# Aff Wiki Doc

# 1AC

## 1AC – Wake

### 1AC – Market Power

#### Contention one: Market Power

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

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

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

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

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

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

I . DEREGULATION AND GAPS IN COMPETITION ENFORCEMENT

A. Antitrust and Regulation as Policy Alternatives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Introduction 1

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

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

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

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

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

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

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

[\*632]

II. Evolution of Antitrust Application in Regulated Industries

A. Historic Antitrust Application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

… .

[The Court further said:]

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

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

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

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

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

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

IV. An Optimal Solution: Complementary and Effective Antitrust Responsibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Clarifying Legal Precedent

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

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

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

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

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

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

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

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

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

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

I. How MARKET POWER CONTRIBUTES To EcONOMIC INEQUALITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Inequality spurs populist backlash.

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

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

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

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

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

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

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

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

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

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

Convergence Across Countries, Divergence Within Them

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

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

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

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

Rising Skills Premia

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

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

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

The Riddle of the 1 Percent

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

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

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

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

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

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

Neo-H-O-S-S

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

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

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

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

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

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

New New Trade Theory

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

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

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

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

Economic Geography

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

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

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

Notable Similarities and Differences

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

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

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

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

Hypothesis

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

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

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

Inequality and Antiglobalization: Evidence from European Elections

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

Immigration and Inequality

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

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

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

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

Imports and Inequality

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

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

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

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

Possible Remedies and Sources of Resilience

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

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

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

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

Limitations and Future Research

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

#### Anticompetitive market power subverts democracy.

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

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

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

A. Corporate Size Translates to Political and Economic Power

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

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

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

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

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

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

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

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

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

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

#### Democratic governance solves existential threats.

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

The Rise of a Global Society

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

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

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

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

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

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

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

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

The Democratic Project

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

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

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

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

The Authoritarian Threat to the Democratic Project

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

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

Global politics becomes a zero-sum game.

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

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

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

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

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

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

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

What is Populism?

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

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

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

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

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

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

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

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

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

### 1AC – Plan

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

### 1AC – Internet

#### Contention two: Internet

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

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

Telecommunications and Modern Regulation – The 1996 Act and Classification

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

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

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

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

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

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

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

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

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

The 1996 Telecommunications Act and Antitrust Laws – Trinko

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

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

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

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

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

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

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

Trinko Doctrine Expands Under Credit Suisse

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

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

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

The Court’s Deference to the FCC

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

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

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

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

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

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

A World Without Trinko and Credit Suisse

Real-World Access

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

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

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

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

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

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

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

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

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

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

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

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

A. Antitrust Would Effectively Protect Competition in ISP Markets

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

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

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

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

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

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

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

2. Understanding Opposition to Paid Prioritization

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

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

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

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

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

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

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

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

3. Net Neutrality Violations Can Sometimes Harm Competition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERNET MONOPOLIES

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

[CHART 1 REMOVED]

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

THE INVESTMENT CON

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

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

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

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

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

ONGOING ABUSES

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

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

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

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

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

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

#### 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 – 3

#### Contention three: Interest Rates

#### Rate hikes are inevitable, the question is how high and how fast?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Market power dilutes the effect of monetary policy, causing over-aggressive rate hikes.

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

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

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

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

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

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

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

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

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

#### Applying antitrust to the regulated financial sector is “key” to amplify monetary transmission.

Yifei Wang et al, Toni M. Whited Yufeng Wu Kairong Xiao ,NATIONAL BUREAU OF ECONOMIC RESEARCH, ’20. “BANK MARKET POWER AND MONETARY POLICY TRANSMISSION: EVIDENCE FROM A STRUCTURAL ESTIMATION” https://www.nber.org/system/files/working\_papers/w27258/w27258.pdf

The U.S. banking sector has experienced an enormous amount of consolidation. The market share of the top five banks has increased from less than 15% in the 1990s to over 45% as of 2017. This consolidation begs the question of whether bank market power has a quantitatively important effect on the transmission of monetary policy. We study this question by formulating and estimating a dynamic banking model with regulatory constraints, financial frictions, and imperfect competition. This unified framework is useful because it allows us to gauge the relative importance of different monetary policy transmission channels. In our counterfactuals, we show that the channel related to reserve requirements has limited quantitative importance. In contrast, we find that channels related to bank capital requirements and market power are very important. These quantitative findings are new to an empirical literature dominated by qualitative results (Kashyap and Stein 1995; Scharfstein and Sunderam 2016; Drechsler et al. 2017). We also find an interesting interaction between the market power channel and the bank capital channel. If the federal funds rate is low, depressing it further can actually contract bank lending, as reduced profits in the deposit market impact bank capital negatively. Lastly, we show that accounting for bank market power is key to understanding cross-sectional variation in banks’ responsiveness to monetary policy, while the interaction of bank market power with regulatory constraints explains most of the decline in monetary transmission effectiveness over time.

#### Over-aggressive monetary policy causes a global debt crisis.

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

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

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

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

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

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

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

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

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

#### Post-covid debt crisis causes nuclear war through hotspot escalation and collapses multilateral governance.

Strategic Partners Marsh McLennan SK Group Zurich Insurance Group, Academic Advisers National University of Singapore Oxford Martin School, University of Oxford Wharton Risk Management and Decision Processes Center, University of Pennsylvania, ’21, “The Global Risks Report 2021 16th Edition” “http://www3.weforum.org/docs/WEF\_The\_Global\_Risks\_Report\_2021.pdf

Forced to choose sides, governments may face economic or diplomatic consequences, as proxy disputes play out in control over economic or geographic resources. The deepening of geopolitical fault lines and the lack of viable middle power alternatives make it harder for countries to cultivate connective tissue with a diverse set of partner countries based on mutual values and maximizing efficiencies. Instead, networks will become thick in some directions and non-existent in others. The COVID-19 crisis has amplified this dynamic, as digital interactions represent a “huge loss in efficiency for diplomacy” compared with face-to-face discussions.23 With some alliances weakening, diplomatic relationships will become more unstable at points where superpower tectonic plates meet or withdraw.

At the same time, without superpower referees or middle power enforcement, global norms may no longer govern state behaviour. Some governments will thus see the solidification of rival blocs as an opportunity to engage in regional posturing, which will have destabilizing effects.24 Across societies, domestic discord and economic crises will increase the risk of autocracy, with corresponding censorship, surveillance, restriction of movement and abrogation of rights.25 Economic crises will also amplify the challenges for middle powers as they navigate geopolitical competition. ASEAN countries, for example, had offered a potential new manufacturing base as the United States and China decouple, but the pandemic has left these countries strapped for cash to invest in the necessary infrastructure and productive capacity.26 Economic fallout is pushing many countries to debt distress (see Chapter 1, Global Risks 2021). While G20 countries are supporting debt restructure for poorer nations,27 larger economies too may be at risk of default in the longer term;28 this would leave them further stranded—and unable to exercise leadership—on the global stage.

Multilateral meltdown Middle power weaknesses will be reinforced in weakened institutions, which may translate to more uncertainty and lagging progress on shared global challenges such as climate change, health, poverty reduction and technology governance. In the absence of strong regulating institutions, the Arctic and space represent new realms for potential conflict as the superpowers and middle powers alike compete to extract resources and secure strategic advantage.29 If the global superpowers continue to accumulate economic, military and technological power in a zero-sum playing field, some middle powers could increasingly fall behind. Without cooperation nor access to important innovations, middle powers will struggle to define solutions to the world’s problems. In the long term, GRPS respondents forecasted “weapons of mass destruction” and “state collapse” as the two top critical threats: in the absence of strong institutions or clear rules, clashes— such as those in Nagorno-Karabakh or the Galwan Valley—may more frequently flare into full-fledged interstate conflicts,30 which is particularly worrisome where unresolved tensions among nuclear powers are concerned. These conflicts may lead to state collapse, with weakened middle powers less willing or less able to step in to find a peaceful solution.

#### Excess rate hikes causes Asian debt crisis.

Cyn-Young Park (朴信永), Director for Regional Cooperation and Integration, Economic Research and Regional Cooperation Department, ADB, ’17, “Impact of US Interest Rate Hike on Asia – Will This Time be Different?” https://blogs.adb.org/blog/impact-us-interest-rate-hike-asia-will-time-be-different

A tightening cycle in US monetary policy is typically bad news for emerging Asian economies.

Asian currencies have been under pressure recently from an expectation that US Federal Reserve (Fed) will raise interest rates this month.

The Fed has kept the target range for its federal funds rate steady at 0.5-0.75% since its last hike in December. Rates have been expected to rise since the Fed began winding down its bond purchase program, widely known as ‘quantitative easing’ in December 2013, and after the Fed raised its federal funds rate in December 2015—the first time it had done so since the 2008 global financial crisis.

But the Fed’s interest rate moves have been much more gradual, and often delayed, reflecting various concerns about global financial market conditions, including the impact of Brexit and increased policy uncertainty. Additionally, there has been mixed economic data in the US.

Higher US interest rates typically bad news for emerging Asian economies

A tightening cycle in the US monetary policy is typically bad news for emerging Asian economies. Rising US interest rates mean higher yields for Treasuries and a stronger US dollar. Higher yields on US assets then attract portfolio capital invested elsewhere back to the US.

A reversal in international capital flows, together with increased volatility due to global portfolio rebalancing, can lead to an abrupt drying-up of external funding in emerging market economies, sharp depreciation of their currencies, contraction of domestic expenditures, and reductions in both domestic asset prices and credits to the private sector.

In order to stop capital flight and sharp currency depreciation, emerging market economies may feel a need to raise their domestic interest rates as well. Higher interest rates would dampen domestic investment and consumption demand, while raising public sector borrowing costs and debt-service burdens.

US rate hike poses risks for Asia

Fear of US interest rate hikes has triggered massive sell-offs in emerging markets in the past. This time around, though, the markets are relatively calm. The MSCI equity market index for Asia—excluding Japan—lost 523 basis points or almost 1% on 3 March alone, due to a sudden change in market expectations on rates with seemingly unequivocal signals from Fed officials. But these losses were recovered in less than a week. This suggests that markets view a rate hike as inevitable, after more than two years of anticipation.

The region may not feel the urge to increase interest rates. Inflation remains under control and a sudden deterioration of financial conditions is not expected. Nevertheless, there is no shortage of risks attached to rate increases. Emerging Asian economies are not a homogenous group, and there are likely to be considerable country variations in terms of impact.

Countries with external imbalances or heavily reliant on external funding are likely to be most vulnerable to the effects of higher US interest rates. This is why Asian countries with substantial budget and current account deficits—India and Indonesia, for example—were among the most severely hit by previous rate hikes. Governments in such economies should exercise fiscal prudence and contain budget deficits and public debts. Some Asian economies should also caution against an increase in private sector debts, as companies that borrowed in dollars during times of ample global liquidity could face debt-servicing difficulties.

