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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

#### 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

#### Democratic governance solves existential threats.

Kolodziej ’17 [Edward; May 19; Emeritus Research Professor of Political Science at the University of Illinois at Urbana-Champaign; EUC Paper Series, “Challenges to the Democratic Project for Governing Globalization,” https://www.ideals.illinois.edu/bitstream/handle/2142/96620/Kolodziej Introduction 5.19.17.pdf?sequence=2&isAllowed=y]

The Rise of a Global Society

Let me first sketch the global democratic project for global governance as a point of reference. We must first recognize that globalization has given rise to a global society for the first time in the evolution of the human species. We are now stuck with each other; seven and half billion people today — nine to ten by 2050: all super connected and interdependent. In greater or lesser measure, humans are mutually dependent on each other in the pursuit of their most salient values, interests, needs, and preferences — concerns about personal, community, and national security, sustainable economic growth, protection of the environment, the equitable distribution of the globe’s material wealth, human rights, and even the validation of their personal and social identities by others. Global warming is a metaphor of this morphological social change in the human condition. All humans are implicated in this looming Anthropogenic-induced disaster — the exhausts of billions of automobiles, the methane released in fracking for natural gas, outdated U.S. coal-fired power plants and newly constructed ones in China. Even the poor farmer burning charcoal to warm his dinner is complicit.

Since interdependence surrounds, ensnares, and binds us as a human society, the dilemma confronting the world’s diverse and divided populations is evident: the expanding scope as well as the deepening, accumulating, and thickening interdependencies of globalization urge global government. But the Kantian ideal of universal governance is beyond the reach of the world’s disparate peoples. They are profoundly divided by religion, culture, language, tribal, ethnic and national loyalties as well as by class, social status, race, gender, and sexual orientation. How have the democracies responded to this dilemma? How have they attempted to reconcile the growing interdependence of the world’s disputing peoples and need for global governance?

What do we mean by the governance of a human society?

A working, legitimate government of a human society requires simultaneous responses to three competing imperatives: Order, Welfare, and Legitimacy. While the forms of these OWL imperatives have differed radically over the course of human societal evolution, these constraints remain predicable of all human societies if they are to replicate themselves and flourish over time. The OWL imperatives are no less applicable to a global society.

1. Order refers to a society’s investment of awesome material power in an individual or body to arbitrate and resolve value, interest, and preference conflicts, which cannot be otherwise resolved by non-violent means — the Hobbesian problematic.

2. The Welfare imperative refers to the necessity of humans to eat, drink, clothe, and shelter themselves and to pursue the full-range of their seemingly limitless acquisitive appetites. Responses to the Welfare imperative, like that of Order, constitute a distinct form of governing power and authority with its own decisional processes and actors principally associated either with the Welfare or the Order imperative. Hence we have the Marxian-Adam Smith problematic.

3. Legitimacy is no less a form of governing power and authority, independent of the Order and Welfare imperatives. Either by choice, socialization, or coerced acquiescence, populations acknowledge a regime’s governing authority and their obligation to submit to its rule. Here arises the Rousseaunian problematic.

The government of a human society emerges then as an evolving, precarious balance and compromise of the ceaseless struggle of these competing OWL power domains for ascendancy of one of these imperatives over the others. It is against the backdrop of these OWL imperatives — Order, Welfare, and Legitimacy — that we are brought to the democratic project for global governance.

The Democratic Project

For Order, open societies constructed the global democratic state and, in alliance, the democratic global-state system. Collectively these initiatives led to the creation of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organization, and the European Union to implement the democratic project’s system of global governance.

The democratic global state assumed all of the functions of the Hobbesian Westphalian security state — but a lot more. The global state became a Trading, Banking, Market, and Entrepreneurial state. To these functions were added those of the Science, Technology and the Economic Growth state. How else would we be able to enjoy the Internet, cell phones and iPhones, or miracle cures? These are the products of the iron triangle of the global democratic state, academic and non-profit research centers, and corporations. It is a myth that the Market System did all this alone. Fueled by increasing material wealth, the democratic global state was afforded the means to become the Safety Net state, providing education, health, social security, leisure and recreation for its population. And as the global state’s power expanded across this broad and enlarging spectrum of functions and roles, the global state was also constrained by the social compacts of the democracies to be bound by popular rule. The ironic result of the expansion of the global state’s power and social functions and its obligation to accede to popular will was a Security state and global state-system that vastly outperformed its principal authoritarian rivals in the Cold War. So much briefly is the democratic project’s response to the Order imperative.

Now let’s look at the democratic project’s response to the Welfare imperative. The democracies institutionalized Adam Smith’s vision of a global Market System. The Market System trucks and barters, Smith’s understanding of what it means to be human. But it does a lot more. The Market System facilitates and fosters the free movement of people, goods and services, capital, ideas, values, scientific discoveries, and best technological practices. Created is a vibrant global civil society oblivious to state boundaries. What we now experience is De Tocqueville’s Democracy in America on global steroids.

As for the imperative of Legitimacy, the social compacts of the democracies affirmed Rousseau’s conjecture that all humans are free and therefore equal. Applied to elections each citizen has one vote. Democratic regimes are also obliged to submit to the rule of law, to conduct free and fair elections, to honor majority rule while protecting minority rights, and to promote human rights at home and abroad.

The Authoritarian Threat to the Democratic Project

The democratic project for global governance is now at risk. Let’s start with the challenges posed by authoritarian regimes, with Russia and China in the lead. Both Russia and China would rest global governance on Big Power spheres of influence. Both would assume hegemonic status in their respective regions, asserting their versions of the Monroe Doctrine. Their regional hegemony would then leverage their claim to be global Big Powers. Moscow and Beijing would then have an equal say with the United States and the West in sharing and shaping global governance. The Russo-Chinese global system of Order would ascribe to Russia and China governing privileges not accorded to the states both aspire to dominate. Moscow and Beijing would enjoy unconditional recognition of their state sovereignty, territorial integrity, and non-interference in their domestic affairs, but they would reserve to themselves the right to intervene in the domestic and foreign affairs of the states and peoples under their tutelage in pursuit of their hegemonic interests. President Putin has announced that Russia’s imperialism encompasses the millions of Russians living in the former republics of the Soviet Union. Russia contends that Ukraine and Belarus also fall under Moscow’s purported claim to historical sovereignty over these states. Forceful re-absorption of Crimea and control over eastern Ukraine are viewed by President Putin as Russia’s historical inheritances. Self-determination is not extended to these states or to other states and peoples of the former Soviet Union. Moscow rejects their right to freely align, say, with the European Union or, god forbid, with NATO.

In contrast to the democratic project, universal in its reach, the Russo-Chinese conception of a stable global order rests on more tenuous and conflict-prone ethno-national foundations. Russia’s proclaimed enemies are the United States and the European Union. Any means that undermines the unity of these entities is viewed by Moscow as a gain. The endgame is a poly-anarchical interstate system, potentially as war-prone as the Eurocentric system before and after World War I, but now populated by states with nuclear weapons.

Global politics becomes a zero-sum game.

Moscow has no compunctions about corrupting the electoral processes of democratic states, conducting threatening military exercises along NATO’s east border, or violating the more than 30-year old treaty to ban the deployment of Intermediate-Range missile launchers, capable of firing nuclear weapons. Nothing less than the dissolution of the democratic project is Moscow’s solution for global Order.

China also seeks a revision of the global Order. It declares sovereignty over the South China Sea. Rejected is The Hague Tribunal’s dismissal of this claim. Beijing continues to build artificial islands as military bases in the region to assert its control over these troubled waters. If it could have its way, China would decide which states and their naval vessels, notably those of the United States, would have access to the South China Sea.

Where Moscow and Beijing depart sharply are in their contrasting responses to the Welfare imperative. Moscow has no solution other than to use its oil and gas resources as instruments of coercive diplomacy and to weaken or dismantle existing Western alliances and international economic institutions. China can ill-afford the dismantling of the global market system. In his address to the Davos gathering in January of this year, Chinese President Xi asserted that “any attempt to cut off the flow of capital, technologies, products, industries and people between economies, and channel the waters in the ocean back into isolated lakes and creeks is simply not possible.” Adam Smith could not have said it better. Both Moscow and Beijing have been particularly assiduous to legitimate their regimes. President Putin’s case for legitimacy is much broader and deeper than a pure appeal to Russian nationalism. He stresses the spiritual and cultural unity of Russianspeaking populations spread across the states of the post-Soviet space. A central core of that unity is the Russian Orthodox Church, a key prop of the regime. Reviled is Western secularism, portrayed as corrupt and decadent, viewed by Putin as an existential threat to the Russian World. The Chinese regime, secular and atheistic, can hardly rely on religion to legitimate the regime. Beijing principally rests its legitimacy on its record of economic development and nationalism. The regime’s success in raising the economic standards of hundreds of millions of Chinese reinforces its claim to legitimacy in two ways. On the one hand, the Communist Party can rightly claim to have raised hundreds of millions of Chinese from poverty within a generation. On the other hand, the Communist Party insists that its model of economic growth, what critics scorn as crony capitalism, is superior to the unfettered, market-driven model of the West. Hence capitalism with Chinese characteristics is more effective and legitimate than the Western alternative.

