# 1AC

## 1AC – Harvard

### 1AC – Internet

#### Contention one: 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.

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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.

#### Net neutrality repeal creates cybersecurity vulnerability for the energy sector.

Sandoval ’19 [Catherine; “Associate Professor @ Santa Clara University School of Law, Former Commissioner @ California Public Utilities Commission; Cybersecurity Paradigm Shift: The Risks of Net Neutrality Repeal to Energy Reliability, Public Safety, and Climate Change Solutions,” *San Diego Journal of Climate & Energy Law* 10, p. 91-178; AS]

I. NET NEUTRALITY REPEAL CREATES A “ZERO-DAY” VULNERABILITY FOR THE ENERGY SECTOR THAT UNDERMINES ENERGY RELIABILITY AND CYBERSECURITY

A. The Cybersecurity Hacker-Paradigm Obscures Systemic Threats to Energy Reliability from Internet Service Provider Network Management after Net Neutrality Repeal

This Article contends that the Federal Communications Commission’s (FCC) January 2018 repeal of net neutrality rules created a “zero-day” cybersecurity vulnerability for the energy sector and other critical infrastructure.1 “A zero-day cybersecurity vulnerability is a previously unknown flaw in a computer program that exposes the program to external manipulation.”2 The flaw may also reside in compromised hardware that creates a “back door” into the internet-connected device.3 This Article argues that cybersecurity has been primarily viewed from a “hacker paradigm” that obscures systemic threats an Internet Service Provider (ISP) can create to energy reliability and cybersecurity through paid priority and other ISP practices. The FCC’s January 2018 Internet Freedom Order4 repealed net neutrality rules the FCC adopted through its 2015 Open Internet Order that prohibited ISPs from blocking, throttling, and paid prioritization of internet traffic— “with some limited exceptions for reasonable network management.”5 Unbridling ISPs from enforceable net neutrality rules triggers energy sector cybersecurity risks. These supply chain risks become systemic risks as the energy sector becomes increasingly intertwined with the internet throughout the energy sector’s distributed ecosystem. To protect energy reliability,safety, resiliency, renewable integration, just and reasonable rates, and the environment the energy sector and itsregulators must address cybersecurity risksincluding those created by ISPs and FCC regulatory decisions.

Cybersecurity and reliability are mandatory standards under federal law for energy sector facilities and services that participate in federal wholesale energy markets and for transmission facilities and services.6 The Federal Power Act (FPA) delegates to the Federal Energy Regulatory Commission (FERC) responsibility for reliability including cybersecurity and just and reasonable rates,7 but the Act does not delegate safety authority to FERC—a gap Congress should address. To fill this gap in the critical safety function, states such as California exercise jurisdiction over electric transmission facilities (whether overhead or underground), for the “limited purpose of protecting the safety of employees and the general public.”8 Distribution system energy utilities must also comply with duties imposed by state law requiring safe, reliable service at just and reasonable rates.9 In twenty-nine states and three territories, state-regulated energy utilities must comply with renewable energy goals.10

The Critical Infrastructures Protection Act of 2001 (CIPA) designated the energy sector as “critical infrastructure” vital to the nation’s economy, national security, and well-being.11 The Electricity Policy Act of 2005 (EPAct) amended he FPA to require electric power grid operators to ensure grid reliability.12 The EPAct defined reliable operation of the “bulk-power system” (BPS) to ensure, “uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.”13

The bulk-power system is composed of: “(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) electric energy from generation facilities needed to maintain transmission system reliability,” but it, “does not include facilities used in the local distribution of electric energy.”14 The EPAct delegated to FERC the authority to create mandatory cybersecurity standards for the entities under its jurisdiction. Under FERC Critical Infrastructure Protection (CIP) rules, “responsible entities” under FERC jurisdiction must observe FERC cybersecurity standards and are subject to penalties for their violation.15 “All bulk power system owners, operators, and users are required to register with [the North American Electric Reliability Organization (NERC)].”16 A “responsible entity” is aRegistered Entity subject to the CIP mandatory standards.”17

Local energy distribution systems are under the jurisdiction of state public utility or public service commissions, or local municipal power or irrigation district authorities. In 2012, it was estimated that, “from 80 percent to over 90 percent of grid assets are outside NERC-CIP’sscope today.”18 States also have a duty to ensure energy utilities under their jurisdiction provide safe, reliable service, at just and reasonable rates.19 Illinois Public Utilities Commissioner Sherina Maye Edwards observed that, “[a]s utility infrastructure becomes increasingly automated, ensuring the security of critical energy infrastructure is becoming a major concern.”20 Further, companies that “own and operate such assets,” must address these risks, as well as, “local, state and federal regulators tasked with ensuring the safety, reliability and costeffectiveness of the services delivered.”21 Ephram Glass and Victor Glass argued that to make the electric grid more resilient against unforeseen attacks on the electric grid’s cyber and physical infrastructure, “the [United States] needs to increase distributed generation to ensure no substations are critical to the stability of the electric grid.”22 To protect American energy reliability and safety, FERC, state, and municipal energy sector regulators must address risksto energy sector reliability, cybersecurity, and public safety triggered by the FCC’s repeal of net neutrality rulesin the 2018 Internet Freedom Order. FERC’s review of energy grid resiliency and reliability, Grid Resilience Order, 162 FERC ¶ 61,012 (2018) (“Resilience Order”) AD18-7-000, must consider harms to grid resiliency and reliability that flow from the FCC’s removal of legal bars to ISP paid priority, blocking, throttling, and unreasonable interference with traffic.

The internet is increasingly critical for energy sector management and dispatch of distributed energy resources (DERs) necessary to achieve environmental goals and combat climate change. The electric grid and its changing energy generation mix rely on information and communications platforms, including the internet, for grid planning and operation. While a variety of communications services and facilities can be used to plan, manage, and monitor the electric grid and distributed energy ecosystem, the internet creates important tools for grid visibility and control. The internet also exposes the electric grid to cybersecurity vulnerabilities which the energy sector and regulators must address.

State and federal decisions over the past twenty-five years fostered the creation a “smart grid” that uses information and communicationstechnology (ICT), including the internet, to better manage the electric grid and create new opportunities for energy users and suppliers.23 Regulatory and private sector investment decisions have embedded the internet into the energy system, just as electricity is embedded into and required for the functioning of the internet. The “Energy-Internet nexus” enables new energy grid management methods that harness communications and information technology to spur reliability, affordability, safety, and climate change solutions. The EnergyInternet nexus fosters integration of DERs such as solar photovoltaic (PV) systems, energy storage, and demand response supported by smart thermostats and other devices connected through the Internet of Things (IoT).

The California Public Utilities Commission (CPUC) decision in the WaterEnergy Nexus proceeding recognized the growing importance of communications, including the internet, for the management of energy, water, and renewable energy integration.24 The CPUC’s 2015 Water-Energy Nexus decision recognizes that “access to reliable communications is increasingly critical to optimize water and energy facility operations and management as our state works to forestall climate change, mitigate or adapt to climate change, and to reduce [greenhouse gas] emissions associated with the electric, natural gas, and water sectors.”25 The following year, CPUC observed that the, “[i]nfrastructure and services to provide both voice and internet communications for data management, transportation, and analysis, including narrowband and broadband signals, are critical to water and energy management, the use of resources, and public safety.”26

Regulatory and investment decisions that fostered the Energy-Internet nexus created path-dependencies that shape grid investments and operation. Smart grid and other state and federal policies created an Energy-Internet nexus that has become central to energy management, resource integration, reliability, and public safety. These policies and investments embed technology, function, and governance systems for the internet and communications technology into the energy sector. This path-dependence creates new opportunities for grid management and integration, but also makes the energy sector vulnerable to ISP and communications network management practices and governance.

Smart grid architecture increasingly depends on the internet as, “the main intermediary to the different stakeholders (along with fiber, GPRS [Ground penetrating radar systems] networks from telecom operators).”27 Internet governance is crucial to the Energy-Internet nexus. Once data traffic crosses from the network of the energy operator or resource across the firewall to the ISP, the traffic is under ISP control.28 The ISP controls the user’s traffic as it crosses the ISP-controlled gateway to the internet.29 No software patch or firewall protects a user from an ISP whose job it is to transit that user’s content to and from the internet.30 The “hacker paradigm” predominant in the cybersecurity framework obscures risks from ISP network management practices. The FCC’s net neutrality repeal allows ISPs to make deals for traffic priority (i.e., paid priority) even if those transactions slow other internet traffic. An ISP’s deals with third parties, including parties the ISP does not recognize to have nefarious motives, could slow or stymie energy sector traffic, portions of which depend on public, non-commercial internet access. Cybersecurity strategies to date focused on firewalls, intrusion detection, and other strategies to keep hackers out. Users cannot throw a firewall over their own ISP. The “hacker paradigm” fails to see ISP-induced risks that traditional cybersecurity strategies leave unmitigated.

#### Cyber-attacks go nuclear – extinction.

Orlov ’20 [Vladimir, Founder & Director of the PIR Center, President of the Trialogue Club International, Head of the Center for Global Trends and International Organizations at the Diplomatic Academy, Ministry of Foreign Affairs of the Russian Federation, Co-Founder and Academic Supervisor of the International Dual Degree MA Program in Nonproliferation and Global Security Studies, MGIMO University, Professor at MGIMO University, author (or coauthor) of more than a dozen books and monographs and more than three hundred research papers, articles, and essays, publishes his views in Russian and foreign periodicals, “‘No Holds Barred’ and the New Vulnerability: Are We in for a Re-Run of the Cuban Missile Crisis in Cyberspace?,” SSRN Scholarly Paper, ID 3538078, Social Science Research Network, 02/14/2020, papers.ssrn.com, doi:10.2139/ssrn.3538078]

Not hundred per cent of the dialogue has been frozen, fortunately. Certain informal, mostly offthe-record, meetings of US and Russian experts on cyber agenda continue taking place, both through Track 2 and Track 1.5. One of the most intellectually stimulating meetings, with frank exchanges, took place in Vienna in December 2018. The report produced after the meeting stressed “the significant risk […] that cyber-attacks could conceivably lead to a military escalation that may further trigger a nuclear weapons exchange, a fact that became more explicit with the adoption of the current Nuclear Posture Review. This issue gets complicated given that third parties may have the capabilities to invoke a cyber conflict between Russia and the United States. Whether a country or a non-state actor, they could put the two countries on the verge of an armed conflict by attacking critical infrastructure of either of them and making it look as if the aggressor were the other one”[22]. However, one should have no illusion: such informal meetings may be fully fruitful only when their reports and policy recommendations are utilized by the governments. And for that, a warmer climate in bilateral relations is a must. So far, we see exactly the opposite: mercury falling to freezing levels.

Risk of cyber clashes growing into a chaotic global cyber war has been emphasized by the UN Secretary-General Antonio Guterres in his Agenda for Disarmament: “Malicious acts in cyberspace are contributing to diminishing trust among States… States should implement the recommendations elaborated under the auspices of the General Assembly, which aim at building international confidence and greater responsibility in the use of cyberspace.[23]” However, as the members of the US-Russian Track 1.5 working group on strategic stability recently concluded, “without a constructive dialogue on cyber issues between the United States and Russia, the world would most likely fail to agree on any norms of responsible behavior of states in cyber space”[24].

Do we really have to survive a cyber equivalent of the Cuban Missile Crisis to realize the importance of achieving some kind of agreement on cyber issues, and on the broader agenda of international information security?[25] Or is that kind of talk plain old alarmism?

I don’t want to sound a fatalist, but I am even less keen on sounding like an ostrich that’s buried its head in the sand. We cannot ignore the obvious: whether the world’s most powerful actors like it or not, the world is sliding to another major crisis like the one in 1962. The cyber war is already raging. There are no rules of engagement in that war. The uncertainty is high. The spiral of tension is getting out of control. The cyber arms race is gaining momentum. And there are no guarantees that the next crisis will be controllable, or that it will result in a catharsis as far as international information security regulation is concerned. There’s no telling what will happen once the cyber genie is out of the bottle.

