it-often-enough” strategy, he repeatedly made that fact-free claim. “After the FCC embraced utility-style regulation,” he told the Mobile World Congress, “the United States experienced the first-ever decline in broadband investment outside of a recession.”

Multiple studies have disproven this claim. An expansive study from George Washington University, found “net neutrality rule changes in the United States had no impact on telecommunication industry investment levels.” This confirms the study by consumer group Free Press that showed ISPs actually increasing their broadband investment during the pendency of the Obama Open Internet Rules.

The Trump FCC’s disinformation campaign was exposed by the ISPs themselves. When the ISPs spoke to their investors they delivered a different message. Tom Rutledge, CEO of Charter Communications: “Title II, it didn’t really hurt us; it hasn’t hurt us.” Randall Stevenson, CEO of AT&T reported in December 2015 they would “deploy more fiber” in 2016 (post-FCC action) than in 2015 (pre-FCC action). The telecom lobby, USTA, said, “from the end of 2015 [post-FCC rule] to mid-2017 [pre-repeal of that rule], U.S. fiber deployment grew from 21 percent to 29 percent of homes.”

The final nail was put in the big con by the “watch what I do, not what I say” results that followed the repeal of net neutrality. “AT&T, Comcast Dramatically Cut Network Spending Despite Net Neutrality Repeal,” one headline proclaimed. The article reported that Comcast’s overall capital expenditures (capex) “dropped in 2019 by roughly 10.5%” and AT&T’s capex was at the “lowest total in nearly a decade.” Another headline announced, “Charter will spend less on cable network in 2019 but charge customers more.”

ONGOING ABUSES

“But where are the abuses?” is the oft-heard refrain against net neutrality. Such rhetoric, of course, ignores the reason that the whole issue started back in 2005 was ISP efforts to limit or control third party use of the network. The economic incentives for such abuses remain.

“Broadband providers have been quietly taking advantage of an internet without net neutrality protections and where the FCC has no legal authority to police harmful conduct by broadband providers,” public interest group Public Knowledge concluded in a 2019 study.

Part of the big con on net neutrality is the ISPs’ claim to “support net neutrality” while opposing its regulatory enforcement. The three core principles of net neutrality are no blocking, no throttling, and no paid prioritization to create “fast lanes and slow lanes.” Recently, because there is no longer a rule against it, ISPs have dropped the prohibition of paid prioritization from the list of things they won’t do.

Throttling of services is commonplace. Researchers from Northeastern University and University of Massachusetts found wireless carriers slow down internet speed for selected video streaming services, not just for network management (which is permitted), but “all the time, 24/7, and it’s not based on networks being overloaded.” Sprint throttled traffic to Skype which competed with Sprint’s calling service. Verizon even throttled a fire department’s service during the California wildfires.

The ISPs have reneged on the pledge made during the 2015 debates over net neutrality that they would not charge extra to create “fast lanes” and “slow lanes.” Broadband ISP Cox Communications created a “fast lane” for gamers willing to pay extra. Comcast made mobile customers pay more if they wanted speeds necessary for high quality video.

Beyond the “big three” net neutrality issues, the Obama FCC established the General Conduct Rule to permit the FCC to keep abreast of unanticipated future developments. At the close of the Obama term, the agency had begun an investigation into “zero rating,” the practice of not charging for mobile data if the customer was using a preferred service. The Trump FCC killed that inquiry and opened the door for networks to self-preference their own content.

#### Those abuses destroy US internet openness leadership – causes global internet balkanization.

Kilovaty ’17 [Ido; Research Scholar in Law, a Cyber Fellow at the Center for Global Legal Challenges, and a Resident Fellow at the Information Society Project at Yale Law School. “Repealing Net Neutrality, National Security, and the Road to a Dictatorial Internet”. Harvard Law Review Blog. Dec 22 2017. https://blog.harvardlawreview.org/repealing-net-neutrality-national-security-and-the-road-to-a-dictatorial-internet/]

On Thursday, December 15, 2017, the Federal Communications Commission (FCC) voted to repeal the Open Internet Order, often referred to as “net neutrality.” This should be no less than a bombshell, as the Internet was originally conceived as a free and open platform, not governed by economic interests, where service providers are neutral as to the data packets flowing through their infrastructure. To solidify that notion, Obama administration rules prohibited internet service providers from discriminating between different websites or services based on whom they wish to promote for financial, ideological, or other reasons. But this net neutrality concept is now being reversed, and we should be thinking about it as no less than a regime change, leading us towards a dictatorial, and potentially not so safe, Internet.

This is not a moment to herald the passing of the Internet entirely. The Internet is still going to be a significant part of our daily lives. However, we are about to witness a true regime change of the Internet. With the FCC’s repeal of net neutrality, the United States, being the leader and proponent of a free and global Internet for at least two decades, is about to create a dictatorial Internet.

This significant Internet regime change could have two important implications, both less intuitive than the commonly discussed consumer-focused concerns. First, internet giants will further consolidate their power, thus increasing our dependence on their services. Subsequently, it could increase their susceptibility to foreign information operations, and potentially pressure them to increase censorship and restrictions on speech, stemming from this national security concern. Second, this will result in an Internet that is less global, encouraging authoritarian regimes to further restrict their own internet, for ideological and political ends.

Consolidation of Power and National Security

Internet giants such as Facebook, Twitter, Amazon, YouTube, and Google, are already in control of a substantial portion of our content consumption, communication, and data hosting activities. It is already difficult for new players to successfully compete against these established Internet players. Without net neutrality, we are about to become even more dependent on these platforms, because they are the ones who will be able to afford more bandwidth and thus be able to block new players from competing under the same rules. This could lead to serious impediments to free speech, but more importantly – new speech and innovation.

But this particular problem goes even further. Consider the Russian meddling in the U.S. presidential election of 2016. The reason why the Russians have been so successful in achieving their goal is due to our already existing dependence on these platforms. Facebook, Google, and Twitter recently came under fire for not acting on the Russian disinformation campaigns on their respective platforms that directly flows from their influence on large groups of people.

Consider this – the Russian disinformation and meddling campaigns took place when net neutrality was still the rule. Whereas repealing net neutrality will result in these Internet giants potentially consolidating their power, which would mean that even more Internet users would be dependent on their almost exclusive services and content, given the convenience of ISP prioritization allowed by the repeal. A post-net neutrality reality will amplify the effects of foreign governments who would attempt to interfere with U.S. internal affairs. Such a scenario could pressure these leading tech giants into censoring and limiting speech allegedly to protect national security interests, to prevent additional foreign meddling.

Such restriction would be in addition to the more intuitive adverse impact on speech with the repealing of net neutrality. This intuitive impact is due to the anticipated prioritization of certain platforms of speech, following the repeal of net neutrality, meaning that no speech will be created equal online. Thinking about the non-intuitive national security implications of the net neutrality repeal described in this section should raise the concern and opposition of other agencies and departments responsible for cybersecurity and national security.

Finally, FCC Chairman, Ajit Pai, has previously claimed that net neutrality provides an excuse for authoritarian states to further isolate their Internet from the global grid. However, repealing net neutrality, and backing off from promoting the Internet as a global and free platform of ideas, will lead to the same. In fact, it will serve as a model for these regimes, whether for commercial or ideological reasons. The result is the same – certain portions of the Internet will be effectively censored.

“Balkanized” Internet

Balkanization of the Internet is a phenomenon that has been discussed over the years, particularly in the context of China, and its approach to Internet governance. The Chinese government has been consistently working on ensuring that the flow of information is heavily controlled, and that the Internet in China is regulated in line with ideological and economic interests. Other countries, like Brazil, have followed suit, particularly in the aftermath of the Snowden revelations. When certain governments are interventionist and paternalistic, the Internet varies from country to country, meaning that transnational communications and information exchanges could be significantly restricted.

With net neutrality about to become a thing of the past, the role of the U.S. as a champion of a free and global internet, where information is flowing across borders and free expression is a central aspect, is diminishing. This should alarm every single one of us, because there is potentially no equivalent leader to assume the role of the champion of a free and global Internet. In Canada, for example, recent Supreme Court decision could have far-reaching implications on the freedom of the Internet. The Court ruled that Google is under obligation to remove search results globally if they hold information pertaining to an ongoing patent infringement trial. Similarly, the European Court of Justice is considering whether EU’s right to be forgotten could apply to search results outside of EU borders. This shows that states are pushing for their conflicting Internet narratives, with potential global implications, while the U.S. is repealing its net neutrality principles, which would remove it from its role of leading the idea of a free and open internet across the globe. This gap in value-driven leadership could reshape the Internet for the decades to come, with voices to regulate and balkanize the Internet becoming louder throughout the world.

#### Key to great power competition – net neutrality repeal collapses global power projection.

Justin Sherman 19. Cybersecurity Policy Fellow at New America, BS in Computer Science and BA in Political Science from Duke University. “How the Internet Is Taking Center Stage in Great Power Competition”. New America. Feb 7 2019. <https://www.newamerica.org/weekly/internet-great-power-world-order-china/>

Case in point: Ever since the U.S. intelligence community released its 2019 Worldwide Threat Assessment last week, there’s been a flurry of headlines about the assessment’s conclusion that President Donald Trump is, essentially and unsurprisingly, wrong: ISIS remains a national security threat, Russia has ambitions to influence upcoming U.S. elections, and North Korea has held fast to its nuclear capabilities despite its avowed commitment to denuclearization. These findings are undoubtedly important, and Trump’s attacks on this community are a threat to broader democratic norms.

But the assessment contains another, overlooked finding that also deserves attention: the role of the internet and internet governance in great power competition and the future world order.

Artificial intelligence, quantum, blockchain—people (often cavalierly) toss around these buzzwords when they discuss key factors in technological competition. Undoubtedly, the likes of AI and quantum computing are technologies that U.S. policymakers ought to pay more attention to and invest more resources in; they’ll greatly shape state power in the years to come. Still, while it may not sound quite as trendy, the internet is already influencing state power and the future world order—and this is something that the strategy rightly points out.

“China and Russia are expanding cooperation with each other and through international bodies,” the assessment states, “to shape global rules and standards to their benefit and present a counterweight to the United States and other Western countries.” It adds that they’ve increased their influence in these international bodies “to gain advantage for their national industries and move toward more state-controlled Internet governance.”

Indeed, taking control of the internet for the purposes of censorship, suppression, and surveillance is on the rise. In particular, states that haven’t yet decided their stance on how to govern the internet are buying into a model championed by countries like China—countries that have for years recognized the importance of the internet for shoring up state power. Hence their actions over the last decade: China and Russia’s companies export surveillance technology to countries with authoritarian leanings or undecided views on the place of technology in society. (Western companies do this, too, but most democratic governments take steps to prevent it.)

By leveraging this surveillance technology to spy on and control citizens, governments can consolidate power. This usually occurs with governments aligned with powers hostile to the United States, or it occurs with countries undecided on the role of technology in their society, in turn pushing them closer to China’s model of digital authoritarianism and encouraging practices like internet fragmentation. China and Russia are also active in standards bodies like the Internet Engineering Task Force (IETF) and international organizations like the UN General Assembly, advocating for tight internet control under the veil of “cybersecurity.”

Why, exactly, does it matter that the intelligence community has underscored the importance of the internet beyond domestic politics?

When the internet is relatively global, open, and secure—for instance, when you can access a VPN or use end-to-end encrypted messaging—it’s a major economic booster. Industries around the world are interconnected; transactions occur at light speed. Open-source research fuels technology development across borders, and businesses can better connect with consumers. For countries with relatively global economies, this significantly bolsters state power.

On top of that, an internet of this nature is better poised to uphold democracy. It can be a catalyst for information-sharing, enabling checks on governments through practices like microblogging and confidential whistleblowing. It can also enable better democratic mobilization, via the construction of large yet leaderless social movements.

Put another way, a relatively global, open, and secure internet can nourish democratic values—and boost democratic power in the process.

The United States and its allies have long championed this vision of the internet, albeit while ignoring some of the tensions within it and struggling with challenges like data privacy. Still, it’s important that policymakers at the highest levels protect this model as authoritarian elements attempt to chip away at it. There are several initial steps that could pave a path forward.

One, the United States could strengthen its diplomatic engagement with international organizations like the U.N. General Assembly on matters of standard- and norm-setting around the internet. As mentioned above, China, especially, has already increased its involvement in these capacities. As the State Department reportedly stands up a new cybersecurity bureau, this ought to be a priority. Relatedly, the United States would be wise to create a cohesive narrative around internet governance. Authoritarians like China have a clear message: The internet is insecure and leads to security issues, and so the government needs to tightly control it. Without exercising undue power over the internet within its borders, the United States needs a similarly compelling narrative that reconciles internet openness with internet security.