Where Moscow and Beijing do converge is in fashioning their responses to the Legitimacy imperative. They repudiate Western liberal democracy. Both reject criticisms of their human rights abuses as interventions into their domestic affairs. Dissidents are harassed, incarcerated, or, in some instances, assassinated. Journalists are co-opted, selfcensored, silenced, or imprisoned. Social media is state controlled. Both the Putin regime and the Chinese Communist Party monopolize the public narratives evaluating governmental policy. Transparency and accountability are hostage to governmental secrecy. Civil society has few effective avenues to criticize governmental actions. Moscow adds an ironic twist to these controls in manipulating national elections to produce an elected authoritarian regime.

Whether either of these authoritarian responses to the Legitimacy imperative will survive remains to be seen. Beijing’s use of economic performance and nationalism to underwrite its legitimacy is a double-edged sword. If economic performance falters, then legitimacy suffers. Whether top-down nationalism will always control nationalism from the bottom-up is also problematic. In resting legitimacy on nationalism, dubious historical claims, and crypto-religious beliefs, Moscow is spared Beijing’s economic performance test. That said, there is room for skepticism that in the long-run Russians will exchange lower standards of living for corrupt rule in pursuit of an elusive Russian mission antagonistic to the West. The implosion of the Soviet Union, due in no small part to its retarded economic and technological development, suggests that the patience of the Russian people has limits. Demonstrations in March 2017 against state corruption in 82 Russian cities, led largely by Russian youth, reveal these limits. They are an ominous omen for the future of the Putin kleptocracy. Meanwhile, neither Russia nor China offers much to solve the Legitimacy imperative of global governance.

#### Populism causes extinction – makes the international system more prone to erupt and escalates every major hotspot.

Lavin ’17 [Frank; October 20; Chairman of Export Now, served in the White House, National Security Council, State Department, and Commerce Department during three Presidential administrations; Georgetown Journal of International Affairs, “Things Fall Apart: Populism and Foreign Policy,” https://www.georgetownjournalofinternationalaffairs.org/online-edition/2017/10/20/things-fall-apart-populism-and-foreign-policy]

What is Populism?

This populism has four characteristics. First, it is grievance-based. It focuses on problems rather than solutions. This has the extraordinary advantage of giving the message potency because negative statements can motivate more effectively than positive ones, but it makes it difficult to form a governing coalition, since constituencies that have a problem with a particular policy might have even greater differences among its alternatives. Indeed, as a candidate, Trump avoided articulating a positive vision regarding even central pillars of his campaign such as health care. Notably, Trump’s main foreign policy pronouncements in the campaign were grievance-based: terrorism, trade and immigration. Equally noteworthy, they were all essentially domestic issues with a foreign genesis. The traditional foreign policy questions were largely absent from his discussions: What is America’s role in the world? What is the value of an alliance? To what extent should we promote democracy and human rights, or should the U.S. focus on national interest calculations?

Second, the populist must establish emotional connectivity with the audience. Trump tends to evaluate people largely based on how they connect with him. The rally format suits him well; he loves the audience and the audience loves him. There are no questions and answers, nor any discussion, nor does there have to be new information, but there is plenty of emotional connectivity. Importantly, this emotional connectivity has little to do with economic class, a point that can befuddle Trump’s domestic political opponents, who underestimate his working-class appeal on the basis that he personally has little in common with them or that his policies supposedly would not help them. To a populist, the first point is broadly irrelevant and the second point is highly debatable. Might many a construction worker welcome a construction boom, and many a restaurant worker welcome an expansion of the business, if it meant job security and a larger paycheck, even if it would create disproportionate returns to the construction company and restaurant owner? For many working men and women, a growth in inequality is not inherently troubling. Thomas Piketty might be right, but it might not matter to most Americans if returns to capital outpace returns to labor. In addition, when establishment elites mock Trump, from his grammar to his boorishness, a portion of non-elites see this as condescension.

Third, populism is exculpatory: Every problem the United States faces was caused by others and the target audience is blameless. So if a company wanted to relocate some activity to Mexico, it must have been to exploit wage differences. No discussion as to whether wage increases at the U.S. facility have outpaced productivity increases. No discussion as to whether union rules impede flexibility and productivity. No discussion of the fact that Mexico might be a better production platform because it has more free trade agreements. Management is to blame, with Mexico in connivance. This is frequently expressed in themes of anti-establishment or alienation, which can have a corrosive effect when anchored in grievances.

Fourth, policy choices are cost-free and without trade-offs. Cost-benefit analysis, transition costs, the challenges in administering a government agency, underperforming programs, secondary effects and unintended consequences – these are all incidental to the victory of the policy choice itself. As such, populists might as well berate NATO leadership into burden-sharing, ignoring the downside to publicly hectoring leaders of sovereign nations. They, too, might as well call for a physical wall on the U.S. border with Mexico since it will be, by self-declaration, cost free.

To be fair, others in public life exhibit some of these elements. President Obama’s healthcare plan was historically grandiose in scope, cost and complexity, yet it was ballyhooed to save money. Similarly, Obama’s eight-year effort to reduce U.S. commitments to NATO was to have no costs in terms of force projection, alliance cohesion, or deterrence. And, Obama was the only President in the modern era to have run against trade as a candidate, an approach Trump followed. What Went Wrong? How could the bipartisan consensus on U.S. international leadership fade so quickly, particularly at a moment when the combination of market economics and alliances of democracies had resulted in perhaps the most prosperous and most liberal moment in human history? There are four contributors to the rise of populism: societal transformation, grievance economics, international leadership, and elite limitations. First, societal transformation – meaning both globalization and automation— has two profound socio-political effects. It produces an extraordinary degree of prosperity; and it carries with it a distribution effect. The bell curve of income distribution does not shift as much as it elongates. Few people are worse off, but many people are not better off. There is not necessarily the creation of a large number of winners and losers, but there is certainly the perception people getting left behind. Trump understands the message: The globalization club is having a party, and you are not invited. Silicon Valley is drinking champagne and your role is to pick the grapes. These trends also feed into the narrative of alienation because it decreases people’s control over their lives even as their overall prosperity increases. Globalization and automation have created economic anxiety in electorates around the world, and not just among steelworkers and coal miners. Realtors, bank tellers, school teachers, and cab drivers are all seeing competitive pressure and the prospect of job elimination. To many Americans, comparative advantage and creative destruction create a more prosperous society, but accompanying it is job insecurity. David Ricardo and Joseph Schumpeter might be right, but so what? Second, over several decades we have seen a shift from growth economics to grievance economics. This represents a break with the recovery policies that guided the leading economies through the 1950s and 1960s (and that economic rationalists such as Macron tilt toward today). In the current view, the primary purpose of economic policy is not to foment prosperity, but to redress grievances. Indeed, regardless of absolute improvements in well-being, reducing economic inequality is deemed to be a basis for policy. The premise of growth economics is that a system is fundamentally fair, so the main challenge is how fast we can go. The premise of grievance economics is that the system is fundamentally unfair, so going faster merely exacerbates the unfairness. This cult of inequality incentivizes interest-group politics and rent-seeking, leading to slower growth. If you focus on growth policies, you get growth. If you focus on grievance policies, you get grievances. A third cause is the shift in the U.S. international posture. We have seen a growing fatigue in the United States over the cost of international leadership. The U.S. entered the post-Cold War era with the institutions and the cohesion of the Cold War era largely intact, even though the end of the Soviet Union removed what political scientists term a “negative integrator.” Now we are deep into the post-post-Cold War era, with faded cohesion and institutions. For the first time since Harding and Coolidge we have two presidents in a row who have no international military or policy pedigree. Beyond the direct costs of international leadership in defense budgets and personnel, Americans seem more sensitive to the indirect costs of public opinion and anti-Americanism. Relationships can be expensive. Friendships can be complicated. If there is no immediate threat, and if no one likes us anyhow, then what is the point of foreign policy?

