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## Antitrust and Deregulation

**ABSTRACT.** Because regulation works alongside antitrust law to govern market structure and economic conduct in the United States, deregulatory cycles can create gaps in competition enforcement. Antitrust is sometimes portrayed as just another form of government intervention that a deregulatory administration should also diminish. This Feature argues that policy makers should resist that political logic. Instead, antitrust should become stronger as regulation becomes weaker. Antitrust as a countercyclical force to deregulation will most directly help to protect consumers from enforcement gaps that result as competition-related rules recede. But antitrust enforcement in deregulating markets can also help to demonstrate where antitrust can govern markets more effectively and efficiently than regulation; it can provide the federal courts with an opportunity to clarify recent Supreme Court decisions on the boundary between antitrust and regulation; and it can better inform ongoing policy debates about the effectiveness of antitrust by providing a more accurate view of what antitrust enforcement can accomplish with its existing legal and analytic framework. Not only is each of these benefits of countercyclical antitrust enforcement important in its own right, but together they can lead to better policy choices between antitrust and regulatory solutions as political cycles change over time.

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## INTRODUCTION

For over a century, antitrust law has provided the principal framework for competition enforcement in the United States, with the Department of Justice (DOJ), the Federal Trade Commission (FTC), and private plaintiffs pursuing cases under the Sherman Act and Clayton Act. For at least as long, however, federal regulatory agencies have also implemented competition policy pursuant to statutes governing industries like telecommunications, electric power, transportation, securities, health care, and agriculture. Sometimes industry specific regulations limit competition,<sup>1</sup> and at other times they protect and promote competition.<sup>2</sup> Even when regulations appear to block competitive entry, they usually do so to manage a separate market failure and mitigate its harmful consequences. The Federal Communications Commission (FCC), for example, blocked competitive entry into the long-distance telephone business so that high-priced long-distance service could subsidize local telephone rates, which state regulators held to a low level to prevent “natural” local service monopolies from exploiting ratepayers.<sup>3</sup> The FCC feared that a competitor entering the long-distance market would target the most profitable customers and siphon off the revenues the Bell System<sup>4</sup> used to cross-subsidize regulated local rates. Whether rules appear to foster or limit competition, regulation has played an important role alongside antitrust law in U.S. competition policy.

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1. See, e.g., Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246, *abrogated by* *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015) (setting prices for certain agricultural products); Use of the Carterphone Device in Message Toll Tel. Serv., 13 F.C.C.2d 430, 441 (1967) (preventing competitive entry of peripheral telecommunications services).
  2. See, e.g., Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015); Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 FCC Rcd. 19392 (1996); High Density Traffic Airports; Slot Allocation and Transfer Methods, 51 Fed. Reg. 21,708 (June 13, 1986) (codified at 14 C.F.R. pt. 93).
  3. The Eighth Circuit has defined a natural monopoly as “a market that can practically accommodate only one competitor.” *Nat’l Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1023-24 (8th Cir. 1985); see also *Allocation of Frequencies in the Bands Above 890 Mc.*, 27 F.C.C. 359, 395 (1959) (noting the natural tendency towards monopoly in the telephone market); STUART MINOR BENJAMIN & JAMES B. SPETA, *TELECOMMUNICATIONS LAW AND POLICY* 950 (4th ed. 2015) (defining “natural monopoly” as “any market where the costs of production are such that it is less expensive for demand to be met by one firm than it would be for that same demand to be met by more than one firm”).
  4. The Bell System was the system of companies, led by the Bell Telephone Company and later by AT&T, which provided telephone services to much of the United States, at various times as a monopoly, from 1877 to 1984, when it was divided into several smaller companies subsequent to a Justice Department investigation. See *United States v. AT&T.*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

This Feature examines the relationship between antitrust enforcement and the changing level of regulation in the economy. Because both antitrust and regulation are forms of government intervention, it might seem logical to assume that they should rise and fall together with different administrations' views about the proper role of government. Contrary to that political logic, this Feature argues that antitrust enforcement should instead run countercyclical to regulation, especially during strongly deregulatory cycles. The comparative importance of countering deregulatory shifts arises because while increased regulation can trigger doctrinal barriers that keep antitrust enforcement out of regulated markets, reduced regulation triggers no such mechanism for pushing antitrust back into deregulated markets.<sup>5</sup> Enforcement gaps can therefore emerge when agencies withdraw rules that govern competition, especially where antitrust has been inactive due to that regulation. It is thus particularly important that antitrust authorities pay attention to changes in industry regulation, so they can step into any gaps caused by receding competition-related rules.

Because regulation can limit the scope of antitrust enforcement, an administration's approach to regulation has important implications for its overall competition policy. An administration inclined toward greater intervention might expand use of its regulatory authority, possibly issuing competition-focused rules that displace antitrust law in markets where the rules apply. Whether such new rules would improve consumer welfare depends on the comparative effectiveness of antitrust enforcement and regulation in the affected markets and on what other benefits or costs the rules might bring. By contrast, an administration that pursues a deregulatory agenda might repeal competition-focused regulations or refrain from enforcing them, leaving anticompetitive activity in the affected markets unaddressed unless antitrust enforcement steps in.<sup>6</sup>

Empirical evidence shows that antitrust enforcement and regulation have not always changed in the same direction.<sup>7</sup> 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.

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5. See *infra* Section I.C.

6. See *infra* text accompanying footnotes 61-67.

7. See *infra* text accompanying footnotes 40-42 and 94-104.

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.<sup>8</sup> 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

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8. Richard Nelson, *The Complex Organization of Capitalist Economies*, 6 CAPITALISM & SOC'Y 1 (2011).

a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which “antitrust may help maintain competition.”<sup>9</sup>

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.”<sup>10</sup> Thus, competition authorities like the FTC and the DOJ’s Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion.<sup>11</sup> Private plaintiffs can pursue civil antitrust liability through suits in the federal courts.<sup>12</sup> 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,”<sup>13</sup> or to constitute a “contract, combination, . . . or conspiracy” in restraint of trade,<sup>14</sup> or to “monopolize, or attempt to monopolize” any line of business.<sup>15</sup>

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.”<sup>16</sup> 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.<sup>17</sup> The 1992 Cable Act gave the FCC authority

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9. Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1007 (1987).
  10. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).
  11. Antitrust Div., *About the Division*, U.S. DEP’T JUST., <http://www.justice.gov/atr/about-division> [<http://perma.cc/VT22-QRQ6>] (describing the DOJ’s similar antitrust enforcement mission); *Enforcement*, FED. TRADE COMMISSION, <http://www.ftc.gov/enforcement> [<http://perma.cc/8ZMK-2V8V>] (describing the FTC’s mission as including the prohibition of anticompetitive mergers and business practices).
  12. 15 U.S.C. § 15(a) (2012). Most states also have antitrust laws closely paralleling the federal antitrust laws. These laws are typically enforced through the offices of state attorneys general. See Richard A. Posner, Address, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL’Y 5, 5 (2004).
  13. Clayton Act of 1914, 15 U.S.C. § 18 (2012).
  14. Sherman Act of 1890, 15 U.S.C. § 1 (2012).
  15. *Id.* § 2.
  16. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1361 (1998).
  17. 49 U.S.C. § 41105 (2012) (giving the DOT discretion to review airline mergers).

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.<sup>18</sup> 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,<sup>19</sup> and then repealed,<sup>20</sup> "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.<sup>21</sup> State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries.<sup>22</sup>

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.<sup>23</sup> 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

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18. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 11(c), 106 Stat. 1460.
  19. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).
  20. Restoring Internet Freedom, WC Docket No. 17-108 (2018).
  21. See, e.g., 7 U.S.C. § 6n (2012) (empowering the Commodity Futures Trading Commission to review commodities exchange acquisitions); 12 U.S.C. §§ 1828(c), 1842 (2012) (empowering the Federal Deposit Insurance Commission to review bank acquisitions); 15 U.S.C. § 78f (2012) (empowering the SEC to review exchange acquisitions); 16 U.S.C. § 798 (2012) (empowering the Department of Energy to review utility acquisitions); 21 U.S.C. ch. 9 (2012) (empowering the FDA to regulate the sale of food, drugs, and cosmetics); 49 U.S.C. § 11324 (b)(5), (c) (2012) (empowering the Surface Transportation Board to review railroad acquisitions).
  22. See generally Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (reaffirming the role of the states in regulating insurance markets); National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (1975) (encouraging states to develop certificate-of-need rules aimed at allowing coordinated planning of new services and construction, but also preventing new facilities from opening without state approval).
  23. 47 U.S.C. § 251 (2012); see also Section 271 of the Telecommunications Act of 1996: *Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., & Transp.*, 105th Cong. 8-15 (1998) (statement of William E. Kennard, Chairman, FCC) (describing the FCC's efforts to increase competition in the long-distance telephone market).

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.<sup>24</sup> 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.<sup>25</sup> 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."<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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

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24. That antitrust and regulation are alternative tools for implementing competition policy has long been recognized by courts and scholars. *See, e.g.*, discussion *infra* Sections I.C, II.B (describing recent case law and the comparative merits of antitrust and regulation).

