UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Prepared Keynote Address by Chairman Joseph J. Simons[1]

At American University Washington College of Law Conference on

Themes of Professor Jonathan Baker's New Book,

The Antitrust Paradigm: Restoring a Competitive Economy

March 8, 2019

Good afternoon. First, I want to thank Jon for asking me to participate in this event. Jon's new book, *The Antitrust Paradigm*, is a significant one.[2] Jon has called for us—courts, agencies, and legislators—to rethink and update some of the core policy choices and legal principles that we have accepted for the past quarter-century or longer.[3] Jon has had an impressive career as an academic, teacher, policy maker, enforcer, and practitioner. A limited number of people have the breadth and quality of experience that Jon possesses. So I take seriously his concerns about the failure of courts and agencies to identify and remedy anticompetitive conduct and problematic mergers.

[1] These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.
[2] JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019).
[3] *Id.* at 3 ("Antitrust doctrines and enforcement actions once thought adequate to protect competition are proving insufficient. Fixing the problem is urgent . . . . This book explains how to foster economic competition by strengthening antitrust.").

I have taken what I will call a shallow dive into the body of empirical economic work Jon cites (although as time passes, my dive is getting deeper), and I have at least some tentative concerns about whether that literature supports many of his policy recommendations. Indeed, one of the themes I would like to highlight today is that we—agencies, courts, legislators—should not establish presumptions or rules that go beyond those that are supported by economic evidence. Notwithstanding any differences we may have, however, I am grateful to Jon that he has made explicit the economic support for his recommendations. All too often, critics of current antitrust doctrine and policy rely on one or a few recent papers on a topic to call for substantial revision of a body of law or practice. Maybe occasionally that is the right course, but often it merely suggests policy choices based on ideology.

As you know, the Commission is holding a series of hearings on competition and consumer protection topics that are intended to help restore or refresh a bipartisan consensus on the proper scope of antitrust enforcement and direction of antitrust policy.[4] Jon generously gave us a few copies of the proofs of his book last summer, and we consulted it extensively in preparing for these hearings. Indeed, as you read Jon's book, you will see his influence in a number of our hearings sessions. Regardless of how you interpret the existing evidence, Jon has done a substantial benefit to all of us by compiling the arguments and evidence for his views. And, I think Jon's ultimate conclusion is sound with respect to the methodology enforcers should use in changing or attempting to change legal doctrine. Jon writes:

> [W]ith an eye to persuading the Supreme Court, plaintiffs should rely heavily on arguments rooted in modern economics. Economic arguments supported by

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[4] *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* Press Release, *FTC Announces Hearings on Competition and Consumer Protection in the 21st Century* (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

> economic evidence are the key to persuading a Court committed to understanding the antitrust laws as advancing economic goals.[5]

I agree with Jon and want to expand on his conclusion. We ought to pursue those policy and enforcement goals that are supported by economic evidence, including especially empirical economic evidence. Theories of harm and benefits should be validated empirically wherever possible. Using economic analysis and evidence could lead to an increase or a decrease in the level of enforcement, depending on the circumstances. I think over time, however, it is likely to lead to better enforcement decisions.

Sixteen years ago I wrote:

> In passing the Federal antitrust laws, Congress adopted an evolutionary scheme in which courts would alter doctrine by 'recognizing and adapting to changed circumstances and the lessons of accumulated experience.' Consequently, the rationality of our antitrust system requires continuing efforts to refine economic theory and empirical research, and evaluate what new strategies raise antitrust concerns and how the FTC should respond to ongoing developments.[6]

I continue to believe this approach—of evolutionary change—is the right approach. I also think it is important in maintaining or rebuilding the bipartisan consensus on antitrust that has existed for the last two to three decades. How can we operationalize this evolutionary approach at the FTC? Let me discuss three key principles:

(i) eschewing ideological attachments;

(ii) adopting presumptions and enforcement decisions based on economic evidence—preferably empirical—and not by past practice or ideological preferences; and

[5] BAKER, *supra* note 2, at 207.
[6] Joseph J. Simons, Dir., Fed. Trade Comm'n Bureau of Competition, *Report from the Bureau of Competition* (Apr. 4, 2003), https://www.ftc.gov/public-statements/2003/04/report-bureau-competition.