To sum up this point, imagine international Presidential leadership as a decision between whether to be a minute early or a minute late. Do you deter or do you react? Being a minute early requires leadership, because it carries with it the possibility of error and the cost of action without a consensus. “Left of Boom,” the British call it. Being a minute late and waiting until the problem has metastasized has the considerable benefit of allowing public consensus to build, and it is the less politically expensive approach. President Obama’s instinct is that foreign policy is better managed by being a minute late, such as responding after-the-fact to the Chinese build-out in the South China Sea, not confronting Russia on its intervention in U.S. elections, and perhaps in the cases of Aleppo or ISIS, Obama was more than a minute late. President Bush’s instinct was to be a minute early, foolishly so to his critics. Presidents have spent some 75 years since Pearl Harbor trying to be a minute early, with all the costs and mistakes that entailed, yet now we have two presidents in a row who believe we are better off being a minute late.

Finally, the appeal of populism has been driven by their perception of the limitations of the U.S. leadership class: insular, rigid, and sometimes simply mediocre. Additionally, over-engineered solutions and the appearance of being self-serving, if not corrupt, help the appeal of populism. Sometimes it comes from the declining marginal effectiveness of government programs as society becomes more affluent and complicated. Indeed, the Obama administration seemed to regularly play into the hands of populists, sometimes passively so, as with the refusal to challenge even the more exotic of the sanctuary city movement. Sometimes, it was by design as with the painstaking construction not to label Islamic terrorism as such. If responsible leaders appear to be playing favorites or not accurately describing a phenomenon, they abandon the issue to their opponents — a phenomenon Trump witnessed through his hesitation in characterizing the Charlottesville protests. If populists rely too heavily on emotional connectivity, which establishment politicians have any emotional connectivity? Does there exist an aspirant for President, other than Donald Trump, who can have a friendly discussion with a Walmart cashier? How many of the possible 2020 presidential candidates have worked in the “real” economy, working for an institution that needed to turn a profit? Sam Rayburn’s wish to Lyndon Johnson, after LBJ had related how bright was his brain trust, was that he wished one of them had run for county sheriff. Can we today wish that one of the 2020 presidential candidates will have run a diner, which would have required them to hire teenagers, train high school dropouts, deal with single parents, lay-off workers from failed projects and negotiate wages, all while paying taxes and dealing with various government agencies? Maybe this is why a restaurant worker might respect an owner, or even a New York real estate developer, but not a career politician. If the elites cannot maintain that connectivity, they give an opening to populists. Attaining political maturity contemporaneous with the Bush 43 invasion of Iraq, Obama was wary of American over-reach and committed to a foreign policy pullback. He embedded that withdrawal in a denial of American exceptionalism, a pillar of U.S foreign policy since Pearl Harbor. If you stop believing in yourself, it is difficult to ask others to believe in you. The rejection of America’s special role in the world helped set the stage for “Make America Great Again.” Was Barack Obama the ultimate Donald Trump enabler? There other contributing factors beyond the above four. The rise of identity politics probably played into Trump’s hands, as did the digital communications revolution. News clutter rewards pugnacity and sensationalism and allows for cocoons and even tribalism. It is also worth noting that Trump is a man of unusual presentation strengths, and he can effectively project personality. Simply put, Trump was an exemplary grievance candidate in a grievance year. Trump articulated a vision; Hillary Clinton did not. We are in a communications era. For Secretary Clinton, communications is a means to an end. For Trump it is an end. She believes in her in-box; He, in his out-box. Hillary campaigned as the functionary; Donald as the visionary. Is internationalism doomed? America is now in the middle of a twelve and possibly sixteen year reign of two presidents who challenge the Cold War view that America is better off with a leading international presence, with being a minute early. It is too expensive, argued President Obama, and it leads us into unwinnable conflicts, draining our reputation and our purse. It is too expensive, echoes President Trump, and foreigners abuse and cheat us. Obama argues for minimalism because the United States is a problem for the world, and Trump argues for minimalism because the world is a problem for the United States. Even as President, Trump is easy to underestimate. Appealingly so. Many critics derive amusement, even a sense of superiority, from his foibles. His factual errors and even spelling mistakes provide an opportunity for mockery, but the lazy epiphany of error-spotting is a poor substitute for a substantive rebuttal. And a significant portion of the criticism is either ad hominem or an over-reach, either of which helps Trump. Those who are serious about policy should look at the direction in which he is taking the country, rather than fixate on these errors. To be even-handed, if President Trump’s distinctive success in the public space was his astonishing 2016 victory, in 2008 the distinctive success of Senator Obama was his astonishing election. Obama wisely chose not to run on his government record but marshaled his formidable stage skills and personal charisma to direct criticism toward Hillary Clinton and John McCain. So if Trump’s foreign policy approach stems from his success as “Ranter-in-Chief,” does Obama’s approach stem from his success as “Charmer-in-Chief?” Radically different styles, but with policy similarities.

The deterioration in U.S. foreign policy will likely continue for the near term. On any given day, the Obama/Trump approach may make sense. We should be a minute late. It makes sense to skimp, to cut defense expenditures, to reduce international good-will and connectivity, to save money all around. Relationships can be expensive and even harmful – this is the seduction of the minimalist school. But there is a countervailing argument.

The main argument against this minimalist approach will be events themselves. The minimalist approach might work in a static environment, but that stasis in itself incentivizes a destabilizer. At some point, history presents the bill. Only then will we be reminded, perhaps cruelly, that although on any given day it might be less expensive to be a minute late, as a matter of national policy we need to be a minute early. If we are not willing to pay the price to be left of boom, then we must pay the price for the boom itself. Worse than the expense and bother of having friends would be the expense and bother of not having friends.

### 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.

#### Internet collapse causes extinction.

Eagleman ’10 [Dr. David; 11/9/2010; PhD in Neuroscience @ Baylor University, Adjunct Professor of Neoroscience @ Stanford University, Former Guggenheim Fellow, Director of the Center for Science and Law, BA @ Rice University; “Six Ways The Internet Will Save Civilization”; https://www.wired.co.uk/article/apocalypse-no]

Many great civilisations have fallen, leaving nothing but cracked ruins and scattered genetics. Usually this results from: natural disasters, resource depletion, economic meltdown, disease, poor information flow and corruption. But we’re luckier than our predecessors because we command a technology that no one else possessed: a rapid communication network that finds its highest expression in the internet. I propose that there are six ways in which the net has vastly reduced the threat of societal collapse.

Epidemics can be deflected by telepresence

One of our more dire prospects for collapse is an infectious-disease epidemic. Viral and bacterial epidemics precipitated the fall of the Golden Age of Athens, the Roman Empire and most of the empires of the Native Americans. The internet can be our key to survival because the ability to work telepresently can inhibit microbial transmission by reducing human-to-human contact. In the face of an otherwise devastating epidemic, businesses can keep supply chains running with the maximum number of employees working from home. This can reduce host density below the tipping point required for an epidemic. If we are well prepared when an epidemic arrives, we can fluidly shift into a self-quarantined society in which microbes fail due to host scarcity. Whatever the social ills of isolation, they are worse for the microbes than for us.

The internet will predict natural disasters

We are witnessing the downfall of slow central control in the media: news stories are increasingly becoming user-generated nets of up-to-the-minute information. During the recent California wildfires, locals went to the TV stations to learn whether their neighbourhoods were in danger. But the news stations appeared most concerned with the fate of celebrity mansions, so Californians changed their tack: they uploaded geotagged mobile-phone pictures, updated Facebook statuses and tweeted. The balance tipped: the internet carried news about the fire more quickly and accurately than any news station could. In this grass-roots, decentralised scheme, there were embedded reporters on every block, and the news shockwave kept ahead of the fire. This head start could provide the extra hours that save us. If the Pompeiians had had the internet in 79AD, they could have easily marched 10km to safety, well ahead of the pyroclastic flow from Mount Vesuvius. If the Indian Ocean had the Pacific’s networked tsunami-warning system, South-East Asia would look quite different today.

Discoveries are retained and shared

Historically, critical information has required constant rediscovery. Collections of learning -- from the library at Alexandria to the entire Minoan civilisation -- have fallen to the bonfires of invaders or the wrecking ball of natural disaster. Knowledge is hard won but easily lost. And information that survives often does not spread. Consider smallpox inoculation: this was under way in India, China and Africa centuries before it made its way to Europe. By the time the idea reached North America, native civilisations who needed it had already collapsed. The net solved the problem. New discoveries catch on immediately; information spreads widely. In this way, societies can optimally ratchet up, using the latest bricks of knowledge in their fortification against risk.

Tyranny is mitigated

Censorship of ideas was a familiar spectre in the last century, with state-approved news outlets ruling the press, airwaves and copying machines in the USSR, Romania, Cuba, China, Iraq and elsewhere. In many cases, such as Lysenko’s agricultural despotism in the USSR, it directly contributed to the collapse of the nation. Historically, a more successful strategy has been to confront free speech with free speech -- and the internet allows this in a natural way. It democratises the flow of information by offering access to the newspapers of the world, the photographers of every nation, the bloggers of every political stripe. Some posts are full of doctoring and dishonesty whereas others strive for independence and impartiality -- but all are available to us to sift through. Given the attempts by some governments to build firewalls, it’s clear that this benefit of the net requires constant vigilance.