Two, U.S. policymakers ought to engage with the 50 countries that haven’t yet decided on the role of the internet within their borders, prioritizing large democratic countries like India that hold important influence over democratic norms toward the internet and tech companies. Also critical on the United States’ part is taking care to educate other countries’ diplomats on cyber issues when they don’t have the resources to do so themselves.

And finally, it’s critical that the White House reinstitute the Federal Communication Commission’s net neutrality protections. For a country that touts the value of an open internet, the United States’ retraction of these protections rings of hypocrisy, and countries like China are happy to capitalize on that point of tension, since it justifies the narrative that limiting a global and open internet—tightly controlling it and bringing it in line with digital authoritarianism—is necessary because, look, not even the United States stands by internet openness.

The internet—particularly its architecture and governance—is a major factor in state power and an important element of this era of great power competition, especially between the United States and China. There may be other, “flashier” technologies out there, sure, but in preparing for great power competition, let’s not forget what already enables cyber attacks, online commerce, and global connectedness in the broadest sense each and every day.

#### Unipolarity prevents global great power war.

Beckley ’20 [Michael; Associate Professor of Political Science @ Tufts University; “Rogue Superpower Why This Could Be an Illiberal American Century”; *Foreign Affairs* 99(6), p. 73-87]

What would happen to the world if the United States fully embraced this kind of “America first” vision? Some analysts paint catastrophic pictures. Robert Kagan foresees a return to the despotism, protectionism, and strife of the 1930s, with China and Russia reprising the roles of imperial Japan and Nazi Germany. Peter Zeihan predicts a violent scramble for security and resources, in which Russia invades its neighbors and East Asia descends into naval warfare. These forecasts may be extreme, but they reflect an essential truth: the postwar order, although flawed and incomplete in many ways, has fostered the most peaceful and prosperous period in human history, and its absence would make the world a more dangerous place.

Thanks to the U.S.-led order, for decades, most countries have not had to fight for market access, guard their supply chains, or even seriously defend their borders. The U.S. Navy has kept international waterways open, the U.S. market has provided reliable consumer demand and capital for dozens of countries, and U.S. security guarantees have covered nearly 70 nations. Such assurances have benefited everyone: not just Washington’s allies and partners but also its adversaries. U.S. security guarantees had the effect of neutering Germany and Japan, the main regional rivals of Russia and China, respectively. In turn, Moscow and Beijing could focus on forging ties with the rest of the world rather than fighting their historical enemies. Without U.S. patronage and protection, countries would have to get back in the business of securing themselves and their economic lifelines.

Such a world would see the return of great-power mercantilism and new forms of imperialism. Powerful countries would once again try to reduce their economic insecurity by establishing exclusive economic zones, where their firms could enjoy cheap and secure access to raw materials and large captive consumer markets. Today, China is already starting to do this with its Belt and Road Initiative, a network of infrastructure projects around the world; its “Made in China 2025” policy, to stimulate domestic production and consumption; and its attempts to create a closed-off, parallel Internet. If the United States follows suit, other countries will have to attach themselves to an American or a Chinese bloc—or forge blocs of their own. France might seek to restore its grip on its former African colonies. Russia might accelerate its efforts to corral former Soviet states into a regional trade union. Germany increasingly would have to look beyond Europe’s shrinking populations to find buyers for its exports—and it would have to develop the military capacity to secure those new far-flung markets and supply lines, too.

As great powers competed for economic spheres, global governance would erode. Geopolitical conflict would paralyze the UN, as was the case during the Cold War. NATO might dissolve as the United States cherry-picked partners. And the unraveling of the U.S. security blanket over Europe could mean the end of the European Union, too, which already suffers from deep divisions. The few arms control treaties that remain in force today might fall by the wayside as countries militarized to defend themselves. Efforts to combat transnational problems—such as climate change, financial crises, or pandemics—would mimic the world’s shambolic response to COVID-19, when countries hoarded supplies, the World Health Organization parroted Chinese misinformation, and the United States withdrew into itself.

The resulting disorder would jeopardize the very survival of some states. Since 1945, the number of countries in the world has tripled, from 46 to nearly 200. Most of these new states, however, are weak and lack energy, resources, food, domestic markets, advanced technology, military power, or defensible borders. According to research by the political scientist Arjun Chowdhury, two-thirds of all countries today cannot provide basic services to their people without international help. In short, most countries depend critically on the postwar order, which has offered historically unprecedented access to international aid, markets, shipping, and protection. Without such support, some countries would collapse or be conquered. Fragile, aid-dependent states such as Afghanistan, Haiti, and Liberia are only some of the most obvious high-risk cases. Less obvious ones are capable but trade-dependent countries such as Saudi Arabia, Singapore, and South Korea, whose economic systems would struggle to function in a world of closed markets and militarized sea-lanes.

# 2ac

## advantage – competition

### AT: turn – 2ac

#### Profit share is increasing for firms---and market power is the reason it’s rising

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C. Fact 3: Profit Share of GDP Has Increased

Similar to markups, the profit share of GDP has been on the rise, as shown in Figure 3. Some recent papers investigate the implications of this trend. Gutiérrez and Philippon (2016) argue that higher within-industry concentration measured in terms of profitability is associated with weak investment. This result resonates with the findings of Eggertsson, Robbins, and Wold (2018), who explore mechanisms that can give rise to higher profitability and lower investment-to-output ratio, along with several other changes.8 In a different approach, Aghion et al. (forthcoming) explore the link between innovation and top income inequality in the United States and show evidence of the tight association between innovative activity per capita and profit share of output.

#### Labor share is declining for workers

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D. Fact 4: The Labor Share Has Declined

Figure 4 demonstrates the steady decline in the labor share of output in the United States since the early 1980s (Karabarbounis and Neiman 2014; Elsby, Hobijn, and Sahin 2013; Lawrence 2015). Kehrig and Vincent (2018) highlight an even stronger drop in the labor share in US manufacturing sector between the late 1960s and early 2010s. This trend has also an international nature, as highlighted by Karabarbounis and Neiman (2014) and Autor et al. (2017b).

**[Figure 4 for Reference]**

Chart, line chart

Description automatically generated

## advantage – internet

## t per se

#### CI: “Anticompetitive business practice” refers to an enterprise’s pattern of behavior that wrongs consumers and competitors. Courts use a “wide standard.”

TOBRINER, J., Associate Justice of California Supreme Court, ’72, Barquis v. Merchants Collection Assn. , 7 Cal.3d 94

In 1938 the United States Congress amended the Federal Trade Commission Act to give the commission authority to regulate "unfair or deceptive acts or practices" (italics added), in addition to its original powers over "unfair methods of competition"; as the United States Supreme Court has observed, the addition of this "unfair ... practices" language, represented "a significant amendment showing Congress' concern for consumers as well as for competitors." (Italics added.) (FTC v. Colgate Palmolive Co. (1965) 380 U.S. 374, 384 [13 L.Ed.2d 904, 913, 85 S.Ct. 1035]; see FTC v. R.F. Keppel & Bros., Inc. (1934) 291 U.S. 304, 310 [78 L.Ed. 814, 818, 54 S.Ct. 423]; FTC v. The Sperry & Hutchinson Co. (1972) 405 U.S. [7 Cal.3d 110] 233, 244 [31 L.Ed.2d 170, 179, 92 S.Ct. 898].) Section 3369's parallel broad proscription of "unlawful [or] unfair ... business practice[s]" illustrates no less a concern for wronged consumers. Moreover, the section demonstrates a clear design to protect consumers as well as competitors by its final clause, permitting inter alia, any member of the public to sue on his own behalf or on behalf of the public generally. If the Legislature had been solely concerned with protection against the evil of unfair competitive advantage, it would certainly have more narrowly circumscribed the class of persons permitted to institute such actions. fn. 11

Given this strong statutory indication that section 3369 is not confined to anti-competitive business practices, we cannot be surprised that the courts, in interpreting the section, have long declared that the provision is at least as equally directed toward "the right of the public to protection from fraud and deceit[,]" as toward the preservation of fair business competition. (Italics added.) (American Philatelic Soc. v. Claibourne (1935) 3 Cal.2d 689, 698 [46 P.2d 135].) In People ex rel. Mosk v. National Research Co. of Cal. (1962) 201 Cal.App.2d 765, 771 [20 Cal.Rptr. 516], the court directly confronted the contention proffered by defendant in the instant case and held that "[t]he equitable relief authorized by Civil Code section 3369 is not circumscribed by any prerequisite showing that the conduct in question be limited to the field of business competition." (See [7 Cal.3d 111] also Athens Lodge No. 70 v. Wilson (1953) 117 Cal.App.2d 322, 325 [255 P.2d 482].)

We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices. (Cf. Vasquez v. Superior Court (1971) 4 Cal.3d 800, 807-808 [94 Cal.Rptr. 796, 484 P.2d 964].) Given the terms of the section, the purpose of the enactment and the controlling precedent, we reject defendant's suggested limitation of section 3369 to "anti-competitive" business practices.

Defendant additionally contends, however, that even if section 3369 is not limited to "competitive injuries," the section's proscription of "unfair competition" should not be read so broadly so as to include the agency's alleged misfiling practice; that, instead, the provision be confined to more traditional "deceptive" or "fraudulent" conduct, conduct sharing at least some of the common features of misrepresentation that characterized the precedent of "unfair competition." We recognize that most of the cases arising under section 3369 to date have challenged "business practices" in which a business enterprise was presenting itself, or its "merchandise," to the public in a deceptive manner so as to defraud consumers (see, e.g., Academy of Motion Picture, etc. v. Benson (1940) 15 Cal.2d 685 [104 P.2d 650]; American Philatelic Soc. v. Claibourne (1935) 3 Cal.2d 689 [46 P.2d 135]) and also that these decisions frequently refer to the "essence" of section 3369 as the protection from any conduct likely to deceive the consumer. (See, e.g., West v. Lind (1960) 186 Cal.App.2d 563, 567 [9 Cal.Rptr. 288].)

The language of section 3369, however, does not limit its coverage to such "deceptive" practices, but instead explicitly extends to any "unlawful, unfair or deceptive business practice"; the Legislature, in our view, intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. fn. 12 Indeed, [7 Cal.3d 112] although most precedents under section 3369 have arisen in a "deceptive" practice framework, even these decisions have frequently noted that the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable "'new schemes which the fertility of man's invention would contrive.'" (American Philatelic Soc. v. Claibourne (1935) 3 Cal.2d 689, 698 [46 P.2d 135].) As the Claibourne court observed: "When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem." (3 Cal.2d at pp. 698-699; see, Ojala v. Bohlin (1960) 178 Cal.App.2d 292, 301 [2 Cal.Rptr. 919]; accord, FTC v. The Sperry & Hutchinson Co. (1972) 405 U.S. 233, 240 [31 L.Ed.2d 170, 177, 92 S.Ct. 898].) With respect to "unlawful" or "unfair" business practices, section 3369 specifically grants our courts that power.

In permitting the restraining of all "unfair" business practices, section 3369 undeniably establishes only a wide standard to guide courts of equity; as noted above, given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate. In the instant case, however, we need not undertake the task of determining the "fairness" of defendant's alleged conduct in light of contemporary standards, because insofar as defendant's alleged practice involves the repeated violation of specific venue statutes, the practice is enjoinable under section 3369 as an "unlawful ... business practice," totally apart from its inherent "fairness." As originally enacted in 1933, section 3369 defined "unfair competition" only in terms of "unfair or fraudulent business practice[s]"; most of the reported cases, dealing in deceptive conduct, arose under the statute as so worded. In 1963, however, the Legislature amended section 3369 to add the word "unlawful" to the types of wrongful business conduct that could be enjoined. Although the legislative history of this amendment is not particularly instructive, fn. 13 nevertheless, as one [7 Cal.3d 113] commentator has noted "it is difficult to see any other purpose than to extend the meaning of unfair competition to anything that can properly be called a business practice and that at the same time is forbidden by law." (Note, Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition (1968) 19 Hastings L.J. 398, 408-409.)