#### Energy wars cause extinction.

Holstein ’20 [Alex; 2020; Managing Partner at Holstein-Gray, M.Sc. in Russian and Post-Soviet Studies from the London School of Economics; Geopolitical Monitor, “Invisible Warfare: NATO and the Geopolitical Storm on the Market Economy Horizon,” <https://www.geopoliticalmonitor.com/invisible-warfare-nato-and-the-geopolitical-storm-on-the-market-economy-horizon/>]

But before we even get to that very worst of the worst-case scenarios of a direct collision between a NATO ally and Russia, even the slightest escalation in the region, considering its vital energy resources, could have a devastating impact on global markets, which in itself would kick off a wave of instability and eventual warfare.

As market economies evolve and integrate by engaging commerce and leveraging technology, the blend between national security and socio-economic imperatives becomes even more prescient. This carries with it both advantages and disadvantages. Traditionally, NATO military forces have relied on critical civilian infrastructure such as communications, food and water, industrial capacity, civil transport and energy supplies to conduct operations. The additional rise of non-kinetic asymmetric threats – cyberwarfare, information warfare, EMP attack – against non-traditional targets, such as banks or major multinational corporations that comprise key components of this critical infrastructure, adds an entirely new dimension to the defense requirements of the 21st century. In addition to dealing with more conventional kinetic threats from traditional and emerging adversaries, NATO must prepare itself for this new era of invisible warfare through deeper strategic cooperation with the private sector and corporate entities.

Great Powers and non-state actors alike can now conduct non-kinetic attacks just as devastating as any nuclear, biological or chemical WMD, resulting in millions of deaths and the mass breakdown of societies, while in turn undermining the doctrine of Mutually Assured Destruction and other deterrents against nuclear war. But even contained instability within specific regions could still disrupt markets on a global scale, whether directly targeting infrastructure or as a knock-on effect of a conventional engagement, as in the case of Nargono-Karabakh and the threat to Europe’s energy supplies. A European energy crisis alone could prove the tipping point toward a wider war, or a societal breakdown, without a single shot fired.

### 1AC – Competition

#### Contention two: 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.

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

#### Antitrust remedies key – 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

# 2AC

## Internet

## Competition

## AT: 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

Although in a common law context, competitive injury originally composed an essential element of the tort of "unfair competition," the Legislature, by adopting section 3369, broadened the scope of legal protection against wrongful business practices generally, and in so doing extended to the entire consuming public the protection once afforded only to business competitors. Thus, section 3369 indicates that "unfair competition" as used in the section cannot be equated with the common law definition of "unfair competition," but instead specifies that, for the purposes of its provisions, unfair competition "shall mean and include unlawful, unfair or fraudulent business practice ..." (Italics added.)

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.)

The recent case of Diaz v. Kay-Dix Ranch (1970) 9 Cal.App.3d 588 [88 Cal.Rptr. 443] represents the first reported appellate decision in an action brought under section 3369 to enjoin an "unlawful" business practice. fn. 14 In Diaz plaintiff agricultural workers brought a class action to enjoin defendant farm owners from continuing an alleged practice of knowingly employing Mexican nationals who had entered this country in violation of federal immigration laws. Although the Diaz court ultimately concluded that considerations of federalism warranted the withholding of equitable relief in the case before it, the court did not dismiss the suit as improper under section 3369, but indicated that the alleged activity could constitute an "unlawful ... business practice" under section 3369. (See 9 Cal.App.3d at pp. 591-593 and fn. 3.)

As discussed above, under the allegations of plaintiffs' first amended complaint, defendant's practice consists of repeated violations of specific statutory provisions of both the Code of Civil Procedure and the Civil Code; such a pattern of behavior clearly constitutes "unlawful" conduct, and if an enterprise pursues such a course of conduct as a "business practice," we conclude that the activity may be enjoined under section 3369. Defendant agency does not, and could not, claim that under the allegations of the complaint the challenged conduct is not a "business practice." The complaint specifically alleges that the agency undertakes its alleged misfiling "as a pattern and practice" and obviously such practice, if in fact conducted, directly relates to the defendant collection agency's conduct of its "business." We thus conclude that plaintiffs' allegations sufficiently state a cause of action for injunctive relief under Civil Code section 3369, and that the trial court erred in sustaining defendant's demurrer to plaintiffs' third cause of action. [7 Cal.3d 114]

#### 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

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

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

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

As might be expected, the promulgation of this rule of reason resulted in an attempt by defendants to justify every restrictive combination that was attacked on the grounds that, in the light of all the economic facts and conditions, the particular practice assailed is reasonable. The courts have responded to this by developing a doctrine of so-called "per se" violations which are held to be prohibited by the antitrust laws regardless of any asserted justification or alleged reasonableness. Such category of violations are sometimes referred to as "unlawful per se" 8/ and it is sometimes said that such acts are illegal per se regardless of their reasonableness. 9/ However such a view suggests an arbitrary holding which, in my opinion, is not justified by an analysis of the cases themselves. Rather, I think the correct analysis is indicated by the statement of the Court in the Socony-Vacuum case that "Agreements for price maintenance...are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition \*\*\* "10/ and by the statement in certain later cases that tie-in agreements and similar arrangements are "unreasonable per se" 11/. This view seems to be that which the Court itself is now taking as indicated by the statement in the Northern Pacific decision that "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conslusively presumed to be unreasonable and, therefore, illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 12 In the opt phrase of a recent decision, such practices are "intrinsically unreasonable". 13/

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

#### 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.

## AT: Process CP

### 2AC – AT: Process CP

#### Ambiguity and uncertainty causes inconsistent outcomes across jurisdictions – unified, clear limitation key.

Jacob Kahn 8. J.D. Candidate, Chicago-Kent College of Law; B.A., Economics, Amherst College. “FROM BORDEN TO BILLING: IDENTIFYING A UNIFORM APPROACH TO IMPLIED ANTITRUST IMMUNITY FROM THE SUPREME COURT'S PRECEDENTS”. 83 Chi.-Kent L. Rev. 1439. 2008. Lexis.

II. A Myriad of Approaches to the Implied Immunity Doctrine

For the next twenty-three years, the Supreme Court's decision in National Gerimedical Hospital served as the Court's last authoritative statement on the doctrine of implied antitrust immunity. The lower federal [\*1455] courts were thus left with little or no guidance in their subsequent attempts to apply the doctrine. 145 Their efforts have produced a confusing number of approaches, 146 and have led to criticism of the doctrine as "a collection of unconnected legal tests." 147

In order to better understand the recent increase in successful implied immunity claims and to put the Supreme Court's two most recent decisions into perspective, it is important to examine the various approaches used by the lower federal courts. As demonstrated below, the majority of courts seek to include factors from the Supreme Court's decisions in their analysis. For example, federal district courts in California and Iowa have considered the following four factors in deciding whether to grant claims for implied immunity: (1) whether the defendant's conduct involved the "precise ingredients" of the agency's regulatory authority, (2) whether the regulatory agency is authorized to grant the remedy sought by the antitrust plaintiff, (3) whether the agency considers competition in its calculation of the public interest, and (4) whether the agency is an expert in the particular industry. 148

As might be expected, not all of the lower courts have chosen to emphasize the same factors from the Supreme Court's decisions. In contrast to the four-factor test outlined above, one judge in the Ninth Circuit has advocated for a three-factor test: (1) whether the regulatory agency has authority to regulate the defendant's conduct, (2) whether the agency has exercised this authority, and (3) whether a court decision in favor of the antitrust plaintiff will render the agency unable to perform its regulatory duty as contemplated by the statute. 149 Interestingly, this test shares only the first factor in common with the four-factor test outlined above despite the fact that both tests are supposedly "gleaned" from the Supreme Court's decisions. 150

In contrast to both of these tests, the Second Circuit recently adopted a two-pronged approach to claims for implied antitrust immunity. 151 Under this method, a court must first determine whether there is a "potential specific conflict" between the antitrust laws and the regulatory scheme. If such [\*1456] a potential conflict exists, then the court is instructed to search for evidence of congressional intent to repeal as shown by: (1) the statute's legislative history and/or structure, (2) the possibility of conflicting mandates issuing from the regulatory agency and an antitrust court, (3) the possibility that application of the antitrust laws would moot a provision in the regulatory statute, (4) the agency's history of regulating the defendant's conduct, or (5) other evidence showing intent to repeal. 152 In the absence of a "potential specific conflict" between the two statutory schemes, the Second Circuit will only grant implied immunity if it determines that the regulatory scheme is "pervasive enough to indicate that Congress forswore the paradigm of competition" in the industry. 153 The Seventh Circuit also uses a similar two-pronged approach to implied immunity claims. 154

Another group of courts abandons the factor counting tests altogether in favor of more subjective methods. For example, claiming to follow a rule established by the Supreme Court in Silver, the Tenth Circuit simply considers whether the defendant's conduct is "necessary to implement the intent of Congress," and should therefore be immunized from antitrust scrutiny. 155 Similarly, the Third Circuit also frames its test around congressional intent, and finds that intent can be shown through (1) legislative history, (2) a plain repugnancy between the regulatory statute and the antitrust laws, or (3) a pervasive regulatory scheme. 156

From these examples, it is easy to see why the implied immunity doctrine has been criticized. 157 Though several courts use similar factors in their tests for implied immunity, 158 few of these factors are uniformly applied. For example, it remains unclear whether conduct that is merely subject to regulatory authority 159 also satisfies the "precise ingredients" test used by at least one federal court. 160 Of even greater concern is the fact that issues such as the extent to which the regulatory agency has exercised its [\*1457] authority are prominently featured in the test proposed by a judge in one federal circuit, 161 but are entirely absent from the test used in another circuit. 162 The variety of approaches means that the success of any claim for implied immunity may depend on the jurisdiction in which the defendant is sued. Given the overall importance of the antitrust laws and the fact that they are intended to apply uniformly to almost all forms of business activity, this possibility is unacceptable.

#### Picking and choosing exemptions in 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.

#### Counterplan causes delay – stifles competition.

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; AS]

Moreover, even disputes between well-heeled corporations can take years to resolve. For example, in 2011 Bloomberg filed a complaint with the FCC, alleging that Comcast was improperly grouping Bloomberg’s channel in an unfavorable cluster of channels.679 Since the FCC had conditioned Comcast’s acquisition of NBC on the basis of fair “neighborhooding” of independent news networks, Bloomberg claimed that Comcast was in violation of its commitments.680 Granted that this dispute was adjudicated outside the auspices of section 616 and the agency’s ALJ, the FCC took over two years to reach a final decision.681 Given the importance of timeliness in high-tech markets—where a slight delay can render a remedy obsolete—even a two-year process in digital markets will likely come at the expense of innovation.

#### Counterplan causes regulatory capture.

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]

C. The Political Nature of Agencies Compromise Their Role As Impartial Adjudicators

Further reasons for not unduly favoring agency over court enforcement of antitrust law are institutional. Courts and agencies are very different decision-making bodies with different roles, strengths and weaknesses.

One of the pillars of the rule of law is expressed by Justice John Marshall's statement that we live under "a government of laws, and not of men." 123 Legislatures are primarily responsible for generally applicable laws that result from a balancing of interests within the political process. Ideally, courts apply law in individual cases neutrally through a reasoning process that is at least theoretically divorced from political influences.

The institutional structure and processes of courts, including lifetime appointments, strict ex parte communications rules, and requirements that decisions be justified by factual records and elaborations of neutral legal norms, are all designed to encourage reasoned and impartial judicial decision-making. 124 Agencies are structured very differently, perhaps due to the fact that they often perform both policy-making and adjudicatory functions.