(iii) engaging in consistent and self-critical evaluation of policy proposals and enforcement decisions.

I discuss each of these in turn.

1. ESCHEW IDEOLOGICAL ATTACHMENTS

I mentioned earlier that critics of current antitrust doctrine and policy often place misplaced reliance on a small number of new papers. There is another, different problem: using avatars from the past—often the distant past—to call for antitrust reforms. The amount of ink and effort spent attacking Judge Bork and his version of the Chicago School in the last few years illustrates the ideological passion that, while seeming to drive some commenters, does not effectively make the case for changes or improvements to the antitrust laws. This effort seems substantially out of proportion to Judge Bork's influence on current antitrust policy and case law. Although the Judge was integral to discrediting the antitrust excesses of the 1960s and 1970s, he was much less central to what followed in terms of enforcement policy and development in the courts. Jon has a nice summary of where Judge Bork thought antitrust law should focus:

> In *The Antitrust Paradox*, Bork detailed precisely how antitrust law should be minimized. He argued that it should guard against only three classes of conduct: "naked" horizontal agreements to fix prices or divide markets, horizontal mergers creating duopolies or monopolies, and an extremely limited set of exclusionary behaviors consisting primarily of predation through abuse of governmental processes. A reformed and refocused antitrust would "abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirement contracts, 'predatory' price-cutting, price 'discrimination,' and the like."[7]

I agree with Jon that Judge Bork's set of antitrust policy preferences includes recommendations that are not sensible. So, historically, has the Commission. The FTC's enforcement record over the past two decades makes very clear that the agency has not limited

[7] Baker, *supra* note 2, at 43-44 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 406 (1993))).

its enforcement efforts to Judge Bork's narrow concerns. The Commission, under Republican and Democratic leadership, has consistently rejected the suggestion that mergers are benign unless they lead to monopoly or duopoly. The Commission regularly seeks relief in markets where a merger will eliminate one of four or five pre-merger competitors, and occasionally, we have gotten relief in even less concentrated markets. The Commission also periodically challenges "small" horizontal mergers. Neither the Commission nor the Antitrust Division has adopted a view of per se legality toward vertical mergers. The Commission has brought significant exclusive dealing cases in the last decade—*Cardinal Health*, *McWane*, and *Intel*.[8] Notably, the Commission's approach has been bipartisan. So anyone who criticizes enforcement today is criticizing what has been a durable bipartisan consensus. There is nothing wrong with that criticism, but let's not divert attention by raising Chicago School strawmen.[9]

2. PRESUMPTIONS & ENFORCEMENT SHOULD BE BASED ON ECONOMIC EVIDENCE

The primary factor in achieving long-term policy consensus is whether the preferred policy is consistent with credible and substantial economic evidence. Agencies and courts must

[8] *In re* Cardinal Health, Inc., FTC File No. 101–0006 (Apr. 20, 2015), https://www.ftc.gov/enforcement/cases-proceedings/101-0006/cardinal-health-inc;
In re McWane, Inc., and Star Pipe Products, Ltd., FTC File 101-0080b (Apr. 17, 2015), https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter;
In re Intel Corporation, FTC File No. 061-0247 (Nov. 2, 2010), https://www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter.

[9] *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 13-14 (2007).

> [T]he intellectual DNA of U.S. antitrust doctrine governing single-firm conduct today is not exclusively or predominantly a single strand of Chicago School ideas. Rather, the intellectual DNA of modern U.S. antitrust doctrine is chiefly a double helix that consists of two intertwined chains of ideas, one drawn from the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other drawn from the Harvard School of Phillip Areeda, Donald Turner, and Stephen Breyer. In the combination of Chicago School and Harvard School perspectives, one sees shared prescriptions about the appropriate substantive theories for antitrust enforcement involving dominant firm conduct (Chicago's main contribution to the double helix) and cautions about the administrability of legal rules and the capacity of the institutions entrusted with implementing them (Harvard's main contribution to the double helix).

be careful about accepting or creating presumptions without a strong economic (preferably empirical) basis. Both the courts and the agencies, however, have been guilty of moving the law beyond what the economic literature would justify, but there are also areas where this agency has undertaken substantial empirical work that eventually supported presumptions or approaches on a strong bipartisan basis. I will describe a couple of examples from both buckets:

- Bucket 1: Where presumptions or approaches were not supported by economic evidence; and

- Bucket 2: Where they were supported by economic evidence.