Human capital is vastly increased

Crowdsourcing brings people together to solve problems. Yet far fewer than one per cent of the world’s population is involved. We need expand human capital. Most of the world not have access to the education afforded a small minority. For every Albert Einstein, Yo-Yo Ma or Barack Obama who has educational opportunities, uncountable others do not. This squandering of talent translates into reduced economic output and a smaller pool of problem solvers. The net opens the gates education to anyone with a computer. A motivated teen anywhere on the planet can walk through the world’s knowledge -- from the webs of Wikipedia to the curriculum of MIT’s OpenCourseWare. The new human capital will serve us well when we confront existential threats we’ve never imagined before.

Energy expenditure is reduced

Societal collapse can often be understood in terms of an energy budget: when energy spend outweighs energy return, collapse ensues. This has taken the form of deforestation or soil erosion; currently, the worry involves fossil-fuel depletion. The internet addresses the energy problem with a natural ease. Consider the massive energy savings inherent in the shift from paper to electrons -- as seen in the transition from the post to email. Ecommerce reduces the need to drive long distances to purchase products. Delivery trucks are more eco-friendly than individuals driving around, not least because of tight packaging and optimisation algorithms for driving routes. Of course, there are energy costs to the banks of computers that underpin the internet -- but these costs are less than the wood, coal and oil that would be expended for the same quantity of information flow.

The tangle of events that triggers societal collapse can be complex, and there are several threats the net does not address. But vast, networked communication can be an antidote to several of the most deadly diseases threatening civilisation. The next time your coworker laments internet addiction, the banality of tweeting or the decline of face-to-face conversation, you may want to suggest that the net may just be the technology that saves us.

#### Digital authoritarianism causes global info-wars – extinction.

Manstead ’20 [Katherine; Non-Resident Fellow @ Alliance for Securing Democracy and Senior Adviser for Public Policy @ Australian National University’s National Security College; “Strong Yet Brittle: The Risks of Digital Authoritarianism”; https://securingdemocracy.gmfus.org/wp-content/uploads/2020/05/Strong-Yet-Brittle-The-Risks-of-Digital-Authoritarianism.pdf]

While digital authoritarianism can enhance regime durability and national power, it also introduces deep-seated vulnerabilities, eight of which are considered below. Significantly, digital authoritarians may find themselves in a state of constant contest with other regime types, trapped in cycles of overreach and backlash, and prone to strategic miscalculations that pull them into interstate conflict. The current turn to digital authoritarianism therefore also has broader implications for international peace and stability.

Brittle Legitimacy

Reliance on information control makes authoritarians brittle. Small chinks in their information control armor could have existential consequences, particularly during political or economic crises (i.e. when the regime needs to rely on control for legitimacy because it is not delivering for citizens). The information and ideas most dangerous to authoritarians include:

• the identity of opposition groups and leaders and their levels of support; 17

• technical means for subverting control of communications and surveillance technologies;18

• ideas about values that transcend state sovereignty, such as liberalism and human rights;19

• evidence that the central government is not delivering efficient outcomes;20 and

• ideas that undermine the myths and narratives used to legitimize authoritarian rule or the power of the ruling elite.21

Constant Contest

Since technologies and ideas are dynamic, the battle for information control is a constant struggle. It can never be ‘won.’ Authoritarians are therefore in a perpetual state of information warfare, inside and outside their regime, and feel perpetually insecure. This dynamic may lead authoritarian governments to assess that it is worth engaging in information or cyberattacks to discredit liberal ideas at their foreign source or to shape or disable systems that jeopardize their information control—despite real risks of conflict escalation and global pushback.

Overreach and Backlash

The fundamental importance of information control to authoritarians increases the likelihood of overreach, leading to cycles of backlash and reprisal. Many perceive China’s heavy-handed narrative warfare in Hong Kong and confrontational efforts to control narratives about coronavirus to be strategic missteps. For example, CCP efforts to stifle dissent by punishing online gaming company Blizzard and the National Basketball Association (NBA) arguably aided Hong Kong protester narratives;22 while CCP obfuscation about coronavirus has prompted unprecedented diplomatic rebukes from world leaders.23 Despite rising international awareness and condemnation of China’s sharp power tactics,24 China is accelerating, not muting, these behaviors.25 One explanation for this is that the CCP calculates that the risks of international backlash (and occasional overreach by its officials) are acceptable, compared with the risk of letting domestic information control falter.

Impaired Feedback Mechanisms

Authoritarians embrace technology to increase the legibility of their societies. But legibility requires cooperation from society. It is facilitated by an open information ecosystem, robust civil society, mechanisms of transparency, and protections for political speech.26 Conversely, information control and technology-enabled systems of surveillance and enforcement discourage accurate reporting and punish whistleblowing, while incentivizing officials to conceal failures and exaggerate successes.27 In 2007, Le Keqiang (before he became China’s premier) described China’s national income figures as “man-made” and unreliable, and noted that more objectively verifiable proxies should be preferred to official statistics collected by provinces.28 Without elections, authoritarians can also struggle to understand public sentiment, a problem highlighted by the Chinese government’s mismanagement of massive ongoing protests in Hong Kong. Party leaders wrongly assessed that the protestors’ grievances were primarily economic rather than political and that they did not enjoy broader public support.29 As Zeynep Tufekci has observed, the costs of China’s “authoritarian blindness” have been immense: a solvable issue (demands to withdraw a relatively unimportant extradition treaty) became “a bigger, durable crisis” with ongoing political consequences.30

China’s delayed reaction to coronavirus is a stark example of the authoritarian legibility and feedback problem. Local officials and hospital administrators in Wuhan suppressed information about the outbreak and punished doctor whistleblowers—depriving other provinces and the central government (not to mention international authorities) of vital signals that would have allowed swifter action to control the pandemic.31 Once authorities acknowledged the pandemic, China deployed the full weight of its digital surveillance capabilities. It was able to implement top-down lockdowns quickly; marshal its tech sector to build health apps; force citizens to download these apps; and access vast commercial holdings of personal data to cross-check compliance. However, it lacked critical bottom-up feedback systems that may have obviated the need for such draconian measures in the first place.32 Indeed, controlling for income and population size, authoritarian regimes appear to be more lethal than democracies during epidemics, arguably because of their closed information ecosystems.33

Overreliance on Technological Systems which ‘Fail Hard’

Many authoritarian governments are embracing AI-driven surveillance and control methods—from ‘smart cities’ to digital currencies, e-payment platforms and social apps. However, when AI systems fail, they tend to fail in unpredictable, often catastrophic ways. While citizens in democracies lament slow adoption of digital governance, authoritarians’ speed comes with the risk that authorities roll out unsafe or vulnerable systems.34 Imagine a critical failure of China’s social credit system—whether by accident or sabotage—which affected the integrity of records. The implications for regime stability could be significant.

AI systems do not need to fail to produce problematic results. They draw insights and make predictions based on correlations in vast datasets but are not good at identifying causal mechanisms. This means that AI systems often produce outcomes which humans cannot reverse engineer or routinely evaluate. Like using asbestos to build a city, AI governance systems might produce good results in the short-term, but inconsistencies or oversights in their approaches could lead to cascading failures that humans struggle to identify, let alone rectify.35

Unintended Consequences from High-Tech Modernism

Fixation by central governments on achieving targets or deploying certain technologies creates incentives for local officials to deploy “technology placebos” that do little to address underlying economic and social concerns. For example, many so-called smart city projects in authoritarian societies have failed to meet development and economic goals. They are fraught with issues such as “unclear strategic goals” (e.g. they often optimize for surveillance, not development) and “inadequate implementation.”36 This problem may be particularly pronounced for less-developed authoritarian governments which have been persuaded, for strategic reasons, to buy Chinese-exported digital surveillance tools that are not customized to local circumstances. These cities may also become locked into unstable or insecure technical architectures37 and economic dependence on China.38

Commitments to targets, and ideological fervor about technology, can also distort commercial decisions and raise unrealistic public expectations. Analysis of China’s AI industry, for example, suggests that companies are eschewing investment in basic research and focusing on quick wins in applied research.39 Additionally, China is already behind on meeting a number of its technology targets40—a lag that will likely be exacerbated by the global economic downturn following the coronavirus pandemic, and rising security fears in foreign markets about the security of Chinese technology and IP theft by its companies.