At the top tier of many regulatory agencies is a bipartisan commission of political appointees, who serve for set, limited terms. Agency heads and commissioners sometimes come from industries that they regulate or aligned industries. They often seek employment in those industries after their terms and the many legal, financial, and lobbying firms that represent them. 25 Some agencies are headed by a single political appointee; all appointees must obtain Senate confirmation and lack lifetime tenure to separate them from further political influence. Agency budgets and expenditures of money go through the executive review process and must be congressionally approved. Agencies are subject to congressional oversight and the possibility of new statutory enactments. In short, their actions are deeply affected by the political process. The political structure of regulatory commissions makes them more susceptible than courts to the influence of their regulated industries as well as other interested parties. Thus, even at the genesis of many regulatory commissions, prominent commentators were predicting that "the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things." 126 In 1960, James Landis, the late dean of Harvard Law School and a prominent advocate of administrative authority,127 reported to President-Elect Kennedy on the tendency of agency tribunals to reflect industry positions because of the "daily machine-gun-like impact" of industry lobbyists and lawyers in formal and informal agency processes. 128 Others have attributed regulatory "capture" to the tendency of agencies to consider themselves responsible for the health of the industries that they regulate, leading them to sometimes favor industry demands over consumer concerns and interests.129 Stark examples of the influence of politics over regulatory agency decisionmaking could be seen in the widespread political debate over Federal Reserve policy. 130 Discussions of the need to ensure the Federal Reserve's newly granted enhanced consumer protection function remains independent from its other functions and criticisms that the Federal Reserve's closeness to the\* banks deterred it from exercising prior authority that it had to illustrate the point. 31 Similar criticisms have been made against the CFTC and manifold other agencies whose inactions led to the banking crisis and recession. 132

None of this is to say that agencies and commissions do not often resist against such influence. Certainly, many agency decisions may be deemed responsive to public interests. However, officials who do not bend to industry desires may find themselves subject to retribution. For example, Leland Olds, first Chairman of the Federal Power Commission after the enactment of part 2 of the Federal Power Act, covering wholesale power sales and transmission regulation, was famously subject to fierce industry condemnation and ultimate defeat of his renomination confirmation.13 3 Currently, EPA officials are subject to congressional attack. Legislation has been introduced to curtail the EPA's promulgation of clean air and other regulations.13 4 The emphasis here is not the fact that agency officials are subject to political influence and pressure or the merits of particular criticisms, although some are clearly deleterious to administrators and commissioners' ability to regulate independently, but a recognition that agencies are inherently less judicial than courts. They may, therefore, be incapable of performing the antitrust enforcement roles that the Court appears to assume.

Moreover, members of Congress have been known to insert provisions in bills bearing on agencies' jurisdiction or funding to discourage them from pursuing unwelcome policy initiatives. 135 Such political interference has been legion.1 The very potential of political retaliation for unpopular action may itself caution agency officials from getting too far out on the limb. Although political questioning may not be inappropriate when an agency is engaged in policymaking, its influence is certainly not the hallmark of ensuring independent adjudication of antitrust claims.

The ability of agencies to impartially adjudicate cases is further hampered by the conflicting interests that many agencies must consider. Even where agencies have pro-competitive agendas, antitrust or other issues will not be decided in a vacuum that ignores the implication of decisions on other agency functions. Agencies need some industry support for policies that they advance, lest they find themselves under severe congressional and executive push back. The power of privately-owned utilities and their capture of regulatory agencies is not new.137 There have been periods of unfriendly courts and regulators to antitrust enforcement before. What is new is the development and complexity of "deregulated markets" with monopolistic attributes. 138 This complexity itself can lead regulators, courts, and the public to a laissez-faire noninterference with market results, lest their intervention with less than full knowledge make things worse.

#### Fact-finding – antitrust’s adjudication processes are key to discovery of anticompetitive behavior.

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]

E. Antitrust Enforcement Requires Full Factual Development

Antitrust issues tend to be fact based. 152 Fact intensive issues often may not be properly resolved in non-adjudicatory proceedings, unless the deciding entity has compulsory process requirements and its own investigative and enforcement capabilities. 153 Even there, facts must be uncovered and factual issues must often be determined under an adjudicatory process. 154

Entities that choose to break the law usually do not publicize their decisions or actions towards that end. The Sherman Act has been in place for over a century, and power companies, natural gas pipelines, and other regulated entities have become aware that they should not admit, and certainly should not publicize, actions to restrain trade or to monopolize. 155 Any trial lawyer who has had more than a smattering of litigation practice understands that large organizations have stated policies which may or may not correlate with the reality of what people acting for the organization do on the ground. Virtually every organization that uses heavy transportation equipment, for example, will have a policy asserting that it is very conscious of safety, but that policy may or may not comport with its actual behavior. 156 Thus, organizations engaged in offshore petroleum drilling may have a public policy asserting something like:

We are in a hazardous business, and are committed to excellence through the systematic and disciplined management of our operations. We follow and uphold the rules and standards we set for our company. 157

Although we use BP as an example because of its relatively recent notoriety, most of the other participants in these and other industries would have similar published policies. 158 But in many cases, company personnel do not [\*653] always follow the official policies (occasionally with the actual or constructive knowledge of management). 159 As organizations become larger and more complex, this disconnect between management assertions (and perhaps belief) and fact may become even more pronounced.

Even in the "old days" agencies with a "special concern" for an industry found it difficult to permit injured parties to obtain the proof needed to make a case when tinged with antitrust issues. 160 Today's exercise of "fact finding" works even less well for establishing the facts of what actually occurred. If an agency does not permit inconvenient facts to get in the way of its preferred policy directions, there likely will be people willing to state their company's "policy," and smaller entities making contrary statements will tend to be overridden in the interests of claimed efficient decision-making. 161 Where motivation is at issue, absent an ability to test factual assertions, anticompetitive motivations can be buried.

Anyone who has ever been in a trial knows that where there is discovery, motives can be uncovered far different from those that are "officially" presented. Interrogatories, hearings, and the opportunity to cross-examine are just a few of the discovery tools needed to ferret out the truth from sophisticated parties whose actions monopolize regulated markets. Similarly, prior to the adoption of FERC Order No. 888 that provides for open access transmission service, 162 municipalities and cooperatives frequently found the opportunities for documentary discovery and cross-examination the primary means to expose the [\*654] discriminatory practices of large investor-owned utilities that were refusing to transmit for or otherwise deal fairly with these dependent, competing cities and cooperatives in the electric business. 163 The following is a transcript excerpt from a cross-examination conducted by one of the authors of this paper during the deposition of the Chief Executive Officer of Consumers Power Company on antitrust issues that shows the need for cross-examination and other discovery:

Q. "Just to be clear about it, if, say, a municipal entity in the State of Ohio desired to buy wholesale power from Consumers Power, would you sell to it?

A. "I don't think so.

…

Q. "Assume that … some other entity were willing to sell power to a municipality within your service territory, would you sell transmission services to get the power there?

A. "The matter has never come up and I think I would want to know more of the details of the transaction.

Q. "What kinds of things would you want to know?

A. "I would want to know, for one thing, whether or not our lawyers felt we were obligated to do so. For another, I would want to know for what purpose the power was being sold and at what rate -

Q. "Sold by whom?

A. "By a selling firm. At what rate, what the receiving utility intended to do with it, what impact it would have in the long run on the ability of Consumers Power Company to maintain its present markets.

Q. "Is it fair to say that your judgment would be based at least in part on your judgment of the extent to which the purchase of this power by the municipality or cooperative within your service territory enabled it to reduce its rates in competition with Consumers Power?

A. "I think that would be a factor.

Q. "A large factor?

A. "I think so.

Q. "Apart from the question of your legal obligation, are there any other major factors?

A. "Well, I think the size of the transaction would be a factor.

Q. "Why is that?

A. "Well, it might be a matter that all things considered wasn't too significant. I think whether the receiving utility actually was going to use it to invade our present market area would be a factor.

Q. "What do you mean by "invade our present market area?'

A. "Well start taking away our customers which we have invested a great deal of money in order to serve them … . We do concern ourselves with the relative rates at which we are able to supply service to our customer as compared with those of other entities. Frankly, we don't like to put ourselves in a position where we are increasing the extent to which our performance looks bad in relationship to that of other entities.

Q. "Does that complete your answer?

A. "Just one final thought on that and that is to the extent that we do we increase our exposure to losing our markets." 164

One knows that one would never have obtained such evidence of refusals to deal and their motivations in a rulemaking or as a result of a conference.

[\*655] In another similar situation, the vice president of an investor-owned utility was pointedly asked by both municipal counsel and the presiding judge whether the company would provide service to a municipality under its existing tariff in a case involving claims of anticompetitive refusals to deal. 165 In responding, the vice president stated:

[Mr. Gardner:] Your Honor, I would have to abide by the Commission's decision on the matter. As I said, I think that the request is inequitable to [Florida Power & Light Co. (FP&L)] and its other customers. I think the tariff is inappropriate to the service required. And if the Commission decides that we should render it, obviously we will. But I am very reluctant to do it under the circumstances of the perceived injury that I see will occur to FP&L because of the inappropriateness of the rate.

Presiding Judge: So could I characterize your answer in a way that might be a little more dogmatic … in the absence of direction by this Commission Florida Power & Light would not provide service [under its existing tariff]?

[Mr. Gardner:] FP&L is reluctant to provide the service, and I guess in the absence we probably won't. But as I say, we are very reluctant to do so. 166

These companies settled the cases in question, agreeing to no longer follow such practices. However, these examples demonstrate the necessity of discovery and cross-examination to antitrust and other agency determinations. 167 In the latter case, it was the first time the company admitted it was refusing to sell wholesale power to competitors, as opposed to its previous evasions that the matter had to be studied and the like.

Today, even in theoretically adjudicative proceedings, such as merger or complaint cases, discovery and cross-examination would rarely be available in antitrust cases at the FERC because the FERC tends to decide cases on the pleadings or after paper hearings. Discovery is generally unavailable unless a traditional hearing is ordered. 168 Paper hearings containing statements drafted or scrutinized by lawyers, conferences, etc. do not bring the same results. Through these, one merely gets a carefully scripted company position without the process needed to ferret out the truth. We stress that the issue is not the correctness of any particular decision or the appropriate application of antitrust policy in specific cases, but that, as the preceding subsections show, agency decisions are plainly influenced by factors divorced from antitrust concerns. 169 Where market contours are being determined, major mergers are being approved, minimum prices are being imposed, and other competitive actions are being decided with minimum process, a more probing antitrust inquiry is required than that which is generally available before agencies.

#### Doesn’t solve advantage two – rules fail

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

NET NEUTRALITY’S MAGINOT LINE

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

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

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

## AT: K

### 2AC – AT: Cap K

#### Perm do both – regulated capitalism best. Plan challenges market concentration. Blanket critique totalizes.

Smith, PhD, 19

(Noah, https://www.bloomberg.com/opinion/articles/2019-03-08/letting-16-year-olds-vote-is-a-good-idea)