25. *See, e.g.*, Press Release, FCC, FCC Sets Limits on Media Concentration (June 2, 2003), [http://apps.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.pdf](http://apps.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf) [<http://perma.cc/LLA5-P2PK>].

26. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

27. Press Release, FCC, FCC Begins Reviewing Cable Ownership Limits (Sept. 13, 2001), [http://transition.fcc.gov/Bureaus/Cable/News\\_Releases/2001/nrcbo113.html](http://transition.fcc.gov/Bureaus/Cable/News_Releases/2001/nrcbo113.html) [<http://perma.cc/4KNV-EQAL>].

28. Press Release, U.S. Dep't of Transp., DOT Proposes To Grant Delta/US Airways Slot Waiver with Conditions (July 21, 2011), <http://www.transportation.gov/briefing-room/dot-proposes-grant-deltaus-airways-slot-waiver-conditions> [<http://perma.cc/5DDY-QR32>].

29. *See infra* text accompanying footnotes 61-67.

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.<sup>30</sup> Congress itself used the Congressional Review Act<sup>31</sup> – 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.<sup>32</sup> Meanwhile, and most significantly, President Trump signed executive orders mandating broad rollback of regulatory programs,<sup>33</sup> also issuing a sweeping mandate that Executive Branch agencies identify two rules to repeal for every new rule they issue.<sup>34</sup> 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,<sup>35</sup> while another executive order requires that agencies establish “Regulatory Reform Task Forces” whose mission is to identify rules to repeal or reform.<sup>36</sup>

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

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30. See *First 100 Days: Rules, Regulations, and Executive Orders To Examine, Revoke, and Issue*, OFF. CONGRESSMAN MARK MEADOWS (2016), [http://morningconsult.com/wp-content/uploads/2016/12/Meadows\\_Rules\\_and\\_Regulations.pdf](http://morningconsult.com/wp-content/uploads/2016/12/Meadows_Rules_and_Regulations.pdf) [<http://perma.cc/993G-2LFL>].

31. 5 U.S.C. §§ 801–808 (2012).

32. Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. TIMES (May 18, 2017), <http://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html> [<http://perma.cc/2YJK-5WFC>].

33. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017).

34. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

35. *Id.*

36. Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017) (enforcing the regulatory reform agenda).

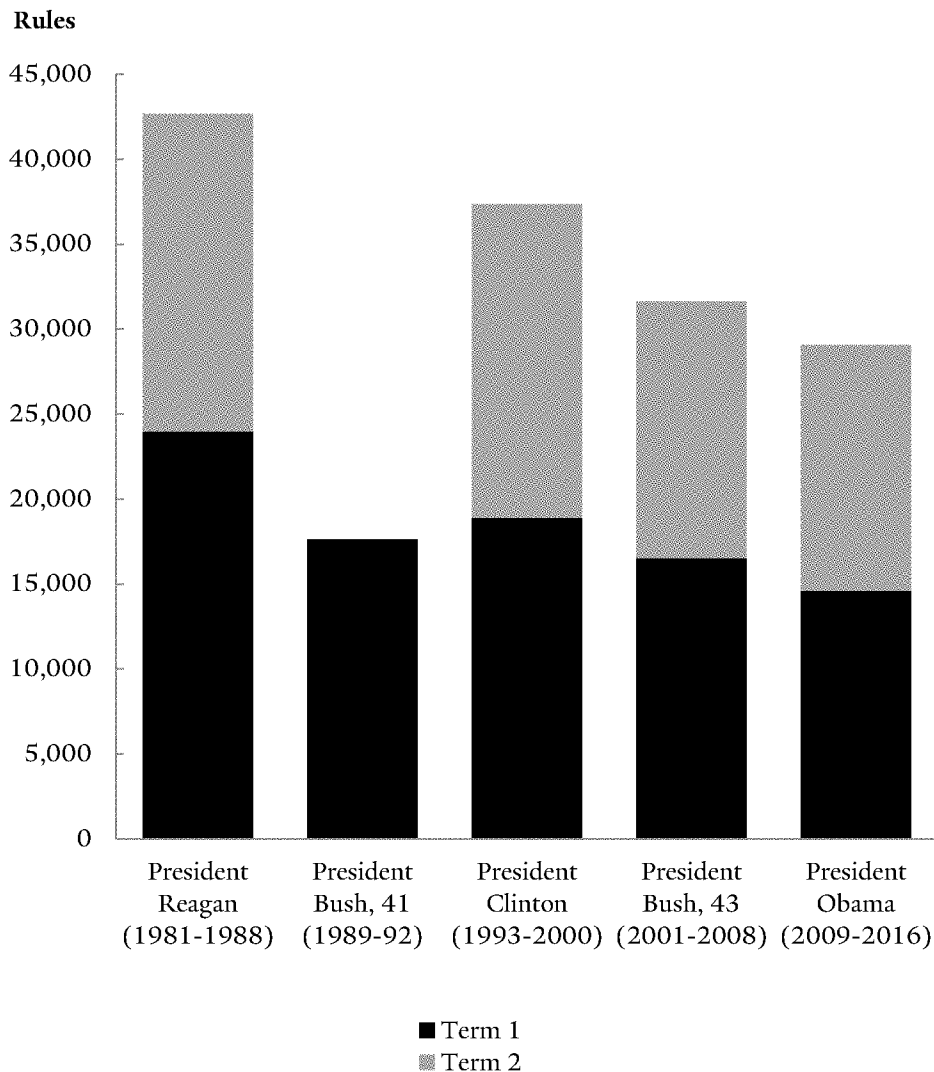


during the first year of the Trump administration.<sup>37</sup> To give a broader picture of the current changes in regulatory activity, Trump's chief regulatory official reported at the end of 2017 that the administration had repealed 67 regulations, withdrawn 635 pending rules, put 244 proposed rules on "inactive" status, and delayed an additional 700 rules.<sup>38</sup>

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,<sup>39</sup> 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).

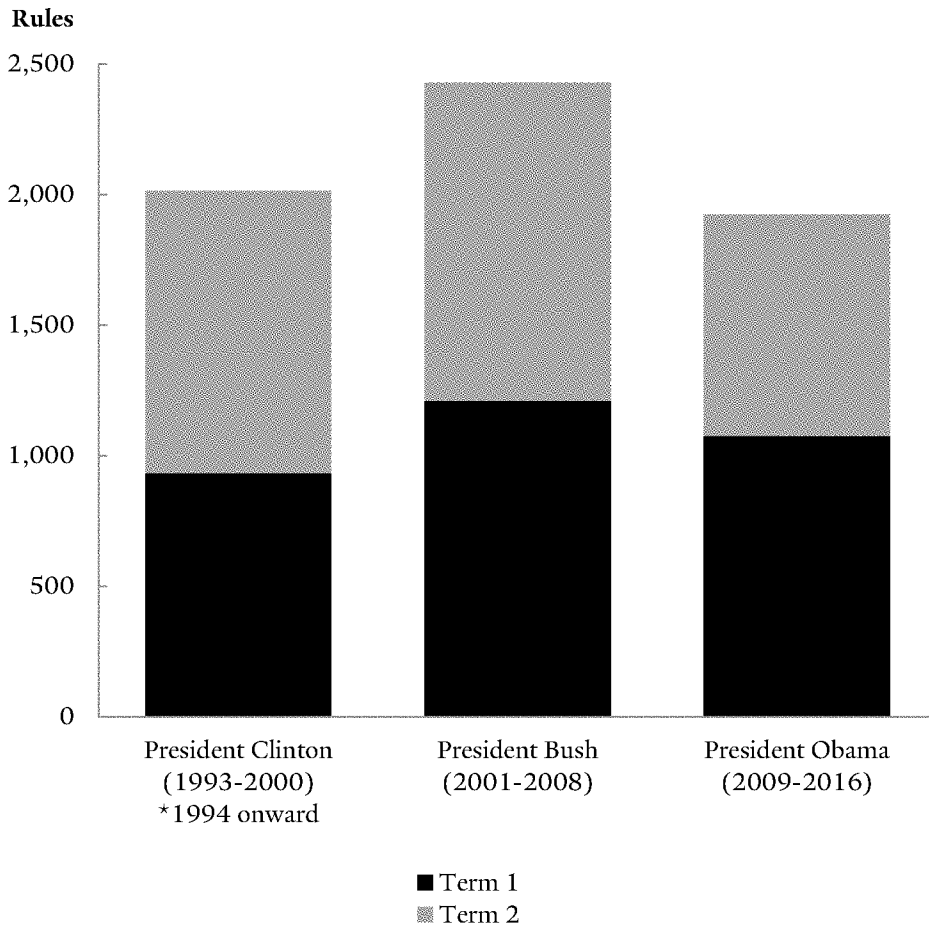
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37. Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *Review Counts*, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> [<http://perma.cc/9M8X-VCH7>] (showing a total of 22 economically significant rules from President Trump's inauguration to Nov. 18, 2017, compared to 75 in the same period during the Obama administration and 54 in the Bush administration, excluding rules from HHS which are disproportionate); *see also* Regulatory Studies Ctr., *Regulation 101: Reg Stats*, GEO. WASH. U., <http://regulatorystudies.columbian.gwu.edu/reg-stats> [<http://perma.cc/9XFU-ZG4S>] (showing the breakdown of economically significant rules by agency during the Clinton, Bush, and Obama administrations).
38. Eric Lipton & Danielle Ivory, *Trump Says His Regulatory Rollback Already Is the "Most Far-Reaching,"* N.Y. TIMES (Dec. 14, 2017), <http://www.nytimes.com/2017/12/14/us/politics/trump-federal-regulations.html> [<http://perma.cc/VMJ6-NQVY>].
39. *See, e.g.*, Press Release, Speaker Ryan Press Office, *A Better Way To Grow Our Economy* (June 14, 2016), <http://www.speaker.gov/press-release/better-way-grow-our-economy> [<http://perma.cc/4ZC6-85YP>] (promising to "cut down on needless regulations and make the rules we do need more efficient and effective"); *Donald Trump Town Hall Meeting in Sandown, New Hampshire* (C-SPAN television broadcast Oct. 6, 2016), <http://www.c-span.org/video/?416581-1/donald-trump-holds-town-hall-meeting-sandown-new-hampshire> [<http://perma.cc/4N3Y-7CJD>] ("We're cutting the regulations at a tremendous clip and I would say 70 percent of the regulations can go."); Sean Hackbarth, *How Regulations at Every Level Hold Back Small Business*, U.S. CHAMBER COM. (Mar. 28, 2017, 11:30 AM), <http://www.uschamber.com/above-the-fold/how-regulations-every-level-hold-back-small-business> [<http://perma.cc/9HPE-5HJT>].

