CLEARLY REPUGNANT: CORRECTING THE COURT'S FAILED APPROACH TO ANTITRUST ENFORCEMENT

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> Where . . . '[t]here is nothing built into the regulatory scheme which performs the antitrust function,' . . . the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, . . . it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.[1]

I. INTRODUCTION

For the past fifty years, regulation and antitrust have maintained a dysfunctional relationship in the United States. Although they effectively

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1. Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004) (citing Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963)).

operated in tandem throughout the 1950s and 60s,[2] the Supreme Court has increasingly aligned itself with big business interests[3] and engaged in overt antitrust antitextualism[4] since the 1970s. This has resulted in a simultaneous reduction in both antitrust enforcement[5] and regulatory power.[6] The disastrous effects of this laissez-faire model in the United States are apparent from the unprecedented consolidation of market power across sectors[7] and its accompanying effects on both consumers[8] and labor conditions.[9] The effects of this dysfunction are uniquely obvious in the realm of "Big Tech"—a moniker often applied to companies like Google, Microsoft, Amazon, and Meta. In an increasingly digital economy, a handful of companies wield an outsized influence over our daily lives and "[t]here is bipartisan agreement that

2. While antitrust enforcement receded somewhat in the wake of New Deal reforms and through World War II, a wave of market consolidation in the 1950s prompted amendments to the Clayton Act and renewed investment in antitrust enforcement. *See* Gene M. Gressley, *Thurman Arnold, Antitrust, and the New Deal*, 38 BUS. HIST. REV. 214, 227 (1964) (describing U.S. antitrust enforcement in the wake of the National Recovery Act and the beginnings of World War II); Debra A. Valentine, *The Evolution of U.S. Merger Law: Prepared Remarks before INDECOPI Conference*, FED. TRADE COMM. (Aug. 13, 1996), https://www.ftc.gov/news-events/news/speeches/evolution-us-merger-law ("A dominant theme driving the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. In 1909, the 200 largest non-banking corporations owned about one-third of all corporate assets; in 1928 they owned 48%; in the early thirties they owned 54%; by 1940 they held 55%.").

3. *See generally* Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER NO. 30326 (2022) (empirically connecting the decline in U.S. antitrust enforcement with the advancement of big business interests).

4. *See generally* Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 (2021).

5. *See, e.g.*, Jon Dubrow, Noah Feldman Greene & Gregory Heltzer, *DOJ to Merging Parties: The Time of "Underenforcement" is Over; Fix-It-First or Risk Being Challenge*d, JDSUPRA (Sept. 21, 2022), https://www.jdsupra.com/legalnews/doj-to-merging-parties-the-time-of-8445648/.

6. *See, e.g.*, Charlie Savage, *E.P.A. Ruling Is Milestone in Long Pushback to Regulation of Business*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/us/supreme-court-epa-administrative-state.html.

7. REBECCA GIBLIN & CORY DOCTOROW, CHOKEPOINT CAPITALISM: HOW BIG TECH AND BIG CONTENT CAPTURED CREATIVE LABOR MARKETS AND HOW WE'LL WIN THEM BACK 4–5 (2022)

8. *See, e.g.*, Janet Nguyen, *Money and Millennials: The Cost of Living in 2022 vs. 1972*, MARKETPLACE (Aug. 17, 2022), https://www.marketplace.org/2022/08/17/money-and-millennials-the-cost-of-living-in-2022-vs-1972/.

9. *See, e.g.*, Greg Iacurci, *U.S. Is Worst Among Developed Nations for Worker Benefits,* CNBC (Feb. 4, 2021), https://www.cnbc.com/2021/02/04/us-is-worst-among-rich-nations-for-worker-benefits.html.

the status quo is just not working."[10] However, there is little agreement over how and where to begin repairing antitrust enforcement's role in regulation.

This Note adopts the argument that the appropriate relationship between antitrust and regulation is neither adversarial nor cyclical, but symbiotic.[11] Using the Federal Trade Commission's (FTC) antitrust suit against Meta over its WhatsApp and Instagram acquisitions as a case study,[12] this Note then goes on to argue that the market of Personal Social Networks (PSNs) is the perfect place to begin restoring the balance between antitrust and regulation. PSNs are uniquely underregulated because they arose and grew in the midst of regulatory and antitrust decay—companies like Meta began in the early 2000s and exploded in the mobile device era of internet access.[13] As a result of this unchecked growth, PSNs must first be broken down to a manageable size by antitrust enforcement before regulation can be crafted to effectively protect consumers from harms like hate speech and privacy invasions.

To make this argument, this Note first addresses the history of the Sherman Antitrust Act[14] and of the Supreme Court's anti-textualist approach to its interpretation since the 1970s. To do so, this Note focuses on the Court's inversion of the "clear repugnancy" doctrine[15] into a doctrine of implied antitrust immunity—while the Court once staunchly maintained that antitrust should rarely be precluded by the existence of regulation, that standard has

10. Shannon Bond, *Facebook, Twitter, Google CEOs Testify Before Congress: 4 Things to Know*, NPR (Mar. 25, 2021), https://www.npr.org/2021/03/25/980510388/facebook-twitter-google-ceos-testify-before-congress-4-things-to-know.

11. *See* Robert A. Jablon, Anjali G. Patel & Latif M. Nurani, Trinko *and* Credit Suisse *Revisited: The Need for Effective Administrative Agency Review and Shared Antitrust Responsibility*, 34 ENERGY L.J. 627, 627 (2013) ("[A]gencies must continue to have significant antitrust roles but . . . judicial antitrust enforcement must also be fully available. ").

12. Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022).

13. Substitute Amended Complaint for Injunctive and Other Equitable Relief at 3, Fed. Trade Comm'n v. Meta Platforms, Inc., No. 1:20-cv-03590 (D.D.C. Sept. 8, 2021), ECF No. 82 [hereinafter *Meta Complaint*].

14. The impetus behind the Sherman Act grew out of a moment of severe state deregulation and a correlated growth in new forms of national corporate structure in the late 1800s. *See* Daniel A. Crane, *Lochnerian Antitrust*, 1 NYU J.L. & Liberty 496, 506–08 (2005) (attributing the rise of monopolies in the late 19th century to a liberalization of state corporate law).

15. *See* Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907) ("[A] statute will not be construed as taking away a common-law right existing at the date of its enactment, . . . unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy[.]").

now been almost fully inverted.[16] The Court has done so even where regulation contains specific antitrust saving clauses.[17]

This Note then explores the consequences of this doctrinal inversion and its resulting underenforcement of anticompetitive conduct. When antitrust and regulation are treated as adversarial, the intended symbiotic system of checks and balances between them breaks down.[18] The gaps between enforcement grow longer, the enforcement itself gets weaker, and new corporate structures become so big that no one knows where to start—especially in an increasingly global and technology-centric economy. Antitrust and regulation have different but complementary roles in protecting consumers. A rise in antitrust lawsuits should not be dismissed as inhibitive of regulation—it should be treated as a call to arms for regulation to step up and assess what has gone wrong and how it can do better to protect consumers.

Finally, this Note explains the FTC's case against Meta and why the proposed divestment remedy is necessary to make prospective regulation more feasible and to protect consumers. The Note concludes with suggestions on how to craft regulation around PSNs that explicitly accounts for the ongoing role of antitrust, specifically in the form of a well-crafted saving clause that the Court cannot ignore.[19] Regulation must change to keep up with the markets, and antitrust is both the alarm bell and the fire extinguisher that buys regulation the time it needs to catch up when it falls behind. A symbiotic approach between antitrust and regulation is both necessary *and* more authentic to the original intended purpose of the Sherman Antitrust Act.

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16. *Trinko*, 540 U.S. at 406.

17. *Id.*

18. *See generally* Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922, 1922 (2018) (discussing the countercyclical role of antitrust enforcement during periods of deregulation). Antitrust scholars like Howard Shelanski argue that this cyclical ebb and flow has provided valuable information on the respective roles of antitrust and regulation, but now is the time to act on that knowledge to "restore antitrust as a complement, rather than substitute, for rules in regulated markets." *Id.* at 1959.

19. This is necessary to avoid what occurred in the telecommunications market. After the Bell System was broken up in 1982, Congress made sure to explicitly include an antitrust saving clause in the Telecommunications Act of 1996 in recognition that regulation could never replace the bluntness of antitrust enforcement where necessary. *See* Andrew Pollack, *Bell System Breakup Opens Era of Great Expectations and Great Concern*, N.Y. TIMES (Jan. 1, 1984), https://www.nytimes.com/1984/01/01/us/bell-system-breakup-opens-era-of-great-expectations-and-great-concern.html; Saving the Savings Clause: Congressional Intent, the Trinko Case, and the Role of the Antitrust Laws in Promoting Competition in the Telecom Sector: Hearing Before the H. Comm. on the Judiciary, 108th Cong. 1–2 (2003) (statement of Hon. F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary).