Depending on who you ask, the term "neoliberal" can apply to anyone from Ronald Reagan to Barack Obama. Some on social media have turned the term into a running joke, holding ironic Twitter polls to see who is the “chief neoliberal shill” (the winner last year was none other than yours truly). But at least one economist has articulated a coherent vision of neoliberalism -- Brad DeLong, a professor at the University of California-Berkeley who worked at the Treasury Department during the Bill Clinton administration. In 1999, DeLong wrote that a combination of market liberalization in developing countries and trade opening by rich nations would allow the poor countries of the world to end centuries of poverty. The plan seems to have worked. Market liberalization in countries such as India and China seems to have precipitated a shift to faster growth, while trade and investment links with rich countries have helped these and other developing countries tremendously: These changes helped pull a billion people out of desperate poverty, and billions more are on the way to becoming middle class. But there was a big hole in DeLong’s neoliberal plan. While the developing world surged forward, the U.S. began to encounter a host of economic problems. Wage stagnation, reduced mobility and rising inequality eroded the foundations of the New Deal society that had sustained the U.S.'s middle class during the second half of the 20th century. The U.S. resisted nationalizing its health-care system, resulting in a cumbersome public-private hybrid arrangement that allowed costs to mushroom while letting some people go uninsured. And financial deregulation led to a crisis and a huge, long recession throughout much of the developed world. Now, DeLong is ready to throw in the towel. In a recent interview, he declared that left-leaning advocates of neoliberal policies in the U.S. were mistaken in thinking they would find a political partner on the center-right. The plan was always to cushion the blow of international trade and easing of regulations on business using government programs, such as universal health care and a robust social safety net, to make sure the working class wasn’t left behind. But, DeLong argues, Republicans rejected that compromise, insisting that any neoliberalism be of the free-market-fundamentalist variety: Barack Obama rolls into office with Mitt Romney’s health care policy, with John McCain’s climate policy, with Bill Clinton’s tax policy…[but] John Boehner, Paul Ryan, and Mitch McConnell [were] the leaders of the Republican Party, and…decided on scorched earth[.] As a result, DeLong declared that old-line neoliberals need to pass the baton to the political left. Others aren’t ready to let DeLong off so easily. In the Boston Review, a panel of economists writes that neoliberalism got the policy wrong as well as the politics. Their various suggestions for post-neoliberal policies include increasing labor’s power with greater unionization and wage boards, tighter regulation of the finance industry and restriction on trade in order to protect U.S. workers. Mike Konczal of the Roosevelt Institute echoes their assessment. Many of these are good ideas. But in rejecting neoliberalism as a concept, the critics go too far. First, progress in the developing world has been impressive -- something for which neoliberalism probably deserves a lot of credit -- but it is far from complete; most of South Asia is still very poor, and much of Africa is just beginning to industrialize. To curb the flows of trade and investment with these countries would be a grave abdication of the U.S.’s international and humanitarian responsibilities. Second, neoliberal policies might have led to faster productivity growth in the 1990s and early 2000s: Tech Boom or Something More? Total factor productivity\* Source: Federal Reserve Bank of St. Louis \* Index 2011 = 1 Contrary to popular belief, wages also increased during that period. The spurt of growth is commonly attributed to the information-technology boom, but that boom might not have been possible if the U.S. had more strictly regulated emerging industries in order to protect favored incumbents. It’s worth noting that West Europe and Japan, whose policies were somewhat less neoliberal than the U.S.’s, ended up producing relatively few big new tech companies, and have failed to catch up to U.S. levels of per capita income in the years since 1990. Finally, although economic blunders have come from the political right in the U.S. in recent decades, it’s also possible for the left to make big mistakes -- not just in poor countries, but in rich ones too. Germany suffered high unemployment in the 1980s and 1990s, thanks to its rigid labor market regulations; eventually, it eased those restrictions, which substantially lowered the unemployment rate. Sweden had a very progressive tax system, but scaled back redistribution in the 1990s in order to speed growth. France, too, has sometimes been forced to curb its ambitions for redistribution and regulation when these produced economic instability and slow growth. The U.S. needs a neoliberal contingent to help insure against missteps like these. So neoliberals’ ideas are still needed. A move toward social democracy should help correct much of the inequality that has arisen in the U.S., while fixing dysfunctional industries like health care and finance. But left-leaning neoliberals like DeLong will still be needed in order to restrain social democrats’ more ambitious impulses, to protect the U.S. economy’s entrepreneurial private sector, and to make sure that technological progress and international trade don’t get forgotten.

#### Alternative causes backlash, fails to resolve environmental challenges, and causes transition wars – growth solves.

Karlsson 21 – (Rasmus, "Learning in the Anthropocene" Soc. Sci. 10, no. 6: 233. <https://doi.org/10.3390/socsci10060233> 18 June 2021)// gcd

Unpacking this argument, it is perhaps useful to first recognize that, stable as the Holocene may have seemed from a human perspective, life was always vulnerable to a number of cosmic risks, such as bolide collisions, risks that only advanced technologies can mitigate. Similarly, the Black Death of the 14th century should serve as a powerful reminder of the extreme vulnerability of pre-industrial societies at a microbiological level. Nevertheless, it is reasonable to think of the Holocene as providing a relatively stable baseline against which the ecological effects of technological interventions could hypothetically be evaluated. With most human activities being distinctively local, nature would for the most part “bounce back” (even if the deforestation of the Mediterranean basin during the Roman period is an example of that not always being the case) while larger geophysical processes, such as the carbon cycle, remained entirely beyond human intentional control. Even if there has been some debate about what influence human activities had on the preindustrial climate (Ruddiman 2007), anthropogenic forcing was in any case both marginal and gradual. All this changed with the onset of the Great Acceleration by which humans came to overwhelm the great forces of nature, causing untold damage to fragile ecosystems and habitats everywhere, forever altering the trajectory of life on the planet (Steffen et al. 2011b). In a grander perspective, humanity may one day become an interplanetary species and thus instrumental in safeguarding the long-term existence of biological life, but for the moment, its impact is ethically dubious at best as the glaciers melt, the oceans fill up with plastics, and vast number of species are driven to extinction. Faced with these grim realities, it is of course not surprising that the first impulse is to seek to restore some kind primordial harmony and restrain human activities. Yet, it is important to acknowledge that, even if their aggregate impact may have been within the pattern of Holocene variability, pre-modern Western agricultural societies were hardly “sustainable” in any meaningful sense. Experiencing permanent scarcity, violent conflict was endemic (Gat 2013), and as much as some contemporary academics like to attribute all evils to “capitalism” (Malm 2016), pre-capitalist societies exhibited no shortage of religious intolerance and other forms of social domination. It is thus not surprising that some have argued the need to reverse the civilizational arc further yet and return to a preliterate hunter-gather existence (Zerzan 2008) even if this, obviously, has very little to do with existing political realities and social formations. Under Holocene conditions, the short-term human tragedy may have been the same, but it did not undermine the long-term ability of the planet to support life. In a world of eight billion people, already accumulated emissions in the atmosphere have committed the planet to significant warming under the coming centuries, with an increasing probability that committed warming already exceeds the 1.5-degree target of the Paris Agreement even if all fossil-fuel emissions were to stop today (Mauritsen and Pincus 2017). This means that sustained negative emissions, presumably in combination with SRM, will most likely be needed just to stabilize global temperatures, not to mentioning countering the flow of future emissions. According to the Intergovernmental Panel on Climate Change (IPCC), assuming that all the pledges submitted under the Paris Agreement are fulfilled, limiting warming to 1.5 degrees will still require negative emissions in the range of 100—1000 gigatons of CO2 (Hilaire et al. 2019, p. 190). The removal of carbon dioxide at gigaton scales from the atmosphere will presumably require the existence of an advanced industrial society since low-tech options, such as afforestation, will be of limited use (Gundersen et al. 2021; Seddon et al. 2020), especially in a future of competing land-uses. It is against this backdrop of worsening climate harms that the limits of “precaution”, at least as conventionally understood, become apparent. While degrowth advocates tend to insist that behavioral change, even explicitly betting on a “social miracle” (Kallis 2019, p. 195), is always preferable to any technological risk-taking (Heikkurinen 2018), that overlooks both the scope of the sustainability challenge and the lack of public consent to any sufficiently radical political project (Buch-Hansen 2018). While there may be growing willingness to pay for, say, an electric vehicle (Hulshof and Mulder 2020), giving up private automobile use altogether is obviously a different animal, to say nothing about a more fundamental rematerialization of the economy (Hausknost 2020). Again, the problem is one in which change either (a) remains marginal yet ecologically insufficient or (b) becomes sufficiently radical yet provokes a strong political counterreaction. A similar dynamic can be expected to play out at the international level where countries that remain committed to growth would quickly gain a military advantage. To make matters worse, there is also a temporal element to this dynamic since any regime of frugality and localism would have to be policed indefinitely in order to prevent new unsustainable patterns of development from re-emerging later on. All this begs the obvious question, if the political and economic enforcement of the planetary boundaries are fraught with such political and social difficulties, would it not be better to instead try to transcend them through technological innovation? Surprisingly, any high-energy future would most likely be subject to many of the same motivational and psychological constraints that hinder a low-energy future. While history shows that existing nuclear technologies could in theory displace all fossil fuels and meet the most stringent climate targets (Qvist and Brook 2015), it seems extremely unlikely, to put it mildly, that thousands of new reactors will be built over the course of the coming decades in response to climate change. Outside the world of abstract computer modelling, real world psychological and cultural inertia tends to ensure that political decision-making, at least for the most part, gravitates to what is considered “reasonable” and “common sense”—such as medium emissions electricity grids in which wind and solar are backed by biomass and gas—rather than what any utilitarian optimization scenario may suggest. Even if the global benefits of climate stabilization would be immense, the standards by which local nuclear risks are assessed, as clearly illustrated by the Fukushima accident which led to a worldwide retreat from nuclear energy despite only causing one confirmed death (which, though obviously regrettable, has to be put in relation to the hundred and thousands of people dying every year from the use of fossil fuels), underscores the uneven distribution of perceived local risks versus global benefits and the associated problem of socio-political learning across spatial scales. Almost two decades ago, Ingolfur Blühdorn identified “simulative eco-politics” as a key strategy by which liberal democracies reconcile an ever-heightened rhetoric of environmental crisis with their simultaneous defense of the core principles of consumer capitalism (Blühdorn 2007). Since then, declarations that we only have “ten years to save the planet” have proliferated, and so have seemingly bold investments in renewable energy, most recently in the form of US President Joseph Biden’s USD 2.25 trillion climate and infrastructure plan. Still, without a meaningful commitment to either radical innovation or effective degrowth, it is difficult to see how the deployment of yet more wind turbines or the building of new highways will in any way be qualitatively different from what Blühdorn pertinently described as sustaining “what is known to be unsustainable” (Blühdorn 2007, p. 253). However, all is not lost in lieu of more authentic forms of eco-politics. Independent of political interventions, accelerating technological change, in particular with regard to computing and intelligent machine labor, may one day make large-scale precision manipulation of the physical world possible in ways that may solve many problems that today seem intractable (Dorr 2016). Similarly, breakthroughs in synthetic biology may hold the key to environmentally benign biofuels and carbon utilization technologies. Yet, all such progress remains hypothetical and uncertain for now. Given what is at stake, there is an obvious danger in submitting to naïve technological optimism. What is less commonly recognized is that naïve optimism with regard to the prospects of behavioral change may be equally dangerous. While late-capitalist affluence has enabled many postmaterial identities and behaviors, such as bicycling, hobby farming, and other forms of emancipatory self-expression, a collapsing economy could quickly lead to a reversal back to survivalist values, traditional hierarchical forms of domination, and violence (Quilley 2011, p. 77). As such, it is far from obvious what actions would actually take the world as a whole closer to long-term sustainability. If sustainability could be achieved by a relatively modest reduction in consumption rates or behavioral changes, such as a ban on all leisure flights, then there would be a strong moral case for embracing degrowth. Yet, recognizing how farreaching measures in terms of population control and consumption restrictions that would be needed, the case quickly becomes more ambiguous. While traditional environmentalism may suggest that retreating from the global economy and adopting a low-tech lifestyle would increase resilience (Alexander and Yacoumis 2018), it may do very much the opposite by further fragmenting global efforts and slowing the pace of technological innovation. Without an orderly and functioning world trade system, local resources scarcities would be exacerbated, as seen most recently with the different disruptions to vaccine supply chains. In essence, given the lack of a stable Holocene baseline to revert to, it becomes more difficult to distinguish proactionary “risk-taking” from “precaution”, especially as many ecosystems have already been damaged beyond natural recovery. In this context, it is noteworthy that many of the technologies that can be expected to be most crucial for managing a period of prolonged overshoot (such as next-generation nuclear, engineering biology, large-scale carbon capture and SRM) are also ones that traditional environmentalism is most strongly opposed to. 3. Finding Indicators From the vantage point of the far-future, at least the kind depicted in the fictional universe of Star Trek, human evolution is a fairly straightforward affair along an Enlightenment trajectory by which ever greater instrumental capacity is matched by similar leaps in psychological maturity and expanding circles of moral concern. With the risk of sounding Panglossian, one may argue that the waning of interstate war in general and the fact that there has not been any major nuclear exchange in particular, does vindicate such an optimistic reading of history. While there will always be ups and downs, as long as the most disastrous outcomes are avoided, there will still be room for learning and gradual political accommodation. Taking such a longer view, it would nevertheless be strange if development was simply linear, that former oppressors would just accept moral responsibility or that calls for gender or racial justice would not lead to self-reinforcing cycles of conservative backlash and increasingly polarizing claims. Still, over the last couple of centuries, there is little doubt that human civilization has advanced significantly, both technologically and ethically (Pinker 2011), at least from a liberal and secular perspective. However, unless one subscribes to teleology, there is nothing inexorable with this development and, it may be that the ecological, social, and political obstacles are simply too great to ever allow for the creation of a Wellsian borderless world (Pedersen 2015) that would allow everyone to live a life free from material want and political domination. On the other hand, much environmental discourse tends to rush ahead in the opposite direction and treat the c limate crisis as ultimate evidence of humanity’s fallen nature when the counter-factual case, that it would be possible for a technological civilization to emerge without at some point endangering its biophysical foundations, would presumably be much less plausible. From an astrobiological perspective, it is easy to imagine how the atmospheric chemistry of a different planet would be more volatile and thus more vulnerable to the effects of industrial processes (Haqq-Misra and Baum 2009), leaving a shorter time window for mitigation. Nick Bostrom has explored this possibility of greater climate sensitivity further in his “vulnerable world hypothesis” (Bostrom 2019) and it begs to reason that mitigation efforts would be more focused in such a world. However, since climate response times are longer and sensitivity less pronounced, climate mitigation policies have become mired in culture and media politics (Newman et al. 2018) but also a statist logic (Karlsson 2018) by which it has become more important for states to focus on their own marginal emission reductions in the present rather than asking what technologies would be needed to stabilize the climate in a future where all people can live a modern life.