**FIGURE 1.**  
**FINAL RULES PUBLISHED IN THE FEDERAL REGISTER<sup>40</sup>**



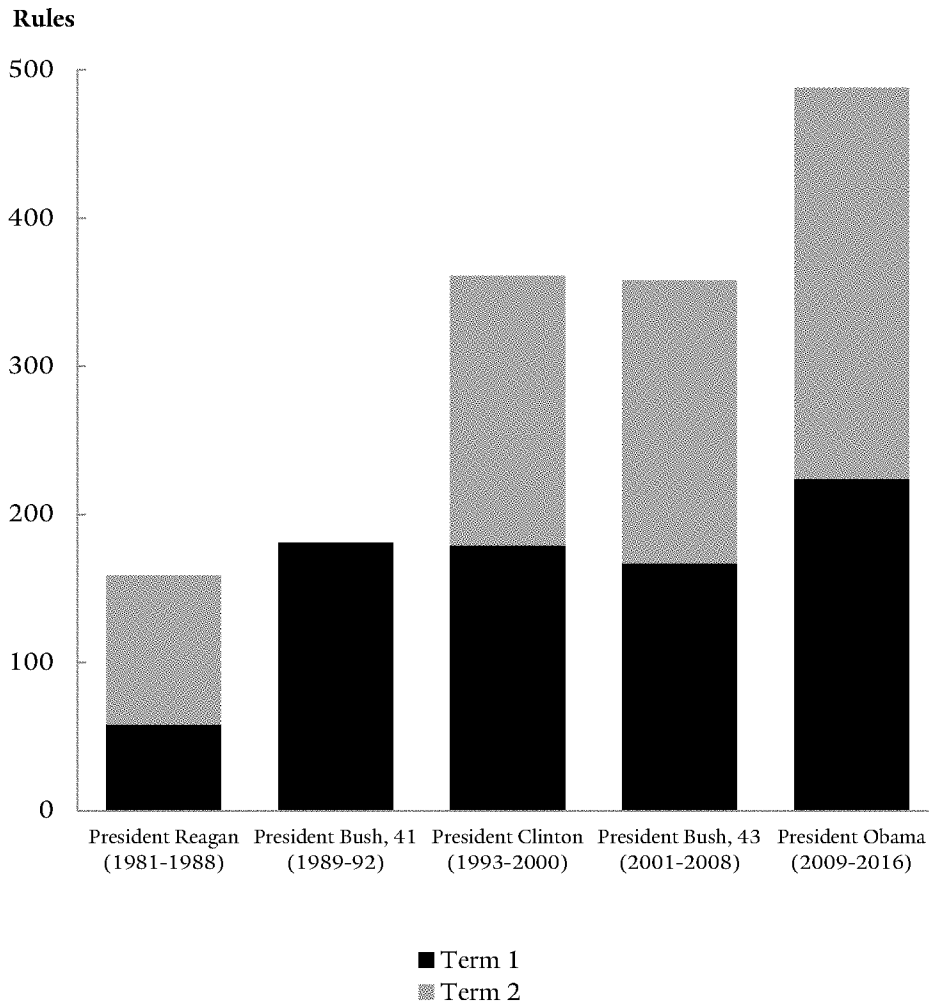
40. *Federal Register Documents Annual Percentage Change 1976-2015*, OFF. FED. REG., <http://www.federalregister.gov/uploads/2016/05/docsPercentageChange2015.pdf>; see also MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULE-MAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 5-6 (2016), <http://fas.org/sgp/crs/misc/R43056.pdf> [<http://perma.cc/6PMA-3R29>].

**FIGURE 2.**  
**SIGNIFICANT RULES PUBLISHED DURING PRESIDENTIAL TERM<sup>41</sup>**



41. Regulatory Studies Ctr., *supra* note 37. “Significant regulations,” as defined by Executive Order 12,866, are those that may “have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.” Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

**FIGURE 3.**  
**ECONOMICALLY SIGNIFICANT RULES ISSUED DURING PRESIDENTIAL TERM<sup>42</sup>**



42. Regulatory Studies Ctr., *supra* note 37. Economically significant rules, as presented in this graph, are regulations issued by executive branch agencies that meet the definition in Section 3(f)(1) of Executive Order 12,866: “have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

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.<sup>43</sup> 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.<sup>44</sup> 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<sup>45</sup> (of which there are well over four thousand in the United States<sup>46</sup>) – and has not been adjusted since 1981, when the Reagan Administration established the threshold.<sup>47</sup> 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.<sup>48</sup>

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43. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

44. Office of Info. & Regulatory Affairs, *supra* note 37.

45. See Wal-Mart Stores, Inc., Annual Report (Form 10-K), at 6 (Mar. 31, 2017) (noting \$481.3 billion in net sales in 2016 from 11,695 stores, which equals \$41.2 million per store).

46. *Total Number of Walmart Stores in the United States 2012-2017, by Type*, STATISTA, <http://www.statista.com/statistics/269425/total-number-of-walmart-stores-in-the-united-states-by-type> [<http://perma.cc/DH4U-S67T>].

47. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

48. Sam Batkins, *A Review of High-Impact, Billion-Dollar Rules*, AM. ACTION F. (Nov. 22, 2016), <http://www.americanactionforum.org/insight/review-high-impact-billion-dollar-rules> [<http://perma.cc/93DG-2JRA>]. By comparison, the G.W. Bush Administration had twelve such rules, although some of the Obama regulations were done pursuant to Congressional mandate or court orders stemming from decisions by the Bush Administration not to regulate. See, e.g., Darren Samuelsohn, *Court Orders EPA To Redo Bush-Era Ozone Plan*, N.Y. TIMES (July 10, 2009), <http://www.nytimes.com/gwire/2009/07/10/10greenwire-court-orders-epa-to-redo-bush-era-ozone-plan-37448.html> [<http://perma.cc/A7AA-TQWH>].

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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> The Open Internet Order aimed to prevent anticompetitive discrimination and collusion in the delivery of

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49. Exec. Order No. 13,610, 77 Fed. Reg. 28,467 (May 10, 2012).

50. See Howard Shelanski, *Retrospective Review, by the Numbers*, WHITE HOUSE (Aug. 31, 2016, 9:00 AM), <http://obamawhitehouse.archives.gov/blog/2016/08/31/retrospective-review-numbers-o> [<http://perma.cc/K88A-8NXK>].

51. *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017); Suzy Khimm, *Critics Tap Decades-Old Law To Stall Trump Bid To Undo Obama Regulations*, NBC NEWS (Mar. 5, 2018, 10:42 AM), <http://www.nbcnews.com/politics/white-house/critics-tap-decades-old-law-stall-trump-bid-undo-obama-n852091> [<http://perma.cc/9838-V38D>]; Ben Penn, *Labor Dept. Ditches Data Showing Bosses Could Skim Waiters' Tips*, BLOOMBERG BNA DAILY LAB. REP. (Feb. 1, 2018, 6:01 AM), <http://bna.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips> [<http://perma.cc/X8JH-YGUG>].

52. *Restoring Internet Freedom*, 33 FCC Rcd. No. 17-108 (Jan. 4, 2018) (declaratory ruling, report and order, and order).

digital content to subscribers.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> Numerous polls found that most voters favored retaining the Open Internet Order's regulations, and moreover, that the support for the Order was bipartisan.<sup>56</sup>

Perhaps not surprisingly given the prevailing public opinion, of which the FCC was well aware,<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> If the administration is moving quickly to repeal rules largely

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53. *In re* Protecting and Promoting the Open Internet, Report and Order on Remand, 30. FCC Rcd. 5601, paras. 7-22 (2015) (declaratory ruling and order).

54. See Wireless Telecomms. Bureau, *Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rate Content and Services*, FED. COMM. COMMISSION (2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0111/DOC-342982A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf) [<http://perma.cc/44B5-L73A>].