#### "Business practices" are defined by common law, case-by-case evaluation.

Associate Justice Ming W. Chin, '99, Cel-Tech Communications v. La Cellular, 973 P. 2d 527 - Cal: Supreme Court 1999

Until today, no case has held or even suggested that the unfair competition law's prohibition of "any unfair ... business act or practice" was a prohibition of penumbral antitrust threats, or that it was not a prohibition of deceptive conduct that harms competitors. Without citing any evidence of legislative intent, the majority insists nonetheless that its definition of unfair business practices is correct because in its view section 3369 as amended by our Legislature in 1933 was intended to "parallel" section 5 of the Federal Trade Commission Act (15 U.S.C. § 45; hereafter the FTC Act), the federal statute that created the Federal Trade Commission (hereafter FTC). (Maj. opn., ante, at 83 Cal.Rptr.2d p. 565, 973 P.2d at p. 544.) Section 5 of the FTC Act as enacted in 1914 originally prohibited "unfair methods of competition" (38 Stat. 719). In 1938, Congress amended section 5 to include "unfair or deceptive acts or practices" in order to expand the FTC's jurisdiction to encompass deceptive and unfair conduct that injured consumers without harming competitors. (52 Statutes at Large 111, the Wheeler-Lea Act of 1938; see also FTC v. Sperry & Hutchinson Co. (1972) 405 U.S. 233, 244, 92 S.Ct. 898, 31 L.Ed.2d 170.) The FTC's jurisdiction under section 5 extends both to antitrust threats to competition and to deceptive business practices that injure competitors or consumers. (FTC v. Sperry & Hutchinson Co., supra, 405 U.S. 233, 239-246 & fn. 5, 92 S.Ct. 898, 31 L.Ed.2d 170.) There is not a shred of evidence, however, that California's section 3369 is patterned 572 \*572 after section 5 of the FTC Act, and in Landowitz, supra, 20 Cal.2d 418, 126 P.2d 609, we reached the quite different conclusion that section 3369's prohibition of any "unfair... business practice" was intended to incorporate common law unfair competition.[2]

The majority's reliance on this court's statement in Barquis v. Merchants Collection Assn., supra, 7 Cal.3d 94, 110, 101 Cal. Rptr. 745, 496 P.2d 817, characterizing the unfair competition law's prohibition of any "unlawful [or] unfair ... business practice" and section 5 of the FTC Act as "parallel broad proscription[s]" is misplaced. The parallelism to which Barquis referred was the fact that section 5 of the FTC Act and our unfair competition law both protect consumers as well as competitors, not that both prohibited penumbral antitrust threats. (See 7 Cal.3d at pp. 109-110, 101 Cal.Rptr. 745, 496 P.2d 817.)

Nothing in Barquis v. Merchants Collection Assn., supra, 7 Cal.3d 94, 101 Cal.Rptr. 745, 496 P.2d 817 even hinted that unfair business practices, however broad a concept, were to be equated with penumbral antitrust threats. To the extent Barquis might be read to suggest that the term "unfair ... business practice" has an amorphous meaning extending in some undefined fashion beyond deceptive conduct, that suggestion is entirely dictum, for the issue decided in that case was whether the business practice in question was unlawful, not whether it was unfair. The suggestion is also unsound. Not only is it contrary to the historical development of the unfair competition law explained above, but it is based on Barquis's misquotation of the unfair competition law. In substituting the word "deceptive" for the 573 \*573 word "fraudulent," Barquis suggested that unfair practices were a category distinct from deceptive practices. (Compare § 3369 [prohibiting any "unlawful, unfair or fraudulent business practice"] with Barquis, supra, at p. 111, 101 Cal.Rptr. 745, 496 P.2d 817 [quoting section 3369 as prohibiting any "`unlawful, unfair or deceptive business practice'" (italics omitted) ].)[3]

Moreover, the majority misunderstands the term "unfair methods of competition" in section 5 of the FTC Act to mean only penumbral antitrust threats. (See maj. opn., ante, 83 Cal.Rptr.2d at p. 565, fn. 11, 973 P.2d at p. 544, fn. 11; id. at p. 566, 973 P.2d at p. 544.) As interpreted by the FTC and the federal courts, that phrase covers not only the penumbral antitrust threats the majority focuses on but also actual violations of the antitrust law and in addition acts of unfair competition having nothing to do with antitrust law, including passing off and other forms of common law unfair competition and consumer deception. (See, e.g., FTC v. Sperry & Hutchinson Co., supra, 405 U.S. 233, 243, 244, 92 S.Ct. 898, 31 L.Ed.2d 170 ["unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws"]; Sears, Roebuck & Co. v. Federal Trade Commission (7th Cir.1919) 258 F. 307, 311 [the first FTC enforcement action to be judicially reviewed, a case of deceptive advertising; "The commissioners, representing the government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers...."]; FTC, Ann. Rep. (1935) 67-71 [Listing 27 "unfair methods of competition" prohibited by the FTC: "9. Passing off goods or articles for well and favorably known products of competitors through appropriation or simulation of such competitors' trade names, labels, dress of goods, etc ...."], quoted in Handler, Unfair Competition (1936) 21 Iowa L.Rev. 175, 244-248; Bailey & Pertschuk, The Law of Deception: The Past as Prologue, supra, 33 Am. U. L.Rev. 849.)

Nor is there any other sound reason for presuming that our Legislature intended section 3369 to incorporate the antitrust portion of section 5 of the FTC Act.' In amending section 3369 in 1933 to authorize injunctive relief against "[a]ny person performing or proposing to perform an act of unfair competition," the Legislature was acting in a field already well established by the common law. There is no reason to suppose that, without any express statement, the Legislature implicitly intended to reject the common law definition of unfair competition and adopt instead antitrust law as the definition of unfair competition. The majority offers no 574 \*574 explanation why, if the Legislature in 1933 had wished to expand the scope of the antitrust laws to reach penumbral antitrust threats, it would have chosen the roundabout method of using a term—"unfair competition"—with an established meaning independent of antitrust law and amending a Civil Code provision relating to the general availability of injunctive relief, rather than directly amending California's antitrust law, the Cartwright Act, in terms that clearly evidenced its intent to broaden the scope of antitrust law. This is especially so if by its reference to "the antitrust laws" the majority includes federal antitrust law. It would be most implausible for the Legislature, if it intended to incorporate the entire body of federal antitrust law, the law of another sovereign, to seek to do so implicitly simply by using the term "unfair ... business practice" without any reference to federal law. Given the absence of any evidence that the Legislature intended to vary or reject that common law understanding of unfair business practices as practices that harm competitors by deceiving customers, the only reasonable conclusion is that the Legislature intended to adopt that understanding. This is the conclusion our court reached in Landowitz, supra, 20 Cal.2d 418,126 P.2d 609.

10:22

#### Division between per-se and rule of reason is arbitrary – per se refers to practices that are unreasonable per se.

Lee LOEVINGER, Assistant Attorney General in charge of the Antitrust Division U. S. Department of Justice , ’61, “THE RULE OF REASON IN ANTITRUST LAW” DOJ. Prepared for Delivery Before the AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW https://www.justice.gov/atr/speech/file/1237731/download

In this opinion, the Court stated that the antitrust law embraced acts which, because of their inherent nature, effect or purpose, restrained trade or restricted competition. It said that the statute did not forbid normal and usual contracts to further trade by resorting to all normal business methods. The Court said that the rule of reason was not that acts which the statute prohibited could be removed from its prohibitions by a shoving that they were reasonable, but that the duty to interpret the term restraint of trade required a reasonable meaning which would not destroy the individual right to contract and carry on trade.

As might be expected, the promulgation of this rule of reason resulted in an attempt by defendants to justify every restrictive combination that was attacked on the grounds that, in the light of all the economic facts and conditions, the particular practice assailed is reasonable. The courts have responded to this by developing a doctrine of so-called "per se" violations which are held to be prohibited by the antitrust laws regardless of any asserted justification or alleged reasonableness. Such category of violations are sometimes referred to as "unlawful per se" 8/ and it is sometimes said that such acts are illegal per se regardless of their reasonableness. 9/ However such a view suggests an arbitrary holding which, in my opinion, is not justified by an analysis of the cases themselves. Rather, I think the correct analysis is indicated by the statement of the Court in the Socony-Vacuum case that "Agreements for price maintenance...are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition \*\*\* "10/ and by the statement in certain later cases that tie-in agreements and similar arrangements are "unreasonable per se" 11/. This view seems to be that which the Court itself is now taking as indicated by the statement in the Northern Pacific decision that "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conslusively presumed to be unreasonable and, therefore, illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 12 In the opt phrase of a recent decision, such practices are "intrinsically unreasonable

". 13/

In this view, the distinction to be made between the categories of acts which are prohibited by the antitrust laws is between those which are intrinsically and those which are extrinsically unreasonable. Acts which are intrinsically unreasonable violate the antitrust laws because their inherent character is so restrictive of competition that the courts will not undertake an elaborate economic inquiry into their purposes, tendencies or effects, or into the circumstances giving rise to their adoption and use.

## cp michigan advantage

### advantage cp – 2ac

#### Doesn’t solve advantage two – “not repeal” doesn’t make sense cuz already happened, BUT consumer suits are more responsive and lock in openness – that’s Ohlhausen, AND...

Wheeler ’21 [Tom; visiting fellow in Governance Studies at The Brookings Institution. “Restoring non-discrimination to the 21st century’s most important network”. Brookings. Feb 25 2021. https://www.brookings.edu/blog/techtank/2021/02/25/restoring-non-discrimination-to-the-21st-centurys-most-important-network/]

NET NEUTRALITY’S MAGINOT LINE

The ongoing challenge of regulatory oversight in an era of rapid technological change is to maintain the flexibility to deal with unanticipated developments. What is essential for the future of meaningful net neutrality, therefore, is the agility to adjust to new technology and new marketplace behaviors. It was for this reason that the Obama decision included a “General Conduct Rule” that empowered the agency to determine whether the action of an ISP was “just and reasonable.” The inquiry into self-preferencing started by the Obama FCC, for instance, was based on whether the practice violated the General Conduct Rule. The companies hated the General Conduct Rule because it gave the FCC continuing oversight of their internet activities.

No doubt, when the Biden FCC revisits the net neutrality question, the ISPs and their allies will again fight what they will describe as the “regulatory uncertainty” of the General Conduct Rule. If they succeed in defining net neutrality as only blocking and throttling, the ISPs will have created a digital Maginot Line.

Like the Maginot Line that proved of no value at the outset of World War II, a fixed set of rules would be easy for a nimble network to get around. To encase the FCC’s open internet activities in the concrete of rigid rules would be as foolish as to entrust the defense of France to concrete fortifications at a time of the rapid blitzkrieg.

#### Adaptability – case-by-case oversight is more effective than ex-ante rules.

Shelanski ’18 [Howard; Professor of Law @ Georgetown University; Partner @ Davis Polk & Wardwell LLP; “Antitrust and Deregulation,” 127 Yale L.J. 1922; May 2018; Lexis]

B. Testing Comparative Advantages of Antitrust and Regulation

A longstanding debate examines the comparative advantages of antitrust and regulation. The late Cornell economist Alfred Kahn, the architect of airline deregulation in the Carter Administration, wrote that "society's choices are always between or among imperfect systems, but that, wherever it seems likely to be [\*1952] effective, even very imperfect competition is preferable to regulation." 117 Kahn does not address antitrust in that quotation, but it suggests that he would find antitrust law's more targeted, case-by-case approach to governing competition to be preferable to regulation. Indeed, Kahn elsewhere wrote, while expressing his "belief in vigorous enforcement of the antitrust laws," that "the antitrust laws are not just another form of regulation but an alternative to it--indeed, its very opposite." 118 Then-Judge Stephen Breyer has similarly stated that "antitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative." 119

The comparisons that Breyer and Kahn made were, in context, mostly between antitrust and rate regulation, where the agency was trying to protect consumers from monopoly pricing. 120 But some of these criticisms, including "high cost; ineffectiveness and waste; procedural unfairness, complexity, and delay; unresponsiveness to democratic control; and the inherent unpredictability of the end result," apply to most kinds of regulation. 121 Regulation might well be worthwhile despite those potential drawbacks, but certain attributes--ex post and case-by-case enforcement, judicial oversight with the government bearing the burden of proof--make antitrust enforcement less vulnerable to those critiques.

Regulation can also be comparatively slow to adapt to new market conditions, and that delay can affect an entire regulated industry. 122 Antitrust authorities also might fail to foresee relevant market changes, but their actions typically affect only one discrete case and they generally have flexibility, as conditions change, to modify relevant consent decrees and decline to pursue similar investigations or sanctions. 123 It is harder for government agencies to make changes [\*1953] to established regulatory programs, 124 making regulation more likely than antitrust to outlast the problems it was implemented to solve. Regulation's delayed adaptation to changing conditions can be costly, 125 especially as markets transition to more competitive structures. 126 As Michael Boudin, a former DOJ antitrust official (and later federal judge) put it, "regulation almost always will be very difficult to dislodge, even if it proves mistaken. Almost any regulatory regime will develop a constituency, armed with congressmen and self-interested bureaucrats . . . [and] become[] the foundation on which private arrangements are constructed, arrangements that cannot easily be discarded." 127

As discussed, the comparative drawbacks of regulation do not mean that antitrust is without its faults. 128 On the whole, however, Breyer captured the consensus that, where feasible, antitrust is a preferable alternative to regulation. 129 The key question, then, is: when is antitrust a "feasible" alternative? One way to reframe the question is this: when will antitrust do a good enough job governing market performance in otherwise-regulated industries that policymakers can avoid the more prescriptive, administrative process of promulgating regulations to solve perceived market failures? That is a question that can be better answered if antitrust enforcement steps into the gaps left by deregulation.