#### Crisis narratives are wrong – peak growth and absolute decoupling are coming – only crisis causes overconsumption.

Nordhaus 20 – founder and executive director of the Breakthrough Institute. (Ted, “Must Growth Doom the Planet?,” The New Atlantis, Number 61, Winter 2020, pp. 76-86)//gcd

But the solution, such as it is, turns out to be right in front of us. Mainstream economic theory may posit that endless economic growth is desirable and possible, but what most macroeconomists actually fret about today is stagnation. The growth rate of developed economies has been [falling for decades](https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2018&locations=XD&start=1961&type=shaded&view=chart). This is due not to biophysical limits to consumption, but rather to the simple mathematical reality that the richer an economy becomes, the more wealth it needs to gain each year to maintain the same growth rate. Economic growth in wealthy post-industrial economies, in other words, appears to be inexorably slowing without the need for eco-austerity.

Each additional increment of growth in advanced economies also typically becomes less material-intensive, as sectors like manufacturing, mining, and refining account for a smaller share of total economic output, and knowledge and service sectors account for a larger share.

Population growth is slowing even faster than economic growth, as fertility rates typically fall as incomes and education rise — a dynamic that has been as robust a feature of global modernity as rising consumption. Japan, now 126 million people, could see its population fall by as much as half, to less than [60 million by 2100](http://www.ipss.go.jp/pp-newest/e/ppfj02/Rf_1_e.html). The European Union, currently about 500 million, could shrink to as low as [300 million by 2100.](https://www.eea.europa.eu/data-and-maps/indicators/total-population-outlook-from-unstat-3/assessment-1) Projections vary about when exactly global population will peak and begin to decline, but all major demographic forecasts project population growth trending in the same direction. Absent a radical change in the demography of a rapidly modernizing and urbanizing planet, global population [is likely to peak](https://population.un.org/wpp/Graphs/DemographicProfiles/Line/900) and begin to decline late in this century or early in the next.

Taken together, declining fertility, slowing per capita economic growth, the changing composition of economic activity, and continuing improvements in technology and resource productivity are likely, toward the end of this century, to bring a peak and decline in the consumption of most important resources, and in impacts upon the environment. In fact, for absolute material demands upon the natural environment not to decline over the long term, one of these three robust trends would need to reverse itself. Global fertility trends would need to start rising again. Long-term slowing of growth rates in industrialized economies would need to reverse. Or a broad swath of food, energy, and resource technologies would need to start to become less resource-efficient.

Smil, like a number of other environmental scholars, contests this notion. Instead, he argues that increases in resource productivity will not be put toward lower resource demands but toward more consumption and faster economic growth. Increasingly efficient steam engines in the nineteenth century famously did not result in a reduction in the use of coal but the opposite. One hundred fifty years of improving lighting efficiency hasn’t resulted in lower use of energy for lighting but rather has inspired us to light up many more things. Much of the long-term improvement in the efficiency of internal combustion engines, Smil notes, has gone toward creating larger and more powerful vehicles. As long as there is pent up demand for more consumption, some portion of productivity gains will be put toward more consumption rather than less resource use.

But the claim that these “rebound” effects assure the endless growth of material consumption assumes that demand for them will never saturate. For that to be true, it must also be the case that the wealthier we get, the more material consumption we will demand, forever. Thirty-six-ounce steaks must become 72-ounce steaks, SUVs must become eighteen-wheelers, 2,000-square-foot split-level ranch homes must become 4,000-square-foot McMansions, and so on.

There is really not much evidence for that proposition. Despite our affinity for supersizing our homes, our automobiles, and our portions, the U.S. economy has nonetheless been following the same basic trajectory as all other developed economies: toward slower national and per capita income growth and consumption of material goods and services. Rockefeller University’s [Jesse Ausubel has studied one hundred key resources](https://thebreakthrough.org/journal/issue-5/the-return-of-nature) in the United States over the past century, such as cropland, water, electricity, nickel, and petroleum. Over a third of them are past peak consumption. Similarly, the [United States](https://www.c2es.org/content/u-s-emissions/) and much of the [European Union](https://www.eea.europa.eu/data-and-maps/indicators/greenhouse-gas-emission-trends-6/assessment-3) have seen falling greenhouse gas emissions over the last decade or more, even [accounting for the outsourcing](https://twitter.com/MaxCRoser/status/1205057947103092741) of industrial production to places like China.

Globally, by contrast, resource use and carbon emissions continue to rise, despite long-term and ongoing improvements in resource productivity. This is the reason that Smil characterizes claims that economic growth might decouple from material and energy inputs as “highly misleading.” But the fact that overall demand for material goods and services has risen during the postwar period, when the global population has tripled and billions of people have moved from deep agrarian poverty to urban and industrial living arrangements provides no strong basis for Smil’s argument.

As both population and economic growth rates flatten out over the course of this century, it is likely that resource-productivity gains will overtake global economic growth rates, resulting in falling global demand for material resources over the long term. As [a 2019 Breakthrough Institute report](https://thebreakthrough.org/issues/food/livestock-revolution) showed, global pasture land, the largest single human use of land, peaked in 2000 and continues to decline even as global beef production continues to rise. In [a 2013 paper](https://doi.org/10.1111/j.1728-4457.2013.00561.x), Ausubel and colleagues argued that global cropland too appears close to peaking, even as global crop production continues to rise.

As with all growth curves, peak consumption of various material resources is not guaranteed to last. These trends could represent the top of a bell curve, the bottom of a new S-curve, or just a long plateau. But what they do demonstrate is that absolute decoupling of resources from economic growth is possible, even given a global economy today that still features robust population and income growth.

Smil’s case for establishing limits to growth depends upon a further claim: that preserving economic growth while reducing environmental impacts can’t happen soon enough to avoid surpassing key biophysical boundaries, which would lead to catastrophe for human societies. But Smil is too aware of the many failed proclamations of environmental scientists to make any strong or specific claim about what those biophysical limits might be. “Forecasting the state of modern civilization for generations or centuries to come remains an impossible exercise,” he acknowledges.

Elsewhere — for example in his 2010 book [Energy Myths and Realities](https://www.aei.org/research-products/book/energy-myths-and-realities/) — Smil has been less than catastrophic about global warming, the environmental risk most commonly thought to threaten the long-term survival of human societies. Nor does he worry that we will run out of resources. Instead, he invokes poorly defined challenges having to do with arable land, soil erosion, depleted aquifers, and crop productivity, combined with a changing climate. He is quite certain, though, that none of it can be sustained. “Pursuit of the highest possible economic growth rates, extending the culture of excessive consumption to additional billions of people, and treating the biosphere as a mere assembly of goods and services to be exploited (and used as a dumping ground) with impunity,” he argues, “must change in radical ways.”

In the end, Smil does offer a prediction of sorts, if not a very strong one. By the end of this century, he argues, human societies will need to impose limits upon economic growth in order to sustain human wellbeing for the long term. But as prophecy, Smil’s prediction is less provocative than it might first appear. By the end of this century, global population will likely be approaching zero growth anyway and a much more industrialized global economy will likely be struggling with the same headwinds to sustained rates of per capita growth that developed economies have been struggling with for decades.

In this regard, Smil’s prognostication, should it come to pass, would follow a similar pattern to many other environmental laws and regulations. Environmental restrictions have often lagged, not led, the peaking of pollution and other environmental impacts. We “saved” the whales only after we had hunted many global populations to extirpation, and developed better substitutes for most of the resources we depended upon them for. Forests have returned across many parts of the United States, Europe, and Latin America after we no longer needed those lands to grow food. [One 2005 study found](http://doi.org/10.1146/annurev.energy.30.050504.164507) that 76 percent of protected areas across Latin America and the Caribbean was under little threat of human development without protection, a dynamic that [appears to be the case globally as well](https://doi.org/10.1371/journal.pone.0008273). We reached a global agreement to protect the ozone only after [DuPont](https://doi.org/10.1002/(SICI)1099-0836(199711)6:5%3C276::AID-BSE123%3E3.0.CO;2-A) had developed a cheap substitute for chlorofluorocarbons.

In answer to modern environmentalism’s tautology, Smil offers redundancy. Human societies will need to impose global limits to growth, he suggests, around the time that growth, or at least growing demands upon resources, will likely be coming to an end anyway.

Given how much damage two centuries of unprecedented growth and economic development have done to the biosphere, many imagine, understandably, that the end of growth might be a panacea for the natural world. But we should not be so quick to assume that a smaller and less affluent human population will necessarily bring lower demands upon natural resources.

History is replete with episodes where much smaller human populations accounted for environmental destruction at large scales. Early North Americans in the paleolithic era cleared most of the continent’s forests and hunted mammoths and other megafauna into extinction. Across human history, roughly [three-quarters](http://www.fao.org/3/a-i3010e.pdf#page=21) of deforestation in temperate forests occurred before the Industrial Revolution, when the human population was less than a billion people, almost all of whom lived in deep poverty compared to today’s industrial standards.

More recently, economic crises in relatively developed regions, such as [Southeast Asia](https://doi.org/10.1111/j.1759-5436.1999.mp30003005.x), the [former Soviet Union](https://doi.org/10.1111/cobi.12450), and [Greece](https://doi.org/10.1080/13608746.2013.799731) have led to serious environmental consequences, as economically struggling populations turned to forests for firewood and to illegal hunting and fishing for food, to devastating effect.

For this reason, degrowth offers no guarantee that environmental impacts will decline. This is all the more so as calls for degrowth are frequently coupled with demands for a return to simpler, less technological, and non-synthetic systems for the provision of food and energy and for production of material goods and services. Less affluent economies more dependent upon production systems that use less technology would substantially increase the resource demands associated with consumption, and would erode or even entirely offset the benefits of lower levels of consumption.

## AT: States CP

### 2AC – AT: States CP

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

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

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

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

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

## AT: Clog DA

### 2AC – AT: Court Clog

#### Coronavirus clogging courts now

Al Tompkins 5/6. Senior Faculty for Broadcast and Online at the Poynter Institute, author of "Aim for the Heart". “COVID-19 shutdowns are creating court backlogs across the U.S.” Poynter. 5/6/20. EK. https://www.poynter.org/reporting-editing/2020/covid-19-shutdowns-are-creating-court-backlogs-across-the-u-s/

The pandemic shutdown is causing a logjam in courts that is piling on top of the normal holdups — trials and hearings are significantly delayed even in better days. I am seeing reports from around the country that should concern us all.

The National Center for State Courts is tracking how state courts are handling pandemic closures. As you can see from their map, some states have closed their jury trial schedules until well into the summer while others are slowly opening over the next two weeks.

The (Schenectady, New York) Daily Gazette said family court dockets there are jammed and will be for some time.

The social restrictions and economic shutdowns since mid-March — and now expected to continue into at least mid-May — mean a parent who is paying child support may have lost their job, and stay-at-home orders may interfere with joint child custody arrangements.

A parent could be concerned about a child being exposed to the virus if the other parent’s household includes a front-line health care worker, or having children staying at home because schools have all been adjourned could be imposing an unanticipated burden on one parent more than another. Some custody situations could involve grandparents, who are in the high-risk age group.

WWMT-TV reported on the situation in Battle Creek, Michigan:

When suspects in felony cases are arraigned, they have a right to a preliminary exam within 21 days

“That’s creating a lot of problems bringing witnesses in to be able to testify to what happened. Even bringing people into the courtroom, a lot of people don’t want to come to court, they don’t want to be around anybody,” defense attorney (Caleb) Grimes said.

(Calhoun County Prosecutor David) Gilbert said when things do get back to normal, he’s expecting a logjam in the courts.