From a strategic perspective, there are risks that authoritarian governments’ fixation on technology-centric strategies will lead them to overestimate what technology can in fact achieve. For example, Chinese military strategists have posited that AI could lift the ‘fog’ of war and eliminate uncertainty and confusion on the battlefield. This is an ahistorical and unlikely prediction that could inspire miscalculation.41 Russian strategists theorize about how psychological operations might subdue adversaries without a shot being fired—an approach that may overestimate what cognitive warfare can achieve, at least without being combined with other elements of national power.42

Challenges to Social Cohesion

The medium- and long-term social consequences of digital authoritarianism are yet untested. Overreliance on surveillance and enforcement systems could attenuate relationships within a society, exacerbating authoritarians’ underlying low trust problems. Since they tend to reduce citizens to data inputs, these systems may deny citizens’ intrinsic desire for dignity and identity—with unexpected results.43 Information control tactics—such as flooding—can repress opposition, but long-term may exacerbate public uncertainty and decrease business confidence and trust in official information, with implications for social cohesion and economic progress.44

Dysfunctional Innovation Ecosystems

Information control and state-led pushes for technology dominance risk hampering innovation. For example, to achieve Xi Jinping’s ‘Made in China 2025’ goals, the CCP is supporting high-tech monopolies, restricting international collaboration, and yoking the state and market together.45 However, monopolies are notoriously inefficient and cross-border collaboration is an important driver of innovation. Further, innovation works best under free market conditions and in open societies.46 Some analysts argue that China’s success in deploying AI applications is an exception to this rule. However, there is a risk that Chinese companies are prioritizing shortterm breakthroughs (e.g. analyzing existing datasets to find new insights) at the expense of long-term investment in basic research.47 While authoritarians may excel at developing and deploying AI applications, conceptual research is arguably the real engine of AI advancement—and something that will continue to thrive in open societies.

Summary and Further Research

All states face risks in the information age, but the extent to which regime type affects the relative likelihood of these risks materializing, and their magnitude, is understudied. For example, much has been written about liberal democracies’ vulnerabilities to propaganda and foreign interference via social media.48 But while information warfare against open societies is more likely, arguably it is a higher magnitude threat for authoritarians, where control of information is core to regime survival. Similarly, analysts often lament that democratic governments have been slow to digitize governance systems and craft forward-looking technology policy.49 But while digital authoritarians might outcompete democracies in the roll-out of advanced technologies, this creates new vulnerabilities and risks. Inappropriate safeguards and accidents may result in cascading failures, while heavily digitized governance systems may be susceptible to foreign attack. Regime type may also affect the relative ability of authoritarians and democracies to mitigate their information age risks. For example, a democracy can build resilience to cyber and information threats through a variety of civil society and market-based interventions. Digital authoritarians must rely on a more limited set of top-down policy tools. Ultimately, a more systematic effort to map the comparative strengths and vulnerabilities of authoritarians and democracies in the information age could help both to better understand the other’s threat perceptions and manage escalation risks. It might also highlight ways in which democracies can hold digital authoritarians’ core interests at risk, in order to deter authoritarian interference in their own digital environments.

# 2ac

## competition adv

## internet adv

### innovation turn – 2ac

#### All metrics show the US innovation is falling behind.

Kersten ’21 [Alexander; 4/14/21; Director of the Renewing American Innovation Project @ Center for Strategic and International Studies; Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy @ Tufts University; “Why Renewing American Innovation? The “Endless Frontier Act” and Biden’s Bid for Maintaining U.S. Global Competitiveness”; https://www.csis.org/analysis/why-renewing-american-innovation-endless-frontier-act-and-bidens-bid-maintaining-us-global; AS]

The China Challenge

China today poses both a technological and security threat to the United States that no country has in modern history. U.S. companies operating under free market rules struggle to compete against state-backed Chinese firms that can ignore a poor quarter while enjoying one of the largest, most-protected markets in the world. With the support of the central government, key Chinese firms are free to innovate and compete in the global market without financial worries while Chinese scientists can focus on research and development instead of seeking grants for their university or research institution. According to Tulane University professor and former Aspen Institute CEO Walter Isaacson in 2019, China has modeled its approach along the lines of U.S. scientist Vannevar Bush’s 1945 report Science: The Endless Frontier, which, besides being the inspiration behind the name of the proposed legislative package, promoted government funding of basic research together with universities and industry—a priority of the Franklin D. Roosevelt administration. As the Chinese government sets long-term strategic goals like Made in China 2025, which was part of China’s 13th Five-Year Plan of 2016-2020, the United States needs to return to its post-World War II values of equating leadership in science and technology with national security and prosperity.

Today, U.S. companies locked in close competition lack the incentives to maintain in-house capabilities for innovation, like they did in the mid-century era of AT&T’s Bell Labs, DuPont’s central R&D unit, Xerox PARC, and others. Heightened competition, shareholder pressures, and new incentives pushed firms to cut these in-house research units back in the 1980s. Since then, the share of applied research in total corporate R&D expenditures fell from 30 percent in 1985 to below 20 percent in 2015—all well below the peak of almost 40 percent in the 1950s. Of course, the Harvard Business Review in 2014 famously suggested that, despite being the source of great inventions throughout history, China today is a “land of rule-bound rote learners” where breakthroughs are rare. Because of this, some argue the Chinese are not great innovators and China’s state-backed system could itself breed complacency and come back to bite it in the near future. However, even by then, experts warn, the United States will have missed the train on many important technologies and will be struggling to catch up.

Despite Silicon Valley and the millennial generation’s supposed penchant for innovative disruption, U.S. total factor productivity has been slowing since the 1970s. Productivity today is the lowest in more than a century. Innovation, historically a clear driver of U.S. productivity, means the creation of ideas and inventions that are translated into practical value and improve the quality of people’s lives directly or via their ability to grow the economy. Whether measured in terms of triadic patents (patents filed in the United States, Europe, and Japan), most available measures of productivity, or even startup company creation, the United States’ trademark innovative spirit has been gradually dampening for decades. And if not for China’s meteoric rise this century, the United States might still be sleepwalking—optimistically but without a serious plan—instead of waking up to the need for a coherent national strategy.

U.S. Complacency, and How We Got There

Noted George Mason University economist Tyler Cowen and other experts have recognized a growing “complacency” in American life as the indicator of a societal shift from the United States’ early dynamism. From the turn of the twentieth century until roughly the moon landing of 1969, the breakneck pace of groundbreaking technologies that directly affected the quality of life and the structure of U.S. society was simply astounding. Yet, since the first moon landing in 1969, only the internet and its application to more and more parts of our lives can claim to have made any meaningful impact—meaning that physically the world of 1969 is much more like that of 2021 than 1969 was of the early twentieth century. This, of course, is not meant to discredit the great advances in medicine and human genomics made in the last few decades, for example, but to show how the rate of society-changing innovations has not maintained the pace that existed from the mid-nineteenth century until roughly 1969.

In the developed world, this slowdown has unfortunately contributed to wage stagnation, the shrinking of the middle class, and greater political polarization domestically. Coinciding with the waning days of the Soviet Union’s power in the 1980s, the U.S. innovation decline was masked at home. Further, the Soviets of that period no longer posed a technological threat to the United States. Japan on the other hand, posed a great technological threat in the 1980s but was and is a staunch U.S. ally, and not a security threat. Unchallenged abroad and riding the dual-edged optimism of the internet boom of the 1990s and the victory over communism, the United States missed the ways in which it was giving up the advantages that made it such a powerhouse in the mid-twentieth century.

Industry experts have also suggested that the United States put its position up for grabs when it began to outsource important production—which President Biden alluded to during the signing of a February 2021 executive order aimed at reducing supply chain bottlenecks. Starting in the 1970s and 1980s, the United States began to outsource production of semiconductors and displays mostly to Taiwan and South Korea, which today account for almost half of all semiconductor manufacturing capacity in the world. Further, adding in mainland China and Japan shows that a whopping three-quarters of all semiconductor manufacturing capacity comes from East Asia—a sharp departure from 1990, when the United States still provided about 50 percent of all global manufacturing capacity. Removing itself from the production process means the United States misses out on important chances for innovating as well as for developing a strong high-tech manufacturing workforce.