55. Tony Romm & Rani Molla, *Many of the FCC's Record-Breaking 21 Million Net Neutrality Comments Are Duplicates – or Come from Suspicious Sources*, RECODE (Aug. 30, 2017, 9:00 AM) <http://www.recode.net/2017/8/30/16223210/net-neutrality-fcc-21-million-record-comments-duplicates-suspicious-data> [<http://perma.cc/VX2E-T7QJ>].

56. Jon Brodtkin, *FCC Explains Why Public Support for Net Neutrality Won't Stop Repeal*, ARS TECHNICA (Nov. 22, 2017, 4:08 PM), <http://arstechnica.com/tech-policy/2017/11/why-the-fcc-ignored-public-opinion-in-its-push-to-kill-net-neutrality> [<http://perma.cc/PP3E-XAVZ>] (citing several surveys).

57. *Id.*

58. See, e.g., Press Release, N.Y. State Office of the Attorney Gen., *A.G. Schneiderman Files Suit To Stop Illegal Rollback of Network Neutrality* (Jan. 16, 2018), <http://ag.ny.gov/press-release/ag-schneiderman-files-suit-stop-illegal-rollback-net-neutrality> [<http://perma.cc/Z23J-D93P>].

59. Cecilia Kang, *Senate Democrats Push for a Network Neutrality Vote. Do They Have a Chance?*, N.Y. TIMES (Jan. 16, 2018), <http://www.nytimes.com/2018/01/16/technology/senate-net-neutrality.html> [<http://perma.cc/558B-SUNK>].

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.<sup>60</sup> Former SEC Chair Mary Jo White had identified those same rules as protecting investors by bringing increased competition to equity and bond markets.<sup>61</sup> 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.<sup>62</sup> The Trump DOT withdrew those rules, specifically referencing the deregulatory Executive Order 13,771.<sup>63</sup> The Department of Agriculture (USDA) has announced that it will not allow finalization of the interim “Fair Farmer Practices” rule,<sup>64</sup> 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.”<sup>65</sup> 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.<sup>66</sup>

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60. See Memorandum from Regulation Nat’l Mkt. Sys. Subcomm. to Equity Mkt. Structure Advisory Comm., U.S. SEC. & EXCHANGE COMMISSION (Apr. 3, 2017), <http://www.sec.gov/spotlight/emsac/emaac-regulation-nms-subcommittee-discussion-framework-040317.pdf> [<http://perma.cc/PE6Y-HD5F>].

61. Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Speech to the Economic Club of New York: Intermediation in the Modern Securities Markets – Putting Technology and Competition to Work for Investors (June 20, 2014), <http://www.sec.gov/news/speech/2014-spcho62014mjw> [<http://perma.cc/QDP7-7TD9>].

62. *U.S. Department of Transportation Announces Enhanced Protections for Air Travelers, Actions To Promote Airline Competition*, U.S. DEP’T TRANSP. (Oct. 18, 2016), <http://www.transportation.gov/briefing-room/us-department-transportation-announces-enhanced-protections-air-travelers-actions> [<http://perma.cc/UB73-PFHZ>].

63. Notice of Withdrawal of Proposed Rulemaking, 82 Fed. Reg. 58,788 (2017).

64. Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48,594 (Oct. 18, 2017) (to be codified at 9 C.F.R. pt. 201).

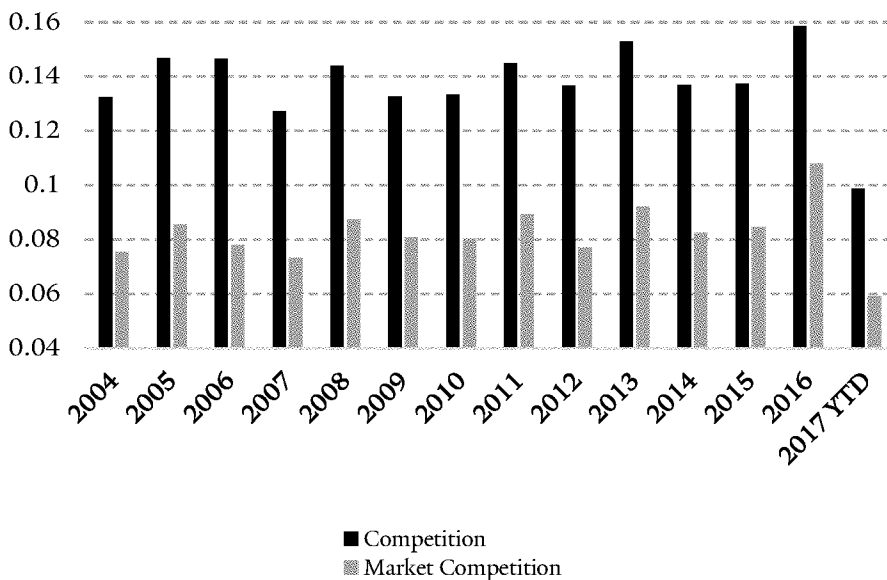
65. Carol Ryan Dumas, *USDA’s Parting GIPSA Rules Ignites Industry*, CAP. PRESS (Dec. 20, 2016), <http://www.capitalpress.com/Livestock/20161220/usdas-parting-gipsa-rules-ignites-industry> [<http://perma.cc/ZSB3-KGZG>].

66. 2014 Quadrennial Regulatory Review, FCC 17-156, MB Docket No. 14-50 (Nov. 20, 2017), [http://apps.fcc.gov/edocs\\_public/attachmatch/FCC-17-156A1.pdf](http://apps.fcc.gov/edocs_public/attachmatch/FCC-17-156A1.pdf) [<http://perma.cc/4AKR-QDPH>].



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.<sup>67</sup> 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.

**FIGURE 4.**  
PROPORTION OF FINAL FEDERAL RULES MENTIONING “COMPETITION” OR “MARKET COMPETITION”<sup>68</sup>



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

67. The data for this chart is derived from the Federal Register’s “Advanced Search” interface. See *Document Search*, OFF. FED. REG., <http://www.federalregister.gov/documents/search#advanced> [http://perma.cc/7ULW-UETR].

68. *Id.* Ratio of “competition” or “market competition” mentions to total number of rules by year.

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.<sup>69</sup> 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.”<sup>70</sup>

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.<sup>71</sup> A beneficiary of those restrictions, long-distance carrier AT&T not surprisingly opposed the petition of the local telephone companies.<sup>72</sup> Several years later Congress turned the tables and, in the Telecommunications Act of 1996, not only opened the long-distance market to

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69. ORG. FOR ECON. CO-OPERATION & DEV., OECD REGULATORY COMPLIANCE COST ASSESSMENT GUIDANCE 52 (2014).

70. Org. for Econ. Co-Operation & Dev., Policy Brief, *Competition and Barriers to Entry*, OECD OBSERVER 4 (Jan. 2007).

71. *United States v. W. Elec. Co.*, 969 F.2d 1231 (D.C. Cir. 1992).

72. *Id.* at 1235.

competition but also required the FCC to issue regulations facilitating entry into the local telephone markets that had until then been monopolies.<sup>73</sup> Almost immediately after the FCC issued its market-opening regulations the local telephone companies sued to block them, ultimately losing in the Supreme Court.<sup>74</sup> The local companies continued to fight those rules for years, notwithstanding requirements to come into compliance in the interim.<sup>75</sup> 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, counterproductive, 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.

### *C. Legal Doctrine and the Competition Enforcement Gap*

Antitrust authorities might be slow to address markets in which a regulatory agency had previously exercised competition oversight for several reasons: adding relevant institutional expertise potentially takes time; distinguishing anti-competitive conduct from firms' reasonable adjustments to a newly unregulated environment might be difficult; and sorting out enforcement jurisdiction when

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73. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

74. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

75. See, e.g., Verizon Commc'ns Inc. v. FCC, 535 U.S. 467 (2002).

an agency retains regulatory authority, but has repealed rules implementing that authority, might not be straightforward. Beyond these practical hurdles for antitrust in filling the gap left by deregulation, there are also doctrinal barriers resulting from the evolution of judicial precedent governing antitrust enforcement in regulated markets.<sup>76</sup> The current state of that doctrinal evolution could worsen the competition enforcement gap that results from deregulation.

For decades, courts treated antitrust enforcement like a complement to regulation that could come into play when antitrust would not conflict with regulatory objectives. The Supreme Court held in 1963 that unless antitrust and regulation are in direct conflict with each other, courts should try to “reconcile[] the operation of both.”<sup>77</sup> Consistent with that principle, the Court subsequently held in *Otter Tail Power v. United States* that antitrust agencies could challenge conduct even if a regulatory agency already had authority to challenge that very same conduct.<sup>78</sup> In a later case, *Gordon v. New York Stock Exchange*, the Court made clear that there must be actual or potential “plain repugnancy” between antitrust and the regulatory statute for a court to bar an antitrust claim.<sup>79</sup> The doctrinal acceptance of complementary application of antitrust and regulation allowed the DOJ to bring one of the most significant antitrust cases ever against a regulated firm: the suit that broke up the decades old AT&T “Bell System” monopoly.<sup>80</sup>

Two cases in the last fifteen years have significantly weakened the “plain repugnancy” standard. In 2004, the Supreme Court ruled in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* that a claim under Section 2 of the Sherman Act could not proceed against Verizon for violations that were more related to the Telecommunications Act of 1996 than to the antitrust laws.<sup>81</sup> The Court phrased the question presented in *Trinko* as “whether a complaint alleging breach of the incumbent’s duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act.”<sup>82</sup> The Court found the allegation did not constitute a legitimate antitrust claim and reversed the Second

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76. See Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683 (2011).

77. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963).

78. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75 (1973).

79. *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 682 (1975) (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 350 (1963)).

80. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

81. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

82. *Id.* at 401.

Circuit.<sup>83</sup> While that result is reasonable, the Court's opinion goes well beyond answering the question presented and extends *Trinko's* reach to claims that could be legitimate under antitrust law.

The *Trinko* Court 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."<sup>84</sup> That prudential consideration for precluding antitrust claims against a regulated firm has little to do with whether the plaintiff pleaded a valid antitrust claim or whether that claim could conflict with the regulatory scheme. Indeed, it suggests that even when a plaintiff does plead a cognizable, nonconflicting antitrust claim, courts should still preclude the claim on grounds of enforcement efficiency if a regulatory structure could address the harm. This consideration marked a clear departure from *Otter Tail* and *Gordon*, which allowed antitrust intervention even where redundant to existing regulatory authority, absent "plain repugnancy" between the two. By introducing "small additional benefit" as grounds for precluding non-conflicting antitrust claims, the Court potentially undermined the long-standing doctrine favoring antitrust as a complement to regulation. The Court clearly took a skeptical view of such complementarity by finding little benefit from antitrust unless "[t]here is nothing built into the regulatory scheme which performs the antitrust function."<sup>85</sup> The Court thereby suggests that it would displace antitrust if the regulation contains anything that addresses competition, even if it is addressed in only a limited way.

Three years after *Trinko*, the Court decided *Credit Suisse Securities (USA) LLC v. Billing*.<sup>86</sup> The plaintiffs in *Credit Suisse* claimed that the defendants violated Section 1 of the Sherman Act, which prohibits "every contract, combination . . . , or conspiracy, in restraint of trade,"<sup>87</sup> by setting securities prices through joint conduct that went beyond what securities laws allow.<sup>88</sup> They also alleged that the defendants had violated antitrust and securities laws by impermissibly engaging in tying and similar activities.<sup>89</sup> Importantly, the Court accepted as given

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83. *Id.*

84. *Id.* at 412.

85. *Id.* (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963)) (alteration in original).

86. 551 U.S. 264 (2007).

87. 15 U.S.C. § 1 (2012).

88. *Credit Suisse*, 551 U.S. at 269.

89. *Id.* at 267; see also *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) ("[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its

that the securities law did, and “inevitably” would, render defendants’ conduct unlawful, so in principle there was no conflict between the antitrust claims and the regulatory statute.<sup>90</sup> The Court nonetheless held that even where a correctly construed antitrust claim would not actually conflict with regulation, the antitrust claim could still be barred on potential conflict grounds.<sup>91</sup> The Court reasoned that “only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid.”<sup>92</sup> Therefore, the Court expanded the notion of plain repugnancy to incorporate not just the genuine conflict that arises when antitrust could bar conduct that regulation might allow, but even conflict between antitrust and regulation that could arise only from judicial mistake or confusion.

*Credit Suisse* thus went beyond prior implied immunity cases to establish a rule that blocks some claims even when they rely on legitimate antitrust principles, are consistent with securities laws, and, correctly read, would not interfere with the applicable regulatory scheme. Where the underlying conduct is similar enough to regulated conduct that a judge might confuse the two and create a conflict with regulatory authority, the Court chose to err on the side of barring antitrust claims.

The effect of *Trinko* and *Credit Suisse* was to render antitrust and regulation more like substitutes and less like complements. The competitive practices, market structure, and market performance of regulated industries are thus more likely to develop without the constraints of antitrust, reflecting instead the potentially different requirements and prohibitions of a regulatory agency’s competition-related rules. With antitrust less able to act in parallel or as a complement, the enforcement of competition in regulated industries will depend on the nature of the relevant rules, the agency’s commitment to enforcement, and the kinds of sanctions the agency can impose. As agencies repeal such rules or back off from actively administering them, the resulting competition enforcement gap could be greater because antitrust has been sidelined as an available supplement or complement. The doctrinal shift in the relationship between antitrust and regulation that resulted from *Trinko* and *Credit Suisse* therefore magnifies the competition enforcement consequences of strong deregulatory cycles.

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control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”).

90. *Credit Suisse*, 551 U.S. at 278-79.

91. *Id.*

92. *Id.* at 279.

A strong reading of *Trinko* and *Credit Suisse* could lead to significant displacement of antitrust enforcement by regulation or perhaps by the mere existence of a statute that authorizes competition-related regulation.<sup>93</sup> By contrast, a narrow, pragmatic reading of the cases could still leave reasonable scope for complementary antitrust enforcement in regulated markets. Wherever courts eventually draw the complement/substitute line between antitrust and regulation, however, the Supreme Court's decisions create a doctrinal mechanism through which federal courts reduce the availability of antitrust actions when regulation comes into the market. During cycles of increased regulation, therefore, courts and defendants will push antitrust in the countercyclical direction of less enforcement. On the other hand, during a deregulatory cycle in which rules go dormant or disappear, it is up to the antitrust agencies themselves to identify and counter potential enforcement gaps.

## II. WHY ANTITRUST SHOULD STEP UP WHEN REGULATION STEPS BACK

The previous Part discussed why aggressive deregulation is likely to create gaps in competition enforcement. This Part argues that antitrust enforcement should run counter to deregulation and step in to fill those gaps. Before turning to the specific reasons for antitrust and regulation to move in different directions, however, a threshold question is whether it is realistic to expect the same administration that weakens regulation to strengthen antitrust enforcement. The available evidence suggests that such an expectation is not unreasonable, although there may be differences across different types of antitrust cases.

As a general matter, antitrust enforcement and regulatory activity have historically changed only modestly with new political administrations,<sup>94</sup> even if campaign rhetoric has sometimes promised otherwise.<sup>95</sup> For example, measures

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93. At issue in *Trinko* were actual regulations that mandated the competitive access the plaintiff sued to enforce. See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 398 (2004). Had the FCC never promulgated those rules it is unclear whether the Court would have found the statute itself to provide enough of a "regulatory structure" addressing competition. It is thus unclear whether it matters under *Trinko* or *Credit Suisse* whether the competition-oriented regulation is implemented in actual rules or simply authorized by statute.

94. See Ronan P. Harty et al., *Merger Enforcement Across Political Administrations in the United States*, 2 CONCURRENTS 1 (2012); *supra* Section I.B.

95. Hillary Clinton, Editorial, *Being Pro-business Doesn't Mean Hanging Consumers Out To Dry*, QUARTZ (Oct. 20, 2015), <http://qz.com/529303/hillary-clinton-being-pro-business-doesnt-mean-hanging-consumers-out-to-dry> [<http://perma.cc/KZ8F-2DAQ>] ("I will prevent concentration in the first place by beefing up the antitrust enforcement arms of the Department

of merger enforcement by the antitrust agencies do not change predictably or consistently with political cycles. Figures 5 and 6 below show that the number of “second requests” – which the agencies issue when their initial investigation of a merger does not resolve concerns over harm to competition – were lower under Clinton than under George H. W. Bush, and were much lower than under the famously deregulatory Reagan Administration. Meanwhile, the number of merger challenges – refusals to allow a merger to go forward as originally proposed even after a second request – rose under George W. Bush from their level under Clinton. To be sure, the data show merger enforcement to have become more stringent under Obama than under either Bush, but if that change from a Republican to a Democratic administration fits with conventional predictions, the change from Clinton to Bush did not.

Looking beyond mergers to enforcement against anticompetitive conduct shows somewhat greater, but still not clear, consistency across administrations. It might not have been surprising that the Democratic Clinton Administration pursued a monopolization case against Microsoft or that the Republican Bush Administration issued a report skeptical of pursuing antimonopoly cases under Section 2 of the Sherman Act<sup>96</sup> – later withdrawn by the Obama Administration.<sup>97</sup> But the Obama Administration also closed the most significant Section 2 investigation that it undertook, that of Google, without taking any enforcement action.<sup>98</sup> Meanwhile, arguably the most significant antimonopoly case the U.S.

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of Justice and the Federal Trade Commission . . . . It’s time to take a page from Teddy Roosevelt’s book and get our economy working for Americans again.”); Stephen Labaton, *Presidential Election Could Alter Shape of Tribune-Times Mirror Deal*, N.Y. TIMES (Mar. 20, 2000), <http://www.nytimes.com/2000/03/20/business/presidential-election-could-alter-shape-of-tribune-times-mirror-deal.html> [<http://perma.cc/28CZ-P9HG>] (quoting then-candidate George W. Bush as having said that antitrust laws should only apply in cases of price-fixing); *President Trump Meeting with Business Leaders* (C-SPAN television broadcast Jan. 23, 2017), <http://www.c-span.org/video/?422482-1/president-trump-meets-business-leaders> [<http://perma.cc/8KHD-G6HE>] (“We think we can cut regulations by 75 percent, maybe more. But by 75 percent.”).