Growing PRC-US trade tensions could spill over to emerging Asian economies

Another reason why we should not be complacent is the rather lackluster global industrial activity and trade amid heightened policy uncertainty around the world. A strong US dollar means greater purchasing power for US customers, which often helps the region weather the impact of US monetary tightening by lifting its exports during episodes of capital outflows. However, global economic recovery remains tentative at best, while many Asian economies remain heavily reliant on exports and deepening value chain trades for investment and growth.

The ongoing economic slowdown in the People’s Republic of China (PRC)—in part driven by structural reforms towards more sustainable and balanced long-term growth—has already affected the region’s trade and its value chain expansion.

Emerging protectionist sentiments could weigh on the region’s trade and economic prospects. Growing tensions over US trade with the PRC could have spillovers to other Asian economies given the PRC’s position in the region’s value chain and weaken their external positions.

#### Asian financial crisis causes Asian regime instability.

ROGER CLIFF, RAND, PhD IR @ Princeton, June ’20, “a new u.s. strategy for the indo-pacific” the national bureau of asian research, nbr special report #86 |

A financial crisis is a disturbance to financial markets that disrupts their capacity to allocate capital.70 Such crises are significant because they often trigger recessions, and those recessions tend to be more severe and last longer than normal business cycle recessions.71 Financial crises may be grouped into four broad categories, although individual crises may involve more than one category: currency crises, balance-of-payments crises, debt crises, and banking crises. A currency crisis results from a speculative attack on a country’s currency that causes a devaluation of the currency or else forces the authorities to defend the exchange rate by expending large amounts of foreign exchange reserves, by sharply raising interest rates, or by imposing capital controls. A balance-of-payments crisis is the result of a sudden fall in international capital inflows to, or a sudden increase in capital outflow from, a country.72 Debt crises can be foreign debt crises or domestic public debt crises. A foreign debt crisis is when a country, or private entities within the country, stop paying back its foreign debt. A domestic public debt crisis is when a country stops honoring its domestic fiscal obligations (e.g., government bonds) by defaulting on them, by deliberate inflation that debases the value of the debt, or by other means. A banking crisis is when bank failures or bank runs cause banks to stop allowing savers to withdraw their money or cause the government to intervene on a large scale to prevent this.73 A financial crisis in the Indo-Pacific would be a significant event not only because it might affect the U.S. economy, but also because it could cause a severe recession that destabilized governments in the region, leading to revolutions or repression.74 In addition, as noted earlier in this chapter, countries that undergo a significant slowdown in economic growth are more likely to experience internal conflict.75

Financial crises are frequent occurrences. One study identified at least 452 instances worldwide between 1970 and 2011 in which a country experienced a financial crisis, implying that an average of eleven such crises occurred per year.76 Within the past quarter century, two financial crises have had a major effect on the Indo-Pacific region in particular: the 1997 Asian financial crisis and the 2007–8 global financial crisis. Unfortunately, financial crises are difficult to predict more than a year or so in advance.77 Thus, while it is highly possible that another major financial crisis could strike the Indo-Pacific at some point over the next decade, it is impossible at this time to predict when it will occur or what countries will be affected.78 If a financial crisis does occur, the developing economies of the Indo-Pacific are likely to be more severely affected than the advanced economies, as this is the typical pattern (although advanced economies were more severely affected during the 2007–8 global financial crisis). Over the duration of a crisis, lost economic output typically amounts to about 30% of an average year’s output, and seven years after the crisis annual output levels are typically about 10% lower than they would have been if pre-crisis trends had continued. Thus, a financial crisis could significantly disrupt the economic growth trajectory and potentially precipitate regime change in rising powers such as China, India, or Indonesia, as well as other vulnerable countries such as Myanmar, Bangladesh, the Philippines, or Nepal.79

#### Asian regime instability causes nuclear war

Perkinson 12 — Jessica, Faculty of the School of International Service of American University in Partial Fulfilment of the Requirements for the Degree of Master of Arts in International Affairs; reviewed by: Quansheng Zhao, Professor of international relations and Chair of Asian Studies Program Research Council at American University, and John C. King, Assistant Professor School of International Service, 2012 (“The Potential for Instability in the PRC: How the Doomsday Theory Misses the Mark,” American University, April 19th, Available Online at http://aladinrc.wrlc.org/bitstream/handle/1961/10330/Perkinson\_american\_0008N\_10238display.pdf?sequence=1)

First, the stability of the Korean Peninsula rests in large part on the stability of China’s political system. Both North and South Korea have vested interests in the continued stability of the CCP for their own security. As is generally well-known in the international community, North Korea relies in large part on China superseding international trade sanctions not only for luxury goods, but for basic needs such as food and oil. For example, the United States led the charge and enacted its first set of sanctions against North Korea over two decades ago in response to the existence of fissile material on the Korean Peninsula and its risk for proliferation.152 Over time, these sanctions have been expanded upon and have attracted the support and participation of the United Nations Security Council (UNSC). Specifically, these sanctions have included blocked property and interests in property, banned transactions involving North Korean vessels and bans on reception of imports originating in North Korea.153 Though these sanctions have not encouraged the North Korean regime to change its policies (and in some cases have made them more militant), they have unfortunately had a devastating effect on the North Korean people, including depravation of access to critical resources such as medication, food and water and energy supplies such as oil.154 In addition, due to a succession of floods and droughts and the refusal of the international community to intervene in a country violating international laws, pervasive malnutrition has led to “up to one million excess deaths since the 1990’s.155 In order to maintain stability on the Peninsula and prevent the North Koreans from becoming desperate, China continues to export both luxury goods and basic commodities into North Korea. For example, in 2005, China accounted for 53% of North Korea’s international commerce. However, this has increased rapidly since sanctions have become stricter and have increased pressure in the country. In 2009, China accounted for 79% in North Korea’s international commerce and as of 2010 was up to 83% of North Korea’s $4.2 billion in trade156 in order to ease the effect of the existing international sanctions.

In addition, China has been a facilitator of the Six-Party Talks, the primary international diplomatic forum for handling tensions on the Korean Peninsula. Countries involved in the Six-Party Talks include China, North Korea, Russia, the United States, South Korea and Japan, and the first round of talks was initiated and hosted by China, taking place in Beijing in August 2003.157 During the talks, China served as a moderator between the US and North Korea during tense times of debate, also insisting on certain thresholds of success before members could leave the talks, such as the drafting of diplomatic agreements158. Though the talks have remained in an on-and-off pattern over the last decade, China still makes consistent efforts to bring North Korea back to the diplomatic negotiations over their nuclear regime.159

South Korea’s dependence on China’s continued stability is twofold. Not only does South Korea rely on China’s continued deterrence of North Korean aggression both through diplomacy and satisfaction of their trade needs, but they also rely on China as a trade partner. For example, on November 23, 2010, North Korea fired dozens of missiles onto the South’s Yeonpyeong Island, killing two South Korean soldiers, significantly escalating tension on the Peninsula as South Korea threatened military retaliation for the attack.160 In response, China focused their energy on deterring an armed response by the South Koreans, which could have potentially led to protracted civil war between the two countries. Though the international community has expressed deep disagreement with China’s soft-line approach toward North Korea, it appears their understanding, ‘big-brother’ style of handling North Korean aggression toward South Korea has at least prevented a violent, protracted conflict, though not necessarily further North Korean acts of aggression.161 Not only does South Korea rely on the continued intervention of the Chinese in North-South relations, but they have a deep economic integration and dependence on Chinese trade. For example, in 2010, South Korea was China’s fourth-largest trading partner, exchanging goods of $207.2 billion, up 32.6% over 2009.162 In other words, both North and South Korea rely heavily on China not only for their continued economic prosperity, but also for the survival of their people and territorial security. Should the Chinese government undergo a period of reform and instability great enough to interrupt these benefits to the Korean Peninsula, the international system may be faced with a serious nuclear and conventional military conflict between North and South Korea.

# 2AC

## Market Power

## Internet

## Interest Rates

### 2AC – AT: Turn

#### 2. The fed has already announced asset tapering to slow quantitative easing. The question is only how much and how fast?

Steve Matthews, Reporter @ Bloomberg, 11-3-2021, "What’s a Taper and Why Has the Fed Started Tapering?" Washington Post, https://www.washingtonpost.com/business/whats-a-taper-and-why-has-the-fed-started-tapering/2021/11/03/5635d85a-3cdf-11ec-bd6f-da376f47304e\_story.html

If you heard economists arguing about “the taper” this year, chances were they weren’t talking about pants or haircuts but about central banks. The question has been when the U.S. Federal Reserve and its global peers, including the European Central Bank, would start to pull back on the massive bond-buying programs they unleashed in 2020, when economies staggering under the pandemic needed all the stimulus central banks could give. Now that the Fed has laid out its tapering plan, the debate is likely to shift to whether it can find the right balance between giving too much or too little support to an economy in transition.

1. What’s a taper?

That’s the term Fed officials (and others) use to describe a plan to take their foot off the gas gradually, by trimming bond purchases over an extended period. The hope is to wean the economy slowly off the extra stimulus the purchases provide to avoid a crash landing. The Fed has been buying $120 billion of bonds per month. The plan announced on Nov. 3 calls for that to come down by $15 billion a month starting later in November.

2. What had the Fed done with bond buying?

As markets reeled from the start of the pandemic in March 2020, Fed officials announced that the bank would buy $200 billion of agency mortgage-backed securities and $500 billion of Treasuries. Initially, that was described as a way of helping to maintain market liquidity. In December 2020, officials said the bank would purchase $80 billion a month in Treasuries and $40 billion a month in mortgage securities until there was “substantial progress” in the economic recovery. Between early March 2020 and late October 2021, the Fed raised the value of the assets it holds from $4.2 trillion to $8.6 trillion.

3. What’s the idea?

The Fed’s usual method of fighting recessions is to push down the interest rates banks charge each other for overnight loans, which allows banks to offer cheaper loans to businesses and consumers, thereby stimulating economic activity. But in the wake of the 2008 financial crisis, the Fed realized that cutting its rate virtually to zero was not medicine enough. So the Fed began buying bonds in hopes of driving down long-term rates that are usually outside its control, in a program it called quantitative easing.

4. Had that ever been done before?

Yes, but never on such a massive scale. In the six years that followed the 2008 financial crisis, the Fed bought more than $3.5 trillion in bonds. Other central banks had similar programs at the time, including the Bank of Japan, the European Central Bank, and the Bank of England. The European Central Bank and the Bank of Japan never stopped the bond purchases they started after the financial crisis, and stepped up their buying after the pandemic hit in the spring of 2020.

5. How did the taper work that time?

It took 10 months. The reductions were announced in December 2013 and began the following month, with the Fed detailing cuts by $10 billion at each policy-setting meeting, divided evenly between Treasuries and mortgage bonds. The Fed wrapped up all the buying in October 2014 and went on to lift rates in December 2015 after keeping them steady for seven years.