### conditionality – 2ac

## cp states

### 2AC – AT: States CP

#### States get pre-empted – *Trinko* and *Credit Suisse* preclude antitrust claims under state law.

Richard Brunell 14. General Counsel of the American Antitrust Institute, Washington, DC; former senior adviser for competition matters at the FTC. “The Roberts Court Turn to the Left?”. Antitrust, Vol. 28, No. 3, Summer 2014. https://www.antitrustinstitute.org/wp-content/uploads/2014/10/Brunell-The-Roberts-Court-Turn-to-the-Left.pdf

Preemption. A pending certiorari petition in an antitrust preemption case, Oneok v. Learjet,38 involves an approach towards regulatory immunity that is arguably outside the antitrust mainstream. In Oneok, the Ninth Circuit held that the Natural Gas Act did not preempt class actions under state antitrust law seeking damages for commercial and industrial purchasers of natural gas harmed by a price-fixing conspiracy in deregulated natural gas markets that was partly responsible for the California energy crisis of 2000–2001.

The Justice Department and the CFTC had brought civil and criminal fraud claims against some of the individuals and energy firms engaged in the market manipulation; FERC also investigated and obtained some forward-looking relief.39 The Ninth Circuit held the state antitrust claims were not preempted by FERC’s “exclusive jurisdiction” over practices affecting wholesale natural gas rates insofar as some of the con- duct at issue (as well as plaintiffs’ injuries) involved retail sales over which states have long had jurisdiction and other “non- jursidictional sales.” The certiorari petition claims there is a conflict based on decisions of the Tennessee and Nevada Supreme Courts that dismissed on field preemption grounds somewhat similar claims arising out of the same misconduct. Ironically, the state courts adopted a relatively expansive interpretation of the preemptive scope of the Natural Gas Act while concluding that state antitrust enforcement under- mined “national uniformity and freedom from burdensome government intervention.”40 At the Court’s invitation, the Solicitor General filed an amicus brief supporting preemption but arguing that certiorari should be denied because there is no conflict and the regulatory environment has changed.41

The Solicitor General (and the Ninth Circuit for that matter) did not consider that the plaintiffs’ antitrust claims were not necessarily preempted even if FERC had jurisdiction over all the practices at issue because state antitrust laws are laws of general applicability, like those against fraud and theft, as to which field preemption under the Natural Gas Act does not apply.42 To be sure, the Roberts Court’s expansion of regulatory immunity (Credit Suisse, linkLine’s gloss on Trinko)43 might suggest that the Court would not be sympathetic to antitrust class action claims—federal or state—that challenge conduct subject to regulation and potential relief by FERC and other agencies. On the other hand, even as it has expanded the notion of what constitutes an “actual conflict” between regulation and antitrust, the Court has not elimi- nated the analysis altogether when it comes to implied regu- latory immunity under the federal antitrust laws.44 And there is little logic in applying a different standard to the preemption of parallel state antitrust laws.45 So it would not be sur- prising for the Court, if it reaches the issue, to reject petitioners’ sweeping field preemption theory under which FERC’s mere jurisdiction to regulate would completely oust state antitrust claims. Relatedly, it seems plausible that when and if a circuit conflict arises in connection with the lower courts’ expansion of the filed rate doctrine to bar treble- damages claims in connection with FERC “market-based” (i.e., deregulated) rates, the Court will rein in the doctrine.46

## cp cil

### cil – 2ac

#### Constitutional retrogression causes nuclear war.

Robin West, Professor of Law, Georgetown University Law Center, The Constitution's Political Deficit, Harvard Law and Policy Review, December 4, 2006, http://www.hlpronline.com/2006/07/west\_01.html.

This allocation of labor -- the Court engages in ennobling moral reasoning about good government and therefore in the philosophical and moral arts of politics, while the Congress does nothing but act, on the basis of its own or constituent "preferences" - occasions what I am calling the "political deficit." The "legal question doctrine" transforms political questions about the nature of good governance into legal questions. The work remaining for the political branch? Horse trading at best. True politics has been given over to courts. II. The "Legal Deficit" Although this might initially seem paradoxical, the combination of what Levinson calls the "democratic deficit" and what I am calling the "political deficit" inherent in U.S. constitutional law and practice lends aid, from time to time in our history, to profoundly lawless, asocial and destructive impulses. By so denigrating the law-maker, we denigrate her product, which is ordinary law. Thus, the "legal deficit." Of course, our constitutional text and practice have, on a handful of important occasions, given "constitutional" comfort to a highly principled natural law. In such cases, text and practice have been a friend and ally to moral and righteous civil disobedience against unjust majoritarian inclinations, as expressed in morally noxious and politically destructive legislative action.6 Less remarked upon, however, is that our constitutional practice has also given constitutional comfort to the anti-legalist instincts of a very different and what might be called "hyper-individualist" strand of anti-legalism: a frontier-conquering, gun-wielding, tax-protesting, border-protecting, conception of liberty, which seeks, with constitutional help, to free the individual of all obligations to the social compact, neighbors, states, and even families, much less to the very "beloved community" of which Dr. King so eloquently spoke.7 Likewise, these days our anti-legalistic and anti-legislative constitutional practices give aid to the President, who seeks constitutional blessing for his instinct to be freed from ties not only under the domestic law that seeks to constrain his reach,

but under international laws, treaties, conventions, and covenants that might do so as well.8 The constitutional and, hence, anti-legalist obligations and entitlements of such a commander-in-chief might well "trump" in his own mind and in his office the petty duties of fidelity to ordinary law. We ought to view both phenomena as dangerous. Hyper-individualism can morph into a narcissistic and costly recklessness, just as a militarist executive unleashed from legal bonds, as well as other sorts of bonds that strengthen and recognize our shared humanity, might imperil the planet. A constitutional practice that preaches relentless suspicion of ordinary, voted-upon law, that persistently sees in politics the worst in us, and sees in a document that protects us against our ordinary politics the best of us, winds up casting a pall of potential illegitimacy over the legislative product. Constitutionalism preaches distrust of both majoritarian politics and of its product, ordinary law. This effect of Constitutionalism is what I'm referring to as the "legal deficit."

## da cptx

### court politics – 2ac

#### The court will kill abortion no matter what – but they’ll avoid political pressure by choosing the Mississippi case, not the Texas case – postdates their ev by six months

Ziegler 11/3 – Mary Ziegler, author of books on abortion, guest contributor to the NY Times, “We Can Now See the Playbook for Overturning Roe v. Wade,” 11/3/21, https://www.nytimes.com/2021/11/03/opinion/roe-v-wade-texas-abortion-sb8.html

After Monday’s Supreme Court oral arguments, the writing seems to be on the wall for Senate Bill 8, the Texas law that bans abortion starting about six weeks after a person’s last menstrual period and that hands enforcement to private citizens. It now looks as though two conservative justices may flip on the Texas law and put it in jeopardy — while clearing the way for the ultimate goal of overturning Roe v. Wade next year.

S.B. 8 looked for a while like a kind of Faustian bargain between the Supreme Court’s conservative supermajority and state legislators: The justices could all but eliminate abortion access in Texas without inciting the kind of political backlash for conservatives that seems likely to come from openly reversing Roe v. Wade. And Republican state lawmakers could rally base voters (a key strategy for today’s G.O.P.) and soothe anti-abortion leaders in the state, including self-proclaimed abortion abolitionists, who have accused some Republicans of being weak on the issue. S.B. 8 allowed the state to appease these activists by banning abortion well before the point of fetal viability — which is unconstitutional under Roe — without the risk of losing in federal court and having to pay attorneys’ fees.

At this week’s arguments, it certainly sounded as if most of the conservative justices were no longer interested in such a deal. But it’s not because they are sympathetic to abortion rights. There are strong reasons to believe that the justices calculated that they need political cover for overturning or badly damaging Roe v. Wade later this Supreme Court term — and this Texas law just might give it to them.

To understand the various dynamics at play, it’s important to look more closely at why the justices might not like the Texas law as a vehicle to undermine abortion rights, especially when a major Roe-targeted case will be argued before them in early December. S.B. 8 is the result of conservatives’ decades-long quest for a bulletproof abortion ban — one that’s exceedingly difficult, if not impossible, to challenge in federal court.

In recent years, some states relished the thought of passing blatantly unconstitutional laws tailor-made for this Supreme Court. Texas, by contrast, forked over more than $2 million in attorneys’ fees after losing a 2016 Supreme Court abortion case, Whole Woman’s Health v. Hellerstedt. After that experience, the state’s lawmakers wanted to maximize reward while limiting risk: a ban on abortions very early in pregnancy that no federal court could touch.

State officials got something close to that with S.B. 8. Because of the way the law was crafted, Texas argued that the only way to raise constitutional challenges to it would be after providers were sued — and then only as a defense. Providing abortions would turn into a game of Whac-a-Mole, and many abortion providers, afraid of limitless legal liability, would lose almost by default.

The Supreme Court let S.B. 8 go into effect on Sept. 1 and then wrote a cryptic order explaining that abortion providers might not have a case that belonged in federal court.

During Monday’s oral arguments, though, it appeared that as many as six justices did not see S.B. 8 as so ingenious. Justice Brett Kavanaugh, widely watched as a potential deciding vote in the case, asked whether states could create an S.B. 8-style law going after gun rights or the freedom of religion.

Part of the conservative justices’ seeming hesitation might come down to defending the court’s own power. The justices may indeed plan to gut abortion rights, and soon, but that does not mean that they want to hand states the authority to ignore whichever constitutional protections they wish.

If Justice Amy Coney Barrett and Justice Kavanaugh are leaning toward allowing abortion providers to challenge S.B. 8 in federal court, as they seemed to be on Monday, it will be about politics as much as power. Both justices seem sensitive to popular opinion and political context: Justice Barrett recently felt the need to proclaim in a speech that the justices are not “partisan hacks,” while Justice Kavanaugh clearly has a desire to be respected by his intellectual peers and an awareness of the potential institutional consequences of his decisions.

The Supreme Court’s reputation has taken a nosedive, dipping almost 20 points over the course of a year. In addition, a record percentage of Americans think that the court is too conservative. It is easy to see why. The court is tackling one culture-war issue after another, from abortion to guns and back again — and climate change, too.

As far as abortion goes, all evidence suggests that the conservatives on the court are gunning for Roe. If they overturn the 1973 ruling, they would eviscerate a decision that a majority of Americans say they support and dismantle a compromise — abortion is legal, but it’s restricted — that many Americans seem to like.

So if the court’s conservative justices decide to let abortion providers sue in federal court, that is not necessarily a sign that they’ve gone soft on Roe. Instead, they may want a way to go after Roe v. Wade in the near future without giving up on the narrative that they are above politics. They have already teed up a case out of Mississippi, Dobbs v. Jackson Women’s Health Organization, that will address whether states can ban abortion before fetal viability — or whether there is a right to abortion at all. Oral arguments in that case are scheduled for Dec. 1, with a decision expected next June.

It may turn out that the court’s conservative justices, just like Texas lawmakers, would rather skirt accountability. They want Americans to believe that if Donald Trump all but promised an end to Roe and the Supreme Court justices he appointed deliver just that, partisan politics will have had nothing to do with it. And handing Texas a loss over S.B. 8 might make that fairy tale a bit more believable.

“insulated from political pressures”—fuck that. there is a 6-3, they were put there expressly to overturn roe and it is the culmination of a 30 year conservative project. 5 justices will overturn even if roberts doesnt. neg can be right they want to avoid political pressure BUT that means they overturn roe by choosing dobbs (and upholding MI’s law) to overturn roe but will still strike down the texas law to avoid the like... controversy.

impact—abortions inev—the impact isnt U.S. lead good it’s less babies good, but... ppl will... get abortiosn anyway

#### Aff lower courts

Shelanski ’18 [Howard; Professor of Law @ Georgetown University; Partner @ Davis Polk & Wardwell LLP; “Antitrust and Deregulation,” 127 Yale L.J. 1922; May 2018; Lexis]

A situation in which "[t]here is nothing built into the regulatory scheme which performs the antitrust function," where the Court would allow antitrust enforcement, 136 differs significantly from the very specific, actively enforced competition regulation of the 1996 Act. But the Court does not tell us how close to "nothing" the competition-oriented regulation must be before antitrust can play a role in the marketplace. The problem is particularly important in markets undergoing deregulation, where change may be gradual and piecemeal. Indeed, the very rules at issue in Trinko gradually weakened and then ceased to exist within a few years, even though the underlying statutory authority remained in place. In cases where such piecemeal deregulation occurs, or where an agency simply stops enforcing its rules, it is unclear at what point the incremental value of antitrust is high enough that it can be enforced in the deregulating market. Significant anticompetitive harm could occur if the agency is deregulating over time, but antitrust can supplement the weakening regulatory structure only when there is "nothing" left of that structure to govern competition. As with Credit Suisse, well-grounded antitrust challenges in markets undergoing deregulation could present lower courts with good cases through which to limit Trinko [\*1956] to its particular circumstances while narrowing the sweep of the decision's prudential recommendations. Such a narrowing would be good for antitrust enforcement generally, but is particularly important for the availability of antitrust to counter a strong deregulatory cycle.