96. *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, U.S. DEP’T JUST. (2008), <http://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [<http://perma.cc/EWW3-VEZG>].

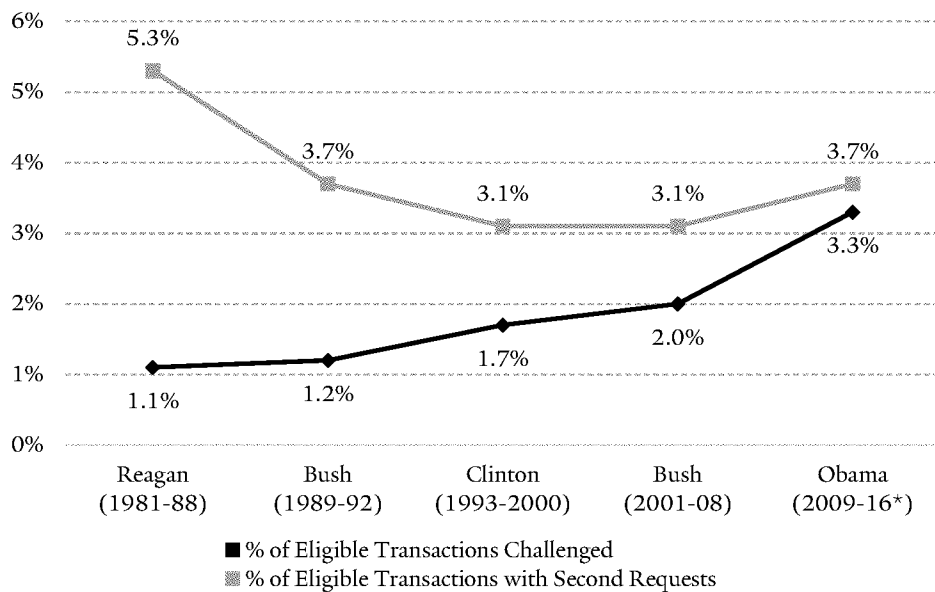
97. Office of Pub. Affairs, *Justice Department Withdraws Report on Antitrust Monopoly Law*, U.S. DEP’T JUST. (2009), <http://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law> [<http://perma.cc/GJN5-52SW>].

98. *Statement of the Federal Trade Commission Regarding Google’s Search Practices In the Matter of Google Inc.*, FED. TRADE. COMMISSION (2013), [http://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglsearchstmt.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglsearchstmt.pdf) [<http://perma.cc/8E3B-CMV9>].



government has ever taken, the break-up of AT&T, occurred under Reagan,<sup>99</sup> resolving a suit the DOJ initially filed under Ford.<sup>100</sup> These examples as well as the broad merger enforcement measures discussed above certainly mask complexity in the antitrust changes that occur across political administrations, but that complexity is the essential point: one cannot assume that Republican administrations will consistently or systematically be weaker on antitrust enforcement than will Democratic ones.

**FIGURE 5.**  
**MERGER ENFORCEMENT TRENDS ACROSS ADMINISTRATIONS: CONVERGENCE OF SECOND REQUESTS AND CHALLENGES<sup>101</sup>**

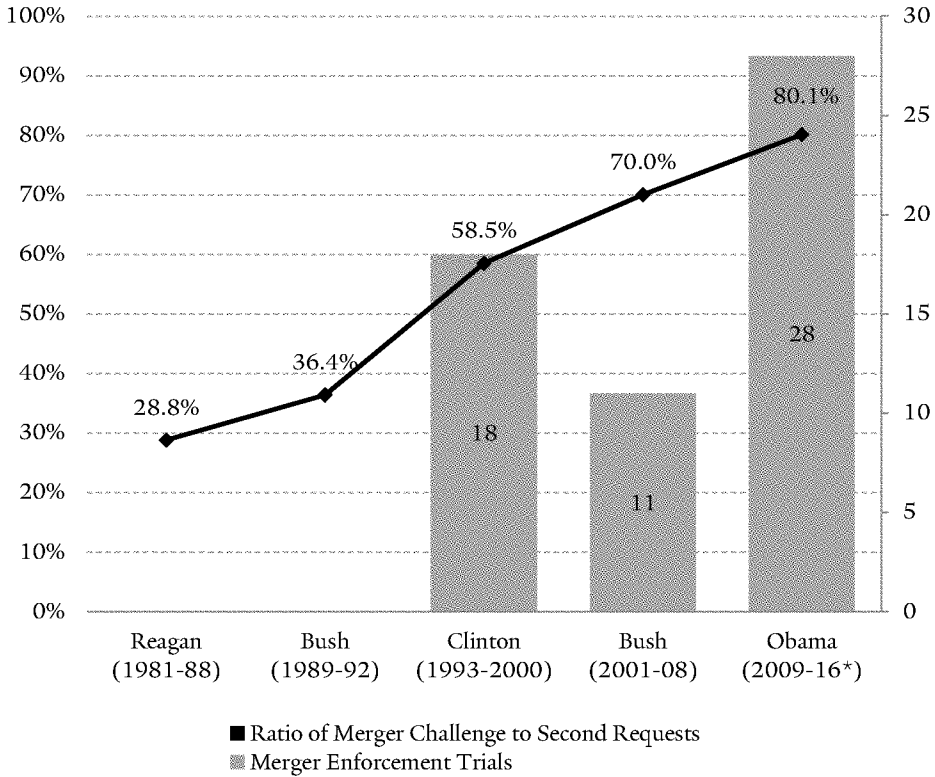


99. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

100. Press Release, U.S. Dep't of Justice (1974), [http://www.justice.gov/archive/atr/public/press\\_releases/1974/338834.pdf](http://www.justice.gov/archive/atr/public/press_releases/1974/338834.pdf) [<http://perma.cc/NE8C-ESYQ>].

101. These data are current through 2015 and compiled from HSR annual reports.

**FIGURE 6.**  
**MERGER ENFORCEMENT TRENDS ACROSS ADMINISTRATIONS: RISE IN CHALLENGES AND**  
**MERGER ENFORCEMENT TRIALS<sup>102</sup>**



Indeed, the record of the antitrust agencies under the Trump Administration over its first year stands in some contrast to the administration’s hard rollback of regulation. The FTC challenged the proposed merger of DraftKings and Fan-

102. These data are current through 2015 and compiled from HSR annual reports.

Duel, and declined to terminate an investigation into Qualcomm's allegedly anticompetitive patent licensing practices.<sup>103</sup> The DOJ challenged an already consummated merger between Parker-Hannifin and Clarcor even after that transaction had gone through a filing at the Obama DOJ without action or objection by the agency.<sup>104</sup> Most surprisingly, perhaps, the DOJ went to court to block AT&T's proposed acquisition of Time Warner in the first court challenge to a vertical merger in decades.<sup>105</sup> Notably, the Obama Administration allowed a very similar merger between Comcast and NBC-Universal to occur with conditions on the combined firm's post-merger conduct—conditions the Trump DOJ declined to entertain in the case of AT&T.<sup>106</sup> Interestingly, it was consistency with deregulatory principles—DOJ's refusal to accept conduct remedies that would require ongoing government oversight and intervention—that ultimately led it to challenge the merger in court.

Similarly, as the FCC was preparing to repeal the Open Internet Order, the Trump Administration's Acting FTC Chairperson stated, "Fortunately, we don't need prescriptive regulation . . . . [T]he FTC can challenge harmful non-neutral practices on a case-by-case basis under its antitrust authority . . . ."<sup>107</sup> Whatever one thinks of the FCC's deregulatory decision on network neutrality, this is the right response for antitrust enforcement, and the FTC should follow through if anticompetitive behavior takes place. While time will tell if this perhaps unexpected enforcement under Trump continues, the above actions again show that weak antitrust enforcement does not necessarily follow from a deregulatory administration. Given the evidence that an administration's regulatory and anti-

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103. FTC, DraftKings, Inc./FanDuel Ltd, <http://www.ftc.gov/enforcement/cases-proceedings/161-0174/draft-kings-inc-fanduel-limited> [<http://perma.cc/X4Z7-F5DW>]; FTC, Qualcomm, Inc., <http://www.ftc.gov/enforcement/cases-proceedings/141-0199/qualcomm-inc>. [<http://perma.cc/RT37-PL6U>].

104. Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of CLARCOR's Aviation Fuel Filtration Business* (Sept. 26, 2017), <http://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s> [<http://perma.cc/C2RU-4EVP>].

105. Office of Pub. Affairs, *Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner*, U.S. DEP'T JUSTICE (Nov. 20, 2017), <http://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner> [<http://perma.cc/5377-XR7F>].

106. Fiona Scott Morton, *Why Behavioral Remedies Won't Work in the Case of AT&T-Time Warner*, PROMARKET (Jan. 16, 2018), <http://promarket.org/behavioral-remedies-wont-work-case-att-time-warner> [<http://perma.cc/XD7F-KMV7>].