#### 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.

## t per se

### 2AC – AT: T Business Practices

#### 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.)

#### Prohibitions can be categorical or limited.

Khan ’19 [Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Separations of Platforms and Commerce,” *Columbia Law Review* 119(4), p. 973-1098]

Notably, state and federal governments have issued line-of-business restrictions through a variety of legal tools: corporate charters, regulatory regimes, and antitrust law.227 In some cases, these limits prohibited firms from expanding into any distinct market; in others, they prohibited firms from entering only adjacent markets—namely, those markets that involve a successive stage of production or distribution. A categorical prohibition would, for example, ban a movie distributor from entering any nondistributor market, whereas a ban on integration would prohibit it from entering only the movie-production market or the movie-theater market. Since this Article examines the dual role that digital platforms play—as both marketplace operators and merchants in the marketplace—this Part primarily focuses on limits on entry into adjacent markets

#### Per se is a subset of standards for applying the rule of reason, not an alternative. Their Stevens card does not support any of their distinctions:

Thomas **PIRAINO** Vice President-Law, Parker-Hannifin Corporation & JD Cornell ’**91** Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis, 64 S. CAL. L. REV. 685 p. 691-693

689-693

II. THE RULE OF REASON

The Supreme Court recognized early in this century that, under a literal approach to Section 1 of the Sherman Act, **any contract** could be deemed to be "in restraint of trade."15

[INSERT FOOTNOTE 15]

Section 1 of the Sherman Act **prohibits** "every contract, combination... or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1973). As Justice Brandeis recognized, "Every agreement concerning trade... restrains." Chicago Bd. ofTrade v. United States, 246 U.S. 231, 238 (1918).

[END FOOTNOTE 15]

In order to allow businesses to reasonably regulate their affairs, the Court developed an interpretation of Section 1 deriving from the common law: Only unreasonable restraints of trade should be illegal.1 6 From the earliest days of antitrust history, the courts have thus felt **compelled** to consider the **competitive circumstances** and **justifications** of **business conduct**. Over the years this factual inquiry came to be called the "rule of reason" and became recognized as "the prevailing standard of analysis" in Section 1 cases.17

Section 1 conduct includes many different types of competitive activities with few common characteristics. Nevertheless, the courts never attempted to tailor specific rule of reason approaches to particular competitive practices. Instead, they assumed that a similar approach should apply in all cases. In attempting to define the rule of reason, the courts could do no better than list all factors that might conceivably **reveal the competitive purpose or effect** of a Section 1 agreement. The classic formulation of the rule of reason, set forth by Justice Brandeis in 1918, includes such factors as the circumstances peculiar to the defendant's business, the conditions before and after the restraint, the nature and purpose of the restraint, and the competitive effects of the restraint.I Later Supreme Court cases failed to refine this open-ended formula. In ContinentalT V v. GTE Sylvania,19 for example, the Court cited Justice Brandeis's formulation without any indication of the relevance or weight to be afforded any particular factor.2"

The Court's rule of reason formula requires a weighing of all the circumstances of each case to determine whether a restraint is legal. This checklist approach puts so many factors at issue that none is disposi- tive. 1 The only certainty under the rule of reason is that courts will be required to engage in a complicated and prolonged investigation into market impact before deciding on the legality of a particular restraint. The approach provides little guidance to businesses trying to plan their conduct or to courts searching for helpful precedent. Both plaintiffs and defendants will be more inclined to prolong litigation because of the rule of reason's uncertain outcome.22 Indeed, the confusion generated by the approach is currently "one of the more vexing problems of antitrust 23 law."

Many commentators and a few lower federal courts have suggested various ways of refining the rule of reason. The most popular method involves the use of a threshold market analysis to "filter" out permissible conduct. If the plaintiff fails to prove that the defendant has market power, the restraint is deemed legal and the analysis is at an end.24 A market filter approach is not, however, a fair or effective solution to the problems with the traditional rule of reason. By adding another stage to the litigation process, the market fiter is likely to complicate antitrust litigation.25 The determination ofmarket power is the most difficult fac- tor in rule of reason analysis. Market power involves such complex issues as the relevant product and geographic markets and the relative market shares of the defendant and its competitors. Proving such issues requires extensive documentary evidence and endless testimony from economists and other experts.26 A threshold market power analysis puts a plaintiff at a significant disadvantage in antitrust litigation. The expense of proving market power and the uncertainty of prevailing at the threshold stage are likely to deter plaintiffs from filing legitimate claims.

III. THE PER SE RULE

Courts developed the per se rule in response to the inefficiency of the rule of reason in antitrust litigation. They saw little reason to engage in a prolonged investigation of obviously anticompetitive conduct. Practices clearly having a "pernicious effect on competition" 27 and lacking "any redeeming virtue' 2 could be conclusively presumed to be illegal without any inquiry into competitive purpose or market effect.29 The courts found such a per se approach attractive because it greatly enhanced the effectiveness of antitrust enforcement. In contrast to a vague rule of reason, clear per se standards reduced the time and expense of antitrust cases, provided clear guidance to businesses, and effectively deterred anticompetitive conduct.30 The courts recognized that such an absolute standard had a certain disadvantage: In a few cases courts would invalidate conduct that a more detailed inquiry might have shown to be legitimate. They concluded, however, that the litigation efficiencies provided by the per se rule justified its occasional overbreadth.31

It is easy to understand, then, how the per se rule came to be viewed as an entirely separate approach to antitrust analysis. Where the rule of reason was ambiguous, the per se rule was clear; where the rule of reason complicated the litigation process, the per se rule simplified it; and where the rule of reason shielded beneficial business practices, the per se rule punished anticompetitive restraints.

**Per se rules**, however, are **no more than an abbreviated version of the rule of reason**. **Every per se rule** has its origin in the **substantive competitive purpose** **and** **effect** of the **prohibited conduct.** Indeed, because of the harshness of the rule, courts were careful not to adopt a per se approach until they had gained enough experience to be confident that a particular restriction would have an **anticompetitive impact in nearly all cases**.32 The Supreme Court first used a per se approach early in this century in price-fixing cases, where the anticompetitive potential of the arrangements was so obvious that the Court could easily dispense with inquiries into market conditions or the defendants' justifications.33 No new per se classifications were established until the late 1950's, when the Interventionist Model began to influence the Supreme Court. By the late 1960's the Court had applied the per se rule to tying arrangements,34 horizontal territorial or customer allocations,35 and group boycotts.36 The Interventionist "fever reached its peak"' 37 in 1967 with UnitedStates v. Arnold, Schwinn & Co., 8 which extended the per se rule to nonprice vertical restrictions imposed by a supplier on its distributors.

#### Their interpretation is arbitrary: no consensus definition of “business practice.” Arbitrary interps move the goalpost and are unfair.

Ass. Justice Madeline Flier, '6, Camacho v. AUTO. CLUB OF SO. CALIFORNIA, 48 Cal. Rptr. 3d 770 - Cal: Court of Appeal, 2nd Appellate Dist., 8th Div. 2006

Second, anticompetitive conduct is best defined in terms of the policy and spirit of antitrust laws; the same cannot be said of a business practice that is "unfair" or "deceptive" in the terms of section 17200. That is, cases involving anticompetitive conduct move in a far smaller, and more clearly defined, universe than unfair or deceptive business practices. It is therefore possible to "tether" anticompetitive conduct to the antitrust laws, while the universe of laws and/or regulations that bear on unfair practices is so varied that it is not possible to achieve a consensus which of these laws and regulations might apply to define an unfair practice.

## fcc pic

### 2AC – AT: Industry PIC

#### Picking and choosing regulated industries destroys predictability and coherence of antirust and regulation.

Markham ‘9 [Jesse; Jr. Marshall P. Madison Prf. of Law @ San Francisco; “The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation under the Ballooning Conception of Plain Repugnancy” 45 GONZ. L. REV. 437 p 474-475]

Alternatively, Credit Suisse might be narrowly understood to apply only in the context of securities regulation. There are indications of that in the decision, which makes no secret of the unique importance of securities markets. However, a special implied repeal rule for securities regulation would be a poor idea because on that view of things there could be as many implied repeal rules as there are industries, each requiring a ranking of its importance to the nation. How would banking, energy, food and drug safety, health care, air transportation, etc. rank? Is regulation in these industries "more important" than antitrust in the Court's hierarchy of preferences? What if they come into conflict with each other-what preferences would then apply? Does the application of implied repeal entitle the Court to rank statutes according to its own preferences? Not only would that intrude on the legislative function, but it would create an unpredictable legal framework. One could not know whether one statute displaces another until the Court had voted its relative preferences between the competing rules.

### securities DA – 2ac

#### Fast growth/inflation now – rate hikes are inevitable – try or die for slow tightening.

Nick Timiraos, Chief econ correspondent @ WSJ, 11-10-2021, "Inflation Pickup Makes Fed More Likely to Raise Rates Next Year ," WSJ, https://www.wsj.com/articles/fed-inflation-cpi-rates-11636552015

The latest rise in inflation helps to explain why investors are increasingly asking not whether the Federal Reserve will raise interest rates next year but rather how much and how quickly it may do so.

The Labor Department reported Wednesday that consumer prices rose strongly in October, up 0.9% on a seasonally adjusted basis from the prior month. Over the last 12 months, inflation is up 6.2%. So-called core prices, which exclude food and energy items, rose 4.6% over the past year. Both are the largest annual increases in more than 30 years.