## \*\*da midterms

### 2AC – AT: Midterms

#### Too many thumpers

Schoen 9-12-21

(Douglas E. Schoen is a political consultant who served as an adviser to President Clinton and to the 2020 presidential campaign of Michael Bloomberg https://thehill.com/opinion/campaign/571868-without-drastic-changes-dems-are-on-track-to-lose-big-in-2022)

Simply put, the current 2022 outlook for Democrats is grim — and it could get even worse. If the Biden administration continues to push unnecessarily big government spending initiatives and tax increases, along with weak immigration policies and an incoherent foreign policy strategy, Democrats could suffer the most substantial midterm loss of any party in recent history.

## da securities

### econ da – 2ac

#### Collapse inevitable – financial sector immunity from antitrust risks another crisis.

Weinstein ’19 [Samuel; Assistant Professor of Law @ Benjamin N. Cardozo School of Law; Former Counsel to the Assistant Attorney General @ U.S. Department of Justice's Antitrust Division; “Financial Regulation in the (Receding) Shadow of Antitrust”. 91 Temp. L. Rev. 447. Spring 2019. Lexis]

Increased concentration across the economy is prompting a renewed national conversation about the appropriate role of antitrust. Indeed, there are strong indications that a number of key industries have become less competitive in recent years. In April 2016, the White House Council of Economic Advisers released an issue brief asserting that "competition appears to be declining in at least part of the economy." 1 President Obama issued an accompanying executive order, which outlined steps to increase competition. 2 The Economist observed in 2016 that, "[a]fter a bout of consolidation in the past decade," commercial air travel in the United States "is dominated by four firms with tight financial discipline and many shareholders in common" and "[w]hat is true of the airline industry is increasingly true of America's economy as a whole." 3 Economic policy experts have warned that "[t]here's no question that most industries are becoming more concentrated" 4 and "[i]n nearly every sector of the economy, the largest firms have more market share than they did in the late 1990s." 5 The most profitable of those firms earn "persistently high" returns "undiminished by competition." 6 These experts question whether "[l]ack of [c]ompetition" is "[s]trangling the U.S. [e]conomy." 7

These concerns would suggest an enhanced role for antitrust law and for the federal antitrust enforcement agencies, which protect competition through merger control, investigations of anticompetitive conduct, and criminal enforcement. 8 There is persuasive evidence that the Federal Trade Commission [\*450] and the Antitrust Division of the U.S. Department of Justice indeed have been more active in the past several years, 9 but there are limits on the anticompetitive conduct federal antitrust enforcers (and private plaintiffs) can reach, especially in regulated markets. 10 This is due in part to the doctrine of implied antitrust immunity: when a court perceives a conflict between the antitrust laws (e.g., the Sherman Act) and a regulatory regime (e.g., the securities laws), it may find immunity for conduct that otherwise would violate the antitrust laws. Two Supreme Court decisions in the 2000s threatened to shift the balance between regulation and antitrust enforcement by expanding the reach of implied antitrust immunity and other forms of regulatory displacement of antitrust. In Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP 11 and Credit Suisse Securities (USA) LLC v. Billing, 12 the Court appeared to restrict the reach of antitrust in regulated markets, increasing the likelihood that courts will find that regulation displaces antitrust entirely, especially in the financial sector. A number of scholars raised significant concerns about the effects this shift might have on competition in regulated markets and recommended that courts read Trinko and Credit Suisse narrowly or otherwise limit their holdings. 13 The [\*451] antitrust enforcement agencies warned that these cases could reduce or eliminate their ability to protect competition in markets subject to regulation. 14

To date, the worst of these fears has yet to be realized. This Article's review of lower court decisions from the decade since the Supreme Court decided Credit Suisse shows that Trinko and Credit Suisse have had a surprisingly limited impact in many regulated markets. While defendants in a range of cases have relied on Trinko and Credit Suisse to seek antitrust immunity or argue that regulation is sufficient to protect competition, outside the financial sector courts have applied those cases narrowly to preserve antitrust's role. 15 The story is different for cases involving the financial markets, however. There, courts have been more willing to find implied antitrust immunity or that regulation otherwise supplants antitrust. 16 As a result, it appears that the task of confronting heightened concentration and reduced competition in the financial sector increasingly will fall to the sector regulators, especially the U.S. Securities & Exchange Commission (SEC) and the U.S. Commodity Futures Trading Commission (CFTC).

These agencies are not particularly effective guardians of competition, however. 17 There are several explanations for this. In most cases, competition [\*452] policy and enforcement are not among the sector regulators' primary missions. 18 Many do not have sufficient competition expertise or adequate competition staff, and competition enforcement may clash with other agency priorities, such as preserving systemic soundness. Capture 19 of sector regulators also is a concern and may reduce incentives for agencies to undertake actions against the best interests of bigger firms in regulated markets, including promoting competition from new entrants or smaller players. 20 As a result, competition in financial markets may suffer as antitrust is displaced by regulations enforced by agencies poorly suited to the task of preserving and promoting competitive markets.

Declining competition in financial markets presents serious problems. Concentration in these markets increases the costs of doing financial business. 21 Prices rise as a small group of banks dominates trading. 22 More ominously, [\*453] systemic financial soundness may be threatened as the biggest banks maintain or increase their market shares in financial products. 23 Big banks may use their market power to evade or defeat Dodd-Frank's safety requirements, especially in the derivatives markets. 24 And, to the extent concentration is linked to the types of interconnectedness that lead to financial contagion, lack of competition enforcement might increase the risk of another financial crisis.

The stakes are high and effective solutions have yet to emerge. Scholars have proposed judicial, legislative, and agency-reform approaches to protecting competition in regulated markets, but none of these methods have proved successful in the financial sector. 25 This Article addresses the problem from a regulatory-design perspective and asks, given Trinko and Credit Suisse, how should Congress and financial-sector regulators structure statutes, regulations, and other administrative guidance in light of antitrust's diminished role in these markets? The Article focuses on Dodd-Frank's regulatory regime for the derivatives sector as a case study. The derivatives markets are among the financial system's largest and most important. 26 Their notional size (the face value of outstanding over-the-counter derivatives contracts), which has ranged in recent years from $ 500 to $ 700 trillion, is many times larger than the entire world economy. 27 And these markets continue to grow. 28 They pose both competition [\*454] challenges and significant systemic risks. 29 Commentators have described the derivatives markets as "[t]he greatest risk of all" 30 and "[t]he world's scariest story." 31

The derivatives markets are widely recognized as having played a key role in the 2008 financial crisis. 32 One of Dodd-Frank's central goals was to ensure that most derivatives transactions are centrally cleared (thereby reducing systemic risk) and traded on exchanges (thereby limiting pricing opacity and promoting competition). 33 The increased significance of derivatives clearinghouses and exchanges in the Dodd-Frank regulatory scheme raises the danger that firms controlling these entities could exclude derivatives-trading rivals who need access to complete their swaps. 34 Such conduct could lead to reduced competition and higher prices in derivatives trading. Big-bank control of clearinghouses and exchanges also may give those firms the opportunity to manipulate the types of derivatives contracts that are exchange traded and centrally cleared, pushing certain contracts into the over-the-counter markets where the banks can charge higher prices. 35 To the extent central clearing of [\*455] derivatives trades reduces systemic risk (the key premise of Dodd-Frank's derivatives reforms), this outcome may threaten systemic soundness. Despite these risks, antitrust immunity may shield such conduct from attack, leaving sector regulators as the only bulwark against anticompetitive activity in these markets. But the CFTC and SEC appear generally unwilling or unable to actively enforce competition rules, creating a dangerous gap in oversight that large banks may use to their advantage. 36

#### Monopolization of regulated industries costs trillions in GDP and labor income.

Thomas Philippon 19. Max L. Heine Professor of Finance at the Stern School of Business at NYU. “The U.S. Only Pretends to Have Free Markets”. Adapted from *The Great Reversal: How America Gave Up on Free Markets*, Harvard University Press, 2019. The Atlantic. Oct 29 2019. <https://www.theatlantic.com/ideas/archive/2019/10/europe-not-america-home-free-market/600859/>

In the United States, meanwhile, antitrust enforcement has become less stringent, while the debate over market competition has become highly ideological and untethered from what data actually show.

A central argument of the Chicago school of antitrust—whose laissez-faire approach was influential in persuading American regulators to take a more hands-off attitude toward mergers—is that monopoly power is transient because high profits attract new competitors. If profits rise in one industry and fall in another, one would expect more entry of new firms in the former than in the latter. This used to be true—until the late 1990s.

Since about 2000, however, high profits have persisted, rather than attracting new competitors to the American market. This suggests a shift from an economy where entry acted as a fundamental rebalancing mechanism to one where high profits mostly reflect large barriers to entry. The Chicago school took free entry for granted and underestimated the many ways in which large firms can keep new rivals out.

What the Chicago school got right, however, is that some of these barriers to entry come from excessive regulations. In some industries, licensing rules directly exclude new competitors; in other cases, regulations are complex enough that only the largest companies can afford to comply.

Instead of debating more regulation versus less—as ideologues on the left and right tend to do—Americans should be asking which regulations protect free markets and which ones raise barriers to entry.

Creeping monopoly power has slowly but surely suffocated the middle class. From 2000 to 2018, the median weekly earnings of full-time workers increased from $575 to $886, an increase of 54 percent, but the Consumer Price Index increased by 46 percent. As a result, the real labor income of the typical worker has grown by less than one-third of 1 percent a year for nearly two decades. This explains in part why much of the middle class distrusts politicians, believes the economic system is rigged, and even rejects capitalism altogether.

What the middle class may not fully understand, however, is that much of its stagnation is due to the money that monopolists and oligopolists can squeeze out of consumers. Telecoms and airlines are some of the worst offenders, but barriers to entry also drive up the prices of legal, financial, and professional services. Anticompetitive behavior among hospitals and pharmaceutical companies is a significant contributor to the exorbitant cost of health care in the United States.

In my research on monopolization in the American economy, I estimate that the basket of goods and services consumed by a typical household in 2018 cost 5 to 10 percent more than it would have had competition remained as healthy as it was in 2000. Competitive prices would directly save at least $300 a month per household, translating to a nationwide annual household savings of about $600 billion.

And this figure captures only half of the benefits that increased competition would bring. Competition boosts production, employment, and wages. When firms face competition in the marketplace, they also invest more, which drives up productivity and further increases wages. Indeed, my research indicates that private investment—broadly defined to include plants and equipment, as well as software, research and development, and intellectual property—has been surprisingly weak in recent years, despite low interest rates and record profits and stock prices. Monopoly profits do not translate into increased investment. Instead, just as economic theory predicts, they flow into dividends and share buybacks.

Taking into account these indirect effects, I estimate that the gross domestic product of the United States would increase by almost $1 trillion and labor income by about $1.25 trillion if we could return to the levels of competition that prevailed circa 2000. Profits, on the other hand, would decrease by about $250 billion. Crucially, these figures combine large efficiency gains shared by all citizens with significant redistribution toward wage earners. The median household would earn a lot more in labor income and a bit less in dividends.

If America wants to lead once more in this realm, it must remember its own history and relearn the lessons it successfully taught the rest of the world. While legal scholars and elected officials alike have shown more interest in antitrust in the United States of late, much of that attention has been focused exclusively on the major internet platforms. To promote greater economic prosperity, a resurgence of antitrust would need to tackle both new and old monopolies—the Googles and Facebooks and the pharmaceutical and telecom companies alike.

Regardless of these predictable challenges, renewing America’s traditional commitment to free markets is a worthy endeavor. Truly free and competitive markets keep profits in check and motivate firms to invest and innovate. The 2020 Democratic presidential campaign has already generated some interesting policy proposals, but none that, like restoring free markets, would increase labor income by more than $1 trillion. Taxes cannot solve all of America’s problems. Taxes can redistribute. Competition can redistribute, but it can also grow the pie.