II. ANTITRUST AND REGULATION AT ODDS

Regulation and antitrust enforcement have not always been so exaggeratedly at odds. Until 2004, the Supreme Court somewhat consistently applied a "clear" or "plain" repugnancy standard in the balancing of statutes with common-law rights,[20] so that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored."[21] This standard allowed regulation and antitrust enforcement to work in tandem, each tool available as the facts of a case demanded.

However, the Court has distorted this standard since the 2000s. As Shelanski summarizes in his argument for rebalancing antitrust and regulation, "[t]he Supreme Court's trend in adopting blunt forms of claim preclusion in regulated industries throws out good cases along with the bad, treats private cases identically to those brought by public enforcement agencies, and makes no provision for the comparative advantages of antitrust and regulation in different settings."[22] The Court's new interpretation of the relationship between antitrust laws and regulatory schemes has worsened an already dire underenforcement of anticompetitive behaviors.

To provide context for this Note's subsequent arguments, this Part covers background on the origins of the plain repugnancy standard and its application throughout the 20th century. It then provides more detail on *Trinko* and *Credit Suisse*, two cases which narrowed the scope of antitrust enforcement in regulated markets, and their reframing of that standard. Finally, this Part further details the consequences of these decisions and the effects they have had on antitrust enforcement.

A. THE CLEAR REPUGNANCY DOCTRINE

The Sherman Antitrust Act of 1890 was born at the tail end of the Gilded Age, a period characterized by steep wealth inequality, across-the-board

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20. *See Abilene Cotton*, 204 U.S. at 437 ("[A] statute will not be construed as taking away a common-law right existing at the date of its enactment . . . unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy[.]"); *see also* Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 162 (1922) (holding that regulation of rates does not bar government actions, but does bar private antitrust actions under the facts described, by stating that "[t]he fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the government. It does not, however, follow that Keogh, a private shipper, may recover damages under section 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed.").

21. United States v. Phila. Nat'l Bank, 374 U.S. 321, 350–51 (1963).

22. Howard Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 731 (2001).

market consolidation under the so-called Robber Barons, and the growth of an increasingly active and agitated labor rights movement.[23] In advocating for the bill to his colleagues, Senator John Sherman made it clear that the Act was intended to address the newly national scale of a common law problem already regulated by the states.[24] While Chicago School academics since Robert Bork have argued that the sole goal of the Act was the protection of consumer welfare,[25] that interpretation of the legislative history does not account for the legal reality out of which the Act emerged.

As indicated by Sherman's repeated references to the inhuman nature of corporations and the "corporate rights open to all," consumer welfare was ancillary to his general concern over monopolies and anticompetitive behavior.[26] His federalist framing indicates that the promotion of competition in and of itself is the goal because the existence of free competition across the states is a check on the "undue influence" that a corporation can otherwise accrue in a single state.[27] As Sherman noted, his intent was to combat "the law of selfishness, uncontrolled by competition," and not to single out "a particular trust, but the system" writ large.[28] To focus on the secondary effect of consumer welfare is to convolute and subjugate the actual goal of the Act: promoting competition to prevent the concentration of unchecked market power.

Keeping this context in mind, the plain repugnancy standard traces back to 1907, and the Lochner Court's general hostility toward regulation during that period.[29] Despite the fact that antitrust may seem at odds with Lochnerian conceptions of freedom to contract, "the freedom of the consumer, individual producer, artisan, or trader from the coercion of government-sanctioned monopolies . . . is reflected amply in the pre-Sherman Act common law and in the antitrust ideology of the Lochner era."[30] From this perspective, antitrust enforcement is actually a restraint on government overreach, both in the form of regulation *and* calculated de-regulation. When one state de-regulates to collude with corporate power, the citizens of all states are threatened by the

23. *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J.F. 960, 965 (2018).

24. 21 CONG. REC. 2456 (1890).

25. *See generally* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

26. 21 CONG. REC. 2457 (1890).

27. *Id.*

28. *Id.*

29. *Abilene Cotton*, 204 U.S. at 437.

30. Crane, *supra* note 14, at 497 (emphasis omitted).

wrongly state-sanctioned and un-checked growth of that chosen corporation and its effects on interstate commerce.

This populist framing of antitrust carried through the first third of the 20th Century. As the Court wrote in a now-overturned 1933 case,

> As a charter of freedom, the [Sherman Anti-Trust Act] . . . call[s] for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but [does] not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis.[31]

Antitrust intervention was deemed necessary to ensure that private entities did not exploit the market and that regulatory entities could not facilitate such behavior by intentionally or unintentionally cementing certain monopolies. Antitrust was thus not only a check on anticompetitive behavior, but on regulatory frameworks themselves.

After the New Deal's expansion of the administrative state, and as World War II distracted from enforcement, however, antitrust took a backseat to regulation.[32] In a 1948 opinion upholding a vertical merger in the steel industry, Justice Reed wrote, "[i]t is not for courts to determine the course of the Nation's economic development . . . . If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts."[33] This was a massive departure from the original intent of the Sherman Act, given Sherman's express intention for the statute to "be construed liberally, with a view to promote its object."[34] Nor was this departure missed by Justice Douglas in his dissent focused on the problem of "bigness."[35]

Despite this retraction of antitrust law, the Court consistently displayed a hesitance to disregard repugnancy standards until the 1960s.[36] By that time, this was clearly articulated as the "plain" or "clear" repugnancy doctrine:

31. Appalachian Coals v. United States, 288 U.S. 344, 359–60 (1933), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984)).

32. *See* Gressley, *supra* note 2, at 227 ("By the fall of 1940 . . . [i]t became increasingly clear that attack on monopoly was being given a holiday.").

33. United States v. Columbia Steel Co., 334 U.S. 495, 526 (1948).

34. 21 CONG. REC. 2456 (1890).

35. *Columbia Steel*, 334 U.S. at 535 (Douglas, J., dissenting).

36. Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304–05 (1963) ("[W]e hesitate here, as in comparable situations, to hold that [a] new regulatory scheme . . . was designed completely to displace antitrust laws—absent an unequivocally declared congressional purpose so to do.").

"Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[37] In the absence of a clause explicitly ruling out antitrust enforcement, the Court sought to maintain both statutory regulation and antitrust actions to the fullest extent possible. But this standard began to weaken in the 1970s. This is illustrated by the stark difference between antitrust decisions from the '60s, like *Silver v. New York Stock Exchange*,[38] and those from the '70s, like *Gordon v. New York Stock Exchange*.[39]

In each case, the Court considered the interaction between antitrust enforcement and regulatory oversight by the Securities and Exchange Commission (SEC). In *Silver*, the Court emphasized reconciliation of antitrust and regulation,[40] but just twelve years later in *Gordon*, mere potential interference was enough for the Court to find implied antitrust immunity.[41] *Gordon* thus marked the beginning of an era of antitrust anti-textualism and over-enforcement paranoia that is only now beginning to change.

Throughout this period, antitrust laws were gradually weakened. After *Gordon*, the Court clarified that implied immunity can apply "even absent active regulatory supervision of the specific conduct at issue . . . if the challenged conduct could be allowed under the statute and if the agency generally exercised 'the kind of administrative oversight of private practices that Congress contemplated.'"[42] Essentially, this means that an antitrust action can be precluded even when brought under a statute with an antitrust saving clause if that clause is not explicitly written to prevent such a result. It also means that an agency does not even need to be actively monitoring certain conduct for an antitrust action to be precluded—all that matters is if the agency is capable of cobbling together some type of oversight and remedy ex post. This perspective reduces the "strongly disfavored" preclusion of antitrust to a standard that requires mere "oversight" by a regulatory body.

Such a perspective also grossly misinterprets the concept of what function regulation must actually perform to preclude antitrust. An accurate example of repugnance would be a price manipulation claim in an industry where prices are set by a regulatory body—not a price manipulation claim in an industry

37. *Philadelphia Nat. Bank*, 374 U.S. at 350–51.

38. *Silver*, 373 U.S. at 341.

39. Gordon v. New York Stock Exch., 422 U.S. 659 (1975).

40. Shelanski, *supra* note 22, at 687.

41. *Id.*

42. *Id.* at 688 (quoting United States v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694, 728 (1975).

where a regulatory body merely has some kind of its own regulatory mechanism in place to punish such misconduct. An entity may be subject to duplicative punishment in the form of both antitrust monetary damages and regulatory penalties, but such hefty punishment may in fact be desirable given the current excesses of market concentration across industries.