6. What led to the taper decision this time?

The U.S. economy rebounded strongly in the first half of 2021 and while growth showed sharply in the third quarter, supply-chain bottlenecks and pent-up demand have stoked inflation to the highest levels since 1991. Meanwhile, the labor market has continued to add jobs, albeit at a slower pace than over the summer, and unemployment has fallen to 4.8%. That allowed Fed officials to declare the test for tapering had been met, which Chair Jerome Powell clearly flagged in remarks on Oct. 22, saying “I do think it’s time to taper.”

7. What’s at stake?

A lot, with the gusher of cash awash in the financial system helping to drive U.S. stocks and housing prices to record highs and Treasury yields holding just above six-month lows. Markets will be watching not only when the Fed begins to taper, but the pace at which it does so. When the tapering plan was announced, Powell noted that the pace of $15 billion a month put the bank on track to wrap the process up by mid-2022, but said it could be speeded up or slowed down depending on the economic outlook. Investors could take a decision to speed up the taper as a sign that the Fed will also accelerate rate hikes. Tightening policy too quickly could derail the economic recovery at a time of continued uncertainty over the duration of the health crisis. Moving too slowly could fuel the inflation pressures unleashed by the reopening from the pandemic.

#### Market power raises prices – antitrust solves.

Vaheesan ’19 [Sandeep; Legal Director @ Open Markets Institute, JD @ Duke; “The Profound Nonsense of Consumer Welfare Antitrust,” *The Antitrust Bulletin* 1(16); AS]

IV. The False Assumptions About Business Conduct

Empirical research, especially in recent years, has shed important light on the effects of certain business conduct. The research on mergers and predatory pricing, in particular, is worth highlighting First, retrospective analyses of corporate mergers have found that they often lead to higher prices and markups. And they generally do not yield productive efficiencies and indeed have often produced inefficiencies. Second, research has found that dominant firms can use below-cost pricing to eliminate and discipline rivals and maintain or augment their power.

Notwithstanding this empirical research, the courts and the agencies rely on simplistic theoretical assumptions about mergers and predatory pricing. In their policy and practice, the DOJ and the FTC continue to presume that mergers generally enhance productive efficiencies. They tolerate consolidation on the grounds that mergers will allow firms to reduce costs of production and potentially lower prices for consumers. In a similar disregard for empirical research, the Supreme Court has asserted that “predatory pricing is rarely tried, and even more rarely successful”53 and rewritten doctrine based on this false assumption. In short, antitrust enforcers and the courts have established pro-merger and pro-predation policy based on speculative theories and ignored a wealth of contrary research findings.

A. The Evidence on Horizontal Mergers and Predatory Pricing

Empirical research has documented that large horizontal mergers and predatory pricing can and do often reduce consumer welfare. In other words, even taking consumer welfare as the appropriate goal of antitrust, corporate consolidation and below-cost pricing by dominant firms should be a serious concern. Economic research, especially in recent years, has found that mergers frequently result in higher prices and price-cost markups and rarely produce the promised productive efficiencies. Other research has shown that dominant firms can use predatory pricing to maintain or extend their market control.

1. Mergers. Economics research has shown that mergers in concentrated markets often lead to higher prices and higher price-cost markups. John Kwoka reviewed dozens of merger retrospectives and found that approximately 80% of the studied mergers led to higher prices and reduced output.54 A comprehensive study of mergers in the manufacturing sector found that these consolidations generally led to higher prices and higher price markups.55 Studies of specific mergers in concentrated markets have similarly found higher prices and price markups.56

A related line of literature has concluded that market concentration is associated with higher prices and markups. A 2017 study found a nearly fourfold increase in markups since 1980 and attribute this rise to increased market power.57 Similarly, a recent article finds that the economy-wide increase in concentration has contributed to higher profit margins.58 In a meta-study of analyses of concentration and price, Leonard Weiss found the positive correlation between concentration and price to be “overwhelming.”59 More recently, based on a review of the empirical literature, Herbert Hovenkamp and Carl Shapiro concluded, “[C]oncentrated industries tend to perform poorly in serving consumers, as they displayed higher prices, higher price/cost margins, and higher profits than less concentrated industries.”60

The empirical literature has found that mergers generally failed to yield their promised efficiencies. In a major 1987 study, economists David Ravenscraft and Frederic Scherer found that mergers generally were not efficiency enhancing and indeed often produced inefficiencies.61 Other research since then has generally been in line with their findings. The study on mergers and acquisitions in manufacturing, noted above, found that these transactions typically did not lead to plant- or firm-level improvements in efficiency.62 In the merger retrospectives he reviewed, John Kwoka found little evidence of firm efficiency improvements from consolidation.63 Examining the empirical research on corporate mergers, economist Melissa Schilling wrote, “A considerable body of research concludes that most mergers do not create value for anyone, except perhaps the investment bankers that negotiated the deal.”64

2. Predatory Pricing. Empirical evidence has found that dominant firms have engaged in predatory pricing. They have used temporary below-cost pricing to eliminate or discipline rivals and protect their own market power. Economists have documented this conduct in many industries, including airlines, coffee, ocean shipping, telecommunications, and tobacco.65 The airline and tobacco studies deserve special attention.

Multiple airlines have resorted to aggressive, below-cost pricing to protect their hub dominance. In response to limited entry by rivals, certain dominant hub carriers have dramatically expanded seat capacity and slashed fares below the cost of service on newly competitive routes. Through this temporary but steep price discounting, they have eliminated the new competitors and restored their own dominance.66 Once the entrants have exited the market, incumbent carriers have reduced capacity and raised fares, sometimes to levels above the pre-entry levels.67 In a 2001 report, the Department of Transportation (DOT) found significant evidence to suggest predation and concluded that predation in the industry was real and indeed common. According to the DOT, this predation eliminated competition in the target markets and helped deter entry against hub incumbents in general.68 According to the DOT, American Airlines at its Dallas/Fort Worth hub, Delta Air Lines at its Atlanta hub, and Northwest Airlines at its Detroit hub appear to have engaged in successful below-cost pricing against new rivals.69

The tobacco industry has also witnessed several episodes of predatory pricing. The industry, which has been highly concentrated for more than a century, is infamous for its regular, lockstep price increases and substantial profit margins.70 Cigarette manufacturers have responded to threats from either newcomers or smaller rivals with bursts of below-cost pricing. For instance, in the 1930s and 1980s, cigarette makers, in concert or independently, slashed prices and sustained significant losses and successfully eliminated rivals or pressured them to follow coordinated pricing practices again.71

#### Counter-cyclical antitrust stops regulatory expansion – turns the DA.

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

There is a possible inverse of the above paradox, in which strengthening antitrust enforcement during deregulation could in fact be consistent with arguments for more conservative competition enforcement. As a threshold matter, even those arguing that antitrust enforcement should be more modest than the status quo, especially in innovative industries, should want such enforcement in clear cases of anticompetitive conduct. So the conservative argument may be not so much about whether antitrust should step in when regulation retreats, but instead about when and to what degree. But there is an additional reason, tied to the political dynamics of current policy debates, that even antitrust conservatives might welcome enforcement during deregulation. Today's deregulation could give way to tomorrow's reregulation. If in the interim there is no progress in addressing the competition-related concerns animating today's debates over antitrust and competitive governance of large firms, that push for reregulation will be stronger and broader. To the extent antitrust enforcement can address some of those concerns, the return to more prescriptive and less flexible regulation of competition in certain markets could be avoided or limited. That is an outcome that antitrust conservatives, too, should favor, even if antitrust enforcement that accomplishes that objective is stronger than they think optimal.

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

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

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

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

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

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

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

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

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

## T-Per Se

### 2AC – AT: T-Prohibition = Per Se

#### B) All rule of reason analysis can be reconstructed as a per se prohibition by defining the prohibited practice to include its anticompetitive effects. We don’t prohibit “anticompetitive practices” in regulated industries, but we do prohibit “anticompetitive practices in regulated industries that harm consumer welfare.

Thomas **KRATTENMAKER** Associate Dean and Professor of Law, Georgetown University Law Center **’88** Per Se Violations in Antitrust Law: Confusing Offenses with Defenses, 77 GEO. L. J. 165 p. 170-174

III. WHAT IS A PER SE OFFENSE?

The fact that no one can adequately describe the purpose of classifying certain conduct as a per se violation poses an even more fundamental problem with the present use of the concept of per se rules. The Supreme Court's opinions, particularly in recent years, are full of talk about per se antitrust violations, but the notion does not convey anything useful. The present state of the law governing both price fixing and group boycotts illustrates the emptiness of the concept of a per se violation of antitrust laws.

A. PRICE FIXING

Horizontal price fixing among competitors immediately comes to mind as an example of a per se offense. Surely, horizontal price fixing is illegal per se. But not in any way that makes an intelligible use of the English language.

In a sense, my objection is elementary. Supreme Court opinions are littered with statements to the effect that price fixing among competitors is illegal per se.33 Yet members of the Supreme Court also agree that not all conduct that literally constitutes horizontal price fixing is illegal per se.34 It simply cannot be helpful, descriptively or analytically, to assert that both of the following propositions are true: (1) horizontal price fixing is illegal per se; (2) not all literally horizontal price fixing is illegal per se. Yet both of these propositions appear, in close proximity, in recent Supreme Court 35 opinions.

I do not regard the Justices as fools. They could explain the apparent contradiction sketched above in either of two ways. First, they might say that "horizontal price fixing is illegal per se" means that after we examine all the relevant facts and issues in a horizontal price-fixing case, if we decide that the practice violates the antitrust laws, we state that result by saying the behavior is "illegal per se." Because some price fixing will, after that examination, turn out to be lawful, the second proposition above, that not all literal price fixing is illegal per se also is correct.

This explanation will not do for two reasons. First, it is not an accurate statement of what the Court does. In NCAA the Court condemned a price- fixing scheme as unlawful, but eschewed the label "per se."'36 Second, it makes no sense. To say that behavior that violates the antitrust laws is a "per se violation" makes the phrase "per se" redundant**.** One might as well say that horizontal price fixing is illegal. Put another way, all violations of the antitrust laws are "per se violations" if all we mean by the phrase is that it describes conduct that, once all the relevant facts and issues are examined, should be held to violate the antitrust laws.

I believe the Justices would advance a different explanation for the apparent contradiction in their legal propositions. It goes like this: (a) when we say that horizontal price fixing is illegal per se, we mean that, to make out an apparent violation of the antitrust laws, all a plaintiff needs to do is prove that some competitors agreed among themselves on the prices at which they would sell their goods or services; (b) when we say that not all literal price fixing is illegal per se, we mean that once a plaintiff has proved that price fixing has occurred, the defendant nevertheless may escape liability by proving certain facts. For example, antitrust law does not condemn a pricing agreement among competitors who lack market power if that pricing agreement is reasonably necessary to facilitate a cooperative joint venture that will lower production costs and enable the joint venture to compete more effec- tively in a deconcentrated market.37 Thus, lawyers do not necessarily violate the Sherman Act when they form a law firm38 and doctors who cooperate to establish clinics are not necessarily antitrust felons.39

The preceding explanation harmonizes the two apparently contradictory legal propositions. Further, the proffered elaboration of proposition (1) de- scribes present law. Note, however, what this means for proposition (2). "Price fixing is illegal per se" translates to "Proof of price fixing shifts the burden to the defendant to establish a valid defense." I simply do not see how either of these two statements can be read as a syntactically or grammatically permissible (much less, helpful) variation or short hand for the other.