The figures highlight why Fed officials have been backing away from characterizing recent price pressures as “transitory.” Even though senior central bank leaders still believe inflation could slow as supply-chain kinks abate, they now see that process taking longer than they expected earlier this year, extending into 2022. That is in part because the spread of the Delta variant of the coronavirus has extended a series of disruptions in the economy.

“Today’s report reaffirms that the Fed is in an uncomfortable place,” said Tiffany Wilding, an economist at Pimco.

Together with evidence that the labor market is rapidly recovering, this means they are more likely to raise interest rates next year, possibly as soon as next summer.

“We see higher inflation persisting, and we have to be in a position to address that risk should it create a threat of more persistent, longer-term inflation,” Fed Chairman Jerome Powell said at a news conference last week.

The rise in core prices over the past year is in line with unit labor costs, a key measure of compensation for U.S. workers, which rose 4.8% in the third quarter from a year earlier. That suggests it could require the labor market to cool down to tame inflation, said Marc Sumerlin, managing partner at economic consulting firm Evenflow Macro.

“The Fed is running out of intellectual places to hide,” he said.

Fed officials approved plans last week to reduce their monthly bond purchases at a pace that, if left unchanged, would end them by next June. They want to stop buying bonds before raising rates.

Earlier this year, they had expected a run of higher prices in the spring would be in the rearview mirror by now. They have believed that higher prices largely reflect disrupted supply chains, temporary shortages and a rebound in travel—all linked to the reopening of the economy after widespread closures caused by the pandemic.

Now, Mr. Powell said, central bank forecasters expect higher inflation to persist “well into next year.” Fed officials modified their policy statement last week to signal marginally less conviction that price increases will prove transitory. Mr. Powell said he hopes inflation will begin moving down by the second or third quarter.

Indeed, the latest inflation numbers suggest prices are picking up again for items that had driven strong gains earlier this year, such as cars. Moreover, other data suggest price pressures are broadening to a wider range of goods and services as rising shipping and commodities costs feed through the economy.

Inflation could also stay above the Fed’s 2% target for longer if other sectors of the economy that haven’t recently contributed to higher prices, like residential rents, see greater inflation in the coming year.

Chicago Fed President Charles Evans said on Monday, “I had expected to see more progress by now, and there are some indications that inflationary pressures may be building more broadly.”

Current readings are much more than the desired “moderate overshoot” of the Fed’s 2% inflation target, said Fed Vice Chairman Richard Clarida on Monday. He added, “I would not consider a repeat performance next year a policy success.”

#### Turn – reducing financial sector concentration promotes monetary transmission.

Romain Duval et al, PhD, Assistant Director in the IMF’s Research Department, 7-21-21, “Taming Market Power Could (also) Help Monetary Policy,” *IMF Blog,* https://blogs.imf.org/2021/07/21/taming-market-power-could-also-help-monetary-policy/

Some central banks are currently debating whether to tighten monetary policy to fight inflationary pressures, after having eased decisively in response to the COVID-19 shock. In making such decisions, central bankers have to consider how much businesses and consumers will respond. The structure of the financial system and the future expectations of consumers and businesses are key drivers of how effective monetary policy actions will be. Yet there’s another, overlooked, driver: corporate market power.

New IMF staff research has found ever larger and more powerful companies are making monetary policy a less potent tool for managing the economy in advanced economies, all else equal.

Market power has risen in many advanced economies and emerging market countries in recent years, as seen in price markups—the ratio of a good or service’s price to its marginal cost of production, concentration, or profits. For example, recent IMF work finds that global price markups have increased by more than 30 percent, on average, across listed firms in advanced economies since 1980, and twice as fast in digital sectors. In addition, the COVID-19 recession is likely to amplify these trends. Large corporations are expected to gain market share vis-à-vis small businesses, which are at greater risk of insolvency.

Our study finds that firms with greater market power respond less to monetary policy actions, possibly because of their bigger profits. Larger profits make these firms less sensitive to changes in external financing conditions, such as those triggered by central banks’ decisions. For example, as of March 2021, Apple had over $200 billion in cash and investment in marketable securities, while Alphabet had over $150 billion. Firms with such large cash cushions can decide on investment and other projects without having to worry about how easily they could tap other funding sources. In contrast, firms that face greater credit constraints, such as young, low-markup firms, are much more responsive to monetary policy actions than older, larger, higher-markup corporations. It could also be that firms with greater market power rely less on funding sources whose conditions respond swiftly to monetary policy actions, such as bank credit.

Specifically, using data for the United States and a panel of 14 advanced economies, we find that high-markup firms respond a lot less to a monetary policy shock—an unexpected change in the policy rate—than the average firm in the economy. For example, in the US, a 100 basis point increase in the policy rate causes a low-markup firm to cut sales by about 2 percent after four quarters, while a high-markup firm barely reduces its sales. Results for the panel of advanced countries are qualitatively similar.

On top of being generally harmful to business dynamism and growth, excessive market power can also hamper central banks’ ability to stimulate economic activity during recessions, and to cool it down during expansions. In principle, if monetary policy is less powerful, central banks could just use more of it—by easing more aggressively to fight a recession, for example; however, this approach may not be fully successful in advanced economies when so many central banks are constrained by the effective lower bound on interest rates, and also face (actual or perceived) limits to quantitative easing—such as financial stability concerns from very large and persistent asset purchases. Conversely, greater market power implies that, should inflationary pressures become persistent, central banks may need to tighten monetary policy more aggressively than would be the case in a more competitive economy, all else equal. Lower-markup firms and more competitive industries would be hit disproportionately. More broadly, aggressive tightening might put the recovery at risk. One silver lining is that market power may dampen the passthrough from higher input costs to output and inflation in the first place, all else equal—market power can reduce the response of inflation and output to a wide range of macroeconomic shocks beyond just monetary policy shocks.

These considerations further strengthen the case for reforms to increase competition in advanced economies. High on the agenda are enhancements to competition law and policy frameworks. These include, depending on the jurisdictions, tighter merger control—particularly when it comes to dominant firms, stronger enforcement of abuse of dominance, greater reliance on market investigations, and more specific measures to cope with the fast-changing digital economy.

Policymakers will need all available tools to secure a dynamic, sustainable, and inclusive recovery. Curbing corporate market power would not only support the recovery directly by stimulating investment, innovation and wage growth, but also indirectly by making monetary policy more powerful. Encouragingly, improvements in antitrust frameworks are currently under consideration in key jurisdictions.

#### No impact

#### Downturn won’t cause war – prefer post-COVID evidence.

Walt ’20 [Stephen; Robert and Renée Belfer professor of international relations @ Harvard University; 5/13/20; "Will a Global Depression Trigger Another World War?"; Foreign Policy; https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/]

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose. This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too. Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure. I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do. Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely. Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible. If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished. On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars

#### Turn: plan key to productivity growth

Demertzis ’21 [M; Deputy Director @ Bruegel; and N. Viegi; South African Reserve Bank Professor of Monetary Economics @ University of Pretoria; “‘Low interest rates in Europe and the US: one trend, two stories’,” *Bruegel-Policy Contributions*]

The process we describe is global in nature, but there are significant local variations. In the US, the main focus is the connection between innovation and concentration. In Europe, the focus is rather on the connection between risk and innovation. How has the US experienced the process of digitalisation, the starting point of the process we have described? This type of technology shock has two characteristics: it needs relatively little tangible capital, therefore generating strong increasing returns to scale, and it leads to winner-takes- all firms. The consequence of these two characteristics is that those winner firms expand rapidly, and use the resources accumulated to defend and expand their dominant positions, leading to concentration and market power. In addition, globalisation means that market power gained domestically can also be scaled globally, which increases exponentially the gains from incumbency.

But this is not necessarily a bad thing. An increase in concentration could very well be a signal of a well-functioning competitive environment in which the most efficient and innovative producers end up naturally capturing a greater market share (Van Reenen, 2018). However, if market concentration is not limited, it results in barriers to entry and uncompetitive practices that do not contribute to productivity and have little to offer in terms of innovation (De Loecker et al, 2020).

Furman (2018) argued that for the US, had concentration been the result of innovative firms capturing the biggest share of the market, an increase in productivity growth across the economy would have been seen. However, as our figures have shown, productivity growth is on a declining path, in line with global trends. Furman (2018) therefore joined all the others cited in section 2 in arguing that market concentration has not resulted in greater dynamism in the US market. Furman also took the view that policy has also contributed to the reduction in competition by reducing antitrust enforcement, an argument that Philippon (2019) made when he talked about “capture”.

The lack of competition and the preservation of star firms raise barriers that prevent other more innovative companies from entering, discourage investments and reduce interest rates. So, the digital shock has played out paradoxically in the US. Although an undoubtedly major innovation shock, it has also led to major concentration effects, creating monopolies that have less incentive to innovate and preventing others from entering. An innovation shock has thus led to conditions less favourable for future disruptive innovation.