While the cases cited here concern securities law, the Court made clear that the repugnancy standard applies in other industries as well, particularly telecoms and energy. In *Otter Tail Power Co. v. United States*, the Court "declined to find that the Federal Power Act provided immunity from the government's claim that the defendant had violated the antitrust laws by refusing to supply either interconnection to distribution facilities or power to competing municipal utilities."[43] The Court distinguished between "duplicative" claims and repugnant claims in a way that bolstered the repugnancy standard yet again, but this 1973 case was the last to do so.

The clear repugnancy standard is evidence that antitrust and regulation not only can but should operate in connection with each other. More importantly, however, it is proof that antitrust enforcement is necessary as a check to regulation—it should be treated as a canary in the coal mine of regulatory capture, and responded to as a call to update how regulation operates. As the following Section illustrates, there are serious consequences when antitrust actions are precluded and regulatory bodies are left to stagnate.

B. THE DISTORTED FRAMEWORK OF IMPLIED IMMUNITY

Since the 1970s, legal precedent has reflected a certain hostility towards antitrust. This hostility is largely attributable to the influence of big business interests on the Court.[44] Such an attitude is reminiscent of antitrust enforcement reluctance in the 1930s and 1940s, but without a similarly robust strengthening of the administrative state. Today's wealth inequality rivals that of the 19th century,[45] and a historically weakened labor movement is unable to fight back.[46] Yet, neither Congress nor the judiciary has responded to reign in the markets and address the unprecedented concentration of market power.

43. *Id.*

44. *See* Lancieri, Posner & Zingales, *supra* note 3, at 57 ("Large business interests have always been opposed to strong enforcement of antitrust law. If we want to attribute the decline of antitrust enforcement to the pressure exerted by big business, we need to explain why starting in the mid-1970s these interest groups succeeded where they had failed before.").

45. *See* CONG. BUDGET OFF., TRENDS IN THE DISTRIBUTION OF FAMILY WEALTH, 1989 TO 2019 (Sept. 27, 2022), https://www.cbo.gov/publication/57598 (tracking wealth distribution in the U.S. from 1989 to present).

46. While there were historically at least 200 work stoppages per year from 1947 to 1979, those numbers have steadily dropped to the point that there are fewer than 50 each year since

This national hostility toward antitrust enforcement is crystalized in two cases from 2004 and 2011 in which the Court suggested that antitrust immunity can exist in regulated markets. Until the first, the Supreme Court had never held that an antitrust action could be precluded by a regulatory scheme with an explicit antitrust saving clause.

1. Trinko

In 2004, the Court held in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* ("*Trinko*") that while the Telecommunications Act of 1996 "preserves claims that satisfy existing antitrust standards," the creation of new non-traditional antitrust claims depends heavily on "the existence of a regulatory structure designed to deter and remedy anticompetitive harm."[47] Justice Scalia's application of the plain repugnancy standard in the majority opinion diverged significantly from past precedent and set the stage for further erosion.

There, a customer of AT&T sued Verizon for denying competitors "access to interconnection support services, making it difficult for those competitors to fill their customers' orders."[48] The plaintiff argued that Verizon's conduct violated § 2 of the Sherman Act by impeding downstream local telephone service offerings. Aside from an obvious issue of standing, which the concurrence would have declined to go beyond,[49] the issue at the core of the case was whether a breach of duties imposed by the Telecommunications Act of 1996 could form the basis of a claim under § 2 of the Sherman Act.

In considering this issue, the opinion emphasized the regulatory response that occurred prior to the filing. As Justice Scalia noted, to take "advantage of the opportunity provided by the 1996 Act for incumbent LECs to enter the long-distance market . . . required Verizon to satisfy, among other things . . . compliance with the Act's network-sharing duties."[50] As a result of this and other interconnection agreements with rivals, Verizon was subject to oversight from both state regulators and the Federal Communications Commission (FCC).

1990. *Annual Work Stoppages Involving 1,000 or More Workers, 1947 - Present*, U.S. BUREAU LAB. STAT. (Aug. 11, 2023), https://www.bls.gov/web/wkstp/annual-listing.htm.

47. *Trinko*, 540 U.S. at 407, 412 (2004).

48. Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 449 (2009) (quoting *Trinko*, 540 U.S. at 404–05).

49. *See Trinko*, 540 U.S. at 416–17 (Stevens, J., concurring) ("In complex cases it is usually wise to begin by deciding whether the plaintiff has standing to maintain the action . . . . I would not go beyond the first step in this case.").

50. *Id.* at 402–03.

Upon reports from rivals that Verizon was not properly fulfilling service orders from other local exchange carriers, simultaneous investigations were opened by the FCC and New York's Public Service Commission (PSC).[51] While the PSC issued a series of orders including heightened reporting requirements and a $10 million fine, the FCC compelled Verizon to pay $3 million to the U.S. Treasury and to enter a consent decree with additional requirements and penalties.[52] The law offices of Curtis V. Trinko, a customer of Verizon's affected rival AT&T, filed suit "[t]he day after Verizon entered its consent decree with the FCC."[53]

As Justice Stevens's concurrence in the judgment noted, the most obvious issue in this case was standing. Justice Stevens wrote that the threshold question is "whether, assuming the truth of its allegations, respondent is a 'person' within the meaning of § 4 [of the Clayton Act]."[54] According to precedent, § 4 is not read literally, "particularly in cases in which there is only an indirect relationship between the defendant's alleged misconduct and the plaintiff's asserted injury."[55] The rationale behind this is to avoid "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other,"[56] which harkens back to a duplicative standard espoused in various 1960s and 1970s antitrust cases.[57] Justice Stevens would have declined to go beyond this issue of standing because the claim was "purely derivative of the injury that AT&T suffered."[58]

However, instead of halting the inquiry there, Justice Scalia's opinion went much further and convoluted the repugnancy standard by reframing the issue of duplication. First, he posed the question of "what effect (if any) the 1996 Act has upon the application of traditional antitrust principles."[59] The effect of this framing is clear from the holding that results: while the 1996 Act's antitrust-specific saving clause "preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards."[60] While the concurrence would have clearly maintained the

51. *Id.* at 403–04.

52. *Id.*

53. *Id.* at 404.

54. *Id.* at 416 (Stevens, J., concurring).

55. *Id.* (Stevens, J., concurring).

56. *Id.* at 416–17 (Stevens, J., concurring) (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 529–535 (1983)).

57. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 731 (1977) (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264 (1972)) ("[W]e are unwilling to 'open the door to duplicative recoveries' under s 4.").

58. *Trinko*, 540 U.S. at 417 (Stevens, J., concurring).

59. *Id.* at 405.

60. *Id.* at 407.

repugnancy standard by refusing to allow a duplicative and administratively difficult claim to proceed, Justice Scalia's holding created a new inquiry entirely: does the claim arise out of "traditional antitrust principles," or is it something "new" created by the regulation itself?

Justice Scalia's reframing had two simultaneous functions. First, it narrowed possible government antitrust actions in a regulated market to only those that are "traditional" without precisely defining what that means. Second, it diluted the rationale for why "new" claims should not proceed. As Justice Stevens explained, the issues of duplicative punishment and impossible administrability are arguably reasonable justifications for why a particular anticompetitive claim cannot proceed in a regulated market.[61] This has nothing to do with the "newness" of the claims, however. Theoretically, if a "new" type of anticompetitive behavior arose as a result of the 1996 Act that was not enforced by a regulatory body and for which there were reduced administrability concerns, there is nothing in the Court's antitrust precedent that should prevent the claim from proceeding simply because it is not "traditional." The emergence of such a claim should instead inspire an audit of the regulatory body to determine if it needs new or additional resources to address new problems.

Instead, Justice Scalia further distorted the standard of clear repugnancy by focusing on a derivative doctrine of implied immunity. In his discussion of the additional requirements imposed by the 1996 Act, Justice Scalia wrote:

> That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity.[62]

While the idea of implied immunity has floated around in various contexts, it had never existed in antitrust until *Trinko*, except as the strongly disfavored result of clear repugnancy analysis.