107. Maureen K. Ohlhausen, *If FCC Repeals Net Neutrality, FTC Won't Leave Users Unprotected*, HILL (Aug. 30, 2017, 10:47 AM), <http://thehill.com/blogs/pundits-blog/technology/348529-after-the-fcc-repeals-net-neutrality-the-ftc-wont-leave> [<http://perma.cc/L2U9-7JTE>].

trust enforcement policies need not be the same, this Part returns to the normative question of advisability and discusses four reasons why antitrust policy should be countercyclical to deregulation.

First, since consumer welfare declines when markets are anticompetitive, antitrust should be available to enjoin anticompetitive practices that deregulation might allow. Second, antitrust enforcement has potential advantages over regulation and, in many settings, might govern competition more efficiently and effectively than regulation. The regulated markets in which antitrust has those advantages will become apparent only if antitrust authorities fill the gaps left by repealed or unenforced rules. Third, enforcing antitrust in markets where the government has reduced regulation or enforcement would give courts the opportunity to interpret the reach of *Trinko* and *Credit Suisse*. Cases that demonstrate enforcement gaps in deregulating markets could lead courts to limit the circumstances under which the two forms of intervention are mutually exclusive substitutes and clarify where they can operate as complements. Finally, political attention and activism have increasingly focused on economic competition and antitrust enforcement, with a variety of proposals advocating the incorporation of broader public interest criteria into antitrust and making competition enforcement more rule-based. Assessing the costs and benefits of such proposals depends at least in part on having an accurate baseline picture of what antitrust can already do with its existing tools and authorities. If antitrust enforcement retreats along with regulation during a deregulatory cycle, it could leave an inaccurately weak impression of what antitrust could already accomplish, which could distort policy decisions when political cycles turn.

#### A. *Preserving Consumer Welfare*

Antitrust in recent decades has focused increasingly on promoting consumer welfare, although there is debate over what that criterion should mean.<sup>108</sup> While consumer welfare has come to be framed in terms of efficiency—keeping output high and prices low—a broader conceptualization could incorporate other factors like employment security, viability of small businesses, wage levels, and other things that affect economic well-being. Over the course of antitrust law's doctrinal development, courts at times found the antitrust statutes to have some of these objectives, even when they were at odds with economic efficiency. For example, courts protected competitors from efficient expansion by dominant

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108. See, e.g., Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 *FORDHAM L. REV.* 2471 (2013); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 *LOY. CONSUMER L. REV.* 336 (2010).

firms and stopped mergers in highly fragmented markets – markets in which consolidation could lower costs and reduce prices for consumers.<sup>109</sup> Moreover, antitrust was historically concerned not just with how market power translated into price effects but also with how it translated into political power.<sup>110</sup> For reasons beyond the scope of this Feature, but well-examined by a variety of scholars, over time the definition of consumer welfare in antitrust has become an economic one: enforcement focuses on preventing anticompetitive conduct that raises prices, reduces output, and limits consumers' choices.<sup>111</sup>

This focus of antitrust on efficiency objectives divorced from considerations of firm size, political effects, impacts on competitors and workers, or consequences for health and safety<sup>112</sup> has again become the subject of vigorous and important debate.<sup>113</sup> While the debate has several strands, two critiques are particularly relevant. First, antitrust has not done a good enough job on its own terms of achieving its efficiency objectives; second, the objectives of antitrust should return to a broader definition of consumer welfare that takes into account effects of economic power other than those on price and output levels.<sup>114</sup> The first critique certainly supports this Feature's argument that antitrust enforcement should be a countercyclical force to protect competition during deregulation; if one views antitrust enforcement as already having fallen short, then failure to close gaps left by repeal or nonenforcement of competition-oriented rules will only worsen the situation. For proponents of the second critique, antitrust enforcement promoting efficient performance of formerly regulated markets is likely to be less satisfying, especially if the repealed regulation achieved some of the broader objectives advocated by some antitrust critics.

Indeed, regulation sometimes displaces the objectives of antitrust altogether in the pursuit of other social benefits to which pure efficiency objectives are irrelevant or an impediment. From a consumer welfare perspective, society can

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109. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

110. See, e.g., Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1053-54 (1979).

111. HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

112. Courts have ruled that it is up to Congress, not the courts, to decide whether price competition should yield to public safety considerations. See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). Antitrust agencies have enforced the antitrust laws to promote increased competition and output even for demonstrably harmful products like cigarettes. *Reynolds American Inc. and Lorillard Inc.*; Analysis of Proposed Consent Order To Aid Public Comment, 80 Fed. Reg. 32,374 (June 8, 2015).

113. See *infra* Section II.D.

114. *Id.*

lose from repeal of either kind of regulation: repeal or nonenforcement of competition-promoting rules could create the previously discussed enforcement gap; and repeal of competition-limiting rules could leave in place anticompetitive practices or market structures without the compensating benefits that regulation had facilitated. In either case, even if antitrust does not replace some benefits that a given rule had achieved, antitrust enforcement can provide valuable, even if only partial, compensating benefits in the wake of deregulation: antitrust would either prevent a gap in the competition enforcement previously implemented by rule or would restore competition enforcement sacrificed for a different social objective no longer pursued by a regulatory agency. For consumer-welfare reasons, deregulatory periods are therefore the wrong time for a conservative turn in antitrust policy, even if one disagrees with the current consumer-welfare approach of antitrust enforcement.

For example, consider again the FCC's Open Internet Order. The central purpose of that order was to ensure that the networks that connect end-users to the Internet do not harm competition among the upstream suppliers of content and services to those end users.<sup>115</sup> The networks therefore could not discriminate in favor of some content providers over others through differential terms of transmission to the networks' subscribers. Since repeal of the Order, networks no longer face a clear prohibition against providing differing terms of access to different content providers. While differences in transmission speed need not be anticompetitive, they could be in some cases. For example, a network that provides both internet access and its own proprietary video service might attempt to gain market share by slowing down rival, unaffiliated video services.<sup>116</sup> Unless the antitrust agencies investigate such alleged cases, it will be up to market forces to stop networks from engaging in anticompetitive conduct. While such forces might prove sufficient, antitrust provides an important safeguard for consumers and competition.

### *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

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115. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

116. Various carriers have been accused of such conduct. See, e.g., Jon Brodtkin, *Verizon Accused of Throttling Netflix and YouTube, Admits to "Video Optimization,"* ARS TECHNICA (July 21, 2017 12:24 PM), <http://arstechnica.com/information-technology/2017/07/verizon-wireless-apparently-throttles-streaming-video-to-10mbps> [<http://perma.cc/M92B-CFJQ>].

effective, even very imperfect competition is preferable to regulation.”<sup>117</sup> 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.”<sup>118</sup> 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.”<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> It is harder for government agencies to make changes

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117. ALFRED E. KAHN, *ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* xxiii (1988).

118. Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CALIF. L. REV. 1059, 1059 (1987).

119. Breyer, *supra* note 9, at 1007.

120. The hazards of rate regulation are well known, and include information asymmetries, diminished incentives to reduce production costs, and excessive capital accumulation by firms to pad their rate base. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 37–38 (1982); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 341 (1990); Joseph D. Kearny & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1401 (1998).

121. BREYER, *supra* note 120, at 4.

122. Michael Boudin, *Review: Competition and Regulation*, 49. U. CHI. L. REV. 1098, 1106 (1982) (reviewing BREYER, *supra* note 120) (footnote omitted).

123. The FTC’s underlying statute and implementing rules provide that any party under order may seek a modification. See Federal Trade Commission Act § 5(c), 15 U.S.C. § 45(c) (2012); 16 C.F.R. § 2.51 (2017).

to established regulatory programs,<sup>124</sup> 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,<sup>125</sup> especially as markets transition to more competitive structures.<sup>126</sup> 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."<sup>127</sup>

As discussed, the comparative drawbacks of regulation do not mean that antitrust is without its faults.<sup>128</sup> On the whole, however, Breyer captured the consensus that, where feasible, antitrust is a preferable alternative to regulation.<sup>129</sup> 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.

### 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

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124. See Administrative Procedure Act of 1946 § 4, 5 U.S.C. § 553 (2012); *Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017) (holding that the APA's procedural requirements apply to stays of existing rules in addition to initial rulemaking).

125. For a discussion of social costs from delayed regulatory change in several industries, see Charles H. Fine & John M. de Figueiredo, *Can We Avoid Repeating the Mistakes of the Past in Telecommunications Regulatory Reform?* (MIT Commc'ns Futures Program, Working Paper No. 2005-001, 2005), <http://web.archive.org/web/20090218021238/http://www.freedomworks.org/reports/o81205.pdf> [<http://perma.cc/D2K4-9SY5>].

126. Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 *YALE J. ON REG.* 55, 57-58 (2007) (discussing the costs of the regulatory scheme established in the Telecommunications Act of 1996 in light of changing market conditions).

127. Boudin, *supra* note 122, at 1106.

128. See also *infra* Section II.D.

129. Breyer, *supra* note 9, at 1007.



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.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> 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

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130. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007).

131. *Id.* at 281-82.

132. *Id.* at 277.