(i) *Horizontal Merger Guidelines* & General Standards for Market Concentration

My first cautionary example involves the 2010 *Horizontal Merger Guidelines* (although one can credibly argue the *Guidelines* fall into either bucket).[10] The 2010 *Horizontal Merger Guidelines* substantially revised the agencies' market concentration thresholds and the presumptions that attach to them. Before the 2010 revision, both the 1982 and 1992 *Horizontal Merger Guidelines* presumed, as anticompetitive, mergers in markets with Herfindahl-Hirschman Indices ("HHIs") above 1800 and a delta of at least 100 points. In 2010, the agencies made a substantial adjustment to that nearly thirty-year old presumption. The presumption now attaches where the post-merger HHI exceeds 2500, and the delta is at least 200 points.[11] This is a significant change: it identifies mergers as potentially presumptively illegal only in those markets that have the equivalent of four (or fewer) equally sized firms, rather than the earlier standard of six (or fewer).

The changes in presumptions were not in response to new or previously existing empirical measurements of concentration and competitiveness of markets. Rather, the changes

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[10] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010).
[11] *Id*.

reflected the two agencies' enforcement experiences. In other words, the changes reflected what the agencies were doing, not what any empirical studies signaled they should do.[12] DOJ data is not public but FTC data is—and it is clear that a substantial percentage of mergers the Commission challenged in the fifteen years preceding the release of the 2010 *Guidelines* were in markets where the post-merger concentration level was in excess of 2500, and the change in concentration was in excess of 200 points. So do we conclude that there was no economic evidence to support the *Merger Guidelines* thresholds?

I don't think so. Here's one way to think about it. The original 1968 DOJ *Merger Guidelines* were based, at least arguably or roughly, on the economic evidence existing at the time.[13] But that evidence was shortly thereafter discredited,[14] suggesting that enforcement had been off the mark (usually erring in the direction of being too strict). With the empirical basis for enforcement gone, the agencies had no choice but to work their way through merger analysis on a case-by-case basis, which resulted in gradually increasing the concentration level at which enforcement concerns would arise. This approach was not unlike the institutional/case study approach that was common in economic journals at the time. Rather than relying on cross-sectional regressions, this approach consisted of an in-depth study of the industry at issue in each case, to reach a conclusion on likely competitive effects.

[12] *See* Malcolm B. Coate & Joseph J. Simons, *Continuity and Change in the 2010 Merger Guidelines*, CPI ANTITRUST J. (Oct. 28, 2010); Timothy J. Muris & Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE (Apr. 2010).

[13] Mark J. Niefer, *Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s*, ANTITRUST (Summer 2015).

[14] *See* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1 (1973); Timothy Bresnahan, *Empirical Studies of Industries with Market Power*, 2 HANDBOOK OF INDUS. ORG. 1011 (Richard Schmalensee & Robert Willig eds., 1989); Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, 2 HANDBOOK OF INDUS. ORG. 951; William N. Evans et al., *Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures*, 41 J. INDUS. ECON. 431 (1993).

I should note that Jon Baker played a significant role in merger enforcement during part of this time period as Director of the Bureau of Economics from 1995 to 1998, and I am confident Jon thought he was applying good economics and using reliable economic evidence.

More recently, however, empirical merger retrospectives (primarily using a difference-in-difference approach) have raised the possibility of testing the results of our institutional/case studies approach more directly and systematically.[15] And indeed, there is a growing literature on merger retrospectives, which Jon cites as evidence that our enforcement has been too lax.[16] What is one to make of this? My own view is that historic merger enforcement over the last two or three decades was based on the best available economic analysis at the time, but that new methods (e.g., merger retrospectives) may allow us to test the accuracy of our case-by-case industry analysis.