For example, the first case Justice Scalia cited in referring to the doctrine, *United States v. National Association of Securities Dealers, Inc.* (*NASD*), considered "whether certain sales and distribution practices employed in marketing securities of open-end management companies, popularly referred to as 'mutual funds,' are immune from antitrust liability."[63] The Court held that

61. *Id.* at 416–17 (Stevens, J., concurring).
62. *Id.* at 406.
63. 422 U.S. 694, 697 (1975).

mutual funds are immune, but only because antitrust enforcement of those particular claims would have been too duplicative and could result in inconsistent standards. Despite the application of this duplicative standard, the *NASD* majority still cited to the clear repugnancy standard as their guiding principle.

As the dissent in *NASD* indicates, this line of cases ostensibly preserved clear repugnancy but still set the stage for the erosion into implied immunity that occurred in the 2000s. As Justice White wrote in the *NASD* dissent:

> Under that holding, in light of the context of this case, implied antitrust immunity becomes the rule where a regulatory agency has authority to approve business conduct whether or not the agency is directed to consider antitrust factors in making its regularity decisions and whether or not there is other evidence that Congress intended to displace judicial with administrative antitrust enforcement.[64]

In other words, the clear repugnancy standard has been watered down to the point that any type of regulatory oversight is enough to justify the dismissal of antitrust claims. This holds true regardless of whether the framework can address anticompetitive harms and regardless of the fact that duplicative punishment can be beneficial where market consolidation has run amok.

Justice Scalia's holding in *Trinko* built on the weakening of the repugnancy standard by focusing the analysis of "traditional antitrust principles" on their enforcement in a regulated market. While the rule-of-reason doctrine has long required an analysis of the totality of the circumstances in cases lacking a per se violation of the Sherman Act, Scalia's analysis brought the existence of a regulatory framework to the foreground. In fact, he completely set aside the 1996 Act and its specific enforced infrastructure sharing by arguing that absent regulation,

> [To compel] such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.[65]

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64. *Id.* at 736 (White, J., dissenting).
65. *Trinko*, 540 U.S. at 407–08.

In other words, Justice Scalia went beyond the already weakened duplicative standard to argue that traditional antitrust law can rarely sustain such a claim at all, absent very specific circumstances of prior dealing. To do so, Justice Scalia says, would actually be antithetical to antitrust doctrine.

This focus on the difference between regulated and unregulated markets misappropriates the doctrine of implied immunity and gives it undue significance in the analysis. Scalia acknowledged that Congress "precluded that interpretation," but he also argued that the clause only preserves "traditional" antitrust claims and that creating a "new claim[] . . . would be equally inconsistent with the saving clause's mandate that nothing in the Act 'modify, impair, or supersede the applicability' of the antitrust laws."[66] This interpretation reveals a blatant disregard for actual antitrust doctrine, which has long included rule-of-reason analysis as a means of recognizing so-called "new" claims.

Justice Scalia even acknowledged this precedent of contextually grounded antitrust claims in the final part of the opinion. He wrote that, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue,"[67] but he did so to emphasize the weighty role he believes regulatory frameworks should play in that analysis. According to Justice Scalia:

> One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[68]

This framework expands the issue beyond duplicative claims and the practical justifications for why certain antitrust suits cannot proceed in light of regulation. It further appears to imply that a more lenient balancing test should be used rather than strict clear repugnancy analysis. Justice Scalia did not outright say this, but why else would he fail to cite to clear repugnancy *at all*?

2. Credit Suisse

In 2007, the Court in *Credit Suisse Sec. (USA) LLC v. Billing* ("*Credit Suisse*") further eroded enforcement in the Court's most recent ruling on the application of antitrust laws to regulated markets.[69] In *Credit Suisse*, the Court

66. *Id.* at 406, 407.
67. *Id.* at 411.
68. *Id.* at 412.
69. 551 U.S. 264 (2007).

held that "the threat of antitrust mistakes" was too great to allow an antitrust suit to proceed despite the saving clauses of the securities acts under consideration.[70] This holding placed an outsized emphasis on the potential havoc antitrust intervention could wreak, but that fear was largely unfounded.[71]

While *Credit Suisse* cites to the clear repugnancy standard, it does so only to further undercut its disfavored status. In an opinion authored by Justice Breyer, the Court defined the clear repugnancy standard according to an interpretation distilled from *Silver*, *Gordon*, and *NASD* as "clear incompatibility" between "securities law and the antitrust complaint."[72] But Justice Breyer first listed a number of specific factors to consider in that approach:

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. We also note (4) that in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that securities law seeks to regulate.[73]

While it is possible to interpret this definition as maintaining the status quo, these additional factors actually water down the clear repugnancy analysis in several ways. Specifically, the third factor merely requires a "risk" that there is some kind of conflict, which is a serious departure from the historically disfavored status of antitrust preclusion.

Justice Breyer went even further by quickly dismissing the possibility that §§ 77p(a) and 78bb(a) of the Securities Act and the Securities Exchange Act could be interpreted "as saving clauses so broad as to preserve all antitrust actions."[74] According to the framing of the Court, if a saving clause does not explicitly mention antitrust, courts must determine if and how antitrust law might be precluded: "Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws."[75] By posing the issue in this manner,

70. *Id.* at 282.

71. *See* Lancieri, Posner & Zingales, *supra* note 3 (empirically connecting the decline in U.S. antitrust enforcement with the advancement of big business interests).

72. *Credit Suisse*, 551 U.S. at 275.

73. *Id.* at 275–76.

74. *Id.* at 275.

75. *Id.* at 271.

Breyer essentially lost track of the purpose of the plain repugnancy standard and reduced the analysis to a specific interrogation of securities markets.

Breyer wrote that he fully accepted petitioners' argument that despite having full control over the matter and actively disapproved of the behavior, the SEC only regulates some of the conduct in question. But he argued that this lack of intervention is an intentional exercise of discretion intended by Congress, and that "there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law."[76] Not only does this interpretation grossly underestimate courts' ability to discern between approved and unapproved conduct, but it also completely erases the original purpose of antitrust as a check on poorly functioning regulation. If the SEC is not addressing clearly harmful behavior that it itself disapproves of, and if the antitrust action would be in line with the SEC's goals, then why should the case be precluded?

Justice Thomas wrote a compelling dissent in *Credit Suisse* pointing to just this issue that harkens back to the origins of the clear repugnancy standard and antitrust as a common law right. As he noted, the texts of both §§ 77p(a) and 78bb(a) preserve "any and all other rights and remedies that may exist at law or in equity," but make no specific reference to antitrust.[77] He reasoned,

> [T]he mere existence of targeted saving clauses does not demonstrate—or even suggest—that antitrust remedies are not included within the "any and all" other remedies to which the securities saving clauses refer. Although Congress may have singled out antitrust remedies for special treatment in some statutes, it is not precluded from using more general saving provisions that encompass antitrust and other remedies. Surely Congress is not required to enumerate every cause of action—state and federal—that may be brought. When Congress wants to preserve all other remedies, using the word "all" is sufficient.[78]

This analysis reflected Senator Sherman's assertion that, "[t]he purpose of [the Sherman Antitrust Act] is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests."[79] By requiring that a saving clause explicitly mention antitrust, the majority limited the reach of enforcement of nearly any regulated industry.

76. *Id.* at 282.
77. *Id.* at 287 (Thomas, J., dissenting).
78. *Id.* at 289 (Thomas, J., dissenting).
79. 21 CONG. REC. 2456 (1890).

In a similar vein, Justice Stevens's concurrence also rejected the majority's determination that antitrust action is precluded and would instead have argued that the plaintiffs simply failed to state a cognizable claim. He wrote that,

> Surely I would not suggest, as the Court did in *Twombly*, and as it does again today, that either the burdens of antitrust litigation or the risk "that antitrust courts are likely to make unusually serious mistakes," . . . should play any role in the analysis of the question of law presented in a case such as this.[80]

Justice Stevens explicitly pointed to the unjustified paranoia that the courts are incapable of properly addressing antitrust claims in regulated markets.

In sum, the Court has muddied the waters of antitrust in regulated markets based on unfounded fears. As a result, they have led a misguided attempt to uphold administrative agencies regardless of whether they are effectively protecting and promoting competition. And they have driven a wedge between antitrust and regulation that is difficult to dislodge.

III. PARANOIA, UNDERENFORCEMENT, AND THE PSN MARKET

The Court's unfounded fear of antitrust overenforcement comes from a misunderstanding of the goals of antitrust and regulation and how they relate. This concern about overenforcement is palpable in the language used repeatedly by the Court in its latest applications of the clear repugnancy standard. As Justice Breyer gravely opines in *Credit Suisse* with respect to securities markets, not only is "any enforcement-related need for an antitrust lawsuit . . . unusually small," but "to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets."[81] As far as the majority is concerned, antitrust is merely a burden on regulation which itself is already a burden on markets—to allow both at once would stifle efficiency and expose market participants to potentially duplicative or even conflicting obligations. This fear is symptomatic of the past fifty years of Court opinions subverting the clear repugnancy doctrine into one of implied immunity.