It is not illegal-much less illegal per se-to fix prices. It is illegal to do so without a valid excuse. To say that it is illegal per se to fix prices is just as useless as it is to say that it is illegal per se to kill another human being, given that the law recognizes such defenses as insanity, self-defense, legal justification, and due care.

Why, then, do we persist in describing offenses as illegal per se? I believe it is simply because we have confused offenses with defenses. What the Court means to say is that certain defenses or justifications frequently offered for price fixing (or group boycotts, or tying arrangements) are to be summarily rejected, without factual inquiry, either as a matter of principle or because experience teaches us that the costs of the inquiry will exceed any potential gains.4° No conduct is per se (that is, "by itself" or "intrinsically") a violation of the antitrust laws. However, certain defenses to such conduct are per se inadmissible or impermissible.41

Thus, for example, ever since United Statesv. Trenton Potteries 4,2 antitrust law has rejected as per se impermissible the defense to a price-fixing claim that the fixed prices were reasonable. Experience teaches that judges are not capable of assuming the responsibility for measuring-as might a public utili- ties commission-the reasonableness of every price in the U.S. economy.43 Principles embedded in the antitrust laws further teach that the reasonable price is the one generated by the invisible hand of the marketplace, not a price chosen by firms on one side of the market.44

Sometimes whether a defense is per se inadmissible depends upon the nature of the underlying violation. Lack of market power is per se inadmissible as the sole defense to a price-fixing charge.4 5 Indeed, the very suggestion, in such cases, that the competing firms lacked market power is incredible. Why did they agree to fix prices if they could not do so? With tying claims, on the other hand, lack of market power is a valid defense.46 Antitrust policy suggests that tying arrangements often can be efficient and cannot plausibly inflict competitive harm unless the seller has market power in the tying product.4 7 But an agreement among competitors to alter prevailing market prices, which has no plausible affirmative procompetitive feature, cannot possibly promote competition even if the parties lack market power.

#### C/I – prohibitions include bans of “unreasonable” conduct – that’s most consistent with the literature. Other interpretations are arbitrary because per se refers to ex-ante conclusions a practice is always per se unreasonable based on anticompetitive effects.

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

689-693

II. THE RULE OF REASON

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

[INSERT FOOTNOTE 15]

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

[END FOOTNOTE 15]

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

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

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

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

III. THE PER SE RULE

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

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

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

## 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

## Regulate CP

### 2AC – AT: Regulation CP

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

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

B. Testing Comparative Advantages of Antitrust and Regulation

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

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

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

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

#### Also means it doesn’t solve advantage two – that’s Ohlhausen, AND...

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

NET NEUTRALITY’S MAGINOT LINE

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

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

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

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

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

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

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

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

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

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

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

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

## Econ DA

### 2AC – AT: Industry PIC

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

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

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

### 2AC – AT: Econ DA

#### Rate hikes *turn* the DA biz con – causes recession.

Matt Clinch, Deputy Managing Editor, CNBC International Digital, 11-11-21 “Former Indian central bank chief warns rapid rate moves could fuel ‘wealth shock’ that scares consumers,” CNBC, https://www.cnbc.com/2021/11/11/indias-raghuram-rajan-warns-rapid-rate-moves-could-fuel-wealth-shock.html

Former Indian Central Bank Governor Raghuram Rajan highlighted the tightrope that policymakers have to walk with monetary stimulus, warning that one false move may lead to a global “wealth shock” that could scare consumers.

With the cost of living surging ever higher in many regions around the world, central banks would typically dial back on their bond buying and push up rates to tame inflation.

The U.S. Federal Reserve has started to normalize policy after the economic fallout from the coronavirus pandemic. It said last week that bond purchases would start to taper “later this month” and acknowledged that price increases had been more rapid and enduring than central bankers had forecast.

Rajan, who led India’s Reserve Bank of India between 2013 and 2016, said this accommodative policy from many central banks had caused bubble-like conditions in certain assets, adding that he believed that inflation had now become “more than transitory.”

“One of the problems of course ... if the central banks move too fast, markets adjust too quickly then you’ve got a huge wealth shock in the economy and that frightens consumers and so on, and you can precipitate the recession that you didn’t want in the first place,” he told CNBC’s Julianna Tatelbaum on Wednesday from the UBS Euro Conference.

He added that central banks needed to proceed cautiously, but warned against policymakers doing nothing at all.

“The longer they wait [to normalize policy] the more this sort of feeds on itself and there’s a belief that central banks aren’t going to move, rates will stay low for long,” Rajan said.

#### COVID, supply chain spikes, AND labor shortage all thump bizcon.

Mike Hlas, The Associated Press, 10-1-2021, "Midwest business confidence in economy falls: survey," No Publication, https://www.thegazette.com/business/business-confidence-in-economy-falls-survey/

Confidence in the economy among business leaders in nine Midwest and Plains states has plummeted in recent weeks, according to a monthly survey released Friday that reflected leaders' lowest rate of confidence since the COVID-19 pandemic began last year.

The overall index for September of the Creighton University Mid-America Business Conditions dropped to 61.6, from August’s 68.9.

Any score above 50 on the survey’s indexes suggests growth, while a score below 50 suggests recession.

The survey’s business confidence index, which looks ahead six months, fell more than 16 points from August’s 53.5 to 37 — the lowest level since March 2020.

Creighton University economist Ernie Goss, who oversees the survey, ticked off other concerns revealed in the latest survey, including that nearly one in three supply managers said finding and hiring qualified workers will be their greatest challenge over the next year.

#### The stock market isn’t the economy – there’s not internal link between stock price fluctuation and overall economic trajectory. Inequality outweighs.

Heather **BOUSHEY** President of The Washington Center for Equitable Growth **’20** https://www.washingtonpost.com/outlook/stock-market-unemployment-disconnect/2020/09/09/087374ca-f306-11ea-bc45-e5d48ab44b9f\_story.html

The president and his supporters are ignoring what former Federal Reserve chair Janet Yellen forcefully explained recently: “The stock market isn’t the economy. The economy is production and jobs, and there are shortfalls in virtually every sector.” How have stocks remained so resilient in the face of such a severe shock? In part, it’s because of inequality. Stocks are overwhelmingly owned by the top 1 percent, which means speculation has been able to continue even as more people have lost their jobs than at any time since the Great Depression.

What’s more, measures such as the Dow and the S&P 500 reflect only the very largest U.S. companies, which can weather steep slumps in demand in a way that Main Street enterprises can’t — while the relief packages Congress passed this spring were better at shielding large companies from economic harm than smaller ones. Given how troubling the underlying economic data are, the immunity of the markets can’t continue (as this past week’s decline may suggest).

When we compare the stock market with jobs data, the numbers are sobering. Spring’s temporary job losses — caused at first by the shutdowns — are settling into a long-term pattern of economic malaise that could reduce low-income and middle-class families’ earnings for years to come. Although the unemployment rate has dropped from its height of 14.7 percent in April, the Sept. 4 jobs report from the Labor Department’s Bureau of Labor Statistics indicates that losses once thought to be temporary are becoming permanent.

If the stock market doesn’t reflect the health of our economy, what does it measure? Most directly, it indicates the financial health of the richest among us. Overall, about 55 percent of Americans own stocks, according to Gallup, but ownership is heavily skewed toward the wealthy. According to Federal Reserve data, the top 1 percent of U.S. households own 39 percent of equities and mutual fund shares, and the top 10 percent own 83 percent — which leaves workers in the bottom 90 percent owning just 17 percent.

#### No risk of overdeterrence from narrowing implied immunity – no empirical evidence for false positives.

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

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

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

#### Implied immunity creates more expensive regulatory compliance – antitrust can replace inefficient regulations.

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]

III. Consequences for the Balance Between Antitrust and Regulation

In many cases, the practical effect of Trinko and Credit Suisse will be to impose a reasonable limitation on conceptually weak antitrust claims where regulation specifically addresses the conduct at issue. There are important circumstances, however, in which the effects of those cases will not be so modest and will lead to unintended, harmful consequences. The potential harm will arise because Trinko and Credit Suisse will also limit antitrust law's ability to complement regulation where the latter has gaps in coverage or effectiveness (as in the AT&T divestiture case); those cases will limit antitrust in substituting for regulation where antitrust would be a more targeted and less costly means of competition enforcement.

Contrary to the Court's presumption, in many cases regulation will be more costly than either antitrust enforcement or a combination of antitrust and regulation would be. In the words of Justice (then Judge) Breyer, "[A]ntitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative."158 Of course, if Congress requires an agency to regulate, policymakers cannot choose antitrust as an alternative. But antitrust might still be a beneficial supplement even if it is not a full substitute; and in the far more usual case where agencies have some discretion in the promulgation and enforcement of regulations, the comparative benefits of antitrust as a substitute become important. Even if regulators have authority to regulate, they may decide that forbearance from "gearing up the cumbersome, highly imperfect bureaucratic apparatus of classical regulation" in favor of antitrust enforcement will be the better pol icy choice.159 This will be a particularly important option as economic conditions in the regulated industry change. The case-by-case approach of antitrust enforcement, which targets specific instances of anticompetitive conduct as they arise, can usually deal with unique or unexpected factual situations better than can regulatory rulemaking, which depends more on specifying competitive obligations and prohibitions prospectively, in advance of actual conduct. After Trinko and Credit Suisse, however, statutory authority to regulate has become a greater potential barrier to antitrust law as a substitute for regulation. This Part begins by discussing the costs and benefits of regulation and then explains why the comparative costs and benefits of antitrust change as an industry moves from monopoly toward competition. It argues that the benefits of regulation diminish as markets become competitive while the costs of regulation remain and even increase as that transition occurs. Regulatory costs that might result in a net benefit in the presence of monopoly become less likely to do so as a market moves away from a concentrated structure. This change in the relative costs and benefits of regulation has implications for the socially desirable balance between antitrust and regula tion and, in turn, shows how Trinko and Credit Suisse may require administrative agencies to make inefficient choices between underregulation and overregulation. A. The Costs and Benefits of Regulation Economic regulation typically arises because there is some reason that competition is either undesirable or unattainable in a market. Natural monopoly, where it costs less to have one firm serve the entire market than to have multiple firms competing to do so, is a prominent example. In such cases, the regulator's main job is to ensure that the monopolist meets its service obligations without extracting monopoly profits from consumers. In other settings, regulators might want to keep multiple firms in the market but allow them to cooperate to overcome certain market failures. Thus, securities regulators might want to let underwriters cooperate in gathering broad information on the potential retail market for securities a firm plans to issue in the future, but at the same time use regulatory oversight to mitigate the scope and harmful effects of collusive pricing that might result from such cooperation in the concentrated securities underwriting market.161 As a final example, regulators might oversee the development of competition in historically monopoly markets. In such cases, the job of the agency may involve establishing conditions on which competitive entrants can gain access and interconnection to the incumbent monopolist's customers and facilities.162 Whatever the particular form economic regulation takes, its potential costs have numerous causes: information asymmetries, regulatory capture, incentive distortions, and a host of other ills have long been the subject of substantial commentary and concern from policymakers, firms, and re searchers.163 The kinds of regulation at issue in Trinko and Credit Suisse are variants of common forms of economic regulation. The regulation at issue in Trinko involved access rules and decisions about what pieces of incumbent networks competitors should be able to use, and at what price. At issue in Credit Suisse was the SEC's oversight of the process by which syndicates of securities underwriters collectively work out the retail price and quantity of securities that members of the syndicate would sell to investors.164 A more general discussion of pricing and access regulation can help shed light on the cost-benefit assumptions underlying Trinko and Credit Suisse and on potential policy consequences of those cases.