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.<sup>133</sup> Second, the FCC had issued a set of rules that directly regulated the anticompetitive misconduct alleged in the case.<sup>134</sup> Finally, the FCC actively administered these duty-to-deal regulations under the 1996 Act.<sup>135</sup> 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,<sup>136</sup> 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*

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133. As the Court itself said in *Trinko*, the duty of a firm to deal with its competitor is disfavored in antitrust law; liability for failure to do so lies “at or near the outer boundary” of antitrust law. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). In contrast, Section 251(c)(3) of the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(3) (2012), affirmatively requires incumbent local telephone companies to deal with their rivals and to provide them with access to the incumbents' network facilities. Whereas antitrust law presumptively protects a firm's ability to refuse to deal with a rival, the 1996 Act imposes obligations to so deal.

134. *Trinko*, 540 U.S. at 412-13.

135. *Id.*

136. *Id.* at 412.

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.

*D. The New Politics of Competition Policy*

The deregulatory push by Congress and the executive branch faces a political cross-current that raises important questions for both competition policy and regulation. Numerous commentators of varying perspectives have advocated a more aggressive response to perceived declines in economic competition and opportunity, rising income inequality, and growth in corporate profits and political influence.<sup>137</sup> Proposals have included breaking up or regulating large companies,<sup>138</sup> mandating low prices,<sup>139</sup> prohibiting acquisition of startups by large incumbent firms, and establishing new merger standards premised on “a broader, longer-term view” less hospitable to transactions that create large firms.<sup>140</sup> Some of these proposals work within the existing framework of antitrust law, while others push for a reformulation of that framework or an increasingly regulatory approach in certain industries like digital platforms or pharmaceuticals, in which

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137. See, e.g., William A. Galston and Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, BROOKINGS (Jan. 5, 2018), <http://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy> [<http://perma.cc/E7N4-SC42>]; Eduardo Porter, *With Competition in Tatters, the Rip of Inequality Widens*, N.Y. TIMES (July 12, 2016), <http://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html> [<http://perma.cc/6YM2-E3SE>]; Asher Shechter, *How Market Power Leads to Corporate Political Influence*, PROMARKET (July 12, 2017), <http://promarket.org/market-power-leads-corporate-political-influence> [<http://perma.cc/FXN6-8QM7>]; *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), <http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing> [<http://perma.cc/X88H-RK6W>] (“Profits are too high. America needs a giant dose of competition.”).
138. See, e.g., JONATHAN TAPLIN, *MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY* 257–62 (2017); Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 516 (2015); Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 790–802 (2017).
139. Ramsi Woodcock, *The Antitrust Duty To Charge Low Prices*, CARDOZO L. REV. (forthcoming), [http://ssrn.com/abstract\\_id=2924828](http://ssrn.com/abstract_id=2924828) [<http://perma.cc/39PJ-5VVZ>].
140. *A Better Deal: Cracking Down on Corporate Monopolies*, SENATE DEMOCRATS 2, 4 (2017), <http://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf> [<http://perma.cc/D6HA-ANKS>].

some argue that firms have become too dominant or have too much power over prices.<sup>141</sup>

Carl Shapiro has discussed the different sources contributing to this movement and the data that underlie the growing focus on market power and concentration.<sup>142</sup> While Shapiro finds mixed support for some of the premises driving the current debate, and takes issue with both the necessity and advisability of some proposals, he also finds evidence to justify stronger merger enforcement than has taken place under recent administrations.<sup>143</sup> To be sure, antitrust agencies have not been asleep in recent decades, and there is evidence that merger enforcement has increased over time, most notably under President Obama.<sup>144</sup> As Jonathan Baker has argued, it is therefore confounding that studies show a rise in corporate market power at the same time that U.S. antitrust institutions are strong and active: “The surprising conjunction of the exercise of market power with well-established antitrust norms, precedents, and enforcement institutions is the central paradox of U.S. competition policy today.”<sup>145</sup> Baker identifies a number of ways in which he concludes antitrust enforcement has fallen short, ranging from insufficient merger enforcement, unchecked anticompetitive exclusion, and inadequate deterrence of coordination among rival firms.<sup>146</sup> Proposals for increased antitrust enforcement within the existing framework range from stronger application of existing enforcement tools and precedents<sup>147</sup> and better detection of new sources of competition problems,<sup>148</sup> to less reticent use

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141. See, e.g., TAPLIN, *supra* note 138, at 257-62; Rafi Mohammed, *It's Time To Rein in Exorbitant Pharmaceutical Prices*, HARV. BUS. REV. (Sept. 22, 2015), <http://hbr.org/2015/09/its-time-to-rein-in-exorbitant-pharmaceutical-prices> [<http://perma.cc/6C8Y-R7FK>].

142. Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS. ORG. (forthcoming) (manuscript at 2-6, 21-24), [http://ssrn.com/abstract\\_id=3058345](http://ssrn.com/abstract_id=3058345) [<http://perma.cc/L94Y-93RD>].

143. *Id.* (manuscript at 21-24, 28) (“The empirical evidence supports moving in the direction of stronger merger enforcement.”).

144. See *supra* Figures 5 & 6.

145. JONATHAN B. BAKER, WASH. CTR. FOR EQUITABLE GROWTH, MARKET POWER IN THE U.S. ECONOMY TODAY 1 (2017), <http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today> [<http://perma.cc/SVF2-UH6G>].

146. *Id.* at 2.

147. See *id. passim*; Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. (forthcoming 2018), <http://faculty.haas.berkeley.edu/shapiro/structuralpresumption.pdf> [<http://perma.cc/KV2Y-MA8F>].

148. Eric A. Posner, Fiona Scott Morton & E. Glen Weyl, *A Proposal To Limit the Anti-Competitive Power of Institutional Investors*, ANTITRUST L.J. (forthcoming), <http://faculty.som.yale.edu/FionaScottMorton/documents/COpolicyALJ.pdf> [<http://perma.cc/5JT3-TYBA>].

of antitrust in novel settings where competitive problems may become entrenched.<sup>149</sup>

Overall, the arguments in the various policy debates surrounding competition policy are consistent with using antitrust enforcement as a countercyclical force to deregulation. The extent to which such countercyclical enforcement satisfies any given perspective in the policy debate depends, however, on what kind of antitrust enforcement one intends: enforcement, even if strengthened, within the existing framework and standards? Or, enforcement that broadens the goals and criteria for antitrust review? The normative position of this paper is to advocate stronger application of the existing antitrust framework in markets undergoing deregulation, which is unlikely to resolve several concerns from critics of current antitrust policy.

At a general level, if one already thinks there is a gap between the competition enforcement that the economy needs and the antitrust enforcement that agencies provide (and that courts allow), then that dissatisfaction will only grow if antitrust enforcement follows regulation into retreat. Such a retreat would be inconsistent with the arguments, such as those mentioned above from Baker and Shapiro, for more effective use of existing antitrust tools.

If, however, one finds antitrust enforcement too weak even where it already applies, then extending that same level of enforcement to new (formerly regulated) firms or markets is unlikely to be seen as sufficient in those areas either. Moreover, because markets in which agencies repeal competition rules are by definition those in which Congress and the agencies had seen fit to replace general antitrust law with more specific competition regulation, antitrust enforcement could be more difficult and slower to have impact. It is therefore likely that there will be instances in which antitrust enforcement in formerly regulated markets fails to remedy the kinds of effects that motivate current critiques of antitrust enforcement. While such instances do not make the antitrust enforcement inconsistent with arguments for more muscular competition law, they suggest that increased antitrust enforcement could paradoxically fuel the calls for broader or more prescriptive antitrust policies, or for a return to regulation.

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

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149. Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663 (2013).

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.

## CONCLUSION

Deregulation can take many forms. In some cases, agencies will repeal rules; in others they will forebear from enforcing or enacting regulation. Looking ahead in the current policy environment, the evidence suggests that agencies will issue fewer new rules even as they repeal existing ones. To the extent regulations govern competition, aggressive deregulation has implications for market performance and consumer welfare. Repealed or unenforced rules might leave anti-competitive conduct or monopolistic markets unconstrained. In cases where regulation permitted or promoted such conduct and market structures, those market conditions will be left in place without the compensating regulatory benefits for which they had been allowed. If antitrust authorities follow the same trend as regulatory agencies and become less active, the enforcement gaps from deregulation will be left without remedy. Those gaps are likely to be more numerous when, as now, aggressive deregulation occurs off a stock of existing rules that is neither abnormally large nor filled with regulations that are ineffective or costless to repeal.

The consequences of strong antitrust to counter strong deregulation extend beyond the consumer-welfare benefits of competition enforcement. Bringing cases as markets deregulate would allow antitrust authorities to push courts to clarify recent doctrine and restore antitrust as a complement, rather than substitute, for rules in regulated markets. Bringing such cases would also identify markets in which antitrust has a comparative advantage over regulation, enforcing competition more efficiently and effectively than previously done by the regulatory agency. Such a demonstration is particularly important when, as now, a growing debate exists over strengthening competition enforcement by expanding the criteria and objectives of antitrust law, or by applying regulation to constrain large firms in particular economic sectors. The pressures for such policy changes will only grow if deregulation leads to additional market power and

concentration. Strong enforcement of existing antitrust law during this deregulatory moment could help inform the debate while potentially avoiding resorting to costly regulatory and legislative responses when political administrations eventually change. Countervailing antitrust enforcement is therefore the best available means not only to ensure competitive, well-functioning markets during a deregulatory cycle, but also for the healthy development of competition policy as political cycles change over time.