More importantly, this fear is also reflective of a larger cultural subservience to the cult of business. As Lancieri, Posner, and Singales illustrated and argued based on a unique empirical study, there has been a serious decline in antitrust enforcement since the 1950s as a result of both

80. *Credit Suisse*, 551 U.S. at 287 (Stevens, J., concurring).
81. *Id.* at 283.

regulatory underenforcement and judicial antitrust anti-textualism.[82] They write,

> Since the 1970s, no president advocated for a reduction in antitrust enforcement, no Congress voted for reduced enforcement except indirectly in obscure budget bills, and no Senate knowingly confirmed nominees to the FTC or DOJ, or to the Supreme Court, who openly promised to reduce antitrust enforcement (again, with some limited exceptions). The decline of antitrust enforcement took place at the hands of regulators and judges with little to no open political support[.][83]

Despite ostensible support for antitrust enforcement across the political spectrum, their research shows that big business interests have successfully swayed the Court towards implied immunity and reliance on under-resourced regulation. The warping of antitrust into antibusiness in the eyes of regulators and the Court has led the United States to an unprecedented point of market concentration and deregulation.

Was any of this fear warranted? Or has it actually manifested even greater harms than the Court's imaginary antitrust bogeyman?

A. THE CONSEQUENCES OF UNDERENFORCEMENT

Deregulation and reduced enforcement have failed to generate greater efficiency and more robust competition. Even worse, they have resulted in a concentration of market power across industries large enough to rival the era of Robber Barons that inspired the Sherman Act.

The failures of deregulation are apparent from Lancieri, Posner, and Singales's research results. Contrary to Chicago School promises of increased efficiency, they found that unlike otherwise-similar nations, annual growth in output per hour worked in the United States has actually decreased significantly since the '70s,[84] and "[w]hile median earnings of male full-time workers in the United States grew 36% in real terms between 1960 and 1980, they did not change at all between 1980 and 2016."[85] Moreover, as a result of profits concentrating around larger firms, "during the 1980–2020 period, the share of income earned by the top 1% of the income distribution grew from 10% to 19% in the United States, versus an increase from 8% to 13% in the United Kingdom and from 7% to 10% in France."[86] In other words, the U.S.

82. *See* Lancieri, Posner & Zingales, *supra* note 3, at 41.
83. *Id.*
84. *Id.* at 54.
85. *Id.* at 55.
86. *Id.* at 56.

economy has not benefitted from decreased antitrust enforcement. Rather, a handful of corporations have benefitted by building monopoly power across industries.

The failures of underenforcement are market consolidation and its accompanying harms to consumers in the long run—higher prices, lower quality products, and worse overall quality of life for the average American both as a worker and as a customer. These failures are evident from looking at nearly any market in the country. As Rebecca Giblin and Cory Doctorow write,

> Just a handful of firms—or sometimes only one—now control everything from the arts (publishing, movies, music, streaming, comics, bookselling, movie theaters, talent agencies, games, wrestling, radio stations) . . . to agribusiness (seeds, livestock, tractors, fertilizer, pesticides, precision agriculture, and the production of meat, eggs, grain, and produce) and everything in between (cruise lines, cheerleader uniforms, groceries, pharmaceuticals, glass bottles, medical devices, airlines, eyeglasses, athletic shoes, fast food, food delivery, and pet food).[87]

They attribute much of this concentration to a "tsunami of mergers: the number of [U.S.] publicly traded companies dropped by half even as they increased by 50% in other developed nations."[88] But they also attribute it to new forms of anticompetitive behavior that have only become possible through technology, like "data moats" and "network effect moats" that are creating "chokepoints that separate producers from consumers so [corporations] can capture a disproportionate share of the value of other people's work."[89] Monopoly may temporarily lower prices for consumers, but when monopsony power kicks in, those same consumers lose out on more value from their labor as workers and eventually are still subjected to higher prices through gimmicks like shrinkflation[90] and because firms have realized they *can* just raise prices in the wake of disasters like the COVID-19 pandemic.[91]

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87. GIBLIN & DOCTOROW, *supra* note 7, at 4–5.

88. *Id.* at 5.

89. *Id.* at 6.

90. *See, e.g.*, *'Shrinkflation' Accelerates Globally as Manufacturers Quietly Shrink Package Sizes*, NAT'L PUB. RADIO (June 8, 2022), https://www.npr.org/2022/06/08/1103766334/shrinkflation-globally-manufacturers-shrink-package-sizes.

91. Even though pandemic-induced shortages have ended, prices have remained unusually high. *See, e.g.*, Rachel Layne, *Why Are Prices So High Right Now—and Will They Ever Return to Normal?*, HARV. BUS. SCH. (Feb. 10, 2022), https://hbswk.hbs.edu/item/why-are-prices-so-high-right-now-inflation.

For PSNs, this concentration is readily apparent from the handful of technology companies that dominate global internet service provider (ISP) markets, including Meta. Of the largest corporations in the world by market capitalization, Apple, Microsoft, Alphabet, Amazon, and Meta are all in the top ten.[92] In 2023, three of the top four social media interfaces were owned by Meta with over a billion monthly active users on each: Facebook, WhatsApp, and Instagram.[93] PSNs are defined by the number of users they provide access to for advertisers and app developers, and by the amount of time they can capture users' attention and have them engage with those ads and apps. These companies arose in the current cycle of drawn-out underenforcement and have never been adequately regulated. Their unprecedented rate and scale of growth is indicative of those origins. The PSN model lays bare the failure of the "consumer welfare" ethos that continues to dominate antitrust discourse.

Proponents of a "consumer welfare" antitrust ethos like Herbert Hovenkamp argue that antitrust is *meant* to be limited and narrowly focused, and its standards have simply been misapplied by its dissenters on either side of the political spectrum. According to Hovenkamp, "bigness" is not a problem under the enlightened consumer welfare standard because,

> While small competitors of a large low cost and high output firm can be injured, many other small firms benefit, including suppliers and retailers. A good illustration is Amazon, which is a very large firm that generally sells at low prices and has maintained high consumer satisfaction. Amazon has undoubtedly injured many small firms forced to compete with its prices and distribution. At the same time, however, Amazon acts as broker for millions of small firms who use its retail distribution services. When a very large firm produces more, it creates opportunities for other firms that sell complements, that distribute the products that a large firm produces, or that supply it with inputs.[94]

As far as Hovenkamp is concerned, antitrust has no place interfering with a firm like Amazon because it hasn't hurt consumers and it props up as many small businesses as it crushes. But he only tells half the story.

92. *The 100 Largest Companies in the World by Market Capitalization in 2022*, STATISTA (Aug. 5, 2022), https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/.

93. *Most Popular Social Networks Worldwide as of January 2023, Ranked by Number of Monthly Active Users*, STATISTA (Feb. 14, 2023), https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/#:~:text=Meta%20Platforms%20owns%20four%20of,monthly%20core%20Family%20product%20users.

94. Herbert J. Hovenkamp, *Antitrust: What Counts as Consumer Welfare?*, at 5, UNIV.OF PENNSYLVANIA CAREY LAW SCHOOL ALL FACULTY SCHOLARSHIP, PAPER NO. 2194 (2020), https://scholarship.law.upenn.edu/faculty_scholarship/2194/.

Hovenkamp leaves out everything he has decided does not have a place in antitrust law. As a result of market power concentration like Amazon's domination of online shopping and shipping, consumers have experienced a significant decrease in the quality of their experience as the company becomes too unwieldy to manage. For Amazon, this has meant a proliferation of fraudulent and shoddy products on the platform.[95] This benefits Amazon by making their own branded knock-off products—the same product ideas they have blatantly stolen from small businesses—more appealing.[96] Moreover, market power like Amazon's allows a firm to wield power over producers and suppliers that ultimately can reduce and control the choices to which consumers have access. When only a handful of firms control what is available to consume, creative expression can be stifled, innovation can be deterred, and consumers have nowhere to turn for alternatives that better align with their needs, like privacy rights or promoting their local community and economy. The extrinsic costs of oversized behemoths are unaccounted for yet notable, like the environmental impact of unchecked consumerism and the perpetuation of imperialist harms through global extractionism.[97]

From a Neo-Brandeisian perspective, the very bigness that Hovenkamp derides as irrelevant is the real problem. As Lina Khan and Sandeep Vaheesan argue, market concentration results in regressive wealth redistribution, enables the accumulation of political clout, and threatens the sanctity of democracy itself.[98] And nowhere is this more easily observable than in the market of PSNs that the FTC is now addressing under Khan's leadership.