#### Concentration doesn’t benefit shareholders.

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]

B. Shareholders of the Resulting Firm Often Suffer Significant Losses

A final basis for rejecting any general claims that mergers are generally desirable is that many empirical examinations of the results for shareholders show that on average the buyer and its investors suffer losses, not gains. In 1992, a major study, covering more than thirty years of mergers among publicly traded companies, reported that the surviving firm on average lost about ten percent of its value over a period of five years.150 Another group of researchers reported that the acquired businesses tended to suffer reduced profitability and loss of market position. 151 In 2012 alone, publicly held companies wrote off $51 billion dollars because of bad mergers.152

Other research is consistent with these findings. A comparison of successful buyers to the losing bidder in a corporate buyout found that the buyers had worse results over time than the unsuccessful bidders.153 In 2010 McKinsey reported: “Anyone who has researched merger success rates knows that roughly 70% of mergers fail.” 154 An article in the Harvard Business Review observed that “study after study puts the failure rate of mergers and acquisitions somewhere between 70% and 90%.”155 The basic point being that buyers have a tendency to overpay and not to realize the gains that they claimed to expect. Even the co-author of a leading article claiming acquisitions resulted in significant premiums for the buyer subsequently recanted and conceded that there were “significant negative returns . . . following a merger.”156

Thus, measured by stock market results most large mergers are not in fact very helpful to the development of economic efficiency, innovation, or other consequences that are desirable from the perspective of the public interest. It follows that stronger anti-merger legislation does not create a significant risk of substantial loss of desirable economic outcomes.

Mergers’ “disappointing results are . . . consistent with the repeated observation that many motivations for merger are largely disconnected from achieving economic efficiency despite what the promoters may assert in securities filings and press briefings.”157 A “publicly held corporation faces very substantial agency problems.”158

The shareholders are largely powerless when ownership is widely dispersed. The board of directors, the agent of the shareholders, is usually under the control of management, which in turn can shape both buying and selling decisions to serve its strategic interests. Moreover, third parties, takeover funds, legal and financial advisers, can and do reap benefits from promoting such transactions even when the result for the enterprise is negative. Hence, many major mergers arise from motivations unrelated to increased efficiency.159

For all these reasons the purchase and sale of large corporations does not consistently advance desirable economic results. These results should encourage Congress to seriously consider new anti-merger legislation.

## Chevron DA

### 2AC – AT: Chevron DA

#### The Court will nuke Chevron in the upcoming term

Kilgore 10/5 – Ed Kilgore, political writer for New York Magazine, “Supreme Court Could Go Totally Extremist This Term,” 10/5/21, https://nymag.com/intelligencer/2021/10/supreme-court-could-go-totally-extremist-this-term.html

There is probably no cause dearer to the hearts of conservative legal theorists than overturning “Chevron deference,” a long-standing precedent whereby federal courts give a wide berth to agency interpretations of mandates set out in congressional laws. This goal also meshes with Republican political priorities, since its chief target is the kind of regulatory powers exercised by “specialized” federal agencies like the Environmental Protection Agency and the Department of Labor, which many businesses resent and resist. This deference is endangered by a potential decision in American Hospital Association v. Becerra, which involves Medicare reimbursement rates for certain prescription drugs.

As Millhiser says, if the Court overturns Chevron deference, it will represent an “earthquake” and a huge inducement to litigation challenging all sorts of critical federal regulatory powers.

If SCOTUS issues sweeping decisions in all three of these areas, the term will go down in history as representing the most audacious burst of judicial activism since the Warren Court. Should it come to pass, the composition and direction of the Court will finally become as vital an election issue for Democrats as it has already become for Republicans.

## AT: FTC Tradeoff

### 2AC – AT: FTC Tradeoff DA

#### Khan’s actions now and in the future smack their DAs.

Okuilar ’21 [Alexander; 7/12/21; Co-Chair @ Morrison & Foerster’s Global Antitrust Law Practice Group, Former Senior DOJ and FTC Official; “FTC Meeting Signals Aggressive and Novel Enforcement to Come”; https://www.mofo.com/resources/insights/210712-ftc-meeting-signals-aggressive.html; AS]

In just over two weeks as chair of the Federal Trade Commission (FTC or “Commission”), Lina Khan already appears to be making significant changes at the agency.[1] As one of her first acts, Chair Khan called for a Commission meeting on Thursday, July 1, 2021 to consider and vote on several important changes to agency rules and procedures, as well as to open several broad investigations. The actions taken at the FTC meeting anticipated the significant Executive Order signed by President Biden last Friday (on which we will shortly send a separate client alert). It was the first public meeting of the FTC in decades (although, it won’t be the last — the FTC just announced another public meeting for July 21) and the matters adopted during the meeting promise to shape the direction of the agency and competition law enforcement in the United States for years. The agenda — published on June 24, 2021[2] — outlined votes on four issues.

Change “Made in the USA” Rules. The Commission’s first order of business was to consider adopting a “Made in the USA” rule imposing civil penalties on marketers making unqualified claims that their products are “Made in the USA” unless 1) final assembly or processing of the product occurs in the United States, 2) all significant processing that goes into the product occurs in the United States, and 3) all or virtually all ingredients or components of the product are made and sourced in the United States.[3]

Remove ALJ as Presiding Officer of Mag-Moss Rulemakings. Next, the Commission debated whether to change Section 18 of the Magnuson-Moss Warranty Act (“Mag-Moss”) rulemaking procedures[4] by 1) making the FTC chair, rather than the chief administrative law judge, the presiding officer, 2) eliminating the requirement of a staff report, and 3) eliminating recommendations as to the final rule for public comment.[5]

Rescind the UMC Policy Statement. Third, the Commission was asked to look at its competition enforcement standards and rescind the 2015 “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (“UMC Policy Statement”).

Open Industrywide Investigations and Minimize Procedures for Compulsory Process. Finally, the Commission considered whether to open several broad investigations and minimize Commission oversight of compulsory process initiated by career lawyers. The resolutions cut across the economy, including “technology platforms, health care, and pharmaceuticals,” mergers (both proposed and consummated), “repeat offenders” of FTC orders, “business practices that target workers and operators of small business,” and “potential infractions of FTC-administered statutes as they relate to COVID-19.”

In a sometimes contentious meeting, the Commission approved each measure along party lines, with all three Democrats voting in favor and Republicans Christine Wilson and Noah Phillips voting against and offering topping motions that were defeated by the three Democrats. While each of the issues is important, the latter two regarding the rescission of the UMC Policy Statement and the expansion and consolidation of investigative power in the chair have raised a raft of questions among the antitrust community and portend a potentially major departure for the agency in its enforcement approach. We discuss the implications of these competition policy changes below.

Rescinding the 2015 UMC Policy Statement: A Possible Rejection of the Consumer Welfare Standard and Traditional Rule of Reason

The Commission rescinded a bipartisan 2015 UMC Policy Statement that laid out the framework for enforcing Section 5 of the Federal Trade Commission Act. Section 5 makes “unfair methods of competition” unlawful and is the basis by which the FTC brings competition actions.[6] Case law establishes that Section 5 sweeps in conduct condemned by the Sherman Act and Clayton Act, but there is longstanding ambiguity about how far Section 5’s prohibitions extend beyond the Sherman and Clayton Acts. The 2015 UMC Policy Statement contemplated case-by-case Section 5 enforcement “guided by the public policy underlying the antitrust laws, namely the promotion of the consumer welfare standard” using a framework “similar to the rule of reason” requiring evidence of “harm to competition or the competitive process,” including taking into account “cognizable efficiencies and business justifications.”[7] The 2015 UMC Policy Statement was intended to place reasonable bounds on the agency’s ambiguous Section 5 authority and to harmonize its approach to antitrust with that of other government enforcers, private parties, and courts.

Although the 2015 UMC Policy Statement explicitly noted that Section 5 reaches conduct outside the letter of the Sherman Act, [8] Chair Khan criticized it as artificially limiting the scope of the FTC’s authority by tying it to existing antitrust jurisprudence. According to Chair Khan, “coupling Section 5 to the Sherman Act has led courts to bind the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act.”[9] Further, she said, “in practice, the 2015 statement has doubled down on the agency’s longstanding failure to investigate and pursue unfair methods of competition.”[10]

Neither Chair Khan nor any other commissioner supporting rescission has advanced a framework to replace the old 2015 policy. But Chair Khan intimated that the FTC may engage in substantive rulemaking on the matter,[11] stating that “in the coming months, the Commission will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under this provision. In the meantime, the Commission will exercise responsibly its prosecutorial discretion in determining which cases are appropriate under Section 5, consistent with legal precedent.”[12]

Senator Klobuchar praised the move  saying, “We need aggressive action from our antitrust enforcers. Chair Khan has a bold vision for the FTC, and I am encouraged that the Commission is taking steps to use its full legal authority to protect competition.”[13]

Both Republican commissioners opposed rescinding the policy statement.[14] Commissioner Wilson noted that the 2015 UMC Policy Statement was bipartisan, and expressed discontent that it was repealed on a party line vote. She stated that the repeal is an “unfortunate first step” towards a “new concerted effort by the Commission to exceed the FTC’s authority regarding the use of Section 5 of the FTC Act.”[15] Commissioner Phillips also objected to the repeal, arguing that it was unclear what guidance would replace the policy statement and that the decision to rescind without a meaningful opportunity for public input was “inconsistent with the rhetoric” of transparency from Chair Khan.[16]

Rescinding the 2015 UMC Policy Statement has wide ranging and potentially dramatic implications for FTC enforcement under Chair Khan. As a threshold matter, it is consistent with an aggressive, populist neo-Brandeisian view of antitrust that is skeptical of the consumer welfare standard as the cornerstone of competition enforcement. It also shows hostility toward the antitrust laws as interpreted by the federal judiciary. Chair Khan criticized the 2015 UMC Policy Statement as binding the FTC to Sherman Act case law developed by “generalist judges.” Rescinding the policy statement also opens the door to FTC rulemakings for new substantive competition rules. (For a more in-depth discussion of a potential substantive competition rulemaking, see our previous Client Alert.) Finally, it could signal future Robinson-Patman Act enforcement by the FTC. The Robinson-Patman Act prohibits price discrimination, and has been widely criticized as protecting competitors and not competition.[17] While still on the books, neither the FTC nor the U.S. Department of Justice’s Antitrust Division have brought any Robinson-Patman Act enforcement actions in decades.[18] Some neo-Brandeisians have advocated a return to active Robinson-Patman Act enforcement by the federal government,[19] however, and rescinding the 2015 UMC Policy Statement would be consistent with such a return.