#### Turn – competition increases stock value.

Van Loo ’20 [Rory; Associate Professor of Law @ Boston University; “In Defense of Breakups: Administering a "Radical" Remedy,” *Cornell Law Review* 105(7), p. 1955-2022; AS]

How might breakups fail to harm shareholders even while improving competition? Maintaining a monopoly can be expensive. 230 Instead of focusing on defensive protection of a dominant market position, firms in a competitive industry pursue greater adaptability and innovation. 23 1 That renewal has the potential to grow the industry at a faster rate than in an industry dominated by a monopolist. Faster-moving companies may be even more important in light of the increasing pace with which technologies are requiring companies to adapt.232

Agency theory and organizational psychology help to explain this conundrum of effective antitrust breakups still increasing shareholder value. Senior managers have often pursued growth, especially through mergers and acquisitions, even when growth would not improve the company's value. 233 Yet many companies hold those acquisitions even after it is clear that they were failures, only divesting them when forced to do so by shareholders. 2 34 Agency theory helps explain how these divestitures demonstrate a misalignment of incentives: managers' compensation may depend on the size of the company, whereas owners care more about profit

. 235 Or executives may direct a large share of the monopoly rents toward salaries while the shareholders' portion does not offset the corresponding costs.236

Because the design of executive compensation structures has improved, CEOs' motivation to grow counterproductively is presumably lessened today compared to decades ago. 237 Moreover, increasing external pressures on managers-including from activist shareholders 238-have presumably made it more likely managers will pursue value-creating divestitures. Nonetheless, the agency problem persists.239 There is also some evidence that organizational inertia and emotional factors may cause companies to hold onto assets that they would economically benefit from divesting. 240

Another way of conceptualizing the potential benefits to shareholders is to view antitrust breakups as a tool of corporate governance to push executives away from self-serving acquisitions. 24 1 A primary goal of corporate law is to align the incentives of shareholders and managers by, for instance, imposing a fiduciary duty on managers. 242 Yet it is costly for shareholders to monitor and influence their agents in the firm-managers and directors-which helps explain why "[t]he problem of managerial agency costs dominates debates in corporate law."243 By discouraging managers from pursuing growth that harms shareholders, or by encouraging beneficial divestitures, antitrust enforcers may benefit shareholders by addressing some harmful effects of high agency costs.

It is unclear what percentage of breakups would add value to shareholders by solving agency costs or otherwise improving the firm's performance. But recent empirical evidence indicates that when CEOs propose mergers, "there is a very large thumb on the scale that pushes all deals toward approval." 2 4 4 It is plausible that a substantial portion of antitrust breakups would not harm shareholders, and many may even benefit them. Of course, it is not, and should not be, the goal of antitrust to break up a company to bring shareholders unrealized gains. Still, the evidence available suggests that any resistance to breakups out of concern for significant harm to shareholders rests on weak foundations.

Despite the absence of evidence of extreme harm to shareholders in the past, to the extent that a monopoly is earning considerable profits from its market dominance, lower stock value would be expected following at least some effective breakups. Putting aside for now the questions surrounding deterrence and fairness, 245 what does the private sector literature on divestitures add to this issue?

As the primary tool for assessing corporate law and antitrust, efficiency would presumably weigh heavily in the comparison of shareholder interests to consumer welfare. 2 4 6 Antitrust laws arguably already prioritize consumer welfare over the monopoly owners' interests.247 To that preexisting hierarchy, this Article has illuminated another efficiency contributor omitted from those analyses: Breakups can help ensure that managers only retain "assets for which [their firms] have a comparative advantage and sell assets as soon as another party can manage them more efficiently." 248 That additional efficiency consideration further weakens the argument for letting shareholder harm obstruct breakups.

In summary, substantial valuation drops as a result of breakups are uncertain to happen and of little societal concern if they do. Indeed, as the next subpart shows, even if every future breakup harms monopolies' shareholders that result may be desirable for addressing monopolies.

# 1ar

## adv 1

### Defense

#### Monopsonies do not pay more and wages are not increasing.

Marcela Escobari 19. A senior fellow in the Center for Sustainable Development, housed in the Global Economy and Development program at Brookings, where she is leading the Workforce of the Future initiative. “The economy is growing and leaving low-wage workers behind” Brookings Institution. 12-19-19. <https://www.brookings.edu/blog/education-plus-development/2019/12/19/the-economy-is-growing-and-leaving-low-wage-workers-behind/>

Yet among workers picking up second shifts or working multiple jobs this holiday season—the cashiers, stock clerks, warehouse workers, and delivery people—the rosy economic headlines might be hard to believe. Our recent report found that **44 percent of American workers, a whopping 53 million people, earn low wages.** These workers’ median hourly wage is $10.22, and they earn annual pay of just $17,950. The sheer number of low-wage workers is **hard to reconcile** with top-line economic statistics. The declining U.S. unemployment rate, which hit 3.6 percent in October, should augur prosperity for the nation’s workers. Certainly the president is banking his reelection campaign on workers feeling the net job gains and wage growth. The gains and growth are real in the aggregate, but they **mask the longer run changes** under the surface that are splitting the labor market and **trapping low-wage workers**; their opportunity for advancement through job changes is limited. We find low-wage workers are the most likely to remain stuck in their wage bracket when they switch occupations. But even workers in the middle class are more likely to **move down** the occupational ladder than up. Low-wage work is often precarious, marked by unpredictable schedules, reduced benefits, and unsteady employment. **Growing industry concentration** and weakened unions **erode workers’ capacity to bargain for higher wages** or redress labor disputes.

### AT Stats

#### 4---Labor share is declining because of market concentration

Ufuk Akcigit & Sina T. Ates 21, Ufuk Akcigit, The Arnold C. Harberger Professor in Economics and the College; Director of Graduate Studies at the University of Chicago, Sina T. Ates, Senior Economist Emerging Market Economies Section International Finance at the Federal Reserve, Ten Facts on Declining Business Dynamism and Lessons from Endogenous Growth Theory, American Economic Journal: Macroeconomics 2021, 13(1): 257–298, https://doi.org/10.1257/mac.20180449

E. Fact 5: Market Concentration and Labor Share Are Negatively Associated

Autor et al. (2017b), Barkai (2017), and Eggertsson, Robbins, and Wold (2018) all point to a tight relation between the fall in the labor share and a rise in market concentration. Indeed, Figure 5, reproducing the findings of Autor et al. (2017b), demonstrates the negative correlation between the two variables across US industries. Moreover, Autor et al. (2017b) contend that to the extent that changes such

Chart, line chart

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as globalization or new technological advances favor more productive companies, there arises a positive relationship between the level of firm productivity and its labor use (measured by payroll-to-sales ratio). The authors also provide suggestive evidence in this regard, namely, a positive association between industry-level productivity (measured by output per worker, patents per worker, etc.) and concentration (measured by fraction of sales accrued by 20 largest firms).

### AT Big Firms

#### Small firms key – distinct tech, incumbency pressure, and diverse approaches.

Federico ’20 [Giulio et al; European Commission; Fiona Scott Morton; Yale University and NBER; and Carl Shapiro; University of California, Berkeley, and NBER; “Antitrust and innovation: Welcoming and protecting disruption,” *Innovation Policy and the Economy* 20(1), p. 125-190; AS | GCD]

I. Introduction

We write in praise of market disrupters—firms that shake up the status quo, threaten incumbent firms, and sometimes transform entire industries. Through this process, which Joseph Schumpeter famously called “creative destruction,” disruptive firms promote economic growth and bring the benefits of new technologies and new business practices and business models to consumers.

We focus on the impact of antitrust policy—known globally as competition policy—on innovation.1 Competition policy seeks to protect and promote a vigorous competitive process by which new ideas are transformed into realized consumer benefits. In this fundamental way, competition spurs innovation. The productivity and growth literature teach us that innovation is the primary driver of rising standards of living over time, so promoting innovation through effective competition policy is likely to be very consequential for economic growth and welfare.

Disruptive firms drive a significant amount of innovation.2 They do not use the same technology or business model as incumbents. They offer consumers a distinct value proposition, not simply lower prices. By making its offer to customers attractive in a new way, a disruptive firm can destroy a great deal of incumbent profit while creating a large amount of consumer surplus. The resulting churn in products and market shares, as new products enter and old ones exit, and as newer business methods and business models supplant older ones, represents a healthy competitive process. If that competitive process is slowed or biased by mergers or by exclusionary conduct, innovation is lessened and consumers are harmed. This same competitive process promotes the development and diffusion of best practices, including what might be termed reductions in X-inefficiency. The trade and productivity literature both convincingly demonstrate that firms vary significantly in their productivity levels and that stiffer competition reallocates sales to more productive firms. The diffusion of best practices also is promoted if sales are contestable, going to the better-performing firms.

Competition policy seeks to protect the competitive process by which disruptive firms challenge the status quo. Competition policy is agnostic regarding the type of firm or the type of innovation involved. Start-ups that grow rapidly can certainly be disruptive. Uber and Airbnb are prominent recent examples. But large established firms can also be disruptive, especially when they attack adjacent markets. Think of Walmart entering local retail markets, Microsoft Bing challenging Google in search, or Netflix producing its own video content.

In contrast, the role played by successful incumbent firms in their own core markets is deeply conflicted. On the one hand, process innovations that lower costs can be most valuable at the largest firms, and market leaders often invest substantial sums to introduce new generations of products. Examples abound: Intel developing a new generation of technology and building new fabs to manufacture microprocessors; Boeing developing a new generation of large commercial aircraft; and Verizon investing to build its 5G wireless network. In many industries experiencing rapid technological change, the biggest firms are also some of the most impressive innovators, as Schumpeter observed 75 years ago.3 This should not be surprising, given the economies of scale associated with R&D, especially in industries where developing the next-generation product or process requires investments of hundreds of millions of dollars and/or extensive experience with the current technology.4 On the other hand, a successful incumbent firm that is profiting greatly from the status quo has a powerful incentive to preserve those profits, and this can mean slowing down or blocking disruptive threats. Successful incumbents also may find it very difficult organizationally to invest in disruptive technologies.5 Competition valuably increases the diversity of approaches taken to the development of new technology.

We stress in this article that innovation is best promoted when market leaders are allowed to exploit their competitive advantages while also facing pressure to perform coming from both conventional rivals and from disruptive entrants. These labels depend on context: the same firm can be a market leader in one area and a disruptive upstart in another. Market leaders may face competitive pressures to innovate coming from (a) other large firms in the same market, (b) other large firms in adjacent spaces, or (c) smaller, pesky disruptive firms. Casual empiricism indicates that all of these sources of competition are important in different settings. All have historically been protected using competition policy.

The central theme animating our analysis is that a market leader is best motivated to innovate if it fears losing its leadership position to a disruptive rival.6 Even a dominant incumbent will feel pressure to innovate if the bulk of tomorrow’s sales will be won by the firm that is most innovative, be that the incumbent or a disruptive challenger, and if other firms are in a position to leapfrog the current incumbent. Once one properly understands the dynamic nature of the competitive process, it becomes clear that greater rivalry—meaning greater contestability of tomorrow’s sales—leads to more innovation.7 The critical role of competition policy is thus to prevent today’s market leaders from using their market power to disable disruptive threats, either by acquiring wouldbe rivals or by using anticompetitive tactics to exclude them.

#### Turn: competition is better for national champions – best data.

Cavenaile et al. ’21 [Laurent; Department of Management @ University of Toronto Scarborough; Murat Alp Celik; Department of Economics @ University of Toronto; and Xu Tian; Department of Finance @ University of Georgia; “The Dynamic Effects of Antitrust Policy on Growth and Welfare,” *Journal of Monetary Economics* 121, p. 42-59; AS | GCD]

Next, we consider innovation by superstar firms. The decline in the frequency of single firm industries results in higher dynamic competition across superstar firms. When faced with peer competitors with similar productivities, superstars increase their innovation intensity as the escape-competition effect dominates the Schumpeterian creative destruction effect of lower profits. This is particularly true for industries with two superstars. Consequently, we observe a 0.75% increase in superstar innovation with lower HHI thresholds, and a 1.44% increase with a higher obstruction rate.

Combining the dynamic effects of innovation by small firms and superstars, as well as the synergy gains from successful mergers, we calculate that the growth rate of aggregate output increases by 3.54% of its value in the first experiment, and 4.03% in the second experiment. In addition, the increased growth in both experiments is the result of rather modest increases in the aggregate R&D expenditure share at 0.55% and 1.77% of its value. Combined with the more modest increases in allocative efficiency discussed earlier, stronger antitrust enforcement achieved through lowering HHI thresholds is calculated to increase social welfare by 1.98% in consumption-equivalent terms in the long run, whereas the gain is even larger at 2.29% with the more targeted higher obstruction rate experiment. Given the very limited impact on overall M&A activity, these results showcase that higher antitrust enforcement achieved through both methods could yield disproportionately large gains in welfare, since the dynamic effects on superstar innovation (through more intense dynamic competition in innovation among peer superstar firms) is found to be quite substantial despite the low rate of obstruction (4.87% among all merger transactions between superstar firms).