95. *See* Paul Conley, *Nearly a Third of Amazon Shoppers Are Disappointed by Quality or Timeliness*, DIGITAL COM. 360 (Jan. 19, 2022), https://www.digitalcommerce360.com/2022/01/19/nearly-a-third-of-amazon-shoppers-are-disappointed-by-quality-or-timeliness/ ("The challenge is that Amazon spent quite a bit of time pre-pandemic, saying, 'we are taking control of our own logistics, we have our Amazon trucks, we have our Amazon Prime shipping,' Ng says. 'Yes, there are things out of everyone's control, but they've spent so much time talking about efficiency and scale that it is actually hurting them.'").

96. Not only are physical goods an environmental problem, the storage of data and cloud computing are substantial as well. *See* Ashleigh Hollowell, *Why Data Has a Sustainability Problem*, VENTURE BEAT (July 7, 2022), https://venturebeat.com/data-infrastructure/why-data-has-a-sustainability-problem/.

97. *See* MICHAEL HARDT & ANTONIO NEGRI, ASSEMBLY 167 (2017) ("Capitalist industry and commodification have long had destructive effects, but in some respects extractivism today brings that process to a head and a point of no return. *Capital against the earth*—one or the other may survive, but not both.").

98. Lina M. Khan & Sandeep Vaheeson, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

The following Sections apply this perspective on bigness to the FTC's amended complaint against Meta regarding its acquisitions of WhatsApp and Instagram.

B. A CASE STUDY: *FTC V. META PLATFORMS, INC.*

In its amended complaint, the FTC defines personal social networking as a unique way of maintaining personal connections that encompasses a multitude of modes of interaction.[99] PSNs are similar to natural monopolies, like energy and telephone networks, "characterized by strong network effects: the value of the service to individual consumers increases with the number of other consumers that use the service." [100] Also like energy and telecommunications networks, PSNs have come to occupy an indisputably important place in contemporary society.

Although it began as a juvenile tool for ranking the appearances of college classmates,[101] Facebook ("FB") has since become one of a handful of sites hosting virtually all online speech in the United States. It is not difficult to illustrate the place FB has secured in American culture: there are "over 300 million [users] in the United States alone."[102] In 2020, every single member of Congress posted on Facebook—and they posted to Facebook and Twitter over 2.2 million times just that year.[103] In 2021 alone, Facebook's Law Enforcement Response Team (LERT) received nearly 120,000 "legal process requests" according to their own recordkeeping.[104] And Meta even offers a popular marketplace for goods and has increasingly branched out into other financial services.[105] In other words, Facebook is so integrated with social,

99. *Meta Complaint*, *supra* note 13, at 7.

100. *Id.* at 8.

101. *See* Julia Reinstein, *Mark Zuckerberg Tells Congress: No, Facebook Wasn't Invented to Rank Hot Girls, That Was My Other Website*, BUZZFEED NEWS (Apr. 11, 2018), https://www.buzzfeednews.com/article/juliareinstein/facemash.

102. Connor M. Correll, *Facebook, Crime Prevention, and the Scope of the Private Search Post-*Carpenter, 56 GA. L. REV. 787, 787 (2022).

103. Connor Perrett, *Members of the 116th Congress Rail Against Social-media Companies But Posted to Twitter and Facebook a Record 2.2 Million Times*, INSIDER (Jan. 26, 2021), https://www.businessinsider.com/congress-members-social-media-records-analysis-2021-1.

104. *Government Requests for User Data - United States,* META, https://transparency.fb.com/data/government-data-requests/country/US/ (last visited Oct. 11, 2023).

105. *See, e.g.*, Hannah Murphy & Kiran Stacey, *Facebook Libra: the Inside Story of How the Company's Cryptocurrency Dream Died*, FIN. TIMES (Mar. 10, 2022), https://www.ft.com/content/a88fb591-72d5-4b6b-bb5d-223adfb893f3.

economic, and political life in America that some have argued it is a state actor[106] or even operating as a government in and of itself.[107]

Despite the outsized societal importance of social media, the market for PSNs is uniquely underregulated and underenforced. Unlike utilities and telecoms that have been federally regulated since the early 20th century, PSNs originated in the mid-2000s at a low point in antitrust enforcement and grew exponentially with the development and widespread adoption of mobile devices[108] throughout the 2010s. Concurrently, regulatory agencies contended with a growing antagonism to their role in a federalist system.[109] Further complicating the issue, the underlying technology behind PSNs is constantly developing and poorly understood by both legislators and the judiciary, while legal barriers such as the First Amendment and § 230 of the Communications Decency Act have made regulation difficult to formulate or enact.[110]

The need for regulation, however, is clear from the similarities between PSNs and utilities and telecoms.[111] First, the technology underlying PSNs, and their data-driven business models (DDBMs) make anticompetitive harms difficult to assess and remedies a challenge to administer. Second, the high barriers to entry, including infrastructural demands, give early market entrants an inordinate advantage over new competitors. And third, the social

106. *See, e.g.*, Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 4, 2019), https://www.lawfareblog.com/are-facebook-and-google-state-actors.

107. *See, e.g.*, Editorial Board, *Facebook is Looking a Lot Like a Government*, WASH. POST (Feb. 23, 2020), https://www.washingtonpost.com/opinions/facebook-is-looking-a-lot-like-a-government/2020/02/23/2977a204-53f1-11ea-929a-64efa7482a77_story.html.

108. *See Meta Complaint*, *supra* note 13, at 3.

109. *See, e.g.*, Noah Feldman, *Gorsuch v. the Administrative State Is Really Heating Up*, BLOOMBERG (Jan. 15, 2022), https://www.bloomberg.com/opinion/articles/2022-01-15/supreme-court-conservative-fight-against-regulatory-state-is-really-heating-up#xj4y7vzkg.

110. *See* VALERIE C. BRANNON, CONG. RES. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 15–16 (Mar. 27, 2019), https://www.everycrsreport.com/files/20190327_R45650_9f272501744325782e5a706e2aa76781307abb64.pdf ("[C]ourts have often dismissed lawsuits attempting to hold social media providers liable for regulating users' content, whether because the court concludes that the First Amendment does not apply to the actions of these private actors or because the court holds that Section 230(c)(2) of the CDA bars the lawsuit . . . . Particularly because of Section 230, there are few, if any, federal or state laws that expressly govern social media sites' decisions about whether and how to present users' content.").

111. For a general understanding of the debate regarding PSNs as infrastructure and thus as comparable to other natural monopolies like electricity and telecommunications, *compare* Luigi Zingales, *The Silent Coup*, PROMARKET (Jan. 11, 2021), https://www.promarket.org/2021/01/11/facebook-twitter-ban-trump-parler-concentration-power/, *with* Carlo Amenta, Michele Boldrin & Carlo Stagnaro, *Digital Platforms May Be Monopolistic Providers, But They Are Not Infrastructure*, PROMARKET (Jan. 26, 2021), https://www.promarket.org/2021/01/26/digital-platforms-monopolistic-infrastructure-free-speech/.

essentiality of PSNs' speech-hosting functions creates a hefty public interest in favor of government oversight.

From an antitrust perspective, the PSN market is complicated because it is two-sided. Two-sided markets, also known as multi-sided platforms (MSPs), are organizations that "have two key features beyond any other requirements (such as indirect network effects or non-neutrality of fees): [t]hey enable direct interactions between two or more distinct sides and [e]ach side is affiliated with the platform."[112] While the classic example of an MSP is a credit card company, this type of business model is increasingly common as a result of the internet and targeted advertising. PSNs like Meta put the majority of their resources into increasing and tracking user engagement so that they can sell their attention to advertisers and app developers. PSNs are designed to maximize the interactions between these three groups and thus facilitate third-party transactions. Users theoretically benefit because the networking services remain "free," while advertisers and developers benefit through the volume of consumers they can reach in a maximally efficient way.

However, as the FTC articulates in their complaint, a lack of market oversight has enabled Meta to acquire monopolistic control through its anticompetitive purchases of WhatsApp and Instagram.[113] And these harms are serious precisely because Meta has come to occupy such an important role for consumers, advertisers, and developers. "Data is the new oil," as mathematician Clive Humby quipped in 2006.[114] A PSN like Meta generates, stores, and analyzes more personal data than almost any other business—data provided for free by users who pay in attention instead. And that attention, refined from the raw masses of data, is invaluable to anyone trying to sell a product, service, or idea. According to the FTC's narrative, Meta struggled to maintain their hold on this data and keep up with competitors as mobile devices proliferated during the 2010s and changed the ways and degree to which people interact online.[115] Old data is practically useless for sales, so Meta must maintain constant streams of fresh data to attract advertisers, better target user attention, and further refine their insight-generating algorithms.[116]

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112. Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162, 163 (2015).