Investigations and Enforcement Resolutions

By another 3-2 party-line vote, the Commission approved a series of resolutions authorizing agency staff to investigate and use compulsory process (e.g., civil investigative demands or subpoenas) in seven areas deemed to be “enforcement priorities.” Although the specific resolutions are not publicly available, based on Chair Khan’s remarks and the FTC’s press release, the resolutions appear to cover wide segments of the American economy, including “technology platforms, health care, and pharmaceuticals” and a “general resolution authorizing the use of compulsory process when investigating mergers.” Other resolutions capture investigations involving “repeat offenders,” investigations of “business practices that target workers and operators of small business,” and investigations of “potential infractions of FTC-administered statutes as they relate to COVID-19.”[20] Chair Khan justified the new resolutions as eliminating “extra bureaucratic hurdles [that] slow down and hobble investigations unnecessarily.”[21]

The new procedures will empower staff to issue compulsory process within these broad investigations, including issuing demands for documents and testimony through civil investigative demands (CIDs) and subpoenas,[22] without receiving further authorization from the entire Commission. Under the previous rules, compulsory process in antitrust investigations could only be issued if a majority of the Commission voted to do so, typically on a matter-by-matter basis.[23] After such a vote, individual CIDs could be authorized by the signature of a single commissioner. But under these resolutions, one commissioner now has the power to authorize the use of compulsory process for investigations in the enforcement priority areas. In practice, since the chair directs FTC staff on a day-to-day basis, this will give the chair the unilateral ability to authorize compulsory process without any need to keep other commissioners informed. The “bureaucratic hurdles” that Chair Khan referred to are staff recommendations making the case for compulsory process in a particular matter and the occasional back-and-forth across the Commission pending a vote. These changes could result in less involvement by all commissioners in ongoing investigations, prior to an enforcement decision requiring a full Commission vote.

In opposing the resolutions, Commissioner Phillips argued that they exceed the agency’s congressionally given powers. Phillips observed that “Congress gave the Commission, not a single commissioner or staff, the authority to bless compulsory process in its investigations” because “[i]t envisioned an informed and deliberated decision by all commissioners before unleashing the FTC’s considerable investigative power.” These resolutions “undermine all that,” Phillips observed, “[f]or what are likely to be our most prominent and expensive investigations.” Additionally, Phillips noted that the authorizing language in the resolutions — “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices” — extends beyond the FTC’s authority to investigate “unfair methods of competition . . . and unfair or deceptive acts or practices.”[24] His proposed amendment to conform the authorizing language  to be consistent with the FTC’s statutory mandate was voted down.

Commissioner Wilson argued that the FTC commissioners should not abrogate their authority at such a “critical time for both consumer protection and antitrust enforcement” by removing “significant swaths of Commission oversight from our investigations.” As one practical example of why Commission oversight matters, she observed that, in the past, she had used her “vote on compulsory process to narrow the burden of third parties that are not targets of an investigation.” She flagged that the resolutions contain “many broad and vague terms” and queried whether “authorizing investigations into ‘exploitative,’ ‘collusive,’ ‘coercive,’ or ‘predatory’ acts or practices will lead to investigations outside the bounds of judicially recognized antitrust principles[.]”[25]

Looking Ahead: Further Implications for FTC Enforcement

The adoption of these resolutions signifies an attempt to expand the authority of the FTC and increase the volume and scope of its investigations, particularly for the technology and health care sectors. The Commission majority has signaled its interest in scrutinizing digital platforms, technology companies, pharmaceutical companies, pharmacy benefits managers, and hospitals, among others. Merging parties in key areas of interest (including those with consummated deals) should anticipate more frequent and extensive use of agency process, including inquiries with respect to new or historically less commonly explored theories of harm. Moreover, FTC staff will be more likely to issue compulsory process to third parties. Companies operating in or adjacent to markets in which there are pending mergers or FTC conduct investigations should also be prepared to receive compulsory process, potentially multiple times on distinct investigations that touch on common issues. For better or worse, it is clear from the July 1 meeting that Chair Khan and the Democratic majority on the Commission want the FTC to become a more central feature of corporate life in America. The last time the Commission attempted a similar move in the 1970s, it ended with curtailment of the agency’s powers by Congress and the courts. In her dissenting statement, Commissioner Wilson warned that “there are many at the FTC who lived through the 1970s and 1980s and experienced the public and Congressional backlash during those dark days of the agency’s history. There are many others who worked with and lived through that period. Current management would be wise to seek their guidance.”[26] Only time will tell.

#### 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 f

Marked

or 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.

# 1AR

## Interest Rates

### XT – Tapering Coming Now

#### Yes Tapering.

Kelsey Ramirez, Fox Business, 11-4-2021, "Fed to begin tapering its assets, economists say it will send interest rates higher," Fox Business, https://www.foxbusiness.com/personal-finance/federal-reserve-tapering-assets-interest-rates

However, the Federal Reserve also said that it would begin tapering its asset purchases this month, reducing the monthly pace of its net asset purchases by $10 billion for Treasury securities and $5 billion for agency mortgage-backed securities (MBS). Later this month, the committee will increase its holdings of Treasury securities by at least $70 billion per month and agency MBS by $35 billion per month.

The FOMC will increase its holdings of Treasury securities by at least $60 billion per month and agency MBS by at least $30 billion per month in December. The committee said it expects similar reductions will be needed each month, but is prepared to adjust based on changes to the economic outlook.

The reduction of these asset purchases is the first step to removing the Fed’s stimulus to the economy, which began at the onset of the COVID-19 pandemic. This change could start to push interest rates higher. If you want to take advantage of low rates now, refinancing your private student loans could potentially save you hundreds on your monthly payments. Visit Credible to find your personalized interest rate without affecting your credit score.

#### Market forecasts confirm.

Patti Domm, CNBC Markets Editor, 11-10-21, “The first Fed rate hike is now expected as early as July following the hot CPI data,” CNBC, https://www.cnbc.com/2021/11/10/the-first-fed-rate-hike-is-now-expected-as-early-as-july-following-the-hot-cpi-data.html

Traders in the futures markets moved up their expectations for the first Federal Reserve interest rate hike to July from September, following a hotter than expected inflation report.

“It’s a very sharp move we’re seeing the back end of 2022,” said Peter Boockvar, chief investment officer at Bleakley Advisory Group.

October’s consumer price index came in at a scorching 6.2% year-over-year, higher than the 5.9% expected.

Traders are now fully pricing in a first rate hike for September, but they are pricing in much higher odds that the Fed starts to raise rates sooner. The Fed has said it would complete tapering its bond buying program by the middle of the year, and then begin raising interest rates.

“The effective fed funds rate is currently at 8 basis points and the fed funds July contract is priced at 27 basis points,” said Boockvar. Each rate hike is assumed to be a quarter of a percentage point.

“That implies the odds are about 80% that they raise rates by July,” he said. The Fed is currently targeting its fed funds rate in a range of zero to 0.25%.

“Fed funds are pricing in more hikes sooner. I think it’s too much,” noted Michael Schumacher, Wells Fargo director rates. Schumacher added that the market is now pricing more aggressive hikes for 2023, with more than three expected in that year.

Fed funds futures also show they now expect a second full hike by December, with the contract trading at 0.57%, noted Ben Jeffery, fixed income strategist at BMO.

Strategists are watching the move in the Treasury curve which is showing a narrowing between long end yields, like the 30-year and the shorter end, like the 5-year

“The flattening of the curve reflects more hawkish fed assumptions, also reflected in the fed funds futures market,” said Jeffery. He said the spread between the 5-year and 30-year is narrower, at 68 basis points, or 0.68 percentage points. That is the flattest since the early weeks of the pandemic in March, 2020.

A flattening yield curve can indicate that investors are worried about a weakening economy.

#### Prices won’t decline until a year from now

Peterson 9/28 – Dana Peterson, executive vice president and chief economist at The Conference Board, “Inflation isn't over yet. Here's when we should finally see lower prices,” 9/28/21, https://www.cnn.com/2021/09/28/perspectives/inflation-consumer-price-index-spending/index.html

High costs for everything, from food and gasoline to automobiles and airline tickets, have made the pandemic that much more difficult for US consumers. So of course, many were relieved to see that consumer prices rose by less than expected in August. But this unfortunately isn't the beginning of the end of inflation for American households. In fact, consumers may not see lower prices until the latter half of 2022.

The total Consumer Price Index (CPI) rose by 5.3% year-over-year in August after hitting 5.4% on an annual basis two months earlier. The core index, which excludes volatile food and energy components, rose by 4% year-over-year in August after cresting at 4.5% in June. Importantly, the month-over-month rates of increase in each of these gauges (0.3% for the total index; 0.1% for the core measure) were notably slower than they were over the last several months.

These figures tease the hope that the worst of the inflationary pressures may be behind us. But it is likely a false aspiration. Yes, the intensity of price hikes slowed over the summer, but the Delta variant and its disruptions risk another bout of US consumer price spikes in the fall. Even if they do not occur, consumers are unlikely to see lower prices this year thanks to computer chip shortages, rising wage pressures as businesses reopen and the return of rent hikes.

Delta variant

### XT – TBTF

#### The size of financial institutions is empirically correlated with multiple measurements of risk taking. This moral hazard spills out to the whole financial sector.

Tom Filip Lesche 21, Professor of Management and Economics at Witten/Herdecke University, *Too Big to Fail in Banking: Impact of G-SIB Designation and Regulation of Relative Equity Valuations*, Springer, <https://link.springer.com/book/10.1007%2F978-3-658-34182-4>)

\*G-SIB = globally, systemically important bank, IGG = implicit government guarantee, EGG = explicit government guarantee

An IGG extends deposit insurance to uninsured bank liabilities without payment of any insurance premium by the insured G-SIB. This is why the fundamental consequences of deposit insurance (see Sect. 2.5) are also applicable here, only more strongly. The frst two subsections explain why (see Sect. 4.2.1) and how (see Sect. 4.2.2) banks receive IGGs and are able to shift the liability for their potential losses to the state. This expected government intervention on a selective basis in a free-market economy results per defnitionem in the distortion of market forces and incentives—more precisely, in moral hazards. The subsequent sections discuss how the behaviour of various bank stakeholders changes—namely, that of the creditors (see Sect. 4.2.3), the bank (management) (see Sect. 4.2.4), and the shareholders (see Sect. 4.2.5). Empirical evidence, where available, complements the fndings.