## Stocks DA

### Collapse Inev

#### “Investment and innovation fails” is because of financialization – aff is goldilocks.

Mark Glick 19. Professor, Department of Economics, University of Utah. “Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust”. Institute for New Economic Thinking. Working Paper No. 95. May 2019. https://www.ineteconomics.org/uploads/papers/WP\_95-Glick-Antitrust.pdf

2. The Impact of Financialization: Diversion of Profits to Finance

Figure 2 comes from a recent paper by Gérard Duménil and Dominique Levy in which they demonstrate that the primary effect of the process of financialization has been to divert profits away from productive uses by non-financial corporations.311 As shown earlier, neoliberalism has led to an increase in profits, a result of lower wages and lax antitrust enforcement. The dark line on Figure 2 depicts the raise in corporate profits. However, these profits have been siphoned off to the high incomes of corporate executives and top-level managers, higher interest payments to support corporate debt, and dividends and share buybacks aimed at increasing the corporation’s stock value. The dotted line shows the remaining retained earnings, which are available for productive investment, innovation and growth. In contrast to total profits, retained earnings declined in the 1970s and now hovers around zero.

[Figure 2 Ommitted]

Investment is highly correlated with retained earnings.312 The low and falling retained earnings helps explain why neoliberal policies have resulted in falling rates of investment and declining growth.313 In ironic contrast to the ostensible promises of trickledown theory of economic growth, neoliberal policies have been largely distributional in nature, reducing the income of the non-business classes only to divert resources away from productive investment into the consumption of the wealthy.

#### concentration causes crisis – too big to fail.

Glick ’19 [Mark; Professor of Economics @ University of Utah; “How Chicago Economics Distorts “Consumer Welfare” in Antitrust,” *The Antitrust Bulletin*, p. 1-19; AS]

Michael Porter takes a position diametrically opposed to W&G, contending that concern for the macroeconomic performance requires a change in antitrust goals. He argues that competition could contribute much more than it does presently to improved macroeconomic economic performance.79 As a result, he has advocated that the CW standard be replaced with a productivity-based antitrust goal.80 The advantage of Porter’s goal over the CW goal is illustrated by the Department of Justice policy concerning bank mergers. Lax merger enforcement has arguably contributed to macroeconomic instability by producing large and interconnected banking and financial institutions 81 that are “too big to fail.”82 The deregulation of the banking sector beginning in 198083 initiated an avalanche of banking mergers. In 1986, there were 14,070 banks. By 2018, this number dropped to 4806.84 Most of this reduction was due to bank mergers.85 For the years 1980–1994 alone, there were more than 6000 bank mergers.86 The result has been the emergence of four megabanks each with assets exceeding a trillion dollars.87 We also know that large interconnected financial institutions can destabilize the macroeconomy, as occurred in 2008. This is a problem borne of the free market that competition policy could have helped ameliorate. Instead, antitrust enforcement agencies allowed the emergence of a small group of interconnected banking giants and have been unreflective about the consequences of their inaction.

All of the bank mergers referred to above were subject to review by the Antitrust Division of the Department of Justice, yet only a handful were challenged.88 This inaction resulted, at least in part, from the Department of Justice’s view that “too big to fail” is not a proper antitrust concern under the CW standard89—thus providing a poignant example of how the CW standard90 can prevent antitrust policy from applying common sense measures to protect the economy. Michael Porter’s vision might have made a difference. Wooden adherence to the CW standard failed us at a moment when other policy levers were not available or effective.91

### Uq –

#### Econ decline inevitable.

Martha C., 12-15-2021, "Fed to accelerate tightening, with as many as three rate hikes in 2022," NBC News, https://www.nbcnews.com/business/economy/fed-set-accelerate-tightening-rate-hikes-waiting-wings-rcna8831

The Federal Reserve is further tightening up its pandemic-era easy money policy and will increase the pace of tapering, a move that could usher in rate hikes earlier than expected, according to a statement released at the conclusion of the central bank's latest policymaking meeting on Wednesday. “In light of inflation developments and the further improvement in the labor market,” members of the Fed’s policymaking committee voted unanimously to wrap up its massive bond-buying program in half the time it initially anticipated, and projected three rate hikes in 2022. The Fed will double down on its monthly asset purchase reduction, buying just $60 billion in Treasuries and mortgage-backed securities, down from the original $120 billion 18 months ago. The central bank announced in November that it would begin tapering by the amount of $15 billion a month, which it will now double starting in January. The purchases were part of a strategy to stabilize the financial system when it was feared that global shutdowns resulting from Covid-19 could trigger an economic collapse. The new pace means the program will conclude in March rather than in June. "Just one month after initiating the taper, they have doubled the pace of withdrawal in an effort to conclude by March so they can raise interest rates sooner,” said Greg McBride, chief financial analyst at Bankrate. “The omicron variant is a wild card for both Fed policy and the overall economy. Until there is greater clarity about transmissibility and possible economic fallout, the Fed has left themselves room to reverse course should it become necessary.”Omicron and inflation have left Wall Street on edge in recent days, and investors have been anxious about how the Federal Reserve will lay out its plan to navigate these twin economic threats. Data released last week found that consumer inflation hit a four-decade high, and the Department of Labor reported Tuesday that wholesale prices jumped at a record rate of 9.6 percent from a year ago. “I think it’s the impact on the broader population that’s really the Fed’s challenge,” said Stephen Lee, principal of Logan Capital Management. In recent comments, Fed Chairman Jerome Powell, who was renominated last month to lead the Fed for another four years, has retreated from describing price increases as “transitory.” There is widespread expectation that he will use his Wednesday afternoon press conference to announce that the Fed will wrap up its pandemic-era bond-buying program more quickly than it initially planned. “There’s a real risk now… that inflation may be more persistent,” Powell said Wednesday in a press conference after the meeting. Private job growth hit 807,000 in December, more than double expectations In response to questions about the time frame between the end of the taper and the initiation of rate increases, he said it was not a topic on which policymakers have focused yet. “Financial conditions can change very quickly” and can “fairly rapidly” affect the economy, Powell said. “We’re not going back to the same economy.” Image: Jerome Powell Federal Reserve Chairman Jerome Powell speaks during a Senate Banking Committee hearing on Capitol Hill, Nov. 30, 2021.Andrew Harnik / AP Policymakers have offset previous macroeconomic shocks in the past by increasing the money supply and adopting more accommodative positions, but that playbook isn’t a go-to this time around. The Fed can’t do anything about factory shutdowns in Asia or container ships queued up off the coast of California, said Ross Mayfield, investment strategy analyst at Baird. “A lot of the inflationary pressures are on the supply side of the equation, which the Fed can’t do much about,” he said. Dysfunction in D.C. also doesn’t help. “You’ve got policy uncertainty as well as Covid uncertainty. It really makes the Fed’s job a little more challenging,” Lee said, pointing to the ongoing wrangling in Washington. Some lawmakers, primarily but not exclusively Republicans, have criticized President Biden’s Build Back Better economic agenda, saying that the roughly $1.7 trillion package would contribute to inflation by pouring more money into an economy that already shows signs of overheating and as well as putting more pressure on already-strained supply chains, which could exacerbate the climbing costs for a growing list of goods and services. Different studies have produced a variety of conclusions, and analysts likewise are split on the likely impact — particularly given the uncertainty around the extent and duration of supply-chain issues moving into the new year. Ethan Harris, head of global economics research for Bank of America, warned in a new report that adding demand in an economy already facing tight supplies of both materials and labor could drive prices up further. “In our opinion, the proposed increases in investment would stimulate demand more than supply in the short run, creating inflationary risks,” he wrote, although he noted that the ultimate impact could differ depending on what the final legislation includes. Harris also called the Build Back Better Act “quite progressive in the short run,” though. He noted that lower-income families would benefit from multiple new tax credits — which would achieve a key goal of the platform advanced by Biden’s economic team.

#### Econ decline happening now

Friedman 21 – Zack Friedman, senior contributor to Frobes, citing Dartmouth econ prof David Blanchflower, “Is The U.S. Already In A Recession?” 10/21/21, https://www.forbes.com/sites/zackfriedman/2021/10/21/research-us-already-in-recession-that-could-be-as-bad-as-2008/?sh=6c6fb48068eb

The U.S. is already in a recession that could be as bad as 2008, according to new research.

Here’s what you need to know.

Economy

David Blanchflower, a Dartmouth professor and former member of the Bank of England Monetary Policy Committee, and Alex Bryson, a University College London professor, claim in new research that the U.S. already entered recession in late 2021. This is contrary to recent economic headlines that promote a soaring stock market and low unemployment data. Based on an analysis of key consumer data, the professors argue that the economic downturn could rival the 2008 financial recession. Here’s why:

Economic crash: reasons why

The professor write that there are several reasons why an economic crash is imminent:

Consumer Data is Ominous

Every recession since the 1980s has been precipitated by a 10-point decrease in consumer confidence indices from the University of Michigan and the Conference Board. In 2021, the Conference Board measured a 25.3-point drop in consumer confidence, while the University of Michigan measured a decline of 18.4 points. In comparison, in advance of the 2008 financial crisis, the Conference Board recorded a 19-point decline and the University of Michigan recorded a 21-point decrease. Blanchflower and Bryson say consumer confidence indices are important because they ask everyday Americans for the views on the economy and expectations about income and employment.

GDP is artificially high

The authors argue that Gross Domestic Product (GDP) in the U.S. is artificially high. They say the real GDP is one year behind what economic data suggests.

Unemployment is artificially low

Record unemployment rates — and a quick recovery from the Covid-19 pandemic — may not tell the entire story. The authors argue that unprecedented government support in terms of unemployment insurance and other economic stimulus has propped up the jobs market, according to the authors.

Economists previously missed these indicators

The authors note that while the data supporting their argument could be wrong, economists dismissed similar indicators in 2007 before the Great Recession.

### Growth turn –

#### It’s equivalent to six years of growth, or five per cent of GDP.

Thomas Philippon 19. Max L. Heine Professor of Finance at the Stern School of Business at NYU. *The Great Reversal: How America Gave Up on Free Markets*. Harvard University Press. 2019. p291-294.

Taking Stock

My main argument in this book is that competition has declined in most US industries over the past twenty years. Here I would like to answer the trillion-dollar question: how much does this matter? To be more precise, suppose we could roll back the barriers to entry, undo the bad mergers, and somehow return to the level of competition we had in the late 1990s. How much better off would we be?

We are going to use a relatively simple model of the economy to answer that question. When economists talk about a “model,” we mean a set of equations that represents how economic agents behave. Households work to make a living: they supply labor; they decide how much to save and what to buy, and they make consumption and saving decisions. Firms compete with each other to supply the goods and services that households and other businesses want to buy. They hire capital, labor, and intermediate inputs from other businesses. They understand that demand is elastic: they lose customers if they set their prices too high. All of these decisions can be written as mathematical objects. We can also incorporate the decisions of the government (taxes, spending, regulations) and the central bank (interest rates).

The virtue of a model is that we can compute the outcome of all these decisions. We call this outcome the macroeconomic equilibrium. The concept of equilibrium is important because the decisions are interdependent. Consider the labor market, for instance. Households supply labor, whereas firms hire labor. But firms hire labor because they expect to sell their products, which are bought by households using their labor income. Similarly, when we say that households save, we mean that they keep money in their bank accounts or that they invest in mutual funds. But banks and mutual funds are intermediaries, not end users. The savings eventually find their way into loans, bonds, and stocks. The return on these claims depends on the capital demand by firms. All these decisions are therefore interdependent. The practical implication is that if we want to understand the consequences of competition—or lack thereof—we need to keep track of what happens in all these markets at the same time. That’s why we need a model.

Once we have the model, the key question becomes this: how large was the change in competition? Let’s review the evidence. We saw that after-tax profits have increased by about 4 percentage points of GDP (Chapter 3). The labor share of income has decreased by about 6 percentage points of GDP (Chapter 6). When we compare the US with Europe, we find a relative markup increase of about 10 percent (Chapter 7). Some of it was due to EU markups going down in addition to US markups going up.

I am then going to feed into the model an experiment that is consistent with this evidence. Let us start from a situation that represents the 1990s. Markups are 5 percent over gross output, which means that firms add a 5 percent margin to the costs of labor, capital, and intermediate inputs. The economy has free entry, so these extra profits simply offset the cost of setting up and operating the businesses. I define the units so that GDP is $100 and total labor income is $65. The labor share is 0.65.

Now imagine that competition declines and that free entry is violated. Businesses can increase their margins from 5 percent to 10 percent. What happens then? The demand for capital, labor, and inputs decreases. Wages decrease too. The impact on employment depends on the willingness of households to continue working for lower wages. I use a conservative model in which households keep on working.\* As a result, the main consequences of higher markups are lower wages, lower investment, and lower productivity, while employment stays about the same. Let us look at the numbers in more detail. Because of competition, GDP is only $95, that is, 5 percent lower. Labor income drops to $57. The new labor share is 57 / 95, which equals 0.6, and is in line with the evidence in Chapter 6. The capital stock decreases by 10 percent, which is also in line with the gap discussed in Chapter 4.