113. *Meta Complaint*, *supra* note 13, at 25–26.

114. Jo Ann Barefoot, *The Case for Placing AI at the Heart of Digitally Robust Financial Regulation,* BROOKINGS (May 24, 2022), https://www.brookings.edu/research/the-case-for-placing-ai-at-the-heart-of-digitally-robust-financial-regulation/.

115. *Meta Complaint*, *supra* note 13, at 3.

116. *See, e.g.*, Robert Springer, *Data Is Useless Without Meaning: The Importance of Insight*, TILT (Sept. 9, 2019), https://www.thetilt.com/content/data-meaning-insight ("Digital marketers are not regularly cleaning their customer data, which the InfoGroup report says should be

To overcome these struggles in the market, the FTC alleges that Meta engaged in two specific types of anticompetitive conduct. First, they leveraged the size of their network and access to the interoperability of their Application Programming Interface (API)[117] to attract third party developers.[118] But once those developers were reliant on the system and Meta had derived extensive benefits from the user base they attracted and locked in, "Facebook imposed several other policies restricting app developers' use of Facebook Platform, including Facebook APIs."[119] As a result, "[w]ith the implementation of these anti-competition policies, developers who had relied on Facebook's expressions of openness suddenly found themselves targeted by Facebook."[120] The court dismissed this part of the complaint because Meta ended these anticompetitive policies, and § 2 of the Sherman Act cannot be applied retroactively. However, it survived as factual support for the other claim.[121]

Second, Meta strategically identified threats to their market dominance and then acquired those threats in order to build a digital moat around itself.[122] To do so, Meta first acquired Onavo, a firm that "marketed itself to users as providing secure virtual private networking services, but—unknown to many users—it also tracked users' activity online."[123] Using the intelligence gathered from this service, Meta would identify targets and then "acquire a potential rival and keep the rival's mechanics deployed to frustrate others' efforts to gain scale using similar mechanics."[124] This is how Meta came to own both Instagram and WhatsApp, two apps that threatened Meta's growth by innovating in the areas of photo-sharing and mobile-messaging respectively. At the same time, Meta also acquired Octazen (a contact importing service)

done weekly or at least monthly. Despite that, 'it is a pervasive problem in the industry to see large companies sitting on years of inactive files,' the report states.").

117. An API is software that facilitates interaction between two or more computer programs.

118. *Meta Complaint*, *supra* note 13, at 14.

119. *Id.* at 45.

120. *Id.*

121. Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34, 60–61 (D.D.C. 2022) ("The question therefore is what to do with Count II: should the Court dismiss the portion that encompasses challenges to the Platform policies, or must it allow the count to remain given its incorporation of the acquisitions? The Court concludes that the latter is the better course, with an important caveat . . . . In the meantime, the Court will not award the FTC a discovery windfall for using Count II as a Trojan horse to smuggle in the Platform policies. Instead, it will not permit what would certainly be time-consuming and costly discovery on such policies.").

122. *Meta Complaint*, *supra* note 13, at 34.

123. *Id.* at 23.

124. *Id.* at 24.

and Glancee (a geolocation service).[125] These two acquisitions allowed Meta to further cut off competitors from vital growth services and dig an even deeper moat around itself.

Meta's control of the market through these acquisitions can be concretely assessed in a few ways. To measure Meta's dominance in the market, the FTC analyzed three main metrics: time spent, daily active users (DAUs), and monthly active users (MAUs).[126] Not only are these similar to the metrics by which Meta judges its own performance and those used in antitrust analysis abroad, they are also indicative of the core mechanism of the PSN business model: captured attention. The value of a PSN comes from both the volume of users it can attract through the network effect and from the ability to keep each of those users engaged with the platform for as long as possible each day. As Tim Wu writes, "Zuckerberg . . . understood advertising's potential to degrade his product . . . the Holy Grail was advertising that people actually wanted to see; Facebook figured that nanotargeting could make that happen."[127] By monopolizing users and their attention—and keeping competitors from doing the same—Meta was able to dominate the targeted advertising space.

According to the FTC, the reason why this behavior is problematic is threefold: Meta's "better to buy than compete" strategy deprived consumers and advertisers of innovation, quality improvements, and choice.[128] By acquiring existing companies to deter competition rather than to improve the user experience, Meta has slowly stripped WhatsApp and Instagram of the qualities that once made them appealing to users, transforming their features into whatever will help quash the latest new competitor.[129] In consolidating all these services into one company, Meta has also subjected the users of Instagram and WhatsApp to the same infrastructure as Meta, making them all more vulnerable to simultaneous service outages and privacy breaches.[130] And by dominating the market in this unethical manner, Meta has also denied consumers and advertisers greater choice of services and privacy protection.[131]

While the FTC's complaint stops there, Meta's domination of attention is also a threat to democracy. As illustrated by the proliferation of mass manipulation and disinformation campaigns run during elections around the

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125. *Id.* at 24–25.

126. *Id.* at 61.

127. TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 296–97 (2016).

128. *Meta Complaint*, *supra* note 13, at 1–2.

129. *Id.* at 42.

130. *Id.* at 42–43.

131. *Id.* at 73.

world over the past decade,[132] Meta's massive user base enables private interest groups and political actors to easily target vulnerable audiences. This is a risk involved with any social media or social network, but the sheer scale of Meta combined with the deeply personal data it collects make it particularly appealing to malicious actors.

As noted in the 2021 Annual Threat Assessment of the U.S. Intelligence Community, "[f]oreign states use cyber operations to steal information, influence populations, and damage industry, including physical and digital critical infrastructure."[133] Because FB, WhatsApp, and Instagram all share the same infrastructure and provide access to over a billion people around the world, it is an appealing one-stop-shop for anyone buying or selling influence. It is also a major stress point for malicious actors to halt global communications, as evidenced by the global outcry every time Meta products (and all the third-party apps that rely on it for log-in functionality) crash simultaneously.[134] Meta even settled a class action lawsuit in 2022 as a result of their role in Cambridge Analytica's mass manipulation of voters in 2016.[135] Based on all this, it is clear that the sheer size and scale of Meta is the biggest part of the problem.

But how does the government remedy a problem of this scale? Antitrust is often criticized as being difficult to administer, especially when it comes to natural monopolies. As Richard Posner wrote in 1968, a natural monopoly is defined by "the relationship between demand and the technology of supply."[136] For utilities and telecoms, the technologies in question are the vast infrastructural networks and machinery required to operate at scale—much of which requires specialized expertise to understand. PSNs are not so different, and there is little overlap between those with internet savvy and members of the judiciary or Congress. As of 2020, the average age of a federal judge was

132. *See Report: Digital Election Interference Widespread in Countries Across the Democratic Spectrum*, FREEDOM HOUSE (Dec. 7, 2020), https://freedomhouse.org/article/report-digital-election-interference-widespread-countries-across-democratic-spectrum.

133. OFF. DIRECTOR NAT'L INTELLIGENCE, ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 20 (Apr. 9, 2021), https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf.

134. *See* Rhona Ascierto, *Too Big to Fail? Facebook's Global Outage,* DATA CTR. DYNAMICS (Oct. 15, 2021), https://www.datacenterdynamics.com/en/opinions/too-big-to-fail-facebooks-global-outage/ ("Facebook's hours long outage on October 4th snarled completely unrelated applications globally, underscoring the criticality—and fragility—of publicly shared digital infrastructure.").

135. James Vincent, *Meta Agrees to Pay $725 Million to Settle Cambridge Analytica Class Action Lawsuit*, VERGE (Dec. 23, 2022), https://www.theverge.com/2022/12/23/23523862/meta-cambridge-analytica-class-action-lawsuit-settlement-725-million.

136. Richard Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1968).

about sixty-nine.[137] As of 2021, the average age of a congressmember was fifty-eight in the House and sixty-four in the Senate.[138] And in the same year, 2021, only 50% of U.S. adults over the age of sixty-five used Facebook and YouTube, and no more than 20% used any of the other major social media sites.[139]

This general lack of understanding of PSNs and their business models exacerbates a long-standing problem of antitrust law: intervention should account for the specificities of the market in question. Under traditional principles of antitrust analysis, courts consider the particularities of the industry and adjust application of the law to the circumstances including the existence of regulation.[140] An unproblematic behavior in one market may be anticompetitive in another, depending on factors like market share, price regulation, and entry barriers. One answer to this problem has been to shift enforcement away from antitrust by enacting regulation with some antitrust-like functions such as the 1996 Telecommunications Act.