Furthermore, the second part of the literature argues that the resulting low interest rate environment then promotes zombie firms, reduces the ability of banks to create credit and enhances the strategic advantage held by such superstar firms.

These, in turn, accelerate concentration and further suppress productivity and interest rates. This creates the vicious cycle between low interest rates, productivity decline and the prospect of innovation.

#### No impact to share prices – the wealthy can afford to lose.

Lina M. Khan & Sandeep Vaheesan, ’17, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, 11 HARV. L. & POL'y REV. 235 (2017).

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.

## regs cp

### 2AC – AT: Regulation CP

#### 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.

#### Remedies – agency regulations are limited, and punishments are easy for companies to circumvent.

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]

A. Agencies May Have No Power to Order Important Antitrust Remedies

Agencies are not authorized to enforce the antitrust laws but are required to consider applicable antitrust policies. 72 Although such policies must be fully taken into account, they must also be harmonized with agencies' substantive statutes. 73 Therefore, leaving antitrust enforcement in regulated industries largely to agencies precludes strict antitrust enforcement. 74

One very important difference between court enforcement of antitrust laws and agency enforcement of regulatory statutes is in allowed remedies. Although some agencies, such as the FERC and the Commodity Futures Trading Commission (CFTC), may levy very substantial fines for specific types of [\*639] regulated conduct, e.g. market manipulation, 75 agencies generally face procedural and substantive limitations in the relief that they may order. In antitrust enforcement the availability of judicial remedies continues to be especially important where the prospect of treble damages and potential liability for opposing party legal fees create important deterrents to illegal conduct. 76 Although it may be robust, where applicable, the FERC and the CFTC penalty authority exists only over a small spectrum of potential industry antitrust violative conduct and, as to the FERC, in less robust form for some other violations. 77

The administrative record preceding the Trinko decision is an excellent example of how administrative agencies often have inadequate tools to deter anticompetitive conduct. In December, 1999, the FCC granted Verizon's (then Bell Atlantic's) application to enter the long distance market in New York State based upon its "conclusion that Bell Atlantic had taken the statutorily required steps to open its local exchange and exchange access markets to competition." 78 But within several months Verizon was admitting that it was breaching its open access commitments for which it paid a "voluntary contribution" of $ 3 million to the FCC, and $ 10 million to competitive local exchange carriers. 79

The Trinko Court portrayed the FCC action against Verizon as showing that the regulatory structure was sufficient to remedy and deter anticompetitive conduct. 80 But then FCC Chairman Powell drew a markedly different conclusion in a subsequent communication to Congress. 81 He explained that "given the "vast resources' of many of" the nation's incumbent local exchange carriers, the Commission's maximum fine "is insufficient to punish and to deter violations in many instances." 82 He advised increasing the forfeiture limits "to enhance the deterrent effect of Commission fines" and also to give the Commission the authority to award punitive damages, attorneys' fees, and costs in formal complaint cases filed under section 208 of the Communications Act. 83

Congress has not provided new remedies under the Communications Act. 84 Of course, the kind of remedies that Chairman Powell was requesting is judicially available under the antitrust laws. But the result of Trinko was to [\*640] prevent courts from using their powers to provide appropriate deterrents. 85 Such a model should not be applied elsewhere. 86

Moreover, as we discuss in Section IV, which considers the advantages of complementary agency and court jurisdiction, defendant companies often trumpet the availability of agency relief when appearing in court, but when appearing before agencies, those opposing antitrust relief have argued that the underlying agency statutes do not permit the relief sought and that agency remedial authority is otherwise limited. 87

## chevron da

### chevron da – 2ac

#### Chevron getting decked now

**Wood 18** – attorney at the libertarian Pacific Legal Foundation (Jonathan Wood 18, 7-29-2018, "Undue Deference," National Review, [https://www.nationalreview.com/2018/07/brett-kavanaugh-opposition-to-chevron-deference-may-reverse-it/)//gcd](https://www.nationalreview.com/2018/07/brett-kavanaugh-opposition-to-chevron-deference-may-reverse-it/)/gcd)

**With Kavanaugh on the bench**, the **Supreme Court may finally be ready to revisit Chevron** and **restore** **meaningful**, independent **scrutiny to the administrative state.**

When **courts reassert themselves and enforce the law** as written by Congress, it “helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority,” Kavanaugh wrote in a recent D.C. Circuit ruling. His concern makes him a fitting successor to Justice Anthony Kennedy, who, in one of his final opinions, urged the Supreme Court to “reconsider” the premises underlying Chevron’s “reflexive deference” to unelected bureaucrats.

Justice Neil **Gorsuch**, Trump’s first nominee, has **argued** that excessive deference to agencies replaces “an independent decisionmaker seeking to declare the law’s meaning as fairly as possible” (i.e., a judge) with “an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.”

**Chief Justice John Roberts** has similarly raised an alarm about the concentration of power in administrative agencies and the lack of meaningful checks and balances. “The danger posed by the growing power of the administrative state,” the chief justice has cautioned, “cannot be dismissed.”

“We seem to be straying further and further from the Constitution without so much as pausing to ask why,” Justice Clarence **Thomas has separately observed.**

The fundamental principles underlying our Constitution are that government power must be divided up, rather than concentrated, and those who exercise it must be accountable to the people. It’s difficult to imagine a greater departure from these principles than the concentration of near-limitless power in the hands of unelected bureaucrats, combined with a lack of oversight from Congress and the courts.

## court politics da

### 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.

#### 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.

#### Legislatures will protect reproductive freedom.

Nelson, 1-11—Cosmopolitan’s senior writer covering politics (Rebecca, “How State Legislators Across the Country Are Joining Forces to Fight for Reproductive Rights,” <http://www.cosmopolitan.com/politics/a15060139/reproductive-rights-council-state-innovation-exchange/>, dml)

Amid crackdowns on abortion access nationwide, Shannon and more than 200 other state legislators across the country have signed on to a new Reproductive Freedom Leadership Council launched on Thursday by the State Innovation Exchange (SiX), a nonprofit policy and resource center for progressive state legislators. The council’s objective is to put reproductive rights at the forefront of progressives’ — and the country’s — agenda.

“The goal is to send the message that despite the 401 state-level abortion restrictions that have been passed into law since 2011, we do have leaders at the state level who are willing to stand up and fight for our rights,”

says Kelly Baden, SiX’s director of reproductive rights.

The council aims to bring state legislators from Oregon to Virginia together in pursuit of that common goal, and ensure that liberal legislators in Alabama — who might not have as many allies in the statehouse — are connected to progressives in states like Vermont. The alliance hopes to keep lawmakers updated on the latest reproductive rights legislation and other related news, as well as help them talk about the issue differently. A big focus, Baden says, is reframing the issue of reproductive rights as not just a constitutional right, but a personal one, too.

According to the Pew Research Center, about 7 in 10 Americans oppose overturning Roe v. Wade, the landmark Supreme Court decision that made access to abortion the law of the land. “Between local, state, and national laws — and this chaotic news culture — it's hard for people to be fully informed of every attempt to restrict their reproductive rights,” Baden says. “But when people do hear about them, they don't want them.” The council, she says, will encourage state legislators to speak out about their commitment to the issue in order to “ramp up the public opposition to bad bills and help reverse the trend.”

Last year, some Democrats, including Vermont Sen. Bernie Sanders and House Minority Leader Nancy Pelosi, faced backlash when they suggested that there shouldn’t be a litmus test on abortion rights and the party should be open to anti-abortion politicians. SiX categorically decries progressives who claim reproductive rights aren’t a necessary component to membership in the Democratic party. “Reproductive freedom is a central and necessary component of an inclusive progressive agenda,” reads the new council’s platform.

Athena Salman, a state representative in Arizona who has signed onto the effort, says reproductive rights is one of the main reasons she decided to run for office in 2016. On Thursday, she plans to submit legislation that would repeal major restrictions on abortion access in the state, such as the mandatory 24-hour waiting period and the ban on state insurance coverage for the procedure.

“I think what happens, unfortunately, in the past, is that we let the other side drive the debate and change the debate,” says Salman, who believes women have been cut out of the conversation. “I'm hoping we can successfully shift the narrative and actually talk about the real reality that women face and also put the focus on respecting women's decisions and not judging them.”

She likens the state legislators’ efforts on reproductive rights to the #MeToo movement. “The only reason that the support for the victims of sexual harassment has gained traction is because not just in one instance, not just in one state, but women across sectors, and men across sectors in our society, are speaking out,” she says. “And now you have this huge echo chamber and you're actually seeing some policy shift as a result.”