“It’s going to be quite the scene. It’s going to be pretty bad, I think. We have district court pretrials, and typically we have 20 to 30 at a time. We’re going to have hundreds. So, we’re short-staffed as far as attorneys are concerned anyway in Calhoun County. We’re going to need to dedicate a lot of attorneys just to do district court pretrials,” he said.

The Administrative Office of the U.S. Courts told federal courts this week to make their own decisions on when and how much to open but to listen to local authorities. That means a federal court in one state might be open to oral arguments but not in another city or state.

And the advisory said courts should brace for a flood of legal filings once law offices open back up. Many big law firms have laid off, cut pay and/or furloughed workers recently (here’s a list).

Nationwide, all immigration court hearings for those not detained were postponed until May 15. The Chicago Reader noted:

“Even before the coronavirus hit, the immigration court system was reeling under unprecedented backlogs, delays, and public outcry from lawyers and (the National Association of Immigration Judges), which represents over 400 of the judges at the nation’s 63 courts. Immigration courts now face over 1.1 million backlogged cases, a number that has skyrocketed under the Trump administration.”

These charts come from the Transactional Access Records Clearinghouse, a research center at Syracuse University’s School of Management:

#### Khan makes antitrust cases inevitable.

Swartz ’21 [Jon; 6/23/21; “New FTC chair Lina Khan is Big Tech’s biggest nightmare”; https://www.marketwatch.com/story/the-wrath-of-khan-new-ftc-chair-is-big-techs-biggest-nightmare-11624384767; AS]

“Antitrust enforcement fell through the floor for decades, and the courts have been defanged as well. I am thrilled by her appointment,” civil-liberties attorney Shahid Buttar told MarketWatch. “Lina’s appointment has broad societal implications far beyond tech, and into consolidation in media, finance, broadband access.”

Khan’s appointment on June 15 was Big Tech’s second major body blow in less than a week. On June 11, the Democratic-controlled House introduced sweeping antitrust legislation with bipartisan support that put Google parent Alphabet Inc. GOOGL, +0.32% GOOG, +0.60%, Amazon.com Inc. AMZN, -0.08%, Apple Inc. AAPL, +1.51% and Facebook Inc. FB, +1.39% in its crosshairs.

The five bills could have far-reaching — and potentially devastating — consequences for tech firms, forcing them to shed businesses like Facebook’s Instagram, severely restricting their ability to scoop up and acquire would-be competitors, and imposing limits on platform-run businesses. The “Ending Platform Monopolies Act,” which proposes structural separation, in part says, “It shall be unlawful for a covered platform operator to own or control a line of business, other than the covered platform, when the covered platform’s ownership or control of that line of business gives rise to an irreconcilable conflict of interest.”

What has the tech sector spooked is the role Khan could have in shaping antitrust law. It was her work as counsel on a House subcommittee, after all, that led to formulation of the five bills, and she has made no secret of how she views the big five companies, whose total market value is more than $8.5 trillion.

Her first task is likely to be the FTC’s investigation of Amazon’s proposed $8.45 billion acquisition of MGM studios, according to a Wall Street Journal report.

“What became clear is there had been a systemic trend across the US… markets had come to be controlled by a very small number of companies,” she told the BBC this year.

Critics like Khan, who wrote a paper in 2017 called “Amazon’s Antitrust Paradox” for the Yale Law Journal, argued that Amazon shouldn’t be excluded from antitrust scrutiny simply because it had a history of cutting prices. The premise of the paper was that traditional antitrust focus on prices consumers pay was inadequate to identify potential harm done by Amazon, and that current competition laws aren’t fit for the challenges of today and are badly outdated. Buttar calls the paper a “seminal work” that helped spark the House’s new antitrust legislation.

“These firms essentially provide infrastructure to the digital age,” she told the BBC in her previous interview.

“A small group of private executives are setting the rules of who gets to use the infrastructure and on what terms,” she added.

Khan, who was not available for comment for this article, is considered as much a threat to Big Tech as the antitrust bills, FTC and Justice Department investigations, and state attorneys general lawsuits.

Her appointment as chair of the FTC — rather than one of its four other members, as some in the Beltway and Silicon Valley assumed — confounded and outraged tech executives. They’re rattled by a LinkedIn profile that includes stints as an associate professor at Columbia Law School since September 2020, where she shares close ties with outspoken tech critic Tim Wu, as well as counsel for the House Subcommittee on Antitrust, Commercial, and Administrative Law, of which Rep. David Cicilline, D-R.I., is chairman, and whose findings led to the five antitrust bills.

Khan’s link to Wu is particularly vexing, tech industry observers note, since the FTC is supposed to operate independently of the White House and Wu is an antitrust advisor to President Joe Biden.

The direct link amounts to a “red-light phone” between the FTC and White House, argues Carl Szabo, vice president and general counsel of NetChoice, an industry group whose funders include Amazon, Facebook, and Google.

“You’ve put somebody in the position of neutrally enforcing the laws when they would much rather write them,” Szabo told MarketWatch. “Imagine being asked to sit before a judge who has written a paper claiming the defendant is guilty. This casts a pall of controversy and political connections, undermining trust.”

“She should recuse herself from any decision [on Big Tech] that she has rendered,” Szabo said. “Otherwise, it will end up being disputed in court.”

None of tech’s big players have publicly commented on Khan. But Jake Ward, president of Connected Commerce Council, an organization representing thousands of small businesses, told MarketWatch: “[Khan] brings an activist perspective, and wants to change a market that is working just fine. Congress and the FTC have done a nice job over the last 100 years on antitrust. We don’t need new laws; the ones we have work just fine.”

## AT: Trade DA

### 2AC – AT: Protectionism DA

#### Trade war thumps.

Yukon Huang, 9-16-2021, "The U.S.-China Trade War Has Become a Cold War," Carnegie Endowment for International Peace, https://carnegieendowment.org/2021/09/16/u.s.-china-trade-war-has-become-cold-war-pub-85352

What began as a trade war over China’s unfair economic policies has now evolved into a so-called cold war propelled by differing ideologies. U.S.-China bilateral relations took a nosedive in 2018 when then U.S. president Donald Trump’s obsession with trade deficits led him to impose punitive tariffs on China. The tariffs were followed by restrictions on both China’s access to high-tech U.S. products and foreign investments involving security concerns and by allegations of unfair Chinese commercial practices.

Despite pleas from the U.S. business community to ease tensions, U.S. President Joe Biden so far has amplified his predecessor’s policies by strengthening anti-China alliances and implementing additional sanctions. Biden now characterizes the U.S.-China conflict as “a battle between the utility of democracies in the twenty-first century and autocracies.”

But the logic underpinning the U.S. trade war was flawed, and the more recent, politically driven restrictions are counterproductive given the damaging long-term economic consequences for both sides. Nonetheless, there have been few signs to date that Biden is likely to change course. In the meantime, then, Europeans may be in a better position for productive give-and-take discussions with China on economic policymaking.

#### Competition law is key to trade liberalization – equal distribution of market power is necessary to the benefit of trade.

Peinert ’20 [Erik; Department of Political Science @ Brown University; “Cartels, competition, and coalitions: the domestic drivers of international orders,” *Review of International Political Economy*, p. 1-25; AS]

Trade, competition, and market power

Early IPE theories drew from neoclassical trade models, whether based on class (Rogowski, 1989) or industry coalitions (Frieden, 1991; Frieden & Rogowski, 1996) for or against free trade. These theories assumed competition to be present, absent any specific impediments that were rarely, if ever, considered. While intermediate variables like factor mobility (Hiscox, 2002) introduced some dimensions of competition—in that factor immobility implies a lessening of competition across industries—the issue was largely avoided, and trade liberalization was assumed to universally increase domestic competition, an assumption necessary for the predicted distributional outcomes of these trade theories.

Even though more recent scholarship focuses on firm-level differences in trade politics, it has still avoided direct engagement with issues of competition and market power. Building off earlier research (Busch & Milner, 1994; Milner, 1988, 1997) and insights from new trade theory (Melitz, 2003), this line of research emphasizes that factor endowments and mobility are less important than firm-level differences in productivity, cost structure, and size. There is an increasingly strong consensus that the primary beneficiaries of trade liberalization are highly productive firms characterized by large economies of scale (Baccini, 2019). Most notably, Baccini et al. (2017) find that Preferential Trade Agreements (PTAs) predominantly benefit the largest and most competitive firms, with increases in concentration ratios for those firms after trade liberalization. Significant research shows that these differences in the expected benefits of trade, driven by economies of scale, and productivity, are among the primary determinants of support for trade liberalization (Chase, 2003; Kim, 2017; Osgood, 2017a, 2017b; Plouffe, 2015, 2017).

However, these arguments reduce economic power to differences in productivity and efficiency, rather than see it as its own political issue, even though many points in this research strongly imply dynamics of market power. Manger (2009) argues that PTAs are primarily tools for multinationals to exclude competitors from regional or national markets, because of first-mover advantages in acquiring important infrastructure or shaping domestic regulations. Similarly, one of the less well-explored details from Baccini et al. (2017) was that the depth of a PTA (including provisions for competition rules) led to a more equal distribution of benefits across firms. While more fine-grained research is needed to isolate the effects of competition provisions,3 the intuitive implication is that the uneven distributional consequences are driven in part by practices or mechanisms that would be prohibited by competition rules. Nonetheless, the reduction of differences in economic power to questions of productivity makes existing literature and theory poorly suited to understand the relationship between trade and market power.

As an alternative starting point, this article looks to the sociology of markets, which does not see the efficiency of different economic arrangements, organizations, or firms as central (Fligstein, 2002, p. 9). The goal of firms and economic actors is survival and stability, not just profit or income optimization. Prices are not exogenous signals of value or scarcity, but are instead contingent on legal norms, economic practices, and social values that coordinate prices to stabilize markets against price-cutting (Fligstein, 1996). Firms look for mechanisms to stabilize prices to prevent ruinous price wars with competitors (Djelic, 1998; Dobbin & Dowd, 2000; Fligstein, 1990). Under this framework, the policies that allocate the coordination rights needed to control or limit price competition—cartels, price-fixing, collusion, mergers, market power, etc.—are the key political questions, and the economic power of lead firms, and the legal infrastructure around them, are among these mechanisms. Unlike issues of direct trade liberalization or protectionism, issues of market power are more dependent on the specific power relationships among firms and competitors, and less reducible to abstract differences like productivity. The ability of antitrust and related policies to allocate coordination rights (Paul, 2020) needed to stabilize prices and markets means that prices—and thus seemingly apolitical measures like productivity—are not simply the result of which firms produce the most efficiently.

In this domain of antitrust, competition, and market power, the state plays a central role in the politics around trade. In the limited existing research specifically on the relationship between antitrust and trade politics, Bradford and Buthe ( € 2015) and Buthe ( € 2015) assert that competition policy is a necessary complement to trade liberalization—to avoid transnational collusion among firms—and antitrust policies are understood on the assumption that state actors genuinely aim to promote competition. This article expands on this to show that the state’s interests and policy interventions are more complex and fundamental than just avoiding collusion, and that the state’s preferences for competition are not just a functional response to trade liberalization. In contrast to public-choice perspectives in the antitrust literature that have subsumed antitrust and competition policy as nothing but another arena for regulatory rent-seeking by private interests (Guzman, 1998; Shughart, 1995), here I focus on the public interest concerns of state actors and follow the tradition of ‘state autonomy’ (Evans et al., 1985), arguing that the state is at least partially independent from the pressures of, or capture by, private interests. State actors have a more encompassing interest (Olson, 1965) in the overall functioning of markets, and they will go to great efforts to puzzle, learn, and understand how market relationships work in the aggregate. None of this framing is to suggest that private interests are not present or important, but state actors have significant space to implement their own agenda, as existing evidence is rather conflicted about the ability of concentrated or organized interests to reliably get their policy preferences.4

## AT: FTC Tradeoff

### 2AC – AT: FTC Tradeoff DA

#### Spike in mergers during COVID overstretches FTC resources

Abbott 21 – Alden Abbott, Senior Research Fellow at the Mercatus Center and former FTC general counsel, “Lack of Resources and Lack of Authority Over Nonprofit Organizations Are the Biggest Hindrances to Antitrust Enforcement in Healthcare,” 4/29/21, https://www.mercatus.org/publications/antitrust-and-competition/lack-resources-and-lack-authority-over-nonprofit

Appropriate federal antitrust and consumer protection enforcement is good for the American economy. It promotes enhanced competition and consumer welfare. Regrettably, however, the effectiveness of federal enforcement in achieving these benefits is threatened by insufficient resources. As FTC Acting Chair Rebecca Kelly Slaughter explained in her April 20 testimony before the US Senate Committee on Commerce, Science, and Transportation, FTC employment has remained flat despite a growing workload, with merger filings doubling in recent years. Lauren Feiner reports on that testimony:

“The absence of resources means that our enforcement decisions are harder,” [Slaughter] said. “If we think that we have a real case, a real law violation in front of us, but a settlement on the table that is maybe OK but doesn’t get the job done, we have to make difficult decisions about whether it’s worth spending a lot of taxpayer dollars to go sue the companies who are going to come in with many, many law firms worth of attorneys and expensive economic experts, versus taking that settlement.”