4.2.1 IGG Origin

An IGG has two possible origins:

1. An offcial government statement designates a bank TBTF for two possible reasons: a. to pre-emptively give certainty to bank stakeholders and other market participants, and to stabilise the overall banking system, or

b. to impose special regulatory requirements on the bank.

2. The market perceives a bank to be TBTF. This, in contrast, is based on the expectation of potential public bailout measures. The market participants that would potentially beneft from an EGG know what motivates policymakers to opt for a bailout (Sect. 4.1.1). Hence, even if a bank is not officially designated as TBTF, market participants will treat a bank as such if they are aware of the systemic importance and react to it by reasonably anticipating the EGG.40

4.2.2 IGG Strength

Even if a bank has been offcially designated TBTF, the scope of any potential bailout will rarely be defned ex ante. This said, the strength of the IGG—and so the moral-hazard effect—depends in general again on market expectations: i.e., on the expected probability and scope of EGGs (see Sect. 4.1.2). These expectations are usually derived from past public interventions and bailout experiences.41

The value of such an IGG for a bank and its counterparties is not only dependent on the strength of the expected bailout, but also on the condition of the fnancial system. The more uncertainty or volatility there is in a market (such as during a banking crisis), the higher the value of a potential protection. This free insurance works like a put option getting closer to the money.42

It is worthwhile to note several factors that mitigate the strength and value of IGGs:

1. TBTF regulation: TBTF regulations constitute additional regulation and supervision of G-SIBs. These may include legislation concerning the contractual liability writeoffs during a bailout—a so-called bail-in (see Sect. 6.3).43

2. ‘Too-big-to-save’: The public fnance capacity of some countries is insuffcient to credibly protect G-SIBs. In such situations, banks may be called ‘too-big-to save’, which implies that TBTF failures can cause national insolvency.44

3. ‘Too-many-to-fail’: This term names a general weakness of an entire banking sector that implies that a government is less likely to protect one bank because it cannot protect all similarly weak G-SIBs.45 This scenario is also known as a ‘too-many-to-fail’.46

Due to the above-named complexities, the extent of IGGs differs across countries and across banks within one country.47

4.2.3 Creditor Moral Hazard

The creditor moral hazard (see Sect. 2.5) extends simply from the depositors, who are already covered by the statutory deposit insurance, to all liability holders that are expected to be protected under a bailout of a G-SIB. Ultimately, creditor moral hazard leads to lower funding costs and larger counterparty positions for G-SIBs. This is the result of the lower return requirements of the creditors and is driven by the following:

• Lower default probability of bank liabilities: In event of bank bankruptcy, liabilities are generally repaid out of the insolvency estate. For the creditors, the IGG works like a double bottom and results in a downward shift in the probability of the default of the respective liabilities, including counterparty risk of derivative contracts.48 Bank creditors not only lend at a lower rate according to the fundamental risk/return tradeoff, but bank counterparties are also willing to accept larger positions and to price in lower counterparty risk. Two main approaches are analysed in the literature to support the foundation of the lower default probability:49

– An ‘objective argument’, mostly measured by market CDS spreads, and

– A ‘subjective argument’, measured by credit rating differences.

• Lower bank monitoring costs: The IGG partly replaces the necessity of monitoring the counterparty bank, which results in a decrease in associated costs.

Economic costs, or negative public economies, accrue when investors come to regard a bank as TBTF. These equal the total costs the bank and its creditors save due to its TBTF status: viz., the asserted argument of lower funding costs and lower bank-monitoring costs. What follows are the empirical results of different studies and methods analysing the above theoretical assertions with regard to the lowered default probability measured by credit ratings and CDS spreads. The lower monitoring costs and the larger counterparty positions are not as well analysed empirically. It also seems unclear to what degree the creditors versus the banks beneft from creditor moral hazard. Studies of the overallfunding cost advantage of G-SIBs dominate this research feld. All studies, regardless of the method applied, find very large and signifcant funding cost advantages of G-SIBs.

Stronger Credit Ratings

Rating agencies publish a variety of credit ratings about banks’ creditworthiness, the issuer itself, and certain (classes of) fnancial obligations. Credit ratings represent the probability of default on the rating agency’s own rating scale. Such credit ratings are a subjective assessment and do not always prove accurate. Nevertheless, to some degree, the rating also refects and influences the market view of a bank’s solvency because debt holders often base their investment and pricing decisions to a signifcant degree on such ratings. Hence, a better rating generally leads to cheaper funding conditions. Moreover, external ratings of bank debt are often a benchmark for central banks and wholesale operations and defne minimum collateral requirements. This also means that better ratings indirectly result in better funding conditions in this case as well.

The three major credit-rating agencies—Standard & Poor’s (S&P), Moody’s, and Fitch—calculate and publish two (or more) separate issuer ratings that are of particular interest for our purposes: (i) a stand-alone issuer rating,50 that refects a bank’s intrinsic capacity to repay its obligations, and (ii) an overall issuer rating,51 that refects a bank’s capacity to repay its obligations with potential external support.

In order to measure the TBTF effect, several studies simply compare both ratings.52 The difference refects the impact or value of possible external support, primarily by the government. All of the studies find that banks considered TBTF receive overall rating uplifts—i.e. credit rating upgrades—compared with other banks.53 This rating “bonus” varies: it is stronger after government interventions54 and ranges from one to four notches. Furthermore, it is found that, higher IGGs are driven by a lower stand-alone rating of a bank,55 a larger domestic market share of the bank, and greater solvency of the bank’s sovereign.56

Lower CDS Spreads

Credit default swaps (CDSs) are credit derivatives used to insure against default of debt instruments. That means that CDSs securitise and reflect the default risk, while debt instruments also comprise interest rate risks in their market prices. Because IGGs only affect default risk, CDS are an intuitive measure for teasing out the insurance costs of an IGG. CDS investors might also rely on credit ratings; however, CDS markets are dominated by institutional investors that are potentially able to independently and accurately assess a bank’s probability of default.57 Moreover, market discipline in the CDS market is usually strong.

Many studies have illustrated that TBTF status affects CDS prices.58 One study using regression analyses fnds that ‘a one percentage point increase in size reduces the CDS spread of a bank by about two basis points’. However, scholars agree that IGGs have a threshold, above which some banks are considered ‘too-big-to-be rescued’59. Event studies identify widening CDS spreads prior to government interventions at other banks that are followed by narrowing CDS spreads around and after events.60

Lower Funding Costs

Funding costs refect investors’ assessment of risk levels. Risk is measured in terms of spreads above the risk-free rate, which is normally defned as the rate on bonds fully guaranteed by the government, such as government bonds. This is why spreads are generally aligned with credit ratings and CDS spreads. However, systemic market factors and issue-specifc factors (such as liquidity) also affect bond prices and yields.61

When investors perceive a bank as TBTF, the risk is primarily in the probability that the government will unexpectedly not rescue the bank weighted by the likelihood of a threatening default. The funding-cost advantage is calculated by translating the rating62 or CDS63 uplift associated to TBTF into the yields paid on banks’ liabilities. Alternatively, some authors apply econometric models64 and control for factors other than TBTF. Other event studies that observe sudden credit-spread changes such after merger-related events65 or government interventions66. Regardless of the research methodology, the observed yield difference—also called the spread—is an estimate of the monetary measure of IGGs. It is denoted in relative terms as a credit spread or in absolute terms as a monetary amount67 and it represents the reduction of funding costs. This funding-cost advantage comprises both the structural strength of the IGG and the time-varying market valuation of the IGG.68 A wide range of studies illustrate robust and very large funding benefts for banks considered TBTF of up to 600 basis points or several-hundred billion US$ per year per bank.69 The relative and absolute funding advantages change materially over time and across banks and jurisdictions.70 Only explicit guarantees to (partially) government-owned banks are stronger than IGG.71 In other words, empirical studies, as a whole, suggest that even the uninsured liabilities of G-SIBs exhibit little sensitivity to banks’ risk-taking.72 It is noteworthy that G-SIBs are also more fexible in their funding strategies and more readily change their funding mix compared to non-G-SIBs.73 This is why the full funding advantage extends beyond a simple comparison of the yields of the same debt instruments.

4.2.4 Bank Moral Hazard

The increased creditor moral hazard caused by the extension of guarantees of the retail depositors (see Sect. 4.2.3) to quasi all creditors of G-SIBs—even if only implicit—also exacerbates bank moral hazards.74 Banks exploit IGGs in terms of (i) increased risk-taking and (ii) increased growth.75

Increased Risk-Taking

There are two reasons increased risk-taking is caused by creditor moral hazard stemming from the TBTF doctrine:

• Less monitoring: The typically well-informed and fast-moving institutional market participants are the driving forces behind a bank’s market discipline. Without suffcient monitoring, engagement and signalling from creditors, bank management increasingly works to benefit shareholders and increase profitability by increasing risk, according to the risk-return principle.

• Lower funding costs: G-SIBs pay lower funding costs for a given level of risk and capital. This makes investment projects profitable at a lower return level: i.e., the relationship of risk and return worsens.

Concerning the increase in risk-taking, ample empirical studies exhibit several different forms of risk-taking:

• Higher leverage: Holding less equity in relation to total assets or liabilities incurs greater risk.76

• Higher asset risk: Engaging in high-risk investments with higher default rates77 and tail risk results in higher asset risk.78

• Higher liquidity risk: G-SIBs take on liquidity risk by pursuing a higher risk funding strategy and holding less stable funding.79

• Higher operational risk: Poor management of all other operational risk categories results in operational risk.80

Higher riskiness of a bank’s overall activities leads to a higher variance in returns.81 This, in turn, results in higher potential losses82 and higher stress to the economy. This suggests that G-SIBs ‘may have a distinct, possibly more fragile, business model’.83 In addition, non-G-SIB competitor banks are also indirectly encouraged to keep the pace with regard to proftability and increased risk.84

Market Discipline and Charter Value

A bank is endogenously incentivised by its creditors and shareholders to exercise market discipline—i.e., to implement prudent risk management. Creditors want to ensure the repayment of their borrowings at par. Shareholders want to ensure that the bank maximises the profts after (re)paying the creditors, but without breaching regulatory requirements—i.e., without losing the banking license.85 This charter value is the shareholders’ value generated by the ownership of the banking license, which is foregone after a bank bankruptcy. Hence, the charter value has an importance for G-SIBs depending on the expected EGG. When creditor monitoring is weak, charter value is the intrinsic motivation to exercise market discipline that most reduces the moral hazard of risk-taking by G-SIBs. There is a trade-off between preserving a bank’s charter value, which decreases as bank risk increases, and maximising the put option value from the IGG, which increases as bank risk increases.86 This implies that the optimal risk management strategy is to increase risk either when the bank’s charter value declines87 or when the risk of losing it declines, and vice versa88. That means the cross-sectional distribution of bank risk-taking is non-uniform. Empirical studies confrm that higher capital levels are associated with higher charter value and lower risk, and vice-versa.89 However, it seems that charter value and risk only exhibit a strong, inverse relationship during economic expansion; the opposite holds during economic contradictions.90 Furthermore, due to higher regulatory capital requirements, the disciplining effect of charter value diminishes.91 Findings92 suggest that charter value has been declining over time, contributing to the increase in risk-taking in the years before the GFC.93

Increase of Size

There are basically two reasons why banks increase in size because of the TBTF doctrine:

• Increasing systemic importance: Several studies show that banks sometimes grow larger than the size providing the greatest scale and scope economies (social optimum), especially to achieve or extend TBTF status and thereby exploit IGGs. Deposit insurance only incentivises extending the magnitude of insured deposits to beneft from cheaper deposits, as deposit insurance is generally underpriced. The relatively stable retail deposits are, per se, benefcial to the stability of the fnancial system. The TBTF doctrine, however, not only incentivises increasing the ratio of liabilities to insured deposits but also incentivises increasing the entire balance sheet to thereby increase IGGs. There are also other categories of achieving systemic importance (Sect. 3.3), but size remains the most prominent. Also, regarding motivations for M&A activities (i.e., to grow inorganically), TBTF is among the most relevant.94

• Increase of risk-taking: Firm size and risk-taking among banks are highly positively correlated.95 Banks manage risk increase mostly through increased leverage, which means balance-sheet expansion. Moreover, more risky and more profitable banks are also able to grow faster.