As a result, we are carefully reviewing the existing merger retrospective evidence to see whether adjustments to the *Horizontal Merger Guidelines* thresholds are appropriate. And even if the evidence does not support such adjustments now, we are studying how to put in place a systematic program of merger retrospectives that will help us determine whether changes are appropriate in the future. This would include testing the accuracy of the more recently developed economic tools, such as merger simulations and gross upward pricing pressure indices ("GUPPIs").

[15] *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2015). *But see* Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018).
[16] BAKER, *supra* note 2, at 15.

(ii) Exchange of Past Compensation Information

My second example regarding presumptions is a more cautionary one, and comes from the 1996 *Statements of Antitrust Enforcement Policy in Health Care*.[17] Statement Six is particularly relevant because both agencies are now devoting more attention to competition in labor markets and how certain conduct, including mergers, may impact competition in those markets.

Statement Six indicates that the antitrust agencies will not challenge health care provider participation in wage surveys if: (i) the information to be shared is based on data more than three months old; (ii) there are at least five providers reporting data; (iii) no one provider's data represents more than 25 percent of the total; and (iv) the data are sufficiently aggregated.[18] Through DOJ Business Review Letters, this safe harbor has been extended to the sharing of compensation information in industries other than health care.[19]

I am not sure we have (or had in 1996) sufficient understanding of these labor markets to identify a safe harbor for the sharing of such fresh compensation information. This safe harbor was created and extended without inquiry into the relevant labor markets and without the benefit of any empirical economic analysis that I am aware of. I believe both agencies need to devote substantial thought to the operation of and degree of competition in labor markets, and the factors that may affect their competitiveness. This thinking ought to inform many aspects of the

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[17] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996).
[18] *Id.* at Statement Six.
[19] *See*, *e.g.*, Letter from Charles A. James, Assistant Attorney General to Alan P. Sherbrooke, Esq. (Oct. 25, 2001), https://www.justice.gov/atr/response-foss-maritime-company-request-business-review-letter (responding to request for business review letter from Foss Maritime related to exchange of cost information); Letter from John M. Nannes, Acting Assistant Attorney General, to Daniel R. Barney, Esq. (Mar. 27, 2001), https://www.justice.gov/atr/response-truckload-carriers-associations-request-business-review-letter (responding to request for a business review letter from the Truckload Carriers Association related to proposed information exchanges).

analysis, including at what point the exchange of relatively current wage and compensation information is unlikely to be harmful.

(iii) Restrictions on Advertising

Now to the positive examples—by which I mean presumptions that are supported by empirical research. One of the best examples is the empirical work relating to advertising restrictions.

It was not intuitive that advertising restrictions limit price and quality competition without sufficient offsetting positive effects. Advertising restrictions were both ubiquitous among professional associations and accepted as ethical and beneficial, or at least not thought likely to be competitively harmful. The Commission produced much of the economic literature that addressed both the costs and benefits of restraints on advertising, including restraints on advertising by professional associations. This economic literature provided the basis for the Commission's long-term and consistent challenge to advertising restrictions as anticompetitive. In the "Three Tenors" case, the Commission relied on this work to classify the advertising restrictions among joint venture partners as "inherently suspect"[20]—a finding of presumptive illegality upheld by the D.C. Circuit.[21]

(iv) Hospital Merger Retrospectives

My final example involves hospital mergers. In the 1990s, the government lost a large number of hospital merger cases in a row, and both agencies considered whether to give up on hospital merger enforcement. The Commission did not take that route. Instead, under the

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[20] Opinion of the Federal Trade Commission, *In the Matter of Polygram Holding, Inc.* (Docket No. 9298), n. 52 (July 28, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/07/polygramopinion.pdf (identifying 17 empirical studies).