But how can Congress even begin to regulate something as global and unmanageable as a network used by over two billion people each month?[141] When questioned by Congress about the difficulties of moderation in 2018, Zuckerberg acknowledged that, "this is an arms race, right? . . . which is why one of the things I mentioned before is we're going to have more than 20,000 people, by the end of this year, working on security and content review across the company."[142] With only 20,000 people moderating a network of nearly two billion, it's no surprise that problems slip through the cracks—problems that could be avoided by shrinking Meta's scale while simultaneously growing its human moderation.

Fortunately, the remedy suggested by the FTC is simple and easily administered: divestiture of WhatsApp and Instagram.[143] While FB will still be a substantial and unwieldly PSN in and of itself, the divestiture of both WhatsApp and Instagram will substantially reduce Meta's size and allow the

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137. Francis Shen, *Aging Judges*, 81 OHIO ST. L.J. 235, 235 (2020).

138. *117th United States Congress: A Survey of Books Written by Members*, LIBR. CONG. (June 15, 2022), https://guides.loc.gov/117th-congress-book-list (discussing the average age of Congress members).

139. Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RES. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/.

140. *See generally* Posner, *supra* note 136.

141. *See Transcript of Mark Zuckerberg's Senate Hearing*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/ (questioning Zuckerberg on his ability to manage a platform with two billion users).

142. *Id.*

143. *Meta Complaint*, *supra* note 13, at 79.

two platforms to move away from Meta's infrastructure. Moreover, severing them from Meta's ownership will end the anticompetitive "digital moat" conduct by which Meta has unfairly prevented innovation in mobile photo sharing and messaging. The most complex part of the divestiture will be the infrastructural issues, but that is not a problem for the courts—it is a prompt to establish or designate an appropriate regulatory body to administer the remedy. And even if WhatsApp and Instagram don't survive the separation, at least the PSN market will have space for new firms to compete and offer users better privacy protections, better APIs, and unique ways to share content and connect with others.

IV. AN OPPORTUNITY FOR RECONCILIATION

The FTC's case against Meta provides a unique opportunity to assess the proper relationship between antitrust and regulation in an industry emblematic of new, technology-driven anticompetitive behavior. The difference between how the court treated each of the FTC's claims indicates the boundaries of where antitrust's reach ends and the need for regulation begins. By assessing these differences and the appropriate boundaries between antitrust and regulation, it is possible to reconcile the two and provide a concrete example of how a regulatory framework can not only survive antitrust intervention but become stronger as a result.

First, it is necessary to address consumer harms that antitrust cannot reach with some form of regulation. This is because interoperability issues, like shutting developers out of an API on which they have become reliant, are not typically redressable via antitrust enforcement. According to Shelanski and William Rogerson, there are three main reasons why regulation can effectively supplement antitrust for digital platforms: (1) antitrust enforcement has been targeted by "well-founded criticism"; (2) regulation offers different and potentially more effective tools than antitrust; and lastly, (3) "because of network effects, conduct that courts ordinarily judge under antitrust law's general rule of reason might have different presumptive effects, and therefore be better governed by a more specific set of standards, in digital platform industries."[144] While the first point is questionable given the unfounded paranoia discussed above, the next two points are important to explore further.

Because PSNs have strong network effects and high infrastructural barriers,[145] there is a certain amount of scale that will always be necessary for

144. William P. Rogerson & Howard Shelanski, *Antitrust Enforcement, Regulation, and Digital Platforms*, 168 U. PA. L. REV. 1911, 1914–15 (2020).
145. *See id.*

one to function. In fact, it can be difficult to imagine a social networking market composed of smaller, more localized firms because the internet is inherently global and detached from locality. But that does not mean such an exercise is not worthwhile. Shelanski and Rogerson extol the potential benefits of what they call "light-handed pro-competitive" (LHPC) regulation that "could include interconnection/interoperability requirements (such as access to application programming interfaces (APIs)), limits on discrimination, both user-side and third-party-side data portability rules, and perhaps additional restrictions on certain business practices subject to rule of reason analysis under general antitrust statutes."[146] While these are all reasonable suggestions that could be included in any potential future regulatory framework, they are not enough without antitrust intervention first because none of these solutions target bigness.

This is where it becomes clear that antitrust and regulation must be redefined in relation to each other. When antitrust is viewed from a "consumer welfare" perspective, regulation seems sufficient to handle any problems that could arise and antitrust feels inappropriate because it is a blunt tool in comparison. As stated at the beginning of this Note, antitrust isn't meant to protect consumers like regulation does, it is meant to protect competition.

Regulation is perfectly adequate at protecting consumers in some ways, such as mandated sharing of infrastructure, but it can't break up a behemoth into regulatable size. Antitrust arose in the context of federalism and was intended to prevent state monopolies from becoming national monopolies,[147] but underenforcement prevented that goal from being achieved. Now, national monopolies have become international monopolies that not only harm U.S. competitors, but that stall the development of other nations' internet innovations. Renewed antitrust enforcement is therefore critical because antitrust must come first for regulation to be effective and then exist concurrently to keep regulation effective.

Moreover, not only is the need for antitrust enforcement clear—the possibility is quite feasible as well. The infrastructure of PSNs is distinct from that of energy or telecommunications because it is virtual, and it is more divisible in some ways. If API interoperability is regulated, the storage of data becomes the biggest issue. And even though the internet is not localized, data is. Largely as a result of jurisdictional evidence collection issues, it has become

146. *Id.* at 1915.

147. *See* Crane, *supra* note 14 (discussing antitrust's role as a check on state-sanctioned monopolies).

common practice for internet firms to store data locally.[148] This means that a Baby Bell-esque break down of a company like Meta would actually be easier to administer than one might think, so long as a regulatory framework is in place to maintain interoperability.

To summarize, the current state of PSNs makes the proper relationship between antitrust and regulation simple. If antitrust can break up a market to prevent power concentration and facilitate more effective oversight, then regulation can take over to protect consumers from other harms. When regulation begins to falter, as it did in the area of telecommunications, antitrust can step in again to address concentration and urge regulation changes to prevent that concentration from building *in that manner*. For this to work, both antitrust and regulation must be constantly vigilant and simultaneously engaged in monitoring a given market. Antitrust is a check on poorly functioning regulation and on regulatory capture, and it bluntly rebalances markets so regulation can be more effective. A renewed investment in antitrust enforcement is also necessary to address the now-global scale of monopolies like Meta.

V. CONCLUSION

The current state of the PSN market clarifies this symbiotic relationship and its importance—and provides an opportunity to establish that relationship as the norm. It is unlikely that a comprehensive regulatory framework for PSNs will exist any time soon because there are larger political splits over how and what content should be regulated. But if any framework is ever proposed, it must include an antitrust saving clause that goes further than the Telecommunications Act of 1996. Instead of just preserving antitrust actions, it should explicitly proscribe the appropriate and continued role of antitrust enforcement as a check on regulation and the ways in which such regulation can entrench certain firms into monopolistic power.

Moreover, although the courts have been hostile to antitrust enforcement over the past fifty years, the Supreme Court has shifted so far towards being equally hostile towards Big Tech that a rehabilitation of the saving clause may now be possible. Justice Breyer and Justice Scalia, two of the biggest influences on the withdrawal of antitrust from regulated markets, are no longer on the Court. And Justice Thomas, a staunch advocate for antitrust saving clauses

148. *See* Erol Yayboke, Carolina G. Ramos & Lindsey R. Sheppard, *The Real National Security Concerns Over Data Localization*, CTR. FOR STRATEGIC & INT'L STUD. (July 23, 2021), https://www.csis.org/analysis/real-national-security-concerns-over-data-localization ("[G]overnments are increasingly seeking to maintain 'digital sovereignty' and control through protectionist data localization mandates").

despite his general hostility to antitrust, has more power than ever before as the most senior member. When reframed in an originalist light as a Lochnerian check on state-sanctioned monopolies, antitrust can be made appealing even to the most anti-government of libertarians.[149]

Deregulation and poorly functioning regulation must be recognized as the means through which state-sanctioned monopoly power operates. The solution is increased antitrust enforcement. As unchecked monopoly power now reaches a global scale, support from across the political spectrum has never been more necessary to return antitrust enforcement to its rightful place in both regulated and unregulated markets as a check on the regulatory state.

149. Crane, *supra* note 14, at 513.