Let us put these numbers into perspective. US GDP is about $20 trillion. If we could make the economy as competitive as it was twenty years ago, the GDP would increase by 5 percent to $21 trillion. Employee compensation is about $11 trillion. In a competitive economy it would be 65 / 57 × 11, or $12.5 trillion. In other words, my calculations suggest that the lack of competition has deprived American workers of $1.5 trillion of income. This is more than the entire cumulative growth of real compensation between 2012 and 2018. The lack of competition has cost American workers six full years of growth. That is a large cost by any measure.

### AT Capital Flight

#### Only we solve capital flight – strong regs

Andreas Nölke 20. Professor of IR and International Political Economy at Goethe University. PhD in Political Science fromthe University of Konstanz. “Financialization and the Crisis of Democracy”. Chapter 35 in “The Routledge International Handbook of Financialization”. First Edition. 2020. Routledge. pp. 425-433.

However, in order to implement these kinds of drastic measures without massive capital flight, it would be important to “lock in” financial markets first of all, preferably on the national level. There are good arguments for keeping financial sector regulation on the level of the nation state – not only because of the much higher degree of input legitimacy on the national level, but also because a certain degree of diversity of national financial sector regulations would decrease the danger of herd behavior and the related contagion in case of a financial crisis (Dorn 2015). The most important instrument would be capital controls in order to effectively control cross border capital flows (Block 2014; Pettifor 2018). This was the usual practice in the 1950s to 1970s and still is being practiced, more or less, by large emerging markets such as Brazil, China and India (Dierckx 2015). Finally, financial transaction taxes would be important in order to decrease the volume of transactions in the financial sector as well as to limit the dense networking between financial market actors (Engelen et al. 2012; Block 2014; Pettifor 2018).

A de-financialized economy is not a completely utopian idea. It would not necessarily lead to a drastic reduction in other forms of economic globalization such as the trade in goods (Bhag- wati 1998: 7–11). In fact, we have witnessed a period of de-financialization – following an earlier financial market excess – before. In the first three decades after the 1940s a drastic curtailing of (cross-border) financial markets went hand in hand with a drastic reduction in the number of financial crises. During this phase of capitalism, transnational financial movements were reduced due to comprehensive capital controls whereby financial markets served as a support for industrialization – not vice versa. Correspondingly, we can decrease the extent of financialization without necessarily curtailing industrial economic activity.

#### Financial sector deconsolidation key to prevent credit boom-bust cycles – turns London

Shang Lin Wei, Professor of Finance @ Columbia, Chief Economist @ ADB, 7-9-21, “The Global Dangers of Rising US Inflation” Project Syndicate. https://www.project-syndicate.org/bigpicture/stagflation-ahead

To anticipate the international consequences of higher US inflation, we need to recognize the risk that the Fed may tighten monetary policy more suddenly and dramatically than its current 3.4% inflation forecast might suggest. For now, a majority of US households, firms, and investors still believe that the Fed will adjust the money-supply spigot in a timely, measured way to prevent inflation from getting out of hand.

But such “inflation anchoring” could prove fragile if Americans see more evidence of the Fed failing to keep inflation near its desired 2% target. Should that happen, both employees’ wage demands and firms’ price-setting will start to reflect the possibility that inflation could shoot up to 5% or more unless the Fed applies the brakes by raising interest rates aggressively.

If US rates rise sharply, history tells us that two types of countries may experience serious financial and economic difficulties. The first group comprises economies that finance a significant part of their investment or consumption with foreign-currency debt, by borrowing either from foreign banks or on international bond markets. Countries with large short-term foreign-currency debts (with less than one year to maturity) and relatively low foreign-exchange reserves are particularly vulnerable to a severe debt or banking crisis.

The second group consists of countries with an overvalued fixed exchange rate, which makes them vulnerable to a run on their currencies and an exchange-rate crisis. So, if the Fed tightens policy significantly, we can expect to see a number of debt and currency crises in Central and South America, Africa, and Asia in the next 2-5 years. Because significant foreign-currency debt and overvalued fixed exchange rates are not mutually exclusive, some countries may suffer several types of crises.

This is why US inflation and interest-rate policy is so important to so many. When the United States sneezes, the rest of the world may catch a cold. But other countries should not expect America to conduct its monetary policy any differently as a result, and nor should they count on the International Monetary Fund or the G7 to be able to direct the US to be more globally minded in managing interest-rate movements.

Even countries not in either of the risk categories will need to address the challenge of imported inflation. China, for example, is deeply concerned about this, even though it currently has relatively modest foreign-currency debts and retains a high level of foreign-exchange reserves.

To prevent imported inflation from fueling domestic inflation, the People’s Bank of China would need to tighten its own supply of liquidity to the economy. For such a policy to be effective, China must either introduce more exchange-rate flexibility or tighten its capital controls, with the former approach promising to be much better for the economy in the long run.

At-risk economies may have six months or so to implement self-help measures before any sudden US monetary-policy tightening happens. They are well advised to work on making their exchange rates more flexible, reducing their reliance on foreign-currency debt, and increasing their foreign-exchange reserves.

### XT 2AC 1: Concentration Bad for Stonks

#### No harm to stocks – mutual funds dilute the impact and rival stock increase offsets losses.

Van Loo ’20 [Rory; Associate Professor of Law @ Boston University; “In Defense of Breakups: Administering a "Radical" Remedy,” *Cornell Law Review* 105(7), p. 1955-2022; AS]

B. Shareholder Harm Is Not an Obstacle

The Supreme Court has historically emphasized that "the Government cannot be denied the [divestiture] remedy because economic hardship, however severe, may result."2 16 Nonetheless, concerns about shareholders have persisted as a factor influencing the remedy choice. 2 17 Indeed, in fighting the government's proposal of a breakup, Microsoft wanted the court to consider "[tiestimony from Goldman, Sachs & Co. and from Morgan Stanley Dean Witter that dissolution would adversely affect shareholder value." 2 18 The district court declined to do so. However, in overturning the breakup order, the Court of Appeals mentioned the value of hearing such testimony about shareholder value. 2 19 The rest of this Part shows why significant shareholder harm is unlikely to happen and may be economically desirable if it does.

If the concern about shareholders comes from fear of harm to people's retirement and savings, the evolving structure of equity ownership is relevant. Most publicly traded shares of large companies now are owned by mutual funds and other institutional owners holding diverse stocks. As a result, the impact of any given breakup would be diluted for most shareholders. Additionally, if a breakup improved long-term market health-or immediately helped the monopoly's competitors most of a given monopoly's shareholders could benefit from a breakup even if the broken-up company's stock was hurt. Indeed, one of the leading studies found that although the prosecuted company's stock went down, its rivals' stock went up. 2 20

### XT 2AC 2: Antitrust Good for Stonks

#### Payouts post-antitrust mean separations have a positive impact on share prices.

Van Loo ’20 [Rory; Associate Professor of Law @ Boston University; “In Defense of Breakups: Administering a "Radical" Remedy,” *Cornell Law Review* 105(7), p. 1955-2022; AS]

Even if the concern is solely about an individual company's shareholders, a breakup does not mean that a portion of the company is eliminated. If Google is forced to sell YouTube or Facebook is required to divest Instagram, shareholders would receive a massive payment for that sale. 22 1 Overall, the literature consistently shows that private divestitures "have a positive impact on the divesting parent's share price."222

There has been limited direct study of the effects on shareholders of breakups. Moreover, what few studies exist did not examine the ultimate question of how breakups would compare to other antitrust remedies. Nonetheless, the leading quantitative research into stock value following antitrust divestitures suggests that the organizational reconfiguration does not significantly drive the stock value down. 2 2 3

### AT courts links –

#### No overdeterrence.

Shelanski ’11 [Howard; Law @ Georgetown, Administrator @ OIRA, Director of the Bureau of Economics @ Federal Trade Commission, Former Chief Economist @ FCC; “The Case for Rebalancing Antitrust and Regulation,” *Michigan Law Review* 109(5), p. 725-727]

C. The Court's Underlying Rationale: Overemphasis on Overenforcement? The principal reason the Court gave in Credit Suisse and Trinko for precluding antitrust claims was concern with the costs of false positives in enforcement. The Court was unusually explicit in its aversion to the potential costs of antitrust in Trinko, notwithstanding that Congress, in including a savings clause in the 1996 act, appeared to have taken a different view. Cases that came after Trinko continued to raise barriers to antitrust plaintiffs in both regulated and unregulated settings. As discussed above, Credit Suisse conferred immunity from even well-established antitrust claims like price-fixing if those claims involve conduct that is factually close to, though not within, activities covered by a regulatory statute. In Twombly, the Court increased the burden on all antitrust plaintiffs through heightened pleading requirements.120 Most recently, in Pacific Bell v. Linkline, the Court virtually eliminated "price squeezes" as cognizable claims under section 2,121 a consequence flowing in large part from the Court's interpretation of refusal-to-deal liability in Trinko.122 Recent cases thus amplify the Court's concern in Credit Suisse and Trinko that overenforcement of anti trust could do more to deter beneficial behavior than to prevent anticompetitive conduct, a concern the Court found especially acute in regu lated industries.

1. Overemphasis on False Positives: Some Evidence The Supreme Court's presumption that false positives are more costly than false negatives in the presence of regulation is questionable on several fronts. First, the cost-benefit assumption underlying the Court's bar to com plex or novel claims against regulated firms may or may not be correct in a given case. Its accuracy depends on a number of factors and hinges more on empirics than systematic logic. For instance, the regulatory agency might not actively exercise its authority. The benefits of adding antitrust enforcement will therefore not necessarily be small or marginal just because Congress has given an agency the authority to regulate. Second, while the Trinko opinion emphasized the costs of false posi tives in antitrust enforcement, precluding antitrust liability would likely cause some number of false negatives in which anticompetitive conduct would go unpunished. To the extent courts can distinguish conduct that causes net harm to competition, an overinclusive rule against liability will reduce consumer welfare. The Supreme Court took the view that the risk and cost of false negatives is minor compared to the risk of false positives. Even if it were true that any individual false positive result is on average more costly than any individual false negative, it is not necessarily true that the total costs of false positives from antitrust enforcement are higher than the cumulative costs of false negatives. That balance depends on the comparative frequency of false positives. In its 2007 Report and Recommendations, the Antitrust Modernization Commission discussed the importance of avoiding both overdeterrence and underdeterrence of anti competitive conduct, but noted in its discussion of treble damages that "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission."123 Third, substantive and procedural developments in antitrust law over the past thirty years have reduced both the likelihood that cases will reach trial and the probability that plaintiffs will win once they get there. On the procedural side, the Supreme Court has placed limits on who can sue under the antitrust laws124 and has raised the pleading requirements for those who can.125 More fundamentally, the Court has increased the substantive burdens on plaintiffs for a number of antitrust claims in particular those alleging monopolization under section 2 of the Sherman Act. The Supreme Court's rulings in antitrust cases over the past twenty years126 have made it harder for plaintiffs to get to the merits, never mind win, on claims ranging from predatory pricing to vertical price restraints and, of course, to refusals to deal.129 Those are only examples, and the Court has raised barriers to plaintiffs for numerous other kinds of antitrust claims as well.130 The point here is not to debate the merits of any of those particular decisions, but to show that antitrust jurisprudence has evolved to reduce significantly the likelihood of false positives. The assumption that even more preclusive rules against liability are necessary to protect against investment deterrence and other costs of overenforcement requires more justification than the Court has offered in light of these developments.131 The caselaw provides additional empirical evidence that the prospect of false positives is not so great as to warrant the antitrust-precluding effect the Court gives to competition-oriented regulation. There have been relatively few successful claims of refusal-to-deal liability and the overall number of cases has not been so great as to suggest the administrative and deterrence costs of a rule-of-reason test will be higher than the benefits of such a rule. Glen Robinson has shown that from 1980 to 2000, there were a total of 71 district and circuit court opinions addressing essential-facilities claims.132 Although essential-facilities claims are a subset of refusal-to-deal claims, they are a large subset and serve as a reasonable proxy for the volume of the latter. In only 5 of 28 circuit court opinions and 6 of 43 district court opinions did the courts find there to be even a triable issue of fact as to the existence of an essential facility.133 My update of the data shows that from 2001 to 2010 there were 22 circuit court opinions addressing essential facilities claims, of which only 3 found a triable issue on the merits.134 Those 3 include the Second Circuit's Trinko decision that the Supreme Court later reversed. During that same recent period there were 56 district court cases (distinct from the circuit court cases just mentioned) that dealt to differing degrees with the essential-facilities doctrine, only 12 of which declined to dispose of the claim on dismissal or summary judgment.