[21] Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

direction of then-Chairman Muris, the Bureau of Economics conducted empirical economic studies that demonstrated the anticompetitive effects of certain past hospital mergers.[22]

I won't dwell on this past experience though. Rather, I want to emphasize that this effort continues in other areas. A current example is our efforts to understand the price and quality effects of Certificates of Public Advantage, or COPAs. In the last few years, the Commission was twice stymied in its efforts to prevent what staff believed were anticompetitive mergers.[23] In these cases, state legislatures took steps purporting to grant the combining hospitals state action immunity through the use of cooperative agreements between the hospitals and the state. These agreements contained various operating requirements, including price and quality components intended to mimic the effects of competition. The Bureau of Economics, working in conjunction with a former Bureau of Economics economist, has initiated studies of the price effects associated with two merged hospital systems operating under the restrictions of a COPA. We are skeptical that regulation can mimic the benefits of competition, but we are going to test that proposition; eventually we hope to have in-hand a body of research that will further support our efforts to prevent and remedy anticompetitive mergers in hospital markets.[24]

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[22] *See* David J. Balan & Patrick S. Romano, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare* (Fed. Trade Comm'n Bureau of Economics, Working Paper No 307, 2010), *available at* http://www.ftc.gov/be/workpapers/wp307.pdf; Christopher Garmon & Deborah Haas-Wilson, *Two Hospital Mergers on Chicago's North Shore: A Retrospective Study*, 18 INT'L J. ECON. BUS. 17 (2011); Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction* (Fed. Trade Comm'n Bureau of Economics, Working Paper No. 293, 2008), *available at* http://www.ftc.gov/be/workpapers/wp293.pdf; Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, 49 J. INDUS. ECON. 63 (2001).

[23] *See* FTC Staff Submission to the Tennessee Department of Health Regarding the Certificate of Public Advantage Application of Mountain States Health Alliance and Wellmont Health System, (Nov. 2016), https://www.ftc.gov/policy/advocacy/advocacy-filings/2016/11/ftc-staff-submission-tennessee-department-health-regarding; FTC Press Release, FTC Dismisses Complaint Challenging Merger of Cabell Huntington Hospital and St. Mary's Medical Center (July 6, 2016), https://www.ftc.gov/news-events/press-releases/2016/07/ftc-dismisses-complaint-challenging-merger-cabell-huntington.

[24] Press Release, *FTC to Hold Workshop on Certificates of Public Advantage in Healthcare Markets* (Apr. 12, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-hold-workshop-certificates-public-advantage-healthcare.

3. Consistent and Critical Evaluation

Now to the last of the three key principles for bipartisan evolutionary change. I believe a necessary factor in achieving and maintaining a new antitrust consensus is a willingness to evaluate critically and consistently the results of agency or court decisions. Academics and practitioners undertake some of this evaluation through their commentary on agency actions and court decisions, and on legislative proposals. But, the enforcement community must remain willing to evaluate its own past enforcement and policy decisions, and to criticize past efforts if the evidence warrants it. The FTC has a long history of such internal evaluation, and that effort must continue. As you know, we are holding a series of hearings designed precisely to do that.[25]

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Unless we restore our previously long-lived antitrust consensus, I am concerned that antitrust enforcement is in danger of becoming politicized and political, unmoored from any common principles, and inconsistent across future administrations. This would be bad not only for antitrust enforcement; it would also harm the development of the case law because the antitrust agencies, through the cases they litigate and the positions they take before the courts, can and do affect the direction of the law. Agencies that change their viewpoints significantly because of the political party of their leadership—rather than because of economic evidence—will have a significant negative effect on our nation's antitrust enterprise, and that would be detrimental to our economy and our country. Instead, we should continually evaluate our antitrust enterprise and strive to base our antitrust enforcement on sound economic evidence and analysis. This, in my view, is our best hope for reviving and maintaining a strong bipartisan

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[25] *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* Press Release, *FTC Announces Hearings on Competition and Consumer Protection in the 21st Century* (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

antitrust consensus. Whether or not you agree with the conclusions in Jon's book, his work moves us along in this effort to seek bipartisan consensus by fostering serious dialogue. Thank you, Jon.