#### Antitrust key to stop TBTF.

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

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

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

## Chevron

### XT 2AC 4: NUQ

#### They granted cert to a Medicare case for the express purpose of nuking Chevron

King 10/1 – Pamela King, writer for E&E News, “Supreme Court could curb agency powers,” 10/1/21, https://www.eenews.net/articles/supreme-court-could-curb-agency-powers/

The Supreme Court could weigh in this term on the scope of authority bestowed to federal agencies.

With high-profile gun and abortion disputes on the horizon, the Supreme Court’s term begins Monday with a groundwater dispute between Mississippi and Tennessee.

But the real blockbuster environmental battles could come through a series of pending petitions for the Supreme Court to get involved in legal fights over the scope of EPA regulations under the nation’s bedrock clean air and water laws.

“The fight about the environment at the Supreme Court significantly overlaps with the fight about executive power and agency power,” said Sean Marotta, a partner at the law firm Hogan Lovells. “What we see in the court’s environmental rulings is not so much strong feelings about the environment but fears of agency overreach.”

Four justices must vote in favor of taking up a Supreme Court petition. The court grants only about 1 percent of cases that come its way.

Among the petitions the Supreme Court could choose to accept this term are a set of requests from Republican-led states and coal companies to overturn a ruling this year that struck down the Trump administration’s Affordable Clean Energy (ACE) rule (Energywire, Aug. 10).

The ACE rule gutted the Obama-era Clean Power Plan, which sought to curb carbon dioxide emissions from coal-fired power plants. The Biden administration has said it plans to craft a completely new regulation.

While legal experts say they expect the ACE dispute to land in the Supreme Court’s rejection pile, there is one argument that gives them pause.

In the petition North American Coal Corp. v. EPA, a coal producer has asked the court to decide whether the Clean Air Act gives the agency authority to impose climate regulations.

“Even though it’s a spurious argument, it’s a killer,” said Pat Parenteau, a professor at Vermont Law School. He added: “Maybe that will tempt some of the hard right.”

The justices will also have a shot at addressing agency powers in one non-environmental case on the calendar: a Medicare drug reimbursement dispute that could test the limits of Chevron deference, the 1984 Supreme Court precedent that provides federal agencies leeway to interpret ambiguous statutes.

“There seems to have been no reason for the court to have granted that other than the court wants to tighten the reins on Chevron,” said Sarah Harris, a partner at the firm Williams & Connolly LLP.

#### Chevron has already been weakened – the 6-3 conservative court is the final nail in the coffin

Yaffe-Bellany 20 – David Yaffe-Bellany, reporter for Bloomberg News, “Biden’s Agenda Faces a Court System More Hostile to Agency Power,” 12/15/20, https://news.bloomberglaw.com/us-law-week/courts-skeptical-of-chevron-may-stymie-bidens-agenda

Barrett declined to offer an opinion on Chevron, which has become a valuable tool for agencies looking to institute aggressive environmental rules. Her exchange with Crapo was little more than a footnote in a hearing that focused largely on the abortion precedent in Roe v. Wade. But ultimately, the Supreme Court’s posture toward Chevron could become a defining theme of President-elect Joe Biden’s first term, with the new administration poised to face a grinding series of legal battles over the scope of its regulatory authority.

Democrats have long hoped that unseating President Trump would usher in a period of political transformation. But if Republicans maintain control of the Senate after Georgia’s Jan. 5 runoffs, Biden won’t be able to push broad legislation through Congress. He may have to use federal agencies’ rulemaking powers to advance much of his agenda, relying on the Environmental Protection Agency to craft policies limiting emissions and the Consumer Financial Protection Bureau to regulate Wall Street.

He’ll inevitably face opposition in the judicial system, which has grown increasingly hostile to government regulation. President Trump and Senate Majority Leader Mitch McConnell have stacked the federal appeals courts with conservative judges, many of them handpicked by groups intent on dismantling regulations. And with Barrett confirmed, the 6-3 conservative majority on the Supreme Court is likely to chip away at Chevron and other legal doctrines that give deference to agencies.

“It’s a big threat,” says Patrick Parenteau of Vermont Law School, an expert on environmental regulations. Courts are “going to demand a whole lot more justification for what the agencies are doing.”

Already, libertarian groups such as the Pacific Legal Foundation are gearing up for fights with the Biden administration over financial regulations, environmental rules, and new policies to combat the pandemic. They’ll be joined by a familiar cast of characters: Republican state attorneys general, who fought Obama’s regulatory agenda in the courts. Challenges to Chevron are likely to be front and center.

“More regulatory activity means more opportunities for courts to defer to agencies,” says Steve Simpson, a senior attorney at the Pacific Legal Foundation. “And more opportunities for people like us to challenge that deference. That will happen across the board.”

The roots of Chevron deference lie in a battle environmentalists lost—a 1984 Supreme Court case in which the Natural Resources Defense Council sued to prevent the Reagan-era EPA from letting the energy company Chevron USA Inc. dodge anti-pollution requirements. The court ruled that the EPA had legal authority to interpret the text of the Clean Air Act in a way that effectively defanged environmental protections.

The historical ironies of that decision abound. The EPA administrator at the time was Anne Gorsuch, the mother of Justice Neil Gorsuch, who’s now the Supreme Court’s most vocal critic of Chevron. And in the 1980s, the late Justice Antonin Scalia, a conservative icon, championed the decision, declaring that it “accurately reflects the reality of government.”

“It eventually evolved into a huge decision that really required courts to defer if agencies’ interpretations were reasonable,” says Lisa Heinzerling, a former EPA lawyer who teaches administrative law at Georgetown University. “The way Chevron became the Chevron we know today is actually with the help of Justice Scalia.”

Toward the end of his career, however, Scalia turned against Chevron, as conservatives increasingly argued that government agencies were using the doctrine to strip Congress of its legislative authority. But by then, Chevron had become one of the most cited decisions in law. In 2014, the Supreme Court rejected a utility industry challenge to the EPA’s interpretation of the Clean Air Act, citing the agency’s regulatory authority under Chevron. Scalia dissented.

In recent years, the Supreme Court has shown a willingness to reconsider Chevron, or at least to limit its reach. Writing for the majority in a 2015 decision, Chief Justice John Roberts ruled that Chevron does not apply to regulatory questions with “deep economic and political significance.”

“The current Supreme Court majority is killing Chevron through disuse,” says Joshua Matz, a Supreme Court litigator at the law firm Kaplan Hecker & Fink. “Judges are neutering Chevron by taking an extremely narrow view of the circumstances in which a statute leaves any ambiguities. You can kill the doctrine by narrowing it to the vanishing point.”

Under the Biden administration, that process would almost certainly accelerate, as libertarian groups and Republican attorneys general sue to block regulations. Lower courts are bound by Supreme Court precedent, but judges at various levels could still rule that the text of a law is insufficiently ambiguous for Chevron to apply. And in theory, the Supreme Court could overturn the decision entirely, creating a whole new framework for administrative law.

Trump’s appointees to the Supreme Court have expressed skepticism of Chevron. As an appeals judge, Gorsuch denounced it as “a judge-made doctrine for the abdication of the judicial duty.” Barrett’s record on regulatory law is less substantial, but court watchers say her strict adherence to textual analysis might make her unwilling to punt an interpretive question to agencies. And Justice Brett Kavanaugh has criticized Chevron over the years, complaining about the “culture of ambiguity” in American law.

#### It’ll be rolled back.

Berman ’20 [Amanda; 2018; a counsel in the Environment & Natural Resources and Litigation groups; Crowell, “Administrative Law – The Supreme Court and the President Rein in the ‘Administrative State,” [https://www.crowell.com/NewsEvents/Publications/Articles/Administrative-Law-The-Supreme-Court-and-the-President-Rein-in-the-Administrative-State](https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference)]

A conservative Supreme Court and administration have both been working to roll back the administrative state, shifting its center of power to the courts. The shift has been incremental, as demonstrated by two recent Supreme Court rulings and executive orders. Yet the impacts on virtually every agency—and therefore every business subject to regulation—are already substantial. And the pace of change could rapidly increase in 2020 and beyond.

“These trends will make it easier for industry to challenge agency actions they don’t like,” says Amanda Shafer Berman, counsel in the Environment & Natural Resources and Litigation groups at Crowell & Moring and a former senior attorney in the Department of Justice’s Environmental Defense Section. “But it might make it harder for them to get what they want.” In other words, even as challenging agencies becomes easier, agencies could become slower and more cautious in ways that regulated businesses may find frustrating. Furthermore, the rollback in administrative power could ultimately result in greater regulatory uncertainty.

#### Chevron is dying.

McGinnis ’20 [John; 2020; George C. Dix Professor in Constitutional Law at Northwestern University; Law Liberty, “The Chevron Doctrine’s Shrinking Domain,” <https://lawliberty.org/the-chevron-doctrines-shrinking-domain/>]

[TITLE]: The Chevron Doctrine’s Shrinking Domain

Today, Chevron is under fire. It has not been overruled nor do I think it is likely to be. But its domain is shrinking and will continue to get smaller. If President Trump gets another term, it may well resemble the Cheshire cat—a still-powerful symbol for a body of law without much doctrinal substance. Just as Chevron was an iconic decision marking the continuing rise of the power of the administrative state, its relative decline in importance captures the three reasons that the administrative state is being cut back. Thus, this essay will use Chevron to introduce these three factors—the return of originalism, the rise of textualism, and the greater distrust of unsupervised expertise—that are transforming administrative law and, with it, the administrative state.