I can attest to the accuracy of Slaughter’s observation, based on my experience as FTC general counsel in the Trump Administration. During my tenure, the FTC did indeed have to contend with resource limitations that adversely affected merger enforcement decision-making.

The problem of resource constraints is particularly acute in the case of healthcare merger reviews, given the increasing consolidation of healthcare institutions. As one noted healthcare scholar stated in 2019, “The Affordable Care Act did not start the consolidation rapidly occurring with hospitals/health systems and medical groups, but it most definitely accelerated the movement to combine. In the last five years, the number and size of consolidations have been at an all-time high.”

Moreover, according to health policy analyst Brian Miller and coauthors, “experts have expressed concern regarding a new merger wave due to pandemic-induced financial distress driven by the temporary cessation of profitable elective care and decreased hospital use.” Antitrust enforcers will need additional resources to ensure that this trend does not yield mergers that undermine the competitive process and harm consumers.

#### No link – Credit Suisse affected private suits – plan means they enforce antitrust law, not government agencies.

Lacour ‘8 [Justin; JD Candidate @ St. John’s; “Unclear Repugnancy: Antitrust Immunity in Securities Markets after Credit Suisse Securities” LLC v. Billing, 82 St. JOHN's L. REV. 1115 (2008) p. 1151-1155]

The Court has made it much more difficult for a plaintiff to seek a remedy from businesses for antitrust violations. 243 After Billing, almost all securities activity that falls under the SEC's regulation is immune from antitrust liability, leaving little or no room for private antitrust actions. 244 The Court assumed that the presence of SEC regulation would naturally result in less of a need for antitrust enforcement. 245 Even if the Court is correct in painting Billing's antitrust claim as simply a "dressed up" securities claim, the Court does not consider the effect of its decision on traditional antitrust claims. While Congress has restricted plaintiffs' ability to bring securities actions in order to prevent frivolous suits, there is no similar legislation for antitrust suits. 246 Although Billing's policy decision is drawn from securities legislation, its effects will be keenly felt in other areas of law. Indeed, that may be the most pressing problem of the Billing standard: that the standard could plausibly be applied to other regulated industries, thus preventing suits against a variety of firms, from airlines to drug manufacturers. 247

Like Twombly, Billing's crippling effects on a plaintiffs ability to get to court could reach far beyond antitrust and securities. This loss is of no small significance. The Supreme Court has recognized that Congress created treble damages remedies for antitrust violations to encourage private antitrust suits, since these private suits provide significant supplement to the limited resources available to government agencies for enforcing the antitrust laws. 248 The availability of treble damages encourages private antitrust litigants to act as "'private attorneys general'" by bringing actions against anticompetitive behavior that might otherwise escape the antitrust enforcement efforts of government agencies. 249 The supervision provided by a regulatory agency cannot control all of the activities of a regulated firm, and budgetary constraints may limit its effectiveness. 250 It is unlikely that the "overworked and understaffed" SEC would be able to prevent all antitrust violations within the securities markets. 251 In much recent securities law jurisprudence, courts have often chosen to defer to the SEC when possible, thus subjecting cases to "minimal judicial review." 252 Such deference to an agency, however, is only appropriate when the agency has superior resources or experience-otherwise, a court is the better vehicle for adjudication. 253 Furthermore, while a regulatory agency may be able to provide the equivalent of injunctive relief to aggrieved parties, the agency cannot provide private damages, and certainly not treble damages. 254 Thus, the "flexible arsenal of antitrust remedies"-injunction, private damages, and criminal sanctions-would be lost, replaced by cease and desist orders, rules, and fines, which do not benefit the aggrieved party.255

#### No spillover between parts of the FTC

Spencer Weber Waller 5, Professor of Law and Director of the Institute for Consumer Antitrust Studies at the Loyola University Chicago School of Law, “In Search of Economic Justice: Considering Competition and Consumer Protection Law”, Loyola University Chicago Law Journal, 36 Loy. U. Chi. L.J. 631, Winter 2005, Lexis

Despite this more comprehensive mission, the FTC is organized in a way that tends to emphasize the separation of these fields, rather than the common elements of the agency's mission. The FTC has a Bureau of Competition and a separate Bureau of Consumer Protection, with a Bureau of Economics to support the work of both endeavors. The Bureau of Competition ("BC") primarily engages in the investigation and enforcement of mergers and complex civil antitrust cases with a recent emphasis on intellectual property and health care issues. The Bureau of Consumer Protection ("BCP") primarily investigates and challenges outright fraudulent conduct. 9 The FTC website details recent BCP activity involving Internet sales, telemarketing, false health and fitness claims, identity theft and similar issues. 10 These are all very different issues from the day-to-day focus of the competition staff. This basic split is further mirrored in the Bureau of Economics ("BE"), where the staff tends to specialize in either competition or consumer protection. Any crossover of staff and cooperation occurs primarily in competition advocacy before legislatures or regulatory agencies, and not in case selection and investigation.

#### No emerging tech impact.

Pinker et al. ’20 [Steven; PhD, Professor of Psychology @ Harvard; Stuart Russell, Professor of Computer Science @ UC Berkeley; Lucas Perry; “Steven Pinker and Stuart Russell on the Foundations, Benefits, and Possible Existential Threat of AI”; June 29th, 2020; https://futureoflife.org/2020/06/15/steven-pinker-and-stuart-russell-on-the-foundations-benefits-and-possible-existential-risk-of-ai/]

Lucas Perry: Now that’s quite a beautiful picture of the future. There’s a lot of existential hope there. The other side to existential hope is existential risk. Now this is an interesting subject, which Steve and you, Stuart, I believe have disagreements about. So pivoting into this area, and Steve, you can go first here, do you believe that human beings, should we not go extinct in the meantime, will we build artificial superintelligence? And does that pose an existential risk to humanity?

Steven Pinker: Yeah, I’m on record as being skeptical of that scenario and dubious about the value of putting a lot of effort into worrying about it now. The concept of superintelligence is itself obscure. In a lot of the discussions you could replace the word “superintelligence” with “magic” or “miracle” and the sentence would read the same. You read about an AI system that could duplicate brains in silicon, or solve problems like war in the Middle East, or cure cancer.  It’s just imagining the possibility of a solution and assuming that the ability to bring it about will exist, without laying out what that intelligence would consist of, or what would count as a solution to the problem.

So I find the concept of superintelligence itself a dubious extrapolation of an unextrapolable continuum, like human-to-animal, or not-so-bright human-to-smart-human. I don’t think there is a power called “intelligence” such that we can compare a squirrel or an octopus to a human and say, “Well, imagine even more of that.”

I’m also skeptical about the existential risk scenarios. They tend to come in two varieties. One is based on the notion of a will to power: that as soon as you get an intelligent system, it will inevitably want to dominate and exploit. Often the analogy is that we humans have exploited and often extinguished animals because we’re smarter than them, so as soon as there is an artificial system that’s smarter than us, it’ll do to us what we did to the dodos. Or that technologically advanced civilizations, like European colonists and conquistadors subjugated and sometimes wiped out indigenous peoples, so that’s what an AI system might do to us. That’s one variety of this scenario.

I think that scenario confuses intelligence with dominance, based on the fact that in one species, Homo sapiens, they happen to come bundled together, because we came about through natural selection, a competitive process driven by relative success at capturing scarce resources and competing for mates, ultimately with the goal of relative reproductive success. But there’s no reason that a system that is designed to pursue a goal would have as its goal, domination. This goes back to our earlier discussion that the ability to achieve a goal is distinct from what the goal is.

It just so happens that in products of natural selection, the goal was winning in reproductive competition. For an artifact we design, there’s just no reason that would be true. This is sometimes called the orthogonality thesis in discussions of existential risk, although that’s just a fancy-schmancy way of referring to Hume’s distinction between our goals and our intelligence.

Now I know that there is an argument that says, “Wouldn’t any intelligence system have to maximize its own survivability, because if it’s given the goal of X, well, you can’t achieve X if you don’t exist, therefore, as a subgoal to achieving X, you’ve got to maximize your own survival at all costs.” I think that’s fallacious. It’s certainly not true that all complex systems have to work toward their own perpetuation. My iPhone doesn’t take any steps to resist my dropping it into a toilet, or letting it run out of power.

You could imagine if it could be programmed like a child to whine, and to cry, and to refuse to do what it’s told to do as its power level went down. We wouldn’t buy one. And we know in the natural world, there are plenty of living systems that sacrifice their own existence for other goals. When a bee stings you, its barbed stinger is dislodged when the bee escapes, killing the bee, but because the bee is programmed to maximize the survivability of the colony, not itself, it willingly sacrifices itself. So it is not true that by definition an intelligent system has to maximize its own power or survivability.

But the more common existential threat scenario is not a will to power but collateral damage. That if an AI system is given a single goal, what if it relentlessly pursues it without consideration of side effects, including harm to us? There are famous examples that I originally thought were spoofs, but were intended seriously, like giving an AI system the goal of making as many paperclips as possible, and so it converts all available matter into paperclips, including our own bodies (putting aside the fact that we don’t need more efficient paperclip manufacturing than what we already have, and that human bodies are a pretty crummy source of iron for paperclips).

Barely more plausible is the idea that we might give an AI system the goal of curing cancer, and so it will  conscript us as involuntary guinea pigs and induce tumors in all of us, or that we might give it the goal of regulating the level of water behind a dam and it might flood a town because it was never given the goal of not drowning a village.

The problem with these scenarios is that they’re self-refuting. They assume that an “intelligent” artifact would be designed to implement a single goal, which is not true of even the stupid artifacts that we live with. When we design a car, we don’t just give the goal of going from A to B as fast as possible; we also install brakes and a steering wheel and a muffler a]

nd a catalytic converter. A lot of these scenarios seem to presuppose both idiocy on the part of the designers, who would give a system control over the infrastructure of the entire planet without testing it first to see how it worked, and an idiocy on the part of the allegedly intelligent system, which would pursue a single goal regardless of all the other effects. This does not exist in any human artifact, let alone one that claims to be intelligent. Giving an AI system one vaguely worded, sketchy goal, and empowering it with control over the entire infrastructure of the planet without testing it first seems to me just so self-evidently moronic that I don’t worry that engineers have to be warned against it.

I’ve quoted Stuart himself, who in an interview made the point well when he said, “No one talks about building bridges that don’t fall down. They just call it building bridges.” Likewise, AI that avoids idiocies like that is just AI, it’s not AI with extra safeguards. That’s what intelligence consists of.

### 2AC – Harmonization

#### Implied immunity expansion diverges from European competition law – plan solves.

Brunell ’12 [Richard; Director Legal Advocacy @ American Antitrust Institute; “In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity,” 78 Antitrust L.J. 279 (2012) p. 279-280]

The recent decisions by the U.S. Supreme Court in linkLine and the European Court of Justice in Deutsche Telekom2 reflect sharply divergent views of the merits of a price squeeze as an antitrust violation and, more generally, of the standards for assessing abuse of dominance by vertically integrated monopolists. The two cases also highlight contrasting approaches in the United States and Europe to the relationship between antitrust and sectoral regulation. Deutsche Telekom, which upheld the European Commission's determination that the German incumbent telephone company had abused its dominant position by engaging in a margin squeeze, illustrates the European view that antitrust enforcement and sectoral regulation in liberalized markets are generally complementary, rather than mutually exclusive.3 Indeed, antitrust enforcement is arguably more necessary when a vertically integrated monopolist is partially regulated than when it is entirely unregulated. On the other hand, linkLine, which all but precluded price squeeze claims in a regulated market, reflects an emerging view that antitrust enforcement should generally stay its hand when federal regulators are on the scene and available to address competitive problems in an industry. This emerging view itself is a marked shift in American policy, which, until recently, had been closer to the European stance that allows for only a very narrow "regulated conduct defense" to antitrust claims.

The Supreme Court's expansion of regulatory immunity-reflected more explicitly in Trinko 4 and Credit Suisse' than in linkLine-is a rather surprising development in an era of deregulation because deregulation has long been thought to entail greater scope for competition laws in regulated industries.6 Also, the deregulation movement itself was driven in significant part by skepticism of the efficacy and competence of regulators to advance the public interest.' Notably, as will be discussed, the shift in the regulation/antitrust balance has been promoted by a broad coalition on the Supreme Court, and opposed by the American antitrust establishment, including the Department of Justice under President George W. Bush. It is also ironic that Europe, which has traditionally had a more hospitable attitude toward regulatory control over industry than the United States, has embraced antitrust as a tool of market liberalization and deregulation, while the United States seems to be moving towards displacing antitrust in favor of regulatory remedies.

#### Disputes trigger digital protectionism – convergence solves.

Lancieri ’19 [Filippo; Postdoctoral Researcher, ETH Zurich. J.S.D., University of Chicago Law School. M.S., Economics, INSPER, "Digital Protectionism? Antitrust, Data Protection, And The EU/US Transatlantic Rift," The Journal of Antitrust Enforcement, Vol. 7, Issue 1, March 2019, Lexis]

IV. The way ahead: Convergence or divergence?

So far, this article presented how the differences between the American and European approaches to data protection provide EU regulators with motivation to strengthen antitrust enforcement in data markets. Moreover, it argued that once this process starts, the unique features of European antitrust policy will prove a perfect incubator, so that antitrust cases against US tech companies for dominance violations should grow. Americans do not share and may not understand neither the motivation nor the antitrust tools employed in the EU. 110 As the Atlantic divide on antitrust enforcement widens (and given that actual protectionist policies are on the rise) 111 calls of digital protectionism should afloat. Tensions run both ways, as Europeans may also be startled by American complaints against what they see as a regular application of the rule of law. 112

With a trade war between the EU and the US looming after a series of trade sanctions, 113 increased strains between two of the world's leading trade and security partners can do little good. 114 The digital economy is a sensitive area and the EU/US safe harbour for data transfer is proof of the damage that may arise from disputes. The first Safe Harbor came after a major trade conflict between the EU and the US over personal data. 115 By striking it down, EU Courts' placed thousands of American and European companies in disarray, 116 reason why business leaders in both jurisdictions welcomed the swift conclusion of the Privacy Shield. 117 The challenge remains, however, on whether it is desirable or possible to bridge such significant cultural differences, or at least develop clear mechanisms that prevents tensions arising from pure misunderstanding.

This remains a contingent question. On one side, convergence may never be necessary. It is perfectly reasonable and may even be optimal that different legal systems will provide different solutions to challenges of a new internet era, forcing agents to adapt to the norms of a given jurisdiction. 118 Lack of convergence is burdensome and may increase the cost of doing business across the Atlantic, 119 but the so far successful implementation of the 'right to be forgotten' experience in Europe demonstrates that both markets are large enough to justify companies adopting different solutions. The risk is that shifts in market behaviour may lead to the 'Brussels' effect' and the export of stricter standards, 120 something that may trigger unpredictable reactions by US authorities facing loss of sovereignty.

On the other, the safe harbour demonstrates how convergence is possible if parties move to bridge differences. As there is more to explore from an academic perspective in this second scenario, this section will focus on that. Bringing together such disparate regimes will require both political motivation and a coherent framework. This part argues that: (i) convergence efforts will require a balancing of the role that economics plays in antitrust enforcement on internet markets on both sides of the Atlantic; and (ii) that recent EU reforms open a window of opportunity for this to happen. In addition, it presents data portability as a mitigating measure that companies may explore to decrease tensions while and if converge does not take place.

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### XT 2AC 2: C/I

#### Prohibit refers to bans on unreasonable practices. Courts reject literal meaning.

Notre Dame Law Review ’17 [“Justice Scalia and Sherman Act textualism”.. [Vol 92, No. 5]. Lexis]

III. A TEXTUALIST ANALYSIS OF SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." (112) Webster's 1886 Complete Dictionary of the English Language defines "restraint" as "[t]hat which restrains, as a law, a prohibition, and the like; limitation; restriction." (113) The same source defines "restrain" as "[t]o limit; to confine; to restrict." (114) Stormonth's Dictionary of the English Language defines "restraint" as: "the act of restraining; abridgment of liberty; restriction; hindrance of will; repression; that which restrains." (115) The same source defines "restrain" as: "to hold back; to bind fast; to curb; to repress; to limit; to abridge." (116) Justice Scalia's coauthored treatise on interpretation endorsed both sources as "reflecting] meanings given at the current time" and "among the most useful and authoritative for the English language generally and for law." (117)

A straightforward application of these definitions could sweep quite broadly. For instance, a definition could require prohibition of every contract that "limits," "confines," or "restricts" commerce or "abridges liberty." Numerous garden-variety commercial arrangements would seem to offend such a ban. For instance, a covenant ancillary to the sale of a business whereby a seller agrees not to sell its wares within a certain geographic area would literally "confine" commerce and certainly "limit," "curb," and "restrict" it. (118) Moreover, an agreement by the purchaser of a chattel, say, a steamship, not to use the vessel in competition against the seller "abridges the liberty" of the buyer and again "confines," "curbs," "restricts," or "limits" commerce. (119)

For over a century, beginning with the Standard Oil decision, the Supreme Court has avoided the consequences of such a plain meaning approach by reading section 1 so as to ban only "unreasonable" restraints, often employing a variant of the absurdity canon. (120) In particular, the Court has repeatedly noted that all contracts restrain trade to some degree, with the result that a "plain meaning" approach to section 1 would ban all commercial agreements and grind commerce to a halt. (121) Congress could not have intended this result, the Court says, with the result that the statute should only ban restraints that the Court deems unreasonable. (122) [\*\*Start Footnote 122\*\*(122) Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 342-43 (1982) ("Section 1 of the Sherman Act of 1890 literally prohibits every agreement 'in restraint of trade.' ... [W]e [have] recognized that Congress could not have intended a literal interpretation of the word 'every' [ ] since [ Standard Oil] [and thus] have analyzed most restraints under the so-called 'rule of reason."' (footnotes omitted) (citations omitted)); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("Although this prohibition is literally all- encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." (citations omitted)).\*\*End Footnote 122\*\*] In its earlier incarnation, this approach also served to avoid the sort of broad reading of the Act that the Lochner-era Court believed would violate liberty of contract. (123) At times, albeit not recently, the Court has invoked legislative history to support this conclusion. (124)

#### No brightline separates rule of reason and per se.

Donald F. Turner, Professor of Law, Georgetown University Law Center,’90,. "The Virtues and Problems of Antitrust Law," Antitrust Bulletin 35, no. 2 (Summer 1990): 297-310

The extreme alternative to the per se approach is the "rule of reason" requiring examination of all facts bearing on whether the conduct is on balance anticompetitive or procompetitive. But, the problems posed by such an approach-vagueness, unpredictability, costs of litigation, and difficulties in obtaining facts-have in some instances led to modified versions of the rule of reason, creating presumptions of illegality on the basis of certain findings, such as that the legitimate objective of defendants were achievable by less restrictive alternatives. In short, as the Supreme Court noted in the NCAA case, "there is often no bright line separating per se from Rule of Reason analysis." 7 In other words, use of "per se" "rule of reason" labels has been confusing.

#### 2. Outlawing only “unreasonable restraints” constitutes a prohibition., Per-se restrictions merely outlaw acts that are inherently unreasonable.

P. Areeda, Harvard University School of Law, ’81, The "Rule of Reason" in Antitrust Analysis: General Issues (Federal Judicial Center 1981)

The Sherman Act prohibition against "every" agreement in restraint of trade has been understood by the federal courts since the 1911 Standard Oil decision to forbid only "unreasonable restraints."l However, Standard Oil reconciled earlier categorical prohibitions with its own rule of reason by declaring some restraints "inherently unreasonable" or, as later courts put it, "per se unlawful." It is the main purpose of this brief essay to explain the ways in which the dichotomy between per se and rule of reason treatment is usually overstated and can confuse the unwary. We do so in Part III, after beginning by (I) addressing the components of the rule of reason inquiry, followed with brief comments on four common confusions (the significance of administrative convenience, state of mind, horizontal-vertical dichotomies and the necessity of "agreement", and (II) considering the rationale for per se rules by reference to the prohibition of price fixing.

## Trade DA

### XT 2AC 2: Trade UQ

#### Global protectionism now- covid, populism

Postnikov, PhD, 10-4-21

(By Dr Evgeny Postnikov, University of Melbourne and Associate Professor Ida Bastiaens, Fordham University https://pursuit.unimelb.edu.au/articles/how-to-rescue-free-trade-in-the-post-covid-world)

Trade policy has become increasingly politicised across the globe, as citizens protest new trade deals and populist leaders promise to wind back free trade in the name of greater economic security and bring back jobs lost to offshoring. And the global pandemic only promises to further exacerbate these protectionist responses as governments face a COVID-induced recession and realise the great vulnerability of their global value chains. The pandemic has also ushered in new pressures for de-globalisation and self-reliance – helped along by the geo-economic tensions between China and the US. But this mercantilist turn is only likely to exacerbate economic decline, similar to the Great Depression when beggar-thy-neighbor protectionist policies prolonged the economic slump and drove dangerous nationalist ideas, pushing the fragile global community into war.

### XT 2AC 5: Link Turn

#### Empirics prove.

Peinert ’20 [Erik; Department of Political Science @ Brown University; “Cartels, competition, and coalitions: the domestic drivers of international orders,” *Review of International Political Economy*, p. 1-25; AS]

Competition goes abroad

This domestic background heavily informed the internationalization of antitrust in the leadup to World War II, in postwar planning during the war, and in trade and competition policy after, infusing free-trade policies with specific content regarding competition and restrictive business practices. The investigation resulting from the earlier case against Alcoa revealed not just Alcoa’s participation in the international aluminum cartel, but that the cartel was maintained through an elaborate web of patent agreements spanning national borders. As this and similar arrangements were discovered, Arnold began aggressively pursuing cases against international cartels and American multinationals leading up to and during the war. In one of the most marked breaks from past antitrust enforcement, he filed cases against scores of American multinationals and their foreign competitors, based on anticompetitive practices outside American borders.

In parallel with Arnold’s campaign, the TNEC stoked fears of the foreign threat of cartels, and much of the committee’s attention focused on how cartels used patents to prevent competition (Wells, 2002, pp. 39–40). By late December 1939, the patents investigation of the TNEC had found a great deal of ‘control exerci[z]ed by foreign governments and business enterprises upon American Industries.’ 56 This was particularly true of German firms, who frequently entered into agreements with American companies to pool patents. For example, Siemens had an American firm take out patents on beryllium, refuse to license them to anyone else, and not produce any themselves, essentially preventing the existence of a beryllium industry in the United States.57 These problems were particularly scrutinized in defenserelated industries, and the TNEC found that multiple European countries had used the U.S. patent system for similar legal devices.58

The experience in the New Deal and this campaign gave American officials, especially the Antitrust Division, a particular understanding of how trade, competition, and restrictive business practices interacted. The permissive standards of patent law and the non-existent reach of antitrust beyond borders59 had allowed multinational firms, in the United States and abroad, to cooperatively partition product and regional markets entirely amongst themselves, and use the full force of national authorities to defend their rights to do so.60 For example, if the best version of a product at the time were made using a mix of technologies covered by patents that only a few firms held, they could come to an agreement where (a) they would license all their patents to each other and (b) agree to fixed prices or to each only operate in mutually exclusive geographic regions. Not only would they all have fixed market shares or even effective monopolies in those regions, but extant patent law required the state to enforce that monopoly on potential competitors.